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Protecting Classified Intelligence Information -- An Historical Review and Some Recommendations

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October 1966

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PROTECTING CLASSIFIED INTELLIGENCE INFORMATION--
AN HISTORICAL REVIEW AND SOME RECOMMENDATIONS

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CONTENTS

Introduction	Page	1
The Espionage Laws -- An Incomplete Structure		2
The British Official Secrets Acts		4
Intelligence Sources and Methods		7
The Judicial View of Intelligence		10
Judicial Access to Sensitive Data		12
Judicial Evaluation of Sensitive Data		17
Some Proposals for Protecting Intelligence Information from Unauthorized Disclosure		18
A Legislative Proposal		20

ATTACHMENTS

Explanation of a Proposed Law for the Protection of Intelligence Data	Annex	A
A Proposed Law -- "Protection of Intelligence Data"		B
Monograph -- "The Espionage Laws"		C
Memorandum -- "The Use of Civil and Equitable Remedies in Protecting Government Secrets"		D
Memorandum -- "AEC Experience with the Use of Restricted Data in Criminal Proceedings"		E
Principal Statutes Utilized in Protecting State Secrets -- Annotated		F
The Totten Doctrine: Four Cases		G

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

INTRODUCTION

The unauthorized exposure of classified information is a chronic problem for governments and intelligence agencies. Defense against the conscious agent of a foreign power is different from, and in some ways less difficult than, deterring revelations caused by carelessness, malice or greed on the part of government employees. The problem is particularly acute in a democratic society whose laws and courts must provide broad protection to criminal defendants. The difficulty of prosecution under the espionage laws and related statutes weakens the deterrence provided by such laws. This is especially true in cases involving disaffected or careless employees of intelligence agencies whose defenses usually include strong equitable pleas which may excite a sympathetic public response.

No legislation or administrative procedure can offer perfect protection. It is submitted, however, that both our laws and administrative procedures can be improved so as to provide more effective deterrence. Some specific recommendations to this end follow.

9/18/2010 18:27 PM

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DATE: AUG 2001

THE ESPIONAGE LAWS -- An Incomplete Structure

A review of American legislation in the field of criminal espionage[1] shows that historically there has been limited legislative effort directed to the protection of intelligence data. As a result there is a startling lack of protection for a governmental function of growing importance and sensitivity. Perhaps the need for laws protecting intelligence data has reached significant proportions only in the relatively recent past.

The changes, technological and otherwise, in the manner in which nations deal with each other have caused some improvements in legislation dealing with the protection of state secrets. The espionage laws[2] provide the basic statutory protection to the Government against the taking and use of defense information by those whose interests are inimical to the national security of the country. Diplomatic communications have traditionally been protected. As early as 1807, the Supreme Court suggested that the legislature recognize and provide against crimes affecting the national

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[1] See Monograph "The Espionage Laws," M. C. Miskovsky, Office of General Counsel, CIA, 1961.

[2] 18 USC §§791-798

9/18/2010 18:27 PM

DATE: AUG 2001

security which "have not ripened into treason."[3] It was not until 1911, however, that Congress passed the first important statute which dealt with the broad problem of espionage. The language of the 1911 Act was amended in 1917 to read much as it does today. More recently Congressional attention has been focused--with enactment of appropriate legislation--on the problems involved in protecting atomic energy data[4] and communications intelligence.[5] The Internal Security Act of 1950,[6] made it unlawful for a government employee merely to communicate classified information to a known representative of a foreign government.[7] However, the espionage laws are still the principal statutory protection against unauthorized disclosure of intelligence materials and information. No legislation has yet been enacted to cover the new problems arising out of the chronic "cold war" status of international relations and the consequent need for a

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[3] Ex parte Bollman and Ex parte Swartwout, 4 Cranch 75, 127, 2 L. Ed. 554, 571 (1807).

[4] 42 USC §2271 et seq.

[5] 18 USC §798

[6] 50 USC §783 (b)

[7] See Scarbeck v. U. S. 317 F.2d 546, cert. denied, 83 S. Ct. 1897 (1963).

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

sophisticated, professional intelligence apparatus as an arm of the executive. The wartime concept of the military secret does not fit intelligence data, the extreme sensitivity of which is often not readily apparent and the revelation of which may have the most damaging effect on the national security.

The proposal for new legislation to establish a category of "Intelligence Data" to be given judicial notice as such, by virtue of official designation, is designed to solve a vexatious and recurring problem for which there is no known cure in existing laws relating to national security. That problem is the immunity enjoyed by persons exposing sensitive information in those instances where the information cannot for practical reasons be brought into the open for the purpose of a court proceeding.

THE BRITISH OFFICIAL SECRETS ACTS

It has often been suggested that if legislation is needed in this area, the Official Secrets Acts offer a good example to be followed through enactment of similar statutes to protect Intelligence Data or by amending our espionage laws to give the broader protection offered by those Acts. It is not commonly understood that the British acts are based on a different theory from that of our espionage acts. Under our

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

system the information involved must be shown to be related to the national defense and security either by specific demonstration or as coming within the definitions of a statute as in the cases of the communications intelligence and Atomic Energy provisions. The British acts are based on the theory of privilege, i.e., that all official information, whether or not related to the national defense and security, is the property of the crown. It is, therefore, privileged as to those who receive it officially so that they may not divulge it without the crown's authority. Since this privilege is theoretically unlimited in scope, action in the event of an unauthorized disclosure involves two problems for the Attorney General. The first is considered a political one as to whether the nature of the disclosure is such that prosecution should be sought; the second is a legal one as to whether prosecution is feasible. If prosecution is decided upon, several consequences flow from the basic theory of privilege. Portions of the trial can be held in camera if the court agrees. This would not be possible under our constitution. While certain procedural aspects can be considered in camera in this country, no part of the actual trial could be heard privately. In Britain certain presumptions may apply. For instance, if the defendant is known to have possession of privileged information and to have been in the company of a known foreign espionage agent, there is a presumption that the information was passed. This is rebuttable but our Supreme Court

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

opinions indicate that such a presumption would not be permissible here. Most important, in the English system it is not necessary to prove that any one item of information relates to the national defense and security. A good example is the so-called ISIS case in which two Oxford students published in their college magazine, ISIS, the story of their experiences in the Navy, including technical intelligence operations in the Baltic. The prosecution merely testified that the article contained information which they had acquired in their official service and it was, therefore, privileged. After the verdict of guilty, the prosecution approached the court alone without presence of defendants or defense counsel and briefed the court on the significance to the Government of the items of information. This was solely for the purpose of informing the court in connection with the sentence. Again we believe such a briefing would be held error under our system.[8] In the case of the RAF officer, Wraight, who defected to Russia and then returned, a Government witness who interviewed him for the security services was allowed to testify without publicly identifying himself. His name was handed in writing to the court. Possibly this could be done here if the defense agreed to it, but it seems clear it could not be done over the defense's objection.

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[8] Jencks v. U.S. 353 U.S. 657, 668 (1957). But see post Jencks Statute 18 USC §3500(c) permitting in camera examination for relevancy and editing of pre-trial reports of Government witnesses.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

In short the Official Secrets Acts would seem to be, in important respects, unconstitutional in this country and therefore cannot be relied upon as examples of means to accomplish our purpose of protecting intelligence data.

INTELLIGENCE SOURCES AND METHODS

The statutory authority and responsibility of the Director of Central Intelligence are set forth in section 102(d) of the National Security Act of 1947, 61 STAT. 495 ~~as amended, 63 Stat. 208~~, 50 USC §403. That Act states, inter alia, "And provided further, That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure; ...."

The use of the term "intelligence sources and methods" indicates the recognition by the Congress of the existence of a special kind of data encompassing a great deal more than the usual terminology "classified information." The espionage laws and the statutes designed to protect communications and atomic secrets specify in great detail the kinds of secret information and data protected. Nevertheless, they do not envision the protection of everything that might be defined as "Intelligence Data," the exposure of which could be detrimental to the national interests. For example, knowing the identities of certain

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

CIA employees or the fact that the agency is making a study of particular published unclassified information might be of great value to a foreign intelligence agency. However, there is some question as to whether such information would be considered by a court to be included among the things protected by existing statutes.

The Congress has recognized and implemented the Director's responsibility to protect intelligence sources and methods by enactment of a number of special authorities for the Agency and a number of exemptions from certain legal requirements which have general application throughout the Government. Section 6 of the Central Intelligence Agency Act of 1949, as amended, 63 Stat. 208, 50 USC §403g, provides that in order further to implement the proviso of the National Security Act that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, "...the Agency shall be exempted from the provisions of Sections 1 and 2, Chapter 795 of the Act of August 28, 1935 (49 Stat. 956, 957; 5 USC §654), and the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency: Provided, That in furtherance of this section, the Director of the Bureau of the Budget shall make no reports to the

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

Congress in connection with the Agency under Section 607, Title VI, Chapter 212 of the Act of June 30, 1945, as amended (5 USC 5947(b))."

Similarily the Agency is authorized by the Central Intelligence Agency Act to expend the funds made available to it for objects of a confidential, extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director. The Act also exempts the Agency from statutory requirements regarding the exchange of funds, the performance rating of employees, the publication of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency and from laws and executive orders governing appeals from adverse personnel actions.

Congress has charged the Director of Central Intelligence with protecting intelligence sources and methods from unauthorized disclosure, has recognized that the term "intelligence sources and methods" encompasses an area not entirely covered in other statutes and has recognized and affirmed the need for such protection by providing statutory authority for that purpose. The void in the statutory structure designed to permit protection of intelligence sources and methods is the absence of sanctions which can be invoked to prevent or punish unauthorized disclosures without disclosing the very sources and methods sought to be protected.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

THE JUDICIAL VIEW OF INTELLIGENCE

The courts have long recognized that the secret intelligence activities of the executive branch are by their very nature matters the disclosure of which would be injurious to the public and yet which are indispensable to the Government.[9] In the Totten case recovery was sought under a secret contract with President Lincoln for espionage activities behind enemy lines in the Civil War. The opinion of the Supreme Court stated:[10] "If upon contracts of such a nature an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of the dealings with individuals and officers, might be exposed, to the serious detriment of the public. A secret service, with liability to publicity in this way would be impossible; and, as such services are sometimes indispensable to the Government, its agents in those services must look for their compensation to the contingent fund of the department employing them,

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[9] See Totten v. U.S., 92 U.S. 105, 107 (1876).

[10] Id. at 106-107.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

and to such allowance from it as those who dispense that fund may award. The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery.

"It may be stated, as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not let the confidence be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband or wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the Government, as the existence of a contract of that kind is itself a fact not to be disclosed." (Emphasis supplied.)

The Totten case marks the beginning of the juridical idea--and judicial cognizance of it--that there is a kind of relationship to the

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

state which is confidential, beyond judicial inquiry, and involving a trust of such a nature that the courts cannot aid a breach of it, even in their solemn duty of administering justice.[11] A secret agent is almost non sui; he literally cannot maintain an action in the courts where his secret activities are germane to the case.[12]

JUDICIAL ACCESS TO SENSITIVE DATA

Present espionage laws dealing with unlawful transmission or obtaining of information related to the national defense[13] have been interpreted as requiring proof of certain questions of fact in regard to which evidence is for submission to the jury for consideration regarding weight and sufficiency. For instance, the information must in fact

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[11] See Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 Fed. 353 (1912), in which the court struck documents from the record on the ground that it was against public policy to disclose military secrets. See cases cited in note 18.

[12] De Arnaud v. U.S., 29 Ct. Cl. 555, 151 U.S. 483 (1894); Allen v. U.S. 27 Ct. Cl. 89 (1892); Tucker v. U.S. 118 F.Supp. 371 (1954).

[13] 18 USC §§793, 794, and 798

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

be related to the national defense and not generally available.[14] The courts have held that a jury cannot find on these facts unless it has available the information allegedly related to the national defense and hears testimony regarding its use, importance, exclusiveness, and value to a foreign government or its potential injury to the United States.[15] Likewise, access must be had by the defendant in a criminal proceeding since the information itself may tend to exculpate with respect to dealings in that information.[16] As Judge Learned Hand said in U.S. v. Andolschek, "The Government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully."[17]

This situation has left the Government in the position of having to reveal in court the very information it is trying to keep secret or, in the alternative, of not prosecuting those who steal information and pass it, to the injury of the nation. To invoke the law's protection of the secret, the secret must be told.

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[14] U.S. v. Heine, 151 F.2d 813, 816 (1945), citing Gorin v. U.S., 312 U.S. 19, 28, 61 S.Ct. 429, 85 L.Ed. 488 (1941).

[15] Gorin v. U.S., 312 U.S. 19, 30-31, supra note 14.

[16] U.S. v. Reynolds, 345 U.S. 1, 73 S.Ct. 538 (1953); Jencks v. U.S., supra note 8.

[17] 142 F.2d 503, 506 (1944)

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

Judicial experience with the privilege which protects military and state secrets has been limited in this country.[18] British experience has been more extensive, but still relatively slight compared with other evidentiary privileges.[19] Nevertheless, it is clear at least from the civil precedents that the court itself must determine whether the circumstances are appropriate for the claim of privilege[20] and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.[21] The latter requirement is the real difficulty. In dealing with it, courts have found it helpful to draw upon judicial

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[18] See Totten v. U.S., 93 U.S. 105, 23 L.Ed. 605 (1876); Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 Fed. 353 (1912); Pollen v. Ford Instrument Co., 26 F.Supp. 583 (1939); Cresmer v. U.S., 9 F.R.D. 203 (1949). See also Bank Line v. U.S., 68 F.Supp. 587, 163 F.2d 133 (1947). 8 Wigmore on Evidence (3d Ed.) sec. 2212(a), p. 161, and sec. 2378(g) (5), pp. 785 et seq.; 1 Greenleaf on Evidence (16th Ed.) secs. 250-251; Sanford, Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments, 3 Vanderbilt Law Review 73-75 (1949). See also Ticon v. Emerson, 134 N.Y.S. 2d 716, 206 Misc. 727 (1954).

[19] Most of the English precedents are reviewed in Duncan v. Cammel, Laird & Co., Ltd., A.C. 624 (1942).

[20] Id. at 642.

[21] U.S. v. Reynolds, supra note 16, at 8, citing Duncan v. Cammel, Laird & Co., Ltd., supra note 19, and Hoffman v. U.S. 341 U.S. 479 (1951).

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

experience in dealing with an analogous privilege, the privilege against self-incrimination.

The Supreme Court said in U.S. v. Reynolds.[22] "The privilege against self-incrimination presented the courts with a similar sort of problem. Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses. Indeed, in the earlier stages of judicial experience with the problem, both extremes were advocated, some saying that the bare assertion by the witness must be taken as conclusive, and others saying that the witness should be required to reveal the matter behind his claim of privilege to the judge for verification. Neither extreme prevailed, and a sound formula of compromise was developed...

"Regardless of how it is articulated, some like formula of compromise must be applied here. Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the

22. Supra note 16, at 8-10.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."[23] Of course, Reynolds was a civil case, but the evidentiary difficulty in criminal cases is quite comparable. Thus, citing Reynolds, the Supreme Court stated in Jencks v. U.S.:[24] "It is unquestionably true that the protection of vital national interests may militate against public disclosure of documents in the Government's possession. This has been recognized in decisions of this Court in civil causes where the Court has considered the statutory authority conferred upon the departments of government to adopt regulations not inconsistent with law for...use...of the records, papers, appertaining to his department. The Attorney General has adopted regulations pursuant to this

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[23] In Kaiser Aluminum & Chemical Corp. v. U.S. 157 F.Supp. 939 (1958), the Court of Claims held that judicial examination of a document for which executive privilege has been asserted, should not be ordered without a definite showing by plaintiff of facts indicating reasonable cause for requiring such a submission. Otherwise, said the Court, at 949, the executive determination would be merely preliminary and "the officer and agency most aware of the needs of government and most cognizant with (sic) the circumstances surrounding the legal claim will have to yield determination to another officer (the Court) less well equipped."

[24] Supra note 8, at 670.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

authority declaring all Justice Department records confidential and that no disclosure, including disclosure in response to subpoena, may be made without his permission.

"But this Court has noticed, in U.S. v. Reynolds, the holdings of the Court of Appeals for Second Circuit that, in criminal causes '...the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense....' "[25]

Out of this evidentiary difficulty has come a sort of "graymail," grounded on the immunity from prosecution (and often civil suit as well) enjoyed by the thief who limits his trade to information too sensitive to be revealed.

JUDICIAL EVALUATION OF SENSITIVE DATA

It must be emphasized that undesired disclosure is only one difficulty of submission to the jury of intelligence data. There is

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[25] The quoted material from the Reynolds case appears at 345 U.S. 12.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

another great problem, the capability of the jury to evaluate such data, often meaningful only in the context of other sensitive information not otherwise bearing on the case and often of a complex and technical nature.[26] It can, of course, be argued that juries often have to grapple with technical facts in order to gain understanding of their significance and that the law provides for technical advice and assistance in such instances in the form of expert witnesses. But in a case dealing with secret information, resort to these legal devices merely increases the amount of sensitive data which must be shorn of its usefulness by disclosure, increasing the Government's reluctance to prosecute and, within the area described, thwarting Congressional intent as expressed in legislation.

SOME PROPOSALS FOR PROTECTING INTELLIGENCE INFORMATION FROM UNAUTHORIZED DISCLOSURE

The courts have recognized that intelligence activities are confidential per se and not subject to judicial inquiry. Congress, in the National Security Act, has charged the Director of Central Intelligence with the protection of intelligence sources and methods

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[26] Compare the holding in the Kaiser case, supra note 23, on the competence of the court to evaluate the contents of a document for which there has been a claim of executive privilege.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

and has given him certain statutory authority and exemptions to assist him in meeting this obligation. Yet often he cannot use the espionage laws and related statutes, otherwise invaluable aids to fulfilling that duty, in those instances where the offense represents the greatest potential threat to the public welfare.

There are three steps which would go far towards solving the problems which still exist in this area. Two of them would seem to require new legislation and the third might be accomplished by regulation under the Director's existing authority. First would be a criminal statute defining the information to be protected and providing punishment for exposure. Second, this statute would include injunctive authority because prevention of exposure is of more concern than punishment for violation and in many cases the injunction might provide greater deterrence than the penal provisions for violation. In addition, provision might be made for forfeiture of retirement benefits by persons convicted under the Act. Precedent for this exists in 5 USC §8312, the so-called "Hiss Act." Third, a requirement by the Director that all employees, agents, consultants and others entering into a relationship with the Agency giving them privity to intelligence data agree in writing to assign to the Agency

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

all rights in anything published by them based on information received in the course of their official duties. [27] Such an agreement and appropriate regulations governing the dissemination of intelligence data could in themselves serve as a basis for injunctive relief apart from or as an alternative to the statutory provision for an injunction to prevent the criminal act of exposure.

A LEGISLATIVE PROPOSAL

As we have seen there is a serious gap in the laws protecting intelligence information. It is obvious that in the protection of classified information from unauthorized disclosure prosecution under the Espionage Act must be limited to those cases where the evidence on intent is clear and the divulging of the information in an open court is not detrimental. Enactment of a criminal statute similar to the proposal appearing at Annex A is suggested as a remedy.

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[27] For a discussion of restrictive employment agreements, and other civil remedies, see memorandum "The Use of Civil and Equitable Remedies in Protecting Government Secrets," Office of General Counsel, CIA, July 14, 1966.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

The proposed statute would close the gap by expanding the kinds of information protected and making prosecution and restraining orders possible where they are now ruled out by the necessity of exposing sensitive information or proving intent. It would be a step in the direction of "crown privilege" which is the basis of the British Official Secrets Acts, in that it would permit conviction on a showing that a person in a limited category, having official access to information designated as "Intelligence Data" by the Director of Central Intelligence had imparted it to someone not entitled to receive it. The justification for the designation of the information as Intelligence Data or for the imparting of it could not be put in issue at trial.

Experience has shown that cases of unlawful disclosure of sensitive intelligence data in many instances involve persons who have obtained access to it through some relationship with an agency of the Government having the data. Thus, the offenders fall most frequently into the very class of persons who have been reminded frequently of the confidential nature of the information with which they deal, the public trust involved in granting them access to such information, and the dire consequences of unlawful disclosure of it.[28]

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[28] Compare the language "in violation of his trust" used in the present espionage statute, 18 USC 793(f) (2).

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

These persons are, then, those who have in one way or another assumed the obligation of not doing the act charged. And so the proposed statute is concerned only with those who have, by reason of a privilege extended them by the government, become trustees of its vital secrets. It does not address itself to the question of leaks to the press, nor does consideration of the proposal require encounter with complex and difficult questions of freedom of speech. The proposal would apply to a small group in a narrow and now almost traditional, area of great difficulty.

It is submitted that the mere existence of such a statute for the protection of Intelligence Data will have a deterrent effect regardless of whether a case is ever prosecuted.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

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DATE: AUG 2001

EXPLANATION OF A PROPOSED LAW FOR THE PROTECTION OF INTELLIGENCE DATA

The idea behind this proposal stems from the difficulties in prosecution for unauthorized disclosure inherent in the United States espionage laws. The leading case, Gorin v. U.S., 312 U.S. 19, decided by the Supreme Court in 1940, has been interpreted through the years as requiring two things in the prosecution of espionage cases: (1) proof that the information divulged was "to be used to the injury of the United States or to the advantage of a foreign nation" and (2) the disclosure during the trial of the material sought to be protected, because under the Gorin rule the jury must decide whether the information is related to the national defense and security. Statutory changes which modify the Gorin rule on intent and disclosure have been so narrow in scope that for practical purposes prosecution for unauthorized disclosure must continue to be limited to those cases where the evidence on intent is clear and the divulging of the information in open court is not detrimental.

The draft bill would be a new criminal statute with the limited objective of protecting only intelligence data as defined therein. It is designed to overcome the practical difficulties of prosecution under present laws and to provide greater deterrence to unauthorized disclosure.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

Paragraph 1 would make the statute applicable abroad as well as within the United States. This jurisdiction is the same as that of the espionage laws.

Paragraph 2 provides for regulations implementing the statute to be promulgated by the Director of Central Intelligence. This responsibility should naturally fall to him who has the statutory responsibility to coordinate the intelligence activities of the government and to protect intelligence sources and methods from unauthorized disclosure.

Paragraph 3 defines Intelligence Data and categorizes various types of information which are included in the term Intelligence Data. The definition is designed to meet the inadequacies of present statutes which were written to cover specific, limited and rather tangible subjects such as military hardware, classified documents and code materials.

Paragraph 4 provides that anyone possessing Intelligence Data before imparting it to anyone else must verify that such other person is lawfully entitled to receive it. Instead of the government proving intent the defendant would have the burden of showing that he had verified the legality of his action in imparting the data. Although stringent and difficult to meet, this requirement is not unreasonable when applied only to persons who have had a thorough indoctrination in their responsibility to protect such data.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

The full force of the draft proposal occurs in paragraph 5. First the statute is made applicable to present or former employees of the Central Intelligence Agency or employees of the government or members of the Armed Forces assigned or detailed to the Agency and Agency contractors and their employees. In effect, it would substitute the judgment of the Director of Central Intelligence for that of the jury. Limiting the proposal so that it applies only to persons lawfully receiving intelligence data in the course of their employment was suggested for two reasons: (1) such persons are the principal source of leaks and (2) it lessens the impact of the argument that this type of legislation is a step toward censorship and infringes upon the freedom of the press.

Paragraph 6 is a proposal to use a court injunction to solve the very real problem of how to stop a person from passing classified information. Since the key to protection of intelligence data is prevention rather than punishment, this provision might well prove to be the most effective part of the law. It is patterned after Section 232 of the Atomic Energy Act of 1954, as amended, 70 Stat. 1070, 42 USC §2280. While this section has never been tested in the courts, it is considered a weapon which would serve a useful purpose as a deterrent.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

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APPROVED FOR RELEASE
DATE: AUG 2001

September, 1966

Protection of Intelligence Data

1. "This chapter shall apply within the admiralty and maritime jurisdiction of the United States, on the high seas and elsewhere, as well as within the United States."

2. In the interests of the security of the foreign intelligence activities of the United States, the Director of Central Intelligence is hereby authorized to promulgate rules and regulations for the protection of Intelligence Data from unauthorized disclosure.

3. The term "Intelligence Data" means information and materials determined by the Director of Central Intelligence as being acquired, obtained by or used in intelligence activities of the United States concerning foreign countries and foreign nationals, and includes, but is not limited to: (1) notes, models, instruments, appliances, facts, statistics, analyses, sketches, drawings, pictures, maps, graphical representations and photographs; (2) intelligence sources and methods; (3) reports, evaluations and estimates; (4) procedures, equipment, devices and methods used in the collection and production of Intelligence Data; and (5) classified information as described in section 798 of Title 18, United States Code.

4. Whoever possesses Intelligence Data is required, before imparting such information to another person, to determine and verify

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

that such other person is lawfully entitled to receive such Intelligence Data.

5. Whoever, being or having been an officer or employee of the Central Intelligence Agency, or being or having been an officer or employee of any department or agency of the United States or a member of the Armed Forces, assigned or detailed to the Central Intelligence Agency, or being or having been a contractor of the Central Intelligence Agency, or being or having been an employee of a contractor of the Central Intelligence Agency, and in the course of such relationship becomes possessed of Intelligence Data, knowingly directly or indirectly imparts, discloses, publishes, divulges, or makes known in any manner, or causes to be imparted, disclosed, published, divulges, or made known in any manner, such Intelligence Data or any part thereof to any person not entitled to receive Intelligence Data under law or executive order or rules and regulations of the Director of Central Intelligence shall be fined not more than $5,000 or imprisoned not more than five years, or both.

6. Whenever in the judgment of the Director of Central Ingelligence any person has engaged or is about to engage in any acts or practices which constitute, or will constitute, a violation of this section, or any regulation or order issued thereunder, the Attorney General on behalf of the United States may make application to the

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with the provisions of this section or any regulation or order issued thereunder, and upon a showing by the Director of Central Intelligence that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order may be granted.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

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DATE: AUG 2001

CENTRAL INTELLIGENCE AGENCY
Washington 25, D. C.

THE ESPIONAGE LAWS

Introduction

The espionage laws provide the basic statutory protection to the Government against the taking and use of defense information by those whose interests are inimical to the national security of the country. As early as 1807, the Supreme Court suggested that the legislature recognize and provide against crimes affecting the national security which "have not ripened into treason."[1] It was not until 1911, however, that Congress passed the first important statute which dealt with the broad problem of espionage. The language of the 1911 Act was amended in 1917 to read much as it does today. This paper deals with the background and interpretation of the espionage laws which as codified are found in Title 18 of the United States Code, sections 791-798.

The espionage laws are the principal statutory protection against unauthorized disclosure of intelligence materials and information. If prosecution is recommended in any given case, then the Department of Justice should be apprised of the facts and left to perform the arrest, indictment and prosecution. A "citizen's arrest" might be made by a Central Intelligence Agency official, for example, under emergency circumstances, but would be legally perilous as standard procedure. The Justice Department would make the determination whether prosecution is justified in a particular case. It is germane to consider that specific information "protected" under the statute is a fact question for the jury and that the courts have taken the position that the Government, in a criminal prosecution, must make a full disclosure of the relevant facts or fail in its case.

The 1911 Espionage Act

Upon recommendation by the Justice Department, a bill to prevent the disclosure of national defense secrets was introduced in the 61st Congress and, after several changes which necessitated four redrafts of the bill in committee, it was sent to the floor of the House where a short debate took place on 6 February 1911.[2] The bill was said to be patterned after the British Official Secrets Act, a major difference, however, resulted from a change made in committee where the presumption of intent occurring in the English Statute was stricken, because the committee members thought the presumption was not fair."

[1] Ex parte Bollman and Ex parte Swarthout; 4 Cranch 75, 127; 2 L.Ed. 554, 571.
[2] 46 CONG. REC. 2030 (1911).

APPROVED FOR RELEASE
DATE: AUG 2001

In debate, Congressman Bennet of New York questioned the wisdom of passing legislation which he believed contained impracise language. The Following exchange took place:

Mr. Bennet:

". . . What is covered by the language . . . 'to which he is entitled?' What is a citizen or anyone else entitled to in connection with a photograph or a picture of a national defense?"

Mr. Parker:

"Many people are allowed to go in and take pictures."

Mr. Bennet:

"Does not the gentleman think the language might be improved?"

Mr. Parker:

"We are not going to improve the language. The language originally was the word 'wrongfully,' which is used in the foreign statutes, but it is vague and ambiguous. The only way that we could make the language seem correct was to say that 'Whoever for the purpose of obtaining information respecting the national defense to which he is not lawfully entitled . . . . ' That is the real point in the case."

Mr. Bennet:

"If the gentleman is correct, we ought to insert the word 'lawfully' . . . before 'entitled.'"

Mr. Parker:

"There is no objection to it, but I do not think it makes any difference in the meaning."

Later in the debate, Mr. Bennet asked if a tourist who takes a picture of a military installation would violate the statute. Mr. Parker in reply said, "I am inclined to think not. At any rate there would be a very small penalty; but there might be a case where a man might take such a photograph to communicate to a foreign government."

Mr. Bennet replied that the House should hesitate to pass a bill which "makes the innocent act of a person a crime." Congressman Hobson remarked that there was no criminality involved in simply taking a photograph of a military installation.

The bill passed the House in a voice vote and was sent to the Senate where it passed without debate. The text of the Act is as follows:

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

CHAP. 226. - An Act to prevent the disclosure of national defense secrets.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That whoever, for the purpose of obtaining information respecting the national defense, to which he is not lawfully entitled, goes upon any vessel, or enters any navy yard, naval station, fort, battery, torpedo station, arsenal, camp, factory, building, office, or other place connected with the national defense, owned or constructed or in process of construction by the United States, or in the possession or under the control of the United States or any of its authorities or agents, and whether situated within the United States or in any place noncontiguous to but subject to the jurisdiction thereof; or whoever, when lawfully or unlawfully upon any vessel, or in or near any such place, without proper authority, obtains, takes, or makes, or attempts to obtain, take or make, any document, sketch, photograph, photographic negative, plan, model, or knowledge of anything connected with the national defense to which he is not entitled; or whoever, without proper authority, receives or obtains, or undertakes or agrees to receive or obtain, from any person, any such document, sketch, photograph, photographic negative, plan, model, or knowledge, knowing the same to have been so obtained, taken, or made; or whoever, having possession of or control over any such document, sketch, photograph, photographic negative, plan, model, or knowledge, willfully and without proper authority, communicates or attempts to communicate the same to any person not entitled to receive it, or to whom the same ought not, in the interest of the national defense, be communicated at that time; or whoever, being lawfully intrusted with any such document, sketch, photograph, photographic negative, plan, model, or knowledge, willfully and in breach of his trust, so communicates or attempts to communicate the same, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.

SEC. 2. That whoever, having committed any offense defined in the preceding section, communicates or attempts to communicate to any foreign government, or to any agent or employee thereof, any document, sketch, photograph, photographic negative, plan, model, or knowledge so obtained, taken, or made, or so intrusted to him, shall be imprisoned not more than ten years.

SEC. 3. That offenses against the provisions of this Act committed upon the high seas or elsewhere outside of a judicial district shall be cognizable in the district where the offender is found or into which he is first brought; but offenses hereunder committed within the Philippine Islands shall be cognizable in any court of said islands having original jurisdiction of criminal cases, with the same right of appeal as is given in other criminal cases where imprisonment exceeding one year forms a part of the penalty; and jurisdiction is hereby conferred upon such courts for such purpose.

Approved, March 3, 1911.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

The 1917 Espionage Act

The Justice Department believed the 1911 Act "incomplete and defective" and with war threatening in 1917 suggested to Congress revisions to the 1911 Act. A bill was introduced in the 64th Congress which contained the 1911 provisions together with prohibition against sedition and insurrection. After several changes, the Senate passed the bill and it went to the House. The House Judiciary Committee studied the bill and made some changes, but no further action was taken in the 64th Congress. A similar bill was introduced in the 65th Congress and after numerous changes were made the bill was enacted and became law on 15 June 1917. While the inadequacy of the 1911 Act was said to be the basis for changes sought in 1917, espionage provisions of the statute enacted by the 65th Congress, as it turned out, were made less effective for the protection of national defense information than the provisions in the 1911 Act.

In the 64th Congress, the espionage provisions of the bill (S. 8148) were criticized by a group of Senators, led by Senator Cummins, who were opposed to restrictions on a citizen's right-to-know as well as the lowering of constitutional safeguards which might encourage excesses by Government. In the 64th Congress, the wording "not lawfully entitled" was objected to by Senator Cummins because "it is going altogether too far to deny any American citizen the right to seek information for innocent purposes with respect to any portion of the Government and its condition."[3] Senator Cummins, in directing criticism at the espionage provisions of the bill, stated: "I am unwilling that a great number of new and strange offenses be created which will draw within themselves a large part of the population of a country which indulges in free speech and free thought, when not necessary to protect either the territory or the honor of the Republic." Senator Cummins touched upon constitutional difficulties inherent in the bill as well as the vagueness of its provisions. He remarked that if the 1911 Act "had been enforced for the last two years more than half the intelligent reading people of the United States would have been in the penitentiary . . . ." His argument was that innocent acts could not be made illegal by statute.

The term "not lawfully entitled" was eliminated during the 65th Congress by the Senate Judiciary Committee mainly because of the attacks by several Senators, including Senator Cummins, who at one point commented that the drafters "did not understand American liberty at all."[4] Members of both Houses were genuinely concerned over the possibility of prosecution because of innocent acts. The Judiciary Committees of both Houses, in order to clarify the intent necessary for violation, described it specifically "with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation." This language was approved by the Senate without debate.

[3] 54 CONG. REC. 3484.
[4] 54 CONG. REC. 3485.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

The phrase "information relating to national defense" was not precisely defined in debate. Senator Cummins questioned the meaning of the term "national defense."[5] He commented that "national defense" was not defined in the bill, nor were there any qualifications or restrictions. He took the term to mean "anything that is necessary in order successfully to defend ourselves against an enemy or successfully to attack an enemy." He charged that all there had to be was a "general connection with the Army or Navy." These statements were not challenged.

During later debate in the 65th Congress,[6] however, Senator Overman stated that, according to the bill, American citizens would not have the right to obtain secrets of the Government or "of the national defense." When it pointed out that "secrets" were not mentioned, Senator Overman, who was in charge of the bill, replied, "But that is what it means."[7] Senator Overman later commented that there would be no violation in obtaining or transmitting information which "had been made public property." Goodrich, in his commentary on the Espionage Act,[8] believes that only "government secrets" were to be covered by the Act, but the debates emphasized that the legislators also wished to protect certain contract work which was being performed outside of Government offices.

The legislators were aware of the responsibilities of the Executive Branch in protecting information which was vital to the defense and war effort. The House Judiciary Committee recognized that a system had to be devised for the prohibition of publication or communication of information relating to the national defense.[9] In recommending H.R. 291 to the 65th Congress, the Judiciary Committee noted that Section 4 gave the President authority to prohibit communication of information which "in his judgment is of such a character that it is or might be useful to the enemy."

In Senate debate, Senator Sutherland on the floor pointed out that "the phrase 'lawfully entitled' means . . . that the particular information must have been forbidden, not necessarily by an act of Congress; . . . the President . . . or the Secretary of the Navy or the Secretary of War . . . as his agent may make regulations which forbid obtaining certain information; and the President . . . may extend those regulations from time to time."[10]

The term "national defense" while criticized as too broad, was kept in the legislation so as to give the legislation broad scope. As was said in debate: "No Senator knows what are these plans or what specific articles are in some buildings that ought to be protected, and we made it general to protect everything connected with the national defense."

[5] 54 CONG. REC. 3485.
[6] 54 CONG. REC. 3488.
[7] 54 CONG. REC. 3489.
[8] The Control of Atomic Energy, Newman and Miller, page 350.
[9] House Report #30, page 18.
[10] 54 CONG. REC. 3489.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

The Espionage Bill introduced in the 64th Congress was criticized because it was an infringement upon the freedom of speech and thought, including the denial of the right to seek information. Under its censorship provisions, a person could have been prosecuted for publishing or communicating information which the President had judged to be contrary to the best interests of national defense.[11] The Senate approved a proviso, however, which put on record the Senate's position that the censorship section was not to be construed as limiting discussion, comment or criticism of the Government or representatives. The censorship section was later modified and then dropped.[12]

Court Decisions

The Act of June 15, 1917 (40 Stat. 217) was entitled "An act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States and for other purposes." It was divided into thirteen titles, the first entitled "Espionage" consisted of nine sections. Various sections of the Act have been considered by the Supreme Court and their constitutionality upheld in cases such as Schenk v. United States, 249 U.S. 204, 63 L. Ed. 470; Frohwerk v. United States, 249 U.S. 204, 63 L. Ed. 561 and Abrams v. United States, 250 U.S. 616, 63 L. Ed. 1173. The decisions in the above cases led the Supreme Court in O'Connell v. United States, 253 U.S. 142, 64 L. Ed. 827, and Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407, 65 L. Ed. 704 to declare simply that the Espionage Act was constitutional, but it was not until 1940 that the Supreme Court was confronted specifically with the constitutionality of the espionage provisions of the Act.[13] In 1939, three people--Hafis Salich, a Russian-born investigative employee of the Navy Department and Mikhail N. Gorin, a Soviet National employed by Amtorg in Los Angeles, and his wife, were indicted for violations of the espionage provision of the Espionage Act.

The Gorin Case.

Briefly, the facts which led to the indictment were as follows:[14] Salich was ordered by his superior to contact the Soviet Consulate in Los Angeles in regard to a certain individual, and Salich

[11] Section 4, H.R. 291. Report No. 30, 65th Congress, 1st Session, 25 April 1917. To Punish Espionage and Enforce Criminal Laws of the United States.

[12] House Report No. 69, 6 June 1917, Espionage Bill, 65th Congress, 1st Session To Accompany H. R. 291.

[13] Gorin v. United States, 312 U.S. 19.

[14] Gorin v. United States, 111 F. 2d 712.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

eventually talked to Gorin. Some time later, Gorin contacted Salich and told of his interest in Japanese activities. Salich reported the conversation to his superior and, according to the testimony of his superior, he forbade Salich to contact Gorin. Salich, however, claimed that his superior told him to give Gorin innocuous material and try to get information from Gorin. Later, Salich agreed to supply Gorin with certain information "on the theory" that it would benefit the United States. He supplied Gorin with the substance of various intelligence reports consisting principally of movement of Japanese from one place to another within the United States.

The instructions to the jury were comprehensive, they have since been used by other courts in giving instructions in espionage cases.[15] Included were the elements of the crime of copying, taking and obtaining documents, writings and notes of matters connected with the national defense. These were: (1) the fact of taking or obtaining must be established; (2) there must be a purpose of obtaining information respecting the national defense; (3) there must be an intent or reason to believe that the information so obtained was to be used to the injury of the United States or to the advantage of the Soviet Union; (4) the information so taken must, in fact, relate to the national defense. More specifically, the court instructed the jurors that "they could consider the character of the information required, as to whether or not it was susceptible to use by the Soviet Union; and whether or not Salich knew facts from which he concluded, or reasonably should have concluded that the information could be used advantageously by the Soviet Union."[16]

More specific instructions were also given under the second count which charged the defendants with communicating, delivering and transmitting to Gorin, as a representative of the Soviet Union, writings, notes and information relating to the national defense and describing the same reports mentioned in the first count. The elements of the crime charged in the second were indicated as: "(1) the fact of disclosure must be proved; (2) the disclosure must be made to representatives or citizens of the Soviet Union; (3) the guilty intent or reason to believe that the information so obtained was to be used to the injury of the United States or to the advantage of the Soviet Union must be present; and (4) the information so taken, must, in fact, actually relate to the national defense."[17]

The defense sought a directed verdict of acquittal at the conclusion of all the evidence on the grounds that: "(1) the innocuous

[15] United States v. Redin; Cases 46932 and 46970, 17 July 1946, U.S.D.C. W.D. of Washington.
[16] 111 F. 2d 712, 717.
[17] Ibid.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

character of the evidence forbade a conclusion that petitioners had intent or reason to believe that the information was to be used to the injury of the United States or the advantage of a foreign nation and (2) the evidence failed to disclose that any of the reports were related to or were connected with the national defense."[18]

An appeal was taken to the Ninth Circuit where the defendants' contentions included: (1) the words "national defense" should be given a military and naval connotation as specifically defined in the present section 793 of Title 18;[19] (2) the Espionage Act is unconstitutional because it "would fix no immutable standard of guilt to govern conduct and would give no fixed and definite meaning . . . but would be subject to definition as to meaning by each court and jury;"[20] (3) the Act violates the 5th and 6th amendments;[21] (4) insufficiency of evidence;[22] (5) the Naval Intelligence Reports show on their face that they do not relate to the national defense;[23] (6) there was no evidence that appellants knew the naval reports to be related to the national defense or that their acts were unlawful;[24] and (7) there was error in allowing testimony of the District Intelligence Officer which showed that Salich had been told not to contact Gorin.[25]

In the course of its opinion, affirming the conviction of Gorin and Salich, the Appellate Court stated:

> "We are, of course, conscious of the argument which could be made that the information divulged must not be of any importance or the Naval Intelligence Officer would not have made the information available to the public by presenting the reprints in evidence. Such procedure was a necessity in order to try the case. Whether it is sound, we think, is a question for the determination of Congress."[26]

The Supreme Court considered the case on the defendants' three objections: (1) that the prohibitions of the Act are limited to obtaining and delivering information concerning the specifically described places and things set out in the Act, such as a vessel, aircraft, fort, signal station, code or signal book; (2) that an

[18] 111 F. 2d 721.
[19] Id. at 718.
[20] Id. at 719.
[21] Id. at 719.
[22] Id. at 721.
[23] Id. at 721.
[24] Id. at 721.
[25] Id. at 721.
[26] Id. at 722.
[illegible] 73.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

interpretation which put within the statute the furnishing of any other information connected with or relating to the national defense than that concerning these specifically described places and things would make the Act unconstitutional as violative of due process because of indefiniteness;[27] and (3) the trial court overruled the petitioners' objection that as a matter of law none of the reports dealt with national defense.[28]

In argument, the petitioners claimed that because of the traditional freedom of discussion "the clearest sort of declaration would be required by the Congress to bring under the statute matters not directly connected with and yet of the greatest important to national defense." The Court decided that based on "an examination of the words of the statute" the meaning of national defense cannot be limited to the places and things enumerated in the present section 793. "It is our view," Justice Reed wrote in his opinion, "that it is a crime to obtain or deliver, in violation of the intent and purposes specified, the things described in paragraphs 1(b) and 2(a) [e.g., photographs, writings, maps, or anything connected with the national defense] without regard to their connection with the places and things of 1(a) [e.g., vessels, airplanes, buildings, canals, railroads and factories]." The conclusion of the Court was drawn from the meaning of the entire act; the legislative history did not play a large part in the decision.

On petitioners' second point, the Court could find no uncertainty in the statute which would deprive a person of the ability to predetermine whether a contemplated action is criminal under its provisions. The Court pointed out that the sections of the statute "are not simple prohibitions against obtaining or delivering to foreign powers information which a jury may consider relating to national defense." If such were the case, then a test would have to be made as to whether it had double meaning or forced anyone at his peril to speculate as to whether certain actions violated the statute. No uncertainty was found in the espionage statute because the intent or reason to believe "provision of the statute required those prosecuted to have acted in bad faith." "The sanctions apply only when scienter is established." Where there is no occasion for secrecy as with reports relating to national defense published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government. National defense entails not only military and naval establishments but also related activities of national preparedness, and the language employed is sufficiently definite "to apprise the public and is consonant with due process." Further, the Court stated that the question of the connection of the information with national defense is a question of fact to be determined by the jury "as negligence upon undisputed facts is determined."

[27] 312 U.S. 19, 23.
[28] Id. at 29.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

While the Gorin case is the only case on which the Supreme Court has ruled directly on the espionage provisions of the act, several cases have been decided in the circuit courts which contribute to an interpretation of the Act.

Other Cases Decided, 1939-45.

In Schachow et al. v. Government of the Canal Zone,[29] the defendants were prosecuted for taking pictures on a military reservation. An Army General and two Navy Commanders testified that the pictures could be used to the injury of the United States and to the advantage of a foreign nation. Evidence indicated that the defendants admitted to an officer that they knew it was a serious offense to take a camera on a military reservation. The defendants were convicted and no reversible error was found on appeal.

In the case of United States v. Grote,[30] the Second Circuit Court of Appeals in 1944 upheld the conviction of a naturalized German citizen for conspiring to violate the Espionage Act. Grote had undertaken to photograph drawings given to him by others from the files of a company doing defense work. Even though Grote testified he had no intent to do harm, the Court said, "The facts pointed more strongly to guilt than to such an incredible stupidity as might make an innocent intent possible." The Court stated further that, "Even though we had not then declared war with Germany, the European war had been going on for two years, we had begun to arm and the impropriety of furnishing patented devices for airplanes to the German Government was obvious."

The conspiracy provisions of the Espionage Act provide an opportunity for prosecution without the actual taking of information. In Thomas v. United States,[31] decided in 1945, the Appellate Court reversed a judgment against Thomas on the ground that there had been an improper charge to the jury. He had been tried on a one-count indictment based upon the conspiracy provisions of the Act. He and six others were charged with seven overt acts in furtherance of a conspiracy to violate the Espionage Act.

The Second Circuit in U. S. v. Heine (1945) noted that it is necessary to "carefully scrutinize lest extravagant and absurd consequence result" from a drastic repression of the free exchange of information which is contemplated by the statute.[32] In that case it was determined that information obtained from open sources, even though arranged to give benefit to a foreign nation, could not be the basis for a prosecution under the Act.

[29] 108 F. 2d 625 (5th Cir. 1939).
[30] 140 F. 2d 413.
[31] 151 F. 2d 183 (6th Cir.)
[32] 151 F. 2d 813, 815 (2d Cir.)

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

Postwar Cases

The Judith Coplon trials and the Rosenberg spy convictions came about as a result of violations of the espionage laws. Judith Coplon, a Department of Justice employee, was tried in the District Court for the District of Columbia pursuant to an indictment which included the following allegations: (1) that defendant "for the purpose of obtaining information respecting the national defense and with intent and reason to believe that the information was to be used to the injury of the United States and to the advantage of a foreign nation, did copy, take, make and obtain documents, writings and notes connected with the national defense." Count Two alleged that the defendant, having custody of documents and papers filed with the Justice Department unlawfully and willfully removed and concealed certain of said documents in violation of 18 U.S.C. 2071.[33] After a trial, which lasted about two and one-half months, she was found guilty on both counts and was sentenced to imprisonment for ten years on the first count and three years on the second, to run concurrently. The espionage statutes were not challenged on appeal, and appellants' charges of error were insufficient to overturn the conviction.[34]

After indictment in the District of Columbia, Miss Coplon was indicted in the New York District Court with V. A. Gubitchev, a Soviet National, on four counts including: (1) a conspiracy to violate sections 793, 794 and 2071 of Title 18, U.S.C. by impeding the functions of the Justice Department and depriving the Government of its right to the honest services of Miss Coplon as an employee of the Justice Department. Count Two charged that Miss Coplon "lawfully having possession of, access to, and being intrusted with documents, writings, and notes relating to the national defense, . . . did willfully attempt to communicate and transmit said documents" to her codefendant, who was a person not entitled to receive them. (18 U.S.C. 793) Count Four charged that Miss Coplon "with intent and reason to believe that they would be used to the injury of the United States and the advantage of a foreign nation" attempted to transmit to her codefendant documents, writings and notes relating to the national defense, a violation of 18 U.S.C. 794.[35]

Prior to the trial in New York, defendants made several motions. In the first, Miss Coplon sought to dismiss the indictment as to her

[33] U.S. v. Coplon, 88 F. Supp. 916 (S.D.N.Y. 1949).
[34] Coplon v. U. S., 191 F. 2d 749 (D.C.Cir. 1951) cert. den. 342 U.S. 926 (1952).
[35] 88 F. Supp. 910.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

on the ground that to try her in New York would constitute double jeopardy inasmuch as she had been indicted, tried, convicted and sentenced in the District of Columbia. In denying the motion, Judge Ryan determined that in the first count of the District of Columbia indictment an element of the crime (18 U.S.C. 793) was "obtaining possession of documents with the specific intent that the information be used to the injury of the United States and to the advantage of a foreign nation" and that Count Two of the New York indictment did not require such intent, the only requirement was that Miss Coplon obtained possession of the documents and attempted to transmit them to her codefendant, who was not entitled to receive them (18 U.S.C. 793). The Court noted that Count Four of the New York indictment differed from Count Two of the District of Columbia indictment "in that the latter required the specific intent of the defendant at the time of taking the documents whereas the former requires the intent at the time of the alleged attempted communication to her codefendant." The Court concluded that the New York indictment charged different statutory offenses.

In this case the Court also determined that under sections 793 and 794 a defendant can be tried for the substantive crime and the conspiracy to commit those crimes.[36] In addition to the conspiracy provisions in the Espionage Act, the Government charged Miss Coplon under the general conspiracy statute, 18 U.S.C. 371. In denying a motion to dismiss a count in the Coplon case, Judge Ryan determined that a prosecution under the conspiracy statute (371) was not inconsistent with prosecution under section 794 and it could not be interpreted as a conspiracy to conspire.

The Rosenberg Case

The espionage case of the greatest magnitude and drama was United States v. Rosenberg.[37] Briefly, the facts were these: Julius Rosenberg and his wife, Ethel, transmitted to a Soviet Vice-Consul material on the atom bomb supplied by David Greenglass and Morton Sobell. Julius also stole and delivered to the Russians the secrets of a proximity fuse. These and connected acts took place from 1944 to 1950. The Rosenbergs were arrested in the summer of 1950; their trial by jury began on 6 March 1951 and on 29 March they were found guilty. The trial judge sentenced them to death. The Rosenbergs appealed to the Supreme Court seven times and each time their plea was denied.

The indictment of Julius and Ethel Rosenberg charged them with conspiring from 1 November 1944 to 16 June 1950 to violate section 794

[36] Id. at 911 and 912.
[37] 195 F.2d 583 (2d Cir. 1952).

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

of Title 18, United States Code, in that they conspired to communicate, deliver and transmit to the USSR and agents and representatives thereof documents, writings, sketches, notes and information relating to the national defense, with intent and reason to believe that they would be used to the advantage of a foreign nation. The one count indictment alleged eleven overt acts setting forth the dates thereof.

Before trial the Rosenbergs moved pursuant to Rule 7(f) Federal Rules of Criminal Procedure for a bill of particulars as to the general conspiracy charge and overt acts, and pursuant to Rule 16, they sought an order permitting inspection and photographing of four enumerated documents. In denying the request, Judge Weinfeld wrote[38] that there were two basic requirements to an indictment: (1) the accused shall be definitely informed as to the charge against him so that he may be enabled to present his defense and not be taken by surprise; and (2) that he may be protected against another prosecution for the same offense. He held that the indictment met the above test. In denying that portion of the motion seeking discovery under Rule 16, Judge Weinfeld took cognizance of the two grounds of the Government's opposition: (1) there was no showing that the documents were "obtained from or belonging to the defendant or obtained from others by seizure or process;"[39] and (2) the sketch of which the defendants sought a copy was classified Top Secret and an affidavit was submitted to this effect. Citing Bank Line v. United States,[40] Judge Weinfeld said, "To grant this portion of the motion would require the Government at this time to make available to the defendants and disclose publicly part of the very information relating to the national defense which it is alleged the defendants conspired to transmit to a foreign government to be used to the latter's advantage and contrary to the national welfare. The issue which may arise upon the trial with respect to such evidence if produced is a matter for the determination by the trial court."

Judge Frank's opinion in U.S. v. Rosenberg, on appeal from the trial court, provides the latest major case law contribution to interpretation of the espionage laws. According to his opinion, the case of U.S. v. Heine held that the espionage statute was not applicable to public information, but it is not a fatal defect if the indictment did not allege that the matter was not public. Judge Frank pointed out that Rule 7 of the Federal Rules for Criminal Procedure only requires essential facts and that it cite the statute involved. On the constitutional problem, Judge Frank stated that the Gorin case had rejected the theory that the espionage statute suffered from vagueness. By implication, he continued, the Gorin case also "sustained the validity of the statute against any identical argument of vagueness . . . under the Sixth Amendment, . . . since the court's decision was primarily concerned with whether the statute set up definite enough standards of

38 U.S. v. Rosenberg, 10 FRD 521 (S.D.N.Y. 1950).

39 For a review of the law on discovery in Federal Courts, see Memorandum for the Record; Subject: "Subpoena Duces Tecum," dated 8 October 1958, General Counsel, CIA.

40 163 F. 2d 133, 139 (2d Cir. 1947).

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

guilt to advise a citizen of what exactly was forbidden and ipso facto a potential defendant of what exactly he was charged with doing." The statute was also valid under the First Amendment and the court emphasized that "the communication to a foreign government of secret material connected with the national defense can by no farfetched reasoning be included within the area of First-Amendment protected free speech."

In discussing the evidence of Julius Rosenberg stealing a proximity fuse from a factory, the opinion stated that it need not be shown that the fuse was secret or connected with the national defense. "The proximity fuse, be it noted, was an important World War II development . . . . The nature of the device itself strongly suggests that it was secret, and unequivocally shows that it was connected with the national defense."

After petitions for certiorari and rehearing were denied by the Supreme Court,[41] the Rosenbergs sought release from custody upon the ground that their sentences were imposed in violation of the Constitution or the laws of the United States.[42] After hearing oral argument, Judge Ryan ruled that it was conclusively shown that petitioners were entitled to no relief and no material issue of fact was raised which required a hearing.[43] On appeal, several issues of constitutionality and interpretation were raised and again put to rest.[44] The petitioners argued that their conviction should be set aside because one item of information classified as secret which they were charged with having conspired to transmit to Russia was so generally known that transmitting it was not forbidden by the Espionage Act. The circuit court did not agree, citing Judge Ryan's decision where it was clearly stated that the Government had presented testimony to establish need for the secrecy of some of the information unlawfully transmitted. The petitioners offered no evidence that the classification of the information was arbitrary, or that the United States Government had information which would have led it to believe it was well-known.[45] That issue of fact was presented to the jury by the trial judge and was resolved against the petitioners. The appeals court noted that U.S. v. Heine on which appellants relied "is so different in its facts as to be completely inopposite."

[41] Cert. denied 344 U.S. 838 (1952), 97 L. Ed. 652; rehearing denied, 344 U.S. 889 (1952), 97 L. Ed. 687.

[42] See 28 USCA 2255.

[43] United States v. Rosenberg, 108 F. Supp. 798 (S.D.N.Y. 1952).

[44] United States v. Rosenberg, 200 F. 2d 666 (2d Cir. 1952).

[45] 108 F. Supp. 798, 808.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

Appellant Sobell raised again on this appeal the fact that "as to him the evidence showed at most 'treachery and general intent to betray;' such an intent does not suffice to prove the specific intent required by the Espionage Act but would meet only the general intent called for by the treason clause of the Constitution; and there was here no compliance with the procedural demands of that clause."[46] The Appeals Court held that this argument was without merit.[47] This issue was raised before the Supreme Court in the petition for rehearing which was denied.

Revision of the Espionage Laws

During the war, Government agencies were confronted with many obstacles in enforcing the espionage laws, including the difficulties in securing indictments under them. Eventually, a joint study of the Espionage Act was undertaken by G-2, ONI and the FBI.[48] Certain recommendations were formulated and transmitted to the Attorney General in 1946.[49] The principal difficulty in proving a violation of the espionage laws apparently was establishing an "intent or reason to believe" that information was "to be used to the injury of the United States or to the advantage of a foreign nation." The committee which formulated the recommendations to the Attorney General believed that an amendment was necessary to provide penalties for the wrongful dissemination of information vital to the national defense by persons who legitimately have possession of such information, but against whom it would not be possible to prove "intent or reason to believe" that the dissemination of such information would be used to the injury of the United States or for the benefit of a foreign nation. The committee also reasoned that while one section of the Act provides penalties for those who willfully transmit information relating to the national defense which they might lawfully possess to someone not entitled to receive it, that even this section was so closely allied to other clauses requiring intent, that here too prosecution would be difficult.

Specifically, the committee made the following six recommendations:

1. Title 50, Section 31 [Presently Title 18, Section 794] should be amended to provide that the offenses described in clauses (d) and (e) shall not be construed to require proof of any intent or reason to believe that the information is to be used to the injury of the United States, and thereby avoid any judicial construction that the intent or reason to believe required by clauses (a), (b) and (c) applies to clauses (d) and (e).

46 200 F. 2d 666, 671.

47 344 U.S. 889, 97 L.Ed. 687.

48 File No. MID 915, Subject: "Strengthening of Espionage Laws of U.S." dated 10 June 1946.

49 Memorandum to the Attorney General, 27 June 1946, from the Secretary of War.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

"2. Title 50 should be amended to include clauses to provide for the punishment of willful dissemination of any information deemed vital to the national defense. Also to penalize any individual for the failure to report loss of any document or writing lawfully in his possession to his superior officer or superior employee of the United States. Also to add a clause to provide a penalty for the unlawful possession of any document or writing.

"3. To amend Title 50, Sections 31, 32 and 34 to make death a penalty for violation in time of peace and war.

"4. The Registration Act be amended to require the registration of any individual who has knowledge of or has received instruction in foreign espionage, counterespionage, or sabotage immediately upon entrance into the United States.

5. To amend the Federal Communications Act of 1934 to permit the use in evidence of information obtained through intercepting telephone, radio, cable and wired communications.

"6. To amend Chapter 212 of Public Law No. 127 dated July 9, 1943, 57 Statutes, 391, which provides a penalty for the willful violation of regulations or orders respecting the protection or security of vessels, harbors, ports or waterfront facilities by striking out Section 2 of this chapter which provides for the termination of the statute six months after the cessation of hostilities in the present war.

The draft bill incorporating the recommendations of the "Interdepartmental Intelligence Committee" was considered by the CIA General Counsel, Mr. Houston, to contain useful clarifications but as a practical matter did not aid greatly in coping with the peculiar security problems faced by the intelligence community. The draft bill would have amended subsections (d) and (e) of sections 1 and 4 of Title 50, U.S. Code as follows:

"(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or (e) Whoever unlawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note or information relating to the national defense, willfully communicates or transmits or

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; or (f) whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, or information relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been removed from its proper place of custody or delivered to anyone in violation of his trust, or lost, stolen, abstracted, or destroyed, and fails to make prompt report thereof to his superior officer, shall be punished by imprisonment for not more than 10 years and may, in the discretion of the court, be fined not more than $10,000.

Sec. 4. If two or more persons conspire to violate the provisions of sections one, two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided, conspiracies to commit offenses under this title shall be punished as provided by section thirty-seven of the Act to codify, revise, and amend the penal laws of the United States approved March fourth, nineteen hundred and nine.

In 1947, a bill was proposed for submission to Congress for the protection of cryptographic systems and communications intelligence. It provided that "whoever having obtained or having had custody of, access to, or knowledge of (1) any classified information . . . and who divulges it, etc., shall be punished." This terminology made the word "classified" a critical part of the proposed bill, and in defining the phrase "classified information" the draft bill proposed construing the phrase to mean information segregated for purposes of national security and marked to designate such segregation. In commenting on the bill which was proposed by the Secretary of Defense, CIA, and Mr. Houston, suggested that on the basis of the Gorin opinion, language similar to that in the Espionage Act be used concerning "intent or reason to believe," and the use of the term "classified information" might invalidate the bill because, since the classification was an administrative act, it would force a person, at his peril, to speculate as to whether certain actions violated the statute.

In September 1948, an omnibus bill dealing with espionage law amendments and internal security was being prepared by the Bureau of the Budget for submission to Congress. The President, Mr. Truman, gave the legislation his personal attention. The bill had originated in the summer of 1946 as a result

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

of discussions of the interdepartmental committee referred to above. Comments were solicited from the Departments of State and Treasury and the FCC, but CIA was not consulted on the proposed bill. However, the Director of CIA, Admiral Hillenkoetter, commented that:

> The first section of the proposed bill apparently is an attempt to tighten up sections 1 and 4 of the existing Espionage Act (50 U.S.C. 31, 34). The present section 1(d) makes punishable the transmission or attempt to transmit to a person not entitled to receive it or any book, instrument, appliance, or note relating to the national defense. The proposed draft adds to those physical items "information" relating to the national defense. Apparently, it was felt that under the old law a person might have a book or appliance, but if he merely passed on information, without a physical transfer, to an unauthorized person, he could not be prosecuted under this section. I feel that this is a desirable change in the law which does not broaden its scope but merely closes a technical loophole relating to the same offense that is now on the statute books. Also desirable, I believe, is the proposed change to section 1, making punishable failure to report discovery that a document or information relating to the national defense has been lost, stolen or abstracted. The proposed amendments to section 4 of the Espionage Act and the provisions concerning limitations of time are not important enough to warrant full discussion and are not, so far as we are concerned, controversial. It is, however, apparent from the history of prosecutions under the Espionage Acts that the stumbling block most commonly found is the requirement that the Government show intent, or reason to believe, on the part of the accused, and these elements are not easily susceptible of proof. At present, the Supreme Court appears to feel that without these elements of proof the statutes might be unconstitutional. It is possible, however, that wording could be found which would be more practical for prosecution purposes and yet would not violate constitutional principles.[50]

In reply to the Budget Bureau's request to CIA for comment on the proposed bill, Admiral Hillenkoetter wrote:

> The first sections of the bill concern themselves with tightening up certain sections of the existing espionage laws. These changes are desirable and merely close technical loopholes in the Espionage Act. To the extent that this is done, we would be happy to support any appropriate measures which would serve to strengthen our espionage laws. We have no comment to make concerning the views of the other departments as to the best technical language to accomplish this aim.

50 Letter to F. Eberstadt, Chairman, Committee on National Security Organization, Commission on Organization of Executive Branch of Government, on 14 September 1948. Confidential.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

We do feel, however, that piecemeal patching of the present statute, which has already been amended several times, is only a partial remedy. It would seem preferable if the entire Espionage Act could be revised and recodified, based upon our recent experiences during and after the war, as well as the experiences of the British under their Official Secrets Act. This could best be accomplished only after a complete and intensive study by an interdepartmental committee. In view of the highly controversial nature of these laws and their impact upon civil rights, it might be best if such a committee were under the chairmanship of an outstanding attorney or eminent member of a law school faculty. It should also include other persons of pre-eminent qualifications who would be free of the special pleading of those Government departments which would be called upon to administer the laws. This is, of course, a long range project, and, until completed, this Agency will support the present proposals insofar as they relate to amending the present Espionage Act.[51]

The intended changes were incorporated into the Internal Security Act of 1950 (September 23, 1950) which amended section 793 of Title 18 by dividing into subdivisions, adding laboratories and stations, and places where material or instruments for use in time of war are the subject of research or development to the list of facilities and plans to which subsection (a) applies, making subsection (d) applicable only in cases in which possession, access, or control is unlawful, making subsection (f) applicable to instruments and appliances as well as to documents, records, etc., and providing by subsection (g) a separate penalty for conspiracy to violate any provisions of section 793.

Another formal attempt to strengthen laws concerned with security began in 1952[52] when the Secretary of Defense, Robert A. Lovett, discussed with President Truman the desirability of sponsoring legislation which would facilitate taking criminal action against those who disseminate classified information unlawfully, including intermediaries, columnists, or newspapers that publish or cause to be published such information.[53] Mr. Lovett thought that legislation along the lines of the "British Defence of the Realm Acts" would be helpful and he thought that Secretary Forrestal had attempted to draft such legislation with the aid of Mr. Leva.[54]

[51] Letter to Mr. Elmer B. Staats, Assistant Director, Legislative Reference, Bureau of the Budget, 20 December 1948. Confidential.

[52] Memorandum to John G. Adams, Deputy General Counsel, Department of Defense from Charles A. Coolidge, Assistant Secretary of Defense, dated 14 October 1952.

[53] Letter to the Attorney General from the Secretary of Defense, dated 8 December 1952.

[54] Memorandum from Coolidge, op. cit. supra.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

The Justice Department had already done a great deal of work on this problem and it was reportedly the opinion of the Department that the Espionage Law contained adequate authority for the prosecution of the intermediary, the columnist and the newspaper. However, they prepared a draft bill to amend the law so as to strengthen the sanctions and make the language more clear. The Amendment was not acted upon by Congress. One difficulty with prosecutions under the espionage laws which became apparent was not that the laws were inadequate but that there was not a "focal point from which the insistence on prosecution should have come after the offenses were committed, because, being isolated from regular /Department of/ Justice supervision, or being seemingly little leaks here and there outside normal Justice fields of endeavor, and sometimes being accidental leaks by quite important Government officials, there just was nobody to push for prosecution.[55]

In 1955, Congress established the Commission on Government Security to study statutes, Executive Orders, regulation programs and procedures intended for the protection of the national security. It also was to recommend desirable changes. The Commission's study was transmitted to the President and Congress on 21 June 1957.[56] A section on espionage was included in which it was recognized that the Government is confronted with the problem of compromise of classified information in the course of prosecution for the violation of the espionage laws.[57] The Commission also recognized the problem of unauthorized disclosure without subversive intent.[58] In its study, the Commission recommended: "That Congress enact legislation making it a crime for any person willfully to disclose without proper authorization, for any purpose whatever, information classified 'secret' or 'top secret,' knowing or having reasonable grounds to believe, such information to have been so classified."[59]

The CIA Office of General Counsel from time to time has studied the espionage statutes and proposed changes in them. A specific problem has been the control of intelligence employees and former employees who use a threat of release of information as blackmail. Prosecution is difficult or impossible in most cases because of the sensitivity of the information which would be revealed in the courtroom. In this connection, experience has shown that even with the attempt and conspiracy provisions of the espionage statutes, it is unlikely that legal action would be effective if begun before the act of espionage is completed.

Following are listed some CIA Office of General Counsel suggestions included in a report on recommended changes in the espionage laws, prepared several years ago:

[55] Memorandum to the Secretary of Defense from Assistant Secretary Cobledge, dated 20 November 1952.

[56] Commission on Government Security, Report of (1957).

[57] Id. at 619.

[58] Id. at 619.

[59] Id. at 620. See also draft amendment, p. 737.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

1. Extraterritorial Application of the Espionage Laws.

Suggested amendment to section 791, Title 18, as follows:

This chapter shall apply:

(a) to all acts which are offenses under this chapter when committed within the admiralty and maritime jurisdiction of the United States and on the high seas, as well as within the United States, (regardless of the nationality of the offender) and,

(b) to all acts which are offenses under this chapter when committed either within the United States and its admiralty and maritime jurisdiction or elsewhere in the world by U.S. nationals or others who owe allegiance to the United States, including permanent resident aliens and aliens who have renounced their allegiance to their former country and have given their allegiance to the United States.

2. Evidentiary Requirements of the Espionage Chapter.

Suggested solution: A statute specifically applying to foreign intelligence collected by classified means analogous to the COMINT section, 798.

As an example, a section might begin as follows:

Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes any classified information -

(1) concerning . . .

There would follow a description of information which would be designed to cover (intelligence) activities . . . .

3. Controlling Threats to Release Information.

Suggested solution.

1. Criminal Statute. An additional section to the espionage chapter making it a crime to threaten to release classified information.

The problems in writing such a section are mostly policital . . . . Thus it might be more practical from our point of view to limit the information to . . . intelligence, sources and methods, etc., similar to the COMINT section 798. . . .

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

Another problem is what type of threats should be prohibited - threats made to CIA officials, Government officials, or anybody?

The practical use of such a statute would be questionable. It might have the effect of discouraging threats but at the same time depriving the Agency of any warning of an impending release of information. On the other hand, such a statute would provide the deterrent which would make an agent think twice before he attempted to blackmail the Agency into writing off his debts, etc.

2. Statutory Injunction. Another legal sanction, and perhaps a more useful one, would be a statutory injunction similar to that found in the Clayton Antitrust Act, 15 USC 25. It would enable the Government to request the court to enjoin a threatened violation of the Espionage Act. The reasoning supporting this approach is the same used in support of the Clayton Act.

The desire to prevent the crime and its subsequent damage from occurring is much better accomplished by enjoining it rather than penalizing the act after it has been completed. The retarding effect of a penalty in these cases may not be nearly so effective as an injunction.

15 USC 25 reads in part as follows:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title . . . .

It is suggested that a section based on this would be very effective in this field. Again the problem is how broad the coverage of types of information should be. We can either make it general and refer to information bearing on the national defense as in sections 793 and 794 with all the attendant problems of proof, or we can attempt to find words and phrases which would cover our particular problem in the same way that the COMINT statute covers NSA's problem.

4. Solicitation to Commit Espionage.

Suggested Solution. Add a new section to the espionage chapter (Title 18, chapter 37) as follows:

> Any person who solicits or incites or endeavors to persuade another person to commit any offense under this chapter or aids and abets or does any act preparatory to the commission of an offense under this chapter, shall be (punishment) . . . .

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

5. General Provision Relating to Punishment.

In addition, we would suggest adding to any legislation enacted a general clause relating to punishment similar to that set forth in Section 223 of the Atomic Energy Act of 1954 (42 USC 2273):

> Whoever willfully violates, attempts to violate, or conspires to violate, any provision of this chapter for which no penalty is specifically provided or of any regulation or order prescribed or issued under . . . this title shall, upon conviction thereof, be punished by . . . .

No further action was taken on amending the espionage laws until February 1958. On 12 February, a meeting was held in the Office of the Special Counsel to the President at the instance of the General Counsel of the Defense Department, Mr. Robert Dechert. The meeting was attended by representatives of the Departments of Justice and Defense, the President's Office, including the Bureau of the Budget, and the General Counsel of CIA. The purpose of the meeting was to discuss means of eliminating security leaks by legislative action. The Special Counsel to the President, Mr. Gerald Morgan, with Mr. Murray Snyder, Assistant Secretary of Defense, agreeing, stated that it would be politically impossible to obtain legislation which would provide for punitive measures against the press and magazines for publishing leaked security information. It was suggested that legislation should be drafted pertaining to employees and ex-employees along the line of the Atomic Energy legislation. At the same time it was agreed that the legislation recommended by the Wright Committee was not suitable as drafted.

In a letter to Mr. J. Walter Yeagley of the Internal Security Division,[60] Mr. Houston pointed out that there were two statutes directed toward specialized fields which attempt to overcome at least a part of the evidentiary problem of prosecuting without compromising security information. One is the Atomic Energy Act in chapter 18 of which section 227 relates to any employee who "knowingly communicates . . . any Restricted Data," and the other being section 798 of Title 18. Mr. Houston thought that similar legislation concerning classified information relating to sources and methods could be drafted to "provide that in the case of employees and ex-employees the disclosure be made willfully and with knowledge or reason to believe that it was classified information without requiring a showing of intent to injure the United States or aid a foreign power."

Two other proposals were suggested by Mr. Houston: An injunctive provision similar to section 230 of the Atomic Energy Act of 1954, as amended, directed against anyone who has violated or is about to violate

[60] February 1958.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

any acts relating to the protection of confidential information; and a provision that espionage laws apply to United States nationals and aliens for acts of espionage against the United States wherever committed.

The Department of Justice again has had the revision of the espionage laws under consideration and, as a step in the revision, the Department submitted to Congress a proposal to repeal section 791 of Title 18, United States Code. In suggesting this bill, Attorney General William P. Rogers wrote the Speaker of the House as follows:

> Chapter 37 of Title 18, United States Code, is entitled "Espionage and Censorship." It consists of a number of sections prohibiting certain acts prejudicial to the national security. The first section in the chapter, section 791, provides that the chapter "shall apply within the admiralty and maritime jurisdiction of the United States and on the high seas as well as within the United States." This embraces the United States and American vessels on the high seas or on navigable waters within the territorial jurisdiction of foreign sovereigns.
>
> Because espionage knows no geographical boundaries, because United States military and civilian personnel are distributed widely about the globe, and because it is unreasonable to limit the Government's ability to protect itself against acts of espionage on the basis of the place where such acts are committed, the Department of Justice recommends the repeal of section 791. By the repeal of this section, chapter 37 will be given extraterritorial effect within the rule expressed in United States v. Bowman (260 U.S. 94), that acts which are directly injurious to the Government and may be perpetrated without regard to locale are punishable when committed by citizens either at home or abroad. Espionage is such an offense.
>
> We would appreciate the appropriate reference of this proposed legislation.
>
> The Bureau of the Budget has advised that there is no objection to the submission of this recommendation.[61]

The Committee on the Judiciary approved the bill with the following statement:

> The limitation upon the application of existing espionage laws to acts committed either in the United States, on the high seas, or within the admiralty and maritime jurisdiction of the United States has prevented prosecution of acts of espionage committed against the United States in foreign countries. The committee has found no justification for such a limitation. On the other hand it believes that it is imperative that the laws of this Nation protect it from acts of espionage committed abroad as well as at home.

[61] House of Representatives Report No. 2651, 85th Congress, 2d Session, 15 August 1958.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

To give our criminal laws such extraterritorial effect is not novel. In the case of United States v. Bowman (260 U.S. 94) the Supreme Court held that citizens of the United States while in a foreign country were subject to penal laws enacted to protect the United States and its property. Crimes against the United States committed abroad are triable, under section 3238 of Title 18, United States Code, in the district where the offender is found, or into which he is first brought.[62]

Although the bill passed the House in the 85th Congress, it was not considered by the Senate prior to adjournment. The same bill in the 86th Congress passed the House but failed passage in the Senate.

[M. C. Miskovsky]
M. C. MISKOVSKY
Assistant General Counsel
1961

[62] Ibid.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

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APPROVED FOR RELEASE
DATE: AUG 2001

July 14, 1966

THE USE OF CIVIL AND EQUITABLE REMEDIES IN PROTECTING GOVERNMENT SECRETS

THE PROBLEM: The problem of protecting official Government secrets and related material, within our free Democratic society bedrocked as it is on the Constitution with its attendant Bill of Rights, has long plagued the intelligence community. Title 18 of the United States Code provides ample legal sanctions following proven acts of espionage, sabotage and unlawful disclosure of classified information; however, with the exception of the injunctive powers granted the Atomic Energy Commission under Title 42, USC 2280, there is currently no truely effective legal weapon, in use, whereby CIA or the intelligence community can protect classified or related information from disclosure from within, even given evidence to the effect that such a disclosure is contemplated by an employee or ex-employee. While over the years much discussion, study and negotiation have been given the matter (especially on the USIB level), no truely effective legal authority has been uncovered, nor is preventive legislation likely to be forthcoming, given the present political climate and the reluctance of Congress to interest itself in espionage legislation during a period of progress and prosperity.

A SOLUTION: It is within this framework then, that the present study has been undertaken, a study to determine whether or not the CIA and perhaps the intelligence community can help close this gap through other existing means. Use of existing tort law relative to industrial espionage and trade secrets, combined with the attendant usage of ancillary prohibitive covenants in open legally

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

actionable contracts of employment, buttressed by the standard injunctive powers granted the District Court under Title 28, United States Federal Rules of Civil Procedure, Rule 65 may act as the fulcrum we seek. The use of these civil remedies, actionable contracts of employment and injunctions is at best complex, and a clear division of the interrelationships difficult of explanation. However, a certain order being necessary to the proper understanding of the underlying basis for the use of these legal weapons, the matter will be presented in the following order, there being necessarily some overlap and duplication in presentation: (1) an overall presentation of the law of torts as it applies to industrial espionage and the protection of industrial and trade secrets (Here, there being little or no Government precedents for such actions we must rely on the law as it is applied to commercial enterprise.), (2) having shown the legal protection now afforded industrial or trade secrets, we will then develop the area of law as it pertains to the use of employment contracts containing ancillary agreements prohibiting the use of industrial secrets during and subsequent to employment, and (3) we will show that there is much precedent relative to the normal use of injunctive procedures in enforcing and protecting trade or industrial secrets, whether or not a contract of employment by the employer and employee exists, and that there is even greater precedent for granting injunctions where the public interest, in our case the national security, is involved. This will complete the presentation of the basic legal tool as it is herein envisioned. Attachments in the form of basic industrial contracts and termination agreements now in commercial use together with copies of proposed contracts and termination agreements which might be implemented by the CIA or other interested components of the intelligence community are appended. See A, B, C, D, E and F.

POSSIBLE FUTURE SOLUTION: In addition to all of the above a short explanation relative to a possible future legal measure will follow; whereby, given the necessary legislation, an employee's retirement and/or other benefits might be denied him should he be found in violation of his contract of employment.

THE LAW OF TRADE SECRETS AS APPLIED TO INDUSTRIAL ESPIONAGE: A trade secret may consist of any formula, pattern,

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or list of customers.

There have been several theories supporting the protection of trade secrets by the courts. Originally, protection was granted to the owner on the basis that the trade secret was a property right.[1] Now, however, the confidential relationship existing between employer and employee is generally considered to be the primary source of protection. As Mr. Justice Holmes stated:

> The starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs, or one of them. These have given place to hostility, and the first thing to be made sure of is that the defendant shall not fraudulently abuse the trust reposed in him. It is the usual incident of confidential relations. If there is any disadvantage in the fact that he knew the plaintiffs' secrets, he must take the burden with the good.[2]

Thus, the essence of the action is the breach of faith, and, therefore, it is of no importance that the defendant could have gained access to the trade secret by legitimate means if he wished.[3] The various doctrinal labels used to protect, however, are of little importance as long as the courts realize the value of trade secrets and give them this protection.[4] But this protection is limited, since it is unquestionably lawful to gain possession of a competitor's unpatented product by proper means and, through inspection and analysis, create a duplicate.[5]

In determining the existence of trade secrets, the courts generally look at secrecy and various technical factors.[6] The courts have not found absolute secrecy to be essential and have usually endorsed

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1. Footnotes begin on Page 13.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

some form of qualified secrecy.[7] However, if the plaintiff has voluntarily disclosed the information or if the facts involved are the subject of public knowledge or general knowledge in the trade, then any right to protection disappears.

The courts have also taken into consideration the extent to which the information may be part of the employee's personal skills and knowledge, which the employer cannot prevent him from using.[9] The problem has been well stated in the case of Space Aero Products Co. v. R. E. Darling Co. 238 Md. 93, 203 A.2d 74, cert. denied, 382 U.S. 843 (1965).

> The development of the law of trade secrets is a result of balancing two conflicting elements essential to our society. There is a strong policy favoring free competition; an employee is entitled to use the skill and knowledge of his trade or profession which he has learned in the course of his employment, for the benefit of himself and the public, if he does not violate a contractual or fiduciary obligation in doing so.... On the other hand, in order to promote the progress of science and the useful arts, the law provides certain protections to an originator. Among these protections are the patent and copyright statutes and the law of torts prohibiting unfair competition. The law protecting trade secrets is another protection.

Thus, the rule is simply that the former employee can use the skills and knowledge he learned during the employment, but he has a duty not to use the trade secrets of his former employee.[10] The rule is straightforward; the difficulty occurs in its application when the former employee's skills and knowledge are closely interwoven with the employer's trade secrets.[11]

CONTRACTS PROTECTING TRADE SECRETS ARE VALID:[12] The law recognizes a right of property in trade secrets.[13] As such property loses its only value if the secret is disclosed, any one who acquires knowledge thereof in a confidential capacity, as that of an employee, is under an obligation, which equity will enforce, not to

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

disclose the secret or use it for his own advantage, even if he makes no express contract to this effect.[14]

It necessarily follows from the recognition of property in trade secrets that express contracts which prohibit their disclosure by those entrusted with knowledge of them are valid and may be as broad as is necessary to protect the owner from injury by the disclosure of the secret or its competitive use. Especially, contracts by employees may restrain them from disclosing secrets of their employment,[15] and the owner of a secret on selling it, may effectively promise not to compete by making use of the process himself or divulging it to others.[16] Indeed, the sale of a secret process as such carries with it the implied obligation not to disclose it to others.[17]

It has been said:[18] "Trade secrets, the names of customers, all such things, which in sound philosophical language are denominated objective knowledge--these may not be given away by a servant; they are his master's property, and there is no rule of public interest which prevents a transfer of them against the master's will being restrained. On the other hand, a man's aptitudes, his skill, his dexterity, his manual or mental ability--all those things which in sound philosophical language are not objective, but subjective--they may and they ought not to be relinquished by a servant; they are not his master's property; they are his own property; they are himself. There is no public interest which compels the rendering of those things dormant or sterile or unavailing; on the contrary, the right to use and to expand his powers is advantageous to every citizen, and may be highly so for the country at large." The importance of the distinction thus suggested may be conceded, but it will not solve all difficulties arising from restrictive covenants by employees. The objective is frequently so entwined with the subjective, that as a practical matter, a former employee cannot use his subjective skill in competition with his former employer without utilizing objective knowledge gained in his old employment. In such a case all circumstances must be considered, and unless excessive and unreasonable hardship is thereby caused a covenant exacted to protect the employer's business should be enforced even though the employee is thereby deprived of exerting his subjective skill in a particular direction.[19]

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

Moreover, the inquiry is pertinent whether an employer as a condition of developing a high degree of even purely subjective skill in an employee may not fairly exact a promise that the skill shall not later be exercised in competition with himself. If the scope of the promise leaves ample opportunity for the exercise of the employee's skill where he will not compete with his old employer, there seems no reason why the promise should be regarded as opposed to public policy, and the American decisions support this conclusion.[20]

INJUNCTIONS AND OTHER REMEDIES UNDER CONTRACTS OF EMPLOYMENT: A typical illustration of a skilled employee's wilful betrayal of an employer's secrets is found in Minnesota Mining & Mfg. Co. v. Technical Tape Corp.[21] In that case, Beyer, an employee, was bound under a "Technical Agreement" not to disclose any of plaintiff corporation's processes to anyone without plaintiff's written consent and not to enter competitive employment for one year after leaving plaintiff's employ. Beyer was one of the most capable chemical engineers Minnesota Mining and Manufacturing ("3M") had. He knew or had access to the precious information which had made 3M's cellophane and masking tapes the undisputed market leaders. For this reason Technical Tape, a competitor, found it expedient to hire him away from 3M. In the course of negotiations between Beyer and Technical Tape respecting Beyer's change of jobs, it was made clear to him that disclosure of 3M's secrets would be a condition of his employment. He was even given a list of "3M Questions" for which he was to secure the answers before leaving for his new employment. It was this fact which proved to be the "bombshell" which insured plaintiff's recovery. On resigning his position at 3M, Beyer told 3M that he was going to work for a paper company which was in no way a competitor of 3M's. As a result of this deception, 3M did not uncover the conspiracy until its success was reflected in 3M's impaired market position. There can be no doubt in cases such as this that the employee is aware that he is committing a breach of faith.[22] In the 3M case, the employee was under both a secrecy agreement and a postemployment agreement not to compete.

At present permanent injunctions are given almost as a matter of course when it has been ascertained that a trade secret has been wrongfully taken. The courts also have shown themselves unwilling

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

to modify injunctions against trade secret users when the latter have attempted to show changed conditions justifying such modification.[23] This judicial attitude shows itself on one side of the controversy over the remedy to be granted against one who illegally acquires and uses a trade secret which, before trial, becomes available to the public. One rule, originating with Shellmar Prods. Co. v. Allen-Qualley Co.[24] and A. O. Smith Corp. v. Petroleum Iron Works Co.,[25] is that the proper remedy in such a case is a permanent injunction against further use of the secret.[26] That the injunction, taking effect after publication of the secret, denies to the wrongful taker a privilege enjoyed by everyone else in the world is justified on the ground that he is a wrongdoer and is not permitted to complain.[27] The contrary rule, most clearly enunciated by the Second Circuit in Conmar Prods. Corp. v. Universal Slide Fastener Co.,[28] is that a permanent injunction is never justified in this situation and that if possible the injured party should be compensated by a damage award alone. However, where the wrongful taker obtains a competitive head start as a result of his prior knowledge and this advantage continues even after the secret is made public, the Second Circuit indicated in Schreyer v. Casco Prods. Corp.[29] that an injunction might issue for a period sufficient to put the wrongful taker back in a position of competitive equality with those who first learned of the secret when it became public. This view is shared by a few other federal courts.[30]

The use of normal federal injunctive procedures under Rule 65, Title 28 of the United States Code is feasible and there is much case law sustaining the use of the injunctive weapon in protecting the public interest generally. One of the earliest cases in this area, in re Eugene Debs et al, United States Supreme Court Reports, 39 L. Ed., U. S. 155-158, enjoined Debs from preventing the flow of rail traffic as being against the public interest. The Federal District Court, in its own right and as an ancillary aid to Government agencies, has the power to grant injunctive relief to make effective a remedy at law or to prevent undue harm or injury to the public interest. It is a sound proposition of law that the power of a Government agency to seek injunctive relief, if not expressly provided by statute, may be

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

implied. West India Fruit and Steamship Company, Inc., et al v. Seatrain Lines, Inc., 170 F.2d 775, a case in which the United States Maritime Commission intervened as a party plaintiff in an action to enjoin the steamship company from putting into effect late reductions pending decisions in the case before the Commission, the District Court, in the absence of any statutory provision, granted a temporary injunction. In the case of Walling v. Brooklyn Braid, Co., Inc., 152 F.2d 930, in the absence of a statutory provision, the court granted an injunction to the Wage and Hour Administrator enforcing a wage order of the Administrator issued under the Fair Labor Standards Act. In the case of Bowles, the Price Administrator, Office of Price Administration, v. Montgomery Ward & Co., Inc. No. 8431, 143 F.2d 38, the court said:

> (7) The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility, rather than rigidity, has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustments and reconciliation between the public interest and private needs, Hecht Co. v. Bowles, supra, and as a result they may, and frequently do, go much farther to give relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. Virginia Ry. Co. v. System Federation No. 40, 300, U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789. The court has broad powers to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past. National Labor Relations Board v. Express Publishing Co., 312 U.S. 426, 435, 61 S.Ct. 693, 85 L.Ed. 930; Local 167 v. United States, 291 U.S. 293, 54 S.Ct. 396, 78 L.Ed. 804; Texas & N.O.R.R. Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034; and Standard Oil Co. v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619, 34 L.R.A., N.S., 834, Ann. Cas. 1912D, 734.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

PROPOSED FUTURE SOLUTION: Basically this solution is an inclusion in the employee's contract of employment to the effect that if he breaches his contract with the employer he forfeits his retirement benefits and any and all other benefits to which he would otherwise be entitled as a former CIA employee. (He would of course be refunded his contribution to the retirement fund.) This could be done either by contract, or under legislation authorizing such contracts and giving them the force of law.

Attachments:

TAB A. DuPont Employment Agreement
TAB B. DuPont Employment Termination Agreement
TAB C. Space Sciences, Inc. Employment Agreement
TAB D. Proposed CIA Contract of Employment Agreement
TAB E. Alternate Proposed CIA Contract of Employment Agreement
TAB F. Proposed CIA Termination Agreement

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

FOOTNOTES

1. Peabody v. Norfolk, 98 Mass. 452 (1868); Tabor v. Hoffman, 118 N.Y. 30, 23 N.E. 12 (1889).

2. E. I. duPont de Nemours Powder Co. v. Masland, 244 U.S. 100, 102 (1917), cited in: Barkes Tarzian, Inc. v. Audio Devices, Inc., 166 F. Supp. 250, 261 (S.D. Cal. 1958); Carter Products, Inc. v. Colgate-Palmolive Co., 130 F. Supp. 547, 574 (D. Md. 1955), aff'd, 230 F.2d 855 (4th Cir. 1956).

3. See, e.g., Franke v. Wiltschek, 209 F.2d 493, 495 (2d Cir. 1953); Sperry Rand Corp. v. Rothlein, 241 F. Supp. 549, 562 (D. Conn. 1964); Head Ski Co. v. Kam Ski Co., 158 F. Supp. 919 (D. Md. 1958). See also RESTATEMENT, TORTS §757 (1939), which sets out liability for use of a trade secret without permission.

4. Klein, The Technical Trade Secret Quadrangle: A Survey, 55 Nw. U. L. Rev. 437, 440, n. 23 (1960). The protection offered a trade secret is both greater and less than that afforded to a patent. The trade secret's protection is greater because it is not limited to a fixed number of years and does not require the strict patent standards for novelty and invention. Trade secret protection is less than that afforded to a patent in that actual secrecy and impropriety in the method of procuring the secrets are both prerequisites to the protection of a trade secret. Mycalex Corp. of America v. Pemco Corp., 64 F. Supp. 420, 423 (D. Md. 1946), aff'd, 159 F.2d 907 (4th Cir. 1947). For the rationale behind the protection of both trade secrets and patents, see RESTATEMENT, TORTS §757, comment a at 2-4 (1939).

5. Tabor v. Hoffman, 118 N.Y. 30, 23 N.E. 12, at 13 (1889). See Smith v. Dravo Corp., 203 F.2d 369, 375 (7th Cir. 1953) which cites NIMS, UNFAIR COMPETITION AND TRADEMARKS 1148 (1947).

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

6. RESTATEMENT, TORTS §757, comment b at 6 (1939), cited with approval in Space Aero, 233 Md. at 110, 208 A.2d at 82, breaks down these requirements into six factors: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by the employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended in its development; (6) the ease or difficulty with which others could properly acquire or duplicate the information. See Manos v. Melton, 350 Mich 500, 100 N.W. 2d 235, 238-39 (1960), citing ELLIS, TRADE SECRETS §239, at 324-25 (1953).

7. RESTATEMENT, TORTS §757, comment b at 5-6 (1939). See Minnesota Mining & Mfg. Co. v. Technical Tape Corp., 23 Misc. 2d 671, 192 N.Y.S. 2d 102, 119 (Sup. Ct. 1959), which required the secrecy to be such that there would be difficulty in others properly acquiring the information. Space Aero is in accord, 233 Md. at 109-10, 208 A.2d at 82. See Mycalex Corp. of America v. Pemco Corp., 64 F. Supp. 420, at 423 (D. Md. 1946), aff'd, 159 F.2d 937 (4th Cir. 1947).

8. National Starch Products v. Polymer Industries, 273 App. Div. 732, 79 N.Y.S. 2d 357, 360 (1948). "A trade secret owner, however, does not abandon his secret by a limited public publication for a restricted purpose." Space Aero Products Co. v. R. E. Darling Co., 233 Md. at 110, 208 A.2d at 82 (1965).

9. The situation is well stated in the case of E. I. duPont de Nemours & Co. v. American Potash & Chemical Corp., 200 A.2d 428, at 437 (Del. Ch. 1964):

> The court fully recognizes that this is a case of great social and industrial significance.... Among the substantial and conflicting policies at play in this situation are the protection of employees' rights in their trade secrets on the one hand, versus the right of the individual to exploit his talents, use matters of general knowledge, and pursue his calling without undue hindrance from a prior

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

employer on the other. The law recognizes that trade secrets are entitled to reasonable protection regardless of the supporting legal label. Reasonable legal protection tends to encourage, as here, substantial expenditures to find or improve ways and means of accomplishing commercial and industrial goals. The protection of such efforts and the results is beneficial to the employer and presumably to society. However, it is hard to ask a man to work in a trade secret area and thereby circumscribe his possible future liberty of action and the use of the knowledge and skills which are inextricably interwoven with his knowledge of the trade secrets.

The "interests" involved are as easy to state as they are difficult to protect, particularly in the face of the ever-increasing complexity of present day technology.

10. Allen Mfg. Co. v. Loika, 145 Conn. 509, 144 A.2d 306, 309 (1958).

11. See, e.g., Minnes v. Mielton, 358 Mich. 500, 100 N.W.2d 235 (1960). The court in Sperry Rand attempted to separate the two when it stated, 241 F. Supp. at 564:

> For example, how certain chemicals effect certain metals, what procedures insure a clean environment and what do not, etc., are things learned from (the defendants') experiences at Sperry and become a part of their intellectual equipment. But their knowledge of the end products of their work there, the combination of apparatus and equipment, materials and procedures which made up the Sperry Process for the manufacture of its superior quality transistor, in short, the things about the process which were the secret of Sperry's success, were information which the defendants could not use or impart to others without breaching their fiduciary duty to Sperry.

12. See Rest., Contracts, §516 (f), and §515 (a) (b) (c). See Scott Paper Co. v. Marcalus Mfg. Co., Inc., 326 U.S. 249,

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

66 S Ct 101, 90 L ed 47 (citing Rest., Contracts, §515); Machman Springfilled Corp. v. Ray Mfg. Co., 139 F (2d) 701 (CCA 2) (citing Rest., Contracts, §§515 (e), 516); Walling v. Wolfermann, Inc., 54 F Supp(2d) 917 (DCWD Mo) (retailer manufacturing candy for over counter sales), app. dism 144 F(2d) 354; Watkins v. Hudson Coal Co., 54 F Supp 955 (DCMD Pa) (superimposition of act upon contract with arbitration clauses but not conforming to act), mod 151 F2d 311 (CCA 3), cert den 327 US 777, 90 L ed 1005, 66 S Ct 522; Conmar Prods. Corp. v. Tiboney, 63 F Supp 572 (DCSD NY) (citing Rest., Contracts, §516 (f) and comment); American Excelsior Laundry Co. v. Dorrieseaux, 204 Ark 843, 165 SW(2d) 593 (citing Rest., Contracts, §515 (b)).

Courts of equity will enforce contracts made by employees not to divulge trade secrets or use such knowledge to their own use and profit. Julius Hyman & Co. v. Velsicol, 123 Colo 563, 233 P2d 977 (citing text), cert den 342 US 870, 96 L ed 654, 72 S Ct 113; quoted in Adolph Gottscho, Inc. v. American Marking Corp. 18 NJ 467, 114 A2d 433.

See Doit v. Doit, 135 Conn 195, 63 A2d 161 (citing Rest., Contracts, §515); Mattis v. Lally, 133 Conn 51, 82 A2d 155 (citing Rest, Contracts, §515); Brecher v. Brown, 235 Ia 627, 17 NW2d 377 (quoting Rest., Contracts, §515); Tawney v. Mutual System of Md., 186 Md 548, 47 A(2d) 372 (quoting Rest., Contracts, §§515 (a) (b) (c) and 516 (f)); Roy v. Boldue, 140 Me 103, 34 A(2d) 479, 149 ALR 630, and annotation, p. 633, "Validity and enforceability of provision restricting competition after termination of employment in, or sale of, real estate broker's business" (citing Rest, Contracts, §516 (f)); Renwood Food Products, Inc. v. Schaefer, 240 Mo App 939, 223 SW2d 164 (citing Rest, Contracts, §515); Lynch v. Bailey, 194 Misc 200, 86 NYS 2d 703 (citing Rest, Contracts, §§515, 516), rev'd 275 AD 527, 90 NYS2d 359, aff'd 300 NY 615, 90 NE2d 484; Lynch v. Bailey, 275 AD 527, 90 NYS2d 359 (citing Rest., Contracts, §515), aff'd 300 NY 615, 90 NE2d 484, Standard Dairies, Inc., v. McMonagle, 139 Pa St 267, 11 A2d 535 (citing Rest., Contracts, §516 (f)); Morris Calorific Co. v. Marra, 29 A(2d) 64 (Pa) (quoting Rest., Contracts, §515); Lien v. Northwestern Engineering Co., 39 NW2d 483 (SD) (quoting Rest., Contracts §515); Journal Co. v. Dundy, 254 Wis 390, 37 NW2d 69 (citing Rest., Contracts, §515); Dutch Maid Bakeries v. Schleicher, 58 Wyo 374, 131 P(2d) 630 (citing Rest., Contracts, §§515 (e), 516 (f)).

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

See also Arthur Murray Dance Studios, Inc. v. Witter, --Ohio--, 105 NE2d 685 (citing text and Rest. Contracts, §§515, 516).

See Dacosta Launder Corp. v. Telecoin Corp., 204 F2d 331 (CA 2) (citing Rest., Contracts, §§515, 516), cert den 345 US 994 97 L ed 1401, 73 S Ct 1133; Grace v. Corbin Determinating Co., Inc., --Tex Civ App--, 255 SW2d 279 (citing Rest. Contracts, §516 (1)).

Manos v. Melton, 338 Mich 500, 109 NW2d 235 (general knowledge precluded claim of trade secret).

13. Herold v. Herold China, etc., Co. 257 F. 911, 169 C. C. A. v. Norfolk, 93 Mass. 452, 93 Am. Dec. 664; Glucol Mfg. Co. v. Schulist, 239 Mich. 70, 214 N. W. 152; Simmons Hdw. Co. v. Waibel, 1 S.D. 488, 47 N.W. 814, 11 L.R.A. 267, 36 Am. St. Rep. 755; Morrison v. Moat, 9 Hare, 241; Yovatt v. Winyard, 1 Jac. & W. 394.

See DuPont de Nemours Powder Co. v. Masland, 244 U.S. 100, 37 S.Ct. 575, 61 L. Ed. 1016; Allen-Bradley Co. v. Stellmar Prod. Co., 31 F. (2d) 293; McClary v. Hubbard, 97 Vt. 222, 122 A. 439; and Nature of Trade Secrets and Their Protection, (1928) 42 Harv. L. Rev. 254. The principles governing trade secrets are applicable not only to secret processes of manufacture but to unpublished literary dramatic and artistic work. See Board of Trade v. Christie Grain, etc., Co., 198 U.S. 236, 25 S. Ct. 637, 49 L. Ed. 1031. L. [illegible] 1490, 34 S. Ct. 951, the court said: "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. 'But,' as was said by Mr. Justice Lurton, speaking for the court in Grenada Lum. Co. v. Mississippi, 217 U. S. 433, 440, 'when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, [illegible] another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.'"

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

Even where bargains for exclusive dealing are forbidden by statute, it is still possible for the buyer to refuse to deal with the seller who supplies the buyer's competitor. Federal Trade Comm. v. Raymond Bros.-Clark Co., 263 U.S. 565, 44 S. Ct. 162, 68 L. Ed. 443, 30 A. L. R. 1114.

See Velcos, Inc. v. Metal Tone Mfg. Co., 119 NJ Eq 324, 182 A 888, aff'd. 120 NJ Eq 618, 187 A 370.

14. Asc., Rest., Agency, §§395, 396. Miles Med. Co. v. Park & Sons Co., 220 U. S. 373, 402, 31 S. Ct. 376, 55 L. Ed. 502; Wiggins' Sons Co. v. Cott-A-Lap Co., 169 F. 150; Witherow Steel Corp. v. Donner Steel Co., 31 F. (2d) 157; Allen-Qualley Co. v. Shellmar Products Co., Morrison v. Woodbury, 105 Kan. 617, 185 P. 735; Wireless Specialty Apparatus Co. v. Mica Condenser Co., 239 Mass. 158, 131 N. E. 367, 16 A. L. R. 1170; Sanitas Nut Food Co. v. Comer, 134 Mich. 370, 96 N. W. 454; Luckett v. Orange Julep Co., 72 N. J. Eq. 367, 67 A. 339, 12 L. R. A. (N. S.) 102; Moss & Waldstein Co. v. Walker, 100 N. J. Eq. 224, 135 A. 275; Mellom Prod. v. Coley, 10 N. J. Misc. 695, 160 A. 639; Harvey Co. v. National Drug Co., 76 App. D. 103, 77 N. Y. S. 674, Vulcan Detinning Co. v. Assman, 108 App. D. 399, 175 N. Y. S. 334; Convisor v. Brownstone & Co., 209 App. Div. 534, 205 N. Y. S. 532; Wishop & Holmes Co. v. Boyce, 61 Misc. 126, 112 N. Y. S. 874, aff'd. w. o. op., 115 U. S. 1150: "Any one may use it who fairly by analysis and experiment discovers it. But the complainant is entitled to be protected against invasion of its right in the process by fraud or by breach of trust or contract." Lamont, Corliss & Co. v. Bonnie Blend Chocolate Co., 135 Misc. 537, 238 N. Y. S. 70; Belmont Laboratories v. Heist, 300 Pa. 542, 151 A. 15 (quoting text). See Germo Mfg. Co. v. McCallion, 137 Cal. App. 532, 290 P. 534, and Hannigan, The Implied Obligation of an Employee, (1929) 77 U. Pa. L. Rev. 970. See Pollock v. Mac Elree, 56 F Supp 961 (DCED Pa) (quoting Rest., Agency, §395); Heyl v. Emery & Kaufman Ltd., 294 F2d 137 (citing Rest., Contracts, §§395, 396).

See Consolidated Boiler Corp. v. Hogue Electric Co., 141 NJ Eq 550, 58 A2d 759 (quoting text); Patterson v. Pollock, 66 Ch App 439, 84 NE2d 606 (quoting Rest., Agency, §396); Chalupink v.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

Stahlman, 368 Pa 83, 81 A2d 877 (citing Rest., Agency §395).

See Singer v. A. Mollander & Son, Inc., 282 F2d 55 (CA 3) (quoting Rest., Agency, §396); Floyd v. Emery & Kaufman, Ltd., 204 F2d 137 (CA 5) (citing Rest., Contracts, §§395, 396).

See also Arthur Murray Dance Studios, Inc. v. Witter, --Ohio--195 NE2d 685 (citing text and Rest., Agency, §396).

McCombs v. McClelland, 223 Or 475, 354, P2d 311.

One who is paid to assist in the development of another's ideas and inventions and to produce for sale by him a marketable product, is under implied obligation not to appropriate them. Kamin v. Kuhnau, 232 Or 139, 374 P2d 912.

Where pre-existing trade secrets were not disclosed to chemist by employer, but chemist was engaged in routine work of analyzing and modifying formulas of competitor's products during the course of which chemist acquired technical knowledge of formulas, a confidential relationship with an implied pledge of confidence was held not to arise, and absent express covenant chemist would not be barred from using his knowledge in developing identical formulas for a new employer. [illegible]ler v. Greenberg, 399 Pa 569, 160 A2d 430 (citing text generally).

15. Thibodeau v. Hildreth, 124 F. 892, 60 C. C. A. 70, 63 L. R. A. 400; Hulcomolino Co. v. Wannemeyer, 249 F. 597, 161 C. C. A. 523; Pedcal v. Hemill Polish Mfg. Co., 250 F. 637; Tower Mfg. Co. v. Monsanto Chem. Wks., 20 F. (2d) 306; Briggs Co. v. Mason, 217 Ky. 269, 289 S. W. 295, 52 A. L. R. 1344; Krumsgraph Co. v. Chamgograph Co., 235 N. Y. 1, 138 N. E. 485; Magnolia Metal Co. v. Price, 65 App. D. 276, 72 N. Y. S. 792; Davey Tree Expert Co. v. Beck, 157 Misc. 702 224 N. Y. S. 239; Moskin Bros. v. Swartzberg, 199 N. C. 539, 155 S. E. 154; Glass v. Hotwitz, 297 S. W. 573 (Tex. Civ. App.). Knapp v. Adams Co., 135 F. 1008, 70 C. C. A. 536; Bossert v. Adams Co., 135 F. 1015, 70 C. C. A. 23. Acc. National Church Products v. Polymer Industries, 273 AD 732, 79 NYS2d 357; Securities Acceptance Corp. v. Brown, 171 Neb 701, 107 NW2d 549.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

16. Simmons Medicine Co. v. Simmons, 81 F. 163; The Coca Cola Bottling Co. v. Coca Cola Co., 269 F. 796 (dictum); Thum v. Tloczynski, 114 Mich. 149, 72 N. W. 149, 38 L. R. A. 200, 68 Am. St. Rep. 469; Grand Rapids Wood Finishing Co. v. Hatt, 152 Mich. 122, 116 N. W. 714; Tode v. Gross, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475, Mackenheimer v. Kurtzmann, 235 N. Y. 57, 138 N. E. 735.

17 Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 53, 11 S. Ct. 478, 35 L. Ed. 55; Vickery v. Welch, 19 Pick. (Mass.) 523; Radium Remedies Co. v. Weiss, 173 Minn. 342, 217 N. W. 339; Kremer v. Kremer, 221 App. D. 747, 225 N. Y. S. 260. See Barunger v. Wells, 62 Cal. App. 472, 216 P. 995; Wodehouse Invigorator v. Meal Stock & Poultry Food Co., 39 Ont. L. Rep. 392, 35 D. L. R. 721.

18. Morris v. Saxelby, (1916) 1 A. C. 688, 714, per Lord Shaw. Brunner & Lay, Inc. v. Chapin, 29 Ill App 2d 161, 172 NE2d 652 (two year restriction embracing United States and Canada unenforceable).

19. Eastman Kodak Co. v. Powers Film Co., 189 App. D. 556, 179 N. Y. S. 325, noted, (1925) 5 Corn. L. Q. 323. But see Paramount Pad Co., Inc. v. Baumblind, 4 NY2d 393, 175 NYS2d 809, where the restraint was held to be excessive, and was declared to be invalid.

Former employee had right to use his general knowledge, together with knowledge of former employer's expired patent to make a similar type bean sorting machine for subsequent employer. Dickey v Freshley Bean Co., 173 F Supp 516 (DC ED Mich), affd 279 F2d 685 (CA 6).

Fact that employee gained considerable experience in employment is not ground for injunctive relief, and where employer failed to prove use of customer list in employee's new employment, injunction would not be granted. McCombs v McClelland, 223 Cr 475, 354 P2d 311.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

Where pre-existing trade secrets were not disclosed to chemist by employer, but chemist was engaged in routine work of analyzing and modifying formulas of competitor's products during the course of which chemist acquired technical knowledge of formulas, a confidential relationship with an implied pledge of confidence was held not to arise, and absent express covenant chemist would not be barred from using his knowledge in developing identical formulas for a new employer. Worder v Greenberg, 399 Pa 569, 160 A2d 430 (citing text generally).

Two-year restriction upon insurance salesman limited to six counties held reasonable and enforceable. Federated Mut. Implement & Hardware Ins. Co. v Anderson, 49 Tenn App 124, 351 SW2d 411.

Five-year county-wide restriction upon an employee of employment agency was held reasonable and enforceable. Donahoe v Tatum, 242, Miss 253, 134 So 2d 442 wherein the court said, "It is the law's function to maintain a reasonable balance in this area. This 'requires us to recognize that there is such a thing as unfair competition by an ex-employee as well as by an unreasonable oppression by an employer.' The circumstances of each case will be carefully scrutinized to determine whether it falls within or without the boundary of enforceability."

20. See Hooker College v. Gross, 201 Miss. 355, 103 N. E. 765. See Comfort Spring Corporation v. Burroughs, 217 NC 650, 9 SE2d 473; Grace v. Orkin Exterminating Co. Inc., -- Tex Civ App--, 255 SW2d 279 (citing text).

21. 23 Misc. 2d 671, 192 N.YS. 2d 102 (Sup. Ct. 1959).

22. A variant of the 3rd situation is Carter Prods., Inc. v. Colgate-Palmolive Co., 130 F. Supp. 557 (D. Md. 1955), aff'd 230 F. 2d 833 (4th Cir. 1956), a classic case of employee disloyalty in which the employee took it upon himself to seek out his employer's competitor. In that case, Fine, a highly skilled research scientist, worked for plaintiff, Carter Products, on the development of a brushless shaving lather, brand name "Rise." While Carter's

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

patent applications (under which Pine was co-inventor) was pending on Pine, Pine left Carter and sought employment at Colgate where he had twice before been turned down. Colgate hired Pine with knowledge of his work for Carter and within a month placed him to work on the development of Rapid Shave No. 1, which it was pushing as a competitor of Pine. Colgate's chemists had previously tried to duplicate Pine's (which was on the market) by methods, but had been unsuccessful. Colgate was successful overnight in perfecting Rapid Shave as a close variant of Pine, as the result of Pine's use of the Pine formula and other know-how acquired at Carter. That Pine was conscious of his betrayal of his former employer cannot be questioned in view of his being co-inventor of Pine on Carter's pending patent, and his being bound by a secrecy agreement.

23. See e.g., A. O. Smith Corp. v. Petroleum Iron Works Co., 74 F.2d 934 (6th Cir. 1934), modifying 73 F.2d 531 (6th Cir. 1934).

24. 97 F.2d 164 (7th Cir. 1938), cert. denied, 301 U.S. 695 (1937), refusing to modify 30 F.2d 823 (7th Cir. 1929).

25. 74 F.2d 934 (6th Cir. 1935), modifying 73 F.2d 531 (6th Cir. 1934).

26. This rationale has been adopted by courts in other jurisdictions. See e.g., Kewanee v. Bicron, 153 Ohio 159, 176 P.2d 911 (1952); Hyde Corp. v. Huffines, 158 Tex. 566, 314 S.W.2d 763, cert. denied, 358 U.S. 898 (1958).

27. Hoffman Fuels, Inc. v. Allen-Sherman-Hoff Co. 97 F.2d 164, 170 (7th Cir. 1938), cert. denied, 301 U.S. 695 (1937).

28. 172 F.2d 158, 159-60 (2d Cir. 1949) (L. Hand, J.).

29. 653 F.2d 991 (2d Cir. 1981), cert. denied, 343 U.S. 919 (1952).

30. See Mostile v. G. M. Kelly Mfg. Co., 89 F.2d 913 (4th Cir.), cert. denied, 302 U.S. 690 (1938); Center Fuels, Inc.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

v. Colgate-Palmolive Co., 150 F. Supp. 597 (D. Md. 1957), aff'd, 250 F.2d 855 (4th Cir.), cert. denied, 352 U.S. 843 (1956).

9/18/2010 18:27 PM

SOCIAL SECURITY No.

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DATE: AUG 2001

EMPLOYMENT AGREEMENT

THIS AGREEMENT, entered into this day of , 19 , between E. I. DU PONT DE NEMOURS AND COMPANY, a corporation of Delaware (hereinafter called "Employer"), and (hereinafter called "Employee").

WITNESSETH:

WHEREAS, in its business, Employer has developed and uses commercially valuable technical and nontechnical information and, to guard the legitimate interests of Employer, it is necessary for Employer to protect certain of the information either by patents or by holding it secret or confidential; and

WHEREAS, the aforesaid information is vital to the success of Employer's business, and Employee through his activities may become acquainted therewith, and may contribute thereto either through inventions, discoveries, improvements or otherwise;

NOW, THEREFORE, in consideration of and as part of the terms of employment of Employee by Employer, at a wage or salary and for such length of time as the employment shall continue, it is agreed as follows:

1. Unless Employee shall first secure Employer's written consent, Employee shall not disclose or use at any time either during or subsequent to said employment, any secret or confidential information of Employer of which Employee becomes informed during said employment, whether or not developed by Employee, except as required in Employee's duties to Employer.

2. Employee shall disclose promptly to Employer or its nominee any and all inventions, discoveries and improvements conceived or made by Employee during the period of employment and related to the business or activities of Employer, and assigns and agrees to assign all his interest therein to Employer or its nominee; whenever requested to do so by Employer, Employee shall execute any and all applications, assignments or other instruments which Employer shall deem necessary to apply for and obtain Letters Patent of the United States or any foreign country or to protect otherwise Employer's interests therein. These obligations shall continue beyond the termination of employment with respect to inventions, discoveries and improvements conceived or made by Employee during the period of employment, and shall be binding upon Employee's assigns, executors, administrators and other legal representatives.

3. Upon termination of said employment, Employee shall promptly deliver to Employer all drawings, blueprints, manuals, letters, notes, notebooks, reports, and all other materials of a secret or confidential nature relating to Employer's business and which are in the possession or under the control of Employee.

IN WITNESS WHEREOF, the parties have signed this agreement in duplicate as of the date written above.

E. I. DU PONT DE NEMOURS AND COMPANY

By _____

_____ DEPT.

WITNESS:

_____ _____ (SEAL)

EMPLOYEE

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

EMPLOYMENT TERMINATION STATEMENT

Employee certifies that he has returned to E. I. du Pont de Nemours and Company all drawings, blueprints, manuals, letters, notes, notebooks, reports, and all other materials of a secret or confidential nature relating to said Company's business which were in his possession or under his control. Employee acknowledges his signed Employment Agreement not to use or divulge at any time any secret or confidential information of said Company, without Company's consent.

Witness:

_____ _____ (SEAL)
EMPLOYEE

Social Security No.:

E. I. DU PONT DE NEMOURS AND COMPANY

By _____

_____ DEPT.

Date: _____ ____, 19____

EMPLOYEES' AGREEMENT

APPROVED FOR RELEASE
DATE: AUG 2001

Waltham

This agreement made at Natick, Massachusetts, This 19th day of March 196 4, between SPACE SCIENCES, INC., a corporation of the State of Massachusetts (hereinafter called the "Employer") and _____ (hereinafter called the "Employee"),

In consideration of and as part of the terms of the employment or continuation of employment (as the case may be) of the Employee by the Employer, it is agreed as follows:

1. Any and all inventions, discoveries or improvements (whether or not patentable) conceived or made by the Employee (either solely or jointly with others) during the period of his employment, relating in any way to the activities or business of the Employer, shall be disclosed promptly to the Employer and shall be the sole and exclusive property of the Employer or its nominee; and whenever requested so to do, by the Employer, the Employee (at the sole expense of the Employer) shall execute any and all applications, assignments and other instruments which the Employer shall deem necessary in order to apply for and obtain Letters Patent of the United States and foreign countries covering said inventions, discoveries, or improvements and in order to assign and convey to the Employer or its nominee the sole and exclusive right, title and interest therein. These obligations shall continue beyond the termination of the period of employment with respect to inventions, discoveries or improvements conceived or made by the Employee during the period of said employment and shall be binding upon his heirs, assigns, executors, administrators or other legal representatives.

2. Except as required in his duties to the Employer, the Employee shall not disclose or use at any time, either during or subsequent to the said employment, any secret or confidential information of the Employer (whether or not developed by the Employee) unless he shall first secure the Employer's written consent.

3. That all papers and records of every kind, relating in any way to the activities or business of the Employer which shall at any time come into the possession of the Employee shall be the sole and exclusive property of the Employer and shall be surrendered to the Employer upon termination of the Employee's employment or at any other time as the employer may request.

4. That the Employee will devote all of his working time and best efforts to the business of the Employer during his employment by the Employer, and to refrain from engaging in other employment with other employers during the term of this agreement, except with the consent in writing of the Employer.

IN WITNESS WHEREOF, the parties have signed this agreement in duplicate as of the date written above.

SPACE SCIENCES, INC.

By_____

_____ Witness

_____ Employee

APPROVED FOR RELEASE
DATE: AUG 2001

Social Security No.

DRAFT

CENTRAL INTELLIGENCE AGENCY

CONTRACT OF EMPLOYMENT

This contract entered into this _____ day of _____, 19__, between The CENTRAL INTELLIGENCE AGENCY, an Agency of the United States Government (hereinafter called "Employer"), and _____ (hereinafter called "Employee").

WITNESSETH:

WHEREAS, in its mission of coordinating the intelligence activities of the several Government Agencies and Departments and in the interest of the national security, Employer has researched, developed and utilized valuable technical and nontechnical information and, to guard the interests of Employer and of the United States of America, it is necessary for Employer to protect certain of this information either by patent, copyright or by holding said information secret or confidential; and

WHEREAS, the aforesaid information is vital to the success of the Employer and to the national security, and Employee through his activities and official assignments may become acquainted therewith, and may contribute thereto either through research, invention, discovery, improvement, activity, operation or otherwise;

NOW, THEREFORE, as a condition of the employment of the Employee, and in consideration of all salaries and other benefits received by the Employee by virtue of his employment with the Employer, the Employee agrees never to publish, serialize, record, or promote by photograph (either still or moving) or in any other way disseminate, without the prior approval of the Employer, any materials, of whatever kind, based upon his experience as an Employee of the Employer. The Employee further agrees that the judgment of the Employer shall be final in determining whether or not any material

APPROVED FOR RELEASE
DATE: AUG 2001

proposed to be disseminated by the Employee relative to his employment with the Employer in any way endangers the national security or the operations of the Employer. Further, should any such dissemination occur in violation of this contract, the Employee hereby assigns all right, title and interest together with any royalties and/or remunerations of any nature which may enure to the Employee by virtue of said breach to the Employer. Should any litigation of any kind whatsoever arise out of such a violation the Employee hereby confesses judgment in favor of the Employer. This obligation shall continue beyond the termination of employment and shall be binding upon Employee's assigns, executors, administrators and other legal representatives.

Upon termination of said employment, for any reason, Employee shall promptly deliver to Employer all drawings, maps, blueprints, manuals, letters, notes, notebooks, reports and any and all other materials of any nature relating to Employer's business and which are in the possession or under the control of Employee.

IN WITNESS WHEREOF, the parties have signed this agreement in duplicate as of the date written or typed in above.

Witness _____ _____ (L.S.)
Employee

Witness _____

CENTRAL INTELLIGENCE AGENCY

By _____ (L.S.)
Contracting Officer

APPROVED FOR RELEASE
DATE: AUG 2001

Social Security No.

DRAFT

CENTRAL INTELLIGENCE AGENCY

CONTRACT OF EMPLOYMENT

This contract entered into this _____ day of _____, 19___, between the CENTRAL INTELLIGENCE AGENCY, an Agency of the United States Government (hereinafter called "Employer"), and _____ (hereinafter called "Employee").

WITNESSETH:

WHEREAS, in the mission of coordinating the intelligence activities of the several Government Agencies and Departments and in the interest of the national security, Employer has researched, developed and utilized valuable technical and psychological information and, to guard the interests of Employer and of the national security of the United States of America, it is necessary for Employer to protect this information either by patent, copyright or by holding said information secret or confidential; and

WHEREAS, the aforesaid information is vital to the success of the Employer and to the national security, and Employee through his activities and official assignments may become acquainted therewith, and may contribute thereto either through research, invention, discovery, improvement, operation, or otherwise;

NOW, THEREFORE, in consideration of and as part of the terms of employment or continued employment of Employee by Employer, at a wage or salary (whether paying under appointment or Contract of any type) and for such length of time as the employment shall continue, and subsequently it is agreed as follows:

1. Unless Employee shall first secure Employer's written consent, Employee shall not disclose or use at any time either during or subsequent to said employment, any secret, confidential or other

APPROVED FOR RELEASE
DATE: AUG 2001

information acquired during his employment with Employer and which he became informed of by reason of his employment with Employer. Further, should this contract be violated, despite this signed agreement to the contrary, all royalties, rights and any and all other remuneration flowing to the Employee through such breach are hereby and without question assigned to the Employer. Further, should any litigation arise out of such matters the Employee hereby confesses judgment in favor of the Employer.

2. Employee shall disclose promptly to Employer or its nominee any and all inventions, discoveries, improvements and information or idea of any kind conceived or made possible by Employee's employment by Employer. The Employee agrees to assign all his interest therein to Employer or its nominee; whenever requested to do so by Employer. Employee shall execute any and all applications, assignments or other instruments which Employer shall deem necessary to apply for and obtain Letters Patent, Copyrights or ownership in any information, invention, publication, movie, recording, etc. These obligations shall continue beyond the termination of employment with respect to all information, invention, publication, movie recording and other disseminated material of whatever character made by Employee during the period of employment, and shall be binding upon Employee's assigns, executors, administrators and other legal representatives.

3. Upon termination, for any reason, of said employment, Employee shall promptly deliver to Employer all drawings, maps, blueprints, manuals, letters, notes, notebooks, reports and any and all other materials of any nature relating to Employer's business and which are in the possession or under the control of Employee.

IN WITNESS WHEREOF, the parties have signed this agreement in duplicate as of the date written or typed in above.

Witness _____ _____ (L.S.)
Employee

Witness _____

CENTRAL INTELLIGENCE AGENCY

By _____ (L.S.)
Contracting Officer

APPROVED FOR RELEASE
DATE: AUG 2001

Social Security No.

DRAFT

CENTRAL INTELLIGENCE AGENCY

EMPLOYMENT TERMINATION AGREEMENT

Employee certifies that he has returned to the Central Intelligence Agency all Agency drawings, blueprints, manuals, letters, notes, notebooks, reports, and any and all other materials acquired by him in the course of and because of his employment with the Central Intelligence Agency, whether Secret in nature or otherwise which were in his possession or under his control. Employee formally acknowledges his original signed Contract of Employment and hereby agrees to conform to that Contract in each and every particular, and agrees once again not to use or to divulge at any time or for any reason, without the specific consent of the Central Intelligence Agency, any information, Secret or otherwise, which came into his possession during the course of and because of his employment with the Central Intelligence Agency.

Witness

_____ _____(L.S.)

Witness

_____

CENTRAL INTELLIGENCE AGENCY

By_____

_____DEPT.
Contracting Officer

Date:_____, 19___

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

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APPROVED FOR RELEASE
DATE: AUG 2001

AEC EXPERIENCE WITH THE USE OF RESTRICTED DATA IN CRIMINAL PROCEEDINGS

Restricted Data is a separate security category relating to information concerning, among other things, the design, manufacture and utilization of atomic weapons and the production of special nuclear material. The category was created by Section 10 (b) (1) of the Atomic Energy Act of 1946, and is defined in Section 11 w. of the Atomic Energy Act of 1954, 42 U.S.C.A. Sec. 2014 (w), as:

> "...all data concerning (1) design, manufacture or utilization of atomic weapons, (2) the production of special nuclear material, or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to Section 142."

Unlawful disclosure or receipt of Restricted Data is subject to severe criminal penalties, Sections 221 et seq., 42 U.S.C. Sec. 2271 et seq.

The principal AEC experience with the use of Restricted Data is criminal proceedings occurred in the atomic bomb espionage cases, United States v. Julius Rosenberg, et al, 195 F.2d 583 (CA.2) tried in S.D. N.Y. in 1951. In these cases which involved Julius and Ethel Rosenberg, Harry Gold, Morton Sobell, and David Greenglass, the AEC was shown the proposed original indictment. Then the proposed original indictment was made more specific and was again shown to AEC so that it could propose deletion of any statements of security interest.

In the trial itself the problem of the use of Restricted Data arose in connection with certain Government exhibits involving the description and operation of the Nagasaki-type bomb and the testimony of David Greenglass regarding one exhibit. These exhibits constituted Restricted Data within the meaning of Section 10 b (1) 1 of the Atomic Energy Act of 1946.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

The use of this evidence was essential to the successful prosecution of the Government's case. Before the Rosenberg trial, the Department of Justice requested that the Commission consider declassifying this Restricted Data contained in Greenglass' confession so that the confession could be used in the trial. The Commission agreed to this request with the following reservations:

> Although the AEC has agreed to the public disclosure at the trial of certain information which we understand is needed in the successful prosecution of the case, we have not officially declassified this data. Its actual use at the trial would operate as a declassification but we are anxious that no inference be drawn that anything has been released other than the specific information actually used at the trial.
>
> It is also requested that drawings, sketches, or documents introduced as evidence at the trial not be made available to the public insofar as possible. We suggest that these drawings, etc., not be blown up so as to make them subject to being reproduced by the public in attendance at the trial.

Several exhibits were declassified and were admitted into evidence along with Greenglass' testimony in regard to one of them. After hearing both counsel in regard to this exhibit and the related testimony, Judge Kaufman ordered, in the interest of national defense, that the court room should be cleared, and the exhibit and testimony concerning it be impounded. Greenglass' testimony was given in the presence of the court, counsel, defendants, jury and newsmen only. The exhibit was made available only to the court, counsel, defendants and jury. This introduction into evidence of the exhibit and the testimony thereon operated as a declassification of the document, although similar information in other documents is still classified. The exhibit and the testimony thereon were impounded by Judge Kaufman, not because they were classified, but because he felt that their release would not be in the best interests of National Security.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

In United States v. Union Carbide and Carbon, criminal action number 11,678 in U.S.D.C. of Colorado, a criminal antitrust proceeding, the problem of the use of Restricted Data was encountered. In this instance its use was in aid of the defendants, accused of conspiring to monopolize the vanadium market in the Colorado plateau area and to fix vanadium prices between 1933 and 1946. The defense was to be that some, if not all, of the actions complained of were taken as a result of the atomic bomb project urging the defendants to carry on the work for it in World War II.

In this case, an indictment handed down in 1946 was changed to a criminal information in 1948, and the case was tried in 1957. The defendants from the outset contended that security would prevent their making a defense to the indictment. The Commission advised that, in their opinion, no serious security problems were involved but stated that it was prepared to cooperate with the parties with respect to procedures for security review of evidence and would consider applications for security clearance of all counsel to permit access to classified information in possession of the Government which might be required in preparing and conducting a defense of the case. Arrangements were subsequently made for the security clearance of counsel on both sides, secretarial employees, the District Court personnel and for the establishment of facilities for the storage of classified documents. At the request of the Department of Justice and the defendants, a large number of classified documents were reviewed and declassified by AEC. All material up to, but not subsequent to, the criminal information was made available. Declassification was continued up to the time of trial.

General Leslie Groves, Chief of the World War II atomic bomb project was the first witness called by defense. After preliminary questions, the defense demanded release of the classification in order to prove its case. After a conference with counsel, the judge ruled the evidence to be inadmissible on the grounds of relevancy. AEC furnished a classification officer throughout the trial.

June, 1961

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

F

APPROVED FOR RELEASE
DATE: AUG 2001

September, 1966

STATUTES UTILIZED IN PROTECTING STATE SECRETS

18 USC 793

18 USC 793 provides that any unauthorized person, who, for the purpose of obtaining information respecting the national defense with intent or reason to believe that such information is to be used to the injury of the United States or to the advantage of a foreign nation,

(a) Copies or attempts to copy

(b) Receives or attempts to receive

(c) Transmits or attempts to transmit

such information shall be fined not more than $10,000 or imprisoned for more than ten years or both. Additionally, 18 USC 793 provides that any person having lawful possession of such information, and who through gross negligence permits the same to be removed, or having knowledge of such an unauthorized removal fails to report the same, shall be fined and/or imprisoned as set forth above.

Cases:

Gorin v. U. S., Cal. 1941, 61 S. Ct. 429, 312 U.S. 19, 85 L. Ed. 488, rehearing denied 61 S. Ct. 617, 312 U.S. 713, 85 L. Ed. 1144.

U.S. v. Coplon, D.C.N.Y. 1950, 88 F. Supp. 921.

U.S. v. Abel, C.A.N.Y. 1958, 258 F. 2d 485, affirmed 80 S. Ct. 683, 362 U.S. 217, 4 L. Ed. 2d 668, rehearing denied 80 S. Ct. 1056, 362 U.S. 984, 4 L. Ed. 2d 1019.

U.S. v. Soblen, C.A.N.Y. 1962, 301 F. 2d 236, certiorari denied 82 S. Ct. 1585, 370 U.S. 944, 8 L. Ed. 2d 810.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

18 USC 794

18 USC 794 provides that whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign government, transmits or attempts to transmit, to any such foreign government or a representative thereof, any document or related material pertaining to the national defense shall be punished by death or by imprisonment for a term of years or for life. 18 USC 794 also provides that whoever, in time of war, with the intent that the same be communicated to the enemy, attempts to elicit information regarding United States military matters shall be punished as set forth above, or whoever conspires to violate this section and one or more such persons do any act to effect the object of the conspiracy, they shall be punished as provided above.

Cases:

U.S. v. Rosenberg, C.A.N.Y. 1952, 195 F.2d 583, certiorari denied 73 S.Ct. 20, 21, 344 U.S. 838, 97 L.Ed. 652, 687 rehearing denied 73 S.Ct. 134, 180, 344 U.S. 889, 97 L.Ed. 652, 687, rehearing denied 74 S.Ct. 860, 347 U.S. 1021, 98 L.Ed. 1142, motion denied 78 S.Ct. 91, 355 U.S. 860, 2 L.Ed. 2d 67.

U.S. v. Sobell, C.A.N.Y. 1963, 314 F.2d 314, certiorari denied 83 S.Ct. 1906, 374 U.S. 857, 10 L.Ed. 2d 1077.

U.S. v. Coplon, C.A.N.Y. 1950, 185 F.2d 629, 28 A.L.R. 2d 1041, certiorari denied 72 S.Ct. 362, 342 U.S. 920, 96 L.Ed. 688.

18 USC 798

18 USC 798 provides that whoever knowingly and willfully communicates or otherwise makes available to an unauthorized person, or publisher, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government any classified information relating to cryptography or communications intelligence shall be fined not more than $10,000 or imprisoned not more than ten years or both.

Case:

United States v. Joseph Sidney Petersen, Jr., Criminal No. 3049, E.D.Va., Jan 4, 1955.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

18 USC 2071

18 USC 2071 provides that whoever willfully and unlawfully conceals, removes, mutilates or destroys or attempts to do so, or who with such intent takes or carries away any document or other thing filed or deposited with any clerk or officer of any court of the United States or in any public office shall be fined not more than $2,000 or imprisoned not more than three years or both. Or, whoever having custody of such document or thing willfully and unlawfully conceals, removes, destroys or falsifies such document or thing shall be punished as set forth above.

Case:

U.S. v. Coplon, 88 F. Supp. 912 Coplon v. U.S., 1951, 191 F. 2d 749, 89 U.S. App. D.C. 103, certiorari denied 72 S. Ct. 363, 342 U.S. 926. 96 L. Ed. 690.

42 USC 2280

42 USC 2280 provides that whenever in the judgment of the Atomic Energy Commission any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of the Atomic Energy Act of 1954, as amended, or any regulation or order issued thereunder, the Attorney General on behalf of the United States may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Commission that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order may be granted.

50 USC 783(b)

50 USC 783(b) provides that it shall be unlawful for any officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

or agency thereof, to communicate in any manner or by any means, to any other person whom such officer or employee knows or has reason to believe to be an agent or representative of any foreign government or an officer or member of any Communist organization, any information of a kind which shall have been classified by the President (or by the head of any such department, agency or corporation with the approval of the President) as affecting the security of the United States, knowing or having reason to know that such information has been so classified, unless such officer or employee shall have been specifically authorized by the President, or by the head of the department, agency or corporation by which this officer or employee is employed, to make such disclosure of such information. 50 USC 783(d) provides a penalty of a $10,000 fine or ten years in prison or both for a violation of 50 USC 783(b).

Case:

Scarbeck v. U.S., C.A.D.C. 1962, 317 F.2d 546, certiorari denied 83 S.Ct. 1897, 374 U.S. 856, 10 L.Ed. 2d 1077.

5 USC 8311 - 8322

5 USC 8311-8322, the Hiss Act, was originally passed in 1954 and was subsequently amended in 1961. Section 8311 sets forth the definitions to be used, section 8312 provides for the barring of payments or annuities following conviction under certain criminal statutes (including but not limited to the espionage laws), and sections 8314 and 8315 provide for the loss of annuities or retirement for refusal to testify or produce records and for false statements or the concealment of facts in employment applications. The rest of the sections, running through 8322, merely provide for the implementation of the Act. The Act has never been found to be unconstitutional.

With regard to section 8315 (formerly 5 USC 2283), making false statements or concealment of facts in employment applications, the United States Court of Claims on 22 January 1965 in the case of Garrott v. United States, 340 Fed. 2d 615, sustained a summary judgment by a former post office employee to recover annuities. The Court held that the former employee, who had been discharged on account of reasonable ground for belief of disloyalty, was entitled to a

9/18/2010 18:27 PM

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trial-type hearing in proceedings to terminate his annuity rights on the ground that he had made false statements and had concealed material facts relating to his affiliation with the Communist Party. The Court further held that a federal agency cannot, without permitting cross-examination and confrontation of adverse witnesses, take detrimental action against a person's substantial interest on loyalty or security grounds, unless, at least, the Congress or the President has expressly authorized lesser procedure.

In effect then, the Court has held that where there is a substantial (monetary) interest, the Government employee cannot be denied his annuity or retirement without being first granted a trial-type hearing.

9/18/2010 18:27 PM

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DATE: AUG 2001

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THE TOTTEN DOCTRINE: FOUR CASES ENUNCIATING THE RULE THAT PUBLIC POLICY FORBIDS LITIGATION OF MATTERS ALLEGEDLY ARISING OUT OF "SECRET SERVICES" FOR THE GOVERNMENT.

In 1876 the United States Supreme Court enunciated the doctrine that the very existence of a contract for secret services (spying) was secret and that public policy precluded any action for the enforcement of such a contract. Totten v. U. S. (1876) 92 U.S. 105 23 L. Ed. 605 23 L. Ed. 605 11 Ct. of Cls. 182. Justice Field stated in cogent part:

> The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the Government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our Government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the Government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public. A secret service, with liability to publicity in this way, would be impossible; and, as such services are sometimes indispensable to the Government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award. The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery.

9/18/2010 18:27 PM

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DATE: AUG 2001

From 1876 to 1954, three cases similar to the Totten case were dismissed by the Court of Claims in reliance wholly or in part on the Totten doctrine. These are: Allen v. U.S. (1892) 27 Ct. Cl. 89; DeArnaud v. U.S. (1894) 151 U.S. 483, 38 L. Ed. 244 14, S. Ct. 374, affirming 26 Ct. Cl. 370 (1891); and Tucker v. U.S. (1954) 127 Ct. Cl. 475, 118 F. Supp. 371.

In dismissing the claim of Allen, the Court of Claims held that it had no jurisdiction to readjudicate a claim that had been rejected by the War Department and was also barred by the Statute of Limitations; however, another reason given for dismissal was that, under Totten, the claim being for services as a spy was such that investigation of it was against public policy. While the Court of Claims dismissed DeArnaud's case because it came within the ruling of Totten, the Supreme Court (which affirmed the dismissal) limited its opinion to the narrow points that payment and the Statute of Limitations both barred the claim. The services of both Allen and DeArnaud had been performed under contract with General Fremont; in the most recent case, that of Tucker v. U.S., the secret services, as in the Totten case, allegedly were performed under contract with the President of the United States. Tucker's claim was dismissed solely on reliance upon Totten.

9/18/2010 18:27 PM

APPROVED FOR RELEASE
DATE: AUG 2001

In the following cases, none of which involves "secret service," the Totten doctrine has been cited with approval for the testimonial privilege of the government, or an agency thereof, to prevent the disclosure of confidential communications which, on grounds of public policy, it is entitled to resist:

Foltz v. Moore McCormack Lines, Inc. (1951) 189 F.2d 531
Greene v. McElroy (1958) 254 F 2d 944
Halpern v. U.S. (1958) 258 F 2d 36
Jencks v. U.S. (1957) 353 U.S. 657, 1 L.Ed. 2d 1103, 77 S. Ct. 1007
Krumin v. Brucknes, (1930), 255 Ill. App. 503
N.L.R.B. v. Capitol Fish Co. (1961) 294 F 2d 868 (U.S.C.A. 5th Cir)
Pollen v. Ford Instrument Co. (1939) 26 F. Supp. 583
Pollen & Isherwood v. U.S. (1937) 85 Ct. Cl. 673
U.S. v. Reynolds (1953) 345 US 1, 73 S. Ct. 528, 97 L.Ed. 727
Simonsen v. Barth et al (1922) 208 P. 938, 64 Mt. 106
Sperandeo v. Milk Drivers & Dairy Employees Local Union No. 537 (1964) USCA 10, rehearing denied (1965)
Ticon Corporation v. Emerson Radio & Phonograph Corporation (1954) 206 N.Y. Misc. 727, 134 N.Y.S. 2d 716
Timken Roller Bearing Co. v. U.S. (1964) 38 FRD 57 USDCND Ohio E.D.
U.S. v. Certain Parcels of Land et al, USDC SD Cal. Cen Div. (1953) 15 FRD 224

See also:

32 ALR2 393n Privileged Communications
8 Wigmore Evidence, 3rd ed. 1940, s2378a. State and Official Secrets at p. 794
Governmental privilege against disclosure of official information in Federal cases 95 L.Ed. 418 et seq.
"Constitutional Law: The People's Right to Know" by Thomas C. Hennings, Jr. (US Senator from Missouri) ABA Journal Vol. 45 (Jul 1959) p. 670

9/18/2010 18:27 PM