The Congress has passed four main statutes to safeguard the Government's cryptologic activities and to enable the Government to limit its disclosure of its cryptologic activities to such information as does not interfere with the accomplishment of cryptologic missions.

(1) The first law [illegible] statute passed in 1950 which prohibits the unauthorized disclosure or prejudicial use of classified cryptologic information of the Government. 18 U.S.C. 798 was the first statute enacted relating specifically to cryptologic activities of the Government as a whole. It provided protection of these activities beyond that afforded other classified defense information and gave tacit recognition to the legality of these activities.

(2) The second law, P.L. 86-36, provided administrative authorities to enable NSA to function without disclosure of information which would endanger the accomplishment of its cryptologic missions. This statute provided the administrative authorities for civilian personnel administration and an effective career system for NSA. Secondly, this law established the policy of the Congress against the public availability of information concerning the activities of the NSA and thereby provided protection to the Agency so that it could function without disclosure of unclassified information as might impair its mission.

(3) The third statute, P.L. 88-290, prescribed by the Congress a comprehensive personnel security system and associated procedures to assure the maximum security of the activities of the National Security Agency.

(4) An important development occurred in the Congress in 1968 which removed any doubt as to the legality of the SIGINT and COMSEC activities of the Executive Branch of the Government. Title 3 of the Omnibus Crime Control and Safe Streets Act of 1968 makes it clear that nothing in any other statute shall limit the constitutional power of the President to take appropriate measures to obtain foreign intelligence information and to protect national security information against foreign intelligence activities.

The Congress has, through the above named statutes, enacted comprehensive provisions of law to protect and safeguard the activities of the NSA and other elements of the Government assigned cryptologic functions and to establish a viable legal basis for the functioning of the National Security Agency.

NSA review completed

SUMMARY OF STATUTES WHICH RELATE SPECIFICALLY TO NSA AND THE CRYPTOLOGIC ACTIVITIES OF THE GOVERNMENT

1. The unique and highly sensitive activities of NSA and of other elements of the Government assigned cryptologic functions require determined security measures. The Congress has passed four main statutes to safeguard the Government's cryptologic activities and to enable the Government to limit its disclosure of its cryptologic activities to such information as does not interfere with the accomplishment of the cryptologic missions. I would like to set forth for each law the reasons for its enactment, its basic provisions, and its effect in accomplishing the intended purpose.

2. The first law to be enacted was a criminal statute passed in 1950 which prohibited the unauthorized disclosure or prejudicial use of classified cryptologic information of the Government. This law, 18 U.S.C. 798, is now codified as one of the espionage statutes. This law defines unauthorized persons as those who are not authorized to receive classified cryptologic information by the head of an agency expressly designated by the President to engage in communications intelligence activities. The purpose of 18 U.S.C. 798 is to provide greater protection to a small category of classified matter that is vital to national policymakers -- yet vulnerable to a unique degree, that is cryptologic information. Prior to this law other espionage statutes protected classified cryptologic information in a limited way. In 18 U.S.C. 798, Congress specifically recognized the authority of the Director, NSA, to classify cryptologic documents and information and to determine the persons who are authorized access to sensitive cryptologic documents and information. Under the other espionage laws unauthorized revelation of classified defense information could be penalized only if it could be proved that the person making the revelation did so with an intent to injure the United States or to the advantage of a foreign power. 18 U.S.C. 798 is much broader in scope since it prohibits the knowing unauthorized disclosure or even prejudicial use of classified cryptologic information. 18 U.S.C. 798, the broadest by far of the espionage laws, also met another useful purpose. It recognized the legality of the cryptologic activities of the Government. Section 605 of the Federal Communications Act of 1934 prohibits the unauthorized interception and divulgence or use of interstate or foreign communications. This law cast doubt on the legality of those cryptologic activities of the Federal Government which involved the interception of foreign communications. Following the enactment of 18 U.S.C. 798 in 1950, however, the Government had a tenable legal basis for its undertaking of communications intelligence activities. The provisions of this criminal statute making it a crime for the unauthorized disclosure or prejudicial use of classified cryptologic information certainly establishes

by implication the Government's lawful right to engage in these cryptologic activities. Since the enactment of 18 U.S.C. 798, Congress has repeatedly appropriated money "specifically" for communications intelligence activities pursuant to budget justifications submitted annually by NSA and the Service Cryptologic Agencies to Committees of both Houses of Congress. We shall see later how the issue of the legality of signals intelligence activities was finally settled by the Safe Streets Act of 1968.

In summary, 18 U.S.C. 798, the first statute which was enacted relating specifically to cryptologic activities of the Government as a whole, gave legal recognition to these activities and provided protection to these activities beyond that afforded other classified defense information.

SECTION 798 - TITLE 18, U. S. CODE

798. Disclosure of Classified Information

(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information --

(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or

(2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or

(3) concerning the communication intelligence activities of the United States or any foreign government; or

(4) obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes --

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(b) As used in subsection (a) of this section --

The term "classified information" means information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution;

The terms "code," "cipher," and "cryptographic system" include in their meanings, in addition to their usual meanings, any method of secret writing and any mechanical or electrical device or method used for the purpose of disguising or concealing the contents, significance, or meanings of communications;

The term "foreign government" includes in its meaning any person or persons acting or purporting to act for or on behalf of any faction, party, department, agency, bureau, or military force of or within a foreign country, or for or on behalf of any government or any person or persons purporting to act as a government within a foreign country, whether or not such government is recognized by the United States;

The term "communication intelligence" means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients;

The term "unauthorized person" means any person who, or agency which, is not authorized to receive information of the categories set forth in subsection (a) of this section, by the President, or by the head of a department or agency of the United States Government which is expressly designated by the President to engage in communication intelligence activities for the United States.

(c) Nothing in this section shall prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of the Senate or House of Representatives of the United States of America, or joint committee thereof. Added Oct. 31, 1951, c. 655, 24(a), 65 Stat. 719.

3. The second law which we are concerned with is P.L. 86-36. This statute was approved in May of 1959. The purpose of this law was to provide authorities to enable NSA to function without disclosure of information which would endanger the accomplishments of its cryptologic missions. NSA had been established by Presidential Directive in 1952 as a separately organized Agency within the Department of Defense. The Secretary of Defense, as the President's designated Executive Agent for the COMINT and COMSEC activities of the Government, had established NSA pursuant to Section 202 of the National Security Act. There was no NSA enabling act per se which stated that there was in the Department of Defense an NSA and that the Secretary of Defense was authorized to make appointments, establish positions, and conduct all other administrative functions without disclosure of information concerning the activities of NSA. In the absence of such enabling legislation, NSA was subject to the Civil Service laws and other statutes applicable to Government agencies in general. This resulted for example in the civilian personnel administration of NSA being subject to general supervision and control by the Civil Service Commission. NSA was required to classify and grade its jobs in accordance with the Federal Occupational Structure. Yet almost 75% of the Agency's positions were not accounted for in the Federal Structure. Security reasons prevented the free exchange of information with the Commission and prohibited the unrestricted publication of titles, definitions of cryptologic fields of work, and of job standards. Detailed review by the Commission of NSA personnel management programs had also not been practicable because of security considerations. Similarly, it had not been possible for NSA to comply with the provisions of statutes which require the reporting of personnel, financial and management data, and the publication of functions and activities of an agency. In order to eliminate the delimma the Congress passed P.L. 86-36 in the Spring of 1959. This law exempted NSA from the laws relating to the classification and grading of civilian positions. Section 2 of P.L. 86-36 authorized the Secretary of

See Also DoD Directive 5400.7
Feb 14, 1975
which gives recognition to PL 86-36
as authority for withholding DoD
records.

Defense or his designee to establish positions, appoint officials in the NSA, and to fix rates of compensation for positions in relation to the rates that are contained in the General Schedule which applies to Government positions in general. P.L. 86-36 did, however, place certain limitations upon the authority of the Secretary of Defense and his designee in establishing positions and fixing rates of basic compensation for positions.

First, Section 2 of the Act provides that the rates of compensation for NSA shall be fixed in relation to the rates of compensation contained in the General Schedule for positions which have corresponding levels of duties and responsibilities. Second, Section 2 of the Act places numerical limitations on the number of NSA officials who can be paid compensation in grades 16, 17, and 18 of the General Schedule. Further, Section 4 of the Act authorizes the establishment of research and development positions requiring specially qualified scientific or professional personnel and authorizes rates of pay for these positions to be fixed at salaries comparable to those set for grades 16, 17, and 18 of the General Schedule, but sets numerical limitations upon the total number of positions that can be established. Finally, except as provided in the Federal Executive Salary Act of 1964, no executive pay level positions can be established in NSA.

One of the most important provisions of P.L. 86-36 is Section 6 which provides that no law shall be construed to require the disclosure of the organization or any function of the NSA or of any information with respect to the activities thereof or the names, titles, salaries, or number of persons employed by NSA.

In summary, P.L. 86-36 provided the administrative authorities for civilian personnel administration and an effective career system for NSA. Secondly, this law established the policy of the Congress against the public availability of information concerning the activities of the National Security Agency, and thereby provided protection to the Agency so that it could function without disclosure of such information as might impair its missions.

President Eisenhower has stated that hindsight is more accurate than foresight, but that foresight is many times more valuable than hindsight. This philosophy applies to Public Law 86-36 in that we lacked the foresight to include certain provisions, but later in 1964 in Public Law 88-290 and in 1969 in Public Law 91-187 we overcame certain deficiencies in P.L. 86-36. I refer first to the numerical limitations on the number of R&D positions in P.L. 86-36. The Congress in P.L. 91-187 in December of 1969 passed legislation which removed the numerical limitations on top level scientific

and professional positions in the National Security Agency. This legislation enables the Secretary of Defense, based upon the demonstrated needs of NSA, to increase the number of scientific and professional supergrades within NSA in response to program changes and priorities. In addition, this legislation gave statutory recognition to cryptology as a specialized field by adding the new field of "Cryptology" to the types of positions in NSA for which there are unlimited numbers of supergrades.

I refer next to the second deficiency which was our failure to have NSA appointments exempted from the Civil Service laws and to have NSA excepted from the provisions of the Performance Rating Act of 1950. These deficiencies were overcome in P.L. 88-290.

Public Law 86-36, as amended

AN ACT

To provide certain administrative authorities for the National Security Agency, and for other purposes.

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

"(32) the National Security Agency." (Repealed. See note.)

SEC. 2. The Secretary of Defense (or his designee for the purpose) is authorized to establish such positions, and to appoint thereto, without regard to the civil service laws, such officers and employees, in the National Security Agency, as may be necessary to carry out the functions of such agency. The rates of basic compensation for such positions shall be fixed by the Secretary of Defense (or his designee for the purpose) in relation to the rates of basic compensation contained in the General Schedule of the Classification Act of 1949, as amended (chapter 51 of title 5), for positions subject to such Act which have corresponding levels of duties and responsibilities. Except as provided in subsections (f) and (g) of section 303 of the Federal Executive Salary Act of 1964, no officer or employee of the National Security Agency shall be paid basic compensation at a rate in excess of the highest rate of basic compensation contained in such General Schedule. Not more than seventy such officers and employees shall be paid basic compensation at rates equal to rates of basic compensation contained in grades 16, 17, and 18 of such General Schedule.

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

SEC. 4. The Secretary of Defense (or his designee for the purpose) is authorized to establish in the National Security Agency not more than ninety civilian positions involving research and development

functions, which require the services of specially qualified scientific or professional personnel, and fix the rates of basic compensation for such positions at rates not in excess of the maximum rate of compensation authorized by section 1581(b) of title 10, United States Code.

SEC. 5. Officers and employees of the National Security Agency who are citizens or nationals of the United States may be granted additional compensation, in accordance with regulations which shall be prescribed by the Secretary of Defense, not in excess of additional compensation authorized by section 207 of the Independent Offices Appropriation Act, 1949, as amended (5 U.S.C. 5941), for employees whose rates of basic compensation are fixed by statute.

SEC. 6. (a) Except as provided in subsection (b) of this section, nothing in this Act or any other law (including, but not limited to, the first section and section 2 of the Act of August 28, 1935 (5 U.S.C. 654)) shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency.

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

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

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

Approved May 29, 1959.

Note

Sections 1 and 7 were repealed and their provisions were incorporated, respectively, in sections 305(a)(8) and 5102(a)(1)(viii) of title 5, United States Code and in section 5108(a) of title 5, United States Code by Public Law 89-554, Sept. 6, 1966, 80 Stat. 660, an Act which revised, codified, and enacted as title 5 of the United States Code the laws relating to the organization of the Government of the United States and to its civilian officers and employees.

Recognizing the importance which teach... and school boards give to receipt of tenure, it is difficult for the Court to believe that the parties to the Master Agreement would have included such a major right in such an ambiguous manner, especially where it would have been facially inconsistent with Article XVII(D).

Education of Laur
F.Supp. at 205–208

Accordingly, sinc
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II. *Substantive I*

[5, 6] Because "the constitutional right to 'substantive' due process is no greater than the right to procedural due process," *Jeffries v. Turkey Run Consolidated School District*, 492 F.2d 1, 4 (C.A.7, 1974) (Stevens, J.); *Weathers v. West Yuma County School Dist. R–J–1*, 530 F.2d 1338, 1340-42 (C.A.10, 1976); *Evans v. Page*, 518 F.2d 18, 21 (C.A.8, 1975); *Morris v. Board of Education of Laurel Sch. Dist., supra*, 401 F.Supp. at 213 n. 36; *Pavlov v. Martin*, 381 F.Supp. 707, 710 (D.Del.1974), *aff'd* 515 F.2d 1407 (C.A.3, 1975); *cf. Mescia v. Penry*, 406 F.Supp. 1181, 1193–94 (D.S.Car.1974), *aff'd* 530 F.2d 969 (C.A.4, 1975), it follows from the Court's rejection of plaintiffs' procedural due process claim that the plaintiffs' substantive due process rights have not been violated.

[7] Furthermore, the Court is unable to characterize the Board's decision to send non-renewal notices to ninety-six teachers as arbitrary and capricious. The defendants' explanation for their conduct does have some rational basis.[25] The anticipated decline in enrollment, the return of teachers on leave and the problems spawned by subject certification and seniority rights support the Board's decision particularly in view of the statutory and contractual requirements for giving such advance notice of non-renewal before definitive budget figures and enrollment or other statistics become available.[26]

... summary judgment will be

ILLEGIB

24. The Court need not confront the parties' concern for whether a school board can grant the equivalent of tenure to teachers who do not qualify for tenure under the statute.

25. See text accompanying notes 5-15 *supra*.

Louis KRUH, Plaintiff,

v.

GENERAL SERVICES ADMINISTRATION, Defendant.

No. 75 C 909.

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

Oct. 20, 1976.

Action was brought to compel disclosure of memorandum pursuant to Freedom of Information Act. The District Court, Neaher, J., held that memorandum from president of the United States to the Secretaries of State and Defense which established the National Security Agency as an organization to establish policy for and advise the president of activities of the intelligence community and to conduct communications intelligence and security activities was exempt from disclosure by statute.

Judgment for defendant.

26. The decision on the merits has made it unnecessary for the Court to consider several procedural or collateral issues raised by the defendants including whether the suit is moot, whether the suit is premature, and whether the Education Association has standing to maintain this action.

1. Records ⇐14

Despite general intent of the Freedom of Information Act to open to the public information concerning public business, certain secrecy statutes nonetheless remain in force; those are statutes which specifically restrict access to government records on the basis of congressional decisions that the confidentiality of certain information in certain agencies is essential to protect the public interest. 5 U.S.C.A. § 552(b)(3).

2. Records ⇐14

Although specific aim of statute protecting the confidentiality of the organization or function of the National Security Agency was to exempt that agency from the Civil Service Commission's requirements for disclosure of personnel data and other information, the statute also has the effect of providing that no law shall require disclosure of the highly sensitive organizational and functional matters or activities of the Agency. 5 U.S.C.A. § 552(b)(3); Act May 29, 1959, § 6, 50 U.S.C.A. § 402 note.

3. Records ⇐14

Even if statute exempting from disclosure under the Freedom of Information Act matters specifically exempted from disclosure by statute so long as the statute requires that matters be withheld in a manner which leaves no discretion and establishes particular criteria for withholding the material were in effect at time that plaintiff sought disclosure of memorandum to the Secretaries of State and Defense which established the National Security Agency, the memorandum would not be subject to disclosure.

4. Records ⇐14

Statutes which specifically exempt disclosure of documents under the Freedom of Information Act need not precisely name the documents or describe the category to which they fall. 5 U.S.C.A. § 552(b)(3).

5. Records ⇐14

Affidavits in which it was stated that memorandum from the president of the United States to the Secretaries of State and Defense which established the National Security Agency established a mechanism within the National Security Council to establish policy for and advise the president of activities of the intelligence community and that the Agency was designated for the conduct of communications intelligence and security activities were sufficient to show that the memorandum was not subject to disclosure under the Freedom of Information Act because it was specifically exempted by statute. 5 U.S.C.A. § 552(b)(3); Act May 29, 1959, § 6, 50 U.S.C.A. § 402 note.

Medower & Kroll, Merrick, N. Y. by Jerome S. Medowar, Merrick, N. Y., for plaintiff.

David G. Trager, U. S. Atty., Eastern District of New York, Brooklyn, N. Y. by George H. Weller, Asst. U. S. Atty., Brooklyn, N. Y., for defendant.

NEAHER, District Judge.

This is plaintiff's second action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(3), seeking to compel disclosure of a memorandum, dated October 24, 1952, from President Harry S. Truman to the Secretaries of State and Defense which established the National Security Agency (the Truman Memorandum). In the first action, 67 F.R.D. 1 (E.D.N.Y.), this court held that the document was exempt from disclosure because it was in fact classified "Top Secret," an exemption under 5 U.S.C. § 552(b)(1),[1] and that under *EPA v. Mink*, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973), the court was precluded from making any inquiry into the reasonableness of the classification. Thereafter the statute was amended, permitting inquiry into the propriety of classification, and plaintiff

1. Before amendment, Exemption 1 of the FOIA read:
"(b) This section does not apply to matters that are—
(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;" 5 U.S.C. § 552 b)(1).

2. After amendment, Exemption 1 reads:
"(b) This section does not apply to matters that are—

once again attempted to obtain the document. He was again unsuccessful throughout the appropriate administrative levels, and has commenced the present action to compel production of the Truman Memorandum under FOIA as amended.

The matter is now before the court on (1) plaintiff's motion to compel production of the minutes of two meetings of the Interagency Classification Review Committee at which his first administrative appeal in his quest for the Truman Memorandum was discussed, Rule 37, F.R.Civ.P., and (2) defendant's cross-motion for summary judgment denying disclosure of the Truman Memorandum, Rule 56, F.R.C.v.P. The summary judgment motion will be considered first, since a dispositive ruling would obviate the discovery motion.[3]

[1] Defendant seeks summary judgment on the ground that the Truman Memorandum is exempt from disclosure under Exemption 3 of FOIA, which provides for nondisclosure of matters that are "specifically exempted from disclosure by statute," 5 U.S.C. § 552(b)(3). Exemption 3 evidences a Congressional judgment that, despite the general intent of FOIA to open up to the public information concerning the public business, certain secrecy statutes should nonetheless remain in force. These are statutes which specifically restrict access to governmental records on the basis of Congressional decisions that the confidentiality of certain information in certain agencies is essential to protect the public interest. *Administrator, FAA v. Robertson*, 422 U.S. 255, 95 S.Ct. 2140, 2146–47, 45 L.Ed.2d 164 (1975).

[2 3] The government, unfortunately for plaintiff, has pointed to just such a statute, one which by its terms negates any requirement to make disclosure of information about the National Security Agency. It reads:

> "[N]othing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency." Pub.L. No. 86–36, § 6, 73 Stat. 63 (1959).

Although a specific aim of P.L. 86–36 was to exempt the National Security Agency from the U.S. Civil Service Commission's requirements of disclosure of personnel data and other information, it is manifest that this was in aid of a broader, overriding purpose; *i. e.*, that *no law* shall require disclosure of the highly sensitive organizational and functional matters or activities of that Agency. This would necessarily include such a law as FOIA. The 1974 amendments of FOIA would not alter such an exemption.[4]

[4] Statutes which specifically exempt disclosure of documents under Exemption 3 need not precisely name the documents or describe the category in which they fall.

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;" 5 U.S.C. § 552(b)(1), as amended.

3. Plaintiff seeks production of the Review Committee's complete minutes in order to establish his right to examine the Truman Memorandum, arguing their relevance because they reflect discussion about declassifying the Memorandum and lack of privilege because he asserts they are now public documents, having been disclosed to him in part in connection with his prior action.

4. A conforming amendment to the "Government in the Sunshine Act," Pub.L. No. 94-409, enacted September 13, 1976, effective 180 days from enactment, amends Exemption 3 of FOIA so as to exempt from disclosure matters

> " 3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld . . . ."

The amendment—even if now in effect—would not change the outcome here. Section 6 of P.L. 86–36 specifically "refers to particular types of matters to be withheld"; namely, "the organization or any function of the National Security Agency, of any information with respect to the activities thereof . . . ."

Administrator, FAA v. Robertson, supra, 95 S.Ct. at 2147. Thus, the statute which permitted the Administrator of the FAA to withhold information when, in his judgment, disclosure would adversely affect the interests of an objecting party and was not required in the interest of the public 49 U.S.C. § 1504, despite the breadth of the disclosure granted, was held to come within the purview of Exemption 3. *Id.* The function of this court's *de novo* inquiry when an agency asserts a right to withhold a document based on Exemption 3 is to determine "the factual existence of such a statute, regardless of how unwise, self-protective, or inadvertent the enactment might be." *EPA v. Mink, supra*, 410 U.S. at 95 n.*, 93 S.Ct. at 840 (Stewart, J., concurring).

[5] The plain language of P.L. 86-36 renders it unnecessary to tarry long with plaintiff's criticism of defendant's affidavits as conclusory and therefore insufficient to establish an exemption.[5] Contrary to plaintiff's contentions, those affidavits do not merely recite the statutory language.[6] The Davis affidavit, *inter alia*, states that the Truman Memorandum establishes a mechanism within the National Security Council to establish policy for and advise the President of activities of the intelligence community, outlines the mission of the National Security Agency and details the responsibilities of the Director. In like fashion, the Allen affidavit relates that, under the Memorandum, the National Security Agency was created as a separately organized agency within the Department of Defense and the Secretary of Defense was designated Executive Agent for the conduct of communications intelligence and security activities. Clearly these matters refer to

5. The affidavit of the Staff Secretary of the National Security Council states:

"6. The seven-page, October 24, 1952 Memorandum from the President to the Secretaries of State and Defense is the foundation upon which all past and current communications intelligence activities of the United States Government are based. It was classified TOP SECRET, but was downgraded to SECRET on September 18, 1975, as described above. The text of the 1952 Memorandum was incorporated almost verbatim in a subsequent National Security Council Intelligence Directive (NSCID No. 9). Much of the substance is contained in the currently active NSCID 6 which details present activities and responsibilities of the Intelligence Community.

"7. The 1952 Memorandum establishes a mechanism within the National Security Council to establish policy for and to advise the President of these activities. It directs the reorganization of the United States Communications Intelligence Board (USCIB), including its composition, responsibilities, and procedures and further defines its authority. The Memorandum also outlines the mission of the National Security Agency and details the specific responsibilities of its Director.

"8. Release of this detailed description of the organization, functions and procedures of the United States Government with regard to the conduct of this sensitive activity, much of which is still valid today, could cause serious damage to the national security. Such details would increase the possibility of penetration of or interference with such United States activities by a potential adversary so as to limit the effectiveness of our activities. It might also severely limit the amount of information available to the United States, information which is vital to the careful, deliberate, analytical process of decision-making in the area of national security policy and could also affect adversely our ability to act quickly, decisively and with the expectation of success in a crisis situation." Affidavit of Jeanne W. Davis, ¶¶ 6-8.

The affidavit of the Director of the National Security Agency recites:

"4. The subject of this Memorandum is 'Communications Intelligence Activities.' It deals with the conduct of communications intelligence activities and primarily with the organization, functions and activities of the National Security Agency. This Memorandum remains the principal charter of the National Security Agency and is the basis of a number of other classified documents governing the conduct of communications intelligence activities and the operations, functions, activities of the National Security Agency.

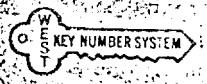
* * * * * * *

"6. Disclosure of this Memorandum would reveal information concerning the current organization, functions and activities of the National Security Agency and the current conduct of communications intelligence activities. I believe that foreign nations are not aware of certain specific information relating to these matters and that disclosure would thus be prejudicial to the defense activities and conduct of foreign affairs of the United States." Affidavit of Lt. Gen. Lew Allen, Jr., ¶¶ 4, 6.

the function, organization or activity of the Agency and, under P.L. No. 86-36 are not required to be disclosed. Exemption 3 of FOIA therefore permits defendant to withhold the Truman Memorandum from public scrutiny.

Accordingly, defendant's motion for summary judgment is granted and plaintiff's motions are denied in all respects.

SO ORDERED.



CHRYSLER CORPORATION and Chrysler Motors Corporation, Plaintiff,

v.

E. L. JONES DODGE, INC., a Pennsylvania Corporation, Defendant.

GENERAL MOTORS CORPORATION, Plaintiff,

v.

E. L. JONES DODGE, INC., a Pennsylvania Corporation, Defendant.

Civ. A. Nos. 76-870, 76-871.

United States District Court, W. D. Pennsylvania.

Oct. 21, 1976.

Actions were instituted to obtain injunctions prohibiting plaintiffs from being joined as defendants in a state action. The District Court, Snyder, J., held that injunction would issue to prohibit retailer from joining manufacturers of vehicle and power steering component as defendants in action in trespass by injured party in state court, where a judgment had been previously entered against injured party on issue of defectiveness in a previous suit against manufacturers in federal court, and there was an apparent unexplained refusal on part of state court to recognize federal judgment or even to permit appellate review of res judicata issue raised by manufacturers.

Injunctive relief ordered.

1. Courts ⇐508(1)

The amendment to the Anti-Injunction Act providing that a court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments reasserts the authority of the federal courts to restrain redundant state court litigation of claims embodied in final federal court judgments. 28 U.S.C.A. § 2283.

2. Courts ⇐508(1)

Exception embodied in phrase "to protect or effectuate its judgments," within provision of Anti-Injunction Act prohibiting a court of the United States from granting an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments, operates to save a successful litigant for being subjected to a vexatious court litigation through collateral attacks on matters previously determined in the federal courts. 28 U.S.C.A. § 2283.

See publication Words and Phrases for other judicial constructions and definitions.

3. Judgment ⇐634

Application of doctrine of res judicata requires the concurrence of the identity of the thing sued upon, the identity of the cause of action, the identity of persons and parties to the action, and the identity of the quality or capacity of the parties suing or sued.

4. Courts ⇐508(2)

Injunction would issue to prohibit retailer from joining manufacturers of vehicle and power steering component as defendants in action in trespass by injured party in state court, where a judgment had been previously entered against injured party on issue of defectiveness in a previous suit

4. This brings us to the next statute which we are concerned with which is P.L. 88-290. In June of 1960 two employees of NSA defected to the Soviet Union. The Committees of the Congress conducted, over a two year period, an extensive analysis and investigation of the security procedures of NSA. Hearings were held in Executive Session with the result that the Congress finally passed in early 1964 P.L. 88-290 to establish a statutory basis for achieving maximum security for the activities of NSA and to strengthen the capability of the Secretary of Defense and the Director, NSA to provide for such security.

This law prescribes by mandate of the Congress that a personnel security system and associated procedures be established to assure that no person shall be employed or continued in employment by NSA unless such employment is clearly consistent with the national security. Let me emphasize that the provisions of this statute are by mandate of the Congress distinct from a delegation of authority. Most of the personnel security programs of the Government are based upon an Executive Order while a few are based upon a delegation of authority by the Congress to the head of an agency. By contrast, the personnel security program of NSA is based upon provisions of law under which the Congress mandated that the Secretary of Defense and the Director, NSA, take certain measures to achieve security of the activities of NSA. Since these provisions of law are based upon the constitutional power of the Congress to prescribe the qualifications for Federal employment, they are stronger constitutionally and are less subject to collateral attack in the courts than the provisions of law establishing other personnel security systems in the Federal Government. The personnel security system established by P. L. 88-290 contains the following essential provisions:

(1) This law provides that no person shall be employed in, detailed, or assigned to the NSA or given access to classified information unless such employment, detail, or access is clearly consistent with the national security.

(2) It prohibits the permanent employment of any person in the Agency unless he or she has been cleared for access to classified information after a full-field investigation.

(3) It provides for Boards of Appraisal to be appointed by the Director, NSA, to assist him in discharging his personnel security responsibilities. Each member of such a board shall be especially qualified and trained for his duties as such a member. The Director will refer to such Boards cases in which there is a doubt as to the continued eligibility of an employee for access to Agency classified information.

(4) This statute gives the Secretary of Defense, in a limited class of cases, the power to summarily terminate the employment of an employee of the National Security Agency.

(5) Finally, this statute amends P.L. 86-36 to exempt appointments in NSA from the Civil Service laws and to except NSA from the provisions of the Performance Rating Act of 1950.

Public Law 88-290 established a three step procedure to assure that a proposed action to terminate an employee of NSA on the grounds of unsuitability or disloyalty will receive judicious consideration. The duties of a Board of Appraisal are to explore fully all pertinent aspects of the case and to submit a recommendation in writing to the Director, NSA, as to what action should be taken in each case. This constitutes the first step. The next step is review and decision by the Director, NSA. If the Director decides to terminate an employee, he may take action pursuant to P.L. 81-733 (that is for national security reasons) or pursuant to the Veterans' Preference Act (veterans preference eligible unsuitable for Government employment). Under both these laws an employee has a right to notice, written charges and appeal of an adverse decision. The third and final step is review and decision by the Secretary of Defense. It is, however, only in a very limited class of cases, specifically those in which compelling national security reasons prevent the invoking of provisions of law for termination of employment, that the Director, NSA, refers the case to the Secretary of Defense with the recommendation that the Secretary discharge an employee.

7. I will be pleased to furnish any additional information which you may desire.

STAT

Incl:
Compilation of Statutes Specifically
Applicable to the National Security Agency
and U. S. Cryptologic Activities

5. The personnel security system of NSA has been functioning effectively since passage of P.L. 88-290 in 1964. Existing directives of the Department of Defense and the Agency are adequate. The entire system is now threatened, however, by S. 1438 whose purpose is to prevent unwarranted invasions by Government officials of the privacy of applicants for Government employment or of Government employees. S. 1438 would impose restrictive limitations upon NSA capabilities to safeguard the security of its activities and its classified cryptologic information, and in the collection of significant information germane to a determination that access is clearly consistent with national security. Under S. 1438 NSA could not continue to use its present procedures and techniques which implement P.L. 88-290. The Department of Defense has, therefore, recommended that NSA be exempted from S. 1438.

NATIONAL SECURITY AGENCY - PERSONNEL SECURITY PROCEDURES

PUBLIC LAW 88-290; 78 STAT. 168

An Act to amend the Internal Security Act of 1950.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The Internal Security Act of 1950 is amended by adding at the end thereof the following new title:

TITLE III - PERSONNEL SECURITY PROCEDURES IN NATIONAL SECURITY AGENCY

"REGULATIONS FOR EMPLOYMENT SECURITY

"Sec. 301. Subject to the provisions of this title, the Secretary of Defense (hereafter in this title referred to as the 'Secretary') shall prescribe such regulations relating to continuing security procedures as he considers necessary to assure--

"(1) that no person shall be employed in, or detailed or assigned to, the National Security Agency (hereafter in this title referred to as the 'Agency'), or continue to be so employed, detailed, or assigned; and

"(2) that no person so employed, detailed, or assigned shall have access to any classified information;

unless such employment, detail, assignment, or access to classified information is clearly consistent with the national security.

"FULL FIELD INVESTIGATION AND APPRAISAL

"Sec. 302. (a) No person shall be employed in, or detailed or assigned to, the Agency unless he has been the subject of a full field investigation in connection with such employment, detail, or assignment, and is cleared for access to classified information in accordance with the provisions of this title; excepting that conditional employment without access to sensitive cryptologic information or material

may be tendered any applicant, under such regulations as the Secretary may prescribe, pending the completion of such full field investigation: And provided further, That such full field investigation at the discretion of the Secretary need not be required in the case of persons assigned or detailed to the Agency who have a current security clearance for access to sensitive cryptologic information under equivalent standards of investigation and clearance. During any period of war declared by the Congress, or during any period when the Secretary determines that a national disaster exists, or in exceptional cases in which the Secretary (or his designee for such purpose) makes a determination in writing that his action is necessary or advisable in the national interest, he may authorize the employment of any person in, or the detail or assignment of any person to, the Agency, and may grant to any such person access to classified information, on a temporary basis, pending the completion of the full field investigation and the clearance for access to classified information required by this subsection, if the Secretary determines that such action is clearly consistent with the national security.

"(b) To assist the Secretary and the Director of the Agency in carrying out their personnel security responsibilities, one or more boards of appraisal of three members each, to be appointed by the Director of the Agency, shall be established in the Agency. Such a board shall appraise the loyalty and suitability of persons for access to classified information, in those cases in which the Director of the Agency determines that there is a doubt whether their access to that information would be clearly consistent with the national security, and shall submit a report and recommendation on each such a case. However, appraisal by such a board is not required before action may be taken under section 14 of the Act of June 27, 1944, chapter 287, as amended (5 U.S.C. 863), section 1 of the Act of August 26, 1950, chapter 803, as amended (5 U.S.C. 22-1), or any other similar provision of law. Each member of such a board shall be specially qualified and trained for his duties as such a member, shall have been the subject of a full field investigation in connection with his appointment as such a member, and shall have been cleared by the Director for access to classified information at the time of his appointment as such a member. No person shall be cleared for access to classified information, contrary to the recommendations of any such board, unless the Secretary (or his designee for such purpose) shall make a determination in writing that such employment, detail, assignment, or access to classified information is in the national interest.

"TERMINATION OF EMPLOYMENT

"Sec. 303. (a) Notwithstanding section 14 of the Act of June 27, 1944, chapter 287, as amended (5 U.S.C. 863), section 1 of the Act of August 26, 1950, chapter 803, as amended (5 U.S.C. 22-1), or any other provision of law, the Secretary may terminate the employment of any officer or employee of the Agency whenever he considers that action to be in the interest of the United States, and he determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security. Such a determination is final.

"(b) Termination of employment under this section shall not affect the right of the officer or employee involved to seek or accept employment with any other department or agency of the United States if he is declared eligible for such employment by the United States Civil Service Commission.

"(c) Notwithstanding section 133(d) of title 10, United States Code, any authority vested in the Secretary of Defense by subsection (a) may be delegated only to the Deputy Secretary of Defense or the Director of the National Security Agency, or both.

"DEFINITION OF CLASSIFIED INFORMATION

"Sec. 304. For the purposes of this section, the term 'classified information' means information which, for reasons of national security, is specifically designated by a United States Government agency for limited or restricted dissemination or distribution.

"NONAPPLICABILITY OF ADMINISTRATIVE PROCEDURE ACT

"Sec. 305. The Administrative Procedure Act, as amended (5 U. S.C. 1001 et seq.), shall not apply to the use or exercise of any authority granted by this title.

"AMENDMENTS

"Sec. 306. (a) The first sentence of section 2 of the Act of May 29, 1959 (50 U.S.C. 402 note), is amended by inserting, 'without regard to the civil service laws,' immediately after ' and to appoint thereto'.

"(b) Subsection (b) of section 2 of the Performance Rating Act of 1950 (5 U.S.C. 2001(b) is amended--

"(1) by striking out the period at the end of paragraph (13) and inserting in lieu thereof a semicolon; and

"(2) by adding at the end thereof the following new paragraph:

"(14) The National Security Agency.'."

Approved March 26, 1964.

6. We have seen how the Congress has provided a statutory basis for a career system for NSA and has mandated by law a personnel security system for NSA. When in the beginning I discussed 18 U.S.C. 798, I pointed out that the Congress had provided the broadest possible protection to classified cryptologic information and had recognized the legality of COMINT activities of the Government. An important development occurred in the Congress in 1968 which assured finally the propriety of U. S. SIGINT and COMSEC activities. The Congress passed the Omnibus Crime Control and Safe Streets Act of 1968. Title 3 of this law prohibits, with certain specified exceptions, all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officials. One of these exceptions in Title 3 makes it clear that nothing in Title 3 or Section 605 of the Communications Act of 1934 or in any other statute shall limit the constitutional power of the President to take such measures as he deems necessary to obtain foreign intelligence information deemed essential to the security of the United States and to protect national security information against foreign intelligence activities. The effect of the above Presidential exception to the bans against wiretapping and electronic surveillance is to remove any doubt as to the legality of the SIGINT and COMSEC activities of the Executive Branch of the Government. The language in Title 3 precludes an interpretation that the prohibitions against wiretapping or electronic surveillance techniques in other laws apply to SIGINT and COMSEC activities of the Federal Government. Wiretapping and electronic surveillance techniques are therefore legally recognized as means for the Federal Government to acquire foreign intelligence information and to monitor U. S. classified communications to assess their protection against exploitation by foreign intelligence activities.

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT
OF 1968 (P.L. 90-351, June 20, 1968)

TITLE III - WIRETAPPING AND ELECTRONIC SURVEILLANCE

SEC. 802. Part I of Title 18, United States Code, is amended by adding at the end the following new chapter.

Chapter 119. Wire Interception and Interception of Oral Communications

§ 2511. Interception and Disclosure of Wire or Oral Communications Prohibited

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Title 50 U.S.C. 403 (d)(3)

(3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: Provided, That the Agency shall have no police, subpena, law-enforcement powers, or internal-security functions: Provided further, That the departments and other agencies of the Government shall continue to collect, evaluate, correlate and disseminate departmental intelligence: And provided further, That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.

§ 952. Diplomatic codes and correspondence

Whoever, by virtue of his employment by the United States, obtains from another or has or has had custody of or access to, any official diplomatic code or any matter prepared in any such code, or which purports to have been prepared in any such code, and without authorization or competent authority, willfully publishes or furnishes to another any such code or matter, or any matter which was obtained while in the process of transmission between any foreign government and its diplomatic mission in the United States, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

June 25, 1948, c. 645, 62 Stat. 743.

Historical and Revision Notes

Reviser's Note. Based on section 135 of Title 22, U.S.C., 1940 ed., Foreign Relations and Intercourse (June 10, 1933, c. 57, 48 Stat. 122).

Minor changes of phraseology were made.

Cross References

Classified information, disclosure by government official, penalty for, see section 783 of Title 50, War and National Defense.
Classified information, disclosure of, see section 798 of this title.

Library References

United States ⇐52.

C.J.S. United States §§ 60, 61.

§ 953. Private correspondence with foreign governments

Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

This section shall not abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.

June 25, 1948, c. 645, 62 Stat. 744.

Historical and Revision Notes

Reviser's Note. Based on Title 18, U.S.C., 1940 ed., § 5 (Mar. 4, 1909, c. 321, § 5, 35 Stat. 1088; Apr. 22, 1932, c. 126, 47 Stat. 132).

The reference to any citizen or resident within the jurisdiction of the United States not duly authorized "who counsels, advises or assists in such correspondence with such intent" was omitted as unnecessary in view of definition of principal in section 2.