No. 03-1395

In The
Supreme Court of the United States

GEORGE J. TENET, individually and as Director of CENTRAL INTELLIGENCE and DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, and UNITED STATES OF AMERICA,

Petitioners,

v.

JOHN DOE and JANE DOE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether *Totten v. United States*, 92 U.S. 105 (2 Otto) (1875), empowers the Executive in a case presenting colorable constitutional claims to deprive courts of subject matter jurisdiction and to circumvent the requirements of the state secrets privilege and the procedural safeguards of *Reynolds v. United States*, 345 U.S. 1 (1953), based solely on the Executive's unilateral and conclusory assertion that disclosure of state secrets is inevitable.

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STATEMENT

Petitioners rely on *Totten v. United States,* 92 U.S. 105 (2 Otto) (1875), for the proposition that the judiciary has no subject matter jurisdiction to hear any case presenting colorable constitutional claims if the case touches upon national security issues and that upon the Executive's request, and without the exercise of any judicial discretion, such a case must be summarily dismissed.

The Ninth Circuit held that *Totten* does not require immediate dismissal of the Does' case and the case is governed by the state secrets privilege, "a separate aspect of the decision in *Totten* that has evolved into a well-articulated body of law addressing situations in which security interests preclude the revelations of factual matter in court." (App. 18a.) The panel observed that in the more than 125 years since *Totten*, the "constitutional protection of the right to due process of law has developed into an assurance in most instances of *some* fair procedure, secret or open, judicial or administrative, before governmental deprivation of liberty or property becomes final." (*Id*.)

The Ninth Circuit relied on *United States v. Reynolds,* 345 U.S. 1 (1953), the landmark state secrets case in which this Court held that it is the responsibility of the judiciary to determine the validity of any claim of state secrets privilege. The procedures governing this determination have been articulated by this Court. While courts examining the claim of privilege properly give great weight to the Executive's position, it remains a judicial function to determine what evidence must be excluded to protect national security and whether the case can go forward on some basis.

The Ninth Circuit also relied on *Webster v. Doe,* 486 U.S. 592, 603 (1988), a case involving claims by a covert Central Intelligence Agency employee, where this Court confirmed the applicability of the state secrets privilege to cases involving the CIA and its covert activities and noted that a "serious constitutional question" would arise if consideration of the Does' constitutional claims were foreclosed. This Court refused to dismiss summarily the *Webster* plaintiff's claims against the CIA and instead instructed that "the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources and mission." 486 U.S. at 604.

The Ninth Circuit acknowledged "that it could very well turn out, after further district court proceedings, that the Does will still be left without redress even if everything they allege is true" because when the "government asserts that the interests of individuals otherwise subject to redress must give way to national security interests for the larger public good, the result can end in a balance tipped toward the greater good, with the resulting unfairness to the individual litigants as the acknowledged corollary." (App. 18a.-19a.) The Ninth Circuit's decision is conservative, respects national security and breaks no new ground.

1. Respondents, John and Jane Doe, seek in this action to compel the CIA to provide a procedurally fair internal hearing and apply substantive law to their claims for financial assistance and personal security, all within the secure confines of the CIA. To achieve this, as the

district court found, it is not necessary to litigate in the district court the classified details of their espionage activities.

2. The Does and their counsel have taken extensive precautions to prevent disclosure of any classified information. In addition to using pseudonyms and excluding any identifying detail in their court filings, the Does' counsel have CIA security clearances and the CIA has reviewed and approved for public filing the complaint and all other documents prior to filing in this case, including this response to the Petition for Writ of Certiorari. (App. 22a.-23a.)

3. John and Jane Doe, former Cold War defectors who were coerced by the CIA into being intelligence sources and who now are U.S. citizens, bring constitutional claims involving violations of property and liberty interests under the Fifth Amendment of the Constitution. John Doe was a high-ranking diplomat for a country considered an enemy of the United States during the Cold War. While John Doe and his wife were posted on diplomatic mission in a third country, they approached a person attached to the U.S. embassy and requested assistance in defecting to the United States. The Does had no interest in conducting espionage. CIA agents intervened, taking the Does to a CIA safe house where they were held for nearly 12 hours, time sufficient to create extreme danger of exposure if they returned to their embassy. The CIA officers employed intimidation and coercion to cause the Does to remain at their diplomatic post and conduct espionage for the United States for a period of time. The CIA officers stated that after this period the Agency would arrange for travel to the United States and ensure financial and personal security for life. The CIA officers professed

that such support was "required by law." As with any agent recruitment at this level, the terms of recruitment and commitments made were approved at the highest level of authority at the CIA. (R.App. 1-3, ¶¶ 2-4; 21-23)[1]

The Agency pressured the Does into undertaking espionage that would virtually guarantee that their activities would become known to the first nation, putting them at lifelong risk of retaliation, including assassination. Believing they had no choice, the Does complied with the CIA's demands for progressively more dangerous activities. (R.App. 3, ¶¶ 5-6)

The Does were eventually brought to the United States and provided new identities and backgrounds by the Agency. The Agency offered to "retire" the Does, but the Does desired to work and become integrated into American society. The Agency provided health care, language training, educational support and assistance in finding employment. The Agency continuously assured the Does, at the time of recruitment, during their espionage missions and for years after resettlement in the United States that the Agency would provide a "safety net" for life, stating that this was "required by law" and by the fact that the Does had "PL-110 status."[2] As soon as permitted by law, the Does became U.S. citizens. (R.App. 1-4)

[1] "R.App." refers to the separately bound appendix submitted by Respondents with this response to the Petition for Writ of Certiorari.

[2] The CIA administers a program referred to as "PL-110" that involves (a) bringing into the United States defectors and certain other "essential aliens" outside normal immigration procedures and (b) the

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With the Agency's substantial assistance, John Doe found employment. (R.App. 4, ¶ 8) In 1997, John Doe lost his job. Pursuant to prescribed procedures, the Does contacted the CIA and requested assistance. They received no response for nearly four months. When a response did come, the Agency's letter expressed gratitude and respect for past services to the United States but indicated regret that no funds were available due to "budget constraints." (R.App. 6, ¶ 15) No other reason was given for not assisting the Does.

John Doe's efforts to find new employment were limited by his age and his security arrangements with the Agency that required him to use the false name and background created by the Agency. The Agency, however, refused to assist, as it had assisted in the past, by talking with senior management of potential employers to mitigate the problems presented by John Doe's situation, including his false credentials. (R.App. 6)

When further attempts at obtaining Agency assistance failed, the Does sought legal representation. (R.App. 6, ¶ 16) The Agency subsequently granted the Does' counsel security clearances to represent the Does. (R.App. 18, ¶ 2) In 1997, an Agency representative explained that the Agency's refusal to provide further benefits was based on its after-the-fact, subjective evaluation of the services performed (with no mention of the previously cited "budget constraints"), that the Agency had determined that the benefits previously provided were "adequate" for the

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provision of assistance and security to these people. (R.App. 24-31; 137-146; App. 3a.)

"services rendered," and that the Does would receive nothing further. The Agency representative advised that the Does could "appeal" the decision to the Director of Central Intelligence ("DCI"). (R.App. 18-19)

Pursuant to these cursory instructions, the Does prepared an appeal based on the "value of the services performed." In connection with this effort, the Does' counsel repeatedly requested from the Agency copies of regulations governing the appeal process, the PL-110 program and access to records potentially relevant to this matter that were classified within the level of security clearances granted the Does' counsel. These requests were ignored or denied. (R.App. 18-20)

Notwithstanding these obstacles, the Does filed their appeal to the DCI. Subsequently, Agency counsel orally advised the Does' counsel that the Deputy Director of Operations (not the DCI) had denied the appeal. Agency counsel advised that a further appeal was possible to the Helms Panel, a panel of former Agency officials. Confused about the appeal process given the inconsistent and contradictory oral information provided by the Agency, the Does again requested copies of the regulations or rules governing appeals and written confirmation of the Agency's appeal determination. Both requests were ignored. (*Id.*)

The Does pursued an appeal to the Helms Panel, again requesting access to documents, persons and copies of pertinent regulations governing appeal. (R.App. 21) All requests were denied or ignored. The Helms Panel review thus proceeded without participation by the Does, other than the written appeal statement, which the Does later

learned was directed to the wrong issues because of misinformation provided by the CIA.

Agency counsel subsequently told the Does' counsel orally that the DCI had determined, based on the Helms Panel recommendation, that the Agency should provide certain benefits to the Does for no more than one year, and nothing thereafter. (R.App. 22)

Agency counsel subsequently advised that in order to accept the benefits of the DCI's decision, the Does would have to execute complete releases. The Does' counsel requested clarification of whether the appeal process, including the DCI's decision, was an adjudication of the Does' rights, and if so, how it could be predicated on a demand for a release. The Agency did not respond. (*Id*.) The additional benefits were not provided.

When the Does' counsel stated to the Agency that its failure to provide a fair process and apply accepted legal principles left the Does with no other option than to go to court, the Agency lawyer's response was "how are you going to get around *Totten*?"

Having exhausted the only administrative process they were given, the Does filed suit in the district court alleging violations of their substantive and procedural due process rights, based both on property and liberty interests, and seeking by way of declaratory relief, mandamus and injunction a constitutionally adequate internal CIA process, including a declaration that the CIA is required to follow substantive law. (App. 117a.-142a.)

4. Defendants moved to dismiss under Fed. R. Civ. P. 12(b)(1) and (6). The district court denied the motion, finding that "litigation of plaintiffs' claims will not require

public revelation of the defendants' intelligence gathering methods," noting the Supreme Court's determination in *Webster* that "the District Court has the latitude to control any discovery process which may be instituted so as to balance [plaintiffs'] need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." (App. 106a.-107a.) The district court further observed that defendants have reviewed and approved for public filing all papers and that "defendants may request leave to submit materials in this matter under seal or *in camera*, or may assert the state secrets privilege recognized in *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953)." (App. 107a.) The district court also found that "the public interest will not be harmed" because the court "understands the need for confidentiality and has the power to allow motions to be filed under seal and heard in closed hearings." (App. 93a.)

Defendants then filed a Motion for Summary Judgment or Alternatively a Renewed Motion to Dismiss. Having feigned ignorance about a "PL-110 program" in their first motion, in their second motion defendants admitted the existence of a program for resettlees[3] "commonly known" as "PL-110" and the existence of regulations governing it. (App. 87a.-88a.) Defendants' motion relied on a declaration by a mid-level Agency official (William McNair, an "Information Control Officer"), who offered his legal conclusion that applicable regulations – which

[3] Resettlees is the word used by the CIA for defectors. (R.App. 61-110, trans. pp. 15-84, trans. p. 19)

had not been provided to the Does or to the court – provided plaintiffs no rights.[4] The Does then sought production under Fed. R. Civ. P. 34 of the regulations referenced in the McNair declaration and noted his deposition. The Agency produced a redacted version of self-selected PL-110 regulations and made Mr. McNair available for deposition. The results of this limited discovery, all accomplished without the assertion of the state secrets privilege by Petitioners, establish that PL-110 regulations provide that the "safety and security" of resettlees are the "continuing obligation of the CIA" and provide for continued financial assistance after resettlees obtain U.S. citizenship, and for life, if appropriate, due to *age, health or financial need* (R.App. 139; 145), and that the standard for obtaining benefits under the PL-110 program is *not* the "value of services" standard the CIA had orally advised the Does applied to their administrative appeal. (R.App. 19)

Mr. McNair also testified that he was involved on behalf of the CIA in judicial proceedings involving classified information on a regular basis. (R.App. 68-71)

The district court denied defendants' second motion, noting that

> [i]n their first motion to dismiss, defendants claimed not to know what PL-110 was. Now, they acknowledge not only the existence of PL-110, but also the existence of CIA internal regulations concerning the PL-110 program and the financial

[4] Plaintiffs moved to strike (R.App. 33-38) and the district court disregarded the legal conclusions (App. 88a. n.6). Respondents object here on the same grounds as in their motion to strike in the district court.

> benefits accorded to defectors. . . . Defendants' initial denial of knowledge of PL-110, followed by their subsequent acknowledgment of PL-110 and related regulations, weaken their credibility.

(App. 87a.-88a.)

5. The Ninth Circuit affirmed in a 2-1 decision. The majority concluded that *Totten* does not require immediate dismissal of this case and that, instead, the case is governed by the state secrets privilege. (App. 27a., 39a.) The majority further acknowledged that it could well be that, "after further district court proceedings, the Does will be left without redress even if everything they allege is true." (*Id.*) The court observed that because the "net result of refusing to adjudicate the Does' claims is to sacrifice their asserted constitutional interests to the security of the nation as a whole, both the government and the courts need to consider discretely, rather than by formula, whether this is a case in which there is simply no acceptable alternative to that sacrifice." (App. 19a.) As such, the majority opinion noted that "[s]tate secrets privilege law prescribes that courts must be sure that claims of paramount national security interest are presented in the manner that has been devised best to assure their validity and must consider whether there are alternatives to outright dismissal that could provide whatever assurances of secrecy are necessary" and concluding that "counterweight role has been reserved to the judiciary [and the judiciary] must fulfill it with precision and care, lest we encourage both Executive overreaching and a corrosive appearance of inequitable treatment of those who have undertaken great risks to help our nation, an appearance that could itself have long-run national security implications." (*Id.*)

6. The Ninth Circuit denied defendants' motion for rehearing or alternatively for rehearing en banc. Writing in dissent, Judge Kleinfeld observed that "I hope the Does' account is fictional (though I do not intimate that it is, having no knowledge). Little could be worse for our ability to engage spies than insecurity about whether they will get what was promised to them. If what the Does allege is true, a serious injustice has been done to them, and the injustice to them is seriously harmful to the long-term security interests of the United States."[5] (App. 75a.)

REASONS FOR DENYING THE PETITION

The Ninth Circuit's decision to let the case proceed in the district court respects national security concerns and the CIA's interest in protecting its sources and methods. The decision is rooted in controlling law from this Court in *Reynolds* and *Webster* and requires the district court to

[5] The serious injustice Judge Kleinfeld noted has been aggravated by the almost five-year delay since the complaint was filed, with no opportunity for the Does to address the merits of their case, notwithstanding the showing of extreme hardship made in the district court (R.App. 1-10) and the Ninth Circuit's order expediting the appeal (R.App. 39). Adding to this injustice is the fact that if the Does had not located counsel to handle their case pro bono (at a cost so far of over $1.6 million), they would have had no way to pursue this case given the resistance by Petitioners to providing them a fair hearing. Access to justice should not be so delayed or so costly, particularly where constitutional liberty and property interests are involved. Respondents note further that Petitioners' argument regarding recourse to the CIA's Inspector General to address Respondents' claims (Petition at 12) is not supported by the record and, in this case at least, is not accurate. Respondents have asked Petitioners to withdraw their argument.

balance the interests of the Does for a forum to consider their constitutional claims with the Agency's important interests. The Ninth Circuit treatment of *Totten* is consistent with the treatment given *Totten* by all circuit courts, including *Guong v. United States*, 860 F.2d 1063 (Fed. Cir. 1988), which Petitioners misread. *Totten* is not jurisdictional, rather it is a part of the state secrets privilege. Petitioners' interpretation of *Totten* would deprive the Does of a forum for their constitutional claims and thus directly conflicts with the holding of this Court in *Webster* that such a jurisdictional bar would raise grave constitutional questions.

I. *TOTTEN* IS PART OF THE STATE SECRETS PRIVILEGE AND IS NOT A JURISDICTIONAL BAR TO CASES TOUCHING ON THE CIA'S COVERT INTELLIGENCE ACTIVITIES

Judicial discussion of *Totten* in the century and a quarter since it was decided makes clear that *Totten* is not a jurisdictional bar. *See*, *e.g., Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991). *Totten* is recognized as an early kernel of the state secrets privilege (or of its broader family, Executive privilege). *See*, *e.g.*, *Rubin v. United States ex rel. Indep. Counsel*, 119 S. Ct. 461, 462 (1998) (dissent from denial of certiorari, discussing ability of courts to recognize "new privileges," citing *Totten* as example for "state secrets privilege" (Breyer, J., dissenting)); *In re Sealed Case*, 121 F.3d 729, 736 (D.C. Cir. 1997) (en banc) (discussing history of Executive privilege, citing *Totten* as "early" ruling that Executive may withhold state secrets); *Zweibon v. Mitchell*, 516 F.2d 594, 625 & n.80 (D.C. Cir. 1975) (en banc) (describing *Totten* as "foreshadow[ing]" the "*evidentiary* privilege of the Executive

Branch with respect to production of documents whose publication could endanger military or diplomatic secrets" (emphasis added)).

A. *Reynolds* Treats *Totten* as Part of the State Secrets Privilege

The Ninth Circuit correctly held that *Totten* is an early expression of the evidentiary state secrets privilege. (App. 25a.) More than a century of legal development demonstrates that the policies discussed in *Totten* have been incorporated into the privilege and are subject to the procedures under which the privilege is now governed. In 1953, some 77 years after *Totten*, this Court in *Reynolds* recognized that "[j]udicial experience with the privilege . . . has been limited," 345 U.S. at 7, but noted that the "privilege against revealing military secrets . . . is well established in the law of evidence," supporting this conclusion with citation to a number of cases, first among which was *Totten*, *id*. at 6-7 & n.11.

This Court held in *Reynolds* that *Totten* sets forth a *privilege* rather than a jurisdictional bar and that it represents one extreme of the privilege's application. Discussing the operation of the privilege, this Court cited *Totten* for the proposition that "the claim of *privilege* should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Id.* at 11 & n.26 (emphasis added) (citing *Totten).* Under *Reynolds*, the *court* has ultimate responsibility for determining whether "it [is] obvious" that the "action should never prevail over the privilege." *Id.* at 11 n.26.

B. This Court's Decision in *Weinberger* Does Not Support Petitioners' Position on *Totten*

Petitioners' reliance on *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139 (1981), is misplaced. In *Weinberger*, plaintiffs sought an injunction to block construction of a nuclear weapons storage facility until the Navy issued an Environmental Impact Statement ("EIS"). This Court held that the Navy was not required to prepare a "hypothetical" EIS because there was no statutory basis for such a requirement and because Congress had expressly limited statutory disclosure requirements to exclude classified information. The case was decided on the grounds that Congress had determined statutorily what information could be released, not by application of *Totten*. The passing citation to *Totten* was not the foundation of the decision, a point noted by the concurrence, and merely reflected the policy determination already made by Congress. *Weinberger*, 454 U.S. at 149.

The Ninth Circuit panel in the case at bar noted the distinction between an explicit statutory exemption of the Freedom of Information Act, which was the basis for the decision in *Weinberger*, and the state secrets privilege, which is governed solely by judge-made law. (App. 28a.) The panel opinion considered the reference by the *Weinberger* court to *Totten* as an "explanation, by analogy, concerning why the National Environmental Policy Act ('NEPA') inquiry could not go forward in the court" and noted that the opinion also referenced *Reynolds* in the same context as the "seminal state secrets privilege case." (App. 28a.-29a.)

C. The Circuit Courts Treat *Totten* as Part of the State Secrets Privilege

1. Petitioners fail to cite one circuit court opinion holding that *Totten* is jurisdictional. The Federal Circuit in *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356 (Fed. Cir. 2001), rejected the Executive's attempt to transform *Totten* into a jurisdictional bar. *Monarch* involved a contract debt that evolved out of a loan to an alleged CIA operative to fund certain covert activities in Europe. When the loan was not repaid, Monarch sued the alleged CIA agent and obtained a judgment in the English courts. Unable to collect the judgment, Monarch brought suit in the United States Court of Federal Claims against the United States alleging breach of contract and a takings claim under the Fifth Amendment. The government moved to dismiss, arguing that under *Totten* the court could not entertain a suit alleging a breach of contract involving secret CIA actions. *Monarch*, 244 F.3d at 1358. The trial court denied the motion and the Federal Circuit affirmed. In recounting the events in the trial court, the appeals court stated "[T]he question then is whether the plaintiff, without such discovery, can make a prima facie case that it is entitled to relief on its claim." *Id.* at 1359. The Federal Circuit further recounted with approval the trial court's point "that the Government's successful invocation of the state secrets privilege may very well prevent plaintiffs from making the necessary showing [of a prima facie case], but . . . it is at least possible that through discovery plaintiffs may be able to gather unprivileged information that, when combined with their other evidence, is sufficient to establish a prima facie case . . . . " *Id.* at 1360 (internal quotation marks and citations omitted).

The Federal Circuit did not reach a different result in the earlier case of *Guong*. That case did not hold that it is the *Executive* that decides if it is "inevitable" that state secrets will be disclosed if a case goes forward as Petitioners maintain. While this is the interpretation routinely given *Guong* by the Executive, the opinion does not say this. Indeed, in *Guong* the *court* determined that the case could not proceed without inevitably resulting in disclosure of classified information, although it did so without insisting on the formalities of the state secrets privilege, because in the *court's* view, formal assertion of the privilege would not alter the *court's* conclusion. 860 F.2d at 1067-68. By contrast here, the district court specifically found that it is *not* inevitable that proof of the Does' claim will require public revelation of secret information. (App. 106a.) The Ninth Circuit panel agreed. (App. 35a.-38a.) ("it is not self-evident that the Does, in order to establish [their] relationship [with the CIA], will need to jeopardize state secrets").[6]

[6] Petitioners offered no evidence to support the contention that disclosure of state secrets was inevitable other than conjecture. Indeed, according to Mr. McNair's testimony at deposition, his unclassified declaration submitted by Petitioners (App. 143a.-148a.) was drafted by CIA lawyers working off "boilerplate," and Mr. McNair was unable to identify what part of the declaration was his testimony and what part the lawyers' (R.App. 90-91). Further, Mr. McNair testified that he regularly participates in administrative and judicial hearings and trials involving classified information. (R.App. 68-71). During Mr. McNair's deposition, which occurred after the filing of Petitioners' second motion to dismiss in the district court, Petitioners' counsel specifically noted that they had not asserted the state secrets privilege. (R.App. 120) (CIA attorney Daniel Pines: "We are not asserting a States Secrets Privilege through that sentence [of Mr. McNair's declaration]" and in response to respondents' counsel's follow-up question, Assistant United States

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The concurrence in *Guong* makes the point that "[i]n applying *Totten* as precedent today . . . I believe one must consider . . . the state secret privilege." *Guong,* 860 F.2d at 1068 (Nichols, J., concurring). Although the Petitioners cite *Guong* for the proposition of automatic dismissal for all cases involving spies, the opinion does not support that conclusion.

Further demonstrating Petitioners' misreading of *Guong* is *Air-Sea Forwarders, Inc. v. United States*, 166 F.3d 1170 (Fed. Cir. 1999). In *Air-Sea,* the Federal Circuit expressly declined to affirm the lower court's dismissal of a breach of contract claim against the CIA on the ground relied on below – that it was barred by *Totten*. Instead, it affirmed on the ground that plaintiff's claim was barred by a prior settlement. *Id.* at 1172. By so ruling on the merits of the contract issue, the *Air-Sea* court made clear that it did not consider *Totten* jurisdictional. *See also McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003) (discussing *Totten* in context of state secrets privilege).

2. In *Clift v. United States*, 597 F.2d 826 (2d Cir. 1979), the appeals court rejected the government's *Totten* argument, concluding that the district court "acted too precipitately in dismissing the complaint," based on *Totten*, *id*. at 827, and held that the plaintiff there should be allowed an opportunity to pursue his case without the

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Attorney Harold Malkin stated "Right. We have not to date asserted the State Secrets Privilege"). The district court acknowledged this and noted that if Petitioners considered national security interests to be threatened, they were free to assert the privilege. (App. 107a.)

secret evidence, *id.* at 830. *See also Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268 (4th Cir. 1980) (en banc) (rejecting *Totten* argument and affirming dismissal only after reviewing classified affidavit submitted in support of the assertion of the state secrets privilege); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1244 (4th Cir. 1985) (affirming dismissal only after review of classified declaration filed in support of the privilege).[7]

3. Prior case law from the Ninth Circuit also is in accord. In *Kasza v. Browner*, 133 F.3d 1159, 1165-66 (9th Cir. 1998), the court affirmed the district court's dismissal, quoting this Court's holding in *Reynolds*, 345 U.S. at 8, that "'[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege,'" and quoting *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983), for the requirement that "'whenever possible, sensitive information must be disentangled from nonsensitive information to allow for "'the release of the latter.'"[8] The court then concluded that, "if the 'very subject matter of the action' is a state secret, then the court should

[7] The *Fitzgerald* court cited another case from that circuit involving the CIA, *Heine v. Raus*, 399 F.2d 785 (4th Cir. 1968), to demonstrate that there are circumstances where, even after the successful invocation of the state secrets privilege, the case is permitted to go forward without use of the classified information. 776 F.2d at 1243 n.12. The *Fitzgerald* court then held that after the privilege is successfully invoked, the court "must consider whether and how the case may proceed in light of the privilege," noting that the court may "fashion appropriate procedures to protect against disclosure." *Id*. at 1243.

[8] Examples of the kinds of nonsensitive information that can be disentangled from sensitive information are provided by the transcript of the deposition of CIA officer William McNair and the redacted PL-110 regulations produced by the CIA. (R.App. 51-131; 137-146)

dismiss . . . *based solely on the invocation of the state secrets privilege." Id.* at 1166 (emphasis added) (quoting *Reynolds*, 345 U.S. at 11 n.26, and citing *Totten*, 92 U.S. at 107). In a concurring opinion, Judge Tashima noted that this Court has explained the purpose of the state secrets *privilege*, quoting *Totten* as support for this conclusion. *Id*. at 1179.

D. The Ninth Circuit Is Correct That Adherence to the Procedures for Asserting the State Secrets Privilege Is Required

The Ninth Circuit correctly relied on *Reynolds* in holding that "to invoke the state secrets privilege, a formal claim of privilege must be 'lodged by the head of the department which has control over the matter, after actual personal consideration [of the evidence] by that officer.'" (App. 29a.) The majority observed that while this may be considered a formality, "formalities often matter a great deal, and they certainly matter here." (*Id.*)

The procedures established in *Reynolds* are based on the recognition that the privilege can result in extreme unfairness and therefore must be applied only where absolutely necessary. (App. 30a.) Given the need for extreme caution where the outcome is so drastic, this Court established strict procedures that must be met. The privilege "is not to be lightly invoked." (*Id*.) "The court itself must determine whether the circumstances are appropriate for the claim of privilege . . . . " *Reynolds*, 345 U.S. at 7-8.

The panel cited *Webster* as confirmation that, "particularly where constitutional claims are at issue, the *Reynolds* inquiry requires courts to make every effort to

ascertain whether the claims in question can be adjudicated while protecting the national security interests asserted." (App. 33a.) The panel further noted the *Webster* holding that "a 'serious constitutional question' would arise if consideration of Does' constitutional claims were foreclosed [and] where constitutional issues are raised, the courts must consider the full panoply of alternative litigation methods . . . – *in camera* review, sealed records, and, if necessary, secret proceedings – before concluding that the only alternative is to dismiss the case and thereby deny the plaintiff's claimed constitutional rights." (App. 34a.) While the framework established by *Reynolds* requires deference to the Executive's expertise, it recognizes that the judiciary must not abdicate control over evidence in a case to the whim of the Executive. *Ellsberg*, 709 F.2d at 58 ("[I]t is essential that the courts continue critically to examine instances of [the state secrets privilege's] invocation.").

The Executive's prerogative is to assert the state secrets privilege; but it is the judiciary's prerogative and indeed constitutional obligation to determine its applicability and effect in any given case. *Reynolds*, 345 U.S. at 9-10; *United States v. Nixon*, 418 U.S. 683, 704-05 (1974).

II. THIS COURT'S DECISION IN *WEBSTER* DEMONSTRATES THAT THERE IS NO EXCEPTION TO THE REQUIREMENT TO APPLY THE STATE SECRETS PRIVILEGE IN CASES INVOLVING THE CIA AND ITS COVERT INTELLIGENCE ACTIVITIES

Webster v. Doe, 486 U.S. 592 (1988), involved constitutional claims by a former CIA covert employee for alleged discrimination based on sexual orientation. The plaintiff

alleged, *inter alia*, violation of his constitutional rights to property and liberty. *Id*. at 596. This Court held four-square that a person who had a secret relationship with the CIA and presented colorable constitutional claims had a right to go forward and litigate them, although, as here, the CIA could still assert the state secrets privilege to avoid disclosure of state secrets.

In *Webster*, this Court held that pursuant to statutory authority the DCI had absolute discretion to terminate an employee and that such decisions were not reviewable under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2). 486 U.S. at 599-602. This Court, however, expressly rejected the CIA's contention that plaintiff's constitutional claims were nonreviewable, noting the "'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* at 603 (citing *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). In so ruling, this Court noted that "the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." *Id*. at 604.

Petitioners' argument in this case fails to distinguish *Webster* and in fact supports the Does' position. Petitioners concede that as "long as a covert CIA employee's name is not identified, certain aspects of his or her activities . . . can be revealed or litigated without necessarily exposing classified information." (Petition at n.4) The same is true here, as the Does have proceeded, like the plaintiff in *Webster*, by using pseudonyms. Petitioners' conclusion that

no case touching upon a covert relationship may ever go forward is not supported by the record or logic. Petitioners fail to show how the details of the "covert" relationship of the *Webster* plaintiff are any less secret than that of the Does' relationship here. Petitioners offer no basis for the assumption that, for example, the details of the covert servicing of electronic equipment at a technical intelligence collection site directed at foreign terrorists by a "covert electronics technician"[9] (as the *Webster* plaintiff is described) would be any less secret than the Does' activities.[10] Be that as it may, the point is that proceeding under a "Doe" pseudonym precludes any unauthorized disclosure of sensitive information as to the individual's relationship with the CIA and allows the court to consider whether the plaintiff can make out a prima facie case without use of classified information.

[9] Covert is synonymous with secret and a covert agent or employee is presumptively no different than a "spy." They both have a secret relationship with the CIA and undertake secret missions. *Guong*, 860 F.2d at 1065 ("secret and covert are synonymous").

[10] The panel posited that the "only obvious difference between *Webster* and this case for present purposes is that the Doe in the *Webster* case was a domestic employee while the Does in this case are foreigners who were engaged to spy for the United States abroad." (App. 34a.) However, the *Webster* opinion does not state that the plaintiff in that case was a domestic employee. The fact that the employee was covert presumptively indicates that he was engaged in covert activities abroad, consistent with the CIA's foreign intelligence mission. Whether the Doe in *Webster* worked domestically or overseas, the fact that he was a covert employee puts him in the same category as Respondents – persons carrying out secret duties for the CIA undercover.

III. PETITIONERS' POLICY ARGUMENT RUNS AFOUL OF THE CONSTITUTION AND THIS COURT'S RULINGS IN *WEBSTER* AND *REYNOLDS*

Petitioners argue that *Totten* is critical to the nation's security and foreign relations interests and the state secrets privilege does not adequately protect the CIA's interests. (Petition at 20-27) Much of Petitioners' argument concerns the need for secrecy in foreign intelligence operations. With that part of the argument Respondents do not take exception. Respondents do take exception to the conclusion that to ensure the confidentiality of national security information one must read *Totten* to effectively remove from the judiciary its constitutional obligations. Such an abdication of the judiciary's traditional and constitutional obligations to the Executive is not justified.

The role of a co-equal, independent and impartial judiciary in safeguarding the rule of law in our democracy is axiomatic. Petitioners' contention that the courthouse door must remain forever closed even to the most deferential of judicial review runs afoul of the fundamental precept of the availability of the courts to enforce the rule of law and ensure procedural fairness when official conduct deprives citizens of liberty or property. The need to protect secrets on matters pertaining to national security is beyond dispute, but so is the importance of checks and balances in our system of democracy. *See Nixon*, 418 U.S. at 704-05 (rejecting claim that separation of powers doctrine precludes judicial review of the Executive's claim of privilege, and reaffirming that "it is the province and duty of this Court 'to say what the law is' with respect to the claim of privilege") (citing U.S. Const. art III, § 1; *The*

Federalist No. 47, at 313 (S. Mittell ed., 1938); and quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

Petitioners' argument that the "CIA's covert operations are designed to acquire secrets of foreign countries in order to protect the life and liberty of United States citizens" (Petition at 21) is not contested, but Respondents do contest the proposition that the Executive may ignore the Constitution. It is worth noting in the context of this argument and the current post-9/11 climate, that in its 1953 decision in *Reynolds* this Court recognized that the nation was then faced with grave danger and nonetheless found it appropriate to balance the interests of litigants in having a forum and an opportunity to litigate their claims with the national interests in protecting the nation. *Reynolds*, 345 U.S. at 10.[11]

The state secrets privilege and the procedures required by *Reynolds* have for over one-half century protected the nation's secrets while balancing the need for secrecy with other constitutional interests. Petitioners offer no evidence to the contrary other than conjecture. Petitioners' basic premise is that courts cannot be trusted,

[11] The *Reynolds* decision was rendered at the height of the Cold War. Between 1950 and 1953, the Soviet Union had shot down no less than five U.S. military reconnaissance aircraft, and Strategic Air Command aircraft were conducting reconnaissance missions against the Soviet Union while the nation rushed to expand and deploy its nuclear capable forces. *See generally* Symposium at Strategic Air Command Museum, *Cold War in Flames: The Untold Story of Airborne Reconnaissance* (Sept. 12, 1998); presentation by Greg Skavinski, *Secrets of the Cold War*, U.S. News & World Rep., Mar. 15, 1993; Kohn & Harafan, *Strategic Air Warfare* (Office of Air Force History) United States Air Force, 1988, pp. 90-119.

are not competent to deal with issues that touch upon national security and, even in any event, the CIA should not have to be burdened with the procedures of the state secrets privilege. Respectfully, Respondents disagree. So does the Ninth Circuit panel (App. 17a.-31a.), and so does this Court in *Webster*.[12]

Petitioners' reference to "full fledged discovery" in the district court (Petition at 23) is unnecessarily alarmist, taken out of context and overlooks the deference the panel gave to the national security interests present (App. 18a.) (recognizing that Respondents' interest may in the end have to give way to the "larger public good"); (App. 34a.) (noting the prescription in *Reynolds* to give appropriate attention to "the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission"); and (App. 29a. n.10; 39a.) (directing the district court on remand to allow the CIA the opportunity to assert the state secrets privilege); the district court's

[12] This Court's decision in *CIA v. Sims*, 471 U.S. 159 (1985), cited by Petitioners (Petition at 21), supports the premise of the importance of the CIA's work and maintaining the confidentiality of its sources and methods. It does not, however, support Petitioners' premise that *Totten* must be transformed into a jurisdictional bar to accomplish these goals. *Sims* involved a Freedom of Information Act request for classified information. This Court upheld the statutory exemption in 5 U.S.C. § 552(b)(3)(A) against public disclosure based on the DCI's statutory obligation to protect intelligence sources and methods. 471 U.S. at 167-73. It did not involve *Totten* or create a CIA exception to the state secrets privilege. Similarly, Petitioners' citation (Petition at 21) to *Snepp v. United States*, 444 U.S. 507 (1980), and *Department of Navy v. Egan*, 484 U.S. 518 (1988), speaks to the importance of maintaining the confidentiality of classified information, a proposition not challenged by Respondents, the district court, or the Ninth Circuit. Neither *Snepp* nor *Egan* addresses the issues in this case.

own cautionary statements about procedures that will be employed to protect national security; and the limited remedy sought by the Does – a fair *internal* CIA hearing applying the rule of law.

Nor does Petitioners' argument square with this Court's decision in *Webster* that the judiciary is required to balance the needs and interests of a plaintiff presenting colorable constitutional claims with the "extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." *Webster*, 486 U.S. at 604. The panel below respects this basic precept of our democracy in holding that the "national interest normally requires both protection of state secrets and the protection of fundamental constitutional rights." (App. 38a.)

It may be expedient for the CIA not to have to comply with the required procedures of the state secrets privilege, but Petitioners have not demonstrated either that the burden of doing so in this case outweighs the constitutional interests served by compliance or that any secrets will be compromised in the process here. It is a matter worthy of judicial notice that the only branch of government that does not leak secrets is the judiciary.

CONCLUSION

The majority opinion by the Ninth Circuit panel poses absolutely no risk to national security. It requires specifically that "[o]n remand, the government should be given the opportunity before the case proceeds further to assert the state secrets privilege should it choose to do so." (App. 29a.) The majority opinion further requires that "[w]hen evaluating the invocation of the state secrets privilege, the

district court must give the 'utmost deference' to the government's evaluation of what constitutes a state secret that will jeopardize national security." (App. 36a.) The district court also indicated its understanding of the deference to be given any claim of state secrets by the government. (App. 106a.-107a.) (noting the "extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission," quoting *Webster,* 486 U.S. at 604).

The reasons the Agency has chosen not to assert the state secrets privilege to date are obvious. There is no actual risk to national security presented by this case. The Does' complaint seeks an order requiring the CIA to conduct a fair *internal* CIA administrative hearing consistent with due process and substantive law. (App. 117a.-142a.) In such an internal hearing, secrecy is assured and Petitioners do not claim otherwise. Plainly, the CIA's two-prong goal in this case is (a) to exclude the judiciary from any consideration of constitutional issues by mutating *Totten* into a jurisdictional bar instead of part of the state secrets privilege and (b) to avoid any judicial requirement that CIA administrative procedures comply with due process and substantive law. Neither goal is appropriate and both violate basic constitutional precepts.

The majority opinion is conservative, respects national security and breaks no new ground. It is completely consistent with Supreme Court authority, as well as other circuit opinions.

Respondents respectfully ask this Court to deny the Petition.

Respectfully submitted,

STEVEN W. HALE
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ELIZABETH A. ALANIZ
PERKINS COIE LLP
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Attorneys for Respondents

The Honorable Robert L. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN DOE and JANE DOE, husband and wife, Plaintiffs, vs. GEORGE J. TENET, Individually and as Director of Central Intelligence and Director of the Central Intelligence Agency, and THE UNITED STATES OF AMERICA, Defendants.	No. C99-1597L DECLARATION OF JOHN DOE

JOHN DOE states as follows:

1. I am the John Doe denominated as a plaintiff in the caption, but this is not my real name. I am proceeding in this matter using John Doe as a pseudonym for reasons of personal security. I make this declaration in the name of John Doe based on my personal knowledge. I am over 21 years of age and otherwise fully competent to testify herein.

2. My wife and I were formerly citizens of a foreign nation then considered to be an enemy of the United States, and I was a high-ranking diplomat for such foreign nation. We were well educated and highly successful in our society, but were disenchanted with

Communism. For a period during the Cold War, we were residing in a second foreign nation, where I held a senior diplomatic assignment. We resided in the embassy compound and were subject to constant surveillance by the first nation's security service.

3. During this time and at great risk, my wife and I approached a person we knew to be attached to the United States embassy and requested assistance in defecting to the United States. Rather than providing the requested assistance, CIA ("Agency") agents sequestered the us in an Agency safe house. The agents employed various forms of intimidation and coercion to convince us that we could not survive in the United States without Agency assistance. The agents asserted that, to obtain such assistance, we would be required to remain at our current diplomatic post and conduct espionage for the United States for a specified period of time, after which time the Agency would arrange for travel to the United States and ensure financial and personal security for life. The agents assured us that the assistance being offered was approved at the highest level in Washington and was, in fact, required by the laws of the United States.

4. We resisted the requests of the agents, stressing that all we sought was assistance in defecting. The agents persisted, using tactics that induced great fear and uncertainty in us. During this time, a CIA agent, said to be the Chief of Station, made several calls to CIA headquarters to receive instructions and approval of the offers being made to us. After being sequestered in an Agency safe house for nearly 12 hours, and in reliance on the Agency's promises of assistance, we reluctantly

agreed to work "in place" for the United States conducting espionage activities.

5. After carrying out our end of the bargain at great personal risk for the requisite time period, we requested that the Agency arrange for our defection and travel to the United States. Instead of making immediate arrangements for defection, the Agency pressured us to undertake more and different types of espionage activities that would expose us to far greater danger and virtually guaranteed that the nature and extent of these activities would become known to the first nation, putting us at life-long risk of retaliation, including the risk of assassination.

6. Believing we had no other choice, my wife and I complied with these new requests. After performing the additional highly dangerous and valuable assignments, we were eventually brought to the United States and provided with new names and false backgrounds. The Agency offered to place us in a what amounted to a retirement statues, with financial and health benefits. We responded that we would rather integrate into American society and become gainfully employed and productive members of our community. The Agency accepted this and again promised lifetime support to the extent that our earnings were insufficient. The Agency repeatedly promised to provide a "safety net" for us for life, stating that this was required by law.

7. Upon entering the United States, we spent approximately eight months in an Agency safehouse being debriefed by various persons who we understood to be Agency or other government officials. During this time and for a period thereafter, defendants provided us

assistance in the form of education and medical benefits and a modest monetary living stipend. The educational benefits were intended to form the basis of a new identity and "cover" life in the United States and were different from the substantial education and professional experience we had from our former lives. The financial stipend provided by the Agency was not what was promised but it was enough to begin a new life and we accepted this without complaint. As soon as permitted by law, and prior to the termination of benefits by defendants in February 1997, we became citizens of the United States.

8. Using a false name and false resume, and with the Agency's assistance and guidance, I eventually obtained professional employment in 1987. At this time, I was in my late 40s. The initial position was as an apprentice and was probationary.

9. As my salary increased over time, the Agency living stipend decreased and eventually was discontinued. The Agency's financial stipend was initially $20,000 per year, plus paid housing and health care costs. In addition, I was paid for debriefing session. After we left the safehouse, the stipend increased to $25,000 per year, plus health insurance premiums and health care costs. After I became fully employed, the stipend increased to $27,000. During the latter several years of the stipend, the total of the stipend and my earnings equaled $27,000.

10. Attached hereto as Exhibit 1 is a copy of a card hand written on 8/9/89 by the Agency's representative who was my contact in the Seattle area in the 1989 to 1993 time period. This exhibit shows a schedule of

payments to be made by the Agency. For example, for the period April 1, 1992 to April 1, 1993, the Agency was to and in fact did pay my wife and me $3,500 which, together with my salary, brought our total income to $27,000.

11. Attached here as Exhibits 2, 3 and 4 are copies of my W-2 statements for 1991, 1992 and 1993, respectively, received from the putative business that was used to provide a conduit for Agency payments to me. Information relating to the name and identification number of the employer and the name given to me by the Agency and my social security number have been redacted for security reasons.

12. At the time the Agency advised me that the financial stipend would end as my salary reached $27,000 per annum (see Exhibit 1), I asked for the Agency's reassurances that, if my employment were terminated for some reason, the Agency stipend would resume. Agency officials replied yes, with the same assurances other Agency officials had given us previously – namely, the Agency would always "be there" for us and would renew the financial stipend and assist with finding new employment. We relied on the assurances.

13. After a number of years of successfully supporting my wife and me without Agency assistance, in February 1997 I was laid off from my job due to elimination of my position following a corporate merger. This came at a time in my life where my age provided a substantial obstacle to locating new employment. My efforts to find new employment were also limited by my security arrangements with the Agency which limited

me to a certain segment of the employment marketplace, and this segment was in general contraction nationwide. In addition, the Agency's security arrangements required me to continue utilizing the false name and background created by the Agency. To date, my efforts to find new employment have been unsuccessful.

14. In February 1997, in accordance with the procedure prescribed by the Agency for making contact with the Agency, my wife and I wrote our Agency contact providing the details of our situation and asking for assistance. We received no response from the Agency for nearly four months. When a response did come in June 1997, the Agency expressed regret that no funds were available to provide assistance. No other reason was given for not assisting us as they requested.

15. Attached hereto as Exhibit 5 is a true and correct copy of the Agency's June 1997 letter.

16. When further attempts at obtaining Agency assistance failed to produce any results, we sought legal representation.

17. At different times over the years, various Agency representatives told my wife and me that we had "PL-110" status and repeatedly assured us that the Agency was required by law to provide us with financial and other assistance during our lifetime.

18. In addition to the continuation of salary between the layoff notice in February 1997 and April 1997, I received from my former employer a severance payment of approximately $13,000, representing two weeks pay for every year of employment.

19. Despite professional outplacement assistance arranged by my former employer, and my own extensive efforts, I have been unable to obtain new employment. In my opinion, this failure occurred for a number of reasons, including: a) my training and employment experience in the United States is in a very narrow field, and this field is contracting due to mergers and corporate downsizing; b) I had to live the cover life with a false name and false background constructed by the Agency and which was set forth on the false resume created by the Agency, c) the Agency did not assist, as it had in the past, by talking with the senior management of the potential employer and therein disclose by true circumstances; d) my age (in my mid- to late 50s); and e) my relatively poor health. With respect to subpoint c) above, the Agency told me they would always disclose to senior management my true circumstances in conjunction with any prospective employment.

20. In spite of bleak prospects, I continue to search for suitable employment.

21. My wife and I received Washington State unemployment assistance until November 1997, when benefits ran out.

22. In an effort to reduce our cost of living to a minimum, when the unemployment benefits ran out, we temporarily left the United States to live with one of my aging relatives in a former Eastern Bloc country in near subsistence level conditions. This was an act of desperation, as it greatly increased the risk to our personal security.

23. The risk to our personal security is created by the fact that, due to our former positions before defection and the fact that defendants forced us to conduct

intelligence activities that would clearly fingerprint us as having conducted espionage for the United States prior to defection, the security service of our former country imposed a sanction on us which was either death or life imprisonment for me and substantial prison time for my wife.

24. My wife and I are aware that sanctions by the aforementioned security service for some persons have been lifted following the end of the Cold War, but not for persons who formerly occupied senior positions within the government and who were known to have conducted espionage activities. The continued presence of such sanctions causes my wife and me considerable concern and anxiety.

25. While temporarily living with my relative, I obtained employment as an advisor to the president of a commercial company on matters related to international trade. There was only a minimal salary associated with this position, but it was something and it provided some prospect for improvement. Unfortunately, after serving in this position for several months, I came in direct contact with a former associate known to me to be, at least in the past, an officer of the state security service. In order to eliminate further contact with this individual and the associated threat to our personal security, I immediately terminated my employment with the company.

26. About this same time, my wife was experiencing health problems. I was at the time also suffering medical problems. The local medical facilities were hopelessly inadequate and were unable to treat either my wife's or my medical problems.

27. The combination of the scare occasioned by the recognition of me by the former (or perhaps current) security service agent, the need to obtain competent medical treatment for my wife, and a desire to be able to work more closely with our attorneys who were still trying to obtain relief from the Agency, caused us to return to the United States.

28. Since returning to the United States, we have obtained temporary work for approximately three months. Aside from this income, we have been living by borrowing against our modest retirement savings. This has included the payment of some $4,800 to reinstate our medical insurance and some $6,200 for premiums, co-payments and medicine. I still cannot find regular, professional work and my wife is unable to do any physical work due to her medical condition. This causes us great stress and concern, since our assets will soon be depleted if something does not change.

29. If this Court does not issue a preliminary injunction requiring the defendants to resume financial stipend payments during the pendency of this case, we feel that we must leave the United States immediately and go to an Eastern Bloc country in order to reduce our living expenses and to search for employment where we believe there is more opportunity for us under our circumstances.

30. Both my wife and I have significant concern and anxiety over such a move in that we will greatly increase the odds of coming in contact with security service agents who are aware of the sanction against us. Whether such sanction would be imposed or simply the

threat of imposition used for blackmail is immaterial – both cause great concern.

31. Both my wife and I will suffer by the low level of medical services that are available at our intended destination.

32. My wife and I suffer great stress as a result of our uncertain future. Despite our best efforts to work and earn social security benefits, we understand we have qualified for social security benefits of only $845 a month at age 65, and 11 months. Presently, I am in my mid to late 50s, too young to receive the modest social security payments I have earned and too old to do much to change the financial situation, particularly considering the severe constrictions placed on me with regard to potential employment by my secret life, false identity and failing health.

33. Should the Court grant our motion for a preliminary injunction, it would be next to impossible for us to post an injunction bond, other than in a nominal amount.

I CERTIFY UNDER PENALTY OF PERJURY under the laws of the United States of America that the foregoing is true and correct.

SIGNED AND DATED at Seattle, Washington, this 4th day of February, 2000 by JOHN DOE.

/s/ J. Doe
John Doe

PRESENT – 4/01/90	$7000 P/A	
4/01/90 – 4/01/91	6000 P/A	22,500
4/01/91 – 4/01/92	4750 P/A	
4/01/92 – 4/01/93	3500 P/A	27,000

Bob 8/9/89

OMB No. 1545-0008		
2 Employer's name, address, and ZIP code * * *		
3 Employer's identification number * * *		
4 Employer's state I.D. number		
5 Employee's social security number * * *		

6 Statutory employment	Deceased	Person part	Legal rep	Bd2 mmp	Successor	Deferred	Void correspondent
☐	☐	☐	☐	☐	☐	☐	☐

7 Allocated tips	8 Advance EIC payment
9 Federal income tax withheld 290.60	10 Wages, tips, other compensation 5166.64
11 Social security tax withheld 320.32	12 Social security wages 5166.64
13 Social security tips	14 Medicare wages and tips 5166.64
15 Medicare tax withheld 74.92	16 Nonqualified plans

17	18 Other
19 Employee's name, address, and ZIP code * * * SEATTLE WA * * *	
20	21
22 Dependent care benefits	23 Benefits included in Box 10

24 State Income tax	25 State wages, tips, etc.	
26 Name of state	27 Local income tax	
28 Local wages, tips, etc.	29 Name of locality	

IRS APP.
Dept. of the Treasury – Internal Revenue Service

Copy 2 To Be Filed With Employee's State, City, or Local Income Tax Return

Form W-2 Wage and Tax Statement 1991

Employee's and employer's copy compared ☐

OMB No. 1545-0008		
2 Employer's name, address, and ZIP code * * *		
3 Employer's identification number * * *		

4 Employer's state I.D. number		
5 Employee's social security number * * *		

6 Statutory employment	Deceased	Person part	Legal rep	Bd2 mmp	Successor	Deferred correspondent	Void
☐	☐	☐	☐	☐	☐	☐	☐

7 Allocated tips	8 Advance EIC payment
9 Federal income tax withheld 67.60	10 Wages, tips, other compensation 3916.68
11 Social security tax withheld 242.80	12 Social security wages 3916.68
13 Social security tips	14 Medicare wages and tips 3916.68
15 Medicare tax withheld 56.80	16 Nonqualified plans
17 See Instrs. for Box 17	18 Other

19 Employee's name, address, and ZIP code * * * SEATTLE WA * * *	
20	21
22 Dependent care benefits	23 Benefits included in Box 10

24 State Income tax	25 State wages, tips, etc.	
26 Name of state	27 Local income tax	

28 Local wages, tips, etc.	29 Name of locality	

IRS APP.

Dept. of the Treasury – Internal Revenue Service

Copy C For EMPLOYEE'S RECORDS (See Notice on back.)

Form W-2 Wage and Tax Statement 1992

This information is being furnished to the Internal Revenue Service. If you are required to file a tax return, a negligence penalty or other [illegible] may be imposed on you if this income is taxable and you fail to report it.

---

a Control number		Void ☐	OMB No. 1545-0008	
b Employer's identification number * * *				
c Employer's name, address, and ZIP code * * *				
d Employee's social security number * * *				
e Employee's name, address, and ZIP code * * * SEATTLE WA				

1 Wages, tips, other compensation 1166.68	2 Federal income tax withheld 0.00
3 Social security wages 1166.68	4 Social security tax withheld 72.32

5 Medicare wages and tips 1166.68	6 Medicare tax withheld 18.92
7 Social security tax	8 Allocated tips
9 Advance EIC payment	10 Dependent care benefits
11 Nonqualified plans	12 Benefits included in Box 1
13 See instrs. for Box 13	14 Other

15 Statutory employment	Deceased	Person part	Legal rep.	942 wmp.	Subtotal	Deferred compensation
☐	☐	☐	☐	☐	☐	☐

16 State Employer's state I.D. No.	17 State wages, tips, etc.
18 State income tax	19 Locality names
20 Local wages, tips, etc.	21 Local income tax

IRS APP.

Dept. of the Treasury – Internal Revenue Service

Form W-2 Wage and Tax Statement 1993

Copy C For EMPLOYEE'S RECORDS (See Notice on back.)

This information is being furnished to the Internal Revenue Service. If you are required to file a tax return, a negligence penalty or other sanction may be imposed on you if this income is taxable and you fail to report it.

5 June 1997

Dear * * *

Thank you for your letter and resume. We are very sorry that it has taken this long to respond to your telephone calls and letter, but we have been in a state of transition and have been unable to give your problem our fullest attention until recently. We were very sorry to learn that you were laid off from your position at the bank. Please be assured that we have carefully reviewed the information you submitted along with your contract with this organization and the benefits contained therein. As Ms Catney stated in your previous discussions, we sympathize with the situation you now find yourself in but regret that due to our budget constraints, we are unable to provide you with additional assistance. We have discussed your resume with an employment specialist who has suggested a job search company in your area. We were advised that this company specializes in finding employment for persons in your field of banking and financing, but we've have no personal experience or other information relating to its success ratio:

Accountants On Call
601 Union St
Two Union Square
Seattle, Wash. 98101

Janeen Reinhart
206-467-0700

We want you to know that this office has great respect for the people we serve and we remain grateful for your past service to this country. We continue to be concerned for your security and welfare and would hope to be flexible should you require assistance in the future.

Again, we wish you and your family every success.

Sincerely,

/s/ Nancy Clayborne
Nancy Clayborne

The Honorable Robert L. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN DOE and JANE DOE, husband and wife, Plaintiffs, vs. GEORGE J. TENET, Individually and as Director of Central Intelligence and Director of the Central Intelligence Agency, and THE UNITED STATES OF AMERICA, Defendants.	NO. C99-1597L DECLARATION OF STEVEN W. HALE

STEVEN W. HALE states as follows:

1. I am one of the attorneys of record for the plaintiffs, John Doe and Jane Doe, know the contents of this declaration to be true and am otherwise competent to testify thereto.

2. After plaintiffs sought legal representation in their efforts to obtain assistance from the Agency, the Agency granted the me and Elizabeth A. Alaniz security clearance for purposes of representing plaintiffs in their claim with the Agency.

3. During a meeting in August 1997 at which the security clearances were granted, the Agency representative (an attorney from the office of General Counsel)

purported to explain the Agency's unilateral determination that the benefits previously provided were "adequate" for the services rendered and that plaintiffs were entitled to no further benefits. The Agency's attorney did not at this time claim any budgetary problems.

4. During this meeting, the Agency's attorney made statements concerning plaintiffs' services for the United States, the benefits previously provided to plaintiffs, and explained that the Agency's decision on benefits was based on an after-the-fact subjective evaluation of the services performed. The statements by the Agency attorney relating to services rendered was incomplete, misleading and substantially understated plaintiffs' services as compared with the description provided to us by plaintiffs. The Agency's representative was unable to reply to questions we posed because, as she said, she "was just a messenger" and had no substantive knowledge of the facts. We, therefore, requested an opportunity to meet with Agency persons who were (a) substantively knowledgeable and (b) empowered to make decisions. This request was denied. Instead, the Agency advised that plaintiffs could appeal the decision to the DCI.

5. We prepared an appeal, on behalf of the plaintiffs, to the DCI. In doing so, the following occurred:

(a) We repeatedly requested from the Agency copies of the regulations that governed the appeal process. These requests were ignored and no regulations were ever provided.

(b) We repeatedly requested copies of the PL-110 rules and regulations. These requests were ignored and no rules or regulations were ever provided.

(c) We repeatedly requested access to records potentially relevant to this matter and which were classified within the level of security clearances granted us. These requests were denied or ignored.

(d) We repeatedly requested access to the persons with personal knowledge of the relevant facts. These requests were denied or ignored.

(e) We requested face-to-face meetings with responsible Agency officials, with or without plaintiffs present, to discuss the relevant facts and circumstances. These requests were denied or ignored.

(f) Notwithstanding the considerable obstacles presented by the Agency's aforestated failures to provide even the most basic information, we filed, on behalf of the plaintiffs, their appeal with the DCI on or about December 9, 1997. At the same time, we requested an independent review by the Agency's Inspector General ("IG"). This request and follow-up requests for IG review have not, to my knowledge, resulted in any review by the IG.

(g) Subsequently, counsel for the Agency orally advised us that the Deputy Director of Operations (not the DCI) had denied plaintiffs' appeal. Counsel for the Agency advised that a further appeal was possible to a panel of former Agency officials (referred to as the Helms Panel after its chairperson, former DCI Richard Helms). Being confused about the appeal process as a result of the inconsistent and contradictory oral information provided by the Agency, we again requested copies of the regulations or rules governing such appeals. This request, like all before it, was ignored.

(h) We requested written confirmation of the Agency's determination of the appeal. This request was ignored.

(i) We pursued, on behalf of plaintiffs, an appeal to the Helms Panel and, in doing so, renewed our requests for access to documents and persons and for a copy of regulations governing the appeal process. In addition, we made repeated requests for an opportunity for plaintiffs themselves or, at a minimum, for us to appear before the Helms Panel and present their case. We also made repeated requests for an opportunity to confront witnesses – whose identities could, if necessary, be concealed. These requests were directed both to the Agency and to the Helms Panel. Other than receiving a voice mail message from Mr. Helms, all such requests were either denied or ignored.

(j) Counsel for the Agency subsequently advised me orally that the DCI had determined, based on the recommendation of the Helms Panel, that the Agency should provide certain benefits to plaintiffs for a period not to exceed one year, and nothing thereafter.

(k) I was allowed to read the DCI's written decision at a secure location in the Washington D.C. area. Even though the DCI's decision document did not bear any classification, the Agency refused to provide me with a copy of the document. The DCI's written decision did not state the reasons for rejecting the legal arguments and factual assertions advanced by plaintiffs in their appeal or the evidence relied upon in reaching his decision. In addition to the DCI's decision, I was also allowed to read a document that purported to be minutes of the proceeding before the Helms Panel. The document was very short and general in detail. It reported that three persons involved in the recruitment, handling, and resettlement of plaintiffs presented testimony. The brief summary of their statements, which totaled several sentences, indicated testimony that was incomplete, misleading and substantially understated plaintiffs' services as compared with the facts as related to me by plaintiffs,

other than the fact that one witness reportedly testified that he or she explained to plaintiffs that PL-110 status is a life-long commitment for security.

(l) Counsel for the Agency subsequently advised me that in order for plaintiffs to accept the benefits of the DCI's decision, they would have to execute full and complete waivers and releases. The DCI's decision document itself makes no mention of waivers or releases.

(m) We subsequently wrote counsel for the Agency asking for clarification of whether the appeal process and the DCI's decision represented an adjudication of plaintiffs' rights, and if so, how such an adjudication could be predicated on a demand for a waiver and release. The Agency has not responded.

6. Whenever I attempted to discuss the merits of the dispute with Agency lawyers, the response was one or more of the following:

(a) On several occasions, the call or letter by us requesting a meeting or discussion was ignored without even the courtesy of a response;

(b) On the few occasions when a dialogue resulted, never was the Agency lawyer willing or able to discuss the merits, notwithstanding the fact that Ms. Alaniz and I had been granted security clearances; or

(c) When we pointed out a failure of the Agency to consider the merits of the dispute according to accepted legal principles and indicated a willingness to go to court if the Agency did not respond appropriately, the Agency lawyer's response was "how are you going to get around *Totten*?

7. The reason for the Agency's unwillingness to discuss the merits of the case with us, notwithstanding the

fact that the Agency had granted us security clearances specifically for the purpose of representing plaintiffs in this matter, was never explained by the Agency.

8. Attached hereto as Exhibit 1 is a true and correct copy of the Report on the Hearings on Federal Government's Handling of Soviet and Communist Bloc Defectors, Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, October 1987.

9. In one of the documents shown to me by the Agency, a document that bore no security classification, the Agency stated that it designated plaintiffs as having "PL-110" status. To the best of my recollection, this document was a response to a staff member of the U.S. Senate. Aside from admitting the plaintiffs' PL-110 status, the summary of plaintiffs' work for the Agency in this document was, when compared with what has been related to us by plaintiffs, incomplete, misleading and substantially understated plaintiffs' services.

10. Attached hereto as Exhibit 2 is a true and correct copy of a letter we received from the Central Intelligence Agency approving plaintiffs' complaint for public filing.

I CERTIFY UNDER PENALTY OF PERJURY under the laws of the United States of America that the foregoing is true and correct.

SIGNED AND DATED at Seattle, Washington, this 4th day of February, 2000 by STEVEN W. HALE.

/s/ Steven W. Hale
Steven W. Hale

FEDERAL GOVERNMENT'S HANDLING OF SOVIET AND COMMUNIST BLOC DEFECTORS

HEARINGS

BEFORE THE

PERMANENT
SUBCOMMITTEE ON INVESTIGATIONS

OF THE

COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

OCTOBER 8, 9, 21, 1987

FEDERAL GOVERNMENT'S HANDLING OF SOVIET AND COMMUNIST BLOC DEFECTORS

THURSDAY, OCTOBER 8, 1987

U.S. SENATE,
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The subcommittee met at 9:33 a.m. in room SD-342, under authority of S. Res. 80, Section 13, dated January 28, 1987, Hon. Sam Nunn, chairman of the subcommittee, presiding.

Members of the subcommittee present: Senator Sam Nunn, Democrat, Georgia; Senator Jim Sasser, Democrat,

Tennessee; Senator William V. Roth, Jr., Republican, Delaware; and Senator William S. Cohen, Republican, Maine.

Members of the professional staff present: Eleanore J. Hill, Chief Counsel and Staff Director; John F. Sopko, Deputy Chief Counsel; Mary D. Robertson, Chief Clerk; Kathleen A. Dias, Executive Assistant to the Chief Counsel; David B. Buckley, Investigator; Cynthia Comstock, Staff Assistant; David Munson, Investigator; Harriet J. McFaul, Counsel; Harold Lippman, Investigator; Daniel F. Rinzel, Chief Counsel to the Minority; Mary K. Vinson, Staff Investigator to the Minority; Marilyn Munson, Secretary; Declan Cashman, Secretary; Evelyn Boyd (Senator Sasser); Rick Goodman (Senator Pryor); Allie Giles (Senator Levin); Natalie Bocock (Senator Cohen); Jeff Landry (Senator Stevens); Lori Beth Feld (Senator Trible); Marianne McGettigan (Senator Rudman); Jim Dykstra (Intelligence Committee); and Richard Dill.

[Senators present at convening of hearing: Senators Nunn and Cohen.]

[The letter of authority follows:]

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,
Washington, DC.

Pursuant to Rule 5 of the Rules of Procedure of the Senate Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, permission is herby granted for the Chairman, or any Member of the Subcommittee as designated by the Chairman, to conduct open and/or executive session hearings without a quorum of two members for the administration of oaths and the taking of

testimony in connection with hearings on the Federal Government's Handling of Soviet and Communist Bloc Defectors, to be held on October 8, 9 and 21, 1987.

SAM NUNN,
Chairman,
WILLIAM V. ROTH, JR.,
Ranking Minority Member.

* * *

Donald Jameson retired from a distinguished career at the CIA, where he became an expert on the subject of defectors and defection. Lt. Gen. James Williams retired recently as Director of the Defense Intelligence Agency, a position in which he had direct experience with the value of the defector to military intelligence.

I think that it might be useful at the outset to define a few terms. At Jamestown, when we use the word "defector," we mean an individual who has illegally removed himself or herself from jurisdiction of a Communist government. We do not as a rule work with emigres who have left their former countries legally.

When we use the term "high level," we mean someone whose position and experience in his former country was such that he is qualified to make a sustained contribution to Western understanding of the East.

Senator NUNN, Mr. Geimer, unfortunately, we have a vote up there. I would like to hear your testimony, and we don't have anybody else here. This is a strange time to take a break, but we are going to have to take about a five-minute break. I will run and vote, and come back as soon as possible. I think that it will be better than going all the way through it. I will be back in about five minutes.

[Recess.]

Senator NUNN. Mr. Geimer, why don't you proceed right where you left off.

MR. GEIMER. I was explaining that Jamestown represents high level defectors. I was saying that when we say high level, we mean someone whose position and experience in his former country was such that he is qualified to make a sustained contribution to Western understanding of the East. Admittedly, applying this label entails a certain amount of subjectivity.

Within the category of "defector," we distinguish four groups. First, there are the people with relatively little education and who occupied relatively low positions in their former country. I refer here to seamen who jump ship, and soldiers who defect in Afghanistan, for example. Jamestown does not work with people of this type because they have little of interest to say beyond the initial press conference.

Second, there are the people from ordinary occupations who have transferable skills. I refer here to hockey players, physicians, engineers, ballerinas, and so forth. Jamestown does not work with people in this category. For the most part these individuals simply want to practice their profession in freedom. They have relatively little trouble adjusting to life in the West, and little interest in participating in the public dialogue on East-West issues.

Third are the intelligence officers. Usually people in this category live quiet lives in the United States. They are given new identities, learn new skills, and live anonymously. This group is believed to be at risk of reprisal from their former governments and, as a result, are not given to public activity.

In most cases, the public and Jamestown would not even know of the existence of an intelligence officer who has defected. There are a few exceptions, however, and Jamestown does work with some former intelligence officers who are willing to write books and to lecture.

The fourth category consists of people who are diplomats, or occupied other high positions in government or in the academics world. These are the people with whom Jamestown works, because we believe it important that the experience and insights of such people be shared as widely as possible in the West. These are the people from whom we can learn the nature and purposes of our adversaries in the East.

Among those whom Jamestown assists, as I mentioned above, are a few former intelligence officers. These are supported by the Federal government under what is commonly referred to as Public Law 110. This law requires the government to support for life individuals who defect and who bring with them important intelligence. However, the vast majority of the people we work with receive no financial assistance. They work for a living just like anyone else.

If an individual is newly defected and requires resettlement assistance, Jamestown will help him find housing, employment, language training, driver's license, or whatever is needed. If an individual is well settled here, Jamestown will provide whatever services are necessary to enable the defector to convey his message to policy-makers and the public.

We may provide editing and translation services for those who are writing articles and books. We may provide training in public speaking for those who have joined

Jamestown's speakers bureau. The one thing that we don't provide, because we don't have enough of it, is money.

Most of the people Jamestown works with could and should work full time speaking, writing, and teaching in the field of international relations. They are, after all, a unique and scarce national resource. However, this resource is not being fully used. Let me cite some examples.

A former Soviet scientist works for the U.S. Government in a capacity unrelated to his education or experience. He should be a full-fledged member of the American academic community, but there are no funds to support his research or to enable him to acquire a degree from an American university.

A former Soviet military officer and university professor makes his living teaching Russian. In our opinion, he should be studying for a U.S. degree so that eventually he can teach in a university here.

A former Soviet diplomat is studying for a graduate degree here, but his studies suffer because he must work nights repairing refrigeration equipment in order to support himself.

A former Cuban diplomat, with a wealth of experience, has just lost his job as an editor because the company he worked for has collapsed. His future is uncertain.

A former ambassador from Ethiopia, a highly educated and cultivated man, is unemployed. For a while he earned a living doing menial work, but found it beyond his physical capacity.

A former high level diplomat from Eastern Europe is nearing the end of a temporary assignment. He would like

to obtain a U.S. graduate degree and pursue a career in teaching, but this is impossible because he needs to support his family.

* * *

unique talents, the negative impact upon future defections, and the propaganda use that the Soviet Bloc makes of these failings. These problems affect not only the number of future non-intelligence defectors but also the critically important defection of the intelligence officer or other essential alien since their treatment is inexorably intertwined to the would-be defector.

III. THE DEFECTOR PHENOMENA

A) Definition: Who Are They?

Unlike "political refugee," "asylee" or "immigrant" that have clear legal definitions and consequences, the term "defector" has been used to cover a wide range of activities and any number of individuals or events. Thus it has been used to describe the 1986 decision of American scientist Arnold Lokshin to move with his family to the USSR[4], the 1960's espionage activities of Col. Penkovsky within the Soviet Union[5], as well as the recent expulsion of known dissidents such as Aleksandr Solzhenitsyn and Yuri Orlov[6].

Congress has provided for selective assistance to a very small number of defectors who are of special interest to the the intelligence community. Section 7 of the *Central Intelligence Act of 1949*, (50 USC 403h), states:

> *Admission of essential aliens; limitation on number*
>
> "Whenever the Director, the Attorney General, and the Commissioner of Immigration shall determine that the entry of a particular alien into

> the United States for permanent residence is *in the interest of national security or essential to the furtherance of the national intelligence mission*, such alien and his immediate family shall be given entry into the United States for permanent residence. . . . Provided, That the number of aliens and members of their immediate families . . . , shall in no case exceed one hundred persons in any fiscal year."

Due to the nature of their mission, these essential aliens are limited to an extremely small number of defectors who for clear national security reasons are afforded the protection and special handling of the Intelligence Community. For the most part, due to their special security problems, these defectors are unable or unwilling to enter the public arena under their real names or identities.[7]

In practice only an exceedingly small number of people fall into this category. The staff found that the bulk of those people one would normally classify as "defectors" have tended to fall outside of this definition, despite the fact that many of them are often privy to important and otherwise unavailable information that would be useful in the public domain for the analysis of Soviet and East European affairs.

Even when this type of defector is eager to contribute his or her knowledge to the analytical community, the staff found

* * *

CENTRAL INTELLIGENCE AGENCY

WASHINGTON, D.C. 20505

Office of General Counsel

13 August 1999

PERSONAL AND CONFIDENTIAL

Steven Hale, Esq.
Perkins Coie
1201 Third Avenue
40th Floor
Seattle, Washington, 98101

Dear Mr. Hale:

We have completed the review of your draft complaint. You may file it as is. Our review was not for the purpose of identifying and removing classified information. Should you elect to file the complaint, the Agency reserves the right to decline to confirm or deny any and all allegations in your complaint when an official confirmation or denial would disclose classified information.

Sincerely

/s/ M. D. Darby
M. Diane Darby
Area Security Officer

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN DOE and JANE DOE, husband and wife, Plaintiffs, vs. GEORGE J. TENET, Individually and as Director of Central Intelligence and Director of the Central Intelligence Agency, and THE UNITED STATES OF AMERICA, Defendants.	NO. C99-1597L PLAINTIFFS' MOTION TO STRIKE PORTIONS OF WILLIAM H. McNAIR'S DECLARATION **NOTE ON CALENDAR TO BE HEARD WITH DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, RENEWED MOTION TO DISMISS NOTED FOR OCTOBER 13, 2000.**

I. MOTION

Plaintiffs John Doe and Jane Doe respectfully move the Court for an order striking the following portion of the declaration of William H. McNair ("McNair") dated July 17, 2000:

> I can inform the court unequivocally that there are *no* Agency or other US federal regulations that require the CIA to provide lifetime subsistence assistance to individuals brought into the United States under the authority of PL-110. **Neither PL-110, nor any other law, statute, regulation, internal policy, unstated principle or anything else has ever before, or does now, obligate the Agency to provide**

> **any form of lifetime financial assistance to individuals brought into the United States by the CIA under the authority of PL-110.**

McNair declaration at 3-4, ¶ 5 (emphasis in original).

II. ARGUMENT

Defendants have moved for summary judgment or, in the alternative, to dismiss the pending action. In support of their motion, defendants filed a declaration from William H. McNair, the Information Review Officer for the clandestine service of the CIA (the Directorate of Operations). The identified portion of the McNair declaration referenced above should be stricken because 1) when deposed, Mr. McNair was unable to identify which portions of the declaration were based on his personal knowledge as opposed to that of others; 2) Mr. McNair has no responsibility or specialized expertise in either making or interpreting such regulations and thus his opinions are unqualified and lack foundation; 3) Mr. McNair's characterizations and opinions as to what the regulations provide constitute legal conclusions; and 4) they are hearsay.

Statements in declarations and other evidence must be stricken or ignored if they constitute hearsay, legal conclusions, inadmissible opinions, or otherwise are incompetent or inadmissible. Fed. R. Civ. P. 56(e) requires that such declarations be made on personal knowledge of such specific facts as would be admissible in evidence, and affirmatively shown by an affiant competent to testify to those specific facts.

A. Mr. McNair is Not Competent to Testify On the Matters Addressed in the Portion of His Declaration that Plaintiffs Seek to Strike

1. Defendants have not established that the subject testimony is based on Mr. McNair's personal knowledge.

In his deposition testimony, Mr. McNair admitted that the CIA's attorneys drafted his declaration, that the declaration was basically boilerplate, and that he could not determine which parts of the declaration are based on something other than his personal knowledge:

> Q: Now with regard to the declaration, did they [CIA lawyers] draft it first or did you draft it?
>
> A: They work actually off of – I don't want to say boilerplate, but we know what the issues are, and then it will come to me maybe twice in draft.
>
> Q: If I wanted to ask you what part in this declaration was in part at least based upon something other than your personal knowledge, you couldn't point that out?
>
> A: Frankly, I doubt it because they run together.

Deposition of William H. McNair dated September 7, 2000 at 56 (submitted as Exhibit A to the Declaration of Steven W. Hale, September 25, 2000.) In response to another question about whether he could determine what part of the declaration was based on something other than his personal knowledge, Mr. McNair responded, "I don't think I could parse that out." McNair Dep. Trans. at 54. The subject testimony must be stricken pursuant to Fed. R. Evid. 602.

2. Mr. McNair Is Not Qualified to Render an Opinion About the Meaning of the CIA's Regulations.

Mr. McNair admitted in deposition that he has no responsibility for making or interpreting CIA regulations and that his sole function with regard to the regulations is a security function, that is, in situations where the regulations are to be released to someone without the requisite security clearance, Mr. McNair's function is to ensure that the regulations are released in a redacted form that does not result in the release of information potentially harmful to the national security. McNair Dep. Trans. at 105. Mr. McNair is not expressly offered by defendants as an expert and he obviously is not an expert on the meaning of regulations. Mr. McNair's opinion is also not admissible as lay opinion as they are not "rationally based on the perception of the witness." Fed. R. Evid. 701, 702.

McNair also admitted that he does not know what procedures the CIA used in responding to plaintiffs' grievance. *Id.* at 90. Yet, the portion of his declaration to which the plaintiffs object states that Mr. McNair is familiar with the laws, statutes, regulations and internal policies that govern the financial assistance given to individuals brought into the United States by the CIA. Such a statement is not admissible because Mr. McNair has no personal knowledge of the procedures for responding to plaintiffs' grievance.

3. Mr. McNair's Testimony Constitutes a Legal Opinion Which He is Not Qualified to Offer.

Mr. McNair's opinions about the CIA regulations are legal conclusions which he is not competent to provide. *See*

Fed. R. Civ. P. 56(e); Fed. R. Evid. 701. Mr. McNair's declaration states that "[n]either PL-110, nor any other law, statute, regulation, internal policy, unstated principle or anything else has ever before, or does now, obligate the Agency to provide any form of lifetime financial assistance to individuals brought into the United States by the CIA under the authority of PL-110." McNair declaration at 3-4. Whether the CIA is obligated by law to provide certain assistance to individuals brought into the U.S. by the CIA is a legal question which Mr. McNair is not competent to address. Mr. McNair is an Information Review Officer. It is not his job to interpret laws or CIA regulations. He stated that he does not even know if any regulations exist that would govern the panel that deals with resettlement grievances. McNair Dep. Trans. at 35. Because the subject portion of his declaration provides a legal conclusion about CIA regulations, it must be stricken.

B. Mr. McNair's Opinions Are Hearsay.

The subject portions of Mr. McNair's declaration is hearsay and is not admissible under any recognized exception to the hearsay rule. Fed. R. Evid. 801, 802.

III. CONCLUSION

For the forgoing reasons, plaintiffs request that the indicated portion of Mr. McNair's declaration be stricken.

DATED this 3rd day of October, 2000.

PERKINS COI LLP

By /s/ Steven W. Hale
Steven W. Hale, WSBA #5993

By /s/ Elizabeth A. Alaniz
Elizabeth A. Alaniz, WSBA #21096
ATTORNEYS FOR PLAINTIFFS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN DOE; et al., Plaintiffs-Appellees v. GEORGE J. TENET, individually and as Director of Central Intelligence and Director of the Central Intelligence Agency; et al., Defendants-Appellants	No. 01-35419 DC# CV-99-1597-RSL Western Washington (Seattle) ORDER (Filed Aug. 6, 2001)

Appellees' motion to expedite this appeal is granted. The provisions of Ninth Circuit Rule 31-2.2(a) shall not apply to this briefing schedule.

Appellants' opening brief is due 30 days from the filing date of this order; appellees' answering brief is due within 28 days after service of the opening brief; and appellants' optional reply brief is due within 14 days after service of the answering brief.

Appellants shall monitor the issuance of the certificate of record. *See* Fed. R. App. P. 11(a); 9th Cir. R. 11-2. Absence of the certificate of record may delay the resolution of this appeal.

The Clerk shall calendar this case on the next available calendar following receipt of appellees' brief.

For the Court

/s/ Martin Lewallen
Martin Lewallen
Motions Attorney/Deputy Clerk
9th Cir. R. 27-7
General Orders/Appendix A

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

Office of General Counsel

1 September 2000

VIA FACSIMILE
Steven W. Hale, Esq.
Perkins Coie, LLP
1201 Third Avenue
Suite 4800
Seattle, Washington 98101-3099

Re: *Doe v. Tenet, et al.*
(US Dist. Ct. Case No. C99-1597L)

Dear Mr. Hale:

Enclosed are Defendant's production in response to Plaintiff's First Requests for Production to Defendants and pursuant to the agreement you reached with Assistant United States Attorney Harold Malkin.

As Mr. Malkin informed you, Defendant objects to the Requests for Production on the ground that information contained in documents responsive to the request is classified pursuant to Executive Order 12958, 3 C.F.R. 333 (1995), *reprinted as amended* in 50 U.S.C.A. § 435 note (1995); and also privileged pursuant to the Director of Central Intelligence's statutory mandate to protect intelligence sources and methods. Section 103(c)(6) of the National Security Act of 1947, *as amended*, codified at 50 U.S.C. § 403-3(c)(6); and also privileged under the Central Intelligence Agency Act of 1949, *as amended*, 50 U.S.C. § 403g. Defendant further objects to the Requests on the ground that they are overbroad and not reasonably calculated to lead to the discovery of admissible evidence as they would request information contained in responsive

documents that would be outside the relevant subject matter of this litigation.

Without waiving these objections, Defendant responds to the Requests by producing the attached documents in a redacted form. Please note that no responsive documents have been withheld, and that all relevant portions of responsive documents have been provided, albeit in a redacted form. William McNair, whose deposition is set for 7 September 2000, is the person responsible for these redactions.

I look forward to meeting with you on September 7 for Mr. McNair's deposition.

Sincerely,

/s/ Daniel L. Pines
Daniel L. Pines
Attorney-Advisor

Enclosures:
as stated

cc: Harold Malkin, Esq.
(via facsimile; with enclosures)

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

General Counsel **OGC-88-53371**
12 December 1988

Stephen A. Saltzburg
U.S. Department of Justice
Office of Assistant Attorney
General
Criminal Division
Room 2113
10th and Pennsylvania Ave., N.W.
Washington, D.C. 20530

Dear Steve:

I am writing to request your assistance in revising certain understandings made in a 1949 letter to the Attorney General by then DCI Admiral Hillenkoetter concerning CIA commitments to those aliens permitted entry into the United States under the provisions of 50 U.S.C.A. 403h. In that letter, Admiral Hillenkoetter assured DOJ that * * * "shall not become a public charge prior to his obtaining United States citizenship." At the time of this original commitment, we believed that * * * would seek American citizenship at the earliest possible moment when they first became eligible for naturalization. Unfortunately, our experience over the years indicates that this 1949 commitment can act as an impediment and financial disincentive to some * * * obtaining U.S. citizenship. It is, of course, the desire of the CIA to encourage * * * to become totally integrated into the American way of life. Such a goal is furthered, we believe, when * * * acquires U.S. Citizenship.

Certainly, the CIA believes it has an obligation to support each of its * * * for a reasonable period of time

and, in some cases, based upon unique circumstances such as illness, age, or indigency, this commitment may be for life. The CIA firmly believes, however, that such a decision should be made by the CIA based upon the merits of each case, and should not be controlled by * * * unwillingness to pursue either available job opportunities or U.S. citizenship. Unfortunately, under the provisions of the 1949 commitment, * * * is able to blackmail the CIA by refusing to become a U.S. citizen, thus requiring the CIA to support him for an indefinite period of time.

The CIA has found that, prior to obtaining U.S. citizenship, many * * * will ask if acquiring American citizenship will affect CIA responsibilities to them. It is the policy of the CIA to answer such questions truthfully. The CIA believes that financial considerations should have absolutely no bearing upon whether * * * decides to become a citizen. It is for these reasons that the CIA requests a revision of the 1949 understanding.

The CIA, therefore, proposes that its obligation to * * * be changed as follows:

> "The CIA will ensure that * * * shall not become a public charge prior to the time he or she becomes a U.S. citizen, or for two years following the time he or she is eligible to obtain U.S. citizenship, whichever occurs first."

Because the majority of * * * have been Communist Party members, * * * in such cases may not be eligible to apply for citizenship for a period of 10 years. To cover court and other potential delays in the processing of * * * citizenship application, it seems reasonable to continue this financial commitment for an additional two years.

CIA concerns with the 1949 commitment are not caused by monetary considerations. The amount required to keep * * * off the public welfare rolls is generally far below what is spent on those we determine to support. The foremost objective of the CIA is to resettle the * * * and to enable the * * * to become a productive member of American society. It is the belief of the CIA that this new proposal is in full compliance with the spirit of the original commitment and will more than meet any obligations the CIA has to its * * * .

It is my understanding that this proposal has been discussed with appropriate members of the Immigration and Naturalization Service and that they have no objections to the proposed change.

Your consideration of the above issues is appreciated. Either I or * * * of my office (40340) is available to discuss this matter further.

Sincerely,

* * *

Russell J. Bruemmer

* * *

The Honorable
The Attorney General
Department of Justice
Washington 25, D.C.

Sep. 8, 1949

Dear Mr. Attorney General:

Reference is made to our previous letter to the Attorney General, dated 1 August 1949, concerning Section 8 of the Central Intelligence Act of 1949. Pursuant to that letter, discussions have been held between representatives of your office and the Immigration and Naturalization Service, and representatives of this Agency. In addition, there is now in process a specific request for motion under Section 8 of the above-mentioned Act.

In the discussions held, it was deemed necessary that additional precautions be set up in the procedure for handling cases of this type. Consequently, I wish to assure you that, in any case in which CIA recommends that an alien be permitted to enter the United States under the provisions of Section 8, * * * this Agency will be in a position to inform you as to his whereabouts and activities at all times whether the alien is in the United States or abroad. Further, we shall advise the Immigration and Naturalization Service of such an alien's location while in the United States, and any change in residence or employment will be reported immediately. Also, when such an alien departs from the United States, we shall advise the Immigration and Naturalization Service.

In the event an alien is permitted to enter under the aforementioned Section * * * , we guarantee that he shall not become a public charge prior to his attaining U.S. citizenship. In such cases we propose to keep the Immigration

and Naturalization Service informed as to the alien's location until he shall depart from the United States or until he shall acquire United States citizenship. If the proposal that CIA keep Immigration and Naturalization Service informed of the alien's location * * * is not satisfactory and if you prefer that the Federal Bureau of Investigation perform this function, we assume you will so notify this Agency.

It should be understood that in carrying out the proposed procedures, this Agency will administer them in its role of a sponsor of the alien. In no case can this Agency exercise physical restraint over an alien or in any way assume internal security functions in view of the provisions of the "National Security Act of 1947" (P.L. 253). In any particular case, and at any time, when derogatory information is received by CIA concerning such an alien, we shall notify you immediately of the information received.

I should like to express my appreciation for the cooperation which my original proposal has evoked in your office. I trust that the above will enable satisfactory procedures to be developed within your office.

Sincerely yours,

/s/ signed
R.H. Hillenkoetter
Rear Admiral, U.S.N.
Director of Central Intelligence

* * *

Dispatched by Special Messenger to Mr. Willard Folly, I&N this date.

Excerpt from relevant regulation –A; item 10.b. date: 07/13/90

Individuals who are accepted * * * and become our Organization's responsibility may be resettled with their immediate families either in our Country or in some third country, insofar as possible that they prefer. * * * Whether in or out of our Country, our Organization assumes certain responsibilities to assist * * * in establishing a normal life and becoming self-supporting. If * * * is resettled in our Country, our Organization's support responsibility normally terminates when he/she acquires citizenship in our Country, but may be terminated earlier.

Excerpt from relevant regulation –A; item 10.a. date: 06/25/99

Our Organization assumes certain responsibilities to assist * * * in establishing a normal life and becoming self-supporting. If * * * is resettled in our Country, our Organization's support responsibility normally terminates when he/she becomes eligible for citizenship in our Country, but may be terminated earlier. This responsibility is limited to individuals and their immediate families who are formally accepted for resettlement assistance. It does not include applicants who lack the "special value" required for status under * * * even though they may be resettled in our Country with our Government's assistance. * * *

Excerpt from relevant regulation –A; item 7, b: date: 01/15/81

Individuals who are accepted * * * and who thus become a * * * responsibility, may with their immediate families be resettled either in our country or in some third country, insofar as possible in the country they prefer. * * * Whether in or out of our country, * * * assumes certain responsibilities to assist the * * * in establishing a normal life and becoming self-supportive. If * * * is resettled in our country, * * * support responsibility normally terminates when * * * has acquired citizenship in our country, but may be terminated earlier if * * * is self-supporting.

Excerpt from relevant regulation –B; item 2,d, (5). date: 01/04/99

It is CIA policy to ensure that a recipient of Section 7 benefits will not become a public charge prior to becoming eligible for U.S. citizenship. CIA may, however, continue to provide financial support to * * * who has been resettled * * * even after * * * has obtained citizenship if * * * determines, in consultation with OGC, that such support is operationally warranted under the totality of the circumstances. The safety and security of * * * are the continuing responsibility of CIA, and expenditures for these purposes, as contrasted to general financial support described above, may be undertaken notwithstanding other limitations described in this regulation.

Excerpt from relevant regulation –B, item c. (4) – (6) date: 06/23/81

As a general rule, CIA financial support for * * * should cease as soon as possible. Likewise, financial support for * * * as a general rule should diminish as soon as possible, particularly after * * * becomes partially self-supporting. CIA has an obligation, however, to ensure that * * * will not become a public charge prior to the time of becoming a citizen or for a period of 10 years of residence in the United States, whichever occurs first. CIA may continue to provide financial support to * * * even after * * * has obtained citizenship or resided in the United States for 10 years, if * * * determines that such support is necessary. The safety and security of * * * are continuing responsibilities of CIA, and expenditures for these purposes, as contrasted to general financial support described above, may be undertaken notwithstanding other limitations described in this regulation.

In any instance in which financial support to * * * has not discontinued after 10 years, the Chief, * * * shall submit to * * * a memorandum recommending either continuation of financial support, termination of such support, or other appropriate action. * * * in coordination with OGC, will approve the continuation or termination of financial support.

No element of CIA shall initiate action to secure passage of a private bill designed to shorten the period of eligibility for citizenship * * * without prior coordination with the Legislative Counsel and the express approval of the DCI.

TRANSCRIPT OF PROCEEDINGS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN DOE AND JANE DOE, Plaintiffs, v. GEORGE J. TENET, et al., Defendants.	:	Civil Action No. C99-1597L Judge Lasnik

Deposition of WILLIAM H. McNAIR

Pages 1 thru 114

Washington, D.C.
September 7, 2000

MILLER REPORTING COMPANY, INC.
735 8th Street, S.E.
Washington, D.C. 20003
(202) 546-6666

[1] The deposition of WILLIAM H. McNAIR, called for examination by counsel for Plaintiffs in the above-entitled matter, pursuant to notice, in the offices of Perkins Coie, 607 14th Street, N.W., Washington, D.C., 20005, convened at 10:15 a.m., before Cheryl K. Gerber, a notary public in and for the District of Columbia, when were present on behalf of the parties:

[2] APPEARANCES:

On behalf of the Plaintiffs:

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On behalf of the Defendants:

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[3] CONTENTS

EXHIBITS

[4] PROCEEDINGS

MR. HALE: The reporter and the witness and Daniel and myself is the totality here, Harold.

MR. MALKIN: I'm fine.

MR. HALE: Good.

Could you swear the witness, please.

MR. MALKIN: Can I just say, Mr. McNair, you and I have never met. Hello.

MR. McNAIR: Hello there.

MR. MALKIN: Okay, Steve. I'm ready, and you'll put something on the record about the need for us to caucus if that arises?

MR. HALE: Yep.

Whereupon,

WILLIAM H. McNAIR

was called for examination by counsel for Plaintiffs and, after having been duly sworn by the notary public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR PLAINTIFFS

BY MR. HALE:

[5] Q. Would you state your full name, please.

A. William Hayes McNair.

Q. And your position with the Central Intelligence Agency?

A. I'm the Information Review Officer for the Director of Operations for CIA.

MR. HALE: Before we get started, Mr. Malkin and I have agreed that if there's any need to confer with counsel since he's appearing by telephone – and of course, Mr. Pines is here also – that you will let me know, one of you, and the reporter and I will be pleased to step out of the room to allow you to caucus privately.

So if there's any question, just ask for a break, and we'll take that break. Okay.

Harold is that okay?

MR. MALKIN: That's fine with me.

Daniel, is that okay with you?

MR. PINES: That's fine with me as well.

MR. MALKIN: Thanks.

BY MR. HALE:

Q. Before we get started substantively, [6] Mr. McNair, I just want to make sure that we have a common understanding. I'm going to try to ask you questions that do not require you to –

MR. PINES: Divulge?

BY MR. HALE:

Q. – divulge classified information in response. If I fail, I'm sure you'll point it out.

But I want to make sure that we agree that if I do ask you such a question that you will either object or answer fully and will not, for example, give an incomplete answer

or maybe even an evasive answer to protect intelligence sources and methods.

In other words, I want you to give me a full answer or say you can't answer rather than protecting intelligence sources and methods by an incomplete answer. Do you understand what I mean? Is that acceptable to you?

A. Yes.

Q. I thought it would be. I just wanted to make sure that we were on common footing there.

[7] MR. MALKIN: I guess, you know, my understanding of these issues is probably less than anyone else's there. But I think you can't be a little pregnant on if something is classified or it's not.

If you do get into something that Daniel and Mr. McNair feels is problematic, I think our preference would probably be that we simply stand on the objection that it deals with classified material.

MR. HALE: And I fully agree, Harold. The only reason I put that on the record because in the past in other proceedings at other times people affiliated with the government have not divulged certain information because they in good faith believe they were protecting intelligence sources and methods as the law requires.

But they didn't state an objection. They just didn't answer fully or they evaded it, and I wanted to make that none of us in this room were going to follow that procedure.

MR. MALKIN: Well, I think I understand [8] that, Mr. McNair. If you do, then we've got common ground rules.

THE WITNESS: Right. I will either tell you that we're wondering into a classified area or I'll give you a glow mar.

BY MR. HALE:

Q. A glow mar?

A. Neither confirm nor deny.

Q. Thank you very much. Let's see how far we can go.

Have you had your deposition taken before, sir?

A. Yes.

Q. So you're familiar that this is under oath as if you were in the courtroom?

A. Yes.

Q. And that if you don't understand any question that I ask that you can feel free to ask me to repeat it?

A. Yes.

Q. In that regard, if I ask your cooperation if there's a way I can modify my question slightly [9] that will allow you to answer as opposed to interposing an objection, I certainly have no – in fact, I would appreciate your assistance in that regard because our purpose is to get what we can, and what we can't, we can't for now anyway.

Have you ever given a classified deposition by any chance?

A. Yes, a number of times.

Q. How did that work?

A. Well, with a cleared attorney, a cleared transcriber, and we just went through and did it.

Q. What kind of proceeding was that in? Was that court proceeding or an administrative proceeding?

A. I've done them in a court proceeding and some administrative proceedings, but generally in court.

Q. And does that usually happen in a facility where the room is secure also?

A. Yes.

Q. Is that an agency facility or Department of Justice?

[10] A. No. It can be anyplace that's been secured.

Q. About how many times have you done that, sir?

A. In a cleared facility?

Q. Yes.

A. Excess of 20.

Q. A few questions, please, just about your background, the usual thing. Can you tell us your formal education after high school?

A. I have a bachelor's degree from political science from Seaton Hall. I have two years of law school.

Q. And where did you attend the two years of law?

A. Emery University.

Q. And that was in what years?

A. Back in the dark ages, 1960/61.

Q. In your declaration, you indicate that prior to 1982, going all the way back to 1962 if I remember, you were with a government intelligence agency. Can you tell me which one or ones?

[11] A. Yes. I was in the U.S. Army.

Q. And that was military intelligence?

A. Correct.

Q. Can you tell the substance of your duties while you were on a 20-year stint with the Army?

A. I was a case officer with the Army, and then went with the agency and continued in the same field.

Q. And case officer, I think I know what you mean, but I'm not sure the record will be quite clear. Can you just explain what a case officer is?

A. An operations officer is one who collects protected information and to provide to U.S. policy makers.

Q. That collection effort is generally most often with what we call human sources, dealing with other people?

A. Yes.

Q. Did you hold executive positions in the Army in that regard?

A. Yes.

[12] Q. What were those positions?

A. Both – by rank I was a CW-4, and by title I was team chief, a group chief and at one point special advisor.

Q. Can you indicate what area of the world you operated in?

A. I have frankly operated in every area of the country of the world except for the Iceland states.

Q. Was there a focus to your work? Were you Soviet Division or Chinese Division or anything of that nature? Can you say?

A. I'd rather not get into that.

Q. Did you have anything to do with defectors during your time with the Army?

A. The Army, I'm not going to answer that.

MR. PINES: And when he says he's not going to answer it, we're objecting on national security grounds.

MR. HALE: Did you hear that, Harold?

MR. MALKIN: I did.

MR. HALE: That's fine. So we'll just [13] have a standing – an understanding that when the witness refuses to answer he's doing so on national security grounds.

MR. MALKIN: Unless otherwise specified.

MR. HALE: Okay, fine.

BY MR. HALE:

Q. Did you have anything to do with what's called PL-110 while you were in the Army?

A. No.

Q. Were you even aware of what's called PL-110 before you came to CIA?

A. Yes.

Q. How did you become aware of it?

A. I really can't pinpoint the first part, when I first heard of it, but I knew of it in my positions.

Q. So you were generally aware that there was such an authority to bring people in the United States but you weren't involved in that program?

A. Let's leave the answer I knew that there was such a program.

[14] Q. Can I just ask if you had operational responsibilities for that program while you were in the Army?

A. I don't want to answer any questions about operational responsibilities in the Army in that field.

Q. And you came to the CIA in 1982, sir?

A. Yes.

Q. What month was that if you remember?

A. 1 October.

Q. That was directly after retiring from the Army?

A. The next day.

Q. Didn't even take a vacation?

A. No.

Q. What position did you assume when you first came to the agency?

A. I was a case officer.

Q. Can you say in what division?

A. I was an LA body, a Latin American officer.

Q. How long did you stay in that position?

[15] A. 1993.

Q. Did you hold an executive position in the Latin American Division?

A. Yes.

Q. What was that position?

A. I have to object on naming the specific positions.

Q. Were you like a supervisor?

A. Yes.

Q. Can you tell me whether you had anything to do with defectors during the time you were in the Latin American Division?

A. The subject of defectors is really a classified subject.

Q. Let me just ask you to reflect on whether – my question, however, is though in the sense that you have said things about defectors in your declaration. So I would hope that maybe on second push you would be able to just simply say whether you were involved in that in any way.

You say in your declaration that the agency is involved in defectors. We'll get to [16] that in a minute.

MR. PINES: I actually don't believe that's correct.

THE WITNESS: I don't think that's correct either.

BY MR. HALE:

Q. Well, we'll get to that in a minute. I'm going to mark this eventually, but I think in – in Paragraph 1 that you say, (reading):

> "The Directorate of Operations is the CIA's Clandestine Service, and is responsible for, among other things: Conducting foreign intelligence and counterintelligence activities through various means, including human resources; conducting covert action" et cetera.

And then later on you talk about in paragraph 2 your responsibilities for reviewing information related to defectors.

So I think taking those two statements together you've been able to say that the agency's business does involve defectors; is that a fair [17] statement?

Mr. Pines is shaking his head.

A. No, sir. The subject of defectors is a classified subject.

MR. MALKIN: Steve, if the answer to the question concerning Mr. McNair's – the parameter of his responsibilities is an important one to you, then maybe we should take a moment to discuss it amongst ourselves.

But before we do, if you want to do that, it might be useful for us to know whether if he's able to answer that

question about what his particular responsibilities included, vis-a-vis defectors, whether you would tend to go beyond that or whether you would be prepared at that point to move on to another subject, understanding that the subject of defectors is understandably a sensitive and classified one.

MR. HALE: Harold, I appreciate that constructive comment, and I think I will step out and let you talk. I do not have many questions of depth in that area. I'm just trying to establish [18] the foundation for his opinions, and his involvement with PL-110 or his involvement with defectors seem to be relevant to that. I don't really intend to ask much specific about it.

MR. MALKIN: Well, then maybe we should take a moment.

MR. HALE: Okay. I'll step out. We'll go off the record.

(Off the record.)

MR. HALE: We're back on the record.

MR. MALKIN: Steve, let me see if I can't just advance the ball here.

MR. HALE: Good.

MR. MALKIN: I am informed, and certainly have no reason to doubt, that the term "defector" is a classified term. But I think that we can satisfy your curiosity by rephrasing your question slightly and then answering it.

So let us try to do that, and let me ask either Daniel or Mr. McNair to rephrase the question and then respond to it and see if the answer is acceptable to you.

[19] MR. HALE: Okay. Thanks.

MR. PINES: And let me just expand on that just a little bit. The term itself I wouldn't say would be classified. I'd sort of state it in a different sphere.

The agency's relationship or nonrelationship to defectors, as that term is used and as it's a term of art, is classified, whether we do or do not have relationship.

So our problem is with that term. I think Bill had a suggestion of a phraseology that would work.

THE WITNESS: You know, if we want to talk about people from a foreign country who are brought or who arrive in the U.S. for resettlement, then that's acceptable or resettlees. It's the word "defector" itself that is the flag.

BY MR. HALE:

Q. Good. I appreciate that. Let me try that.

During your time in the Army, did you [20] work with persons who became resettlees from foreign nations into the United States?

A. I was involved in people who aspired to be and some who were resettled in the U.S.

Q. In doing that, were you involved at all in making arrangements for that resettlement?

A. I was part of the arrangements, yes.

Q. Were any of those arrangements done under what's called PL-110?

A. Yes.

Q. Did you make those resettlement arrangements while you were in the Army under Army regulations?

A. No.

Q. Army guidelines or policy?

A. Not that I recall. That is really a community effort.

Q. And when you worked in the Latin American Division of the CIA, were you involved in resettlees from foreign countries coming to the United States?

A. While I was a LA officer, I was involved [21] in people who aspired to be resettled and some who were resettled.

Q. And the ones that were resettled, were you involved in making the arrangements for that resettlement?

A. Yes.

Q. Can you tell me what role you played generally in that resettlement effort?

A. I was the one who brought those who aspired to be into a discussion point.

Q. And then that was turned over to someone else?

A. Eventually.

Q. Yes. Were you ever involved during your time as a Latin American officer of the CIA in determining what level of benefits resettlees would have in the United States once they came here?

A. Only a very peripheral – that's a much higher-level decision.

Q. Who, if you can say generically, would make the decisions about the resettlement [22] benefits?

A. Headquarters, the E-MOR-FUS (phonetic) them.

Q. Is it fair to say you were a field officer and you would come into contact with persons who aspired to be resettlees, and some did, and the ones that did were eventually turned over to higher authorities to deal with, and you dropped out of the picture?

A. The decision is always out of the case officer's hand.

Q. And it comes from Headquarters?

A. Yes.

Q. Were you ever involved in making any representations to potential resettlees as to what level of benefits they would receive after you were advised of that level of benefits by Headquarters?

A. I'm hesitating because I'm trying to think of the circumstances. I have engaged in discussions of what could be possible.

Q. I see. And those were based upon [23] advise –

A. Instructions.

Q. – you received – instructions from Headquarters?

A. Yes.

Q. Can you tell me generally the level of authority from Headquarters that was involved in such instructions?

MR. PINES: What do you mean by "level"?

BY MR. HALE:

Q. I mean did the DDO give you those instructions?

A. At a minimum.

Q. So we're clear on DDO, Deputy Director for Operations.

A. Yes.

Q. So it would either be that person or the only people above him would be the director or the deputy director?

A. Correct.

Q. So when a potential resettlee was told what would be available for benefits, it came from [24] either the DDO, the Deputy Director of Central Intelligence or the Director of Central Intelligence.

A. To the best of my knowledge, yes.

Q. And to whom do you currently report by title if you can tell me that, not necessarily by name?

A. I am a Special Assistant to the Chief of Information Management Staff, and I report directly to the DDO himself.

Q. What is your current grade if I may ask you, sir?

A. I'm a GS-15.

Q. Did I ask you – I don't recall if I did – what executive positions you may have held in the Latin American Division?

A. And I said I didn't want to.

Q. Can you say something like branch chief or a division –

A. Yes. I was a branch chief in various places and a senior officer in charge in other places.

[25] Q. I take it you were stationed overseas for part of your time in the Latin American Division?

A. Yes.

Q. When you were overseas, you had a cover identity?

A. Yes

Q. So the record is clear on that, that means you had some name that's not William McNair.

A. In some places.

Q. I asked you earlier if you had been involved in depositions of a classified nature, and you said yes.

Have you also been involved in judicial proceedings, a trial that involved classified information?

A. Yes.

Q. About how many times?

A. I probably do 15 to 20 appearances a year.

Q. Fifteen to twenty a year?

A. Yes.

Q. Is that mostly federal court?

[26] A. Oh, yes. Almost without exception, but some exceptions.

Q. And what type of cases are those mainly?

A. From espionage on.

Q. Criminal prosecutions?

A. Yes.

Q. To civil cases?

A. Some civil cases, generally criminal cases.

Q. Do any of these trials involve you actually giving classified testimony in a closed courtroom that's been cleared?

A. I have appeared in camera, ex parte and under some unusual arrangements made so that the classified information could be presented.

Q. And did any of those involve a trial that was actually in a closed courtroom that had been swept by say the FBI, so you actually had a trial but the whole proceeding was classified and closed to the public?

A. Yes.

Q. How many times have you done that?

[27] A. Probably between 5 and 10.

Q. All right. And did any of those trials involve contract claims with any of the agency suppliers?

A. Not that I recall.

MR. PINES: Can we go back a second to one of your earlier questions?

MR. HALE: Sure.

MR. PINES: I want to make sure that it's clear. You indicated, Bill, that you testified approximately 15 to 20 times per year. Was that in trials or that's in hearings?

THE WITNESS: Appearances in hearings and before a judge or in the trial itself.

BY MR. HALE:

Q. So some of the appearances might not have been at trial but was in front of the judge with opposing counsel present, but they were cleared counsel I take it?

A. Or sometimes without opposing counsel present.

Q. Do you appear in administrative [28] proceedings that are classified, like EEOC proceedings?

A. No. I review all EEOC proceedings, both directions.

Q. And those are classified, are they not?

A. Those are classified.

Q. So that's an administrative trial, but you have not been called to testify in those?

A. I don't think we've ever gone to trial in one frankly.

Q. But there is a procedure for classified trials for EEOC matters; correct?

A. We handle classified reports of investigation and the EEOC determinations similar to INS proceedings. They all come before me.

Q. Do you ever testify in front of an EEOC official about classified information?

A. Never before an EEOC official.

Q. How about an administrative law judge that's acting in the EEOC proceeding?

A. Some administrative law judges and some INS proceedings.

[29] Q. So there are ways in which classified information can be discussed in an adjudicatory manner.

A. Under CIPA there is a well thought out procedure for this.

Q. And you say CIPA, what is that?

A. Classified Information Procedure Act.

Q. The reason I ask in Washington State we have a law called CIPA that relates to environmental shorelines.

A. No.

Q. I didn't think that's what you meant.

May I ask you, please, if there are agency regulations that you are aware of that relate to the selection of persons to participate in resettlement processes?

A. Yes.

Q. The key word in that phrase was "selection," in other words, what you have to do to qualify. Did you understand that?

A. Correct.

Q. Do you know are there agency [30] regulations – and when I say agency, you know I mean CIA; right?

You have to say yes or no.

A. Yes.

Q. Are there agency regulations that you know of that relate to the resettlement of these people who are resettlees from foreign countries?

A. Yes.

Q. And are there agency regulations that deal with the determination of the level and extent of benefits to be given resettlees?

A. Yes.

Q. And are there agency regulations that deal with grievances by resettlees?

A. I say yes – to the best of my knowledge, yes.

Q. You were just a little bit uncertain there. Is it something with my question? Is grievance a bad word?

A. Well, I wasn't – I was trying to include – there are regulations for review of the process.

[31] Q. Of what process?

A. Of the consideration of and the management of these sort of procedures.

Q. Are there regulations that govern any internal review of a resettlees complaint? For example, the resettlees not getting some entitlement to which they think they are entitled?

A. It is my understanding that there is, and I think it's an agency regulation.

I'm including within this there are deal regulations and there are agency regulations. Generally, they are identical perhaps and differ only in a degree so that one, if the agency says you do two steps, the DO regulation would probably say you do three steps.

Q. I see. So there is an agency regulation to your recollection and maybe a DDO regulation, but the DDO regulation would add not subtract from.

A. Correct. You have to do what the agency reg says.

Q. And you may do more at the DDO.

[32] A. You may be told to do more.

Q. So are there, so I understand correctly, agency regulations and DDO regulations that relate to determination of benefit levels for resettlees?

A. That speak to this issue, yes.

MR. PINES: That would probably be DO regulations, not DDO regulations.

THE WITNESS: Yeah, I'm sorry. DO regelations.

MR. HALE: DO, excuse me.

MR. PINES: DO is Director of Operations. DDO is Deputy Director of Operations.

MR. HALE: I am out of practice of using those terms.

BY MR. HALE:

Q. Are there regulations, sir, that deal with the DCI's review of determinations by the DO – DDO, excuse me, of resettlee benefits and resettlee grievances?

A. I know it happens, and I believe there is a procedure for requiring it do happen, but I know it happens.

[33] Q. Do not recall as you sit here whether there's actual regulations that tell the DCI how to do that particular job?

A. I just think it's part of that says subject to review by the DCI.

Q. Sir, are there, to your knowledge, any regulations that deal with the functioning of what is known as the Helms Panel?

A. I think there's a letter of instruction to that effect, but I'm not sure if it's incorporated in a regulation or not.

Q. Are the members of the Helms Panel classified other than Mr. Helms?

A. I don't think so, but I'm not sure.

MR. PINES: Let's go further on this. My understanding – I guess Bill can support me on this. The term "Helms Panel" is not acknowledged by the agency. There is a final outside review panel, the exact terminology which I cannot recall off the top of my head.

BY MR. HALE:

Q. My understanding is that in dealing with [34] resettlee grievances that there is this outside review panel which is referred to as the Helms Panel. Is that your understanding?

A. Frankly, I don't know that it's referred to as the Helms Panel. That's what I think of it as, but I'm not sure what they call it.

Q. But there is an outside panel.

A. There is an outside panel.

Q. And it's made up of retired agency officers?

A. I don't think they are – there may be some retired agency officers, but I think it's more former senior officials of the government.

Q. I see. Do you know how many persons sit on the outside panel when they review a resettlee grievance?

A. My impression is five maybe, but I don't think it's a large panel.

MR. PINES: And if you don't know the answer to these, tell him no.

THE WITNESS: Yes, I don't know. My impression is that it's not a large panel.

[35] BY MR. HALE:

Q. Just to make sure I'm clear – I think I asked this, but I'm not sure of the answer – do you know if there are regulations that govern that panel's functioning?

A. I do not know of any regulations that govern it, but I could be wrong. I just have an awareness of what exists out there.

Q. Were you involved in any way in the CIA's Inspector General review of the treatment of resettlees in the 1980's?

A. No.

Q. Did you know that that occurred?

A. I heard, but I did not – was not around doing it at that time.

Q. I take it then you didn't ever read the IG report on the intelligence community's handling of resettlees?

A. I think I've read segments of it, but I don't – I'm pretty sure I've never read the entire report.

Q. Did you ever read the classified [36] Congressional report or the unclassified report on those hearings?

A. I don't believe so.

Q. Moving on now to another topic, I'd like to just ask you a few questions about classification procedures. You are involved in classifying documents, are you not?

A. Yes.

Q. And in determining what can be unclassified?

A. Correct.

Q. My understanding would be that would be a major part of your current position; is that correct?

A. I have top secret authority, original top secret authority, delegated from the DCI, and I also have declassification authority for all DO information.

Q. When the agency originates a classified document, how does it become designated as classified?

A. Most of them are derivative [37] classifications in that whoever creates the document knows from where did the information come from, and they take that classification and give a consideration as to whether or not they have added anything to it. And it either retains that classification or perhaps might be downgraded, but it's generally based on the document from which the document comes.

Q. The source?

A. Yes.

Q. Usually then the person who creates the document would classify them?

A. Yes.

Q. When is that done, sir?

A. At the time of creation.

Q. Not to interject my personal experience in this but just to see if it still holds true, when I was at the agency if I created a document – for instance, I used to write the President's daily brief, and I would – if I wrote something for that publication, I would look at my sources, and if it was a top secret code word [38] source, then that top secret code word would go on the document as soon as I finished typing it.

Is that the way it's done now?

A. It's actually done at the moment of typing it.

Q. And that's because even if the document is inside the CIA where everybody has some form of security clearance, not everybody has a need to know everything; correct?

A. You can't get out of your document without putting a classification to it.

Q. So once it's created, it's going to have something on it that says secret or confidential or top secret; correct?

A. Some classification or unclassification designation will be on it.

Q. And again, trying to ask you this in a manner that allows to answer it unclassified, my understanding is there's a level of classification called confidential and one at secret and one at top secret; correct?

A. Correct.

[39] Q. In addition, the agency in order to further its need to know procedures also has compartmentization; correct?

A. Correct.

Q. So something can be, for example, secret and then have some compartmental code word attached to it; correct?

A. Correct.

Q. An let's just for an example use like a – well, I was going to use an example of a code word that was in a

court case, but I won't do that. Let's just call it coffee cup. There's one right here.

A. Okay.

Q. So if there was a compartmented program called coffee cup and you were creating a document that was secret coffee cup, when you created it you would mark it secret/coffee cup; correct?

A. Correct.

Q. And that then allows that document to be restricted to only persons who have A, a secret clearance, and B, a coffee cup compartment [40] clearance.

A. Correct.

Q. Can you say, sir, that there is widespread use of compartmentalization inside the agency?

A. Within the Director of Operations, yes.

Q. In the area you work. So it's quite frequent that you would see a classification with another compartment code word?

A. Correct.

Q. And is it true that if there's a compartment that you are not cleared for then you wouldn't even have reason to know it exists; correct?

A. Correct.

Q. So if you weren't cleared for coffee cup, for example, you would have no idea that coffee cup material existed usually?

A. Usually. You might know it existed, but you would not – if you've not been read in on it, you wouldn't know what it stood for.

Q. You might have seen the code word, but [41] you wouldn't know what it meant.

A. Correct.

Q. And in some particularly closely held ones, you might not ever even know the code word exists; correct?

A. Correct.

Q. For example, if there was a highly sensitive human source that was being run say by the DDO himself or herself, that might be so highly classified that only a handful of people would ever have access to that particular compartment.

A. Correct.

Q. How do you determine the need to know, sir?

A. Well, the determination rests with the possessor of the information. It's their responsibility to determine whether or not the next person has the need to know.

Q. And the need to know is that they have a need to carry out their official duties?

A. Correct.

[42] Q. Or, for example, if Congress is conducting oversight of a particular program, then if the Congress persons and the staff persons have the requisite clearance, information related to that program would be presented to them because they would have a need to know to do their oversight function; correct?

A. Correct.

Q. In a classified trial if a judge was determining the guilt or innocence of a person charged with a crime, they would have a need to know the details associated with that alleged crime; correct?

A. Unless we made a determination that a State Secrets Act was required, then yes, the judge would have the need to know and the assumed clearance to receive that information.

Q. So if a person has both the clearance level and the need to know, then access would generally be granted.

A. Oh, absolutely.

Q. As predicted, I am moving more slowly [43] than I thought I would, but let's see if I can't pick it up.

MR. HALE: Are you okay, Harold?

MR. MALKIN: Still here.

MR. HALE: If you feel the need to say anything at any time, please do. It's not fair that you're not getting your say here.

MR. MALKIN: That's quite all right. I appreciate that, and I'm not reluctant to speak up if I think it's necessary.

MR. HALE: Somehow I knew that.

Harold, I'm going to have marked now Mr. McNair's declaration as Exhibit 1.

(Exhibit No. 1 was marked for identification.)

(Document handed to the witness.)

BY MR. HALE:

Q. Mr. McNair, the court reporter has handed you what has been marked as Exhibit 1. Do you recognize that document, sir?

A. Oh, yes.

Q. Will you please say what it is?

[44] A. It's my declaration.

Q. Dated July 17, 2000?

A. Correct.

Q. And did you prepare this declaration, sir?

A. I assisted in the preparation of it.

Q. Can you tell me who assisted you?

A. Mr. Pines.

Q. I'm sorry?

A. Mr. Pines.

Q. Thank you. Is this document unclassified?

A. Yes.

Q. And obviously, sir, when you signed this, you considered it to be completely accurate?

A. Absolutely.

Q. And do you still consider it to be completely accurate?

A. Absolutely.

Q. In paragraph 1, sir, you in the second sentence indicate what the CIA Clandestine Service is responsible for among other things. And just [45] again, for the record, if you could in a few words explain what you mean by conducting foreign intelligence activities.

A. Well, as I said, including human sources, conducting covert action, liaison with foreign intelligence and security services, supporting clandestine tech operations and coordinating the CIA support to Department of Defense.

Q. But focussing just for a moment – and forgive me, I think you probably think I know what foreign intelligence operations means, and I think you certainly do, but the record needs to be complete.

So can you just explain what you mean when you say the CIA conducts foreign intelligence activities?

A. When we speak of foreign intelligence or FI, we're talking about the gathering up of protected information for passing on to policy makers in the U.S. government.

Q. How is that distinct from counterintelligence operations or activities?

[46] A. Counterintelligence is preventing an opposition service from gathering our information.

Q. When you speak of human sources, what do you mean by that, sir?

A. Human sources are those individuals that we use in the collection of this protected information.

Q. For example, a person employed in a foreign country's embassy might be a human source if you manage to recruit that person to pass information to you?

A. Yes.

Q. And covert action is what, sir?

A. Covert action are conducting those operations for which we have a or hope to have a deniability.

Q. And an example might be a disinformation campaign?

A. It might be an operation designed to change a policy of a foreign government.

Q. Or influence a foreign election for example?

[47] A. Or to change activities within a foreign government.

Q. And the distinction there being is that you undertake an activity that hopefully have some intended effect rather than just collecting information?

A. Correct. We do that at the direction of the National Security Council.

Q. Then the last example would be collection of technical – or excuse me, clandestine technical collection. What do you mean by that?

A. That would be using technical means to gather protected information.

Q. Is that like a listening device?

A. That would be one.

Q. Paragraph 2 of your declaration, sir, starts on page 2. It indicates there your responsibilities as the information review officer of the operations directorate.

When you review records in your official capacity, do you also have the responsibility for collecting those records?

[48] A. I cause them to be collected, yes.

Q. In other words, in say I would suspect maybe your most frequent requirement to do that was in response to FOIA requests?

A. We have a large section that does FOIA.

Q. I thought you might. So if a FOIA comes in, then your job is to send out requests for responsive information; is that correct?

A. Not exactly. A request that comes into the agency is then parcelled out to the component, and then we have a component. I set the policy for how the component does it and how they make the search, collect the record and do the review and release.

MR. HALE: Would you read that answer back for a minute because my mind wondered. I just want to make sure I hear it.

(Whereupon, the Court Reporter read back the previous answer.)

BY MR. HALE:

Q. So if a FOIA came in, for example, from a historian who was studying Chile and they wanted [49] information relating to the election of Alenday, would you send

the actual request out itself and say to your division chief here is a request for information relating to Alenday in 1992, respond?

A. No. Taking the example as just any example, when the request comes in and is passed over to my shop that does this, they simply search the database.

There is one director of operations database, and the people who do this go in and would conduct a search of the database to pull up the information.

Q. Does that database include information from all compartmented information?

A. The database contains all DO information with the exception of – the electronic database contains all information with the exception of one compartmented type of information.

Q. How do you search that one compartment?

A. We go to the specific division and say you must go through and look for this, but we can – we keep that one level separate from the [50] electronic database because it belongs to the specific division itself.

Q. Are you at liberty to say what division that is?

A. No. Each division has –

Q. Oh, each division has?

A. Yes.

Q. Do you also send a request to the director or the deputy director?

A. Of . . .

Q. Central Intelligence.

A. There are five elements to the agency, the DCI, the DI, DSD, DO and DA, and so each of those would get from a place that is called the Office of Information Management – they would get the request.

So that if they thought the information was contained within the DCI area, they would task the DCI area. We would not. We might refer it to the DCI. We may point out to OIM that look, you ought to check the DCI area because we have an indication that they would probably have an [51] interest in this as well.

Q. Now in this database, is there every historical record the agency has in the database?

A. That belongs to the Director of Operations.

Q. So back to 1947, you have every document that exists in that database?

A. Actually, prior to '47 because we have the U.S.S. records therein as well.

Q. I don't want to ask you what it costs to put that database together.

A. A whole heap.

Q. So as far as you know, every single document in the agency is somehow in that database or in a separate divisional database.

A. Let me correct you. Every document belonging to the Director of Operations, only the Director of Operations. The rest of the agency has another database. Only the DO has a separate database.

Q. When you do a search for FOIA, you only do the DO database?

[52] A. Our people only – we are only responsible for the Director of Operations information.

Q. And does somebody else – do the other directorates respond to the FOIA?

A. Oh, yes.

Q. You have a counterpart in each of the divisions?

A. There is one IRO in each of the other, the SNT, the DI and the DCI area.

Q. So others respond to your request, and then you do the review, or you or your people do the classification review?

A. Our office pulls up the information and does the review. If they are going to release information, they refer it to the owning component, and then we will release it.

Q. Now when the person querying the database turns up a responsive document that has a classification compartment on it that he or she is not cleared for, what happens?

A. Well, the people who do this for me all have global access as do I. If you were to go [53] into the database and ask the question and your clearance, your profile, did not match, in some cases it would tell you that this is not available to you, and some instances it would simply not appear.

But the people who do the search have the global access, and they will always see what is there.

Q. So there is nothing so compartmented inside the agency that your information review officers don't have it pop up on the screen?

A. We have an extremely limited number of people, like I think the current number is 3. I have global access, and there is nothing that I go looking for that I won't see.

Q. Then does you or one of the other two people in your division have global access get involved in every search?

A. One of those three will.

Let me say they this is what they do. This is their job. They pull them up, and then someone else reviews it.

[54] Q. Who is that someone else?

A. We have other analysts there.

Q. When did you first become familiar with our case, the case that we're here today for?

A. A year ago last Fall.

Q. So you weren't involved before the complaint was filed?

A. No.

Q. Did your involvement first relate to reviewing the complaint to see if it could be publicly filed?

A. Yes.

Q. Did you do that personally?

A. Actually, I did. We work very closely with OGC, so that as soon as anything comes in – sometimes we see

things before they do, but when it comes in, then it's an almost simultaneous effort.

Q. Now in paragraph 3 of your declaration, you in the second sentence state that, (reading):

> "The statements herein are based upon my personal knowledge, information [55] made available to me in my official capacity, the advice and counsel of the CIA Office of General Counsel," et cetera.

Can you tell me, sir, what part of the declaration here was based upon something other than your personal knowledge? In other words, one or two of the other categories, information furnished to you or advice of the General Counsel?

A. I don't think I could parse that out. I always, always, always have that third part in there about advice and counsel of the CIA Office of General Counsel.

Q. Did they help you form your opinion, the Office of General Counsel personnel?

A. There are those who say – my wife who says no one changes my mind. But we discuss it, but they usually give it to me as a clean slate and say what do you think of this.

Q. They give you the draft and you give the opinion?

A. Yes.

[56] Q. Now with regard to the declaration, did they draft it first or did you draft it?

A. They work actually off of – I don't want to say boilerplate but we know what the issues are, and then it will come to me maybe twice in draft.

Q. If I wanted to ask you what part in this declaration was in part at least based upon something other than your personal knowledge, you couldn't point that out?

A. Frankly, I doubt if I could because they run together.

Q. Now, on top of page 3 – I guess it starts on the bottom of page 2, paragraph 4 and continues on to the top of page 3, you indicate that 50 U.S.C. 403h is commonly known as PL-110. Do you see that?

A. Oh, yes.

Q. In what way is that statute known as – commonly known as PL-110? I mean who knows it that way?

A. We have debated this several times. It [57] appears in our books, of course, under the correct heading. You can't look in the book for PL-110. It's just not there. It's just a shorthand form of people who don't want to give the official title to it.

Q. Is the official title classified?

A. No, no. It's right there. You cited it.

Q. The statute?

A. 50 U.S.C., yes.

Q. It's easy to say it's PL-110, isn't it?

A. PL-110 is much easier.

Q. You say commonly known, so that would be throughout the agency that people at least throughout the DO –

A. Yes.

Q. – people know what PL-110 means.

A. Absolutely.

Q. People that you talk to in the General Counsel's Office know what PL-110 means.

A. Absolutely.

MR. PINES: Just to back up on that, sometimes Bill thinks he knows what everyone else [58] assumes. People who are involved in these sort of issues within the General Counsel's Office would know that information, not everyone would absolutely off the top of their head know what PL-110 means.

MR. HALE: So, Mr. Pines, someone like you who works with Mr. McNair would know what PL-110 means.

MR. PINES: Well, let me put it this way: I did not know what PL-110 meant until I got involved in this case.

BY MR. HALE:

Q. But the lawyers, Mr. McNair, that you work with in General Counsel other than Mr. McNair (sic) share your view that PL-1110 means the U.S.C. 403, Section H?

A. There are certainly some attorneys who would not know it because they work elsewhere in the agency, but those in litigation will quickly come to know what it is.

Q. And that's been true for some period of time. It's not a new statute, is it?

[59] A. Oh, no. It goes back to '49.

Q. Now in that same paragraph, the next sentence, you say, "I have been informed that plaintiffs further allege." I'm wondering why you use the words "I have been informed" because you actually have read these pleadings, have you not?

A. Yes.

Q. So you know what the plaintiffs allege firsthand, do you not?

A. Well, I guess this is a work of art the way it's worded like that.

Q. I have no – there's nothing particular I have in mind here. I just found that to be – in a situation where you have read the pleadings, I wondered why those choice of words were there.

So I take it maybe if you were drafting this firsthand yourself you might just say I am aware that plaintiffs are alleging because I've read the pleadings.

A. I would probably pull up that paragraph and put it in the next declaration.

Q. I see. This is a paragraph you used over [60] and over?

A. Yes, yes.

Q. Now in the last couple lines of that paragraph 4 talking about lifetime benefits, that term "lifetime benefits" appears throughout this declaration.

Would you agree with me that the plaintiffs in this lawsuit are alleging benefits other than lifetime benefits?

A. I don't know how to back it off from there. That seems an applicable phrasing to me.

Q. Is it one you chose, sir, or is this the one the lawyers chose?

A. Probably a lawyer chose it at some point, but I don't have a problem with it.

MR. HALE: Excuse me for just a minute, Harold. I'm checking something.

MR. MALKIN: Okay.

(Pause.)

MR. HALE: I'm going to hand you – I'm not going to mark this; it's a court document already – the second amended complaint, which is [61] dated March 30, 2000, and ask you just to read the first couple sentences of paragraph 5.20.

Harold, if you want, we can read that to you, but I don't know if you have it handy.

MR. MALKIN: Okay.

(Document handed to the witness, and the witness reviews document.)

BY MR. HALE:

Q. And then after you've read that, sir, if you'd turn over to paragraph 6.2 and read that paragraph.

A. Six point . . .

Q. Two.

(Witness reviews document.)

THE WITNESS: All right.

BY MR. HALE:

Q. Would you agree that those paragraphs state that plaintiffs believe they have rights in terms other than with the qualification lifetime?

A. It says they believe that, yes.

Q. So you agree with me then that the plaintiffs are alleging that they have a variety [62] of rights under what they believe is the PL-110 Program, only some of which are characterized in the context of "lifetime;" is that correct?

A. That's what your pleading says.

Q. If I could just hand this back to you again and ask you to just focus on paragraph 6.2, and agree with me, if you will please, that the plaintiffs state that the basis of their alleged rights are statute and regulation, not just statute. Do you see that, sir?

MR. PINES: I'm a little confused by this whole line of questioning because you're not actually asking for lifetime benefits as you phrase your complaint. You're suggesting that you're entitled to due process, not any sort of benefits. Isn't that correct? Or are you now stating that your clients claim they're entitled to lifetime?

MR. HALE: The complaint speaks for itself, but his declaration is all in terms of lifetime benefits, and I am

attempting to point out that the complaint characterizes our request [63] as other than just that.

MR. PINES: Well, your complaint has –

MR. HALE: Many things in it.

MR. PINES: But it's only about due process; would you agree with that?

MR. HALE: No.

MR. PINES: So you're also asking for financial benefits as well?

MR. HALE: The complaint is what it is, but we state the basis of the claim to be my current question statute as well as regulation. I mean you can read it in 6.2.

MR. PINES: Well, then I guess I'm confused as to what the questioning is. Is the question whether you're seeking benefits aside from lifetime benefits, or the question stating that you are claiming you have a statutory and regulatory right beyond a lifetime benefit?

MR. HALE: Let me suggest if the witness can answer the question I have asked, that would be great. If not, he can say he's confused, and I'll ask it a different way.

[64] BY MR. HALE:

Q. Let me restate the question because we've had kind of a colloquy here.

Do you understand the complaint to be stating that the plaintiffs believe they have certain rights that are based on regulations as well as statute?

A. That's what the words say.

Q. Did you understand that before now?

A. Yes, I thought so.

Q. Did you understand that when you prepared your declaration or when you signed the declaration?

A. I think I understood it.

Q. Now in paragraph 5 of your declaration, Mr. McNair – let me just switch to a different copy – you indicate that you have specifically reviewed any regulations or internal CIA policies concerning PL-110. Do you see that?

A. Yes.

Q. Now can you tell me how you went about reviewing the regulations that relate to PL-110, [65] first, how you gathered together those regulations and then how you reviewed them.

A. A couple of ways. I talked to the organization that deals with this as a matter of course.

Q. PL-110 you mean?

A. Yes. And asked them to go through and what are the regulations that affect them.

I talked to a section of the Director of Operations that oversees general policy questions, mand then I had one of my analysts, researchers go through and take your pleadings and take key words out and do an electronic search for these words. Then I went wondering through the entire phase myself to see if I came up with anything any different.

And knowing where the regulations for this sort of thing would be, I was able to go into the category of regulations and go through them and look and see. So I've pretty much covered the waterfront I think.

Q. And so you looked at more regulations [66] than the ones you eventually provided to us a few days ago?

A. Yeah, to see if they had any bearing on this.

Q. So you were the one who made the decision to include one regulation but not include the other in the material that you sent to us?

A. Actually, I think one of the analysts made the first cut, and then working with Daniel, and then I went through to make sure that we didn't have anything in difference. So it's – this is sort of an evolving process.

MR. PINES: If I could just interject, the discovery request or the request for production of documents dealt with paragraph 6 and items therein. You did not ask for regulations related to paragraph 5. So the ones that were provided were ones that responded to the questions or the issues raised to paragraph 6, which was would not become public charge.

MR. HALE: So there are additional regulations that might have been responsive if we [67] would have said paragraph 5.

MR. PINES: I have to read paragraph 5 to see exactly what it says.

MR. HALE: Okay.

(Pause.)

MR. PINES: Let me answer it this way: There are other regulations that discuss subsistence assistance to be provided to individuals brought into the United States under the authority of PL-110. There are other that were not turned over to you.

There are no other regulations – and Mr. McNair can verify this I believe – that concern the bolded sentence in paragraph 5 with regard to any other regulations, internal policies, et cetera, et cetera, concerning provision of any form of lifetime financial assistance to individuals brought into the United States by CIA under authority of PL-110.

BY MR. HALE:

Q. I take it if we request those other regulations that you would at least provide them [68] in a redacted form like you did the ones that we requested?

A. Anything is possible. I really – we always hesitate to release regulations even in a redacted form because your interest is in this part and then someone else's interest is in that part, and before you know it, we have on the public record the entire regulation, which we intended to be classified.

So we very reluctantly approach this release question on regulations.

Q. Let me ask you to look at that bolded language at the bottom of page 3 of your declaration. It goes on to the top of page 4.

Now if we took the word "lifetime" out of that sentence – and take a minute please to read that whole sentence and then come back.

I'll state my question again. If we took the word "lifetime" out of that sentence, would it still be an accurate sentence?

A. So if you took out the word "lifetime."

Q. Yes, sir.

[69] MR. PINES: Do you want to take a moment?

THE WITNESS: Well, I'm trying to imagine what it would look like.

MR. PINES: Let's take a moment to answer that question.

MR. HALE: We're going to take a little break here and let you caucus. We'll step out.

(Off the record.)

MR. HALE: We're back on the record.

BY MR. HALE:

Q. Do you remember the question, Mr. McNair?

A. Yes, take out the word "lifetime."

Q. Can you answer that? Would that be a correct statement if the word "lifetime" was removed?

A. Well, the only obligation would be the individual agreement we had made with the person. The regulations themselves don't call – the regulations themselves don't call for it other than what is here in the agreement we have with Justice in paragraph 6.

Q. But the agreement with Justice, would it [70] not make the statement that is in bold at the bottom of page 3 not true if you took out the word "lifetime"? Under the agreement with Justice, you in fact do have an obligation to provide financial support.

A. Until they reach citizenship.

Q. Well, the answer to the question I think is if you remove the word "lifetime" the sentence is not true.

A. That's correct.

MR. MALKIN: I guess I just want to clarify. It's not as though the statement is true or not true. The statement is made in paragraph 5, and then is quickly qualified in paragraph 6.

I don't want there to be some impression on the record that there was something misleading when in the immediately following paragraph there is a qualification made that does acknowledge that there was some interagency agreement that necessitated or obligated the CIA to perform some or to pay some sort of money to individuals for a [71] certain period of time.

It's not an important clarification, but I just don't want the word "true" or "untrue" to be taken out of context I guess.

BY MR. HALE:

Q. Mr. McNair, let me ask you to look at that sentence in bold again, and this time take out the word "financial" and tell me if it would still be an accurate sentence if the word "financial" were removed.

(Witness reviews document.)

THE WITNESS: If you took out the word "financial," obligate the agency to provide any form of lifetime assistance to individuals, then the regulations do not require that.

BY MR. HALE:

Q. And would that still be true?

A. The regulations do not require it.

Q. Lifetime assistance?

A. Right.

Q. Would you consider a provision of lifetime safety and security to be assistance?

[72] A. I don't think the regulations require. I don't think there's anything in there that says that you were to do it because what would – it would certainly change if they were to leave.

Q. Well, the regulations say what they say, and we can review that in a minute.

Now in that same bolded language, you talk about unstated principles. Can you tell me what it is that allows you to render an opinion about unstated principles of the agency?

A. I think probably the fact that I've been doing this for about 38 years now. I have about as good an understanding of what our principles under which we work are as anyone you're going to run into.

So it's my declaration, and it's my opinion that there is no unstated principle about that.

Q. About providing assistance to resettlees?

A. Right.

MR. PINES: Lifetime assistance.

MR. HALE: Lifetime assistance to [73] resettlees. Thank you, Mr. Pines.

MR. PINES: And it's also – to be more specific, it's lifetime financial assistance.

MR. HALE: Thank you again.

BY MR. HALE:

Q. Well, do you have an opinion about unstated principles of the agency with regard to financial assistance to resettlees other than lifetime?

A. We meet our obligations.

Q. And those obligations are derived from your agreements with the resettlees?

A. From the agreements and then as long as the commitments on both sides are met. There are some things you simply can't do for people.

Q. But the unstated principle that you're aware of at the agency is to meet your agreements with resettlees.

A. Absolutely.

Q. How are those agreements with resettlees documented if they are?

A. In my experience, they would be written [74] down, and they would be within a file pertaining to the individual.

Q. Have you – if I asked you whether you reviewed the file related to the plaintiffs here, would you be able to answer that question?

MR. PINES: We're going to object on grounds of national security and instruct the witness not to answer.

MR. HALE: I thought so.

BY MR. HALE:

Q. What is your understanding of the unstated principle of the agency, if any, with regard to providing lifetime safety and security to resettlees?

A. We would do so within – as long as that assistance was accepted. In other words, we wouldn't pursue someone around saying you have to let us help you, but by and large, we would take care of that sort of issue when possible.

Q. Now you say – a moment ago you said that you had been around for some 38 years in this business, so you felt like you had a fairly good [75] basis to make a statement about the agency's policies.

But would you agree with me, sir, that the 38 years has not all been with the agency?

A. Actually, a great deal of my Army experience was with the agency.

Q. So you worked together with the agency at that time then?

A. Yes.

Q. So do you think you have, for example, an understanding of what the agency's unstated principles were with regard to resettlees in 1980?

A. Oh, yes.

Q. And that's based on your time in the Army?

A. That's based on my experience as a case officer for the U.S. government.

Q. On page 4 of your declaration, sir, in paragraph 7, you quote from the Court's June 7, 2000 order, (reading):

> "The Court is confident that the case may be litigated without requiring [76] the disclosure of national security secrets."

Do you see that?

A. Yes.

Q. Do you disagree with that opinion of the Court?

A. No. The way it's written –

MR. PINES: Let's back up a little bit. It's a little misleading I think your question because it states the Court determined – as it's phrased, (reading):

> "The Court is confident that the case may be litigated without requiring the disclosure of national security secrets because, as the Court stated, the Agency has reviewed and approved "for public filings all papers filed by plaintiffs thus far."

That was the issue that he was addressing in the declaration. So I guess if your question is does he believe

that the case can be litigated without requiring the disclosure of national [77] security secrets, that's one issue.

All we're doing is quoting the Court's statement that because the agency has already reviewed this for public filing that the Court is confident.

BY MR. HALE:

Q. Mr. McNair, Mr. Pines has attempted to clarify it. Is your answer to the previous question correct, though, that as part of the sentence that I quoted you don't have any disagreement with that?

"The Court is confident the case may be litigated without requiring disclosure of national security secrets," you have no reason to challenge that, do you?

A. Ask the question again.

Q. Do you have any reason to believe that the Court is incorrect when it concludes that this case may be litigated without requiring the disclosure of national security secrets?

A. Oh, I disagree with the Court.

Q. You do?

[78] A. Yes.

Q. Can you explain why?

A. The discussion of operational relationships in an open court is impossible. The discussion of methods is an open court is impossible. The discussion of a grievance made would be highly doubtful.

If the allegations were true, then this could not be in an open court.

Q. Could it be done in a classified proceeding?

MR. MALKIN: Let me interrupt for a second. You're not asking him for a legal conclusion. You're saying based on the discussion you and he had earlier could this case be litigated in a manner similar to one of those other proceedings that he – that Mr. McNair said he had been party to?

MR. HALE: Okay. I'll accept that rephrasing.

THE WITNESS: Under those conditions, yes.

[79] BY MR. HALE:

Q. But you're convinced there's no way this case could be litigated in open court.

A. I do not believe it would be possible at all.

Q. Are you aware of the Webster v. Doe decision, Mr. McNair?

A. Just offhand, no.

Q. Are you aware that in a case involving a covert CIA employee the U.S. Supreme Court made this similar conclusion about that case?

A. I don't.

Q. You don't know that?

A. I don't know the case. I don't know the decision, no.

Q. Now you are the person who reviewed our complaint and the briefs that we've filed and the declarations that we've filed in this case; correct?

A. Are there any that I – I have to ask. Are there anything that I did not review?

MR. PINES: Let me answer this in a [80] different way. The way that the process was done was it was sent to our security officer. It was not sent to me, so I did not review it again in sort of unfair advantage.

She then sent it off to Mr. McNair's department. I do not know whether each and every time, because there were several things that went back and forth, that he actually saw every paper, but someone in his department did, and he was responsible for that.

THE WITNESS: Either coming from the security officer and those conditions, either me or my associate did it.

BY MR. HALE:

Q. Are you generally familiar, though, with what we alleged in the complaint and in the declarations that are on file in this case?

A. Whatever I said in the declaration I'm aware of.

Q. Those were approved for public filing; correct?

A. The allegations were.

[81] Q. Your position is that the allegations are not classified?

A. Well, allegations are exactly that. There is a point at which you have to step into allegations and say no.

Any time I classify something, then I'm saying one, it's true; two, I'm going to officially acknowledge it; and three, it would do damage to national security. So I'm very reluctant. You have to consider where does the information come from, and you sort of balance off what's the damage if the way it's now presented as in alleged against allowing this to go forth.

So the decision was made that in this case at that point we could sustain and still protect ourselves by considering it an allegation that did no grievance harm. It did not name any of our instillations or individuals or case officers involved.

Q. In fact, there weren't any details about places or dates or real names; correct?

A. Correct.

[82] Q. If real places and real dates and real names were used, you probably would have objected to the filing.

A. Absolutely.

Q. Because that could potentially cause harm to national security or to individuals.

A. Correct.

Q. You're aware, are you not, that the plaintiffs are proceeding in this case by the name of John Doe?

A. I'm aware that that's the name on the case, yes.

Q. And that's not their real name.

A. I assumed it was not.

Q. Can you explain to me what the potential harm would be to any individual safety, innocent or otherwise, if the agency confirmed that John Doe was a resettlee under PL-110?

A. Let's take an example. Anytime – sometimes people will say well, the individual themselves so that they were operationally involved with you. We're not going [83] to confirm it because what happens then is individual A residing in his country – once we knowledge that yes, they were operationally involved with us, then the host security service simply goes back and looks for any surveillance records they have, any investigation they have on individual A.

As long as they think individual A was perhaps involved, they will only do some things. In certain countries, they will take individual A out without any question, and they'll take all the colleagues of individual A.

Q. What do you mean take them out?

A. Well, if they're going to arrest one and they're not sure which one of five, they'll just arrest all five. That way they feel pretty sure they have got a hold of the guilty one.

But in other paces, then they will simply say okay, individual A, now we know because CIA says that they were involved with them. Well, remember we saw individual A associating with individual B, and we thought that they had an [84] interest in playing bridge together, but low and behold, now we know this was a clandestine relationship.

And isn't it amazing because individual B, an American, also was seen frequently with individual C and individual D and individual E. So all these people now

come under suspicion, and perhaps they were involved with us. Perhaps they weren't. But they were also handled by other Americans at different times, and so now they have identified some of our other officers.

So this ripple that goes out from an acknowledgement affects not only the individual themselves, but other of their countrymen, other of our officers, other mechanisms which we might have employed, such as rental of safe houses or cars or drivers or anything of this nature. So that the damage that you get from one acknowledgement is so far reaching, we simply won't allow it.

Q. I think I understand that if the individual were identified by the name that he or [85] she is using, but how can that connection be made with John Doe? Because the court pleadings in this case use the pseudonym John Doe, which is not the name that he used anywhere else in his life before. So how can you make the connection between John Doe and Tim Buck Too or individual B or C?

A. Which is why we allowed this particular pleading to go forth. You couldn't sustain a trial, an appearance in court with John Doe.

Q. Unless the courtroom were locked.

A. Oh, I have more faith in American media than that I suspect. It's just in the nature of things that we're not going to endanger our people or out operational relationships unless we were to get an absolute control over the setting.

Could you have a trial under closed conditions? I would assume anything is possible. It would be a very onerous appearance, but it would certainly never be an open trial.

Q. Can you tell me what opinion you have with regard to the allegations in the complaint [86] about the procedures used in the agency review process of the resettlee complaint?

Say for example that the resettlees counsel was not permitted to participate, would you say that the resettlees counsel was not entitled to cross-examine or the resettlee was not entitled to appear?

If you confirmed or denied those allegations, can you explain to me how that might impact, if it would in your opinion, national security?

MR. MALKIN: Steve, excuse me, just for clarification, are you asking him whether the factual statement of what happened in this particular case if he were to acknowledge as truth or as lack of truth, or are you asking him whether your characterization generally of the agency's policies and practices was true or not true?

MR. HALE: Well, I'm not sure it makes any difference. I'm really not asking him to comment on this case specifically. I'm just saying is there anything that impacted national [87] security as far as you're concerned if you acknowledged an allegation that there was or were not a certain procedural event in an agency review process for resettlees.

MR. MALKIN: Okay.

THE WITNESS: In general, it is my experience that we will lean over backwards to allow as fair a hearing as is humanly possible.

Sometimes we lean over against my recommendation because I think we're going too far, but we do happen to

have a director presently, who reminds me that he's the director and he'll do what he wants to do.

So these procedures without even addressing the specifics of them, if someone asks me if we do fair review proceedings, I would have to say yes. I think we give every possible opportunity for a fair review of whatever the subject is.

BY MR. HALE:

Q. I appreciate that answer. It's not exactly the question I asked, though.

[88] In the complaint, we allege that there were certain unfairness in the procedures that our plaintiffs encountered. Without commenting about whether our plaintiffs are in fact actually resettlees or not, are the comments about the process themselves troubling to you in the sense of disclosing national security information if you confirmed or denied the process?

A. I don't know the process that took place, and so I have trouble making a judgment on whether or not it was fair. I would be truly stunned to find that the process was not fair.

MR. PINES: If I can see if I understand your question and maybe this is one way of phrasing it.

Is your question why are the agency regulations involving the process it goes through, why are those classified? Is that the question you're asking for?

MR. HALE: No.

MR. PINES: Then I misunderstood you.

BY MR. HALE:

[89] Q. As a person who has done a couple years of law school and done all the things you've done at the agency, do you believe that the adjudicatory process is one that requires an adversary proceeding to ensure fairness?

MR. MALKIN: Wait. I think I'm going to object.

MR. HALE: What ground, Harold?

MR. MALKIN: I think that calls for a legal conclusion.

MR. HALE: Objection stated.

BY MR. HALE:

Q. Please answer the question.

THE WITNESS: I don't think I'm qualified to answer it frankly.

Q. Well, I understand, Mr. McNair, but you just said that you would be stunned if you didn't do it in a fair fashion. Of course, you know much more than I do as we sit here about what the process is, even though you also said you weren't sure what the process was.

I'd just like to know what you think is [90] fair since you gave that opinion, so I think the question is a fair one even though Harold has got the objection about a legal conclusion.

When an individual has got rights they assert, whether they're valid or invalid, is the resolution of those rights fair in your mind if there's not an adversary proceeding? Do you know what I mean by that?

MR. PINES: Before you answer the question, I'm going to add an objection on relevancy what Mr. McNair's belief is as to the fairness of an adjudicatory process that's totally irrelevant to this proceeding.

If you can answer, please do so.

THE WITNESS: I probably have been around lawyers too long. I can probably make an argument on both sides of that.

I really find it difficult to address the situation because I don't know what the procedures were.

MR. MALKIN: Steve, I think you need to be more specific because –

[91] MR. HALE: Okay. All right. I'm going to be more specific now, Harold.

MR. MALKIN: I'm telling you I have no – other than the objection, he's free to answer. But, you know, what you have alleged in the complaint as far as I'm concerned is not in all respects a nonadversary proceeding.

Your complaint acknowledges that your side was permitted to make a presentation as was according to the complaint of the agency. So certainly that could be construed to be adversarial. I think you need to flesh out with him how adversarial.

MR. HALE: I'm going to do that, Harold.

BY MR. HALE:

Q. Do you think it's important to have the ability to cross-examine witnesses in order to have a fair trial or a fair administrative proceeding?

MR. PINES: Same objection.

MR. MALKIN: I think our objection stands throughout this line of questioning.

[92] MR. HALE: I agree. It's understood.

THE WITNESS: I happen to believe in the principle that ex parte hearings are fair, and so you have to work with the circumstances as you get them.

Under the best of all circumstances, does everybody get to state their case? That would seem reasonable.

Do you have to be able to address – cross-examine the witness? Well, I can tell you I have testified in cases where I would have been most reluctant to have been cross-examined because of the nature, and certainly, not casting any aspersions, but I don't wish to go before terrorists. I don't wish to go before members of organized crime and be identified.

So There are cases where you do not – I don't think you're entitled to have a cross-examination.

BY MR. HALE:

Q. Because that would be public is what [93] you're saying?

A. No. Because it would be – there are people in whose – in which your testimony would be not well received by the opposition.

MR. HALE: I'm going to move on, Harold. I think you'll enjoy that.

BY MR. HALE:

Q. On page 5 of your declaration, sir, can you tell me in that last sentence of paragraph 8 that's in parenthesis there, why that's true with regard to counsel?

I understand your position with regard to the plaintiffs, but why is it classified whether the agency granted me a security clearance for this case or not?

A. I'm sorry. Say that again.

Q. Well, if I understand the last sentence in paragraph 8 of your declaration, you are saying that it would be classified to say whether or not I have been granted a security clearance and signe a security agreement with the agency.

A. See, it's most difficult with attorneys. [94] You can give them a clearance and inevitably their notes are put into a folder with their client's name, and since we expect these identifications to be protected and require that by and large they be held within the skiffs or protected facilities, then it's really a – for the counsel to hope to have notes in their offices almost impossible.

Q. And I think that may be a different point than one I'm asking, Mr. McNair. I understand what you're saying.

But in our pleadings, we allege that the agency has cleared myself and Ms. Allenez and that we've signed secrecy agreements, and we are adhering to those agreements.

We put those in the pleadings, and we sent them to the agency, and you cleared them or someone on your staff

cleared them, and so we filed them with the Court. The Judge in fact took note of them in his last decision that we've been cleared.

You cleared me to put that in my pleading, and now I read your declaration that [95] that's classified, and I guess I don't understand.

A. Well, no. That's not classified. Actually, your clearance was for the administrative proceedings.

Q. Okay.

A. So you can – I have no problem with that. It's just we're not going any further with it is the way I see this.

Q. I'm not sure I know what you mean you're are not going any further.

MR. PINES: I think it would help if he read the sentence above it. I think it's to which the parenthetical relates.

THE WITNESS: The reason for why that you would submit the pleadings for review and because – wait a minute.

BY MR. HALE:

Q. The preceding sentence says that people like me give you a chance to look at the pleadings before we file them for one of two reasons. We either do it voluntarily, or we do it because we've agreed to do it as part of our agreement [96] with the agency to get a security clearance.

Then as I understand the parenthetical comment, you say that which of those categories I fall in is classified, and I'm asking you to explain it.

A. Let me ask for advice of counsel as to why that's in there because the way I see it it is saying that you submitted it either voluntarily or because you were given a security clearance.

I'll have to ask Daniel. I'm sorry.

MR. PINES: I can answer on the record instead of going off. I drafted the sentence, and the reason it was drafted that way was because, as you're well aware, we contend this entire case is precluded based on Totten.

Therefore, we did not want you or the Judge or anyone else to take the suggestion that by having granted or accepted that we either grant you a security clearance or didn't grant you a security clearance, you would either submit for a review voluntarily or because we granted you a security clearance that in some way indicated the [97] truth or the nontruth of what you had alleged.

So it was not done for any other reason and unfortunately got legalized up, but that was the purpose of the sentence.

BY MR. HALE:

Q. So aside from you wanting to protect that inference, which I understand and don't have any problem with, is not a classified fact that I have signed a security agreement with you and have submitted my pleadings because I'm required to do so.

A. No, no.

Q. You didn't tell me that was classified. You cleared it to publish. I wanted to make sure there wasn't any misunderstanding.

A. No, no, no, no. Actually, I remember discussing the thing now. That was the only reason for it.

MR. HALE: Now can I confirm, Harold and Daniel, that first sentence of paragraph 9 is not intended to be a formal assertion of a States Secrets Privilege?

[98] MR. MALKIN: I'm just reading it.

I don't – I mean maybe Daniel and I should talk for a second, but my – I think my – well, let me give the Daniel the chance to respond first.

MR. PINES: Yes. We are not asserting a States Secrets Privilege through that sentence.

MR. HALE: The reason I ask that is because if you were then we'd have to do other things, and I understand some day you might assert the privilege, but we're not doing it now. This is your opinion.

MR. MALKIN: That's right.

MR. HALE: I don't want to take three hours and go through every allegation in the complaint and ask you to state the basis of it if I don't need to. I think I'm entitled first, if you do assert a privilege, to have your statement to me about why it's privileged and to the Court.

MR. MALKIN: Right. We have not to date asserted the States Secrets Privilege.

MR. HALE: We can move on, and we can save that for another day if we ever come to that.

[99] I would like to please to mark – Daniel, you don't care if we mark your fax and cover letter as part of the exhibit, do you? My main thing is this.

MR. PINES: That's fine. You can lop it all together.

MR. HALE: Harold, we're going to mark as Exhibit 2 Daniel's fax to me and cover sheet, the letter and the redacted regulations and the redacted communications that come with it.

(Exhibit No. 2 was marked for identification.)

(Document handed to the witness.)

BY MR. HALE:

Q. Mr. McNair, I've handed to you what's been marked as Exhibit 2. Is that document familiar to you?

A. Oh, yes.

Q. You may not have seen the cover fax sheet before, but those are the redacted regulations that –

A. Correct.

[100] Q. – you provided Mr. Pines to provide to me?

A. Correct.

Q. I believe I'm correct in saying that these are unclassified?

A. Yes.

Q. Can you tell me was it you, sir, who determined what to redact from the documents?

A. My associate and I talked about this. She actually did the redaction because I had a medical appointment, but I'm in agreement with this.

Q. Can you tell me – I understand from Mr. Pines' letter and from a conversation with Harold that there are two objections, one is on relevance and one is on classified information basis.

A. Correct.

Q. Which is which? Can you tell me that? I mean I know there's quite a bit being blacked out here.

MR. PINES: Let me try to clarify that [101] because I think it's a little more of a legal issue.

None of the redactions here – rephrase. All the redactions that you have here are based on national security reasons. The relevancy reason is when you go back to the regulations you only have certain pertinent paragraphs that we have pulled. We didn't include the rest of the regulation A, it's classified, but B, it wasn't relevant to what you asked for when we pulled it all apart.

MR. HALE: It might be relevant to our case but isn't relevant to what I asked for; is that correct?

MR. PINES: Correct.

MR. HALE: Well, maybe if I could ask you would it be not responsive then as opposed to being not relevant?

MR. PINES: Well, okay. It was not responsive to the question. Relevancy is of course a matter of debate.

MR. HALE: Just so you guys understand, [102] it's more than likely I'll probably give you another request that's more appropriately defined so as not quite so narrow. Because it does appear to us that these regulations do

sort of come out in the middle of a group of regulations that deal with a topic at issue in this lawsuit.

MR. PINES: Well, we can certainly have that discussion.

BY MR. HALE:

Q. Now do you ever consider when you redact this type of a document for making it unclassified substitute a word for another one?

For example, if the word "defector" was in this regulation – and you've already explained to me that the word "defector" is a classified word, but there might be another word that could be used, like resettlee or something of that nature.

Is it possible to provide that type of additional explanation so we could better read the sentence without using the classified word?

A. In most cases, yes.

[103] Q. Okay.

MR. HALE: Harold, I'll probably have a conversation with you about whether that's possible to do here.

Quite frankly, some of the sentences it looks like they're missing a noun. If that noun happens to be a code word or something like that, but if you can give me a fair substitute so we can make sense out of the sentence that might be useful. We can discuss that later off the record.

MR. MALKIN: Can I ask one quick favor? I was just handed a note. I literally need to make about a ten-

second phone call. Can I just put you on hold for one second?

MR. HALE: Sure. Go ahead. That's fine.

MR. MALKIN: By the time you frame your next question, I'll be back.

(Off the record.)

MR. HALE: Back on the record.

BY MR. HALE:

Q. Can you tell me, Mr. McNair, if these regulations were not redacted what level of [104] classification they would have?

A. Secret.

Q. Any particular compartment?

A. No.

Q. Do you know why these regulations were not provided to us earlier?

MR. PINES: I'm going to object as vague and ambiguous. Earlier when?

MR. HALE: Prior to last week, I mean like a year ago or two years ago.

MR. MALKIN: Just to make it clear, not suggesting that we did not respond as part of the matter of litigation in an appropriate way to your discovery response.

MR. HALE: Absolutely, Harold. We gave you a Rule 34 request. You responded timely. No complaint.

BY MR. HALE:

Q. I'm just asking whether you know, if you do, sir, why we didn't get copies of these a year ago or two years ago. Maybe the answer is we didn't ask for them. Maybe you don't know.

[105] A. I have no idea.

Q. Do you know that we in fact did ask for relevant regulations earlier?

A. I don't believe I know that.

Q. Mr. McNair, is it your job in any way to participate in the drafting of these types of regulations, substantive drafting?

A. No.

Q. Is it your job in any way to interpret the regulations as to what they mean?

A. No.

Q. Your job is to review them in circumstances where there's a request to give them to someone else and to make sure that they're given to them in a way that doesn't threaten national security; correct?

A. Correct.

Q. It's a security function?

A. A classification function.

Q. Thank you.

MR. PINES: Are we going to work with the regulations first? Is that what you're going to [106] look at?

MR. HALE: Yeah.

MR. PINES: I just wanted to clarify. Looking at it as I have the last couple days, I wasn't sure if it was clear what these were so I want to clarify for the record –

MR. HALE: That would be terrific.

MR. PINES: – and for you so you understand.

There are five effective regulations we've handed to you. Three of them are marked regulation A, and they are different renditions of the same regulation. One went into effect January 15, '81. It was then superseded by the one that went into effect July 13th, 1990, and then superseded by the one that's June 25th, 1999 that applies to the present time. Those were the first three.

So those are all different renditions of the exact same regulation, just at different times it was changed and rewritten. Because of the way that your request was phrased, we gave you the [107] three different versions.

The same is true for the two regulations that are marked regulation B. By the way, A and B are not their present name. The real numbering of the regulation is classified, but we just ascribed a letter to it.

So the same is true for regulation B. There are two versions here. One was in effect it looks like June 23rd, 1981. It was then superseded by regulation B that went into effect January 4, 1999.

MR. HALE: I appreciate that clarification, Daniel. The two you just spoke of, item B, regulation B, the older one is item C, 4 through 6, and the newer one is item 2, d(5).

So the 1990 regulation superseded the '81 regulation, but because of the evolution of regulations over time, the letters don't match directly. Is that what you're saying?

MR. PINES: The letters don't match, and also what happened was in the prior rendition the part that you were interested in kind of fell [108] across a couple different categories. In the more recent rendition, all that information was all in one paragraph. So rather than give you the irrelevant paragraphs, we just cut to the chase. They did get renumbered and relettered.

MR. HALE: Thank you. That helps a great deal.

In essence, what we have here are two regulations. One has three versions. One has two versions.

MR. PINES: Correct. They are the same version. They're just earlier –

MR. HALE: One superseded the other.

MR. PINES: Correct.

BY MR. HALE:

Q. Your answer earlier, Mr. McNair, when I asked you about the classification level that the whole regulation, not just what you've given me here, is secret.

A. Yes.

MR. PINES: Maybe to clarify that just a little bit more, without the redactions, each one [109] of these

regulations in whatever version you see them that sections would be mark secret, and the whole regulation of which it's a part is also classified secret.

MR. HALE: All right.

BY MR. HALE:

Q. Mr. McNair, earlier you had mentioned – when you were explaining to me some of the considerations that go into disclosures and confirmations for national security purposes, you mentioned about in some countries people might be arrested.

Can I follow up on that and ask you is it your opinion that resettlees, at least some of them, do in fact face repercussions from their former country if their identity or location were known?

A. Some of them, yes.

Q. Some of those repercussions could be physical danger?

A. Absolutely.

Q. In some extreme cases could even be [110] death?

A. Absolutely.

Q. By the way, did you have any role in reviewing anything that the agency has filed in this case?

Do you get involved that way, or do you just trust the lawyers to know what's classified and not classified?

A. They usually run it by me.

Q. Did they do it in this case? Did you look at what was filed by the government in this case?

A. I would assume so.

MR. HALE: Why don't we take about five minutes, if you would, please, and we'll come back on the record.

(Off the record.)

MR. HALE: Let's get back on the record.

BY MR. HALE:

Q. Mr. McNair, if you would look at Exhibit 2, please, and go to the next to the last regulation, the regulation B dated 1/4/99.

[111] A. Yes.

Q. About two-thirds of the way of that regulation, do you see the sentence that says "The safety and security of blank are continuing of CIA"?

A. Yes.

Q. Can you tell me if you know of what recourse a resettlee might have if the agency refused to provide that protection? I mean is there some procedure in the agency that challenged that decision?

A. I don't know the procedures for it, no.

MR. HALE: All right. Well, as I discussed with counsel before, I'm not going to close this deposition because there may be need to return to it after we have further discussions about production of additional regulations or what have you.

So I will suspend it for now, but ask you to please prepare a transcript and furnish it to me and to Mr. Pines and –

MR. MALKIN: You can actually send it to [112] us. We'll be the ones who are paying for it.

MR. HALE: Okay. That's fine.

(Whereupon, at 12:50 p.m., the taking of the deposition concluded.)

(Signature not waived.)

[113] CERTIFICATE OF DEPONENT

I have read the foregoing ___ pages, which contain the correct transcript of the answers made by me to the questions therein recorded.

_____

Subscribed and sworn to before me this ___ day of ___, 19___.

_____
Notary Public, in and for

_____

My commission expires:___

[114] ***CERTIFICATE OF NOTARY PUBLIC***

I, CHERYL KAY GERBER, the officer before whom the foregoing deposition was taken, do hereby testify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me stenographically and thereafter

reduced to typewriting under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto nor financially or otherwise interested in the outcome of the action.

/s/ Cheryl Kay Gerber
CHERYL KAY GERBER
Notary Public in and for
the District of Columbia

My commission expires: October 31, 2002

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN DOE and JANE DOE, Plaintiffs, v. GEORGE TENET, et al., Defendant.	)	Judge Lasnik Civil Action No. C99-1597L

DECLARATION OF WILLIAM H. MCNAIR

I, William McNair, hereby declare and say:

1. I am the Information Review Officer ("IRO") for the Directorate of Operations ("DO") of the United States Central Intelligence Agency ("CIA" or "Agency"). The Directorate of Operations is the CIA's Clandestine Service, and is responsible for, among other things: conducting foreign intelligence and counterintelligence activities through various means, including human sources; conducting covert action; conducting liaison with foreign intelligence and security services; supporting clandestine technical collection; and coordinating CIA support to the Department of Defense. I have held operational and executive positions in the intelligence agencies of the United States Government since 1962, and with the CIA since 1982. I served as Associate IRO for the DO from July 1993 until I was appointed to my present position in February 1994.

2. As DO/IRO, I am responsible for the review of records maintained by offices in the DO that may be responsive to Freedom of Information Act ("FOIA") or Privacy Act requests, as well as to requests from the

Department of Justice in criminal or civil litigation. I am also responsible for conducting classification reviews with respect to information originated by the DO, or otherwise implicating DO interests, including any and all Agency regulations or statutes that govern Agency actions towards Agency employees, assets, sources, defectors, etc. I am authorized to sign declarations on behalf of the Agency regarding the existence of any such regulations or statutes, and to discuss or describe the contents of any relevant regulations or statutes under the cognizance of the Agency.

3. Through the exercise of my official duties, I have become familiar with the major issues in this civil action, and with the allegations of plaintiffs that they are entitled to lifetime benefits from the Agency. The statements herein are based upon my personal knowledge, information made available to me in my official capacity, the advice and counsel of the CIA Office of General Counsel, and conclusions I reached and determinations I made in accordance therewith.

4. I have been informed that plaintiffs allege that they committed espionage upon the request of the Agency, were sponsored by the Agency to defect to the United States pursuant to Section 7 of the Central Intelligence Agency Act of 1949, 50 U.S.C. § 403h (commonly known as "PL-110"), and did in fact defect to the United States where they now reside. I have been informed that plaintiffs further allege that they are entitled to lifetime benefits from the Agency pursuant to PL-110, an Agency policy or regulation established pursuant to PL-110, or some other unspecified Agency policy or regulation providing for lifetime benefits to defectors or a certain class thereof.

5. The Directorate of Operations is the CIA directorate responsible for the processing of individuals brought into the United States by CIA under the authority of PL-110. As the court may be aware, other federal agencies may bring individuals into the United States under PL-110. As DO/IRO, I have full access to all information concerning the Agency's responsibilities under PL-110. I have specifically reviewed such information for any regulations or internal CIA policies concerning PL-110 with respect to any provisions of subsistence assistance to be provided to individuals brought into the United States under the authority of PL-110. I can inform the court unequivocally that there are no Agency or other US federal regulations that require the CIA to provide lifetime subsistence assistance to individuals brought into the United States under the authority of PL-110. **Neither PL-110, nor any other law, statute, regulation, internal policy, unstated principle or anything else has ever before, or does now, obligate the Agency to provide any form of lifetime financial assistance to individuals brought into the United States by CIA under the authority of PL-110.**

6. There is an agreement between the CIA and the Department of Justice in which CIA promised to DOJ that CIA would ensure that individuals whom the CIA brought into the United States under the authority of PL-110 would not become public charges before such time that they either attained United States citizenship, or were eligible to become United States citizens. The Agency has a regulation to this effect as well. However, I have been informed that plaintiffs in this case claim that they are presently United States citizens.

7. On page 10, lines 12-17, of this Court's 7 June 2000 Order, the Court states that, because the Agency has reviewed and approved "for public filing all papers filed by plaintiffs thus far" that "the Court is confident that the case may be litigated without requiring the disclosure of national security secrets. . . . " I wish to explain the purpose of the Agency's review of the complaint filed in this case.

8. I am the individual who, on behalf of the Agency, has conducted the review of the plaintiffs' complaint and other pleadings and posed no objection to the filing of such pleadings in open court. The CIA does not conduct a classification review, per se, of court pleadings in cases such as these. Plaintiffs pleadings contained mere allegations which, absent official US Government confirmation, did not constitute classified information. The purpose of my review, therefore, was to determine whether certain allegations, in themselves, could be so harmful to national security that I should object to their being disclosed. Such an allegation might be to name a specific individual to be a CIA officer. Whether or not true, such an allegation can jeopardize the physical safety and financial well-being of the named person, as well as his or her family. In cases when the allegation is true, the potential threat also extends to intelligence sources with whom that officer had contact. Thus, my review of a pleading generally looks to those allegations that, regardless of their truth, would threaten the national security or the safety and well-being of innocent persons. Individuals submit pleadings to CIA for such a review either voluntarily or because they have been granted a security clearance by CIA and, as a condition of receiving such a clearance, are required to submit their pleadings. (In which category plaintiffs and their counsel fall can only be discussed in a classified pleading.)

9. In this case, any Agency response to the factual assertions made in any of plaintiffs' pleadings, whether to either confirm or deny the allegations contained therein, would be classified information and could not be filed in open court. The reason for this is that, while mere allegations made by individuals about the Agency are not classified in most circumstances, when such allegations are either confirmed or denied by the Agency (or by the United States Government in general) they then bear the imprimatur of an official statement, at which point, at least in the instant case, national security issues would be raised and the matters would become classified.[1]

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed this 17 day of July 2000

William H. McNair
WILLIAM H. MCNAIR
Information Review Officer
and
Records Validation Officer
Central Intelligence Agency

[1] Although not necessarily self-evident, the denial of such a relationship would itself reveal classified information. If the CIA were to deny a relationship every time one did not exist, then any time the Agency refused to confirm or deny a relationship, it would be tantamount to an admission that such a relationship does in fact exist. Such a procedure would obviously reveal the very information that the CIA seeks to protect (i.e. a current or past covert relationship) and would risk national security.