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NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

March 13, 1987

MEMORANDUM FOR ARNOLD INTRATER
GENERAL COUNSEL
OFFICE OF ADMINISTRATION

FROM: PAUL SCHOTT-STEVENSON *PS*
SUBJECT: Travel Search Request

The Assistant U.S. Attorney, Holly B. Fitzsimmons, in the case of U.S. v. Durrani, asked my office whether any member of the National Security Council staff was in Lisbon on September 12, 1986, or in London between September 28 and October 2, 1986. Ms. Fitzsimmons requires this information for purposes of expected cross examination of the defendant who is being prosecuted for exporting arms to Iran illegally. Durrani is claiming he was associated with Lt Colonel North and thus is a U.S. agent.

I have asked our Administrative Office to see if anyone on the NSC staff was in Lisbon or London on the dates mentioned. I would appreciate it if you would ask your travel office to conduct a similar search of their records.

Ms. Fitzsimmons would like an answer within two weeks, if possible.

cc:
NSC Admin Office ✓

USV. DURRANI

3/6/87

NATIONAL SECURITY COUNCIL 7pm

Conv. w/ Holley Fitzsimmons,

Judge wants a witness
to explain & give more
details of the affidavit
re ① the time involved to
make the search manageable

② How to cut back the
subpoena to make it reasonable

③ Hawk parts in the #2+3

Home # (203) 263 5447

Hearing 10 AM 9 March '87

Continuance probably can be had
until 2pm

CIA lawyer Don Eilenberger

(H) 703-931-1066 (FRINIGHT IN LAWS
203-263-2353)

(W) 703-482-7531

State Dennis Foreman

⑧ 647 9791

(2)

NATIONAL SECURITY COUNCIL

{ Jack Kosar - Nat'l Airport
LONDON Sept 28 - Oct 2 '86
LISBON, Port 12 Sept '86

#

No independent Ker purchases -
drawn down items from Israel,
DoD stocks - Who could say this

→ How to search

ISSUE IS contacts w/ Gov.

met ⁱⁿ LONDON LISBON w/ Mr.
White (who Δ thinks now is Ollie)

PROF Notes on those dates for
Ollie on these dates then you're
disproved

"PROG fail to produce NSC
up at her peril"

3/9/87
Conversation w/ ^①Holley Fitzgimmons
Chambers —

4 Requests

① Memo from North to Poland.

April 16 1986 440 pm

"We ~~seem~~ have a problem
on our side in that over 50
→ the parts now do not
appear to be in stock"

Profs Note

② Memo from N to P
including appendix 2 of
Sept 2, 1986 titled or regarding
"Next Steps with Iran"

concerns various initiatives
being pursued by the USG
to exchange arms
including Hawk missile
parts for hostages

③ Memo from N to P dtd

②

8 Sept 86 stating that
CIA has located several
unknown quantities of
thrust missile parts that
could be used in hostages
exchanges

[I have asked Mr. F. L.
to inquire whether # 3 is a
Refs Note]

④ Memo from N to P. ind. dtd
10 Oct 86 re "Next Steps
with Iran" and disc further
dilemmas of thrust missile
parts by the USG

[" " " " " "
" "]

#

Subpoena - proposed narrowing
to ① All docs relating to

③

or involving describing the involvement or policy of the NSC, ^{any} of its employees, or any of its agents or operations with instruments of launch missile systems or spare parts for launch mis systems to the Islamic Rep of Iran from Jan 1, '85 thru Feb '87. ④

#

Ques: ① Do they exist
② Are they classified?

③ Sept 12 '86

Sept 28 - Oct 2 '86

Where was North?

Prove he's in D.C. by Profs Note

10 Am Court Appearance
Linda

Fax's to ^{3/3}

Mr. Levin - Epstein
New Haven, Conn.

United States District Court

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

V.

SUBPOENA

ARIF DURRANI

CASE NUMBER: CRIM. B-86-59 (TFGD)

TYPE OF CASE

☐ CIVIL ☒ CRIMINAL

SUBPOENA FOR

☒ PERSON ☒ DOCUMENT(S) or OBJECT(S)

TO:

Custodian of Records
National Security Council
c/o Administrative Office
Old Executive Office Building, Room 397
17th and Pennsylvania Aves., N.W.
Washington, D.C.

YOU ARE HEREBY COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE

United States District Court
915 Lafayette Boulevard
Bridgeport, Connecticut 06604

COURTROOM

Fourth Floor

DATE AND TIME

March 4, 1987,
at 9:30 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s): *

See Attachment A

☐ See additional information on reverse

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

U.S. MAGISTRATE OR CLERK OF COURT

ESTHER P. ROWE

DATE

2/24/87

(BY) DEPUTY CLERK

Sharon Collins

This subpoena is issued upon application of the:

☐ Plaintiff ☒ Defendant ☐ U.S. Attorney

QUESTIONS MAY BE ADDRESSED TO:

Ira B. Grudberg, Esq.
Jacobs, Grudberg, Belt & Dow
350 Orange Street
New Haven, CT 06503 (203) 772-3100

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER

*If not applicable, enter "none".

RETURN OF SERVICE ⁽¹⁾			
RECEIVED BY SERVER	DATE <i>11:00 AM</i> <i>MARCH 2, 1987</i>	PLACE <i>1735 PA. AVE N.W.</i> <i>WASH. D.C. 20006</i> <i>7th floor</i>	
SERVED	DATE	PLACE	
SERVED ON (NAME)		FEES AND MILEAGE TENDERED TO WITNESS ⁽²⁾	
		<input type="checkbox"/> YES <input type="checkbox"/> NO AMOUNT \$ _____	
SERVED BY		TITLE	
STATEMENT OF SERVICE FEES			
TRAVEL	SERVICES	TOTAL	
DECLARATION OF SERVER ⁽²⁾			
<p>I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.</p> <p>Executed on _____</p> <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div style="text-align: center;"> <p><i>Date</i></p> </div> <div style="text-align: center;"> <p><i>Signature of Server</i></p> </div> </div> <div style="text-align: center; margin-top: 10px;"> <p><i>Address of Server</i></p> </div>			
ADDITIONAL INFORMATION			

- (1) As to who may serve a subpoena and the manner of its service see Rule 17(d), Federal Rules of Criminal Procedure, or Rule 45(c), Federal Rules of Civil Procedure.
- (2) "Fees and mileage need not be tendered to the deponent upon service of a subpoena issued on behalf of the United States or an officer or agency thereof (Rule 45(c), Federal Rules of Civil Procedure; Rule 17(d), Federal Rules of Criminal Procedure) or on behalf of certain indigent parties and criminal defendants who are unable to pay such costs (28 USC 1825, Rule 17(b) Federal Rules of Criminal Procedure)".

ATTACHMENT A

(1) All documents regarding or naming the following individuals or entities and concerning the sale of military equipment to governments or individuals outside the United States: Arif Durrani, of California; Manuel Pires, of Lisbon, Portugal; Willy de Grief, of Brussels, Belgium; Howard Koser, of Washington; George Hassan, of Lisbon, Portugal; Richard Secord, of California; Albert Hakim, of California; Advance Technology, Inc., of Wilmington, Delaware; Varian Associates, of California; Radio Research, Inc., of Danbury, Connecticut; Kram, Ltd., of Belgium; Risenvest, of Belgium; and Rutland Trading, of Belgium.

(2) All documents relating to or describing the involvement of the National Security Council or any of its employees with shipments of military equipment to the Islamic Republic of Iran, either directly or indirectly, from 1982 through February 1987.

(3) All documents regarding payment for arms shipments to Iran that in any way involved the National Security Council or any of its employees, from 1982 through February, 1987.

Definition: As used above, "documents" include any written, printed, typed, recorded, or graphic material, photographic matter, sound reproductions or computer data files, tapes, inputs or outputs, however produced or reproduced that are now or formerly in your actual or constructive possession, custody or control.

NSC/S PROFILE

UNCLASSIFIED

ID 8700734

RECEIVED 03 MAR 87 08

TO GREEN

FROM GRUDBERG, IRA

DOCDATE 03 MAR 87

KEYWORDS: INVESTIGATION

DURRANI, ARIF

SUBJECT: US DISTRICT COURT OF CONNECTICUT REQUEST THE NSC CUSTODIAN OF RECORDS
APPEAR BEFORE THE COURT ON 4 MAR

ACTION: APPROPRIATE ACTION

DUE: 04 MAR 87 STATUS S FILES PA

FOR ACTION

FOR CONCURRENCE

FOR INFO

REGER

STEVENS

THOMPSON

SCHARFEN

PEARSON

COMMENTS

REF#

LOG

NSCIFID

(TC)

ACTION OFFICER (S) ASSIGNED ACTION REQUIRED DUE COPIES TO

DISPATCH _____ W/ATTCH FILE _____ (C)

United States District Court

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

V.

SUBPOENA

ARIF DURRANI

CASE NUMBER: CRIM. B-86-59 (TFGD)

TYPE OF CASE	SUBPOENA FOR
<input type="checkbox"/> CIVIL <input checked="" type="checkbox"/> CRIMINAL	<input checked="" type="checkbox"/> PERSON <input checked="" type="checkbox"/> DOCUMENT(S) or OBJECT(S)

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(BY) DEPUTY CLERK <i>Sharon Collins</i>	2/24/87

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☐ Plaintiff ☒ Defendant ☐ U.S. Attorney

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Jacobs, Grudberg, Belt & Dow
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* If not applicable, enter "none".

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SERVED	DATE	PLACE
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SERVED BY		TITLE
STATEMENT OF SERVICE FEES		
TRAVEL	SERVICES	TOTAL
DECLARATION OF SERVER ⁽²⁾		
<p>I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.</p> <p>Executed on _____ <div style="display: flex; justify-content: space-between;"> Date Signature of Server </div> <div style="text-align: center;"> Address of Server </div> </p>		
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Definition: As used above, "documents" include any written, printed, typed, recorded, or graphic material, photographic matter, sound reproductions or computer data files, tapes, inputs or outputs, however produced or reproduced that are now or formerly in your actual or constructive possession, custody or control.

PSS's Draft

cont w/ Paul B.T.
comments

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

cont w/
Holley Fitzsimmons

UNITED STATES OF AMERICA)	
)	
v.)	Criminal Action
)	No. B-86-59 (TFGD)
ARIF DURRANI)	
)	AFFIDAVIT OF
)	GEORGE VAN ERON

I, George Van Eron, do hereby declare as follows:

1. I am the Director of the Secretariat of the National Security Council (NSC), and have served in that capacity since May 1979. I am responsible for managing the Secretariat, which provides custodial support for national security records generated by the President, the NSC, the Assistant to the President for National Security Affairs, and the NSC staff. The Secretariat logs, tracks, indexes, researches, dispatches, files and has custody of such records, under the supervision of the Director of the Office of Information Policy and Security Review (OIPSR), the Executive Secretary of the NSC, and the Assistant to the President for National Security Affairs. I have personal knowledge of all matters set forth in this Affidavit.

$$40 \times 2\frac{1}{2} = 100$$

$$\begin{array}{r} 6 \\ \hline 600 \end{array}$$

2

2. I have read the February 27, 1987, subpoena issued in the case of UNITED STATES OF AMERICA v. ARIF DURRANI, and addressed to the "Custodian of Records, National Security Council." To conduct a search of documents in the custody of the Secretariat, as called for in such subpoena, would require at least 600 man hours, ~~the full-time services of 2 to 3 employees over a period of not less than six weeks~~. Employees detailed for such purpose would be unavailable to assist in on-going efforts of the Secretariat to comply with earlier requests for documents variously made by the Office of Independent Counsel and certain Select Committees of the Congress. Some documents potentially responsive to ~~what~~ *part* of the subpoena heretofore have been collected, pursuant to earlier requests. Insofar as such subpoena calls for documents dating from 1982, compliance would require a greatly expanded search; and it would be necessary to re-review all those documents collected in connection with such earlier requests.

3. I estimate that at least 90 percent of any documents identified in response to such subpoena would be properly classified under Executive Order 12356 of April 1, 1982. Any search of documents in custody of the Secretariat accordingly would have to be conducted in accordance with those safeguards on access to classified information set forth in that Executive Order. Controls necessary for that purpose are additional reasons for the length of time required.

MAN
Hours
20 x 2 = 40
30 x 2 = 60
75 x 8 = 600
man hours

PBT
Holley
said
this is
relevant!
Judge
Zabaneh

Paulina

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____

George Van Eron

District of Columbia
City of Washington

Sworn to and subscribed before me this 5th day of March, 1987, by
George Van Eron.

Richard D. White
Notary Public

My commission expires 14 December 1988.

UNITED STATES OF AMERICA)
)
)
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 v.) Criminal Action
) No. B-86-59 (TFGD)
)
)
 ARIF DURRANI)
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)	No. B-86-59 (TFGD)
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George Van Eron

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA)	
)	
v.)	Criminal Action
)	No. B-86-59 (TFGD)
ARIF DURRANI)	
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City of Washington

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George Van Eron.

Richard D. White
Notary Public

My commission expires 14 December 1988.

WHITE HOUSE LAW LIBRARY

Room 528

395-3397

TO Joek

ROOM _____ DATE 3/4

☒

To Keep

☐

To Borrow

Due Date _____

☒

Per Your Request

☐

FYI

Message:

From: mh

(7-1-86 Edition)

IAL Cover Sheet:

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L classified infor-
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-213-7903.

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CHAPTER XXI—NATIONAL SECURITY COUNCIL

<i>Part</i>		<i>Page</i>
2101	Freedom of Information Act requests for classi- fied documents—processing, fees, reports, appli- cable material, declassification criteria, partial release	470
2102	Rules and regulations to implement the Privacy Act of 1974.....	476
2103	Regulations to implement E.O. 12065—including procedures for public access to documents that may be declassified	480

(7-1-86 Edition)

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Reserved]

CHAPTER XIX—CENTRAL INTELLIGENCE AGENCY

<i>Part</i>		<i>Page</i>
1900	Public access to documents and records and de- classification requests.....	426
1901	Rules and regulations to implement the Privacy Act of 1974.....	435
1902	Information security regulations	441
1903	Regulations to implement section 401 of the Intel- ligence Authorization Act for fiscal year 1985.....	443

missal of indictment against receiving state fails to try ent that is subject of transfer oner back to sending state; o effect on conviction. United 979, CA5 Fla) 599 F2d 100, 05 F2d 554.

ment contemplated by Article Agreement on Detainers Act ictment which underlies origiquest by which custody of d. Fasano v Hall (1979, DC 91, affd (CA1 Mass) 615 F2d

state Agreement on Detainers) are not cognizable under 28 ick v United States (1978, 1964 (disagreed with United CA3 Pa) 615 F2d 585, on 2 F Supp 721 and (disagreed CA4 Md) 659 F2d 402, cert 449, 102 S Ct 1259)).

USCS § 2255 must rest on claim in violation of laws of United subject to collateral attack, s on either of these grounds, ust have fundamental defect mplete miscarriage of justice nt exceptional circumstances dy afforded by writ of habeas claims do not rise to required or are unsubstantiated where failed to comply with provi Agreement on Detainers Act record does not disclose that ioner any harm either in his deral charges or to his status . Huff v United States (1979, 0, cert den 444 US 952, 62 L Ct 428 and (disagreed with ms (CA3 Pa) 615 F2d 585, 502 F Supp 721 and (disagreed Muncy (CA4 Md) 659 F2d 71 L Ed 2d 449, 102 S Ct

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of Interstate Agreement on not "fundamental defects" e of justice" so as to make available; alleged violations g on determination of guilt v Hall (1980, CA1 Mass)

ate Agreement on Detainers mental defect" cognizable in ings. United States v Wil- 615 F2d 585.

ate Agreement on Detainers prisoners to state custody rst tried on federal charges, ndamental defect" causing of justice" needed to justify prisoner failed entirely to

show that he was actually prejudiced by alleged violations or that his rights were not properly vindicated before trial court. Mars v United States (1980, CA6 Mich) 615 F2d 704.

Claim that prisoner's rights under Interstate Agreement on Detainers Act were violated was factor to be considered in determining whether Sixth Amendment speedy trial rights were violated, and did not provide independent basis for grant of writ of habeas corpus. Foran v Metz (1979, SD NY) 463 F Supp 1088, affd without op (CA2 NY) 603 F2d 212.

Where United States is sending jurisdiction, Federal District Court has jurisdiction under habeas corpus statute to their claim alleging violation of Interstate Agreement on Detainers Act. Williams v Dalsheim (1979, ED NY) 480 F Supp 1049.

Unawareness of provisions of IAD on part of petitioner's counsel does not render representation of petitioner per se ineffective. Kowalak v United States (1982, ED Mich) 534 F Supp 186.

Prisoners are not entitled to habeas corpus relief for violations of Article IV of IAD. Carlson v Hong (1982, DC Hawaii) 545 F Supp 352.

Annotations:

Availability of postconviction relief under 28 USCS § 2255 based on alleged governmental violation of the Interstate Agreement on Detainers Act (18 USCS Appx). 58 ALR Fed 443.

37.5. Jurisdiction

Federal District Court has jurisdiction to consider habeas corpus claim based on alleged violations of Interstate Agreement on Detainers. Fasano v Hall (1979, DC Mass) 476 F Supp 291, affd (CA1 Mass) 615 F2d 555.

38. Challenge to detainer

Prisoner incarcerated in jurisdiction but has adopted Uniform Criminal Extradition Act is entitled to procedural protections of that Act, including right to pretransfer hearing, before being transferred to another jurisdiction pursuant to Article IV of Detainer Agreement; prisoner may state claim for relief under 42 USCS § 1983 where state officials failed to grant him requisite pre-transfer hearing. Cuyler v Adams (1981, US) 66 L Ed 2d 641, 101 S Ct 703.

Permanent injunction preventing federal prison warden from recognizing state writ of habeas corpus ad prosequendum is not abuse of court's discretion where prisoner has no adequate remedy at law that could have preserved his rights under Interstate Agreement on Detainers. Burrus v Turnbo (1984, CA9 Cal) 743 F2d 693.

Invalidity of detainer under Interstate Agreement on Detainers (18 USCS Appx) is by itself insufficient ground for granting habeas relief where

prisoner's challenge to detainer does not support claim that conviction in receiving state was improperly rendered. Hudson v Moran (1985, CA9 Nev) 760 F2d 1027.

Failure to grant prisoner pretransfer extradition hearing does not deprive requesting state of jurisdiction, constitute exceptional circumstance justifying habeas corpus relief, or require remand to custody of asylum state. Shack v Warden of Graterford Prison (1984, ED Pa) 593 F Supp 1329.

40. Right to speedy trial within 180 days [Article III(a)]

For purposes of 18 USCS Appendix it seems clear that 180 day restriction does not come into play until person begins service of term of imprisonment, which does not include time person was only held in some other facilities awaiting final sentencing. United States v Wilson (1983, CA10 Colo) 719 F2d 1491.

Any violation of Interstate Agreement on Detainers by state of Tennessee does not constitute such fundamental defect in state proceedings against defendant as to be cognizable in federal habeas corpus proceeding. Grizzell v Tennessee (1984, MD Tenn) 601 F Supp 230, later proceeding (CA6 Tenn) 746 F2d 1476.

42. Right to speedy trial within 120 days [Article IV(e)]

One hundred twenty-eight day delay between prisoner's arrival in receiving state and trial violates 120-day speedy trial period, and entitles defendant to dismiss with prejudice, thereby further entitling defendant to federal habeas corpus relief to obtain release from prison. United States ex rel. Holleman v Duckworth (1984, ND Ill) 592 F Supp 1423.

43. —Exhaustion of remedy

Since substance of petitioner's Interstate Agreement on Detainers Act claim was raised in state court, he did not waive claim and sufficiently complied with state procedural requirements so that he was not barred from pursuing his federal habeas corpus remedy. Williams v Dalsheim (1979, DC NY) 480 F Supp 1049.

44. Right to trial before return to sending state [Article IV(e)]

Even if prisoner can show that government violated Interstate Agreement on Detainers Act by returning him to state custody prior to resolution of federal charges for which he was removed from state custody, such error does not entitle prisoner to vacation of sentence pursuant to writ of habeas corpus since such error falls short of fundamental defect causing complete miscarriage of justice or of exceptional circumstances. United States v Boniface (1979, CA9 Ariz) 601 F2d 390.

CLASSIFIED INFORMATION PROCEDURES ACT

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

§ 1. Definitions

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

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

RESEARCH GUIDE

Federal Procedure L Ed:

3 Fed Proc, L Ed §§ 5:550, 5:560.

INTERPRETIVE NOTES AND DECISIONS

Use of terms "classified information" and "national security" do not render 18 USCS Appendix void for vagueness inasmuch as terms are so defined in CIPA [18 USCS Appendix §§ 1 et seq.] to convey reasonable degree of certainty to defendant of what is required. *United States v Wilson*

(1983, SD NY) 571 F Supp 1422.

Void for vagueness attack is inapplicable to procedural statute such as Classified Information Procedures Act (18 USCS Appx.). *United States v Collins* (1985, SD Fla) 603 F Supp 301.

§ 2. Pretrial conference

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

INTERPRETIVE NOTES AND DECISIONS

18 USCS Appx §§ 2 and 5 do not relieve burden of proving that information is classified from government's shoulders in that if such dispute arises,

government is expected to demonstrate that information in question is indeed classified. *United States v Jolliff* (1981, DC Md) 548 F Supp 229.

§ 3. Protective orders

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

RESEARCH GUIDE

Am Jur:

23 Am Jur 2d, Depositions and Discovery §§ 424, 445.

§ 4. Discovery of classified information by defendants

The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

RESEARCH GUIDE

Am Jur:

23 Am Jur 2d, Depositions and Discovery § 445.

INTERPRETIVE NOTES AND DECISIONS

Trial judge did not abuse discretion in refusing defendants opportunity to inspect classified surveillance equipment aboard US Customs airplane which vectored their flight path during drug smuggling flight, since under Classified Information Procedures Act (18 USCS Appx § 4) district court

was authorized to delete material from information made available to defendants. *United States v Porter* (1983, CA6 Tenn) 701 F2d 1158.

Defendant in narcotics prosecution is not entitled under 18 USCS Appendix §§ 1-16 to disclosure of technical data on transmitting device worn

by FBI agent, or to dismissal for refusal to disclose, since data was not classified, and agents testified as to range, clarity and reception of device

and were subject to cross-examination. *United States v Panas* (1984, CA8 Mo) 738 F2d 278.

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

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

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

RESEARCH GUIDE

Am Jur:

23 Am Jur 2d, Depositions and Discovery § 445.

INTERPRETIVE NOTES AND DECISIONS

18 USCS Appx § 5 notice must be particularized, setting forth specifically classified information which defendant reasonably believes to be necessary to his defense. *United States v Collins* (1983, CA11 Fla) 720 F2d 1195.

Notice requirements § 5 of Classified Information Procedures Act (18 USCS Appendix) do not violate privilege against self-incrimination and are not constitutionally infirm. *United States v Wilson* (1984, CA2 NY) 750 F2d 7.

18 USCS Appx §§ 2 and 5 do not relieve burden

of proving that information is classified from government's shoulders in that if such dispute arises, government is expected to demonstrate that information in question is indeed classified. *United States v Jolliff* (1981, DC Md) 548 F Supp 229.

18 USCS Appx § 5 is not inconsistent with USCS FRCrP 16 inasmuch as although Rule 16 may not authorize broader disclosure, Rule does not preclude disclosure authorized in other enactments. *United States v Jolliff* (1981, DC Md) 548 F Supp 229.

§ 6. Procedure for cases involving classified information

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

(b) **Notice.** (1) Before any hearing is conducted pursuant to a request by the United States under subsection (a), the United States shall provide the defendant with notice of the classified information that is at issue. Such notice shall identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States. When the United States has not previously made the information available to the defendant in connection with the case, the information may be described by generic category, in such form as the court may approve, rather than by identification of the specific information of concern to the United States.

(2) Whenever the United States requests a hearing under subsection (a), the court, upon request of the defendant, may order the United States to provide the defendant, prior to

trial, such details as to the portion of the indictment or information at issue in the hearing as are needed to give the defendant fair notice to prepare for the hearing.

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

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

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

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

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

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

(e) **Prohibition on disclosure of classified information by defendant, relief for defendant when United States opposes disclosure.** (1) Whenever the court denies a motion by the United States that it issue an order under subsection (c) and the United States files with the court an affidavit of the Attorney General objecting to disclosure of the classified information at issue, the court shall order that the defendant not disclose or cause the disclosure of such information.

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

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

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

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

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

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

RESEARCH GUIDE

Am Jur:

23 Am Jur 2d, Depositions and Discovery § 445.

INTERPRETIVE NOTES AND DECISIONS

Provisions of 18 USCS Appx § 6 applies to government's response to defendant's § 5 notice; if government wishes to avail itself of § 6 to elimi-

nate or ameliorate classified information disclosure, it must provide defendant with notice of those items of classified information in defendant's

classified information disclose defendant with notice of classified information in defendant's

(a) Within one hundred and twenty days of the date of the enactment of this Act [enacted Oct. 15, 1980], the Chief Justice of the United States, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeal, or Supreme Court. Such rules, and any changes in such rules, shall be submitted to the

Section 6(c) of Classified Information Procedures Act (18 USCS Appx § 6(c)) requires that balancing test be made in order to guarantee that defendant is not prejudiced by any substitution, and does not preclude presentation of defendant's story to jury but merely allows some restriction on manner in which story will be told. *United States v Collins* (1985, SD Fla) 603 F Supp 301.

appropriate committees of Congress and shall become effective forty-five days after such submission.

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

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Security procedures established pursuant to Act Oct. 15, 1980, P. L. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the protection of classified information.

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

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

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

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

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

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

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

The secure quarters shall be located within the Federal courthouse, unless it is determined that none of the quarters available in the courthouse meets, or can reasonably be made equivalent to, security requirements of the Executive Branch applicable to the level and category of classified information involved. In that event, the court shall designate the facilities of another United States Government agency, recommended by the court security officer, which is located within the vicinity of the courthouse, as the site of the proceedings. The court security officer shall make necessary arrangements to ensure that the applicable Executive Branch standards are met and shall conduct or arrange for such inspection of the quarters as may be necessary. The court security officer shall, in consultation with the United States Marshal, arrange for the installation of security devices and take such other measures as may be necessary to protect against any unauthorized access to classified information. All of the aforementioned activity shall be conducted in a manner which does not interfere with the orderly proceedings of the court. Prior to any hearing or other proceeding, the court security officer shall certify in writing to the court that the quarters are secure.

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

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

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information involved. The Department of Justice Security Officer shall advise the court in writing when the necessary security clearances have been obtained.

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

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

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

5. Persons Acting for the Defendant. The government may obtain information by any lawful means concerning the trustworthiness of persons associated with the defense and may bring such information to the attention of the court for the court's consideration in framing an appropriate protective order pursuant to Section 3 of the Act [18 USCS Appx § 3].

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

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

7. Custody and Storage of Classified Materials.

a. Materials Covered. These security procedures apply to all papers, documents, motions, pleadings, briefs, notes, records of statements involving classified information, notes relating to classified information taken during in camera proceedings, orders, affidavits, transcripts, untranscribed notes of a court reporter, magnetic recordings, or any other submissions or records which contain classified information as the term is defined in Section 1(a) of the Act [18 USCS Appx § 1(a)], and which are in the custody of the court. This includes, but is not limited to (1) any motion made in connection with a pretrial conference held pursuant to Section 2 of the Act [18 USCS Appx § 2], (2) written statements submitted by the United States pursuant to Section 4 of the Act [18 USCS Appx § 4], (3) any written statement or written notice submitted to the court by the defendant pursuant to Section 5(a) of the Act [18 USCS Appx § 5(a)], (4) any petition or written motion made pursuant to Section 6 of the Act [18 USCS Appx § 6], (5) any description of, or reference to, classified information contained in papers filed in an appeal, pursuant to Section 7 of the Act [18 USCS Appx § 7] and (6) any written statement provided by the United States or by the defendant pursuant to Section 8(c) of the Act [18 USCS Appx § 8(c)].

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

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

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

8. Operating Routine.

a. Access to Court Records. Court personnel shall have access to court records only as

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

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

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

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

9. Records Security.

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

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

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

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

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

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

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

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

15. Effective Date. These procedures shall become effective forty-five days after the date of submission to the appropriate Congressional Committees, as required by the Act [18 USCS Appx §§ 1 et seq.].

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

INTERPRETIVE NOTES AND DECISIONS

Security procedures established pursuant to § 9 of Classified Information Procedures Act [18 USCS Appx § 9] which allows government with optional apparatus for gathering data relating to trustworthiness of defense counsel and his associ-

ates by any lawful means and for bringing such information to Court's attention does not violate defendants Sixth Amendment right to counsel. *United States v Jolliff* (1981, DC Md) 548 F Supp 232.

§ 10. Identification of information related to the national defense

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

RESEARCH GUIDE

Am Jur:

23 Am Jur 2d, Depositions and Discovery § 445.

§ 11. Amendment to the Act

Sec. 11. Sections 1 through 10 of this Act may be amended as provided in section 2076, title 28, United States Code [28 USCS § 2076].

§ 12. Attorney General guidelines

(a) Within one hundred and eighty days of enactment of this Act [enacted Oct. 15, 1980], the Attorney General shall issue guidelines specifying the factors to be used by the Department of Justice in rendering a decision whether to prosecute a violation of Federal law in which, in the judgment of the Attorney General, there is a possibility that classified information will be revealed. Such guidelines shall be transmitted to the appropriate committees of Congress.

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

- (1) the intelligence information which the Department of Justice officials believe might be disclosed,
- (2) the purpose for which the information might be disclosed,
- (3) the probability that the information would be disclosed, and
- (4) the possible consequences such disclosure would have on the national security.

§ 13. Reports to Congress

(a) Consistent with applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches, the Attorney General shall report orally or in writing semiannually to the Permanent Select Committee on Intelligence of the United States House of Representatives, the Select Committee on Intelligence of the United States Senate, and the chairmen and ranking minority members of the Committees on the Judiciary of the Senate and House of Representatives on all cases where a decision not to prosecute a violation of Federal law pursuant to section 12(a) has been made.

(b) The Attorney General shall deliver to the appropriate committees of Congress a report concerning the operation and effectiveness of this Act and including suggested amendments to this Act. For the first three years this Act is in effect [enacted Oct. 15, 1980], there shall be a report each year. After three years, such reports shall be delivered as necessary.

§ 14. Functions of Attorney General may be exercised by Deputy Attorney General or a designated Assistant Attorney General

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

§ 15. Effective date

The provisions of this Act shall become effective upon the date of the enactment of this Act [Oct. 15, 1980], but shall not apply to any prosecution in which an indictment or information was filed before such date.

§ 16. Short title

That this Act may be cited as the "Classified Information Procedures Act".