

In The
United States Court of Appeals
For The District of Columbia Circuit

**VALERIE PLAME WILSON;
JOSEPH C. WILSON, IV,**

Plaintiffs - Appellants,

v.

**I. LEWIS LIBBY, JR.; KARL C. ROVE;
RICHARD B. CHENEY; RICHARD L. ARMITAGE;
JOES DOES 1-9; UNITED STATES OF AMERICA.**

Defendants - Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiff-appellants are Valerie Plame Wilson and Joseph C. Wilson, IV. Defendant-appellees are I. Lewis Libby, Karl C. Rove, Richard B. Cheney, Richard L. Armitage and the United States.

Judicial Watch, Inc. appeared as amicus curiae in the district court.

B. Rulings Under Review

The rulings under review are the memorandum opinion and order of the district court issued on July 19, 2007. The district court's opinion is available at 498 F. Supp. 2d 741 (D.D.C. 2007).

C. Related Cases

The case on review was not previously before this Court or any other court. There are no related cases currently pending in this Court or in any other court of which counsel is aware.

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**Authorities upon which we chiefly rely are marked with asterisks.*

STATEMENT OF JURISDICTION

The United States District Court had jurisdiction pursuant to 28 U.S.C. § 1331. The United States Court of Appeals for the District of Columbia Circuit has jurisdiction pursuant to 28 U.S.C. § 1291.

This is an appeal from a final judgment of the District Court. The District Court judgment was entered on July 19, 2007. (J.A. 82). A timely notice of appeal was filed on July 20, 2007. (J.A. 83).

STATEMENT OF THE ISSUES PRESENTED

1. Whether there are “special factors counseling hesitation” precluding constitutional claims pursuant to *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), when no federal statute applies or provides any possible remedy for plaintiffs.

2. Whether a claim for public disclosure of private facts is precluded by the Westfall Act, 28 U.S.C. § 2679, when the action of revealing the identity of a secret operative of the Central Intelligence Agency is illegal and outside the scope of the defendants’ employment.

STATUTES AND REGULATIONS

Statutes are reproduced in the addendum.

STATEMENT OF THE CASE

This is an appeal from the grant of the defendants’ motions to dismiss plaintiffs’ claims for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction. Plaintiffs Valerie Plame Wilson and Joseph C. Wilson IV alleged that the defendants intentionally revealed Ms. Wilson’s status as a secret operative for the Central Intelligence Agency (“CIA”) in retaliation for Mr. Wilson exposing false statements in the

President's State of the Union Address. The plaintiffs sued for violations of their constitutional law and common law rights and seek damages.¹

Plaintiffs' Amended Complaint asserts several constitutional claims. First, it alleges a violation of Mr. Wilson's freedom of speech under the First Amendment because the defendants intentionally punished his wife in retaliation for his constitutionally protected expression. Second, the Amended Complaint alleges that Ms. Wilson was denied equal protection in violation of the Fifth Amendment because she was subjected to arbitrary and discriminatory treatment. Third, the Amended Complaint alleges that the defendants infringed the privacy rights, protected under the due process clause of the Fifth Amendment, of Ms. Wilson by revealing her status as a secret operative for the CIA. Fourth, the Amended Complaint alleges that the defendants deprived Ms. Wilson of her property without due process of law by effectively ending her employment as a secret operative. Additionally, the Amended Complaint presents a common law claim for public disclosure of private facts.

On July 19, 2007, the United States District Court for the District of Columbia granted the defendants' motions to dismiss. J.A. 82. As to the four constitutional claims, the District Court concluded that there were "special factors counseling hesitation" that precluded a *Bivens* action. J.A. 50-74. As to the common law claim for public disclosure of private facts, the District Court granted the defendants' motions to dismiss for lack of subject matter jurisdiction pursuant to the Westfall Act, 28 U.S.C. § 2679. J.A. 75-81.

Plaintiffs filed a timely notice of appeal. J.A. 83.

¹Plaintiffs' Amended Complaint is found at J.A. 15-38.

STATEMENT OF FACTS

Valerie Plame Wilson was an employee of the CIA until January 2006. Her employment status was classified and was not publicly known until July 14, 2003, when a press report precipitated by leaks by the defendants revealed her status and exposed her. (Amended Complaint ¶7) (JA 17).²

Joseph C. Wilson IV is married to Valerie Plame Wilson. From 1976 through 1998, Mr. Wilson was a member of the United States Diplomatic Service. From 1988 to 1991, he was the Deputy Chief of Mission at the United States Embassy in Baghdad, Iraq. In that position, he was recognized as “truly inspiring” and “courageous” by President George H. W. Bush after he shielded more than 50 Americans at the Embassy in the face of threats from Saddam Hussein to execute anyone who refused to turn over foreigners. Mr. Wilson later served as United States Ambassador to Gabon and Sao Tome and Principe under President George H. W. Bush and as Senior Director for Africa at the National Security Council under President Clinton. (Amended Complaint ¶8) (JA 17-18).

This lawsuit arises from actions by the defendants, officials at the top level of American government, to punish Mr. Wilson by destroying his wife’s career at the CIA by exposing her status as an operative for that agency. The defendants sought to do this in retaliation for Mr. Wilson, in an op-ed article in the *New York Times* and in comments to the media, exposing

²Since the District Court dismissed this case for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction, all of the allegations in plaintiffs’ Amended Complaint must be taken as true. *See, e.g., Broudy v. Mather*, 460 F.3d 106, 108 (D.C. Cir. 2006); *Trudeau v. Federal Trade Commission*, 456 F.3d 178, 193 (D.C. Cir. 2006) (in considering a motion to dismiss a court shall accept as true all of the allegations of the complaint and the plaintiff must be given every reasonable inference from the facts).

inaccurate statements in President George W. Bush's January 28, 2003 State of the Union Address. In that speech, President Bush stated that "[t]he British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa."

The initial revelations of Mr. Wilson's report

On May 6, 2003, the *New York Times* published a column by Nicholas Kristof that disputed the accuracy of the "sixteen words" in the State of the Union address. The column reported that as a result of a request from the Vice President's office for an investigation of allegations that Iraq sought to buy uranium from Niger, an unnamed former ambassador -- now known to be Plaintiff Joseph C. Wilson IV -- was sent on a trip to Niger in 2002 to look into the matter. According to the column, the former ambassador reported back to the CIA and State Department in early 2002 that the allegations were unequivocally wrong and based on forged documents. (Amended Complaint ¶19) (JA 20).

On or about May 29, 2003, in the White House, Mr. Libby asked an Under Secretary of State for information concerning the unnamed former ambassador's travel to Niger to investigate claims about Iraqi efforts to acquire uranium yellowcake. The Under Secretary thereafter directed the State Department's Bureau of Intelligence and Research to prepare a report concerning the former ambassador and his trip. The Under Secretary provided Mr. Libby with interim oral reports in late May and early June 2003, and advised Mr. Libby that Mr. Wilson was the former ambassador who took the trip. (Amended Complaint, ¶19) (JA 21)..

On or about June 9, 2003, a number of classified documents from the CIA were faxed to the Office of the Vice President to the personal attention of Libby and another person in the Office of the Vice President. The faxed documents, which were marked as classified, discussed,

among other things, Mr. Wilson and his trip to Niger, but did not mention Mr. Wilson by name. After receiving these documents, Mr. Libby and one or more other persons in the Office of the Vice President handwrote the names “Wilson” and “Joe Wilson” on the documents. (Amended Complaint ¶ 19) (JA 21).

On or about June 11 or 12, 2003, the Under Secretary of State orally advised Libby that Mr. Wilson’s wife worked at the CIA and that State Department personnel were saying that Mr. Wilson’s wife was involved in the planning of his trip. (Id.) Around the same time, Mr. Libby spoke with a senior officer of the CIA to ask about the origin and circumstances of Mr. Wilson’s trip and was advised by the CIA officer that Mr. Wilson’s wife worked at the CIA and was believed [erroneously] to be responsible for sending Mr. Wilson on the trip. (Id.) (JA 21-22).

Prior to June 12, 2003, *Washington Post* reporter Walter Pincus contacted the Office of the Vice President in connection with a story he was writing about Mr. Wilson’s trip. Mr. Libby participated in discussions in the Office of the Vice President concerning how to respond to Pincus. (Id.) (JA 22).

On or about June 12, 2003, Mr. Libby was advised by Vice President Cheney that Mr. Wilson’s wife worked at the CIA in the Counterproliferation Division. Mr. Libby understood that the Vice President had learned this information from the CIA. (Id.) (JA 22).

On June 12, 2003, the *Washington Post* published an article by Mr. Pincus about Mr. Wilson’s trip to Niger, which described Mr. Wilson as a retired ambassador but did not identify him by name, and reported that the CIA had sent him to Niger after an aide to the Vice President raised questions about purported Iraqi efforts to acquire uranium. Mr. Pincus’ article questioned the accuracy of the portion of President Bush’s State of the Union address concerning Iraq’s

efforts to purchase uranium and stated that the retired ambassador had reported to the CIA that the uranium purchase story was false. (Id.) (JA 22).

On or about June 14, 2003, Mr. Libby met with a CIA briefer. During their conversation, Mr. Libby expressed displeasure that CIA officials were making comments to reporters critical of the Vice President's office, and discussed with the briefer, among other things, "Joe Wilson" and his wife "Valerie Wilson," in the context of Mr. Wilson's trip to Niger. (Id.) (JA 22).

On or about June 19, 2003, an article highly critical of Vice President Cheney appeared in *The New Republic* magazine online entitled "The First Casualty: The Selling of the Iraq War." Among other things, the article questioned the "sixteen words" and stated that following a request for information from the Vice President, the CIA had asked an unnamed ambassador to travel to Niger to investigate allegations that Iraq had sought uranium from Niger. The article included a quotation attributed to the unnamed ambassador alleging that the administration officials "knew the Niger story was a flat-out lie." The article also was critical of how the administration, including the Office of the Vice President, portrayed intelligence concerning Iraqi capabilities with regard to weapons of mass destruction, and accused the administration of suppressing dissent from the intelligence agencies on this topic. (Id.) (JA 23).

Shortly after publication of *The New Republic* article, Mr. Libby spoke by telephone with his then-principal deputy and discussed the article. The Principal Deputy asked Mr. Libby whether information about Wilson's trip could be shared with the press to rebut the allegations that the Vice President had sent Mr. Wilson. Mr. Libby responded that there would be complications at the CIA in disclosing that information publicly, and that he could not discuss the matter on a non-secure line. (Id.) (JA 23).

On or about June 23, 2003, Mr. Libby met with *New York Times* reporter Judith Miller. During this meeting, Mr. Libby was critical of the CIA, and disparaged what he termed “selective leaking” by the CIA concerning intelligence matters. In discussing the CIA’s handling of Mr. Wilson’s trip to Niger, Mr. Libby informed Ms. Miller that Mr. Wilson’s wife might work at a bureau of the CIA. (Id.) (JA 23-24).

Mr. Wilson’s op-ed

On July 6, 2003, the *New York Times* published an op-ed article by Mr. Wilson entitled “What I Didn’t Find in Africa.” On that same day, the *Washington Post* published an article about Mr. Wilson’s 2002 trip to Niger, which was based in part upon an interview of Mr. Wilson. Mr. Wilson appeared as a guest on the July 6 television interview show “Meet the Press.” In his op-ed article, and in interviews with print reporters and on television, Mr. Wilson explained that he had taken a trip to Niger at the request of the CIA in February 2002 to investigate claims that Iraq had sought or obtained uranium yellowcake from Niger and that he found no evidence to support these allegations. Mr. Wilson stated that he believed, based on his understanding of government procedures, that the Office of the Vice President had been advised of the results of his trip. (Amended Complaint, §19) (JA 24).

In a May 12, 2006 court filing in *United States v. Libby*, the government proffered a copy of the July 6 op-ed annotated shortly after its publication in the handwriting of the Vice President of the United States. The government believes those notes of the Vice President “support the proposition that publication of the Wilson Op-Ed acutely focused the attention of the Vice President and [Mr. Libby] – his chief of staff – on Mr. Wilson, on the assertions made in his article, and on responding to those assertions.” (Id.) (JA 24).

The retaliation

Following the publication of Mr. Wilson's op-ed piece and statements in the national media, the defendants engaged in a concerted effort to retaliate against him by exposing his wife's employment as a covert operative for the CIA. On or about July 7, 2003, Mr. Libby had lunch with the then-White House Press Secretary and advised the Press Secretary that Mr. Wilson's wife worked at the CIA and noted that such information was not widely known. (Id.) (JA 25).

On or before July 8, 2003, Vice President Cheney advised Mr. Libby that the President of the United States specifically had authorized Mr. Libby to disclose to *New York Times* reporter Judith Miller certain information from an October 2002 National Intelligence Estimate concerning Iraq and weapons of mass destruction in order to rebut Mr. Wilson. Just three days later, on July 11, 2003, Director of Central Intelligence George Tenet conceded that claims about Iraqi attempts to buy uranium from Africa in the January 2003 State of the Union address were a mistake and that the "16 words should never have been included in the text written for the President," an acknowledgment that the substance of Mr. Wilson's criticism was legitimate and correct. (Id.) (JA 25).

Rather than admit the validity of Mr. Wilson's criticisms, on or about the morning of July 8, 2003, Mr. Libby met with Judith Miller. When the conversation turned to the subject of Joseph Wilson, Mr. Libby asked that the information that he provided on the topic of Mr. Wilson be attributed to a "former Hill staffer" rather than to a "senior administration official," as had been the understanding with respect to other information that Mr. Libby provided to Ms. Miller during this meeting. In speaking with Ms. Miller, Mr. Libby discussed Mr. Wilson's trip and

criticized the CIA reporting concerning it. During this discussion, Mr. Libby advised Ms. Miller of his belief that Mr. Wilson's wife worked at the CIA. (Id.) (JA 25).

Also on or about July 8, 2003, Mr. Libby met with the Counsel to the Vice President in an anteroom outside the Vice President's Office. During their brief conversation, Mr. Libby asked the Counsel to the Vice President, in sum and substance, what paperwork there would be at the CIA if an employee's spouse undertook an overseas trip. (Id.) (JA 26).

Not earlier than June 2003, but on or before July 8, 2003, the Assistant to the Vice President for Public Affairs learned from another government official that Wilson's wife worked at the CIA and advised Mr. Libby of this information. (Id.) (JA 26).

On or about July 10 or July 11, 2003, Mr. Libby spoke to a senior official in the White House, believed to be Karl Rove or one or more of John Does No. 1 - 9, who advised Mr. Libby of a conversation earlier that week with columnist Robert Novak in which Mr. Wilson's wife was discussed as a CIA employee involved in Mr. Wilson's trip. Mr. Libby was advised that Mr. Novak would be writing a story about Mr. Wilson's wife. (Id.) (JA 26).

On or about July 12, 2003, Mr. Libby flew with the Vice President and others to and from Norfolk, Virginia, on Air Force Two. On his return trip, Mr. Libby discussed with other officials aboard the plane what Mr. Libby should say in response to certain pending media inquiries, including questions from *Time* reporter Matthew Cooper. (Id.) (JA 26).

On or about July 12, 2003, in the afternoon, Mr. Libby spoke by telephone to Mr. Cooper, who asked whether Mr. Libby had heard that Mr. Wilson's wife was involved in sending Mr. Wilson on the trip to Niger. Mr. Libby confirmed to Mr. Cooper, without elaboration or qualification, that he had heard this information too. (Id.) (JA 26). On the same

day, Mr. Libby spoke by telephone with Judith Miller of the *New York Times* and discussed Mr. Wilson's wife, and that she worked at the CIA.

Around the same time, others of the defendants similarly revealed Ms. Wilson's employment at the CIA in an attempt to punish her and Mr. Wilson. For example, on Friday, July 11, 2003, Mr. Cooper telephoned Defendant Rove at the White House. In the ensuing conversation, Mr. Rove instructed Mr. Cooper that the conversation was to be on "deep background," which Mr. Cooper has stated he understood to mean that he could use the information Mr. Rove provided to him but not quote directly from it, and that he must keep the identity of the source of the information confidential. (Amended Complaint, § 27) (JA 29).

In the same telephone conversation, Mr. Rove clearly indicated to Mr. Cooper that Ms. Wilson worked "at the agency," which Mr. Cooper understood obviously to mean the CIA. Defendant Rove also told Mr. Cooper that Ms. Wilson "worked on 'WMD' [weapons of mass destruction]" issues and that she was responsible for sending Mr. Wilson to Niger. This was the first time that Mr. Cooper had heard anything about Joseph Wilson's wife. (Amended Complaint, ¶28) (JA 29). Mr. Cooper has said he has a distinct memory of Defendant Rove ending the call by saying, "I've already said too much." (Amended Complaint, ¶29) (JA 29).

In July 2003, shortly after Mr. Novak's column appeared, Mr. Rove called Chris Matthews, host of the *MSNBC* network program "Hardball," and told him that Mr. Wilson's wife was "fair game." "Fair game" is a hunting term used to describe prey (an animal that is killed and eaten) and is used colloquially to describe a person who may legitimately be attacked. Again, Mr. Rove made this statement targeting Ms. Wilson off the record on the condition that

he not be identified as its source, so as to avoid detection for the wrongdoing. (Amended Complaint, ¶30) (JA 29).

Similarly, Mr. Armitage participated in exposing Ms. Wilson as an effort to punish Mr. Wilson. On or about June 10, 2003, Mr. Armitage received a memorandum prepared by an analyst in the State Department's Bureau of Intelligence and Research that referred to Valerie Wilson as a CIA WMD manager. The memorandum was stamped "Secret" and the paragraph that mentioned Ms. Wilson was prefaced with the letters "S/NF," meaning Secret/No Foreigners. (Amended Complaint, ¶36) (JA 31).

On or about June 13, 2003, Mr. Armitage had a meeting with reporter Bob Woodward. During the course of that meeting, Mr. Armitage told Mr. Woodward that Ms. Wilson worked at the CIA as an analyst on weapons of mass destruction. On July 8, 2003, Mr. Armitage met with reporter Robert Novak and revealed to Novak that Ms. Wilson worked for the CIA on weapons of mass destruction. (Amended Complaint, ¶39) (JA 31).

These actions of the defendants were the product of a concerted effort to punish Mr. Wilson for embarrassing the Bush Administration by revealing a crucial misstatement in the President's State of the Union Address. On October 28, 2005, Special Counsel Patrick Fitzgerald explained at a press conference announcing the indictment against Mr. Libby: "In July 2003, the fact that Valerie Wilson was a CIA officer was classified. Not only was it classified, but it was not widely known outside the intelligence community. Valerie Wilson's friends, neighbors, college classmates had no idea she had another life. The fact that she was a CIA officer was not well known for her protection and for the benefit of all of us. It is important that a CIA officer's

identity be protected, that it be protected not just for the officer, but for the nation's security.” (Amended Complaint, ¶21) (JA 27).

At the same press conference, Special Counsel Fitzgerald also stated the following: “Valerie Wilson’s cover was blown in July 2003. The first sign of that cover being blown was when Mr. Novak published a column on July 14th, 2003. But Mr. Novak was not the first reporter to be told that Wilson’s wife, Valerie Wilson, Ambassador Wilson’s wife Valerie, worked at the CIA. Several other reporters were told [by Libby].” (Amended Complaint, ¶33) (JA 30).

Mr. and Ms. Wilson were seriously injured

Plaintiffs were seriously injured by the defendants’ retaliatory revelation of Ms. Wilson’s status as a CIA operative. Mr. and Mrs. Wilson fear for their safety and for the safety of their children as a result of the defendants’ conduct. The disclosure of Ms. Wilson’s covert identity makes her and her family a target for those persons and groups who bear hostility to the United States and/or its intelligence officers. (Amended Complaint, ¶42) (JA 32).

As a result of the defendants’ actions, Mrs. Wilson was impaired in her ability to carry out her duties at the CIA, and to pursue her career there serving her country, as she had planned. (Id. at ¶43) (JA 32). Her ability to continue as a secret operative obviously was ended. Both Mr. and Ms. Wilson have suffered gross invasions of privacy as a result of the defendants’ conduct. (Id. at ¶41) (JA 32).

SUMMARY OF ARGUMENT

This is a case about abuse of power at the highest level of American government. Plaintiffs Valerie Plame Wilson and Joseph C. Wilson IV have alleged that the defendants

intentionally revealed Ms. Wilson's status as a secret operative for the CIA in retaliation for Mr. Wilson exposing false statements in the President's State of the Union Address. The plaintiffs seek money damages as compensation for the substantial harms they have suffered as a result of the violation of their constitutional and common law rights.

The District Court dismissed plaintiffs' constitutional claims by concluding that there were "special factors counseling hesitation" that precluded the claims under *Bivens v. Six Unknown Named Federal Agents*, 403 U.S. 388 (1971). The District Court identified two such factors. First, it concluded that the Privacy Act, 5 U.S.C. § 522, is a comprehensive remedial scheme that precludes plaintiffs' *Bivens*' claims. (JA 58-67). At most, however, this should bar only plaintiffs' constitutional claim for invasion of privacy. The District Court used this statute to bar plaintiffs' claims for violation of freedom of speech under the First Amendment, for denial of equal protection, and for deprivation of property without due process. No authority supports using the Privacy Act to bar *Bivens* claims unrelated to invasion of privacy.

Moreover, it is clearly established that the Privacy Act does not apply to the Offices of the President and Vice President. *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980). The Privacy Act thus does not apply to defendants Cheney, Libby, and Rove and thus cannot preclude *Bivens* suits against them. The Supreme Court has explained that a statute precludes a *Bivens* suit "[w]hen the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of administration." *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). A statute that does not apply and thus provides no remedy surely cannot be deemed

a comprehensive remedial scheme that precludes constitutional claims for which no other remedy exists.

Second, the District Court concluded that the litigation might involve sensitive information and that this was a special factor counseling hesitation. (JA 70-74). Although the United States intervened in this lawsuit, never has it raised concerns over the potential risk to secret national security information. The law is clear that only the United States can raise this concern. *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953).

The individual defendants are alleged to have revealed Valerie Plame Wilson's secret status as a CIA operative in violation of federal law. They surely should not be able to have her claims dismissed on the grounds that her secret status might implicate sensitive information. Besides, at this stage of the litigation it is purely speculative whether any sensitive information will be implicated. The trial court can deal with that if it arises; there is no need to dismiss the lawsuit now.

The District Court dismissed plaintiffs' common law claim based on the Federal Employees Liability Reform and Tax Compensation Act of 1988, commonly known as the Westfall Act, 28 U.S.C. § 2679. (JA 75-82). This Act, however, provides no protection for actions outside the scope of a federal official's duties. Revealing Valerie Plame Wilson's status as a secret operative was beyond the scope the defendants' official duties. In fact, they were violating federal statutes and executive policies by doing so. At the very least, under the law of this Court the appropriate solution should be discovery to determine whether the defendants' actions were within the scope of their employment. *Stokes v. Cross*, 327 F.3d 1210, 1215 (D.C. Cir. 2003).

The District Court's decision, if affirmed, would leave the plaintiffs with no remedy for an egregious violation of their rights. This is inconsistent with the purposes of both *Bivens* and the Westfall Act.

ARGUMENT

STANDARD OF REVIEW

The District Court's decision granting the defendants' motions to dismiss plaintiffs' constitutional claims for failure to state a claim upon which relief can be granted is reviewed de novo. *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006). Likewise, the District Court's decision granting the defendants' motions to dismiss plaintiffs' common law claim for lack of subject matter jurisdiction is reviewed de novo. *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1432 (D.C. Cir. 1995).

I. THE DISTRICT COURT ERRED BY DISMISSING PLAINTIFFS' CONSTITUTIONAL CLAIMS BASED ON "SPECIAL FACTORS COUNSELING HESITATION."

The law is clear that there is a cause of action under *Bivens v. Six Unknown Named Federal Agents*, 403 U.S. 388 (1971), for violations of freedom of speech, for denial of equal protection, for invasion of privacy, and for denial of property and liberty without due process of law. *See, e.g., Davis v. Passman*, 442 U.S. 228 (1979) (due process and equal protection); *Dellums v. Powell*, 566 F.2d 167, 194 (D.C. Cir. 1977) (First Amendment). Plaintiffs thus do not seek the recognition of new claims under *Bivens* or the extension of *Bivens*; rather, their claims are entirely in areas where the law is clear that there are causes of action under *Bivens*. Of course, the District Court is correct that *Bivens* claims may be appropriate in some contexts, but not others. Dist. Ct. Op. at 17, 32. (JA 57, 72). But every case presents a new context and it

certainly is not the law that *Bivens* claims exist only in the specific contexts of prior cases. For example, countless decisions of this Court have recognized *Bivens* claims under the First Amendment even though the context of each was different. *See, e.g., Broudy v. Miller*, 460 F.3d 106 (D.C. Cir. 2006); *Lederman v. United States*, 291 F.3d 36 (D.C. Cir. 2002); *Haynesworth v. Miller*, 820 F.3d 1245, 1255 (D.C. Cir. 1987).

The District Court dismissed plaintiffs’ *Bivens* claims on the ground that there are “special factors counseling hesitation.” The District Court found two “special factors”: the existence of a comprehensive remedial scheme and the concern that the lawsuit could require the disclosure of confidential information. Neither of these justifications, however, constitutes “special factors counseling hesitation” as defined by this Court and the United States Supreme Court.

A. Statutes That Do Not Apply And That Fail To Provide Any Remedy Cannot Be “Special Factors Counseling Hesitation” Under *Bivens*.

The District Court found that two federal statutes – the Privacy Act, 5 U.S.C. § 552a, and the Intelligence Identities Protection Act, 50 U.S.C. §§ 421-426, provide a “comprehensive remedial scheme” and thus preclude plaintiffs’ constitutional claims under *Bivens*. But neither of these statutes meets the test for a “comprehensive remedial scheme” in this case because neither provides any possibility for the slightest relief to plaintiffs. The Supreme Court has explained that a federal statute is a “special factor counseling hesitation” “when the defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.” *Carlson v. Green*, 446 U.S. 14, 18-19 (1980).

In every case where the Supreme Court has applied this exception it has found that there

was another federal statute that provided a remedy for the plaintiff. For example, in *Bush v. Lucas*, 462 U.S. 367 (1983), the existence of remedies under the civil service process was found to preclude a *Bivens* suit by a federal employee. In *Schweiker v. Chilicky*, 487 U.S. 412 (1988), the existence of remedies under the Social Security Act was deemed to preclude a *Bivens* suit for wrongful termination of benefits. Most recently, in *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007), the Court found that a suit against officials of the Bureau of Land Management for “harassment and intimidation” was precluded because the plaintiff “had an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints.” *Id.* at 2600. Tellingly, although the Court denied the *Bivens* claim on other grounds, it concluded that this “patchwork” of remedies was not an “elaborate remedial scheme” sufficient to indicate that “Congress expected the Judiciary to stay its *Bivens* hand.” *Id.*

Likewise, when this Court has found statutes to be “special factors” it is because they provide alternative remedies that Congress deemed to be sufficient. *See, e.g., Thomas v. Principi*, 394 F.3d 970 (D.C. Cir. 2005) (veterans’ benefit statute); *Ethnic Employees of Library of Congress v. Boorstin*, 751 F.2d 1405 (D.C. Cir. 1985) (Title VII).

Neither of the statutes used by the District Court to preclude plaintiffs’ *Bivens* actions provides any possibility of relief for plaintiffs. In fact, as explained below, neither has any relevance to the claims presented by plaintiffs.

1. The Privacy Act

This Court previously has held that the Privacy Act may constitute a “special factor” counseling hesitation in certain circumstances. *Chung v. U.S. Dep’t of Justice*, 333 F.3d 273, 274 (D.C. 2003). This case does not present such circumstances because the Privacy Act does

not apply at all.

First, at most, the Privacy Act would be a special factor counseling hesitation only with regard to one of plaintiffs' four constitutional claims: the cause of action for invasion of privacy in violation of the Fifth Amendment. Plaintiffs other three causes of action, as explicitly stated in the Amended Complaint, are for violation of freedom of speech, denial of equal protection, and deprivation of property without due process of law. The Privacy Act has no relevance whatsoever to these claims. No case ever has used the Privacy Act to preclude claims that are unrelated to invasion of privacy.

Second, the Privacy Act does not apply to the offices of the President and Vice President and thus cannot preclude causes of action against defendants Cheney, Libby, and Rove.³ The Privacy Act applies to federal agencies and relies on the definition of "agency" found within the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The Supreme Court has held that the "unambiguous" legislative history of FOIA establishes that the Office of the President does not fall within that statute's definition of "agency." *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980). Thus, numerous decisions have found that the Office of the President is not covered by the Privacy Act. *See, e.g., Jones v. Exec. Office of President*, 167 F. Supp. 2d 10, 18 (D.D.C. 2001); *Dale v. Exec. Office of President*, 164 F. Supp. 2d 22, 26 (D.D.C. 2001). Similarly, courts have expressly ruled that the Office of the Vice President is not covered by the Privacy Act. *See, e.g., Judicial Watch, Inc. v. Nat'l Energy Policy Dev.*

³Plaintiffs do not deny that the Privacy Act applies to the United States Department of State and thus defendant Armitage could use this statute as a special factor counseling hesitation for the constitutional privacy claim against him, though not as to the three other constitutional claims.

Group, 219 F. Supp.2d 20, 55 (D.D.C. 2002); *Schwarz v. U.S. Department of Treasury*, 131 F. Supp.2d 142, 147-48 (D.D.C. 2000).

No court, until the District Court in this case, ever has held that the Privacy Act precludes a *Bivens* suit in a situation where the Act does not apply at all. Indeed, such a conclusion is inimical to the rationale of *Bivens*. As Justice Harlan explained in his famous concurring opinion in *Bivens*, a cause of action for damages exists against federal officials under the Constitution because “[f]or people in *Bivens*' shoes, it is damages or nothing.” 403 U.S. at 410 (Harlan, J., concurring). That is certainly true for the plaintiffs in this case. For Joseph Wilson and Valerie Plame Wilson the only possible remedy is damages; it truly is damages or nothing. Denying a constitutional damages claim based on a statute that has no application cannot be reconciled with *Bivens*.

The District Court concluded that Congress made a conscious choice to exclude the Offices of the President and Vice President from the Privacy Act and that this precludes *Bivens* claims against Mr. Cheney, Mr. Libby, and Mr. Rove. It declared: “[T]his Court concludes that if the Office of the Vice President is exempt from the requirements of the Privacy Act, that exemption has not been inadvertent.” Dist. Ct. Op. at 23-24 (JA 63-64) (citation omitted).

At most, however, this means that Congress did not want to impose on the Office of the President and Vice President the burdens of the Privacy Act with regard to the protection and disclosure of information. This, though, does not support the inference that Congress meant to preclude all constitutional causes of action for privacy against those in the Offices of the President and Vice President. There is absolutely nothing in the legislative history of the Privacy Act that even hints at such a congressional intent. It must be remembered that a statute

provides a special factor counseling hesitation when “Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.” *Carlson v. Green*, 446 U.S. at 18-19. An exemption from a statute imposing substantial burdens does not support the inference that Congress desired to preclude all causes of action in any way related to privacy.

In fact, where courts have held that the Privacy Act precludes *Bivens* suits it has done so because in those cases the Privacy Act provides a remedy. None of these cases is a situation, like this case, in which the Privacy Act does not apply at all. For example, in *Downie v. City of Middleburg Heights*, 301 F.3d 688 (6th Cir. 2002), the Sixth Circuit upheld the district court’s refusal to imply a *Bivens* remedy under the First Amendment “because the Privacy Act is a comprehensive legislative scheme that provides a meaningful remedy *for the kind of wrong Downie alleges that he suffered.*” *Id.* at 696 (emphasis added). The court’s conclusion was based on its finding that the plaintiff’s claims stemmed from the creation, maintenance, or dissemination of allegedly false records and that, accordingly, alleged “wrongs that could be addressed under the Privacy Act. *Id.* In other words, because the *Downie* plaintiff had a Privacy Act claim (whether or not he could prevail on it), the court declined to also imply a *Bivens* remedy. Here, though, the plaintiffs have no possible claim under the Privacy Act.

Similarly, in *Chung v. U.S. Dep’t of Justice*, 333 F.3d 273 (D.C. Cir. 2003), the D.C. Circuit affirmed without discussion the district court’s dismissal of a *Bivens* claim based on an unauthorized leak, noting that the dismissal was based on the fact that “the Privacy Act provides a comprehensive remedial scheme for harm caused by governmental disclosure of personal information.” *Id.* at 275. The district court’s dismissal in *Chung* of the *Bivens* claims under the

First and Fifth Amendments was based on the fact that the Privacy Act “comprehensively cover[ed]” the plaintiff’s claims stemming from the “allegedly wrongful disclosure of government records.” *Chung v. U.S. Dep’t of Justice*, 2001 U.S. Distr. LEXIS 25302 *12 (D.D.C. 2001). As in *Downie*, the *Chung* plaintiff had pled a Privacy Act claim and, based on the fact that the Privacy Act covered such claim, the court, not surprisingly, was not willing to also infer a *Bivens* remedy.⁴ This was also true in *Hatfill v. Ashcroft*, 404 F. Supp. 2d 104, 117 (D.D.C. 2005), where the court refused to imply *Bivens* remedy for a Fifth Amendment due process claim that was redressable under the Privacy Act and where the plaintiff had pled a Privacy Act claim.

In other words, the cases relied upon by the District Court concerning the Privacy Act and *Bivens* all involve instances where the Privacy Act was available and provided a possible remedy for the plaintiff. There is no basis for concluding that the Privacy Act was meant to preclude *Bivens* claims in situations like this in which it does not apply.

2. The Intelligence Identities Protection Act

The Intelligence Identities Protection Act (IIPA) is a criminal statute that was enacted in 1982. Under its terms, it is a crime to intentionally disclose the identity of a covert agent to someone not authorized to receive classified information if the disclosure is done with

⁴In *Chung*’s case, he was complaining about information that had been leaked from an agency’s investigative files and there was no claim by the government that the files were not subject to the Privacy Act. Here, by contrast, the Ms. Wilson’s privacy claim stems from leaked information that was not from an “information system” as defined by the Privacy Act. There is nothing in the legislative history quoted above suggesting that Congress’s concern with harm to individual privacy was wider than that caused by disclosures of information in agency systems of records.

knowledge that the information disclosed identifies the agent and that the United States is taking affirmative steps to conceal the agent's intelligence relationship with the United States. 50 U.S.C. §§ 421(a), (b), and (c). Violations of the act are felonies punishable by fines or terms of imprisonment of no more than three years, or both. *Id.* at §§ (c) and (d).

Congress enacted the IIPA in response to a systematic effort by a small number of individuals, including former intelligence agency employees, to disclose the names of covert intelligence operatives. S. Rep. 97-201 at 1, *reprinted in* 1982 U.S.C.C.A.N. 145. It was believed that such disclosures may have contributed to the deaths or attempted assassinations of some CIA officers. CRS Report for Congress, Intelligence Identities Protection Act, October 3, 2003, p. 2. President Ronald Reagan, in signing the act, remarked that the IIPA was a recognition "that the revelation of the names of secret agents adds nothing to legitimate public debate over intelligence policy. It is also a signal to the world that while we in this democratic nation remain tolerant and flexible, we also retain our good sense and our resolve to protect our own security and that of the brave men and women who serve us in difficult and dangerous intelligence assignments." The Freedom of Information Center, Remarks on Signing the Intelligence Identities Protection Act of 1982, June 23, 1982.

The defendants argued in the District Court that the IIPA was a very special factor counseling hesitation. As plaintiffs pointed out, however, the IIPA is purely a criminal statute and there is no precedent for relying on a criminal statute as a "special factor" that would preclude a *Bivens* civil remedy. The District Court agreed and declared: "In this Court's view, the existence of a purely criminal statute that provides no civil remedies at all cannot fairly be said to constitute a comprehensive *remedial* statutory scheme for purposes of the availability of a

Bivens remedy.” Dist. Ct. Op. at 28 (JA 68) (emphasis in original). The District Court explained: “Criminal provisions are generally not remedial, and extending the special-factors analysis to defer to criminal statutes would radically alter the analytical framework that the Supreme Court has cautiously employed.” *Id.* at 29 (JA 69).

But then the District Court declared: “That is not to say that the IIPA is altogether irrelevant to the special-factors analysis. Certainly it is, in combination with the Privacy Act and other special factors discussed below, part of the panoply of reasons weighing against the creation of a new *Bivens* cause of action.” *Id.* (JA 69). This, though, makes no sense. As the District Court noted, a criminal statute that provides no civil remedies is completely irrelevant in assessing whether Congress has provided a comprehensive remedial scheme that it deems to provide an adequate alternative to suits directly under the Constitution.

A criminal statute offers no possible remedy to an injured individual and thus is not a basis for precluding a remedy under *Bivens*. Criminal statutes, by their very nature, are intended to redress societal, not individual, harms. The IIPA is no exception. Although it stemmed, at least in part, from an incident that placed individual covert agents at risk, the statute provides no individual relief whatsoever. Accordingly, there is simply nothing from which to infer a congressional intent to omit damage remedies under *Bivens*.

Indeed, allowing a *Bivens* action advances the goals of the IIPA. The IIPA provides for criminal liability for wrongly revealing an agent’s secret status. A *Bivens* action supplements that by compensating wronged individuals via a civil suit for damages.

Contrary to the characterization by the District Court, as explained above, plaintiffs do

not seek the “creation of a new *Bivens* cause of action.” They simply seek to apply existing *Bivens* causes of action for violations of freedom of speech, denial of equal protection, invasion of privacy, and deprivation of property without due process to this factual situation.

B. The Possible Relevance of Sensitive Information Is Not A Special Factor Counseling Hesitation In This Case.

The District Court found a second special factor counseling hesitation: the case concerns the disclosure of the secret status of a CIA operative. The District Court said: “Such potential difficulties associated with claims based on the disclosure of information relating to covert CIA operatives gives the Court reason to pause before extending *Bivens* to this context.” Dist. Ct. Op. at 34 (JA 74).

There are several serious flaws with this argument. First, at this stage of the litigation, there is no reason to believe that this case will involve, or even risk, the disclosure of any sensitive information. The defendants have publicly acknowledged that Valerie Plame Wilson was a secret operative. The District Court noted this and stated: “The Government has *officially* acknowledged, in documents filed in the *Libby* criminal case and at oral argument in this matter, that Mrs. Wilson was a covert operative for the CIA.” Dist. Ct. Op. at 31 (JA 71) (emphasis in original). In fact, the Supreme Court has expressly recognized that the protection of secrecy under *Totten v. United States*, 92 U.S. 105 (1876), is not implicated in a “suit brought by an acknowledged (though covert) employee of the CIA.” *Tenet v. Doe*, 544 U.S. 1, 10 (2005).

The District Court, nevertheless, said that the litigation of some of plaintiffs’ claims might require inquiry into secret information. It said, for instance, that Ms. Wilson’s equal protection claim might entail inquiry as to how other secret operatives were treated. Dist. Ct. Op. at 31-32 (JA 71-72). This argument deserves consideration only if defendants wish to assert

that there are other employees in Ms. Wilson's situation who were treated in the same manner. Defendants make no such claim that others in Ms. Wilson's situation have been treated in the same way. Absent such a claim, defendants cannot defeat an equal protection claim by asserting a situation that never happened. In other words, if in the litigation, the defendants present a basis for believing that the equal protection claim requires disclosure of sensitive information, the trial court could consider it then. It does not provide a basis for dismissing that claim, let alone all claims, at this stage.

The District Court also said that the suit "will inevitably require judicial intrusion into matters of national security." Dist. Ct. Op. at 33 (JA 73). The District Court explained: "The resolution of these claims therefore might require an exploration into Mrs. Wilson's specific duties as a covert operative." *Id.* But at this stage, that is purely speculative. If that problem arose in the litigation, the trial court could decide the appropriate way to deal with it. Anticipation of a problem that may never arise is surely not a reason to preclude a suit for constitutional violations from going forward.

Second, quite crucially, the United States government never raised the need to protect national security information as a basis for dismissing this lawsuit. Although the United States intervened in this case and filed briefs in the District Court, never did it raise concerns over disclosure of national security information. Under well established law, it is settled that it is not for individuals defendants to raise this concern.

Rather, only the United States government may invoke the state secrets doctrine and the United States has not done so. As this Court has noted, "[t]he starting point for any analysis of a

claim of the state secrets privilege is *United States v. Reynolds*, 345 U.S. 1 (1953).” *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982). In *Reynolds*, the Supreme Court declared: “The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.” 345 U.S. at 7-8. Thus, the D.C. Circuit has been emphatic that “[t]he privilege may be asserted only by the government itself; neither a private party *nor an individual official* may seek its aid.” *Ellsberg v. Mitchell*, 709 F.2d 51, 56 (D.C. Cir. 1983) (emphasis added).

The United States government has not invoked the state secrets doctrine in this case or made any argument that the case should be dismissed because of the possible relevance of sensitive information. The United States filed a brief with the District Court seeking dismissal of the tort law claim based on the Westfall Act. *See* Memorandum of Points and Authorities in Support of the United States’ Motion to Dismiss. Totally absent from the government’s brief was any invocation of the states secrets doctrine or any argument that there is sensitive information that requires dismissal of the case.

Moreover, the irony in the defendants invoking the sensitive nature of the information must be noted. This case arises from the defendants revealing the classified, highly secret and sensitive information that Ms. Wilson was a covert operative for the CIA. For the defendants to now say that they cannot be held liable because the information is secret and sensitive is much like the child who kills his parents and begs for mercy on the ground that he is an orphan. As explained above, in *Tenet v. Doe*, 544 U.S. at 11, the Supreme Court said that the state secrets

privilege applies if there is a possibility that an “espionage relationship might be revealed.” But in this case, the espionage relationship already has been revealed by the defendants and that, of course, is the entire basis for this lawsuit. The possible relevance of sensitive information was not a special factor counseling hesitation or warranting dismissal at this stage of the proceedings.

II. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS’ CLAIM FOR PUBLIC DISCLOSURE OF PRIVATE FACTS BASED ON THE WESTFALL ACT.

In addition to their constitutional claims, plaintiffs presented one supplemental common law claim for public disclosure of private facts. The law of the District of Columbia recognizes the tort of invasion of privacy by public disclosure of private facts.

The requirements for the tort of public disclosure of private facts have been alleged in the plaintiffs’ Amended Complaint. The cause of action requires “(1) publicity, (2) absent any waiver or privilege, (3) given to private facts, (4) in which the public has no legitimate concern, and (5) which would be highly offensive to a reasonable person of ordinary sensibilities.” *Wolf v. Regardie*, 553 A.2d 1213, 1220 (D.C. 1989).

Each of these elements has been alleged here. The defendants, individually and collectively, publicized that Ms. Wilson was a secret operative for the CIA. Amended Complaint, ¶¶14-30 (JA 19-29). There is no privilege that protected the disclosure. Moreover, Ms. Wilson contends that her status as a secret operative was a private fact, that the public had no legitimate interest in knowing this, and that the disclosure would “be deemed outrageous and highly offensive to a reasonable person of ordinary sensibilities.” Amended Complaint, ¶66 (JA 35). In other words, all of the elements of the tort of public disclosure of private facts have been alleged.

The District Court dismissed this claim based on the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the “Westfall Act”), 28 U.S.C. § 2679. Dist. Ct. Op. at 35-41 (JA 75-81).

The Westfall Act establishes the Federal Tort Claims Act (“FTCA”) as the exclusive remedy for any tort claim resulting from the act or omission of a government employee acting within the scope of his or her employment, with the exception of *Bivens* remedies for constitutional tort claims. If the Attorney General or his designee, certifies that a federal employee was acting within the scope of employment “at the time of the incident out of which the claim arose,” it is presumed that the individual employee is granted immunity from suit, the United States is substituted for the employee and the action proceeds as one against the United States. *Id.* at § 2679(d)(2).

The United States has made such a substitution here, based on the certification of the Attorney General’s designee that “at the time of the conduct alleged in the amended complaint the individual defendants . . . were acting within the scope of their employment as employees of the United States.” Certification of Scope of Employment by Timothy P. Garren, Director, Torts Branch.

Although the scope-of-employment certification has a *prima facie* effect, it is not conclusive and is subject to judicial review, *Gutierrez v. Lamagno*, 515 U.S. 417, 436-37 (1995); *Kimbrow v. Velten*, 30 F.3d 1501, 1509 (D.C. Cir. 1994). Certification shifts the burden to the plaintiffs to initially allege facts that, if true, would place the defendants’ actions outside the scope of their employment. *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 32 (D.D.C. 2006); *Schneider v. Kissinger*, 310 F. Supp.2d 251, 264 (D.D.C. 2004). What is crucial and overlooked by the

District Court is that plaintiffs are entitled to discovery and an evidentiary hearing to resolve any issues of material fact. *Id.*

Scope-of-employment determinations are governed by the law of *respondeat superior* in the state where the tortious act occurred. *Council on Am-Islamic Relations v. Ballenger*, 444 F.3d 659, 663 (D.C. Cir. 2006). The test is an objective one “based on all the facts and circumstances.” *Id.* The District of Columbia’s law of *respondeat superior* follows the Restatement (Second) of Agency (1958), § 228. *See Mosley v. Second New St. Paul Baptist Church*, 534 A.2d 346, 348 n.4 (D.C. 1987). Quite importantly for this case, where the tort was committed solely for the benefit of the employee, the District of Columbia courts typically find that such conduct is outside the scope of employment. *See, e.g., Schechter v. Merchants Home Delivery*, 892 A.2d 415, 431 (D.C. Ct. App. 2006).

There are two reasons why dismissal under the Westfall Act was inappropriate. First, the unauthorized disclosure of classified information was committed solely for the benefit of the employees; revealing the identity of a secret operative in these circumstances was not and never could be in service of the master, here the United States. Second, there are factual issues that underlie the certification that are in dispute and as a result, at a minimum, discovery is needed to resolve any such dispute.

As to the former, President Bush and his administration have stressed over and over again that protecting national security in this post-9/11 era is of such importance and presents such a challenge that many of the bedrock principles of our society must yield to this greater good. In

current American political discourse, it is common to suggest that September 11 “changed everything.” Certainly the President and Vice President have expressed this view publicly.⁵

Even prior to 9/11, the unauthorized disclosure of covert agents was viewed as posing a significant threat to our national security. President George H. W. Bush stated publicly that those who expose the names of our human sources of intelligence are “the most insidious of traitors.” George H. W. Bush, 41st President of the United States, Remarks at the Dedication Ceremony for the George Bush Center for Intelligence (Apr. 26, 1999). The Intelligence Identities Protection Act, enacted more than a decade earlier in 1982, criminalized the unauthorized disclosure of the identities of covert agents and was passed in response to a concerted effort by a small group of Americans to disclose the names of covert intelligence agents. *See* S. Rep. 97-201, at 1, *reprinted in* 1982 U.S.C.C.A.N. 145. Those disclosures may have caused the deaths or attempted assassinations of some CIA officers, the expulsion of others from foreign countries, and impaired U.S. relations with foreign intelligence sources. *See* CRS Report for Congress, Intelligence Identities Protection Act, The Library of Congress, October 3, 2003.

When Valerie Plame Wilson’s identity as a covert agent was revealed, President Bush pledged to fire anyone in his administration responsible for the leak. He reaffirmed that pledge on several occasions. *See, e.g.,* www.washingtonpost.com/wp-dyn/articles/A32143-

⁵ For example, on September 14, 2003, Vice President Cheney stated on Meet the Press that “9/11 changed everything . . . It changed in terms of the kind of national security strategy we need to pursue, in terms of guaranteeing the safety and security of the American people.” Transcript, Sept. 14, 2003, p. 2, *available at* www.msnbc.msn.com/id/3080244/. Nine days later at a press conference with Iraq Prime Minister Alawi, President Bush echoed this sentiment, “[s]ee, 9/11 changed everything.” Transcript, Sept. 23, 2004, p. 11, *available at* www.whitehouse.gov/news/releases/2004/09/20040923-8.html.

[2004Jun10.html](#) (on June 10, 2004, President Bush answered in the affirmative in response to the question of whether he stood by his pledge to fire anyone who had leaked);

www.whitehouse.gov/news/releases/2005/07/20070718-1.html (on July 18, 2005, president said “if someone committed a crime, they will no longer work in my administration.”). Although he never honored that pledge, the president’s initial reaction to news of the leak reflects the seriousness of the misconduct and the potentially grave threat it poses to national security. Most importantly, it demonstrates that revealing Ms. Wilson’s status as a secret operative was not within the scope of defendants duties as government employees. It clearly shows that the defendants were not acting in the interests of their employer, as is required under respondeat superior liability, but for their own personal interests.

Applying these principles to the scope-of-employment inquiry, the paramount importance of protecting our national security means that the master/employer (the United States) would never be served in any way by the unauthorized disclosure of Ms. Wilson’s covert agent status, because to do so would pose a grave and direct threat to national security. *See, e.g., United States v. Libby*, Indictment, Count One, ¶d, p. 2 (“Disclosure of the fact that such individuals [covert agents] were employed by the CIA had the potential to damage the national security in ways that ranged from preventing the future use of those individuals in a covert capacity, to compromising intelligence-gathering methods and operations, and endangering the safety of CIA employees and those who dealt with them.”).⁶ Thus, it is not just a question of the legality or

⁶ That the unauthorized disclosure of classified information is also grounds for dismissal is further indicia that it is conduct outside the scope of federal employment. *See Doe v. Cheney*, 885 F.2d 898 (D.D.C. 1989) (NSA employee properly terminated for disclosure of classified information based on determination that further employment and access to classified information would be danger to national security).

illegality of the conduct in question, but that it placed our national security at risk. This is simply an unacceptable outcome that cannot reasonably be argued as in furtherance of the employee's service to the master/United States and that is "different in kind from that authorized." Restatement, § 228(2).

Moreover, as high level officials with cleared access to classified information, each of the defendants was well aware of the unacceptable risks to national security that their conduct posed. As the federal indictment notes, Mr. Libby was obligated by applicable laws and regulations, including 18 U.S.C. § 793 and Executive Order 12958, as modified by Executive Order 13292, not to disclose classified information to persons not authorized to receive such information. *United States v. Libby*, Indictment, Count One, ¶b, pp. 1-2. For example, Mr. Libby executed a "Classified Information Nondisclosure Agreement" acknowledging that he understood that the unauthorized disclosure of classified information could result in irreparable injury to the United States. *Id.* at p. 2. Given their positions, it is likely that each of the other defendants executed similar agreements.

The District Court said that "[b]y focusing on the alleged public disclosure of Mrs. Wilson's covert status, plaintiffs have therefore taken too narrow a view of relevant conduct. . . . In short, plaintiffs cannot rebut the Westfall certification simply by arguing that defendants' actions were illegal." Dist. Ct. Op. at 37 (JA 77). But plaintiffs do not simply argue that defendants' actions were illegal. Plaintiffs maintain that under federal law and the policy of the Executive Branch, defendants' conduct was unauthorized and beyond the scope of their employment. This makes the Westfall Act inapplicable.

The District Court stated: "[T]his Court must look beyond the alleged disclosure of Mrs.

Wilson's covert identity and assess whether the underlying conduct was of the type defendants were employed to perform. The proper inquiry in this Court's view, then, is whether talking to the press . . . in order to discredit a public critic of the Executive Branch and its policies is within the scope of defendants' duties as federal employees." *Id.* at 38 (JA 78). But this states the inquiry at too high a level of abstraction and thus oversimplifies the issue. Of course, the defendants may discredit public critics of the Executive Branch. The question, though, is whether it was in the scope of defendants' duties to do so by deliberately revealing that Mr. Wilson's wife was a secret operative. It is this conduct that is the basis for this lawsuit and it is this conduct that was beyond the scope of the defendants' duties.

The District Court stated that "the alleged tortious conduct, namely the disclosure of Mrs. Wilson's status as a covert operative, was incidental to the kind of conduct that defendants were employed to perform." *Id.* at 39 (JA 79). This is simply wrong. The disclosure of the secret status of a CIA operative is not incidental to the defendants' duties; it is plainly beyond the scope of their duties and it is tortious. The Westfall Act has no application in such circumstances.

Second, the determination by the District Court that the defendants were acting within the scope of their employment rests on a number of assumptions for which there is no factual support and which are in dispute. Under the process employed in this Circuit to resolve such disputes, plaintiffs are entitled to discovery and an evidentiary hearing provided that they allege "sufficient facts that, taken as true, would establish that the defendants' actions exceeded the scope of their employment." *Stokes v. Cross*, 327 F.3d 1210, 1215 (D.C. Cir. 2003).

The United States claimed in the District Court that the requirement in the Restatement that the conduct occur within authorized time and space limits is "not disputed in the Amended

Complaint.” U.S. Mem. at 9. With respect to defendants Cheney, Libby and Rove this is very much in dispute. Although the Amended Complaint identifies a number of conversations that Mr. Libby had with reporters in which he conveyed information concerning Ms. Wilson’s status as a covert CIA operative, it does not identify where and when those conversations took place. That is because this information is still unknown to the plaintiffs, which is not surprising given the lengths to which the defendants went to conceal their activities. At least one of the dates -- July 12, 2003 -- was a Sunday, and that is also the date on which Vice President Cheney advised Mr. Libby of Ms. Wilson’s status as a covert operative within the CIA. What is not yet known is whether these conversations took place off hours, away from the White House, and outside the authorized time and space limits of the defendants’ jobs. Indeed, it is unknown whether these meetings took place in Washington, Virginia, or Maryland -- critical information in determining which state law applies. Similarly with respect to Mr. Rove, the Amended Complaint identifies a conversation he had with Chris Matthews, but the exact date, time and place of the conversation is not yet known. Accordingly, plaintiffs should be accorded discovery so as to be able to rebut the defendants and the United States claim that the actions were within the scope of the defendants’ employment.

Also, the government’s certification appears to be based on the premise that the defendants were speaking to the press “to address inquiries concerning the policies and practices of the government,” U.S. Mem. at 13, and to “correct inaccuracies in the press and provide an explanation of the government’s position.” *Id.* at 14. The Amended Complaint, however, makes very different allegations as to why this occurred and that is the controlling document for these purposes. *See, e.g., Stokes v. Cross*, 327 F.3d at 1215.

As alleged in the Amended Complaint, the defendants were not simply answering press inquiries and correcting inaccuracies. Rather, the defendants planned and carried out a deliberative and affirmative plan to publicly discredit and retaliate against Mr. Wilson by depriving Ms. Wilson of her job as a covert CIA officer. Rather than addressing publicly, directly, and on the merits why Mr. Wilson was wrong or unfair, they embarked on an anonymous whispering campaign designed to discredit and injure the plaintiffs. Amended Complaint, ¶3 (JA 16). The defendants carried out their campaign by affirmatively reaching out to the press, “pushing back” and “us[ing] everything they had.” *Id.* at ¶23 (JA 14). As Special Counsel Fitzgerald stated in a court filing, “it is hard to conceive of what evidence there could be that would disprove the existence of White House efforts to ‘punish’ Wilson.” *Id.* at ¶34 (JA 16), *quoting* Government’s Resp. to Def.’s Third Mot. to Compel Disc. at 30 n. 10 (April 5, 2006) (Dkt. #80).

Given that the defendants’ conduct is a far cry from the routine press communications on which the scope of employment certification is based, the grounds for that certification are genuinely in dispute. This dispute can only be resolved through discovery and an evidentiary hearing.

Plaintiffs’ need for discovery is heightened here, where the complaint is based on an anonymous campaign designed purposely to conceal the identifies and roles of the actors/defendants. These defendants hid behind reporters’ claims of privilege, even allowing a reporter to go to jail rather than reveal her sources. Their goal was not to publicly correct inaccuracies about the policies and practices of this administration. Rather, they plotted and acted maliciously and in secret to destroy the Wilsons. Because the government’s certification is

not premised on the conduct as pled, but instead on a fiction that is unsupported by the current record, it cannot stand. The District Court erred by dismissing plaintiffs' claims for public disclosure of private facts under these circumstances.

CONCLUSION

For these reasons, the District Court's dismissal of plaintiffs' Amended Complaint should be reversed and the case should be remanded for further proceedings.

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CERTIFICATE OF COMPLIANCE

This Brief of Appellants has been prepared using:

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on February 5, 2008, I filed with the Clerk's Office of the United States Court of Appeals for the District of Columbia Circuit, via hand-delivery, the required copies of the foregoing Brief of Appellants and Joint Appendix, and further certify that I served, via UPS Ground, the required copies of the same to the following:

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*** CURRENT THROUGH P.L. 110-180, APPROVED 1/8/2008 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 171. TORT CLAIMS PROCEDURE

Go to the United States Code Service Archive Directory

28 USCS § 2679

Review expert commentary from The National Institute for Trial Advocacy

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this *title [28 USCS § 1346(b)]*, and the remedies provided by this title in such cases shall be exclusive.

(b) (1) The remedy against the United States provided by sections 1346(b) and 2672 of this *title [28 USCS §§ 1346(b) and 2672]* for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government--

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) (1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the

provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of *Rule 4(d)(4) of the Federal Rules of Civil Procedure*. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this *title [28 USCS § 1346(b)]* and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this *title [28 USCS § 2675(a)]*, such a claim shall be deemed to be timely presented under section 2401(b) of this *title [28 USCS § 2401(b)]* if--

- (A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and
- (B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 [28 USCS § 2677], and with the same effect.

HISTORY:

(June 25, 1948, ch 646, § 1, 62 Stat. 984; Sept. 21, 1961, P.L. 87-258, § 1, 75 Stat. 539; July 18, 1966, P.L. 89-506, § 5(a), 80 Stat. 307; Nov. 18, 1988, P.L. 100-694, §§ 5, 6, 102 Stat. 4564.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Based on *title 28, U.S.C., 1940 ed., § 945* (Aug. 2, 1946, ch. 753, § 423, 60 Stat. 846).
Changes were made in phraseology.

Senate Revision Amendment

The catchline and text of this section were changed and the section was renumbered "2678" by Senate amendment. See 80th Congress Senate Report No. 1559.

Amendments:

1961. Act Sept. 21, 1961 (effective 6 months after enactment and applicable as provided by § 2 of such Act, which appears as a note to this section) designated the existing provisions as subsec. (a); and added subsecs. (b)-(e).

1966. Act July 18, 1966 (effective 6 months or more after enactment, as provided by § 10 of such Act, which appears as 28 USCS § 2672 note) substituted subsec. (b) for one which read:

"(b) The remedy by suit against the United States as provided by section 1346(b) of this title for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action

or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim."

1988. Act Nov. 18, 1988 (effective upon enactment and applicable as provided by § 8 of such Act, which appears as a note to this section), substituted subsecs. (b) and (d) for ones which read:

"(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

"(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court."

Other provisions:

Effective date and application of 1961 amendments. Act Sept. 21, 1961, P.L. 87-258, § 2, 75 Stat. 539, provided: "The amendments made by this Act [adding subsecs. (b) to (e) of this section] shall be deemed to be in effect six months after the enactment hereof but any rights or liabilities then existing shall not be affected."

Effective date and application of Nov. 18, 1988 amendments. Act Nov. 18, 1988, P.L. 100-694, § 8, 102 Stat. 4565, provide:

"(a) General rule. This Act and the amendments made by this Act [generally amending 28 USCS §§ 2671 et seq.; for classification, consult USCS Tables volumes] shall take effect on the date of the enactment of this Act.

"(b) Applicability to proceedings. The amendments made by this Act [generally amending 28 USCS §§ 2671 et seq.; for classification, consult USCS Tables volumes] shall apply to all claims, civil actions, and proceedings pending on, or filed on or after, the date of the enactment of this Act.

"(c) Pending state proceedings. With respect to any civil action or proceeding pending in a State court to which the amendments made by this Act [generally amending 28 USCS §§ 2671 et seq.; for full classification, consult USCS Tables volumes] apply, and as to which the period for removal under *section 2679(d) of title 28, United States Code* (as amended by section 6 of this Act), has expired, the Attorney General shall have 60 days after the date of the enactment of this Act during which to seek removal under such section 2679(d).

"(d) Claims accruing before enactment. With respect to any civil action or proceeding to which the amendments made by this Act apply in which the claim accrued before the date of the enactment of this Act, the period during which the claim shall be deemed to be timely presented under *section 2679(d)(5) of title 28, United States Code* (as amended by section 6 of this Act) shall be that period within which the claim could have been timely filed under applicable State law, but in no event shall such period exceed two years from the date of the enactment of this Act."

Tennessee Valley Authority. For provisions relating to employees liability and reform with regard to the Tennessee Valley Authority, see Act Nov. 18, 1988, P.L. 100-694, § 9, 102 Stat. 4566, which appears as *16 USCS § 831c-2*.

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TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

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5 USCS § 552a

§ 552a. Records maintained on individuals

(a) Definitions. For purposes of this section--

- (1) the term "agency" means agency as defined in section 552[(f)](e) of this title;
- (2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;
- (3) the term "maintain" includes maintain, collect, use, or disseminate;
- (4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;
- (5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;
- (6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;
- (7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected; and
- (8) the term "matching program"--
 - (A) means any computerized comparison of--
 - (i) two or more automated systems of records or a system of records with non-Federal records for the purpose of--
 - (I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or
 - (II) recouping payments or delinquent debts under such Federal benefit programs, or
 - (ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,
 - (B) but does not include--
 - (i) matches performed to produce aggregate statistical data without any personal identifiers;
 - (ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals;
 - (iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;
 - (iv) matches of tax information (I) pursuant to *section 6103(d) of the Internal Revenue Code of 1986* [26 USCS § 6103(d)], (II) for purposes of tax administration as defined in section 6103(b)(4) of such Code [26 USCS § 6103(b)(4)],

(III) for the purpose of intercepting a tax refund due an individual under authority granted by section 404(e), 464, or 1137 of the Social Security Act [42 USCS § 604(e), 664, or 1337]; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act [42 USCS § 1320b-7];

(v) matches--

(I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or

(II) conducted by an agency using only records from systems of records maintained by that agency; if the purpose of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel;

(vi) matches performed for foreign counterintelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel;

(vii) matches performed incident to a levy described in *section 6103(k)(8) of the Internal Revenue Code of 1986* [26 USCS § 6103(k)(8)]; or

(viii) matches performed pursuant to section 202(x)(3) or 1611(e)(1) of the Social Security Act (42 U.S.C. 402(x)(3), 1382(e)(1));

(9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;

(10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;

(11) the term "source agency" means any agency which discloses records contained in a system of records to be used in a matching program, or any State or local government, or agency thereof, which discloses records to be used in a matching program;

(12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and

(13) the term "Federal personnel" means officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits).

(b) Conditions of disclosure. No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this *title* [5 USCS § 552];

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office [Government Accountability Office];

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

(c) Accounting of certain disclosures. Each agency, with respect to each system of records under its control, shall--

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of--

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to records. Each agency that maintains a system of records shall--

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and--

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either--

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency requirements. Each agency that maintains a system of records shall--

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual--

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include--

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources or records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and

(12) [Caution: For effective date, see 1988 Amendment note] if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.

(f) Agency Rules. In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this *title* [5 *USCS* § 553], which shall--

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g) Civil remedies.

(1) Whenever any agency--

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2) (A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3) (A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of \$ 1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of legal guardians. For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i) Criminal penalties.

(1) Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than \$ 5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than \$ 5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than \$ 5,000.

(j) General exemptions. The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this *title [5 USCS §§ 553(b)(1), (2), and (3), (c), and (e)]*, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is--

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this *title [5 USCS § 553(c)]*, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific exemptions. The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this *title [5 USCS §§ 553(b)(1), (2), and (3), (c), and (e)]*, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is--

(1) subject to provisions of section 552(b)(1) of this *title [5 USCS § 552(b)(1)]*;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however,* That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this *title* [5 *USCS* § 553(c)], the reasons why the system of records is to be exempted from a provision of this section.

(l) Archival records.

(1) Each agency record which is accepted by the Archivist of the United States for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Archivist of the United States shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section [effective 270 days following Dec. 31, 1974], shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m) Government contractors.

(1) When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(2) A consumer reporting agency to which a record is disclosed under section 3711(e) of title 31 shall not be considered a contractor for the purposes of this section.

(n) Mailing lists. An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) Matching agreements.

(1) No record which is contained in a system of records may be disclosed to a recipient agency or non-Federal agency for use in a computer matching program except pursuant to a written agreement between the source agency and the recipient agency or non-Federal agency specifying--

(A) the purpose and legal authority for conducting the program;

(B) the justification for the program and the anticipated results, including a specific estimate of any savings;

(C) a description of the records that will be matched, including each data element that will be used, the approximate number of records that will be matched, and the projected starting and completion dates of the matching program;

(D) procedures for providing individualized notice at the time of application, and notice periodically thereafter as directed by the Data Integrity Board of such agency (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)), to--

(i) applicants for and recipients of financial assistance or payments under Federal benefit programs, and

(ii) applicants for and holders of positions as Federal personnel, that any information provided by such applicants, recipients, holders and individuals may be subject to verification through matching programs;

(E) procedures for verifying information produced in such matching program as required by subsection (p);

(F) procedures for the retention and timely destruction of identifiable records created by a recipient agency or non-Federal agency in such matching program;

(G) procedures for ensuring the administrative, technical, and physical security of the records matched and the results of such programs;

(H) prohibitions on duplication and redisclosure of records provided by the source agency within or outside the recipient agency or the non-Federal agency, except where required by law or essential to the conduct of the matching program;

(I) procedures governing the use by a recipient agency or non-Federal agency of records provided in a matching program by a source agency, including procedures governing return of the records to the source agency or destruction of records used in such program;

(J) information on assessments that have been made on the accuracy of the records that will be used in such matching program; and

(K) that the Comptroller General may have access to all records of a recipient agency or a non-Federal agency that the Comptroller General deems necessary in order to monitor or verify compliance with the agreement.

(2) (A) A copy of each agreement entered into pursuant to paragraph (1) shall--

(i) be transmitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives; and

(ii) be available upon request to the public.

(B) No such agreement shall be effective until 30 days after the date on which such a copy is transmitted pursuant to subparagraph (A)(i).

(C) Such an agreement shall remain in effect only for such period, not to exceed 18 months, as the Data Integrity Board of the agency determines is appropriate in light of the purposes, and length of time necessary for the conduct, of the matching program.

(D) Within 3 months prior to the expiration of such an agreement pursuant to subparagraph (C), the Data Integrity Board of the agency may, without additional review, renew the matching agreement for a current, ongoing matching program for not more than one additional year if--

(i) such program will be conducted without any change; and

(ii) each party to the agreement certifies to the Board in writing that the program has been conducted in compliance with the agreement.

(p) Verification and opportunity to contest findings.

(1) In order to protect any individual whose records are used in a matching program, no recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program to such individual, or take other adverse action against such individual, as a result of information produced by such matching program, until--

(A) (i) the agency has independently verified the information; or

(ii) the Date Integrity Board of the agency, or in the case of a non-Federal agency the Data Integrity Board of the source agency, determines in accordance with guidance issued by the Director of the Office of Management and Budget that--

(I) the information is limited to identification and amount of benefits paid by the source agency under a Federal benefit program; and

(II) there is a high degree of confidence that the information provided to the recipient agency is accurate;

(B) the individual receives a notice from the agency containing a statement of its findings and informing the individual of the opportunity to contest such findings; and

(C) (i) the expiration of any time period established for the program by statute or regulation for the individual to respond to that notice; or

(ii) in the case of a program for which no such period is established, the end of the 30-day period beginning on the date on which notice under subparagraph (B) is mailed or otherwise provided to the individual.

(2) Independent verification referred to in paragraph (1) requires investigation and confirmation of specific information relating to an individual that is used as a basis for an adverse action against the individual, including where applicable investigation and confirmation of--

(A) the amount of any asset or income involved;

(B) whether such individual actually has or had access to such asset or income for such individual's own use; and

(C) the period or periods when the individual actually had such asset or income.

(3) Notwithstanding paragraph (1), an agency may take any appropriate action otherwise prohibited by such paragraph if the agency determines that the public health or public safety may be adversely affected or significantly threatened during any notice period required by such paragraph.

(q) Sanctions.

(1) Notwithstanding any other provision of law, no source agency may disclose any record which is contained in a system of records to a recipient agency or non-Federal agency for a matching program if such source agency has reason to believe that the requirements of subsection (p), or any matching agreement entered into pursuant to subsection (o), or both, are not being met by such recipient agency.

(2) No source agency may renew a matching agreement unless--

(A) the recipient agency or non-Federal agency has certified that it has complied with the provisions of that agreement; and

(B) the source agency has no reason to believe that the certification is inaccurate.

(r) Report on new systems and matching programs. Each agency that proposes to establish or make a significant change in a system of records or a matching program shall provide adequate advance notice of any such proposal (in duplicate) to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget in order to permit an evaluation of the probable or potential effect of such proposal on the privacy or other rights of individuals.

(s) Biennial report. The President shall biennially submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report--

(1) describing the actions of the Director of the Office of Management and Budget pursuant to section 6 of the Privacy Act of 1974 during the preceding 2 years;

(2) describing the exercise of individual rights of access and amendment under this section during such years;

(3) identifying changes in or additions to systems of records;

(4) containing such other information concerning administration of this section as may be necessary or useful to the Congress in reviewing the effectiveness of this section in carrying out the purposes of the Privacy Act of 1974 [note to this section].

(t) Effect of other laws.

(1) No agency shall rely on any exemption contained in section 552 of this *title* [5 USCS § 552] to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this *title* [5 USCS § 552].

(u) Data Integrity Boards.

(1) Every agency conducting or participating in a matching program shall establish a Data Integrity Board to oversee and coordinate among the various components of such agency the agency's implementation of this section.

(2) Each Data Integrity Board shall consist of senior officials designated by the head of the agency, and shall include any senior official designated by the head of the agency as responsible for implementation of this section, and the inspector general of the agency, if any. The inspector general shall not serve as chairman of the Data Integrity Board.

(3) Each Data Integrity Board--

(A) shall review, approve, and maintain all written agreements for receipt or disclosure of agency records for matching programs to ensure compliance with subsection (o), and all relevant statutes, regulations, and guidelines;

(B) shall review all matching programs in which the agency has participated during the year, either as a source agency or recipient agency, determine compliance with applicable laws, regulations, guidelines, and agency agreements, and assess the costs and benefits of such programs;

(C) shall review all recurring matching programs in which the agency has participated during the year, either as a source agency or recipient agency, for continued justification for such disclosures;

(D) shall compile an annual report, which shall be submitted to the head of the agency and the Office of Management and Budget and made available to the public on request, describing the matching activities of the agency, including--

(i) matching programs in which the agency has participated as a source agency or recipient agency;
(ii) matching agreements proposed under subsection (o) that were disapproved by the Board;
(iii) any changes in membership or structure of the Board in the preceding year;
(iv) the reasons for any waiver of the requirement in paragraph (4) of this section for completion and submission of a cost-benefit analysis prior to the approval of a matching program;
(v) any violations of matching agreements that have been alleged or identified and any corrective action taken; and
(vi) any other information required by the Director of the Office of Management and Budget to be included in such report;

(E) shall serve as a clearinghouse for receiving and providing information on the accuracy, completeness, and reliability of records used in matching programs;

(F) shall provide interpretation and guidance to agency components and personnel on the requirements of this section for matching programs;

(G) shall review agency recordkeeping and disposal policies and practices for matching programs to assure compliance with this section; and

(H) may review and report on any agency matching activities that are not matching programs.

(4) (A) Except as provided in subparagraphs (B) and (C), a Data Integrity Board shall not approve any written agreement for a matching program unless the agency has completed and submitted to such Board a cost-benefit analysis of the proposed program and such analysis demonstrates that the program is likely to be cost effective.

(B) The Board may waive the requirements of subparagraph (A) of this paragraph if it determines in writing, in accordance with guidelines prescribed by the Director of the Office of Management and Budget, that a cost-benefit analysis is not required.

(C) A cost-benefit analysis shall not be required under subparagraph (A) prior to the initial approval of a written agreement for a matching program that is specifically required by statute. Any subsequent written agreement for such a program shall not be approved by the Data Integrity Board unless the agency has submitted a cost-benefit analysis of the program as conducted under the preceding approval of such agreement.

(5) (A) If a matching agreement is disapproved by a Data Integrity Board, any party to such agreement may appeal the disapproval to the Director of the Office of Management and Budget. Timely notice of the filing of such an appeal shall be provided by the Director of the Office of Management and Budget to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives.

(B) The Director of the Office of Management and Budget may approve a matching agreement notwithstanding the disapproval of a Data Integrity Board if the Director determines that--

- (i) the matching program will be consistent with all applicable legal, regulatory, and policy requirements;
- (ii) there is adequate evidence that the matching agreement will be cost-effective; and
- (iii) the matching program is in the public interest.

(C) The decision of the Director to approve a matching agreement shall not take effect until 30 days after it is reported to committees described in subparagraph (A).

(D) If the Data Integrity Board and the Director of the Office of Management and Budget disapprove a matching program proposed by the inspector general of an agency, the inspector general may report the disapproval to the head of the agency and to the Congress.

(6) In the reports required by paragraph (3)(D), agency matching activities that are not matching programs may be reported on an aggregate basis, if and to the extent necessary to protect ongoing law enforcement or counterintelligence investigations.

(v) Office of Management and Budget responsibilities. The Director of the Office of Management and Budget shall--

(1) develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing the provisions of this section; and

(2) provide continuing assistance to and oversight of the implementation of this section by agencies.

HISTORY:

(Added Dec. 31, 1974, P.L. 93-579, § 3, 88 Stat. 1897; Dec. 31, 1975, P.L. 94-183, § 2(2), 89 Stat. 1057; Oct. 25, 1982, P.L. 97-365, § 2, 96 Stat. 1749; Dec. 21, 1982, P.L. 97-375, Title II, § 201(a), (b), 96 Stat. 1821; Jan. 12, 1983, P.L. 97-452, § 2(a)(1), 96 Stat. 2478; Oct. 15, 1984, P.L. 98-477, § 2(c), 98 Stat. 2211; Oct. 19, 1984, P.L. 98-497, Title I, § 107(g), 98 Stat. 2292; Oct. 18, 1988, P.L. 100-503, §§ 2-5, 6(a), 7, 8, 102 Stat. 2507-2514; Nov. 5, 1990, P.L. 101-508, Title VII, Subtitle C, § 7201(b)(1), 104 Stat. 1388-334; Aug. 10, 1993, P.L. 103-66, Title XIII, Ch 2, Subch A, Part V, § 13581(c), 107 Stat. 611; Aug. 22, 1996, P.L. 104-193, Title I, § 110(w), 110 Stat. 2175; Oct. 2, 1996, P.L. 104-

226, § 1(b)(3), 110 Stat. 3033; Oct. 19, 1996, P.L. 104-316, Title I, § 115(g)(2)(B), 110 Stat. 3835; Aug. 5, 1997, P.L. 105-34, Title IX, Subtitle C, § 1026(b)(2), 111 Stat. 925; Nov. 10, 1998, P.L. 105-362, Title XIII, § 1301(d), 112 Stat. 3293; Dec. 17, 1999, P.L. 106-170, Title IV, § 402(a)(2), 113 Stat. 1908.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"Section 6 of the Privacy Act of 1974", referred to in subsec. (s)(1), is § 6 of Act Dec. 31, 1974, 88 Stat. 1908, which was repealed by § 6(c) of Act Oct. 18, 1988. Such § 6 of the Privacy Act formerly appeared as a note to this section.

With respect to the Committee on Government Operations, referred to in this section, § 1(a)(6), (c)(2) of Act June 3, 1995, P.L. 104-14, which appears as a note preceding 2 *USCS* § 21, provides that any reference to such Committee in any provision of law enacted before January 4, 1995, shall be treated as referring to the Committee on Government Reform and Oversight of the House of Representatives, except that it shall be treated as referring to the Committee on the Budget of the House of Representatives in the case of a provision of law relating to the establishment, extension, and enforcement of special controls over the Federal budget. The Committee on Government Reform and Oversight of the House of Representatives was renamed the Committee on Government Reform of the House of Representatives, pursuant to H. Res. No. 5, One Hundred Sixth Congress, Jan. 6, 1999.

Explanatory notes:

The bracketed subsection designator "(f)" has been inserted in subsec. (a)(1) to indicate the subsection of 5 *USCS* § 552 which Congress probably intended to cite. Subsec. (e) of 5 *USCS* § 552 was redesignated subsec. (f) of such section by § 1802(b) of Act Oct. 27, 1986.

"Government Accountability Office" has been inserted in brackets in subsec. (b)(10) on the authority of § 8 of Act July 7, 2004, P.L. 108-271 (31 *USCS* § 702 note), which redesignated the General Accounting Office as the Government Accountability Office, and provided that any reference to the General Accounting Office in any law in force on July 7, 2004, shall be considered to refer and apply to the Government Accountability Office.

A former 5 *USC* § 552a was transferred by Act Sept. 6, 1966, which enacted 5 *USCS* §§ 101 et seq., and now appears as 7 *USCS* § 2244.

Effective date of section:

This section took effect 270 days after Dec. 31, 1974, pursuant to § 8 of Act Dec. 31, 1974, P.L. 93-579, which appears as a note to this section.

Amendments:

1975. Act Dec. 31, 1975, in subsec. (g)(5), substituted "to September 27, 1975" for "to the effective date of this section".

1982. Act Oct. 25, 1982, in subsec. (b), in para. (10), deleted "or" following "Office;"; in para. (11), substituted "; or" for a concluding period, and added para. (12); and, in subsec. (m), designated the existing provisions as para. (1), and added para. (2).

Act Dec. 21, 1982, in subsec. (e)(4), in the introductory matter, substituted "upon establishment or revision" for "at least annually"; and substituted subsec. (p) for one which read: "Annual Report. The President shall submit to the Speaker of the House and the President of the Senate, by June 30 of each calendar year, a consolidated report, separately listing for each Federal agency the number of records contained in any system of records which were exempted from the

application of this section under the provisions of subsections (j) and (k) of this section during the preceding calendar year, and the reasons for the exemptions, and such other information as indicates efforts to administer fully this section."

1983. Act Jan. 12, 1983, in subsections (b)(12) and (m)(2) substituted "section 3711(f) of title 31" for "section 3(d) of the Federal Claims Collection Act of 1966 (31 U.S.C. 952(d))".

1984. Act Oct. 15, 1984, in subsection (q), designated the existing provisions as para. (1), and added para. (2).

Act Oct. 19, 1984 (effective 4/1/85, as provided by § 301 of such Act, which appears as 44 USCS § 2102 note), in subsection (b), substituted para. (6) for one which read: "to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;"; and in subsection (l)(1), substituted "Archivist of the United States" for "Administrator of General Services" in two places.

1988. Act Oct. 18, 1988, in subsection (f), in the concluding matter, substituted "biennially" for "annually"; substituted subsection (o) (designated in the directory language as subsection (r), such being effective as provided by § 10 of the Act, which appears as a note to this section), for one which read: "(o) Report on new systems. Each agency shall provide adequate advance notice to Congress and the Office of Management and Budget of any proposal to establish or alter any system of records in order to permit an evaluation of the probable or potential effect of such proposal on the privacy and other personal or property rights of individuals or the disclosure of information relating to such individuals, and its effect on the preservation of the constitutional principles of federalism and separation of powers."; in subsection (p) (designated in the directory language as subsection (s), such being effective as provided by § 10 of the Act, which appears as a note to this section), in the heading, substituted "Biennial" for "Annual", in the introductory matter, substituted "biennially submit" for "annually submit", in para. (1), substituted "preceding 2 years" for "preceding year", and in para. (2), substituted "such years" for "such year".

Such Act further (effective as provided by § 10 of such Act, which appears as a note to this section), in subsection (a), in para. (6), deleted "and" following the concluding semicolon, in para. (7), substituted a period for the concluding semicolon, and added paras. (8)-(13).

Such Act further (effective as above), in subsection (e), in para. (10), deleted "and" following "maintained;"; in para. (11), substituted "; and" for the concluding period, and added para. (12).

Such Act further (effective as above) redesignated former subsections (o), (p), and (q) as subsections (r), (s), and (t), respectively, and added new subsections (o), (p), and (q); and added subsection (v).

1990. Act Nov. 5, 1990 substituted subsection (p) for one which read:

"(p) Verification and opportunity to contest findings.

(1) In order to protect any individual whose records are used in matching programs, no recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program to such individual, or take other adverse action against such individual as a result of information produced by such matching programs, until an officer or employee of such agency has independently verified such information. Such independent verification may be satisfied by verification in accordance with (A) the requirements of paragraph (2); and (B) any additional requirements governing verification under such Federal benefit program.

"(2) Independent verification referred to in paragraph (1) requires independent investigation and confirmation of any information used as a basis for an adverse action against an individual including, where applicable--

"(A) the amount of the asset or income involved,

"(B) whether such individual actually has or had access to such asset or income for such individual's own use, and

"(C) the period or periods when the individual actually had such asset or income.

"(3) No recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program to any individual described in paragraph (1), or take other adverse action against such individual as a result of information produced by a matching program, (A) unless such individual has received notice from such agency containing a statement of its findings and informing the

individual of the opportunity to contest such findings, and (B) until the subsequent expiration of any notice period provided by the program's law or regulations, or 30 days, whichever is later. Such opportunity to contest may be satisfied by notice, hearing, and appeal rights governing such Federal benefit program. The exercise of any such rights shall not affect any rights available under this section.

"(4) Notwithstanding paragraph (3), an agency may take any appropriate action otherwise prohibited by such paragraph if the agency determines that the public health or public safety may be adversely affected or significantly threatened during the notice period required by such paragraph."

1993. Act Aug. 10, 1993 (effective 1/1/94, as provided by § 13581(d) of such Act), in subsec. (a)(8)(B), in cl. (v), deleted "; or" following "personnel", in cl. (vi), substituted a semicolon for "; or", and added cl. (vii).

1996. Act Aug. 22, 1996 (effective 7/1/97 as provided by § 116 of such Act, which appears as 42 USCS § 601 note), in subsec. (a)(8)(B)(iv)(III), substituted "section 404(e), 464, or 1137 of the Social Security Act" for "section 464 or 1137 of the Social Security Act".

Act Oct. 2, 1996, in subsec. (a)(8)(B), in cl. (v), inserted "or" following "personnel", in cl. (vi), deleted "or" following "personnel;", and deleted cl. (vii), which read: "(vii) matches performed pursuant to *section 6103(l)(12) of the Internal Revenue Code of 1986* and section 1144 of the Social Security Act;".

Act Oct. 19, 1996 (effective on enactment, as provided by § 101(e) of such Act, which appears as 2 USCS § 130c note), in subsecs. (b)(12) and (m)(2), substituted "3711(e)" for "3711(f)".

1997. Act Aug. 5, 1997 (applicable to levies issued after enactment, as provided by § 1026 of such Act, which appears as 26 USCS § 6105 note), in subsec. (a)(8)(B), in cl. (v), deleted "or" after the concluding semicolon, in cl. (vi), inserted "or" after the concluding semicolon, and added cl. (vii).

1998. Act Nov. 10, 1998, in subsec. (u), deleted para. (6), which read: "(6) The Director of the Office of Management and Budget shall, annually during the first 3 years after the date of enactment of this subsection and biennially thereafter, consolidate in a report to the Congress the information contained in the reports from the various Data Integrity Boards under paragraph (3)(D). Such report shall include detailed information about costs and benefits of matching programs that are conducted during the period covered by such consolidated report, and shall identify each waiver granted by a Data Integrity Board of the requirement for completion and submission of a cost-benefit analysis and the reasons for granting the waiver.", redesignated para. (7) as para. (6) and, in para. (6) as redesignated, substituted "paragraph (3)(D)" for "paragraphs (3)(D) and (6)".

1999. Act Dec. 17, 1999 (applicable to individuals whose period of confinement in an institution commences on or after the first day of the fourth month beginning after the month of enactment, as provided by § 402(a)(4) of such Act, which appears as 42 USCS § 402 note), in subsec. (a)(8)(B), in cl. (vi), deleted "or" after the concluding semicolon, in cl. (vii), added "or" after the concluding semicolon, and added cl. (viii).

Short titles:

Act Dec. 31, 1974, P.L. 93-579, § 1, 88 Stat. 1896 provided: "This Act may be cited as the Privacy Act of 1974." For full classification of such Act, consult USCS Tables volumes.

Act Oct. 18, 1988, P.L. 100-503, § 1, 102 Stat. 2507, effective as provided by § 10 of such Act, which appears as a note to this section, provides: "This Act may be cited as the 'Computer Matching and Privacy Protection Act of 1988'." For full classification of such Act, consult USCS Tables volumes.

Act July 19, 1989, P.L. 101-56, § 1, 103 Stat. 149, provides: "This Act may be cited as the 'Computer Matching and Privacy Protection Act Amendments of 1989'." For full classification of such Act, consult USCS Tables volumes.

Act Nov. 5, 1990, P.L. 101-508, Title VII, Subtitle C, § 7201(a), 104 Stat. 3388-334, provides: "This section may be cited as the 'Computer Matching and Privacy Protection Amendments of 1990'". For full classification of such section, consult USCS Tables volumes.

Transfer of functions:

The functions of the Director of the Office of Management and Budget under this section were delegated to the Administrator for the Office of Information and Regulatory Affairs by § 3 of Act Dec. 11, 1980, P.L. 96-511, which appears as *44 USCS § 3503* note.

Other provisions:

Congressional findings and statement of purpose. Act Dec. 31, 1974, P.L. 93-579, § 2, 88 Stat. 1896, provided:

"(a) The Congress finds that--

"(1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;

"(2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information;

"(3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;

"(4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and

"(5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

"(b) The purpose of this Act [adding this section, among other things; for full classification, consult USCS Tables volumes] is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to--

"(1) permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;

"(2) permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent;

"(3) permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;

"(4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;

"(5) permit exemptions from the requirements with respect to records provided in this Act [adding this section, among other things; for full classification, consult USCS Tables volumes] only in those cases where there is an important public policy need for such exemption as has been determined by specific statutory authority; and

"(6) be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act [adding this section, among other things; for full classification, consult USCS Tables volumes]."

Privacy Protection Study Commission. Act Dec. 31, 1974, P.L. 93-579, § 5, 88 Stat. 1905, as amended by Act June 1, 1977, P.L. 95-38, 91 Stat. 179, provided:

"(a)

(1) There is established a Privacy Protection Study Commission (hereinafter referred to as the Commission) which shall be composed of seven members as follows:

"(A) three appointed by the President of the United States,

"(B) two appointed by the President of the Senate, and

"(C) two appointed by the Speaker of the House of Representatives.

Members of the Commission shall be chosen from among persons who, by reason of their knowledge and expertise in any of the following areas--civil rights and liberties, law, social sciences, computer technology, business, records management, and State and local government--are well qualified for service on the Commission.

"(2) The members of the Commission shall elect a Chairman from among themselves.

"(3) Any vacancy in the membership of the Commission, as long as there are four members in office, shall not impair the power of the Commission but shall be filled in the same manner in which the original appointment was made.

"(4) A quorum of the Commission shall consist of a majority of the members, except that the Commission may establish a lower number as a quorum for the purpose of taking testimony. The Commission is authorized to establish such committees and delegate such authority to them as may be necessary to carry out its functions. Each member of the Commission, including the Chairman, shall have equal responsibility and authority in all decisions and actions of the Commission, shall have full access to all information necessary to the performance of their functions, and shall have one vote. Action of the Commission shall be determined by a majority vote of the members present. The Chairman (or a member designated by the Chairman to be acting Chairman) shall be the official spokesman of the Commission in its relations with the Congress, Government agencies, other persons, and the public, and, on behalf of the Commission, shall see to the faithful execution of the administrative policies and decisions of the Commission, and shall report thereon to the Commission from time to time or as the Commission may direct.

"(5)

(A) Whenever the Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit a copy of that request to Congress.

"(B) Whenever the Commission submits any legislative recommendations, or testimony, or comments on legislation to the President or Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, or testimony, or comments on legislation, to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

"(b) The Commission shall--

"(1) make a study of the data banks, automated data processing programs, and information systems of governmental, regional, and private organizations, in order to determine the standards and procedures in force for the protection of personal information; and

"(2) recommend to the President and the Congress the extent, if any, to which the requirements and principles of *section 552a of title 5, United States Code* [this section], should be applied to the information practices of those organizations by legislation, administrative action, or voluntary adoption of such requirements and principles, and report on such other legislative recommendations as it may determine to be necessary to protect the privacy of individuals while meeting the legitimate needs of government and society for information.

"(c)

(1) In the course of conducting the study required under subsection (b)(1) of this section, and in its reports thereon, the Commission may research, examine, and analyze--

"(A) interstate transfer of information about individuals that is undertaken through manual files or by computer or other electronic or telecommunications means;

"(B) data banks and information programs and systems the operation of which significantly or substantially affect the enjoyment of the privacy and other personal and property rights of individuals;

"(C) the use of social security numbers, license plate numbers, universal identifiers, and other symbols to identify individuals in data banks and to gain access to, integrate, or centralize information systems and files; and

"(D) the matching and analysis of statistical data, such as Federal census data, with other sources of personal data, such as automobile registries and telephone directories, in order to reconstruct individual responses to statistical questionnaires for commercial or other purposes, in a way which results in a violation of the implied or explicitly recognized confidentiality of such information.

"(2)

(A) The Commission may include in its examination personal information activities in the following areas: medical; insurance; education; employment and personnel; credit, banking and financial institutions; credit bureaus; the commercial reporting industry; cable television and other telecommunications media; travel, hotel and entertainment reservations; and electronic check processing.

"(B) The Commission shall include in its examination a study of--

"(i) whether a person engaged in interstate commerce who maintains a mailing list should be required to remove an individual's name and address from such list upon request of that individual;

"(ii) whether the Internal Revenue Service should be prohibited from transferring individually identifiable data to other agencies and to agencies of State governments;

"(iii) whether the Federal Government should be liable for general damages incurred by an individual as the result of a willful or intentional violation of the provisions of section 552a(g)(1)(C) or (D) of title 5, United States Code; and

"(iv) whether and how the standards for security and confidentiality of records required under section 552a(c)(10) of such title should be applied when a record is disclosed to a person other than an agency.

"(C) The Commission may study such other personal information activities necessary to carry out the congressional policy embodied in this act [adding, this section, among other things; for full classification, consult USCS Tables volumes], except that the Commission shall not investigate information systems maintained by religious organizations.

"(3) In conducting such study, the Commission shall--

"(A) determine what laws, Executive orders, regulations, directives, and judicial decisions govern the activities under study and the extent to which they are consistent with the rights of privacy, due process of law, and other guarantees in the Constitution;

"(B) determine to what extent governmental and private information systems affect Federal-State relations or the principle of separation of powers;

"(C) examine the standards and criteria governing programs, policies, and practices relating to the collection, soliciting, processing, use, access, integration, dissemination, and transmission of personal information; and

"(D) to the maximum extent practicable, collect and utilize findings, reports, studies, hearing transcripts, and recommendations of governmental, legislative and private bodies, institutions, organizations, and individuals which pertain to the problems under study by the Commission.

"(d) In addition to its other functions the Commission may--

"(1) request assistance of the heads of appropriate departments, agencies, and instrumentalities of the Federal Government, of State and local governments, and other persons in carrying out its functions under this Act [adding this section, among other things; for full classification, consult USCS Tables volume.];

"(2) upon request, assist Federal agencies in complying with the requirements of *section 552a of title 5, United States Code*;

"(3) determine what specific categories of information, the collection of which would violate an individual's right of privacy, should be prohibited by statute from collection by Federal agencies; and

"(4) upon request, prepare model legislation for use by State and local governments in establishing procedures for handling, maintaining, and disseminating personal information at the State and local level and provide such technical assistance to State and local governments as they may require in the preparation and implementation of such legislation.

"(e)

(1) The Commission may, in carrying out its functions under this section, conduct such inspections, sit and act at such times and places, hold such hearings, take such testimony, require by subpoena the attendance of such witnesses and the production of such books, records, papers, correspondence, and documents, administer such oaths, have such printing and binding done, and make such expenditures as the Commission deems advisable. A subpoena shall be issued only upon an affirmative vote of a majority of all members of the Commission. Subpoenas shall be issued under the signature of the Chairman or any member of the Commission designated by the Chairman and shall be served by any person designated by the Chairman or any such member. Any member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission.

"(2)

(A) Each department, agency, and instrumentality of the executive branch of the Government is authorized to furnish to the Commission, upon request made by the Chairman, such information, data, reports and such other assistance as the Commission deems necessary to carry out its functions under this section. Whenever the head of any such department, agency, or instrumentality submits a report pursuant to *section 552a(o) of title 5, United States Code* [now § 552a(r)], a copy of such report shall be transmitted to the Commission.

"(B) In carrying out its functions and exercising its powers under this section, the Commission may accept from any such department, agency, independent instrumentality, or other person any individually identifiable data if such data is necessary to carry out such powers and functions. In any case in which the Commission accepts any such information, it shall assure that the information is used only for the purpose for which it is provided, and upon completion of that purpose such information shall be destroyed or returned to such department, agency, independent instrumentality, or person from which it is obtained, as appropriate.

"(3) The Commission shall have the power to--

"(A) appoint and fix the compensation of an executive director, and such additional staff personnel as may be necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to chapter 51 [5 USCS §§ 5101 et seq.] and subchapter III of chapter 53 [5 USCS §§ 5331 et seq.] of such title relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of such title, and

"(B) procure temporary and intermittent services to the same extent as is authorized by *section 3109 of title 5, United States Code.*

"The Commission may delegate any of its functions to such personnel of the Commission as the Commission may designate and may authorize such successive redelegations of such functions as it may deem desirable.

"(4) The Commission is authorized--

"(A) to adopt, amend, and repeal rules and regulations governing the manner of its operations, organization, and personnel;

"(B) to enter into contracts or other arrangements or modifications thereof, with any government, any department, agency, or independent instrumentality of the United States, or with any person, firm, association, or corporation, and such contracts or other arrangements, or modifications thereof, may be entered into without legal consideration, without performance or other bonds, and without regard to section 3709 of the Revised Statutes, as amended (*41 U.S.C. 5*);

"(C) to make advance, progress, and other payments which the Commission deems necessary under this Act [which, among other things, enacted this section; for full classification, consult USCS Tables volumes] without regard to the provisions of section 3648 of the Revised Statutes, as amended (*31 U.S.C. 529*); and

"(D) to take such other action as may be necessary to carry out its functions under this section.

"(f)

(1) Each member of the Commission who is an officer or employee of the United States shall serve without additional compensation, but shall continue to receive the salary of his regular position when engaged in the performance of the duties vested in the Commission.

"(2) A member of the Commission other than one to whom paragraph (1) applies shall receive per diem at the maximum daily rate for GS-18 of the General Schedule when engaged in the actual performance of the duties vested in the Commission.

"(3) All members of the Commission shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the Commission.

"(g) The Commission shall, from time to time, and in an annual report, report to the President and the Congress on its activities in carrying out the provisions of this section. The Commission shall make a final report to the President and to the Congress on its findings pursuant to the study required to be made under subsection (b)(1) of this section not later than two years from the date on which all of the members of the Commission are appointed. The Commission shall cease to exist on September 30, 1977.

"(h)

(1) Any member, officer, or employee of the Commission, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than \$ 5,000.

"(2) Any person who knowingly and willfully requests or obtains any record concerning an individual from the Commission under false pretenses shall be guilty of a misdemeanor and fined not more than \$ 5,000."

Repeal of guidelines and regulations for maintenance of privacy and protection of records of individuals. Act Dec. 31, 1974, P.L. 93-579, § 6, 88 Stat. 1909, which formerly appeared as a note to this section, was repealed by Act Oct. 18, 1988, P.L. 100-503, § 6(c), 102 Stat. 2513.

Disclosure of social security number. Act Dec. 31, 1974, P.L. 93-579, § 7, 88 Stat. 1909, provided:

"(a)

(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

"(2) the provisions of paragraph (1) of this subsection shall not apply with respect to--

"(A) any disclosure which is required by Federal statute, or

"(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

"(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it."

Effective date of Act Dec. 31, 1974. Act Dec. 31, 1974, P.L. 93-579, § 8, 88 Stat. 1910 provided: "The provisions of this Act [enacting this section and notes to this section] shall be effective on and after the date of enactment, except that the amendments made by sections 3 and 4 [amending this section and the analysis preceding 5 *USCS* § 500] shall become effective 270 days following the day on which this Act is enacted."

Authorization of appropriations to Privacy Protection Study Commission. Act Dec. 31, 1974, P.L. 93-579, § 9, 88 Stat. 1910; Sept. 3, 1976, P.L. 94-394, 90 Stat. 1198, provided: "There is authorized to be appropriated, without fiscal year limitation only to such extent or in such amounts as are provided in appropriation Acts, the sum of \$ 2,000,000 to carry out the provisions of section 5 of this Act [5 *USCS* § 552a note] for the period beginning July 1, 1975, and ending on September 30, 1977."

Implementation guidance for amendments. Act Oct. 18, 1988, P.L. 100-503, § 6(b), 102 Stat. 2513, provides: "The Director shall, pursuant to *section 552a(v) of title 5, United States Code*, develop guidelines and regulations for the use of agencies in implementing the amendments made by this Act [generally amending this section consult USCS Tables volumes for full classification] not later than 8 months after the date of enactment of this Act."

Rules of construction. Act Oct. 18, 1988, P.L. 100-503, § 9, 102 Stat. 2514, effective as provided by § 10 of such Act which appears as a note to this section, provides:

"Nothing in the amendments made by this Act [generally amending this section; consult USCS Tables volume for full classification] shall be construed to authorize--

"(1) the establishment or maintenance by any agency of a national data bank that combines, merges, or links information on individuals maintained in systems of records by other Federal agencies;

"(2) the direct linking of computerized systems of records maintained by Federal agencies;

"(3) the computer matching of records not otherwise authorized by law; or

"(4) the disclosure of records for computer matching except to a Federal, State, or local agency."

Effective date of Oct. 18, 1988 amendments. Act Oct. 18, 1988, P.L. 100-503, § 10, 102 Stat. 2514, as amended July 19, 1989, P.L. 101-56, § 2, 103 Stat. 149, provides:

"(a) In general. Except as provided in subsections (b) and (c), the amendments made by this Act [amending this section and adding and repealing notes to this section] shall take effect 9 months after the date of enactment of this Act.

"(b) Exceptions. The amendment made by sections 3(b), 6, 7, and 8 of this Act [amending subsecs. (f), (q)] (r), and [(p)](s); adding subsec. (v); and adding and repealing notes to this section] shall take effect upon enactment.

"(c) Effective Date Delayed For Existing Programs. In the case of any matching program (as defined in *section 552a(a)(8) of title 5, United States Code*, as added by section 5 of this Act) in operation before June 1, 1989, the amendments made by this Act (other than the amendments described in subsection (b)) shall take effect January 1, 1990, if--

"(1) such matching program is identified by an agency as being in operation before June 1, 1989; and

"(2) such identification is--

"(A) submitted by the agency to the Committee on Governmental Affairs of the Senate, the Committee on Government Operations of the House of Representatives, and the Office of Management and Budget before August 1, 1989, in a report which contains a schedule showing the dates on which the agency expects to have such matching program in compliance with the amendments made by this Act, and

"(B) published by the Office of Management and Budget in the Federal Register, before September 15, 1989."

Effective date delayed for certain education benefits computer matching programs. Act Aug. 15, 1990, P.L. 101-366, Title II, § 206(d), 104 Stat. 442, provides:

"(1) In the case of computer matching programs between the Department of Veterans Affairs and the Department of Defense in the administration of education benefits programs under chapters 30 and 32 of title 38 [38 *USCS* §§ 1401 et seq., 1601 et seq.] and chapter 106 of title 10, United States Code [10 *USCS* §§ 2131 et seq.], the amendments made to *section 552a of title 5, United States Code*, by the Computer Matching and Privacy Protection Act of 1988 (other than the amendments made by section 10(b) of that Act [note to this section]) shall take effect on October 1, 1990.

"(2) For purposes of this subsection, the term 'matching program' has the same meaning provided in *section 552a(a)(8) of title 5, United States Code*."

Publication of guidance concerning content and accuracy of information. Act Nov. 5, 1990, P.L. 101-508, Title VII, Subtitle C, § 7201(b)(2), 104 Stat. 1388-334, provides: "Not later than 90 days after the date of the enactment of this Act, the Director of the Office of Management and Budget shall publish guidance under subsection (p)(1)(A)(ii) of *section 552a of title 5, United States Code*, as amended by this Act."

Limitation on application of verification requirement. Act Nov. 5, 1990, P.L. 101-508, Title VII, Subtitle C, § 7201(c), 104 Stat. 1388-335, provides:

"Section 552a(p)(1)(A)(ii)(II) of title 5, *United States Code*, as amended by section 2, shall not apply to a program referred to in paragraph (1), (2), or (4) of section 1137(b) of the Social Security Act (*42 U.S.C. 1320b-7*), until the earlier of--

"(1) the date on which the Data Integrity Board of the Federal agency which administers that program determines that there is not a high degree of confidence that information provided by that agency under Federal matching programs is accurate or

"(2) 30 days after the date of publication of guidance under section 2(b) [subsec. (b)(2), which appears as a note to this section]."

Classified national security information. For provision relating to a response to a request for information under this section when the fact of its existence or nonexistence is itself is classified or when it was originally classified by another agency, see § 3.7 of Ex. Or. No. 12958 of April 17, 1995, *60 Fed. Reg. 19835*, which appears as *50 USCS § 435* note.

Termination of reporting requirements. For termination, effective May 15, 2000, of provisions of subsec. (s) of this section relating to periodic reports to Congress, see § 3003 of Act Dec. 21, 1995, P.L. 104-66, which appears as *31 USCS § 1113* note. See also page 31 of House Document No. 103-7.

Transfer of provision relating to Chief Privacy Officer. Act Dec. 8, 2004, P.L. 108-447, Div H, Title V, § 522, 118 Stat. 3268, which formerly appeared as a note to this section, was transferred to *42 USCS § 2000ee-2*.