

LEGISLATION ESTABLISHING SPECIAL JUDICIAL PANEL TO SCREEN INTELLIGENCE CASES INVOLVING BREACH OF CONTRACT DISPUTES

HON. JAMES A. TRAFICANT, JR.

OF OHIO

IN THE HOUSE OF REPRESENTATIVES

Tuesday, February 11, 1997

Mr. TRAFICANT. Mr. Speaker, today I am introducing legislation to mandate the establishment of a special Federal judicial panel to determine whether cases involving breach of contract disputes between U.S. intelligence agencies and individuals involved in espionage on behalf of the United States should go on trial. The legislation directs the Chief Justice to assign three Federal circuit court judges, senior Federal judges, or retired justices to a division of the U.S. Court of Appeals for the District of Columbia for the purpose of determining whether an action brought by a person, including a foreign national, in an appropriate U.S. court for compensation for services performed for the U.S. pursuant to a secret Government contract may be tried in court. The bill provides that the panel may not determine that the case cannot be heard solely on the basis of the nature of the services provided under the contract.

The goal of the bill is to allow individuals who have a legitimate claim against the U.S. Government regarding a secret service contract to have their day in court. Currently, these types of cases are barred from even going to trial by the Totten doctrine, which bars the judiciary from adjudicating disputes that arise out of secret Government contracts which involve the performance of secret service.

The Totten doctrine is based on the 1876 Supreme Court case of *Totten v. United States*. The case involved the estate of an individual who performed secret services for President Lincoln during the Civil War. The court dismissed the plaintiff's postwar suit for breach of contract, stating, in part:

The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter . . . It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.

Other court rulings over the years have affirmed the Totten doctrine as it applies to breach of contract disputes arising from espionage services performed pursuant to a secret contract. Basically, the Totten doctrine prevents individuals who have performed espionage services for the United States and have legitimate claims against the Government from even having their claims heard in a U.S. court. In a paper published in the Spring, 1990 issue of the *Suffolk Transnational Law Journal*, Theodore Francis Riordan noted that "[W]hen a court invokes Totten to dismiss a lawsuit, it is merely enforcing the contract's implied cov-

enant of secrecy, rather than invoking some national security ground."

While, on the whole, U.S. intelligence agencies do their best to fulfill commitments made to individuals who perform services on their behalf, there are instances in which, for whatever reason, U.S. intelligence agencies have not fulfilled its commitments.

For example, during the Vietnam war the Pentagon and the CIA jointly ran an operation over a 7 year period in which some 450 South Vietnamese commandos were sent into North Vietnam on various espionage and spy missions. The CIA promised each commando that, in the event they were captured, they would be rescued and their families would receive lifetime stipends. Due to intelligence leaks and intelligence penetrations by the North Vietnamese, most of the commandos were captured almost immediately. Many were tortured and some were killed by the North Vietnamese. Beginning in 1962, CIA officers began crossing the names of captured commandos off the pay rosters and telling their family members that they were dead. Many of the commandos survived the war. After varying periods of time they were set free by the Vietnamese Government. Two hundred of the commandos now living in the United States filed a lawsuit last year asking that all living commandos be paid \$2,000 a year for every year they served in prison—an estimated \$11 million. Last fall, the CIA decided to provide compensation to the commandos.

Mr. Speaker, how many other cases are there in which U.S. intelligence agencies have acted in a similar manner but not settled out of court? I find it outraged than an individual who risked his or her life for the United States would not even have the opportunity to have his or her grievance heard in a court of law because of Totten.

Existing Federal statutes give the Director of Central Intelligence the authority to protect intelligence sources and methods from unauthorized disclosure. I understand the importance to national security of preventing any unauthorized leaks of information that would compromise U.S. intelligence sources and methods. That is why my legislation directs the special judicial panel to take into consideration whether the information that would be disclosed in adjudicating an action would do serious damage to national security or would compromise the safety and security of U.S. intelligence sources at home and abroad. In addition, the bill provides that if the panel determines that a particular case can go to trial, it may prescribe steps that the court in which the case is to be heard shall take to protect national security and intelligence sources and methods, including holding the proceedings in camera.

Finally, because there may be a number of cases that were never even contested because of the Totten doctrine, the bill waives the statute of limitations for any claims arising on or after December 1, 1976 and filed within 2 years of enactment of the bill into law.

Mr. Speaker, this is a responsible piece of legislation that affords both U.S. citizens and foreign nationals who perform intelligence services for the United States of some assurance that they have some recourse if the Government does not honor its commitments. The bill also includes enough safeguards to protect national security and the safety of U.S. intelligence sources. I want to emphasize that the

bill would not automatically provide compensation to anyone. It simply would allow legitimate breach of contract cases to go to trial.

Supporters of the U.S. intelligence community have criticized court involvement in intelligence cases by noting that most Federal judges do not have the expertise, knowledge and background to effectively adjudicate intelligence cases. In fact, in the United States versus Marchetti, the Fourth Circuit took the position that, basically, judges are too ill-informed and inexperienced to appraise the magnitude of national security harm that could occur should certain classified information be publicized. I must respectfully and strenuously disagree with this type of reasoning. I would point out, Mr. Speaker, that Federal judges routinely adjudicate highly complex tax cases, as well as other tort cases involving highly technical issues, such as environmental damage caused by toxic chemicals. It's absurd to assert that judges can master the complexities of the tax code and environmental law, but somehow be unable to understand and rule on intelligence matters.

The truth is, the U.S. intelligence community has become too insulated from the regulations and laws that other Federal agencies must abide by. The Totten doctrine has outlived its usefulness. There is no legitimate national security reason why an individual who was promised certain things in a contract with the U.S. Government—even a contract for the performance of secret services—should not be able to file a claim for breach of contract, and have that claim objectively reviewed based on the merits of the claim. That's all my legislation would do.

The bill would make the intelligence community more accountable to the public—without in any way compromising national security or intelligence sources and methods. It is a well-reasoned, fair bill. Most importantly, it's the right thing to do. I urge all of my colleagues to support the bill, the text of which follows:

H.R. —

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

SECTION 1. ASSIGNMENT OF JUDGES TO 3-JUDGE DIVISION.

(a) **ASSIGNMENT OF JUDGES.**—The Chief Justice of the United States shall assign 3 circuit court judges or justices (which may include senior judges or retired justices) to a division of the United States Court of Appeals for the District of Columbia for the purpose of determining whether an action brought by a person, including a foreign national, in a court of the United States of competent jurisdiction for compensation for services performed for the United States pursuant to a secret Government contract may be tried by the court. The division of the court may not determine that the case cannot be heard solely on the basis of the nature of the services to be provided under the contract.

(b) **ASSIGNMENT AND TERMS.**—Not more than 1 justice or judge or senior or retired judge may be assigned to the division of the court from a particular court. Judges and justices shall be assigned to the division of the court for periods of 2 years each, the first of which shall commence on the date of the enactment of this Act.

(c) **FACTORS IN DIVISION'S DELIBERATIONS.**—In deciding whether an action described in subsection (a) should be tried by the court, the division of the court shall determine whether the information that would be disclosed in adjudicating the action would do

serious damage to the national security of the United States or would compromise the safety and security of intelligence sources inside or outside the United States. If the division of the court determines that the case may be heard, the division may prescribe steps that the court in which the case is to be heard shall take to protect the national security of the United States and intelligence sources and methods, which may include holding the proceedings in camera.

(d) REFERRAL OF CASES.—In any case in which an action described in subsection (a) is brought and otherwise complies with applicable procedural and statutory requirements, the court shall forthwith refer the case to the division of the court.

(e) EFFECT OF DIVISION'S DETERMINATION.—If the division of the court determines under this section that an action should be tried by the court, that court shall proceed with the trial of the action, notwithstanding any other provision of law.

(f) OTHER JUDICIAL ASSIGNMENTS NOT BARRED.—Assignment of a justice or judge to the division of the court under subsection (a) shall not be a bar to other judicial assignments during the 2-year term of such justice or judge.

(g) VACANCIES.—Any vacancy in the division of the court shall be filled only for the remainder of the 2-year period within which such vacancy occurs and in the same manner as the original appointment was made.

(h) SUPPORT SERVICES.—The Clerk of the United States Court of Appeals for the District of Columbia Circuit shall serve as the clerk of the division of the court and shall provide such services as are needed by the division of the court.

(i) DEFINITIONS.—For purposes of this section—

(1) the term "secret Government contract" means a contract, whether express or implied, that is entered into with a member of the intelligence community, to perform activities subject to the reporting requirements of title V of the National Security Act of 1947 (50 U.S.C. 413 and following); and

(2) the term "member of the intelligence community" means any entity in the intelligence community as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. App. 401a(4)).

SEC. 2. APPLICABILITY.

(a) IN GENERAL.—Section 1 applies to claims arising on or after December 1, 1976.

(b) WAIVER OF STATUTE OF LIMITATIONS.—With respect to any claim arising before the enactment of this Act with would be barred because of the requirements of section 2401 or 2501 of title 28, United States Code, those sections shall not apply to an action brought on such claim within 2 years after the date of the enactment of this Act.

TRIBUTE TO ERNEST NIEMEYER

HON. PETER J. VISCLOSKY

OF INDIANA

IN THE HOUSE OF REPRESENTATIVES

Tuesday, February 11, 1997

Mr. VISCLOSKY. Mr. Speaker, it is my privilege to commend an outstanding citizen of Indiana's First Congressional District, Mr. Ernest Niemeyer. On Friday, January 24, 1997, a testimonial dinner at the Radisson Star Hotel in Merrillville, Indiana, was held to honor Ernie for his 28 years of dedicated public service.

Ernie has devoted most of his life to improving and maintaining an outstanding environment for Indiana's First Congressional District. Over his distinguished career, Ernie served as

a Lake County councilman for 4 years, Indiana State senator for 12 years, and Lake County commissioner for 12 years.

Ernie's public service began in 1962, when he was elected as a Lake County councilman. In 1968, Ernie was appointed to the Lake County Parks Board. Ernie was immediately elected president. Under his stewardship, the park board obtained the first two county parks: Lemon Lake and Stoney Run. In 1970, Ernie successfully ran for sixth district State senator. Ernie served his constituency as the chairman for the agricultural subcommittee. In this capacity, he introduced and was successful in passing legislation for funding projects, including the Williams Levee in the Kankakee River. Ernie was then promoted to senate majority whip. In 1984, Ernie was elected as third district Lake County commissioner, where he proudly served as a senior member. During this tenure, he served twice as commissioner board president.

Over the years, Ernie has also devoted time to numerous committees and boards. He has served as chairman of the Lake County Drainage Board and the Kankakee River Basin Commission. He also was an active member of the County Planning Commission, the Lake County Solid Waste District, and the Indiana State Association of County Commissioners.

Ernie's unselfish dedication to his civic duty must also be commended. Ernie was a member of the Lowell VFW, and Post 101 American Legion. He is a past president of the Indiana Auctioneers Association and past director of the National Auctioneers Association. Ernie was also a president of the Indiana Livestock Auction Markets Association, and he still retains membership in the Lowell Chamber of Commerce.

In addition, Ernie answered his country's call and joined the U.S. Army during World War II. He served 2 years in the South Pacific Theatre as a combat infantryman with the 158th Regimental Combat Team. This regiment was engaged in battles in the jungles of New Guinea leading to the liberation of the Philippines from the Japanese imperial forces. During those campaign battles in the Philippines, Ernie earned and was awarded the prestigious Combat Infantryman's Badge, three battle stars, and individual campaign ribbons. For bravery and dedication beyond the normal call of duty to his comrades in battle, he was honored with the Bronze Battle Star Special Award.

After returning home, Ernie took steps to begin his professional career as an auctioneer. In 1951, he graduated from auctioneers school and established one of the most successful auctioning businesses in northern Indiana. Ernie shares this business with his son, Rick.

Mr. Speaker, I ask you and my other distinguished colleagues to join me in commending Ernie for his tireless efforts to improve the quality of life for Indiana's First Congressional District. Ernie, his wife, Norma, and their children, Doyle, Rick, and Pam, can be proud of his record of unselfish dedication to the public. His service will forever remain a part of north-west Indiana's great history.

PRIMARY CARE PROTECTION ACT OF 1997

HON. LOUISE MCINTOSH SLAUGHTER

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Tuesday, February 11, 1997

MS. SLAUGHTER. Mr. Speaker, I am proud to have the opportunity today to introduce the Primary Care Promotion Act of 1997. This thoughtful, constructive legislation would refocus and target the current Federal Government effort to reduce the number of medical specialists graduating from U.S. teaching hospitals.

There is little debate today that our Nation is experiencing a shortage of primary care physicians and an oversupply of specialists. In 1995, there were almost 650,000 active physicians in the United States. Of those, about 384,000 were specialists, while only 241,000 were primary care providers—a ratio of 1.6 specialists for every general practitioner.

As a result of this situation, some government agencies are working to change policies that appear to encourage students or medical schools toward training specialists rather than family practitioners. Last year, the Health Care Financing Administration [HCFA] issued a regulation reducing graduate medical education [GME] reimbursement for combined residencies. The apparent purpose of this action was to reduce a perceived incentive for students to enter combined residencies, which usually train doctors for a medical specialty like child psychiatry. There are, however, a small number of combined residency programs that produce primary care physicians. My legislation would restore full GME reimbursement for residents enrolled in a combined residency program where both programs are for training in primary care, like internal medicine and pediatrics.

This legislation has been carefully crafted to preserve HCFA's intent to reduce the number of specialists trained while increasing the ranks of family practitioners. The Primary Care Promotion Act has already been endorsed by: American Academy of Pediatrics, American Osteopathic Association, American College of Physicians, National Association of Children's Hospitals, Association of Professors of Medicine, American Society of Internal Medicine, Association of Program Directors in Internal Medicine, Medicine-Pediatrics Program Directors Association, American College of Osteopathic Pediatricians, Association of Osteopathic Directors and Medical Educators, Federated Council for Internal Medicine, which includes: American Board of Internal Medicine, American College of Physicians, American Society of Internal Medicine, Association of Professors of Medicine, Association of Program Directors in Internal Medicine, Association of Subspecialty Professors, and Society of General Internal Medicine.

I am pleased that Representatives RANGEL, McDERMOTT, McNULTY, and KENNEDY of Rhode Island have already joined me as original cosponsors of this legislation. I look forward to working with them and the rest of my colleagues to pass this constructive, bipartisan initiative.