

Former CIA Agent's Book Banned

On July 7, 2004, Federal District Court (D.D.C.) Judge Thomas Penfield Jackson ruled in *Wendy Lee v. Central Intelligence Agency*, C.A. 03-206 (TPJ) that a former CIA agent may not publish her memoirs. Wendy Lee, a pseudonym used to keep her real identity secret, claimed that the CIA had unlawfully imposed a prior restraint on her speech by improperly declaring large portions of her memoir as classified and unpublishable. She had filed a lawsuit seeking injunction and declaratory relief against the CIA under the Administrative Procedure Act (APA) (5 U.S.C. § 701 (2004)), the CIA's internal regulations, and the First Amendment.

The CIA had filed a motion for summary judgment. However, Lee did not file an opposition to the agency's motion because her attorney, Mark S. Zaid, was not permitted to view any of her memoir due to its classified status. In his opinion, Jackson acknowledged that the only classified information available to Zaid was Lee's real name and her affiliation with the CIA. Although Zaid suggested ways the court could enable him to better assist his client — that he be allowed to view the documents in question, provided he obtained the proper security clearance; to allow Lee to meet with the court in private to present her argument for publication; or to allow the court its own *in camera* examination of the documents — Jackson ruled out all three, citing the decision in *Stillman v. Central Intelligence Agency*, 319 F.3d 546 (D.C. Cir. 2003). In that case, the court sought to balance its own *in camera* examination of the documents in question and the “appropriate degree of deference owed to the Executive Branch concerning classification decisions” against the “concomitant intrusion upon the Government's interest in national security” that might occur when the plaintiff's attorney was involved.

Lee also claimed that in blocking publication of her memoirs, the CIA was violating her First Amendment rights without demonstrating a “substantial government interest” that would be harmed by the publication, and that there was no “logical connection” between the information to be deleted and the reasons for classification. Second, Lee argued that the CIA's refusal to declassify her cover status was “unreasonable, arbitrary and capricious, and a violation of the APA.”

Jackson wrote, "CIA classification decisions are entitled to substantial deference," and that courts "are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications," citing cases such as *Salisbury v. United States*, 690 F.2d 966 (D.C. Cir. 1982) and *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972). The information in Lee's memoirs, Jackson wrote, was properly classified according to the protocol outlined by Executive Order No. 12958 and its subsequent revision, Executive Order No. 13292, 68 Fed. Reg. 15315 (2003). Further, an affidavit submitted to the court by the Information Review Officer for the Directorate of Operations of the CIA William H. McNair, "convincingly" and "painstakingly" explained why each piece of information in Lee's memoir could present a threat to national security if published.

Although Lee argued that the information contained in her memoir had been published elsewhere, Jackson found the previously published information was not "as specific . . . nor does it mirror the information in [Lee's] memoir in any substantial way."

Finally, Jackson cited the "valid and enforceable secrecy agreement" Lee signed when she was employed by the CIA. "Although the secrecy agreement constitutes a prior restraint on speech," he wrote, "such contracts are generally enforced."

As to Lee's request that her affiliation with the CIA be declassified, Jackson wrote that the CIA's decision to keep her affiliation secret had also been made according to proper protocol, and shared the CIA's concern that revealing her identity would "reveal intelligence sources, methods, and personnel still active in the field." Citing the National Security Act of 1947 (50 U.S.C. § 403-3 (c)(7) (2004) and *Dep't. of the Navy v. Egan*, 484 U.S. 518 (1988), Jackson wrote that such "declassification decisions fall squarely under the CIA's discretion" and "courts have traditionally been reluctant to intrude upon the authority of the Executive in military and national security affairs." Jackson concluded that Lee did not "allege any wrongdoing in the CIA's consideration" of her change of status, and that he could find no "evidence of arbitrary, or capricious behavior" in the CIA's decision, saying the agency "appears to have responded to her request quickly, and with reasoned analysis."

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