ORAL ARGUMENT SCHEDULED FOR FEBRUARY 19, 1998

BRIEF AND APPENDICES FOR APPELLEE

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 72-1020

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UNITED STATES OF AMERICA, Appellee,

v.

GEORGE GORDON LIDDY, and
IDA MAXWELL WELLS, Petitioners,

ROBERT SPENCER OLIVER, Appellee.

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ON PETITION AND CROSS-MOTION
TO VACATE 1973 ORDER

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Cr. No. 72-CR-01827-01

## CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), appellee, the United States of America, hereby states as follows:

**A. Parties:** This case involves a petition and cross-motion to vacate 1973 Order, both filed in this Court in the first instance. Petitioner is Ida Maxwell Wells, who was an "aggrieved party" in the criminal case in which the 1973 Order issued (Crim. No. 72-CR-1827-01). Cross-movant, George Gordon Liddy, was a defendant in that criminal case. Appellee, R. Spencer Oliver, who opposes vacation of the 1973 Order, was also an "aggrieved party" in the criminal case. Other "aggrieved parties" are Severin M. Beliveau, Robert E.B. Allen and the estate of Robert S. Vance. The United States was a party to the criminal case in which the 1973 Order was issued.

**B. Rulings Under Review:** The petition and cross-motion to vacate 1973 Order were filed in this Court in the first instance, and have not previously been ruled on. The unpublished Order at issue was issued on January 19, 1973, by this Court in Appeal No. 73-1020.

**C. Related Cases:** Vacation of the 1973 Order is sought to facilitate discovery and introduction of evidence in Wells v. Liddy, Civil Action No. JFM 97-946, pending in United States District Court, District of Maryland. The unpublished 1973 Order arose from the case of United States v. Liddy, Crim. No. 72-CR-1827-01, in the United States District Court in the District of Columbia, and was issued after an interlocutory appeal to this Court, Appeal No. 73-1020. This Court later affirmed Liddy's

criminal convictions in United States v. Liddy, 509 F.2d 429 (D.C. Cir. 1974), cert. denied, 420 U.S. 911 (1975).

# I N D E X



## TABLE OF CASES



* Cases chiefly relied upon are designated by asterisks.

OTHER REFERENCES

## ISSUE PRESENTED

In the opinion of appellee, the following issue is presented:

Whether this Court should modify or vacate the 1973 Order in this case, which suppressed evidence of the contents of illegally wiretapped conversations, where the only movant with an arguable claim to relief -- Ida Maxwell Wells, whose conversations were unlawfully intercepted -- has withdrawn her motion to vacate the order, and where the sole surviving movant -- George Gordon Liddy, who was convicted for procuring the illegal wiretaps -- has no right to relief since the law clearly bars him from reaping the fruits of his illegal actions for use in his civil suit or for any other purpose.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 73-1020

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UNITED STATES OF AMERICA, Appellee,

v.

GEORGE GORDON LIDDY, and
IDA MAXWELL WELLS, Petitioners,

ROBERT SPENCER OLIVER, Appellee.

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

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# BRIEF AND APPENDICES FOR APPELLEE

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## INTRODUCTION

On August 28, 1997, this Court ordered briefing on the petition of Ida Maxwell Wells to vacate an Order issued on January 19, 1973, in this case, and the cross-motion of George Gordon Liddy to vacate that same order. In light of the fact that the only party with an arguable right to relief -- Wells -- has withdrawn her motion, the United States opposes any grant of relief to the sole surviving movant -- Liddy -- who was convicted of illegal wiretapping in the instant case and is in no position to ask for the right to disclose the contents of the conversations he illegally intercepted. Accordingly, the United States requests

that the Court summarily deny Liddy's motion.[1/]

## COUNTERSTATEMENT OF THE CASE

### I. Background: the Liddy Prosecution and the Issuance of the 1973 Order.

In 1972, petitioner George Gordon Liddy (Liddy), among others, was involved in planning and execution of a burglary of the Democratic National Committee (DNC) headquarters at the Watergate Hotel for purposes of political espionage. Prior to that time, Liddy and others arranged for the illegal interception of phone calls to and from the DNC. Conversations of at least five people at the DNC -- R. Spencer Oliver, Ida Maxwell Wells (Wells), who was Oliver's secretary, Robert E.B. Allen, Severin M. Beliveau, and Robert S. Vance (the aggrieved parties) -- were illegally intercepted. These conversations were monitored by Alfred C. Baldwin (Baldwin) at a nearby Howard Johnson Hotel; he and his boss, James McCord, wrote summaries of those conversations, which were later destroyed. Baldwin was later granted immunity in exchange for his cooperation with the government in the Watergate prosecutions.

Liddy and McCord were indicted, along with five codefendants who subsequently pleaded guilty. Liddy and McCord went to trial before then-Chief Judge John J. Sirica in Criminal Case No. 1827-72, and were convicted. Liddy was found guilty of conspiracy,

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1/ Given Wells' withdrawal of her motion, the United States submits that this case can be resolved on the motions and briefs and that oral argument would not significantly aid the Court. See Fed. R. App. P. 34(a)(3); D.C. Circuit R. 34(j.).

burglary, and illegal wiretapping, and his convictions were later sustained by this Court on appeal. United States v. Liddy, 509 F.2d 429 (D.C. Cir. 1974), cert. denied, 420 U.S. 911 (1975).

At Liddy's trial, the government sought to introduce into evidence testimony concerning the contents of the illegal wiretaps in order to help prove its case. Prior to the receipt of evidence, however, the aggrieved parties, as intervenors, moved to suppress all evidence related to the contents of the intercepted conversations and requested a protective order. Judge Sirica denied the requested relief and the aggrieved parties noted an interlocutory appeal. On January 29, 1973, this Court issued an unpublished order reversing Chief Judge Sirica's order (attached hereto as Appendix A). This Court ordered suppression of evidence of the contents of the wiretapped conversations, and barred references to the evidence by the witnesses except in camera.

## II. Wells' Civil Suit and the Requests to Vacate Protective Order

Wells, one of the aggrieved parties, is the plaintiff in a defamation action against Liddy; this case is currently pending in U.S. District Court in Maryland. She alleged defamation based on Liddy's statements "on his radio show and in speeches" that Wells was "a procurer of prostitutes for VIP's visiting the DNC" (Wells' Petition to Vacate at 3).[2/] On June 5, 1997, Wells filed a petition

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[2/] John Dean III has also brought a defamation action against Liddy, among others, for Watergate-related allegations; although there has been a partial settlement in that case, the complaint against Liddy is still pending in federal district court in the

in this Court to vacate the Court's 1973 order so that she could depose Baldwin and elicit testimony regarding what he heard during the intercepted phone conversations.[3/] She attached her affidavit attesting to her belief that revelation of the content of the intercepted phone conversations would have little, if any, negative impact at this juncture, and consenting to the vacation of the order. Wells' petition proposed that Baldwin's deposition be held under seal until the trial in this matter.

On June 16, 1997, Liddy filed a response to Wells' petition, and a cross-motion to vacate the same 1973 order, requesting that this Court vacate its 1973 order "without restrictions" (Liddy's Cross-Motion at 1). According to Liddy, revelation of the contents of the intercepted conversations is both "essential to a full understanding of this unprecedented chapter in American History" (Liddy's Response to Wells' Petition at 5) and "crucial to Liddy's defense in Ms. Wells' defamation action" (id. at 6).[4/] Liddy further alleged that there is additional relevant testimonial and documentary evidence that is unavailable unless the 1973 order is vacated (id. at 7).

On July 8, 1997, Wells filed a response (styled as "Reply")

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District of Columbia.

[3/] Wells averred that Baldwin would deny having overheard any conversations related to prostitution, and that he would testify to that effect at her trial if permitted to do so.

[4/] Apparently, Liddy takes the position that disclosure of the contents of the intercepted conversations will help prove that he did not defame Wells when he accused her of having procured prostitutes at the DNC (see Wells' Petition at 3). This position is seemingly inconsistent with that of Wells.

to Liddy's cross-motion, to which were appended affidavits from aggrieved parties Robert Allen and Severin Beliveau consenting to vacation of the order.[5/] In proffering that Baldwin's account of the wiretapped conversations would reveal nothing salacious or illegal, Wells represented that Baldwin was "already on the record" in both a 1972 FBI interview and a 1996 deposition in John Dean's defamation case against Liddy as denying that he had overheard anything suggesting prostitution activities at the DNC. Wells explained that she had sought vacation of the protective order to prevent Liddy from claiming an inability to defend himself against Wells' defamation suit: if Liddy is free to seek discovery and evidence of prostitution activities at the DNC, she explained, his efforts will yield denials of any such activities and "[t]hen Liddy will not be able to tell the Wells' civil jury 'he was barred by a 1973 court order' from proving his false, defamatory statements about Ms. Wells" (Wells' Reply to Cross-Motion at 5). Wells also sought an expedited decision on the motion so as to permit the trial in Wells v. Liddy, which was set for December 1997, to proceed on schedule.

On July 30, 1997, the United States filed a response to this Court's Order of June 30th, which had directed it to respond to the pending petitions. The United States raised the question whether

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[5/] Subsequently, on July 25, 1997, Wells' counsel forwarded to the Clerk of this Court a letter from a representative of the estate of Judge Robert S. Vance, another of the aggrieved parties, advising that "Judge Vance's widow and family are not in a position to offer an opinion one way or the other regarding the subject of the pending motions."

this Court's 1973 Order was merely a suppression order in the then-pending criminal case which would not operate to preclude disclosure 24 years later by Baldwin or others of the contents of the intercepted conversations. The United States also noted that regardless of the scope of the 1973 order, disclosure of the contents of an illegal wiretap would constitute a criminal violation under 18 U.S.C. § 2511(c) unless the consent of the party to an intercepted conversation negated criminal liability, as one Circuit Court had held. Finally, the United States noted that, at most, only partial disclosure of the intercepted conversations would be consistent with the wiretap statutes and governing case law because only some of the parties to intercepted conversations had consented.

Also on July 30, 1997, R. Spencer Oliver filed an Opposition to the petitions to vacate protective order, asserting that granting the motion would invade his privacy and the privacy of others whose conversations were intercepted. On August 11, 1997, R. Spencer Oliver filed a Reply to the July 30th submission of the United States. The Reply 1) suggested that the 1973 Order did extend beyond the then-pending litigation; 2) found "disappointing" the discussion of the United States of the case law construing a "consent exception" to the wiretap statutes; 3) averred that there is no "civil need" exception to the wiretap statutes; 4) queried whether Baldwin's deposition in the Dean defamation suit could not be utilized by Wells in her suit; 5) represented that Allen and Severin had changed their positions as to whether the protective

order should be vacated, and now opposed vacation; 6) reiterated the privacy rights of the parties whose conversations were illegally intercepted.

On August 13 and 15, 1997, Severin and Allen filed Affidavits withdrawing their consent and objecting to the vacation of the 1973 order.

On August 28, 1997, this Court ordered that the motions to vacate be referred to a merits panel and set a briefing schedule. The Court's Order directed the parties to include in their briefs a discussion of the scope of this Court's 1973 order, and of the relationship between that order and the wire interception statutes, 18 U.S.C. § 2510 et seq.[6/]

## III. The Parties' Positions Subsequent to this Court's Briefing Order

On October 6, 1997, Wells filed her brief in response to this Court's August 28th Order. In that brief, Wells withdrew her petition to vacate protective order, on grounds of ripeness and mootness and because any future controversy would properly be litigated in Maryland. Wells' brief agreed with the suggestion of the United States that the 1973 Order was a suppression order in the Liddy prosecution, and did not operate beyond the then-pending

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[6/] On September 16, 1997, Wells filed a motion requesting this Court to eliminate the briefing schedule, rely on the pleadings already filed, and expedite review of the petitions to vacate, noting that the trial of Wells v. Liddy was scheduled to begin on December 2, 1997. By order of October 1, 1997, this Court denied the motion to expedite.

We are informed that the trial of Wells v. Liddy has now been continued to June 1, 1998, at Liddy's request.

criminal case, but found that fact irrelevant in light of the fact that the wiretap statutes would still operate to bar disclosure of the intercepted conversations.[7/] Pointing out that vacation of the 1973 Order would not "admit" any testimony in Wells v. Liddy, or "immunize" Baldwin, that there were no questions or motions to compel pending, and that this Court cannot give advice to Baldwin about his future conduct, Wells averred that there is no ripe case or controversy before this Court (Brief for Wells at 6, 13-16). As to mootness, Wells informed the Court that Baldwin had already been deposed in Wells v. Liddy on July 30, 1997, and had answered all questions put to him, apparently without disclosing the contents of any illegally intercepted conversations.[8/] Because, she stated, "there is nothing left to ask Mr. Baldwin that deals with Liddy's libel of Ms. Wells," the issue is moot, and even if Liddy should disagree, that disagreement should be litigated in the defamation case in the Maryland District Court (id. at 16-19).

Liddy's brief, also filed on October 6, 1997, likewise agreed with the suggestion of the United States that the 1973 Order "can, and should, be construed to be limited to [Liddy's] 1973 criminal case" (Brief for Liddy at 3). However, because "witnesses with

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[7/] Wells found impractical the suggestion of the United States that partial disclosure of consenting parties' conversations might not violate the wiretap law (Brief for Wells at 14-15), but in any event, averred that no court can or should render an advisory opinion to Baldwin as to what future conduct would constitute a violation of law (id.).

[8/] According to Wells, "Mr. Baldwin fully answered all questions put to him from both counsel as to whether he overheard anyone at the DNC speaking about prostitution. His answer was always no!" (Brief for Wells at 16.)

information concerning the contents of the intercepted conversations have interpreted the scope of the Order otherwise" (id.), this Court's "guidance" is needed, presumably to educate these overly-cautious witnesses and sanction their disclosure of the contents of the illegal wiretaps. Liddy expressed the same concern as Wells regarding the practicality of separating the conversations of consenting parties and non-consenting parties but, unlike Wells, ignored the rights of non-consenting parties and proposed that this Court vacate the 1973 Order in its entirety (id. at 4-5). After purporting to recognize that the wiretapping statute is intended to protect the privacy interests of parties to intercepted conversations, Liddy proposed -- without supporting authority -- that these privacy interests must "give way to the greater public interest in the truth and an accurate historical record" (id. at 5-6).

On November 5, 1997, Oliver filed his brief asserting 1) that the 1973 Order should be given a broad interpretation because it has been serving the purpose for twenty-four years of "forbid[ding] the insult of 'disclosure' from adding to the injury of 'illegal interception'" (Brief for Oliver at 15-16); 2) that there is no exception to the non-disclosure provision of the wiretap law for "civil suit 'need'" (id. at 16-20); 3) that "the 1973 Order is the law of the case precluding Liddy and Baldwin from relitigating 'disclosure' of the illegally intercepted contents of conversations" (id. at 21); and 4) Wells should be barred from seeking to vacate the protective order based on the policy of the

law favoring finality of judgments (id. at 26).

## SUMMARY OF ARGUMENT

This Court need not decide the scope of the 1973 Order because, regardless of its scope, there is no motion currently pending before this Court that merits relief. Whether or not the 1973 Order is construed merely as a suppression order or also as a protective order, the wiretap statutes prohibit disclosure of the contents of illegally intercepted conversations. If the 1973 Order is narrowly construed, the wiretap statute still operates to bar disclosure, and if the 1973 Order is broadly construed, it provides the same protections to victims of illegally intercepted conversations as the wiretap law. Although the United States suggested in its earlier pleading that there might be an exception to criminal liability under 18 U.S.C. § 2511 (1)(c) if disclosure were sought by the victim of an illegal wiretap to vindicate her own rights, the viability of that "consent" exception need not now detain the Court because the only "consenting" party -- Wells -- has withdrawn her petition to vacate and no longer seeks any relief in this Court. The only party still seeking relief -- Liddy -- is indisputably entitled to none; he was convicted of violating the wiretap law, and having victimized the aggrieved parties once by intercepting their private conversations, may not victimize them again by disclosing those conversations.

Should this Court nonetheless wish to consider the scope of the 1973 Order, the United States submits that the order was

intended as a suppression order in the then-pending litigation, and not a protective order. The aggrieved parties' illegally intercepted conversations thus are protected from disclosure today, not by the 1973 Order, but by the wiretap law. Because the Order was not intended to cover disclosure after the trial, vacation or modification of the order would have no effect today.

Even if this Court were to disagree and construe the Order broadly, the Order would provide no protections beyond those provided by the statute. Thus, vacation of the order would afford Mr. Liddy -- the sole surviving movant -- no relief because the wiretap laws would continue to operate to bar disclosure of intercepted conversations.

## ARGUMENT

### This Court Should Deny Liddy's Motion to Vacate Protective Order.

#### A. The only movant with an arguable right to relief has withdrawn her motion, and the sole surviving movant is indisputably entitled to no relief.

One of the primary purposes of the federal wiretap statute is to "protect[] the privacy of wire and oral communications." Gelbard v. United States, 408 U.S. 41, 48 (1972) (citing legislative history). The Senate Report, in discussing the various enforcement provisions of the statute -- suppression, criminal penalties, and civil damages -- stressed that "[t]he perpetrator [of the illegal wiretapping] must be denied the fruits of his unlawful actions in civil and criminal proceedings." Id. at 50

(quoting S. Rep. No. 1097, 90th Cong., 2d Sess., 69 (1968); U.S. Code Cong., & Admin. News, p. 2156).

In June and July of 1997, before this case had been referred to a merits panel, there were two requests for relief before this Court: a motion to vacate protective order on behalf of Wells, one of the aggrieved parties, and a cross-motion to vacate on behalf of Liddy, who had been convicted of illegally wiretapping the very conversations he now seeks to disclose. Both movants at that time sought disclosure of the contents of the illegal wiretaps in order to vindicate their own rights in their civil defamation action. In its July 25, 1997, pleading (Appellee's Response to Court Order), the United States noted that there was some case law that might support Wells' motion: as a "consenting" party, Wells could arguably obtain disclosure of her own conversations (although not those of non-consenting parties) to vindicate her own rights. The United States cited no authority, nor is it aware of any, to suggest that Liddy -- who procured the illegal wiretaps -- may obtain disclosure for any purpose.

Wells, the only party who had any arguable claim to relief, has now withdrawn her motion to vacate protective order.[9/] Liddy, the sole surviving movant, is indisputably entitled to no relief. Having victimized the aggrieved parties once by illegally intercepting their private conversations in violation of 18 U.S.C. § 2511 (1)(a), he now seeks court authorization to disclose those

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9/ Even if this Court does not agree with all of the reasoning contained in Wells' brief, it is still her prerogative to withdraw her motion.

conversations in violation of 18 U.S.C. § 2511 (1)(c), to aid in his defense of the civil defamation against him. But "disclosure . . . makes the [aggrieved parties] the victim[s], once again, of a federal crime." Gelbard, supra, 408 U.S. at 52.[10/] As a convicted wiretapper, Liddy may not reap the fruits of his illegal actions for his use in a civil proceeding. Id. at 50 (citing S. Rep. No. 1097, supra, at 69 (1968), U.S. Code Cong., & Admin. News, p. 2156).[11/] Although Liddy purportedly seeks disclosure in part in the public interest -- i.e., to make an accurate historical record -- he cites no authority to support a public interest exception,[12/] or a historical record exception, to the rule of non-disclosure. Nor could such an exception be easily reconciled with the privacy concerns underlying the wiretap statutes. Finally, even if a Court were inclined to authorize disclosure in the public interest -- assuming such disclosure could be reconciled with the statute and

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[10/] This Court need not decide whether Wells' previously-given consent would entitle Liddy to seek such disclosure of her conversations since all parties appear to agree that it is not feasible to "redact" Wells' conversations from those of others in Baldwin's (or others') recollections.

[11/] Indeed, this Court, in 1974, affirmed Liddy's conviction in the face of his claim that his inability to cross-examine on the contents of the overheard conversations deprived him of his Sixth Amendment rights. United States v. Liddy, supra, 509 A.2d at 446. If Liddy was not entitled to disclosure at his criminal trial to vindicate his constitutional rights as a defendant, surely he is not entitled to disclosure to aid his defense against a civil suit where the same aggrieved parties continue to assert the same privacy rights.

[12/] Of course, the government's position in 1973 that it was entitled to limited disclosure of the contents of the conversations to vindicate the public interest -- i.e., bring a wrongdoer to justice -- did not prevail.

with the privacy concerns of victims of illegal wiretapping -- Liddy, as the procurer of the illegal wiretaps in the first instance, is the least deserving party to obtain such relief. Liddy's motion should be summarily denied.

B. Because the 1973 Order is a suppression order of limited scope, vacation of that Order would have no effect today.

If this Court should nonetheless wish to consider the scope of the 1973 Order, the United States submits that the Order was intended to be a suppression order in the Liddy trial, not a protective order to operate in perpetuity. Because the Order served its purpose 24 years ago, and has no further function, no purpose would be served by vacating that order today.

This Court's 1973 Order reads in pertinent part:

> Proof of the contents of intercepted telephone conversations is not required to prove the charges for which the defendants are on trial. Disclosure of such contents would frustrate the purpose of Congress in making wiretapping a crime. See particularly 18 U.S.C. § 2515 (1970).
>
> It is therefore ORDERED by the court that the contents of wiretapped conversations shall not be offered or received in evidence, nor shall any reference be made by the witnesses, the parties, or their counsel which would indicate the contents of such conversations, except in camera. This paragraph and the preceding paragraph of this order shall be read to the jury when the trial convenes.
>
> Nothing in this order will preclude the admission of evidence as to the telephones in the Democratic Headquarters which may have been tapped, or evidence as to the persons in Democratic Headquarters using such telephones during intercepted conversations.(Emphasis

added.) [13/]

Clearly, the Order is intended to suppress evidence in the Liddy trial. The sole statutory citation is to § 2515, which governs suppression of evidence at trial. The Order explains that the evidence of the contents of the conversations is not necessary to "prove the charges" at trial, that the contents of the wiretapped conversations will not be received "in evidence," but that the fact of interception and the identity of persons intercepted are admissible as "evidence." The fact that the jury was to be informed of the bar on disclosure further suggests that the bar was imposed for trial purposes. Even the underscored language, which has apparently been the basis for a broader interpretation of the order, suggests that the "reference[s]" the order bars are references in the trial setting because it is "witnesses, the parties, or their counsel" to whom the prohibition applies -- all persons participating in the trial -- and because references are permitted in camera -- an obvious reference to the trial setting.

Although the Order has apparently been interpreted by some as a protective order, extending beyond the Liddy trial,[14/] this

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13/ Judge MacKinnon issued a separate statement indicating that he would permit the Government to refer to the contents of the intercepted conversations in general terms, but would prohibit either side from eliciting information of a personal or incriminating nature, the trial judge to enforce such restrictions sua sponte.

14/ Both Baldwin and Earl Silbert, the trial prosecutor in the Liddy case, have apparently construed the 1973 Order as precluding them indefinitely, and in all contexts, from disclosing information known to them about the contents of the intercepted conversations

interpretation is undermined by the fact that the aggrieved parties had no need for a protective order given that they were fully protected by the wiretap statutes.[15/] 18 U.S.C. § 2511 provides in pertinent part:

> (1) Except as otherwise specifically provided in this chapter any person who --
>
> * * *
>
> (c) intentionally discloses . . . the contents of any wire, oral or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> * * *
>
> shall be punished as provided in subsection (4) or shall be subject to suit as provided by subsection (5).

In light of the unequivocal and complete legislative bar on disclosure of illegal wiretaps, this Court likely recognized that there was nothing to be accomplished by Court Order that was not

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(see Liddy's Response to Wells' Petition, Tabs B and C).

[15/] The pleadings that were filed before this Court in 1973 are devoted primarily to the issue of suppression of evidence in the then-pending litigation. In addition, the aggrieved parties sought a remedy under Fed. R. Crim. P. 41(e) (Motion for Return of Property). Specifically, the aggrieved parties sought "the submission of such indicia under seal and in camera and its destruction without review by even the conversation's participants and their counsel" (Brief for Appellants and In Support of Motion for Summary Reversal, Or In the Alternative, For An Extraordinary Writ Under [28] U.S.C. § 1651, or in the Alternative, For an Expedited Appeal at 27 n.1). The only reference to a remedy of general non-disclosure which we have located comes at the very end of a brief devoted to other remedies: "In this case the only way to assure the future non-use of contents is to destroy its indicia and to seal the lips of those who might otherwise disclose" (id. at 28). This pleading is attached hereto as Appendix B.

already prohibited by law.

This limited interpretation of the order finds support in this Court's characterization of the order in its published decision affirming Liddy's criminal convictions:

> Prior to trial, persons claiming to be parties to intercepted conversations moved to suppress the contents of the illegally wiretapped conversations and to prevent their disclosure by witnesses at trial. After a series of rulings by the district court and this court and an in camera hearing on proposed testimony regarding the conversations, this court held that proof of the contents of the intercepted communications was not required to prove the charges against the defendants and ordered that the contents not be offered as evidence. The order allowed evidence regarding the identity of the telephones which were tapped and the persons at the Democratic National Committee who used those telephones.

United States v. Liddy, supra, 509 F.2d at 446 (emphasis added).

If the 1973 Order is a suppression order and not a protective order, it served its purpose in the Liddy trial, and has no further function. Vacation or modification of the order today would thus have no effect.[16/]

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[16/] In any event, even if the 1973 Order is construed as a protective order barring disclosure of the contents of the illegally intercepted conversations outside the trial setting, the order would merely be coextensive with the non-disclosure provision of the wiretap law. Thus, vacation or modification of the order could not serve to authorize disclosure because disclosure is prohibited by the wiretap statute. Wells is correct that a contrary conclusion would be tantamount to a grant of immunity, which would be beyond the power of the court. See United States v. Lugg, 892 F.2d 101, 104 (D.C. Cir. 1989)(courts have no power to order immunity).

CONCLUSION

Wherefore, the United States respectfully requests that Liddy's motion to vacate protective order be summarily denied.

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CERTIFICATE OF WORD COUNT

I HEREBY CERTIFY that this brief conforms to the word limit imposed by D.C. Circuit Rule 28(d)(1)

Elizabeth Trosman
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