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Constitutional Law - United States v. Richey: Disclosure of Tax Information by Former IRS Agent not Protected by the First Amendment

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CONSTITUTIONAL LAW

UNITED STATES v. RICHEY: DISCLOSURE OF TAX INFORMATION BY FORMER IRS AGENT NOT PROTECTED BY THE FIRST AMENDMENT

I. INTRODUCTION

In *United States v. Richey*,[1] the Ninth Circuit held that the disclosure by a former Internal Revenue Service agent of confidential tax information in violation of 26 U.S.C. § 7213 [2] was not speech worthy of first amendment[3] protection even though it touched upon a matter of public concern.[4]

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1. 924 F.2d 857 (9th Cir. 1991) (per O'Scannlain, J., with whom Wright, J. joins; Reinhardt, J., dissenting).

2. 26 U.S.C. § 7213(a)(1) provides:

> (a) Returns and return information.
>
> (1)Federal employees and other persons. It shall be unlawful for any officer or employee of the United States, . . . or any former officer or employee, willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)). Any violation of this paragraph shall be a felony punishable upon conviction by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution, and if such offense is committed by any officer or employee of the United States, he shall, in addition to any other punishment, be dismissed from office or discharged from employment upon conviction for such offense.

Section 7213(a) imposes criminal penalties for violation of the confidentiality requirements spelled out in detail in section 6103, discussed *infra*. Therefore case law defining what comprises a disclosure, under what circumstances a disclosure may be authorized, and related matters centers around interpretation of section 6103. There have been no criminal prosecutions under section 7213(a) heretofore.

3. U.S. CONST. amend I. "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

4. *Richey*, 924 F.2d at 863. For a discussion of "public concern," see, n.53 *infra*, and accompanying text.

The court ruled that the government's compelling interest in maintaining a workable tax system[5] outweighed Richey's personal interest in having an unbiased judge preside at his trial,[6] his interest in commenting on matters of public concern,[7] and the public interest in being informed about the operation of the courts.[8]

The Ninth Circuit's opinion balanced Richey's right to speak on matters of public concern under the first amendment against the government interest in the confidentiality of tax returns and tax return information expressed in 28 U.S.C. § 7213. This note measures that opinion against the background of section 6103, the statute upon which section 7213 depends, and against recent Supreme Court decisions scrutinizing statutes that purport to limit a speaker's right to speak on matters of public interest.

FACTS

Lawrence Richey, a retired Internal Revenue Service (IRS) agent with 25 years of service, was indicted in 1985 for participation in a tax shelter scheme.[9] After several trials and appeals,[10] a jury found him guilty of conspiracy and aiding and assisting in the preparation of false tax returns.[11] Judge

5. *Id.* at 862.

6. *Id. See also* 28 U.S.C. § 455, which provides in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> (b) He shall also disqualify himself in the following circumstances:
> (1) Where he has a personal bias or prejudice concerning a party . . .

7. *Richey,* 924 F.2d at 860.

8. *Id.*

9. *Id.* at 858. United States v. Richey, 874 F.2d 817 (9th Cir. 1989)(unpublished memorandum decision) Richey was hired to prepare the tax returns of persons participating in "payroll discount" or "consulting services" tax shelters subsequently ruled by the IRS to have been set up to evade taxes. Memorandum decision at 2 and 10. *See also,* United States v. Russell, 804 F.2d 571, 575 (9th Cir. 1986).

10. U.S.D.C. Eastern District of Washington Docket No. CR-85-169-1 Proceedings docket. Judgment filed July 6, 1987. This document makes reference to several related proceedings. Richey was one of many defendants involved in the original government prosecution. He tried unsuccessfully to get his case as hired tax preparer separated from the cases against the initiators of the scheme.

11. U.S.D.C. Eastern District of Washington Docket No. CR-85-169-1 Filed July 6, 1987. JUDGMENT AND PROBATION/COMMITMENT ORDER "Finding and Judgment. Defendant has been convicted as charged of the offenses of Count 1 - Conspiracy; in violation of 18 U.S.C. 371; and Counts 13-26, inclusive, - Aiding and Assisting in the preparation of False Tax Returns; in violation of 26 U.S.C. 7206 (2)."

Alan A. McDonald, who had presided over the last of these trials, sentenced Richey to probation with special conditions.[12] Condition (b), "Defendant shall abstain from making any derogatory remarks against the Government of the United States," drew the attention of the local press, television, and radio stations. Three newsmen contacted Richey for comment on the gag order.[13] In response to questions by a reporter for the *Spokesman-Review* and *Spokane Chronicle,* Richey speculated that Judge McDonald, whom he had audited and assessed for additional tax fifteen years earlier, might have wanted "retribution."[14] In a videotaped interview with KNDO TV, Richey stated in response to a question as to why he thought Judge McDonald had imposed the restraint, "I thought it was rather malicious. I may have rubbed him the wrong way in my frequent letters to the editors; I don't know. I also remember interviewing him as an agent about fifteen years ago and assessing some additional tax . . ."[15]

For these statements, Richey was charged with and convicted of three felony counts of unauthorized disclosure of tax return information in violation of 26 U.S.C. § 7213.[16] Richey's

12. Richey was sentenced to three years imprisonment on each count, for a total of 45 years. *Id.* The sentencing order provided:

> IT IS FURTHER ORDERED execution of the sentences as to imprisonment, only, hereby imposed are [sic] suspended and the Defendant is placed on probation for a period of five years, with the following special conditions of probation:
>
> (a) Defendant shall continue to file timely tax returns and pay all tax due and owing to the United States;
>
> *(b) Defendant shall abstain from making any derogatory statements against the Government of the United States;*
>
> *(c) The Defendant shall refrain from associating with anyone who advocates non-payment of taxes justly due; and*
>
> (d) Defendant shall perform 250 hours of community service, at the direction of the probation officer.
>
> IT IS FURTHER ORDERED that Defendant, LAWRENCE M. RICHEY, shall pay one-third the costs of prosecution (emphasis added).

13. *Richey*, 924 F.2d at 858.

14. *Id.* Richey's remarks were printed on the front page of the *Spokesman-Review* and *Spokane Chronicle* newspapers on October 7, 1987. That day, the news director of the Yakima radio station called Richey and asked him to verify that he had audited McDonald. Richey confirmed the audit, but refused to reveal the year or outcome. This information was broadcast four times. *Id.* at 864. The videotaped interview was initiated that day and broadcast two months later. *Id.*

15. *Id.* at 864. Nothing in the record indicates the contents of his frequent letters to the editor.

16. U.S.D.C. Eastern District of Washington, CR-88-217-S. Judge Harry L. Hupp presided over the non-jury trial, and sentenced Richey to supervised probation for a period of three years. Judgment filed Nov. 3, 1988.

appeal to the Ninth Circuit of this conviction raised three issues, principally arguing that Richey's disclosure of tax information was protected by the first amendment, and that his indictment should have been dismissed.[17]

II. BACKGROUND

A. STATUTES PURPORTING TO LIMIT FIRST AMENDMENT RIGHTS

When a statute is challenged as an impermissible interference with rights under the First Amendment, the Supreme Court will weigh the individual's constitutional right against the state interest asserted.[18] "When a substantial claim of an abridgement of [a right] is advanced, the presumption of validity that belongs to an exercise of state power must not [prevent] close examination of the merits of the controversy."[19] Whether the statute is a state law or a law passed by Congress, the Court will conduct this examination.[20]

In *NAACP v. Claiborne Hardware Co.*, the Court stated the constitutional limitation where the government asserts a

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In the meantime, since Richey's comments to the press violated the condition of probation forbidding derogatory statements against the Government, Richey's probation for his prior convictions under 18 U.S.C. 371 and 26 U.S.C. 7206(c) was revoked, and he was sentenced by another judge to a new probationary term which did not contain that condition. *Richey*, 924 F.2d at 864.

17. Brief for Appellant at 3, United States v. Richey, 924 F.2d 857 (9th Cir. 1991). "1. Whether the trial court should have granted the motion to dismiss; 2. Whether the trial court should have granted the motion for removal of counsel; 3. Whether Appellant's disclosure of his audit of his trial judge was protected by the First Amendment."

Richey's motion for removal of counsel was based on an erroneous reading of section 7213 in which Richey's attorney suggests that the U.S. Attorney prosecuting the case should be removed since he disclosed the amount of tax paid and the tax years involved in Judge McDonald's audit. *Id.* at 7.

18. In recent decades the Supreme Court has elaborated on the interpretation of the first amendment in many areas. We are here concerned with a challenge to a statute which places a content restriction on speech. *E.g.* Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).

19. Bridges v. California, 314 U.S. 252, 293 (1941) (Frankfurter, J., dissenting).

20. Although most recent cases reaching the Court have challenged state statutes, *e.g.*, Riley v. Nat'l. Fed'n. of Blind, 487 U.S. 781 (1988), concerning the North Carolina Charitable Solicitations Act, many cases during World War I and during the 1950's challenged federal statutes aimed at punishing subversive activity, *e.g.* Schenck v. United States, 249 U.S. 47 (1919), wherein Justice Holmes set forth the framework by which to measure the words against the statute; "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* at 52.

substantial interest in regulating activity protected by the first amendment.[21] While recognizing that governmental regulation having an incidental effect on first amendment freedoms may be permitted in certain narrowly defined instances,[22] the Court held that the state may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[23] The NAACP boycott, which violated Mississippi anti-boycott statutes, was a protected speech activity insofar as it was non-violent.[24] The Court reasoned that the presence of activity protected by the first amendment demands "precision of regulation" where the state seeks to impose liability.[25]

In 1980, in *Consolidation Edison Co. v. Public Serv. Comm'n.*, the Supreme Court reviewed the theories offered to justify state regulation of protected speech activity.[26] Employing an analytical framework which has since guided the court in a line of cases challenging statutes and regulations burdening speech, the court examined the Public Service Commission order banning certain bill inserts to see if it was a) a reasonable time, place or manner restriction; b) a narrowly tailored means of serving a compelling state interest; or c) a permissible subject matter regulation.[27] The court found that the order was none of these,

21. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912, 916 (1982), (quoting the "precision of regulation" standard from NAACP v. Button, 371 U.S. 415, 438 (1963) and other earlier cases). In *Claiborne*, the Mississippi Supreme Court had held the NAACP liable and awarded damages to the white merchants of Claiborne County for economic losses incurred over a seven year period as a result of a civil rights boycott launched at an NAACP meeting. The Supreme Court found that Mississippi could not hold the NAACP liable under the circumstances.

22. *Id.* at 912 n.47. "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (quoting United States v. O'Brien, 391 U.S. 367, 376-77 (1968)).

23. Claiborne, 458 U.S. at 920, (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

24. *Id.* at 915.

25. *Id.* at 916 n.50. "the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect,'" (quoting *Pennekamp v. Florida,* 328 U.S. 331, 335).

26. Consolidated Edison Co. v. Public Serv. Comm'n., 447 U.S. 530 (1980). The Court invalidated a New York Public Service Commission order prohibiting public utility companies from placing inserts discussing public policy issues in monthly bills.

27. *Id.* at 535. Pacific Gas and Elec. Co. v. Public Utils. Comm'n. of California, 475 U.S. 1 (1986); Riley v. Nat'l. Fed'n. of the Blind, 487 U.S. 781 (1988); and Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990) are three recent cases which

since the Public Service Commission admitted that its aim was "to suppress certain bill inserts precisely because they address controversial issues of public policy."[28]

The Court rejected two arguments which would have limited the individual's right to speak when the state seeks to impose subject matter restrictions on freedom of speech. To the first, that the state may limit speech from certain sources, the Court replied, "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual."[29] Second, the Court rejected the state suggestion that speech may be restricted if an alternative avenue exists.[30]

In *Landmark Communications, Inc. v. Virginia*, the Court invalidated a Virginia statute which imposed criminal penalties for the disclosure of confidential information.[31] The state contended that without a requirement of confidentiality such as the statute imposed, the Judicial Inquiry and Review Commission could not function properly; and that premature disclosure of sensitive information presented an "immediate threat to the orderly administration of justice."[32] Virginia

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closely examine the second and third prongs of the analysis required by *Consolidated Edison*, namely, whether the regulation in question is a content based restriction serving a compelling state interest.

28. *Consolidated Edison*, 447 U.S. at 537.

29. *Id.* at 533 (quoting First Nat'l. Bank v. Bellotti, 435 U.S. 765 (1978)).

30. *Consolidated Edison*, 447 U.S. at 541 n.10: "Although a time, place, and manner restriction cannot be upheld without examination of alternative avenues of communication open to potential speakers, see *Linmark Associates, Inc. v. Willingboro*, 431 U.S. at 93, we have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression. See *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. at 757 n.15; *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975); *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974) (*per curiam*)."

In his dissent to *Austin v. Michigan Chamber of Commerce*, Justice Kennedy observed, "That the avenue left open is more burdensome than the one foreclosed is 'sufficient to characterize [a statute] as an infringement on First Amendment activities.' (citations) As the Court reaffirmed just two Terms ago, '[t]he First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.'" (quoting Meyer v. Grant, 486 U.S. at 424.) *Austin*, 110 S. Ct. at 1423.

31. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1977). Landmark was found guilty and fined under a Virginia statute for publishing an article reporting confidential information disclosed in an inquiry pending before the Virginia Judicial Inquiry and Review Commission. *Id.* at 831-32. There were injunctions and restraining orders limiting several other media outlets in their coverage of the issue, and another newspaper had been convicted of violation of the statute.

32. *Id.* at 833, (quoting Landmark Communications, Inc. v. Virginia, 217 Va. 699, 712, 233 S.E.2d, at 129.)

argued that confidentiality encourages the filing of complaints by protecting witnesses from possible retaliation; protects judges from injury caused by frivolous or unwarranted complaints; and generally assures confidence in the judiciary as an institution by providing for orderly disclosure after groundless claims have been weeded out by the inquiry process.[33]

Accepting these state goals as permissible, the Court inquired whether criminal sanctions are an appropriate tool for insuring the confidentiality of the judicial inquiry process,[34] and concluded that the state interests advanced are insufficient to justify the imposition of criminal sanctions.[35]

The Court turned to the public interest in learning about what Landmark published, and found that Landmark, in providing accurate information about the judicial inquiry, served the interest in public scrutiny and discussion of government that the first amendment was adopted to protect.[36] Since the Virginia statute sought to punish speech so near the core of the first amendment, the state interest in protecting judicial reputations from harm was an insufficient reason "for repressing speech that would otherwise be free."[37]

In arguing for the necessity of confidentiality, Virginia depended on a state legislative finding "that a clear and present danger to the orderly administration of justice would be created by divulgence of the proceedings of the Commission."[38]

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33. *Id.* at 835.

34. *Id.* at 834, 837. While 47 states and the District of Columbia have confidentiality requirements, only Virginia and Hawaii provide criminal sanctions for disclosure. Only Maine, Mississippi, and Washington do not appear on the list of states having "some mechanism for inquiring into judicial disability and conduct" which appears as an appendix to the opinion of the court at 846-848. The court suggested that methods other than criminal sanctions might be effective in enforcing the confidentiality desired for the proceedings, pointing out that other states used oaths of secrecy and contempt proceedings to prevent participant disclosure. *Id.* at 841.

35. *Id.* at 838.

36. *Id.* at 839.

37. Id. at 842, (quoting New York Times v. Sullivan, 376 U.S. 254, 272-73 (1954)). Quoting from Justice Black's majority opinion in *Bridges v. California* and from the dissent by Justice Frankfurter as well, the court noted, "'The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion'. . .Mr. Justice Frankfurter, in his dissent in *Bridges,* agreed that speech cannot be punished when the purpose is simply 'to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed.'" *Id.* at 842.

38. *Id.* at 843.

The Court examined the ramifications of permitting the state to override protections of the Bill of Rights by a general statement of legislative finding.[39] Before the Virginia Supreme Court, Landmark had argued "before a state may punish expression, it must prove by 'actual facts' the existence of a clear and present danger to the orderly administration of justice."[40] The Court accepted that premise, noting that the Virginia Supreme Court had relied on a legislative finding of danger, but had found no actual danger.[41] The Court found that the danger evidenced by the record was not clear and present, and that the activity the state sought to punish was precisely one "envisioned by the Founders in presenting the first amendment for ratification."[42]

The *Landmark* analysis has formed the basis for subsequent cases challenging statutory limitations on a first amendment right to disclose confidential information. *Butterworth v. Smith* expanded the analysis to include the interest of the speaker in disclosure.[43] Reporter Smith challenged a Florida statute prohibiting him from disclosing his own grand jury testimony. The Court held that insofar as it prohibits a grand jury witness from disclosing his own testimony, the Florida statute violates the first amendment.[44]

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39. *Id.* at 843-45.

40. *Id.* at 843, (quoting *Landmark*, 217 Va. at 706, 233 S.E. 2d at 125).

41. *Id.* at 843-44. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake... A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within reach of the statute and if so whether the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Id.*

42. *Id.* at 845, (quoting Wood v. Georgia, 370 U.S. 375, 388 (1962)). The question before the court was whether Landmark and other press, as third persons who are strangers to the judicial inquiry may be punished for divulging truthful information. The court specifically reserved the question of whether witnesses or other participants, including staff employees, may be punished for disclosing confidential information. *Id.* at 837. See *Butterworth, infra.*

43. Butterworth v. Smith, 110 S. Ct. 1376 (1990). Reporter Michael Smith testified before a Florida grand jury regarding improper behavior of certain public officials. He was warned that he could not disclose his grand jury testimony without subjecting himself to criminal penalties under Florida's grand jury confidentiality statute, which provided that disclosure may be ordered by the court for use "in the defense or prosecution of the civil or criminal case and for no other purpose whatsoever." *Id.* at 1379. Since he wanted to report his investigation, including that portion of it which formed his grand jury testimony, he filed suit seeking declaratory relief and an injunction preventing the state from prosecuting him. *Id.*

44. *Id.* at 1379-80.

The Court reaffirmed its *Landmark* holding, linking its consideration of grand jury secrecy safeguards in *Butterworth* to its former consideration of judicial inquiry rules by observing the tension between First Amendment rights and "government investigatory proceedings."[45] Pointing out that Virginia had "offered little more than assertion and conjecture" in support of its belief that criminal sanctions were necessary to promote the objectives of its statutory scheme, the Court reasoned that Florida likewise was unable to show that its interests were served by the permanent ban on disclosure.[46]

Finally, the Court examined Smith's interest in disclosure, observing that the drafters of the Federal Rules of Criminal Procedure and similar rules in a majority of states did not impose upon witnesses an obligation of secrecy with respect to their own testimony.[47] The Court concluded that the statute's impact on Smith's ability to make a truthful statement on matters of public importance is "dramatic."[48] "[t]he ban extends . . . into the indefinite future. The potential for abuse of the Florida prohibition, through its employment as a device to silence those who know of unlawful conduct or irregularities on the part of public officials, is apparent."[49]

Butterworth and *Landmark* both concern state statutes prescribing criminal penalties for unauthorized disclosure of confidential information. The Supreme Court has found the state interests asserted insufficient to permit the burden that such criminal sanctions impose on speech near the core of the first amendment - the right of citizens to speak out and the right of the public to know and discuss matters of public interest.

B. LIMITATIONS ON THE FIRST AMENDMENT RIGHTS OF GOVERNMENT EMPLOYEES.

In *Pickering v. Board of Education*, the Supreme Court rejected the principle that a public employee must refrain

45. *Id.* at 1380.

46. *Id.* Florida's perjury and witness tampering statutes, and the Florida courts' subpoena and contempt powers provide sufficient control over grand jury processes. "We think the additional effect of the ban here in question is marginal at best, and insufficient to outweigh the first amendment interest in speech involved". *Id.* at 1382.

47. Butterworth v. Smith, 110 S. Ct. at 1382. The court found it not conclusive, but probative of the weight to be assigned Florida's interests that the Advisory Committee called the seal of secrecy "an unnecessary hardship (which) may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate." *Id.* at 1383.

48. *Id.*

49. *Id.*

from speaking out on matters of public interest, "which in the absence of such position he would have an undoubted right to engage in."[50] However, the state interest in regulating the speech of its employees, arising from its interest in promoting efficiency of the public services it performs, differs from its interest in regulating the speech of the general public. The Court declined to lay down a general standard for the regulation of the speech of public employees, but suggested that a balance must be struck between the employee interest in commenting on a matter of public importance and the state interest in promoting efficiency.[51] Noting that an employee's speech disclosing confidential matters or seriously undermining the effectiveness of working relationships might provide a permissible ground for dismissal, the Court reserved those issues, intimating that those situations would involve different considerations from Pickering's plight.[52]

Public employee speech which adversely affected working relationships was the subject of *Connick v. Meyers*, where the content of Assistant District Attorney Myers's speech touched on matters of both personal and public concern, and its form and context dictated further analysis.[53] In a 5-4 decision, the majority upheld the firing of Myers, finding that the first amendment does not require an employer to tolerate action which he believes will disrupt the office, undermine authority,

50. Pickering v. Bd. of Educ., 391 U.S. 563, 567 (1968). Pickering was a teacher dismissed by the Board of Education for writing a letter to the newspaper criticizing that Board's funding practices.

51. *Id.* at 568.

52. *Id.* at 570 n.3. Pickering did not disclose confidential information in his letter to the newspaper. In Snepp v. United States, 444 U.S. 507 (1980), the Supreme Court treated the issue of a government employee disclosing confidential information. Snepp, a former Central Intelligence Agency (CIA) employee who had agreed not to disclose classified information without authorization, was ordered by the Court to place the profits from his book about the CIA in a constructive trust when the Court found that he had published in violation of that agreement. Although Snepp attempted to raise the issue of a prior restraint under the first amendment, the Court treated the agreement as a fiduciary obligation well within the mandate of the CIA Director to demand in the interests of national security. Courts have imposed strict limitations on the disclosure of information classified as touching upon national security. *See e.g.*, United States v. Marchetti, 466 F.2d 1309 (4th Cir.) *cert. denied,* 409 U.S. 1063 (1972), where the court proposed standards accommodating both national security and first amendment interests.

53. Connick v. Myers, 461 U.S. 138, 150 (1983). After Assistant District Attorney Myers refused a transfer and circulated a questionnaire among fellow employees, her superior, District Attorney Connick, fired her for insubordination and interfering with working relationships. Examining the questionnaire in this context, the Court found that it substantially reflected a personnel dispute and only tangentially touched on a matter of public importance.

and destroy close working relationships.[54] The dissent found that Myers's dismissal violated her first amendment rights as a public employee because Connick had not shown that Myers's speech had caused actual disruption, and because frequent newspaper coverage of the events and personalities at the District Attorney's office showed that Myers's speech was about a matter of public concern.[55] Both majority and dissent, though disagreeing on the interpretation of the facts of the case, agreed that a public employee's rights to speak out on matters of public concern should not be limited by a general rule, but must be viewed in a factual context.[56]

In another close decision, *Rankin v. McPherson*, the Court upheld a public clerical worker's right to speak on matters of public concern, reiterating the principle that a court must examine the statement in its circumstances, but adding that the state must bear the burden of justifying a discharge.[57] Balancing Constable Rankin's interest in preserving discipline and efficiency in the workplace with McPherson's right to express a political opinion in a private conversation, the Court affirmed the Court of Appeals ruling that "however ill-considered" her opinion was, it did not make her unfit for the job.[58]

The Ninth Circuit has applied the factual tests of public concern and actual disruption set forth by the Supreme Court in *Pickering* and *Connick* where a public employee has claimed that his first amendment right to speak on matters of public concern was violated by his dismissal, suspension, or transfer. In *Allen v. Scribner* the court stated that the threshold inquiry is whether the statements address a matter of public concern, and that the content, form, and context of the speech at issue will assist in that determination.[59] Criticism of government policy, competency, and efficiency which is purposefully directed to the public rests on the "highest rung of the hierarchy of [f]irst

54. *Id.* at 154.

55. *Id.* at 160, n.2.

56. *Id.* at 153, 157.

57. Rankin v. McPherson, 483 U.S. 378, 388 (1987). McPherson, a clerk in the county Constable's office, was fired for a remark she made in a private conversation with a co-worker as they listened to a radio report of the assassination attempt on President Reagan, "If they go for him again, I hope they get him." *Id.* at 388.

58. *Id.* at 383.

59. Allen v. Scribner, 812 F.2d 426, 430 (9th Cir. 1987). The court reversed a summary judgment against plaintiff Allen, ruling that a genuine issue of material fact existed as to whether he would have been transferred notwithstanding his first amendment expression.

[a]mendment values"[60] because it brings to light an alleged breach of public trust on the part of public officials.[61] Second, once the subject speech has been determined to address a matter of public concern, the government must show that the speech has caused actual disruption of the public services it performs. Potential disruption cannot "serve as a pretext for stifling legitimate speech or penalizing public employees for expressing unpopular views."[62]

The Ninth Circuit has recently added to the body of law surrounding the first amendment speech rights of government employees in cases concerning dismissal or other job-related retaliation.[63] In *United States v. Richey*, the Ninth Circuit considered for the first time the criminal punishment of speech on a matter of public concern by a present or former government employee.

C. Analysis of Tax Statutes

Before 1977, federal tax returns were public records; under former 26 U.S.C. § 6103, decisions regarding individual

60. *Id.* at 431, quoting NAACP v. Claiborne Hardware, 458 U.S. 886, 913 (1982), Thornhill v. Alabama, 310 U.S. 88, 102 (1940) and McKinley v. City of Eloy, 705 F. 2d 1110, 1114 (9th Cir. 1983).

61. *Id.* (quoting Connick, 461 U.S. at 148).

62. *Id.* at 432, (quoting McKinley, 705 F.2d at 1115).

63. The Ninth Circuit has applied a fact-driven analysis, examining whether the sanctioned speech touched on a matter of public concern, and whether actual disruption occurred in these cases:

In Finkelstein v. Bergna, 924 F.2d 1449 (9th Cir. 1989), a divided court, while agreeing that the law is clearly established that public employees cannot be disciplined solely for speaking out on matters of public interest, disagreed on the application of the rule to the facts of that case.

In Burgess v. Pierce County, 918 F.2d 104 (9th Cir. 1990), the court used the *Pickering-Connick* analysis to rule that the question of whether a fire marshall's dismissal for speaking out against proposed fire ordinances was a retaliatory violation of his first amendment right and not the result of disruption caused by his speech is a question of fact precluding summary judgment.

In Havekost v. United States Dep't. of the Navy, 925 F.2d 316 (9th Cir. 1991), the court weighed Havekost's claim that her speech was about a matter of public interest, and not simply an employee grievance, against the fact that she made no attempt to reach the general public in her speech activity. The Ninth Circuit found against Havekost, citing Barkoo v. Melby, 901 F.2d 613, 618-19 (7th Cir. 1990) which stated that actual communication with the press on an issue of some public interest might indicate public speech. Havekost, 925 F.2d at 319.

In Berry v. Hollander, 925 F.2d 311 (9th Cir. 1991), the court denied first amendment relief to a whistleblower employed by the Veteran's Administration (VA) who claimed that he was being harassed by his employers in retaliation for his speaking out about VA malpractice. The court found that he had not exhausted his statutory remedies under various federal acts designed to protect such interests as he claimed.

disclosure and disclosure policies were within the discretion of the executive branch.[64] By 1974, the Internal Revenue Service was disseminating the identifiable tax information of millions of taxpayers annually to various government agencies.[65] Congress passed the Privacy Act of 1974 and created the Privacy Protection Study Commission. Concerned that the Privacy Act would not adequately protect the confidentiality of tax returns, Congress in 1976 amended 26 U.S.C. § 6103 to provide that tax returns shall be confidential and not subject to disclosure *except as provided* by the statute.[66]

In the eighteen subsections of section 6103, Congress spelled out thirteen areas of allowable disclosure.[67] At the same time, Congress revised 26 U.S.C. § 7213,[68] increasing the criminal penalty for an unauthorized disclosure, and created a civil remedy for damages caused by willful or negligent disclosure under section 7217.[69]

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64. M. SALTZMAN, IRS PRACTICE AND PROCEDURE, 4-56 (2d ed. 1989).

65. *Id.* at 4-57. *See also* Benedict & Lupert, *Federal Income Tax Returns - the Tension between Government Access and Confidentiality,* 64 CORNELL L. REV. 940 (1979).

66. 26 U.S.C. 6103(a). Section 6103, entitled "Confidentiality and disclosure of returns and return information," provides in pertinent part:

> (a) General rule.
> Returns and return information shall be confidential, and *except as authorized by this title-*
> (1) no officer or employee of the United States,
> *. . .shall disclose any return or return information* obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee (emphasis added).

One of the factors which motivated Congress to change the fundamental posture of the tax disclosure statute was the substantial amount of Watergate testimony which revealed that President Nixon and the White House staff had allegedly attempted to gain tax information and even initiate audits and investigations for political purposes. Benedict & Lupert, *supra* note 65 at 942, n.5. The returns of Reverend Billy Graham, actor John Wayne and Democratic National Chairman Lawrence O'Brien were allegedly among those requested by the White House. *Id.* at 969.

67. SALTZMAN, *supra* note 64 at 4-57. "With respect to each of these areas, the committee has tried to balance the particular office or agency's need for the information involved with the citizen's right to privacy and the related impact of the disclosure upon the continuation of compliance with our country's voluntary assessment system." Tax Reform Act of 1976, P.L. 94-455, *reprinted in* 1976 U.S. CONG. & ADMIN NEWS at 3747.

68. 26 U.S.C. 7213, *supra* note 2. Congress substituted "willfully to disclose" for "to disclose" in 1978.

69. SALTZMAN, *supra* note 64 at 4-58. Congress repealed section 7217 in 1982 and replaced it with section 7431. The statutes are essentially the same.

Thus it was against the backdrop of what Senator Weicker referred to as the government "lending library" which circulated millions of tax returns annually that Congress enacted the stringent restrictions on disclosure that comprise section 6103 and its related penalty and remedial statutes.[70] The House of Representatives and the Senate disagreed on whether disclosure situations should be inclusive or exclusive under the statute.[71] The Senate version prevailed: all tax return information is confidential except for the specific permitted disclosures under the statute.

Section 6103 stands as a strong protection against the indiscriminate dissemination of tax return information precisely because its provisions exclude disclosure, even against the claims of laws such as the Freedom of Information Act (FOIA) designed to inform citizens of how personal information gathered by the government is being used.[72] When section 6103 has been challenged by a request for disclosure under the FOIA, it has been interpreted narrowly by the courts as a statute that is non-discretionary; that is, it establishes particular criteria which have to be met before disclosure can take place.[73] The IRS has argued that section 6103 blocks access to individual tax return information requested under the FOIA, and the courts have generally upheld the IRS position.[74]

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70. Stokwitz v. United States, 831 F.2d 893, 894 n.1 (9th Cir. 1987) quoting Senator Wiecker, "Over the years, a myriad of government agencies have gained access to tax information of the IRS. De facto, IRS became a lending library of confidential tax information. As the Privacy Commission noted, information the IRS maintained was treated as a 'generalized governmental asset.'" 122 CONG. REC. 24,013 (1976).

71. Tax Reform Act of 1976, P.L. 94-455, *reprinted in* 1976 U.S. CONG. & ADMIN. NEWS at 3747. In the Senate version, the general rule is confidentiality. Tax return information is not subject to disclosure "except in those limited situations delineated in the newly amended sections of 6103 *where the committee decided that disclosure was warranted.*

There is no comparable provision in the House bill." *Id.* (emphasis added).

72. SALTZMAN, *supra* note 64 at 4-58.

73. *Id.* The Freedom of Information Act, 5 U.S.C. 552 (FOIA), allows citizens access to information gathered by the government. However, the Act contains nine categories of information not generally available, including materials exempt by statute from disclosure. *Id.* at 2-7, 2-11. The Internal Revenue Service has successfully argued that section 6103 is the type of statute that exempts information from disclosure because it is nondiscretionary under 5 U.S.C. 552(b)(3). *Id.* at 4-58.

74. Under section 6103 the IRS has refused to disclose tax information it has gathered about a taxpayer to the taxpayer *himself*, a use of probably not foreseen by Congress. *See e.g.*, Cliff v. Internal Revenue Service, 496 F. Supp. 568 S.D.N.Y. (1980). In a suit under the FOIA by a tax attorney requesting that the IRS release internal memoranda and other documents for his use in advising a client, the court ruled that disclosure was forbidden in part because the requested material was tax return information under section 6103. *Id.* at 575 n.15.

Section 6103 appears to have accomplished Congress's purpose in staunching the flow of tax information from the IRS, but its interpretation in district and appellate courts has not been uniform. Cases have centered around the issue of whether the giving of tax information was a permitted "disclosure" under the parameters of the statute. The circuit courts are split on how narrowly section 6103 should be construed. The narrower view focusses on the agent's disclosure to discern that there was a violation.[75] In contrast, the broader view assumes that it is not possible for information which is already in the

See also, Church of Scientology v. Internal Revenue Service, 484 U.S. 9 (1987) where the Supreme Court interpreted the effect of the Haskell amendment on section 6103, but noted in passing that the parties agreed that "if section 6103 forbids the disclosure of material, it may not be produced in response to a request under the FOIA." *Id.* at 11.

Whether tax information requested under the FOIA need be disclosed under the prior version of section 6103 depended on the test of whether the party had placed income at issue. In Association of Am. R.R. v. United States, 371 F. Supp. 114 (D.D.C. 1974), the court ruled that although railroads must comply with Interstate Commerce Commission requests for tax information, the FOIA did not require public disclosure of this information. The court held that since the railroads did not place their total income in issue on the ICC forms, they had not waived their right to confidentiality. *Id.* at 118.

75. Rodgers v. Hyatt, 697 F.2d 899 (10th Cir. 1983) (disclosure of tax information in a court proceeding did not justify later disclosure absent express statutory authorization).

In Chandler v. United States, 687 F. Supp. 1515 (D. Utah 1988), the court granted a damage award under section 7431 to the taxpayer for an IRS agent's negligent disclosure to the taxpayer's employer of tax return information, despite the IRS claim that taxpayer had waived confidentiality by filing an injunctive suit against the IRS. *Id.* at 1517, 1521. *See also*, Olsen v. Egger, 594 F. Supp. 644, 647 (S.D.N.Y. 1984), (quoted in Chandler, 687 F. Supp. at 1518. (prior use of tax return information in a state court action to recover alimony and child support did not constitute a waiver of confidentiality. The court pointed out that such waivers were common abuses under the statutes prior to the Tax Reform Act of 1976, and that the revised statute does not permit the court to create judicial exceptions to the general prohibition against disclosure.)) *Id.*

In Johnson v. Sawyer, 640 F. Supp. 1126 (S.D. Tex. 1986) a taxpayer sued the IRS for damages from disclosure after the IRS issued a press release outlining tax evasion charges against Johnson and stating that he had pleaded guilty and been convicted. Although the IRS had agreed not to disclose Johnson's tax evasion case as part of the settlement agreement, IRS guidelines permitted the issue of press releases disclosing convicted tax evaders as a means of publicizing the enforcement of tax law, and the information was released in a routine office practice. The court, in a thorough analysis of section 6103, found no language which would permit such a press release. *Id.* at 1133. In a note which has been quoted in Lampert v. United States 854 F.2d 335, 337 (9th Cir. 1988), the court stated the crux of the dilemma caused by strict interpretation of section 6103:

"This court recognizes that its strictly enforcing the comprehensive regulation of § 6103 greatly hampers the government's ability to issue press releases concerning the prosecution of tax evaders. If that result is poor public policy, it is for Congress - not the Courts - to amend § 6103 to allow the issuing of such releases." Johnson, 640 F. Supp. at 1133 n.18.

public record to be a "disclosure."[76] In addition, some circuits allow disclosures under the rubric of "tax administration."[77]

The Sixth Circuit declined to find unauthorized disclosure where there was no nexus between the data disclosed and the furtherance of obligations controlled by Title 26.[78] Similarly, where the disclosure of tax information was incidental to disclosure of information that a taxpayer had invoked the Fifth Amendment, the Tenth Circuit found that there was no nexus between that non-tax activity disclosed and the taxpayer's obligation to pay taxes. Thus, federal agents' limited disclosures were permissible in the context of the case they were pursuing.[79]

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76. See discussion of Ninth Circuit cases, *infra* notes 80-92 and accompanying text.

77. 26 U.S.C. § 6104(b)(4). Subsection (b), entitled "definitions" has ten paragraphs of which "Tax Administration" subsection (4)(A) means-

> (i) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes . . . and
>
> (B) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions.

See also, Rueckert v. IRS 775 F.2d 208 (7th Cir. 1985). The Illinois Department of Revenue has a rule forbidding its agents from engaging in outside employment. Finding evidence in agent Rueckert's state tax return that he might be doing so, Illinois requested and received his federal return to establish his sources of income, and reprimanded him for pursuing outside employment on the basis of that return information. Rueckert sued the IRS, alleging that its disclosure of his tax return information to Illinois violated his right to confidentiality. Finding no case law on the specific question, the court reviewed the legislative history and wording of section 6103, focussing particularly on § 6103(d) permitting disclosure to state agencies for tax administration, and § 6103(b)(4), definition of tax administration. Finding the definition of tax administration "so sweeping as to compel rejection of restrictive interpretation" the court denied Rueckert's claim. *Rueckert*, 775 F.2d at 211, (quoting Unites States v. Mangan, 575 F.2d 32 (2d Cir.) *cert. denied*, 439 U.S. 931 (1978). *Accord* Davidson v. Brady, 559 F. Supp. 456 (W.D. Mich. 1983), *aff'd. on other grounds*, 732 F.2d 552 (6th Cir. 1984), (quoted in *Rueckert*, 775 F.2d at 211.) (Where Davidson's tax return was disclosed in another man's federal judicial proceeding pertaining to tax administration, the disclosure was authorized under the tax administration exception.) *Rueckert*, 775 F.2d at 211.

78. *In Re* Grand Jury Investigation, 688 F.2d 1068, 1070 (6th Cir. 1982), *petition for reh'g. denied*, 696 F.2d 449 (6th Cir. 1982). The nexus test depends on an interpretation of § 6103(b)(2), the definition of return information. The court in *In Re Grand Jury* found that an IRS agent's disclosure to the United States attorney that defendant Jackson had threated potential witnesses against him in a grand jury investigation of irregularities in his tax returns was not "return information." Finding that the information was related to an obstruction of justice violation, and had nothing to to with tax irregularities, the court rejected Jackson's claim that the disclosure was just cause for him to refuse to comply with the grand jury subpoena. *Id.*

79. First W. Gov't. Sec., Inc. v. United States, 796 F.2d 356, 359-60 (10th Cir. 1986) (IRS disclosure that taxpayer had invoked the fifth amendment privilege against self-incrimination was not return information.)

Within the Ninth Circuit, at both the district court level and in the Court of Appeals, courts have given a broad reading to section 6103, finding that the tax information disclosed had already lost its confidential status, and denying damages to the complaining taxpayer.[80] In 1985, United Energy Corporation was denied damages under 26 U.S.C. § 7431 for unauthorized disclosure to the press under 26 U.S.C. § 6103(h)(4)(C).[81] The court held that when a United States Attorney merely answered questions asked by a reporter about a complaint filed by United Energy against the IRS, his statements confirming that the IRS was investigating United Energy were not a disclosure of confidential tax information; by filing its complaint asking the court to stop the investigation, United Energy was held to have "lost any entitlement to privacy in that information."[82]

In 1987, the Ninth Circuit set forth a baseline interpretation of section 6103 in *Stokwitz v. United States*. The court ruled that an unauthorized search of Stokwitz's office and briefcase, and seizure of his personal copies of his tax returns by his supervisor and secretary, both government employees, was not a disclosure forbidden under section 6103.[83] The court reasoned that the statute must be read as a whole; that its purpose was to prevent the unauthorized disclosure of tax information actually filed with the IRS, and that copies were

80. United Energy Corp. v. United States, 622 F. Supp. 43 (D.C. Cal. 1985); Stokwitz v. United States 831 F.2d 893 (9th Cir. 1987); and Lampert v. United States, 854 F.2d 335 (9th Cir. 1988).

81. United Energy, 622 F. Supp. at 45. The court quotes section 6103(h)(4)(C) authorizing the disclosure of return information "in a Federal or State judicial proceeding pertaining to tax administration, but only. . . if such return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding." 6103(h)(4)(c).

The Tenth and Sixth Circuits have also extended the range of permissible disclosure under § 6103 (h)(4)(C) to include disclosure to the press and other interested parties, even though there is no specific § 6103 exception permitting such disclosure. In 1986, the Tenth Circuit held that the statutory language did not specifically limit itself to disclosures made to federal officials, thus the section applied to disclosures made to anyone. Note, *Meaning of "Return Information" within Internal Revenue Code Section 6103 and When Return Information May Be Disclosed by the Internal Revenue Service under Section 6103 (h)(4)*, 65:4 DEN. U.L. REV. 646. The Note discusses First Western Government Securities v. United States, 796 F. 2d 356 (10th Cir. 1986). Accord *Davidson v. Brady*, 559 F. Supp. 456 (W.D. Mich, 1983), *aff'd*, 732 F.2d 552 (6th Cir. 1984); Note, *Meaning* at 649 n.95.

82. United Energy, 622 F. Supp. at 46.

83. Stokwitz, 831 F.2d at 894. The court suggested that Stokwitz's more appropriate remedy was the *Bivens* action he had also filed against his employer. *Id.*

not covered by the statute.[84] Quoting from the legislative history, the court found that Congress's overriding purpose was to curtail loose disclosure practices by the IRS, and abuse by government agencies of information filed with the IRS.[85] The court read the elaborate disclosure procedures codified in section 6103 as establishing a "comprehensive scheme for controlling the release by the IRS of information. . . That is as far as the statute goes. . . There is no indication in either the language of section 6103 or its legislative history that Congress intended to enact a general prohibition against public disclosure of tax information"[86] (emphasis in original). Such an interpretation would be excessively burdensome, since "[s]ection 6103 was not designed to provide the only means for obtaining tax information; it simply provides the only means for acquiring such information from the IRS."[87]

In *Lampert v. United States*, the Ninth Circuit expanded on the reasoning in *United Energy Corp.* and *Stokwitz*, holding that "once return information is lawfully disclosed in a judicial forum, its subsequent disclosure by press release does not violate" section 6103.[88] The court surveyed the cases holding for strict interpretation of section 6103, disagreeing with *Rodgers v. Hyatt* and *Johnson v. Sawyer* which had held that press releases concerning tax information already in the public record were an unauthorized disclosure.[89] Rejecting the argument that for a government employee to disclose any return information, confidential or not, there must exist an applicable exception to 6103, the court stated, "Only a strict

84. *Id.*

85. *Id.* at 894-95.

86. *Id.* at 895-96.

87. Stokwitz, 831 F.2d at 897. The court points out that if a government employee obtained tax information by subpoena, discovery, or other appropriate way and subsequently disclosed that information, the government would be liable for civil or criminal penalties if section 6103 procedures were the only avenue for disclosure.

88. Lampert v. United States, 854 F.2d 335, 338 (9th Cir. 1988). Three cases were consolidated for appeal to the Ninth Circuit: *Lampert v. United States, Figur v. United States,* and *Peinado v. United States*. The court affirmed the district court's holding in each that press releases related to tax proceedings were not unauthorized disclosures. The United States Attorney issued press releases summarizing tax evasion charges against Figur; issued two press releases in *Peinado*, one announcing that he had pleaded guilty to tax evasion, and another revealing his sentence. In *Lampert*, the government sought an injunction against Lampert's promotion and sale of abusive tax shelters; both the United States Attorney and the IRS issued press releases on that case.

89. *Id.* at 337. See also discussion of *Rodgers v. Hyatt* and *Johnson v. Sawyer*, *supra* note 75.

technical reading of the statute supports [this] position."[90] The court opined that such a reading would defeat the purposes of the statute, and greatly hamper the government's ability to publicize the prosecution of tax evaders.[91] The court concluded that once tax return information is lawfully disclosed in court proceedings, the 6103 directive to keep the information confidential is moot.[92]

III. THE COURT'S ANALYSIS

The issue before the Ninth Circuit was whether former Internal Revenue agent Lawrence M. Richey's prosecution and conviction for his disclosure to the press of tax information violated his first amendment right to freedom of expression.[93] The court first observed that the government may properly limit speech when compelling government interests outweigh the interests of the speaker.[94] The court next identified the interests at stake: Richey's interest in a fair trial, which includes the right to have an unbiased judge;[95] his interest as a citizen in commenting upon matters of public concern, and the related interest of the public in being informed about matters of public concern;[96] and the interest of the government in protecting the confidentiality of tax information.[97] The court then balanced Richey's and the public's interests against those of the government and found that "Richey's self-serving comments to the press . . . are not transmogrified into speech worthy of first amendment protection simply because they touched upon a matter of public concern."[98]

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90. *Id.* at 338.

91. *Id.* The court quotes the footnote from *Johnson v. Sawyer*, 640 F. Supp. 1126, 1133 n.18, quoted *supra* note 75. The underlying reasoning is that since one of the main purposes of section 6103 was to restore taxpayer confidence in the IRS, a prohibition of press releases showing that tax evaders were being prosecuted (hence, the system was being operated fairly) would defeat that goal.

92. Lampert, 854 F.2d at 338.

93. United States v. Richey 924 F.2d 857 (9th Cir. 1991). The majority opinion was written by O'Scannlain, Circuit Judge, joined by Wright, J. The dissent was written by Reinhardt, J. who had been a member of the panel deciding Stokwitz v. United States, 831 F.2d 893 (9th Cir. 1987), *cert. denied* 485 U.S. 1033 (1988). *See supra* notes 70, 82-87 and accompanying text.

94. *Id.* at 859. The court cites Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841 (1978) for this proposition. However the statement does not appear in that case.

95. Richey, 924 F.2d at 859.

96. *Id.* at 860. The court identifies the matter of public concern as potential judicial bias, and the public interest in the operation of the courts. *Id.*

97. *Id.* at 861.

98. *Id.* at 863.

The court first examined Richey's interest in a fair trial, including the right to have an unbiased judge. Assuming for the purposes of the appeal that Richey had a colorable claim of potential bias by Judge McDonald, the court found Richey's interest "substantial."[99]

The majority and the dissent disagreed over the nature of Richey's interest in making the statements at issue. This basic difference influenced their respective treatments of the constitutional question.[100] The dissent argued that Richey's interest was not in *obtaining* a fair trial, but "in publicizing the facts relating to his allegedly unfair treatment" in his completed trial.[101] Richey's claims had two legal grounds: whether Judge McDonald violated the recusal statute by presiding over Richey's trial,[102]

99. Richey, 924 F.2d at 859. The court allowed Richey's claim of bias to stand since the disclosure at issue occurred in October, 1987, while his conviction for conspiracy to defraud the IRS was on appeal (notice filed July 10, 1987 [USDC Eastern District of Washington Docket No. CR-85-169-1, *hereinafter*, Docket CR-85-169-1]) to the Ninth Circuit on that ground among others. United States v. Richey, 874 F.2d 817 (9th Cir. 1989)(memorandum disposition).

On May 5, 1989, the Ninth Circuit ruled that the "odd provision in his sentence (now eradicated) requiring him not to criticize the government of the United S[t]ates . . . while not defensible, does not bespeak prejudice." (mem. at 4-5).

Richey was joined by the ACLU in arguing that the provision violated his first amendment rights. Since Richey's disclosures had triggered a probation revocation hearing December 8, 1988 in which a different judge removed the restraining provisions (and also changed the prison sentence from 45 years to 15 counts of 3 years each, running concurrently)(Docket CR-85-169-11), the court termed the issue moot.

The test for mootness set forth in Nebraska Press Association v. Stuart, 427 U.S. 539, 546-547 (1976), "capable of repetition, yet evading review," was interpreted by the court as follows: "There has been no showing that Richey is in danger of being resentenced to hold his tongue," (mem. at 12) a reading at odds with the Supreme Court's explication of the rule, since the phrase "capable of repetition" refers to any future abuse, not just one involving the same party. Nebraska, 427 U.S. at 546-547. The Ninth Circuit reading would not recognize a showing that any judge might in the future impose a similar penalty on any defendant.

100. The court viewed Richey's interest as a due process interest in gaining a fair trial, and in that context found Richey's comments to the press disruptive, and the relationship between his statements and that interest tenuous. Richey, 924 F.2d at 859-60 n.2, 862 n.6, and 867 n.6.

"In contrast to the government's 'compelling' interest, Richey's personal interest in having an unbiased judge preside at his trial could hardly be advanced by his gratuitous remarks to the media, particularly given they were made *after* the trial." *Id.* at 862. Consequently, Richey's remedy was through the appellate process.

In contrast, the dissent viewed Richey's right to appellate review irrelevant to his exercise of his first amendment right to criticize the district court for its conduct of his prior trial. *Id.* at 868.

101. Richey, 924 F.2d at 867 n.6.

102. The dissent argued that despite the Ninth Circuit ruling (Richey, 874 F.2d 817 memorandum) rejecting Richey's claim that the judge should have recused himself *sua sponte*, the test required by 28 U.S.C. 455, *supra* note 6, and interpreted by the Supreme Court in Liljeberg v. Health Serv. Acquisition Corp. 486 U.S. 847 (1988), involves the appearance of bias, as well as actual bias. Richey, 924 F.2d at 865.

and whether the judge's conduct was unfair and prejudicial.[103] The dissent pointed out that people have a first amendment right to criticize the judiciary when they believe a wrong has occurred.[104]

The court next considered Richey's interest, as a citizen, in commenting on matters of public concern. Citing *Landmark*, the court stated that potential judicial bias is clearly a matter of public concern, "which Richey had a cognizable interest in discussing."[105] The court agreed that the public interest in being informed must be considered in any first amendment calculus.[106] However, the court observed that the public interest in being informed carries less weight in the balancing process when invoked by persons privy to sensitive materials.[107]

Turning to the government interest in protecting the confidentiality of tax information, the court found that confidentiality is necessary to ensure compliance with federal tax laws, and that the government also asserts a privacy interest on behalf of its citizens.[108]

Next the court balanced the government interest in maintaining a workable tax system with Richey's interest, which it

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The dissent pointed to the language of section 455(a), that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." As long as a reasonable person might question the ability of a judge to be impartial in the tax fraud case of a man who had audited his returns, the statute applies. Richey, 924 F.2d at 868 n.9.

103. Richey, 924 F.2d at 868. The dissent found that the judge's conduct in presiding over the trial, and in imposing sentence which included the "wholly unprecedented and unconstitutional gag order" provoked Richey's compelling interest in bringing his complaint to the public's attention. *Id.* at 871, 868.

104. *Id.* at 868. *See also* Bridges v. California, 314 U.S. 252 (1941) (Frankfurter, J., *dissenting)* "Comment after the imposition of sentence - criticism, however unrestrained, of its severity or lenience . . . -is an exercise of the right of free discussion. *Bridges*, 314 U.S. at 300.

105. Richey, 924 F.2d at 860.

106. *Id.*

107. *Id.* at 860-861. The court cites Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837 (1978) pointing out that the Supreme Court disavowed taking a position on the constitutionality of punishing "participants" for breach of the confidentiality mandate. *Id.* at 861.

The dissent rejects the court's argument as having no support in the law, since the Supreme Court expressly declined to address the question of whether a disclosure of confidential information by a participant, staff member, or witness, rather than by a third party would lead to a different outcome. *Id.* at 867. *See also,* Butterworth v. Smith, 110 S. Ct. 1377 (1990) (statute forbidding disclosure of grand jury testimony by a witness unconstitutional).

108. Richey, 924 F.2d at 861.

identified as a remedial interest in having an unbiased judge preside at his trial.[109] The court characterized the government interest as "compelling,"[110] and found that it outweighed Richey's personal interest in having an unbiased judge, since his comments to the press would have no effect on the judicial process.[111]

Weighing the government interest against Richey's interest as a citizen in commenting upon matters of public concern, the court quoted several cases which discuss limitations to a public employee's right to comment on such matters.[112] Concluding that the government's interest permits restrictions on disclosures, the court found Richey's interest

109. *Id.* at 862.

110. *Id.* The court quoted Bradley v. United States, 817 F.2d 1400, 1405 (9th Cir. 1987) for the proposition that the government interest in maintaining a workable tax system is "compelling." Bradley made a first amendment challenge to an IRS provision forbidding the filing of "frivolous" tax returns when he was fined $500 for filing a return which contained only his identifying information and a statement condemning United States policy in Central America.

The dissent pointed out that the "compelling" government interest the *Bradley* court found to outweigh Bradley's first amendment claim was its interest in the filing of accurate tax returns. "To hold otherwise would frustrate Congress's intent to reduce the administrative burden on the IRS from handling forms which are not in processible form." Bradley, 817 F.2d at 1404. The *Bradley* court considered Bradley's *conduct* in filing as well as the speech component, quoting the *O'Brien* standard, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech elements can justify incidental limitations on First Amendment freedoms." *Bradley*, 817 F.2d at 1405, (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)).

The dissent stated that by relying on Bradley, the court "improperly trivializes" Richey's free speech rights. Richey, 924 F.2d at 870 n.13.

111. See discussion *supra* n.100.

112. Richey, 924 F.2d at 862. The dissent pointed out that none of the cases cited by the court supports the conclusion that the IRS interest permits suppression of Richey's speech. As presented, they provide illustrations of the principle that the speech of public employees may be limited under some circumstances. *Id.* at 869 n.10.

E.g., Cox v. Louisiana, 379 U.S. 536 (1965) concerned an unconstitutional time, place, and manner restriction, and an overbroad statute; Allen v. Scribner, 812 F.2d 426 (9th Cir. 1987) held that a bare assertion that an employee's speech would interfere with efficient government operation cannot support limiting that speech; Connick v. Myers, 461 U.S. 138 (1983) upheld a limitation on an employee's speech which was reasonably likely to disrupt the office where the subject speech was of limited public concern; Snepp v. United States, 444 U.S. 507 (1980) concerned national security, an area where the Supreme Court has established special guidelines. Richey, 924 F.2d at 869 n.10.

The court cited United States v. Posey, 864 F.2d 1487 (9th Cir. 1989) in support of the related point that the availability of the disclosed information elsewhere does not ease a restriction on speech. *Richey* 924 F.2d at 863 n.7. However, *Posey*, like *Snepp*, is a case involving the national security interest.

insufficient to outweigh that of the state.[113] Therefore, the court affirmed the conviction.[114]

THE DISSENTING OPINION

The dissent opened by describing Richey's "odyssey" through the courts as a sad chapter in the history of the Ninth Circuit where twice his first amendment rights were violated with the active participation of a judiciary unable to grasp the importance of freedom of speech when it involved criticism of the judiciary.[115] Casting the issue in terms of the public's right to know of judicial conflicts of interest, the dissent noted the irony that Richey was convicted for exercising his free speech rights by explaining why he believed a federal judge had imposed an order flagrantly violating those rights.[116]

Considering first the limitations on the speech of public employees, the dissent applied the *Pickering-Connick* test, finding in answer to the first prong of the test, that Richey's speech was on a matter of public concern.[117] The dissent found that Richey's speech was about judicial bias, and "[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern."[118] His responses to reporters' questions touched on tax information relevant to Richey's claim that the judge should have recused himself.[119]

113. Richey, 924 F.2d at 863 n.7. "Moreover, public confidence in the tax system is less likely to erode if disclosure is made during the course of a judicial proceeding, rather than at the whim of a former IRS agent. Richey's offhand comments to the press suggest to the public that no restrictions of such information exist." *Id.*

114. *Id.* at 863. Since they considered the substance of Richey's speech to be disclosure of tax information, the court did not consider the public interest in learning of judicial bias, and thus did not consider the nexus argument, although they cited *In Re Grand Jury Investigation,* 696 F.2d 449 (6th Cir. 1982) in dismissing Richey's argument for dismissal of government counsel for disclosure of McDonald's tax information.

115. *Id.* at 863. The court characterizes the dissenting opinion as "strident emotional rhetoric." *Id.* at 859 n.2.

116. *Id.* at 865.

117. Richey, 924 F.2d at 866. *See* Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Connick v. Myers, 461 U.S. 138 (1983). The dissent pointed out that the public interest that arose in Richey's case was in itself evidence that he spoke on a matter of public concern. In addition, the dissent observed that if law did not require Judge McDonald to recuse himself under the circumstances of Richey's case, Richey might have had an even more compelling justification for making his charges to the press in order to encourage reform of the rules. Richey, 924 F.2d at 869.

118. *Id.* at 866. (Quoting Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 839 (1978 at 866)).

119. *Id.* Richey supported his allegation with specific facts, maintained the dissent, quoting New York Times v. Sullivan, 376 U.S. 254 (1964) and Sweeney v. Patterson, 128 F.2d 457, 458 (D.C.Cir.) *cert. denied,* 317 U.S. 678 (1942) "The protection of the public requires not merely discussion, but information." Richey, 924 F.2d at 871.

The second prong of the test, balancing the free speech interest against the asserted government interest, involves a factual inquiry into the context and circumstances of the speech. Where a first amendment interest is asserted, the Constitution requires the court to assess the particular harm to the individual *and* the general harm which would result to society from the suppression of the statement at issue.[120]

The dissent agreed that the government has a weighty interest in maintaining a workable tax system and in protecting the confidentiality of tax information.[121] The dissent nevertheless found that the first amendment protected Richey's comments criticizing the conduct of the court, a matter of public concern.[122] The dissent observed that the public interest in learning about governmental wrongdoing depends on the nature of the information, not the identity of its source.[123] Moreover, the dissent continued, in criminal proceedings, there is a great need for public accountability, as openness discourages "decisions based on secret bias or partiality."[124] Openness is particularly important where a recusal issue has arisen in the context of a criminal trial, since public confidence in the courts is essential to the community. "[T]he appearance of justice can best be provided by allowing people to observe it."[125]

The dissent concluded that the balance weighed in favor of the public interest in learning of judicial bias and against the injury to the tax system that might result from a disclosure that a judge had once been audited.[126] Finally, the dissent observed that the only harm to the taxpayer was the premature disclosure of a small amount of tax information, which under the rulings of the Ninth Circuit would have been in the public record

120. Richey, 924 F.2d at 870. *See also* Bridges, 314 U.S. at 293.

121. Richey, 924 F.2d at 867. *Citing* Lampert v. United States, 854 F.2d 335 (9th Cir. 1988) and Stokwitz v. United States, 831 F.2d 893 (9th Cir. 1987), *cert. denied* 485 U.S. 1033 (1988).

122. Richey, 924 F.2d at 865.

123. *Id.* at 867. *See also,* First Nat'l. Bank v. Belotti, 435 U.S. 765 (1978) (inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of its source).

124. Richey, 924 F.2d at 869 n.11 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980)).

125. Richey, 924 F.2d at 869 n.11 (quoting Richmond Newspapers, 448 U.S. at 571-72). *See also,* Offutt v. United States, 348 U.S. 11, 14 (1954) (justice must satisfy the appearance of justice.)

126. Richey, 924 F.2d 870 n.13. The disclosure was inconsequential compared to the disclosures judges must make under the Ethics Reform Act of 1989, 2 U.S.C. § 701 *et seq. (Transferred to* 5 U.S.C. 101-112 Nov. 30, 1989). Richey, 924 F.2d at 871 n.14.

shortly after Richey's statement to the press.[127] In contrast, the harm to Richey is the deprivation of his free speech right, or criminal sanction if he exercises that right.

Summarizing the three preeminent factors—that bias on the bench involves a breach of public trust, that an individual who believes he is a victim of judicial bias should not be silenced by the state, and that the actual disclosure was minimal—the dissent found that Richey's speech was protected by the first amendment.[128] Therefore, the statute was unconstitutional as applied to Richey.[129]

IV. COMMENT

The Ninth Circuit in *United States v. Richey* decided that 26 U.S.C. § 7213, a statute prescribing penalties for unauthorized disclosure of tax information, was not unconstitutional as applied to Richey—that his speech was not "worthy of first amendment protection" and that the district court did not err in denying the motion to dimiss the indictment on first amendment grounds.[130]

This comment rests on two premises: first, that the court might have avoided the constitutional issue by looking to its own precedent in interpreting the statute and granting Richey's motion to dismiss or deciding the case on statutory ground. Second, having declined to interpret the statute as permitting Richey's disclosure, the court should have employed the dissent's constitutional analysis as the more accurate interpretation of the constitutional question.

A. THE APPLICATION OF THE STATUTE

Richey argued three issues on appeal: whether the trial court should have granted the motion to dismiss; whether the

127. Richey, 924 F.2d at 871. The dissent bases this on the fact that Richey had already appealed his conviction when he made his statements to the press. One of the grounds he argued on appeal was the recusal issue. United States v. Richey, 874 F.2d 817 (9th Cir. 1989)(memorandum disposition).

In Brief for Appellant at 2, United States v. Richey 924 F.2d 857 (9th Cir. 1991), Richey asserts that at the sentencing hearing for his false tax return conviction on June 19, 1987, "Judge McDonald was indirectly reminded by counsel of his connection with Appellant." Brief at 2. If this is a matter of public record as part of the sentencing hearing, Richey's case would fall squarely under *Lampert*.

128. Richey, 924 F.2d at 871.

129. *Id.*

130. *Id.* at 863.

trial court should have granted the motion for removal of counsel; and whether [Richey's] disclosure of his audit of Judge McDonald was protected by the first amendment.[131] The Ninth Circuit in its opinion considered only the constitutional question and did not take up the issue of a motion to dismiss under the statute.[132] However, under existing Ninth Circuit precedent, as well as authority from other circuits, Richey's case might have been dismissed or decided on statutory grounds.

First, the Ninth Circuit held in *Lampert* that "once return information is lawfully disclosed in a judicial forum, its subsequent disclosure by press release does not violate" 26 U.S.C. 6103.[133] In October 1987, when he made the statements for which he was convicted, Richey had already filed his notice of appeal with the district court. Moreover, the controversial sentence including the "gag order" was already a matter of public record, having been filed July 6, 1987.[134] It can be argued under *Lampert* that the disclosure was already a part of the public record of judicial proceedings, since the basic events upon which Richey would argue his appeal had already taken place, and it was only the details which awaited disclosure. Richey's appeal could not have been argued without the disclosure, and Richey in fact disclosed less than what eventually was revealed.[135]

Second, under the nexus test used by the Sixth Circuit, the disclosure of information concerning a possible obstruction of justice was not considered to be disclosure of "return information," even where the communication included an

131. Brief for Appellant at 3, United States v. Richey, 924 F.2d 857 (9th Cir. 1991). This comment is not concerned with the argument for removal of counsel, which the court dismissed. Richey, 924 F.2d. at 863.

132. The Supreme Court has put forth guidelines for avoiding constitutional issues when possible; among them, the Court will not pass on a constitutional question, even when it is properly presented, where some other ground is present, such as a statute, upon which the case may be decided. Ashwander v. TVA, 297 U.S. 288, 346 (1936) (Brandeis, J., *concurring*).

133. Lampert, 854 F.2d at 338. The charge against Richey for violating 26 U.S.C. § 7213 depends upon the terms of section 6103 for its application. There is no case law interpreting section 7213.

134. United States District Court, Eastern District, Washington Docket CR-85-169-1, Sentence or probation order, July 6, 1987. The sentence totalled 45 years, at three years for each of fifteen counts, suspended. Richey was placed on probation for five years, on condition, among others, that Richey "abstain from making any derogatory statements against the Government." *Id.*

135. Brief for Appellant at 3, United States v. Richey, 924 F.2d 857 (1991) states that the United States Attorney revealed the amount of additional tax and the tax years involved in Richey's audit of Judge McDonald.

incidental disclosure of tax information.[136] The court in *In Re Grand Jury* did not construe the strict protections of the statute as disabling IRS employees from reporting a taxpayer's criminal conduct unrelated to his IRS obligations.[137] One may apply this reasoning to Richey's allegation of judicial bias, which was accompanied by the incidental disclosure of tax information as explanation for the alleged bias. Although Richey did not allege criminal conduct on the part of the judge, his allegations were serious, implying a breach of the public trust.

Third, under the broad definition of "tax administration" followed by several circuits, a court could find Richey's disclosure permissible.[138] *Rueckert* provides the closest parallel to Richey's situation, where a disclosure pursuant to investigating a conflict of interest was found to be authorized under 26 U.S.C. 6103.[139]

A judge has not hitherto been considered a party to tax administration proceedings for purposes of subsections 6103(b)(4) or 6103(h)(4). However, under section 6103(h)(5) the defendant in a criminal case may inquire whether a prospective juror has been audited.[140] In *United States v. Hashimoto,* the Ninth Circuit held that failure of the IRS to respond to this request resulted in reversible error based on a significant risk of prejudice.[141] In view of this holding, and the fact that the relevant tax information of any party to the case may be disclosed under 6103(h)(4), it seems illogical that a judge should be excused from similar scrutiny if significant risk of prejudice is to be avoided.[142]

Finally, the Richey court, in arguing for the taxpayer's right to privacy cited *Association for American Railroads.*[143]

136. *In Re* Grand Jury Investigation, 688 F.2d 1068 (6th Cir. 1982). When the IRS informed the United States attorney that the taxpayer was threatening witnesses, they incidentally disclosed that they were investigating him. The court held this not to violate § 6103.

137. *Id.* at 1071.

138. 26 U.S.C. 6103(b)(4) and 6103(h)(4). *See supra* note 78 and accompanying text.

139. Rueckert v. Internal Revenue Service, 775 F.2d 208 (1985).

140. 26 U.S.C. § 6103 (h)(5).

141. SALTZMAN, *supra* note 64 at 4-71 n.70 (citing United States v. Hashimoto, 878 F.2d 1126 (9th Cir. 1982).

142. Indeed, it is possible that the Judge's tax information is a matter of public record under the Ethics Reform Act of 1989, *supra* n.126. If so, Richey's case would qualify for summary judgment in his favor.

143. Richey, 924 F.2d at 861.

While it is true that that case stands for the proposition that a taxpayer's right to privacy may not be breached by disclosure under the Freedom of Information Act, the holding rests on the condition that the taxpayer had not placed his income "at issue," since in doing so, the taxpayer waives his right to confidentiality.[144] It can be argued that Judge McDonald placed his tax information in issue by his conduct in not recusing himself and in imposing a draconian sentence on the man he knew had audited that information.

B. First Amendment Analysis

If a court rejects the argument that Richey's disclosure was authorized under 26 U.S.C. § 6103, and thus not subject to the criminal penalties under section 7213, then it must consider the constitutional challenge, weighing the statute against the first amendment right asserted.

Section 7213 is a subject matter restriction on speech, imposing criminal penalites for its violation.[145] Where the exercise of protected speech is subject to criminal prosecution, the statute is subject to heightened scrutiny.[146] Moreover, a tax provision which imposes a penalty is to be construed strictly; the government must meet its burden of proving all the elements of the violation.[147] In Richey's case, the government needed to argue and prove that Richey violated each element of the statute. But the government did not meet its burden; Richey simply admitted making the statement. Given the wide variations in interpretation of the terms of the statute, the court found itself in the unenviable constitutional situation of weighing a conviction under a federal statute whose terms have occasioned disagreement among the courts as to what constitutes its violation, without adequate argument from either side on that issue.

Landmark held that "before a state may punish expression, it must prove by actual facts the existence of a clear and present danger to the orderly administration of justice."[148]

144. Association of Am. R.R. v. United States, 371 F. Supp. 114, 118 (D.D.C. 1974).

145. 26 U.S.C. § 7213, *supra* note 2.

146. Pacific Gas & Elec. Co. v. Public Util. Comm'n of California, 475 U.S. 1 (1986) (Rehnquist, J., dissenting) "a governmentally imposed penalty for the exercise of protected speech is sufficiently like direct suppression to trigger heightened First Amendment scrutiny." *Id.* at 29.

147. Bradley v. United States, 817 F.2d 1400, 1402-1403 (9th Cir. 1987).

148. Landmark, 435 U.S. at 843.

The *Landmark* Court emphasized that a legislative finding of possible danger is no substitute for a judicial analysis of the statute as applied. Were it otherwise, the court explained, the first amendment as a check on legislative power would be nullified.[149] In Richey's case, there was no showing of actual harm, only the invocation of the sentiments occasioned by the situation which inspired the enactment of the statute in the first place. Richey's statement, in the context of his posture as a criminal defendant appealing his conviction, in no way raises the spectre of executive abuse which spawned the statute's elaborate protections.

The constitutional balance does not change when Richey is considered as a former public employee. Whether citizen or former public employee, he has a right, as the dissent states, to speak out if he believes he is the victim of judicial bias.[150] The question becomes whether *what* he says may be limited. Restrictions on what former IRS agents and other government employees may disclose are necessary to protect the government's interest in the orderly administration of tax laws, the system of voluntary disclosure, and the confidentiality of individual tax information. However, a statute which will not permit disclosure under circumstances of criminal defense, except under the most technical reading, proves a trap for the unwary, and where freedom of speech is the price to be paid, the statute has exceeded constitutional bounds.[151] As the Court in *Butterworth* pointed out, such a restriction on disclosure is permanent, dramatic in its effect, and subject to abuse by persons in power.[152]

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149. *See supra,* note 41 and accompanying text.

150. Richey, 924 F.2d at 871.

151. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Marbury v. Madison, 1 Cranch 137, 163 (1803) (quoted in, Bivens v. Six Unknown Fed'l. Narcotics Agents, 403 U.S. 388, 397 (1971)).

If Richey had obeyed the statute and not spoken to the press, this is what probably would have happened. The Ninth Circuit would not have changed its finding of no bias in the judge's conduct, since it did not consider the gag order a sign of bias. The court probably would have lifted the gag order. Then instead of being deprived of his constitutional right to criticize the government for the few months he endured that sanction before he broke his silence, Richey would have had two years of court ordered silence before the decision of the Ninth Circuit lifted it. Of course, if the Ninth Circuit affirmed his conviction and found no constitutional insult in the condition of probation, Richey would be effectively silenced until July 1992, observing the 200th anniversary of the Bill of Rights by not criticizing the judge who sentenced him or the Ninth Circuit which affirmed that conviction in an unpublished memorandum.

152. Butterworth v. Smith, 110 S. Ct. 1376, 1383 (1990).

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