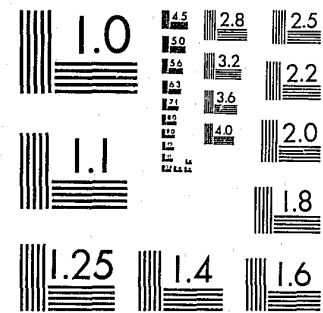


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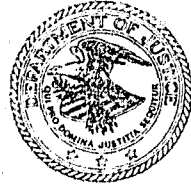
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National Institute of Justice
United States Department of Justice
Washington, D. C. 20531

Date Filmed

3/11/81

74987



Department of Justice

NCJRS

JAN 16 1981

ACQUISITIONS

FOR IMMEDIATE RELEASE
FRIDAY, JANUARY 2, 1981

AG
202-633-2007

The Department of Justice today published guidelines restricting the use of search warrants by federal officers and employees to obtain documents, tapes, or similar materials from those who are neither subjects of a criminal investigation nor closely related to the subjects of a criminal investigation. The guidelines will be published in the Federal Register for public comment as a proposed rule.

These Attorney General's guidelines on methods of seeking documentary materials from such disinterested third parties are required by Title II of the Privacy Protection Act of 1980.

The law was signed by the President in October, and was passed in response to the Supreme Court's 1978 decision in Zurcher v. Stanford Daily, in which the Court held that a search by local police of a student newspaper office in California did not violate either the First or Fourth Amendment.

Title I of the Act, which is based for the most part on a bill drafted by the Department of Justice for the Administration, strictly limits the instances in which federal, state or local law enforcement officers may use search and seizure to obtain materials related to public communication in books, newspapers, and broadcasts.

The guidelines required by Title II are intended to safeguard individual privacy by restricting the use of search

(MORE)

NCJ# 74987

warrants to obtain documentary materials where less intrusive means of access to the materials, such as a subpoena, summons, or formal or informal request, are available.

The guidelines focus on searches for documentary materials because such searches not only may involve the seizure of private papers, but also may require examination of other documents of a confidential nature during the execution of the warrant.

The guidelines require that a search warrant not be used to obtain documentary materials held by a disinterested third party unless it appears that the use of a less intrusive method would jeopardize the availability or usefulness of the materials sought, and the use of a warrant has been approved by an attorney for the government. In an emergency, a supervisory law enforcement officer may approve the application for the warrant, but the United States Attorney must be notified within 24 hours.

Stricter provisions apply to the use of search warrants which could intrude on professional, confidential relationships, such as where the third party is a lawyer, physician, psychiatrist, or clergyman, and the material sought or other material likely to be reviewed during the search contains private information on clients or patients.

(MORE)

In these cases, a search warrant may be used only if resort to less intrusive methods would jeopardize the availability or usefulness of the materials, if access to the materials is of substantial importance to the investigation or prosecution, and if the application for the warrant has been approved by the Attorney General or a designated senior Justice Department official. In an emergency, the United States Attorney may authorize the application, provided the Attorney General or his designee is notified of the authorization and the justification for it within 72 hours.

Where other professionals involved in therapeutic or counselling relationships, such as psychiatric social workers or psychologists, are the holders of the materials sought, the United States Attorney must determine if the use of a search warrant would result in review of highly confidential materials, and if so, must abide by the guideline criteria and procedures applicable to third party physicians or psychiatrists.

In addition, the guidelines make it clear that the fact that the possessor of the materials may have grounds to challenge a subpoena or other legal process is not a legitimate basis for the use of a search warrant.

Any federal employee violating the guidelines would be subject to appropriate administrative disciplinary action by the employee's agency. In the Department of Justice,

(MORE)

violation of the guidelines, under certain circumstances, could result in dismissal.

In accordance with the provisions of the Privacy Protection Act, the guidelines may not be litigated, nor their violation used as the basis for the exclusion or suppression of evidence.

#



United States Department of Justice

ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
WASHINGTON, D.C. 20530

[28 CFR; Part 59]

~~X~~ GUIDELINES ON METHODS OF OBTAINING DOCUMENTARY MATERIALS HELD BY THIRD PARTIES

AGENCY: Department of Justice

ACTION: Proposed Rule

SUMMARY: As required by Title II of the Privacy Protection Act of 1980 (Pub. L. 96-440, §201, et seq., 42 U.S.C. 2000aa-11, et seq.), these guidelines will govern the methods used by all federal officers and employees to obtain documentary materials in the possession of persons who are neither suspects in an offense nor closely related to such suspects. The primary purpose of these guidelines is to limit the use of search warrants to obtain documentary materials held by third parties when less intrusive but equally effective alternative means of obtaining such materials exist.

DATE: Comments must be submitted on or before (please insert 30 days from the date of publication in the Federal Register).

ADDRESS: Comments may be mailed to:

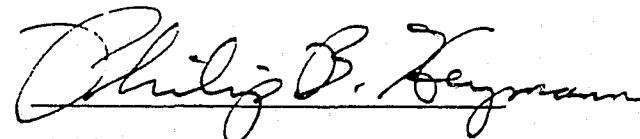
The Assistant Attorney General
Criminal Division
United States Department of Justice
Room 2107 Main Justice
Washington, D.C. 20530

FOR FURTHER INFORMATION CONTACT:

Mary Ellen Warlow
Criminal Division
United States Department of Justice
Room 2209 Main Justice
Washington, D.C. 20530

(202) 633-3645

Accordingly, under the authority of Title II of the Privacy Protection Act of 1980, Pub. L. 96-440, §201, et seq., 42 U.S.C. 2000aa-11, et seq., the Attorney General proposes to issue, as a new Part 59 to Title 28, Code of Federal Regulations, guidelines on methods of obtaining documentary materials held by third parties to read substantially as follows:



Philip B. Heymann
Assistant Attorney General
Criminal Division

Date: December 29, 1980

PART 59--GUIDELINES ON METHODS OF OBTAINING DOCUMENTARY

MATERIALS HELD BY THIRD PARTIES

Sec.

59.1 Introduction.

59.2 Definitions.

59.3 Applicability.

59.4 Procedures.

59.5 Sanctions.

[AUTHORITY: Title II of the Privacy Protection Act of 1980(Pub. L. 96-440, § 201, et seq., 42 U.S.C. 2000aa-11, et seq.)]

§ 59.1 Introduction.

(a) A search for documentary materials necessarily involves intrusions into personal privacy. First, the privacy of a person's home or office may be breached. Second, the execution of such a search may require examination of private papers within the scope of the search warrant, but not themselves subject to seizure. In addition, where such a search involves intrusions into professional, confidential relationships, the privacy interests of other persons are also implicated.

(b) It is the responsibility of federal officers and employees to recognize the importance of these personal privacy interests, and to protect against unnecessary intrusions. Generally, when documentary materials are held by a disinterested

third party, a subpoena, administrative summons, or governmental request will be an effective alternative to the use of a search warrant and will be considerably less intrusive. The purpose of the guidelines set forth in this part is to assure that federal officers and employees do not use search and seizure to obtain documentary materials in the possession of disinterested third parties unless reliance on alternative means would substantially jeopardize their availability (e.g., by creating a risk of destruction, etc.) or usefulness (e.g., by detrimentally delaying the investigation, destroying a chain of custody, etc.). Therefore, the guidelines in this part establish certain criteria and procedural requirements which must be met before a search warrant may be used to obtain documentary materials held by disinterested third parties. The guidelines in this part are not intended to inhibit the use of less intrusive means of obtaining documentary materials such as the use of a subpoena, summons, or formal or informal request.

§ 59.2 Definitions.

As used in this part --

(a) the term "attorney for the government" shall have the same meaning as is given that term in Rule 54(c) of the Federal Rules of Criminal Procedure;

(b) the term "designee" of the Attorney General means any official of the Department of Justice at the level of

Deputy Assistant Attorney General or above, who has been specifically designated by the Attorney General to approve search warrant applications governed by subsection 3(b) of this part.

(c) the term "disinterested third party" means a person or organization not reasonably believed to be --

(1) a suspect in the criminal offense to which the materials sought under these guidelines relate; or

(2) related by blood or marriage to such a suspect;

(d) the term "documentary materials" means any materials upon which information is recorded, and includes, but is not limited to, written or printed materials, photographs, films or negatives, audio or video tapes, or materials upon which information is electronically or magnetically recorded, but does not include materials which constitute contraband, the fruits or instrumentalities of a crime, or things otherwise criminally possessed; and

(e) the term "law enforcement officer" shall have the same meaning as the term "federal law enforcement officer" as defined in Rule 41(h) of the Federal Rules of Criminal Procedure.

§ 59.3 Applicability.

(a) The guidelines set forth in this part apply, pursuant to Title II of the Privacy Protection Act of 1980

(Pub. L. 96-440, § 201, et seq., 42 U.S.C. 2000aa-11, et seq.), to the procedures used by any federal officer or employee, in connection with the investigation or prosecution of a criminal offense, to obtain documentary materials in the private possession of a disinterested third party.

(b) The guidelines set forth in this part do not apply to:

(1) audits, examinations, or regulatory or compliance inspections pursuant to federal statute or the terms of a federal contract;

(2) governmental access to documentary materials for which valid consent has been obtained; or

(3) methods of obtaining documentary materials whose location is known but which have been abandoned or which cannot be obtained through subpoena or request because they are in the possession of a person whose identity is unknown and cannot with reasonable effort be ascertained.

(c) The use of search and seizure to obtain documentary materials which are believed to be possessed for the purpose of disseminating to the public a book, newspaper, broadcast, or other form of public communication is subject, in addition to any limitations or requirements imposed by the guidelines, in this part to the limitations set out in Title I of the Privacy Protection Act of 1980 (Pub. L. 96-440, § 101, et seq., 42 U.S.C. 2000aa, et seq.).

§ 59.4 Procedures.

(a) Provisions governing the use of search warrants generally.

(1) A search warrant should not be used to obtain documentary materials believed to be in the private possession of a disinterested third party unless it appears that the use of a subpoena, summons, request, or other less intrusive alternative means of obtaining the materials would substantially jeopardize the availability or usefulness of the materials sought, and the application for the warrant has been authorized as provided in paragraph (2) below.

(2) No federal officer or employee shall apply for a warrant to search for and seize documentary materials believed to be in the private possession of a disinterested third party unless the application for the warrant has been authorized by an attorney for the government. Provided, however, that in an emergency situation in which the immediacy of the need to seize the materials does not permit an opportunity to secure the authorization of an attorney for the government, the application may be authorized by a supervisory law enforcement officer in the applicant's department or agency, if the appropriate United States Attorney is notified of the authorization and the basis for

justifying such authorization under this part within 24 hours of the authorization.

(b) Provisions governing the use of search warrants which may intrude upon professional, confidential relationships.

(1) A search warrant should not be used to obtain documentary materials believed to be in the private possession of a disinterested third party physician, lawyer, psychiatrist, or clergyman, under circumstances in which the materials sought, or other materials likely to be reviewed during the execution of the warrant, contain confidential information on patients or clients which was furnished for the purposes of professional counseling or treatment, unless --

(i) it appears that the use of a subpoena, summons, request, or other less intrusive alternative means of obtaining the materials would substantially jeopardize the availability or usefulness of the materials sought;

(ii) access to the documentary materials appears to be of substantial importance to the investigation or prosecution for which they are sought; and

(iii) the application for the warrant has been approved as provided in paragraph (2) below.

(2) No federal officer or employee shall apply for a warrant to search for and seize documentary materials believed to be in the private possession of a disinterested third party physician, lawyer, psychiatrist, or clergyman under the circumstances described in paragraph (1) above, unless, upon the recommendation of the United States Attorney, the Attorney General or his designee has authorized the application for the warrant. Provided, however, that in an emergency situation in which the immediacy of the need to seize the materials does not permit an opportunity to secure the authorization of the Attorney General or his designee, the application may be authorized by the United States Attorney if the Attorney General or his designee is notified of the authorization and the basis for justifying such authorization under this part within 72 hours of the authorization.

(3) Whenever possible, a request for authorization by the Attorney General or his designee of a search warrant application pursuant to paragraph (2) above shall be made in writing and shall include:

(i) the application for the warrant; and

(ii) a brief description of the facts and circumstances advanced as the basis for recommending

authorization of the application under this part.

If a request for authorization of the application is made orally or if, in an emergency situation, the application is authorized by the United States Attorney as provided in paragraph (2) above, a written record of the request including the materials specified in subparagraphs (i) and (ii) shall be transmitted to the Attorney General or his designee within 7 days. The Attorney General or his designee shall keep a record of the disposition of all requests for authorizations of search warrant applications made under this subsection (b).

(4) A search warrant authorized under paragraph (2) above shall be executed in such a manner as to minimize to the greatest extent practicable scrutiny of confidential materials.

(5) Although it is impossible to define the full range of additional doctor-like therapeutic or counseling relationships which involve the divulging of private information, the United States Attorney should determine whether a search for documentary materials held by other disinterested third party professionals involved in such relationships (e.g., psychologists or psychiatric social workers) would implicate the special privacy concerns which are addressed in this subsection. If the United States Attorney determines

that such a search would require review of extremely confidential information furnished or retained for the purposes of professional counseling or treatment, the provisions of this subsection should be applied. Otherwise at a minimum, the requirements of subsection (a) must be met.

(c) Considerations bearing on choice of methods.

In determining whether, as an alternative to the use of a search warrant, the use of a subpoena or other less intrusive means of obtaining documentary materials would substantially jeopardize the availability or usefulness of the materials sought, the following factors, among others, should be considered:

(1) whether it appears that the use of a subpoena or other alternative which gives advance notice of the government's interest in obtaining the materials would be likely to result in the destruction, alteration, concealment, or transfer of the materials sought; considerations bearing on this issue may include:

(i) whether a suspect has access to the materials sought;

(ii) whether there is a close relationship of friendship, loyalty, or sympathy between the possessor of the materials and a suspect;

(iii) whether the possessor of the materials is under the domination or control of a suspect;

(iv) whether the possessor of the materials has an interest in preventing the disclosure of the materials to the government;

(v) whether the possessor's willingness to comply with a subpoena or request by the government would be likely to subject him to intimidation or threats of reprisal;

(vi) whether the possessor has previously acted to obstruct a criminal investigation or judicial proceeding or refused to comply with or acted in defiance of court orders; or

(vii) whether the possessor has expressed an intent to destroy, conceal, alter, or transfer the materials;

(2) the immediacy of the government's need to obtain the materials; considerations bearing on this issue may include:

(i) whether the immediate seizure of the materials is necessary to prevent injury to persons or property;

(ii) whether the prompt seizure of the materials is necessary to preserve their evidentiary value; or

(iii) whether delay in obtaining the materials would significantly jeopardize an ongoing investigation or prosecution.

The fact that the disinterested third party possessing the materials may have grounds to challenge a subpoena or other legal process is not in itself a legitimate basis for the use of a search warrant.

§ 59.5 Sanctions.

(a) Any federal officer or employee violating the guidelines set forth in this part shall be subject to appropriate administrative disciplinary action by the agency or department by which he is employed.

(b) Pursuant to section 202 of the Privacy Protection Act of 1980 (Pub. L. 96-440, § 202, 42 U.S.C. 2000aa-12), an issue relating to the compliance, or the failure to comply, with the guidelines set forth in this may not be litigated, and a court may not entertain such an issue as the basis for the suppression or exclusion of evidence.

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LEGISLATIVE AFFAIRS

Ninety-sixth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Thursday, the third day of January,
one thousand nine hundred and eighty

An Act

To limit governmental search and seizure of documentary materials possessed by persons, to provide a remedy for persons aggrieved by violations of the provisions of this Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Privacy Protection Act of 1980".

TITLE I—FIRST AMENDMENT PRIVACY PROTECTION

PART A—UNLAWFUL ACTS

SEC. 101. (a) Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce; but this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if—

(1) there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate: *Provided, however,* That a government officer or employee may not search for or seize such materials under the provisions of this paragraph if the offense to which the materials relate consists of the receipt, possession, communication, or withholding of such materials or the information contained therein (but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under the provisions of section 793, 794, 797, or 798 of title 18, United States Code, or section 224, 225, or 227 of the Atomic Energy Act of 1954 (42 U.S.C. 2274, 2275, 2277), or section 4 of the Subversive Activities Control Act of 1950 (50 U.S.C. 783)); or

(2) there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being.

(b) Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize documentary materials, other than work product materials, possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce; but this provision shall not impair or affect the ability of any government

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officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if—

(1) there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate: *Provided, however,* That a government officer or employee may not search for or seize such materials under the provisions of this paragraph if the offense to which the materials relate consists of the receipt, possession, communication, or withholding of such materials or the information contained therein (but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under the provisions of section 793, 794, 797, or 798 of title 18, United States Code, or section 224, 225, or 227 of the Atomic Energy Act of 1954 (42 U.S.C. 2274, 2275, 2277), or section 4 of the Subversive Activities Control Act of 1950 (50 U.S.C. 783));

(2) there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being;

(3) there is reason to believe that the giving of notice pursuant to a subpoena duces tecum would result in the destruction, alteration, or concealment of such materials; or

(4) such materials have not been produced in response to a court order directing compliance with a subpoena duces tecum, and—

(A) all appellate remedies have been exhausted; or

(B) there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpoena would threaten the interests of justice.

(c) In the event a search warrant is sought pursuant to paragraph (4)(B) of subsection (b), the person possessing the materials shall be afforded adequate opportunity to submit an affidavit setting forth the basis for any contention that the materials sought are not subject to seizure.

PART B—REMEDIES, EXCEPTIONS, AND DEFINITIONS

SEC. 105. This Act shall not impair or affect the ability of a government officer or employee, pursuant to otherwise applicable law, to conduct searches and seizures at the borders of, or at international points of, entry into the United States in order to enforce the customs laws of the United States.

SEC. 106. (a) A person aggrieved by a search for or seizure of materials in violation of this Act shall have a civil cause of action for damages for such search or seizure—

(1) against the United States, against a State which has waived its sovereign immunity under the Constitution to a claim for damages resulting from a violation of this Act, or against any other governmental unit, all of which shall be liable for violations of this Act by their officers or employees while acting within the scope or under color of their office or employment; and

(2) against an officer or employee of a State who has violated this Act while acting within the scope or under color of his office or employment, if such State has not waived its sovereign immunity as provided in paragraph (1).

(b) It shall be a complete defense to a civil action brought under paragraph (2) of subsection (a) that the officer or employee had a reasonable good faith belief in the lawfulness of his conduct.

(c) The United States, a State, or any other governmental unit liable for violations of this Act under subsection (a)(1), may not assert as a defense to a claim arising under this Act the immunity of the officer or employee whose violation is complained of or his reasonable good faith belief in the lawfulness of his conduct, except that such a defense may be asserted if the violation complained of is that of a judicial officer.

(d) The remedy provided by subsection (a)(1) against the United States, a State, or any other governmental unit is exclusive of any other civil action or proceeding for conduct constituting a violation of this Act, against the officer or employee whose violation gave rise to the claim, or against the estate of such officer or employee.

(e) Evidence otherwise admissible in a proceeding shall not be excluded on the basis of a violation of this Act.

(f) A person having a cause of action under this section shall be entitled to recover actual damages but not less than liquidated damages of \$1,000, and such reasonable attorneys' fees and other litigation costs reasonably incurred as the court, in its discretion, may award: *Provided, however,* That the United States, a State, or any other governmental unit shall not be liable for interest prior to judgment.

(g) The Attorney General may settle a claim for damages brought against the United States under this section, and shall promulgate regulations to provide for the commencement of an administrative inquiry following a determination of a violation of this Act by an officer or employee of the United States and for the imposition of administrative sanctions against such officer or employee, if warranted.

(h) The district courts shall have original jurisdiction of all civil actions arising under this section.

SEC. 107. (a) "Documentary materials", as used in this Act, means materials upon which information is recorded, and includes, but is not limited to, written or printed materials, photographs, motion picture films, negatives, video tapes, audio tapes, and other mechanically, magnetically or electronically recorded cards, tapes, or discs, but does not include contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used as, the means of committing a criminal offense.

(b) "Work product materials", as used in this Act, means materials, other than contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used, as the means of committing a criminal offense, and—

(1) in anticipation of communicating such materials to the public, are prepared, produced, authored, or created, whether by the person in possession of the materials or by any other person;

(2) are possessed for the purposes of communicating such materials to the public; and

(3) include mental impressions, conclusions, opinions, or theories of the person who prepared, produced, authored, or created such material.

(c) "Any other governmental unit", as used in this Act, includes the District of Columbia, the Commonwealth of Puerto Rico, any terri-

S. 1790—4

tory or possession of the United States, and any local government, unit of local government, or any unit of State government.

SEC. 108. The provisions of this title shall become effective on January 1, 1980, except that insofar as such provisions are applicable to a State or any governmental unit other than the United States, the provisions of this title shall become effective one year from the date of enactment of this Act.

TITLE II—ATTORNEY GENERAL GUIDELINES

SEC. 201. (a) The Attorney General shall, within six months of date of enactment of this Act, issue guidelines for the procedures to be employed by any Federal officer or employee, in connection with the investigation or prosecution of an offense, to obtain documentary materials in the private possession of a person when the person is not reasonably believed to be a suspect in such offense or related by blood or marriage to such a suspect, and when the materials sought are not contraband or the fruits or instrumentalities of an offense. The Attorney General shall incorporate in such guidelines—

(1) a recognition of the personal privacy interests of the person in possession of such documentary materials;

(2) a requirement that the least intrusive method or means of obtaining such materials be used which do not substantially jeopardize the availability or usefulness of the materials sought to be obtained; and

(3) a recognition of special concern for privacy interests in cases in which a search or seizure for such documents would intrude upon a known confidential relationship such as that which may exist between clergyman and parishioner; lawyer and client; or doctor and patient; and

(4) a requirement that an application for a warrant to conduct a search governed by this title be approved by an attorney for the government, except that in an emergency situation the application may be approved by another appropriate supervisory official if within 24 hours of such emergency the appropriate United States Attorney is notified.

(b) The Attorney General shall collect and compile information on, and report annually to the Committees on the Judiciary of the Senate and the House of Representatives on the use of search warrants by Federal officers and employees for documentary materials described in subsection (a)(3).

S. 1790—5

SEC. 202. Guidelines issued by the Attorney General under this title shall have the full force and effect of Department of Justice regulations and any violation of these guidelines shall make the employee or officer involved subject to appropriate administrative disciplinary action. However, an issue relating to the compliance, or the failure to comply, with guidelines issued pursuant to this title may not be litigated, and a court may not entertain such an issue as the basis for the suppression or exclusion of evidence.

Speaker of the House of Representatives.

*Vice President of the United States and
President of the Senate.*