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U.S. Economic Espionage Act Withstands Constitutional Challenge in First Conviction by Trial: *United States v. Chung*

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In 1996, the United States Congress passed the Economic Espionage Act (EEA) to "address a glaring gap in Federal law" by, for the first time, criminalizing the theft of "intangible property, such as trade secrets or intellectual property." Cong. Rec., Senate, 104th Congress, 2d Session (Oct. 2, 1996). Since then, the EEA has been sparingly used, and the first conviction by trial under the EEA did not occur until July of this year. That recent landmark case was significant because it involved a constitutional challenge to the EEA's definition of "trade secret" and a waiver of the defendant's right to trial by jury. The case also illustrated the government's methods in investigating and prosecuting offenses under the EEA.

The defendant, Dongfan Chung, spent most of his career as a structural engineer working for Boeing. Federal agents became interested in Mr. Chung after executing a search warrant at the home of another engineer who worked for a naval defense contractor. During the search, the federal agents found an address book with Mr. Chung's contact information and correspondence between the two engineers about secret technical information. The federal agents began a surveillance of Mr. Chung and searched his trash, discovering technical

documents from Boeing interspersed within the pages of newspapers. The federal agents used the evidence from Mr. Chung's trash to obtain a warrant from the Court to search his home. In Mr. Chung's home, the federal agents discovered a well-organized library of over 300,000 pages of secret Boeing documents.

The government indicted Mr. Chung on, among others, charges of violating the EEA. Mr. Chung waived his right to a jury trial, consenting instead to have his case decided by a judge. That decision was perhaps motivated by the complex technology involved in the case that would be difficult for a jury to comprehend and Mr. Chung's defense strategy, which focused on legal challenges to the EEA rather than factual disputes over the government's evidence.

Mr. Chung argued that the EEA's definition of "trade secret" is unconstitutional, because it vaguely defines "trade secret" with imprecise terms such as "information" that "is not generally known," "not readily ascertainable through proper means," and has "independent economic value." *United States v. Chung*, 622 F. Supp.2d 971, 974 (C.D. Calif. 2009). Similarly, Mr. Chung contended that he could not be convicted under the EEA unless the government proved that he "knew" the information he took from Boeing was a "trade secret" as defined by the EEA. See *United States v. Chung*, 633 F. Supp.2d 1134, 1143 (C.D. Calif. 2009).

The Court ruled that the EEA is not unconstitutionally vague, noting that the EEA incorporated the well-known definition of "trade secret" from the Uniform Trade Secret Act that has been adopted in civil statutes in at least forty-four of the fifty American states. *Chung*, 622 F. Supp.2d at 974. However, the Court agreed with Mr. Chung on the knowledge requirement, ruling that the government must prove that he "knew" the information that he took from Boeing was a "trade secret" and explaining that "[i]t would be unjust . . . to hold Mr. Chung accountable for possession of what he honestly believed was publicly available information."

Chung, 633 F. Supp.2d at 1145. Nevertheless, the Court found that proving Mr. Chung knew the documents that he took from Boeing contained trade secrets "is not exceedingly difficult" because he was aware of "the measures taken to protect the information." *Id.* at 1145-46. Moreover, the Court found that Mr. Chung's library of Boeing documents constituted a "do-it-yourself kit" for technology that "took a large team of engineers five years to develop" and that if acquired by competitors would put Boeing "at a serious competitive disadvantage." *Id.* at 1147. The Court, therefore, found that Mr. Chung knew the information was secret and had independent economic value.

Mr. Chung's case established a potential defense under the EEA—a person does not violate the EEA if he subjectively believes that the misappropriated information is publicly known or available. That defense, however, will not succeed if the government can show that the misappropriated information was knowingly taken in violation of company security policies and restrictions. Mr. Chung's case, therefore, emphasizes the importance for companies to establish formal trade secret policies and security practices. If Boeing had not instituted such measures in this particular case, the government's prosecution of Mr. Chung under the EEA may have failed.

Mr. Chung was convicted under a section of the EEA with a maximum penalty of 15 years imprisonment. *Id.* at 1143. Sentencing will proceed after the government and Mr. Chung have an opportunity to make recommendations to the Court under the applicable sentencing guidelines.

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