THE USE OF CLASSIFIED INFORMATION IN LITIGATION

HEARINGS

BEFORE THE

SUBCOMMITTEE ON SECRECY AND DISCLOSURE

OF THE

SELECT COMMITTEE ON INTELLIGENCE

OF THE

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THE USE OF CLASSIFIED INFORMATION IN LITIGATION

WEDNESDAY, MARCH 1, 1978

U.S. SENATE,
SUBCOMMITTEE ON SECRECY AND DISCLOSURE
OF THE SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 457, Russell Senate Office Building, Senator Joseph R. Biden (chairman of the subcommittee) presiding.

Present: Senators Biden (presiding), Hathaway, Hart, Huddleston and Pearson.

Also present: Audrey Hatry, clerk of the committee.

Senator BIDEN. The hearing will come to order, please.

I would like to begin by apologizing for being late. It is not the fault of any other member of the committee than myself. I was commuting from my home State, and we haven't learned how to drive in the snow, Admiral, up in Delaware, and there were two inches of snow and you would have thought there were three feet the way people were driving on the turnpike. So I apologize for the delay.

These hearings culminate a year long study by the Secrecy and Disclosure Subcommittee of the Intelligence Committee. We have been concentrating in this first year upon the impact of secrecy on the enforcement of the law and the administration of justice. We have come to the surprising conclusion that the inevitable tension between the rule of law and the secrecy necessary for intelligence operations has at times, in my opinion, undermined both the rule of law and secrecy. These hearings will explore that phenomenon and hopefully will lead to a public discussion which will result in a better accommodation between law enforcement and secrecy.

We examined first the leak cases, that is, the cases of unauthorized disclosure of secrets to the public media, and then classical espionage cases. We learned in our year long study that at times the desire to preserve secrecy can undermine the criminal sanctions intended to enforce secrecy. Leaks of classified information and the covert transmission of secrets to agents of a foreign power can and do at times go unpunished. Investigations stop because of fears—and I emphasize legitimate fears—that further investigation or prosecution of the crime will result in the further necessary disclosure of very sensitive information that will undermine the national security.

Our concern over this problem deepened as we learned that the fear of disclosure of intelligence information could also frustrate

investigation and prosecution of crimes less directly related to the national security, including perjury to Congress, narcotics violations, possible violations of the intelligence community legislative charters, and even have affected, in one case, in our opinion, murder. The purpose of these hearings is to discuss this problem, to the extent that it can be discussed publicly, and to search for solutions.

We will have difficulties, of course, in discussing this problem in a public hearing. We do not want to do further damage to the national security by disclosing exactly what we found in any one of the files we have reviewed. In practically every actual case we have reviewed, there were real national secrets at stake, and at least a reasonable argument for foregoing indictment and trial.

In order to provide focus for the hearings and to keep the discussion from becoming too amorphous, I have asked the subcommittee staff to prepare an unclassified memorandum for the use in these hearings which would accomplish two goals. The first is that it would summarize the results of staff reviews, and second, it would create hypothetical cases based upon review of case files which we could use in public hearings.

I should also mention a few caveats about the staff memorandum. It is a tentative summary of the staff's review of the files and represents neither a final judgment nor a formal position. But we have discussed the main finding both in the intelligence community and with the Department of Justice, and have found rough agreement on many, but not all, points. I am sure every member and his staff will review these files before we adopt formal committee positions on this matter.

Second, we have attempted, in developing these hypothetical cases, not to even give the impression that they are variations of actual cases. I know that it is tempting for members of the press to take these cases and extrapolate the facts in the hypotheticals on to real cases. To those members of the press who are so inclined, I must emphasize that you will be doing this at your own peril. The only relationship between the hypothetical cases and real cases is the role that the fear of disclosure of classified information played in the Executive branch decision not to proceed with investigation and prosecution.

Before proceeding with the hearings I will read an excerpt from the staff memorandum, and I quote.

Summary of Findings

Our inquiry into the over 40 actual cases has led the staff to the following conclusions. (A) There is a major breakdown in the administration of the criminal espionage statutes in leak cases. To date, we have been unable to identify a single successful prosecution of an individual who leaked classified information to a publication. This record was found despite the nearly unanimous assessment that at least some leaks cause serious harm to the national security.

The breakdown results in part from an impasse between the Department of Justice and the intelligence community of how to deal with the use of classified information necessary for investigation and prosecution in these cases. Briefly stated, there is no formal

mechanism that we know of to weigh the risks of further disclosure against the benefits of prosecution.

Common circumstance in leak cases is that the intelligence agency whose information is leaked also possessed the information and expertise necessary to investigate or prosecute the leak.

In some cases we have reviewed, it appears that the victim agency and the Department of Justice, in effect, create an unnecessary dilemma or impasse in order to frustrate investigation or prosecution for other reasons, including: prosecution of a leak through confirmation of the leak will damage the agency's reputation for keeping secrets and thereby undermine its ability to obtain confidential information from intelligence agencies both at home and abroad. Also, that the leak was from a high agency official who acted without higher authority, but the judgment is made that pursuit of the investigation would embarrass the official; or the leak is actually an authorized disclosure and pursuit of the investigation would be unjust.

The unauthorized public disclosure of classified information which endangers national security is only a small portion of the intelligence product which is leaked routinely to the news media. Officials often make unauthorized disclosures of classified information in an attempt to influence public debate in a manner they believe to be in the national interest. In attempting to serve their view of the national interest, some damage to the sources and methods of intelligence collection may be inflicted. These leaks, in other words, are the mistakes that occur in the widespread sub rosa practice of providing selected intelligence information to the news media. And this creates serious problems.

Some of the problems are because the process is informal and quasi-legal, there is no way to insure that the public receives a balanced selection of intelligence information that is important to the public debate about defense and foreign policy.

Second, the same hit or miss system that shortchanges the public on one end also results in occasional compromise of sensitive intelligence information. Insofar as the subcommittee staff could determine, most compromises were accidental byproducts of a disclosure made to accomplish some other purpose. Typically, a disclosure about Soviet plans for a new ICBM might accidentally compromise the source of that information.

Now, the disagreements over the use of classified information also impedes classical espionage prosecutions. However, the likelihood that there will be a consensus resolution of the disagreement is much more likely for the following reasons because classical espionage cases are generally considered more serious than leak cases, and second, because the federal espionage statutes are more closely drawn to cover classical espionage cases than leak cases. Many classical espionage cases are, in effect, out of the control of the intelligence community because the law enforcement machinery has been engaged by an arrest or because the public or officials outside the intelligence community know of the crime and therefore create pressure upon the intelligence community to provide information necessary for prosecution.

Usually the constitutional problems, that is, primarily first amendment problems, are much less severe in classical espionage cases than they are in leak cases.

However, we have reviewed classical espionage cases which have not proceeded to either investigation or prosecution for the same reason that leak cases cannot proceed, concern about the disclosure of intelligence information in the course of investigation or prosecution being the reason. Furthermore, we know of cases where the disagreements between the intelligence community and the Department of Justice over classical espionage cases almost required Presidential intervention to resolve the disagreement.

The impasse over the use of classified information occurs in other types of criminal cases, and at times the Department of Justice may have been placed at a marked disadvantage because of this dilemma by defendants in perjury, narcotics, and even murder cases.

Before turning to Senator Pearson, I would like to make one final comment about the spirit in which these hearings will be conducted. These are not adversary proceedings, for members of the committee and the intelligence community agree on the seriousness of this problem. Indeed, I doubt that the findings that I have just read are news to any experienced intelligence officers, and least of which, to the Director.

Therefore, I hope we will spend our energies in these hearings on seeking solutions. We will hear a large variety of proposals ranging from new *in camera* procedures, recasting espionage statutes so that there is less jeopardy to secrets in the presentation of criminal cases, and even establishing new types of administrative tribunals for dealing with intelligence employees who violate the law. In these hearings and in the weeks and months to come, I look forward to working with you, Admiral Turner, and the other witnesses who will appear here today and the next couple of days, in the spirit of cooperation and accommodation, and in the hope that we can find a solution to what I think we would all agree is a most vexing problem.

Senator Pearson?

Senator PEARSON. I thank the chairman.

I have an opening statement which I will simply put in the record because it is repetitious of the chairman's very excellent definition of the purposes of this hearing, but I would like to read two paragraphs because they represent to me the fundamental purpose of the business that we are about, and that is to say that these hearings are based on two elementary premises. The first is that there is a compatibility between the concept of a free society and the concept that some secrecy is necessary to maintain that society's freedom. And second, that the inherent conflicts arising from this premise are not subject to absolute resolution. They can be resolved only by continually pursuing a balance between opposing interests.

And that is really what we are doing today. It is what we will be doing during the course of these hearings. We are pursuing a compatible balance. And we are doing it in public because we are convinced that if the public knows more about the subject, a consensus will emerge which will allow us the free use of information within the context of valid security needs.

Mr. Chairman, I ask that the balance of this statement be put in the record at this time.

Senator BIDEN. Without objection the entire statement will be put in the record.

[The prepared statement of Senator Pearson follows:]

PREPARED STATEMENT OF SENATOR JAMES B. PEARSON, A U.S. SENATOR FROM KANSAS

These hearings are based on two elemental premises. First, that there is a compatability between the concept of a free society and the concept that some secrecy is necessary to maintain that society's freedom. And, second, that the inherent conflicts arising from this premise are not subject to absolute resolution. They can be resolved only by continually pursuing a balance between opposing interests.

That is really what we are doing today. It is what we will be doing during the course of these hearings. We are pursuing a compatible balance. We are doing it in public because we are convinced that if the public knows more about the subject a consensus will emerge which will allow the free use of information within the context of valid security needs.

The basic feature of secrecy is limitation of access to secrets. So, society as a whole cannot make a decision on whether or not individual matters are legitimately being kept secret. It cannot make a decision on the intangible cost of keeping these secrets. Society, therefore, must be assured that accountable mechanisms are effectively in place to make proper judgments in their behalf.

For nearly a year now, the Secrecy and Disclosure Subcommittee has been examining those mechanisms on which society is relying.

We have been studying the classification procedure which determines what information should be protected by secrecy. During the course of our work the administration has also examined this problem. New classification procedures are now being implemented. There is room for further improvement and we are assured that additional adjustments will be made.

We have also studied compartmentation, the process of keeping secrets within secrets. Compartmentation is the formalized mechanism for enforcing a strict "need to know" requirement for access to particularly sensitive information. Compartmentation is of continuing interest to our Subcommittee because of its potential to impede the timely flow of vital intelligence to policymakers.

And, perhaps most importantly, we have examined the problems secrecy presents to the enforcement of our laws. The Constitution provides a requirement for public trial. It is the unique right which must be protected against any—no matter how well-intentioned—infringement. From that and other Constitutional provisions, a dilemma has arisen. When a public prosecution requires the use of classified information, the interests of national secrets come into conflict with the interests of law enforcement.

The specifics of this last area of concern serve as the focus for these hearings. We will be examining the successes and failures of the mechanisms government employs to ensure proper balance between society's sometimes conflicting interests of national security and law enforcement.

Senator BIDEN. Senator Hathaway.

Senator HATHAWAY. Thank you, Mr. Chairman. I just want to add a note to what you said to make sure that the only issue that we are dealing with is not just leaks and espionage cases. Equally important is the situation where the Executive branch learns of serious crimes as a result of their intelligence sources and methods, crimes like narcotics, bribery, for example, and then can't do anything about it. I think it is terribly important that we ask our witnesses to address those problems as well. In short, what happens when the Government learns of a serious crime from a secret source? Do these crimes get reported to the Department of Justice? Can they be prosecuted

or even investigated if the information was obtained from secret informants or sources that need to be protected?

It is my understanding that that is a substantial problem and of course, that raises the obvious question, what good does it do to be able to get the information if no one can do anything about it.

Thank you, Mr. Chairman.

Senator BIDEN. Thank you, Senator.

Senator Huddleston.

Senator HUDDLESTON. I want to thank you, Mr. Chairman. My statement will be submitted in the record. I just want to commend you for conducting these hearings on this very important subject, very important area in the whole picture of intelligence operations. I think that this is a very significant problem that we are dealing with, and I am anxious to hear from the witnesses as to what their approach will be toward some of the hypothetical cases that have been listed, and I think that we are in for some extremely important testimony that undoubtedly will result in some extremely important recommendations from the subcommittee.

[The prepared statement of Senator Huddleston follows:]

PREPARED STATEMENT OF SENATOR WALTER D. HUDDLESTON, A U.S. SENATOR FROM KENTUCKY

I would first like to commend Senator Biden for the extremely useful work he has done on this subject. It is a problem which we had not anticipated uncovering, and one which everyone seems to agree deserves the most thorough examination possible.

One reason why I believe this issue merits our close scrutiny is its relevance to an important aspect of the intelligence charter legislation we recently introduced. The draft charters provide both criminal and civil sanctions for serious violations of the rights of U.S. citizens by intelligence agencies. It is possible and, indeed, probable that criminal or civil litigation arising out of the charters will involve sensitive classified information. If the criminal and civil sanctions of the charters are to be effective, we must, therefore, be certain that the judicial process can adequately deal with such information. I hope these hearings will contribute to our understanding of this problem and suggest ways we can improve our ability to handle it.

Senator BIDEN. Thank you.

Before I recognize our next Senator, I would like to make special comment that Senator Hart has spent a great deal of time in this area particularly investigating the leak cases to which I referred, and I appreciate not only his effort but the expertise he brings to that subject.

Senator Hart.

Senator HART. Mr. Chairman, unauthorized disclosure, as someone has suggested, is something that everybody does particularly in this town, but that gentlemen do not discuss in public. At the chairman's suggestion I have been asked to help break that taboo today and hope that this Secrecy Subcommittee chaired by Senator Biden can shed some light on a very shadowy subject.

When we talk about leaks or unauthorized disclosures, what do we really mean? We all know that each day dozens of public officials, high and low, in the Government make statements to the press, and in making these statements they choose not to take responsibility for their acts and ask not to be quoted by name. These

are the so-called unnamed sources or not for attribution stories. But among those many stories are a few that contained classified information so sensitive that publication may do irreparable—I repeat, irreparable—harm to our Nation's security. And that is what I at least am concerned about, because leaks of this kind harm our Nation as surely as turning over the information directly to some foreign source.

Let me in part summarize some of what the staff has found about leaks and add my own interpretation at that time.

Now, the first basic question is a tough one. Who leaks classified information? I think we can illuminate the subject a little. Allen Dulles, the first Director of Central Intelligence, or one of the first, said, "The contrived leak is the name I give to the spilling of information without the authority to do so, and it has occurred most often in the Defense Department and at times in the State Department."

In 1971 another Director of Central Intelligence, Richard Helms, conducted a study of serious leaks for the so-called plumbers squad at the White House. That study found that one third of the sources of serious leaks were "high administration officials," and still another third of the serious leaks appeared to originate in the Defense Department, the intelligence community, and to a lesser extent the diplomatic community. Interestingly enough, less than 5 percent of those leaks were attributed to sources in Congress, which I think is a startling revelation for many of us in the Congress. The Helms study found that leaks were particularly frequent at budget time when departments were trying to convince the Congress of the merits of their allotment of Federal funds. And that is what we know about who does the leaking. They are frequently high officials in the administration and persons in the Pentagon, the intelligence community, and the State Department.

The next question is: What kind of classified information is leaked? Frankly, a little of everything is leaked over time, according to our findings. But an extremely high percentage of leaked information that causes concern in the intelligence community is usually about the Soviet Union, its military plans and capabilities, and sometimes its diplomatic initiatives abroad. Now, I would like to venture an explanation of these leaks. Frankly, almost everything the free world knows about Soviet military power, plans, and activities, comes from U.S. secret intelligence. Little is available from public sources, because the Soviets are so secretive about this subject. But information about Soviet plans and capabilities is essential to any informed public debate about what kind of defense we need and how much we should spend for it. And that belief that the public interest will be served by making selected information available is presumably what motivates the officials who leak the classified information. Sometimes, however, they also leak information which endangers sensitive sources and methods and which threatens to cause real damage to our Nation's security.

Now, I think this is a dangerous and haphazard process. On the one hand we have no guarantee that the public receives a balanced selection of information about Soviet plans and miltiary capabilities.

On the other hand the Executive branch is left absolutely powerless to deal with the exposure of secrets that are vital to protecting our national security.

Mr. Colby began, and you, Admiral Turner, have wisely continued the practice of making increasing amounts of the intelligence product of CIA available to the public. And I would suggest today the possibility of also making more extensive disclosures about what the Soviets are doing, but to make these disclosures in a manner carefully calculated to protect our sources and methods. In short, let's eliminate the motive to leak, improve the public debate about defense, and in the same stroke isolate those who continue to insist on leaking classified information. And then when we try to do something about the leaks, we will have a smaller and more manageable problem to attack.

I would like to put in the public record today a composite sample case of what does occur when a really serious leak of classified information is detected. It is not a happy story.

The leak usually comes to the attention of a high official in the intelligence community who realizes that a media account may also endanger a very sensitive source of intelligence information.

Sometimes the leak is first investigated by the Agency itself and sometimes not, but the end result is a letter to the Attorney General asking the FBI to investigate the leak.

The Department of Justice, however, does not usually initiate an investigation. Rather, it responds with a letter back to the agency containing what is called the eleven questions. Neither the Department of Justice nor the FBI will normally proceed further until the eleven questions are answered. Some of the eleven questions are sensible ones, such as whether the compromised information was properly classified in the first place, and whether the article disclosing it was accurate. In a really sensitive leak, however, the whole process grinds to a halt at question nine.

This question asks whether the information regarding the leak can be declassified for purposes of prosecution. Unless the answer to that question is a yes, the Department of Justice and FBI usually do not investigate. They reason that it is pointless to investigate a case which cannot be prosecuted since the relevant information cannot be declassified for use in the court. And so nothing happens.

The more sensitive the source that might be compromised by a leak, the more reluctant the Agency is to make a bad matter worse and declassify the information altogether. If the material is so innocuous that it can be declassified immediately for preliminary investigation, it is arguably not a very serious leak.

And there you have, I think, Mr. Chairman, the ingredients of the breakdown of the laws intended to protect our Nation's bona fide secrets from leaks as well as enemy spies.

Admiral Turner and Mr. Civiletti, as these hearings progress, I hope that we will be able to talk about possible solutions to these problems. I think the charges and countercharges that fly back and forth between the Hill and the administration and over the heads of the American public do not serve any of us well in our attempts to find out how our Nation's secrets make their way into the press.

I think the most important thing that might come from these hearings is an orderly process, as I have suggested, Admiral Turner, for turning over to the public forum in an orderly process and manner the information that we need for our national security debates, and only in that way I think will we attack the really serious problem of the systematic leaks, particularly from the Defense Department and other administration sources.

Thank you very much, Mr. Chairman.

Senator BIDEN. Thank you, Senator.

Admiral Turner, proceed in any way you feel comfortable.

STATEMENT OF ADM. STANSFIELD TURNER, DIRECTOR OF CENTRAL INTELLIGENCE, ACCOMPANIED BY ANTHONY LAPHAM, OFFICE OF GENERAL COUNSEL, CENTRAL INTELLIGENCE AGENCY

Admiral TURNER. Mr. Chairman, members of the committee, I am pleased to be here and agree with all the remarks that have been made on the seriousness and the national import of the issues before this committee.

The subject is a many-sided, complex one, and I believe one that is not well understood, and these hearings should certainly help in enlightening the American public. At the heart of it, however, what we are dealing with is a tension between two vitally important governmental interests which are often difficult and sometimes impossible to serve together, so that the service to the one may involve a sacrifice of the other. One interest has to do with the effective and impartial administration of criminal justice, with its associated requirement that relevant evidence be available for use by both the prosecution and the defense. On the other side is the interest in the successful administration of foreign and national defense policies of the United States, together with the supporting intelligence functions for which I am responsible, and the associated requirements that certain information be protected against disclosure. These interests can and do pull against each other, whenever the disclosure demands imposed by the judicial process are met by the contrary imperatives of the intelligence process. The resulting dilemmas can be very painful, and they are not infrequent.

What must be settled at the outset is whether the dilemmas that I perceive are real. If, on the scale of national values, every law enforcement interest is always superior to any intelligence interest, there could never be much of a problem. Under this view, intelligence information would simply be brought forward as needed, either by the prosecution or the defense, no matter what the consequences that might flow from the disclosure of that information at a public trial. If the opposite view were taken, so that law enforcement interests were always seen as subordinate to intelligence interests, there likwise would be little to decide in any given case. It would simply be a matter of terminating any criminal proceeding in whole or in part should any intelligence information be threatened with disclosure.

In my judgment, the correct view is neither of the above. The values are so variable that they cannot be abstractly and neatly

ordered in advance. The reality is that there are no easy formulas for decision. What that means in practice is that each case must be separately judged on its own facts, and that the intelligence interests must be taken into account, along with such pertinent considerations as justice and precedent, in reaching decisions as to whether and on what basis to proceed with prosecution. Indeed, this sort of accounting may have to be repeated several times or at several stages in the same case.

Ultimately, assuming in felony situations that a grand jury is disposed to indict, it is the Attorney General who has the discretion to exercise, the power to act, and therefore, the authority to decide whether a prosecution is warranted and on what basis to go forward. This is not to say, however, that I have no role in influencing that decision whenever intelligence interests are concerned. On the contrary I think I have a necessary role.

In the first place, I consider it my responsibility to insure that no relevant information is withheld from the Attorney General, that is, that he has access to all information, without regard to classification, that may be fairly thought to bear on this issue of whether a crime may have been committed and under what circumstances it may have been committed.

I want to stress this aspect of the subject so as to avoid any possible misunderstanding. Access to relevant information should not be a point of dispute, because the Attorney General has a clear right and need to review all such information so that his decisions may be taken with the fullest factual perspective.

Second, I see it as my responsibility to make known to the Attorney General my estimate of the importance of the intelligence information that may be identified as relevant to a criminal prosecution, and the potential impacts of the public disclosure of that information. Again, I think that this kind of estimate is something that the Attorney General must have before him if he is to make informed decisions and properly weigh the consequences of those decisions. If I were to conclude in some particular context that the Attorney General had struck an incorrect balance, my recourse would be to approach the President so that he could determine as appropriate whether the next best interests of the United States favored prosecution, and so that he would at least be aware of my forecast as to the likely consequences of that course of action.

Similarly, with respect to the declassification of documents said by the Attorney General to be needed in support of a prosecution, it seems to me that I should react positively so far as I can do so without endangering vital intelligence interests. But insofar as I conclude that the declassification of specific documents would lead to truly damaging national security effects, it seems to me that the declassification would be an irresponsible and possibly unauthorized act on my part, except as it might be directed by the President.

I should add in this connection that I know of nothing that precludes the use of a classified document as evidence in a judicial proceeding. Indeed, the use of a document in that form, assuming that it is properly classified to begin with, merely recognizes the situation for what it is; namely, one in which a national security risk is being

taken to achieve a law enforcement purpose that cannot be achieved in a risk-free way. In short, I cannot accept it as my responsibility to make a real conflict disappear by an act of declassification that pretends that effects of disclosing particular documents will be benign, when I believe the opposite to be true.

Mr. Chairman, there is an impression in some quarters that the relations between the CIA and the Department of Justice in this entire field are characterized by hostility and lack of cooperation. I am sure that Mr. Civiletti will give his own appraisal on this score later but I would like to give you my own appreciation, which is that the relations between the CIA and the Department of Justice are not at all strained or hostile, and indeed, are marked by mutual good faith and shared understandings about the dilemmas I am now discussing. Certainly it is true that there is a continuing dialogue and debate, and sometimes adversary exchanges, but that is hardly surprising in light of the divergent interests being represented. Usually there is an accommodation. But where there is disagreement, it stems not from poor relations but rather from the intrinsic difficulty of the issues we confront.

Let me turn now to some more fundamental reasons which explain why the issues present such difficulty. Without wanting to stray too far into the legal territory that is more familiar to Mr. Civiletti and other witnesses who will follow, my own sense is that the reasons are traceable to the nature of our judicial process, procedural safeguards available to an accused in a criminal case, and to some of the criminal laws with which we have to work.

A criminal trial in this country is a public event, and there are constitutional guarantees that make it so. I have no quarrel with those guarantees, but at the same time, I cannot ignore the extent to which they contribute to the problem when it comes to making evidentiary use of intelligence information. When an election is made to use such information, it is on its way into the public domain, and there are few if any ways to avoid that outcome or to limit the exposure of the information to the actual participants in the trial.

Other constitutional provisions secure to an accused broad rights of cross-examination, and the applicable rules of procedure confer on the accused rights of wide-ranging pretrial discovery to look behind the prosecution's case and to develop his own defenses.

There are not many legal tools available to regulate and control this flow of events just because the information in question happens to be sensitive from a national security standpoint. In addition, these same features make the judicial process almost as uncertain as it is open. For example, the lines of defense which will be followed, and the scope of discovery and cross-examination which will be allowed, are not matters that lend themselves to precise advance measurement. They are heavily unpredictable, and what that means is that the decision to prosecute is that much more difficult for those who must gauge as best they can, before the course is set, where it all might lead.

Again, I am not complaining about any of this, or suggesting any radical reforms that would strip away the rights of the accused, all

of which exist to assure fairness of criminal proceedings. I am only trying to describe how things look from where I sit and to put into their true settings the hard choices that have to be made.

What I have said takes on greater force when you consider the necessities of proof under some of the basic criminal statutes that are of special concern to intelligence agencies.

Let us suppose, if I can make a hypothetical case also, Mr. Chairman, that a former government employee were to be arrested in the course of delivering a CIA document to a foreign agent, and that the arrest prevented the delivery from being completed, and let us further suppose that the document summarized current Agency operations in another country and included a roster of CIA officers in that country.

A crime, under the espionage laws, certainly would have been committed, and that crime must certainly rank high in terms of compelling governmental interests in prosecution. Yet such prosecution would exact an extraordinary price. As I understand it, the government would be required to show that the information in the document was of enough significance to materially injure the national security had it fallen into the hands of the foreign agent.

Now, that burden of proof would almost surely require that the document itself be offered in evidence, that its accuracy be confirmed by a knowledgeable agency witness, and that its value be explained. In result, the trail proceedings would have succeeded in doing just what the defendant himself was being tried for having attempted but failed to do, that is, to transmit the disclosed information, and the accuracy of that information would have been verified in the bargain. I am sure that you would agree that a spectacle of that sort would not be pleasant to contemplate for those who had to struggle with a decision to prosecute.

Unattributable leaks to the press and unauthorized disclosure through attributed publications raise separate but no less troubling problems. On this front there is no statute that is generally applicable, at least none that is clearly applicable, and the lack of clarity in the law is in itself a genuine concern, if for no reason other than it leaves people in doubt as to their liabilities and may even tend to deter legitimate expression.

Let me also point out that we in the Intelligence Community have legitimate interests on both sides of this issue. On the one hand, our concern for protecting national secrets is genuine. The consequences of invasion of national secrecy can be severe. The most poignant example is that of the agent whose life or freedom is jeopardized by disclosure of his identity. Such individuals have been willing to accept great risks in order to serve our national interests, but they certainly did not sign on with us in the expectation of being exposed publicly by irresponsible citizens acting on their own.

Beyond such cases there is a wide range of clear damage from unauthorized disclosures. In some instances our relations or our negotiations with other sovereign nations can be impeded, or our access to information important to our interests can be denied. Most significantly, perhaps, is the long term effect such disclosures can have on our national intelligence efforts. Agents simply will not be

recruited to an intelligence service that appears to be an information sieve; foreign intelligence organizations simply will not share their information with such an organization; and extremely expensive technical intelligence collection systems will prove to have been a taxpayers' waste simply because a counter can be constructed for almost every system if enough detail about it is disclosed.

At the same time, Mr. Chairman, I would urge you to recognize that the seriousness of these losses through unauthorized disclosures gives us in our Nation's intelligence community great cause to support the prosecution of individuals who do the disclosing. My blood boils at the obvious callousness and selfishness of such persons, and I believe that they more than deserve the punishment which might result from prosecution. This alone is incentive for us to lean over backwards in releasing information which is essential to such judicial proceedings.

Beyond that, however, we in the intelligence community feel that the country desperately needs to prosecute these offenders in the name of deterring others.

In the brief year that I have been part of our intelligence organization we have held our breath while releasing data to permit the prosecution of three espionage cases. I assure you that the incentives to release information for the purposes of prosecution are indeed strong.

I would also and finally like to add my strong dissent with a sometimes popular view that in fact encourages individuals to break our laws in the name of whistle blowing on what they think are individuals they perceive to have performed improperly. I do not question that such whistle blowing has served our national purposes in a few instances in the past and may again in the future. I would point out, however, that the Congress, in its wisdom over the past 2 years, has created an alternative to public whistle blowing on intelligence agencies.

This is a Select Committee on Intelligence in each Chamber of the Congress. Never have I seen these committees deny a citizen's request to report on what he believes to be malperformance. In addition, the Executive branch has created a corresponding safety valve in the Intelligence Oversight Board, a body totally independent of the Intelligence Community and reporting directly to the President.

Thus, with such a body in both of these branches of our Government, a citizen has recourse, even if he suspects collusion at high levels, of one or the other. I would submit that I have yet to see one of these so-called whistle blowers who directed his whistle first to one of these authorized mechanisms.

This leads me to suspect that rather than being patriotic heroes, as some want to describe them, these individuals are more likely to be self-serving charlatans in quest of fame or fortune. In short, it is my view that we have the mechanisms for insuring that the individual citizen need not feel that he must take it unto himself to judge what is a national secret and what is not. If we do not curb this view, which by its logical extension means that 215 million Americans have the right and the ability to pass upon our national

secrets, we will degenerate into chaos in this vital zone of national defense.

Thank you, sir.

Senator BIDEN. Thank you very much, Admiral.

I would like to indicate that, with the permission of my colleagues, we should keep to a 10-minute rule on the first round, and I will withhold my questions, but I would like to get into the hypothetical cases, Admiral, and then I will yield to my colleagues for their questions on the first round.

But before even doing that, I want to reiterate that the purposes of these hearings are not only to examine what dilemma there is, or conflict, if any, between Justice and the CIA or the Intelligence Community in making decisions as to whether or not to prosecute. Beyond that, and much more important in my opinion, it is to determine whether or not there are procedural mechanisms that we can institute or administrative mechanisms that you the Executive branch can institute that will at least diminish the harm done by the types of leaks that we have uncovered in our reading of your damage assessments, and the failure to be able to prosecute for, in my opinion, in looking at the cases, very legitimate reasons.

The hypothetical case you gave is a very, very poignant case that how do you as the Director suggest that that person be prosecuted when the very prosecution will result in the very thing you were most concerned about: jeopordizing our national security. And I would like to point out that in my exposure to these cases, there have been some serious national security leaks. These aren't just little things. Some of them are of some consequences, that in your judgment—and I am using "your" in an editorial sense, the judgment of the Agency, the judgment of the Justice Department, it hasn't—they have not lent themselves under our criminal process to prosecution.

So we are really here, No. 1, to establish that we have a serious problem, and No. 2, to look for administrative and criminal, procedural remedies, possibly, that can help alleviate your problems. I would be the first to acknowledge, that it is extremely difficult to decide to forego prosecution of someone you would love to nail for a legitimate reason but are unable to do so because national security is being invoked, legitimately so, as, in effect, a defense.

There have been references to legitimate blackmail and greymail and other catchy phrases, but the fact of the matter is, prosecution is unable to go forward because national security would be further damaged.

Now, we also wanted to make clear at the outset that it is not the intention of this subcommittee nor the full committee to examine actual cases, nor is it the intention of this committee to get into questions relating to cases that are presently on appeal or presently being adjudicated in the courts.

And so I would ask my colleagues to be cognizant of that, which they already are, and let's try to avoid even accidentally focusing on a case which might be on appeal. Obviously, we cannot lead witnesses to what they want to speak to, but from our standpoint, it is not our intention to go into cases which are presently on appeal.

And as you know, Admiral, with the help of your able counsel, we

have, the committee and your Agency, agreed to a set of hypotheticals that we could use as a focus for these hearings, And I thought it would be useful, before beginning the questioning of Admiral Turner, to read the hypothetical cases in the record for the purposes of providing a better focus for our questioning.

But before actually reading the hypothetical, I would like to repeat the caveat I made in my opening statement. We have attempted in developing these hypothetical cases not to even give the impression that they are a variation of actual cases, I know that it is tempting—once again, I am being repetitious—tempting to men and women of the press to extrapolate from these hypothetical cases, a relationship to existing cases, and the members of the press who do so, do it at their own peril. The only relationship between the hypothetical cases which I am going to read into the record and the real cases is the role that the fear of disclosure of classified information played in the Executive branch decision not to proceed with investigation or prosecution.

And Admiral, I think you have a copy of those before you, and I think my colleagues do. Maybe you could read along as we read this into the record so the public has a focus here, too.

And for the purpose of our hypothetical cases which we have mutually agreed on, assume for the purpose of these hypothetical cases the following background facts: that the United States is at war in a remote part of the world because insurgents of a foreign country in that region are receiving arms, financial aid, and other support from another superpower.

And assume further that the United States has a critical military facility in the foreign country and that there are a number of important intelligence collection facilities on the military base.

Assume that the highest officials of the regime with which we are allied in the small country have from time to time engaged in narcotics trafficking.

Assume further that the major export of this country is sugar, and that there are presently import quotas into the United States on sugar. Assume there is an excess of sugar produced worldwide, and therefore the price is very low and that country desperately wants an increase in its quota.

And assume that secret peace negotiations have begun involving the superpower and the representatives of the insurgents in the small country as well as the regime with which we are allied, and that a number of secret drafts of a treaty dealing with the disposition of the base and a peace treaty between the parties has been circulated among the parties.

Now, that is the fact situation which obviously, for those who have just heard it for the first time, will be cumbersome to sort out, but hopefully, as the hypotheticals are raised, it will make more sense.

In the first hypothetical case—and again, the reason for these is to point out the kinds of dilemmas that we are faced with and you are faced with.

The first hypothetical is an article that appears in the Washington Post which contains classified information derived from the secret negotiations suggesting that we have had initial contacts with the

superpower; and that we have exchanged drafts of a treaty; and that we have intelligence information on the superpower's fallback position in the negotiations. The point of the article is that we should have taken a harder line in the U.S. draft of the treaty because we knew our opponent's fallback position. The leak contains communications intelligence information because our intelligence on the fallback position was derived from intercepts at the military base of communications between insurgent representatives and the superpower. This sounds like a law exam. The Department of Defense refers the case to the Department of Justice for prosecution under section 798 of the United States Code, which makes it a crime to disclose communications intelligence to an unauthorized person. The Department of Justice responds by requesting the Department of Defense to declassify all information about the communications intercept operation at the base. And the Department of Defense refuses to declassify the information and no further action is taken on that leak.

Second hypothetical—and that is a leak hypothetical, obviously—is a high-ranking military officer working on the base has an extramarital affair with a woman who, unbeknownst to him, is a spy for the superpower and the insurgents. The insurgents and the superpower blackmail the high-ranking official into turning over intelligence information on a variety of intelligence collection processes carried out on the base. The fact that the espionage has occurred is detected through a double agent operating inside the security service of the superpower. The double agent is extremely valuable to us, the United States, because he has been reporting not only on what is going on between the superpower and the insurgents, but on intelligence operations of the superpower throughout the world.

The Department of Defense, working with the FBI, places the officer under surveillance on the military base using the information that they received from the double agent, but they are unable to detect the officer passing any of these classified documents and have no independent information on his espionage activity. Obviously, if they did that would end the matter. They could arrest him without having to reveal who the agent was. But the FBI and the military counterintelligence officers decide to confront the officer who is giving this information with the alleged espionage, and he refuses to talk unless he is granted immunity. The question is presented to the Attorney General, who decides that he can only proceed with further investigation or prosecution of this officer if the CIA is willing to surface their double agent. The CIA refuses, and therefore immunity is granted, and the officer retires at the end of the year with full benefits, never having been prosecuted.

In the third hypothetical case, we have secret agents who are close to and extremely knowledgeable about the affairs of the highest officials in the regime with which we are allied. In the course of their reporting, we determine that he has—that is, the head of the nation with which we are allied—shipped 200 kilos of heroin into the United States, and information is sufficient to identify the particular Americans involved and is probable cause for an arrest of the Americans.

The case if referred to the Director of Central Intelligence, who determines that the case should not be referred to DEA for further investigation or prosecution for the following reasons. (a) any further investigation would of necessity compromise our spy network directed against an allied regime, and (b) any indication that we are engaged in espionage directed at our ally would obviously disrupt our relationships with that ally.

A fourth hypothetical case: A high official of the Directorate of Operations, DDO, of the CIA who has lived in a small country for many years and is a close friend of the president of that country has been secretly making agreements with lobbyists in Washington to procure an increase in their sugar quota through an amendment of the Sugar Act.

The DDO official is acting without apparent authority from the U.S. Government. The arrangement is that the allied regime will pass bribe money to the lobbyist and through him to Members of Congress who are sympathetic with the cause, and who are willing to work for an amendment in the Sugar Act to increase quotas. One of our sources close to the president of the regime reports to the CIA of the arrangement. The CIA refers the case to the Department of Justice for investigation and prosecution.

The FBI investigates the case and the Department of Justice is about to indict the DDO official, the lobbyist and several Members of Congress. The lawyer for the DDO official meets with representatives of the Department of Justice, as would be the case, and asserts his client was only doing what was necessary to maintain a vital intelligence link to the president of that country. His lawyer also threatens to seek discovery of the many items of vital intelligence he received through the DDO's relationship with the president. Specifically, the DDO officer would reveal in open court details of secret messages he carried outside official channels from the President of the United States of America to the president of the allied regime. The CIA and the State Department decide that such disclosures would so jeopardize our relationships with the small country and undermine our relationship of trust with other countries in that part of the world, that any further prosecution would be unwise. Furthermore, CIA argues strenuously that any further investigation or prosecution would necessarily require surfacing the source close to the president, thereby endangering that source's life. The Department of Justice decides not to proceed with the prosecution.

A fifth and final hypothetical. The high-ranking official in this second hypothetical, that is, the U.S. military officer, murders his paramour after learning she is an enemy spy. The CIA blocks the Department of Justice murder investigation on the grounds that any further investigation or prosecution of the case would of necessity require surfacing our double agent who led us to the information that the paramour was an enemy agent.

End of hypotheticals. Again, we tried to include in the hypothetical cases instances where murder could be thwarted, where direct leaks could be thwarted, where narcotics trafficking could be prevented from being pursued, and where bribery could be prevented from being pursued because of legitimate national security interests.

And with the reading of those hypotheticals, I will yield any time I have left, which is probably none, and yield to Senator Pearson for any questioning on any matter.

Senator PEARSON. Thank you, Mr. Chairman.

Admiral, I want to thank you for an excellent statement, and I take it from some of the points you developed that the procedure whereby a judgment is made as to the use of classified material in litigation or possible litigation, wherein it is more or less a joint determination between yourself and the Attorney General, arbitrated by the President if necessary, is one that you think, given the personalities involved and the complexity of the problem, that has been successful, particularly in classical espionage cases, and you would have no recommendations for any modifications of that procedure at this time.

Admiral TURNER. Senator, I——

Senator PEARSON. Is that the impression of your statement that you wish to convey?

Admiral TURNER. Yes.

Senator PEARSON. There have been some successful espionage litigations, but I don't recall any successful action in regard to leaks. Perhaps the—the only one that comes to my mind is the *Ellsberg* case, which was thrown out of the courts because of the misconduct of the Government. When you have a situation involving a leak of classified material, and the Justice Department takes a look at that case and then they send you back the so-called eleven questions, when you get down to No. nine and it asks "will you declassify the information," if that No. nine isn't answered, that is the ball game. That is just the end of the case; isn't that true?

Admiral TURNER. I don't think it always is nor need be, but that is a matter for the Department of Justice to decide whether, if there is an indication that the material may not be released, they are willing to make the effort to try to see if a case can be developed.

We cannot, of course, make a final judgment on whether the information can be released until we have some greater indication of the probability of success, the probability that our information will be critical to the trial, the circumstances under which it will have to be released in the trail, how much of the document will have to be released, whether it is all or part of it, and so on. So we can give only a tentative indication in answering question No. nine.

Senator PEARSON. That is a very great intangible, if the CIA has to make a judgment on declassification prior to a complete investigation.

That is one of the factors.

Admiral TURNER. Yes, sir.

Senator PEARSON. You are forced to weigh the risks without the benefit of complete information.

Admiral TURNER. Senator, in each case, we are weighing the risk versus the benefit, and if we have no idea that, you know, if it is a 5 percent——

Senator PEARSON. I understand. I am really not being critical, but what comes to my mind is that there is a gradation of offenses, and I think you probably agree with this, that in the classical espionage

cases, in situations where the damage is so great that you are more inclined to release the information and let the prosecution go forward, but that the leaks of information are in many cases are not fully considered.

Admiral TURNER. I think that is partially true. At the same time, I would point out that since the invention of the Xerox, it is very difficult to have much hope that you are going to find the leaker himself. Clearly there are cases where we probably can, if we pursue it with the FBI and Justice authorities, but in many, many cases, the number of people who theoretically have had access to it is so great that it is a needle in a haystack.

Senator PEARSON. I know you have thought about this an awful lot.

Admiral TURNER. Yes, sir.

Senator PEARSON. Do you have any recommendations that you might make in relation to the so-called eleven question procedure which might facilitate the judgments you have to make, or might make it easier to go forward with investigations and prosecutions?

Admiral TURNER. Well, we have some suggestions——

Senator PEARSON. Or do we always come back to this same dilemma?

Admiral TURNER. I think you always end up coming back to it. The exact procedures as to whether Justice turns it off completely when we indicate an initial negative reaction on No. nine or not is a matter the Attorney General and I have talked about and can work on. I think within the executive branch, we can smooth some of these procedures out and we do talk about them, and particularly when we see the benefit to be gained is very high.

Senator PEARSON. A modification of the declassification system itself would help, would it not?

Admiral TURNER. That has been considered in a study that is coming to fruition right now in the Executive branch.

May I ask Mr. Lapham to add to this, if I may, sir?

Senator PEARSON. I would be very pleased to have his comments.

Mr. LAPHAM. Senator, I think as Senator Hart said in his opening statement when he made reference to the eleven questions, and particularly the ninth one——

Senator PEARSON. Maybe you ought to grab a microphone there.

Mr. LAPHAM. Senator Hart made reference in his opening remarks to the eleven questions and particularly to the ninth one which is the one that so often brings any investigation or possibility of an investigation to an end, and said that in the view of the Justice Department, if faced with a negative answer to that question, it is pointless to proceed.

Now, I am not sure really that is the issue, I think the Justice witnesses will tell you—I don't want to speak for them, but I think they will tell you that it is not a question of pointlessness, but a question there of their authority to proceed when what they see is no prospect of a criminal prosecution, and you therefore, may want to ask or direct questions to the Justice Department witnesses as to whether they could use some additional legal authority here to investigate these cases even though the result of the investigation might

not lead to a prosecution. There may be an authority problem here on top of the practical problem.

Senator PEARSON. That is a good suggestion. I thank the Chair.

Senator BIDEN. Senator Hathaway?

Senator HART. If the Senator would yield, also we are told by former Justice Department or even existing Justice Department people experienced in this field that one of the frustrations of tracking these cases down is to find out that the leaks came from the highest sources in the Government, and that is kind of a damper on prosecutions, also, I think, or has been in the past.

Thank you, Senator.

Senator HATHAWAY. Thank you, Admiral, for your excellent statement.

I wanted to ask you a question in regard to it, though. I am not clear on the procedure you go through. On page 3 you say that the Attorney General requests information and then you provide access to relevant information.

Who determines whether it is relevant or not? I just wanted you to explain what the decisionmaking procedure is within the CIA, within the Intelligence Community.

Say that the Attorney General has a narcotics case and he asks you, have you got any information on so and so and you say yes, we have, but then where do you go from there?

Admiral TURNER. It is a mutual debate. They tell us what their case is, and what kind of information they want us to produce. We go through our files and produce what we think is relevant. They may come back and say no, they think something else is available and relevant.

Senator HATHAWAY. What if they don't know that? You don't offer your whole file to them, and both sides go over it to determine whether it is relevant or not?

Admiral TURNER. Basically, yes. As I say, they are entitled to any information that we have. The question is, if it gets off into highly extraneous materials, we are reluctant to consider declassifying it and producing it, but it is just part of the same debating process because initially we may not understand the legal course they are pursuing and therefore not understand the relevance of the information.

Senator HATHAWAY. Well, let me get it clear now.

Does the Attorney General see the entire file, or are there parts of the file that you might not disclose even to the Attorney General if you thought that the risk of a leak was too great?

Admiral TURNER. I personally am not willing to take the responsibility of turning the Attorney General off if he persists in saying that he needs to see something. That does not mean I will necessarily——

Senator HATHAWAY. The Attorney General may be in a position that he doesn't know what you have. He just says I want all the information you have on John Smith.

Now, do you give him all the information on John Smith or let him look at it and then make the decision with him as to which parts you are actually going to turn over to him for investigation

and further prosecution. Or do you in the first instance hold back some information that you think he, in your opinion, shouldn't see at all?

Admiral TURNER. The latter is the case. We will make everything available to him and then debate with him on whether it is relevant to his case.

Senator HATHAWAY. So he sees everything.

Admiral TURNER. He is entitled to see everything, yes, sir.

Senator HATHAWAY. Now, at what level is this done? I understand that in a real case that happened some years ago, a GS–11 or GS–10 or something like that decided that a matter was classified and wouldn't allow the prosecuting authorities to use that information?

Is the decisionmaking done at that level or would it come up to your office, or just how high up does it come?

Admiral TURNER. Well, I think that, in the last year I have been here, sir, hardly a day has gone by that I have not been involved in this type of a decision, not necessarily always with the Justice Department, but in a declassification situation. But yes, a GS–11 may make that decision, but if the Justice Department doesn't like that decision, a GS–12 can appeal it and it works its way on up to the Attorney General and myself.

There is no reason—there is certainly no authority for a GS–11 to be the final authority in such a situation.

Senator HATHAWAY. So if the Attorney General wasn't satisfied, he could finally get it to you if he needed to.

Admiral TURNER. They do come to me frequently.

Senator HATHAWAY. Is this a real problem? I mean, how often—I know it is difficult to say how often, but are there many classic espionage cases where you—we have not been able to give information to the Attorney General so that they couldn't be prosecuted, or is this a rare occasion?

Admiral TURNER. Well, in my brief year it has been rare, because it hasn't happened, I believe.

Tony, can you amplify on that?

Mr. LAPHAM. I really can't. I am not aware of a true, classic espionage case that has failed or been abandoned because of failures by at least CIA to produce what was necessary to go forward.

There may have been such a case, Senator but none since I have been there, and none in the field of true espionage.

Senator HATHAWAY. We understand that about 20 cases that were supplied to us over the last 10 years where no prosecution was made because the information was classified.

Mr. LAPHAM. Are you talking about the espionage cases involving transmission or communication of information to foreign agents?

Senator HATHAWAY. Yes, yes, I am.

Mr. LAPHAM. I can't speak for a long record of that, but at least over the last 2 years there has been no such occasion involving CIA.

Senator HATHAWAY. Admiral, let me ask you one last question because I think my time is running out.

Do you think in view of the fact that you have an interest in maintaining the national security and you don't want to let—I think

you would tend more in not letting information out, the Attorney General on the other hand is eager to prosecute those who have violated the law, that we ought to have some third party or panel make the decision as to whether or not the information should be available to the Attorney General and whether the Attorney General should in fact go ahead and prosecute?

Admiral TURNER. I don't believe that is necessary. I would re-emphasize that I have a strong interest in seeing prosecutions take place.

Second, in my view and what I think I have been saying to you today is the Attorney General is the final arbiter. He can overrule me. He can take the classified document and produce it in court. I may have taken my objection to the President and attempted to influence the thing in a different direction, but if the Attorney General persists and the President does not intervene or I don't go to the President to suggest it to him, the Attorney General is empowered to act.

Senator HATHAWAY. Well, do you——

Admiral TURNER. I cannot stand in the way of a prosecution because of classified information.

Senator HATHAWAY. Do you think that is a good situation?

Admiral TURNER. I think that is a good situation, yes.

Senator HATHAWAY. To have the Attorney General have the sole power outside of appeal to the President?

Admiral TURNER. I think so. He is the chief law enforcement officer of the country and has to weigh the equities involved. I am not sure who else we could get who could better balance that.

Senator HATHAWAY. He is not the chief national security officer of the country.

Admiral TURNER. No.

Senator HATHAWAY. As I say, he is probably more determined to prosecute, and his opinion of the matter might be warped somewhat just as someone who is more interested in national security would be warped the other way. It seems to me that a panel or a third party could be in a better position to make a decision in these cases.

Well, I hope you would think about that and——

Admiral TURNER. I will give it thought.

Senator HATHAWAY. And give us any further comments you might have.

Thank you, Mr. Chairman.

Senator BIDEN. Senator Huddleston?

Senator HUDDLESTON. Thank you, Mr. Chairman.

Pursuing just a little further in that area where a decision has to be made whether to continue the prosecution or not, it seems to me you might reach a very difficult, indeed an almost impossible situation, because of the imprecision of the process to begin with. I can see that Justice may not be able to define to you the total amount of documentation that they may need declassified. It might be a dragnet sort of proposition where they may come to you and say we have got to have everything conceivably connected with this kind of situation. You are then at a point where you don't know and Justice doesn't know where you may be headed.

How far along that line do you go, or when do you get to the point when you can say, that it is appropriate to either continue or not to continue, and do you get into a situation where you have already produced more than you might want to produce before any kind of an intelligent decision can be made whether the case ought to be continued or discontinued?

Admiral TURNER. That is one of the great problems we face, and in a recent instance we were asked for 758 documents, after reviewing 55,000 pages, I believe, and we had to look through all of those, and there was no guarantee that they would all be needed, nor was there any guarantee that another 758 might not be called for by the defense let alone the Justice Department if the case had gone to trial.

I feel it is my responsibility in those instances to review the scope of what has been suggested might be required, and then to look further in my own files, in my own mind as to what other people like the defense might call upon if it proceeded, and then to provide the Attorney General an overall damage assessment.

Senator HUDDLESTON. The point is that in order to make this decision that you indicate you have to make, that is the risk versus the benefit, may be a monumental task.

Does the very magnitude of it on occasion tend to discourage further prosecutorial efforts?

Admiral TURNER. No; I really don't think so because I don't think the Justice Department is as loaded with the responsibilities we are of reading all these documents. You know, they put the onus on us——

Senator HUDDLESTON. They can keep asking without——

Admiral TURNER. And they can keep asking. We can't be too discouraged because they have the authority to take the documents if we don't produce the reasons why they shouldn't. So we have to respond. I will say that one of these days I am going to have to come to you, sir, in your other guise of providing us money and ask for more people to help the lawyers here. We have already increased their size in our agency, but it is getting to be a very considerable workload.

Senator HUDDLESTON. Well, I think it would not be an undesirable approach to make because it seems to me in the whole question of protecting secrets, the ability to prosecute has to be established somewhere along the way. Along these lines how much deterrent is our law, when it is well known that it would be very difficult to prosecute in some cases because of the security implications? Does our law provide any deterrent at all in your judgment?

Admiral TURNER. Well, clearly, for leaks, it seems very minimal since we have been unable to find a case that has been successfully prosecuted.

For espionage, it seems to me there is a reasonable deterrent today, and particularly in this last 12 months we have had two convictions, three convictions.

Senator HUDDLESTON. As you know, we are interested in developing new charters and guidelines, which would include the handling of classified information, and it seems important to understand whether there is any effective way to do it if we run into this problem of prosecution.

Admiral TURNER. We are very interested in any other ways that will help us be more effective in deterring this leakage or espionage.

Senator HUDDLESTON. One other question is the matter of what information or what signals we send to our adversaries. Certainly it is obvious that if you had to spread across a judicial proceeding highly classified information or security secrets, you would be disclosing a lot of important information. On the other hand, what do we tell our adversaries when we apprehend someone or we discover someone who is breaking our espionage laws, and then proceed not to prosecute further on the basis that to do so would disclose security information? Are we not giving them some information in that very process that may be of some help to them?

Admiral TURNER. Well, we are easing their task of perhaps recruiting more people to work for them because the risks the people they recruit undertake is less than if there was a high priority of prosecution if caught.

Senator HUDDLESTON. Well, it might also tell them that the person suspected obviously was in a very sensitive area and was providing, could have been providing, a very damaging information because we are not willing to expose that fact by going to court with it.

Would that be true?

Admiral TURNER. That is true. I would have to say it is also possibly the other assumption on the part of the other side that the person was a double agent.

Senator HUDDLESTON. We get into all kinds of problems.

On the scope of the problem, are there no ongong, no current situations where prosecution should take place but it is not because of the security risk?

Mr. LAPHAM. There are at least a couple of possible such situations, Senator, very hard for us to know why in the end a prosecution does not take place. All kinds of factors are taken into account in coming to that decision, the strength of the evidence, seriousness of the crime and any number of other considerations, but there are a couple of possible examples of current cases in which security concerns are very much in mind and could contribute heavily to a decision of that sort.

Senator HUDDLESTON. Now, are you speaking just for the CIA?

Mr. LAPHAM. Yes, sir, I am.

Senator HUDDLESTON. And not for military intelligence or any other component of the community?

Mr. LAPHAM. I can't speak for that other.

Senator HUDDLESTON. You are not referring to any other element of the Intelligence Community except CIA.

Mr. LAPHAM. I was not.

Senator HUDDLESTON. I see.

Thank you, Mr. Chairman.

Senator BIDEN. Senator Hart?

Senator HART. Thank you. Mr. Chairman.

Admiral, part of the problem I have with your statement is that there seems to be a difference of perception here. I pointed out in my opening remarks that the Helms report as well as the study done by this committee indicated that the vast majority, in terms of

quantity of leaks, came out of the administration, came out, particularly out of the Defense Department, and you come down very hard in your statement on people who leak and your opinions of them. I quote two significant statments here. "I urge you to recognize that the seriousness of these losses to unauthorized disclosures give us in our Nation's Intelligence Community great cause to support the prosecution of the individuals who do the disclosing. My blood boils at the obvious callousness and selfishness of such persons, and I believe they more than deserve the punishment which may result from prosecution."

Next page, "This leads me to suspect that rather than being patriotic heroes, as some want to describe them, these individuals are more likely to be self-serving charlatans in quest of fame or fortune."

Now, obviously you are referring to dissident agents and others from the Agency that you have to deal with, who go out and write books and endanger your agents. The fact of the matter is that the bulk of the problem comes from generals and admirals.

Now, if I inserted "a high-ranking Pentagon official" in the subject of those sentences, would you feel the same way?

Admiral TURNER. Absolutely.

Senator HART. Well, then, what can be done about this?

Every December, January and February in this town we are treated to the same old business. The Russians are coming, the Russians are coming. Not only are they coming, they are thirty feet tall.

Now, that is not accidental. We all give it a kind of a wink and a nod because we have been around long enough. You begin to see it after a while. There is a pattern to it. Unfortunately people out in the country take it seriously, and I take it that is the purpose of those kinds of disclosures, to justify greater budget expenditures.

Now, if you can't—if people are elected to vote on those things, and given committee assignments to examine budget requests, and the Pentagon can't convince them of their needs but rather have to go in an unauthorized, highly selective, highly prejudicial disclosure or leak route to get to our constituents to frighten them so they will frighten us, then I think something ought to be done about it. That is what the leak problem is.

Admiral TURNER. I agree with you fully, Senator Hart.

One thing that I am doing to move in that direction is to try to release more information in unclassified form, thereby reducing the amount of information that is tempting to be released in an unauthorized way. Thereby also helping us better to protect what remains. There is a lack of respect today for classified information throughout the Government because too much of it exists and too much does not need to be classified.

This is a small step in that direction but——

Senator HART. As I indicated in my opening remarks, I think it may be a giant step if it helps reduce the base of the problem, in effect, to the real problem, what should be the real problem, and that is your dissident agents or whoever it is jeopardizing people's lives and sources and methods. But there is such hypocrisy about this

whole Pentagon operation, it just makes me sore. I think it is cynical as hell and it shouldn't be the way we run this Government, and you know, if the chiefs are not obeying the law, why should the Indians? I mean, it is a direct incentive to every Government employee in the Government to tell anything they know because they just saw some Assistant Secretary or Secretary of Defense or high ranking general or admiral call in the AP or some favored reporter who has been reporting on defense matters for years and tell them everything we know or almost everything we know about what the Soviets have been up to.

Admiral TURNER. I am not anxious to appear to be defending admirals and generals because I happen to be one. But I would say that many of those so-called leaks or leaks frequently are not as injurious to our national interests as are the ones that come from these dissidents and people who have no care what it is.

Second, I would also urge some consideration that it isn't always the chiefs. It happens at many echelons, and sometimes it unfortunately happens in the Pentagon, in the State Department, in the other agencies, probably in the Central Intelligence Agency, but perhaps less so because we are not involved in policymaking. It occurs as a deliberate lower level effort to undercut even the policies of that agency or that department itself, by people who are not in agreement with the Secretary or whoever it may be who makes the policy. And it is an insidious situation, Senator.

Senator HART. Well, as I said in my opening remarks ——

Senator BIDEN. Would the Senator yield on that point?

Staff informs me, Admiral, that of the leaks and damage assessments, your damage assessments which we reviewed, that many of them were of serious consequence, that the damage assessment was cast in very grave terms, and they were leaks from the very agencies that the Senator is referring to.

Now, I don't know whether or not they were leaks from admirals and generals, because they weren't followed through, but they were leaks from those departments, although not only those departments. I want to set the record straight, but that your agency, from what we have read, has determined that some of these leaks were of serious consequence, were grave, and that they were from the agencies the Senator refers to.

Senator HART. Well, that is precisely my point. I think you are right that there is a lot that goes out that could go out and I applaud your efforts to make that available in a routine, orderly, legal basis. I want to ask you what cooperation are you getting from the Secretary of Defense and the Defense Establishment in that regard, but, the chairman is absolutely right that we know for a fact that some of those disclosures have been serious violations of national security.

Admiral TURNER. I did not mean to overstate the case. I am saying that if you ask me to rank my concern, it is more for the external, unauthorized—well, they are all unauthorized—leaks from outside the establishment than it is from inside, but there are leaks from inside the establishment that are very serious.

Senator HART. Well, in response to the question, what kind of cooperation are you getting in your efforts for orderly, nonleak

disclosures of Defense-related information from the Defense Establishment?

Admiral TURNER. I am not meeting any tremendous resistance. There is a basic bureaucratic resistance in my organization, in all the other organizations, to doing something that hasn't been done before, and there are real hazards to it. I am beat over the head in the media because I am politicized, because I release a story which maybe supports the administration's position, which I didn't release for that purpose, and I think there are other hazards in this because I will release reports that will in 6 months or a year prove to be erroneous. We never are 100 percent correct, and there are those who genuinely believe that I am endangering the Nation's confidence in the Central Intelligence Agency in particular as the central intelligence producing organization by forcing myself in due course to expose our errors as well as our successes.

So there are down sides to this policy as well as up, and genuine debates within the organization which I am encountering.

Senator HART. Well, I just want to make one more observation and then I will yield, and that is that I don't think there is anything more important to this Nation's security and the security of the world than our present negotiations on strategic arms limitations. Now, we went through a series several weeks or months ago of carefully timed, orchestrated, calculated leaks about our negotiating position and the status of those negotiations and propositions put forward by the highest officials of this Government. That was done presumably, reportedly by individuals who disagreed with those positions, who may have even themselves been involved in the negotiating process, and all I can say, Admiral, is that for my money, where that is concerned, I would absolutely quote your statement back "my blood boils at the obvious callousness and selfishness of those kinds of people, and I believe they more than deserve the punishment which should result from prosecution."

Thank you.

Senator BIDEN. Thank you.

Admiral, I have several questions, and then we will go into a second round if any of my colleagues have additional questions.

What is your time constraint? Do you have one? Obviously you are busy, but I mean, is there anything——

Admiral TURNER. I do have a 12:15 appointment with another Senator, sir.

Senator BIDEN. Without getting into the next 10 minutes the question of which type of leak is more serious or—although I am inclined to agree with my colleague from Colorado, it is the type of thing that personally bothers me—without getting into that for a moment, I would like to try to focus on what remedies are available to us. I think one of the things that was established at the outset of this hearing, and I believe you and counsel both agree, is we have some serious problems. We have some serious problems and there are ways in which because of our administrative and judicial system, your efforts are hampered.

Obviously, for example, to take an extreme case, if we had *in camera* proceedings where no criminal trial need be done in public,

every one of these people from any general, assuming there is one, through to a former agent, would be prosecuted. Justice would be able to go forward and take care of the whole problem in terms of making someone accountable for their actions.

But obviously we did away with the Star Chamber hundreds of years ago in our English jurisprudential system, and so now what we have to do is figure out a method by which we can work an accommodation, to put you in a better position of seeing to it that what Senator Huddleston suggested is happening doesn't happen. That is, why would someone who is in collaboraton, in the classic espionage case, with the security agency of a foreign power, not be inclined to go big, because the bigger it is, the bigger the secret, the more important it is, and probably the less the likelihood you are going to be able to do anything about it, to oversimplify it.

So there is the question of, does failure to prosecute encourage more security leaks, or, when you are balancing that, would prosecution result in such an avalanche of additional leaks, additional information that we would be worse off.

Now, it seems to me there are two things we can attempt to do. One is deal with administrative sanctions, and I raise these without having concluded what we should or shouldn't do.

Some experts who have attempted to grapple with the questions that we have been discussing have essentially come to the conclusion that traditional criminal and civil penalties in the areas that we have been discussing are simply impractical because of this dilemma, and the only alternative is some type of administrative sanction. They propose that in cases such as the *Helms* case, or even in espionage cases involving present or former officials, an appropriate remedy is disciplinary action or in the case of a former employee, reduction of pension or some action to retrieve past compensation.

Of course, in the case of publications of secrets by CIA agents, you have traditionally attempted to enjoin by civil action such publication. However, this last option is not very practical especially in circumstances where the espionage is a complete act, or the deceit to a congressional committee is a completed act.

Now, Admiral, do you believe that you have the authority in the National Security Act to establish administrative procedures which would either cause a demotion in rank or eliminate pension or in some way financially penalize those within your jurisdiction who engage in this nefarious activity?

Admiral TURNER. Well, to begin with, I do have the authority under the National Security Act, to dismiss an employee, which is a total punishment of a sense.

Senator BIDEN. Sometimes dismissal does not mean loss of a pension or loss of accrued benefits, does it?

Admiral TURNER. No. If the man is dismissed under that provision and has accrued benefits, he still receives them, so that is true.

Tony, would you amplify on that, please?

Mr. LAPHAM. Well, just to say that that is correct in my view of it, Senator. There is, so far as I know, no way to get at a government pension or other accrued benefits of that kind other than through legislation which does not now exist.

There is legislation on the books—I am not at this point completely fresh on its provisions but I think it provides for a forfeiture only in cases of conviction of certain enumerated crimes, by no means all crimes, but in any case, only the conviction of a crime.

Senator BIDEN. Well, would you support legislation, Admiral, that assuming we could draft it, that would give you the authority not only to dismiss but to penalize an employee, or a former employee, someone who you fired because they are, you have concluded, a security risk? And obviously, by the way, the whole purpose for doing this is if you first conclude that you can't go to a trial in a criminal proceeding because you would need to divulge so much information that it would be against our national interest. Therefore you have decided that what you must do is you must take that employee out of the range of further classified information and also dismiss him from his present job.

But would you be amenable to having the authority—I am not sure we can give it, but assuming we could legislate it, that would allow you the further sanction of eliminating their pension benefits or trying to retrieve past compensation?

Admiral TURNER. Senator, I am inclined to say yes; to the degree I would like to look at the provisions of it, but I am also a little timorous at the thought of having the arbitrary authority to reduce somebody's pension and the reponsibility that goes with it.

I would suspect that before such a provision could be made law, there would have to be a series of checks and balances on that. If those could be created so that a single individual such as myself did not have arbitrary authority, but the checks and balances weren't equally dangerous to national security as going to public trial, maybe that would be a satisfactory solution.

Senator BIDEN. The second question I have, Admiral, is would you be in favor of a separate criminal code and separate administrative code for intelligence officers as we presently have now for military officers and military personnel in the Uniform Code of Military Justice? Without getting into detail of what it would be, do you favor that concept?

Admiral TURNER. I would be most interested in exploring that. I wonder if there is constitutional provision for that as there is for the military, but if it is constitutional that is something that should be looked at. Then the question raised is whether the administrative burden of doing it is satisfactory to the purpose.

Senator BIDEN. Well, Admiral, there are a number of other questions I have and others have, but you also have a 12:15 appointment, and you have been more than amenable to us today and in the past, so I am sure the questions we have we will be able to pursue at another time with you.

I would like to ask your permission, if you would mind us submitting some of the questions in writing to you. The questions I have relate primarily to the types of remedies we should consider, if any can be considered, to help us rectify what we have all agreed this morning is a serious problem facing you and the country.

Admiral TURNER. I would be very happy to respond, Senator, because we are appreciative of your efforts to try to find additional

remedies, and we are as anxious as you to find ones that are satisfactory with our democratic standards in this country.

Senator BIDEN. We would also like—I would like to publicly thank, which will probably ruin his credibility, Tony Lapham who has been very, very helpful to our staff, and accommodating in helping us work out a reasonable and workable way in which we could proceed with these hearings.

I would like to thank you for that.

Mr. LAPHAM. Thank you, Senator, and contrary, sir, it would enhance my credibility, and I need all the help in that respect I can get.

Senator BIDEN. Well, there is a vote on.

Thank you, Admiral, and we will be back in touch with you. I appreciate your testimony.

I notice Mr. Civiletti has walked in the room. He is our next witness.

Mr. Civiletti, there are five buzzers up there which means there is a vote on. It will take us about 8 minutes to get over and vote and be back.

Is it convenient for you to begin testifying at approximately 5 after 12?

Mr. CIVILETTI. Yes, Senator.

Senator BIDEN. Fine. Thank you. We will be back in 8 or 10 minutes. The hearing is recessed until then.

[A brief recess was taken.]

Senator BIDEN. The hearing will come to order.

Mr. Civiletti, I appreciate your coming today and I realize your schedule has been somewhat frenetic in the last few days, and without any further comment by me, why don't you proceed with your testimony or comments.

STATEMENT OF HON. BENJAMIN CIVILETTI, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY HON. ROBERT L. KEUCH, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

Mr. CIVILETTI. Thank you very much, Mr. Chairman Biden.

I particularly wanted to come today because the letter from you and the subcommittee and the vice chairman to the Attorney General did come to my attention and it addresses, in my view, one of the most difficult and sensitive areas in the Justice Department's criminal law enforcement responsibility, and that is the line between effective, vigorous enforcement and prosecution of the criminal law, which is the responsibility of the Department of Justice, and at the same time, maintaining the safety and integrity of our intelligence systems, our national security and defense and other related matters.

In the abstract, that line and that balance are very difficult. As to particular fact situations, it is also not simple, and we need—the Intelligence Community and the Justice Department—we need the focus and attention and the expertise developed by such progressive hearings as you are conducting on this subject in this subcommittee.

In my brief experience as Assistant Attorney General of the Criminal Division, and as Acting Deputy Attorney General, I am

familiar with the manner and methods by which the Department of Justice and the Intelligence Agencies have grappled with this issue, satisfactorily at times and I think unsatisfactorily at other times.

First, the problems are presented in connection with espionage prosecutions. I think it is safe to say that in our free and open society which we all treasure, we are, from time to time, victims of such efforts in the modern world by hostile countries, in ever increasing ways, and we must maintain our vigilance in that regard. Our efforts to apprehend and prosecute where the criminal laws have been violated are extremely important to all the safety and security of the citizens of this country and our system.

We have been fairly successful with regard to many espionage prosecutions.

The second area concerns perhaps not direct espionage, but the subject which you so correctly were addressing to Admiral Turner, and that is the problem of leaks or the disclosure of confidential or classified information in one manner or another.

Under our present system, we are, frankly, far less successful in that area in prosecutions or in even determining with precision the source of such leaks. Partly that is due to evidentiary problems generally with the leak situation. Partly it is due to our firm belief in the tenets of the first amendment. And partly it is due to the fact of life that with a great deal of classified information and our many-faceted government, we, that is the Government, the Intelligence Community, or the National Security Council, must, to perform its duty, disseminate that information to a wide variety of people in a classified form. That makes the evidentiary trail a difficult trail to follow. Although you may point the finger of guilt at a particular group or particular department, the criminal law, of course, requires evidence of individual guilt beyond a reasonable doubt, or at least a fair chance to establish that in a court of law, and that becomes a much more difficult proposition.

The third area which this subcommittee is addressing in the balance between disclosure and protection is the area dealing with other crimes, not espionage or leaks, but other crimes which are associated with intelligence actions or activities. Those crimes include either the rogue elephant circumstance, which is I believe rare today, extremely rare, or the circumstance of people associated with or even incidentally related to intelligence activities who commit unrelated crimes such as bribery or other felonies or crimes against the person.

In that instance, although the investigation may show and relate and develop some evidence with regard to the underlying crime, at the same time, because of its nearness or relationship to the intelligence activity, it naturally calls into question the very issue between the disclosure of confidential information—confidential sources, confidential locations, or national secrets of one kind or another—and the state of mind of the particular participant who is engaged in the underlying criminal activity.

We at Justice take the view, which we think is proper given our responsibilities, that we must try with every means and ability available to us to secure prosecution. Our interest is in the enforcement of the law, regardless of who violates it, and we take the advocate's position, not irresponsibly, that to the extent possible, it is

our duty to find a way to get the facts and the evidence and to prosecute.

We are sensitive to the somewhat differing responsibility and philosophy of the intelligence community which does not have direct law enforcement responsibility but does have the terrible burden of protecting the security of the country, its processes, and its secrets, so that we do not blindly override their concerns. We try to understand them, and through an escalating process from time to time those differences in philosophy as well as in missions are attempted to be resolved. First a resolution is attempted by the line attorney who is the prosecutor and the investigators and the lower level employees of the intelligence agency in question. Then, as matters, some matters are resolved and others are not, there is an escalation or a ladder effect in the attempt at resolution through, as I believe you have heard testimony, through the point where we reach the Attorney General's level and he is insisting or taking the view that classified matters must be either declassified or evidence obtained or sources or methods disclosed in a particularly egregious case, and the intelligence community, because of its sensitivity or the agency involved, the head of that agency is convinced that the danger of disclosure and the risk is more important than prosecution. In that instance, although it is extremely rare, in that instance, the ultimate resolution under the present system rests with the chief law enforcement officer in the United States, the same person who is charged with the national security of the United States, who is the President.

So those three areas that I mentioned and our attempts to resolve them are imperfect. They need sound thinking. They need attention. And they need discussion as well as the guidance and expertise of those in the Congress and in the community at large who provide a different point of view, an additional point of view to those of us in Justice and in the intelligence community who address these problems regularly and have tried to resolve the difficulties and to draw the lines in these areas to the best of our ability. So I am happy to be here. I am glad that the hearings are being conducted in such a responsible way in probing into an area of great difficulty which requires attention, sound thinking, and hopefully progressive resolution.

Senator BIDEN. Thank you, Mr. Civiletti.

I understand that you also have a time constraint that is related to other committee hearings which are underway demanding your presence, and it is my understanding that the gentleman to your left was—would you mind introducing him?

Mr. CIVILETTI. Yes; let me introduce, Mr. Chairman, to you Mr. Robert Keuch, who is a Deputy Assistant Attorney General of the Criminal Division of the Department of Justice. As an aide, let me say that Mr. Keuch is one of the first honor-program participants to reach this managerial and responsible level in the Department of Justice. In his very prominent career in the Department of Justice, Mr. Keuch has had a wide experience with intelligence matters and how they relate to criminal prosecutions. It gives me pleasure to have him pinch-hit for me with his statement and response to your questions.

Senator BIDEN. Fine. I appreciate your coming and we will be back to you with questions, if that is all right.

Mr. Keuch, if you would like to proceed with your statement.

STATEMENT OF ROBERT L. KEUCH, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. KEUCH. Thank you, Mr. Chairman.

It is a pleasure to appear before this subcommittee to discuss one of the most difficult problems the Government must face in the areas of criminal justice and national security: what can be done when a criminal prosecution involves the necessary disclosure of information related to the national defense, a problem that can perhaps be best summarized by asking the question, to what extent must we harm the national security in order to protect the national security. The very basic conflict in that question is one that runs throughout every facet of this problem, and very relevant to our discussions today is one that is mandated by our constitutional system and the protections of our criminal justice procedures.

Until fairly recently, the problem was most apparent in espionage cases, either classical espionage cases or cases involving leaks of information. Such cases usually start when in accordance with their statutory and/or regulatory responsibilities, agencies advise us that national security information has been or is about to be disclosed improperly.

Upon receiving such a report, or prior to the time an arrest or other action is taken in those cases in which we have indications of an ongoing or an anticipated act involving the compromise of national security information, we initiate discussions with officials of the agency involved to determine what action can and should be taken. One area we must focus on is one which has troubled us for many years: how to maintain the prosecution and at the same time protect the national security information involved. This problem inevitably arises, for defendants, of course, are entitled under the Constitution to a public trial and the evidence used against them must be made public. In practical terms this means that if we are to attempt to prosecute someone for relating national security information improperly, we must be prepared to disclose at least a part of the information publicly.

While that may not seem to be much of a problem initially, if the information has already been leaked or given to a foreign government, what is the harm in making it public; it is often, of course, very serious. For example, even assuming the information has already been leaked and/or has already reached a foreign power, our reliance on it at a public trial will necessarily confirm the accuracy of the information. This is a considerable benefit for while foreign powers receive a steady flow of information from a variety of sources, they must always grapple with the initial task of separating the wheat from the chaff, culling out from the mass that which is accurate. A public trial must, of necessity, help them accomplish that goal.

This problem can be compounded if we capture the foreign agent or the individual or individuals willing to compromise national se-

curity information and prevent the actual disclosure of military or state secrets.

Under those circumstances, the damage which occurs in cases where we cannot retrieve the information before it is made public or sent abroad has obviously been avoided. Disclosure of the information involved at a public trial, then, would not only confirm its accuracy, but it would also accomplish the very thing we try to prevent: its compromise and the transmittal of such information to a foreign power.

The first decision we must always make, then, is whether the game is worth the candle. Is the prosecution more important than the potential harm we may cause to the Nation's security interests.

When we first meet with the Agencies, we make it clear that if we are to proceed with an espionage prosecution, at least some of the information will have to be disclosed at trial to satisfy the elements of the offense as defined by the espionage statutes; that is, that the information, in fact, is related to the national defense. Each agency, under the applicable laws and regulations, has a responsibility to protect its own information, so the affected agency must make the initial decision whether it can be released consistent with the national security interests involved.

While we of course share this concern, the Department of Justice has a different responsibility: the duty to see that the laws shall be enforced. When these responsibilities collide, we meet with the Agency and attempt to resolve the problem if at all possible. In some cases, for example, we can limit any further disclosure to a portion of the information or to some of the lesser classified information such as using confidential or secret material rather than top secret information that may have been compromised, thereby minimizing the harm and permitting the prosecution to proceed. If we reach an impasse and if we feel a prosecution must be undertaken, the matter is presented to the Attorney General and the head of the agency concerned for resolution. If necessary, the President may have to make the ultimate decision. I am pleased to report that although that path is available, it has had to be used very rarely in the past.

The second aspect of the problem we have had to face is presented by those cases, either espionage cases or cases involving other violations of criminal law, in which the defendant claims a need for access to classified information in order to present his defense. It is the latter type of case, cases involving violations of criminal law other than those involving the compromise of national defense information, which has come to public attention recently.

Clearly we as prosecutors cannot determine precisely how a defendant can present his case, and although he has no license to rummage through governmental files at will, a defendant does have a right to information which may be useful in his defense. The important point to note here is that under our criminal procedures a defendant need not establish that a particular piece of evidence will be relevant or would definitely exculpate him in order to have access to such information. Rather, the defendant need merely demonstrate that it may be helpful to his defense or will otherwise satisfy our

criminal rules and statutes, and we then face the prospect of being ordered by a court to provide him access to the information he claims he needs. And of course this last statement points up yet another aspect of our dilemma. It is difficult, if not totally impossible, to predict the full extent of the discovery and similar orders which will be issued by a trial judge and which will require the disclosure of national defense information.

Our difficulties, then, as previous speakers and your own opening statement, Mr. Chairman, have made clear, are obvious. In espionage cases, having charged the defendant with the compromise of national security information, we face the prospect of having to provide him access to still more sensitive information in order to prosecute him. In cases involving violations other than espionage, this prospect remains the same but may or may not be as acceptable, depending upon the seriousness of the criminal violation involved and the sensitivity of the national security information which is at issue.

An additional area of concern involves necessary or potential witnesses. Under certain circumstances it is of course possible that the protection of the identity of a potential witness—for example the identity of an informant, an undercover agent, or perhaps a double agent—may be important to the national security. If we wish to protect this identity, it follows that the witness will not be made available for public trial and examination by us or the defendant, and, as with national security information generally, if we or the defendant need this information and if we feel the prosecution must proceed in spite of the Agency's feeling that it cannot be disclosed, we will attempt to resolve the matter through negotiation and, if that fails, present the matter to the Attorney General and the Agency head or ultimately, of course, the President.

In discussing these problems, I would like to point out that though there are barriers, they are not necessarily insurmountable. Indeed, it has been possible during the past few years to prosecute espionage cases in a variety of circumstances. The staff has been provided with a list of 20 espionage matters which have been prosecuted successfully since the 1950's. Some of the more recent cases include, of course, the *Moore* trial in Maryland and the *Lee* and *Boyce* prosecutions in California. The number of serious nonespionage cases in which prosecution has been prevented or rendered unsuccessful has, in my view, been minimal to date. It should also be noted that in cases in which we cannot proceed, alternatives such as administrative sanctions may be available.

Thus, while there are serious problems in this area, we have been successful in resolving them in a very significant number of cases.

In conclusion let me say that the interest of this subcommittee in highlighting these problems and trying to find a better way to resolve them is commendable. Because the foundations for the problems under discussion are, in our view, of constitutional dimension, there are serious doubts that legislation relating either to the substantive offenses involved or to our criminal justice procedures will help in totally resolving them. However, the Department does look forward to our mutually desired quest to find the best solution possible.

With that in mind and with recognition of the fact that I have only presented a brief outline of the many aspects of our concerns, I will be pleased to try to answer any questions you may have.

Thank you, Mr. Chairman.

Senator BIDEN. Thank you very much.

To once again focus the intent of these hearings, as your statement points out, although you think the problem is less serious than the tentative conclusion that I have drawn, nonetheless is a serious problem of at least some cases possibly not being, and in fact have not been prosecuted for fear of further doing harm to the national interest.

As you put it in your opening statement, you say to what extent must we harm the national security in order to protect the national security, and I think we are all in agreement that there are some of those cases, that we have decided, that the administration, the Justice Department has ultimately decided that we should not proceed because we would do more harm than we will do good.

Now, I would like to focus, unlike with the testimony of Admiral Turner, Admiral Turner is not an attorney, you are an attorney, and you are involved in a very critical position in making determinations and recommendations as to how Justice proceeds in cases of the nature that we set out in hypotheticals and of the cases that you provided us, and I would like to thank you for your cooperation with our staff.

And so I would like to focus, if we may, on the possibility of legislating procedural or changes in the criminal procedure, the Federal criminal statutes as related to criminal procedure, and I am going to be fairly technical and understand if you are not in a position at this moment to respond in detail, that you would please not hesitate to expand upon your answer in writing.

Mr. KEUCH. Certainly.

Senator BIDEN. One of the areas suggested to us as a possible means by which we could diminish the problem we all acknowledge exists is an *in camera* procedure for judicial supervision of the use of classified information. Congress might enact an *in camera* procedure for judicial supervision of the use of classified information in the course of civil and criminal proceedings in which the United States is a party. The procedure might be modeled after section 509 of the Rules of Evidence proposed by the Supreme Court in 1974.

Section 509 defined "a secret of state" privilege which might be invoked by the Government which would in turn promote an *in camera* adversary proceeding in which the parties would litigate the use of the information, usually classified, to which the Government had invoked the privilege.

Now, to make this even clearer, it refers to either the witness that you say is sometimes troublesome that need not be produced, and/or specific documentation, information that is classified, that must be introduced in evidence under ordinary circumstances, to bring your case to successful conclusion.

Section 509 was rejected by the Congress as it reviewed the rules proposed by the Supreme Court. However, any proposal made at this time might respond to the criticism of section 509.

For example, the new state secret privilege might more narrowly define the type of information to which the Government could invoke the privilege. It might give a greater role to the court in reviewing the claim of privilege, including authority to go beyond and behind the classification to determine the actual damage to the national security if the information were disclosed.

A new rule 509 might also give central supervision to invocation of the privilege to the Attorney General and require his personal review of the documents prior to invocation of the privilege.

It might guarantee the presence of the defendant and his counsel in the *in camera* procedures, although it would subject both—that is, the counsel and the defendant—to contempt of court and possible espionage prosecution if they disclosed the results of the *in camera* procedure.

It might give either party an immediate right to appeal of the determination of the court, whether the information is privileged and the consequence of the invocation of the privilege; that is, whether the Government has to drop the prosecution of the criminal case, concede the case to the plaintiff in a civil case, or in a criminal case the defendant has to forgo a particular affirmative defense.

This *in camera* procedure could obviously only apply to questions of law, and could only be used to litigate questions of fact where a jury trial had been waived. Therefore, in most criminal and civil cases there will likely arise circumstances, even if such procedure were enacted, where classified information might have to be disclosed to the jury and the public.

However, such a procedure might minimize those circumstances, and through the offices of an objective judicial tribunal, force an accommodation upon the parties to avoid the impasse that presently occurs in most such cases.

Now, my question for you, are you in favor of developing some type of procedure along these lines, and how would you amend the description of the procedure I have described above, and if you want me to go through that again, I will, because it is awfully hard to digest in one swallow. But to start it off, do you think it is reasonable and more importantly, constitutional, for us to proceed along the lines of attempting to develop a rule similar to that suggested by the Supreme Court in 1974, section 509?

Mr. KEUCH. Well, at the risk, Mr. Chairman, of affecting my credibility, I must say that I was the author of rule 509 as proposed by the Department of Justice and accepted by the Supreme Court in the Rules of Evidence, so I am, I think, fairly familiar with the procedures you are discussing.

I think I would like to start out, however, preliminarily by saying that we have to break the question, or at least my answer, up into two areas, and I think you have already touched on that in posing the question to me.

One, of course, is that in which the information, the classification and status of the information, is part of the substantive offense that is involved, the classic espionage situation, even the leak situation where part of the element of the proof is in fact that the information was properly classified or did in fact relate to the national defense.

That, we feel, is definitely a jury question. We feel that the possibility of a waiver of a jury raises serious constitutional questions because of the interest in a public trial, and if we could now go to the easier part of the question, that is, those matters that are preliminary to the presentation of our evidence in chief, I would like first to point out that a great deal of material and a great deal of procedures are now attempted to proceed *in camera.*

For example, rule 16 of the Federal Rules of Criminal Procedure, which provides access to statements and other material at defendant's pretrial, does provide that the Court may restrict the application of the rule if he determines it is in the interest of the national—best interests of—I believe it is national security, but there is a provision to permit us to make the argument, that this matter could be withheld.

The problem, of course, is that it is very difficult for the judge, just as it is for us prior to trial, to determine what information might be particularly relevant to a criminal prosecution, and the Supreme Court in the *Alderman* case pointed out that the court should not embark upon an attempt to try to decide what for the defense is relevant. However, they also encourage the use of *in camera* proceedings in national security matters.

Another caveat, of course, is it does not entirely solve the problem. You pointed out that you would have to have the opposing parties present, there would be protective orders issued by the courts, of course, and there could be sanctions such as contempt of court and perhaps a violation of the espionage statutes, too, for further disclosure by those parties if the proceedings terminated in a ruling favorable to the Government, but the sum and substance would still be that the very information that we are seeking to protect would have to be disclosed to the individuals participating in that conference, including the defendant and his attorney, and we have seen a trend in recent cases where the argument has been made that the attorneys themselves and the defendant himself or herself are certainly not as fully capable of challenging the Government's claims that the information is of such a type and they must need or they need the assistance of experts, and this of course adds to the number of people to which there are disclosures.

Senator BIDEN. That does move it one step, though. I mean, it doesn't solve it, but it does move it back a step at least, doesn't it?

Mr. KEUCH. It certainly does, and we would—and to answer your question in a very positive note, we would certainly be interested in exploring those procedures. I think the fact that 509 was proposed, for example, is an indication of the fact we have tried to work on these problems. We do, of course, use *in camera* proceedings in responding to wiretap motions and other pretrial motions. Certainly this is one of the areas that we feel needs a great deal of exploration.

Senator BIDEN. Do you believe that there are any possibilities—for the civil libertarians, I am not suggesting it, in raising it, at all as an alternative, do you believe that there is any possibility of being able to develop under our Constitution a proceeding that would be totally *in camera*, the entire proceeding?

Is it possible to put the jury under the same sanctions for contempt of court and violation of espionage laws as we would, as has been suggested by some would be done to the defense, the defendant and defense attorney in the procedure you and I just discussed.

Mr. KEUCH. If my answer is not taken as definitive, I think I would have to say that we would see two very serious problems with that. The first one, I think, is legal, and the second problem that would have to be discussed is policy or political with a small "p" to be clear what we are talking about.

The legal problems, our research is not totally conclusive, and I must say it is not—there are no cases where we feel directly to the point, but the research indicates that the right to a public trial protects not only the defendant, the rights of the defendant, but also society's rights, that there are very strong reasons why there should be an open prosecution of individuals.

Now, of course, there have been departures from that rule. Rape cases are an example, other cases where there might be great embarrassment to the parties involved, *et cetera*, but even in those cases there has been admission to the courtroom of friends, relatives, other supporters of the defendant, *et cetera*, and those cases I do not think have faced the issue or the problem of the cases in the Supreme Court in the Federal system which again indicate that part of the concept of a public trial is for the benefit of society in addition to the defendant.

I might footnote that espionage and leak cases are peculiarly that type of case in which society has a strong interest. A rape case, even a fraud case, even a massive bribery or perjury case still is pretty much confined to a small group of players, and the issues are fairly between one or two individuals. Certainly that is true in a rape or personal assault case.

However, in the espionage case, you really raise issues that are fundamental to our society, and they involve really the judgment of society and the public against the individual, and obviously have grave first amendment overtones.

So I think there is a serious question whether given the direction of the cases already, that the right to a public trial includes the right of society to a public trial in addition to the defendant, and any type of total *in camera* procedure, even with a waiver by the defendant would be constitutional.

The second, perhaps, I have already pointed up and that is the policy or political questions, and that is whether or not we would wish to have this type of prosecution and this type of sanction imposed in a closed trial. I don't think one needs to speculate very much to think of what the indications would have been had the Ellsberg prosecution, for example, or other prosecutions of that type been tried in an *in camera* courtroom.

On the civil side, of course, the *Washington Post* case, the *New York Times* case, the *Washington Post* case in which I participated was, of course, tried in a sealed courtroom. It was a jury trial because we were—I'm sorry, a nonjury trial because we were seeking an equity relief from the court, and it was sealed. On the civil side the problems are much, much less.

Senator BIDEN. Is there a distinction in the possible application of the method I suggested, the total *in camera* proceeding?

Would your answer be any different or distinguish between the leak cases and classical espionage cases?

I can understand it seems clearly it could not work, and the argument you make is very compelling with regard to leak cases, the *Ellsberg* case, but how about the case where somebody—well, let's stick to our hypothetical so I don't get in trouble here, where a high ranking military officer working at a base has an extramarital affair with a woman who is a spy for a superpower and the insurgents and the superpower blackmail that military officer into turning over intelligence operations that are very important. This is a classical espionage case where you have information being sold and/or turned over because of blackmail by a Government official here in the United States to an enemy agent, and it relates to a location of our agents and/or a formula for bombs, satellites, aircraft, or anything else. Is there a distinction in terms of that type of case and the application *in camera*?

Mr. KEUCH. I think the second part of my answer, Senator, certainly is. That is the political and policy question, there certainly is, because there are different interests involved.

But I think as to the first part, that is, what I believe to be the direction of the law and the interest of the public trial, I don't see how those cases would draw a distinction in those circumstances.

Now, again, let me make the caveat that I don't believe that those cases are conclusive or definitive because they certainly have not been considered in this context, that is, the terrible balance or at least the very important balance that must be drawn between harming the national security to protect the national security, so it may well be that within our constitutional system there may be reasonable grounds to argue, to develop a procedure with many protections. I just—I don't want to be pessimistic. I don't want to close it off.

Senator BIDEN. No; by the way, I am not at all certain we have an answer to this.

Mr. KEUCH. That's right.

Senator BIDEN. I mean, when I started these hearings, and one of the most difficult decisions that I have had to make as Chairman of this Committee was, after our qualified and eager staff amassed all this information, what was I going to do with it, and that is, now we raise the question. Some have argued and will argue with me that I have opened Pandora's—we, this subcommittee, has opened Pandora's box and shown the world that we have real serious problems, and then when we can't resolve it, we have made things worse.

Well, I happen to think that when in doubt, always err on the side of discussing things publicly rather than making *in camera* decisions as a Senator.

But let me continue this series of hypotheticals. What if that military officer were court martialed under the Uniform Code of Military Justice? Is it possible that we could proceed with a court martial, where all the jurors are military personnel who have security clearance? I mean, can we deal with that aspect of it?

Mr. KEUCH. I think you have stepped perhaps another half step back from the problem because as you point out they do have security

clearances, although I think the right to the public trial applies to the court martial system. I am not as familiar with the case decisions in the military courts, though your staff has brought some to my attention. The question again would be the applicability of the right to public trial to the individual before a court martial. I would think that given the decisions in the Supreme Court concerning the Uniform Code of Military Justice, some of the protections that must be provided in that code, despite the distinction between the emergency situations, the more serious situations of a soldier in combat, *et cetera*, I believe we would find that the same rules would apply.

So my answer would have to go back to whether or not our reading of this trend of those cases, that is, that a public trial would be required, public meaning, at least meaning the entry of supporters, friends, relatives, *et cetera*, and perhaps some representatives of society in general, whether they be limited to certain members of the media or certain other people who would be there as observers, and that frankly, Senator, in struggling with these problems, that is one of the matters, one of the aspects that we looked at, whether or not the public trial situation could be satisfied by the fact that you would have some type of group of observers from a mixed part of the various segments of the military—I'm sorry, the legislative, the judicial, the Executive branch, the public, the media, *et cetera*, who would participate in the trial and that would satisfy this requirement for public trial. That is something we also have not come to a definitive answer about, if it is something that we might want to crank into this consideration.

Senator BIDEN. Is it possible, in your opinion, for us to put members of the intelligence community in the same posture that we have placed military officers and subject them to the same types of possible sanctions and waivers that we ofttimes do to military personnel?

Mr. KEUCH. I think there is certainly a basis to argue that individuals who have obtained lawful access as a part of their job to classified information, highly sensitive information, can be treated in some ways differently than the individual who gets it by accident, indirectly, or because one of those individuals have decided to violate their trust. Indeed, as you know, in certain attempts to redraft the espionage statutes, that concept was brought forward.

Whether you can advance that to the point where there can be closed hearings and even totally closed administrative proceedings, I would have very serious doubt, Senator.

Senator BIDEN. Is it possible, in your opinion, for us to—is it possible for an intelligence officer—is it possible for anybody to waive their right to a public trial?

Mr. KEUCH. I think it is certainly possible, well, except that what that runs into is the concept I keep coming back to and and I must say, it was a surprise to us when we started our research. We started out thinking, well, a public trial was a right to the defendant to protect him from Star Chamber proceedings and the rest, and that was the interest the courts were looking at, but we get deeply involved in the discussions in the case that part of the right to the public trial is the public's right to that public trial, without too many repetitions of the word there. That is, that there is a society's in-

terest, and I think that that interest is particularly strong, as I have indicated, in the types of cases we are talking about because espionage cases and leak cases by their very nature raise some very basic questions about the balances of our constitutional system, about the balances of what the executive should protect and should not protect, *et cetera.*

I think even—and a waiver requirement that would be a condition to employment or condition to the access to material which of itself in the intelligence community and certainly in many places in the Executive branch, even in private industry, for that matter, would be tantamount to having an employment I think would fall because of the same problem of the public trial need.

Senator BIDEN. The public's right to a public trial.

Mr. KEUCH. Yes, sir.

But again I hope the caveat will be that we do not feel our answers are definitive or conclusive because just now——

Senator BIDEN. I understand that. I understand that. I have the same—I quite frankly approached this problem from a very different perspective than I now find myself in. I assumed that when we started this staff investigation we were going to find that the agencies were crying wolf a great deal, and I must admit that prejudice. I assumed that I would be confronted, had we not looked at the damage assessments, with some agency official saying, if you knew what I knew, you would know that we had to and I wanted to make sure that I wasn't the victim of that, and I have—I have become alarmed at what we have found, that the agencies' hands for, in my opinion, in a number of, many cases, very good reasons, been tied because of—in order to protect the national interest they would have to harm it more than they were protecting it.

Let me ask you a few questions about the cooperation between you and your department and the intelligence community.

In cases that aren't direct espionage cases, the case where, in our fourth hypothetical, I think it was our fourth hypothetical or fifth, where—let me see if I can find it here—well, in our third hypothetical where we set out a situation where there is trafficking in narcotics, that doesn't really directly relate to the other operations that are going on, in that hypothetical we set it out so that the—we had knowledge of the parties involved and the existence of the trafficking. How about those cases where—assuming there are any, and I don't know, where the agency may know that there is such trafficking going on, but it has not come to the attention of anyone other than the agency.

Do you feel that there is any mechanism set up whereby No. 1, not only inform you of all that you ask for but you are informed of any crime that the agency is aware of that is not being committed by an agency official. I understand the Executive order now says—and Mr. Lapham is still here, and please feel free to jump in, Mr. Lapham, if you would like—but I understand the Executive order now says that if any agency official is engaged in the criminal offense, the agency must call that to the attention of the Department of Justice, but how about those cases where the agency officials find out in their unrelated activities that there is a crime being committed?

Do you have—have you ever gotten into that discussion, that problem? Has it been a concern of the Department? Do you ask them those questions? And I realize you have, you know, you say well, we only ask questions about that which we know, I mean, but you know, the spectre has been raised by people who have come to this committee and others saying that, you know, we think there are things the agency knows about that they are not telling us, that don't relate to agency work.

That's a very, very long question. It isn't really a question. I am just trying to get to an area of concern.

Maybe you could comment.

Mr. KEUCH. I think so, sir. I think I can meet your concerns, Senator.

First let me say that there are, I believe, very formal requirements for the reporting by the agency in all parts of the intelligence community, and in fact, the entire Executive branch to the Attorney General when they learn of any violations of criminal law. First of the requirements, of course, is the statute, 28 U.S.C. 535. The others are the applicability of the Executive orders which are somewhat broader than just an agency employee but involve any criminal violation, and those reports in fact, and indeed, are made on a continuing basis.

We also, after the—I think there was a need to update our procedures under the statute that I referred to, Executive Order 11905 was promulgated, we entered into a very formal memorandum of understanding with the CIA concerning the reporting requirements and in what manner and method they would be reported, and at what level things must come to before a determination is made that that does involve in fact a criminal violation which must be reported, and I must say that I believe that procedure is working very well.

We are following generally the same procedures other parts of the intelligence community are in fact now discussing with the Defense Department whether or not that memorandum of understanding should be formalized or something similar to it with NSA and other portions of the Department of Defense.

So I think there are mechanisms to provide for reporting to the Attorney General on violations, and I think generally they are working very well.

Of course, it would be difficult, I am sure that the Director could not say that every violation or criminal violation known to his staff had been reported to him or to us, and I certainly can't say that everything the agency knows has been reported to us, but we have not found any instances from other sources, from other situations where in the prosecution of another case, or let's say a DEA investigation or arrest, that we have indications that an intelligence agency had information of the violation of criminal law and it was not reported to us.

I think if you are concerned as to the degree of, level of cooperation, and as to the Attorney General, and the Department of Justice having access to relevant information, I would like to join in Admiral Turner's comment and agree with him. I think the cooperation has

been good. I think the Attorney General has had the access that has been necessary.

Senator BIDEN. How long have you been in your position with Justice?

Mr. KEUCH. Seventeen years, sir.

Senator BIDEN. Seventeen years.

Has there been any change in that relationship?

Mr. KEUCH. I think there has been a very significant change on both sides of the equation. I think the Department of Justice is much better exercising its responsibilities. I fear that for a period of time —there was a time when I believe we abdicated our responsibilities to test the claim of national security, to insist on more details in those cases where we had some questions. These procedures that I referred to also formalized, I believe, our responsibilities, and we have definitely, I think, improved in that area.

On the other side, I think perhaps both in a reflection to our change in procedures and also because of what I think are some excellent changes in the attitudes in the intelligence community, I believe there have been improvements in the cooperation.

So yes, there has been a decided change, Senator, and I think that —however, on both sides, I think that we stand both with some problems in the past, and I believe the Department's approach has also improved.

Senator BIDEN. The reason why I ask that is not to ask who were good guys and who were bad guys, but if that is the case, that there has been a change, then it seems to me that that argues for at least a memorandum of understanding or a statutory definition of the relationship between the agencies so that the change doesn't occur the other way in later administrations or as time wears on, but that is for another time.

Question No. nine of the eleven that you have heard referred to here today.

Mr. KEUCH. Yes, sir.

Senator BIDEN. Does that routinely end Justice's inquiry when CIA or any other agency answers it and says no, we cannot make it public?

Mr. KEUCH. I do not believe so, sir. I would like to underscore Senator Hart's statement and his questions. He kept saying usually, and I would like to put about four strong black lines under usually because we do not apply those requirements rigidly. There are cases where because of the irreparable harm that is done, because of the seriousness of the leak or the seriousness of the espionage involved, or because of other impact on our national security, we will proceed, and indeed, have in many cases, without a full determination of question nine prior to the time we initiate our investigation.

I cannot give any specific examples, but I can give some general ones, going back in time, to give increased protection. I can recall at least two particular ones where one, the secretary, the head of the agency, not of the CIA, came over with newspaper articles claiming that the leaks were just absolutely incredible, they caused irreparable harm, and demanded an investigation immediately. We did not rely on question nine, nor even raise the issue at that time.

But there was another problem, and I think this is another point that must be made in response to your question, and that is that the other questions which I think at least were referred to as reasonable questions other than question nine, raise questions like the extent of dissemination and the rest, and in the example I mentioned, the head of the agency also stated that the dissemination had been very, very minimal, and that investigation should quickly be able to disclose who the leaker was and steps could be taken.

Well, we authorized an initial investigation into the question of whether or not that dissemination had, in fact, been minimal. I suppose some of that was my own personal knowledge, because I was aware there was broad dissemination within the Department of Justice of that information.

We found, not to my surprise but I think to the agency's surprise, that there had been wide dissemination of this information, however irreparably it harmed the United States, that there had, in fact, been some newspaper articles almost 2 years prior to this particular event which discussed some of the same information.

I hope this points out the fact that it is not just question nine but it is a combination of those considerations which may stop a leak case. The dissemination may be so broad that it would almost be impossible to find the individual who leaked the information.

Or there may have been such public disclosure of the information that it would no longer meet the standards of the espionage statutes; there are concepts that provide if the executive branch has not protected the information sufficiently, if there has been a public disclosure, that you cannot bring prosecutions for espionage.

So I think that the question nine does not routinely stop an investigation, although I have to be very honest and say that yes, if there is a situation where it is so obvious that no matter what we found, no prosecution could ever be contemplated, there are serious questions, as Mr. Lapham pointed out, as to whether or not we would then not be in authorizing a Bureau investigation, an FBI investigation for espionage, not be violating our responsibilities because we are, in fact, not conducting a criminal investigation, we know that. We would be conducting what is really, in fact, an administrative investigation for that particular agency.

Now, that may be a good thing. It may be that we should have the resources in the FBI and the resources—or some other location, to make that type of investigation routinely, administrative investigations for the Agency, but that is not the responsibility at the moment, it is not the mandate, and it is certainly an area that could be looked into, and I might say that the executive branch is considering just that type of issue, whether or not it shouldn't be done.

Senator BIDEN. Shouldn't it be somebody's responsibility?

Mr. KEUCH. Yes, sir, and that is one of the matters now under active consideration.

Senator BIDEN. Speaking of administrative procedures, and for the benefit of those waiting, our next witness has been kind enough to indicate he would come back at 2 o'clock, if I am not mistaken—I hope that is correct—and we will recess in just a few minutes so everyone can get a bite of lunch, and we will come back again, but I would like to pursue one more avenue, if I may.

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Can administrative measures and procedures be directed against either present or former employees of the Government? Can they be conducted completly *in camera?* Are we back to that same old saw?

Does the due process clause of the Constitution insure that any Government employee, against whom the Government attempts to take disciplinary action, have the right to a public proceeding?

For example, does an employee against whom the Government would like to withdraw a security clearance or to take other disciplinary action, including demotion or firing or reduction of pension rights, have the right to a public proceeding, and is this right to public adjudication as broad in administrative cases as it is in criminal and civil cases?

Mr. KEUCH. Definitely not. In fact, where the difference becomes—the adjustment is made, Senator, not in the fact of not having the hearings open and available to the public, but there are greater limitations on the information that has to be provided.

For example, under the industrial security program administered by the Department of Defense, which provides clearances to the general public, I think it is a broader issue because it is not just Government employees or military people—there are provisions that information that would be seriously harmful if it were totally disclosed, can be provided by affidavit, can be provided in excised form as sanitized information and so on. So the protections in those hearings have been not to keep the public out of the hearing but to provide means by which information would be provided without fully disclosing its source or fully giving away the information.

So I think the question as to public trials, as to the due process right is obviously much less in administrative matters, and I have indicated in my statement that in many cases we can take administrative action. However, generally those are ones in which there has been a misuse of classified information, either a negligent losing, or the typical leaving the briefcase in the girlfriend's apartment or in Union Station, *et cetera*, where the facts are obvious and the individual has not reised this type of defenses, *et cetera*, and there has been administrative action taken either by reduction in grade or removal from a position where there is access to classified information, *et cetera.*

But yes, I think the industrial security program would be an interesting set of cases to look at for the development of some administrative proceedings in this area.

Senator BIDEN. To digress for a moment, Mr. Lacovara, it has been suggested to me that it might be amenable to you to testify tomorrow morning at the scheduled hearings.

Which would be your preference, if I could interrupt our witness for a moment, to come back at 2 o'clock or tomorrow morning?

Mr. LACOVARA. My personal preference would be tomorrow morning, Senator.

Senator BIDEN. Fine. It is settled. We will do it tomorrow morning, all right.

That means, sir, you have got me for a while longer, just a little while.

I have, by the way, and will submit for the record, and for you to answer, if you would, in Mr. Civiletti's name, a number of questions that again relate to this subject, obviously.

Again, I keep coming back to what in the Lord's name do we do, what can we do in terms of legislation, whether it deals with the substance of the statutes, the espionage act. Some argue, and I am one, that the espionage act, as written in 1971, I believe, is a good deal less useful today than it was in 1971, because of the dramatic change in what constitutes espionage and how it is conducted. But there must be, I hope, I don't say there must be—is there, in your opinion, do you have any constructive suggestions for us as to the alteration in the substantive aspects of statutes or changes in criminal or administrative procedure that we in the Congress could initiate in order to aid you in what is obviously a serious dilemma?

Mr. KEUCH. I think in the substantive elements of the offense, sir, I quite agree with you that the espionage statutes need some reform, and the language of 1917 and '22 is not totally applicable today. But an interesting sidelight is that we tried to redraft those statutes for the—I am not even sure I ought to mention the bill number and further weaken my credibility, but for the first draft or one of the first drafts of the Uniform Code of Criminal—Uniform Criminal Code, we struggled with redefining information relating to the national defense, and after a 6 or 7 months struggle, finally came up with deciding to use the litigative history that we had and using the same terminology. So I am not entirely certain we can totally modernize those statutes. I think they can be made more easy to understand and perhaps more attuned to the problem. But I don't think it will change our problems because you would still have to, I think, in the classic espionage situation, have to establish the elements of the offense in the trial, and part of that element would have to be the character of the information that was compromised. We do have certain statutes on the books, of course, and you referred to them, one of them in your opening statement, 18 USC 798, and 50 USC 785 or 783(b), I believe, which in different ways are somewhat restricted, but they apply only to the compromise or misuse of classified information, and we do not have the same burdens in the public trial of proving that the information was related to the national defense. There isn't the same testimony back and forth about a great mass of material related to a particular document or documents.

We have had one prosecution under the latter statute, which I am sure your staff is aware of, the Case of *United States* v. *Scarbeck*. Scarbeck was a State Department employee in Poland who was in the blackmail situation in one of your hypotheticals and did in fact pass on classified information from the embassy safe. 783(b) of Title 50 refers to or applies only to government employees who communicate classified information to agents of a foreign government, so it is limted by the class it applies to, and the type of information that we have to prove, and by the recipient of that information.

And we did conduct that trial proving only that the information was properly classified—and by properly I mean that it was marked in the proper way, the individual who classified it, the Ambassador, had the authority to classify it, *et cetera*. We did not go into the substance of the information or have to discuss the details in the documents, which as I remember involved our war defense plans or our plans for Poland should a war break out in western Europe. So that that type of drafting, of course, might be considered, but I hasten to add

that the same reaction to rule 509, of course, arose in reaction to an attempt to combine the concepts of 798 and 783(b) in the new criminal code, and that is a matter we would have to look at very closely before such an attempt would be made again.

But I think there are areas that can be looked at in this area consistent with 798 or with the same idea. But whether or not as a policy or a practical matter, again, the sum of the matters that I referred to earlier, the obvious public interest in these types of cases, the very important societal interests that are involved in espionage and classified information matters. I think there would be a very interesting question of whether or not as a matter of policy those proposals would be advanced at this time.

If we move away from the substantive statutes themselves, I think we have indicated throughout our exchanges that there may be more leeway in the rules of criminal procedure in some of the proceedings. I think if nothing else, if there were some indication of Congressional intent of the burden, and the balance that should be drawn by the courts, I believe that might be helpful.

I think these hearings alone, Senator, if we can come up with nothing that we think will totally solve the problem, or put the lock back on your Pandora's box, will have served a very valuable purpose because they will have made the public aware of the problems we have to face, and I hope will make the other parts of our process aware of the problems we face when we bring these matters, and I hope also convince those segments that we are applying those responsibilities, as the Intelligence Agencies are, as responsibly as we possibly can.

I think there would be a better and more fruitful opportunity—I think it is under way, as Admiral Turner mentioned—to aid some of our problems, and that is by tightening up not only the classification procedures themselves, that is, the amount of information that is classified, but also the number of people that have access to that classified information.

Now, this, of course, is a law of diminishing returns. As we deny people information, we may make it more difficult for them to make wise decisions, and so forth.

So I think in that area, which is an area I am glad to see we are undertaking in the Executive branch, would be a possibility.

I believe that the last Executive order, which for the first time had some provisions for administrative remedies, administrative penalties for abuse of the classification process, was also a step in the right direction, the fact that an individual now who classified a document must identify himself, that there is personal accountability, and the rest, is very good.

But there is an administrative mechanism within the executive branch for the review of classified information, each department and agency must under, even the present Executive order, have a department review committee of some type to review claims that information is improperly classified, and so forth, and of course, there is a Government-wide committee.

The obvious problem, as Judge Kaufman and I were discussing this morning, and I know Judge Kaufman is going to give the committee his thoughts, is that there may be some reluctance on the part

of an employee in the Federal employment anyway to go that route because of the fear that he will be identified as someone who is identifying those areas and some sanction be taken.

I would hope that is an unrealistic fear. I would hope we can more aggressively use those administrative sanctions or perhaps provide in some way that they can be done without any possibility of damage.

Senator BIDEN. I hope so, too. One thing I do think that the hearings will do, if nothing else—and hopefully there will be other things—but as you will recall, this time last year the tenor of the debate surrounding these issues on the Hill was whether or not we should have tougher sanctions than exist now, was in fact the agency asking too much. When Admiral Turner was before our committee initially, the question was, is the administration considering the possibility of being tougher on those leak information, and we got into a sort of a civil liberties argument about whether or not we are shutting off access, and I think the focus of this issue is completely different than that. The question is can we in fact impose the penalties which are presently on the books in light of the constraints, the real constraints, that exist.

One last question for purposes of the oral testimony and then some for written purposes, but some experts have suggested to our staff that perhaps the Congress should enact legislation which would formalize decisionmaking within the Executive branch in the type of cases we have been discussing. For example, they suggest that Congress should establish in the charters a permanent working group of representatives of the intelligence community in the Department of Justice to review all such cases. The working group could be authorized to make decisions on the use of intelligence as well as whether to proceed at all.

In other words, not to infringe upon the traditional perspective prerogatives of members of the group, these could be subject, first, to an appeal to the Attorney General and then an appeal to the President of the United States.

Also, the records of the working group and the decisions reached, and the rationale for the decision reached might be available to the intelligence oversight committees in the Congress. The oversight committees could in their discretion ask for additional information in particular cases.

The question is, how do you react to such a suggestion, do you have any alternatives to formalizing this decisionmaking process, some of which you have already mentioned, and how would you react to a statute which would require the DCI and the Attorney General to develop a procedure rather than setting one out for them in the statute, in the charters?

Mr. KEUCH. Sir, I agree that there are no formal procedures at the moment, if I can underscore the word "formal." However, I do believe very strongly that the procedures that we have been following, or the path we have taken in meeting the issues we are discussing here today have worked extremely well, and one of my reactions would be, to the establishment of a permanent working group, is that it is just inevitable, that I think that the people who have to draw the balances we are talking about, that is, should we disclose information for this prosecution, must of necessity be the people who know

most about the prosecution on the one hand, that is how good is our evidence, how good are other witnesses, what else is available? Are there any other sources that we might be able to prove this from other than classified information or the particular sensitive witness we want, and so forth, and on the other hand, the individuals who know most about the particular areas in which we wish to get information. So I think even if you set up a permanent working group that I could see would be a sounding board or some type of administrative body, they would of necessity have to turn to those very people who are now, because of the practical matters, involved in the initial negotiations.

Senator BIDEN. But, would it not solve one problem that is alleged to exist, and I don't know that it does. Maybe I best should ask you the question whether the problem exists, and that is that because so many of these cases are brought to your attention, particularly in leak cases, that you don't get by question No. nine unless there is an overriding outside interest that forces you to zero in on the case. For example, suppose the case is a leak, the leak is one which is not picked up by the press—I mean, it is in the press but the press doesn't recognize its impact on national security. There are cases that have not gone to prosecution, leak cases, which I would argue, would have deserved much more attention in the press, had the press been aware of the seriousness of the leak.

Do you follow what I am saying?

Mr. KEUCH. I understand, sir.

Senator BIDEN. A low level bureaucrat might leak to someone something of significance which would not receive nearly the publicity quite possibly as an insignificant leak by a high level official.

Mr. KEUCH. I understand.

Senator BIDEN. Because of the nature of the person engaged in the leak.

Now, it is argued by some that you all are under such fire and Mr. Lapham's agency is under such fire and such pressure, that some of these are routinely discarded because you don't have the time and because question No. nine is answered in the negative.

Maybe you could respond to whether that problem exists, because if it doesn't exist, I would acknowledge that the institutionalization of a process to look at whether or not the leak should or should not —or whether or not the classified information should or should not be made public, loses some of its, at least to me, some of its compelling interest that I asked about.

Mr. KEUCH. In my view, Senator, that problem does not exist, or if it does exist, it does not exist to any great extent, and it would have to be in isolated cases. There has certainly not been any situation to my knowledge where the Department of Justice has decided not to prosecute a case because of the embarrassment to the official involved or the individual who might ultimately be involved in the investigation.

There is an aspect, however, of that situation in which, as pointed out by the admiral's comments and I believe some of Senator Hart's questions, you have a very difficult question at times when the very person who has the authority to declassify and classify information

is the individual who may have been responsible for an inadvertent or careless or negligent disclosure of that information.

Senator BIDEN. You don't always know why No. nine was negatively answered. The Department says no, we do not want to declassify that. Do you routinely say, go back and say why don't you want it declassified?

Mr. KEUCH. No, sir, we don't. We will on an ad hoc basis. We do not—but it very much depends on—there are some times when it is obvious, and it may well be even in those situations, there may be other reasons other than the fact that the information cannot be declassified. Now, those reasons may be appropriate or inappropriate. Again, we know of no situation where we have been told, we are not going to come back and answer, we won't cooperate with you because of what we consider to be inappropriate reasons.

If the classification is not apparent or the sensitivity is not apparent, we will on an ad hoc basis try to expand on that, and I think that is perhaps more true in the nonleak cases, that is, the cases of the individual who has committed some other criminal violation than it is in the leak cases, perhaps, because in the leak cases we generally are dealing with people who we are talking to about information, we know what they are talking about, you know they know what they are talking about, and again, the very people who have to make this decision are the ones who are involved in the situation.

But no, I would have to say that we do not routinely do that.

Senator BIDEN. So you would not suggest that there be a formalization of this procedure?

Mr. KEUCH. No, sir, I would not.

I think another problem with that would be—and it is one perhaps well down the road, but we have had experience with attempts in many other areas to try to formalize procedures and formalize our rules and regulations in order to provide control and consistency and the rest, and lo and behold, we find that those procedures get translated into rights of defendants, rights that must be gone through in trials and the rest, and I think another concern I would want to explore very carefully is whether or not if we set up this type of working agreement, that there would be a minitrial as to whether or not we had gone through this entire formal procedure and had followed every sentence and comma in the statute. That would be of general concern.

Senator BIDEN. Well, thank you very much. I kept you beyond the point that I said I would. I am sorry.

We will—we have a number of questions, both myself and some of my colleagues, and we would appreciate the continued cooperation of the Department in this very troublesome matter.

Tomorrow our witness list will consist of Mr. Lacovara and Judge Fletcher, and I thank you very much for your time and thank the agency for its cooperation.

The hearing is recessed until 10 o'clock tomorrow morning.

[Whereupon, at 1:24 p.m., the subcommittee recessed, to reconvene at 10 a.m., Thursday, March 2, 1978.]

THURSDAY, MARCH 2, 1978

U.S. SENATE,
SUBCOMMITTEE ON SECRECY AND DISCLOSURE
OF THE SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The subcommittee came to order, pursuant to recess, at 10 a.m. in room 1202, Dirksen Senate Office Building, Senator Joseph R. Biden (chairman of the committee) presiding.

Present: Senator Biden.

Senator BIDEN. The subcommittee will come to order.

Our first witness today is Mr. Philip A. Lacovara.

Mr. Lacovara, I appreciate your coming today. Without delaying things any further, I would like to suggest that you begin your statement in any way you would like.

If you would rather proceed from notes, your entire statement will be put in the record; you proceed in any way that would be most appropriate.

[The prepared statement of Philip A. Lacovara follows:]

PREPARED STATEMENT OF PHILIP A. LACOVARA,[1] FORMER DEPUTY SOLICITOR GENERAL IN CHARGE OF CRIMINAL AND INTERNAL SECURITY CASES BEFORE THE SUPREME COURT

INVESTIGATING AND PROSECUTING FEDERAL OFFENSES WHEN NATIONAL SECURITY INFORMATION MAY BE INVOLVED

March 1, 1978.

I am appearing this morning at the Subcommittee's invitation to offer my views on the problems that are encountered in investigating and prosecuting criminal cases involving national security information. In commenting on these problems, I draw on my experience in the Department of Justice, where I served as Deputy Solicitor General in charge of the government's criminal and internal security cases before the Supreme Court, and as Counsel to Watergate Special Prosecutors Archibald Cox and Leon Jaworski. Several of the investigations undertaken by the Special Prosecutor's Office, especially the investigation of the break-in by several of the White House "Plumbers" at the office of Daniel Ellsberg's psychiatrist, touched upon these problems.

1. Relationship between national security and prosecutorial discretion

The prosecution of a federal offense invariably involves a continuing series or discretionary judgments, beginning with the decision whether to open an investigation and extending through the decision how to deliver the final summation at the trial. At each stage, concern about "national security" considerations may affect the judgments that are made. I wish to emphasize at the outset, that although many abuses have been committed in this country in the name of "national security"—over a period going back more than thirty years—the goal of protecting national security is certainly legitimate. Accordingly, it is no more objectionable for any federal prosecutor, ranging from an Assistant United States Attorney to the Attorney General, to weigh genuine national security interests than it is for a prosecutor to evaluate the countless other variables that inform the exercise of prosecutorial discretion.

[1] Partner, Hughes, Hubbard, & Reed, Washington, D.C.

There are two distinct types of situations in which national security factors may complicate a federal criminal case. The first involves the risk that the very initiation of an investigation or a prosecution will compromise some national secret or intelligence method. For example, the opening of an investigation may destroy the cover of an undercover operative, or may confirm the importance of purloined information. These are inherent risks and are beyond the scope of my remarks.

The second type of impact can come from the disclosure of classified information that might be required at a trial. If the information is so sensitive that the damage to the national interest would exceed the public interest in prosecuting the offense, the prosecution would have to be aborted. Apparently, there have been instances in which anticipated disclosures at a trial were so grave that even a full investigation of an alleged offense was deemed pointless.

2. Existence of alternatives to "disclose-or-dismiss" dilemma

My objective today is to suggest that the appearance of a national security feature in a federal investigation or prosecution should not be regarded as a "stop" sign, but rather as simply a flashing "caution" warning. If the Department of Justice proceeds with a little sensitivity and a modicum of imagination, the involvement of some national security component need not erect an impassable roadblock to the pursuit of a federal offense that *otherwise* merits investigation and prosecution. Before any final judgment is made that national security imperatives outweigh the public interest in enforcing the criminal law, a number of alternatives can be explored to avoid confronting that ultimate dilemma.

Congress has the responsibility, I submit, to devise procedures and standards that will reduce the occasions on which officials of the executive branch must address the dilemma. I have the sense that the government may be aborting cases prematurely or unnecessarily because of a failure to press the alternatives to their fullest, as we did, for example, in the Special Prosecutor's office in the Ellsberg break-in prosecution, where defense efforts to use "national security" threats to stymie the case were beaten in the courts. In addition, when the close calls have to be made, it is important to identify the official with the responsibility to weigh the alternatives, and to equip him with some policy priorities. On each of these issues, the government's present practice may be deficient, and there may be room for congressional action.

The need to introduce national security information as evidence in a criminal trial, and hence the necessity of disclosing it to unauthorized persons, most obviously arises in espionage prosecutions for alleged transmission or disclosure of classified information. As long as the basic elements of the offense defined by Congress include the element of injury to national security, the government must place evidence before the jury to establish that element. In addition, the defendant is entitled to place rebuttal evidence before the jury. There may be no practical alternative to production of classified evidence in an espionage case, unless Congress is prepared to take the controversial step of enacting an official Secrets Act under which the fact of classification is critical, not the underlying nature of the information.

Similar problems can arise in numerous contexts other than espionage cases, and are easier to deal within those other contexts. The most recent example receiving widespread public attention was the plea bargain arranged with former Director of Central Intelligence, Richard Helms. In that case, Helms was under investigation for possible perjury committed in congressional testimony about covert CIA operations abroad. The Justice Department accepted his plea of nolo contendere to the lesser offense of refusing to testify candidly before a congressional committee, explaining: "the trial of [his] case would involve tremendous costs to the United States and might jeopardize national secrets."

In those criminal cases that require disclosure of classified information, the prosecutor is faced with the very difficult choice either to drop the case or jeopardize, to a greater or lesser extent, American national security. As the Congress develops tighter legal restrictions on our intelligence agencies, cases presenting this dilemma are likely to occur with increasing frequency.

Based upon my experience, the dilemma is often a false one, because on close examination much or most classified information is overclassified. Thus, its disclosure at a trial, if necessary, would not present truly grave risks of

jeopardizing our military security. The intelligence community resolutely opposes any public disclosure of classified information, and that attitude is understandable because the mission of those agencies is to obtain and maintain secrets. While I hardly mean to deny the general propriety of protecting the secrecy of defense information, I do suggest that prosecutors should be skeptical about the adverse consequences that would allegedly flow from the disclosure of the limited amount of classified information that might be necessary to sustain a major prosecution.

The main thrust of my statement, however, is that in many instances it may not even be necessary to reach the "disclose-or-dismiss" dilemma. I believe that various substantive and procedural mechanisms can be utilized to pursue otherwise appropriate prosecutions without jeopardizing the national security. I would like to devote the rest of my statement to discussion of these possible mechanisms.

There are two basic approaches to avoidance of the dilemma: (A) reliance on substantive doctrines of law to obviate the need to produce classified data at a trial, and (B) use of special procedures to resolve disputed issues without *public* disclosure of any national security information that must be considered. Some of these options are currently available; others would take legislative action. I cannot emphasize too strongly, however, that the decision to restrict or abort an otherwise meritorious prosecution should rarely, if ever, be made until all substantive and procedural alternatives are exhausted, and this may involve exercise of the government's right to appeal from adverse decisions made initially by the trial judge. *See* 18 U.S.C. § 3731.

A. AVOIDANCE OF DILEMMA BY RELIANCE ON PRINCIPLES OF SUBSTANTIVE LAW

On the substantive level, the key is one of relevancy. A purported risk of disclosure of sensitive information can be avoided if the information is not truly relevant to any material issue in the trial. In that event, the government need not produce it, and can counter a defendant's *in terrorem* threat to introduce it by insisting that the information be excluded from evidence. *See* Rules 401 and 402, Federal Rules of Evidence. The government can insist, for example, on a precise interpretation of the relevancy of the sensitive information to the trial. This was the approach taken by the Watergate Special Prosecutor in *United States* v. *Ehrlichman*, 376 F. Supp. 29 (D.D.C. 1974), *aff'd*, 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977), the prosecution resulting from the break-in at the office of Daniel Ellsberg's psychiatrist.

Prior to the return of the indictment in that case, some defense counsel warned us that they would force into the public trial record the most highly classified defense information. Thus, they argued, an indictment would be aimless because we would certainly have to abandon the prosecution rather than permit the disclosure of the data. It was a worthwhile strategy, but we concluded we were not faced with any imminent dilemma. We satisfied ourselves that an indictment was otherwise appropriate and that there were alternatives that could properly neutralize the defense strategy.

After the indictment was returned, the defendants did in fact demand the production of highly classified files, including nuclear missile targeting plans. The defendants were seeking to utilize discovery to obtain national security information in order to support the purported defense that they believed the break-in was justified by national security concerns. The Special Prosecutor argued, however, and both District Judge Gesell and the U.S. Court of Appeals for the District of Columbia Circuit agreed, that the information sought was irrelevant because "good faith" motivation was not a valid defense against the crime charged, a conspiracy to violate Fourth Amendment rights. Thus the difficulty of choosing between forfeiting an important criminal prosecution or disclosing information potentially damaging to our national security was avoided.

I suggest that there are a number of other types of cases, where there has been a supposed risk of disclosing secret material, that actually parallel the Ellsberg break-in case. For example, in a perjury case, it is highly doubtful that the defendant is entitled to introduce background information of a classified nature designed to show what his false answers were designed to conceal. Motive is simply not a material issue in such a case, and the classified information thus is not relevant at the trial.

The new Federal Criminal Code expressly recognizes that proposition. Section 1345(d) of S. 1437, 95th Cong., as it passed the Senate on January 30, 1978, precludes a defense in a false-statements prosecution that, in a closed congressional session, a false answer was necessary "to prevent the disclosure of classified information or to protect the national defense." This explicit provision, of course, does not necessarily define the maximum limits of situations in which a "national security" defense can and should be precluded. Congress can certainly use its power over the definition of the elements of federal crimes, and over the permissible defenses to them, to deal more comprehensively with this problem.

Another substantive legal doctrine of possible use to avoid disclosure of classified information is the assertion of a claim of privilege. The Supreme Court has recognized the validity of an absolute privilege for national security information in the context of a civil case against the government. *See United States* v. *Reynolds*, 345 U.S. 1, 6–7 (1953). The scope of the government's right to withhold national security information as privileged in a criminal case is not yet settled. In the Nixon tapes case, the Supreme Court refused to find the President's claim of a generalized executive privilege broad enough to justify withholding the tapes from the Special Prosecutor for use in a criminal trial, but strongly implied that a privilege claim based on military or diplomatic secrecy could prevail in such a situation. *United States* v. *Nixon*, 418 U.S. 683, 710–11 (1974).

Further definition of this "state secrets" privilege is in the hands of the Congress. The proposed Federal Rules of Evidence originally promulgated by the Supreme Court included a rule defining a privilege for state secrets, but Congress found all the proposed rules dealing with privileges unacceptable and rejected them. In dealing with the problem of disclosure of national security information in criminal litigation, I suggest it would be advisable for Congress to set specific standards for the scope of a "state secret" privilege.

In any case in which a court sustains a claim that national security information is privileged, the problem then posed is to determine the effect of the privilege on the further progress of the case. The proposed rule of evidence promulgated by the Supreme Court provided that if a valid claim of privilege by the government deprived the opposing party of material evidence, it would be up to the judge to determine what further action was required in the interests of justice, including striking a witness's testimony, finding against the government upon the issue as to which the evidence is relevant, or dismissing the action. *See* 2 J. Weinstein, *Evidence* ¶ 509 (1977). The proposal simply restated the flexible discretion possessed by a trial judge. Under the Federal Rules of Criminal Procedure, for example, a trial judge has an array of sanctions he can impose in the event the government fails to comply with a discovery request. *See* Fed. R. Crim. p. 16(d)(2). But it is vital to note that dismissal of the case is neither necessary nor likely in most situations in which information is withheld on the ground of the privilege for state secrets.

The courts, although finding dismissal necessary in some cases following a valid claim of government privilege, have not held dismissal mandatory in all cases. In the analogus area of the government's assertion in a criminal case that the identity of an informer is privileged, for instance, the Supreme Court has held that whether disclosure is essential to the continuing viability of the case depends on "balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." *Roviaro* v. *United States*, 353 U.S. 53, 62 (1957). Thus the defendant may not compel dismissal when the government refuses to disclose the identity of an informer in the context of determining whether probable cause existed for a search or arrest, *McCray* v. *Illinois*, 386 U.S. 300 (1967), or when the defense to which the information may be relevant is merely speculative, *United States* v. *Ortega*, 471 F.2d 1350 (2d Cir. 1972), *cert. denied*, 411 U.S. 948 (1973).

Accordingly, when the government makes a legitimate claim that national security information is privileged, the remedy available to the defendant would vary depending upon the circumstances of the case. At one end of the scale, for example, if the defendant's possible use for the information is totally speculative, the case simply could continue without disclosure. At the other end of the scale, where the information is central to the question of guilt or innocence and where no other alternative to public disclosure is possible, dismissal may be necessary. In between, procedures such as instructing the jury

to assume that the missing information would have proved a given proposition may be possible. Certainly the Department of Justice should press for some intermediate treatment like that before deciding that the case must be abandoned.

This approach illustrates another area in which congressional action would be useful. Congress has authority to define rules of procedure and to prescribe a sliding scale of sanctions. It would be useful for Congress to establish a formal policy that directs the courts to reserve dismissal for instances in which non-production of classified information poses a substantial threat to a defendant's due-process right to a fair trial.

B. AVAILABILITY OF PROCEDURES AVOIDING OR RESTRICTING DISCLOSURE

In addition to those substantive bases for avoiding the disclose-or-dismiss dilemma, several procedural mechanisms can be used to reconcile the accused's right to a fair trial with the public interest in maintaining legitimate state secrets. The most obvious technique to insure protection of classified information during criminal litigation is the *in camera* proceeding.

I readily acknowledge a well-founded abhorrence for secret trials. The Sixth Amendment to the Constitution expressly guarantees the accused the right to a public trial. The courts have long recognized, however, that the right of a criminal defendant to a public trial, or even to be present at certain kinds of hearings, is not absolute or all-embracing. Recognizing the competing interests at stake, the Supreme Court has already indicated that in the area of electronic surveillance conducted for national security purposes, a court properly may determine in an *in camera, ex parte* proceeding whether the electronic surveillance was lawful, *Giordano* v. *United States*, 394 U.S, 310, 314 (1969) (Stewart, J., concurring), or whether the defendant has standing to challenge the surveillance, *Taglianetti* v. *United States*, 394 U.S. 316, 317–18 (1969) (per curiam). The same type of proceeding is also permissible to determine the relevancy of material sought from the government by a criminal defendant through discovery procedures. *See United States ex rel. Williams* v. *Dutton*, 431 F. 2d 70, 71 (5th Cir. 1970).

Pursuing these principles, it would be possible, in many criminal cases involving classified information, to have the court act *in camera* to decide preliminary issues, including discovery requests and admissibility of evidence, that involve the risk of disclosure. This was precisely the approach upheld by the United States Court of Appeals for the Eighth Circuit in *United States* v. *Bass*, 472 F. 2d 207, 211 (8th Cir.), *cert. denied*, 412 U.S. 928 (1973), a criminal prosecution for making fraudulent statements with respect to parts supplied by a subcontractor to an Air Force contractor. The court of appeals approved the lower court's *in camera* inspection of the contract to determine whether portions of the contract that were deleted by the government as involving confidential military secrets were exculpatory or otherwise relevant to the trial.

In other cases involving the risk of disclosure of sensitive information, the use of limited *in camera* procedures, allowing either defense counsel alone or defense counsel and the defendant to be present, may be sufficient to protect the information while respecting the defendant's rights. To illustrate, the courts have approved the exclusion of both the public and the defendant from limited segments of criminal hearings in order to protect the confidentiality of the "hijacker profile" developed by the Federal Aviation Administration. *See United States* v. *Bell*, 464 F. 2d 667, 670 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972). The public has been excluded from portions of a trial in order to preserve the confidentiality of undercover narcotics agents. *See United States ex rel. Lloyd* v. *Vincent*, 520 F. 2d 1272, 1274 (2d Cir.), *cert. denied*, 423 U.S. 937 (1975). This type of procedure is ideally suited for cases in which the defendant is a present or former official who probably had prior personal access to the information. In that situation, there is a minimal incremental risk from exposing the sensitive information to the defendant or his counsel. Even in other cases, the use of *in camera* hearings on preliminary questions of admissibility of evidence, coupled with carefully designed protective orders, could greatly reduce the potential harm of general public disclosure of sensitive information.

The problems I have just discussed involve production of information that may be classified, especially information from the government's own files. There is a distinct problem, however, where the defendant himself threatens

to disclose classified information during his trial—or at least is in a position to do so. It is my view that if the information is not otherwise relevant, the trial judge may properly forbid the defendant's testimony about it.

We are generally loathe to muzzle a defendant testifying on his own behalf, but even the defendant is bound by the rules of law governing the conduct of a criminal trial, including the rules of relevancy. My view on this problem is supported, I believe, by decisions like that of the District of Columbia Circuit in *United States* v. *Gorham*, 523 F. 2d 1088 (D.C. Cir. 1975). In that case, a piece of potential evidence, a note signed by a prison official during a prison uprising stating that none of the prisoners would be prosecuted, was held to be irrelevant. The defendants argued, however, that it should be admitted as evidence so that the jurors might use it in order to reach a verdict based on their "consciences" rather than on the law. Although a jury has the power to render a verdict at odds with the evidence and the law, the courts held that the defendant does not have a right to present to the jury any evidence solely relevant for the purpose of inducing such an extra-legal verdict. 523 F. 2d at 1097–98. Further analogous support is furnished by the unanimous position of the federal courts that a defendant has no right to an instruction to the jury that it may render such a verdict. *See, e.g., United States* v. *Dougherty*, 473 F. 2d 1113, 1130–37 (D.C. Cir. 1972).

By similar reasoning, a defendant in a trial involving national security information could be ordered not to testify about sensitive information that has been held to be irrelevant or privileged by the judge, even though the testimony conceivably could have a beneficial "extra-legal" effect on the jury for the defendant. The proper place to rely on such information, if it tends to mitigate the accused's acts, would be during sentencing, where the judge can receive it *in camera* and evaluate its significance for purposes of fashioning the appropriate sentence.

All of these procedural devices would be more effective if Congress required that the proposed disclosure of classified information by the defense be made the subject of pre-trial notice and hearing. Rules 12.1 and 12.2 of the Federal Rules of Criminal Procedure contain somewhat similar directives. Under Rule 12.1, a defendant who intends to rely on an alibi defense must, upon demand by the government, provided pre-trial notice of that intent and must supply details of the circumstances and supporting witnesses. The Supreme Court has upheld such rules against constitutional attack. *See Williams* v. *Florida*, 399 U.S. 78 (1970). Under Rule 12.2, a defendant who may wish to rest on an insanity defense must provide similar notice and information. Creation of a comparable rule where the defense intends to use classified information would greatly facilitate the informed handling of those cases.

Furthermore, an additional procedure should be designed to lay out the ground rules for the trial before it begins. This would give the government the opportunity to decide, before a jury is empaneled and jeopardy attaches, whether any required disclosures outweigh the public interest in proceeding, whether protective procedures are adequate, and whether interlocutory appeals from trial court rulings are in order. *See* 18 U.S.C. § 3731. The special statutory procedures for screening evidence derived from electronic surveillance, 18 U.S.C. §§ 2518 (9) and (10), 3504, statements of government witnesses, 18 U.S.C. § 3500, and confessions, 18 U.S.C. § 3501, provide ample precedents for creation of procedures dealing with the use of national security information in criminal cases.

3. Resolving the dilemma: Who decides?

Before closing, I also would like to address the problems that arise from the potential conflict in authority between the Attorney General and the Director of Central Intelligence. Each of them may lay a plausible claim to final authority over the decision whether or not to prosecute an offense when the trial may involve disclosure of national security information.

At the outset, it is important to recognize that the power to prosecute and the related power to decide not to prosecute are vested solely in the Executive Branch of the government, and its decisions are not generally reviewable by the co-ordinate branches. *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1869); *United States* v. *Cox*, 342 F. 2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); *United States* v. *Cowan*, 524 F. 2d 504 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976). In all but the most unusual circumstances, this Executive

power to prosecute—or not to prosecute—is exercised by the Attorney General through his subordinates in the Department of Justice. *See, e.g.* 28 U.S.C. §§ 515, 516. *Compare United States* v. *Nixon*, 418 U.S. 683 (1974).

Congress has specifically provided in 28 U.S.C. § 535(a) that the Attorney General has the authority to investigate violations of the federal criminal code by government employees. To underscore this responsibility, agency heads are directed to report "expeditiously" to the Attorney General any information concerning criminal misconduct by government employees. 28 U.S.C. § 535(b). Thus, the heads of other agencies are not normally free to decide whether their subordinates should be prosecuted for apparent violations of the law.

Congress, however, has given the Director of Central Intelligence the statutory responsibility to protect intelligence sources and methods from unauthorized disclosure. National Security Act of 1947, 50 U.S.C. § 403g. In specific cases, the Director may view this responsibility as conflicting with the Attorney General's authority to investigate and prosecute criminal violations because the prosecution could result in a disclosure of intelligence sources or methods.

As this Subcommittee is aware, this is not a hypothetical problem. In another forum[2] I have testified—critically—about the issues raised by a 1954 understanding between the Justice Department and the CIA under which the CIA was ceded the authority to investigate misconduct by its own employees. The Agency apparently has effectively blocked prosecutions by the Department of Justice of both government and non government employees by simply "stonewalling" and refusing to allow the Justice Department access to the relevant information.

It would be worthwhile for the Congress to resolve this conflict and prevent future stalemates concerning the advisability of pursuing prosecutions that might lead to disclosure of government secrets. In my opinion, since the exercise of the Article II powers of the Executive Branch are involved, the proper disposition of this problem would be to provide for procedures under which the primary responsibility for a decision whether to prosecute would rest with the Attorney General, subject to the DCI's right to appeal to the President. It is the President who is, after all, both commander-in-chief and chief law enforcement officer. If the Attorney General and the Director of Central Intelligence cannot agree, the matter is presumably important enough to call for Presidential resolution.

4. Conclusion

The problems under consideration by the Subcommittee in these hearings can never be totally eliminated. In order to continue to protect the rights of the individual defendant as well as the collective security of the nation, cases will arise requiring the almost imponderable choice between enforcing the rule of law and protecting some aspect of national security. Yet through the imaginative and diligent pursuit of alternatives like those I have suggested, it will often be possible to avoid grasping either horn of the disclose-or-dismiss dilemma. And perhaps when disclosure seems inevitable, it may not really portend national defense.

STATEMENT OF PHILIP A. LACOVARA, FORMER DEPUTY SOLICITOR GENERAL IN CHARGE OF CRIMINAL AND INTERNAL SECURITY CASES BEFORE THE SUPREME COURT AND FORMER COUNSEL TO WATERGATE SPECIAL PROSECUTORS ARCHIBALD COX AND LEON JAWORSKI

Mr. LACOVARA. Thank you kindly, Mr. Chairman.

Since I have made my statement available to the subcommittee, I do not see any reason to read it in full.

I would summarize some of the points, but before summarizing what I described in my statement, I would like to react to some of

[2] Statement, "Prosecutorial Agreements Between the Department of Justice and Other Federal Agencies," before the House Government Operations Subcomm. on Government Information and Individual Rights, July 23, 1975.

the testimony that was presented yesterday by Admiral Turner, Assistant Attorney General Civiletti, and Mr. Keuch.

Senator BIDEN. Before you do, let me make one thing clear. I am very anxious to hear all that you have to say, and I did not mean to imply by not reading your statement you should in any way rush your testimony.

I have as much time as you are willing to give to this committee. You have a great deal of experience, and I believe that you can shed some light and give us some of your wisdom, so please take as much time as you think is warranted.

Mr. LACOVARA. Thank you, Senator.

There was no misunderstanding on my part, I appreciate that assurance.

The testimony given yesterday seemed to me to underestimate the scope and depth of the problem.

I was a little surprised by it. I think some of the acknowledgements made by the other witnesses and the findings of the subcommittee staff, and indeed the hypotheticals that the subcommittee staff have drafted, illustrate some of the problems. I want to underscore my view that there is a serious problem in attempting to deal with criminal conduct, when national security concerns are somewhat in the picture.

When I was listening to the witnesses who testified yesterday, I found it impossible to avoid thinking of the James Bond character in the Ian Flemming novels.

As you may know, Agent 007 supposedly had a license to kill, but I think the testimony and the findings of the subcommittee staff, as well as my observations, support the judgment that the situation in real life is even more sweeping that Ian Flemming wrote in his fictional novels. What we have seen described, and what I believe to be the case, is a situation in which people who are somehow connected with intelligence information, whether they are themselves intelligence officers, or otherwise involved with national security operations, have by virtual immunity from prosecution—something like a license not only to kill, but to lie, steal, cheat, and spy. The situation, I think, is one that does not properly permit us to be sanguine about it, and to say this is really a hopeless dilemma but there is not very much that can be done about it.

I do not think the dilemma is hopeless, and I certainly think that if the subcommittee and the witnesses yesterday conclude that nothing can be done, we all ought to go home.

One of the other impressions I had from the witnesses yesterday and from my general experience in this area, is that the concern about damaging national security by proceeding with investigation of prosecution may be terribly shortsighted.

There were references made by members of the subcommittee, and by the witnesses to damage assessments that describe the potential impact from proceeding with particular investigations and prosecutions.

I have no doubt that in many potential investigations or prosecutions, there could be grave impact on intelligence sources and methods, and other kinds of policy considerations, if certain information is surfaced.

It seems to me though that the problem that is present is one of inability to see the forest for the trees. As all of the witnesses acknowledged yesterday, and as the subcommittee staff has found, and as the statements of the members of the subcommittee acknowledged, there is virtually no effective deterrent against either leaking or against committing other kinds of crimes as long as one has access to national security information which is either at the core of his misconduct, or somehow peripherally involved, so that the malefactor can threaten to force its disclosure if some proceedings are instituted.

I say this reflects inability to see the forest for the trees, because in my judgment, speaking abstractly now at least, it might be much more protective of our national security for the intelligence community and the Department of Justice to say in one case or another, we have got to swallow hard, and absorb the damage that will be done, assuming there is no way to avoid that damage. That is another subject in my statement, but to swallow hard to absorb the damage, in order to show people that they do not have a license to lie, cheat, steal, spy, and kill, that the involvement of national security information does not provide immunity against Federal investigation and prosecution.

Now, that is a kind of discipline, or an exercise of the will that legislation cannot enforce, but my suggestion is that the committee in its oversight function might very well urge that in balancing national security considerations against the objective of enforcing the criminal law in a particular case, there should be a more broad range assessment made. The balance is not simply between investigating and prosecuting this offense, and the impact on the national security from the disclosure of the information, the very fact of proceeding might very well have a theraputic impact that would be beneficial in protecting our national security, and would at least demonstrate there is a credible deterrent out there.

It is very much like the Strategic Air Command; if nobody believes it is usable, it is pointless.

Senator BIDEN. Yesterday I asked that question whether we might not do more harm long range to the national security by failing to jeopardize national security in a specific instance, and I assume your answer is yes.

We are doing, or at least we are potentially doing more harm to national security by not swallowing harder, and absorbing the loss the individual case will cause. In the long run, there is a therapeutic effect in letting people that damage our Government know that they may very well be prosecuted even if it means we have to suffer. Is that what your position is?

Mr. LACOVARA. That is exactly my position.

I think it applies with special force to people inside the Government who, as some of the testimony indicated, are at least a substantial portion of the problem that the subcommittee is considering.

That is the traditional leak situation, or even the deliberate complicity in espionage.

I do want to underscore that my concerns, and I believe the subcommittee's concerns, go beyond just the question of leaks of classified information, or espionage. What we have seen, and what the subcommittee's hypotheticals suggest is that there are other kinds of

crime that are not themselves in any way related to national defense information, that are somehow coated with virtual immunity, because the would-be defendant is in the intelligence community, or because he is somehow affiliated with the intelligence community or some intelligence operation. The problems are somewhat different, but I think it should be no less consoling to us that bribery, perjury, extortion, or murder, not to mention major narcotic smuggling, may be placed beyond the reach of Federal criminal investigation and prosecution solely because of the involvement of some national security component.

My principal thesis, though, in my testimony, Senator, is that the dilemma that we have been talking about may not be quite as inevitable or as insoluble as it has been regarded in the past.

I say it may not be as inevitable as some of the witnesses suggest for this reason: Looking at the so-called eleven questions as an illustration of the way the process currently works, one of the questions that is put, question nine, asks whether the agency requesting an investigation is prepared to declassify all of the information relating to the transaction or the event.

The intelligence community, since this is its mission, is essentially unwilling to disclose information.

Its job, as I described in my statement, is to obtain and maintain secrets. Therefore, there is a natural tendency to tilt in favor of nondisclosure, so it is predictable as a bureaucratic matter, that when a question is asked on Monday afternoon, are you prepared to declassify all of the information that may somehow be relevant to this investigation, the intelligence agency is likely to reply Tuesday morning, "no, thank you."

That seems to frame the issue very artificially.

As I suggest in my testimony, the preparation of a damage assessment at that point, and a prediction that if all of the information were to be disclosed, there would be grave injury to our national security, is in my view a false approach to the problem. There is no way to predict on that Monday afternoon or that Tuesday morning, what information, if any will actually have to be declassified or made available to the public, nor is it possible, I suggest, in most instances for the intelligence community to make a truly intelligent decision, what the damage would be, from the release of that information, when the release will not in any event come until months or years down the road.

Senator BIDEN. You were with the Justice Department prior to your special prosecutor assignment, is that correct?

Mr. LACOVARA. Yes, sir.

Senator BIDEN. Did you deal with this area at all in your capacity at the Justice Department?

Mr. LACOVARA. Yes, sir, Mr. Chairman.

My position was Deputy Solicitor General of the United States in charge of the Government's criminal and internal security cases in the Supreme Court.

As you may know, the Solicitor General controls the Supreme Court litigation, and reviews lower court cases that were decided against the Government. Within my areas of responsibility, in the

period that I served in that position, came for example, the *Ellsberg* case, the prosecution in California which was dismissed because of Government misconduct and nondisclosure about operation of the "Plumbers," but I did have contact with——

Senator BIDEN. But at what stage would you have gotten into the process, when it is already in the courts?

Mr. LACOVARA. Yes; my function at that time involved the cases that were already in court, so that my familiarity at that time with the process of deciding whether to proceed with the investigation and prosecution was very small. It was just based on conversations with the operating level people in the Justice Department.

Senator BIDEN. The reason that I pursue that, is to find out what runs through the minds of those who are making the decision.

I tried to pursue this yesterday. Does the person charged with the responsibility of sending out that questionnaire, when you referred to the eleven questions, is that a very routine matter, or are all cases treated with some degree of importance? Or is it here just another case? Unless we read about it, unless it received a lot of publicity from the paper, and unless there is a lot of flap within the administration, are the eleven questions sent to the intelligence community, and the intelligence community routinely then says, no, we do not want it declassified, and sent back, is that it, is that practically how it works?

Mr. LACOVARA. My impression, is yes, Senator, but I have to acknowledge that I never dealt on the line with the eleven questions.

When I actually encountered these problems in an operating level capacity, it was when I was in the Special Prosecutor's Office; we did not use the same approach in dealing with the intelligence agency.

Senator BIDEN. On things that had arisen to a level exposure?

Mr. LACOVARA. It was already rather evident that we were going to press forward.

I do want to emphasize, though, that we were conscious of the fact that, although we were prosecutors, we were also essentially public officials, and American citizens. I can assure you that my responsibility for some of the legal and policy questions convinced me that there might very well come a stage in our prosecutions, including the investigation or prosecution of the "Plumbers" activities and at one point even in the Watergate investigation, that the investigation or prosecution might have to be fobbed off, if in fact continued efforts on our behalf would jeopardize our national security. I was sensitive to that problem, and so were other people in the office.

We did regard it as a legitimate factor to consider in the exercise of discretion. The judgment that we made, and this, I think, is not as often made by the Department of Justice, is that it was not necessary to throw up our hands in frustration at the first intimation of a national security problem. I described that in somewhat more detail in my statement, but that is the essential approach that I followed. But I should say that, responding as directly as I can to your question, prosecutors are interested in making cases, they are interested in making major cases as easily as possible.

Therefore, to the extent that it appears that there are going to be significant roadblocks in the way of actually getting from the beginning of the process to obtaining conviction, prosecutors naturally tend to regard that kind of case as being less worthy of their time and attention.

Over the years, my impression has been that people in this area have been frustrated often enough by the lack of cooperation from the intelligence agency, and refusal to declassify, or at least to give blanket assurance of prospective declassification. There is, I would say, something approaching an antipathy toward proceeding with these investigations. That is not to say the Justice Department is reluctant to handle them, I do not think that is the case, nor do I think that where an apparent incident of misconduct appears to be of major import, that there would not be especially diligent effort. But the human psychology, or the inclination, or the tendency, I think cannot be ignored here.

We are talking about real living people who make decisions, and not abstract theoretical items.

Senator BIDEN. What do you think of the idea we suggested yesterday, and was rejected by both Justice and intelligence community representatives, that there be a special board of people to whom all such cases would be referred, and the decision to proceed or not to proceed would be made with some greater degree of uniformity by this committee, by this particular group of persons?

This has been suggested to us, to the committee, to the committee staff, and is one which we would like to pursue in terms of determining whether or not it is workable. What do you think of that idea?

Mr. LACOVARA. I was intrigued by the idea when it was suggested yesterday.

I had not thought about it earlier, and I must say my own initial reaction is negative.

I think it would probably be unwise to diffuse the responsibilities still further. As I described in the statement, the Attorney General has primary responsibility for enforcing the law.

That means not just enforcing the criminal law, but also protecting the national security under those statutes and the Executive orders which are designed to preserve national security information. So in my judgment, the Attorney General already has comprehensive responsibility in this area, and the Director of the Central Intelligence Agency, under the statute and/or Executive orders has a more narrow and more sharply defined responsibility.

Admiral Turner acknowledged yesterday, as I understood it, that in the event the two of them disagree, the Attorney General may make a decision in light of all of the factors, balancing the national interest in enforcement of the law, and the national interest in preserving the national security, and in the event there was some disagreement, the Director could appeal to the President.

I think that this is the best system and it would not be desirable to diffuse or merge those.

Senator BIDEN. If I could pursue this a little bit more, my concern as it develops here is not so much for the celebrated cases not being resolved properly.

The celebrated cases, whether they become public knowledge or not, are the ones that are widely known within the Agency and/or the Justice Department, and I have confidence that the Attorney General, whoever he or she will be, in concert with Director of the Central Intelligence Agency, with the President as the final arbiter, will make a decision, if the present system is the best vehicl' to make that decision.

It may not make the right decision, but quite frankly, I cannot think of a way to institutionalize proper decisionmaking.

I have not figured that one out yet, but I am concerned about the case that for whatever the reason—either the lack of input of a person who has engaged in the espionage, or the leak, or the lack of public notice that it has received—ends up as more of a routine case, and ends up being checked off the list by number nine. I know myself—you are a prosecutor, I was a defense attorney—and I know the best thing I could do for my client, and I never had to handle a national security case or defense, but the best thing I could do in a major criminal trial was to impress on the U.S. Attorney General, the Deputy Attorney General and/or the attorney general of my State, and/or the city solicitor, whomever, that this will be a difficult case. There were going to be serious roadblocks, also that it would be very time consuming. I was prepared to insist upon certain motions. I was going to take a certain course of action, none of which were frivolous, but might have escaped the attention of the prosecutor, and I now will take the time to point it out.

The end result of that, whether it is right or wrong, human nature being what it is, the U.S. attorney, or the attorney general of my State, who has 20 other cases also to prosecute simultaneously, says, well, if I go with this client I am in for a 3-week trial, that will probably be appealed and I do not know if I can nail him in the first place, and I have got these two murder cases, one rape case, and a bribery case which could be pursued, and it looks like a clear road. They call in Biden, and they say, is your client ready to plea bargain?

Those of our fellow citizens who are not attorneys, sometimes view that as somehow a bad thing, but it is part of the criminal justice system, and I do not think it is a bad thing necessarily.

The only bad thing is we do not have enough prosecutors. Even in these cases my concern is that, and I am not at all married to the idea of an institutionalized board or group of persons, but administratively, there should be something that can be done within the administration to see to it that the prosecution is not quashed before it really is looked into, before it really has a chance to be investigated. Again, I want to make this clear for the record, I do not believe for a moment that in any of the cases, not many cases all told, roughly, around 50, that the staff has looked into, that there was a deliberate intention on either the part of the Agency and/or the Justice Department to protect anyone in the sense that they did not want to take the chance, that they did not want to move, or the laxity on their part, that they just did not feel like doing it. My concern is that there is a developed routine that it is accepted which makes it very difficult to prove a leak case, to get a prosecution; or

that it is going to be like pulling teeth with the agency to get the information we want—they will give us everything we ask for, but we are not even sure what we should ask for, and that will only develop as the case develops. There is a tendency to say let us move on to things that we can do. If we come up with nothing more, I think we can come up with more, but I tend to be an optimist, if we could come up with nothing more out of the extensive work the staff has done, and the hearings and the follow up hearings we have had, if we came out with nothing more than a reasonable suggestion that was embraced by the executive branch to administratively streamline these cases, I think we would have made a major accomplishment. I am concerned that it is a combination of inertia, inadvertance, or lack of time, that some cases that might very well be able to be pursued without seriously jeopardizing our security. But they tend to fall by the board, because as you said, the view of the Agency is to say we do not want to disclose, and the tendency on the part of the Department is when they hear, that they do not want to disclose, to say, this will be tough, so that is why I obviously, why I raise the issue, can we in any way administratively streamline process, the initial process of where you decide to proceed or cease to proceed.

Mr. LACOVARA. Let me react to that, Senator.

You obviously put your finger on what is probably the most pervasive problem in the administration of criminal justice, and that is, how to regularize and rationalize the exercise of prosecutorial discretion.

The factors that a prosecutor considers in deciding whether he wants to go forward with a case are legion, and some of them we have talked about, including the complexity of investigation, the likelihood of success, and the competing caseload he has.

We are talking here about one particular type of problem that a prosecutor confronts, the complication to his investigation because of the national security components.

It seems to me that there are two ways you can deal with the effects of that factor. One of them is, as you suggest, to streamline the process so that there is not as much motivation for a prosecutor to appear reluctant to go forward. If it looks as if the difficulty he will encounter in proceeding with the investigation will be smaller, he will have a correspondenly greater incentive to go forward. So I think it is certainly desirable to do what you suggest, and that is to try to improve the relationship between the Department of Justice and the intelligence agencies to break down some of those barriers, or at least some of those are relatively imposing hurdles.

It can be done, I think not only by encouraging executive action, but also by doing what I suggested in my statement: establishing some procedures or policy priorities. That can be done legislatively, I think.

That gets me to the second approach that can be taken to deal with your problem, and that is establishing a procedure for institutionalizing the decisionmaking.

It would not be foolproof, but it might very well be an improvement over the present system to provide that the decision not to

proceed in cases because of some national security complication must be made at a particular level in the Department of Justice.

There are already Executive policy directives and a few statutory requirements that certain decisions be made at senior management levels, and I would think that it would be feasible to require that a "no prosecution" decision not become final unless and until that decision or recommendation is reported to the Assistant Attorney General or the Deputy Attorney General and approved for overall reasonableness. So I think that there are two ways to solve the problem; one is to break down the disincentives to proceeding, and the other is to restructure the decisionmaking process.

Senator BIDEN. We need that restructuring right now. When a damage assessment is done by the agency on a case, whether it is the hypothetical narcotics trafficking, murder, or the hypothetical case where there is the actual sale or the blackmail of military officers selling secrets to an enemy agent, when that damage assessment is written, it indicates what transpires to the best of the knowledge of the agency, and then it says just what its title indicates—a damaging assessment, how much damage was done. What it does not do is follow up, and I do not believe the Justice Department follows up on why the prosecution has not gone forward.

If we require that in all our national security cases there be a written assessment, a rationale as to why we did not proceed—obviously that would be classified—it might very well require the prosecutor and the agency to go the step beyond where we both are saying they do not now go, not because of any intention to thwart the law but because of defense tactics. Maybe we could do it that way.

Mr. LACOVARA. Well, that is one of the kinds of procedures that I would recommend. It is analogous to something that I have recommended to this committee and several others recently in connection with the proposed Foreign Intelligence Surveillance Act.

My strong endorsement for a warrant system is based not so much on the notion that judges are necessarily more protective of civil liberties than any one else. The process of requiring someone in the Executive branch who wants to make a decision to promote national security in some way to write that out in a way that would not only make a written record of it for someone to examine later but would justify it in a rational step-by-step way would have a very beneficial impact.

It forces people to think through what they are doing, and a lot of times instinctive judgments that are made just will not withstand analysis when a person begins to try to explain why he is doing something. I suggested in my testimony on the surveillance bills that a lot of abuses or a lot of irrational actions or unsupportable efforts could be filtered out by requiring people to write things out and submit them for review, and I think that same process would be useful here, just to articulate the reasons why a prosecution is being aborted because of some national security concern.

I think a system that requires that could be defined, the factors that should be considered and addressed, and they should be listed, and I think that it would make the process more rational and certainly would dovetail with the approach I have recommended that

people not just throw up their hands whenever there is some national security factor here but really think through what the consequences are.

Senator BIDEN. I like that idea, because I think it responds to human nature.

In all of our individual experience, if any of us have had to distill to writing what our rationale was for the argument with our wife, or the rationale as to why we took the position we took initially before the U.S. Senate, it forces you to review the matter with more clarity.

Mr. LACOVARA. That is exactly my point.

Senator BIDEN. And I think that is a very, very good point, a very constructive point.

Why don't you move on to the other major points.

I am sorry to have interrupted so much, but I think that your testimony is very helpful to us. I hope that you do not mind when we hit upon a point pursuing it at that time.

Mr. LACOVARA. Senator, one of the first things I learned as a courtroom lawyer—and this is a somewhat analogous situation—is that when the judge leans across the bench and asks a question, that is the teaching moment; and if he has some interest do not say, "I will get to that later," but respond immediately. So I am perfectly delighted that you have some questions, and I am prepared to respond at any time.

The major thrust of my statement, Senator, is what I described in our colloquy: The dilemma that I characterized as the disclosure-of-dismiss dilemma often can be avoided.

It can be avoided through several different mechanisms, and I think some of the hypotheticals that the staff has drafted really underscore the point.

The hypothetical involving the possible murder investigation——

Senator BIDEN. For the record, when the people read this portion, let us review the hypothetical. It was one where a military officer was blackmailed into giving secrets to an enemy agent, learns that the source of his problem is his paramour, and eliminates his paramour and kills his paramour.

Now, that is the murder case you are referring to?

Mr. LACOVARA. Yes, Senator; the hypothetical states that any effort to proceed with the investigation or prosecution would of necessity require surfacing our double agent who led us to the information that the paramour was an enemy agent.

Now, there was a reference yesterday to a similarity between these hypotheticals and law school hypotheticals where we are normally restricted to the facts as given to us to be assumed. But my contention is that it is in no real sense inevitable and, indeed, might not even be likely that proceeding with that murder prosecution would involve the assumption stated in the hypothetical, namely the basic assumption that the double agent would have to be surfaced.

The reason is that the character or the employment of the victim is normally quite irrelevant in a murder prosecution, and the rule of relevancy, I will suggest, is the major approach to piercing the horns of the dilemma that is often referred to in this area. If the informa-

tion that is classified is not relevant to the issues in a trial, there is a substantial basis for resisting its disclosure.

We have talked about due process rights, talked about sixth amendment rights to a public trial. All of those, however, assume that the evidence or the information which there are reasons not to disclose in the name of protecting the national security would somehow have to come out as part of the fair trial, or public trial. That is not inevitable in many situations, particularly where we are dealing outside of the area of what we call classical espionage.

Murder cases are perhaps the most vivid illustration, but some of the other hypotheticals, like narcotics smuggling, involve situations in which the full background of the participants, or the ultimate source of the tips that lead to the raid that seized the narcotics is probably not relevant. These illustrate other areas in which it is entirely reasonable to project that there will never be a dilemma in producing the information publicly.

Senator BIDEN. In the case of the murder, in the hypothetical, for purposes of the hypothetical, we would assume that the defendant would move for the discovery of information that the prosecutors had, or maybe even argued, over an affirmative defense, that the killing was in the line of duty. It was an enemy agent that was being eliminated, and therefore produced that evidence.

Mr. LACOVARA. Yes; that is the routine demand for national security information, which is becoming quite fashionable in just about every prosecution.

To digress in slightly, Senator, you may recall back in 1969, I believe it was, the Supreme Court ruled in the *Alderman* case that a person overheard on an illegal electronic surveillance would have the right to litigate whether or not his prosecution was tainted by that illegal electronic surveillance.

The surveillances in question were for intelligence purposes and the intelligence agencies, and the Justice Department agreed that those prosecutions would have to be abandoned, rather than disclose the information. It became routine in virtually every kind of criminal case for a defense counsel to demand that the Executive Branch search all its intelligence files to see whether the defendant had ever been overheard in any electronic surveillance including telephone calls to foreign embassies, and the like, that might be subject to surveillance. This came up in credit card fraud cases, securities fraud cases, where there was no conceivable electronic surveillance likely to have been involved in the prosecution.

Congress finally responded to the problem by passing a special statute to deal with these demands. The point I am making is that it became fashionable, briefly, to make routine demands about file searches, to see whether a person has been subjected to national security surveillances.

Congress dealt with that problem effectively. Now it is becoming fashionable to attempt to require the production of classified information at any time anyone is somehow connected with the intelligence community.

The FBI break-in cases in New York, and the would-be prosecution of Director Helms are cases in point.

My strong recommendation to the subcommittee is that it consider the approach that we took in the Special Prosecutor's office in dealing with exactly that kind of problem.

As I described in my statement we were told by counsel before we indicted in the Ellsberg break-in case that we would never be able to maintain a successful prosecution because the defense would subpena classified information, which we as responsible public officials could not allow to be placed in the public record.

They exercised their subpena rights, they demanded pretrial discovery, but the approach we took, was to say this is not relevant, whether or not Mr. Ellsberg had access to highly classified information, we can assume that that is the case.

It is simply not a defense to a charge that his psychiatrist's Fourth Amendment rights were criminally violated by breaking into his office, that the people who orchestrated that burglary were concerned about national security. It is not a legal defense. In that position we resisted in the discovery, we were sustained, and Judge Gesell said the information did not have to be produced, the Court of Appeals affirmed that result, and the Supreme Court denied further review.

It is precisely what should happen, Senator, and what is very likely to happen in actual court room proceedings in the hypothetical.

If the defendant wanted to say, I insist on showing the character of the victim, and in order to show the character, I will insist that you provide for me all information in your intelligence files that would show that she was in fact a double agent or a spy, that information would be excludable from evidence because it is not relevant to a murder case. Therefore, the agency would never be faced with a decision whether to surface that double agent.

Senator BIDEN. I did not know this, it is a very good point.

One of these counter arguments offered by the members of the intelligence community is that they cannot count upon the judge properly exercising discretion or having a tendency to very broadly interpret relevancy. I think that the counter argument to that is to assume that if the lower court judge rules that it is relevant and allows it in, the option exists at that point to drop the case.

Mr. LACOVARA. That is exactly right. That is why I started out saying the dilemma is addressed as imminent when in fact it is not.

It is addressed prematurely, and as I said in my statement, even today there are appeal rights for the government. Even the initial decision by the district judge to order its production does not require that it be produced the next day.

The Government has the option then to discontinue the prosecution, and also has the option to appeal.

What I suggested in my testimony as the basis for legislative action, would be the establishment of procedures similar to those that are currently provided for in our rules for pretrial notification.

Senator BIDEN. Say that again.

Mr. LACOVARA. The situation that you and I were discussing, Senator, involves an order in the middle of the trial.

Senator BIDEN. Right.

Mr. LACOVARA. In which the district judge said I think there is sufficient relevance that I will order you to produce it.

The government then has the option either to produce it, and incur whatever damage to national security there might be, or to dismiss the prosecution and give up, or attempt to appeal during the trial.

Those rulings may very well be appealable even under current law.

The appeal in the middle of the trial is obviously not the most desirable way to handle it.

What I have suggested is a matter of legislative improvement over the current system. Congress could and should establish a requirement that issues of this sort be brought up prior to trial. There are in the Federal Rules of Criminal Procedure and in title 18 of the U.S. Code, various procedures which require pretrial notice about certain issues, so they can be litigated in advance, such as admissability of certain evidence, the use of alibi, admissibility of wire tapping. If Congress were to say that at any time the Government concluded national security information might be relevant to a trial, or anytime the defendant insists on the production of national security information at a trial, the Government, or the defendant must give notice prior to the trial.

Senator BIDEN. Let us pursue that another step. What I think we both have been saying here is that the courts have, and one case I pointed out, that maybe we are implying should in most cases, when there are national security questions at stake, be, if not more restrictive, more careful in their assertion of what constitutes relevancy.

Is there any merit in your opinion in us attempting to legislate a narrower standard of relevancy for national security cases?

Mr. LACOVARA. I think the answer to that question is yes, Senator, and I think the due process interests that are at stake can be protected, while attempting that approach.

Most of the constitutional restrictions that we are all willing to guard quite jealously include the notion of reasonableness, and thus involve balancing.

The courts have shown themselves to be sensitive to the legitimate component of national security information.

The Supreme Court, for example, has explicitly permitted *ex parte* proceedings, and proceedings *in camera* where national security information is involved.

The Supreme Court, even in the Nixon tapes case with which I have had some familiarity, went out of its way to emphasize that the kind of executive privilege that was being overruled, was the generalized executive privilege designed to promote communication. But it was not suggesting that the courts should lightly overrule a claim of a State secret, or national security privilege. There is ample demonstration that the courts regard legitimate national security information as worthy of protection, and I suggest that the courts would look favorably on a sensitive legislative balancing that says there are public interests at stake on both sides of this equation, and the court should look very carefully at true national security information before deciding its relevancy at a trial.

The other related approach, Senator, to what you have suggested, is something that I proposed in my statement. That is to provide, through legislation, some alternatives to the production of that information, alternatives short of requiring the dismissal of the prosecution. For example, in the murder case, let us assume that the judge decides that for some reason, it is relevant whether or not the victim was a double agent.

That is a far cry from saying the defendant and the jury are entitled to know who the double agent was, who provided that information.

It is already recognized in the law, and I think could easily be codified in this sensitive area, that there are other sanctions that can be applied, when information is withheld by the Government on some legitimate ground.

This comes up frequently in the case of undercover informants, even in traditional cases, narcotics prosecutions, for example. This is a recognized privilege that the Government can claim to withhold the identity of an undercover agent or an informant.

If information about what that informant knew is deemed relevant to the trial, the Government is not always faced with the decision either to surface him, or to have the prosecution dismissed. An intermediate sanction is for the court to instruct the jury that it can assume or must assume that whatever information that informant might provide would be adverse to the Government's case, and would help the defense.

Coming back to the murder hypothetical, it could easily follow from a legislative rule, that the Government would have the option of either producing the informant, or the double agent, or having the judge instruct the jury that it is taken as resolved against the Government, that is, it will be established on behalf of the defendant, that the victim was a double agent. Thus the need for the testimony is obviated by conceding the effect that the testimony might have.

That can be done with other kinds of classified information.

Take the Ellsberg break-in case, Senator. Among the kinds of information that the defendants were demanding in that case, was information about U.S. nuclear missile targeting plans, and the objective they said was to show that they were genuinely concerned, because Ellsberg had access to varying secrets, and, therefore, they were entitled to be concerned by what he was doing.

An alternative to actually producing the missile targeting plans would have been to describe to the jury generally what the information was without providing the specific information itself, and to take it as given that the information was of a highly sensitive nature.

Senator BIDEN. I am revealing my position, but I think this is the most constructive testimony we have heard.

I agree with you, I think there are a number of intermediate steps that can be taken, between on one hand, having to resort to a fatal *in camera* proceeding or the other extreme, of saying there is nothing we can do.

I think this is very, very constructive. Do not apologize for that at all.

Let me recap what we have done so far in asking you to proceed after that.

On the administrative question we dealt with, it seems to make some sense to you, as I understand it, that we at least require the procedure of a written explanation as to why there was no prosecution, No. 1.

No. 2, with regard to the procedural aspect of, that we can legislate criminal procedure, that we contemplate the possibility of redrafting, or drafting the Federal rule which in essence says in national secrets cases, the defense argument of relevancy of classified information must be one that is raised prior to the trial, or the pretrial proceedings, and that would obviate a lot of the problem we now have. No. 3, that we consider the possibility again in terms of the procedural rules, the rules of criminal procedure, attempting to define, or find a balance in the area of national secrets, as to what constitutes relevancy.

More narrowly defining it properly, or at least attempting to explore that avenue. Fourth, what you are suggesting is that we codify a sliding scale of steps that a court could take if secrets are determined to be relevant. The nature of the secrets could be examined in an *in camera* hearing proceeding, with just the court, defense counsel and defendant and prosecutor, and prosecutor present. Let us assume for the purposes of discussion that as a result of the *in camera* proceeding the court concludes a double agent's identity is at stake. He could instruct the jury that from that point on, an assumption of fact must be that such and such was the case, and that would in many cases hopefully protect the anonymity of the source of our information. I can think of cases where this wouldn't work. I can envision others where it is theoretically possible for this to be only one possible source, and if the enemy was aware of the fact that there was a source, there would be no question who the source was. Your suggestion would eliminate a number of cases where that is not the case?

Mr. LACOVARA. That, Senator, gets to the real dilemma, the irreducible conflict.

Senator BIDEN. Which is the whole point of what we are attempting to do.

You also mentioned something which has not gone unnoticed, but I am sure we will be back again with the Department and with agency officials. The practical points that are faced with that dilemma at that point, that dilemma ultimately need not be faced at that point, and you can do one of two things, dismiss the prosecution, give up and say all right, we yield, or appeal that ruling in the middle of the trial.

Again, not one that is most desirable, but yet more desirable in my opinion than making the decision five steps before the fact, where before we are certain we have gotten to that point.

Mr. LACOVARA. I would interject there, Senator, that Congress has provided in the District of Columbia Code, but I think not elsewhere, that in criminal prosecutions in this jurisdiction, where Government evidence is excluded in the middle of the trial, the Government can take and expedite an appeal which must be heard within 48 hours, and decided within 72 hours, during which time the trial is stayed.

There is already congressional precedent for that, even though I think it is far preferable to get those questions up front before the trial.

Senator BIDEN. Without belaboring the point, I can picture the situation arising where as defense counsel, I truly thought I would move them all up front, but as the trial developed, facts came forward that put me in the position in terms of properly arguing the case for my client that I raise midtrial requests for production of evidence, production of records, and secrets which I believe to be relevant now. There may be little ways of my knowing they would be relevant earlier, but based in part on how the prosecution proceeds to establish the case it became relevant so even if we do move it up front, there would be the necessity of having the mechanism of expedited appeal of matters which might come up in the trial. I am sorry to keep interrupting.

I think this is very, very interesting testimony, and why don't you proceed with the remainder of what you have?

Mr. LACOVARA. Thank you, Senator.

I think dialogs are always more interesting and informative than monologs, so I am glad you interrupted me.

I believe I have covered, Senator, most of the themes that I have discussed in my prepared statement.

I concluded my prepared statement with a discussion of the problem that we did get to early on, and that is the perplexing question of who decides. Although I had not, I confess, thought of the possibility of referring decisions like this to a third party or a board, I think the responsibility should be that of the Attorney General or the Department of Justice at least. Admittedly not every case is going to come to the attention of the Attorney General personally, but I think the responsibility should be primarily within the prosecutive arm, namely the Department of Justice, but I also do think it would be possible for Congress to insist that decisions involving national security concerns be passed up at least to a certain level of responsibility within the Department of Justice, to insure that there is a consideration of all of the factors by a senior Government official, not just a GS–11, or a GS–13, God bless them.

Since I have been one, I say that most sincerely.

Senator BIDEN. I have a growing concern, it does not speak directly to this point, that we in the Congress are hearing from too many top-level administrators, whereas the bulk of the time is required for them not in making policy, but in answering to the Congress.

Now, keep in mind, that comes from one of those guys who got here in 1972, the main demand was we did not have the responsive Cabinet, we could not get people up here to discuss matters, but I am concerned, and I am concerned with the courts, by the way, that we are beginning, we have in my opinion burdened the courts with a number of responsibilities that I think should have been met in the first instance right here in this body.

We tended to use the phrase, the younger kids use cop out, and say let the courts decide it, so that it was suggested by staff, when we were discussing the first portion of our discussion, maybe in

addition to the rationale, require the Attorney General to sign off on all of these.

Well, I quite frankly think we probably got better testimony yesterday from the person who is, I do not know what the GS rating was, but probably who knows a great deal more, and it is no reflection on the Attorney General, but a great deal more about the matter than the Attorney General does. I have less and less confidence that as we bring into this signing off process, the highest officials in the Government, that that in no way assures that we have a proper decision. Indeed I am beginning to believe the converse. The more we do that, the less we have the Attorney General of the United States, making a decision on major social policy, an issue near and dear to me like busing. I feel certain that if the Attorney General of the United States really zeroed in on the issue, he would be recommending to the President a different course of action, than he had done, but because he is signing off on 400 other things, there is a solicitor, or a head of the Civil Rights Division making that decision, which may be different than the administration policy. There are a number of other items that I think that could be cited to indicate that that may be the case, so I am not particularly enamored anymore with "high-level" signoffs. Although I admit I come from that school which says let us have the highest official who has on responsibility on that subject matter signoff. But I would rather have the official who makes the decision most often, who has the primary responsibility to sign off, and have their rear end on the line, rather than the Attorney General's. That is not to contradict what you suggested, it is just to raise another aspect of how we ultimately resolve these things.

Mr. LACOVARA. I agree with you, and I think it probably would not be necessary to require that the Attorney General personally sign off on these questions.

My recommendation was that there be at least some senior management people.

Bob Keuch, who testified yesterday, is a GS–17 or GS–18, he has many years of experience, he knows how the system operates, and he is in my mind to be distinguished from a 2-year veteran of the Department of Justice.

Senator BIDEN. Yes; I do not think we have disagreement.

It may be these national security cases are so important, important in the sense that they are decided correctly because civil liberties are at stake.

We have been sitting here today and yesterday, focusing on the concern, that there are men and women who are out there jeopardizing the national security, and not at their own peril.

On the other side of that, I want to be, and I believe the entire membership of this committee, I know the ranking member does also, very, very cognizant of the fact that in our system we must arrive at a solution, that does not jeopardize civil liberties. And quite frankly, if we came to that, if we are thrust upon the horns of that dilemma, I for one would have to opt on the side of civil liberties, rather than on the side of taking more restrictive action to protect our national security. I think the single most damaging

thing to do to our national security, would be to put Americans' civil liberties in jeopardy.

Let me pursue this, and I promise, I will let you go after this, but let me pursue several of the suggestions made to us which we have not covered to get your reaction. If you would like to expand on them, you may want to do it in writing, we would welcome that. First of all, let us review rapidly the suggestion of an *in camera* procedure for judicial supervision for use of classified information.

Section 509 of the Rules of Evidence, as proposed by the Supreme Court in 1974, defined a secret of the state privilege which might be invoked by the Government, in which the parties would litigate the use of classified information in litigation.

Section 509 was rejected by the Congress, as it reviewed the rules by the Supreme Court; however, any proposal made at this time, for example, a new state secret privilege, might more narrowly define the type of information which the Government could invoke the privilege, and it might give a greater role to the reviewing claims, include authority to go beyond the classification, to have information disclosed, and it goes on and on.

The bottom line I guess is does the suggestion that you have made about changing the Federal rules of criminal procedure as it relates to the claim of relevancy obviate the need to move in this direction, or if not, does this make sense, or do you see trouble here?

Mr. LACOVARA. It does not obviate the need to move in that direction, Senator, even if Congress were to attempt to define more narrowly the relevance of national security information in criminal proceedings.

I think that the proposed rule reflects a very healthy approach. I have problems with the definition of national security information, and I think the definition could be reworked, and I would think it should be reworked if Congress will begin to address these problems, and to say, some information is not going to be received in a criminal trial, or may not be received in its raw form.

I think it is Congress' responsibility to make sure that the limitation on the free flow of information in a criminal trial is as narrow a restriction as possible. It should manifest the civil liberties concerns that we all have, so I would suggest that something akin to rule 509 would still be necessary, and would be useful in this area.

I should say it is my recollection that the rejection of all of the article V privileges by the Congress around 1974, was primarily motivated by the concern about congressional recognition of a national security privilege.

You will remember, although it seems so long ago, that was the time when the national security was getting a bad name thanks to the former President.

Senator BIDEN. Also, I think quite frankly, until our staff investigated this question in detail as it did, my colleagues were not aware of the dilemma.

I know I was not, and I think that my colleagues, as they become aware of what we have found, were really quite surprised as to what the real problem was. As I said yesterday, admitting to previous positions which brought forth this matter, I quite frankly asked the

staff to get into this from the perspective of making sure that I was prepared for the assertion that if you knew what we knew you would know that, that is the side to which I came, so I agree, that the debate in 1974 was of different concerns, and without full knowledge of some of the real issues that are here.

One last area, if I may, you may recall yesterday, I raised the question about administrative remedies, and sanctions, I guess sanctions is the word. Mr. Gitenstein suggested to me a moment ago that the suggestion which you made today, and I have pressed you on, seems to be more applicable to classical espionage cases than leak cases. In leak cases, the mere indictment confirms the importance of information, so that we may not even be able to get to that point.

Now, if that is true, I think in some instances it is, we seem to be, if we decide we cannot move into a totally *in camera* proceeding, which I think most people would acknowledge we cannot, we are left with looking at administrative remedies, although the suggestions have been made, and I will raise them again with you, I cannot quite frankly picture someone worrying about loss of pension as really getting in the way of them leaking information to the press. But at any rate, the sanctions that have been suggested with regard to administrative tribunal which would be available, one is obviously firing. Two, once fired, deny pension rights. Correct me if I am wrong, but I think it was suggested the possibility of their being able to recover from the dismissed employee salary and/or pension, and/or pay?

Again, I do not look at this as a great answer, but let us talk about the legality of being able to do any of those things.

The only way in which it would make sense to do this in leak cases, would be if we were at the more restrictive proceeding.

I think all of us as lawyers would acknowledge that there is a more limited scope available for the defendant in administrative proceedings than in a criminal proceeding.

How much more limited that is, how much more restrictive can we be, and still comply with the due process clause? Also, does the due process clause in the Constitution insure that any Government employee against whom the Government attempts to take disciplinary action, does he have a right to a public proceeding? Obviously, if he does, then it is not a very useful mechanism.

Mr. LACOVARA. My reaction to that is, probably not, Senator.

The cases that I am familiar with involving administrative proceedings affecting Government employees, deal essentially with an opportunity for notice and hearing, that is notice of the charges, and an opportunity to contest the adverse evidence, and to present favorable evidence.

I do not see why it would be essential in that kind of proceeding to have the proceeding open to the public. Certainly, I would suggest there would rather be ample ground for providing that at least those portions of the proceeding whose openness might jeopardize some legitimate governmental interest could be closed, so my answer is that while I think an entirely *in camera* proceeding could be legitimate, I would think on policy grounds, that Congress would want to confine the *in camera* nature of such an administrative pro-

ceeding to the portion of the proceeding in which some classified information might actually be disclosed, or in which the significance of the leaked information might be discussed.

Senator BIDEN. Apparently 798 is the leak statute which, as I understand it, makes it a crime to leak information not necessarily to whom you leak it, but just to leak classified information.

Mr. LACOVARA. That I believe is restricted to communications intelligence information, not all classified information.

Senator BIDEN. Then really the question is, is it a crime to leak classified information? Do we have a statute on the books that in fact makes it a crime for me to walk off this podium, call a press conference, and leak to the press classified information which does not fall within the preview of 798?

Mr. LACOVARA. The answer to that as you put it, Senator, is no.

The espionage statute requires that in addition to the fact of classification, and indeed without regard to the fact of classification, there have to be two other elements, one is that the information presents a danger to the security of the United States; the other is that the actor has acted with the intent to disclose the information with an awareness of its potential danger.

Senator BIDEN. We have nothing akin to the Official Secrets Act of the British, which as I understand it, makes it an absolute crime to disclose regardless of intent, and without having a showing of it being able to damage the national security, to disclose the classified information.

Mr. LACOVARA. That is correct, Senator.

We have two statutes, I believe, which are of the same type, but much more limited; one deals with communications intelligence information, or information that would disclose sources or methods of communications intelligence, and the other deals with atomic energy information.

It is a crime, as I understand it. to disclose information, I think it is called restricted nuclear data, like that, and a mere disclosure of that is, I believe, a criminal offense without regard to intent, and without regard to a showing of the underlying nature of the information.

Senator BIDEN. Our next witness is chief judge of the Court of Military Appeals, who will be pursuing the possibility of applying a uniform code of military justice provisions on espionage to the intelligence employees with him.

Do you believe this is constitutionally possible, and do you think it would improve our situation in any way if we did that?

If you are not prepared to speak to that, maybe you could come back to us later.

Mr. LACOVARA. With a caveat, Senator, that I have not considered that possibility in any detail. I could give an instinctive reaction.

I think instinctively, my answer would be that Congress can adopt special criminal procedures, or substantive provisions that are applicable to special classes of Government employees, so Congress could say that whatever the text is, all the applicable provisions of the UCMJ would also hereafter apply to employees of defined agencies.

Congress has that power. It is another matter whether or not Congress wants to make a policy judgment to transform a civilian agency into in effect a quasi-military operation.

Since our earliest days we have regarded the military codes, the articles of war, and uniform code of military justice as basically turning on the military status of the people covered, and throughout our history there has been a general divorce between the military status and civilian status, for purposes of a type of special code.

Senator BIDEN. The irony of the situation, as I understand the military code of justice, is that a military officer leaking classified information, can be tried and court-martialed under that code, and sanctioned, whereas a member of an agency, intelligence agency, working under that same base, working with that same officer, and revealing the same information, may very well not be able to be tried, or prosecuted, or have sanctions imposed.

I realize that there are unwritten sanctions that exist, and I am not talking about breaking lines, I mean, one of the sanctions is you transfer one from wherever the devil they are to the Antarctic, where they will be, that is their new station, wherever, so I do not mean to imply that the agency at this point completely has their hands tied.

I do not think that is the case, but there are a number of things that can be done, and I assume are done, to move people who are security risks, out of their position.

I do not suggest, for the record and for the benefit of the public and the press, that there are agencies which cannot protect our national secrets, once they are aware that they are in jeopardy. I assume that I should have stated that in the beginning.

I quite frankly think, if there is a rationale, it makes sense to treat military personnel who have access to national intelligence information, national secrets information, in a distinct way and category, that we do not do an injustice to the distinction and breakdown between military and civilian rule in this country. Some intelligence activities are paramilitary, and it makes sense to treat intelligence personnel by similar standards.

My real concern, and I realize that there are strong arguments about the constitutionality of that, I quite frankly do not find those arguments persuasive.

Mr. LACOVARA. I do not think the arguments are essentially constitutional. I think it is a policy question because that same comparison between the intelligence funtions of intelligence agencies, and military intelligence agencies, could also be extended to other kinds of misconduct covered by the uniform code, theft, fraud, homicide, and the rest, and the question is whether or not you want to have a special code for Government employees that is different from the civilian code, and whether or not you want to have civilian employees of the Government covered by the civilian code.

My point is that there are other kinds of crimes covered in the uniform code of military justice other than espionage.

Senator BIDEN. I fully agree with that. I am not even remotely suggesting that what we do. I am not suggesting that it would be

a wise procedure to say from this point on intelligence officers will be treated under the uniform military code.

What I have suggested is that we should explore the possibility of a uniform intelligence code which would be a standard that applies to those who have access to national secrets. The standard would be akin to the way in which we handle matters under the uniform military code, but I think it would be a mistake in policy to say we are moving all intelligence personnel under the uniform military code.

As pointed out to me, one of the articles under the code is on uniforms, so we would have a problem.

One last question. We discussed at some point a requirement that the Department of Justice make a written explanation when prosecution does not proceed, and when national security matters are involved.

I think that is a good suggestion, but it does raise a question. Is it not difficult, if not impossible, to select a single element in the decisionmaking process which leads to the exercise of the prosecutor's discretion?

Is it going to be too difficult to do that, because there is not always one factor?

Mr. LACOVARA. I do not think it is impossible, Senator, to draft a requirement that calls upon a person who exercises discretion not to prosecute to explain his decision, where there was substantial impact on this decision by national security considerations.

When we had our colloquy about the scope of the factors considered by prosecutors exercising prosecutorial discretion, I mentioned that the factors are legion.

I could see where a prosecutor could either not act in good faith, or acting out of indolence could say to himself or to his superiors the real reason I decided not to go forward with this investigation is that I just do not think there is any likelihood we will find a missing witness, or I do not think we will have enough admissible evidence, and it is not because of any national security problems confronted.

Any system that anyone establishes for dealing with any problem can be short-circuited, but I think, assuming the good faith of the prosecutors, it would be likely in most instances in which they are actually concerned about the national security complications, they will not be adverse to saying so. If somebody disagrees with them, they will adjust to having their decisions overturned.

I do want to emphasize, Senator, that my experience in Government, notwithstanding Watergate, has convinced me of the essential good faith and essential competence of most people in Government.

Senator BIDEN. That is the point I wanted to raise; I really find it very difficult to believe that that young prosecutor whom you refer to will not take it seriously.

I find it very difficult to believe that the vast majority of those persons in the department, who have the responsibility, would not exercise that with diligence.

As a matter of fact, I can picture the possibility of a supervisor saying to a young prosecutor, I am not looking for the Bible to be

written here, shorten it up. And lastly, by experience, although from the other side of the fence, the prosecutors like to prosecute, and when they cannot, they like to make the record as to why they cannot. So as evidenced by those who finally get the jobs, we do, although it is now very much in vogue today to claim, have and take the best and brightest in those positions, so I think we could count on good faith overwhelmingly of the Department.

I really appreciate your time. I think your suggestions have been very helpful.

I am not certain, but in all probability, after these hearings are concluded, this first round will end up being the first round, and the staff and I and Senator Pearson and members of the entire subcommittee will be trying to distill what we have received, I suspect we will have to have back again, if not all of the witnesses, and I will possibly need witnesses to focus more specifically on some of the suggestions.

The thing that pleases me most about the hearing thus far, and particularly yesterday, was not that the suggestions were overwhelming, but that they were a total acknowledgement of the existence of the problem, which to date no one has admitted existed, and I think that is a very positive step.

Thank you again kindly, and I appreciate not only your coming this morning, which has taken so much time, I have had you here for now the better part of 2 hours, but that you sat through it all day yesterday.

Thank you very much.

Mr. LACOVARA. I thank you, Senator

[A brief recess was taken.]

AFTER RECESS

Senator BIDEN. The subcommittee will please come to order.

Your honor, I apologize for keeping you waiting, but there was a vote, and I knew if I convened the hearing, and then interrupted, it would just take longer time, so I appreciate your waiting.

Judge, you can proceed in anyway you feel most comfortable, reading or excerpting.

STATEMENT OF HON. ALBERT B. FLETCHER, JR., CHIEF JUDGE, U.S. COURT OF MILITARY APPEALS

Judge FLETCHER. Thank you, Mr. Chairman.

Let me read my statement first.

Senator BIDEN. Fine.

Judge FLETCHER. Mr. Chairman, kind members of the committee:

A dilemma exists—either really or potentially—for every major law enforcement office in the United States: What to do when the investigation and criminal trial of an individual will involve revelation in that usually public forum called a courtroom of documents or information which the intelligence community of this country has classified as not subject for public consumption. There are two basic variations to the predicament. The first is the case where material in the possession of one party or the other is to be used in

court on the merits of the trial. Such situation presents itself, for instance, when the prosecution needs such material as a key element of its case, either to reflect the information leaked or conveyed to a foreign government or to show the information that was leaked or conveyed damaged our national security. It also arises when the defense intends to reveal such material in presenting an affirmative defense. The second is the situation where the defense wants to discover the material in the course of preparing and presenting its case.

The Federal Government almost unfailingly has abided by an all-or-nothing approach to this problem along both of these avenues. My understanding is that the Federal Bureau of Investigation, apparently, will not even investigate a "leak" case unless the intelligence community will agree beforehand to declassify all information related to the case. I would venture that the frustration experienced by the Justice Department in its inability to successfully prosecute such cases because it was not provided the necessary evidence with which to do so is great. And nearly every time that the defense rattles its saber implying that its case will necessarily thrust into matters bearing even tangentially upon national security, the matter is quietly dropped.

The unwillingness to compromise to some degree in either of these situations leads to the same result: The case against a suspect or defendant is terminated. However, if either of these aspects is permitted to abort the further investigation and prosecution of any criminal case, justice is thwarted and the entire Nation is the loser.

Just as the problem centers around the judicial proceeding, so, it seems to me, must the answer to that problem, for if provision can be made at trial so that the secrecy of the material retains its integrity and, at the same time, the basic rights of the defendant are safeguarded, the competing interests are neutralized. As I have indicated, it appears that there are two basic variations to this problem: use at trial, usually by the Government, and discovery by the defense of material possessed by the intelligence community. Accordingly, the response of the judiciary will vary depending upon which variation of the problem arises.

A possible judicial solution when the Government seeks to close the proceedings in order to protect its information from compromise was outlined by the majority of the U.S. Court of Military Appeals in its recent decision in *United States* v. *Grunden*, 25 U.S.C.M.A. 327, C.M.R. 1053, —— M.J. —— (1977). Under *Grunden*, the judge must make a two-part inquiry whenever the Government presents such a motion. His initial task, reduced to its simplest terms, is to determine whether the material in question has been classified by the proper authorities in accordance with the appropriate regulations. As I said in writing the majority opinion.

It is important to realize that this initial review by the trial judge is not for the purpose of conducting a de novo review of the propriety of a given classification.

I would underline that, Senator. In other words, he does not look behind the classification; rather, he is concerned only with whether proper authorities acting pursuant to proper authorization classified

the material. Once he concludes in the affirmative, his second inquiry is how much of the proceeding needs to be closed in order to protect the material. As the court emphasized, the judge must not employ "an ax in place of the constitutionally required scalpel." Only those portions of the trial in which references will be made to classified information may be closed. This means not only that witnesses who make no such references must testify in open court, but that even those witnesses who do address such material must appear in open court when rendering unclassified testimony. In so holding, the court concluded,

> This bifurcated presentation of a given witness' testimony is the most satisfactory resolution of the competing needs for secrecy by the Government, and for a public trial by the accused.

It has been suggested that to restrict the judge from piercing the veil of the classification presents some risk that the Government will invoke the privilege frivolously or out of self-interest. But this risk seems minimal to me, when carefully considering what the Government obtains from the privilege: simply a trial which at some stages is closed to the public. In other words, it gets nothing except protection of its secret from public disclosure and gains no practical trial advantage over the defendant. Thus, I believe the incentive to act other than responsibly in this regard is not great.

My conviction that this minimal risk is worth running is reinforced when I consider the practical and legal quagmire involved in permitting the judge to rule on the propriety of designating a document classified as a state secret. It must be remembered that a trial judge has no special expertise in the area of national defense or foreign policy, and I would add appellate judge, and there are a host of practical difficulties of which this committee already is aware inherent in any approach for the court to obtain such expertise through such vehicles as panels of experts. Additionally, there is a legitimate argument of some force that this matter of security classification is an executive concern constitutionally and ought to remain so, especially in light of a viable, *Grunden*-type alternative.

I believe that where the Government seeks to gain judicial protection of its classified secrets in a judicial proceeding, the *Grunden* rationale presents an eminently viable procedure which assures both parties the greatest reconciliation of their respective rights.

When the problem arises from a defense initiative for discovery of classified information or documents, the procedure I believe needs to be followed is found in the United States Supreme Court decision of *Alderman* v. *United States*, 394 U.S. 165 (1969). My reading of the relevant portion of the majority opinion, reflecting the views of five of the eight justices who participated in the decision, is as follows: Whenever the defense seeks access, to which the Government objects, to a body of information or documents for preparation of its case, the judge initially will determine the relevance of that type of evidence.

Once, however, the judge determines that a particular type of material is relevant, the defense must have access to all requested information of that type. No one, not even the trial judge, is per-

mitted to examine each particular item and to test for relevance to the defense. Mr. Justice White, in writing the majority opinion, well articulated the rationale leading to this conclusion. I will not take this committee's time discussing it; suffice it to say, it is an opinion most trial attorneys can well appreciate.

I should add that the ultimate responsibility for the protection of the integrity of classified documents used in connection with judicial proceedings rests with the judge. He can and should place all parties and court personnel under enforceable orders against disclosure not authorized by the court. To this end, stiff sanctions must be at the disposal of the judge to back-up his orders. As Mr. Justice White stated in *Alderman*, "We would not expect the district courts to permit the parties or counsel to take these orders lightly."

I believe that *Grunden* and *Alderman* present reasonable and effective procedures to meet the competing needs of the Government and the criminal accused. They permit the machinery of justice to run its natural course unhindered and, at the same time, respect and protect the security interests of this country.

Let me add one thing, Senator, if I may, to my prepared statement.

Grunden and *Alderman* both, sir, depend on a strong trial judge, a trial judge that has a total charge of the court, and is not a mere referee.

The trial judge has got to be the governor, or neither *Grunden* or *Alderman* would be successful in the type of hearing we are talking of here.

Senator BIDEN. Strong in what sense Judge?

Judge FLETCHER. He has got to keep control of the participants, control of the counsel, he has to lay ground rules he will enforce and they have to be enforceable ground rules.

In other words, rules that are practical and applicable to the situation.

You cannot pick up a form, I do not believe, in a case like this, and say, these are my rules.

I think the judge must set down specific rules for each case he tries depending upon the matter which is in question before him.

Senator BIDEN. Your honor, do you feel the rationale you used in the *Grunden* opinion could be used in cases arising in Federal court, in criminal cases, in Federal court, neither rising under the Uniform Code of Military Justice.

Judge FLETCHER. Yes, because none of the rationale that went into *Grunden* had any specific note to the military.

Senator BIDEN. The trial court judge in that case, would make judgments both as to matters of law, and fact. As I understand it, under this delivery the trial judge would define that there is no longer public testimony, that this is a closed courtroom, and heard testimony and made determinations that related to law and to fact. Is that correct?

Judge FLETCHER. I think you could proceed that way.

That was not the way I anticipated *Grunden* would work.

I expected the pretrial conference, where the Government would set up which witnesses would be produced, and what would be the basic tenor of this testimony. Then the court would, if proper

motion were made, look at the material and the testimony as to whether it was to be classified, and if the authority had the right to so classify or declassify. In the end he would divide the time up so that there would be a script, so to speak, as to witnesses, tied in of course, if this were to happen. Senator, the court must instruct at that point, and at the closing, the jury as to what has happened, so that his clearing the courtroom of the public does not in effect say, "I find that this is properly classified." There would have to be an instruction, at the time the case began, and at the closing to be considered. So in effect does that answer your question?

Senator BIDEN. Yes; it does.

Let me expand on it a little bit more.

This morning we heard testimony, and we discussed at some length the possibility of codifying the rules of criminal procedure, a pretrial senario along the lines you just suggested your honor, that is any matter which the defense was going to argue, should be a document, classified document, which the defense was going to argue is relevant to this defense therefore, should be made available to the defense would be stated, set out, and argued in a pretrial situation. At that point, the pretrial judge would make a ruling and determination what constituted relevancy, and if he or she determined that the information being sought was not relevant, then obviously the Government could then decide to proceed without peril, except on appeal, but could proceed.

Now, one thing we did not contemplate, unless I missed it, was the possibility of the actual identity and testimony of the witness.

It was suggested also that as part of this procedure the defense would have to name the witness and the scope of witnesses' testimony and the Government would argue that this should remain classified because the witness was a double agent, or the testimony of the witness would jeopardize national security, if it were made known, again, the judge would be able to rule on that matter prior to trial and I should think that is a workable method that we could so legislate in the Federal rules and procedure,——

Judge FLETCHER. Yes, in fact, I think it follows the omnibus crime bill to a degree. Legislation could provide by pretrial consultation, arrive at that, and once again, you could say this witness is in a closed session.

Senator BIDEN. Your honor, it has been suggested to us that in military cases, the Government has a greater right to maintaining secrets, and proceed out of public view and scrutiny than they do in ordinary criminal matters, do you believe that to be the case?

Judge FLETCHER. No, I do not.

Senator BIDEN. It has been suggested that we should have legislation which treats intelligence officers with access to national secrets along the lines more similar to the lines of military officers are treated under the Uniform Military Code of Justice, that is—Well, that is self explanatory.

Judge FLETCHER. Do I understand your question would be under the Uniform Code of Military or a parallel code?

Senator BIDEN. A parallel.

Judge FLETCHER. Yes; I think a code could so be constructed.

I think you would have to bear carefully in mind though the admonition of the Supreme Court in the areas of the rights provided for, say, under the amendments to the Constitution, I think you have got to watch that very closely, that you are not going to abrogate any of those rights, which is, I think, the tendency of the code of this nature.

Senator BIDEN. As I understand it, in the military code, you have a system whereby you could have defense counsel and jurors who have top secret clearance.

Judge FLETCHER. Yes; in fact, most of them would have to have security clearance of some kind.

Senator BIDEN. Now do you think we could in a criminal proceeding against an officer, excuse me, an intelligence officer, a member of an intelligence agency, subject that person to the same set of circumstances, that is required that the jurors in the case where an intelligence officer is being tried, to be cleared, and the defense counsel, do you think we could constitutionally do that?

Judge FLETCHER. Yes; I think we could qualify jurors under a specific code, and qualifications could be are that they could obtain the clearance necessary for the particular case in hearing.

I do not think that you could broadly across the board, say they all have to be top secret. If you are talking about secret information, I think your clearance only has to reach their elevation, but I think there could be a clarification as to counsel and jurors.

Senator BIDEN. Judge, one of the other things that has been suggested to us by some, is that we could legislate an expeditious procedure, whereby in the middle of a trial, even if we were able to set out new rules of criminal procedure with regard to intelligence cases, as related to pretrial discovery, that it is very possible, although the defendant, the defense counsel raised all the issues of relevancy they thought would be raised, that they would be raising, but in the middle of the trial, as a consequence of the state's case, they seek additional information arguing its relevancy to their defense, based upon what the state has just brought forward at that time, is it possible, is it not, for the court to go into closed session, hear the argument, and make a determination?

In the event the determination has been made against either of the parties, assuming it is made against the Government, at that point, the Government is then faced with a situation of either having to disclose the material they feel is very sensitive in open court, or drop the proceeding at that point. If we were able to legislate an expeditious appeal procedure, which I understand is not part of the Federal Rules now, but is in the rules of the District of Columbia requiring appellate review within 48 or 24 hours or 36 hours. Do you think that is a reasonable suggestion.

Judge FLETCHER. Yes; I think you could set up an interlocutory appeals system.

I think you must be specific in the legislation as to what will give rise to the appellate rights of either the state or defendant, and I think that is particularly true when you talk about the state.

It must be very limited, and not be a broad concept, it must be the narrowest concept as far as the state is concerned.

The defense, as far as interlocutory appeal can be, can be more broad, but I think it could be done.

Senator BIDEN. Do you think that there is a need to legislate any of this now, or do you suggest that the rights that we have, that the court, the Federal court now has the capability of proceeding in a way that you have suggested, and that we are discussing here, is there any need for any legislation to give the court a right that they presently do not now have.

Judge FLETCHER. Well, I think the main right would be that there must be some way to clear jurors, as, in other words, there must be some way to get security clearance for jurors.

Senator BIDEN. It has been suggested to me by staff that there might be a point of departure in the *Grunden* case that does distinguish it from what can or cannot be done in a criminal case in Federal court.

You make a point in your statement on page 3, to point out that you do not go beyond the classification, of:

> It has been suggested that to restrict the judge from piercing the veil of classification presents some risk that the Government will invoke the privilege frivolously or out of self interest. But this risk seems minimal to me when carefully considering what the Government obtains from the privilege: simply a trial which at some stages is closed to the public. In other words, it gets nothing except protection of its secrets from public disclosure and gains no practical trial advantage. Thus, I believe the incentive to act other than responsibly in this regard is not great.

Now, one of the arguments raised, I am told, against rule 509, as was suggested in 1974, was that if we proceeded to not go behind declassification at some point, or have that capability that the Federal Government would declassify everything, that there would be an overclassification beyond which there already is, and result in the public's right to a public trial, not just defendant's rights to a public trial, but the public's rights to a public trial which was the point here yesterday by the Attorney General's office. In the *Drummond* case the jury is instructed it is their role, not the role of the agency which stamped the documents to determine whether the information does in fact relate to national defense; therefore, the guilt or innocence of the accused hinges on that.

I am not sure they are reconcilable, but I am sure there will be a great deal of flap that will be created whether or not they are reconcilable.

I wonder if you could respond to my general comment.

Judge FLETCHER. Well, first, I would hate to communicate, what apparently those who would oppose to the previous bill, the motion that the Federal Government would rise to such a means and classify all information. I have gone on the premise that this would not be the case, based upon my statement.

I think it is factual determination for the jury, I think that the jury properly instructed and by virtue of the tools of cross-examination of efficient witnesses; I think that they could reach this conclusion.

I just do not believe, sir, that the trial judge should attempt to decide whether the classification is proper as to the material. I think it is strictly a fact question.

Senator BIDEN. As I understand, under the military code, the mere disclosure of a classified document in and of itself is an offense, but that under section 793 the Government need not only show there was a disclosure, but that the disclosure did in fact affect the national security interests, and it becomes an affirmative defense to say what was classified did not warrant a classification in the first instance, and the release of it did not in any way jeopardize the national security?

Judge FLETCHER. I frankly do not know about the code. Wait a minute.

I think what was bothering me was that I was trying to locate the specific statute in which this fell.

In talking with my counsel here, he said these have come under article 134 of the code and quite frankly, I am not familiar with any military codes at this point.

I am relaying what I have been told here from my counsel, that there is an affirmative defense the same as in the civilian sense.

Senator BIDEN. OK. I appreciate it very much, your honor, and again, I apologize for keeping you waiting. Your testimony has been very helpful. Thank you very much.

We stand adjourned.

[Whereupon, the subcommittee was adjourned at 2 p.m.]

MONDAY, MARCH 6, 1978

U.S. SENATE,
SUBCOMMITTEE ON SECRECY AND DISCLOSURE
OF THE SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The select committee met, pursuant to notice, at 10:10 a.m. in room 1318, Dirksen Senate Office Building, Senator Joseph R. Biden (chairman of the subcommittee) presiding.

Present: Senators Biden (presiding), Huddleston, Pearson, and Wallop.

Senator BIDEN. The committee will come to order, please.

Mr. Colby, thank you very much for taking the time to come back and testify before our committee on this very thorny problem. I have no opening statement.

Mr. Lawrence Houston, who was to be seated at the table with you, is having some transportation problems, the former CIA General Counsel will be here, I am told. When he comes, you invite him to jump right in, if we can.

Senator Huddleston, do you have any statement?

Senator HUDDLESTON. I have no statement.

Senator BIDEN. You are not at all new to this process, Mr. Colby, so proceed in any way that you deem appropriate.

STATEMENT OF WILLIAM COLBY, FORMER DIRECTOR OF CENTRAL INTELLIGENCE

Mr. COLBY. Thank you, Mr. Chairman. I appreciate the chance to be here and it is an honor to be invited.

Mr. Chairman, we must resolve how to keep the necessary secrets of intelligence. I stress the word necessary—some secrets are literally essential if we are to have an effective intelligence system. But we all know that the total secrecy which characterized intelligence in the past included many unnecessary secrets and that some of these covered activity improper at the time or not meeting the higher standards we insist on today.

The revision of our intelligence structure incorporated in the Presidential Executive orders recently and in the proposed S. 2525 will in my view prevent such abuse or wrongdoing in the future. But we would be irresponsible if our revision of our intelligence structure did not recognize the need to protect the necessary secrets of intelligence better than we do today.

This is not just a theoretical problem. Foreigners abroad wonder if the Americans can keep any secrets, and this has led to individual foreigners deciding that they will not work with us in a secret relationship, depriving us of the information they could have given us.

It has affected foreign intelligence services from which we had obtained important material in the past but which reduced their sharing of similar material. Our sensitive technological sources are today vulnerable to leaks about their access and techniques which can make it easy for the countries about which they are reporting to frustrate their continued acquisition of information.

An exhaustive study of our present legal system for the protection of our intelligence secrets has summarized the situation starkly: "The basic espionage statutes are totally inadequate." We must give a signal to our intelligence personnel, to our citizenry disturbed by this situation, and to our foreign friends that America will not try to keep unnecessary secrets but that it does have the will and the machinery to keep the necessary ones.

But this must be done within the concepts of our Constitution and the policies which mark our free society. We must have a dignified and serious legal structure through which to act and not turn frantically to attempts to enforce contracts or obtain damages for disclosure, resulting in stimulating publishers into covert techniques to avoid injunction. We must have a system which would work effectively in the few cases in which it would be required and not be frustrated by the danger of greater exposure in the course of legal proceedings.

Mr. Chairman, I submit that a very simple approach would answer this problem. It would be characterized by several features:

(1) Criminal penalties for the unauthorized disclosure of secret intelligence sources and techniques by individuals who have consciously undertaken the obligation to protect the secrecy of such sources and techniques.

(2) Sources and techniques defined narrowly only to include those matters which would be vulnerable to termination or frustration by a foreign power if disclosed, not substantive information and conclusions whose source it could not be expected to identify.

(3) Penalties applicable only to individuals who assumed the obligation and not to other individuals who receive such material—for example, journalists—if they never undertook an obligation to protect such secrecy.

(4) A shield law protecting journalists or other third parties repeating such information in the course of the exercise of their constitutional rights from subpena or other requirement to testify and reveal the individual from whom they obtained such information, if they themselves had not undertaken to respect the secrecy of the sources and techniques.

(5) A special procedure for any prosecution under the statute, by which a question of law could be decided whether the specific material which had been disclosed without authorization met the legal definition of a "secret intelligence source or technique." This procedure would provide for an adversary—and not an *ex parte*—proceeding before a Federal judge *in camera* for this purpose, and provide that any material obtained by discovery in the course of such a proceeding would remain under judicial seal and not be exposed beyond the parties and their counsel, and further require that they undertake the obligation to protect the continued secrecy of

such material and thereby subject themselves to the application of the statute.

(6) The judge's finding that the specific material met the legal standard would be deemed a question of law preliminary to the actual trial which would take place in open court with full right of jury to decide the guilt or innocence of the individuals prosecuted on the basis of the material actually disclosed publicly, the material having been disclosed in the *in camera* hearing thus not being made public in the course of the trial

(7) The criminal penalties of this statute would be exclusive. It would clearly bar any other legal proceeding, such as injunction or civil suit, against the individual who undertook the obligation and thus eliminate any prior restraint on publication other than the general law, as outlined in "The New York Times" 403 U.S. 713 (1971) and subsequent cases. It would also eliminate any obligation of individuals undertaking to respect the secrecy to submit writings, speeches, *et cetera*, for prior clearance by any agency of the Government, although the voluntary submission of such material and its clearance would constitute a bar to protection.

(8) Material circulated within the Government would be divided into that material containing information as to secret sources and techniques and that substantive material which would not reveal such sources and techniques. Access to the former category should be limited to those who signed the undertaking to respect the continued secrecy of such sources and techniques subject to this statute.

Mr. Chairman, I believe this proposal would solve most of the problems involved in the very unsatisfactory situation we have today. It would provide a mechanism for prosecuting the exposure of material which could truly damage our intelligence system, but it would protect the rights of the individual and reflect the interest of our Nation that this category of secrecy be restricted as much as possible.

It would apply only to those who undertake to protect intelligence sources and techniques and protect individuals such as journalists or other third parties against harrassment. It would reduce the chances of this statute being used as a bar to "whistle blowing" against abuse or wrongdoing by eliminating prior restraint or contract theories and by requiring a Federal judge to decide the question of whether the secret meets its standards.

It would provide a procedure to reduce the danger that prosecution produces greater exposure through the discovery process. It would not try to solve the problem of all classified material, but merely limit its objective to reenforcing our intelligence system. And to ensure against arbitrary decision not to prosecute a case in which additional exposure only to the parties and their counsel was believed too dangerous, the statute could include a provision that any such decision be made by the Attorney General personally and be reported to this select committee and that of the House of Representatives.

Mr. Chairman, we need a signal to the world that we can keep the real secrets of American intelligence. I urge you to give it.

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Senator BIDEN. Mr. Colby, I thank you for not only a coherent statement, but a very, very good statement. I am surprised. You almost sound like a civil libertarian.

Mr. COLBY. The first amendment is a part of the Constitution that I swore to uphold.

Senator BIDEN. I am being a bit facetious, but I really appreciate the fact, and the committee appreciates the fact, that you have done precisely what we have asked, give us some solid suggestions as to what we can do about the thorny problem that you are more aware of than I based on your experience.

We have three of our members here. I will limit our questions to 10 minutes. If I could begin with some specific questions

In your statement you say we must give a signal to our intelligence personnel and to our citizenry disturbed by the situation, and to our foreign friends, that America will not try to keep unnecessary secrets but that it does have the will and the machinery to keep necessary ones. You state that sources and techniques should be defined narrowly to include such matters that would be vulnerable to termination or frustration by foreign powers if disclosed, not substantive information or conclusions whose source it could not be expected to identify.

You go on to say that secret sources and techniques materials should be separated from substantive materials which would not reveal the source and technique. A statute should be enacted to cover stricter procedures to handle such materials and special trial proceedings for prosecution of those who reveal sources and technique information.

How would you handle and prosecute cases involving so-called substantive secrets? Is there a statute for publication of classified material apart from that information covered by a COMINT section, section 798, title 18?

Mr. COLBY. There is that one. The only other one is the espionage one and the Congress on various occasions in its history have faced up to whether it has wanted to have an Official Secrets Act against disclosure generally and has turned it down. I think there was some conscious consideration that for the more general area of secrecy was such that they would punish espionage but not punish disclosure, except for communications intelligence—for which there is exception.

There are some other statutes you could apply, one about revealing government material, and so forth. I think those are really not on point on here. The intent of those statutes really does not apply to this situation.

Senator BIDEN. Under our present statutes, as I understand them, most leaks are not a crime.

Mr. COLBY. That is right. A proper reading of the espionage statute is that you really have to have the intent to injure the United States by giving it to a foreigner. That, of course, is not what one does when one gives it to the newspapers here.

Senator BIDEN. I am intrigued. One of the original reasons that this subcommittee was set up and why all of us assembled, as the ranking member can tell better than I, was we were starting off to

do something about the classification systems. We got into this more specific problem in attempting to grapple with the consequence of trying to grapple with the whole question of classification.

I am intrigued by your suggestion, and I would like you to amplify on it if you would—that we should divide, in a sense, sources and techniques and substantive secrets in our approach to get a handle on what constitutes legitimate classification. As I understand it you would attach more severe sanctions to the former. Is that generally correct?

Mr. COLBY. Yes; I think that is generally so, Mr. Chairman.

There are lots of reasons why our government wants to keep some secrets. Some of those are enshrined by law, like the various rules to protect the secrets of crop statistics and things like that. Those do exist. There is a precedent for isolating a category of secrets and giving it special protection. There are some 20 or 30 some statutes that protect financial statistics, and things of that nature.

Second, there are lots of reasons beyond those statutes why the government needs to keep some secrets, diplomatic correspondence with foreign countries in confidence, some of our military secrets, some of the planning, some of the weapons systems. These are legitimate subjects for protection.

To try to rework the entire classification system, I think, would be a gargantuan job, an enormous job. I think that the problem we are really wrestling with is the problem of exposing intelligence sources and techniques, not all of intelligence.

I think that you can produce a great amount of our intelligence assessments and information without necessarily showing where it is coming from. It is a custom in much of this material to show an indication of source to emphasize its reliability, but I think we can apply to intelligence, to a great degree, the practice of journalism which is to produce material for public consumption but to protect the source.

There is a lot of debate about who Deep Throat is, and none of us know, but we have all read his material and seen the results. I think that same basic approach is applicable to much—not all, but much—of our intelligence information. It would require that it would be rewritten and we would refer to a "reliable source" but, in a short period of time, I think, it would establish its credibility through its accuracy and that would be an ample replacement for the present system of referring to the specific source.

You do not really have to say that you learned in a message from Omsk to Tomsk that the Russians have a certain kind of missile. You can refer to the fact that they have the kind of missile and that you know it from a secret source—it does not necessarily come from that particular place.

Having looked for the sources of leaks in our own government, I know that other governments would have an equally difficult time, in many cases, to pinpoint the source of a leak. In some cases, in espionage perhaps—this is not true. Obviously there are some few things where just the existence of the information would point inevitably to where it comes from.

If a Chief of State takes a walk in the garden with his secretary and, in the course of that walk, tells him something and reads in the U.S. Intelligence output the next day that statement, he knows pretty much who was involved in passing it on. There are some things that you really cannot include in this category.

But I think they are the minority, rather than the majority.

Senator BIDEN. How do we go about the actual process of working a statute that deals with sources and techniques? For example, take a hypothetical case—actually, we are moving to the hypothetical in these questions. I would like to stick to the hypotheticals that we raised at the beginning of this hearing.

One of the hypotheticals related to an Army officer at a post in Country X who was being blackmailed by a foreign government because he had a paramour. And the hypothetical that we ran through, the instance that he learns that the paramour was an agent for a hostile government and he kills that paramour.

How do we break down what is sources and methods and what is substantive information in terms of prosecution of that man for murder?

Mr. COLBY. I believe in the first place you can define the intelligence source and method involved in this case, the double agent and whoever it is, the intelligence service someplace, and you question whether that would have to be exposed in the course of the trial.

Nothing that was actually revealed is in the category of the intelligence sources and methods. The fact that there is a contract with that Chief of State, I do not think, is any great surprise. The double agent in the super power's home country is what we are concerned about.

I am not sure that you would have to reveal him. The hypothetical says you would. I think there is an argument. I had the privilege of reading Mr. Lacovara's testimony. There is a chance here that you can get through that hearing without necessarily revealing that source as a part of it.

I think Mr. Lacovara has some very imaginative ideas.

Senator BIDEN. In your experience, which is vast, did you find that the Justice Department and/or your former agency operated as mechanically as has been asserted by some thus far? That is, the eleven questions, if you read the statement, the constant reference to the eleven questions which you are more familiar than am I.

Getting to question No. nine. I understand the stock question is, will you make everything available, and the stock answer, essentially, is no, we will not.

Do things really stop at that point? How, in a managerial sense, is that handled from that point on?

Mr. COLBY. I think at that point you will have people who say no, never. We went through the same struggle with the investigations with the Senate and House committees in 1975. It was more or less the same kind of a problem.

The initial answer—we revealed these things—the initial answer is no, and then you begin to negotiate from that position. One side wants it and the other side does not want to give it and there are ways in which you can come down the middle, by giving the material without the names, and things like that.

I think that is the way that it is worked out. I think the point is that we do not have to decide whether it is total disclosure or not. I think many times you can negotiate your way through that.

Senator BIDEN. Everyone agrees with that, Mr. Colby. The question that I have is in your experience, is that the practice? It does not have to be. Does negotiation really take place? What is the triggering device that makes it happen?

I suggested, and I am not at all sure I am correct, that it seems as though only if it is the case that the negotiating process of whether or not prosecution will move forward depends less upon the substance of the issue, that is, what the espionage activity was, what the leak was, the substance of it, than it does whether or not as to who the person is or whether or not the press has treated it as a major issue, that is, it receives a lot of attention.

Those two factors seem to put the Justice Department and the CIA into a negotiating posture more readily rather than the damage assessment reports which say hey, this is serious.

Is that correct?

Mr. COLBY. Let us face it, 10 years ago, particularly 20 years ago, if CIA said to the Justice Department that this will cause us some problems, that would probably be the end of it. The Justice Department would not ask any more. They probably would have stopped right there.

Do you remember the memorandum in 1954? It was implied that the CIA would not even have to bring the material to the Justice Department if they ran into something.

In more recent years, you have to negotiate your way a bit through it. There has been a movement over the years, but I have found that if you have a good reason, you can explain it to the Justice Department. In my experience, I think, the main one I was involved in was the one about the Thai with the narcotics out in Chicago.

We explained that if you got into that case you would get into his activities in Thailand and that the normal discovery process would reveal a lot of that material in public print and it did not seem to be in the U.S. interests to do it.

There were other things you could do to the man, expel him from the country, and so forth, and that seemed to be adequate.

In that case the Justice Department was understanding of the problem and, in that case, decided not to prosecute, as you know. But I think it was a good faith judgment on everybody's part. I do not think it was two bureaucratic entities sending missives to each other, if not missiles.

Senator BIDEN. Your experience is that the working relationship that a negotiation process has increased over the years?

Mr. COLBY. Certainly.

Senator BIDEN. That is for the better?

Mr. COLBY. Surely.

I think that the Justice Department probably feels more pressure today than they did 10 or 20 years ago to justify not prosecuting where 10 or 20 years ago they could say publicly that there is some intelligence in there, we are not going any further, and

everybody in the public would say fine. Now every newspaper man in the world would be after it trying to expose something about it.

The pressure is different, but I think a good faith attempt to solve it is in the negotiation. That is a good thing; there is nothing wrong with that.

Senator BIDEN. That point has been raised earlier in the testimony. I will come back to it. It seems to me that might argue for some administrative determination to make sure that we do not go back to that process.

Mr. COLBY. I think that this committee's existence indicates that we are not going back to that situation. I believe that is a fact.

If Congress does its job of supervising, I do not think we are going back.

Senator BIDEN. I have other questions. I will yield to my colleague, Senator Pearson.

Senator PEARSON. I thank the chairman. I think Senator Huddleston was here at the start of the testimony. I came in midtestimony. As a matter of courtesy, I yield to the Senator from Kentucky.

Senator BIDEN. Fine.

Senator HUDDLESTON. Whatever is the desire of the Senator suits me fine.

Mr. Colby, a question. You mentioned that it is important that we do develop a proper procedure so that we can protect necessary secrets. I assume, giving a message to the world, that we can protect secrets that they give us.

I think you have indicated that there has been some reluctance already on the part of some foreign sources to share with us secret information. Can you give us an idea of the magnitude of that problem?

Mr. COLBY. I cannot speak for the time since January 30, 1976, since I have seen no classified material since that date. I do know before I left office on that date, I was aware of a number of individuals who had declined to work for us or who had declined to work for us any longer, foreigners who were agents.

I was also aware of a quite obvious reduction in the sensitivity of the information we were receiving from intelligence services.

Senator HUDDLESTON. You see, it is a problem.

Mr. COLBY. I am aware also of some cases in which foreigners indicated that they could not establish any kind of a secret relationship with us even if it might be to their advantage.

Senator HUDDLESTON. I think that you boiled it down to the central problem; that is, making the determination of what is necessary and what is unnecessary as far as secrets are concerned. At least that has to be the proper starting point. What we do from there on to protect necessary secrets would have to be devised, of course.

Who would make this determination or judgment?

Mr. COLBY. First, the first one who says that this is a necessary secret and it has been exposed is the Director of CIA, who reports the matter to the Attorney General for prosecution.

Senator HUDDLESTON. Is this determination made only after something has been exposed, or could it be made along the way as the information is developed?

Mr. COLBY. I think that he would have to have a classification system which would indicate that certain material fell under the statute and certain other material which was still confidential or secret did not fall under this particular statute, and he would have to mark his papers with those two distinctions.

Senator HUDDLESTON. Would there be a possibility that the classification of certain material might change from time to time, perhaps the relationship changing with other countries?

Mr. COLBY. Certainly. I am saying the initial decision would be made that this particular material reveals a certain intelligence source for whose exposure we would prosecute.

When you actually get up to the prosecution, however, you take another look at it and you decide whether it still is that sensitive, deciding whether to prosecute.

Once you decide to prosecute, you must go before a judge and convince him that it meets legal standards.

Senator HUDDLESTON. Then would the decision have to be based on whether or not the damage to the security might occur from the time of prosecution, or might it have occurred at the time that the disclosure was made?

Mr. COLBY. I think it was at the time of the disclosure. If you come along just 4 years and 11 months afterwards the situation might have changed, so you really would not go through with the prosecution. Say the source had died in the interim and there would not be any particular problem—although there would be a particular problem in identifying many sources even though they are dead. Their families are concerned; your obligation for protecting them is still alive.

Say, in this case, it was exposed somewhere else and therefore would not be a matter of concern. In that case, I think you would say that this man did violate the statute at the time. Since that time, of course, this did not come from that disclosure. Nevertheless, there is a clear violation, and you could prosecute.

Senator HUDDLESTON. Any further disclosure?

Mr. COLBY. Subsequent would not matter.

Senator HUDDLESTON. Would you make a distinction between information that might just be embarrassing to the United States versus information that might actually do harm.

Mr. COLBY. That is my point. If we are talking about doing harm to the national security, I do not think anyone can really define that very well. Some people think it could only happen if there were a bomb under the Capitol, that we have survived a lot of other things and therefore it does not matter.

That is why I say let us define it as a source or technique which is subject to frustration; that does not talk about the national security or anything else. It is a rather narrowly defined thing to protect our intelligence sources, and I think if you define it in that way you limit the application of the statute, but you also get it out of this general political assessment as to whether it would hurt the national security, which then becomes a political issue rather than a legal one.

Senator HUDDLESTON. You dwelt a little on the statement that sometimes the information itself might reveal the sources or methods. That is one of the things that earlier our investigative committee and

our subsequent oversight committee learned from the intelligence community, namely that sometimes information that is very innocuous on the face of it reveals things that are very helpful to our adversaries.

Can you write that into the statute in any way?

Mr. COLBY. I think that the definition would reply to that. If the material actually did reveal the source, then it would fall under the category which should be marked that it reveals the source, and it then could become a basis for prosecution, even if it is an assessment of what is happening in some cases.

My experience is that there is a great deal of our material which could be revealed without that kind of damage to the source occurring.

Senator HUDDLESTON. It is sometimes true that what we know, just the fact that we know something, could be damaging to our relationship with other countries or could reveal something about sources.

Mr. COLBY. There I would make a distinction between the two points you made. In other words, if you take the substance of the information that I know a certain thing, if that is embarrassing to a country at the diplomatic level, something of that nature, then I think it is subject to the normal statutes and not to the special statutes, to protect the intelligence sources.

But only if the material did pinpoint the source would it fall under the statute, and that is the purpose of the statute—to draw very narrowly what only protects our secret sources and techniques and does not try to protect us against national embarrassment or protect our national defense and national security; leave that to the ordinary statutes, the ordinary classification system.

Senator HUDDLESTON. What about revelations about covert actions or clandestine collection that may not reveal sources at all?

Mr. COLBY. I would apply the general statute to that. If you could prosecute under the general statutes, fine. If you could not, then it would not fall into this category.

Senator HUDDLESTON. You are very restrictive.

Mr. COLBY. There are a lot of secret political positions that our country has—secret negotiations, secret operations, all that sort of thing—but, as you know, the committee has revealed a number of these, and we are surviving at this stage.

We did have one that cut us off part way—the Angola one. That was revealed, and it stopped us, stopped the operation, but I do not think it necessarily revealed the sources. That one would be one for the general statutes.

I am saying there are some limits there against too cavalierly releasing these general secrets. But this statute is rather narrowly drawn to just protect the sources and techniques.

Senator HUDDLESTON. That is your major thrust, to narrow it down?

Mr. COLBY. The narrowing would give the important signal that is needed.

Senator HUDDLESTON. You think it could be that flexible, that you could consider each case?

Mr. COLBY. I think a judge would have to review your consideration of each case.

Senator HUDDLESTON. Based on what the damage would be at the time of the prosecution?

Mr. COLBY. Or at the time of the revelation. I would say at the time of revelation, primarily.

Senator BIDEN. Excuse me, if I may ask for a clarification there. The judge would review it, based not on what the damage was, but whether it was a source or technique?

Mr. COLBY. Right.

Senator BIDEN. Although there may be damage?

Mr. COLBY. The political damage is another problem. That falls under the general statutes.

Senator BIDEN. All right, so it could very well be that there could be damage politically but that the source and the technique would not be revealed and the statute would not come into effect?

Mr. COLBY. Exactly.

Senator PEARSON. If the Senator would yield on that point, suppose, Mr. Colby, the court rules that the document in question meets the criteria of sources and methods, but assume also that he makes the judgment that the document is relevant to the defense. How, then, does one make this available to the defense to meet the constitutional requirement of a public trial and the presentation of that matter to a jury?

Mr. COLBY. I think you solve that problem, Senator Pearson, by providing a special procedure for this statute that requires that the pretrial question of law, to whether a secret source or method would be frustrated, would be decided *in camera* in an adversary proceeding in which the parties are under judicial control as to what they do with their knowledge, that is, contempt, and undertake to protect the secrecy of the material. That brings them right under the statute for that additional material.

That is not to say that in every case the intelligence people would be willing or responsible to thereby give them the information.

Senator PEARSON. That brings us right back to where we are now.

Mr. COLBY. That is right. In those few cases, you would have to abort the prosecution, as I understand it. I accept that.

Senator PEARSON. I think your proposal has great merit. I merely want to emphasize the continuing limitation.

Mr. COLBY. I admit that in some cases you would have to stop the prosecution. I think you would limit the number of those cases very substantially and you would be able to prosecute most of them. I think the Agency would probably undertake the gamble of letting the defense—we are talking about a defendant who probably already knows the material anyway, or much of it.

Senator PEARSON. He may, but he may also require the use and production of the documents.

Mr. COLBY. Before the judge *in camera*.

If the defendant knows that much about it to be that deeply involved, you are not taking a risk to give the information to him. In some cases you would, and I think the double agent here in the superpower intelligence service is in that category.

All right. You cannot have everything. Accept that.

I think you have the various administrative things and you would be better off than you are today, a lot better off than you are today. It would not be a perfect world, but it would be better.

Senator PEARSON. Thank you.

Senator HUDDLESTON. You are suggesting, of course, that the *in camera* proceedings be expanded considerably over what they are at the present time. You would go further down the road *in camera* to get to the point where you could make an intelligent decision about whether you should proceed or should not proceed.

Then you are risking only those who participate in those proceedings.

Mr. COLBY. You are not talking about public disclosure. That is a great deterrence today in many of these cases.

Senator HUDDELSTON. They would be under the law themselves.

Mr. COLBY. In many of these cases today the real deterrent is the public disclosure of exactly the type of things you are talking about, the embarrassment, the general effect on our foreign policy, defense policy, you know? If you could limit it and not have a public disclosure but only to the parties who are under the seal to protect it, then I think you would take that chance, in many cases.

Senator HUDDLESTON. I do not think anybody on our committee is concerned about shielding our country from embarrassment, particularly. I think there might be a recognition of the cumulative effect of the embarrassment.

Mr. COLBY. I think there are some things that we would want to protect ourselves against embarrassment. If we publicized the fact that we had penetrated a friendly government, or something, it is embarrassing and makes all sorts of political difficulties, diplomatic difficulties.

If you do not have to do it, do not.

Senator HUDDLESTON. Translating that into necessary and unnecessary secrets?

Mr. COLBY. I think that is in the category of the general secret that we are talking about that has good reason, but not in this category of a secret source.

Senator HUDDLESTON. My time is up, Mr. Chairman.

Senator BIDEN. We will come back again.

Senator?

Senator PEARSON. Let me ask one question. I am sort of caught up with your statement, having come in late, for which I apologize to you. We are very grateful for your continuing presence and your help to us on these various difficult matters.

You were speaking on the second page of your statement and saying that we must have a dignified, serious legal structure through which the act would not turn frantically to enforce contract or obtain damages for disclosure, resulting in stimulating publishers, *et cetera*, *et cetera*.

Did you have reference, when you wrote that, to the *Snepp* case?

Mr. COLBY. Also my own experience with *Marchetti*. I am not singling out any particular one.

Senator PEARSON. All of those cases?

Mr. COLBY. Right.

Senator PEARSON. In your judgment, do those in authority now seek to protect information? Are they utilizing all the tools presently available to them?

Mr. COLBY. I believe that they are trying to use the legal machinery that they have available. It is very imperfect.

When we decided to go ahead on the *Marchetti* case, we consciously made the decision that we may lose or we may win it. If we lose it, we will show how weak we are in the legal machinery. We actually won it, but in the process we enabled the charge of prior censorship to be made and a good deal more of the books were sold as a result of the blank spaces within them, of course. And that is not the way to go about it.

This is a serious matter. These are serious matters, and they need to be gone at as among our more serious problems. They are at least as serious as protecting our crop statistics, and we do that with criminal sanctions.

Senator PEARSON. Thank you very much.

Senator BIDEN. Senator Wallop?

Senator WALLOP. Mr. Chairman, I came down to hear Mr. Colby's statement and the dialog surrounding it. I do have one question—a philosophical one, I would think.

Was there ever a time under the laws protecting our secrets that penalties were applicable only to individuals who assumed the obligation to protect them and not to other individuals who received such material, even if they might be classified as coconspirators or accessories, who had never undertaken an obligation to protect such secrecy?

That sounds like a weird question, but are there circumstances in which this country could imply to anybody who has never taken an oath to protect our secrets that he has such an obligation?

Mr. COLBY. Well, that individual would be under the general espionage law and if he gave it to a foreigner with an attempt to injure the United States, then he would fall under that general legislation.

Senator WALLOP. I am less concerned about his giving it to a foreigner than giving it to an American citizen. I wonder if there is an implied obligation that ever arises.

Mr. COLBY. I can testify that a very substantial number of American journalists and publishers did withhold material at my urgent request on an occasion when I convinced them that the success of an ongoing operation depended upon it.

The thing eventually broke down, but a large number of them showed essentially the sense of responsibility that you are saying.

Senator WALLOP. I am sure.

Mr. COLBY. There was no statute. I had no power to punish them, or anything.

Senator WALLOP. I realize that, but I wonder if you can conceive of an implied obligation of citizenship. An agent has consented to all kinds of other things.

Mr. COLBY. I think there is, and one appeals to it if one has a good reason to convince them.

Senator WALLOP. Can we do anything other than appeal to it? To go back, I realize that alcohol and driving is a lot different than the first amendment, but there is an implied consent that you either subject your body to a chemical test or otherwise you are deemed guilty.

I wonder if there is, at some moment in every citizen's life, an implied obligation of citizenship that can be written into law?

Mr. COLBY. I think in the *New York Times* case, the language of the Justices suggests, it is a little obscure, actually, but it does—it implies that in the case of grave and irreparable harm to the United States that the Government might get an injunction. I do not think you can go much further than that.

Prior restraint is considered the last possible outcome by later Supreme Court cases, but nonetheless, there is the recognition that there are possible situations in which the Court may give an injunction against some material being revealed.

The journalist would rather have an absolute freedom to make the decision themselves, but the Court has not gone quite that far and I think that is probably realistic. That does combine the first amendment with a recognition that, in some situation, it might be necessary to restrain in order to protect the first amendment.

Senator WALLOP. Thank you very much, Mr. Chairman.

Senator BIDEN. I have several different questions then, sir, we will get to you. [Mr. Houston was just seated at the witness table.] I apologize for keeping you waiting. We have not had the benefit of your testimony yet.

I would like to pursue an extension of some of the things raised by both Senators Pearson and Huddleston.

Obviously it is critical, I think it is critical, if we draw a statute, frame a statute to define sources and methods, assuming we can do that with some sort of specificity, we have reached the first stage of the thrust. Then, as I understand the way that you are suggesting that a trial would mechanically proceed assuming Justice or CIA and the intelligence community decided that a certain move forward——

Mr. COLBY. Or the President overrules.

Senator BIDEN. The administration decides they should move forward in attempting to prosecute, your procedure that you are suggesting would be that a judge in an *in camera* proceeding would make a decision, in an adversary proceeding, as to whether or not the information that was in question was a source and a method as opposed to a general secret.

At that point, I assume that we would be saying—I think we can —whether or not something is a question of law, not a question of fact. Being a question of law, a judge in an *in camera* proceeding could make that decision as distinguished from a question of fact, that must go before a jury for determination. The judge cannot decide questions of fact on his own in a jury trial.

You do not have any doubt in your mind that clearly the question of its being a source and a method, technique and a source, whatever, could be made a question of law and not fact?

Mr. COLBY. I think if you defined it right, you could. You could have it decided as a legal question, as to just what the set of facts,

either admitted or proven before the judge, whether that set of facts meets the legal standards defined in the statute.

Senator BIDEN. If I may digress to the first hypothetical we used——

Mr. COLBY. Of course, if I may add one more point, that after the judge has made that decision, the whole matter must go to a jury. Of course, the jury would be entitled to throw the material out, throw the case out, for any reason it wanted to.

Senator BIDEN. How would it get to the jury?

Mr. COLBY. That being the fact that this does meet the standard, the legal standard, then you go to the jury to prove that this individual released this material and his involvement in it, and so forth. That has to be proved in open court.

Senator BIDEN. Let us move back, if I may. Mr. Lacovara, whose testimony you had occasion to read, made what I thought were some positive suggestions apparently consistent with what you have suggested. When we were dry running the trial, the way it would work, that one of the problems a prosecutor has is that defense counsel argues that just about everything the prosecution has is relevant to the defense of his client.

So, the Justice Department and the intelligence community is faced with the concern at midtrial that an open court defense would argue that some classified information is relevant, should be made available—declassified, in effect, by being discussed in open court—and that is the relevancy question as to whether or not it goes to the elements of the crime.

For example, in the murder case referred to, whether or not defense counsel might argue, as extraneous as it may seem now on the face of it, that the knowledge of who the double agent was somehow impacts upon legitimate defense of his or her client for murder.

The judge, at that point, would make a ruling as to whether or not it was evident in an evidenciary sense.

Mr. Lacovara suggests that since Justice and intelligence is skittish about that process because they never know what is going to happen at that point they have tended not to want to take the chance. One of the ways to correct that would be to say in the statute that all relevancy questions that reasonably could be foreseen must be raised in a pretrial, *in camera* proceeding, and the judge would make decisions on relevancy of information prior to going to court.

For example, if the court ruled, in a pretrial proceeding, that the knowledge of the double agent's identity was something that should be made available and was an element in the defense, then Justice would be faced with a decision, this judge says in order for us to be able to prove this person guilty of murder we are going to have to reveal the source, and we do not want to do that, so we know not to go any further.

The second thing Mr. Lacovara suggested was—I am probing—in questioning, I, as a former defense counsel, can see a number of instances where you might not reasonably know, because you do not know the entire prosecution's case, all you would argue as being relevant. So where, in midtrial, there is a relevancy question raised by defense that could not reasonably have been anticipated, that

there should be an expedited appeals process, within a number of hours, where the jury would be, for the record and those who would be reading this who were not attorneys, or the jury would actually be taken out of the room where defense counsel and the prosecution and the court would go into chambers and make a determination, at that point, as to what was relevant.

Then if it was found against the prosecution, or vice versa, that either side would have a right of expedited appeal.

The reason that I go into such detail is so that I can understand your suggestion that we would, in a way, further limit the process by having the statute that says that the only thing under this statute that is protected is the source and the method.

Was that your technique?

Mr. COLBY. Technique.

Senator BIDEN. Technique and the source.

A reason why that is important in terms of whether we are able to prosecute or not really has to do with relevancy, does it not? That is, whether or not something is a source and a technique becomes important in prosecution only if the judge determines that that source and that technique need be exposed or need be proven as an element of the crime.

In other words, obviously a court would rule, I suspect, that regardless of whether or not the prosecution raises the double agent in the case referred to as a source, that would clearly fall under the statute, would it not?

Mr. COLBY. No; that is not what was revealed. In other words, you have two different sources involved, the one that was revealed and now the additional one. You are prosecuting for the first one. Your question of whether the defense has a right to bring in——

Senator BIDEN. What if the defense argues——

Mr. COLBY. The defense would argue the existence of this other agent, the additional agent, is essential to the record, because he cannot defend himself on the first case without it. That is the question of relevancy and I think yes, that we will just assume that is a secret source.

You could either, at the pretrial, or Mr. Lacovara's system of the expedited interim *in camera* hearing, get into that question of whether it is relevant, and you could go into it on the basis of a contempt and acceptance of the statute, the workings of the statute on the parties and the counsel to protect this additional source you are talking about.

Even in that situation, it might be that the Government would give up the case right then because of the sensitivity of the particular double agent. He might not even want to expose it to the other party because the other party does not know about it.

That is possible, I said.

I think in many cases the defendant would have known about it, which is how it got there.

Senator BIDEN. If I may—and I will conclude with this. I have some more questions but we have a number of witnesses who I am holding up here. If I could submit some of those to you in writing——

Mr. COLBY. I would be delighted. I will have to write a law review article for each one, perhaps, but I would be glad to try.

Senator BIDEN. In the first hypothetical case we have been using in this hearing, the article appears in the *Washington Post* which contains classified information derived from the secret negotiations suggesting that we have had initial contacts with a superpower. We have exchanged drafts and treaties, that we have intelligence information on the superpowers fallback position in negotiations.

The point of the article is that we should have taken a harder line on the U.S. draft because we know our opponent's fallback position.

The leak contains communications intelligence information. Because our intelligence on the fallback position was derived from intercepts at the military base of communications between insurgent representatives and the superpower, the Department of Defense referred the case to the Department of Justice for prosecution under section 798 of the U.S. Code which makes it a crime to disclose communications intelligence to an unauthorized person.

The Department of Justice responds by requesting that the Department of Defense declassify all information about the communication and intercept operations at the base. The Department of Defense refuses to declassify the information, and no further action is taken on the leak.

In that context, let us assume that the Department of Defense does not refuse the negotiating process that was entered into, and they decide when they refer the case that the Department responds to the Justice Department and declassifies some information of the communications center intercept operation relating to the base.

How does your suggestion help us deal with that hypothetical case? How would we work it?

Mr. COLBY. My suggestion here would be that the intelligence information on the superpower's fallback, you might not have a source revealed.

Senator BIDEN. In this case, the source——

Mr. COLBY. Actually, it is communications intelligence. That is not necessarily so. You may have learned that through penetration of the Embassy, a secret source in the home country of the organization, a secret source in the local party that it has, and so forth. It is not necessary that that be the only source of that material. It may be the only source, but it may not be necessary that it is.

If you put out the material when you published this material, classified within the Government and did not say that this comes from the communications intercept, maybe it does not have the source or technique revealed. Maybe it does, too. Maybe it could only come from one place. That is another problem.

Senator BIDEN. What we have done there then, which may not be all bad, what we have done is undercut the proof of the crime.

The only thing we could be prosecuting for here would be the revelation, not on the fallback position, but that there were intercepts which were——

Mr. COLBY. My proposal would only apply if the source was inevitably revealed. Otherwise, you would turn to the general rules, the

general laws, and the general administrative restraints on trying to protect it. But you are admitting you cannot protect everything.

Senator BIDEN. Two more questions, if I may. Then I will cease.

One of the suggestions that came about as a consequence of the exchange of questions and answers last Thursday of this hearing was that it might be worth while for us, the Congress, to write a law and/or there be an administrative order set out which requires the Justice Department to set out in writing why they refused to prosecute. Why they believe they could not prosecute in a specific sense and not in a general case.

Obviously, that would remain classified. It would not be a document that would be made available to the public at large.

Now, the rationale for that was that would force or require good thinking people to be more specific and look more closely into the determination of whether or not they could proceed.

One of the things that you said, and one of the things that other expert witnesses have said, is that many times we do not have to get to sources and methods, which at first blush it looks like we might have to. If we really sat down, if the administration really were able to spend time going into this, if somebody spends some time looking into it, you might be able to prosecute under the present statutes without revealing sources and methods.

But, because the tendency is to avoid any disclosure, but many times it does not go into the detail that it should—do you think that administratively it would be wise to require a written finding as to why we did not proceed?

Mr. COLBY. I think accountability on that sort of decision is important. It is obviously an important decision and subject to abuse and thereby articulating the rationale does make sense. I would go one step further. My own suggestion is that under the statute that an accounting be given to these committees, the select committees of the House and the Senate, so that you can look at it as the other body of the Constitution and decide whether or not there is some sort of covering here that does not stand up.

Senator BIDEN. One of the things that we have found in our reviewing of the damage assessments is that I have been—I think it is fair to say we have been somewhat impressed that refusals to prosecute have, almost in every instance, been good faith refusals to prosecute, from what we know, and not really attempts to cover up.

Mr. COLBY. That is my experience, certainly.

Senator BIDEN. I think that your suggestion would codify that assurance.

Well, I do have other questions. I invite you, depending on your schedule, Mr. Colby—and Senator Huddleston may have additional questions——

Senator HUDDLESTON. I do not believe so. I think it might be helpful to the committee to have some of Mr. Colby's judgments on the type of necessary and unnecessary secrets. I think the staff may have some questions along that line.

Senator BIDEN. I think that is a good suggestion. Staff has already prepared four or five questions already related to that.

I also invite you, depending on your schedule, to stay at the table, if you like, and hear Mr. Houston's testimony and maybe there may

be some overlap that we could get the benefit of both of your judgments.

I understand your schedule.

Sir, proceed in any way you feel is appropriate.

STATEMENT OF LAWRENCE HOUSTON, FORMER CIA GENERAL COUNSEL

Mr. HOUSTON. Mr. Chairman, I am merely here to respond to your questions. I will give you a little background.

I was General Counsel of the Central Intelligence Agency from 1947 until I retired in 1973. Consequently, I do have some familiarity with this problem.

For the record, we recognized very early on that the existing legislation was not going to be very effective, particularly in the intelligence field. As time went on, with the growing use of the rules of discovery, it became more and more of a problem.

We were asked in our office a number of times why we could not have something equivalent to the British Official Secrets Act, and we made a study of that back in the 1950's, we could not find anybody who had made a study of the British Official Secrets Act, and quickly came to the conclusion that some of the important elements of protection in the British Official Secrets Act would be ruled unconstitutional.

Senator BIDEN. For the benefit of this hearing and record, would you briefly summarize the main elements of the British Official Secrets Act.

Mr. HOUSTON. The major point to understand here, it is based on a different philosophy. Under the British philosophy, all information gained while working for the Crown, belongs to the Crown. Our view is that it belongs to the people.

You start with that basic difference. You come into a number of practical situations.

One of the famous cases in the British experience, the case of the publication in the magazine *Isis* where some students had gone on active duty and engaged in cryptographic naval work on their active duty and came back and wrote an article in the university paper *Isis*.

The decision was made to prosecute. An expert witness, who did not have to identify himself, put the article in evidence and merely testified that it contained information relevant to the security and protection of the Crown.

In essence, that made the case. And then afterward when the guilty verdict was found, they then went *in camera* to the judge in connection with sentencing and explained the information that was serious and damaging, *in camera*, not in the presence of the defense.

Senator BIDEN. Only for the purpose of determining the severity of the sentence?

Mr. HOUSTON. That is correct, sir.

That is a case where we could not possibly have a similar proceeding under similar situations. Consequently, we spent much time looking at the other aspects of this business, and one of the first moves, of course, was the enactment of section 798 of title 18, U.S. Code, the communications intelligence section.

It is interesting to note in those days the people responsible for the communications intelligence were extremely worried about merely having that phrase used in public.

When the statute was passed, if my recollection is correct, it has never been properly tested. The only case I can recall is the *Peterson* case. In that case, the defendant pleaded guilty. My deputy, who worked very closely with Justice in connection with that case, formed the opinion that if Peterson had fought it through with all the rules of discovery and so forth, that he might well have beaten the case, so there is no real test.

We were then much interested in a case that arose under title 50, of the United States Code, section 783(b), the case of a State Department employee named Scarbeck who was convicted under 783(b), and there was an appeal and a long, to us very interesting, opinion from the appellate court. I have the citation here: 317 Fed 2d 546.

In this case, the crime was for an employee of the United States to pass classified information to an agent of a foreign power, and the court limited the admission of documents that the Government put into evidence merely to show they were properly classified under the Presidential regulations.

This is limited, as I said, to employees, and only when the information is given to the agents of a foreign power.

After years of studying the various possibilities, we came up with a draft statute which I am sure is before this committee, which would have expanded the Scarbeck Act to include any employee or former employee that gave classified information to an unauthorized person.

Senator BIDEN. Not an enemy agent, an unauthorized person—who would be anyone who did not have classification to have that?

Mr. HOUSTON. That is correct, sir.

We fully realized the political implications of proposing such enactment, and the Department of Justice studied it at some length and returned it to us with some minor adjustments.

They felt it fell within the constitutional bounds.

So that is the major piece of drafting that my office participated in, in trying to cover this subject, and I have not been close to this now for some 5 years, but as far as I know, I do not know of any alternative that would give the type of protection that we needed.

I would differ with Mr. Colby on his very limited view because I think that there is substantive information that is just as important as source and technique information.

Also, I am not sure—I am now talking off the top of my head since I have not had a chance to study case history, but again, with the breadth of discovery under the present rules—I am not sure this limited target could be so limited. I am afraid you might get into the same problem that we have been fighting.

If the statute were so broadened, still it is not the answer to all problems, but I think it would be effective in case that, in the past, we would not have been able to take action on.

Senator BIDEN. All that would have to be shown, if I understand the suggested expansion, that a present or former Government employee who had access to classified information, tells that informa-

tion to anyone who did not have the classification, and then there would not be a requirement showing that the information—it would not be required that it be proven in court that the information was anything other than classified?

Mr. HOUSTON. That is the holding of the appellate court in the *Scarbeck* case. I would be surprised that if the broadened statute was enacted, the Court would so limit themselves. They would insist on some inspection into the validity of the classification.

Senator BIDEN. As a practical matter, assume you had such a statute and you would get to the point of validation on the classification. How do you suggest that would or could be handled?

Will that be done *in camera*? Will that be done by the court absent defense or prosecution counsel, or the information made merely available and the judge making a determination of whether or not it was properly classified?

Mr. HOUSTON. This, of course, is speculation on what might happen under a new statute, but I would see such a proceeding *in camera* as has happened a couple of times in the past, leave it to the judge as to how far to make an adversary proceeding or to bring defense counsel into the picture.

We actually have had such a situation where I was subpenaed as a witness in a criminal trial along with documents and the documents were agency messages, classified messages, reporting on elements of the crime, the subject of the case.

The classification of these documents related almost entirely to the source information on the documents themselves so when the documents were requested, I asked the judge, the Federal judge, to allow me to explain the classification problem and to ask his approval to excise the source information, which primarily were numbers and references, and leave the substance of the messages to go into evidence.

The judge agreed with this procedure and did not call defense counsel in. Under the circumstances, he merely told them what he had done.

Senator BIDEN. Did you even tell the judge what the source was, or was that limited also?

Mr. HOUSTON. We took it document by document to show what information would reveal the source of the information.

Senator BIDEN. The source was not there to delete?

Mr. HOUSTON. If the source was not indicated, we would not delete it. If there was information, say, at the heading of the message, as there was, I believe, in all of them indicating the source of the information in the body, then we would point out to him that that information on the source was what we wanted to protect, not the substantive information in the body of the message.

Senator BIDEN. Now, one of the arguments against that we get into a very subjective determination on an ad hoc basis as to what constitutes legitimate classification. That will vary, potentially, from one judge to another judge.

Mr. HOUSTON. That is correct.

Senator BIDEN. In your study and experience in this matter there is no way of avoiding that, apparently?

Mr. HOUSTON. I do not think there is any way of generalizing on this. Each case is a case in itself. As each case arose, we would have

to study it ourselves, talk to Justice, maybe talk to the State Department, talk to people outside for one reason or another, come back, consider classification problems we had, ask the operating people to review the classifications on the basic documents, or to explain them.

Each one became sort of a custom built case in itself, so it is terribly hard to generalize. But you are quite correct that different judges have different views of the validity of classification.

Senator BIDEN. I am not sure—let me back up.

Your suggested statute would only allow for or call for the prosecution of the employee or former employee, for example, in the situation where a former employee or present employee leaked classified information to the press, the press in turn prints it without revealing its source—the press source—of the classified information. Under the statute that you suggest, there would be no way to proceed against it. How would you proceed if you thought it was very, very important, other than by injunctive relief, seeking that against the party disclosing the classified information, that is, the press.

Mr. HOUSTON. I do not think there should be any prosecution of the press under these circumstances. I remember back in the Eisenhower days there was a serious leak of military classified information and the General Counsel of the Secretary of Defense wanted very much to prosecute the paper which published this and took it up—I went to a meeting with Mr. Hagerty and Allen Dulles and we took the position that there absolutely should not be any attempt to prosecute the paper which published the information.

Mr. Hagerty, for the President, finally agreed with us and no prosecution was then sought.

Senator BIDEN. Senator Huddleston?

Senator HUDDLESTON. I do not know if I have any specific questions. I was thinking if we had a perfect classification system we could move perhaps more in that manner if the judge, and even the defense counsel, had more confidence. Should there not be levels of classification?

Where do you get from the point of classified material that may be somewhat damaging to us, revealing some of the operations that we do not want to reveal but would not actually have a direct bearing on the national security, to that which would have a direct bearing on sources or techniques?

Is there any way to establish a system under which judiciary would have that knowledge? To leave under frequent review whether the classification was strong enough and was the basis for prosecution?

Mr. HOUSTON. Of course, you have the basic classification system, which imposes degrees of classification on various pieces of information, but when we got in the situation where it looked as though there would be prosecution or a court case of any sort, we would find out the basis for the classification before we went to Justice. Then we would talk to Justice about what would appear to be involved in the way of discovery or evidence needed for trial, or whatever.

Then we would go back and ask the operational people to review the information and the sensitivity of it in the light of possible revelation. And we would put heavy pressure on not to have just pro-

tection against embarrassment, but a serious question of classification. We would go back and forth a number of times between Justice and our own people, trying to resolve this and there are very few cases where we are unable to resolve it, one way or another.

I remember, at the moment, two cases involving our own people that we found we could not—only two that could go to trial.

Senator HUDDLESTON. Only two?

Mr. HOUSTON. Only two.

Senator HUDDLESTON. In your tenure that was not a very big percentage of cases prosecuted.

Mr. HOUSTON. There were very few. Both of these involved misuse of funds, taking of funds for their own purposes. In both cases, the funds involved and the people who took them were involved in most sensitive political activities, and we went not only to our own people to establish the degree of sensitivity that they put on it, but also went to the State Department who were extremely concerned.

In effect, one of them—I talked to a Federal judge who happened to know something about the case. He says, no, do not come in.

Senator HUDDLESTON. Thank you.

Senator BIDEN. Mr. Houston, under the British Official Secrets Act how, if you know, would the British proceed in a case, our hypothetical that related either to bribery or murder, let's take the murder case.

In the situation, if I may stick to our hypothetical here, the hypotheticals we have been using, a high-ranking official in the American government in the military has a paramour and that paramour is being used by another intelligence community, hostile one, to blackmail this officer.

The officer finds out, the high-ranking official murders the paramour after learning that she is an enemy spy. In that situation, there is a murder case. The issue is murder.

Under the British Official Secrets Act, how would they handle that kind of prosecution, or is it because it was in any way related—how would they handle it?

Mr. HOUSTON. I am not sure I am sufficiently informed on that aspect. The cases I talked about were actual cases of prosecution to do with releases of information.

All I can say, for one thing, their rules of discovery are much more limited than ours. I am not sure the judge would consider the classified aspects of this as relevant to the murder charge.

Senator BIDEN. Is it fair to say, in your experience—and nobody has as broad experience in this matter—that our classification system, or those who classify documents tend to be more overzealous in classification than is warranted?

Is there not a great deal of information that has been classified secret or top secret that really does not, in any way, or in any direct way, impact upon our national security?

Mr. HOUSTON. There is a great deal of overclassification. No question about it.

In fact, I, myself, quite a number of times objected to classification when it came through my office. In the intelligence business, it is a little tricky to make a generalization because of the aspects we

touched on a little earlier. Sometimes a piece of information may reveal sources or methods, although it looks innocent in itself.

Senator BIDEN. That is true. There is no question about that, but that "may" is fairly broad.

As a member of this committee, in the last, I guess going on 2 years, at least 1 year, some of the things, the slides that are put up that have top secret written on them are preposterous. I have read them—not in terms of any leak, but they have appeared in magazines, have been discussed openly by officials, and relate to a piece of military equipment, for example, stamped top secret.

My big concern—and I have several—with the suggestion that you made about changing the statute to say that disclosure of any classified information by an employee who does not have the classification is a crime, I am a little distrustful. I lack the confidence in the system to the point that I am prepared to be bound by, or to attempt to bind other people by, the classification systems that would be interpreted by the judge.

Most judges—I should not say "most judges;" I know many judges are reluctant to be put in the position and lack the expertise of making a determination as to whether or not a matter is truly classified. I mean truly in the national interest that it be kept a secret.

I can see the situation where, unless we develop a special panel of judges that have a special expertise in foreign policy and special expertise in intelligence matters would essentially be rubber stamps for the community. I do not know whether the community comes in and says, hey, this is really important, judge, and we cannot even tell you what the source is but we can tell you that it may, in fact, jeopardize our relationship further.

Many of the things that we have seen in my short tenure appear that the community and/or the administration, no one single administration has attempted to keep from being published are matters that would be of severe embarrassment more to individuals than to our country's security. At least in my opinion, that is the case.

I do not know whether we have a right. I do not know whether it should be policy to have a statute that helps protect individuals and leaders from embarrassment, even though, indirectly, it embarrasses the country and let a judge make that determination as to whether or not this classification is warranted in our national security interest.

That is why I like the idea of trying to deal with the classification in a way—I guess this is the question.

Mr. Colby suggested that we take out a narrow segment, that is sources and techniques. Would it, in your opinion, be a reasonable approach to say any agent or employee of the Federal government who reveals to a third party any source or technique, that that, in fact, should be prosecuted and it only need be shown that it was a source or technique and that determination could be made as a matter of law by the judge?

Is that possible?

Mr. HOUSTON. I do not personally believe it is quite broad enough. I believe there is a need for protection in cases of substantive information and technique.

The point that you are making, we went back time and again between Justice and our own people to establish the validity of a classification or have them withdraw it. In some cases, they could not establish it to our satisfaction, or Justice's.

Senator BIDEN. Is it not the very nature of the institution that the intelligence community is going to err on the side—and assume that a classification is warranted, because we do not want to take any chance, or significantly limit the chances, as opposed to an agency which does not have as much at stake or an interest in determining what is in our national interests?

Obviously, your job as a member of the intelligence community is to keep secrets for your benefit. Theoretically I would say our intelligence operation would operate better if absolutely nothing was disclosed. One of the problems we have right now is, according to reports I get as a member of the Foreign Relations Committee or this committee is that much of the knowledge or technique that we have available as to weaponry is reported in things like "The Aviation Weekly," and the Soviets know a great deal more about our potential capability than we do about theirs, because nothing, or little if anything, is disclosed in the Soviet Union.

Obviously, it puts them in somewhat of a stronger position in the military field, not in the strongest sense in the strength of their internal domestic situation.

Is not the tendency going to be to classify, by you as a member of the intelligence community, to say that that could impact on our national security? The Pentagon Papers—I am not so sure that anything revealed in those Pentagon Papers should not have been revealed. And they argue that the technique and the way it was done, I find it offensive.

Much of what was in there, I believe, should not have been classified in the first instance.

Mr. HOUSTON. I took that position with then General Counsel of the Department of Defense.

Senator BIDEN. You lost.

Mr. HOUSTON. I was not in charge of the case.

Senator BIDEN. That is what I am saying. If we had good thinking men like you able to make that decision—and I understood that to be the case, that much of what is classified should be declassified, but you were overruled. You were not making the decision.

So if we had the statute in effect that you are discussing, the person who overruled you, with whom I disagree with in terms of the ruling—I am talking in a general sense now—would be making a decision that impacted potentially—not potentially, impacted upon the dissemination of information that I think should be in the public sphere, but you would be protecting it from getting it into the public sphere by making it easier to prosecute someone for releasing what we both think should have been released.

We are getting into a policy question, obviously.

Mr. HOUSTON. There is no question that there is a tendency in the intelligence community to be overprotective. I found it somewhat thus until we got into the spotlight of the law. This is a very revealing business when you begin to get in a court and tell people about

what the rules of discovery are, and there were a good many times when we could not convince the operators at the operating level and would have to go to the Director and ask him to review to determine whether he could back up the validity that they claimed they had for the classification.

Once we made such a review and came to the conclusion that there was a valid basis for classification, I do not remember any difficulty at any time in explaining such a classification to any judge or to the Department of Justice, or to whomever we had to explain it to.

Senator BIDEN. I thank you very much, Mr. Houston, for your testimony.

Is there anything you would like to add, Mr. Colby?

Mr. COLBY. No, I think the issues are fairly clearly drawn. I do not think Mr. Houston and I are that far apart.

Mr. HOUSTON. Not too far apart.

Mr. COLBY. Nevertheless, there is a distinction there. I would rely on the general law, the administrative controls, and so forth, for protection of the embarrassing material and legitimately protect the internal workings of the government, the advice given to the President and things of that nature.

I think the general law should apply to those. I think we need a better protection of our sources and techniques if we have an opportunity to include it in this general realm of our intelligence legislation, we should do so.

Senator BIDEN. Implicit in that, as I understand it, is your concern that, in order to have access to information worldwide that we need very badly for our ultimate security, we have to convey to other nations that our sources and techniques will be more closely guarded and protected.

Mr. COLBY. The other nations, Mr. Chairman, I think have taken the great mass of publicity about CIA and its activities as an indication that we do not have any secrets. I think we could reassure them that we take this action and show them we are going to protect some secrets, the sources and techniques. Say yes, we are going to conduct the other ones on a much more open basis, but these we can protect.

Senator BIDEN. The focus of the heart of the debate on this issue would be on what constitutes source and technique. There seems to be some general agreement with regard to questions of relevancy of the information, that the Court will have to make that decision, and that it should be made in an *in camera* proceeding.

Based on the decision, Justice, in this case, will make the determination whether they think it is worthwhile in balancing the question, to proceed.

Is there anything you would like to add?

Mr. HOUSTON. Just one thing on this business of establishing the definition of source and technique. It is extremely difficult to get any agreement on this.

At Mr. McCone's request in the early 1960's, we formed a committee of the lawyers from the intelligence community to try and arrive at a definition of what was then called protective information, more or less about the same subject. I have never seen a committee so divergent in its views and so impossible to get to any agreement.

So I wish you well. You will find it very difficult.

Senator BIDEN. I acknowledge that that may be a problem. We had some little experience with that. We asked the Agency—they suggested, I am not sure how it came about, but in a definition of source and technique in another context that was raised, and my understanding from staff is we received a 20-page single space definition of what constituted sources and techniques.

Again, that just speaks to my basic concern about your statutory suggestion, that is, the Agency is going to, I think—I expect that it would, and should, be overprotective, broader than in almost every instance, than it need be in order to have the broadest umbrella to protect what is ultimately their responsibility, that is, obtaining and keeping secrets.

But you are right. It is a herculean task.

Mr. HOUSTON. I believe it is manageable on a case-by-case basis if given the back and forth between requirements of the law and the other requirements, and you would not find the exact same situation in any one case. It is hard for me to generalize. We found every single case to be a unique situation in itself.

Senator BIDEN. As you are aware, the damage assessments that this subcommittee have looked at, and I believe that some of them went back prior to 1973, and I understand you left in 1973?

Mr. HOUSTON. Yes, sir.

Senator BIDEN. At least some of the cases we looked at, and there were approximately 50 cases where there was a determination by the agency in the damage assessment that there was damage, and the damage was significant, and varying degrees of significance but nonetheless significant, and there was a general consensus that it would have been worthwhile prosecuting if we could prosecute.

It was determined that, for a number of reasons—it varied—that prosecution could not or should not go forward, and obviously what prompted these hearings is how do we come up with a statutory help, if need be, administrative changes that would put us in a position to be able to prosecute the wrongdoers and send a signal to the rest in the community that if, in fact, they do reveal certain information that not only do we have the desire to prosecute, which exists now, but the capability without further jeopardizing internal security matters.

But anyway, the only reason I mention that is that I thought you said, in response to Senator Huddleston, that in most of the cases there was a desire to prosecute, very near 10, you were able to successfully prosecute, or did I misunderstand?

Mr. HOUSTON. I said I could remember two cases where we decided, with Justice, that we could not prosecute. I do not remember any prosecution as such. A great deal of our involvement, when we got into the security aspects, was either when something of ours became involved in another criminal case or a defendant in narcotics or munitions prosecution, claimed that we were behind them and the problem of proving the negative sometimes was troublesome.

But by working with the U.S. attorneys involved in each case, we were able to work out a satisfactory answer and not interfere with their prosecution.

Senator BIDEN. Gentlemen, thank you very much. I really appreciate your time.

Our next witness is Morton H. Halperin, who is the director of the Center for National Security Studies whose activities are sponsored by the ACLU Foundation Fund for Peace.

Mr. Halperin, welcome, and thank you for taking the time to come before this committee.

STATEMENT OF MORTON H. HALPERIN, DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES

Mr. HALPERIN. Thank you, Mr. Chairman. I am pleased to be here. I have a prepared statement, and I would like to ask that that be entered into the record.

Senator BIDEN. Without objection, your entire statement will be entered into the record.

[The prepared statement of Morton Halperin follows:]

PREPARED STATEMENT OF MORTON H. HALPERIN,[1] DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES

Mr. Chairman, I am honored and privileged to appear before this committee today to present some views on the very difficult and complex matters with which this subcommittee is grappling. I am speaking on behalf of the Center for National Security Studies and the American Civil Liberties Union.

It might be most useful if I simply make some comments on the issue contained in the draft study distributed by the committee and then respond to any questions that you might have.

The first and perhaps most important point that I would make is that I believe that the issues involved in criminal cases are substantially different from those which are raised when national security issues develop in civil litigation. I would urge, therefore, that the committee consider these two issues separately. In criminal cases, the government has an obligation not to rely upon claims of national security to interfere with the due process rights of a defendant that it chooses to bring into court. In civil litigation the government may be the plaintiff, the defendant, or simply a third party seeking to protect information that others wish to obtain and make public.

Let me turn first to the question of criminal cases. There are two general approaches that could be used to seek to avoid the problem of forcing the government to choose between releasing sensitive national security information and dropping a prosecution.

One key to the matter is to draft narrow statutes which do not require the government to prove anything about the quality of particular information and which excludes defenses which require the use of classified information. For example, and the sufficiency of the offer of proof. At the end of such hearing the court should be required to issue an opinion dealing both with the legal theory and the sufficiency of the offer of proof.

The legislation should provide that such a ruling must be in writing and should be subject to an automatic right of appeal by either party prior to the trial, both to the court of appeals and by petition to the Supreme Court.

If the district court upholds the legal theory and the sufficiency of the offer of proof and the government either appeals, or turns the documents over to the defendants, it should be required to give the documents to the court. The court would then examine the documents *ex parte in camera*, to determine if they are discoverable in whole or in part under *Brady*, *Jencks*, or the federal rules. The court would be permitted to examine the documents sought on an *ex parte in camera*, basis, but it would not be permitted to receive on an *ex-parte* basis affidavit or argument in support of the irrelevance of the docu-

[1] Morton H. Halperin is the director of the Center for National Security Studies whose activities are sponsored by the ACLU Foundation and the Fund for Peace.

ments to the offer of proof. The court should be authorized at its discretion to permit counsel for the defendant, and, if necessary, the defendant himself to participate in the adversary *in camera* proceeding based on a protective order.

If the court, after examining the documents, finds that they are discoverable, it should notify the government and give it then an opportunity to formally assert the state's secrets privilege, or simply to drop the prosecution. If the court finds that the state's secrets privilege has been properly invoked, it shall give the government the choice of either dropping the case, waiving the privilege and releasing the documents, or appealing the ruling of the court on this issue.

I should add that in my view such procedures are unlikely ever to be invoked unless the power to prosecute officials of intelligence agencies is taken away from the Department of Justice and given to a special prosecutor. As the current attorney general and his predecessors have reminded us on a number of occasions, they are responsible for the morale of FBI agents and agents of other intelligence agencies. Indeed, their ability to perform certain functions given to them by Congress and by the president depend on the morale and effectiveness of the FBI. For that reason, there is always a conflict of interest between the duty to enforce the criminal laws and the duty to have an effective, functioning intelligence agency. A special prosecutor's office should be created whose sole function would be to monitor the activities of the intelligence agencies and to prosecute violations of the statutes enacted by Congress. A model for such legislation is contained in H.R. 6051, Title VII.

Let me turn briefly to the question of civil litigation. Here I think the problem is not as complicated and much less needs to be done by way of legislation. In order to avoid any remaining uncertainty about the matter, Congress may wish to specifically authorize *in camera* adversary proceedings when the government invokes the state's secrets privilege, if the court feels that such adversary proceedings are necessary to determine whether or not the privilege was properly invoked. The legislation should require, where the government is the plaintiff and seeks the aid of the court in enforcing its position, that the government should be required, as it was in the Pentagon Papers civil trial and in the *Marchetti* case, to turn over all relevant information to the defendants under an appropriate protective order preventing the public release of the information.

There is one area where I think more extensive legislation might be appropriate. I believe that in situations where there are allegations of violations of constitutional rights, and where those allegations have a clear and firm factual basis, the consequences of invoking the state's secrets privilege should be different then the normal consequences which flow from the invoking of an evidentiary privilege in a criminal case. Where the government finds it necessary to invoke the state's secrets privilege to prevent a citizen from litigating possible violations of his or her constitutional rights, then I believe that the consequences of invoking the privilege should be that the violation of the constitutional right should be assumed to be proven for the purpose of the litigation. In such cases, whatever is done in general to amend the Tort Claims Act, the government should assume from any individuals who have been sued in their personal capacity, the responsibility for paying any damages which may arise out of the litigation.

This solution to the problem seems to me to deal in an appropriate way with the various concerns involved. On the one hand, the government should not be required to reveal information which it has satisfied the court is protected by the state's secrets privilege. On the other hand, the government should not be able to use the privilege to prevent a citizen from being compensated for violations of constitutional rights or to prevent the courts from granting injunctive or declaratory verdicts. No harm will be done to the privilege or to the purpose of the privilege if the government, in appropriate cases, is required to compensate individuals when it declines to contest their factual allegations where those allegations are not based on mere suspicion.

Let me emphasize, Mr. Chairman, that these are only very preliminary thoughts and remarks stimulated by the very useful paper prepared by the committee staff. I would be glad to answer any questions that you might have. My colleagues and I at the Center for National Security Studies and the

American Civil Liberties Union look forward to working with you and the staff of the committee in developing an appropriate response to these difficult issues.

Mr. HALPERIN. If I may, in the interests of time, summarize it briefly, and then I would like to make a few comments on some of the testimony that the committee has already received.

Senator BIDEN. I would appreciate that.

Mr. HALPERIN. I should say that I am speaking on behalf of the American Civil Liberties Union as well as the Center for National Security Studies.

I think it is useful that the committee has separated the issue of how to deal with criminal cases from the issue of states secrets information and civil cases. I would urge you not to completely lose sight of the problems that I think do exist in civil litigation and I think the committee ought to consider whether something should be done about that as well.

The two major points that I would make about criminal cases are really the points that Mr. Lacovara has made in more detail and eloquence. Basically they are the solution of the problem, in my view, rests largely in the narrowing of the criminal statutes involved so that they do not require proof about the nature of the information.

The example I used in my statement has to do with violations by officials of intelligence agencies on the restrictions put on those agencies. I think that such a statute could be drawn that would not require the release of any information.

Similarly, as I understand the perjury statute, the release of classified information beyond that necessary to prove that the perjury was committed is irrelevant, either to the proof of the case or to any part of the defense. I have never been able to understand the assertion of the Government that the prosecution of Mr. Helms would have forced the revelation of substantial amounts of national security information, since the alleged perjury was already made public.

The second way to proceed——

Senator BIDEN. It was made public; was it confirmed?

Mr. HALPERIN. The Senate Intelligence Committee issued a detailed report, including quoting from cables. Mr. Helms himself, the second time he testified under oath, admitted that, in fact, he had been involved in giving aid to Mr. Allende's opponents, one of the issues on which the alleged perjury had taken place. So that I think that the factual information necessary was public. In addition, he testified under oath that the CIA did not send photographers to antiwar demonstrations to take pictures. The Rockefeller Commission report stated the CIA had sent agents to such demonstrators to take pictures, so the only issue there was whether Mr. Helms knew that at the time of the testimony.

It is hard for me to believe that information about this knowledge of photographing American citizens in demonstrations in the United States related to the national security and had to be kept secret.

The second major point I would make about criminal cases is I would say that there are procedures in existence which can be used. They were followed in the *Ellsberg* case—which, I should say, I was on the other side, working as a consultant for the defense.

I should say, Mr. Chairman, in the interests of full disclosure, I was the person who originally classified the Pentagon papers. I am not sure I want to defend that decision, but I thought I would put that on the record.

The other major procedure——

Senator BIDEN. I think—I hate to disappoint you, but I think that is fairly well known. I appreciate your disclosure.

Mr. HALPERIN. The other point I would make, another one which Mr. Lacovara made in detail, I think there are existing procedures which will avoid this uncertainty in the middle of the trial that suddenly material would be released. I think it would be useful for Congress to codify these proceedings in a way that he suggests and I suggest.

I think our suggestions are essentially compatible. There is a little more detail in my statement, but I think essentially we are saying the same thing.

As to civil litigation, there are two suggestions that I would make. One, that the Congress codify the procedures that have developed having to do with the ability of the government to examine *ex parte in camera* affidavits in the cases where the state secrets privilege may be involved.

The other is legislation which I think should be considered in connection with revisions of the tort claims act which the Judiciary Committee is now considering. The amendment would provide that in the case of an alleged constitutional violation where the Government asserts the secrets privilege that the Government, then, becomes liable rather than the individuals for the damages. With certain limitations, the burden would be on the Government to disprove the allegations if it denies information under the state secrets privilege.

Let me, if I may, make a few comments on what has gone before. I was glad to welcome Mr. Colby into the ranks of civil libertarians. I think his statement does suggest an awareness of some of the questions that would arise in attempting, for example, to subpena the press in cases involving the proposed espionage litigation.

Let me say that it seems useful to think of the espionage laws in three areas. One, is attempts to publish leaks of information to the press. There I would endorse very strongly what Mr. Colby said. Namely, it is my understanding that the intent of Congress in enacting the general espionage laws was that they were not intended to punish leaks of information to the press. They were intended only to be used in situations where the individual made an attempt to aid a foreign power or had a clear reason to believe that his actions would directly aid a foreign power.

I think that it is extremely important, in light of the Ellsberg indictment, and in the light of the committee report that accompanies S. 1437. Congress should not inadvertently, as it appears to be doing, make a fundamental change in those espionage laws which, in effect, endorses their use in situations of leaks where there is not intent to injure the United States.

That was not the intent of the Congress in enacting that legislation and I think we should not have such a general statute.

Senator BIDEN. Would you explain that? Where are we doing that now?

Mr. HALPERIN. The report of the Senate Judiciary Committee accompanying S. 1437, the revision of the Federal Criminal Code, has a paragraph which suggests that the statute under which Ellsberg was indicted, U.S.C. 793 (d) and (e) in fact was intended to be used for leaks and in situations where there was no intent of injury to the national security of the United States.

This statement was made in that committee report. I think that that was not the intent of Congress. Congress previously commenting on the espionage laws has said that there was no statute, general espionage statute, punishing releasing information without an intent to injure the national defense.

I find that comment in the committee report extremely disturbing, because it suggests committee endorsement of the new, and potentially dangerous, interpretation of the existing espionage statutes.

The second category has to do with the transfer of information to agents of a foreign power and there the committee has had called to its attention the existence of U.S.C. 782(b). It can be used to punish the secret transfer of information to a foreign power without making it public.

We already have on the books a statute that applies to Government officials that give information to foreign powers. I think the committee ought to inquire into the question of why the statute has not, in fact, been used in the espionage indictments, that it looked at, where a decision has been made not to prosecute.

The third has to do with the question of narrow statutes dealing with particular kinds of information. We have two such statutes, really three. Two dealing with communication and codes and the other dealing with atomic energy information.

With regard to a "sources and methods" statute, it is hard to define that reasonably. It is either so narrow or so useless or so broad that it becomes, in effect, an official secrets act. Unless some way can be found to do that, there is no way to proceed with that.

I appreciate the opportunity to be here. I would be glad to answer any questions.

Senator BIDEN. Has the American Civil Liberties Union taken an official position on the pretrial procedures set out in your statement?

Mr. HALPERIN. Yes. The written statement that I presented has the endorsement of the American Civil Liberties Union.

Senator BIDEN. One of the options you suggested dealing with the use of classified information was simplification of statutes so classified information is not necessary to prove the case or in relevant defenses. As to crimes for a violation of intelligence agencies' charters would not an appropriate defense that the defendant had a good faith belief that he was acting pursuant to the lawful authority based on the pattern of practices as to ambiguous grounds in the past.

Would not such a defense require the disclosure of considerable classified information?

Mr. HALPERIN. That may or may not be the case now. That is whether Mr. Kearny, for example, has a defense under the statutes under which he is indicted. I do not know. My tendency is to think

that it is not a defense of burglary to say that many other people have committed burglaries and have gotten away with it.

It seems to me that that problem would be erased if Congress enacted a comprehensive statute on the intelligence agencies. Then it would be like saying to the intelligence agencies, whatever came before, whatever may have been the practices and patterns of your behavior prior to the enactment of this legislation are no longer relevant. The Congress is now telling you in very precise and very clear terms what it is that you may do and what it is that you may not do.

If we say in this legislation that you need a warrant to break into somebody's house it would not be a defense to a prosecution that prior to the enactment of this legislation there was a pattern of behavior of not getting a warrant.

At least for future events, I think you could avoid most of this simply by making it clear that the past patterns do not apply.

Senator BIDEN. Is the ACLU prepared to simplify the criminal statutes to obviate the need for classified information and consider simplification of the espionage statutes to avoid the same problems?

Mr. HALPERIN. The ACLU does not have a position on that. I will give you my personal view.

Senator BIDEN. I would like to hear it.

Mr. HALPERIN. I do not think there is any civil liberties issue involved in the secret transfer of information to agents of a foreign power. Therefore, in my view, a great deal can be done in light of the committee's report on the inability to prosecute the various cases. The committee ought to look hardest at whether something should be done which would permit the Government to prosecute in cases of espionage without being forced to review the content of the information involved.

As I say, I think the statute provides a basis for doing that. If there have been problems in using that statute, I think one ought to look at them and consider whether or not that statute can be modified in whatever ways are necessary to do that.

Senator BIDEN. You have not had an opportunity to do that up to this point?

Mr. HALPERIN. I do not see what you need. That statute says, if you are an employee of the U.S. Government and you transfer a document that you know to be classified to somebody whom you know is a foreign power or agent of a foreign power, you have committed a crime.

Under the court of appeals decision, all you have to do is prove those things. You have to prove the person is a Government official, prove he knew the document was classified, which can come in from testimony that there are stamps in large letters on the top and bottom of it and he saw it, and you have to prove that there are those stamps, which comes from testifying as to the fact that there were stamps.

The content of the document does not have to be made public and is irrelevant to the prosecution. I do not understand why that statute cannot be used in these cases.

I do not know how to fix up the statute, because it seems to me very clear, very precise, and perfectly capable of doing——

Senator BIDEN. I understand your dilemma.

Mr. HALPERIN. I think the committee ought to ask specifically that, in the cases that it has looked at, did the Government consider using the statute? If so, why was it not used?

Senator BIDEN. Do you think there is any merit—you individually or the ACLU has taken a position on attempting to work on a definition of sources and methods?

Mr. HALPERIN. I think that the problem, the problem there is that I do not think that one can be drafted which gives the kind of protection even as Mr. Colby wants and is not so broad as to cast a shadow on a great deal of additional information.

I do not know how to do that. The draft legislation of the Senate Intelligence Committee talks about information, something that would directly lead to revealing the name of an agent. I suspect that that will not go far enough to satisfy most of the people who want such legislation.

I do not know how it, in fact, can be done, but my impression is that that is not a very serious problem. There have been very few individuals who have gotten access to information and have revealed intelligence sources and methods, and I would say for the record that Mr. Snepp, I think, went out of his way——

[Pause].

Senator BIDEN. The reason why I stopped you at that point, the staff study of the damages assessments the staff has looked at indicates that there not only was a leak of substantive information in a number of cases, but that that release directly leads to the source and method question. It identifies the party.

Mr. HALPERIN. These are leaks to the press, not to agents of foreign powers?

Senator BIDEN. Both.

Mr. HALPERIN. Where there are leaks to agents of a foreign power, as I say, those are a separate issue. I think we already have a statute. If we do not, I think it should be easy to draft one.

The problem with the press, first of all, my guess is that in most of those cases that leaks were by senior officials. If you look at Mr. Snepp's book he gives you several instances of such leaks by Ambassador Martin and high officials of the CIA in which that occurs and which he says, in an effort to prove something to somebody, the Ambassador released information which jeopardized some of his agents. That is one of the things he is upset about. That is one of the reasons he wrote the book.

Then I think you run into the question of what is an authorized disclosure. There is clearly some level of the U.S. Government which has a right to release information even if it is going to jeopardize the source. I suggest that you are going to run into questions such as, does the Ambassador to a country have the right to do that, does the Director of Central Intelligence? Who does?

In many cases, I would suspect you would run into those kinds of problems.

Second, I think the problem is, as you say, information that would lead to the release of a source, if you have a general statute that

makes it a crime for an official or former official to publicize information which could jeopardize an intelligence source or method, you would have an enormous, chilling effect on a whole body of information, precisely because nobody precisely knows how to draw that line or precisely what the jury will say about the information.

I would say I do take exception to Mr. Colby's suggestion that you can define an issue of fact as an issue of law and have the judge decide it. I do not think you can do that.

I think the question of whether information is an intelligence source or method as it is defined is a question of fact, and I do not think under a system which requires a public trial, you can get around it by making it a question of law.

If you are talking about a secret transfer, you can simply make it a crime that the thing was stamped with a special stamp, to transmit it. If you are talking about public disclosure, if such a statute would be unconstitutional it would be equally unconstitutional to have the judge make that determination *in camera.*

The Supreme Court, in looking at the phrase related to the national defense in 18 U.S.C. 793 said explicity that that is a matter of fact and must go to the jury. I think that issue is settled.

I really do not think you can get around it by labeling it.

Senator BIDEN. Would it be the ACLU's position, even if we enacted all the pretrial procedures suggested by you in your paper that a special prosecutors' office would still be necessary to handle cases where national security is a factor?

Mr. HALPERIN. Yes. Our feeling about the special prosecutor has to do with the conflict between the Attorney General's role as, in fact, the Director of the FBI and his role as the person to make the decision about whether or not to prosecute.

The Attorney General has said many times in connection with decisions on whether to prosecute that he is concerned with the morale of the FBI. He is properly concerned about the morale of the FBI because the Director of the FBI conducts his investigations. That produces a pure conflict of interests in his role as manager of the FBI who depends on that organization, and is therefore concerned about its morale, and the decisions that have to be made about prosecutions which are decisions that should be made independent of the question of whether they adversely affect the morale of the FBI.

Our view is that there is a pure conflict of interest here that requires the appointment of a special prosecutor to investigate an alleged criminal activity on the part of the intelligence agencies.

If you look at the experience of the Watergate Special Prosecutor that experience demonstrates, that the special prosecutor, not preoccupied with managing the intelligence agency, will be much more creative in getting over these allegations that you could not proceed with prosecutions because it would reveal intelligence information than somebody who is in the channel of protecting intelligence information as well as in the channel for deciding on prosecutions.

Senator BIDEN. Would the ACLU be in favor of a special prosecutor as proposed in H.R. 61, title VII, handling espionage and leaks prosecutions as well as violations of civil liberties?

Mr. HALPERIN. I do not think we have a position on that. I would be glad to inquire to see whether we could get you one.

Senator BIDEN. I would appreciate that very much.

Your proposal in the civil area suggests the development of an analogous *in camera* procedure. Do you envision such a procedure being enacted by legislation? Second, would it be modeled after rule 509 of the Rules of Procedures proposed by the Supreme Court in 1974?

Mr. HALPERIN. I am not familiar with that rule. I think it can, and should be, enacted by legislation to make clear, on the one hand, the obligation of the judge to conduct as full an adversary proceeding as possible before he goes into any *in camera* proceeding; second, to make clear that the judge does have the authority to accept material *ex parte in camera;* third, to authorize the judge to engage in a proceeding under a protective order when he deems it appropriate to do so.

I think the judges have authority to do all of those things already. There has been sufficient uncertainty about it in various courtrooms so that it seems to me to be worth codifying that in the form of amendments to the rules of civil procedure.

Senator BIDEN. One possible problem with such a procedure, if there is not a sufficiently high threshold for the initiation of civil litigation *in camera* or discovery procedures, or any discovery procedures that could be used by an adversary in frivolous litigation to gain access to value intelligence information, how would you respond to that problem?

Mr. HALPERIN. I think that is a very real problem. I would respond to it by giving the judge discretion to engage in an *ex parte in camera* examination of the material when he has doubts of whether the claim was frivolous or whether there was any substantial basis for it or not; and to determine for himself whether there are serious charges involved prior to any adversary proceeding.

Senator BIDEN. Has the ACLU drafted a procedure of threshold as you suggested? Do you have any draft?

Mr. HALPERIN. We have not. We are in the middle of litigation on this issue, in the case involving the NSA's intercept of national cable traffic where the Government has invoked successfully in the district court the state secret's privilege to refuse to confirm or deny whether any particular individuals had their cable traffic intercepted.

It is our position that in that case we have exceeded whatever the threshold is, and I would be glad to make our brief on that case available to the committee, where we do argue the issue.

Senator BIDEN. Thank you.

Thank you very much, Mr. Halperin. I appreciate your testimony. With your permission, we would like to—I realize you are a very busy man—possibly get back to you with a few written questions.

Mr. HALPERIN. I would be glad to.

Senator BIDEN. Thank you very much.

These hearings will be recessed, subject to the call of the Chair.

[Thereupon, at 12:20 p.m., the committee recessed, to reconvene at the call of the Chair.]

APPENDIX I—COURT CASES

our examination of the record and authorities in light of his contentions discloses no error which would warrant disturbing the judgment.

Affirmed.

Irvin C. SCARBECK, Appellant,
v.
UNITED STATES of America, Appellee.
Nos. 16739, 16952.

United States Court of Appeals
District of Columbia Circuit

Argued June 7, 1962.

Decided Dec. 31, 1962.

Petition for Rehearing En Banc Denied En Banc Feb. 28, 1963.

As Amended March 12, 1963.

Certiorari Denied June 17, 1963, See 83 S.Ct. 1897.

Prosecution of United States foreign service officer for communicating classified information to representatives of a foreign government. The United States District Court for the District of Columbia, Leonard P. Walsh, J., entered judgment of conviction on jury verdict and the foreign service officer appealed. The Court of Appeals, Washington, Circuit Judge, held that under the statute prohibiting communication of classified information to representatives of a foreign government, the President of the United States or the Secretary of State were not required personally to classify the documents; an Ambassador had authority to classify foreign service dispatches, and the dispatches as classified and certified by him were within the scope of the statute.

Affirmed.

1. War and National Defense ⇐48

Under statute prohibiting communication of classified information by United States officers or employees to an agent or representative of a foreign government, the classification of documents is not required to be made personally by President of United States or Secretary of State; an Ambassador of United State Embassy had authority to classify foreign service dispatches, and dispatches as classified and certified by the Ambassador were within scope of statute. Executive Order No. 10501 as amended by No. 10901, 50 U.S.C.A. § 401 note; Internal Security Act of 1950, § 4(b), 50 U.S.C.A. § 783(b).

2. Constitutional Law ⇐258
Criminal Law ⇐13

The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

3. Criminal Law ⇐13

The general principle that terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is not to be applied in derogation of common sense, especially where statute deals with a limited class of persons, so situated as to have special knowledge concerning acts prohibited, and where punishment is to be imposed only on those who have scienter.

4. United States ⇐41

Federal employees are subject to orders of their superiors, and are informed by statute, regulations, other public directives, and oral instructions, as to what they shall or shall not do in connection with their government employment.

5. War and National Defense ⇐48

Foreign service dispatches classified as "secret" or "confidential" pursuant to presidential executive order and foreign service manual were "classified as affecting the security of the United States" within meaning of statute prohibiting a United States officer or employee from communicating classified information to representatives of a foreign government. Executive Order No. 10501 as amended by No. 10901, 50 U.S.C.A. § 501 note; Internal Security Act of 1950, § 4(b), 50 U.S.C.A. § 783(b).

See publication Words and Phrases for other judicial constructions and definitions.

6. War and National Defense ⇐48

In prosecution of United States foreign service officer for communicating classified information to representatives of a foreign government, the government was not required to prove that documents involved were properly classified "as affecting the security of the United States", Executive Order No. 10501 as amended by No. 10901, 50 U.S.C.A. § 501 note; Internal Security Act of 1950, § 4(b), 50 U.S.C.A. § 783(b).

7. War and National Defense ⇐48

In prosecution of United States foreign service officer for communicating classified information to representatives of a foreign government, factual determination was whether information had been classified and whether foreign service officer knew or had reason to know that it was classified, and neither foreign service officer nor jury was permitted to ignore classification given documents under Presidential authority. Executive Order No. 10501 as amended by No. 10901, 50 U.S.C.A. § 401 note; Internal Security Act of 1950, § 4(b), 50 U.S.C.A. § 783(b).

8. Criminal Law ⇐1153(4)

Where federal district judge after stating that he had given consideration to all evidence denied defendant's motion to suppress alleged confessions but no findings of fact or rulings of law were stated in connection with ruling, nor was any request for specific findings or rulings made by defendant's counsel, Court of Appeals would uphold ruling of trial court if there was any reasonable view of evidence that would support it.

9. Criminal Law ⇐531(3)

In prosecution of United States foreign service officer for communicating classified information to representatives of a foreign government, decision of trial judge to permit officer's alleged confessions to go to jury with an instruction on issue of coercion was not improper under the evidence. Executive Order No. 10501 as amended by No. 10901, 50 U.S.C.A. § 401 note; Internal Security Act of 1950, § 4(b), 50 U.S.C.A. § 783(b).

10. Criminal Law ⇐519(1)

Statement of chief security officer of United States Embassy that only moral pressures were used during interrogation of foreign service officer who was subsequently charged with communicating classified information to an agent of a foreign government did not amount to a concession of improper coercive tactics rendering foreign service officer's confession inadmissible where moral pressures referred to appeals to foreign service officer's integrity, conscience, patriotism, and the like, that chief security officer employed in course of interrogation. Executive Order No. 10501 as amended by No. 10901, 50 U.S.C.A. § 401 note; Internal Security Act of 1950, § 4(b), 50 U.S.C.A. § 783(b).

11. Criminal Law ⇐412(2)

Inculpatory statements obtained during a defendant's period of unlawful detention are inadmissible in subsequent prosecution. Fed.Rules Crim.Proc. rule 5(a), 18 U.S.C.A.

12. Criminal Law ⇐519(8)

In prosecution of United States foreign service officer for communicating classified information to agents of a foreign government, there was ample evidence to support conclusion that foreign service officer had not been involuntarily detained during time that he had given confessions to a United States Embassy chief security officer and to agents of

Federal Bureau of Investigation. Internal Security Act of 1950, § 4(b), 50 U.S.C.A. § 783(b); Fed.Rules Crim.Proc. rule 35, 18 U.S.C.A.

13. Criminal Law ⇐517(4), 538(3)

Extra-judicial confessions or statements made by accused after the act and when he is under suspicion are not admissible in a subsequent criminal prosecution unless they are supported by corroborative evidence, and if the independent evidence is sufficient to establish the truth, trustworthiness and reliability of accused's statements to investigating authorities, and statements themselves supply whatever elements of the offense are not proved by independent evidence, proof is sufficient to send the case to the jury.

14. Criminal Law ⇐409

Admissions made by United States foreign service officer to United States Embassy chief security officer and to agents of Federal Bureau of Investigation prior to his arrest were sufficiently corroborated by independent evidence in prosecution for communicating classified information to representatives of a foreign government. Internal Security Act of 1950, § 4(b), 50 U.S.C.A. § 783(b).

15. War and National Defense ⇐48

Evidence sustained conviction of United States foreign service officer for communicating classified information to agents of a foreign government. Internal Security Act of 1950, § 4(b), 50 U.S.C.A. § 783(b).

16. Criminal Law ⇐993

Where foreign service officer had cooperated with authorities during investigation at time that he was under suspicion of communicating classified information to agents of a foreign government, Court of Appeals in affirming foreign service officer's conviction stated that federal district court should seriously consider exercising its power to reduce three ten year sentences which had been imposed to run consecutively, as for example, by making sentences run concurrently. Fed.Rules Crim.Proc. rule 35, 18 U.S.C.A.

Mr. Samuel C. Klein, Washington, D. C., for appellant.

Mr. Kevin T. Maroney, Attorney, Department of Justice, with whom Mr. Robert S. Brady, Attorney, Department of Justice, was on the brief, for appellee.

Before BAZELON, Chief Judge, and WASHINGTON and WRIGHT, Circuit Judges.

WASHINGTON, Circuit Judge.

Appellant Irvin C. Scarbeck was tried in the District Court on an indictment which charged him in three counts with communicating classified information to representatives of the Polish Government, in violation of 50 U.S.C. § 783(b), and in a fourth count with removing a document on file at the United States Embassy in Warsaw, Poland, in violation of 18 U.S.C. § 2071. After a jury trial, Scarbeck was found guilty on the first three counts, and not guilty on the fourth. He was sentenced to ten years imprisonment on each of the first three counts, to be served consecutively. Appeal was taken from the judgment of conviction. During its pendency, a motion for a new trial was made in the District Court. This was denied, and an appeal was taken from the denial. The two appeals were consolidated by order of this court.

The Government's evidence, in substance, was that appellant Scarbeck was employed in the United States Embassy in Warsaw from December 1958 until June 1961, serving as Second Secretary and General Services Officer. In September 1959 he met and thereafter became involved with Miss Urszula Maria Discher, a Polish national. He maintained an apartment for her, and visited her there almost nightly when he was in Warsaw. On the night of December 22-23, 1960, when appellant and Miss Discher were undressed and in bed together, the door was opened and several men

entered—one in the uniform of the Polish militia. One of the men had a camera and took compromising pictures. Miss Discher was then taken to the police station, where she was interrogated by Polish security police (known as the "U.B.") and threatened with expulsion from Warsaw, imprisonment for black market dealings, and forced service as a prostitute.

The facts following are derived largely (but not wholly) from appellant's statements to a security officer of the State Department and to agents of the Federal Bureau of Investigation, which were received in evidence over appellant's objection.

The appellant remained in the apartment and conversed with two other men who arrived to interview him. He was told that Miss Discher would be imprisoned, that his activities with her would have to be reported to the United States Embassy, and that his career would be finished. The men suggested, however, that if appellant furnished information and documents from the Embassy to them, they might be able to quash the report to the Embassy concerning his activities and to procure the release of Miss Discher. Appellant disclaimed having any knowledge of classified matters and stated that he would not under any circumstances give them any information which would endanger the security of the United States. He agreed, however, to meet with them again. Miss Discher was then returned to her apartment from the police station.

Appellant thereafter met with the men, whom he believed to be Polish security policemen, once a week or once in two weeks until about April 11, 1961. He first gave them unclassified documents and information obtained from unclassified material, but the men became insistent that he provide them with more important documents and information. According to appellant's statements, about five or six weeks after his first meeting with them he took to them Despatch No. 344, a document prepared by the Ambassador of the United States and classified and marked as "Secret." The men photographed and returned this document to him in about fifteen minutes. He also provided them on other occasions with information contained in Despatch No. 518 classified and marked "Secret," and in Despatch No. 444 classified and marked "Confidential."

During his talks with the U.B. men, appellant had asked their assistance in obtaining a Polish passport for Miss Discher. Early in April 1961 Miss Discher obtained the passport and used it immediately to go to Germany. Appellant had previously arranged for the issuance of a West German visa to her, permitting her entry, and had arranged accommodations for her in Frankfurt. He paid her transportation to Germany. Before she left Warsaw, appellant mentioned to the two U.B. men his worries about her lack of funds and accepted 1600 German marks (then about $400) which they offered him. Appellant stated to them that it was a loan which he would repay. He had refused previous offers of money made by these men.

Appellant joined Miss Discher in Frankfurt about the middle of April and remained until the first week of May, when he returned to Warsaw. He was then under suspicion by his superiors, and was ordered to report on June 5, 1961, to the United States Embassy in Bonn, Germany, to attend a conference. Later that day (June 5) he was interviewed by a security official of the Department of State and signed an inculpatory statement detailing some of the facts outlined above. He returned to the United States where he was questioned by agents of the F.B.I., and where he signed three more inculpatory statements. He was arrested, indicted and tried, resulting in the conviction now under review.

I.

[1] Appellant's initial contention raises the question of the proper interpretation of the statute under which he was convicted, 50 U.S.C. § 783(b) (1958), incorporating Section 4(b) of the Inter-

nal Security Act of 1950, 64 Stat. 991. This section provides, in pertinent part:

"It shall be unlawful for any officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, to communicate in any manner or by any means, to any other person whom such officer or employee knows or has reason to believe to be an agent or representative of any foreign government * * * *any information of a kind which shall have been classified by the President (or by the head of any such department*, agency, or corporation *with the approval of the President) as affecting the security of the United States*, knowing or having reason to know that such information has been so classified, unless such officer or employee shall have been specifically authorized by the President, or by the head of the department, agency, or corporation by which this officer or employee is employed, to make such disclosure of such information." (Emphasis supplied.)

As we have seen, appellant Scarbeck was an employee of the State Department, stationed in Warsaw, Poland, from December 1958 until June 1961. He was found guilty of having communicated to Polish government agents Foreign Service Despatches numbered 344, 518 and 444 (or information contained in them); the first two Despatches had been classified and certified "Secret," and the last Despatch had been classified and certified "Confidential," by the United States Ambassador to Poland. The Ambassador testified that these classifications were security classifications applied to information which should be protected in the interest of the national defense of the United States; and that his authority for the classifications was the President's Executive Order 10501, as amended by Executive Order 10901, and the Foreign Service Regulations based on the Executive Order.

Appellant's contention is that his conviction under Section 783(b) cannot stand because there was no showing that he had communicated the contents of any document which had been classified *personally* by the President as "affecting the security of the United States," or one that had been so classified *personally* by the Secretary of State with the approval of the President.[1]

At the outset, we note that the construction of the statute urged by appellant would largely reduce it to a dead letter. With the pressures of more urgent business, the President and the Secretary of State of necessity could personally classify very few documents or items of information. In the normal course of events a subordinate Government employee or official labels his own materials with whatever classification he deems appropriate, within the scope of his authority, and his superiors reviewing those materials later re-classify or de-classify as they may judge necessary or desirable. But in this process the great mass of documents in the State Department never will reach the Secretary of State or the President. Executive Order 10501 of November 5, 1953, 18 Fed.Reg. 7049, as amended by Executive Order 10901 of January 9, 1961, 26 Fed.Reg. 217, fully recognizes this; after defining classification categories, it provides that the authority to classify

1. This contention goes to the sufficiency of the indictment, which charges the appellant with having communicated, with respect to each of the three Despatches in question, "information the defendant had reason to know had been classified, under the authority of the President of the United States and the Secretary of State, as affecting the security of the United States." It is irrelevant that this point may not have been made at the trial; it may be raised at any time. Fed. R.Crim.P. 12(b); see United States v. Manuszak, 234 F.2d 421, 422 (3d Cir., 1956); Johnson v. United States, 206 F.2d 806, 808, 14 Alaska 380 (9th Cir., 1953).

under the order may be exercised, as to the Department of State, by the head (Secretary) "or by such responsible officers or employees as he, or his representative, may designate for that purpose."

We note further that security and defense information has long been "classified" against disclosure and that the term classified by, or with the approval of, the President or a department head, had a well understood connotation on September 23, 1950, when Section 783(b) was enacted by Congress.[2] For example, Executive Order 8381 of March 22, 1940, 5 Fed.Reg. 1147, defines "vital military and naval installations or equipment * * * requiring protection against the general dissemination of information relative thereto" within the meaning of the Act of January 12, 1938, 52 Stat. 3, 18 U.S.C. § 795, as:

> "1. All military or naval installations and equipment which are *now classified, designated, and marked under the authority or at the direction of* the Secretary of War or the Secretary of the Navy as 'secret', 'confidential', or 'restricted' * * *." (Emphasis supplied.)

Executive Order 10104 of February 1, 1950, 15 Fed.Reg. 597, superseded Order 8381, and contained three numbered paragraphs defining vital military and naval installations and equipment under the 1938 Act. Most pertinent here is the following:

> "3. All official military, naval, or air force books, pamphlets, documents, reports, maps, charts, plans, designs, models, drawings, photographs, contracts, or specifications *which are now marked under the authority or at the direction of* the President, the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force as 'top secret', 'secret', 'confidential' or 'restricted' and all such articles or equipment *which may hereafter be so marked with the approval or at the direction of* the President." (Emphasis supplied.)

Congress itself in the Act of May 13, 1950, passed only a few months prior to the statute here involved, made it a crime to communicate knowingly certain types of classified information (see 50 U.S.C. § 46a) and defined the term "classified information" as "information which, at the time of a violation under this chapter, is, for reasons of national security, *specifically designated by a United States Government agency* for limited or restricted dissemination or distribution." (Emphasis supplied.) 50 U.S.C. § 46.[3]

It could hardly be supposed that in enacting Section 783(b) Congress was not aware of this background and of the necessity for, and the existing practice of, delegation to others by the President and department heads of the authority to classify security and other defense information. It seems highly unlikely that Congress would have intended to provide a penalty for disclosure only of such information as had personally been classified by the President or the head of a department—necessarily a fairly rare occurrence. And the legislative history of Section 783(b) bears this out.

The language of Section 783(b) in the respect now pertinent, i. e., "of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States," was contained in identical form in Section 4(b) of the original congres-

2. Section 783(b), of course, does not purport to be an enabling act; the power of the Executive branch to protect secret documents affecting the national defense and security has been exercised from the beginning, and is in no way limited or extended by Section 783(b).

3. 50 U.S.C. §§ 46, 46a, and 46b were superseded by Section 24(a) of the Act of October 31, 1951, 18 U.S.C. § 798, which continued in Section 798(b) the same definition of classified information as is found in 50 U.S.C. § 46.

sional bill, S. 1194, introduced by Senator Mundt on March 8, 1949; in Section 4(b) of the second 1949 bill, S. 2311, introduced by Senator Mundt on July 22, 1949;[4] in Section 4(b) of S. 4037 introduced by Senator McCarran on August 10, 1950; and in Section 4(a) of H.R. 9490 introduced by Representative Wood in the House on August 21, 1950. This latter bill became the Internal Security Act of 1950 over the President's veto, and the pertinent section was incorporated in 50 U.S.C. § 783(b), which is now before us.

At the Senate Hearings on S. 1194, Senator Mundt pointed out that Section 4(b) of the bill grew "directly out of the experience we had in the House Committee on Un-American Activities last fall in investigation of the so-called pumpkin papers case, the espionage activities in the Chambers-Hiss case, the Bentley case, and others."[5] When S. 4037 was reported favorably on August 17, 1950, the Senate Report (S. Rep. No. 2369, 81st Cong., 2d Sess.) stated:

> "Section 4(b) makes it unlawful, except with special authorization, for any officer or employee of the United States or of any Federal agency to communicate with any representative of a foreign government or to any officer or member of a Communist organization, *information of a kind* which he knows or has reason to know has been *classified by or with the approval of the President* as affecting the security of the United States." (Emphasis supplied.)

The language emphasized indicates strongly that personal classification by the President was not required.

The debate in the Senate relative to Section 4(b) of S. 4037 centered about its possible application to employees of corporations only partly owned by the United States, and to representatives of friendly governments. Senator Kefauver considered the bill to be too broad in these respects.[6] Senators McCarran, Mundt and Ferguson replied to his criticisms. Portions of the debate are lowing:

> "MR. FERGUSON. * * *
>
> "First, we must know what we are trying to prevent. The purpose of this part of the bill is to prevent Government employees and those working for Government agencies and those who are serving in capacities in which they are likely to receive very vital information which has been classified by the President as being security information, from knowingly and willfully giving such information to foreign agents or to persons who belong to Communist organizations. 96 Cong.Rec. 14615.
>
> * * * * * *
>
> "The only persons who are entitled to receive such secret information are those whom the President of the United States or the heads of the departments allow to have such information. That is as it should be. Ibid.
>
> * * * * * *
>
> "MR. KEFAUVER. The Senator from Michigan knows that in all the

4. On March 21, 1950, S. 2311 was reported favorably by the Senate Committee on the Judiciary, with amendments designed to make the prohibitions of the bill "operative whether or not the classified information was obtained within or without the scope of the official duties or employment," and to add the requirement of scienter. The words "obtained in the course of his official duties or employment," were omitted and the words "knowing or having reason to know that such information has been so classified" were added. See S.Rep. No. 1358, 81st Cong., 2d Sess., March 21, 1950.

5. It is a matter of common knowledge that many if not most of the documents involved in these cases were not documents personally classified or described by the President or a department head as secret or not to be disclosed. The quoted language is found at page 31 of the Hearings, cited infra at footnote 7.

6. See, for example, 96 Cong.Rec. 14240 et seq. (September 6, 1950).

departments, practically all documents are marked 'confidential' or 'restricted.' Under such circumstances, it would be impossible for anyone to have a full appreciation of what might be marked 'restricted.'

"This measure does not mean that anyone who might be so charged would have to have seen what was so marked. On the contrary, if such a person should pass on such information third hand, and if subsequently it should turn out to have been marked 'restricted,' that person would be guilty, because the amendment does not provide that the person passing on the information must have seen it.

"MR. FERGUSON. Mr. President, that is not a fact. The amendment provides that such a person must know that the material is restricted or must have reason to believe that it is restricted. How would that situation develop? It would develop in this way: If certain information is classified by the President or by the head of any Department or agency, with the approval of the President, then if any person knows that a certain paper or certain information has been *classified by the President or, on his authority, by someone else* as affecting the security of the United States, such person should not give the information to any foreign agent or any foreign government; it should be a crime for anyone to do so. * * *" (Emphasis supplied.) Ibid.

"MR. KEFAUVER. This subsection says it shall be unlawful to communicate in any way any information that has been *classified by the President or any division of the Government with the approval of the President.* That is paraphrasing it. * * *" (Emphasis supplied.) 96 Cong.Rec. 15198.

"MR. KEFAUVER. * * * I was at the Department of Justice late this afternoon. They told me, for instance, that they mark things confidential that a third or fourth assistant can read, which the President in the White House also marks confidential. We have some material marked confidential by the President which a third or fourth assistant from the top also marks confidential.

"MR. MUNDT. I am not sure of the pertinence of the Senator's question. I do not think it has anything to do with the colloquy now in progress. *So far as marking matters confidential, under this legislation it must be done by the President or someone authorized by him to do it.* I do not not want to get into all of these details. * * *" (Emphasis supplied.) 96 Cong.Rec. 15253.

Pertinent also are certain of the colloquies which occurred at the Senate hearings on S. 1194, the original bill on this subject introduced by Senator Mundt on March 8, 1949. As indicated, that bill was, and the intervening bills were, in all respects now relevant, identical with the final legislation. These colloquies are set out in the margin.[7]

These passages in the debates and hearings indicate, in our view, that the speakers understood that the President

7. "*Senator Ferguson.* What kind of papers do you have in mind that it would be a crime to deliver to allies?

"*Senator Mundt.* That is spelled out in definition. It is any paper which has been—

"*Senator O'Conor.* Classified.

"*Senator Mundt.* Yes; classified as affecting the security of the United States, all classified information.

"As the Senator understands, one time a thing is classified and at another time it is not.

"*Senator Ferguson.* I understand that, but the word 'classified' is not always under a directive of the President.

"*Senator Mundt.* By the President or by somebody acting for him.

"*Senator O'Conor.* The head of any department, agency, or corporation.

would take ultimate responsibility for the protection and classification of security documents and information, but that the actual marking of documents and the safeguarding of information would be delegated to others. There can be little doubt, in view of the legislative history taken in the light of the existing background, that Congress intended to enact a broad and effective statute, prohibiting the transfer of all documents officially classified as affecting the national security, whether or not the President or the head of a department had personally marked them as such. The question is whether the statutory language can fairly be construed to accomplish that result. We think it can.

In the first place, the statute does not read "classified by the President." It says "*of a kind*" classified by the President (or a department head). Those words must mean that the President (or the head of an approved department) is to establish the kinds or categories of documents and information which are to be classified by appropriate authority. This requirement has been fulfilled in the instant case, through the issuance by the President of Executive Orders, stated to be "in the best interests of the national security," and the promulgation by the Secretary of State of the regulations contained in the Foreign Service Manual. Executive Order 10501, as amended by Executive Order 10901, describes the "categories" of information which shall be classified as "Top Secret," "Secret," and "Confidential." The "Secret" category, for example, is authorized, "by appropriate authority, only for defense information or material the unauthorized disclosure of which could result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to national defense, or information revealing important intelligence operations." Any information of this character is "of a kind" described by the President by Executive Order as being

"*Senator Ferguson.* Then this goes so far as to allow an administrative officer to classify anything, and the transfer of that would be criminal under your act.

"*Senator Mundt.* It permits him to transfer anything provided he has the approval of the President so to do, but it keeps the responsibility on the President. It says with the approval of the President.

* * * * *

"*Senator Ferguson.* Has this anything to do with the national defense?

"*Senator Mundt.* This is very definitely a part of the national defense.

"*Senator Ferguson.* I mean the papers we are talking about. If it is marked 'Secret' because it is for the national defense, that is one thing, but suppose it is just marked 'Secret' and it has nothing to do with the national defense.

"*Senator Mundt.* That is covered in the definition as affecting the security of the United States. It is spelled out.

"*Senator O'Conor.* In line 12 of the bill the requirement is that the classification would be of those papers which affect the security of the United States.

"*Senator Ferguson.* That was what I wanted to get at.

"*Senator Mundt.* That is right. That is definite.

"*Senator Ferguson.* What about the person knowing, or believing or having reason to believe that it would affect the security?

"*Senator Mundt.* From the standpoint of the person against whom the statute runs he can determine that by whether it is marked 'Classified' or not. The man who does the classifying acts in his responsible capacity as the representative of the President.

"*Senator Ferguson.* All right. What you do, then, is to use the word 'classified' to be the determining feature. Suppose it is not marked?

"*Senator Mundt.* If it is classified it is marked or it is supposed to be marked.

"*Senator Ferguson.* Suppose he gets the knowledge from a classified paper and then gives it orally?

"*Senator Mundt.* If he knows or has reason to believe that it is classified, he is guilty." Hearings before a Sub-Committee of the Committee on the Judiciary, United States Senate, 81st Cong., 1st Sess., on S. 1194 and S. 1196 (1949), at 32-33.

suitable for classification as "Secret." Similarly, the Executive Order authorizes use of the classification "Confidential," "by appropriate authority, only for defense information or material the unauthorized disclosure of which could be prejudicial to the defense interests of the nation." [8]

The Executive Order goes on to select certain departments as "having primary responsibility for matters pertaining to national defense," one of which is the Department of State,[9] and provides as follows with respect to them:

> "* * * the authority for original classification of information or material under this order may be exercised by the head of the department, agency, or Governmental unit concerned or by such responsible officers or employees as he, or his representative, may designate for that purpose. The delegation of such authority to classify shall be limited as severely as is consistent with the orderly and expeditious transaction of Government business."

Thus express authority for, and "approval of the President" of, the delegation by the Secretary of State to selected responsible officers and employees of his power to assign an original classification is given in the Executive Order. It is implicit, of course, that the original classification will be subject to review by superior officers and the Secretary.

Since the Secretary's power to delegate his authority to classify originally is established, the Ambassador's authority to classify and to certify the classification of the three Despatches in question is not debatable. He was clearly authorized as the "originator" of Despatch 344 to give the original and appropriate classification to it, and as principal officer of the Embassy, his power to certify (or to change if deemed appropriate) the original classification given by others to Despatches 518 and 444 is also plain. See the Regulations contained in the Foreign Service Manual, Part II, §§ 912.1, 913.1, and 913.2.[10] And it is equally clear that his classifications were made with the approval and under the

8. The definitions of material to be classified as Secret and Confidential as set out in the regulations contained in the Foreign Service Manual are patterned on, and appear to be identical with, the definitions of those terms in the Executive Order. See §§ 911.32 and 911.33 thereof.

9. Under Section 783(b), one of the President's functions is recognized to be this process of selection. This, it seems to us, is the meaning of the words "with the approval of the President" as used in the phrase "classified by the President (or by the head of any such department, agency, or corporation with the approval of the President)." The "approval of the President" is to be given by authorizing the heads of selected agencies to institute a plan of classifying their protected documents. Appellant appears in substance to agree. His brief says:

> "The 'approval of the President' refers to heads of a department, agency, or corporation, and is intended to limit the authority to classify under the statute to only *certain heads* of a department, agency, or corporation actually those having a direct responsibility for national defense or security."

> The designation of the agencies authorized to classify occurred when the President issued Executive Order 10501, as amended by Executive Order 10901.

10. These are as follows:

> "912 *Principles of Classification and Control*
>
> "912.1 *Assigning Classification or Control Designation*
>
> "The originator of a document shall be responsible for the original assignment of its classification or control designation.
> * * *
>
> "913 *Authority to Certify Classifications or Control Designations*
>
> "913.1 *General*
>
> "The final signature or approval of a document bearing a classification or administrative control designation constitutes a certification by the signing or approving officer that the classification or control designation assigned is appropriate. The officer who signs or approves such a document is called the 'certifying officer' with respect to the classification or control designation of the document. Thus, authorization to sign a document automatically confers authority to certify its classification or control des-

authority of the President and the Secretary of State.

We conclude that Ambassador Beam had authority to classify Despatches 344, 518, and 444 by virtue of the provisions of the Executive Order and the Foreign Service Manual; and that the Despatches as classified and certified by him are within the scope of Section 783(b).

[2] Appellant also urges that since criminal statutes must be strictly construed, no meaning can be given to Section 783(b) beyond the narrowest interpretation of its words. He quotes from Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926), where the Supreme Court said:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. International Harvester Co. v. Kentucky, 234 U.S. 216, 221, [34 S.Ct. 853, 58 L.Ed. 1284]; Collins v. Kentucky, 234 U.S. 634, 638 [34 S.Ct. 924, 58 L.Ed. 1510]."

[3, 4] The general principle just stated is of course well settled. But it is not to be applied in derogation of common sense, especially where the statute deals with a limited class of persons, so situated as to have special knowledge concerning the acts prohibited, and where punishment is to be imposed only on those who have scienter. See Gorin v. United States, 312 U.S. 19 at 27–28, 61 S.Ct. 429, 85 L.Ed. 488 (1941). Here the scienter requirement is explicit: Section 783(b) says that the accused must be in the posture of "knowing or having reason to know that such information has been so classified." And here the class to which the statute applies is a relatively small group—employees of the Federal Government. This group is not only a limited one: it is a well-informed one. Federal employees are subject to the orders of their superiors, and are informed by statutes, regulations, other published directives, and oral instructions, as to what they shall or shall not do in connection with their Government employment. Employees of the State Department were told, by Section 783(b) and by the regulations set out in the Foreign Service Manual, which incorporates the directives of Executive Order 10501, as amended, that they are not to communicate to representatives of a foreign government information known by them to have been classified as "Secret" or "Confidential" by officials authorized to classify them. As Mr. Justice Holmes said in a highly pertinent case, involving prohibitions against Government officials receiving or soliciting funds for political purposes:

> "It is argued at some length that the statute, if extended beyond the

ignation unless a prohibition is specifically included in the authorization to sign.

"913.2 *Designation of Certifying Officers*

"Any officer at a post authorized to sign correspondence in accordance with 1 FSM II 121 is authorized to certify the classification or administrative control designation of any document which he signs, except that the Top Secret classification shall be certified only by the principal officer or his designee. The authority to certify classifications or control designations should not be confused with the responsibility for initial assignment of a classification or control designation. Any employee who originates a classified or administratively controlled document has the responsibility for assigning the appropriate classification or administrative control designation at the time the document is prepared. The classification or control designation so assigned may be changed or eliminated by the certifying officer or by intermediate reviewing officers." Foreign Service Manual, Part II, §§ 912.1, 913.1, 913.2.

political purposes under the control of Congress, is too vague to be valid. The objection to uncertainty concerning the persons embraced need not trouble us now. * * * The other objection is to the meaning of 'political purposes.' This would be open even if we accepted the limitations that would make the law satisfactory to the respondent's counsel. But we imagine that no one not in search of trouble would feel any [trouble]. Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk." United States v. Wurzbach, 280 U.S. 396 at 399, 50 S.Ct. 167, 74 L.Ed. 508 (1930).[11]

We think a like view must be taken here.

II.

Appellant further urges that even if his construction of the statute—that the classification of documents must be made personally by the President or the Secretary of State—is rejected, then the Government was required to prove at the trial that the documents involved were properly classified "as affecting the security of the United States." He argues that "This would present an insurmountable hurdle since, as is obvious, the standards set forth in E.O. 10501 relate to the protection of information involving the 'national defense' and not to 'the security of the United States,' the criterion set forth in 783(b)."

But the Executive Order itself negates this. Its preamble recites that the President deems his order "necessary in the best interests of the national security." It is quite true that the classification categories set up in the Order relate to what is referred to as "defense information," but the definitions of material appropriate for classification can as well be described as relating to the national security. (See Part I of this opinion.) Appellant has not undertaken to show that "defense information," as described in the Executive Order, is not of necessity "information * * * affecting the security of the United States," within the meaning of Section 783(b). Common sense tells us that it is: defense is one aspect of security and indeed in their broad senses the two terms have a very similar connotation. The legislative history, as we have seen, shows that Congress must have equated the two terms.[12] Furthermore, Ambassador Beam, who was primarily responsible for the classifications involved here, testified that the classifications "Top Secret," "Secret" and "Confidential" were security classifications applying to information which should be protected in the interest of national defense. And the definition of "Defense Information" contained in Section 911.2 of the regulations in the Foreign Service Manual is phrased in terms which include protection of the national security, both internal and external, in every aspect; it is not limited to protection against physical attack.[13]

11. See also Hygrade Provision Co. v. Sherman, 266 U.S. 497 at 501-502, 45 S.Ct. 141, 69 L.Ed. 402 (1925):

"By engaging in the business of selling kosher products they [appellant meat dealers] in effect assert an honest purpose to distinguish to the best of their judgment between what is and what is not kosher. The statutes require no more." Similarly, in United States v. Hood, 343 U.S. 148 at 151, 72 S.Ct. 568, 96 L.Ed. 846 (1952), it is said:

"This Act penalized corruption. * * *

"* * * The picture of the unsuspecting influence merchant, steering a careful course between violation of the statute on the one hand and obtaining money by false pretenses on the other by confining himself to the sale of non-existent but plausible offices, entrapped by the dubieties of this statute, is not one to commend itself to reason."

12. See, for example, the colloquy in fn. 7, supra, between Senators Ferguson and Mundt.

13. "911.2 *Defense Information*

"The Department was informed by the Attorney General of the United States on April 17, 1954, that defense classifi-

[5, 6] We think, therefore, that documents classified as "Secret" or "Confidential" pursuant to the Executive Order and the Foreign Service Manual are "classified * * * as affecting the security of the United States," within the meaning of Section 783(b). The remaining inquiry is whether the prosecution was required to show that they were properly so classified. In our view, the answer to this question must be in the negative.

There is no suggestion in the language of Section 783(b), by specific requirement or otherwise, that the information must properly have been classified as affecting the security of the United States. The essence of the offense described by Section 783(b) is the communication—by a United States employee to agents of a foreign government—of information of a kind which has been classified by designated officials as affecting the security of the United States, knowing or having reason to know that it has been so classified. The important elements for present purposes are the security classification of the material by an official authorized to do so and the transmission of the classified material by the employee with the knowledge that the material has been so classified. Indeed, we think that the inclusion of the requirement for scienter on the part of the employee is a clear indication of the congressional intent[14] to make the su-

cations may be interpreted by the Department, in proper instances, to include the safeguarding of information and material developed in the course of conduct of foreign relations of the United States whenever it appears that the effect of the unauthorized disclosure of such information or material upon international relations or upon policies being pursued through diplomatic channels could result in serious damage to the Nation. The Attorney General further noted that it is a fact that there exists an interrelation between the foreign relations of the United States and the national defense of the United States, which fact is recognized in section 1 of Executive Order 10501. Accordingly, defense information shall be interpreted as including information or material which, if disclosed to unauthorized individuals, may result in a break in diplomatic relations affecting the defense of the United States; may cause an armed attack to be launched against the United States or its allies; may reduce the ability of the United States to defend itself against attack; may increase the enemy's ability to wage war against the United States; may compromise military or defense plans, intelligence operations, or technological developments vital to national defense; may jeopardize the international relations of the United States; or may endanger the effectiveness of a program or policy of vital importance to the national defense or otherwise be prejudicial to defense interests. Illustrative examples of such information which may require classification include:

"a. Information and material relating to cryptographic devices and systems;

"b. Information pertaining to vital defense or diplomatic programs or operations;

"c. Intelligence or information relating to intelligence operations which will assist the United States to be better prepared to defend itself against attack or to conduct foreign relations;

"d. Information pertaining to national stockpiles, requirements for strategic materials, critical products, technological development, or testing activities vital to national defense;

"e. Investigative reports which contain information relating to subversive activities affecting the internal security of the United States;

"f. Political and economic reports containing information, the unauthorized disclosure of which may jeopardize the international relations of the United States or may otherwise affect the national defense; or

"g. Information received in confidence from officials of a foreign government whenever it appears that the breach of such confidence might have serious consequences affecting the national defense."

14. The following passage from the Senate debate is of interest here:

"*Mr. Ferguson.* It says 'information which has been classified.'

"*Mr. Kefauver.* That is correct; but it does not mean that the individual must actually seize the document to come within the terms of the bill.

"*Mr. Ferguson.* The person would have to know the information contained in the document is classified.

perior's classification binding on the employee, once he knows of it.[15] Cf. Gorin v. United States, 312 U.S. 19, 27–28, 61 S.Ct. 429, 85 L.Ed. 488 (1941). The excerpts from the Senate Hearings set out above in footnote 7, supra, confirm this.

Gorin v. United States, supra, involved a prosecution under Sections 1(b) and 2 of the Espionage Act of 1917, for obtaining any information connected with or relating to the national defense and delivering it to an agent of a foreign country with an intent, or reason to believe, that it is to be used to the injury of the United States or the advantage of a foreign nation. The Supreme Court held that the statute embraced everything connected with or related to national defense in its well understood connotation (312 U.S. at 28, 61 S.Ct. at 434), and that, once properly instructed as to the meaning of national defense as used in the statute, it was for the jury to determine whether the documents involved were in fact connected with the national defense.[16] Here, similarly, the function of the court was to instruct as to the meaning of "classified" information, the disclosure of which would be violative of Section 783(b), and the function of the jury was to decide whether the information revealed was classified information in that sense.

The Gorin case does not support the proposition that in a prosecution under Section 783(b) the jury must be permitted to determine not only the question whether the document was classified but also whether it affected the security of the United States. The Espionage Act of 1917, involved in Gorin, covered the entire population: it forbade any person to obtain and deliver documents connected with the national defense, irrespective of whether they had been so classified or marked, and the factual determination whether they were so connected had to be resolved in each case. However, as we have noted, Section 783 (b) was aimed at a small group—employees of the Federal Government. Under the Foreign Service Regulations, see footnote 10, supra, only the originator of a document is authorized to assign the original classification, and only certain other officers are authorized to certify the classification and to review or change it. As already shown, this procedure is in accord with the Executive Order and has the approval of the President. Once the classification has been given and certified, every employee must respect it until an official authorized to change the classification has done so. In the meantime, if a Foreign Service employee sees a document marked "Secret" or "Confidential" and has legitimate reasons for thinking that the security interests of the Government would be better served by treating the document as unclassified, he may apply to his superiors, give those reasons, and have the point decided. But certainly an employee of the State Department could not bring an action in the courts to remove the label "Secret" attached by his superiors to a

"*Mr. Kefauver.* Or have reason to believe that it is confidential.

"*Mr. Ferguson.* Or to be told that it is." 96 Cong.Rec. 14242.

15. There can of course be no contention, and there is none, that appellant was not aware that the Despatches involved here were classified as affecting the security of the United States. Each page of each Despatch was marked at top and bottom with its classification. And appellant as a foreign service officer was charged with knowledge of the regulations applicable to such officers, relating to classified material.

16. The Supreme Court said:

"The function of the court is to instruct as to the kind of information which is violative of the statute, and of the jury to decide whether the information secured is of the defined kind. It is not the function of the court, where reasonable men may differ, to determine whether the acts do or do not come within the ambit of the statute. The question of the connection of the information with national defense is a question of fact to be determined by the jury as negligence upon undisputed facts is determined." 312 U.S. at 32, 61 S.Ct. at 430.

particular document, simply because he was being blackmailed and wished to be able to offer the document to his blackmailers without criminal consequences. Merely to describe such a litigation is enough to show its absurdity. Yet appellant is urging that after such an employee has obtained and delivered a classified document to an agent of a foreign power, knowing the document to be classified, he can present proof that his superior officer had no justification for classifying the document, and can obtain an instruction from the court to the jury that one of their duties is to determine whether the document, admittedly classified, was of such a nature that the superior was justified in classifying it. The trial of the employee would be converted into a trial of the superior. The Government might well be compelled either to withdraw the prosecution or to reveal policies and information going far beyond the scope of the classified documents transferred by the employee. The embarrassments and hazards of such a proceeding could soon render Section 783 (b) an entirely useless statute.

[7] We conclude that it is the intent of the statute to make the superior's classification binding on the employee. In this case, if the Government's evidence be believed, appellant knew perfectly well what he was about: the Polish agents were demanding classified (i. e., valuable and secret) information, and he tried to satisfy their demands. He cannot now claim that the Government is required to prove that the documents he gave were in fact properly classified.[17] The factual determination required for purposes of Section 783(b) is whether the information has been classified and whether the employee knew or had reason to know that it was classified. Neither the employee nor the jury is permitted to ignore the classification given under Presidential authority.

III

We turn to appellant's contention that it was error to admit in evidence the four inculpatory statements given by him under circumstances now to be related.

As already indicated, appellant was ordered by the State Department to report to the United States Embassy in Bonn, Germany, on June 5, 1961, for a conference. Upon his arrival in Bonn, appellant, having given his consent, was driven in a car to Frankfurt and was taken at about 1 p. m. to a room in the annex to the American Consulate. The security officer in charge at the United States Embassy in Germany, Kenneth W. Knauf, was awaiting his arrival. Appellant was there interrogated by Knauf, and during the interrogation appellant told of giving classified information to two Polish nationals believed by him to be U.B. agents. A statement, including the confession, was dictated by appellant (except for the opening and concluding paragraphs) to a stenographer from about 7:30 p. m. until 8:15 p. m. It was typed by her, and was returned to appellant. He read it, made a few minor corrections, and signed it at about 10:30 p. m. The confession, as signed, con-

17. His counsel seems to have agreed to this at the trial, as indicated by the following colloquy in the trial court:

"THE COURT: The question that we have to determine is did this defendant take a document that was on the face of it listed as Top Secret, Secret or Confidential, the document itself. Then we are going to start in to evaluate what the State Department should have considered—

"MR. KLEIN [counsel for defendant, now appellant] (interposing):—which we are not going to do. What I am going to relate to another exhibit which shows when a document should have been classified as Secret and show there was overclassification. I think I have a right to do that.

"Of course he has the authority to classify anything he wants Secret or Top Secret.

"THE COURT: But my only point is, that once he does classify it, it is not for an employee to determine that it is mis-classified.

"MR. KLEIN: Yes.

"THE COURT: Do you get my point?

"MR. KLEIN: Yes, of course.

"THE COURT: Now don't you agree?

"MR. KLEIN: Yes, I agree."

cluded with a declaration, admittedly dictated by Knauf, that: "The foregoing statement is made of my own free will. * * * I certify that no coercion, force, pressures, duress, press [promises?] or threats were made against me. During the conversation on this date, Mr. Knauf has explained to me my rights under the Constitution. * * *" After reading the quoted conclusion of the statement, and before signing it, appellant remarked "No pressures?" and Knauf replied "Only moral pressures." A tape recording of the interview was made while it progressed, apparently without appellant's knowledge. The tape was introduced in evidence as part of the defense, and has been made available to us.

Toward the end of the interrogation, Knauf had telephoned his superiors in Washington and was asked by them to bring appellant there. Appellant was informed of this and agreed to accompany Knauf to Washington. Arrangements were made for Knauf and appellant to fly from Dusseldorf to New York at 8:00 the next morning. Appellant and Knauf were driven to Knauf's home in Bonn, where they slept for about two hours. They then went to the airport, boarded a plane and arrived in New York at about 1:45 p. m. on June 6th. They were met by another Department of State Security Officer, who expedited their clearance through customs and immigration. During this period Knauf took appellant's passport. Appellant and Knauf then flew to Washington, going directly from the Washington Airport to the State Department. A suite consisting of two bedrooms, and a bathroom between, all of which opened onto a private corridor, had been arranged for them by the State Department at a nearby motel. A State Department officer accompanied appellant to the motel, despite appellant's protests that he could find his way by himself. Appellant chose to occupy the inner bedroom, which had a television set and an attached sun porch, and Knauf occupied the bedroom nearest the door leading into the suite. Neither of the rooms had a telephone. Both bedrooms had air-conditioning units and both, like the bathroom, had windows opening onto a fire escape with a drop ladder.

On June 7 appellant and Knauf went to the office of the Assistant Chief of the Bureau of Security of the State Department, where appellant retold his story. After concluding this account, appellant was escorted to the cafeteria for lunch. After lunch he was asked if he objected to being interviewed by the F.B.I. He said he had no objections. He was interrogated for the rest of the day in an office in the State Department building by two agents of the F.B.I. A written statement was obtained from appellant. On each of the next two days (June 8 and 9), appellant was further interrogated by the F.B.I. agents, and on each day he signed another written statement. It is undisputed that on each day before he was questioned the agents told him that he was free to leave and warned him of his constitutional right to remain silent, and of his right to obtain legal counsel. Before appellant signed the statements the agents each time told him that he did not have to give a written statement, that if he did it might be used against him, and that he had a right to consult an attorney before giving such a statement.

About 4 p. m. on Saturday, June 10, upon his return to the motel from a long walk with a security officer, appellant was handed a suspension notice by a personnel officer of the State Department. From the morning of June 5th when appellant reported to the U. S. Embassy in Bonn until the time he received this notice on June 10 appellant was, with the exception of the times he was alone in his bedroom at Knauf's home in Bonn and in his bedroom at the motel, constantly in the company of security officers of the State Department or agents of the F.B.I. During this time appellant did not ask to communicate with a lawyer, he did not refuse to accept an escort, although he protested mildly on several occasions, and he did not refuse

to submit to interrogation, although warned of his rights.

After his suspension, appellant was not accompanied and moved about as he wished, alone. On Monday, June 12, he moved to a single room in the motel, where he stayed until the morning of June 13. On that morning, as he left the motel to walk to the State Department, where he had been asked to report, he was arrested by the F.B.I. on a warrant, and was taken promptly before the United States Commissioner.

[8] Appellant made a timely motion to suppress his admissions. He argued that the confession of June 5th to Knauf was coerced and should have been excluded, and that the subsequent statements made to the F.B.I. were a product of the original involuntary confession, and should likewise be ruled inadmissible. Alternatively, he based his motion to suppress on the ground that he was under arrest from the time of his arrival at Frankfurt—or some time subsequent thereto but prior to the time at which statements were given to the F.B.I.—and that, consequently, his statements (or at least the three made in the United States) were inadmissible under the rule of Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957). Evidence was heard on this motion, including testimony by appellant given outside the hearing of the jury and restricted to the issues raised by the motion. His testimony has been incorporated in the summary of facts given above. The trial judge, stating that he had given careful consideration to all the evidence, denied the motion. No findings of fact or rulings of law were stated in connection with the ruling, nor was any request for specific findings or rulings made by counsel. Accordingly, we must uphold the ruling of the trial court if there is any reasonable view of the evidence that will support it.

[9] We cannot say that the decision of the trial judge—to permit the confessions to go to the jury with an instruction on the issue of coercion—was not proper. There was no evidence of physical violence. Indeed, appellant claims only that there was psychological pressure on him in the Knauf interview. Appellant was shown to be a man of intelligence and experience, including experience in interrogation while serving in U. S. Military Intelligence and in the Office of Military Government in Germany. He testified that Knauf introduced himself as a security officer, that he raised no objection to the interrogation, that Knauf as Chief Security Officer in Bonn was within his rights in questioning him about the mistakes he had made in his job, and that during the questioning he knew he had the right to remain silent, but "the way in which Mr. Knauf was presenting his points, one by one, naturally put tremendous pressure on me to keep answering his questions." [18] He also testified that "I did not tell Mr. Knauf that I would not sign the statement, and Mr. Knauf did not force me to sign the statement. By this time we had reached a point where Mr. Knauf was very well aware that I no more wished to sign that statement than he wished me to walk away without signing it, but I was in no position to bargain with Mr. Knauf. Mr. Knauf held all the whips and the whip hand."

The trial judge heard testimony from both Knauf and the appellant giving their recollections of the interview. Knauf's testimony alone was heard by the jury. The trial judge first, and later the jury, heard the tape recording of the interrogation. It has been submitted to us as an exhibit—introduced by defendant-appellant. The recording is of unsatisfactory quality and appears to be not entirely complete, but we have found little in it to support the claim of coer-

18. His testimony continued as follows:
"If you are placed in the position where you know that you can keep your counsel to yourself and not open your mouth, but at the same time there are certain things being held out either in front of you or over your head where you think that if you continue to cooperate, then I think very likely you will probably keep answering the questions."

cion. The impression given is that the interview was conducted on a fairly friendly basis throughout. From all the materials available to us, we are unable to conclude that the trial judge and the jury erred when they found that the admissions made were voluntarily given.

[10] Appellant argues that Knauf's statement, that "only moral pressures" were used during the interrogation, amounts to concession of improper coercive tactics rendering the confession inadmissible. It is clear, however, that this phrase was used in reference to the appeals to integrity, conscience, patriotism, and the like, that he employed in the course of the interrogation. Such appeals, in and of themselves, do not amount to improper coercion.

[11] We also are unable to agree with appellant's second line of reasoning for exclusion of these statements—that the conduct of the State Department officials and F.B.I. agents amounted to a violation of the Mallory rule. The issue here, as in any other invocation of the Mallory rule, is whether the inculpatory statements were obtained during a period of unlawful detention in violation of Rule 5(a) of the Federal Rules of Criminal Procedure, which provides that "any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner * *." A period of unlawful detention cannot exist, of course, unless there has been an arrest or action amounting to arrest. In the unusual circumstances of this case, we must decide whether appellant was, at the time he made the inculpatory statements, being involuntarily detained, for, if his presence and participation were voluntary, it is well established that the Mallory rule is inapplicable. See Vita v. United States, 294 F.2d 524 (2d Cir., 1961), cert. denied, 369 U.S. 823, 82 S.Ct. 837, 7 L.Ed.2d 788 (1962); United States v. Pravato, 282 F.2d 587 (2d Cir., 1960); Trilling v. United States, 104 U.S.App.D.C. 159, 172, 260 F.2d 677, 690 (1958) (separate opinion, dictum); Metoyer v. United States, 102 U.S.App.D.C. 62, 66, 250 F.2d 30, 34 (1957) (dissent, dictum); cf. Dunn v. United States, 273 F.2d 470 (5th Cir., 1960); Holzhey v. United States, 223 F.2d 823 (5th Cir., 1955).

In analyzing this contention, it is useful to distinguish between the statement of June 5th given to Knauf and the subsequent statements made to the F.B.I.

[12] The attack on the statement of June 5th represents the first time, to our knowledge, that the McNabb [19]-Mallory line of decisions has been invoked to obtain suppression of a confession made in a foreign country. We do not now have to decide under what circumstances a confession made abroad would fall within the prohibition enunciated by these cases because, in the present case, there was ample evidence to support the conclusion that appellant had not been involuntarily detained.

Knauf testified that as a security officer he had no power to arrest. The testimony of both appellant and Knauf in the lower court supports the inference that appellant was aware that Knauf could not arrest him.[20] The tape shows that after some general conversation about matters not here involved, Knauf said that it was time to interject a statement so that appellant would understand the situation. He said that they would probably have a long conversation that afternoon, that appellant would be within his "rights" in not answering some of the questions that would be asked, that appellant might want not to answer some questions because they might tend

19. McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943); Compare Bram v. United States, 168 U.S. 532, 561–565, 18 S.Ct. 183, 42 L.Ed. 568 (1897).

20. Appellant testified that he was told, probably after he had signed the statement, that Knauf could not arrest him, but that Knauf could ask the Germans to arrest him. Appellant admittedly had assisted in procuring a German visa for Miss Discher by illegal means.

to incriminate him or for other reasons, that Knauf preferred to have appellant decline to answer rather than to lie to him, that he could not "push" appellant to answer, but that "integrity was an integral part" of this and that "as a matter of integrity" appellant was obliged to answer, and finally that, if he believed that appellant was lying, he would get someone in to put appellant under oath and would have him sign a statement. Appellant said that he understood. He did not undertake to leave at that time or later. As noted above, he, testified that Knauf as a security officer was within his rights in questioning him, that he knew he had the right to remain silent, and that he raised no objection to the interrogation. Appellant may have been influenced to stay and participate in the inquiry by any one or a combination of a number of factors—conscience, integrity, a belief that if he left the room or building he might be summarily discharged from his position with the Foreign Service, or possibly that he might be arrested by the Germans (see footnote 20, supra). But as he in effect acknowledged, it is surely the prerogative of a Government agency investigating matters vitally related to the national security to request its employees to cooperate when confronted with reasonable inquiry into their activities. In any event, we find nothing which would amount to an arrest at that time, or to duress vitiating appellant's confession to Knauf.

We turn now to the confessions made to the F.B.I. on June 7th, 8th, and 9th. On the evidence presented, the trial judge concluded that appellant's participation was voluntary, and that there was no unlawful detention. In reaching this conclusion the judge must necessarily have decided that the mere fact that appellant was continually accompanied by one or more State Department officials, from the morning of June 5 until after the last statement was given to the F.B.I. agents on June 9, did not, without more, amount to an arrest, and that there were no other circumstances from which appellant could reasonably have concluded that he had been deprived of his freedom of movement. We think the trial judge could properly reach the conclusion he did reach. Appellant testified that he was asked whether he objected to talking to the F.B.I., and had replied that he did not. Although he was informed by the F.B.I. agents that he could consult an attorney, he did not do so, nor did he attempt to reach friends to inform them of his predicament. He made no complaint about the accommodations provided for him and made no sustained effort to depart from the company of the State Department officials, nor any serious protest about the treatment he was receiving. From about 4 p. m. on June 10 until his arrest on June 13 he was not accompanied by State Department officials and made use of his freedom to come and go as he wished. Although this was after his statements had been given, it is not without significance. The statements that he signed, taken together with the testimony of the F.B.I. agents who dealt with him, support the belief that his major desire was to be as cooperative as possible with regard to the inquiry that was being conducted. The clear inference is that he thought he might avoid or mitigate punishment, and help his dependents, by assisting in the inquiry. There may be cases in which, although no formal arrest has occurred and the suspect, after being advised of his rights, has expressed no objection to being interviewed by them, the conduct of law enforcement officials who interrogate the suspect clearly creates an unlawful detention. But this is not such a case. Here the evidence fully supports the conclusion that appellant was willing, one might indeed say eager, to reveal as much information as he could. That appellant's conduct may have been motivated by hope that he could, by virtue of his cooperation, benefit himself and others, does not affect the admissibility of his statements unless the hope was implanted by promises made to him, a state of affairs not suggested in the evidence.

We conclude, therefore, that the trial judge properly admitted all four statements made by appellant.

IV.

We now come to the question whether the proof was sufficient to support appellant's conviction. As we have seen, he was charged with, and was found guilty of, passing, sometime during the first five months of 1961, to persons known to be agents of the Polish Government, information contained in three Despatches, Nos. 344, 518 and 444, known by him to be classified as affecting the security of the United States, in violation of 50 U.S.C. § 783(b). Combining the language of the first three counts of the indictment and the language of 50 U.S.C. § 783(b), set out supra in Part I, which lays down the requirements for finding a person guilty of violation of its terms, there are five essential elements which must have been proved by competent evidence to sustain the conviction:

(1) The defendant must have been an officer or employee of the United States or of some department or agency thereof.

(2) The defendant must have communicated in some manner information from Despatches Nos. 344, 518 and 444.

(3) The information communicated from these Despatches must have been of a kind classified "by the President, or by the head of a department with the approval of the President," within the meaning of Section 783(b), as affecting the security of the United States.

(4) The person to whom the information was communicated must have been a person that the defendant knew or had reason to believe was an agent or representative of a foreign government.

(5) The defendant must have had reason to know that the information communicated had been classified as affecting the security of the United States.[21]

[13] We have seen that the appellant was interrogated by security officers of the State Department and by agents of the F.B.I. after he was under suspicion, and that he made oral admissions and confessions to them and gave them written statements, all of which were received in evidence. It has long been the rule that admissions of an accused made outside the courtroom while under suspicion are not sufficient alone to prove guilt: there must be corroborating evidence to support them. The decisions in Opper v. United States, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101 (1954), and Smith v. United States, 348 U.S. 147, 75 S.Ct. 194, 99 L.Ed. 192 (1954), deal with the extent of the corroboration necessary for this purpose. They provide the guiding rule for us, namely, that extra-judicial confessions or statements made by the accused after the act and when he is under suspicion are not admissible unless they are supported by corroborative evidence; that this evidence "need not be sufficient, independent of the statements, to establish the *corpus delicti*" (Opper, 348 U.S. p. 93, 75 S.Ct. p. 164); that the independent evidence must be "substantial" and must "tend to establish the trustworthiness of the statements" made by the accused and must support "the essential facts admitted sufficiently to justify a jury inference of their truth"; and that such evidence thereby serves the "dual function" of bolstering the admissions, i. e., making them reliable, and of thus proving "the offense 'through' the statements of the accused" (Opper, 348 U.S. p. 93, 75 S.Ct. p. 164; Smith, 348 U.S. p. 156,

21. It must also appear, if the point is raised as a defense, that the defendant was not specifically authorized to disclose the information. The appellant did not and does not contend that he was authorized to disclose. He admits on brief that he knew that disclosure had not been authorized. The Government established in its case in chief that the Ambassador did not authorize disclosure of the three classified Despatches in issue. It is thus unnecessary for us to decide whether, if the Ambassador had undertaken to give such authority, the authority from him would have been sufficient under the statute to exonerate a person making disclosure in reliance upon it.

75 S.Ct. p. 199).[22] In other words, if the independent evidence is sufficient to establish the truth, trustworthiness and reliability of the accused's statements to the investigating authorities, and the statements themselves supply whatever elements of the offense are not proved by the independent evidence, the proof is sufficient to send the case to the jury. That this is the correct construction seems clear not only from the language used but also from the fact that in Opper one essential element of the offense, the payment of money to the Government employee, was proved directly only by the defendant's extra-judicial statement.[23]

We proceed to examine whether there was in this case evidence, independent of the admissions and confessions made by the defendant to investigating officers after the acts were committed, which, if credited, would prove each of the five elements of the crime in the way outlined above as to each count of the indictment.

As we have noted, Ambassador Beam's testimony was that Scarbeck was employed as Second Secretary and General Services Officer at the Embassy of the United States at Warsaw, Poland, from December 1958 until June 1961, thereby proving Element (1) of the offense as set out above, which in fact is not in dispute. The Ambassador testified further that the three Despatches in question had been given security classifications, and were so certified by him, meaning that the information in them is to be protected in the interest of national defense, and that the classifications given was stamped at the top and bottom of each page of each Despatch.[24] If this testimony is credited, Element (5) of the offense as so numbered above has been met. Since the classification "Secret" or "Confidential" was stamped at the top and bottom of each page of the three Despatches in question, Scarbeck must have known that the information had been classified as affecting the security of the United States. (See footnote 15, supra.) The Ambassador's testimony that his authority to classify and certify the three Despatches came from Executive Order 10501, as amended by Executive Order 10901, and the Foreign Service Regulations, disposes of Element (3). The Executive Order mentioned, as we have seen, gives the approval of the President to classification, for security and defense purposes, of specified kinds of material by such responsible officers or employees as the Secretary of State may have designated. Under the Foreign Service Manual, Section 121.2, and Sections 912.1, 913.1 and 913.2 set out in footnote 10 above, there is no question that the Ambassador as principal officer of the Embassy had received authority from the Secretary to classify, and certify the classifications of, the three Despatches involved here. As we have noted, we cannot construe the statute as authorizing one accused of passing classified information to claim that he was entitled to substitute his own judg-

22. The Court said in Smith:
"All elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused. Cf. Parker v. State, 228 Ind. 1, 88 N.E. 2d 556 [89 N.E.2d 442]." 348 U.S. at 156, 75 S.Ct. at 199.

23. The opinion indicates (see 348 U.S. at 94 and fn. 12, 75 S.Ct. at 165 fn. 12) that the independent corroboration consisted of a long distance call made the day before the cash payment was made, the drafting of a check by the petitioner on that day, and the purchase of air transportation for a trip by the Government employee on the day of payment. As the Supreme Court stated, this evidence tends "to prove the truthfulness of petitioner's statements," but it obviously does not prove directly that on the day in question or any other day the petitioner paid in cash $1,000 to the Government employee. (The $1,000 check was not cashed until several days after the day on which the petitioner admitted making payment in cash and at that time it was cashed by the petitioner, not the employee.)

24. These markings appear on the Despatches, which were introduced in evidence.

ment as to the propriety of the classification for that of the Ambassador, or for a court to do so.

[14] As to Element (4), there was independent evidence—Miss Discher's testimony—that Scarbeck knew or had reason to believe that the Polish men, with whom he met frequently after the compromising incident in her apartment, were agents of the Polish Government. Her testimony will be summarized later. It is sufficient to say now that it, if believed, abundantly establishes this point.

Element (2), whether Scarbeck communicated any of the information contained in Despatches 344, 518 and 444 to these men, is directly evidenced only by Scarbeck's extra-judicial statements to investigators made after the three acts of communication had occurred and after he was under suspicion. The question thus arises whether or not the Government introduced independent evidence of a quantum and quality sufficient to corroborate his admissions within the meaning of Opper v. United States, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101 (1954), and Smith v. United States, 348 U.S. 147, 75 S.Ct. 194, 99 L.Ed. 192 (1954), i. e., whether a jury would be warranted in inferring from the independent evidence that the defendant's statements are reliable and true.

Miss Discher's testimony confirmed and agreed with Scarbeck's statements with respect to how they met, his relations with her, and the events on the night of December 22–23, 1960, when men broke into her apartment, finding them in a compromising situation and photographing them. She testified further that Scarbeck told her, following this incident, that he was being blackmailed by two men from the U.B., and that "they wanted him to get for them the cipher, and then some kind of a plan of work he was receiving from Washington". This agrees with Scarbeck's extra-judicial statements. In reply to the question "Did Mr. Scarbeck ever tell you, Miss Discher, whether or not he ever give anything to these U-B men?" she said: "As far as I know and what I know from Mr. Scarbeck, if they received anything they were trifles". She also testified that he told her the U.B. agents had offered him money, and she told him not to accept any money from them; that after December 22, 1960, Scarbeck "took care" of getting a residence permit for her, which she had never had before; that Scarbeck "took care" of getting a passport for her to leave Poland, and that she was told by Scarbeck that the man who handed the passport to her must have been George, one of the two U.B. agents with whom Scarbeck had been meeting once or twice a week, or rather frequently. While her testimony does not directly show that Scarbeck passed to the U.B. information from the three classified Despatches named in the indictment,[25] a jury could well conclude from it that after December 23, 1960, he met frequently with these men, that the men offered him money, that he was being blackmailed by them, that he passed some kind of information to them, and that it may very well have been classified material, since he was able to procure through them Polish documentation of a sort very difficult to obtain. And in any event the jury could conclude that her testimony, which agreed on so many points with his statements, confirmed the reliability and truth of his statements. All the more so, since she appeared to be a reluctant and perhaps even a hostile witness for the Government.

There were other witnesses to corroborate other portions of his statements. Three Embassy employees testified that, commencing in January 1961, they saw Scarbeck reading the Reading

25. The appellant's statements to her, although extra-judicial, were contemporaneous with the events to which they related and were not made at a time when he was under suspicion, and thus were not the type of admission involved in Opper.

File[26] in the Embassy's File Room on various occasions, and that they had not seen him doing this before January 1961. Miss Jokel, in charge of the File Room, stated that Scarbeck did this two or three times a week for about three months starting in January of 1961, and that on three occasions during this period he asked for Despatch 344. Major Tarbell of the Embassy staff testified that in late March of 1961 he discussed a Despatch relating to the Polish Armed Forces with Scarbeck in the Embassy File Room, where Scarbeck was reading a confidential Despatch, and that Scarbeck was familiar with the Armed Forces Despatch. (Despatch 518, classified "Secret," deals with the Polish Armed Forces.)

This evidence, if credited, corroborates and tends to show the truth of Scarbeck's admissions that, in order to obtain information to pass to the two Polish U.B. agents, he resorted to reading regularly the Reading File maintained for the information of Embassy officers. It also confirms that he made a rather determined effort to obtain and did obtain Despatch 344, and that he was familiar with the contents of Despatch 518.

Three other witnesses connected with the Embassy established with Embassy records (introduced in evidence) that at 5:30 p. m. on February 6, 1961, Scarbeck left a classified envelope with Marine Guard Post No. 1 at the Embassy and checked out of the Embassy at 5:40 p. m.; that after checking in at the Embassy at 9:15 p. m. he withdrew the envelope from the Guard Post at 9:20 p. m.; and that at 11:25 p. m. he again left a classified envelope with Marine Guard Post No. 1, and checked out of the Embassy at 11:35 p. m. Miss Cwynar, a stenographer at the Embassy, testified that, after ascertaining from Scarbeck that Despatch 344 had been left by him with the Marine Guard Post, she withdrew at 9:15 a. m. a day or two later the classified envelope left on February 6 at 11:25 p. m. by Scarbeck and that she found Despatch 344 in it. This evidence confirms and tends to establish the trustworthiness of Scarbeck's admissions relating to the manner in which he withdrew Despatch 344 from the Embassy in an effort to avoid suspicion. He stated that for this purpose he put blank sheets of paper in the envelope marked "Classified" which he left with the Marine Guard on the first occasion, that he carried Despatch 344 out and brought it back secretly, and that, after withdrawing the envelope and carrying it to his office, he then placed the Despatch in the "Classified" envelope which he again left with the Guard on the second occasion that same evening.[27]

Friedrick Cordes, a German policeman stationed in Frankfurt, Germany, gave detailed testimony relating to the assistance he provided in getting Ursula Discher out of Poland, and relating to Scarbeck's visit with her in Frankfurt, which in general confirmed Scarbeck's

26. The Reading File was maintained for the information of officers of the Embassy. It contained a chronological compilation of outgoing airgrams and Foreign Service Despatches in one book and in another book copies of incoming and outgoing telegrams. Some of the material was unclassified, whereas other documents in the file were classified and were stamped with the classification given.

27. Appellant argues that his acquittal by the jury of the charge, under Count 4 of the indictment, of removing Despatch 344 on file at the United States Embassy in Warsaw in violation of 18 U.S.C. § 2071, necessarily means that the jury believed that he did not secretly take Despatch 344 out of the Embassy, contrary to his own statements. It may very well be, however, that the jury did not regard an absence of the Despatch from the Embassy of approximately three and one half hours (5:40 to 9:15 p.m.) as a "removal" within the meaning of the statute. Or the jury may have had other reasons for reaching the verdict of acquittal under Count 4. In any event, an acquittal under Count 4, even if it may be regarded as inconsistent with the verdict of guilty under Count 1, is not enough alone to justify us in overturning the verdict on Count 1. Dunn v. United States, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932).

statements about this matter. Cordes also testified that Scarbeck complained in Frankfurt that he and Miss Discher were being followed, and that he requested Cordes' aid in ascertaining the identity of the followers. This also is in general accord with Scarbeck's statements.

[15] In short, there was independent evidence which if credited confirms the truth of a substantial part of Scarbeck's statements—those statements relating to his relationship with Miss Discher, his relationship with, and blackmail by, two U.B. agents, the statements that they demanded security information from him and offered him money and that he was able to and did procure a residence permit and a passport for Miss Discher through them, his statements as to the method by which he procured a German visa for her and the method by which he was able to take Despatch 344 from the Embassy without incurring suspicion, and his statement that at a time after he became involved with the agents he first engaged in reading the Reading File regularly to obtain information to give to them. (It was from this reading, he said, he obtained the information from Despatches 518 and 444 which he said he communicated.) This evidence appears to us more than ample to support the reliability and truth of the confessions generally. It warrants an inference that, to gain the favors that he did obtain from the U.B. agents, he necessarily communicated something of value to the agents, and that it thus proves *through the defendant's statements* that the information communicated was from the named Despatches within the scope of Opper and Smith.

V.

Appellant's final argument is that the trial judge erroneously denied his motion for a new trial on the grounds of newly discovered evidence—evidence that allegedly sheds new light on the nature of the interrogation in Germany. However, the "evidence" proffered appears neither newly discovered nor relevant to any of the issues in the case. The motion was properly denied.

[16] For the reasons given, the judgment of conviction, and the order denying a new trial, will be affirmed. However, in view of the extent of appellant's cooperation with the authorities during the investigation, we think the District Court should seriously consider exercising its power, under Fed.R.Crim.P. 35, to reduce the sentences which have been imposed, as for example, by making them run concurrently. See Kaplan v. United States, 241 F.2d 521, 523 (5th Cir.), cert. denied, 354 U.S. 941, 77 S.Ct. 1406, 1 L.Ed.2d 1539 (1957).

Affirmed.

Richard X. WILLIAMS, Appellant,

v.

UNITED STATES of America, Appellee.

Misc. 1819 and No. 17186.

United States Court of Appeals District of Columbia Circuit.

Jan. 24, 1963.

Petition for Rehearing En Banc Denied En Banc June 28, 1963.

On reconsideration sua sponte by the court en banc of the petition for a rehearing en banc of the petition for leave to prosecute this appeal without prepayment of costs; Richmond B. Keech, District Judge.

The Court of Appeals allowed appellant to prosecute his appeal without prepayment of costs from this time on.

Application allowed.

Miller, Danaher, Bastian and Burger, Circuit Judges, dissented.

PART B

ALDERMAN ET AL. *v.* UNITED STATES.

ON MOTION TO MODIFY ORDER OF REMAND TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

No. 133, Oct. Term, 1967. Certiorari denied October 9, 1967.—Rehearing and certiorari granted and case decided January 29, 1968.—Motion to modify argued May 2, 1968.—Reargued October 14, 1968.—Order of January 29, 1968, withdrawn, rehearing and certiorari granted, and case decided March 10, 1969.*

After petitioners in No. 133, O. T., 1967, were convicted of conspiring to transmit murderous threats in interstate commerce, they discovered that one petitioner's place of business had been subject to electronic surveillance by the Government. This Court refused to accept the Government's *ex parte* determination that "no overheard conversation in which any of the petitioners participated is arguably relevant to this prosecution," and vacated and remanded the case for further proceedings (390 U. S. 136). The Government moved to modify the order, urging that surveillance records should be subjected to *in camera* inspection by the trial judge, who would then turn over to petitioners only those materials arguably relevant to their prosecution. In Nos. 11 and 197 petitioners, who were convicted of national security violations, raised similar questions relating to the use of eavesdropped information. *Held:*

1. Suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, and not those who are aggrieved solely by the introduction of damaging evidence. Thus, codefendants and coconspirators have no special standing and cannot prevent the admission against them of information which has been obtained through electronic surveillance which is illegal against another. Pp. 171–176.

2. A petitioner would be entitled to the suppression of evidence violative of the Fourth Amendment where the Government unlawfully overheard conversations of the petitioner himself, or where the

*Together with No. 11, *Ivanov* v. *United States*, and No. 197, *Butenko* v. *United States*, on certiorari to the United States Court of Appeals for the Third Circuit, argued October 14, 1968.

conversations occurred on his premises, whether or not he was present or participated therein. *Silverman* v. *United States*, 365 U. S. 505, 511–512. Pp. 176–180.

3. If the surveillance is found to have been unlawful, and if a petitioner is found to have standing, the Government must disclose to him the records of those overheard conversations which the Government was not entitled to use in building its case against him. Pp. 180–185.

(a) The task of determining those items which might have made a substantial contribution to the preparation of the Government's case is too complex and the margin for error too great to rely solely upon the *in camera* examination by the trial court. Pp. 181–182.

(b) The trial court should, where appropriate, place defendants and their counsel under enforceable orders against unwarranted disclosure of the materials they are entitled to inspect. P. 185.

(c) Defendants will not have an unlimited license to rummage in the Government's files, as they may need or be entitled to nothing beyond the specified records of overheard conversations and the right to cross-examine the appropriate officials regarding the connection between those records and the prosecution's case. P. 185.

No. 133, O. T., 1967, order of January 29, 1968, withdrawn, order denying certiorari set aside, rehearing and certiorari granted, 371 F. 2d 983, judgments vacated and remanded; Nos. 11 and 197, 384 F. 2d 554, judgments vacated and remanded.

Solicitor General Griswold reargued for the United States in No. 133, October Term, 1967, on the motion to modify the Court's Order of January 29, 1968, 390 U. S. 136. With him on the brief were *Assistant Attorney General Vinson, Louis F. Claiborne, John S. Martin, Jr., Beatrice Rosenberg,* and *Sidney M. Glazer.*

Edward Bennett Williams reargued for petitioners in No. 133, October Term, 1967, in opposition to the motion. With him on the brief were *Harold Ungar* and *W. H. Erickson.*

Mr. Williams argued the cause and filed a brief fc petitioner in No. 11. *Charles Danzig,* by appointmen of the Court, 393 U. S. 814, argued the cause and filed a brief for petitioner in No. 197.

Solicitor General Griswold argued the cause for the United States in Nos. 11 and 197. With him on the brief were *Assistant Attorney General Yeagley, Messrs. Claiborne* and *Martin,* and *Kevin T. Maroney.*

MR. JUSTICE WHITE delivered the opinion of the Court.

After the convictions of petitioners had been affirmed, and while their cases were pending here, it was revealed that the United States had engaged in electronic surveillance which might have violated their Fourth Amendment rights and tainted their convictions. A remand to the District Court being necessary in each case for adjudication in the first instance, the questions now before us relate to the standards and procedures to be followed by the District Court in determining whether any of the Government's evidence supporting these convictions was the product of illegal surveillance to which any of the petitioners are entitled to object.

No. 133, O. T., 1967. Petitioners Alderman and Alderisio, along with Ruby Kolod, now deceased, were convicted of conspiring to transmit murderous threats in interstate commerce, 18 U. S. C. §§ 371, 875 (c). Their convictions were affirmed on appeal, 371 F. 2d 983 (C. A. 10th Cir. 1967), and this Court denied certiorari, 389 U. S. 834 (1967). In their petition for rehearing, petitioners alleged they had recently discovered that Alderisio's place of business in Chicago had been the subject of electronic surveillance by the Government. Reading the response of the Government to admit that Alderisio's conversations had been overheard by unlawful

electronic eavesdropping,[1] we granted the petition for rehearing over the objection of the United States that "no overheard conversation in which any of the petitioners participated is arguably relevant to this prosecution." In our *per curiam* opinion, 390 U. S. 136 (1968), we refused to accept the *ex parte* determination of relevance by the Department of Justice in lieu of adversary proceedings in the District Court, vacated the judgment of the Court of Appeals, and remanded the case to the District Court for further proceedings.

The United States subsequently filed a motion to modify that order. Although accepting the Court's order insofar as it required judicial determination of whether any of the prosecution's evidence was the product of illegal surveillance, the United States urged that in order to protect innocent third parties participating or referred to in irrelevant conversations overheard by the Government, surveillance records should first be subjected to *in camera* inspection by the trial judge, who would then turn over to the petitioners and their counsel only those materials arguably relevant to their prosecution. Petitioners opposed the motion, and the matter was argued before the Court last Term. We then set the case down for reargument at the opening of the current Term, 392 U. S. 919 (1968), the attention of the parties being directed to the disclosure issue and the question of

[1] In its brief on reargument, the Government suggests that no electronic surveillance was conducted at places owned by Alderisio, but rather was carried out only at premises owned by his associates or by firms which employed him. The Government also contends that Alderisio himself did not have desk space at the subject premises. Finally, the Government asserts that Alderman neither participated in any conversation overheard nor had any interest in the places which were the object of the surveillance. These allegations by the Government will have to be considered by the District Court in the first instance, and we express no opinion now on their merit.

standing to object to the Government's use of the fruits of illegal surveillance.[2]

Nos. 11 and 197. Both petitioners were convicted of conspiring to transmit to the Soviet Union information relating to the national defense of the United States, 18 U. S. C. §§ 794 (a), (c), and of conspiring to violate 18 U. S. C. § 951 by causing Butenko to act as an agent of the Soviet Union without prior notification to the Secretary of State. Butenko was also convicted of a substantive offense under 18 U. S. C. § 951. The Court of Appeals affirmed all but Ivanov's conviction on the second conspiracy count. 384 F. 2d 554 (C. A. 3d Cir. 1967). Petitions for certiorari were then filed in this Court, as was a subsequent motion to amend the

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[2] In our order of June 17, 1968, restoring the Government's motion to the calendar for reargument, 392 U. S. 919–920, we requested counsel to include the following among issues to be discussed in briefs and oral argument:

"(1) Should the records of the electronic surveillance of petitioner Alderisio's place of business be subjected to *in camera* inspection by the trial judge to determine the necessity of compelling the Government to make disclosure of such records to petitioners, and if so to what extent?

"(2) If *in camera* inspection is authorized or ordered, by what standards (for example, relevance and considerations of injury to persons or to reputations) should the trial judge determine whether the records are to be turned over to petitioners?

"(3) What standards are to be applied in determining whether each petitioner has standing to object to the use against him of the information obtained from the electronic surveillance of petitioner Alderisio's place of business? More specifically, does petitioner Alderisio have standing to object to the use of any or all information obtained from such electronic surveillance whether or not he was present on the premises or party to a particular overheard conversation? Also, does petitioner Alderman have standing to object to the use against him of any or all information obtained from the electronic surveillance of petitioner Alderisio's business establishment?"

Ivanov petition to raise an issue similar to that which was presented in No. 133, O. T. 1967.[3] Following the first argument in *Alderman* (*sub nom. Kolod* v. *United States*), the petitions for certiorari of both Ivanov and Butenko were granted, limited to questions nearly identical to those involved in the reargument of the *Alderman* case.[4]

[3] The United States admits overhearing conversations of each petitioner, but where the surveillance took place and other pertinent details are unknown. In its brief the Government states:

"In some of the instances the installation had been specifically approved by the then Attorney General. In others the equipment was installed under a broader grant of authority to the F. B. I., in effect at that time, which did not require specific authorization. . . . [P]resent Department of Justice policy would call for specific authorization from the Attorney General for any use of electronic equipment in such cases."

In all three cases, the District Court must develop the relevant facts and decide if the Government's electronic surveillance was unlawful. Our assumption, for present purposes, is that the surveillance was illegal.

[4] In each case the grant of certiorari, 392 U. S. 923, was limited to the following questions:

"On the assumption that there was electronic surveillance of petitioner or a codefendant which violated the Fourth Amendment,

"(1) Should the records of such electronic surveillance be subjected to *in camera* inspection by the trial judge to determine the necessity of compelling the Government to make disclosure of such records to petitioner, and if so to what extent?

"(2) If *in camera* inspection is to be authorized or ordered, by what standards (for example, relevance, and considerations of national security or injury to persons or reputations) should the trial judge determine whether the records are to be turned over to the defendant?

"(3) What standards are to be applied in determining whether petitioner has standing to object to the use against him of information obtained from such illegal surveillance? More specifically, if illegal surveillance took place at the premises of a particular defendant,

"(a) Does that defendant have standing to object to the use against him of any or all information obtained from the illegal sur-

I.

The exclusionary rule fashioned in *Weeks* v. *United States*, 232 U. S. 383 (1914), and *Mapp* v. *Ohio*, 367 U. S. 643 (1961), excludes from a criminal trial any evidence seized from the defendant in violation of his Fourth Amendment rights. Fruits of such evidence are excluded as well. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 391–392 (1920). Because the Amendment now affords protection against the uninvited ear, oral statements, if illegally overheard, and their fruits are also subject to suppression. *Silverman* v. *United States*, 365 U. S. 505 (1961); *Katz* v. *United States*, 389 U. S. 347 (1967).

In *Mapp* and *Weeks*, the defendant against whom the evidence was held to be inadmissible was the victim of the search. However, in the cases before us each petitioner demands retrial if any of the evidence used to convict him was the product of unauthorized surveillance, regardless of whose Fourth Amendment rights the surveillance violated. At the very least, it is urged that if evidence is inadmissible against one defendant or conspirator, because tainted by electronic surveillance illegal as to him, it is also inadmissible against his codefendant or coconspirator.

This expansive reading of the Fourth Amendment and of the exclusionary rule fashioned to enforce it is admittedly inconsistent with prior cases, and we reject it. The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were vio-

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veillance, whether or not he was present on the premises or party to the overheard conversation?

"(b) Does a codefendant have standing to object to the use against him of any or all information obtained from the illegal surveillance, whether or not he was present on the premises or party to the overheard conversation?"

lated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing.

Thus in *Goldstein* v. *United States,* 316 U. S. 114 (1942), testimony induced by disclosing to witnesses their own telephonic communications intercepted by the Government contrary to 47 U. S. C. § 605 was held admissible against their coconspirators. The Court equated the rule under § 605 with the exclusionary rule under the Fourth Amendment.[5] *Wong Sun* v. *United States,* 371 U. S. 471 (1963), came to like conclusions. There, two defendants were tried together; narcotics seized from a third party were held inadmissible against one defendant because they were the product of statements made by him at the time of his unlawful arrest. But the same narcotics were found to be admissible against the codefendant because "[t]he seizure of this

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[5] As the issue was put and answered by the Court:

"The question now to be decided is whether we shall extend the sanction for violation of the Communications Act so as to make available to one not a party to the intercepted communication the objection that its use outside the courtroom, and prior to the trial, induced evidence which, except for that use, would be admissible.

"No court has ever gone so far in applying the implied sanction for violation of the Fourth Amendment. While this court has never been called upon to decide the point, the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized. *A fortiori* the same rule should apply to the introduction of evidence induced by the use or disclosure thereof to a witness other than the victim of the seizure. We think no broader sanction should be imposed upon the Government in respect of violations of the Communications Act." 316 U. S., at 121.

The Court noted that the principle had been applied "in at least fifty cases by the Circuit Courts of Appeals . . . not to mention many decisions by District Courts." *Id.,* at 121, n. 12.

heroin invaded no right of privacy of person or premises which would entitle [him] to object to its use at his trial. Cf. *Goldstein* v. *United States*, 316 U. S. 114." *Wong Sun* v. *United States*, *supra*, at 492.

The rule is stated in *Jones* v. *United States*, 362 U. S. 257, 261 (1960):

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. . . .
>
> "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy." [6]

This same principle was twice acknowledged last Term. *Mancusi* v. *DeForte*, 392 U. S. 364 (1968); *Simmons* v. *United States*, 390 U. S. 377 (1968).[7]

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[6] The "person aggrieved" language is from Fed. Rule Crim. Proc. 41 (e). *Jones* thus makes clear that Rule 41 conforms to the general standard and is no broader than the constitutional rule.

[7] *McDonald* v. *United States*, 335 U. S. 451 (1948), is not authority to the contrary. It is not at all clear that the *McDonald* opinion would automatically extend standing to a codefendant. Two of the five Justices joining the majority opinion did not read the opinion to do so and found the basis for the codefendant's standing to be the fact that he was a guest on the premises searched. "But even a guest may expect the shelter of the rooftree he is under against criminal intrusion." *Id.*, at 461 (Jackson, J., concurring). Cf. *Jones* v. *United States*, 362 U. S. 257 (1960). Nor does *Hoffa* v. *United States*, 385 U. S. 293 (1966), lend any support to petitioners' position, since the Court expressly put aside the issue of standing.

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We adhere to these cases and to the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. *Simmons* v. *United States*, 390 U. S. 377 (1968); *Jones* v. *United States*, 362 U. S. 257 (1960). Cf. *Tileston* v. *Ullman*, 318 U. S. 44, 46 (1943). None of the special circumstances which prompted *NAACP* v. *Alabama*, 357 U. S. 449 (1958), and *Barrows* v. *Jackson*, 346 U. S. 249 (1953), are present here. There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party. The victim can and very probably will object for himself when and if it becomes important for him to do so.

What petitioners appear to assert is an independent constitutional right of their own to exclude relevant and probative evidence because it was seized from another in violation of the Fourth Amendment. But we think there is a substantial difference for constitutional purposes between preventing the incrimination of a defendant through the very evidence illegally seized from him and suppressing evidence on the motion of a party who cannot claim this predicate for exclusion.

The necessity for that predicate was not eliminated by recognizing and acknowledging the deterrent aim of the rule. See *Linkletter* v. *Walker*, 381 U. S. 618 (1965); *Elkins* v. *United States*, 364 U. S. 206 (1960). Neither those cases nor any others hold that anything which deters illegal searches is thereby commanded by the Fourth Amendment. The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that

the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

We do not deprecate Fourth Amendment rights. The security of persons and property remains a fundamental value which law enforcement officers must respect. Nor should those who flout the rules escape unscathed. In this respect we are mindful that there is now a comprehensive statute making unauthorized electronic surveillance a serious crime.[8] The general rule under the statute is that official eavesdropping and wiretapping are permitted only with probable cause and a warrant. Without experience showing the contrary, we should not assume that this new statute will be cavalierly disregarded or will not be enforced against transgressors.

Of course, Congress or state legislatures may extend the exclusionary rule and provide that illegally seized evidence is inadmissible against anyone for any purpose.[9] But for constitutional purposes, we are not now

[8] Title III, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 211. Not only does the Act impose criminal penalties upon those who violate its provisions governing eavesdropping and wiretapping, 82 Stat. 213 (18 U. S. C. § 2511 (1964 ed., Supp. IV)) (fine of not more than $10,000, or imprisonment for not more than five years, or both), but it also authorizes the recovery of civil damages by a person whose wire or oral communication is intercepted, disclosed, or used in violation of the Act, 82 Stat. 223 (18 U. S. C. § 2520 (1964 ed., Supp. IV)) (permitting recovery of actual and punitive damages, as well as a reasonable attorney's fee and other costs of litigation reasonably incurred).

[9] Congress has not done so. In its recent wiretapping and eavesdropping legislation, Congress has provided only that an "aggrieved person" may move to suppress the contents of a wire or oral communication intercepted in violation of the Act. Title III, Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 221 (18 U. S. C. § 2518 (10) (a) (1964 ed., Supp. IV)). The Act's legislative history

inclined to expand the existing rule that unlawful wiretapping or eavesdropping, whether deliberate or negligent, can produce nothing usable against the person aggrieved by the invasion.

II.

In these cases, therefore, any petitioner would be entitled to the suppression of government evidence originating in electronic surveillance violative of his own Fourth Amendment right to be free of unreasonable searches and seizures. Such violation would occur if the United States unlawfully overheard conversations of a petitioner himself or conversations occurring on his premises, whether or not he was present or participated in those conversations. The United States concedes this much and agrees that for purposes of a hearing to determine whether the Government's evidence is tainted by illegal surveillance, the transcripts or recordings of the overheard conversations of any petitioner or of third persons on his premises must be duly and properly examined in the District Court.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART, who are in partial dissent on this phase of the case, object to our protecting the homeowner against the use of third-party conversations overheard on his premises by an unauthorized surveillance. Their position is that unless the conversational privacy of the homeowner himself is invaded, there is no basis in the Fourth Amendment for excluding third-party conversations overheard on his premises. We cannot agree. If the police make an unwarranted search of a house and seize tangible property belonging to third parties—even a transcript of a third-party conversation—the homeowner may object to

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indicates that "aggrieved person," the limiting phrase currently found in Fed. Rule Crim. Proc. 41 (e), should be construed in accordance with existent standing rules. See S. Rep. No. 1097, 90th Cong., 2d Sess., at 91, 106.

its use against him, not because he had any interest in the seized items as "effects" protected by the Fourth Amendment, but because they were the fruits of an unauthorized search of his house, which is itself expressly protected by the Fourth Amendment.[10] Nothing seen or found on the premises may legally form the basis for an arrest or search warrant or for testimony at the homeowner's trial, since the prosecution would be using the fruits of a Fourth Amendment violation. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920); *Johnson* v. *United States*, 333 U. S. 10 (1948); *Wong Sun* v. *United States*, 371 U. S. 471 (1963).

The Court has characteristically applied the same rule where an unauthorized electronic surveillance is carried out by physical invasion of the premises. This much the dissent frankly concedes. Like physical evidence which might be seized, overheard conversations are fruits

[10] If the police enter a house pursuant to a valid warrant authorizing the seizure of specified gambling paraphernalia but discover illegal narcotics in the process of the search, the narcotics may be seized and introduced in evidence in the prosecution of the homeowner, whether the narcotics belong to him or to a third party. *E. g.*, *Harris* v. *United States*, 331 U. S. 145, 155 (1947). But if the officers have neither a warrant nor the consent of the householder, it is elementary Fourth Amendment law that the narcotics are suppressible on his motion. In both cases, however, the homeowner's interest in the narcotics and his standing to object to their seizure are the same; and insofar as the Fourth Amendment's protection of "effects" is concerned, the right of the officer to seize the contraband without a warrant and use it in evidence is identical. The reason that the narcotics may be seized and introduced in evidence in the first case where there was a valid warrant, in spite of the householder's interest in the narcotics and his standing to object, but not in the second case where there was no warrant is not the simple reason suggested by MR. JUSTICE HARLAN that the householder has a property interest in the narcotics and therefore has "standing" to object. Rather, it is because in the first case there was no illegal invasion of the premises, while in the second the officer's entry and search violated the Fourth Amendment, the narcotics being the fruit of that illegality.

of an illegal entry and are inadmissible in evidence. *Silverman* v. *United States,* 365 U. S. 505 (1961); *Wong Sun* v. *United States, supra.* When *Silverman* was decided, no right of conversational privacy had been recognized as such; the right vindicated in that case was the Fourth Amendment right to be secure in one's own home. In *Wong Sun,* the words spoken by Blackie Toy when the police illegally entered his house were not usable against him because they were the fruits of a physical invasion of his premises which violated the Fourth Amendment.

Because the Court has now decided that the Fourth Amendment protects a person's private conversations as well as his private premises, *Katz* v. *United States,* 389 U. S. 347 (1967), the dissent would discard the concept that private conversations overheard through an illegal entry into a private place must be excluded as the fruits of a Fourth Amendment violation. Although officers without a valid warrant may not search a house for physical evidence or incriminating information, whether the owner is present or away, the dissent would permit them to enter that house without consent and without a warrant, install a listening device, and use any overheard third-party conversations against the owner in a criminal case, in spite of the obvious violation of his Fourth Amendment right to be secure in his own dwelling. Even if the owner is present on his premises during the surveillance, he would have no complaint unless his own conversations were offered or used against him. Information from a telephone tap or from the microphone in the kitchen or in the rooms of guests or children would be freely usable as long as the homeowner's own conversations are not monitored and used against him. Indeed, if the police, instead of installing a device, secreted themselves on the premises, they could neither testify about nor use against the owner anything they

saw or carried away, but would be free to use against him everything they overheard except his own conversations. And should police overhear third parties describing narcotics which they have discovered in the owner's desk drawer, the police could not then open the drawer and seize the narcotics, but they could secure a warrant on the basis of what they had heard and forthwith seize the narcotics pursuant to that warrant.[11]

These views we do not accept. We adhere to the established view in this Court that the right to be secure in one's house against unauthorized intrusion is not limited to protection against a policeman viewing or seizing tangible property—"papers" and "effects." Otherwise, the express security for the home provided by the Fourth Amendment would approach redundancy. The rights of the owner of the premises are as clearly

[11] MR. JUSTICE HARLAN would also distinguish between the situation where a document belonging to a third party and containing his own words is seized from the premises of another without a warrant and the situation where the third party's words are spoken and overheard by electronic surveillance. Under that view the words of the third party would be admissible in the latter instance but not in the former. We would exclude the evidence in both cases.

So also we do not distinguish between electronic surveillance which is carried out by means of a physical entry and surveillance which penetrates a private area without a technical trespass. This much, we think, *Katz* makes quite clear. In either case, officialdom invades an area in which the homeowner has the right to expect privacy for himself, his family, and his invitees, and the right to object to the use against him of the fruits of that invasion, not because the rights of others have been violated, but because his own were. Those who converse and are overheard when the owner is not present also have a valid objection unless the owner of the premises has consented to the surveillance. Cf. *Mancusi* v. *DeForte*, 392 U. S. 364, 367–370 (1968). The Fourth Amendment protects reasonable expectations of privacy and does not protect persons engaged in crime from the risk that those with whom they associate or converse will cooperate with the Government. *Hoffa* v. *United States*, 385 U. S. 293, 303 (1966).

invaded when the police enter and install a listening device in his house as they are when the entry is made to undertake a warrantless search for tangible property; and the prosecution as surely employs the fruits of an illegal search of the home when it offers overheard third-party conversations as it does when it introduces tangible evidence belonging not to the homeowner, but to others. Nor do we believe that *Katz*, by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home or to overrule the existing doctrine, recognized at least since *Silverman*, that conversations as well as property are excludable from the criminal trial when they are found to be the fruits of an illegal invasion of the home. It was noted in *Silverman*, 365 U. S., at 511–512, that

> "This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard."

The Court proceeded to hold quite the contrary. We take the same course here.

III.

The remaining aspect of these cases relates to the procedures to be followed by the District Court in resolving the ultimate issue which will be before it—whether the evidence against any petitioner grew out of his illegally overheard conversations or conversations occurring on his premises.[12] The question as stated in *Wong Sun* v. *United States*, 371 U. S. 471, 488 (1963), is " 'whether,

[12] It seems that in none of these cases were there introduced any recordings, transcripts, or other evidence of the actual conversations overheard by electronic surveillance.

granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" See also *Nardone* v. *United States*, 308 U. S. 338, 341 (1939).

The Government concedes that it must disclose to petitioners any surveillance records which are relevant to the decision of this ultimate issue. And it recognizes that this disclosure must be made even though attended by potential danger to the reputation or safety of third parties or to the national security—unless the United States would prefer dismissal of the case to disclosure of the information. However, the Government contends that it need not be put to this disclose-or-dismiss option in the instant cases because none of the information obtained from its surveillance is "arguably relevant" to petitioners' convictions, in the sense that none of the overheard conversations arguably underlay any of the evidence offered in these cases. Although not now insisting that its own evaluation of relevance should be accepted automatically and without judicial scrutiny, the United States urges that the records of the specified conversations be first submitted to the trial judge for an *in camera* examination. Any record found arguably relevant by the judge would be turned over to the petitioner whose Fourth Amendment rights have been violated, and that petitioner would then have the opportunity to use the disclosed information in his attempt to show that the Government has used tainted evidence to convict him. Material not arguably relevant would not be disclosed to any petitioner.[13]

[13] This would be true even though the material on its face contained no threat of injury to the public interest or national security, apparently because, in the Government's view, it would be very difficult to distinguish between that which threatened and that which

Although this may appear a modest proposal, especially since the standard for disclosure would be "arguable" relevance, we conclude that surveillance records as to which any petitioner has standing to object should be turned over to him without being screened *in camera* by the trial judge. Admittedly, there may be much learned from an electronic surveillance which ultimately contributes nothing to probative evidence. But winnowing this material from those items which might have made a substantial contribution to the case against a petitioner is a task which should not be entrusted wholly to the court in the first instance. It might be otherwise if the trial judge had only to place the transcript or other record of the surveillance alongside the record evidence and compare the two for textual or substantive similarities. Even that assignment would be difficult enough for the trial judge to perform unaided. But a good deal more is involved. An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court to identify those records which might have contributed to the Government's case.[14]

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did not. As explained below, we think similar difficulties inhere in distinguishing between records which are relevant to showing taint and those which are not.

[14] In both the volume of the material to be examined and the complexity and difficulty of the judgments involved, cases involving

The United States concedes that when an illegal search has come to light, it has the ultimate burden of persuasion to show that its evidence is untainted. But at the same time petitioners acknowledge that they must go forward with specific evidence demonstrating taint. "[T]he trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin." *Nardone* v. *United States*, 308 U. S. 338, 341 (1939). With this task ahead of them, and if the hearings are to be more than a formality and petitioners not left entirely to reliance on government testimony, there should be turned over to them the records of those overheard conversations which the Government was not entitled to use in building its case against them.

Adversary proceedings are a major aspect of our system of criminal justice. Their superiority as a means for attaining justice in a given case is nowhere more evident than in those cases, such as the ones at bar, where an issue must be decided on the basis of a large volume of

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electronic surveillance will probably differ markedly from those situations in the criminal law where *in camera* procedures have been found acceptable to some extent. *Dennis* v. *United States*, 384 U. S. 855 (1966) (disclosure of grand jury minutes subject to *in camera* deletion of "extraneous material"); *Palermo* v. *United States*, 360 U. S. 343, 354 (1959) (whether the Jencks Act, 18 U. S. C. § 3500, requires disclosure of document to the defense); *Roviaro* v. *United States*, 353 U. S. 53 (1957) (disclosure of informant's identity). In the *Dennis* case the Court noted that ordinarily "[t]rial judges ought not be burdened with the task or the responsibility of examining sometimes voluminous grand jury testimony," and that it is not "realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities." 384 U. S., at 874–875.

factual materials, and after consideration of the many and subtle interrelationships which may exist among the facts reflected by these records. As the need for adversary inquiry is increased by the complexity of the issues presented for adjudication, and by the consequent inadequacy of *ex parte* procedures as a means for their accurate resolution, the displacement of well-informed advocacy necessarily becomes less justifiable.

Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands. It may be that the prospect of disclosure will compel the Government to dismiss some prosecutions in deference to national security or third-party interests. But this is a choice the Government concededly faces with respect to material which it has obtained illegally and which it admits, or which a judge would find, is arguably relevant to the evidence offered against the defendant.[15]

We think this resolution will avoid an exorbitant expenditure of judicial time and energy and will not unduly prejudice others or the public interest. It must be remembered that disclosure will be limited to the transcripts of a defendant's own conversations and of those which took place on his premises. It can be safely

[15] The dissents, it should be noted, would require turnover of arguably relevant material, whatever its impact on national security might be. To this extent there is agreement that the defendant's interest in excluding the fruits of illegally obtained evidence entitles him to the product of the surveillance. Given this basic proposition, the matter comes down to a judgment as to whether *in camera* inspection would characteristically be sufficiently reliable when national security interests are at stake. On this issue, the majority and the dissenters part company.

assumed that much of this he will already know, and disclosure should therefore involve a minimum hazard to others. In addition, the trial court can and should, where appropriate, place a defendant and his counsel under enforceable orders against unwarranted disclosure of the materials which they may be entitled to inspect. See Fed. Rule Crim. Proc. 16 (e). We would not expect the district courts to permit the parties or counsel to take these orders lightly.

None of this means that any defendant will have an unlimited license to rummage in the files of the Department of Justice. Armed with the specified records of overheard conversations and with the right to cross-examine the appropriate officials in regard to the connection between those records and the case made against him, a defendant may need or be entitled to nothing else. Whether this is the case or not must be left to the informed discretion, good sense, and fairness of the trial judge. See *Nardone* v. *United States*, 308 U. S. 338, 341–342 (1939).[16]

IV.

Accordingly, in No. 133, O. T. 1967, the motion of the United States is denied to the extent that it requests an initial *in camera* inspection of the fruits of any unlawful

[16] THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE WHITE join the entire opinion of the Court. In addition, MR. JUSTICE HARLAN and MR. JUSTICE STEWART join the opinion to the extent that it denies standing to codefendants, coconspirators, and others whose Fourth Amendment rights have not been violated by the electronic surveillance involved. The four members of the Court joining the entire opinion agree with the opinion in recognizing the householder's standing to object to evidence obtained from an unauthorized electronic surveillance of his premises even where his own conversations are not overheard; MR. JUSTICE FORTAS concurs in the judgment to this extent. Finally, MR. JUSTICE STEWART, in addition to the four members of the Court joining the entire opinion, agrees with Part III of the opinion.

surveillance and the withholding of those portions of the materials which the trial judge might deem irrelevant to these convictions. Primarily because of our decision with respect to standing, however, the order and judgment of January 29, 1968, are withdrawn. The order denying to petitioners a writ of certiorari is set aside. The petition for rehearing is granted, and the petition for certiorari is granted as to both Alderisio and Alderman. The judgments of the Court of Appeals for the Tenth Circuit in No. 133, O. T. 1967, and the judgments of the Court of Appeals for the Third Circuit in Nos. 11 and 197 are vacated, and each of the cases is remanded to the District Court for further proceedings consistent with this opinion, that is, for a hearing, findings, and conclusions (1) on the question of whether with respect to any petitioner there was electronic surveillance which violated his Fourth Amendment rights, and (2) if there was such surveillance with respect to any petitioner, on the nature and relevance to his conviction of any conversations which may have been overheard through that surveillance. The District Court should confine the evidence presented by both sides to that which is material to the question of the possible violation of a petitioner's Fourth Amendment rights, to the content of conversations illegally overheard by surveillance which violated those rights and to the relevance of such conversations to the petitioner's subsequent conviction. The District Court will make such findings of fact on those questions as may be appropriate in light of the further evidence and of the entire existing record. If the District Court decides on the basis of such findings (1) that there was electronic surveillance with respect to one or more petitioners but not any which violated the Fourth Amendment, or (2) that although there was a surveillance in violation of one or more of the petitioners' Fourth Amendment rights, the conviction of such petitioner was not tainted

by the use of evidence so obtained, it will enter new final judgments of conviction based on the existing record as supplemented by its further findings, thereby preserving to all affected parties the right to seek further appropriate appellate review. If, on the other hand, the District Court concludes in such further proceedings that there was a violation of any petitioner's Fourth Amendment rights and that the conviction of the petitioner was tainted by such violation, it would then become its duty to accord such petitioner a new trial.

Vacated and remanded.

MR. JUSTICE DOUGLAS, while joining the opinion of the Court, concurs in Part II of the opinion of MR. JUSTICE FORTAS and would hold that the protection of the Fourth Amendment includes also those against whom the investigation is directed.

MR. JUSTICE STEWART. I join MR. JUSTICE HARLAN'S separate opinion, except insofar as it would authorize *in camera* proceedings in the *Ivanov* and *Butenko* cases. I would apply the same standards to all three cases now before us, agreeing to that extent with the opinion of the Court.

MR. JUSTICE BLACK dissents, adhering to his dissent in *Katz* v. *United States*, 389 U. S. 347, 364–374 (1967).

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

The Court's careful opinion is, I think, constructed on a faulty premise, which substantially undermines the validity of its ultimate conclusions. The majority con-

fronts these cases as if each of the two major problems they raise can be solved in only one of two ways. The Court seems to assume that *either* the traditional standing doctrine is to be expanded *or* that the traditional doctrine is to be maintained. Again, it is assumed that *either* an *in camera* decision is to be made by the judge in every case *or* that there is to be an automatic turnover of all conversations in every case. I do not believe, however, that the range of choice open to us on either issue is restricted to the two alternatives the Court considers. On both issues, there is a third solution which would, in my view, more satisfactorily accommodate the competing interests at stake.

I.

STANDING.

I am in substantial agreement with the reasons the Court has given for refusing to expand the traditional standing doctrine to permit a Fourth Amendment challenge to be raised by either a codefendant or a coconspirator.[1] But it does not follow from this that we

[1] I also am unable to accept my Brother FORTAS' suggestion that standing be accorded to any defendant who can show that an illegal search or seizure was directed against him. As my Brother FORTAS himself recognizes in stopping short of an extreme position that rejects all standing limitations, a proper decision on this issue cannot only consider the fact that a broadened standing rule may add marginally to the impact of the exclusionary rule on unconstitutional police conduct. Rather, one must also consider that my Brother FORTAS' rule permits a defendant to invade the privacy of others to hear conversations in which he did not participate. Moreover, the rule would entail very substantial administrative difficulties. In the majority of cases, I would imagine that the police plant a bug with the expectation that it may well produce leads to a large number of crimes. A lengthy hearing would, then, appear to be necessary in order to determine whether the police knew of an accused's criminal activity at the time the bug was planted and whether the police decision to plant a bug was moti-

may apply the traditional standing rules without further analysis. The traditional rules, as the majority correctly understands them, would grant standing with regard to (1) conversations in which the accused himself participated and (2) *all* conversations occurring on the accused's "premises," regardless of whether he participated in the particular conversation in any way. As I hope to show, the traditional rationale for this second rule—granting standing to the property owner—does not fit a case involving the infringement of conversational privacy. Moreover, no other persuasive rationale can be developed in support of the property owner's right to make a Fourth Amendment claim as to conversations in which he did not himself participate. Consequently, I would hold that, in the circumstances before us, standing should be granted only to those who actually participated in the conversation that has been illegally overheard.

A.

There is a very simple reason why the traditional law of standing permits the owner of the premises to exclude a tangible object illegally seized on his property, despite the fact that he does not own the particular object taken by the police. Even though he does not have title to the object, the owner of the premises is in possession of it—and we have held that a property interest of even less substance is a sufficient predicate for standing under the Fourth Amendment. *Jones* v. *United States*, 362 U. S. 257 (1960).[2] This simple rationale does not, how-

vated by an effort to obtain information against the accused or some other individual. I do not believe that this administrative burden is justified in any substantial degree by the hypothesized marginal increase in Fourth Amendment protection.

[2] The Court suggests, *ante*, at 177, n. 10, that I am wrong in finding that the traditional grant of standing to the property owner may properly be grounded on the simple fact of the owner's domin-

ever, justify granting standing to the property owner with regard to third-party conversations. The absent property owner does not have a property interest of any sort in a conversation in which he did not participate. The words that were spoken are gone beyond recall.[3]

Consequently, in order to justify the traditional rule, one must argue, as does the majority, that the owner of the premises should be granted standing because the bugged third-party conversations are "fruits" of the police's infringement of the owner's property rights. The "fruits" theory, however, does not necessarily fit when the police overhear private conversations in violation of the Fourth Amendment. As *Katz* v. *United States*, 389 U. S. 347, 352–353 (1967), squarely holds, the right to the privacy of one's conversation does not

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ion over all physical objects on his premises. The majority argues that even though a particular object (say a packet of narcotics) is not described in a valid search warrant, it may nevertheless be seized if the police find the narcotics in their search for the other evidence of crime. It follows from this, says the Court, that the householder's possessory interest in the seized property is not a sufficient basis for standing. But this argument ignores the fact that an accused may have *standing* to raise a Fourth Amendment claim and yet lose on the *merits*. In the case the Court hypothesizes, the householder has standing because he has lost possession of an object formerly under his control. However, he loses on the merits because the police seizure was reasonable under the circumstances.

[3] Thus, unlike the Court, I find it quite easy to distinguish "between the situation where a document belonging to a third party and containing his own words is seized from the premises of another without a warrant and the situation where the third party's words are spoken and overheard by electronic surveillance." *Ante*, at 179, n. 11. While the absent owner can read the document when he returns to his home, he cannot summon back the words that were spoken in his absence. In the one case, the owner is personally aggrieved by the police action; in the other case, he is not.

hinge on whether the Government has committed a technical trespass upon the premises on which the conversations took place. *Olmstead* v. *United States*, 277 U. S. 438 (1928), is no longer the law. If in fact there has been no trespass upon the premises, I do not understand how traditional theory permits the owner to complain if a conversation is overheard in which he did not participate. Certainly the owner cannot suppress records of such conversations on the ground that they are the "fruits" of an unconstitutional invasion of his property rights. See *Goldman* v. *United States*, 316 U. S. 129, 135–136 (1942).

It is true, of course, that the "fruits" theory would require a different result if the police used a listening device which did physically trespass upon the accused's premises. But the fact that this theory depends completely on the presence or absence of a technical trespass only serves to show that the entire theoretical basis of standing law must be reconsidered in the area of conversational privacy. For we have not buried *Olmstead*, so far as it dealt with the substance of Fourth Amendment rights, only to give it new life in the law of standing. Instead, we should reject traditional property concepts entirely, and reinterpret standing law in the light of the substantive principles developed in *Katz*. Standing should be granted to every person who participates in a conversation he legitimately expects will remain private—for it is such persons that *Katz* protects.[4] On the other hand, property owners should not be permitted to assert a Fourth Amendment claim in this area if we are to respect the principle, whose vitality the Court has now

[4] It seems clear that, under the *Katz* rationale, a person is personally aggrieved by electronic surveillance not only when he is actually speaking but also when he is listening to the confidences of others.

once again reaffirmed, which establishes "the general rule that Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." *Ante*, at 174. For granting property owners standing does not permit them to vindicate intrusions upon their *own* privacy, but simply permits criminal defendants to intrude into the private lives of others.

The following hypothetical suggests the paradoxical quality of the Court's rule. Imagine that I own an office building and permit a friend of mine, Smith, to use one of the vacant offices without charge. Smith uses the office to have a private talk with a third person, Jones. The next day, I ask my friend to tell me what Jones had said in the office I had given him. Smith replies that the conversation was private, and that what was said was "none of your business." Can it be that I could properly feel aggrieved because the conversation occurred on my property? It would make no sense if I were to reply to Smith: "*My privacy* has been infringed if you do not tell me what was said, for I own the *property!*" It is precisely the other way around—Smith is telling me that when he and Jones had talked together, they had a legitimate expectation that their conversation would remain secret, even from me as the property owner.

Now suppose that I had placed a listening device in the office I had given to Smith, without telling him. Could anyone doubt that I would be guilty of an outrageous violation of the privacy of Smith and Jones if I then listened to what they had said? It would be ludicrous to defend my conduct on the ground that I, after all, was the owner of the office building. The case does not stand differently if I am accused of a crime and demand the right to hear the Smith-Jones conversation which the police had monitored. The Government doubtless has violated the privacy of Smith and Jones,

but their privacy would be violated *further* if the conversation were also made available to me.[5]

In the field of conversational privacy, the Fourth Amendment protects persons, not places. See *Katz* v. *United States*, 389 U. S. 347, 351 (1967). And a man can only be in one place at one time. If the privacy of his conversation is respected at that place, he may engage in all those activities for which that privacy is an essential prerequisite. His *privacy* is not at all disturbed by the fact that other people in other places cannot speak without the fear of being overheard. That fact may be profoundly disturbing to the man whose privacy remains intact. But it remains a fact about *other* people's privacy. To permit a criminal defendant to complain about such intrusions is to permit the vicarious assertion of Fourth Amendment rights—a step which I decline to take in relation to property owners for much the same reasons as those which have impelled the Court to deny standing to coconspirators.

In rejecting the "property" rule advanced by the Court, I do not mean to suggest that standing may never properly be granted to permit the vicarious assertion of Fourth Amendment rights. While it is arguable that an individual should be permitted to raise a constitutional claim when the privacy of members of his family has been violated, I need not reach this question on the facts of the cases before us. It must be noted, however, that even if this Court recognized a man's right to protest whenever the privacy of his family was infringed, the lines the majority draws today would still seem extremely arbitrary. Under the prevailing "property" rule, for example, a husband generally cannot complain

[5] This is not to say, of course, that the property owner could not bring a civil action to have the illegal listening device removed from his premises. He simply could not hear what the listening device had recorded, if none of his own conversations had been overheard.

if the police overhear his wife talking at her office or in a public phone booth, cf. *Katz* v. *United States, supra,* although he can complain when the police overhear her talking at home. Yet surely the husband's interest in his wife's privacy is equally worthy of respect in all three cases. If standing is to be extended to protect a person's interest in his family's privacy, an individual should be permitted to make a constitutional claim *whenever* a family member's reasonable expectation of privacy has been infringed, regardless of the place where his privacy was invaded. Indeed, the Court's emphasis on property ownership could well mean that a husband, as owner of a particular property, is entitled to complain as to a violation of his wife's privacy, but that the wife could not complain as to the unlawful surveillance of her husband since she did not have a sufficiently substantial interest in the property on which the intrusion occurred. In contrast, if a perfect stranger is overheard on one's property, standing is established. In sum, I simply cannot discern a coherent policy behind the Court's solicitude for property interests in this area.

B.

The Court's lengthy discussion of my position loses sight of the basic justification for the narrower standing rule I have advanced. To recapitulate, it is my central aim to show that the right to conversational privacy is a personal right, not a property right. It follows from this that the Court's rule permits property owners to assert vicariously the personal rights of others. Indeed, granting standing to property owners compromises the personal privacy of others.

The Court's response seems to be that the Fourth Amendment protects "houses" as well as "persons." But this is simply to treat private conversations as if they were pieces of tangible *property.* Since an individual

cannot carry his possessions with him wherever he goes, the Fourth Amendment protects a person's "house" so that his personal possessions may be kept out of the Government's easy reach. In contrast, a man must necessarily carry his voice around with him, and cannot leave it at home even if he wishes. When a man is not at home, he cannot converse there. There is thus no need to protect a man's "house" in order to protect *his* right to engage in private conversation. Consequently, the Court has not increased the scope of an accused's *personal* privacy by holding that the police have unconstitutionally invaded his "house" by putting a "bug" there. Houses do not speak; only people do. The police have violated only the *privacy* of those persons whose conversations are overheard.

I entirely agree, however, that if the police see a person's tangible property while committing their trespass, they may not constitutionally use this knowledge either to obtain a search warrant or to gain a conviction. Since a man has no choice but to leave the bulk of his physical possessions in his "house," the Fourth Amendment must protect his "house" in this way or else the immunity of his personal possessions from arbitrary search could not be assured. Thus if an individual's personal *possessions* are to be protected at all, they must be protected in his house; but a person's private *conversations* are protected as much as is possible when he can complain as to any conversation in which he personally participated. To go further and protect other conversations occurring on his property is simply to give the householder the right to complain as to the Government's treatment of others.

C.

While the Court grants special standing rights to property owners, it refuses to reach the question whether employees, business visitors, social guests, and other

persons with less substantial property interests are also entitled to special standing privileges. Yet this question will be presented to the District Court on remand in the *Alderisio* case,[6] and it will doubtless be an issue in many of the other cases now on our docket which we will remand for reconsideration in the light of our decision today. While a definitive solution to this problem is obviously premature, the Court's failure to give the lower courts any guidance whatever on this point will result in widespread confusion as trial judges throughout the land attempt to divine the rationale behind the property rule established today. Confusion will be compounded by our own past decisions which have decisively rejected the notion that the accused must necessarily have a possessory interest in the premises before he may assert a Fourth Amendment claim. See *United States* v. *Jeffers*, 342 U. S. 48 (1951); *Jones* v. *United States*, 362 U. S. 257 (1960); *Mancusi* v. *DeForte*, 392 U. S. 364 (1968). But it will not do simply to incorporate the standing law developed in those cases in an effort to solve the problem before us. For our past decisions involved situations in which the police search was directed against the individual seeking to invoke the Fourth Amendment. Here, however, the question is whether an individual may hear the conversations of third parties.[7] If, for example, it develops at the hearing that petitioner Alderisio simply had a bare right to

[6] As the Court points out, *ante*, at 168, n. 1, the Government denies that electronic surveillance took place on property owned by Alderisio. Rather, the premises were owned either by firms which employed Alderisio or by "business associates."

[7] I have not thought it necessary to deal with the subsidiary question of the standing of any of these petitioners to challenge at trial any evidence submitted against them that is alleged to be a fruit of a bugged conversation in which they participated. I agree that this is a question that should be left to the District Court for determination in the first instance at the hearing on remand.

remain on the business premises that were bugged, cf. *Jones* v. *United States, supra,* it surely could not be argued that his privacy had been infringed even though he had not been personally involved in any of the conversations that had been overheard. The Court seems duty bound to make at least this much clear.[8]

II.

In Camera Proceedings.

While I would hold that property owners have no right as such to hear conversations in which they were not participants, it appears to me that at a minimum the Court should adopt the Government's suggested judicial screening procedure with regard to third-party conversations. Property owners should not be permitted to intrude into the private lives of others unless a trial judge determines that the conversation at issue is at least arguably relevant to the pending prosecution.

On the other hand, I would agree that in the typical case, the prosecution should be required to hand over the records of all conversations in which the accused played a part. Since the other parties to these conversations knew they were talking to the accused, they can hardly have an important interest in concealing from him what they said to him. Whatever risk of unauthorized disclosure is involved may generally be minimized even further by the issuance of appropriate protective orders. Fed. Rule Crim. Proc. 16 (e).

There is, however, at least one class of cases in which the standard considerations do not apply. I refer to the situations exemplified by *Ivanov* and *Butenko*, in which the defendant is charged, under one statute or another,

[8] As the Court's justification of its "property" rule seems to center exclusively on the right of homeowners to protest intrusions into their homes it may well be that the rights of owners of business premises should be stringently limited.

with spying for a foreign power. In contrast to the typical situation, here the accused may learn important new information even if the turnover is limited to conversations in which he was a participant. For example, he may learn the location of a listening device—a fact that may be of crucial significance in espionage work. Moreover, he will be entitled to learn this fact even though a valid warrant has subsequently been issued authorizing electronic surveillance at the same location. Similarly, the accused may find out that the United States has obtained certain information that his foreign government believes is still secret, even when our Government has also received this information from an independent source in a constitutional way. And he may learn that those in whom he has been reposing confidence are in fact American undercover agents.

Even more important, there is much less reason to believe that a protective court order will effectively deter the defendant in an espionage case from turning over the new information he has received to those who are not entitled to it. For in an espionage case, the defendant is someone the grand jury has found is likely to have passed secrets to a foreign power. It is one thing to believe that the normal criminal defendant will refuse to pass on information if threatened with severe penalties for unauthorized disclosure. It is quite a different thing to believe that a defendant who is probably a spy will not pass on to the foreign power any additional information he has received.

Moreover, apart from the sense of fair play of most judges, additional safeguards could be devised which would assure that an *in camera* procedure would be used only when an unauthorized disclosure presents a substantial risk to the national security. As in the somewhat analogous situation in which the Government attempts to invoke a national security privilege in a

civil action in order to trigger an *in camera* proceeding, there should "be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *United States* v. *Reynolds*, 345 U. S. 1, 7–8 (1953). Indeed, I would go even further than did the Court in *Reynolds* and lay upon trial judges the affirmative duty of assuring themselves that the national security interests claimed to justify an *in camera* proceeding are real and not merely colorable.

The Court's failure to consider the special characteristics of the *Ivanov* and *Butenko* cases is particularly surprising in the light of the reasons it gives for creating an absolute rule in favor of an automatic turnover. For the majority properly recognizes that its preference for a full adversary hearing cannot be justified by an easy reference to an absolute principle condemning *in camera* judicial decisions in all situations. Indeed, this Court has expressly authorized the use of such procedures in closely related areas involving the vindication of Fourth Amendment rights. See *Roviaro* v. *United States*, 353 U. S. 53 (1957); *McCray* v. *Illinois*, 386 U. S. 300, 309–313 (1967). If, as the Court rightly states, the propriety of an *in camera* screening procedure is a "matter of judgment," *ante*, at 182, depending on an informed consideration of all the competing factors, I do not understand why the trial judge should not be authorized to consider whether the accused simply cannot be trusted to keep the Government's records confidential. Nor do I understand why the Government must be confronted with the choice of dismissing the indictment or disclosing the information because the accused cannot be counted on to keep faith with the Court.[9] Moreover, it is not

[9] I would not, however, go so far as my Brother FORTAS, who would appear to require an *in camera* proceeding in any case in which the Government claims that a turnover would be prejudicial to the national security. I believe that this special procedure is

difficult to imagine cases in which the danger of unauthorized disclosure of important information would clearly outweigh the risk that an error may be made by the trial judge in determining whether a particular conversation is arguably relevant to the pending prosecution. It may well be, for example, that the number of conversations at issue is very small. Yet though the Court itself recognizes that "the need for adversary inquiry is increased by the complexity of the issues presented for adjudication," *ante,* at 184, it nevertheless leaves no room for an informed decision by the trial judge that the risk of error on the facts of a given case is insubstantial. Since the number of espionage cases is small, there is no chance whatever that these decisions will be made in a hurried fashion or that they will not be subjected to the most searching scrutiny on appeal. Of course, if any of the conversations should be found arguably relevant, their disclosure should be required before the prosecution is permitted to continue.

In sum, I would require the Government to turn over to Alderman and Alderisio only the records of those conversations in which each defendant participated, and I would leave the way open for a preliminary *in camera* screening procedure in the *Ivanov* and *Butenko* cases.

MR. JUSTICE FORTAS, concurring in part and dissenting in part.

I.

In the present cases, the Court holds (1) that the Government may use evidence it obtains by unlawful electronic surveillance against any defendant who does not have "standing" to complain; (2) that a defendant has standing only if he was a party to the overheard conver-

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only justified when the accused has been indicted for his espionage activities, indicating that he has probably passed records to a foreign power.

sation or if it took place on "his premises";[1] and (3) that all illegally obtained surveillance records as to which a defendant has standing (including national security information) must be submitted to the defendant or his counsel, subject to appropriate protective orders, and their relevance to the defendant's trial must be determined in adversary proceedings. The defendant is entitled to suppression or exclusion from his trial of such illegally obtained information and its fruits.

I find it necessary to file this separate opinion because I believe (1) that a person concerning whom an investigation involving illegal electronic surveillance has been conducted, as well as the persons given "standing" in the majority opinion, has the right to suppression of the illegally obtained material and its fruits; and (2) that it is permissible for the trial judge, subject to suitable specifications, to order that information vital to the national security shall be examined only *in camera* to determine its relevance or materiality, although I agree that all other information that may be the subject of a motion to suppress must be shown to the defendant or his counsel so that its materiality can be determined in an adversary hearing.

II.

The effect of the Court's decision, bluntly acknowledged, is to add another to the long list of cases in which the courts have tolerated governmental conduct that violates the Fourth Amendment. The courts have done this by resort to the legalism of "standing." See, *e. g.*, *Goldstein* v. *United States*, 316 U. S. 114, 121 (1942); *Wong Sun* v. *United States*, 371 U. S. 471 (1963). Cf., *United States* v. *Jeffers*, 342 U. S. 48 (1951); *Jones* v. *United States*, 362 U. S. 257 (1960); *Mancusi* v. *DeForte*, 392 U. S. 364 (1968).

[1] The Court leaves the scope of the interest that the defendant must have in the "premises" to be determined in future litigation.

It is a fundamental principle of our constitutional scheme that government, like the individual, is bound by the law. We do not subscribe to the totalitarian principle that the Government is the law, or that it may disregard the law even in pursuit of the lawbreaker. As this Court said in *Mapp* v. *Ohio*, 367 U. S. 643, 659 (1961), "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." [2]

The Fourth Amendment to our Constitution prohibits "unreasonable" governmental interference with the fundamental facet of individual liberty: "[t]he right of the people to be secure in their persons, houses, papers, and effects." Mr. Justice Jackson recognized the central importance of the Fourth Amendment in his dissenting opinion in *Brinegar* v. *United States*, 338 U. S. 160, 180–181 (1949):

> "Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the

[2] Mr. Justice Brandeis elaborated this point more than 40 years ago:

"In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. . . ." *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928) (dissenting opinion).

See also *Elkins* v. *United States*, 364 U. S. 206, 222 (1960); *Terry* v. *Ohio*, 392 U. S. 1, 13 (1968); *Goldstein* v. *United States*, 316 U. S. 114, 128 (1942) (dissenting opinion); *Irvine* v. *California*, 347 U. S. 128, 149 (1954) (DOUGLAS, J., dissenting); Comment, The *Benanti* Case: State Wiretap Evidence and the Federal Exclusionary Rule, 57 Col. L. Rev. 1159, 1167–1168 (1957).

> individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police."

It is disquieting when an individual policeman, through carelessness or ignorance or in response to the pressure of events, seizes a person or conducts a search without compliance with the standards prescribed by law. It is even more disturbing when law enforcement officers engage in unconstitutional conduct not because of their individual error but pursuant to a calculated institutional policy and directive.

Surreptitious electronic surveillance—the "uninvited ear" as my Brother WHITE calls it—is a "search and seizure" within the ambit of the Fourth Amendment. *Silverman* v. *United States*, 365 U. S. 505, 511 (1961); *Katz* v. *United States*, 389 U. S. 347, 353 (1967). It is usually the product of calculated, official decision rather than the error of an individual agent of the state. And because by nature it is hidden, unlawful electronic surveillance is even more offensive to a free society than the unlawful search and seizure of tangible material.

In recognition of the principle that lawlessness on the part of the Government must be stoutly condemned, this Court has ruled that when such lawless conduct occurs, the Government may not profit from its fruits. *Weeks* v. *United States*, 232 U. S. 383 (1914), held that in a federal prosecution the Government may not use evidence secured through an illegal search and seizure. In *Mapp* v. *Ohio*, *supra*, the exclusionary rule was applied to the

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States. In that case, the Court expressly recognized that only a proscription of the use of unlawfully seized material could properly implement the constitutional prohibition. It acknowledged that other remedies were not effective sanctions. *Id.*, at 651–653. See also *Weeks* v. *United States, supra,* at 393; *Irvine* v. *California,* 347 U. S. 128, 137 (1954); *Wolf* v. *Colorado,* 338 U. S. 25, 41–47 (1949) (dissenting opinion); *People* v. *Cahan,* 44 Cal. 2d 434, 282 P. 2d 905 (1955). As this Court said in *Walder* v. *United States,* 347 U. S. 62, 64–65 (1954), "The Government cannot violate the Fourth Amendment . . . and use the fruits of such unlawful conduct to secure a conviction. . . . [T]hese methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men." [3]

But for reasons which many commentators charge are related more to convenience and judicial prudence than to constitutional principles, courts of all States except California [4] and of the federal system, including this Court, have allowed in evidence material obtained by police agents in direct and acknowledged violation of the Fourth Amendment. They have allowed this evidence except in those cases where a defendant who moves for suppression of the material can show that his personal right of privacy was violated by the unlawful search or seizure. This restriction on persons who can suppress illegally acquired evidence has been attributed by some

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[3] We pointed out last Term that "[a] ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which procured the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur." *Terry* v. *Ohio, supra,* n. 2, at 13. See *Irvine* v. *California, supra,* n. 2, at 150 (dissenting opinion).

[4] See *People* v. *Martin,* 45 Cal. 2d 755, 290 P. 2d 855 (1955).

commentators [5] to the fact that the constitutional right to suppress was at one time considered to stem in part from the Fifth Amendment's privilege against self-incrimination.[6] Only the person whose right has been violated can claim the protection of that privilege. 8 J. Wigmore, Evidence §§ 2196, 2270 (McNaughton rev. 1961). But if the exclusionary rule follows from the Fourth Amendment itself, there is no basis for confining its invocation to persons whose right of privacy has been violated by an illegal search. The Fourth Amendment, unlike the Fifth, is couched in terms of a guarantee that the Government will not engage in unreasonable searches and seizures. It is a general prohibition, a fundamental part of the constitutional compact, the observance of which is essential to the welfare of all persons.[7] Accordingly, commentators have urged that the necessary implication of the Fourth Amendment is that any defendant against whom illegally acquired evidence is offered,

[5] Broeder, Wong Sun v. United States: A Study in Faith and Hope, 42 Neb. L. Rev. 483, 539, 540 (1963); Comment, Fruit of the Poisonous Tree—A Plea for Relevant Criteria, 115 U. Pa. L. Rev. 1136, 1140–1141 (1967). Others have attributed the standing requirement simply to a hostility towards the exclusionary rule on the part of the courts. See, *e. g.*, Edwards, Standing to Suppress Unreasonably Seized Evidence, 47 Nw. U. L. Rev. 471 (1952).

[6] *Mapp* v. *Ohio*, 367 U. S. 643 (1961), was a 5-to-4 decision. My Brother BLACK concurred only on the basis that the Fifth Amendment's ban against self-incrimination, operating in conjunction with the Fourth Amendment, required the exclusionary rule. See also *Ker* v. *California*, 374 U. S. 23, 30 (1963); *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964).

[7] The California Supreme Court has recognized that it is not inconsistent to hold that any person may object to the use against him of evidence obtained by an illegal search or seizure, while at the same time allowing only a person who has been made to incriminate himself to suppress his confession and its fruits. Compare *People* v. *Martin*, *supra*, n. 4, with *People* v. *Varnum*, 66 Cal. 2d 808, 427 P. 2d 772 (1967).

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whether or not it was obtained in violation of his right to privacy, may have the evidence excluded. It is also contended that this is the only means to secure the observance of the Fourth Amendment.[8]

I find these arguments cogent and appealing. The Fourth Amendment is not merely a privilege accorded to him whose domain has been lawlessly invaded. It grants the individual a personal right, not to privacy, but to insist that the state utilize only lawful means of proceeding against him. And it is an assurance to all that the Government will exercise its formidable powers to arrest and to investigate only subject to the rule of law. See *Brinegar* v. *United States, supra,* at 181 (dissenting opinion).

To allow anyone, regardless of "standing," to prevent the use against him of evidence that the Government has lawlessly obtained would, however, be contrary to a number of decisions stemming from *Jones* v. *United States, supra. E. g., Wong Sun* v. *United States, supra; Parman* v. *United States,* 130 U. S. App. D. C. 188, 399 F. 2d 559 (1968). It is the mandate of *Jones* that something more than the generalized interest of any citizen in gov-

[8] See generally Grant, Circumventing the Fourth Amendment, 14 So. Cal. L. Rev. 359, 368 (1941); Allen, The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties, 45 Ill. L. Rev. 1, 22 (1950); Kamisar, Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure, 1961 U. Ill. L. F. 78, 105. Traynor, Mapp v. Ohio at Large in the Fifty States, 1962 Duke L. J. 319, 335; Broeder, *supra,* n. 5, at 540; Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579, 649–650, n. 352 (1968); Comment, Judicial Control of Illegal Search and Seizure, 58 Yale L. J. 144, 157 (1948); Note, Standing to Object to an Unlawful Search and Seizure, 1965 Wash. U. L. Q. 488; Comment, Standing to Object to an Unreasonable Search and Seizure, 34 U. Chi. L. Rev. 342 (1967). But see Edwards, *supra,* n. 5, at 472; Weeks, Standing to Object in the Field of Search and Seizure, 6 Ariz. L. Rev. 65 (1964); Comment, 55 Mich. L. Rev. 567, 581 (1957).

ernmental obedience to law may be required for suppression of unlawfully obtained evidence. But if the Court is not prepared to repudiate the holding, stated in *Jones*, that something more must be shown to compel suppression than a claim of prejudice based only on "the use of evidence gathered as a consequence of a search or seizure directed at someone else," 362 U. S., at 261, it should at least follow *Jones* faithfully and completely.

Jones represented a substantial step towards full implementation of the Fourth Amendment. The case involved a charge of illegal possession of narcotics, and it held that mere lawful presence on the premises searched gave "standing" to challenge the legality of the search.[9] It rejected the view "generally" held by courts of appeals "that the movant [must] claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched" in order to have the seized property suppressed. *Ibid.* It explicitly rejected the use of property concepts to determine whether the movant had the necessary "interest" or "standing" to obtain exclusion of the unlawfully seized evidence. See *id.*, at 266.

The Court said in *Jones*, in a passage the majority quotes but the full scope of which it does not incorporate in its opinion:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, *one against whom the search was directed*, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. . . .
>
> . . . . . .

[9] I assume that the Court today intends to incorporate at least this direct holding of *Jones*.

> "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy." (Emphasis supplied.) *Id.*, at 261.

It is my position that this quotation, read in light of the Court's rejection of property concepts, requires that we include within the category of those who may object to the introduction of illegal evidence "one against whom the search was directed." Such a person is surely "the victim of an invasion of privacy"[10] and a "person ag-

[10] Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 211, provides that a law enforcement officer seeking prior judicial authorization for interception of wire or oral communications shall include, among other things, in his application to the court "a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted . . . ." 82 Stat. 218 (18 U. S. C. § 2518 (1) (b) (1964 ed., Supp. IV)). Examination of such applications should facilitate the task of deciding at whom a particular investigation was directed. See also *Berger* v. *New York*, 388 U. S. 41, 55-59 (1967), in which we held that the Fourth Amendment requires, as a precondition of judicial authorization of an eavesdrop, that the conversations sought to be seized be described with particularity.

Although I have referred to relevant provisions of the Omnibus Crime Control and Safe Streets Act, I note that I have not considered the constitutionality of the Act, as that issue is not involved in this case. I express neither agreement nor disagreement with the majority's statements concerning the Act.

grieved," even though it is not his property that was searched or seized. As I think the Court recognized in *Jones*, unless we are to insist upon property concepts, it is enough to give him "standing" to object that the government agents conducted their unlawful search and seizure in order to obtain evidence to use against him. The Government violates his rights when it seeks to deprive him of his liberty by unlawfully seizing evidence in the course of an investigation of him and using it against him at trial. See *Rosencranz* v. *United States*, 334 F. 2d 738, 741 (C. A. 1st Cir. 1964) (concurring opinion).

III.

I do not agree with the Court's decision that sensitive national security material that may not be relevant to a defendant's prosecution must be turned over to the defendant or his counsel for their scrutiny. By the term "national security material," I mean to refer to a rigid and limited category. It would not include material relating to any activities except those specifically directed to acts of sabotage, espionage, or aggression by or on behalf of foreign states.

Because the Court believes that no distinction can be made with respect to the defendant's right to suppress relevant evidence on the basis of the sensitivity of the material, it has concluded that no distinction can be made as to the method of determining whether the material is relevant. I agree that an *in camera* inspection of the records of unlawful surveillance should not be the usual method of determining relevance. I agree with all that the Court says about the inadequacy of an inspection in which the defendant cannot participate and the burden that it places upon the trial judge. But in cases where the trial court explicitly determines, in written findings, sealed and available for examination by

reviewing courts, that disclosure would substantially injure national security interests, I do not think that disclosure to the defendant is necessary in order for the Government to proceed with a prosecution. The trial judge should make such findings only when the Attorney General has personally certified that specific portions of the unlawfully obtained materials are so sensitive that they should not be disclosed. But when such a certification is made, I believe that the trial judge may himself weed out the material that he deems to be clearly irrelevant and immaterial. The balance, of course, must be turned over to the defendant or his counsel, unless the Government chooses instead to dismiss the prosecution.

Let me emphasize that the defendant's right to suppress is the same whether the charge is espionage, sabotage, or another kind of crime: Relevant material that has been illegally seized may be suppressed if the defendant has standing, but the existence of nonrelevant illegal evidence will not prevent a prosecution. Only the method of determining the relevance of the lawlessly obtained material to the prosecution would vary according to whether the national security is involved.

I agree with the majority that the possibility of error in determining relevance is much greater if there is only *in camera* examination. But I also agree with my Brother HARLAN that disclosure of some of the material may pose a serious danger to the national interest. I therefore reach the conclusion that a differentiation may properly be made between the method of handling materials the disclosure of which would endanger the national security and other illegally obtained materials. Skepticism as to the court's ability to detect and turn over to the defendant all relevant material may be well founded, but *in camera* inspection does not so clearly threaten to deprive defendants of their constitutional rights that it justifies endangering the national security. Accordingly, I would

hold that after certification by the Attorney General that specific portions of unlawfully obtained materials are sensitive, the trial judge may find that their disclosure to the defendant or his counsel would substantially injure national security interests, and he may determine *in camera* whether the materials are arguably relevant to the defendant's prosecution.

PART C

UNITED STATES COURT OF MILITARY APPEALS

UNITED STATES, Appellee

v.

OLIVER E. GRUNDEN, JR., Airman First Class,
U. S. Air Force, Appellant

No. 31,643

ACM 21679

On Petition of the Accused Below

February 18, 1977

Major Byron D. Baur argued the cause for Appellant, Accused. With him on the brief were Colonel Jerry E. Conner, John H.F. Shattuck, Esquire, Melvin L. Wulf, Esquire, and David F. Addlestone, Esquire.

Captain Alvin E. Schlechter argued the cause for Appellee, United States. With him on the brief was Colonel Julius C. Ullerich, Jr.

Opinion of the Court

FLETCHER, Chief Judge:

The appellant's court-martial resulted in his conviction of two specifications of failing to report contact with persons believed by him to be agents of governments hostile to the United States and one specification of attempted espionage, in violation of Articles 92 and 134, respectively, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The appellant challenges the validity of his conviction on several grounds. We find it necessary for the resolution of this case to address only two: first, the failure of the military judge to sua sponte instruct the court members on evidence of uncharged misconduct; and, second, the denial of his right to a public trial. We find on both counts the judge erred.

The facts are not in dispute. The appellant, after a series of discussions with three individuals, each of whom worked covertly for the government, failed to report these conversations and ultimately attempted to communicate information relating to national defense, contrary to Air Force Regulation 205-37 and 18 U.S.C. § 793(d).

Throughout the proceedings the prosecution adduced numerous acts of misconduct, over defense objection, including possible earlier acts of espionage. The military judge, in an Article 39(a) session, subsequent to the presentment of evidence on the merits, accurately noted each act of uncharged misconduct. He correctly stated that he was required to instruct the court members as to the limited purpose of this evidence. Appellant's counsel requested that an uncharged misconduct instruction not be given. The judge considered the request and did not so instruct.

No evidence can so fester in the minds of court members as to the guilt or innocence of the accused as to the crime charged as evidence of uncharged

misconduct. Its use must be given the weight of judicial comment, i.e., an instruction as to its limited use.[1] United States v. Gaiter, 23 U.S.C.M.A. 438, 50 C.M.R. 397 (1975).

This Court's statement in United States v. Graves, 23 U.S.C.M.A. 434, 437, 50 C.M.R. 393, 396 (1975):

> Irrespective of the desires of counsel, the military judge must bear the primary responsibility for assuring that the jury properly is instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law. Simply stated, counsel do not frame issues for the jury; that is the duty of the military judge based upon his evaluation of the testimony related by the witnesses during the trial.

encases the judge's obligation to instruct. When evidence of uncharged misconduct is permitted, nothing short of an instruction will suffice.

As to the second error, the military judge during the preliminary Article 39(a) session, stated that because the trial on the espionage charges could delve into classified matters, certain procedures would be instituted. These included ascertaining that all court members and personnel would have the appropriate security clearances, and that the public would be excluded from portions of the trial. Thus, despite the objection of the defense counsel, and the trial judge's own assurances that he would "bend over backwards" to protect the appellant's rights, the public was excluded from virtually the entire trial as to the espionage charges.[2]

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[1]The basic legal tenet and the seven exceptions to that rule which permit the introduction of uncharged misconduct are set forth in paragraph 138g of the Manual for Courts-Martial, United States, 1969 (Rev.), as reiterated by this Court in United States v. Janis, 24 U.S.C.M.A. 225, 51 C.M.R. 522 (1976). The fact that this evidence was admissible under that test gives rise to the question of the need for an instruction.

[2]The propriety or impropriety of the exclusion of the public from all or part of a trial cannot, as attempted by the government in this case, be reduced to solution by

During this portion of the trial, nine witnesses testified, only one of whom discussed classified matters at any length. Of the remaining eight witnesses, one made less than 10 references to classified matters, three made only one reference, and the remaining four made no references. In excising the public from the trial, the trial judge employed an ax in place of the constitutionally required scapel.

The right of an accused to a public trial is a substantial right secured by the Sixth Amendment to the Constitution of the United States. In re Oliver 333 U.S. 257 (1948). Indeed, this Court has long held that an accused is, at the very least, entitled to have his friends, relatives, and counsel present regardless of the offense charged. United States v. Brown, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1956).[3] The improper exclusion of the public has been treated as error per se in recognition that to do otherwise is to place the defendant in the ironic position of having "to prove

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mathematical formulas. The logic and rationale governing the exclusion, not mere percentages of the total pages of the record, must be dispositive.

The dissenting judge has apparently adopted the government position that as over 60 percent of the total record was conducted in open session, there can be little or no question but that the trial judge exercised discretion in his exclusion of the public. Unfortunately what both the dissenting judge and the government have failed to do is to analyze what portions of the record are involved in this question. The "over 60 percent" figure which has been bandied about entails the preliminary procedural matters, the entire trial on the merits as to the charge of which the appellant was acquitted, final instructions, and the sentencing phase of the trial. The fact that these portions of the trial were open to the public can have no bearing on the resolution of the propriety of the judge's exclusion of the public from virtually the entire trial as to the espionage matters. Further, simple examination of the record reveals that the "bulk of the closed session" did not contain numerous and repeated references to classified matters; in fact, as noted by the government in its pleadings, only two witnesses of the total of nine would fit into this category.

[3]This Court is in full agreement with the concurrence of then Chief Judge Quinn that the right to a public trial is indeed required in a court-martial. To the extent that United States v. Brown, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1956), implies a "military exception" to the right to a public trial for service personnel in reliance upon Ex parte Quirin, 317 U.S. 1 (1942), it is overruled.

what the disregard of his constitutional right has made it impossible for him to learn." United States ex rel. Bennett v. Rundle, 419 F. 2d 599, 608 (3d Cir. 1969).[4]

As recognized in United States v. Brown, supra, the right to a public trial is not absolute, and under exceptional circumstances, limited portions of a criminal trial may be partially closed over defense objection.[5] In each instance the exclusion must be used sparingly with the emphasis always toward a public trial. Historical exceptions have evolved and expanded[6] which need not be discussed, for the stated basis for the exclusion of the public in this case was the fact that classified or security matters might be presented. Exclusion of the public on such a basis is provided for in paragraph 53e, Manual for Courts-Martial, United States, 1969 (Rev.) which provides in pertinent part that:

> As a general rule, the public shall be permitted to attend open sessions of courts-martial. Unless otherwise limited by directives of the Secretary of a Department, the convening authority, the military judge, or the president of a special court-martial without a military judge may, for security or other good reasons, direct that the public or certain portions thereof be excluded from a trial. However, all spectators

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[4]See United States v. Zimmerman, 19 C.M.R. 806 (A.F.B.R. 1955); United States v. Kelly, 172 F. 2d 919 (3d Cir. 1949); Tanksley v. United States, 145 F. 2d 58 (9th Cir. 1944).

[5]See United States ex rel. Lloyd v. Vincent, 520 F. 2d 1272 (2d Cir. 1975); Stamicarbon, N.V. v. American Cyanamid Co., 506 F. 2d 532 (2d Cir. 1974).

[6]See e.g. Note, The Accused's Right to a Public Trial, 42 Notre Dame Law 499 (1967); Note, The Right to a Public Trial in Criminal Cases, 41 N.Y.U.L. Rev. 1138 (1966); Radin, The Right to a Public Trial, 6 Temp. L.Q. 381 (1932). These traditional exceptions have been broadened to include limited exclusions to protect undercover policemen or agents, to insure full and honest testimony by government witnesses, to protect airline hijacking profiles, and to preserve order. United States v. Ruiz-Estrella, 481 F. 2d 723 (2d Cir. 1973); United States ex rel. Bruno v. Herold, 408 F. 2d 125 (2d Cir. 1969); United States ex rel. Orlando v. Fay, 350 F. 2d 967 (2d Cir. 1965). See Illinois v. Allen, 397 U.S. 337 (1970); Bloom v. Illinois, 391 U.S. 194 (1968).

> may be excluded from an entire trial, over the accused's objection, only to prevent the disclosure of classified information. The authority to exclude should be cautiously exercised, and the right of the accused to a trial completely open to the public must be weighed against the public policy considerations justifying exclusion.

Although the presentation of classified or security matters did not develop as an historical exception to the requirement of a public trial, this Court recognizes that, within carefully limited guidelines, partial exclusion of the public on such a basis can be justified. Military appellate courts have noted the necessity to require that court personnel and members have designated security clearances, and that questions of classified materials could properly be disposed of in closed sessions. United States v. Kauffman, 33 C.M.R. 748, 795 (A.B.R.), reversed on other grounds, 14 U.S.C.M.A. 283, 34 C.M.R. 63 (1963);[7] United States v. Northrup, 31 C.M.R. 599 (A.F.B.R. 1961); United States v. Dobr, 21 C.M.R. 461 (A.B.R. 1956). Yet, in each instance the exclusion of the public was narrowly and carefully drawn. The blanket exclusion of the spectators from all or most of a trial, such as in the present case, has not been approved by this Court, nor could it be absent a compelling showing that such was necessary to prevent the disclosure of classified information.[8] The simple utilization of the terms "security" or "military necessity" cannot be the talisman in whose presence the protections of the Sixth Amendment and its guarantee to a public trial must vanish.[9] Unless an appropriate balancing test is

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[7] In United States v. Kauffman, 33 C.M.R. 748, 795 (A.B.R. 1963), the limited exclusion of the public during the portion of one witness' testimony on espionage matters was sustained. It should be noted, however, that the exclusion was so limited that no evidence was offered, and instead only procedural matters were discussed which did not relate to the question of guilt or innocence. See United States v. Henderson, 11 U.S.C.M.A. 556, 564, 29 C.M.R. 372, 380 (1960).

[8] See United States v. Michaud, 48 C.M.R. 379 (N.C.M.R. 1973).

[9] This Court recognizes that the Supreme Court in Parker v. Levy, 417 U.S. 733, 743 (1974), acknowledged the uniqueness of the military society, and that it has reaffirmed that belief in recent decisions. See Middendorf v. Henry, 425 U.S. 25, (1976); Greer v. Spock, 424 U.S. 828 (1976); Schlesinger v. Councilman, 420 U.S. 738 (1975). Yet, this Court once again must state that analysis and rationale will be determinative of the propriety of given situations, and that the mere uniqueness of the military society or military necessity cannot be urged as the basis for sustaining that which reason and analysis indicate is untenable. See United States v. Robel, 389 U.S. 258 (1967).

employed with examination and analysis of the need for, and the scope of any suggested exclusion, the result is, as here, unsupportable.

It is our decision that the balancing test employed by a trial judge in instances involving the possible divulgence of classified material should be as follows. His initial task is to determine whether the perceived need urged as grounds for the exclusion of the public[10] is of sufficient magnitude so as to outweigh "the danger of a miscarriage of justice which may attend judicial proceedings carried out in even partial secrecy." Stamicarbon, N.V. v. American Cyanamid Co., 506 F. 2d, 532, 539 (2d Cir. 1974). This may be best achieved by conducting a preliminary hearing which is closed to the public at which time the government must demonstrate that it has met the heavy burden of justifying the imposition of restraints on this constitutional right.[11] The prosecution to meet this heavy burden must demonstrate the classified nature, if any, of the materials in question. It must then delineate those portions of its case which will involve these materials.

It is acknowledged that special deference should be accorded matters of national security. Ethyl Corporation v. Environmental Protection Agency, 478 F. 2d 47 (4th Cir. 1973); Epstein v. Resor, 421 F. 2d 930 (9th Cir. 1970). Although the actual classification of materials and the policy determinations involved therein are not normal judicial functions, immunization from judicial review cannot be

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[10] Our inquiry deals solely with requests for exclusion by the government and differs from the considerations employed when the defendant requests exclusion of the public in order to insure a fair trial. See Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965).

[11] See New York Times Co. v. United States, 403 U.S. 713 (1971). It is recognized that in this case the Supreme Court was concerned with First Amendment questions; however, the principles enunciated in regard to government's attempts to prevent the disclosure of matters in the name of "security" are applicable to the "public trial" aspects of the Sixth Amendment present in this case.

countenanced in situations where strong countervailing constitutional interests exist which merit judicial protection. United States v. United States District Court, 407 U.S. 297 (1972).[12] Before a trial judge can order the exclusion of the public on this basis, he must be satisfied from all the evidence and circumstances that there is a reasonable danger that presentation of these materials before the public will expose military matters which in the interest of national security should not be divulged. United States v. Reynolds, 345 U.S. 1 (1953). The method used by the prosecution to satisfy this burden, as recognized in United States v. Reynolds, supra, will vary depending upon the nature of the materials in question and the information offered. It is important to realize that this initial review by the trial judge is not for the purpose of conducting a de novo review of the propriety of a given classification decision.[13] All that must be determined is that the material in question has been classified by the proper authorities in accordance with the appropriate regulations. Brockway v. Department of the Air Force, 518 F. 2d 1184

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[12]The Supreme Court upheld the requirement of judicial scrutiny in the foreign prior warrant procedures before the utilization of wiretaps under the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2520. Government contentions that "domestic security" concerns must prevail over the protections of the Fourth Amendment were rejected. The Court did not address the question of "foreign" security matters, but instead carefully limited its holding in this and subsequent cases to "domestic" security questions. See Russo v. Byrne, 409 U.S. 1219 (1972). However, the overriding concerns expressed by the Supreme Court in that case have been recently applied to matters concerning foreign security surveillance as well. Zweibon v. Mitchell, 516 F. 2d 594 (D.C. Cir. 1975). We feel that this rationale is sound at least as it relates to the propriety of judicial scrutiny, and the ability of the trial judge to properly exercise this scrutiny.

[13]Environmental Protection Agency v. Mink, 410 U.S. 73 (1973). This case involves analysis of the Freedom of Information Act as originally enacted. Both subsequent congressional modification of that act, and the presence of additional constitutional concerns found in criminal prosecutions lead us to conclude that the trial judge may utilize in camera inspection of the material to determine whether the prosecution has met its burden should he deem it necessary. United States v. Nixon, 418 U.S. 683 (1974); Schaffer v. Kissinger, 505 F. 2d 389 (D.C. Cir. 1974). See Zweibon v. Mitchell, supra.

(8th Cir. 1975).[14] The ultimate questions of whether these materials "relat[ed] to the national defense"[15] and could be used to the injury of the United States or the advantage of a foreign country must remain for resolution by the jury. 18 U.S.C. § 793d. The sole purpose of this review is to protect an accused's right to a public trial by preventing circumvention of that right by the mere utterance of a conclusion or blanket acceptance of the government's position without a demonstration of a compelling need. United States v. Nixon, 418 U.S. 683 (1974).[16]

This Court appreciates full well that such a hearing may involve complex and delicate matters for resolution by the trial judge, yet, as recognized by the Supreme Court, these are matters that judicial officers must and should be equipped to properly determine. United States v. United States District Court, supra. Similarly, we feel that objections to this procedure because of the possibility of "leaks" are insufficient to prohibit its use; adequate measures exist to insure the necessary confidentiality required when matters of national security are concerned.[17]

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[14]The potential for abuses may exist, and upon proper motion it is incumbent upon the trial judge to determine whether a particular classification was done in an arbitrary and capricious manner, thereby compelling its disclosure. Wolfe v. Froehlke, 510 F. 2d 654 (D.C. Cir. 1974); Schaffer v. Kissinger, supra; Epstein v. Resor, 421 F. 2d 930 (9th Cir. 1970).

[15]See United States v. Drummond, 354 F. 2d 132 (2d Cir. 1975).

[16]See also Rowley v. McMillan, 502 F. 2d 1326 (4th Cir. 1974).

[17]See Alderman v. United States, 394 U.S. 165 (1969).

The trial judge's determination that the prosecution has met its burden as to the nature of the materials[18] does not complete his review in this preliminary hearing. He must further decide the scope of the exclusion of the public. The prosecution must delineate which witnesses will testify on classified matters, and what portion of each witness' testimony will actually be devoted to this area. Clearly, unlike the instant case, any witness whose testimony does not contain references to classified material will testify in open court. The witness whose testimony is only partially concerned with this area should testify in open court on all other matters. For even assuming a valid underlying basis for the exclusion of the public, it is error of "constitutional magnitude"[19] to exclude the public from all of a given witness' testimony when only a portion is devoted to classified material. The remaining portion of his testimony will be presented to the court members in closed session. This bifurcated presentation of a given witness' testimony is the most satisfactory resolution of the competing needs for secrecy by the government,

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[18]This determination does not preclude the defense from going forward and demonstrating the "public" nature of the material which would thus establish a separate ground prohibiting exclusion of the public. See 18 U.S.C. § 793.

[19]United States v. Clark, 475 F. 2d 240, 246 (2d Cir. 1973). The Second Circuit sustained the underlying basis for the exclusion in reliance upon its prior decision of United States v. Bell, 464 F. 2d 667 (2d Cir. 1972) — prevention of the disclosure of airline skyjacking profiles because of a compelling need to protect the air traveling public. However, the court would not permit the total exclusion of the public in a hearing where only a portion of the testimony presented related to this profile, and the remainder, as here, was devoted to a wide range of matters bearing on the defendant's innocence or guilt.

and for a public trial by the accused.[20] It will be incumbent upon the trial judge to sua sponte instruct the court members both as an introductory matter and in greater detail during his final instructions as to the underlying basis for the use of this bifurcated process. It is imperative that the court members determine whether the documents or information in question are violative of the espionage statute based solely upon the evidence presented. Neither the utilization of a particular document marking, nor the presentation of certain testimony in closed sessions can be, in and of itself, sufficient to sustain a conviction. Dubin v. United

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[20]This was the procedure employed by the trial court and sustained by this Court in United States v. Kauffman, supra. We share the conclusion expressed in United States v. Clark, supra, that:

> Nor does the remote possibility of an unsolicited, spontaneous disclosure of the elements of the profile justify such a broad policy of exclusion. Since the witnesses were aware of the government's desire to maintain the secrecy of the profile, the risk of inadvertent disclosure was negligible.

475 F. 2d at 246. A cautionary instruction to the witness should more than adequately protect the government's interests in a given case.

The Court recognizes that not every situation is easily "pigeon-holed" into testimony which is devoted to classified material and that which is not; as noted earlier in this opinion, we feel that trial judges should and must be capable of exercising sound discretion in their rulings. Clearly, therefore, the trial judge need not participate in so rigid a procedure as to turn his courtroom into a parade; continuity of testimony and the fact that a given witness' testimony deals virtually exclusively with classified material are certainly factors which could lead to the exclusion of the public from all of a given witness' testimony regardless of the fact that a portion was not concerned with such matters. The procedure we set forth is to protect an individual's rights under the Sixth Amendment and to prevent those rights from being ignored on the basis of unthinking acceptance of government claims of need without the appropriate demonstration of that need.

States, 363 F. 2d 938 (Ct. Cl. 1966); United States v. Drummond, 354 F. 2d 132 (2d Cir. 1965).[21]

Applying the above criteria and procedures to the facts of the instant case it is abundantly clear that the military judge committed error of constitutional magnitude. His blanket exclusion of the public failed to satisfactorily balance the competing interests, and improperly denied the appellant his right to a public trial.[22]

Reversal is required. The findings and sentence as approved by the United States Air Force Court of Military Review are set aside. The record of trial is returned to the Judge Advocate General of the Air Force. A rehearing may be ordered.

Judge PERRY concurs.

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[21]It must be apparent that exclusion of the public during a trial may cause some court members to erroneously conclude that as the witness or document needs protection, the testimony must be true, and therefore, the defendant's innocence is to be doubted. Note, Exclusion of the General Public From A Criminal Trial — Some Problem Areas, 1960 Wash. U. L.Q. 458. See Quick, A Public Criminal Trial, 60 Dick. L. Rev. 21, 28 (1955). The fears expressed by the Supreme Court in Jackson v. Denno, 378 U.S. 368 (1964), that jurors cannot understand the policy consideration calling for the given exclusion are applicable to this situation. Hence, cautionary instructions tailored to the facts of the particular case are mandated lest the very purpose behind the procedures discussed be thwarted.

[22]The dissenting judge complains that the procedure which we adopt is defective because it unfairly compromises the governmental interests involved, and because the government is not protected from an arbitrary, or presumably a good faith but incorrect, ruling compelling disclosure of certain materials. We can share his concern that Congress has failed to provide our system with statutory authorization for Government appeals in criminal cases. See United States v. Rowel, 24 U.S.C.M.A. 137, 138, 51 C.M.R. 327, 328 (1976) (Fletcher, C.J. concurring). However, congressional inaction cannot abrogate our obligation to insure that each accused in the military justice system is afforded his rights under the Sixth Amendment.

COOK, Judge (dissenting):

I disagree with both aspects of the majority opinion. As to the instruction on uncharged misconduct there is a vast difference between the failure of defense counsel to request an appropriate instruction as constituting a waiver of the trial judge's duty to instruct on issues for determination by the court members and an affirmative request by the defense that a particular instruction not be given. In my book, the latter instance represents defense-induced error which, except in the case of a manifest miscarriage of justice, will not be considered by an appellate court as a ground for reversal of an otherwise valid conviction. Even if United States v. Graves, 23 U.S.C.M.A. 434, 50 C.M.R. 393 (1975), is as expansive as the majority now perceive it to be, a construction with which I disagree,[1] it does not overrule the self-induced error concept. In United States v. Morales, 23 U.S.C.M.A. 503, 508, 50 C.M.R. 647, 647 (1975), the Court noted that Graves did not extend to "an affirmative waiver by defense counsel of appropriate judicial action required by the evidence." In United States v. Harden, 24 U.S.C.M.A. 76, 51 C.M.R. 249 (1976), the Court iterated the limitation of Graves with a reference to United States v. Brux, 15 U.S.C.M.A. 597, 602, 36 C.M.R. 95, 100 (1966), in which the Court held that, except to prevent a miscarriage of justice, "self-induced error . . . may not later be claimed as the basis for appellate reversal."

As to the public trial issue, the principal opinion acknowledges that the right to a public trial is "not absolute." The fact that the trial judge held a preliminary hearing on the matter demonstrates to me that he was mindful of his responsibility to effect a sensitive accommodation between the accused's right to a public trial

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[1]See my dissent in United States v. McGee, 23 U.S.C.M.A. 591, 594, 50 C.M.R. 856, 859 (1975), and United States v. Nelson, 24 U.S.C.M.A. 49, 51 C.M.R. 143 (1975).

and the Government's need to protect classified information affecting national security. His declaration that he would "bend over backwards" to preserve the accused's right demonstrates to me that his criterion for exclusion of the public was at least as stringent as that contemplated by the majority. The question then is whether the judge disregarded his own declaration and, in fact, wielded "an ax in place of the . . . required scapel," as the majority conclude.

Contrary to the majority's disdain of "mere percentages of the total pages of the record," as indicative of the scope of exclusion, in my opinion, that circumstance is very important to resolution of the issue. The defense brief represents that the trial was conducted "almost entirely in secret." However, Government counsel's analysis of the transcript of the record, with which I agree, indicates that over 60 percent of the proceedings were "open to the public," and that the "bulk of the closed session of the court-martial . . . contained numerous and repeated references to classified matters." In my opinion, therefore, the record does not reflect "blanket exclusion of the public," as the majority describe the trial judge's ruling, but rather it convinces me the trial judge was firmly committed to, and properly applied, the "logic and rationale governing the exclusion" of the public, which the majority posit as an appropriate standard for measuring the validity of the trial judge's ruling. I would affirm the determination by the Court of Military Review that the accused was not improperly denied the right to the presence of the public at portions of his trial.

Turning to the standards postulated by the majority by which to determine when to exclude the public, I am constrained to express some of my misgivings. The majority, I believe, have developed their standards from an amalgam of cases dealing not only with the right to public trial, but with the right, under the Freedom of Information Act,[2] to information contained in public records. As matter

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[2] 5 U.S.C. § 552.

classified to protect national security interests is a basis to exclude the public from a trial and is also exempt from disclosure under the Freedom of Information Act, the admixture has a surface appeal. But, in my opinion, it is wrong to measure the correctness of a ruling excluding the public by the requirements of the Information Act.

The majority say that a "witness whose testimony is only partially concerned with . . . [classified material] should testify in open court on all other matters." The majority thus seem to equate exclusion of the public during testimony by a particular witness to the process of piecemeal excision that a trial judge may undertake in an action under the Freedom of Information Act to separate unclassified matter from the classified in a particular public record. I do not believe that sort of easy compartmentalization of the testimony of a witness, especially in a prosecution of this kind, is so commonplace and practicable as to be elevated to a standard for decision. But more importantly, the picture conjured up by this standard is that of a series of entrances and exits by the public, as the witness oscillates in his testimony between the classified and the unclassified.

In Stamicarbon, N.V. v. American Cyanamid Co., 506 F. 2d 532, 537 (2d Cir. 1974), the Second Circuit Court of Appeals perceived "frequent shuttling between public and in camera proceedings" as presenting a serious risk of prejudice to the fairness of a trial. Inferentially, the majority concede their standard entails the risk that, in a trial with court members, the closed session testimony might be accorded greater weight, merely because of its apparent greater significance; they would control the risk by requiring the trial judge "to sua sponte instruct the court members both as an introductory matter and in greater detail during his final instructions as to the underlying basis for the use of this bifurcated process." In my opinion, the better approach is to assess the probable extent to which a witness' testimony will deal with classified material. If the major part of the testimony is concerned with such matter, or such matter is embraced in many different parts of the anticipated testimony, then the whole of the testimony should be given with the

public excluded. I believe that approach is not only conducive to a more orderly trial than the multiple exclusions demanded by the majority's standard, but it minimizes, if it does not entirely eliminate, the risk that the court members might, from the comings and goings of the public, give added weight to the testimony heard in the nonpublic sessions. Further, I believe the approach I suggest will tend to lessen, rather than encourage, later claims by an accused that the public should not have been excluded for a particular series of questions and answers because their subject matter did not deal with classified information.

A second disturbing aspect of the majority's standards is their apparent disregard of what to me is a very important difference between a Freedom of Information case and exclusion of the public at a trial. In a Freedom of Information Act proceeding, if the trial judge mistakenly determines that classified documents are not entitled to exemption from disclosure because not properly classified, his decision is appealable; and his decision can be stayed pending appeal. See Department of the Air Force v. Rose, 425 U.S. 352 (1976). Consequently, national defense interests sought to be safeguarded by the classification are protected until the trial ruling can be reviewed. No such protection is accorded the Government against a ruling by a trial judge refusing exclusion of the public from the whole or part of a trial because classified information is involved. True, the Government must disclose classified evidence to the accused and his counsel, as the accused has the right to know the evidence against him. Alderman v. United States, 394 U.S. 165, 181, 184 (1969). See also United States v. Nichols, 8 U.S.C.M.A. 119, 125, 23 U.S.C.M.A. 343, 349 (1957). However, because the accused has the right to know does not mean that disclosure must also be made to the public in general, especially if the trial is held in a foreign country and foreign nationals are in attendance. It seems to me, therefore, that as a trial ruling against the Government is not reviewable, the potentiality for irreparable harm to national security interests must be taken into account by the trial judge.

Aside from the Freedom of Information Act, the need to protect national security interests, and military secrets in particular, is so strong that, while re-

cognizing a trial judge should not abdicate his responsibilities in the conduct of a trial to the Executive, the Supreme Court held that the judge should not jeopardize national security interests "by insisting upon an examination of the [classified] evidence, even . . . alone, in chambers." United States v. Reynolds, 345 U.S. 1, 10 (1953). The Supreme Court took the same approach to the Freedom of Information Act, as originally worded, and held that the exemption from disclosure of classified information, provided by the Act, did not "permit in camera inspection of such documents to sift out so-called 'nonsecret components.' " Environmental Protection Agency v. Mink, 410 U.S. 73, 81 (1973). In its wisdom, Congress later amended the Act to allow the trial court to examine classified records in camera and to "determine the matter de novo." 5 U.S.C. § 552(a)(4)(A); Department of the Air Force v. Rose, supra.

It may be that the Freedom of Information Act's empowerment of the court to determine the correctness of a security classification and other developments in the area of in camera proceedings have undermined the limitation on the judge's authority propounded in Reynolds, supra. See Alderman v. United States, supra at 198-99 (Harlan, J., concurring in part and dissenting in part). It may also be that the basic policy of the act favoring disclosure over secrecy requires that, in a trial under the act, a judge resolve, in favor of disclosure, any doubt he may have as to the correctness of a classification of particular matter as information affecting national security interests. However, I believe that neither individually nor in combination do these circumstances support the procedure prescribed by the majority to determine whether the public should be excluded during the presentation of classified matter at a trial.

In footnote 14 of the principal opinion, the trial judge is portrayed as the bulwark against an "arbitrary and capricious" classification. A judge can also be arbitrary and capricious. An accused who is subject to an abuse of power in the denial of a public trial may obtain relief on appeal. But when the Government is subject to an arbitrary and capricious ruling, which requires disclosure of classified

matter to the public, it has no means of relief, short of terminating the trial and dropping the charges. I do not believe, therefore, that the Government is obligated, as the majority indicate it is, to demonstrate "a compelling need" to exclude the public. It seems to me that a burden of that magnitude is not only inconsistent with the majority's earlier suggestion that "[a]ll that must be determined" is that the classification was made by a proper authority in accordance with regulations, but is also wrong in principle. I believe that the correct test is whether the classified information is of a nature that presents a real, not merely colorable, basis for a conclusion that national security interests are implicated. If there is a rational doubt, that doubt must be resolved in favor of the Government. Balancing the respective interests of the accused and the Government in this way, strikes me as eminently preferrable to that propounded by the majority. It takes account of, and tries to guard against, the risks of a wrong ruling by the trial judge. If the trial is closed to the public, the accused may still be acquitted; thus he has suffered no harm from the several evils deemed to exist in a closed trial and the Government has preserved its classified information from public disclosure. If, as here, the accused is convicted, and the exclusion of the public from trial was improper, and of a magnitude justifying reversal, the accused will get a new trial. And finally, if the accused is convicted and the exclusion of the public was proper, then neither he nor the Government has been deprived of a right. The intention of the majority to preserve the right to a public trial is laudable, but I just cannot agree with the course they have chosen to fulfill that purpose.

A third issue on which we granted review was whether the findings of guilty of the offense of willfully attempting to communicate information relating to national defense, in violation of 18 U.S.C. § 793(d), (Charge I and its specification), must be reversed because the statute "is unconstitutional as applied in this case." The argument in support of the assignment of error is a mosaic of alleged instructional deficiencies. Some of the purported deficiencies relate to matters that are wholly evidentiary in nature, with no discernible connection to a constitutionally

impermissible application of the statute. For example, it is contended that the trial judge should have directed the court members to disregard at least part of the testimony of a Government witness because he was not properly qualified as an expert "on why...[the information which was the subject matter of the charge] was classified or how a person might have reason to believe that its release could injure the national defense" [emphasis in original], and that he should have rejected, or charged the court members to disregard, certain testimony as "irrelevant" to one of the essential elements of the offense. Other aspects of the argument, which also seem to me not to raise any question as to the constitutionality of §798, attack the correctness of various parts of the instructions that were given. In this category is the contention that the trial judge erred in instructing the court members, if they determined the information in issue bore a security classification, they could consider that fact "with all the other evidence in determining whether" the information "relates to the national defense." I am satisfied that none of the asserted instructional deficiencies, either alone or in combination, demonstrate a constitutional informity in the application of §798 or justify reversal of the findings of guilty of Charge I and its specification.

I would affirm the decision of the Court of Military Review.

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[3]As to the correctness of this instruction, I agree with appellate Government counsel that classification of information alleged to relate to national defense by the Government is a proper factor for the court members' consideration in a case of this kind. Such classification is evidence that the Government

has acted to protect the information from public domain. See United States v. Drummond, 354 F.2d 132, 152 (2d Cir. 1965), cert. denied, 384 U.S. 1013 (1966); United States v. Soblen, 391 F.2d 236 (2d Cir. 1962), cert. denied, 370 U.S. 944 (1962); United States v. Heine, 151 F.2d 813 (2d Cir. 1945). Further, I discern no reasonable risk that the instruction could have misled the court members to conclude "that proof of classification was sufficient to prove relation to the national defense."

APPENDIX II—GOVERNMENT DOCUMENTS

Eleven Questions Posed by the Justice Department in Unauthorized Disclosure Investigations

1. Date and identity of the article or release disclosing the classified information.

2. Specific statements which are classified and whether the data was properly classified.

3. Whether the classified data disclosed is accurate.

4. Whether the data came from a specific document and, if so, the origin of the document and the name of the individual responsible for the security of the classified data disclosed.

5. The extent of official dissemination of the data.

6. Whether the data has been the subject of prior official releases.

7. Whether prior clearance for publication or release of the information was sought from proper authorities

8. Whether the material or portions thereof or enough background data has been published officially or in the press to make an educated speculation on the matter possible

9. Whether the data can be declassified for the purpose of prosecution and, if so, the name of the person competent to testify concerning the classification.

10. Whether declassification had been decided upon prior to the publication or release of the data.

11. What effect the disclosure of the classified data could have on the national defense.

PART B

Washington D.C. 20505

28 JAN 1978

Honorable Griffin B. Bell
Attorney General
Department of Justice
Washington, D. C. 20530

Dear Griffin:

Thank you for your letter of 9 January, forwarding a proposed CIA/DOJ Memorandum of Understanding intended to implement 28 U.S.C. §535.

I agree that the memorandum accurately reflects the understandings that have been reached by our staffs, and I would propose only the two following modest amendments:

(a) The provision governing the obligations of senior intelligence officials to report possible crimes to the Attorney General appears, slightly reworded, as section 1-706 rather than section 3(g)(8) of Executive Order 12036, the successor to Executive Order 11905. Footnote 1 of the memorandum should be revised accordingly.

(b) The first sentence in paragraph 4 of the memorandum would less awkwardly express the same meaning if it were rewritten to state:

> A basis for referral shall be deemed to exist and the matter shall be referred to the Department of Justice unless the preliminary inquiry establishes in a reasonable time that there is no reasonable basis for belief that a crime was committed....

With these minor changes the Memorandum of Understanding is acceptable, and I believe as you do that its adoption will be a real step forward. The two changes are reflected in the enclosed draft, which we will regard as final unless you have any further comments or objections.

Yours sincerely,

/s/ Stansfield Turner
STANSFIELD TURNER

MEMORANDUM OF UNDERSTANDING

Procedures for Reporting Violations of Federal Law
as Required by 28 U.S.C. §535

1. Taking cognizance of the statutory responsibility of the Director of Central Intelligence to protect intelligence sources and methods from unauthorized disclosure and taking note of the security problems of the CIA, I hereby establish the following procedures by which CIA shall report violations of Federal law as required by 28 U.S.C. §535. This Memorandum of Understanding is issued pursuant to authority conferred by 28 U.S.C. §535(b)(2) and supersedes any prior agreements or guidelines. 1/

2. When information or allegations are received by or complaints made to the CIA that its officers or employees 2/ may have violated Title 18 of the United States Code, CIA shall conduct a preliminary inquiry. Such an inquiry, normally conducted by the Office of the Inspector General or Office of Security and reviewed by the Office of General Counsel, will determine if there is any basis for referral of the matter to the Department of Justice. The inquiry will not, however, seek to establish all necessary elements of the possible violation as a precondition to reporting the matter to the Department of Justice expeditiously.

1/ This Memorandum defines only the reporting requirement under 28 U.S.C. §535 for violations committed by "CIA officers and employees" as defined in note 2, infra. Reporting requirements for violations committed by other Government officers and employees will be governed by section 1-706 of the revised version of E. O. 11905 which will require the Director, along with other senior officials of the Intelligence Community, to:

> Report to the Attorney General evidence of possible violations of federal criminal law by an employee of their department or agency, and report to the Attorney General evidence of possible violations by any other person of those federal criminal laws specified in guidelines adopted by the Attorney General.

2/ For the purpose of the reporting requirement set forth in this Memorandum, the phrase "CIA officers and employees" includes a former officer or employee (a) when the suspected offense was committed during his Federal employment and (b) when the suspected offense, although committed thereafter, is connected with his prior activity in the Federal service (see, for example, 18 U.S.C. §207).

3. If, as a result of this preliminary inquiry there is a basis for referral to the Department of Justice and CIA desires to conduct a more extensive investigation for administrative or security reasons, it will so inform the Department of Justice to ensure that such investigations do not jeopardize the Government's criminal investigation or prosecution.

4. A basis for referral shall be deemed to exist and the matter shall be referred to the Department of Justice unless the preliminary inquiry establishes in a reasonable time that there is no reasonable basis for belief that a crime was committed. Referrals shall be made in the following manner:

(a) In cases where no public disclosure of classified information or intelligence sources and methods would result from further investigation or prosecution, and the security of ongoing intelligence operations would not be jeopardized thereby, the CIA will report the matter to the cognizant office of the Federal Bureau of Investigation, other appropriate Federal investigative agency, or to the appropriate United States Attorney or his designee for an investigative or prosecutive determination. [3/] CIA officers or employees who are the subjects of such referrals to any component of the Department of Justice may be identified as John Doe #____ in any written document associated with the initial referral. The true identities of such persons, however, will be made available when the Department determines such to be essential to any subsequent investigation or prosecution of the matter so referred.

A record of such referrals and the action subsequently taken to dispose of the matter shall be maintained by the CIA, and on a quarterly basis, a summary memorandum indicating the type of crime, place and date of referral and ultimate disposition will be forwarded to the Assistant Attorney General, Criminal Division, or his designee. Referrals made by CIA covert facilities to United States Attorneys, the FBI or other Federal investigative agencies will also be included in the quarterly report with due regard for protection of the security of said installations.

(b) In cases where preliminary investigation has failed to develop an identifiable suspect and the CIA believes that investigation or prosecution would result in public disclosure of classified information or intelligence sources or methods or would

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[3/] This reporting requirement applies to all matters except cases involving bribery or conflict of interest which shall be directly referred to the Criminal Division.

seriously jeopardize the security of ongoing intelligence operations, the Criminal Division will be so informed in writing, following which a determination will be made as to the proper course of action to be pursued.

(c) In cases where preliminary investigation has determined that there is a basis for referral of a matter involving an identifiable CIA officer or employee to the Department of Justice, the future investigation or prosecution of which would result in the public disclosure of classified information or intelligence sources or methods or would seriously jeopardize the security of ongoing intelligence operations, a letter explaining the facts of the matter in detail will be forwarded to the Criminal Division. A separate classified memorandum explaining the security or operational problems which would result if the information needed to prove the elements of the offense were made public or which could result from a defense request for discovery under Rule 16 of the Federal Rules of Criminal Procedure shall also be forwarded to the Criminal Division, if requested. Such officers and employees may be designated as John Doe #____ under the conditions and limitations set forth in paragraph 4(a), above.

In reporting such matters, the CIA shall inform the Criminal Division of the steps it has taken to prevent a recurrence of similar offenses, if such action is feasible, as well as those administrative sanctions which may be contemplated with respect to the prospective criminal defendant.

The Criminal Division, after any necessary consultation with CIA, will make a prosecutive determination, informing the CIA in writing of such determination.

5. The CIA may take appropriate administrative, disciplinary, or other adverse action at any time against any officer or employee whose activities are reported pursuant to this Memorandum of Understanding, but shall coordinate such actions with the appropriate investigative or prosecutive officials to avoid prejudicing the criminal investigation or prosecution.

6. While requiring reports to the Criminal Division to be in writing, the nature, scope and format of such reports may vary on a case-by-case basis dependent upon an assessment by the CIA and Criminal Division of the nature of the matters which are being reported. Matters not readily resolved by reference to the foregoing guidelines will be handled on a case-by-case basis, as the need may arise, consistent with the provisions of 28 U.S.C. §535

7. Although this Memorandum of Understanding establishes reporting procedures with respect to the requirements of 28 U.S.C. §535 with reference only to Title 18 violations, CIA will utilize these same procedures to report any violations of law required by Executive Order to be reported to the Attorney General.

8. The Director of Central Intelligence, whenever he believes security or other circumstances warrant, may make a direct referral to the Attorney General of any matters required to be reported pursuant to this Memorandum of Understanding, in lieu of following the reporting procedures set forth herein.

Office of the Attorney General
Washington, D. C. 20530

JAN 9 1979

Honorable Stansfield Turner
Director of Central Intelligence
Washington, D. C. 20505

Dear Admiral Turner:

It is with pleasure that I forward for your review a proposed Memorandum of Understanding between the CIA and the Department of Justice. This memorandum is intended to implement the provisions of Title 28, United States Code, Section 535, and sets forth more detailed reporting procedures than those contained in the Attorney General's "Memorandum to the Heads of All Departments and Agencies in the Executive Branch of Government" dated May 4, 1976. The Memorandum of Understanding is the product of extensive discussion and exhaustive preparation between the major operating components and the Office of General Counsel of your Agency as well as attorneys of the Criminal Division of this Department.

It is my view that the Memorandum of Understanding, as drafted, preserves the role of this Department to fairly and effectively enforce the Federal criminal laws of this country while at the same time recognizes your responsibility as the Director of Central Intelligence to protect intelligence sources and methods from unauthorized disclosure.

25-995 O - 78 - 15

I believe that you will find the Memorandum of Understanding to be an excellent vehicle by which each of us can discharge our respective responsibilities. I look forward to receiving any comments you may have and trust that your review of this matter will result in its adoption by the Central Intelligence Agency.

Sincerely,

Griffin B. Bell
Attorney General

Enclosure

MEMORANDUM OF UNDERSTANDING

Procedures for Reporting Violations of Federal Law as Required by 28 U.S.C. § 535

1. Taking cognizance of the statutory responsibility of the Director of Central Intelligence to protect intelligence sources and methods from unauthorized disclosure and taking note of the security problems of the CIA, I hereby establish the following procedures by which CIA shall report violations of Federal law as required by 28 U.S.C. § 535. This Memorandum of Understanding is issued pursuant to authority conferred by 28 U.S.C. § 535(b)(2) and supersedes any prior agreements or guidelines. 1/

2. When information or allegations are received by or complaints made to the CIA that its officers or employees 2/ may have violated Title 18 of the United

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1/ This Memorandum defines only the reporting requirement under 28 U.S.C. § 535 for violations committed by "CIA officers and employees" as defined in note 2, infra. Reporting requirements for violations committed by other Government officers and employees will be governed by section 3(g)(8) of the revised version of E.O. 11905, which will require the Director to:

> Report to the Attorney General evidence of possible violations of federal criminal law by any employee of the senior official's department or agency; and report to the Attorney General evidence of possible violations by any other person of those federal criminal laws specified in guidelines adopted by the Attorney General.

2/ For the purpose of the reporting requirement set forth in this memorandum, the phrase "CIA officers and employees" includes a former officer or employee (a) when the suspected offense was committed during his Federal employment and (b) when the suspected offense, although committed thereafter, is connected with his prior activity in the Federal service (see, for example, 18 U.S.C. § 207).

States Code, CIA shall conduct a preliminary inquiry. Such an inquiry, normally conducted by the Office of the Inspector General or Office of Security and reviewed by the Office of General Counsel, will determine if there is any basis for referral of the matter to the Department of Justice. The inquiry will not, however, seek to establish all necessary elements of the possible violation as a precondition to reporting the matter to the Department of Justice expeditiously.

3. If, as a result of this preliminary inquiry there is a basis for referral to the Department of Justice and CIA desires to conduct a more extensive investigation for administrative or security reasons, it will so inform the Department of Justice to ensure that such investigations do not jeopardize the Government's criminal investigation or prosecution.

4. A basis for referral shall be deemed to exist and the matter shall be referred to the Department of Justice whenever the preliminary inquiry fails to establish in a reasonable time that there is (no) reasonable basis for belief that a crime was committed. Referrals shall be made in the following manner:

(a) In cases where no public disclosure of classified information or intelligence sources and methods would result from further investigation or prosecution, and the security of ongoing intelligence operations would not be jeopardized thereby, the CIA will report the matter to the cognizant office of the Federal Bureau of Investigation, other appropriate Federal investigative agency, or to the appropriate United States Attorney or his designee for an investigative or prosecutive determination. 3/ CIA officers or employees who are the subjects of such referrals to any component of the Department of Justice may be identified as John Doe # ____ in any written document associated with the initial referral. The true identities of such persons, however, will

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3/ This reporting requirement applies to all matters except cases involving bribery or conflict of interest which shall be directly referred to the Criminal Division.

be made available when the Department determines such to be essential to any subsequent investigation or prosecution of the matter so referred.

A record of such referrals and the action subsequently taken to dispose of the matter shall be maintained by the CIA, and on a quarterly basis, a summary memorandum indicating the type of crime, place and date of referral and ultimate disposition will be forwarded to the Assistant Attorney General, Criminal Division, or his designee. Referrals made by CIA covert facilities to United States Attorneys, the FBI or other Federal investigative agencies will also be included in the quarterly report with due regard for protection of the security of said installations.

(b) In cases where preliminary investigation has failed to develop an identifiable suspect and the CIA believes that investigation or prosecution would result in public disclosure of classified information or intelligence sources or methods or would seriously jeopardize the security of ongoing intelligence operations, the Criminal Division will be so informed in writing, following which a determination will be made as to the proper course of action to be pursued.

(c) In cases where preliminary investigation has determined that there is a basis for referral of a matter involving an identifiable CIA officer or employee to the Department of Justice, the future investigation or prosecution of which would result in the public disclosure of classified information or intelligence sources or methods or would seriously jeopardize the security of ongoing intelligence operations, a letter explaining the facts of the matter in detail will be forwarded to the Criminal Division. A separate classified memorandum explaining the security or operational problems which would result if the information needed to prove the elements of the offense were made public or which could result from a defense request for discovery under Rule 16 of the Federal Rules of Criminal Procedure shall also be forwarded to the Criminal Division, if requested. Such officers and employees may be designated as John Doe #____ under the conditions and limitations set forth in paragraph 4(a), above.

In reporting such matters, the CIA shall inform the Criminal Division of the steps it has taken to prevent a recurrence of similar offenses, if such action is feasible, as well as those administrative sanctions which may be contemplated with respect to the prospective criminal defendant.

The Criminal Division, after any necessary consultation with CIA, will make a prosecutive determination, informing the CIA in writing of such determination.

5. The CIA may take appropriate administrative, disciplinary, or other adverse action at any time against any officer or employee whose activities are reported pursuant to this Memorandum of Understanding, but shall coordinate such actions with the appropriate investigative or prosecutive officials to avoid prejudicing the criminal investigation or prosecution.

6. While requiring reports to the Criminal Division to be in writing, the nature, scope and format of such reports may vary on a case-by-case basis dependent upon an assessment by the CIA and Criminal Division of the nature of the matters which are being reported. Matters not readily resolved by reference to the foregoing guidelines will be handled on a case-by-case basis, as the need may arise, consistent with the provisions of 28 U.S.C. § 535.

7. Although this Memorandum of Understanding establishes reporting procedures with respect to the requirements of 28 U.S.C. § 535 with reference only to Title 18 violations, CIA will utilize these same procedures to report any violations of law required by Executive Order to be reported to the Attorney General.

8. The Director of Central Intelligence, whenever he believes security or other circumstances warrant, may make a direct referral to the Attorney General of any matters required to be reported pursuant to this Memorandum of Understanding, in lieu of following the reporting procedures set forth herein.

PART C

PROSECUTIONS FOR VIOLATIONS OF ESPIONAGE STATUTES

Since 1951, the Government has initiated numerous prosecutions under the Espionage statutes (Title 18, United States Code, Sections 791–798), including the following cases:

United States v. *Julius Rosenberg, Ethel Rosenberg, David Greenglass, Morton Sobell and Anatoli Yakovlev* (Southern District of New York). Indictment was returned on January 31, 1951. Julius and Ethel Rosenberg and Morton Sobell were convicted on April 5, 1951. The Rosenbergs were sentenced to death and have been executed. Sobell was sentenced to 30 years imprisonment. Yakovlev, an official of the USSR, departed the United States prior to the return of the indictment. Greenglass pleaded guilty and was sentenced to 15 years imprisonment.

United States v. *Otto Verber and Kurt L. Ponger* (District of Columbia). Indictment was returned on January 13, 1953. Verber and Ponger pleaded guilty in June 1953. Verber was sentenced to ten years and Ponger 15 years imprisonment.

United States v. *Jack Soble, Myra Soble and Jacob Albam* (Southern District of New York). Indictment was returned on February 4, 1957. Jack and Myra Soble pleaded guilty on April 10, 1957. Albam pleaded guilty on April 26, 1957. Soble was sentenced to seven years imprisonment on October 8, 1957. On the same date, the sentence of Myra Soble was reduced from five and one-half years to four years and that of Jacob Albam from five and one-half years to five years.

United States v. *Joseph Sidney Petersen* (Eastern District of Virginia). Indictment was returned on October 20, 1954. Defendant pleaded guilty on December 22, 1954, and was sentenced to seven years imprisonment on January 4, 1955.

United States v. *George and Jane Zlatovski* (Southern District of New York). Indictment was returned on June 8, 1957. The Zlatovskis were residing in Paris, France, at the time of the indictment and have never been apprehended.

United States v. *Rudolf Ivanovich Abel* (Eastern District of New York). Indictment was returned August 7, 1957. Defendant was convicted on October 25, 1957, and sentenced to 30 years imprisonment. The Supreme Court affirmed the conviction on March 28, 1960. While serving the 30-year sentence, Abel was released for return to Soviet Union in simultaneous exchange for American Gary Francis Powers.

United States v. *Alfred K. and Martha Dodd Stern* (Southern District of New York). Indictment was returned on September 9, 1957. Prior to the return of the indictment the Sterns departed from Mexico City, where they had been residing, and went behind the Iron Curtain. They are now fugitives.

United States v. *Igor Y. Melekh and Willie Hirsch* (Northern District of Illinois). Indictment was returned on October 27, 1960, charging the defendants in three counts with a conspiracy to violate Section 793(a)(b)(c) and Section 951 of Title 18, U.S. Code. Bail was set at $50,000 for each. On motion by the Government, the court on March 24, 1961, altered the bond for Igor Melekh, a United Nations employee, to permit him to leave the United States on April 8, 1961, and upon further motion by the Government, the court dismissed the indictment on April 11, 1961 as to Melekh and Hirsch.

United States v. *Robert Soblen* (Southern District of New York). On November 29, 1960, Dr. Soblen was indicted in New York on a conspiracy to commit espionage in violation of Sections 793 and 794, Title 18, U.S. Code. On arraignment, bail was set at $75,000, but later reduced to $10,000 pending trial due to his suffering from leukemia. On July 13, 1961 Soblen was convicted for violation of the espionage statutes and sentenced to life imprisonment on August 7, 1961. The defendant's motion for a new trial based on "newly discovered evidence" was denied on November 3, 1961. Soblen was the bother of Jack Soble, who along with his wife, Myra, and Jacob Albam were convicted for their espionage activities on behalf of the Soviet Union in 1958. On March 13, 1962, the Circuit Court of Appeals

affirmed the conviction. On June 25, 1962, the Supreme Court denied petition for writ of certiorari. On the same day, Soblen unlawfully fled the United States and subsequently committed suicide in England.

United States v. *Arthur Rogers Roddey* (Eastern District of Virginia). Indictment charging Roddey with violations of the espionage statutes was returned on January 10, 1961. Roddey entered a plea of guilty on February 17, 1961, and was sentenced to eight years imprisonment. Placed on parole on March 20, 1964 by order of Board of Parole.

United States v. *Irvin C. Scarbeck* (District of Columbia). Scarbeck, former Second Secretary of the American Embassy, Warsaw, Poland, was arrested upon his return to the United States on June 13, 1961, and charged with the unauthorized transmittal of classified information to an agent of a foreign government in violation of Section 783(b), Title 50 of U.S. Code. He was subsequently indicted by a grand jury in the District of Columbia and held in custody in lieu of $50,000 bail. On July 20, 1961, a grand jury returning a superseding indictment in four counts charging him with furnishing classified information from certain State Department foreign service dispatches to a representative of a foreign government and with unlawfully removing a document from the United States Embassy at Warsaw. Scarbeck was convicted on three counts and sentenced to 30 years imprisonment on November 9, 1961. On appeal the Court of Appeals affirmed the conviction but recommended that the District Court consider a reduction of sentence. The Supreme Court denied Scarbeck's motion for writ of certiorari on June 17, 1963. On November 15, 1963, the District Court reduced the sentence to 10 years in consideration of the recommendation of the Court of Appeals based on the "extent of Scarbeck's cooperation with the authorities during the investigation."

United States v. *George William Sawyer* and *Garlan E. Markham, Jr.* (Eastern District of Pennsylvania). On November 1961, a nine-count indictment was returned against Sawyer, a former supervisor, Naval Air Technical Services Facility, Department of the Navy, Philadelphia, Pennsylvania, and Markham, a manufacturer's representative, charging violation of the espionage statute and other statutes. In pre-trial motions, co-defendant Markham moved to suppress certain documents and materials which had been seized from his home on the ground that there had been an unlawful search. The court granted this motion and the Government proceeded at trial solely against co-defendant Sawyer. The trial of this matter commenced on April 18, 1963, and lasted six days. Sawyer was tried on charges of receiving a bribe; unlawful sale of government property; and the unlawful transmission of information relating to the national defense. On April 26, 1963, the jury returned a verdict of not guilty on all three counts.

United States v. *Harry Carl Schoeneman* and *Garlan E. Markham, Jr.* (District of Columbia). On December 15, 1961, a five-count indictment was returned against Schoeneman, Department of Navy civilian employee (Bureau of Weapons) and Markham, manufacturer's representative, for violations of the espionage statute and other statutes. Trial commenced April 1, 1962, and on May 18, 1962, the jury returned a verdict of guilty on the first four counts and not guilty on the fifth count. On June 1, 1962, motions for judgment of acquittal or a new trial were argued on behalf of both defendants and denied by the court. The defendants were sentenced to five to fifteen months on each count to run concurrently. The defendants appealed and the Court of Appeals for the District of Columbia on April 4, 1963, reversed the lower court decision, holding that the defendant's motion to suppress evidence obtained from a search of Markham's home should have been granted. The Court of Appeals held that there was insufficient showing of probable cause on the data the search warrant was issued to justify the issuance of a search warrant.

United States v. *Nelson C. Drummond* (Southern District of New York). On September 28, 1962, Drummond, a yeoman first class in the United States Navy stationed at the United States Naval Base, Newport, Rhode Island, was arrested by Special Agents of the FBI at a meeting with two Soviet

Nationals in Larchmont, New York. At the time of his arrest, Drummond had in his possession a number of classified documents which are the property of the United States Navy. The two Soviets were subsequently identified as a Second and Third Secretary of the Soviet Mission to the United Nations. Shortly after his arrest, Drummond was brought before a United States Commissioner in New York City and bail was set at $10,000. On October 5, 1962, a Federal Grand Jury in the Southern District of New York returned a two-count indictment against Drummond charging him in Count One with having conspired with four named Soviet Nationals, all former members of the Soviet Mission to the United Nations, to deliver information relating to the national defense of the United States to the Union of Soviet Socialist Republics, in violation of Title 18, U.S. Code, Section 794(c). Count Two charged that Drummond had attempted to deliver certain classified documents relating to the national defense of the United States to two named Soviet Nationals on or about September 28, 1962, and entered a plea of not guilty. The indictment in this case named Drummond as the defendant and the two members of the Soviet Union's delegation to the United Nations, Evgeni M. Prokhorov and Ivan Y. Vyrodov, together with two former UN employees of the Soviet Union who had previously departed this country, as co-conspirators. Although Prokhorov and Vyrodov would not be prosecuted because of their diplomatic immunity, the United States Government requested that they be recalled as *persona non grata*. They subsequently departed this country for the Soviet Union. After pre-trial motions were argued, the case went to trial in May 1963. The trial resulted in a hung jury and the presiding judge dismissed the jury and set a new trial date, June 1963. At the second trial, which began on July 8, 1963, the jury found Drummond guilty on Count One. On August 15, 1963, Judge Thomas F. Murphy sentenced Drummond to life imprisonment. The defendant appealed his conviction and on December 1965, the Court of Appeals, Second Circuit, sat en banc and by a vote of 5 to 3 affirmed Drummond's conviction.

United States v. *Ivan Dmitrievich Egorov, Aleksandra Ivanovna Egorova, Robert K. Baltch and Joy Ann Baltch* (Eastern District of New York). On July 15, 1963, a Federal grand jury in Brooklyn, New York, returned a two-count indictment against Egorov, his wife, and Robert K. Baltch and his wife, charging them with conspiring to transmit information about rocket launching sites, atomic weapons in shipments, and other aspects of national defense, to the Soviet Union, in violation of Title 18, U.S. Code, Section 794 (c). Egorov, who is a Soviet national, was employed by the United Nations Secretariat. Named as co-conspirators but not as defendants in both counts were Petr Egorovich Maslennikov and Aleksei Ivanovich Galkin, who have departed the country. Maslennikov, who was First Secretary of the Russian Mission to the United Nations, and Galkin, who was First Secretary of the Byelorussian Mission to the United Nations, could not be prosecuted due to their diplomatic immunity. On October 7, 1963, Judge Rayfiel denied Egorov's motion on a claim of diplomatic immunity. Prior to trial, Egorov and his wife were simultaneously exchanged for Americans, a Jesuit priest and a student, who were being held by the Soviets in the USSR. A superseding indictment was returned by the grand jury at Brooklyn, New York, on December 17, 1963, against Robert Sokolov (also known as Robert Keistutis Baltch) and Joy Ann Baltch, charging the two defendants, as in the earlier indictment, with a conspiracy to violate Section 794(a) and Section 951 of Title 18, U.S. Code. The new indictment named the Egorovs as well as Soviet officials Petr E. Maslennikov and Aleksei I. Galkin as co-conspirators but not as co-defendants. On October 2, 1964, the indictment was dismissed at the request of the Attorney General whose action was prompted by overriding considerations of national security. The Sokolovs departed the United States on October 15, 1964.

United States v. *John William Butenko and Igor A. Ivanov* (District of New Jersey). On October 29, 1963, John William Butenko, an American employed as control administrator for the International Electric Corporation of Paramus, New Jersey, and Igor A. Ivanov, a Soviet National employed by AMTORG, a Soviet trade agency in New York City, were arrested and

charged in a complaint with a conspiracy to violate the espionage statutes (Section 794(c) of Title 18, U.S. Code) by delivering to a foreign government information relating to the national defense of the United States. In connection with the arrests of Butenko and Ivanov, the United States demanded that three members of the Soviet Mission to the United Nations, Gleb A. Pavlov, Yuri A. Romashin and Vladimir I. Olenev, be expelled from the United States territory on grounds that they violated their diplomatic immunity by helping Ivanov and Butenko in the espionage conspiracy. The three Soviet officials have departed this country. On November 1963, a Federal grand jury in Newark, New Jersey, returned a three-count indictment charging Butenko and Ivanov with a conspiracy to violate Section 794 of Title 18, U.S. Code (espionage), and further charged Butenko with a violation of Section 951 of Title 18, U.S. Code (failure to notify Secretary of State as an agent of foreign government). The three members of the Soviet Mission to the United Nations implicated in the case were named as co-conspirators. Trial of the case of *U.S.* v. *Butenko* and *Ivanov* (District of N.J.) began on October 9, 1964, and on December 2, 1964, the jury returned a verdict of guilty on all counts. On December 18, 1964, Trial Judge Augelli sentenced Butenko to 30 years on Count I; 5 years on Count II; and 5 years on Count III, sentence to run concurrently. Ivanov was sentenced to 20 years on Count I and 5 years on Count II, sentence to run concurrently. The Court of Appeals on October 6, 1967, upheld the conviction of Butenko and Ivanov.

When this case was on appeal before the Supreme Court, the Solicitor General advised the Court that conversations of the defendants had been overheard on electronic surveillance conducted by the government. On March 10, 1969, the Supreme Court vacated the judgment of conviction and remanded the case to the District Court for an evidentiary hearing on the question of electronic surveillance.

On remand, the District Court found that the case against Igor Ivanov was not tainted by unlawful electronic surveillance and resentenced Ivanov to twenty years in prison. The Court of Appeals affirmed and on October 15, 1974, the Supreme Court denied Ivanov's Petition for a Writ of Certiorari. In December of 1974, the Court, acting on motion by the Government to reduce Ivanov's sentence, sentenced Ivanov to the time already served prior to trial, 53 days. The grounds for the Government's motion was the opinion of the Department of State that further incarceration would not serve the national interest and could adversely affect our relations with the Soviet Union. During the period between 1969 to 1973, Butenko by his actions and inactions never pressed his right to a hearing and frustrated every effort to afford him an appropriate hearing. During this time, Butenko remained in custody because he could not post bond in the amount of $100,000. Motions for the reduction of bail were pressed to the Supreme Court on several occasions but were denied.

Finally in December of 1973, Butenko filed new motions for disclosure and a hearing on electronic surveillance. In April of 1974, the Parole Board granted Butenko parole to become effective in May of 1974. On March 5th, Judge Augelli entered an order setting a date for the taint hearing in May.

On the eve of his hearing date, Butenko, through his attorney, indicated that he did not desire to pursue the hearing, if the Court would take account of his time served when it imposed a new sentence.

On May 9, 1974, Judge Augelli entered a new judgment of conviction and a new sentence against John W. Butenko. When Judge Augelli imposed the new sentence, he noted the fact that John Butenko has been in the custody of the Attorney General since the date of his arrest in this case on October 29, 1963—approximately 10 years and 6 months. Butenko was sentenced to a term of 12 years imprisonment; however, execution of the sentence was suspended and Butenko was placed on probation for one year and eight months.

PROSECUTION FOR VIOLATION OF THE ESPIONAGE PROVISIONS OF THE ATOMIC ENERGY ACT

The first prosecution under the espionage provisions of the Atomic Energy Act (Title 42, U.S. Code, Section 2274(a)), was recently concluded:

United States v. *George John Gessner* (District of Kansas). On March 30, 1962, a six-count indictment was returned by a grand jury in Kansas City, Kansas, charging the defendant, in five counts, with a violation of Title 42, U.S. Code, Section 2274(a), and one count with a violation of Title 50, U.S. Code, Section 783(b). In the first five counts, Gessner was charged with communicating restricted data information concerning the construction and firing system of the Mark VII nuclear weapon and the design and operation of the 280 mm and 8 inch gun type nuclear weapon to agents of the Union of Soviet Socialist Republics, and in the Sixth Count, with communicating classified information relating to the United States Nuclear Arsenal to persons the defendant had reason to know were representatives of the Union of Soviet Socialist Republics. The trial was delayed due to a series of competency hearings held pursuant to Title 18, U.S. Code, Section 4244. At the final hearing on April 11, 1964, Gessner was found competent to stand trial and the trial began on May 26, 1964. At the conclusion of the trial, the Sixth Count was withdrawn at the request of the Government and the Court submitted the first five counts to the jury. On June 9, 1964, the defendant was found guilty on each of the five counts with a recommendation by the jury of life imprisonment. Gessner appealed the conviction and on appeal, the United States Court of Appeals, Tenth Circuit on December 12, 1965 reversed the conviction and ordered a new trial on the grounds that Gessner's confession was involuntary as a matter of law. The Government, after careful study, concluded that it would not be successful in attempting to have this decision reviewed by the Supreme Court. The available evidence was reviewed to determine whether it was feasible for the Government to retry the case. It was concluded that absent the defendant's confession, the evidence was insufficient to retry the indictment, and on March 8, 1966, upon motion of the Government, the indictment was dismissed.

United States v. *Robert Glenn Thompson* (Eastern District of New York). On January 7, 1965, a Federal grand jury in Brooklyn, New York, returned a three-count indictment charging Robert Glenn Thompson with conspiring to violate Title 18, U.S. Code, Section 794, by obtaining information for the Soviet Union of U.S. military installations, missile sites, code books and intelligence and counter-intelligence activities, including the identity of American agents. The indictment, which all thirteen overt acts, charged Thompson with furnishing military data to Soviet agents from 1957–1963. The indictment also charged Thompson with a conspiracy to violate Title 18, United States Code, Section 951, and with a substantial offense to violate this Code section, for action within the United States as an agent of a foreign government without prior notification to the Secretary of State. The indictment named as co-conspirators but not as defendants, three Soviet Nationals, one by his true identity and two by code numbers. They are Fedor Kudashkin, "John Kurlinsky" and "Steven." Subsequent to the return of the indictment, the Department of State identified "John Kurlinsky" as Boris Karpovich, Information Counselor in the Soviet Embassy in Washington, D.C. Since Karpovich held diplomatic immunity and could not be prosecuted, the Department of State declared him to be *persona non grata* and ordered him to depart the United States. Kudashkin, a Soviet National, was formerly employed by the U.N. Secretariat in New York, now living in the Soviet Union. Thompson was arraigned on January 7, 1965, at which time he entered a plea of not guilty and was released on $15,000 bail. On March 8, 1965, Thompson changed his plea to guilty on Count One of the indictment which charged him with conspiring to commit espionage in violation of 18 U.S.C. 794(a). The date of sentence had been set by the court for May 13, 1965, and on that date he was sentenced to 30 years imprisonment.

United States v. *Robert Lee Johnson and James Allen Mintkenbaugh* (Eastern District of Virginia). On April 6, 1965 a Federal grand jury in Richmond, Virginia, returned a three-count indictment charging Robert Lee Johnson and James Allen Mintkenbaugh with conspiring to violate Title 18, U.S. Code, Section 794, by agreeing to transmit to the Union of Soviet Socialist Re-

publics national defense information relating to military installations, military weapons, missiles, missile sites, codes and ciphers, the intelligence activities of the United States Army and the identities of Government employees, both military and civilian. The indictment, which alleged 23 overt acts, charged them with furnishing military information to Soviet agents from 1953 to 1964. The indictment also charged Johnson and Mintkenbaugh with conspiring to violate Title 18, U.S. Code, Section 793, by agreeing to obtain national defense information for the Union of Soviet Socialist Republics and with a conspiracy to violate Title 18, U.S. Code, Section 951, in that Johnson and Mintkenbaugh agreed to act as agents of a foreign government without notification to the Secretary of State. The indictment named as co-conspirators, but not as defendants, ten Soviet nationals, one by his true identity and nine by code names. The identified Soviet was Vitaly Ourjoumov, who was formerly employed in the Soviet Embassy in Paris, France. Johnson and Mintkenbaugh had been arrested on April 5, 1965, on a complaint charging them with a conspiracy to commit espionage. Both were held under $20,000 bond. They were arraigned in the United States District Court at Alexandria, Virginia, on April 1965. The case was set for trial on September 7, 1965. On June 7, 1965, both defendants withdrew their pleas of not guilty to Counts II and III of the indictment and entered a plea of guilty to each of these counts. At the same time each defendant entered a plea of guilty to a one-count information filed that day by the United States Attorney. Johnson pleaded guilty to an information charging him with transmittal of classified information under 50 U.S. Code 783(b), and Mintkenbaugh pleaded guilty to an information charging him with possessing of property, to wit: a cipher pad, designed and intended for use in violation of United States statutes under 18 U.S.C. 957. On July 30, 1965, Judge Oren Lewis sentenced both Mintkenbaugh and Johnson to the maximum sentence of 25 years.

United States v. *William Henry Whalen* (Eastern District of Virginia). On July 12, 1966, an indictment was returned by a Federal grand jury in the Eastern District of Virginia, charging that from 1959 through the early part of 1963, William H. Whalen, a retired Army Lt. Colonel, conspired to deliver to the Soviet Union classified information relating to the national defense in violation of 18 U.S.C. 794 (espionage). The information involved pertained to our atomic weaponry, missiles, military plans for defense of Europe, estimates of comparative military capabilities, military intelligence reports and analyses, information concerning the retaliation plans by our Strategic Air Command and information pertaining to U.S. troop movements. Two Soviet nationals named in the indictment as co-conspirators, but not as defendants, were Col. Sergei Edemski, Assistant Soviet Military Attache with the Soviet Embassy, and Mikhail A. Shumaev, the First Secretary of the Soviet Embassy. In addition to the first count in the indictment charging espionage, Whalen was charged in the remaining two counts with having conspired to act as an agent of the Soviet Union without prior notification to the Secretary of State in violation of 18 U.S.C. 951 and with a substantive violation of Section 951. The indictment charged Whalen with having received over $5,000 from the Soviets. Whalen was brought before a Commissioner in Alexandria, Virginia after his apprehension by the FBI on July 12, 1966 and was released on $15,000 bond. Whalen was arraigned on August 4, 1966, before Federal District Judge Oren Lewis in Alexandria, Virginia, at which time he entered a plea of not guilty. Edemski, who now holds the rank of major general and is assigned to the Soviet Embassy in London, England, was in the United States from August 17, 1955 to February 5, 1960. Mikhail Shumaev was in the United States from September 24, 1959 to September 5, 1963. On December 16, 1966, Whalen entered a plea of guilty to an information charging a conspiracy to commit espionage (18 U.S.C. 793) and to Count Two of an indictment charging a conspiracy to act as an agent of a foreign government without registering with the Secretary of State (18 U.S.C. 951). After accepting the plea of guilty, Federal District Judge Oren Lewis cancelled Whalen's bond, ordered his immediate commitment, and requested a probation report before sentencing. On March 1, 1967, Judge Lewis sentenced Whalen to the maximum 10 years under 18 U.S.C. 793 and 5 years under 18 U.S.C. 951, said sentences to run consecutively for a total of 15 years imprisonment.

United States v. *Herbert W. Boeckenhaupt* (Eastern District of Virginia). On October 31, 1965, Air Force Staff Sergeant Herbert W. Boeckenhaupt was arrested at March Air Force Base in California by the FBI on an espionage complaint. On December 16, 1966, a Federal grand jury in the Eastern District of Virginia returned a three-count indictment charging Boeckenhaupt with conspiracy to commit espionage (18 U.S.C. 794(c) and 18 U.S.C. 793(g) as well as conspiracy 18 U.S.C. 371) to act as an agent of the Soviet Union without registering with the Secretary of State in violation of 18 U.S.C. 951. The indictment charged that Boeckenhaupt, from June 1965 through October 1966 conspired with Aleksey R. Malinin, Assistant Commercial Counselor of the Soviet Embassy, to transmit to the Soviet Union highly classified information relating to the electronics communications and cryptographic systems and equipment of the Strategic Air Command and classified traffic information going through such equipment, as well as code cards connected therewith. Boeckenhaupt who had enlisted in the Air Force in 1960, was an electronic communications and cryptographic systems repairman with Top Secret Cryptographic clearance. In his assignment he had access to cryptographic material and equipment classified up to and including Top Secret. Malinin, who was named in the indictment as a co-conspirator, but not as a defendant, had diplomatic immunity. Trial commenced on May 22, 1967 and a verdict of guilty was returned by the jury on Counts I and II. Count III had been previously dismissed by the Court *sua spente*. On June 7, 1967, Boeckenhaupt was sentenced to 20 years imprisonment on Count I and 10 years on Count II with the sentences to run consecutively for a total of 30 years. A Notice of Appeal was filed by the defendant on June 8, 1967. His conviction was affirmed on March 1, 1968, by the Fourth Circuit Court of Appeals. On March 11, 1968, the defendant filed a Petition for Rehearing *en banc* in the Fourth Circuit Court of Appeals.

United States v. *Aleksandr Vasilvevich Tikhomirov* (Western District of Washington). On February 7, 1970, a complaint was filed with the U.S. Commissioner in Seattle, Washington, charging Tikhomirov with having conspired with agents and employees of the Union of Soviet Socialist Republics to obtain documents, writings and notes connected with the national defense of the United States with intent and reason to believe that the information would be used to the advantage of the Union of Soviet Socialist Republics. He was arrested that same day by Special Agents of the FBI under a warrant issued pursuant to the aforementioned complaint, in downtown Seattle after he allegedly received materials relating to the national defense of the United States. He was arraigned before the United States Commissioner who set bond at $100,000. On February 11, 1970 the scheduled preliminary hearing was continued to February 19, 1970 and Tikhomirov's bail was reduced to $75,000. This bail was posted and he was released from custody that day. On February 16th, the Commissioner ordered the complaint dismissed on motion of the Government; on the condition that Tikhomirov depart from the United States on or before February 17, 1970. The expulsion of Tikhomirov was done pursuant to the request of the Department of State on the grounds that it would best serve the interests of the United States.

United States v. *Valeriy Ivanovich Markelov* (Eastern District of New York). On February 14, 1972, Markelov was arrested by Special Agents of the Federal Bureau of Investigation, on a complaint charging him with attempting to obtain documents, connected with the national defense, with reason to believe that the documents obtained were to be used to the advantage of a foreign nation. He was arraigned on February 15, 1972, before a United States Magistrate, who set bond at $500,000. The following day the bond was reduced to $100,000. He was released from custody. On February 17, 1972, a federal grand jury in Brooklyn, New York returned a two-count indictment against Markelov, charging that he violated 18 U.S.C. 793(b) in that he obtained information respecting the national defense with reason to believe that the information was to be used to the advantage of the Soviet Union, and that he violated 18 U.S.C. 951, in that from January 1971 to February 14, 1972 he acted within the United States as an agent of the Soviet Union without prior notification to the Secretary of State. On Feb-

ruary 28, 1972, Markelov was arraigned and entered a plea of not guilty to the indictment. He was granted 60 days for filing pre-trial motions. The amount and conditions of his bail were continued as previously set by the United States Magistrate on February 16, 1972.

United States v. *Sarkis O. Paskalian* (Eastern District of New York). On June 27, 1975, Paskalian was charged by complaint with a violation of the Espionage Act, 18 U.S.C. § 794(c) (conspiracy to gather defense information to aid a foreign government). The complaint charged that from 1971 to June 1975, Paskalian conspired with agents of the Soviet Union to violate 18 U.S.C. § 794(a) in that they did conspire to communicate, deliver and transmit to the Soviet Union information relating to the national defense of the United States in violation of 18 U.S.C. § 794(c). On July 15, 1975, a grand jury in the Eastern District of New York returned a four-count indictment charging Paskalian with conspiracy to violate the Espionage Act and related offenses. Specifically, Paskalian was charged in Count One with conspiring to obtain and communicate national defense information to aid a foreign country, 18 U.S.C. 794(c), and in Count Two with conspiring to violate another section of the Espionage Act, 18 U.S.C. 793, and in Counts Three and Four with violating and conspiring to violate 18 U.S.C. 951, failing, as a foreign agent, to notify the Secretary of State. On September 16, 1975, Paskalian entered a plea of guilty to Count One of this indictment, an offense which carries a maximum term of life imprisonment. On October 31, 1975, he was sentenced to a term of 22 years imprisonment.

United States v. *Sahag K. Dedeyan* (District of Maryland). On June 26, 1975, Dedeyan was charged by complaint with a violation of the Espionage Act. This case was related to the espionage case against Sarkis O. Paskalian in the Eastern District of New York. Dedeyan was charged with a violation of 18 U.S.C. § 794(f)(2) for his failure to report, in 1973, the illegal photographing of a document relating to the national defense which had been entrusted to him and over which he had control; namely, a document entitled "Vulnerability Analyses: U.S. Reinforcement of NATO." On September 23, 1975, a grand jury in the District of Maryland returned a one-count indictment charging Dedeyan with a violation of the Espionage Act, 18 U.S.C. 793(f)(2). After a two-week trial, the jury returned a verdict of guilty on July 29, 1976. On October 22, 1976, he was sentenced to a term of three years imprisonment.

United States v. *Edwin G. Moore II* (District of Maryland). On January 18, 1977, a grand jury returned an eight-count indictment charging Edwin G. Moore II with transmitting national defense information to the U.S.S.R., retention of classified information and retention of stolen government property in violation of Title 18, United States Code, Sections 794(a), 793(e) and 641. The case arose when, on the night of December 21, 1976, an employee at a residence maintained by the Soviet Union for its embassy personnel discovered a package on the premises. Fearing it was a bomb, he notified the police, who found that it contained classified documents. The FBI determined that the package contained classified CIA documents and a note requesting that $3,000 be dropped at a time and location specified. The note also offered to sell additional documents and information for $197,000, to be delivered on December 22. The FBI established surveillance at the drop site, and arrested Moore, a former CIA employee, when he picked up the package he believed to contain the requested $3,000. A search warrant was obtained, and a search of his home revealed a large amount of classified information. Trial began in Baltimore on April 11, and concluded May 5 at which time the jury returned a guilty verdict on the first five counts in the indictment (three having previously been dismissed by the Court at the Government's request prior to trial). On December 8, 1977, Moore was sentenced to fifteen years on one count and ten years on each of the other four counts to run concurrently.

United States v. *Ivan Nikonorovich Rogalsky* (District of New Jersey). On January 19, 1977, a grand jury returned a three-count indictment charging Ivan N. Rogalsky with conspiracy to transmit and transmitting national defense information to agents of the U.S.S.R. and the disclosure of classified information to agents of the U.S.S.R. in violation of Title 18, United

States Code, Sections 793(g), 794(c) and 793(b). Yevgeniy Petrovich Karpov, a Second Secretary of the Soviet Mission to the United Nations, was named as an unindicted co-conspirator. On January 7, 1977, the FBI had arrested Rogalsky, a former Russian merchant seaman who claimed he had defected to the United States several years ago. Rogalsky was in possession of classified documents from the RCA Research Center in New Jersey when apprehended. The Center works on highly classified communications satellite and defense projects. An RCA employee, who was approached by Rogalsky, assisted the FBI in providing information leading to Rogalsky's apprehension.

United States v. *Christopher J. Boyce and Andrew D. Lee* (Central District of California). On January 26, 1977, a grand jury at Los Angeles returned a twelve-count indictment charging Christopher J. Boyce and Andrew D. Lee with conspiracy to transmit and transmitting national defense information to agents of the U.S.S.R.; disclosure of classified information; acting as agents of a foreign government; and theft of government property. These charges alleged violations of Title 18, United States Code, Sections 794 (c) and (a); 793 (g), (b), (c) and (e); 798; 951; and 641. Included in the indictment as an unindicted co-conspirator was Boris A. Grishin, a science attache with the Soviet Embassy in Mexico City. The FBI had arrested both men for espionage on a complaint filed on January 16, 1977. Christopher J. Boyce was an employee of TRW, Inc., a CIA contractor in Redondo Beach, California, and he held a top secret security clearance with access to sensitive scientific, technical, and communications data. After the cases were severed, trial of Boyce began on April 11, and on April 28, the jury returned a verdict of guilty on all eight counts of the indictment. Lee's trial began April 27, and on May 14, the jury returned a verdict of guilty on all counts. On July 18, Lee was sentenced to serve a term of 10 years in prison on count one, which charged a violation of 18 U.S.C. 794(c); on count two, which charged a violation of 18 U.S.C. 794(a), he was sentenced to life imprisonment; and on each of the remaining six counts, he was sentenced to serve terms of 5 years. All of the sentences are to be served concurrently. On September 12, 1977, Boyce was sentenced to a term of 40 years imprisonment.

PART D

The Director
Central Intelligence Agency

Washington, D.C. 20505

The Honorable Birch Bayh, Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to Senator Inouye's letter to me (Q#1070) requesting answers to eight questions on the Helms matter and copies of all correspondence between the Attorney General, or any other representative of the Department of Justice, and the Central Intelligence Agency requesting access to or use of documents in the investigation or prosecution of Richard Helms regarding his testimony before Congress.

We have been informed by the Department of Justice that, while the case against Ambassador Helms has been resolved, an investigation of certain ITT officials and other persons is being actively pursued. Many of the documents which were relevant to the Helms investigation are also relevant to the current investigation and, for that reason, the Department is reluctant at this time to provide copies of the DOJ-CIA correspondence on the case.

Below are set forth answers to the questions contained in your letter:

Q. (1) How many "potentially relevant" documents were identified? Did the Department of Justice explain what use it planned to make of these documents? Were Justice Department representatives prepared to use the information in questioning witnesses, in presentation of the documents to the grand jury, or for the actual use at trial? Did they distinguish which documents were to be used for developing the perjury charge, the so-called "ITT-cover-up" charge, or some other charge?

A. The Department of Justice attorneys were given access to Agency information, including classified operational traffic, intelligence reports and internal memoranda relating to operations and events in Chile in order that they might determine which documents fell within the ambit of the CIA-ITT-Chile investigation. From this corpus of documentary information the Department of Justice investigators identified materials which they considered relevant to the investigation. These documents, including 55,102 pages of material which were numerically stamped, were retained in special safes within the CIA, Office of General Counsel. The materials so identified filled four, four-drawer safes.

Drawing from this total collection the Department of Justice investigators then asked that some 758 documents, attachments and daily calendars and logs be reviewed to determine whether and to what extent they could be declassified for use as evidence in the course of the investigation.

The Agency was not informed which documents were to be used for developing a perjury charge, the so-called "ITT-cover-up" charge or some other charge. Nor was it informed whether the documents were to be used solely for presentation to the grand jury or also were to be used in questioning witnesses and for actual use at trial. To the best of our knowledge, however, the Department was interested in using these documents for all of these purposes, but at a minimum they wanted the latitude to use these documents as required.

Q. (2) Did the Department of Justice explain what protective action they intended to take with respect to these documents? Did they express any willingness to sanitize the documents to use in camera procedures; to refrain from using some documents in the grand jury or in public trials and limit their use only to interviews? Or, did they simply request bulk declassification of all of the documents which they reviewed?

A. The Department of Justice requested total declassification of the documents required so that they could be freely used for investigative and prosecutive purposes. Documents were declassified to the extent possible and we understand that the declassified as well as the sanitized documents were used in the grand jury proceedings. No special protective steps were taken with respect to these documents. As to other documents which might have become involved in the proceedings, for example, as a result of defense discovery requests, the Department of Justice represented that it would take such actions to protect classified material as might be possible under the Federal Rules of Criminal Procedure and be permitted by the trial judge.

Q. (3) Did CIA officials discuss this matter with Mr. Helms or any representatives of Mr. Helms during the period that he was under investigation? Or, were all discussions pertaining to these documents in this matter handled by the Department of Justice and all requests or possible requests for documents discussed between representatives of the Department of Justice and the CIA?

A. To the best of our knowledge there were only the following interchanges with Ambassador Helms or his representatives on the ITT-Chile Matter:

a. On 10 November 1975 Ambassador Helms asked about the status of the Justice investigation and whether indictments were in the offing. The Agency explained that same day, that Justice had used a grand jury in the District of Columbia to secure subpoenas of corporate records. On 11 November 1975, Ambassador Helms thanked the Agency for this information and asked to be advised of further developments.

b. On 7 May 1976, the Agency alerted Ambassador Helms to a draft Senate Select Committee addendum to a November 1976 report entitled, "Alleged Assassination Plots Involving Foreign Leaders," sections of which dealt with covert actions in Chile in 1970 and quoted former President Nixon's statements concerning the extent of his knowledge and approval of CIA actions in Chile. On 9 May 1976, Ambassador Helms thanked the Agency for this information and, noting that he did not know whether the statements were factually correct, suggested that a former senior Agency official be shown the draft and be asked to comment on it. On 11 May 1976, the Agency informed Ambassador Helms that the former official came to Headquarters, reviewed the Senate Select Committee's draft report, took issue with certain parts and so informed a member of the Senate Select Committee staff.

Q. (4) Of the documents provided to the Department of Justice, how many did the Department request the CIA to declassify? How many of the documents was the CIA willing to declassify? How many of the documents which the CIA was not willing to declassify fell into each of the following categories?

a. Documents which could not be declassified because they revealed the names of agents.

b. Documents which could not be declassified because they revealed the names of cooperating foreign nations.

c. Documents which could not be declassified because they revealed the names of cooperating Americans.

d. Documents which could not be declassified for other reasons.

A. According to our count the Department of Justice requested declassification of 758 documents and attachments of which 152 documents were declassified in full, and 519 were declassified in substantial part, deleting only cryptonyms, pseudonyms, names of personnel under cover, etc. Fifty-three documents could not be declassified and 34 documents have not been declassified pending additional review. The documents which could not be declassified either in whole or in part frequently contained a number of classified items falling within more than one of the above suggested categories (a-d). A single document, therefore, may be counted in more than one column in the chart below.

Reason for denial	Documents denied in part	Documents denied in entirety
a	97	12
b	17	1
c	30	11
d	466	49

Q. (5) Of those documents which the Department of Justice proposed declassifying as potentially relevant, how many of those documents were considered to be potentially exculpatory. Was there any review of documents or any other review to determine what classified information should be provided to meet constitutional obligations to the rights of the defendant?

A. It is assumed that one of the reasons for the Department's extensive review of Agency documents was to determine whether any documents were potentially exculpatory or otherwise required at trial to meet constitutional requirements but we do not know how many of the reviewed documents may have been identified as relevant for these purposes.

Q. (6) Was the CIA led to believe that Mr. Helms, if indicted, intended to raise any particular affirmative defense which would require disclosure of classified intelligence information? If so, what was that defense, and in general terms what was the nature of the information required to be disclosed? Similarly, was it the Agency's understanding that Mr. Helms would have made pre-trial motions requiring disclosure of classified information? If so, what motions did you anticipate and in general terms what was the nature of the information which would have been required to be disclosed? How did you get your information regarding this issue?

A. The Agency had no specific indication as to the line or lines of defense which would have been pursued by Ambassador Helms but it was assumed that broad discovery requests, supported by numerous pre-trial discovery motions, would have been forthcoming in the event of prosecution. In all likelihood such discovery would have sought production of a great deal of classified information including, of course, the information which was deleted from the documents provided to the Department of Justice.

Q. (7) Did the DCI express to the President or the Attorney General any official review of whether further criminal proceedings against Mr. Helms might jeopardize national security or sources and methods? Specifically, what was communicated and to whom was that view expressed?

A. The DCI indicated to the President and, in more specific terms to the Attorney General, the potential national security consequences of declassification of those items which were deleted from the documents which were requested by the Department of Justice.

Q. (8) Why would the disclosure of the names of agents; the names of cooperating foreign nations; or the names of cooperating Americans be needed in a prosecution for perjury or related charges pertaining to misleading Congress as to the covert action in Chile?

A. Any question as to why any particular information or document may have been required in support of any of the charges under investigation should more appropriately be answered by the Department of Justice.

Yours sincerely,

STANSFIELD TURNER

APPENDIX III—CURRENT STATUTES

50 U.S.C. 783

§ 783. Offenses.

(a) Conspiracy or attempt to establish totalitarian dictatorship.

It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 782 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however*, That this subsection shall not apply to the proposal of a constitutional amendment.

(b) Communication of classified information by Government officer or employee.

It shall be unlawful for any officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, to communicate in any manner or by any means, to any other person whom such officer or employee knows or has reason to believe to be an agent or representative of any foreign government or an officer or member of any Communist organization as defined in paragraph (5) of section 782 of this title, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, knowing or having reason to know that such information has been so classified, unless such officer or employee shall have been specifically authorized by the President, or by the head of the department, agency, or corporation by which this officer or employee is employed, to make such disclosure of such information.

(c) Receipt of, or attempt to receive, by foreign agent or member of Communist organization, classified information.

It shall be unlawful for any agent or representative of any foreign government, or any officer or member of any Communist organization as defined in paragraph (5) of section 782 of this title, knowingly to obtain or receive, or attempt to obtain or receive, directly or indirectly, from any officer or employee of the United States or of any department or agency thereof or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, unless special authorization for such communication shall first have been obtained from the head of the department, agency, or corporation having custody of or control over such information.

(d) Penalties for violation.

Any person who violates any provision of this section shall, upon conviction thereof, be punished by a fine of not more than $10,000, or imprisonment for not more than ten years, or by both such fine and such imprisonment, and shall, moreover, be thereafter ineligible to hold any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

(e) Limitation period.

Any person may be prosecuted, tried, and punished for any violation of this section at any time within ten years after the commission of such offense, notwithstanding the provisions of any other statute of limitations: *Provided*, That if at the time of the commission of the offense such person is an officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, such person may be prosecuted, tried, and punished for any violation of this section at any time within ten years after such person has ceased to be employed as such officer or employee.

(f) Membership as not violation per se.

Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. (Sept. 23, 1950, ch. 1024, title I, § 4, 64 Stat. 991; Jan. 2, 1968, Pub. L. 90-237, § 3, 81 Stat. 765.)

18 U.S.C. 793

§ 793. Gathering, transmitting or losing defense information.

(a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, research laboratory or station or other place connected with the national defense owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, stored, or are the subject of research or development, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored, information as to which prohibited place the President has determined would be prejudicial to the national defense; or

(b) Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts to copy, take, make, or obtain, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or

(c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter; or

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; or

(f) Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of its trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(g) If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy. (June 25, 1948, ch. 645, 62 Stat. 736; Sept. 23, 1950, ch. 1024, title I, § 18, 64 Stat. 1003.)

PART C

18 U.S.C. 798

§ 798. Disclosure of classified information.[1]

(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information—

(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or

(2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or

(3) concerning the communication intelligence activities of the United States or any foreign government; or

(4) obtained by the process of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(b) As used in subsection (a) of this section—

The term "classified information" means information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution;

The terms "code," "cipher," and "cryptographic system" include in their meanings, in addition to their usual meanings, any method of secret writing and any mechanical or electrical device or method used for the purpose of disguising or concealing the contents, significance, or meanings of communications;

The term "foreign government" includes in its meaning any person or persons acting or purporting to act for or on behalf of any faction, party, department, agency, bureau, or military force of or within a foreign country, or for or on behalf of any government or any person or persons purporting to act as a government within a foreign country, whether or not such government is recognized by the United States;

The term "communication intelligence" means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients;

The term "unauthorized person" means any person who, or agency which, is not authorized to receive information of the categories set forth in subsection (a) of this section, by the President, or by the head of a department or agency of the United States Government which is expressly designated by the President to engage in communication intelligence activities for the United States.

(c) Nothing in this section shall prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of the Senate or House of Representatives of the United States of America, or joint committee thereof. (Added Oct. 31, 1951, ch. 655, § 24 (a), 65 Stat. 719.)

PART A

APPENDIX IV—OTHER MATERIAL RELEVANT TO USE OF CLASSIFIED INFORMATION IN LITIGATION

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MARYLAND
BALTIMORE, MARYLAND 21201

FRANK A. KAUFMAN
UNITED STATES DISTRICT JUDGE

April 27, 1978

Mr. Mark Gitenstein
Select Committee on Intelligence
United States Senate
Washington, D. C. 20510

Dear Mr. Gitenstein:

I have your letter of March 17, 1978 and the enclosures thereto. I have given considerable thought to the problems which arise in connection with the use of classified information in relation to espionage prosecutions. I understand that inquiries were originally addressed to me on behalf of the Committee because I was the presiding judge in the trial of United States v. Moore, Criminal No. K-77-026. Since that case is on appeal, I know you agree that it would be inappropriate for me to make any comment related to it. However, I am glad to try to set forth in this letter the thoughts which I do have. Those thoughts are aimed at safeguarding the respective interests of each individual employee of a security agency and of the public. The individual employee is entitled to his constitutional rights both during and after his period of employment. The public has dual interests in: (1) not having withheld at any time any information except that which clearly needs to be withheld in the public interest, and (2) insuring that persons who commit the crime of espionage are prosecuted effectively. Those two interests of the public often conflict. And of course the interests of the employee and of the public also often conflict. A trial judge, as is pointed out in the memoranda and documents you have sent to me, has available to him many options which enable him to balance those interests when they conflict. However, it would be helpful if additional discretionary authority could be conferred on a trial judge if that can be done without offending constitutional principles. In searching for an appropriate procedure, I now set forth, with great hesitancy, the following as perhaps deserving of exploration and consideration.

(A) Determination of the class of employees who will receive such highly classified information that it will be difficult to prosecute them for espionage without the disclosure of information which should not be disclosed for security reasons. Such a class should be narrowly defined.

(B) Drafting of a form of advice to each person who falls within that classification at the time he is employed, or at the time he is given duties of the type indicated. Each such person should be so advised that in the event he is indicted for espionage or unlawful disclosure of classified information which falls within a specified type of classification, the Government will have the right to ask the Court, for security reasons, to limit, to the extent and only to the extent necessary to prevent the harmful disclosure of classified information, the rights of that employee as a defendant in such case to have a public trial and/or to have a trial by jury. Such advice should be given both in writing to such employee before he commences any duties and receives any such classified information, and also orally, on the record. Such employee should have the opportunity to have an attorney with him when such explanation is made on the record by an appropriate official of the governmental agency involved. The advice to the employee should include, inter alia, the clear explanation that, as a condition of his employment, he is being asked to agree in advance that if he is indicted for espionage or unlawful disclosure of classified information within specified classifications, the Government will have the right to ask the trial judge (i) to hold on a non-public basis such portions of the trial as the judge determines cannot be tried in public without disclosing to the public facts which cannot be made known generally without endangering national security and/or (ii) to try on a non-jury basis such issues as the judge determines cannot be submitted to the jury without disclosing to jurors facts which cannot be made known to them without endangering national security. The employee should be asked to indicate orally whether he understands that, if he accepts such employment, he is being required as a condition thereof to agree in advance to those limitations of his constitutional rights. The employee should also be asked, on the record, whether he agrees to accept employment and also to waive, to the extent deemed necessary by the trial judge in accordance with the above set forth standards, his constitutional rights to a public trial and to trial by jury.

(C) Any waiver of rights by the employee should be limited to issues pertaining only to content of information.

(D) Regardless of whether any of the thoughts discussed in paragraphs A, B, and C above are adopted in practice,

procedures should be available to each employee, who handles classified information, to enable him, without fear of endangering his employment status, to bring to the attention of watchdog executive and/or congressional bodies any contentions which he may have with regard to over-classification. If such opportunity exists, there would be little or no excuse for an employee, who possesses classified information, to leak or to disclose it because he thinks it should be known to the public.

I find the entire subject matter fascinating. I wish I had more time to do research and thinking in connection with it. I know that the possibilities I have outlined in this letter present a number of very close and challenging constitutional and social issues. I express no views with regard to the constitutional validity of the thoughts I set forth herein. As you know, what I have written in this letter is simply a written confirmation of the ideas I have discussed with you during several rather lengthy telephone conversations which we have had. During those conversations, you told me that you thought it would be helpful if I would write this letter and suggest avenues of exploration. Accordingly I have so done. However, I stress that I simply am suggesting avenues of exploration, and do not advocate, at this time, anything other than exploration, except as set forth in paragraph D above.

Kindest personal regards.

Sincerely,

Frank A. Kaufman

PART B

STEWART SECURITY SERVICES
Crystal House 1, Apt. 202
1900 South Eads
Arlington, Virginia 22202

W. Donald Stewart, President

(703) 979-6540
Security Consultant - Investigations

February 24, 1978

Statement by Mr. W. Donald Stewart

on

The Security Clearance Program
and Its Relation to Possible
Unauthorized Disclosures of Classified Defense Information

for

The Senate Select Committee on Intelligence

INDEX

The Security Clearance Program and Its Relation to Possible Unauthorized Disclosures of Classified Defense Information

Unauthorized Disclosures of Classified Defense Information

This statement is being voluntarily furnished by W. Donald Stewart to the Senate Select Committee on Intelligence specifically for the attention of the Subcommittee on Secrecy and Disclosure.

Qualifications of Author

I served as an FBI Agent from July 1951 until August 1965, the last nine years as an Espionage Supervisor at FBI Headquarters, and from August 13, 1965 until December 1972 as Chief Investigator for the Office of the Secretary of Defense with the primary responsibility of investigating Unauthorized Disclosure cases. Because the Directorate for Inspection Services (DINS), commonly known then as the Secretary of Defense's Inspector General group, was phased out for economy purposes, I was appointed Inspector General of the newly formed (October 1972) Defense Investigative Service where I remained until I retired on June 30, 1975. During my tenure in DINS I handled 222 Unauthorized Disclosure investigations and numerous major criminal and counterintelligence investigations in accordance with the provisions of Department of Defense Directive 5210.50 entitled "Investigation of and Disciplinary Action Connected with Unauthorized Disclosures of Classified Defense Information" dated April 29, 1966, which made DINS the focal point of all such violations, and with the provisions of Department of Defense Instruction 5200.22 entitled "Reporting of Security and Criminal Violations" (to DINS) dated September 12, 1966.

In April 1969 I prepared a pamphlet entitled "Analysis of Unauthorized Disclosure Investigations." This consisted of a review of 125 investigations conducted between March 1965 and March 1969. I described the whole program - Background, Authority, Source of Unauthorized Disclosures, Mechanics of Handling, Program Improvement, Positive Results, Personality Characteristics of Individuals Responsible for Unauthorized Disclosures, the Question of Prosecution, and Observations.

Since I retired I have written a book entitled "Leaks" (not yet published) and founded Stewart Security Services.

Purpose

The purpose of this paper is twofold. One purpose is to show how haphazard the Security Clearance Program operates, and secondly to show that weaknesses in our Security Clearance Program could be responsible for unauthorized disclosures of classified information through the improper conferring on of a security clearance on an undeserving person

or through the failure to remove a person's security clearance when the person becomes a security risk for one of several reasons.

Specifically, this paper reflects who has access, legally and illegally, to classified Defense data; examples of weaknesses in our Security Clearance Program permitting undesirables to obtain a security clearance; variations in the investigative criteria for a Top Secret clearance; how security clearances are adjudicated, along with an idea for a Central Adjudication Branch for economy, security and privacy purposes, and finally the introduction of the use of the polygraph for pre-employment checks and for background checks. The polygraph could minimize invasion of an individual's privacy, expedite his date of employment and clearance, and save the U.S. Government a large amount of money in various ways.

Hopefully, the Committee will recognize the need to bring the entire Security Clearance Program into proper focus with appropriate standardization and safeguards to all persons concerned.

The Meaning of a Security Clearance

What does a security clearance mean? Actually it means that a designated authority has sanctioned a person's access to view classified defense material at a level of Confidential, Secret, or Top Secret. Actually there are also what are called "Exotic" clearances or "Special" clearances which are over and above Top Secret.

Who Has Access to Classified Data

(A) The Press

The press does not, in fact, legally get a security clearance; however, they are often given "Backgrounders," which are familiarization lectures in order to prepare them to write a story. These generally contain classified defense information. There is a stipulation that the data imparted is "Off the Record." In 1969, there was a case where a Vice Admiral compromised our 10-year lead over the Soviets on Anti-Submarine Warfare. Reportedly the press was not told the "backgrounder" was "off the record" and 14 papers ran the story. But, then again, what authority exists by anyone to confer a clearance on any member of the press through a "backgrounder," "off the record." When members of the press are taken into the Defense Department's Office of Public Affairs, a Top Secret background investigation is conducted before the clearance is conferred.

(B) The Congress

Members of Congress are awarded a Top Secret clearance by virtue of the fact they are elected to Congress, so said the late Mendel L. Rivers, on February 1, 1965, when as Chairman of the House Armed Services Committee, he addressed his Committee and, in particular, the new members. Interestingly enough, Representative Robert Leggett was then a new member of the Committee and later came to the public's attention because of his indebtedness due to his association with a mistress and fathering illegitimate children. Not too long ago, Representative Frank Horton was jailed for drunken driving. And while Congressman Rivers headed his above Committee, he was known to imbibe heavily, very heavily, but in none of the above cases was there any thought of removing the Coongressman's clearance. Yet, in any other Government Department, such conduct, as above, would cause the person to be cited as a "Possible Security Risk" and his access to classified defense data could, and probably would, be suspended.

As a matter of possible interest, a request by David Young, then the White House Plumber Chief, to Fred Buzhardt, then Defense Department General Counsel, caused me to conduct an investigation concerning leaks attributed to Congress. The results were incorporated in a report dated February 13, 1973, entitled: "Unauthorized Disclosures of Classified Defense Information Possibly Attributable to Members of Congress and/or their Staffs." This was requested by David Young at a time when the White House and Congress were pointing the finger at each other as to who the biggest leaker was. The report reflected the loose handling of classified data by Congressional people; the "bootlegging" of classified data to Congressmen; the lack of accountability of material sent from the Department of Defense to the Hill; and in one case the refusal of a staff member to execute a Personnel Security History form so a background investigation could be conducted of him.

(C) The Military

All enlisted personnel at the time of entry into the Armed Services are given a National Agency Check (NAC). This consists of the individual's name and birth date being run through the appropriate indices of the FBI, State Department, and CIA. Also, the person is fingerprinted; however, his fingerprints are not checked at the FBI, only the name from his fingerprint card is checked in the indices of the Identification Division of the FBI. So what happens if the individual gives a false name and birth date when he enters the service? Naturally, all such checks are worthless; however, the enlisted man receives a Secret clearance based on a clean NAC.

What proof of identification must he have to enter the service and later obtain his Secret clearance? He must produce a high school diploma and a birth certificate. Are they verified? Yes, the military recruiter causes checks to be made at the high school and the appropriate Bureau of Vital Statistics. What does that do? It merely informs the recruiter that John Jones graduated from Holy Mount High School - it does not tell the recruiter if John Jones is white or black, tall or short, blonde or redheaded. The Bureau of Vital Statistics merely informs that one male was born on such and such a date to William and Doris Jones, perhaps it might gratuitously give the baby's name as John. Can the required documentation be fabricated? Yes, I've had a couple of national news stories on this weakness in our security program, but to no avail. Additionally, no change has been made even in view of the fact that last summer it was discovered that 500 Panamanian aliens enlisted in the U.S. Marine Corps by utilizing fabricated documents. Can this be stopped? Yes, by requiring the enlisted to submit the names and addresses of three references who should be interviewed to verify the John Jones is the person he purports to be, and also to have the FBI do a search of his fingerprints from the fingerprint card he submits.

Do you have any examples of people entering the service illegally other than the above 500 Panamanians? Yes, about two years ago I had a national news story about Thomas Ragner Faernstrom who reenlisted fictitiously ten times during a 13-month period between November 1973 and January 1975, collecting approximately $30,000 in bonus. Subsequent interviews with him revealed he had done this over a 10-year period and bilked the U.S. Government out of $600,000. A check of his fingerprints would have uncovered him at any stage.

Last July a 28 year old North Carolina man was arrested and held 40 days as a deserter from the Army in spite of his protests that he never joined. Someone else joined using his identification which he had previously lost. An FBI fingerprint check would have probably nipped this fraudulent enlistment in the bud at the enlistment stage as the fraudulent enlistee most likely couldn't get in under his own identity.

In January 1975, a sailor in Seattle, Washington hi-jacked a Navy plane and was subsequently caught. Later it was developed that a year before he had been discharged from the Marine Corps as a mental case. An FBI fingerprint check would have surfaced him.

Actually on the subject of poor security I have acted in the capacity of a one-man vigilante committee before I retired and for 2-1/2 years since without success. I could cite example after example, but the purpose here is not to show how the vulnerability to our security exists from the fact that you are an accepted person. Since you live with people who have Top Secret clearances, they are likely

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to impart data to you because you are a serviceman like them. Further, you have a legitimate right to be in the proximity of certain areas which contain Top Secret data and are likely to learn about them because you are accepted as another service person. Actually, one service person does not enter a room and say, prior to a conference, "Who's got Top Secret here? I want to 'shoot my mouth off'."

The 500 illegal Panamanian aliens who joined the U.S. Marine Corps undoubtedly got some exposure that probably the Marines wish they hadn't. Further, wouldn't it be ironic if our U.S. Marine Corps became engaged later in a battle in Panama and met stiff resistance and learned later the enemy was trained in our U.S. Marine Corps camps? Hopefully that won't happen.

(D) Civilian Employees

Civilian employees and Department of Defense contractor employees have access to classified information. Most are awarded a Secret clearance on a straight National Agency Check (NAC). If, however, any derogatory data develops, an investigation is undertaken to resolve the matter.

Civilian employees requiring a Top Secret investigation undergo a thorough background check involving verification of birth data, residencies, employment, and interviews of references.

Variations in the Investigative Criteria for a Top Secret Clearance

The FBI, Defense Investigative Service (DIS), and the Civil Service Commission (CSC) each do background investigations for Top Secret clearances. Possibly State Department and the CIA also do their own. However, my point is that the criteria differ and to this end I'll speak of the variations in the FBI, DIS, and CSC criteria for a Top Secret clearance.

If there is any specific interest here, I have written a detailed paper dated February 25, 1975 entitled "Criteria for Security Clearances" where I go into greater depth. Briefly, the FBI is the only one of the three which is recognized as a police agency and thereby permitted to review all police agency criminal files in checking for a reference to the person being cleared for Top Secret. This being so, why do we worry about a person being a homosexual in connection with his getting a clearance since DIS and CSC are not likely to surface this data? As you may know, most homosexual subjects are often booked by a police department in the category of "Disorderly Conduct," given a small fine and released. For example, a former Special Assistant to former President Lyndon Johnson was arrested at a YMCA in Washington, DC, in about 1963, for his

participation in a homosexual affair. If this affair had happened in New York City, for example, and DIS or CSC had been conducting a background check based on the fact that Jenkins lived in New York once, neither having access to NYPD files could have uncovered this arrest, but, of course, the FBI, having such access, would have the data, would probably have caused him to be denied a clearance as a possible security risk. There are also other crimes which would not necessarily cause the person's fingerprints to be forwarded to FBI Headquarters and his arrest would go undetected during a fingerprint check of FBI files.

Let's look at the scope of an investigation. The FBI does neighborhoods for only the last five years unless derogatory data is developed. DIS and CSC go back for 10-15 years. The FBI verifies birth data from records and not Bureau of Vital Statistics' records as does DIS and CSC. FBI checks three listed references and no developed references are sought unless derogatory data is developed. If a listed reference is not available when the FBI knocks on his door, no effort is made to locate him again. DIS and CSC locate all listed references if possible.

The House Appropriations Committee hearings in April 1975 reflected that based on its review of DIS and CSC from May 1974 to November 1974, the following was noted. DIS charged $390/investigation and CSC charged $604. At that time FBI charged $799. DIS cases averaged 19.8 leads/case whereas CSC averaged 30.7. DIS reports averaged four pages and CSC averaged 21 pages. FBI then operated under a 30-day deadline whereas DIS and CSC were taking in the neighborhood of 45-60 days. In regard to updating Top Secret clearances, FBI never updates those of its personnel; CIA updates its personnel every 3-5 years, and the Defense Department does a 5-year bring-up.

Adjudications

Who decides who gets the clearance after the background investigation is done? The Defense Investigative Service at one time serviced 1400 customers. That meant that each customer would get a full background investigation on its person and determine if he or she qualified for a clearance. I can't personally state that much additional investigation was often requested because the adjudicator wouldn't make a decision on the facts available. Yet, more than likely another adjudicator in the same agency could have - that's the difference between experience and lack of it.

Most important is the fact that the 1400 agencies had in their files much personal data on the person being cleared and this data, in my opinion, should not be in the files of the agency. The natural solution would be a Central Adjudication Branch within DoD,

for example, which would handle and retain all background investigative reports and simply inform the customer that based on the results of the background investigation the Department of Defense is awarding John Jones a Secret or Top Secret clearance. Much is saved in logistic costs in this manner because every agency doing its own adjudication must have its own classified file room complete with personnel. Also, many potential invasion of privacy suits could be avoided because personal background data would be much more restricted. No one at the agency has any need to know personal type data offered during the investigation about one of the employees being cleared. I personally have had complaints from employees about the discussion of such personal data such as age, past marriages, etc., contained in investigative reports on Personal History Questionnaires executed by the person being cleared.

The Polygraph for Security Screening

When the idea of using a polygraph is mentioned, instant resentment takes place. Immediately every one thinks in terms of its use being to convict someone; however, the polygraph is often used for exculpating purposes. Also, it is used for a veracity check such as was recently done during the interviews in Korea with Tongsun Park. Its use in connection with the Justice Department interviews of Park more or less set a precedent as far as the Government is concerned in that it places a great deal of belief in the ability of the polygraph to show deception which does not necessarily mean guilt.

Now, let's consider using the polygraph for general security screening. What I would propose is simply taking in hand the Personnel Security Questionnaire, FD 398, which all persons requiring a clearance must execute, and one by one reviewing each question with the applicant. For instance, is your name John Jones? Were you born April 10, 1928 at New York, New York? Have you ever been arrested? Did you reside at 1212 Vermont Avenue, Ventnor City, New Jersey from 1964-1972? etc. This is not an invasion of privacy since we are only reciting what the applicant has told us. We are not going to disqualify him if he shows deception on the above residence question and arrest question. We are going to instruct the field investigator to dig into these areas. We may very well be able to eliminate all other areas if no deception is noted.

What is the advantage of the polygraph in this type of screening? There are several. One is probably a quicker clearance for a preemployment check enabling the person to report to work earlier. Often while the U.S. Government is checking out someone, the person becomes tired of waiting and gets other employment; hence, all the investigative effort is lost and if the person was to become a Government

employee, a new recruit must be found. Secondly, in a case that homosexuality may be developed during an investigation, a polygraph with the applicant would reflect deception and confronted with same the person might make a full disclosure. The alternative to his lack of cooperation on that subject or other subjects of possible personal embarrassment is to resolve the derogatory data in a full field investigation. Even if the person is determined not to have committed the suspected act, be what it may, the line of questioning pursued in neighborhoods where the person now lives and formerly lived, as well as present and past employment, leaves him with a stigma.

In the case of the military enlistee, the polygraph again being used to just verify what the enlistee has told us becomes an excellent screening device and may even serve to expedite his entrance into the service. On the other hand, at the recruiter level, the utilization of a polygraph at the recruiter level may also surface a potential fraudulent enlistee, thereby saving the U.S. Government a great deal of money by eliminating associated cost with processing and training a recruit. The polygraph could indicate that the potential recruit is or has been a drug user, is presently a fugitive from justice, or has served time for a crime which would disqualify him from military service, is not the person he purports to be, has certain physical limitations, etc. Again, only his questionnaire is being reviewed with him.

In a July 8, 1976 Los Angeles Times newspaper article entitled "At Least 1 in Every 250 Recruits Enlisted Fraudulently, Pentagon Figures Disclose" by Norman Kempster, 1,935 cases of fraudulent enlistments came to the attention of the military during a 15-month period ending March 31, 1976. What the article does not bring out is that these people for the most part surfaced themselves in order to get discharged. We have to admit that when economic conditions are not the best that the $403/month pay, plus room and board and a clothing allowance for a Private in the military, can look awfully good.

Locally I can think of Army Private Angel, who killed two Montgomery County (Maryland) police officers after a bank robbery about two years ago as being one of the persons falling into the fraudulent enlistment group. He was not truthful in the papers he executed before entering the service. Whether it would or would not have altered the death of the two Montgomery County police officers, I cannot say. I can say that a pre-enlistment screening by polygraph would probably have excluded him and saved the Army a great deal of time and expense associated with his induction and training and embarrassment to its service. Angel was also a suspect in a murder prior to entering the service.

Another point, not only in favor of expediting the investigation of a civilian or military employee and saving related costs, is that many areas where a person may have formerly resided or was employed are now considered "high risk" areas and are not normally entered by Defense Investigative Service agents because of possible personal jeopardy. Therefore, to develop the fact a person lived there or worked there, other investigation must be launched to verify same. A similar but less dangerous type of a case is one where a person has listed a residence or employment, necessary to be verified being in that part of this country which is 400-500 miles from the nearest investigative office, making it necessary for an investigator to take a road trip to the location. A polygraph might well resolve our interests in this matter.

In closing, I believe our present Security Clearance Program and pre-employment check could be upgraded by use of the polygraph. At the same time in many cases there would be a substantial saving to the U.S. Government and a minimum of invasion of privacy to an applicant.

PART C

PROPOSED RULE 509—FEDERAL RULES OF EVIDENCE

[Rule 509. Secrets of State and Other Official Information

[(a) Definitions.—

[(1) Secret of state.—A "secret of state" is a governmental secret relating to the national defense or the international relations of the United States.

[(2) Official information.—"Official information" is information within the custody or control of a department or agency of the Government the disclosure of which is shown to be contrary to the public interest and which consists of (A) intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions, or (B) subject to the provisions of section 3500 of title 18, United States Code, investigatory files compiled for law enforcement purposes and not otherwise available, or (C) information within the custody or control of a governmental department or agency whether initiated within the department or agency or acquired by it in its exercise of its official responsibilities and not otherwise available to the public pursuant to section 552 of title 5, United States Code.

[(b) General rule of privilege.—The Government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state or official information, as defined in this rule.

[(c) Procedures.—The privilege for secrets of state may be claimed only by the chief officer of the Government agency or department administering the subject matter which the secret information sought concerns, but the privilege for official information may be asserted by any attorney representing the Government. The required showing may be made in whole or in part in the form off a written statement. The judge may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon, except that, in the case of secrets of state, the judge, upon motion of the Government, may permit the Government to make the required showing in the above form in camera. If the judge sustains the privilege upon a showing in camera, the entire text of the Government's statements shall be sealed and preserved in the court's records in the event of appeal. In the case of privilege claimed for official information the court may require examination *in camera* of the information itself. The judge may take any protective measure which the interests of the Government and the furtherance of justice may require.

[(d) Notice to Government.—If the circumstances of the case indicate a substantial possibility that a claim of privilege would be appropriate but has not been made because of oversight or lack of knowledge, the judge shall give or cause notice to be given to the officer entitled to claim the privilege and shall stay further proceedings a reasonable time to afford opportunity to assert a claim of privilege.

[(e) Effect of sustaining claim.—If a claim of privilege is sustained in a proceeding to which the Government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the Government upon an issue as to which the evidence is relevant, or dismissing the action.

PART D

MEMORANDUM

FROM: MARK GITENSTEIN

DATE: NOVEMBER 28, 1977

SUBJECT: NATIONAL SECURITY AND THE ADMINISTRATION OF JUSTICE

I. THE HELMS CASE

The following appears in the Statement of Facts filed by the Department of Justice in connection with the court hearing on Richard M. Helms' no contest plea:

> The Department of Justice has determined that the disposition of this matter...is fair and just for the following principal reasons: ...that the trial of this case would involve tremendous costs to the United States and might jeopardize national secrets.

This suggests that in the Helms case the Department of Justice faced a dilemma presented in almost every case it handles in which national security information might be necessary as a part of the litigation. A conflict arises between the Attorney General's responsibility to enforce the law and the Director of Central Intelligence's responsibility to protect sensitive sources and methods, a requirement set out in the National Security Act of 1947.

MG:mlh

II. OTHER CASES SIMILAR TO HELMS STUDIED BY THE SECRECY AND DISCLOSURE SUBCOMMITTEE

There is a broad variety of cases in which classified information might be jeopardized. The Secrecy and Disclosure Subcommittee of the Select Committee has examined a number of these cases. Perhaps the most stark confrontation between the Director of Central Intelligence's responsibility to protect sources and methods and the Attorney General's responsibility to enforce the criminal law, including the perjury statute, is where the DCI is charged with perjury as in the Helms case. However, classified information might also be necessary in organized crime and narcotics cases where the defendant alleges that he was involved at one time or another with the CIA and that his illegal activities were known to the CIA. This happened in a recent major narcotics investigation involving the importation of several kilos of heroin from Southeast Asia and has happened in the past in cases involving major organized crime figures who were from time to time involved with the CIA in covert activities.

We have found that the primary area in which this conflict routinely arises is in espionage cases. The Secrecy and Disclosure Subcommittee in the course of its survey of "leaks" and the effectiveness of the espionage statutes in protecting secrets against leaks, requested the intelligence agencies each to provide ten cases which characterize the problems they have

experienced with the espionage statutes and leaks. The Subcommittee examined ten cases of recent vintage from each intelligence agency, CIA, NSA and DIA, cases which not only involved leaks of information to the newspapers, but clandestine transmission of information by agency employees to agents of a hostile power, classical espionage. Of those thirty cases only two or three were actually referred to the Department of Justice for investigation and none of those were formally investigated. All of these cases were cases which have arisen in the last few years. Many of the cases, almost half, were cases which involved disclosure of communications intelligence, cases which could have been prosecuted under section 798 of Title 18 of the United States Code. That section of the criminal code is the only espionage provision we presently have on the books that approaches the strict liability criminal standard used by the British in the Official Secrets Act.

Many of these "leak" cases are not even referred to the FBI for further criminal investigation because the Department of Justice has developed a policy of refusing to investigate such cases unless the intelligence community is willing to declassify all information related to the case. This policy grew out of frustration by the Department over the years with intelligence community reluctance to provide necessary evidence to prosecute major leak cases after the FBI had invested considerable time and effort in investigation.

We have also reviewed materials provided for us by the Department of Justice pertaining to a list of twenty-two cases which occurred in the past few years involving similar types of leaks or covert transmission to hostile foreign powers. These were cases in which the investigation or prosecution was not pursued by the Department of Justice because of the risk of further damage to the national security. In the overwhelming majority of these fifty cases the Department of Justice or the agency involved decided not to pursue the prosecution or investigation because of the intelligence community's fear that further investigation or prosecution would exacerbate the damage already occurring to the national security by the offense in the first instance.

III. DAMAGE BY CONFIRMATION VERSUS AUGMENTATION

The impact of investigation or prosecution of a leak or classical espionage upon the national security can be divided into two basic categories:

(1) The further investigation or prosecution of an espionage violation can further damage the national security via confirmation of the validity of the information disclosed. For example, in either a covert transmission case or a leak case a hostile power discovers information which is very sensitive to the national security but may discount the information because

of questions about the reliability of the source, whether it be a spy or a newspaper. However, if an indictment is filed against the subject, the hostile intelligence service tends to view that as confirmation of the accuracy of the information provided. This particular form of damage to the national security is practically impossible to remedy because of the constitutional requirement of a "public" trial -- the defendant has a right to a public adjudication of the charges against him. This is one reason why criminal sanctions for even the most serious "leaks" to newspapers is a peculiarly ineffective remedy.

(2) Further investigation or prosecution may damage the national security by augmenting the damage to the national security by disclosing either to the defendant and therefore to the hostile intelligence service, or to witnesses or even in the public proceeding of a trial to the hostile service, further information necessary to either investigate the case or to prove the case against the defendant. For example, it frequently becomes necessary in the course of investigation to discuss the facts of the case with a variety of witnesses who may be associates of the defendant and of course in a criminal case there are a plethora of procedures which involve public discussion of evidence related to the crime. This may be particularly risky in espionage cases where investigation or

prosecution may disclose sophisticated counter espionage techniques.

IV. AUGMENTATION OF THE DAMAGE IN CRIMINAL CASES

This latter problem, augmentation of the damage, seems easier to solve than the former. Where the Justice Department is determined to proceed, against a Rosenberg, Ellsberg, or in two major espionage prosecutions earlier this year, the prosecutors and judges have fashioned ad hoc procedures to protect the national security and at the same time insure the administration of justice. Therefore this experience will be the focus of the Committee's present efforts.

In a criminal prosecution involving any of the offenses suggested above, whether it is perjury, narcotics smuggling, organized crime offenses such as extortion, or espionage, there are a variety of circumstances in the course of pretrial or trial procedures in which classified information is likely to be required:

(1) As a part of the case against the defendant. In a typical espionage prosecution classified information may be directly relevant to proving the case against the defendant. For example, in a prosecution under section 793 of Title 18, it is necessary to prove that the information passed will actually damage the national security or be of aid to a foreign

government. Of course, in some cases the information passed is not of obvious significance to a foreign government and there is always the likelihood the foreign government does not understand the impact of the information passed. In the course of a typical espionage case, e.g. the prosecution earlier this year of a former agency official who tossed classified documents onto the lawn of the Russian Embassy, it is necessary to provide in the criminal trial further explanation to the jury and therefore to the public on the significance of the information passed. In the Russian Embassy case the government had to publicly disclose the names of individuals in the CIA telephone directory (among the documents tossed onto the Embassy lawn).

The TRW prosecution earlier this year (a TRW employee provided the Russians photographs of documents describing extremely sensitive overhead reconnaissance systems) was one of the very few prosecutions under section 798 of Title 18 for the unauthorized dissemination of communications intelligence. However, even though that statute does not require proof of harm, it is necessary to prove that the information was appropriately classified and in the course of such a procedure it is necessary to offer evidence that indicates the significance of the information passed.

(2) As a part of the defendant's affirmative defense. In the course of any of these prosecutions it is likely that the

defendant will raise an affirmative defense that will require classified information. It stands to reason that Richard Helms, had he been prosecuted for perjury, would have offered the affirmative defense that either it was a pattern or practice of Agency officials not to disclose classified information in the course of a congressional briefing or even to deceive congressional committees. Or, he might have argued that the information he provided the Committee was indeed truthful. Obviously either of these offers of proof would have required the disclosure of a considerable amount of classified information, either involving the Chile covert action or past covert action briefings, or briefings in which questions were raised about Agency covert operations. In the course of organized crime and narcotics investigations a defendant might raise his former association with the Agency as an affirmative defense which would require evidence of the CIA's relationship to him or similar agency relationships to other individuals in the underworld.

(3) As a part of pretrial discovery. In every criminal trial the defendant is entitled as a matter of constitutional right, statutory right or pursuant to the Federal Rules of Criminal Procedure to: (a) all materials that were obtained from or belonged to the defendant; (b) information pertaining to the testimony of a government witness; (c) and any exculpa-

tory information within the government's possession. Frequently the information which must be disclosed in these pretrial procedures is classified.

V. "GRAY MAIL": THE PRICE OF FAILING TO RESOLVE THIS DILEMMA

Since the Espionage Act was enacted in 1917, the Federal Government has been cautious in using the statute because of the necessity to provide further classified information in the course of such a prosecution. Even before the evolution of the various procedural rights described above, prosecutors in the Department of Justice and intelligence community officials realized that the espionage statute was not necessarily an effective remedy for all "leaks" to the newspaper or covert transmission to a foreign spy because to penalize the unauthorized disclosure required further secrets be disclosed. The Department of Justice is also aware that a clever defense counsel, in the course of trial or through pretrial discovery, can in effect threaten the government with frivolous discovery motions or a line of questioning that discloses or requires the disclosure of classified information. An internal CIA study of this problem in 1966 characterizes the dilemma as follows:

> Out of this evidentiary difficulty has come a sort of 'gray mail', granted on the immunity from prosecution (and often civil suit as well) enjoyed by the thief who limits his trade to information too sensitive to be revealed.

The possibility of such "gray mail" in criminal cases has had a profound influence upon the administration of justice. It not only influenced the Helms case and important narcotics and organized crime cases, but it has also had an impact on even the most clear-cut espionage cases. For example, the Russian Embassy and the TRW cases prosecuted earlier this year were almost stymied as a result of this conflict and indeed the authority for the Justice Department to proceed on the Russian Embassy case almost required Presidential intervention in early January. Almost all the major leak cases we looked at could not be investigated or prosecuted because of reluctance on the part of the intelligence community to pursue the cases out of the same fear of "gray mail".

VI. IMPACT ON COMMITTEE CHARTER DRAFTING

However, the most fundamental concern of the Select Committee about this problem relates to the legislative charters it intends to propose. Certainly the major provisions of any legislative charter intended to restrict the activities of the intelligence officials, e.g. a provision prohibiting political assassination, interference in domestic political activities, or engaging in so-called COINTELPRO-like activities, would be enforced by criminal sanction or civil remedies. However, it is not only probable but likely that any criminal prosecution

under such provisions would inevitably face the same frustration. Any intelligence community official charged with violating any of our proposed prohibitions would inevitably raise many of the same evidentiary rights as former DCI Helms or any espionage defendant. Under the present state of the law such prosecutions would have the same likelihood of success as any of the other prosecutions described above.

The attached memorandum on issues and options is intended to serve as an agenda for discussions between Committee staff, members, and officials of the Executive Branch and other interested parties on the issues presented by the Helms case and the other cases described in this memorandum. Hopefully out of these discussions will evolve a number of proposals which we might propose in the form of legislation or suggest to the Executive Branch as administrative initiatives. Furthermore, these proposals and reaction to them might be aired in hearings before the Secrecy and Disclosure Subcommittee in January.

ISSUES AND OPTIONS

I. AN IN CAMERA PROCEDURE FOR JUDICIAL SUPERVISION OF THE USE OF CLASSIFIED INFORMATION

Congress might enact an in camera procedure for judicial supervision of the use of classified information in the course of civil and criminal proceedings in which the U.S. is a party. The procedure might be modeled after Section 509 of the Rules of Evidence proposed by the Supreme Court in 1974. Section 509 defined a"secret of state"privilege which might be invoked by the Government prompting an in camera adversary proceeding in which the parties would litigate the use of information, usually classified, to which the Government had invoked the privilege.

Section 509 was rejected by the Congress as it reviewed the rules proposed by the Supreme Court. However, any proposal made at this time might respond to the criticisms of Section 509. For example, the new State secret privilege might more narrowly define the types of information to which the Government could invoke the privilege. It might give a greater role to the court in reviewing the claim of privilege, including authority to go beyond and behind the classification to determine the actual damage to the national security if the information were disclosed. It might give central supervision to invocation of the privilege to the Attorney General and re-

quire his personal review of the documents prior to an invocation of the privilege. It might guarantee the presence of the defendant and his counsel in the in camera procedures although it would subject both to contempt of court and possible espionage prosecution if they disclose the results of the in camera procedure. It might give either party an immediate right of appeal of the determination by the court of whether the information is privileged and the consequence of the invocation of the privilege, e.g. whether the Government has to drop the prosecution in the criminal case, concede the case to the plaintiff in a civil case, or in a criminal case the defendant has to forego a particular affirmative defense.

This in camera procedure could obviously only apply to questions of law and could only be used to litigate questions of fact where a jury trial has been waived. Therefore in most criminal and civil cases there will likely arise circumstances even if such a procedure were enacted where classified information might have to be disclosed to the jury and the public. However, such a procedure might minimize those circumstances and through the offices of an objective judicial tribunal force an accommodation upon the parties to avoid the impasse that presently occurs in most such cases.

Among the questions which such a procedure are likely to raise are the following:

(1) Who may invoke the privilege?

Current case law indicates that only the head of the Government agency having jurisdiction over the subject matter of the information for which the privilege is claimed may make the claim, and then only when he demonstrates personal familiarity with both the information and the reasons why its disclosure would be harmful. On the side of the agency, this presents an onerous administrative burden on the head of the agency's time. Can, or should, this burden be alleviated? Or, does the burden provide a useful, practical safeguard against frivolous claims of privilege?

The potential for frivolous or self-interested claims raises the question of whether the agency should have the right on its own to claim the privilege. Would it serve any useful purpose to require the Attorney General personally, or perhaps the Assistant Attorney General responsible for the agency, to concur in invoking the claim? Such a requirement might result in fewer, less partisan claims. Conversely, however, what expertise do Department of Justice attorneys have with respect to whether the disclosure of particular information will adversely affect the national security? And, too, if a judge is confronted with a claim of privilege which he knows has been sanctioned by both an agency head and the Attorney General, will he not be even more likely to defer to the claim?

(2) What should the standard be?

It is possible to articulate in general terms any number of standards information would have to meet in order to constitute a State secret. The new Executive Order on classification, for example, categorizes information as "confidential", "secret", or "top secret", according to whether its disclosure would cause "serious", "substantial", or "very grave" danger to the national security. Would any of those standards be suitable? If not, is there a better standard? A corollary question as a matter of procedural fairness and a safeguard against frivolous claims is should there be a requirement that any information for which the claim is made have been classified hitherto?

(3) What questions should the judge decide?

Whatever the standard, what questions concerning it should be decided by the judge? In various formulations of the draft Federal Rules of Evidence, it was proposed that the judge only rule on the Government's showing that information or testimony for which privilege was claimed was reasonably likely to disclose a State secret. The judge would not have been called upon to determine whether the purported secret was properly designated as such. In contrast, under current case law it would appear that the court has the ultimate authority to rule on the propriety of designating particular material as a

privileged State secret, but the court must, in this respect, give "utmost deference" to the opinion of the Executive branch.

A limited role for the court in these questions is supported by the judiciary's lack of expertise in questions of national defense or foreign affairs, and, perhaps more importantly, by constitutional arguments that determinations of this nature are more properly a matter for the Executive. With such a limited role, however, what guaranty has the party adversely affected by the recognition of a State secret privilege that the privilege was not invoked frivolously or as a matter of self-interest on the part of the Executive?

(4) Could a panel of "experts" assist the court in playing a larger role in determinations on State secrets?

The courts have broad authority under Federal Rule of Evidence 703 to employ their own experts to assist them on difficult questions. Would it be possible to establish panels of "experts" on national security matters?

Such a suggestion raises a host of practical difficulties. All individuals selected would have to have very high security clearances and be kept current on national security matters. They would have to be individuals of proven experience in defense or foreign affairs matters and of recognized impartiality. Presumably the number of such individuals would accordingly have to be small. In order that distinguished

individuals would consent to serve, the number of occasions on which they could be called would also have to be strictly limited.

Who would appoint such individuals? The President? The President in part and Congress in part? How would a panel be selected for a particular trial? By some random method? Or should counsel for either or both parties have a role?

The role of such a panel would presumably be to advise the court on whether the disclosure of the information would in fact adversely affect -- by whatever standard was applicable -- the national security. To what extent, as a practical matter or as a matter of law, would the judge be bound by the panel's determination? An appellate court? What likely effect would the availability of such a panel have on the government's propensity to prosecute criminal cases in which State secrets might be involved, and where the determination of the validity of the privilege was taken out of the Government's hands?

Numerous procedural questions arise as well. Could the panel receive information on testimony ex parte? If so, could opposing counsel at least propose questions to be raised? Would the whole report of the panel be available to opposing counsel? Could opposing counsel cross-examine the panel at the time of its report?

(5) Is editing feasible?

One of the most difficult practical problems for the Government in cases related to national security matters is the breadth of discovery. The other party to litigation can request an extremely broad range of materials which are "relevant" by general discovery standards, but perhaps only peripherally related to the central points at issue. A defendant in a criminal case may, for example, contend that a pattern of Government activity over many years is relevant to his defense and may, accordingly, subpoena thousands of Government records for those years. Confronted with the choice of turning over all such records, many of which might be highly sensitive, or dropping an otherwise valid prosecution, the Government may feel compelled to drop the case.

This suggests the question of whether highly sensitive records could at least in some instances be sanitized for introduction into the trial. Could sensitive portions, e.g. sources and methods of intelligence, be deleted? Could other records be summarized? If so, who would do it? A panel of experts appointed by the court? Or, perhaps the Government itself with the court ruling on whether the edited documents satisfied the other party's legitimate interests? Difficult decisions would be required in balancing the degree of relevance and probative value of the information against the dangers of disclosure -- comparing apples

familiar to the courts with oranges normally outside its province. Nevertheless, Rule 403 of the Federal Rules of Evidence suggests that the courts may exclude otherwise relevant evidence when its probative value is substantially outweighed by other considerations. Is something similar feasible here?

(6) Should the Department of Justice be guaranteed by statute right of access to all information necessary to determine whether the privilege should be invoked?

At the present time there are long delays involved in any litigation involving the U.S. as a party caused by negotiations between the Department of Justice and the intelligence community over access to relevant classified information. A provision in the statute guaranteeing Department of Justice access to information obviously would facilitate and expedite litigation. Should such a provision give a right of appeal to the President by the intelligence community to preclude dissemination of extra-sensitive information to the Department of Justice? Should Congress be concerned about the risk to security by disseminating intelligence information outside the intelligence community? Should the intelligence community in cases involving extra-sensitive information be able to preclude further investigation and prosecution by refusing the Department of Justice access to the information? If Presidential authority to stop an

investigation involving extra-sensitive information is to be recognized, should the statute require the President to inform the appropriate intelligence oversight committees of each such instance?

(7) What should the consequences be of invocation of the privilege?

Assuming such a procedure were developed and the court rules in a particular case that information in question is privileged, what should be the consequences of that ruling? For example, in the case of a valid affirmative defense offered by the defendant should the court have authority to strike the defense completely or should he apply the same standards he would in any criminal case on the question of materiality and credibility of the evidence in question? Assuming the classified information which the court rules is privileged relates to information to which the defendant is entitled in pre-trial discovery should the Government be required to drop the prosecution? In a civil case if the information in question pertains to an element of the plaintiff's claim should the Government be able to succeed in having the case dismissed if it has invoked the privilege and the court recognizes the privilege? Should this legislation attempt to spell out each possible consequence of invocation of the privilege and define precisely what the judge

is to do in each circumstance? Or, should the legislation merely leave the consequences up to the discretion of the judge?

II. MAKE IT A STRICT LIABILITY CRIME TO PASS CLASSIFIED INFORMATION COVERTLY TO THE AGENT OF A FOREIGN POWER

Harold Edgar and Benno Schmidt in a comprehensive 1973 article in Columbia Law Review on the espionage statutes, 73 Columbia Law Review 930 (May 1973) state that, "Requiring the Government to prove proper classification may so compromise the security that national defense interests require subordination of the interests in imposing punishment." In recognizing the dilemma that we have described above, they suggest the following:

> We believe, therefore, that the information protected against clandestine transfer to foreign agents should be broadly defined, probably more broadly than in current law. In this context, we see no dispositive objection to making knowing and unauthorized transfer of classified information to foreign agents an offense, without regard to whether information is properly classified.

Such a provision would not require the Government to establish the propriety of the classification but only to prove that a document stamped with the proper classification stamp had been passed to an agent of a foreign power. Therefore the focus of the trial and related procedures would be on whether the person who received the information was an agent of a foreign power and whether or not the defendant knew he was an agent of a foreign power.

Among the questions raised by such a provision are the following:

(1) Is it proper to permit criminal penalties to attach to the causal disclosure of improperly classified information?

Is it sufficient to leave this to prosecutorial discretion and would it be satisfactory to take into account the impropriety of the classification at the time of sentencing? Is it proper to permit these considerations to be conducted in camera since there is no constitutional right to a public sentencing procedure? Since we would obviously want to impose very stiff penalties in the case of a deliberate transfer of classified information to an agent of a foreign power is it improper to give the judge broad discretion to impose penalties under such a crime where the information might be improperly classified?

(2) Should the provision be limited to covert transmission?

Schmidt and Edgar had in mind a provision that dealt only with classical espionage, that is the deliberate and covert transmission of intelligence information directly to an agent of a foreign power. They deliberately avoided proposing a provision that might in any way encompass the publication of information in a newspaper with the intent to compromise the information to the agents of a foreign power. Is it possible to draft such a provision which permits a penalty to attach to covert transmission which is indirect but which does not involve publication in a

newspaper? Should criminal sanctions attach to the deliberate leaking of information to the newspaper with intent to harm the national security and without a requirement to prove propriety of classification?

(3) The CIA has proposed a variant on the Edgar-Schmidt proposal permitting criminal sanctions to attach to the covert transmission and publication of information based simply upon classification provided that the Government would have to prove that a procedure existed through which the defendant could have forced review of the classification of the document.

With this added requirement that a review procedure exist, would it be appropriate to expand the Edgar-Schmidt proposal to include publication? Or, the indirect transmission of intelligence information to an agent of a foreign power?

III. SIMPLIFYING PERJURY TO CONGRESS STATUTES

Some critics of the Helms case disposition have contended that perhaps Congress should enact a contempt of Congress statute that makes it a strict liability crime to deceive Congress in any manner and specifically abolish any of the affirmative defenses that Helms might have offered. Such a statute might abolish the affirmative defenses of mistake of law or mistake of fact.

Such a proposal raises a number of questions:

(1) Should the statute be qualified to the extent that it only makes criminal deception where the defendant has made no effort to obtain an executive session or to ask the committee to clear the room of the public or to go off the record?

(2) Is it constitutional to in effect abolish other defenses and privileges including the privilege against self-incrimination? What if the questions propounded do not relate to a valid legislative function of the committee in question? What if the question pertains to private life information of the defendant or the subject of a Government file? Should the statute be cast in terms of knowing deception or deliberate deception, and if the latter, would not a deliberate deception requirement provide the defendant with the option of presenting evidence that he was not completely knowledgeable about the information and thereby requiring the presentation of classified information as to the true facts surrounding the question?

(3) Should the statute only attach to testimony by Government officials? Or, should the statute apply to former Government officials or officials testifying about their first or second-hand knowledge about Government activities?

IV. STRONGER ADMINISTRATIVE SANCTIONS AGAINST PRESENT OR FORMER EMPLOYEES

Some experts who have attempted to grapple with this question have essentially come to the conclusion that traditional criminal and civil penalties in the areas described above are simply impractical because of this dilemma and the only alternative is some type of administrative sanction. They propose that in cases such as the Helms case, or even in espionage cases involving present or former officials, the appropriate remedy is disciplinary action or in the case of a former employee reduction of pension or some action to retrieve past compensation. Of course in the case of publication of secrets the CIA has traditionally proposed a civil injunction. However, this last option is not very practical in circumstances where the espionage is a completed act or the deceit to a congressional committee is a completed act.

Administrative remedies raise a number of questions:

(1) Can an administrative procedure directed against either a present or former employee be conducted completely in camera?

Does the "due process" clause of the Constitution ensure that any Government employee against whom the Government attempts to take disciplinary action has a right to a public proceeding? For example, does an employee against whom the Government would like to withdraw a security clearance or to

take other disciplinary action, including demotion or firing or reduction of pension rights, have a right to a public proceeding? Is this right to public adjudication as broad in administrative cases as it is in criminal and civil cases?

(2) The National Security Act of 1947 gives the Director of the CIA broad authority to take in camera disciplinary action against CIA employees. Is that provision constitutional and can it be extended to other agencies?

Does the Totten case (Totten v. United States, 94 U.S. 105 (1875)) stand for the proposition that intelligence community employees have less rights than other employees of the federal Government? If so, does that principle also imply that former intelligence community employees have less rights than former employees of other departments of the Government?

(3) Should such a proposal for administrative sanctions include a program of expanded deferred compensation and pension rights to former employees?

Without an expanded pension program there would be very little the Government could take away from a former employee. Are there other remedies against a former employee that may be exercised through an administrative remedy other than withdrawal of pension rights?

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