Department of Justice

STATEMENT

OF

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BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
HOUSE OF REPRESENTATIVES

CONCERNING

GRAYMAIL LEGISLATION - H.R. 4736

ON

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Chairman Edwards and members of the Subcommittee, I am pleased to appear before you today to discuss H.R. 4736, a bill introduced by Congressman Murphy which addresses the problems posed by classified information in criminal cases. Two other bills which respond to this issue have been introduced -- H.R. 4745, an Administration bill introduced by the Chairman of the House Judiciary Committee, Congressman Rodino, and S. 1482, introduced by Senator Biden, Chairman of the Rights of Americans Subcommittee of the Senate Intelligence Committee and of the Criminal Justice Subcommittee of the Senate Judiciary Committee. I have been privileged to testify in the hearings which have been held on these bills in the Senate Subcommittee on Criminal Justice and in the House Permanent Select Committee on Intelligence. In February, the House Intelligence Committee approved H.R. 4736, as amended.

The formulation of these three bills, which are substantially similar in their major contours, was the result of lengthy, frank, and productive discussion by members of the Congress and their staffs, members of the intelligence community, the ABA, the defense bar, the ACLU, and the Department of Justice. As I noted at the introduction of these bills in July of last year, the differences between them "are overshadowed by the similarities in the basic approach taken ... and by a common recognition of the need for a legislative response to the graymail problem."

In the months since the introduction of these bills, the Department of Justice has continued to work with the Congress and other interested groups to resolve our remaining differences. I believe that at this stage we are very close to reaching a consensus on a bill which will provide needed procedures for dealing with criminal cases in which the disclosure of classified information is at issue and which will meet both the need to protect against the unnecessary disclosure of highly sensitive national security information and the need to preserve the defendant's right to a fair trial. I am therefore pleased, Mr. Chairman, that you have acted expeditiously in calling this hearing on H.R. 4736 so that we may explore any remaining differences and move forward with this much needed legislation.

In my testimony today, I will first briefly discuss the problems we currently face in criminal prosecutions involving national security information and the reasons why I believe there is a need for legislation to resolve those problems. Second, I will comment on the key provisions of H.R. 4736 as reported by the House Permanent Select Committee on Intelligence, and note the significant improvements made by the amendments of H.R. 4736 passed by the Committee. Finally, I will discuss major differences between H.R. 4736 and the Administration bill, H.R. 4745.

I. THE "GRAYMAIL" PROBLEM

Two of the most important responsibilities of the Executive are the prosecution of violations of federal criminal laws and the protection of our national security secrets. Under present procedures, these responsibilities far too often conflict forcing the government to choose between accepting the damage resulting from disclosure of sensitive national security information and jeopardizing or abandoning the prosecution of criminal violations. The government's understandable reluctance to compromise national security information invites defendants and their counsel to press for the release of sensitive classified information the threatened disclosure of which might force the government to forego prosecution. "Graymail" is the term that has been applied to describe this tactic. However, the "graymail" problem is not limited to instances of unscrupulous or questionable conduct by defendants since wholly proper defense attempts to obtain or disclose classified information may present the government with the same "disclose or dismiss" dilemma.

To fully understand this problem, it is necessary to examine the decision making process in criminal cases involving classified information. Under present procedures, decisions regarding the relevance and admissibility of evidence are normally made as they arise at trial. In advance of trial, the government must guess whether the defendant will seek to disclose certain classified information at trial and speculate

whether it will be found admissible if objected to at trial. In addition, there is the question whether material will be disclosed at trial and the damage inflicted before a ruling on the use of the information can be obtained. Without a procedure for pretrial rulings on the disclosure of classified information, the deck is stacked against proceeding with prosecution of these cases because without a pretrial determination of which items of classified information may be ultimately disclosed at trial all of the sensitive items that might be disclosed must be weighed in assessing whether the prosecution is sufficiently important to incur the national security risks.

Thus, in the past, the government has foregone prosecution of conduct it believed to violate criminal laws in order to avoid compromising national security information. The costs of such decisions go beyond the failure to redress particular instances of criminal conduct. Such determinations foster the perception that government officials and private persons with access to military or technological secrets have a broad de facto immunity from prosecution. This perception not only undermines the public's confidence in the fair administration of criminal justice but also promotes concern that there is no effective check against improper conduct by members of our intelligence agencies.

While only a very small percentage of criminal cases present classified information questions, these cases often involve matters of considerable public interest. Moreover, we are increasingly confronting classified information issues

in a wide range of cases including espionage, perjury, burglary, and civil rights violations, among others. The new Foreign Corrupt Practices Act and the possible enactment of a charter for intelligence activities can be expected to expand the number of cases in which the graymail problem will arise.

The Justice Department has endeavored to resolve problems posed by classified information as they arose in individual criminal cases. Our experience with such an ad hoc approach has convinced us of the need for a legislative response to the graymail problem. Only by establishing a uniform set of procedures for resolving classified information issues prior to trial can the speculation and irrationality be removed from the present system.

Currently, the government can make only a rough and poorly informed assessment of the national security costs of a prosecution in which classified information may be at issue. Under the procedures contained in H.R. 4736, we would be able to determine whether in fact there was an actual conflict between our prosecutorial and national security responsibilities, and if so, to make an informed assessment of the costs of continuing prosecution.

While it is not possible to eliminate the tension between the Executive's responsibility to prosecute crime and its duty to protect the integrity of sensitive national security information, the procedures contained in H.R. 4736 would significantly enhance the government's ability to discharge these responsibilities without jeopardizing the defendant's right to a fair trial.

II. H.R. 4736

H.R. 4736, which has been amended and approved by the House Permanent Select Committee on Intelligence, addresses a wide range of procedural issues involving classified information that may arise in the context of a criminal prosecution. These procedures, which provide for pretrial rulings and appeals on whether classifed information may be disclosed by a defendant at pretrial or trial proceedings will promote necessary uniformity and predictability. Moreover, in achieving this goal, the bill would require only modest procedural changes in the manner in which criminal cases involving classified information are to be conducted. The primary effect of the bill would be to alter the timing of rulings on the admissibility of evidence. Essentially, the major features of the bill are rooted in statutory provisions and procedural rules that now apply to the conduct of criminal cases. Furthermore, the provisions of H.R. 4736 are designed so as to assure that there is no diminution of the defendant's right to a fair trial.

A. Key Provisions of H.R. 4736.

1. Defense notice of intent to use classified information.

Under section 102(a)(1), the defense is required to inform the court and the government, before trial, of any classified information it intends to disclose at trial or at a pretrial proceeding. This notice requirement is the initial step in the procedure created by the bill for pretrial determinations concerning the admissibility of classified information. Its purpose is to apprise the government of the defendant's intent to disclose classified information at trial, so that the

government may determine whether it will be necessary to seek a pretrial disclosure ruling regarding the information. Similar notice requirements appear in the rape evidence rule (Rule 412 of the Federal Rules of Evidence) and in Rules 12.1 and 12.2 of the Federal Rules of Criminal Procedure which require notice of the defendant's intent to raise an alibi or insanity defense, respectively.

Consistent with the purpose of the notice requirement, the defendant may not disclose the information at issue until the government has been afforded an opportunity to obtain a predisclosure ruling as provided in section 102. Furthermore, the bill provides for prior notice of intent to disclose classified information at the trial stage in those situations in which the defendant could not have anticipated at an earlier time that he would wish to reveal such information.

2. Pretrial, in camera determination of the admissibility of classified information.

The core feature of H.R. 4736 is its provision for a pretrial determination of the admissibiltiy of classified information. Upon certification by the Attorney General that a public proceeding may result in the disclosure of classified information, the pretrial determination is to be made in camera.

The purpose of this provision is to prevent the unnecessary abandonment of prosecutions by making it possibile for the government to ascertain, in advance, whether the classified information at issue will be permitted to be disclosed at trial. This advance determination of admissibility, coupled with subsequent determinations concerning the use of alternatives

to disclosure of specific classified information, and concerning the sanctions that will be imposed for the government's objection to disclosure of classified information found to be admissible, will equip the government to make an informed assessment prior to trial of the national security costs of continuing the prosecution as well as the risk to its successful prosecution of the case by refusing to permit disclosure.

The government may move for a pretrial proceeding concerning the classified information either in response to notice given by the defendant or on its own initiative. Thus the government has the opportunity to obtain a pretrial disclosure ruling on all the classified information issues that might have a bearing on its decision to continue prosecution.

When the government requests a pretrial ruling on the disclosure of classified information, it must identify the information that will be at issue. Where the information in question was provided to the defendant by the government, the specific information is to be identified. However, in other circumstances, the government is permitted to identify the information by generic category. This approach, which might include a category such as "the identity of CIA agents" might be used in situations where the defendant may not be aware of the particular information of concern to the government or may be uncertain of its accuracy. Without this "generic category" option, the government would be forced to choose between compromising classified secrets by confirming the accuracy of the information or providing previously undisclosed information to the defendant and failing to obtain a pretrial ruling and so risking public exposure of the information at trial.

The generic categories used by the government to identify the information which will be at issue at the pretrial proceeding are subject to the approval of the court. This requirement of judicial approval will guard against the use of overly broad categories and insure that the categories are appropriate to describe the information of concern to the government.

3. Alternatives to disclosure of specific classified information.

Once the court has determined in the initial pretrial proceeding that the classified information at issue is admissible, the government nonetheless may move that, in lieu of authorizing the disclosure of specific classified information, the court order substitution of a summary or a statement admitting relevant facts. The court must grant the government's request if it finds that the statement or summary will "provide the defendant with substantially the same ability to make his defense."

It is at this stage, under H.R. 4736, that the focus of the pretrial proceeding is to shift to a consideration of the classified nature of the information sought to be disclosed. In support of its motion, the government may submit an affidavit certifying that disclosure of the specific information would cause damage to the national security and setting out the basis for the classification. At the government's request, the affidavit is to be reviewed by the court in camera and ex parte. However, the defendant has a full opportunity to contest the adequacy of the substitute at a full hearing. This provision

will permit the government to continue prosecution and avoid disclosure of sensitive national security information while assuring that the defendant will be able to use any classified information necessary to his defense.

Under section 109(b), similar provision is made for the use of substitutes for the disclosure of specfic classified information at the discovery stage. In our judgment, existing discovery rules would permit such substitutions. Rule 16(d)(1) of the Federal Rules of Criminal Procedure provides that "upon a sufficient showing, the court may at any time order that discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate." The Notes of the Advisory Committee concerning Rule 16(d)(1) list among the considerations that may be taken into account by the court the protection of information vital to the national security. However, section 109(b) of this bill would provide needed clarification and guidance.

4. Sanctions other than dismissal.

If the court determines that the defendant may disclose specific classified information, and the Attorney General files an affadavit objecting to such disclosure, the court is to order the defendant not to disclose the information. It is then the court's task to fashion an appropriate remedy for the government's denial of the defendant's use of the information. We view as important section 105(b)'s recognition that this sanction need not always be dismissal of the entire indictment. Listed under section 105(b) are examples of lesser sanctions

that may be imposed. Like other decisions by the court adverse to the government which occur in the predisclosure proceedings under H.R. 4736, the government may appeal the imposition of these sanctions. This permits the government to make the crucial "disclose or dismiss" decision with a full understanding of the costs involved.

5. Interlocutory appeal by the government.

Section 108 of H.R. 4736 would authorize the government to take interlocutory appeals from adverse district court orders relating to the disclosure of classified information. Inclusion of this provisions is a key element in addressing the graymail problem. At present, the government is powerless to obtain appellate review of these important district court rulings. Instead, the government must either compromise the national security information by permitting its disclosure during the course of the prosecution or withhold the information and run the risk of incurring the sanction of dismissal of the case.

Congress has empowered the United States to appeal orders of a district court suppressing or excluding evidence in a criminal case. See 18 U.S.C. §3731. A similar provision authorizing interlocutory appeals of orders requiring the disclosure of sensitive national security information is warranted since such orders may have even a more dramatic impact on a prosecution than a suppression ruling.

This section also responds to the defendant's interest in a speedy trial by providing for an expedited appeal.

6. Preservation of the integrity of classified information: protective orders and the development of security procedures.

Two sections of H.R. 4736 address the problem of protecting against the compromise of national security information. Section 109(a) provides that upon the motion of the government the court is to issue an order to protect against the disclosure of classified information provided by the government to the defense. The authority of the federal courts to issue such protective orders is well established. The Report of the Intelligence Committee on H.R. 4736 lists examples of the kinds of protective provisions that might be included in such an order.

Section 110(a) directs the Chief Justice to promulgate security procedures to protect against the compromise of classified information submitted to the federal courts. At present, the handling of such materials is often the subject of ad hoc arrangements developed in each case.

B. Improvements to H.R. 4736 worked by amendments approved by the House Permanent Select Committee on Intelligence.

In two respects, H.R. 4736 as reported by the Permanent Select Committee on Intelligence is, in the judgment of the Department of Justice, a significant improvement over the bill as introduced. The Administration bill, H.R. 4745, contains neither reciprocity or reporting requirements. On the other hand, H.R. 4736 as introduced contained expansive reciprocity and reporting requirements which were of serious concern to the Department. Responding in part to these concerns which I raised in my testimony before the Intelligence Committee, the Committee approved significant amendments to these provisions.

1. Reciprocity requirements.

Although the Administration bill contains no reciprocity requirements, the Department of Justice is not opposed to reasonable reciprocal disclosure by the government where the defendant is required in the course of the pretrial proceedings prescribed by the bill to reveal information concerning his case which would not otherwise be available to the government. H.R. 4736, as introduced, would have automatically required the government, whenever the defendant was authorized to disclose classified information, to provide the defendant with a bill of particulars, and the information and the identity of witnesses it expected to use to "rebut" the classified information at issue. As such, these provisions were not genuinely reciprocal, for they would have required substantial additional disclosure by the government even where the classified information to be disclosed by the defendant was originally provided by the government. (Indeed, it is anticipated that in most cases, the classified information sought to be disclosed by the defendant will be supplied by the government as part of the discovery process.) The operation of these provisions, then, often would have placed a disclosure burden on the government not matched by any similar disclosure by the defendant. In our view, such automatic expansion of the defendant's discovery rights would undermine the very purpose of the legislation by providing defendants with additional incentives to press for disclosure of classified information.

Of particular concern to the Department was the requirement that we disclose the identities of our witnesses. Since the bill does not require the defendant to disclose the identity of his witnesses, those instances in which the identity of defense witnesses would be revealed in the course of the required pretrial disclosure determinations would be quite limited. In addition, we were very much concerned that mandating automatic disclosure of the identities of our witnesses would create a significant potential for harm to or intimidation of witnesses and for the subornation of perjury. Unfortunately, past experience has clearly demonstrated the dangers of intimidation and corruption of witnesses where their identity is made known in advance of trial.

The amendments to the reciprocity provision of section 107 approved by the Intelligence Committee have done much to meet these concerns. First the addition of section 107(d) provides that the reciprocity requirements are not to be automatically invoked where the information to be disclosed by the defendant was provided by the government. This then will more accurately reflect a reciprocal disclosure burden on the prosecution and defense. Second, the disclosure of government witnesses is, in all cases, to be discretionary with the court. In exercising this discretion, the court is to be guided by considerations of 1) the nature and extent of the defendant's disclosure, 2) the probability of harm to or intimidation of witnesses, and 3) the probabilitiy of identifiable harm to the national security.

2. Reporting requirements.

H.R. 4736, as introduced, contained detailed reporting requirements which mandated that the government file a a written report with the House Permanent Select Committee on Intelligence and the Select Intelligence Committee of the Senate whenever "the United States decides not to presecute any individual for a violation of federal law becuase there is a possibility that classified information will be revealed." The contents of these reports were to include 1) findings detailing the reasons not to prosecute, 2) identification of the classified information that might be revealed, 3) the purpose for which the information might be revealed, 4) an assessment of the probability of such disclosure, and 5) the possibile consequences of such disclosure on the national security.

The Department of Justice firmly opposed the inclusion of such a reporting requirement which calls for a detailed written justification of the exercise of our prosecutorial discretion on a case-by-case basis. There is, to my knowledge, no precedent for such an incursion into the Executive's traditional responsibilities. Furthermore, we are unaware of any pattern of intransigence on the part of the Department or failure to accomodate the needs of the Intelligence Committees that would warrant the type of reporting requirements which were originally included in H.R. 4736.

It is my understanding that the Department has undertaken in the past to brief these Committees on an informal basis on aspects of particular cases. I would suggest that a continuation

of such a flexible, informal process is more in keeping with the proper roles of two co-equal branches of government.

The Intelligence Committee's approval of an amendment to the original reporting requirements of H.R. 4736 renders them considerably less objectionable from the Department's perspective. Section 202, as amended, directs the Attorney General to report to the House and Senate Intelligence Committees summaries of cases in which indictments are not sought or prosecutions are dismissed because of the danger that classified information would be revealed. This report is to be filed annually. I believe it is significant that the very Committee which is to receive these reports found merit in the arguments we advanced and rejected the imposition of the detailed reporting requirements of H.R. 4736 as introduced.

III. MAJOR PROVISIONS OF THE ADMINISTRATION BILL NOT INCLUDED IN H.R. 4736.

The Administration's bill, H.R. 4745, contains two major provisions which are not included in H.R. 4736. These are a "relevant and material" admissibility standard for classified information and a limited modification of the Jencks Act. The reasons for the inclusion of these provisions is set out briefly below.

A. Admissibility Standard for Classified Information.

Under the Administration's bill, the standard for the admissibility of classified information was to be whether the information was "relevant and material to an element of of the offense or a legally cognizable defense." We believe that the significant governmental interest in nondisclosure

requires that a more demanding standard than mere relevance apply in determining the admissibility of information concerning vital national security matters. The "relevant and material" standard we proposed was based on the standard adopted by the Supreme Court in Roviaro v. United States, 353 U.S. 53 (1957) for determining whether the defendant is entitled to obtain and disclose the identity of a government informant in a criminal case. Noting the important "public interest in effective law enforcement" served by the protection of the identity of informants, the Court ruled that disclosure of such information is not required unless the information is "relevant and helpful to the defense of an accused or is essential to a fair determination of a cause." 353 U.S. at 59, 60-61. We believe that a similar standard would be appropriate in cases involving national security matters, for the interest in protecting the confidentiality of classified information is equally, if not more compelling as that in protecting the identities of government informants.

Nonetheless, there has been considerable opposition to the inclusion of the Administration's "relevant and material" standard for the admissibility of classified information, and its adoption was rejected by the House Intelligence Committee. In the Committee's Report which accompanies H.R. 4736, it was stressed that "[i]t is the intent of the Committee that existing standards of use, relevance, and/or admissibility of evidence not be affected by H.R. 4736." H.R. Rep. No. 96-831, 96th Cong. 2d Sess. 14 (1980).

B. Limited Modification of the Jencks Act.

Currently, the Jencks Act (18 U.S.C. §3500) would require the disclosure of classified information contained in the statement of a government witness which, though related to the subject matter of the witness' testimony, is not at all inconsistent with the witness' testimony and thus of no value for impeachment purposes. Therefore, in the Administration's bill, we proposed that if the court found that disclosure of the classified information contained in the witness' statement would damage the national security and that portion of the statement were consistent with the witness' testimony, the court could excise that portion of the statement before it was delivered to the defense.

We believe that this proposed modification is entirely in keeping with the purpose of the Jencks Act which is to assist the defendant in impeaching the testimony of government witnesses. Precedent for permitting the review of Jencks Act statements and the deletion of materials by the court prior to delivery of the statement to the defendant already exists in subsection (c) of the Act, which requires the court to excise portions of the statement that are found not to relate to the subject matter of the witness' statement. Furthermore, it is important to emphasize that the issue of this proposed modification of the Jencks Act is one of policy, not consitutional law. As the Supreme Court made clear a decade ago in its unanimous opinion in United States v. Augenblick, 393 U.S. 348, 356 (1969): "the Jencks decision and the Jencks Act

were not cast in constitutional terms. Palermo v. United States, [360 U.S. 343] at 345, 360. They state rules of evidence governing trial before federal tribunals; we have never extended their principles to state criminal trials."

Nonetheless, the proposed modification of the Jencks Act set out in the Administration bill has been the subject of considerable controversy. We believe the potential for prejudice to the defendant from the proposed limitation on the Jencks Act's disclosure provisions is extremely remote. Absent the inclusion of such a provision, the United States may needlessly be forced to forego the use of a crucial witness, drop a prosecution entirely, or compromise sensitive national security information. Fortunately, this problem can be expected to arise relatively infrequently, although in those cases in which it does arise, prosecution of the case may be seriously jeopardized. We will be prepared to accept the Committee's resolution of this issue, in order to speed passage of the bill.

CONCLUSION

I believe that we are now nearing final agreement on a graymail bill that will be acceptable to all parties concerned. As I noted above, H.R. 4736 will require only modest procedural changes in the manner in which criminal cases involving classified information are conducted. Yet by providing much needed uniformity and predictability through procedures which permit the orderly resolution prior to trial of the problem of disclosure of classified information, such legislation would provide an equitable and reasonable approach to the troublesome issues arising in criminal prosecutions involving sensitive national security information.

While there will always be cases in which the risks of revealing highly sensitive classified information will be too great to permit prosecution, legislation such as H.R. 4736 would permit a significant number of cases to proceed to trial which otherwise could not be pursued because of the government's current inability to make an informed assessment of the risks of continuing prosecution.

END