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GRAYMAIL, S. 1482

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

S. 1482

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GRAYMAIL, S. 1482

THURSDAY, FEBRUARY 7, 1980

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:07 a.m., in room 35, of the Russell Senate Office Building, Senator Joseph R. Biden, Jr. (chairman of the subcommittee) presiding.

Present: Senator Biden.

Also present: Mark Gittenstein, chief counsel, and Edna Panaccione, chief clerk.

Senator BIDEN. This hearing will come to order.

OPENING STATEMENT OF SENATOR BIDEN

The Subcommittee on Criminal Justice opens 1 day of hearings today on legislation, S. 1482. Graymail legislation and the problem of "graymail" has been the subject of extensive committee and staff work on both the House and Senate Intelligence Committees and in the Department of Justice. Therefore, this hearing culminates over 2 years of exploratory work on this most vexing problem which has both threatened the national security and the rule of law.

I and others present in this room have, particularly Phil Heymann, have spent many hours discussing this problem since it first surfaced sometime ago. I delivered a speech at Bowdoin College in Maine in November of 1977 outlining what I saw as the concerns and suggesting the need for legislation. We also issued a report in the Intelligence Committee dealing with the subject, but, I will not go into those findings now or repeat the essential points of that report.

The fact that such diverse parties as the Criminal Division of the Department of Justice, the intelligence agencies, the American Civil Liberties Union, The Association of Former Intelligence Officers and the American Bar Association can reach a consensus on this problem has been quite heartening to me as a legislator. A great deal of the credit for the success lies with our first witness, Phil Heymann, Assistant Attorney General for the Criminal Division, but others in this room deserve a great deal of credit also.

In summary the purpose of this hearing is to attempt to flesh out the remaining areas of disagreement and to assure that we indeed do have a basic consensus for proceedings. I think that we will find four or five areas where work will be necessary—issues like the standard of admissibility, the Jencks Act and the reporting requirements are three that come to mind immediately.

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However, I view these and other outstanding issues as resolvable. Indeed, I believe that the other members of the subcommittee will find, as I have, that with all of the complicated and controversial intelligence-related legislative issues facing us this year—a CIA and FBI charter, changes in the Hughes-Ryan requirements, new espionage statutes, and modification of the Freedom of Information Act—that have been considered, graymail may be the one where there is a real consensus and we can move immediately.

Consensus is possible because all sides realize that action is essential. National security considerations require a graymail bill to facilitate espionage prosecutions while accountability for intelligence agencies requires that graymail procedures be in place to protect against possible criminal acts by intelligence agents.

I would also like to point out that although I see this as the area where we are most likely to be able to move in this Congress, I don't want to mislead anyone as to my view on other unrelated matters. I think we must move on a charter and I think that the suggestions coming from some quarters of the Congress and some quarters of the administration are uncalled for, but that is for another time, another debate and another subject. I just didn't want anyone of the press who may be here to read from my assertion that I think this is the area we can move most rapidly on, that I am willing to abandon movement on the other subjects, nor to imply that any of the witnesses wish to abandon movement.

I would like to suggest, as I know you all are very busy, and all have spent a great deal of time on this subject, to proceed in the following manner. First, I would like to ask Phil Heymann of the Criminal Division of the Department of Justice to be our first witness and then, Phil, with your permission, I will question you because I know you have other committees that have great interest in your activities these days, in an editorial sense, and then let you go, if you would like, and then call as a panel four witnesses and then a second panel after that of two additional witnesses.

Seated at the table also are Mr. Brent Rushforth, Deputy General Counsel, Department of Defense, Dan Silver, General Counsel of the Central Intelligence Agency, and Daniel Schwartz, General Counsel, National Security Agency. Also, I have read all of your statements and they will be submitted in full for the record and if you could summarize them, or proceed in any way you would like. Phil Heymann.

STATEMENT OF PHILIP B. HEYMANN, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. HEYMANN. Thank you, Mr. Chairman. I think I would like to just do three things in an opening statement and then turn to your questions. The first is to give the chairman credit for his efforts which were indeed pioneering in addressing the problems of rising criminal prosecutions involving sensitive national security information.

As you said, at present there is a measure of agreement among groups as diverse as the American Civil Liberties Union. I would have said, under any other context, that groups as diverse as those of us at this table testifying—the American Civil Liberties Union,

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the American Bar Association, Senators from both parties and from all sectors of the political spectrum—is an unusual situation and it is one for which you deserve a great deal of credit.

Hearings that you held as chairman of the Secrecy and Disclosure Subcommittee of the Senate Select Intelligence Committee provided an extensive examination of the graymail problem and set the groundwork for a legislative response. We have, as you know, worked with you and your staff, Congressman Murphy, the ACLU, the intelligence community, and the Intelligence Committees to devise legislation that can provide procedures for orderly and equitable resolution of issues in criminal cases that involve national security considerations.

The striking thing about the present situation is the extent to which there is agreement on the issues. The core elements of the chairman's bill are, I believe, widely agreed upon. Let me just review them: A procedure for securing pretrial rulings from the court to determine whether classified information may be disclosed by the defendant at a trial or at a pretrial proceeding, No. 1. No. 2, in your bill, Senator Biden, and widely agreed upon, are provisions for the use of alternatives for the disclosure of specific items of classified information, summaries, substitutions, admissions by the Government, but always with due regard for the defendant's right to a fair trial. No. 3, provision of alternative measures other than dismissal of the prosecution where this is compatible with the defendant's right to a fair trial and substitutions don't work. No. 4, authorization of interlocutory appeals by the Government of district court rulings relating to the disclosure of classified information so we don't find ourselves again in the situation we found ourselves in the ITT case where we disagree with the ruling but have no choice other than to either compromise the information or dismiss the case for good.

No. 5, provision of appropriate security measures to safeguard against the compromise of classified information disclosed to the court and defendants. I was going to cite a sixth agreed item. It is one that not everybody agrees with, but I would like to commend your bill for including some form of limited exception to the Jencks Act disclosure requirements. I note that the ACLU disagrees with that provision.

This set of widely agreed upon procedures would go far to remedy problems that we now have in the graymail area. There will always be irresolvable problems that will cause us to dismiss some cases.

Let me go finally, Mr. Chairman, to the areas where we disagree with your bill and urge modifications. They are on the whole relatively minor matters. The areas of agreement far exceed the areas of disagreement. I believe that the ABA, over this past weekend, proposed a standard more similar to ours than to yours for determining when classified information has to be introduced at trial. We believe that the right standards, with an appropriate amount of ambiguity built into it, is that classified information should not have to be disclosed unless the court finds it "relevant and material to an element of the offense, or legally cognizable defense."

I haven't seen the ABA resolution, but I believe the ABA came out in the same place. Our standard, which just gives a court a little bit

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of margin in situations where it is difficult to say something is logically irrelevant, but it is not important in any way to the defense and this is obvious. Our provision gives the court a little bit of leeway in those situations, and in doing so it corresponds closely but in a much more modest way to the protection that is given information about the informants by the Supreme Court's *Roviaro* case. In that situation, the Supreme Court would deny disclosure unless it is either relevant and helpful or essential to the defense. We are not asking for anything as sizable as that. We are asking for just a little bit of leeway for the courts when a matter may be of extremely marginal relevance.

The materiality standard is the language used in rule 16 to govern discovery in a criminal trial. I should also mention before moving on that in the area of testimony as to the prior record of a woman who is the victim of rape, the courts give considerably more leeway than either in the informant's situation or a fortiori under the standard we propose in allowing the court to forbid the disclosure of evidence as to the sexual history of the victim of rape. That is a statute passed by Congress and put into the rules of evidence.

Number 2, we have problems which we regard as primarily technical with the way S. 1482 requires reciprocity, and its bill of particulars provisions. We think that the notion of a bill of particulars is a technical notion that is misconceived in this area. If the defendant wants a bill of particulars and if it is appropriate, the court can grant it under rule 7f already. We are worried about what a court will require under S. 1482's provisions. We don't know how far it will go, what it will mean. It is not clear to us. The judges will feel free to tailor some reciprocal obligation on the Department of Justice in such a way that it simply be fair. In such a way that the courts say, if a defendant has had to open his hand and show something to the prosecution, the prosecution ought to reciprocally open its hand to about the same extent.

All we want there is something that is written that gives the court leeway for fairness and your bill indeed has a phrase in there that is very helpful in that regard. The court is to consider, "the interest of fairness," and it doesn't bind the court to bills of particulars or anything else. The law bills the particulars as a rather arcane law that nobody knows what to make of.

Finally, in the major category and then for anything else I think I will just pass—we are concerned about the reporting requirements in section 12(b) of S. 1482. There are concerns that come out of three directions. One direction is obviously that in some cases the matter that will concern us and cause us not to proceed with a case will be of the most sensitive kind such as the name of an informant and we will be reluctant and concerned about disclosure.

The second ground is the worry that goes to prosecutorial discretion. The notion is that the executive branch should be making prosecutorial calls. The third problem is simply a technical one of applying a reporting requirement at all. There are cases, and it is perhaps the more common type of case, in which the decision not to prosecute turns on a variety of factors: The evidence is somewhat weak; there is a national security graymail issue in it; we are worried about another defense that may be raised. A variety of factors enter into it. It is a little bit hard to picture exactly how the reporting requirement will apply to these types of matter.

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Again, we are not urging anything dramatically different on reporting. What we are urging is that it be kept somewhat informal with the committee. That it be kept oral rather than written, and that it be kept periodic rather than on the occasion of every failure to prosecute.

I am personally required to approve every failure to prosecute on national security grounds and I do that whenever we fail to prosecute on national security grounds. Nobody else can approve that decision. I think I welcome some kind of informal relationship with the committees where we would keep you quite fully informed as to the factors and cases that went into that decision, but we urge informality, as the House Intelligence Committee itself determined in the last week or two.

Senator Biden, any more minor matters are covered in our rather long testimony and I will leave them there.

Senator BIDEN. Thank you very much. Let me begin by speaking to the last area of disagreement mentioned, the reporting requirement. One of the conclusions I reached when looking at the damage assessment file of cases in the past, was that not only was legislation necessary but much of the need of the legislation could be eliminated by a thorough interagency reporting requirement between the FBI, Justice Department, and the CIA. I should emphasize that only for purposes of this particular question that those damage assessment files are all prior to your holding this office and prior to this administration. I should also emphasize that there has been a good deal of cooperation between your Department and the Intelligence Committee and in fact, all of the committees in the Congress. What we found is, as you will recall from the report which you have discussed, is that we ended up a lot of times with cases being dropped because they weren't fully explored. This was because there was a reluctance on the part of one agency to come forward, possibly with good reason, with all the information and when it got to your desk or your predecessor's desk, it was too much trouble to dial the phone. That was the biggest problem they had.

So that a lot of cases seem to me to be written off because the only thing you'd end up on your desk with was an assertion that CIA doesn't want to disclose the following information. Obviously the Department has its hands full. So, it was my judgment that things were written off. Not in a cavalier way, not because there was a disregard for prosecuting people, but because of the press of time.

So, the whole reason why we wrote the reporting requirement in the first place was to deal with that question and that concern and one other: There is a concern that on occasion it is possible that case would not be prosecuted because of potential political embarrassment not because of national security reasons.

So that what you are suggesting to us now is that the requirement that is written into S. 1482 may be too stringent, possibly unnecessary, and that you want to do it more informally. My concern about the informality is that informality tends not to have a regularity to it. How do we know what to ask you for unless you tell us in a regularized fashion what you haven't done.

Do you understand the point I am driving at?

Mr. HEYMANN. Yes. That isn't a hopeless situation, Senator Biden. I would like to have time to get back to the committee on it that we

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could, for example, advise you that in the following five matters, or that during the last quarter, I signed off on five matters. There wouldn't be five in a quarter incidentally. It is many fewer than that.

It would be more like five in a year probably than five in a quarter. But, I could give you—I would like to consider it that I could give you notice of that with some general description of the matter and then the committee could ask for a hearing, in executive session with an oral report on exactly what was involved, how far it was pursued, why no case went forward, were there other possibilities and why weren't they exercised.

Senator BIDEN. Obviously there is a willingness on your part to cooperate in this matter. What I am a little confused about is why there would be a willingness to cooperate if communicating orally, but a reluctance to do so in writing. We say the findings shall include the intelligence information that the Department thought might be disclosed; the purpose of the information, the probability that the information would be disclosed and the possible consequences.

We do not ask for a specific format. You could answer by saying that the intelligence information that would have been disclosed related to the ABC system that we have in place in Xanadu and the purpose for which it might be disclosed would be to compromise an agent in Xanadu and the possible consequences would be that the loss of life of the agent and that is it.

I just don't know why you would be willing to tell us that verbally, and reluctant to put that in writing.

Mr. HEYMANN. We work that way within the executive branch, Senator Biden. Let me give you a close analogy and then an even closer one. On highly sensitive matters within the executive branch, I will only convey them orally to the Attorney General. I am not talking about national security matters, but, if there is an investigation that is like the recent one that has leaked, I will try to be very careful about the use of documents which can themselves get out and I am worried that in that case it may have not been documents that got out.

Now, to come very close to the point, when Dan Silver wants to tell me that there is a matter that involves the potential for criminal prosecution coming out of the CIA, and that it may have serious national security problems but we ought to explore it, he sends over to me a memo that is almost unintelligibly vague inviting a set of oral communications that then take place to fill out all the facts. We are very careful about putting information we want to keep secure into written form rather than oral form. It is not in terms of keeping a record, it is in terms of sending information back and forth.

Senator BIDEN. For the record I should—I have been saying us, I am sort of changing hats here. I am mentioning Intelligence Committee. The record should be clear. I am not suggesting nor does this legislation suggest that you would report to this subcommittee or to the Judiciary Committee, I am talking only of the Intelligence Committee.

Mr. HEYMANN. That is obviously a separate problem, the more committees, the more concern we have.

Senator BIDEN. Yes, but I want to make clear what we are talking about here. Well, I understand your concern. I don't think I share it as fully as you would like me to, but let me ask you one more question on that point.

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The House committee in their bill went a little further in your direction. I don't think it altered the written requirement portion, but it required a yearly summary of the cases that you have decided not to move on. I assume you have the same objection to that?

Mr. HEYMANN. Well, a periodic summary is less burdensome to us than a summary when every case comes up, but otherwise, I suppose the problems are much the same. I have not, Senator Biden, looked closely at where the House committee ended up on this one.

Senator BIDEN. I don't want to belabor the point, and we can try to work something out, but the crux of the difficulty is written versus oral in the reporting side. Not the question of sharing the information with the committee, but it is the manner in which it would be shared?

Mr. HEYMANN. That is correct. Excuse me. The House provision said the Attorney General shall report to the select committee of the House once each year concerning the operation effectiveness of this act. Such reports shall include summaries of those cases in which a decision not to prosecute or not to continue a prosecution was made because of the possibility of disclosure of national security matters. So it is much the same thing, but on an annual basis.

Senator BIDEN. Well, I could quite frankly see that if there were an annualized requirement that you could orally come and make that. But, we would end up with a written record in the sense that there would be a reporter who would sit there and take this down.

Mr. HEYMANN. It is my understanding that that has been the way. I think perhaps more on the House side, with the House Intelligence Committee.

Senator BIDEN. Well that has been the way the Intelligence Committee operates on our side too, generally.

Mr. HEYMANN. We have freely come up, whenever asked, and you are asking that there be some system so that you could know when to ask, and I think we could devise such a system. Whenever asked we could come up and talk freely and fully about the reasons for not following through on a prosecution.

Senator BIDEN. To make it very clear, and this is not—I don't say this in a partisan vein at all and I really mean this. I have no problem with the way in which the intelligence community, whether it is Defense, NSA, CIA, whomever, the Justice Department generally, FBI, has responded to the inquiries of our Intelligence Committee.

I think that is because there are people heading all of those agencies now and a national mood the last several years which has been very clear that that information would, could, and should be shared with an oversight committee. So I am happy with that. My concern in this area and in the other intelligence-related areas is that times change. I don't think the principle of having to share that information with us should change as the mood changes, and the leadership changes. The same President may change his mind.

I don't like the idea of the Congress being in a position of operating in this area at the pleasure of the Executive. I have no problem with the way in which the Executive has exercised his pleasure so far. I hope we can solve the problem of you reporting all of the cases which are not prosecuted. We are more likely to exercise our oversight if it is done at one time with all the cases. The practical problem we are going

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to have, the chairman of the Intelligence Committee saying, "Well, look, we can't get a quorum or which one of you guys will sit in here and hear this issue. We are almost as busy as some of you."

So I see that as a positive movement possibly. That it be a single shot but that you must—I just want to make sure and this is a very important area of the legislation as far as I am concerned. I want to be sure that I understand what you are saying; that is, you don't have a reluctance for there to be a requirement in the law that all the cases in which prosecution is declined be brought to the attention, at some point, sometime, in some fashion, to the relevant committee in question, the Intelligence Committee. Am I correct about that?

Mr. HEYMANN. I didn't quite go that far, Senator Biden.

Senator BIDEN. Well, that is what I am trying——

Mr. HEYMANN. Simply because it makes a great deal of difference if it is informal rather than formal to us, but I would have to go back and I would have to talk to the Attorney General and I would also have to ask my colleagues here to explore it. My own personal reaction is not one of concern with that, but I would have to go back and talk to other people about it.

Senator BIDEN. Fine. That is fair enough. But I just want to make sure that you understand my concern.

Mr. HEYMANN. Yes.

Senator BIDEN. So we do have a basis for discussing it. I am interested in insuring that all the cases in which prosecution is declined, be made known to the Intelligence Committee at some point at some time. Otherwise, we don't know what to ask. I am not married to the written requirement procedure.

I can understand the executive branch's concern about leaks and papers flowing in the wrong direction, but that once you do come before the relevant committee, and I mean one, that there be a record and that we be able to ask you and you be required to answer the questions orally which I was asking heretofore to be done in a written fashion.

So those two elements are the important elements of the reporting requirement to me. I like this way best. I think it is the most orderly. It meets the needs that I think must be addressed best but I am not married to that and I would like very much for you to pursue that. Those two points.

Mr. HEYMANN. We will get back to you or your staff, Senator Biden, within a week on that.

Senator BIDEN. Now, I am sorry to hold you so long, but the Justice Department has argued long and hard for amendment to the Jencks Act.

Mr. HEYMANN. And the ABA apparently joined us over the weekend. It makes us somewhat less lonely than we have been.

Senator BIDEN. Could you tell how Justice envisions the provisions in the bill would work in practice?

Mr. HEYMANN. Senator Biden, I could and I will, but let me point out that Earl Silbert who you have appearing later in the morning was the moving spirit, as far as I know, without any detailed consultation with the Department of Justice, in working out a compromise in the

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ABA that rejects our provision. Our provision is written in terms of the judge's discretion to refuse to disclose consistent information from a prior statement.

The ABA rejects that and it adopts instead a different term that gives some protection to national security information and considerable protection to the defendant's right to the impeachment value of a Jencks statement. I would not be inclined to quarrel with the ABA's change there.

Senator BIDEN. Is that to say you will agree with Mr. Silbert's testimony and so I could ask him that question?

Mr. HEYMANN. I think that is correct. But, they have changed the provision in a way that continues to give protection in national security matters. They find technical difficulty with the language "consistent" that we have used, just as we find technical difficulty with the language concerning bills of particulars. The ABA is at present a group that is not enthusiastic about prosecutorial powers. The ABA has a substitute provision. It seems to me to be as good as ours and probably better and I think I would move to their provision.

Senator BIDEN. All right, OK.

Mr. HEYMANN. And you have Mr. Silbert coming later this morning, I understand.

Senator BIDEN. Yes, he is. Section 4 of the bill authorizes the Government to delete certain items and summarize a substitute for others. Now, could you tell us for the record why this is needed and does it go beyond what is permitted in the Federal rules of criminal procedure, rule 16?

Mr. HEYMANN. Well the issue of deletions and summaries can come up in either of two places. It can come up in the context of discovery where perhaps rule 16 would authorize it and perhaps it wouldn't. It can also come up in terms of what can be used at trial by the defendant who has already gained access through discovery or himself had information.

There is no specific rule in the Federal rules of criminal procedure that deals with the latter situation although judges have allowed it as part of a common law power of some sort.

As you know, Senator Biden, in many ways this entire bill codifies, regularizes, and makes predictable what many, including the Department of Justice, would argue is largely within the power of the courts now. The trouble is it is not predictable. It is not regular. It depends for a defendant on what court he happens to be before. It depends for us on what court, what time.

What those provisions do seem to me to be, perhaps, are the wisest single central part of a bill that I think is very desirable. Frequently the national security problem with a disclosure relates to specifics of the disclosure that have nothing to do with the defendant's rights. For example, a particular disclosure would reveal the name of an agent of the United States who had done something that bears on the defendant's guilt or innocence. A summary or a stipulation or an admission by the Government will fully capture what is important to the defendant: that an agent of the Government urged him to commit the crime, or did this or did that. For the purposes of a fair presentation to the jury, it will all be there. The only thing that is

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eliminated is what is irrelevant in terms of fairness and that is the particular name of the agent, or the particular location of an installation.

What I am saying is that by a happy coincidence that I find rare in life, what is crucial to national security are specifics that are often irrelevant to fair trial and the provisions in your bill that permit—and indeed we would have urged you as one of our minor requests that it be required of the judge wherever it is consistent with fair trial—substitution fully adequate for fair trial but deleting specific names. That provision is a provision that does everything. It maintains a fair trial and protects national security. It is crucial both for what goes in a trial and for what is available in discovery.

Senator BIDEN. One last question. To move back to the standard of relevant and material that you would like to see rather than merely relevant. I thought what I was doing was, and I think I still hold the same position, that what I was doing was essentially reiterating present law. Now you said in your testimony that the "relevant and material" standard is current law. But isn't that current law only for discovery and not admissibility and isn't there, shouldn't there be a distinction made between the two?

Mr. HEYMANN. I think if there is a distinction between the two, Senator Biden, we would want something a little bit broader for discovery than for admissibility at trial so that the defendant would have a broader array available to him.

To be frank, I don't think that either of us can say that the standard of relevant and material is the present law or relevant is the present law. I could argue either side. I much prefer to argue the side of that relevant and material is the present law. It is the law for information about informants. It is much more generous to the defense than the present law for rape evidence.

My argument would go by analogy and it would say, this is a situation like information about an informant and information about the sexual practices of a rape victim, and does require something higher than mere logical relevance and thus should be the same.

I think that is a quite strong argument. If you want to know whether the trial courts we have been before have been acknowledging that they are applying anything more than relevance, the answer is, I think, that most of them have not acknowledged that they are applying something more.

Senator BIDEN. One of the fundamental differences, though, between the interest being protected in the case of a rape victim and the interest which you are seeking to protect is that in the case of—in the law as we changed it, and I sponsored it with regard to previous sexual behavior of the rape victim. My purpose there, along with my colleagues, I assume, was to protect the interest of the victim.

Now, I think that is arguably different than the interest of the Government, even though the Government can be a victim. We are talking about an individual and the Government.

Mr. HEYMANN. If that is true, Senator Biden, it is not true of the informant situation to which again it is very similar. The analogy between informant and national security seems to me to be very close. Indeed, in national security matters we are dealing with foreign

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informants—the intelligence community happens to call them something different from informants—they call them agents and sources—but they are domestically simply called informants. They are the same operation, the same type of people.

The idea that they get one level of protection where they may be killed abroad and a greater level of protection where they may be killed at home, doesn't make much sense to me.

I would like to take one brief step back, Senator Biden.

Senator BIDEN. Sure.

Mr. HEYMANN. To correct something I did. I would like to respond to your question on the Jencks Act because I would like to just leave the record a little bit open on whether the ABA provision or our provision is the better. You asked me how our provision would work and, incidentally, I think we will agree with the ABA provision, but I would like to leave the record just a little bit loose on that.

I have not, in fairness, consulted my colleagues here. It came up very suddenly. It came as a surprise to me on Monday of this week, the way our provision would work where we would have a witness. The problem situation is that a Government employee is going to be a witness. Perhaps the Government employee is a CIA agent who is going to be a witness and wrote a report on an event.

Now, because he is a witness, the Jencks Act requires his reports on what he is testifying to to be furnished to the defense and available at trial. We agree that if there is any inconsistency, any possibility of impeachment coming out of those reports, they should be made available to the defense and available at trial.

However, in a certain number of cases—it is not large and so it is not an immense issue either from the civil libertarian point of view or from the national security point of view, but it is one we feel we are right on, and therefore are firm and strong on—in a certain number of cases, that report by the CIA agent describing a conversation that the defendant was involved in will include detail, for example, the name of another agent, which is under present Jencks Act standards related to his testimony and therefore under the Jencks Act has to be turned over, but is in no way important to the defense. Just having the particular name in many cases will not help the defense in any way to impeach the testimony of the agent who has testified.

For that reason our provision said that a judge could look ex parte as he can under rule 16, as he can in another provision of the Jencks Act now, as he can with *Brady* questions and determine for himself whether this was consistent.

Where the classified national security name of an agent or a location of an installation was consistent with the statements or was of no use for impeachment, and if he found that it was consistent and of no use for impeachment, then the judge would say that can be deleted and the rest of the Jencks Act statements handed over.

The ABA proposal that Mr. Silbert will describe to you simply goes directly to the conclusion. It says if the judge finds, not that it is consistent—that was our language—but that it is not material to impeachment, then he may delete it. That is from a group that is not sympathetic to Government concerns and not in prosecution and not hostile to Jencks Act in any way.

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I think they capture the same purpose and that is why I said what I said earlier, but I would like to have you people have an opportunity to comment. I would just like to have my colleagues have an opportunity to come back to you with a comment.

Senator BIDEN. Fine, fine. Well I know you, as I said earlier, you have many more pressing matters this week and I have other questions but we are going to have, I assume, continue to have the opportunity to speak with you on a regular basis. So, it is not like when I let you go today that you are not available on the phone or in your office to pursue some of these discrepancies.

I would like to say that I agree with your outline of where we are at this point. I think the areas of agreement are vast. The areas of disagreement are minimal and the three most troubling of those areas of disagreement are the ones that we have been discussing. Hopefully we can arrive at a satisfactory resolution of those areas of disagreement, but I want to thank you very much for coming up.

Mr. HEYMANN. We appreciate your proceeding with the hearings and the support you have given this, Senator Biden, because it would be—I think I agree with you and I think you agree with me—it would be a shame for us to fail to get action at a time, and on a bill where there is such a measure of agreement.

Senator BIDEN. I agree.

Mr. HEYMANN. Thank you, Senator Biden, and if I want peace and quiet I can come back in here?

Senator BIDEN. You certainly can, except there has been some suggestion that I should begin hearings in this subcommittee on the conduct of the FBI in the matter you are most involved in.

I am resisting that as much as you would probably like me to resist it. Thank you very much.

Mr. HEYMANN. You are welcome.

[The prepared statement of Mr. Heymann follows:]

PREPARED STATEMENT OF PHILIP B. HEYMANN

Mr. Chairman, and members of the subcommittee, I am pleased to be here today to discuss S. 1482, a bill introduced by Senator Biden and cosponsored by Senator Kennedy of this subcommittee as well as Senators Bayh and Huddleston. This bill represents a well-reasoned response to the problems posed by classified information in criminal cases. In August of 1979 I was privileged to appear before the Subcommittee on Legislation of the House Permanent Select Committee on Intelligence to discuss two legislative proposals before that subcommittee addressing what we have come to refer to as the "Graymail" problem. These were H.R. 4736, which was introduced by Representative Murphy, and H.R. 4745 an administration bill introduced by Congressman Rodino, chairman of the House Judiciary Committee. I now look forward to this opportunity to comment on the provisions of S. 1482.

At the outset, I want to commend the chairman for his pioneering efforts in addressing the problem of the disclosure of sensitive national security information in the context of criminal prosecutions. As chairman of the Secrecy and Disclosure Subcommittee of the Senate Select Committee on Intelligence, he directed an extensive study of the impact of secrecy on the administration of justice in cases involving the national security. Since that time, the Department of Justice has worked with Chairman Biden, Congressman Murphy and the ACLU to devise legislation that would provide procedures for these troublesome cases. From these sessions has emerged a significant degree of agreement on the major contours of a legislative response to the difficult issues which arise in criminal cases involving national security matters.

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In my testimony today I will first briefly discuss the problems we currently face in criminal cases involving national security information and the reasons why I believe there is a need for legislation to resolve those problems. I will then specifically address the provisions of S. 1482. In doing so, I hope to explain the importance if the improvements the provisions of the bill will produce, and where appropriate, will suggest modifications that I believe will enhance the effectiveness of the legislation.

As the chairman and I both noted in announcing the introduction of the various graymail bills on July 11, some important differences in approach remain to be resolved. However, in focusing on these differences, I do not want to create the erroneous impression that the differences outnumber or overshadow the similarities and advantages offered by S. 1482 and the administration's approach.

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 defense 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 drop the prosecution. "Graymail" is the label that has been applied to describe this tactic. It would be a mistake, however, to view the "graymail" problem as 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 the problem, it is necessary to examine the decisionmaking process in criminal cases involving classified information. Under present procedures, decisions regarding the relevance and admissibility of evidence are normally made as they arise during the course of the trial. In advance of trial, the Government often must guess whether the defendant will seek to disclose certain classified information and speculate whether it will be found admissible if objected to at trial. In addition, there is a question whether material will be disclosed at trial and the damage inflicted, before a ruling on the use of the information can be obtained. The situation is further complicated in cases where the Government expects to disclose some classified items in presenting its case. Without a procedure for pretrial rulings on the disclosure of classified information, the deck is stacked against proceeding with these cases because all of the sensitive items that might be disclosed at trial must be weighed in assessing whether the prosecution is sufficiently important to incur the national security risks.

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 illegal 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 for a variety of crimes. This perception not only undermines the public's confidence in the fair administration of criminal justice but it 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 important 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 provisions and the possible enactment of a charter for intelligence activities can be expected to expand the number of cases presenting classified information problems

The Justice Department has recently endeavored to resolve problems posed by issues involving classified information as they arose in individual 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

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of procedures for resolving classified information issues prior to trial can the speculation and irrationality be removed from the present system. Rather than making a rough and poorly informed guess as to the national security costs of a prosecution, the government under the procedures contained in S. 1482 would be able to determine whether in fact there was an actual conflict between its prosecution and national security responsibilities and, if there was, to make an informed assessment of the costs of continuing the prosecution. While it is not possible to eliminate the tension between the executive's prosecutorial responsibilities and its duty to guard against disclosure of classified information, I believe that the procedures contained in this bill would significantly enhance the Government's ability to discharge these responsibilites without jeopardizing the defendant's right to a fair trial.

THE PROVISIONS OF S. 1482

Key provisions of S. 1482 would create a procedure for pretrial rulings and appeals on whether classified information may be disclosed by the defendant at pretrial or trial proceedings. These provisions would prevent the premature and unnecessary abandonment of prosecutions in the face of "graymail" threats by enabling the Government to obtain court orders barring the disclosure of inadmissible classified information. When classified information is determined by the court to be admissible, the bill provides that alternatives to disclosure of the specific classified items and measures other than dismissal be employed where such steps are compatible with the defendant's right to a fair trial. In addition, by authorizing the Government to take interlocutory appeals the bill would redress the present situation in which the Government, when faced with a questionable district court ruling, must either compromise the national security information by permitting its disclosure at trial or withhold the information and jeopardize the prosecution. A number of other important issues are also addressed in S. 1482, and I will discuss these issues as they arise in relation to the various sections of the bill.

SECTION 1. DEFINITIONS

This section provides workable definitions for the terms "classified information" and "national security" that will determine the scope of the information subject to the procedures contained in the bill. The definition of "classified information" in subsection (a) will encompass all information determined pursuant to executive order, statute, or regulation to require protection for reasons of national security. This definition has the advantage of encompassing both the present executive order governing classified information (Executive Order 12065) and any executive orders, statutes, or regulations supplementing or superseding the present executive order. Consistent with the definition of "classified information", the definition of "national security" in subsection (b) tracks the definition of that term in Executive Order 12065.

SECTION 2. PRETRIAL CONFERENCE

This section adapts the general pretrial conference provision of rule 17.1 of the Federal Rules of Criminal Procedure to the particular context of criminal cases involving classified information. The procedure established by this section will enable either party to secure a pretrial conference early in the case to set appropriate timetables for the resolution of issues involving classified information. I believe that this provision of S. 1482 should afford the parties and the court adequate opportunity to address the often complex sensitive questions presented in criminal cases involving classified information.

SECTION 3. PROTECTIVE ORDERS

This section requires the court, upon the request of the Government, to enter an appropriate protective order to protect against the compromise of classified information. There is precedent for this provision in current law. At present, rule 16(d)(1) of the Federal Rules of Criminal Procedure authorizes the court to enter appropriate protective orders in connection with the discovery process. The authorization of the issuance of protective orders under this section, of course, would apply whether the disclosure of classified information to the defendant was in response to a discovery request or otherwise.

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I believe that the subcommittee could provide important guidance to the courts regarding the protective measures that may be utilized by specifying in this section examples of the types of protective measures that would normally be appropriate to safeguard against the compromise of classified information. Examples of the terms of a protective order that could be included in this section would be:

(a) Prohibiting the disclosure of the information except as authorized by the court;

(b) Requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;

(c) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;

(d) Requiring appropriate security clearances for persons having need to examine the information in connection with the preparation of the defense;

(e) Requiring the maintenance of logs recording access by all persons authorized by the courts to have access to the classified information in connection with the preparation of the defense;

(f) Regulating the making and handling of notes taken from material containing classified information; and

(g) Authorizing the assignment of Government security personnel and the provision of Government storage facilities.

SECTION 4. DISCLOSURE OF CLASSIFIED INFORMATION TO DEFENDANTS

This section provides that, upon the motion of the Government, alternatives to disclosure of specific items of classified information may be employed. Rule 16(d)(1) of the Federal Rules of Criminal Procedure presently provides that "[u]pon a sufficient showing the court may at any time order that the discovery * * * be denied, restricted, or deferred or make such other order as is appropriate." This section would supplement rule 16(d)(1) by providing guidance to the court as to alternatives to be employed when disclosure of the specific classified information to the defendant is not necessary. These alternatives include the deletion of specific items of information, the use of a summary of the information, and the substitution of a statement admitting relevant facts. This procedure would both permit prosecutions to be continued where an order requiring that the specific classified information be disclosed to the defendant would prompt the Government to dismiss the case and protect against the unnecessary disclosure of classified information. As under present rule 16(d)(1), this section provides that the Government may demonstrate that the use of such alternatives is warranted in an in camera submission to the court alone.

I urge that the subcommittee amend this section to provide that the court be required to authorize the use of one of the alternatives to disclosure unless it determines that disclosure of the classified information itself is necessary to enable the defendant to prepare for trial. This approach would have the advantages of providing a basis for consistent judicial decisions on the use of alternatives to disclosure of classified information, avoiding unnecessary disclosure, and protecting the interests of the defendant by assuring that the section could not be used to withhold any classified information necessary to enable the defendant to prepare for trial.

SECTION 5. NOTICE OF THE DEFENDANT'S INTENTION TO DISCLOSE CLASSIFIED INFORMATION

This section requires the defendant to notify the court and the Government of classified information the defendant expects to disclose either at trial or at any pretrial proceeding. The defendant's duty to notify the court extends to all documents or testimony that he knows or has reason to believe contain classified information. The defendant is required to provide a brief description of all such classified information within the time specified by the court. However, this description need not indicate the relationship of the information to the defense or the method by which the defendant intends to develop the information at the pretial or trial proceeding.

The notice requirement is similar to the requirement adopted by Congress in 1978 to deal with sensitive information regarding the victim's prior sexual behavior in rape cases. The rape evidence statute created new rule 412 of the Federal Rules of Evidence. That rule requires the defendant to provide written

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notice 15 days prior to trial of any evidence of specific instances of the alleged victim's prior sexual behavior which the defendant intends to offer at trial. The purpose of the notice requirement in rape cases, like the purpose of the notice requirement in section 5 of S. 1482, is to identify cases in which there is a need to hold a pretrial in camera hearing to determine whether sensitive information may be disclosed by the defendant at trial. The Federal Rules of Criminal Procedure also contain other notice requirements. Rule 12.1 presently requires the defendant to provide the Government with a written notice of his intention to offer an alibi defense and to disclose the names and addresses of the witnesses upon whom he intends to rely to establish the alibi. Rule 12.2 now requires the defendant to notify the Government in writing of his intention to rely upon the defense of insanity at the time of the alleged crime.

The notice requirement of section 5 is the initial step in the procedure created by the bill for predisclosure rulings regarding the relevance and admissibility of classified information. Notice from the defendant of the information he intends to disclose is essential to alert the Government to the nature of the information the defendant will seek to reveal and to enable the Government to evaluate whether it needs to obtain a predisclosure ruling regarding the information. Consistent with the purpose of the notice requirement, subsection (a) provides that, upon request, the court shall order that the classified information identified in the defendant's notice not be disclosed until the Government has been afforded a reasonable opportunity to obtain a predisclosure ruling pursuant to the procedures established by section 6 of the bill.

SECTION 6. PROCEDURE FOR CASES INVOLVING CLASSIFIED INFORMATION

The procedures set out in section 6 should operate to prevent the unnecessary abandonment of prosecutions by making it possible, in appropriate cases, for the Government to secure court orders barring the disclosure of classified information, to ascertain whether alternatives to disclosure of specific information are available, and, where the court determines that disclosure is required but the Government objects to such disclosure, to determine whether measures other than dismissal of the prosecution are appropriate. These procedures will permit 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 prosecution interests of protecting national security by refusing to permit the disclosure of classified information.

SUBSECTION 6(a). MOTION FOR HEARING

This subsection provides that the Government, upon learning that the defendant may disclose classified information, may move for a hearing concerning such information. In connection with this motion, the Government is to provide the court with a certification that the information in question is classified, and may submit an explanation of the classificaiton of the information.

An extremely important aspect of this subsection is its provision for obtaining an in camera hearing. Such a procedure will protect against the unnecessary compromise of classified information and will permit a more open and frank discussion of the issues relating to disclosure. I believe we agree, however, that these procedures should be structured in such a way as to assure that an in camera proceeding is utilized only when the Government is seeking to prevent the compromise of sensitive national security information.

The administration's proposed procedures for obtaining an in camera hearing differ somewhat from those of S. 1482. We had proposed that all predisclosure hearings be held in camera, but that it would be a prerequisite to obtaining any such hearing that the Government demonstrate to the court in an ex parte proceeding that the disclosure of the information reasonably could be expected to cause damage to the national security to the degree required to warrant classification under the applicable executive order, statute, or regulation. Under S. 1482 the court will be required to conduct the predisclosure hearing in camera if the Government certifies that a public proceeding may result in the comprise of classified information. While the two approaches vary somewhat, I believe they serve the same purpose: providing assurance that in camera hearings are employed only when sensitive national security material is actually involved. In my view, the approach under this section of S. 1482 is an acceptable alternative, but I believe that a requirement that the Government demonstrate to the court that

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the information was properly classifiable would better serve the goal of informed judicial decisions on disclosure and related issues.

SUBSECTION 6(b). HEARING

Paragraph (1) of this subsection requires the Government to provide notice to the defendant of the information that is to be at issue in the hearing. Where the Government has previously provided the defendant with specific classified information in connection with pretrial proceedings, the Government would simply identify the specific information in its notice to the defendant. In other circumstances, however, the Government would have the option of identifying the specific information or describing the information by generic category. The generic category approach (which might include a category such as "the identity of CIA agents") might be used instead of disclosing specific names of agents in situations where the defendant may not know the particular information of concern to the Government or may be uncertain of its accuracy.

The "generic category" notice option will provide a procedure for coping with potentially troublesome cases. In many cases, the Government will have provided classified information to the defendant in addition to that information which is identified by the defendant under the notice provisions of section 5. Under section 6(a), the Government could seek a pretrial hearing on these items, and would simply list the additional specific classified items in its notice to the defendant of the material to be considered in the hearing. In some cases, however, the Government will not have previously provided the specific classified information to the defendant and will be extremely reluctant to disclose the additional classified material to the defendant. Absent the "generic category" notice option, the Government may face a dilemma in which it must either (1) compromise classified secrets by confirming the accuracy of information or providing the defandant with information of which he had no previous knowledge, or (2) fail to obtain a pretrial ruling and risk public exposure of the information at trial.

I would suggest that to safeguard against any abuse of the "generic category" option, that the Government's choice of a particular generic category be subject to judicial approval. Requiring judicial review of the appropriateness of the generic category would permit the court to guard against overly broad categories and insure that the categories were appropriate to describe the specific classified information of concern to the Government.

Paragraph 6(b)(2) requires the Government, whenever it has requested a pretrial proceeding, to provide the defendant with a bill of particulars as to the portions of the information or indictment which the defendant identifies as related to the classified information at issue in the pretrial proceeding. Apart from other problems presented by this provision, I am concerned that it and the reciprocity provision under subsection 6(c) will serve to undermine the basic purpose of the legislation by providing defendants with additional incentives to press for disclosure of classified information.

I question the need for the bill of particulars section. Rule 7(f) of the Federal Rules of Criminal Procedure now permits the defendant to seek a bill of particulars in any Federal criminal case. Whether a bill of particulars is appropriate depends on the nature of the indictment or information filed by the Government and the circumstances of the particular case. The defendant will have an opportunity to move for a bill of particulars under rule 7(f) prior to being required to notify the Government of classified information he intends to disclose at trial. There is no reason to require a bill of particulars at a later stage since a suitable bill of particulars will already have been provided or will have been found to be inappropriate by the district judge. At a minimum, I would urge that if the provision is retained, it should be amended to make clear that the court will supervise the process applying the standards of the current rule and will determine the adequacy of the particulars provided by the Government.

Paragraph 6(b)(3) provides that the court, after the hearing, shall determine whether and in what manner the classified information at issue may be used in trial or at a pretrail proceeding. The court is to set forth the basis for its determination in writing.

I find it striking that S. 1482 is silent as to the standard to be applied by the district court in determining whether classified information subject to the bill's notice and hearing procedures may be disclosed by the defendant at trial. I

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believe inclusion of a standard to Govern the court's determination is essential to the basic purpose of a legislative response to the graymail problem—to provide guidance to the courts, to promote uniformity and predictability, and to facilitate decisions on the merits in cases involving classified information through procedures compatible with the defendant's right to a fair trial.

I strongly urge the subcommittee to adopt a "relevant and material" standard to govern the court's determination to permit the defendant's disclosure of classified information. This is the standard which the administration adopted in its legislative proposal addressing the graymail problem. Under the hearing provisions we drafted, the court would be required to prohibit the defendant from disclosing or eliciting classified information unless it found that the information was relevant and material to an element of the offense or a legally cognizable defense.

It was our intent in formulating this standard that the term "material" was to mean more than that the evidence in question bore some abstract logical relationship to the issues in the case; it would require that the evidence be of significance to the defendant's case. I would stress, however, that this standard was not intended to, and, in my view would not, preclude disclosure by the defendant of classified information found by the court to be "relevant and material" to impeachment.

The "relevant and material" standard we propose for inclusion in S. 1482 is 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 identify 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 in *Roviaro* ruled that disclosure of such sensitive 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. Thus, the Court found in the informant situation that the significant government interest in nondisclosure requires that a more demanding standard than relevance be employed. Certainly 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 than that in protecting the identities of law enforcement informants.

I would also note that in enacting the recent rape evidence rule, Congress recognized that a higher standard than relevance was warranted in determining whether the victim's past sexual behavior could be disclosed at trial. There, Congress required not only that the evidence of the victim's past sexual behavior be "relevant", but also "that the probative value of such evidence outweighs the danger of unfair prejudice." Rule 412(c)(3), Federal Rules of Evidence. The "relevant and material" standard I have proposed would reject such a balancing approach which could preclude the accused from disclosing evidence important to his defense and would instead merely require that the classified information be significant to the defense of the case in order to be disclosable at trial.

Paragraph (4) of subsection 6(b) sets out additional procedures to be followed after the court's initial ruling on the disclosability of classified information by the defendant. These procedures would provide needed flexibility where the court finds that disclosure is appropriate. First, in lieu of disclosure of specific classified information, the Government may proffer a statement admitting the relevant facts the information at issue would tend to prove or may submit a summary or portion of the specific classified information. Substitution of the proffered alternative is required if the court finds that the defendant's right to a fair trial will not be prejudiced. 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 material necessary to afford him a fair trial. Second, should the court find that the use of these alternatives to full disclosure is not appropriate and the government continues to object to disclosure, a broad range of possible judicial responses is provided.

The court would be afforded broad discretion in fashioning an appropriate sanction for nondisclosure. By requiring that every order imposing sanctions for nondisclosure permit the Government to avoid the sanction by agreeing to the defendant's disclosure of the information, the bill will afford the Government the opportunity to weigh the impact of the particular sanction against the costs

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of permitting disclosure. Permitting the Government to exercise its right to take an interlocutory appeal prior to the enforcement of any order imposing sanctions for nondisclosure will enable the Government to make the critical "disclose or dismiss" decision with a full understanding of the costs involved.

SUBSECTION 6(C). RECIPROCITY

I question the need for the requirement that the Government provide the defendant with rebuttal evidence when classified information is found admissible under the predisclosure hearing procedures. The discovery rights of defendants in criminal cases under current law are substantial, and there is, in my view, no legal requirement that such an additional discovery provision accompany the type of pretrial notice and hearing procedures contained in this bill. I am aware that it has been argued that the Supreme Court's decision in *Wardius* v. *Oregon*, 412 U.S. 470 (1973), mandates the inclusion of a provision such as that set forth in subsection 6(c) of S. 1482. In that case, the Court ruled in the alibi notice context that due process required that if the defendant is compelled to give advance notice of his intention to present an alibi defense the Government must provide the defendant with notice of its refutation of the alibi defense.

In *Wardius*, however, the Court was addressing a procedural rule designed to prevent surprise and to maximize the amount of information available to prepare for trial. In that context, the Court concluded that it was unfair to require only one party to make disclosure. S. 1482 is not intended to enhance discovery of information to facilitate preparation for trial but is instead designed to provide procedures for orderly pretrial determination of issues involving the use of classified information at trial. In this respect, then, S. 1482 is comparable to the rape evidence legislation recently adopted by Congress and unlike the alibi notice rule. In the rape evidence rule there is no requirement that the Government disclose its rebuttal evidence.

However, I recognize that there may be limited circumstances in which, pursuant to the pretrial hearing provisions, the defendant will be required to disclose information that would not be subject to the existing reciprocal discovery provisions of current law. I believe these instances will be limited because most of the classified information that will be at issue in the pretrial hearing will have been provided to the defendant by the Government as part of the discovery process. Thus, while the Department is not opposed to a reasonable reciprocity provision as a policy matter to insure the fairness of the procedural scheme created by the proposed graymail legislation, the reciprocity requirement should be sufficiently flexible to adapt to the circumstances of particular cases. I am therefore pleased that this provision of S. 1482 provides that the court is to consider the "interest of fairness" in making its determination whether the government is to be required to supply rebuttal evidence.

I urge that this "interest of fairness" language be retained, at a minimum, so that the court may respond appropriately where fairness does not require further disclosure by the government, for example, where the classified information involved was originally supplied to the defendant by the Government on discovery. I would suggest that perhaps another solution would be for the reciprocity provision to explicitly state that where such information was provided to the defendant pursuant to a discovery request, that the Government need not supply in addition its rebuttal evidence unless the interests of fairness compel such additional disclosure.

I am also concerned that, in contrast to the alibi situation, it is not entirely clear what is covered by the requirement that government "provide the defendant with the information it expects to use to rebut the classified information." Unless the trial judge is provided with discretion to guide the Government as to the scope of its obligations or the sanction for nondisclosure is modified to exclude good faith mistakes as to whether material should be considered to be "rebuttal evidence", I believe that the provision may spawn troublesome and disruptive litigation.

SECTION 7. INTERLOCUTORY APPEAL

This section would authorize the Government to take interlocutory appeals from adverse district court orders relating to the disclosure of classified information. Inclusion of this provision is a key element in addressing the graymail problem. At present, the Government is powerless to appeal such orders

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and therefore is unable to obtain appellate review of 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 jeopardize the prosecution.

Congress has empowered the United States to appeal orders of a district court suppressing or excluding evidence in a criminal case where the U.S. attorney certifies that the appeal is not taken for purposes of delay and that the evidence is a substantial proof of a fact material in the proceeding. See 18 U.S.C. 3731. I believe that a similar provision authorizing interlocutory appeals of orders requiring the disclosure of classified information is warranted since such orders may have even a more dramatic impact on a prosecution than a suppression ruling. Like 18 U.S.C. 3731, this provision would require certification that the appeal is not taken for purposes of delay.

This section also responds to the need to protect the defendant's interest in a speedy trial. While I expect that most issues involving classified information will be resolved prior to trial and that thus most interlocutory appeals will be taken prior to trial, this section permits interlocutory appeals to be taken during trial and contains provisions to insure that such appeals will be resolved quickly to avoid disruption of the trial. The procedures for interlocutory appeals during trial are patterned closely on provisions of the District of Columbia Code adapted by Congress in 1970. See D.C. Code § 23–104.

SECTION 8. INTRODUCTION OF CLASSIFIED INFORMATION

This section addresses various issues related to the disclosure of classified information at a trial or pretrial proceeding. These provisions would serve to protect against unnecessary disclosure of classified information without undercutting the rights of criminal defendants. Subsection (a) provides that documentary materials need not be declassified in order to be placed into evidence. This subsection addresses a problem which has arisen in prior cases where trial judges have required that documents be declassified prior to use at trial. Since classification is an executive rather than a judicial function, subsection 8(a) would correctly permit the Government to introduce classified material at trial without changing or eliminating its classification status. The decision whether to continue or modify the classification status of the document after it has been disclosed at trial is best left to the classifying agency.

I view as extremely important the provisions of subsection 8(b), which authorize the court to prevent unnecessary disclosure of classified information by permitting the use of only a portion of a classified document or the excision of some or all of the classified information from a writing, recording, or photograph introduced in a criminal case. In the recent espionage prosecution in the *Kampiles* case, the Government introduced into evidence a copy of a highly classified manual with certain extremely sensitive items deleted. This step, which was taken with the consent of the defendant, protected the material from unnecessary exposure. Section 8(b) of S. 1482 would permit the court, over objection of the defendant, to order that this approach be followed in future cases.

The effect of this provision would be to protect the most sensitive aspects of classified documents—aspects that the Government would otherwise avoid revealing in presenting its case at trial. The defendant's rights would be protected since the court would hear any arguments the defendant chose to offer against permitting the deletions and the defendant would be free to demonstrate that the deleted portions should be disclosed, where, for example, they represented a relevant and material part of his defense.

Subsection 8(b) does not, however, reach those instances where it is impractical to delete sensitive portions of a document. I urge the subcommittee to adopt a provision similar to that contained in subsection 8(c) of H.R. 4745 which would permit the government to prove the contents of a classified writing, recording or photograph without the introduction of the original or a duplicate into evidence. By relying on secondary evidence such as testimony to prove matters contained in the writing, recording or photograph, the disclosure of classified information could be minimized Absent the inclusion of such a provision, the best evidence rule (rule 1002 of the Federal Rules of Evidence) would appear to preclude this approach. As would be the case under section 8(b) of S. 1482, the defendant would have an opportunity to present any arguments against this approach, and would be free to introduce the classified writing, recording, or

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photograph if it is material to his defense. Where, however, the defendant has no interest in or basis for introducing the document itself, the provision I have proposed would prevent the needless disclosure of the classified information.

Subsection 8(c) provides a procedure to address the problem presented during a pretrial or trial proceeding when the defendant poses a question or embarks on a line of inquiry that would require the witness to disclose classified information. The provision serves in effect as a supplement to the in camera proceeding provisions in section 6 to cope with situations which cannot be handled effectively under that section.

SECTION 9. SECURITY PROCEDURES TO SAFEGUARD AGAINST COMPROMISE OF CLASSIFIED INFORMATION DISCLOCED TO THE COURT

This section addresses the need for the development of adequate procedures to prevent the compromise of classified information submitted to the Federal courts. Such information may be disclosed in original documents submitted to the court in briefs and pleadings, during oral arguments, or through testimony. At present, the handling of such materials is often the subject of ad hoc arrangements developed in each case. Section 9, like section 103(c) of the Foreign Intelligence Surveillance Act, calls for the formulation of uniform security procedures for the protection of classified information submitted to the Federal courts.

SECTION 10. JENCKS ACT EXCEPTION FOR CLASSIFIED INFORMATION

Section 10 would amend the Jencks Act (18 U.S.C. 3500) to provide a limited and, I believe, reasonable exception to its disclosure provisions. The purpose of the Jencks Act is to assist the defendant in impeaching the testimony of government witnesses by requiring that prior statements of a Government witness regarding the subject matter of his testimony be provided to the defendant. At present, the Jencks Act contains a provision permitting the court, upon the motion of the United States, to determine in an in camera proceeding whether certain aspects of the witness' statement should be excised as unrelated to the subject matter of the witness' testimony and withheld from the defendant. Section 10 of S. 1482 would add an additional exception to the disclosure provisions of the Jencks Act permitting the excision of, or substitution of a summary for, those aspects of the witness' statement which are classified and are consistent with the witness' testimony.

Without a provision such as section 10, the Jencks Act would require the disclosure to the defendant of classified information which, though related to the subject matter of the witness' direct testimony, is not at all inconsistent with the witness' testimony and is thus of no value for impeachment purposes. Thus, absent the proposed modification of the Jencks Act, the government may have to forego the use of an important witness, drop a prosecution entirely, or compromise sensitive national security information the disclosure of which will not further the purpose of the Jencks Act of assisting the defendant by providing material useful for impeachment.

The following hypothesis illustrates the problem that may arise under the Jencks Act. Suppose a Government agent who witnesses the transfer of a highly classified document to a member of a hostile foreign intelligence service prepared a statement describing these events and in this statement noted that the person receiving the document was the superior of a CIA agent whom the United States had planted in the foreign intelligence service. Under the Jencks Act, the United States would be required to choose between disclosing the existence of the CIA agent to the defendant (another agent of the foreign intelligence service or a person cooperating with that organization) or not calling the eyewitness to the transfer of the document whose testimony would be critical to the successful prosecution of the case.

I believe that the provisions of section 10 would prevent such situations without undercutting the important purpose served by the Jencks Act, and thus I urge the subcommittee to retain the proposed modification of the Jencks Act as a sound, reasonable response to a limited but nonetheless serious problem.

I am aware that the proposed modification of the Jencks Act has been the subject of controversy and would like to take the opportunity to address some of the arguments that have been advanced in opposition to the proposed amendment of the Act. At the outset, it is important to emphasize that the issue is one of policy, not constitutional law. There is absolutely no constitutional problem

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posed by the adoption of section 10 of S. 1482. 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*, *supra*, at 345, 362. They state rules of evidence governing trial before Federal tribunals; and we have never extended their principles to State criminal trials." Indeed, the Jencks Act itself demonstrates that Congress may constitutionally assign to the courts the responsibility for determining whether aspects of a witness' statement should be deleted before being provided to the defendant and his counsel. *See* 18 U.S.C. 3500(c).

The real question raised by the Jencks Act modification proposal is whether the benefits of the provisions to the sound administration of criminal justice and the protection of sensitive national security secrets outweigh any possible adverse impact on the defendant's ability to impeach prosecution witnesses. As I noted above, absent the inclusion of a Jencks Act provision such as that contained in section 10 of S. 1482, the United States may be needlessly forced to forego the use of a crucial witness, drop a prosecution entirely, or compromise sensitive national security information. While this problem can be expected to arise infrequently, it would seriously jeopardize those prosecutions in which it did arise unless the proposed modification is adopted.

Much of the opposition to the Jencks Act modification I have encountered has rested on the argument that defense counsel rather than the court should determine the usefulness of a witness' prior statement for impeachment purposes. There are numerous situations, however, in which the court rather than defense counsel determines whether material is sufficiently important to the defendant to merit disclosure.

First, as noted above, there is a statutory precedent for permitting the review of Jencks Act statements and the deletion of material by the court prior to delivery of the statement to the defendant. Subsection (c) of 18 U.S.C. 3500 presently requires the court to excise portions of the statement that are found not to relate to the subject matter of the witness' testimony. Congress, as a matter of policy, authorized this exception even though defense counsel may be better equipped to determine what portions of the witness' statement relate to the direct testimony.

The proposed modification of the Jencks Act in section 10 of S. 1482 would merely extend the court's ability to excise portions of statements in a carefully confined set of cases where the excisions involve sensitive national security secrets and would not deprive the defendant of any material useful for impeachment.

I reiterate that this modification is entirely consistent with the purposes expressed by Congress in enacting the Jencks Act. See e.g., H. Rept. No. 700, 85th Cong. 1st sess. 2, 4 (1957) ("Such provisions as this legislation contemplates effect a twofold beneficial purpose. It protects the legitimate public interest in safeguarding confidential government documents and at the same time it respects the interests of justice by permitting defendants to receive all information necessary to their defense."); S. Rept. No. 981, 85th Cong. 1st sess. 4 (1957) ("The Committee is also of the opinion that the decision as to relevance must be made by the trial judge and not by the defendant or his attorney".). Second, under the discovery rules, the court rather than the defense counsel determines whether the information at issue is material to the preparation of the defense. Third, under the Brady doctrine which involves the constitutional due process right of the defendant to disclosure of exculpatory material, the court rather than defense counsel determines whether the material is sufficiently beneficial to the defendant to require that it be made available to the defendant. There are thus numerous situations in which the court rather than defense counsel makes the assessment of the value of the information to the defense.

In the hearings in which I participated before the Subcommittee on Legislation of the House Permanent Select Committee on Intelligence, the Supreme Court's decision in *Alderman* v. *United States*, 394 U.S. 165 (1969) was cited as a basis for opposing the proposed Jencks Act modification contained in the administration's graymail bill, H.R. 4745, a provision substantially similar to that of section 10 of S. 1482. In *Alderman*, the Court concluded that the task of tracing the impact of illegally obtained information on the investigation of the defendant was "too complex and the margin of error too great to rely wholly on the in camera judgment of the trial court." 394 U.S. at 182. However, the Supreme Court has expressly distinguished the problem addressed in *Alderman* from the Jencks Act

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context noting that "[i]n both the volume of the material to be examined and the complexity and difficulty of the judgments involved, cases involving electronic surveillance will probably differ markedly from those situations in the criminal law where in camera procedures have been found acceptable to some extent." 394 U.S. at 182–83 n. 14. Furthermore, Federal courts following *Alderman* have repeatedly distinguished between the complex task of assessing the impact of electronic surveillance and the function of examining reports or statements to determine whether they contain exculpatory material or information discoverable by the defendant.[1]

The potential for prejudice to the defendant from the proposed Jencks Act provision is extremely remote. Under the provision, if the government certifies that the specific material in the witness' statement is classified and demonstrates that the material was consistent with the witness' testimony, the court would delete the material or substitute a summary and then provide the statement to the defendant. The provision would permit the excision of additional, consistent detail not disclosed in the witness' direct testimony. It would not deprive the defendant of any of the means of impeachment referred to by the Supreme Court in the *Jencks* case—"[f]lat contradiction," [t]he omission from the report of facts related at the trial," "a contrast in emphasis upon the same facts" and "a different order of treatment." *Jencks* v. *United States*, 353 U.S. 657, 667 (1957).

If the subcommittee determines that employing a standard permitting excision of material upon a finding that the material was "consistent" with the witness' testimony would permit excision in too broad a range of circumstances, other language could be used that would more clearly define those situations in which the portion of the witness' statement had no value for impeachment purposes. For example, section 10 could be amended to provide that excision would be permitted only when the classified information was "fully consistent" with the witness' testimony.

I would also suggest that while the provision requiring the Government to supply an affidavit identifying the portions of the witness' statement that are classified is acceptable to the Department, I believe the interests of the defendants would be better served and the court would be able to make a more informed decision if, as we provided in our graymail proposal, the government were required to demonstrate to the court that the Jencks Act materials it sought to have excised were properly classified. This would insure that consistent portions of a Government witness' statement could be deleted only when there was a genuine danger of compromising sensitive national security information.

Finally, while the Department would prefer excision of classified information that has no impeachment value to be mandatory, we believe that even the permissively phrased provisions of section 10 amending the Jencks Act provide an important mechanism to limit unnecessary disclosure of classified information without jeopardizing the rights of the defendant.

SECTION 11. IDENTIFICATION OF INFORMATION RELATING TO THE NATIONAL DEFENSE

This section would require the Government in espionage and other criminal cases involving the transmittal of classified information to identify those materials it expects to rely upon to demonstrate the national defense or classified information element of the offense. This provision is intended to aid the defendant in the preparation of his defense when the Government has submitted large quantities of materials to prove the national defense or classified information element of the offense. The procedure provided under this section would enable the defendant to focus on the particular materials on which the Government intends to rely in establishing its case. I believe this section responds to a legitimate concern of defendants, but I would prefer that it would provide that requiring the Government to supply this notice be within the discretion of the court.

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[1] See, e.g., *United States* v. *Allen*, 554 F. 2d 398, 411 (10th Cir. 1977) (distinguishing *Alderman* in upholding in camera examination of a report by the court to determine whether it contained exculpatory information); *United States* v. *Rawlinson*, 487 F. 2d 5, 7–8 (9th Cir. 1973) (distinguishing *Alderman* in upholding in camera judicial determination as to whether the disclosure of an informant's identity would be helpful to the defendant); *United States ex rel. Williams* v. *Dutton*, 431 F. 2d 70, 71–73 (5th Cir. (1970) (distinguishing *Alderman* in upholding *in camera* judicial determination whether information was material to the guilt or punishment of the defendant).

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SECTION 12. ATTORNEY GENERAL GUIDELINES

Subsection (a) requires the Attorney General to issue guidelines specifying the factors to be considered in rendering decisions not to prosecute cases in which there is a possibility that classified information will be revealed.

Subsection (b) would require the Department of Justice to file a written report whenever there is a decision not to prosecute because of the possibility of disclosure of sensitive national security information. The written report is to include (1) "written findings detailing the reasons for the decision not to prosecute," (2) "the intelligence information which the Department of Justice officials believe might be disclosed," (3) "the purpose for which information might be disclosed," (4) "the probability that the information would be disclosed," and (5) "the consequences such disclosure would have on the national security." This report is to be provided to the Permanent Select Committee on Intelligence of the House and the Select Committee on Intelligence of the Senate.

The Department of Justice opposes the inclusion of such a reporting provision. In our view, the provision goes beyond legitimate oversight and would constitute an infringement of the executive's function to enforce the Federal criminal laws. The provision calls for a detailed written justification of the Justice Department's exercise of its prosecutorial discretion on a case-by-case basis whenever the Department's decision not to prosecute involves as a factor the possible disclosure of classified information. There is, to my knowledge, no precedent for such an incursion into the executive's traditional responsibilities. Such a statutory requirement would establish a precedent that could lead to the intolerable situation in which the Department was compelled routinely to detail its reasons for not seeking indictments or for dismissing charges or participating in plea bargains in particular cases.

I am unaware of any pattern of intransigence on the part of the Department or failure to accommodate the legitimate informational needs of Senate and House Committees on Intelligence that would warrant the type of reporting requirements in S. 1482. 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 respectfully suggest that a continuation of such a flexible, informal process is more in keeping with the proper roles of two coequal branches of Government than is the regime envisioned by subsection 12(b).

In opposing the bill's reporting requirement, I do not mean to question the legitimacy of the underlying concern that a risk of disclosure of classified information should not be used by the executive as an excuse to avoid embarrassing disclosures of Government wrongdoing or incompetence and should not lightly override prosecution of a substantial criminal violation. I simply believe that the subcommittee's concerns in this area can be met without the bill's sweeping reporting provision.

I also have serious doubts regarding the wisdom of requiring the preparation and circulation of at least two sets of written findings disclosing the classified information and detailing all of the ways in which its public disclosure would harm our national security. By definition, such written reports will involve instances where the classified information is viewed by the executive as so sensitive that protection of its confidentiality overrides the strong interest in prosecuting violations of Federal criminal laws. Without denigrating the care with which such reports would be handled by the committees and their staffs, I believe that this subcommittee should pause to carefully reflect whether such reports should be routinely required.

In concluding my testimony before the subcommittee today, I would like to stress that S. 1482 and the modifications I have proposed would require only modest procedural changes in the manner in which criminal cases involving classified information are conducted. The primary effect of the bill would be to alter the timing of rulings on the relevance and admissibility of certain evidence. As I have noted above, the primary features of S. 1482 and the modifications of the bill I have proposed are rooted in statutory provisions and procedural rules that now apply to the conduct of criminal cases. Moreover, the bill reflects the desire to preserve the important values served by public trials in criminal cases. None of the provisions of S. 1482 nor the amendments I have proposed would authorize the exclusion of the public or the press during the taking of any testimony at a criminal trial.

I believe that the candor and cooperation of all the parties who have participated in the formulation of S. 1482 and the two bills introduced in the

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House of Representatives have brought us very near a final resolution of the graymail problem that will provide a reasonable and equitable legislative response to the troublesome issues arising in criminal prosecutions involving sensitive national security matters. While I urge the subcommittee to give careful consideration to the modifications of S. 1482 I have proposed in my statement today, I would like to conclude my testimony be emphasizing that the Department of Justice believes that the core elements of S. 1482 represent a response to the graymail problem which will protect the integrity of sensitive information relating to our national security and defense and will enhance the effective prosecution of criminal cases in which classified information may be at issue, while at the same time insuring that the rights of the accused are not compromised.

Senator BIDEN. Our next panel which is already at the table and I apologize if I mispronounced anyone's name. Mr. Rushforth, Deputy General Counsel, Department of Defense, sitting on my right; Mr. Silver, General Counsel, CIA. Mr. Silver in the middle, and Daniel Schwartz, General Counsel, the National Security Agency.

Gentlemen, why don't we begin in that order, proceed in that order and I will put your entire statements in the record. If you would like to proceed with your entire statement feel free to, but also it would probably be more useful if we could summarize them since I am familiar with them and get to questions more rapidly. Thank you.

PANEL OF EXPERTS:

STATEMENT OF BRENT N. RUSHFORTH, DEPUTY GENERAL COUNSEL, DEPARTMENT OF DEFENSE; DANIEL B. SILVER, GENERAL COUNSEL, CENTRAL INTELLIGENCE AGENCY, AND DANIEL C. SCHWARTZ, GENERAL COUNSEL, NATIONAL SECURITY AGENCY

Mr. RUSHFORTH. Thank you, Senator Biden. I am Brent Rushforth representing the Department of Defense. I support fully the Department of Justice's position on the proposed legislation and support the notion that it constitutes a significant step toward a solution of a complex and difficult problem and I appreciate being invited here this morning to speak to the proposed legislation.

Mr. Heymann has spoken in his testimony of the tension that exists between two very important responsibilities of the executive branch. On the one hand the prosecution of violations of Federal law and on the other the protection of our national security secrets.

The Department of Defense has significant responsibility in the second category. I can say from personal experience within the Department of Defense that our participation in the resolution of that tension between these responsibilities in specific cases has been excruciating. When the resolution includes the dropping of an otherwise valid prosecution or the revealing of sensitive national security secrets during the course of that prosecution, our country is not well served.

I don't believe it is necessary to repeat the analysis or comments on the bill that were included in Mr. Heymann's testimony. I do wish to emphasize our support for most of the comments and amendments suggested by Mr. Heymann. In particular we support the suggestion and the comment of Mr. Heymann on protective orders. We think it would be very useful to spell out in the legislation specific examples of protective orders that could be invoked by the court.

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We believe the bill properly allows excising of certain portions of documents. This has worked well in past criminal litigation by stipulation between the Government and the defendant but the bill as presently structured gives the power to the court to impose that upon the attorney, even though the defense attorney may not agree and we believe that is a very important provision here. Many times the national security may be compromised by the submission of a document in its full and complete form whereas if there were certain excising of critical pieces of information that have nothing to do with the right of the defendant to a fair trial, that document could be submitted and go into the record.

Regarding Mr. Heymann's comment on written findings and reporting of reasons why a particular national security prosecution may have been dropped rather than prosecuted, I can simply say that within the Department of Defense there is substantial nervousness if you will with regard to the submission of written findings and written reports on each and every case as that decision is made.

I believe there would be substantial agreement with Mr. Heymann's comments on those provisions. That is to say we would have no trouble cooperating fully in briefings to the relevant committees regarding those decisions, but we would prefer that those briefings be done in the way that Mr. Heymann suggested. That is to say, periodically rather than when those decisions are made and in oral form rather than written form. I want to emphasize that I would agree fully with Mr. Heymann's comments that when we proceed to discuss these cases within the executive branch, we do so in the way Mr. Heymann suggested.

Senator BIDEN. Because of your concern for leaks and your inability to plug the leaks at the executive level?

Mr. RUSHFORTH. Well I would rephrase that by saying that we are——

Senator BIDEN. I want to set that clear by the way, you know. I have been so tired of being on the Intelligence Committee and talk about the leaks from us. My God, you guys in the executive branch make us look like amateurs in terms of leaks. The record should reflect that. I hope you write that in big print, because I think the public has a very different view of where these leaks come from. They are not coming from us.

Mr. RUSHFORTH. Well I want to say for my part—I don't want to let this moment pass without saying that I think both the legislative branch and the executive branch have very substantial problems in this regard and I wouldn't want to try to be the judge as to who is doing the worse job. I do want to say that I think the problems are substantial.

Senator BIDEN. I agree with that.

Mr. RUSHFORTH. And the reluctance or the nervousness regarding the provision of written report has to do with that phenomenon. The paper flow is, the Xerox machine is a substantial enemy to the maintaining of national security secrets.

Again, I agree with Mr. Heymann that this bill does not constitute major surgery. Indeed it may be fairly said to canonize or to bring into the legislative arena what the judge may already have the power to do but that does not denigrate its importance because as this kind

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of litigation presently goes on, it is basically a role of the dice as to whether the competing interest of maintaining national security secrets on the one hand and maintaining a valid prosecution on the other hand can be reconciled.

We believe this bill will allow the Government to proceed with valid prosecutions while protecting the defendant's right to a fair trial and preventing harmful disclosure of national security secrets.

I think I will conclude with that, Senator Biden, and certainly am happy to answer questions.

Senator BIDEN. Fine, thank you. Mr. Silver.

Mr. SILVER. Thank you, Mr. Chairman. I will not read my statement but I would like to make a few comments. First of all I would like to associate myself with your own opening remarks, Senator Biden, about the importance of the full range of legislative proposals relating to the intelligence community before the Congress, not the least of which are the charters. Having spent the last 2 years of my life working intensively on the charters, I attach a great deal of importance to to the passage of that bill and I know that Admiral Turner personally is deeply committed to the charter legislation.

I also want to make it clear that this graymail problem and legislation to correct it are very near the top, if not at the top, of our list of legislative priorities. Dealing with these problems, both for the Director of Central Intelligence and for myself, has been one of the most agonizing and difficult areas with which we have had to deal.

Our interests, the interests of the Central Intelligence Agency in this bill, are manyfold. I just want briefly to touch on three areas that concern us and that we think demonstrate a strong need for the codification and regularization of the procedures in this area, in order, as Mr. Heymann said, to make them predictable.

The first is espionage prosecutions, many of which, as you know, have had to be forgone or aborted at some point in the procedure because of the very difficult problems of exposing national security information. The second is allegations that are made about the role of the Central Intelligence Agency and about the role of the intelligence community in general in the criminal process—allegations that are untrue but against which we have very little ability to defend ourselves, that in some fashion we are interfering with the Justice Department's activities, protecting wrongdoers, so forth and so on. I can assure you that it is only with the greatest reluctance and after the most careful consideration both by ourselves and by the Justice Department that national security concerns are allowed to intrude into the prosecution of any case.

The public doesn't see this process and I think it is widely misunderstood. One advantage that we see in the graymail bill is to remove this misunderstanding as a public concern.

Third, the question of dealing with our own employees is a concern to us. The overwhelming majority of our employees are honest, upright, and devoted to upholding the law. But, as in any large organization, there is an occasional bad apple, if you will, and we find it frustrating and unacceptable because in many cases, we cannot proceed with criminal prosecution in the fashion that another Government agency would, if, for example, we discover that someone has misappropriated funds from the Agency.

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I would say parenthetically that the vision that some of the supporters of this bill have that passage of this bill will lead to the massive incarceration of Intelligence Agency employees for violations of laws in the United States is a badly misplaced delusion, but the ability to proceed in the rare cases that arise is very important to us.

Senator BIDEN. I would agree with that completely. I am glad you emphasized that point because it has been raised as you know by others and I share your view as to the competence and honesty of the overwhelming majority of the people in the community.

Mr. SILVER. Thank you, Senator. The second point, as previous witnesses have emphasized, is that the differences between this bill, S. 1482, and the administration version, while not totally insignificant, are far less important than the common principles and provisions that run through both. My own personal view is that what we really need is something that will make it clear to the courts that they do have the power to act in this area, introducing predictability into the conduct of these cases, and that this bill would certainly achieve that end.

There is one provision that is not present in the Senate bill that I consider very important and I would like to draw your attention to it. That is the provision which is found in H.R. 4745 that would permit the Government to prove the contents of a classified document without actually introducing that document into evidence.

That provision, which is section 8(c) of H.R. 4745 would overcome the best evidence rule in a very limited number of cases. The purpose of this is to deal with the rare situation in which excision of parts of a document, or even a summary of its contents, is not sufficient to protect the national security information and in which the actual contents of the document, word by word, or picture by picture—and I should say classified photographs are one of the biggest problems in this area—is not really germane to the defense. I think that this provision would perfect the otherwise very satisfactory procedural tools that are included in S. 1482.

Senator BIDEN. I beg your pardon. Now the provision you are referring to is 8(c) of the administration bill or 4745 of the House bill?

Mr. SILVER. It is H.R. 4745.

Senator BIDEN. Oh, I am sorry. OK. I am with you now.

Mr. SILVER. OK. I wanted to make one comment in respect to the matter that you raised, Senator, about interagency cooperation, that you were careful to attribute to a pre-Phil Heymann point in time and just to assure you that, in my tenure as General Counsel of CIA and in dealing with Mr. Heymann, the cooperation on these cases has been complete. Communication has been complete. There has been a very small number of cases but in those that have arisen, we have spent many hours together going over the national security information that was involved. Mr. Heymann is a skilled cross-examiner and he has put us to our proof in a very intensive fashion before he would accept any claim that the national security required terminating or foregoing a prosecution.

Senator BIDEN. May I interrupt you there? Have you had, has that presented any difficulty for your agency? We used to have the 11-question routine in past years and obviously the method which you are now engaged in, and that you as the General Counsel and Phil

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Heymann as the head of the Criminal Division are engaged and which you just recited for us, is a very different process.

Now, has the present process caused the CIA, the General Counsel's Office of the CIA any difficulty? Has it in any way compromised you or have you had any problems with it?

Mr. SILVER. Well, let me start in answering that by drawing a distinction between the kind of case in which the 11 questions apply and the kind of case I was talking about.

Senator BIDEN. All right.

Mr. SILVER. The 11 questions, somewhat to my dissatisfaction, still exist and typically in a case where we report to Mr. Heymann that there has been a leak or unauthorized disclosure of classified information, the procedure that follows is a questionnaire with the 11 questions. Very few if any of those cases are dropped because of national security concerns. They generally are dropped because the FBI or the Department determines that the number of people too whom the information was disseminated is so great that they can't possibly hope to pursue an investigation or that there are some other nonnational security reasons for dropping the case.

Occasionally, paradoxically, we find ourselves in a situation where, as Mr. Heymann was saying, there may be a national security reason not to pursue the investigation and the Agency is saying that we are willing to take the national security risk in order to achieve the prosecutorial aim because the roles are not always what you might expect in that situation.

The kind of case to which I was alluding is the kind of case in which I think the graymail bill would be most often used. That is, for example, a classic espionage case where someone has been detected selling documents to a foreign power or an unrelated criminal case in which there is an intelligence agency involvement or equity. In those cases the kind of procedure that I described to you causes us, as you correctly discern, a lot of work but no substantive difficulty, and we very much appreciate having the kind of dialogue that Mr. Heymann can give.

Senator BIDEN. Well now, in the bill that we drafted, the subcommittee, there is a provision requiring the Justice Department to promulgate guidelines specifying the factors to be used in deciding whether to prosecute a case where national security information may be disclosed, and what I was attempting to get at through this provision was an avoidance of the routine 11-question procedure which in other times may produce the same results it produced in the past and too in a sense, institutionally require without specifying how, leaving it to the discretion of the executive branch the process that you and Mr. Heymann engage in now.

So I assume you don't have any problem with the executive branch setting down guidelines, but nonetheless there would be guidelines, not the open situation which exists now.

Mr. SILVER. I have no problem with it, Senator Biden. I have a certain pessimism as to whether it will materially change the present practice.

Senator BIDEN. I am not so dissatisfied with present practice, I just don't want to go back to past practice. Again, I don't mean to imply that all that was done in the past was bad or designed to do something

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illegal or to pull the wool over somebody's eyes, or to avoid disclosing a blemish. My characterization of it would be that there seemed to be a sense of fruitlessness and an interagency unwillingness to cooperate and it just became institutionalized so that, you know, the Justice Department would get it and say, well, you won't give us all. If they don't answer question eight, well hell, we are not going to move forward and there were many examples of it just ending there. I mean nothing more than a checkoff on very important cases. I mean not minor matters. There were some very important cases. So that I am concerned that we don't, as the personnel changes, 2, 5, 10, 12 years from now and the climate changes that we don't slip back that way.

That is the reason for it. I have no great faith in guidelines, whether they be for the Federal Energy Regulatory Commission or the CIA, or the Congress producing significant results. But, it is more as a breaking action to keep it from moving back. Although you are pessimistic about what it will produce, you have no objection to the inclusion in the legislation of such a provision requiring Justice to move forward with guidelines?

Mr. SILVER. That is correct, sir.

Mr. RUSHFORTH. Senator Biden, if I may take a crack at that same question.

Senator BIDEN. Surely.

Mr. RUSHFORTH. I think with or without the guidelines provision, this legislation, or this bill if it becomes legislation is bound to institutionalize the process that we have been talking about here and it is bound to make that process function a whole lot better than it has functioned in the past.

I have been involved with Mr. Silver and Mr. Heymann in many of the so-called classic espionage cases where on the one hand you have the national security interest involved and on the other you have the interest of the proceeding and these have been excruciating episodes and they have been extremely difficult not because Mr. Heymann was trying to make our life difficult, but because simply the two interests were so head on, in such head-on competition that the resolution of those interests was almost impossible at times.

This legislation which will go a long ways toward making that resolution a whole lot easier. The kinds of things we would sit and argue about for hours were the kinds of things that this legislation will go a long way toward taking care of.

For example, we have a document in front of us with language and a picture and we would argue for hours about whether that could be made available to the defendant and if so whether it would ultimately end up in the public record of the trial and how compromising that would be to national security.

The provisions of this legislation will go a long way toward solving this.

Senator BIDEN. Thank you. I interrupted your statement.

Mr. SILVER. I was at the end.

Senator BIDEN. All right. Mr. Schwartz, you have been very patient, sitting there with all these questions and statements. Would you make your statement and then maybe we could continue with the questions.

Mr. SCHWARTZ. I've had the opportunity, Mr. Chairman, to sit here and nod my head in agreement to most of my colleagues' comments. I

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appreciate the opportunity to be here and testify in support of this legislation. I want to pass along Admiral Inman's regrets that he could not attend in person and express his interest and concern for this legislation and compliment you, Mr. Chairman, on the efforts you have taken to push this forward.

In light of the extensive testimony that has taken place both today and in the past on this legislation, I would like to just focus briefly, if I could, on the particular concerns of the National Security Agency and the type of involvement that we tend to have in the kinds of cases that make this legislation necessary.

As you are aware the signals intelligence mission of the National Security Agency requires a unique sort of security protection because of the fragile nature of the sources of the intelligence that we deal with. Even obscure references to information derived from signals intelligence can alert a knowledgeable observer to the sources of the information and thus can result in countermeasures that can deny the source to us, often negating years of effort and adversely affecting the use of complex and often costly technical systems.

Because of the nature of NSA's mission, its materials and documents may often become the subject of discovery or production disputes in both espionage or leak-related cases and in a widely disparate group of other criminal prosecutions. In fact, this problem is not limited to criminal prosecutions and we have experienced the same pressures in some civil actions, for example, involving the antitrust laws.

But in criminal prosecutions, the defense counsel now routinely use various authorities available to them in an effort to locate any sensitive information, regardless of its relevancy, partially in an effort to dissuade the Government from prosecuting a particular case.

Once classified documents have been obtained under proper security procedures, the defense may often request the court to release some or all of those documents despite their classification. While some reasons for release are advanced, perhaps the most difficult to counter is the argument that there has been elsewhere an unauthorized or unsubstantiated public disclosure of portions of the information. The fact that an unsubstantiated leak or speculation has occurred may cause substantial harm to the national security in and of itself.

The additional fact that there may be neither criminal investigation nor prosecution as a result of that particular leak may of itself be particularly perplexing to us in the intelligence community. But to claim such disclosures as the basis for making public sensitive classified information and documents greatly increases our collective chagrin.

The leak or speculation may be in part fact and in part fiction or sufficiently garbled that foreign observers are not able to attribute the information to a particular source or technique with a sufficient degree of reliability to warrant or justify the institution of countermeasures. The release of an official confirmation at trial, however, is likely to provide the necessary information to identify the source and justify the countermeasures.

We believe that the steps taken in S. 1482 as well as the steps proposed in the administration version will go a long way to improving this situation and take significant steps to recognize more clearly the

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national security needs to protect classified information while addressing the very real concerns of both the prosecution and defense.

Therefore, while we prefer the administration version and concur with many of the comments that have been made this morning about various minor changes, in our view minor changes, in the legislation, we support this legislation and feel it goes a long way toward solving many of the common concerns.

Senator BIDEN. Thank you very much. Mr. Rushforth, you testified in favor of a provision contained in the administration's bill. I think probably all three of you are in agreement on this, section 8A which would authorize the Government to introduce classified documents into evidence without declassifying it.

I have several questions relating to that position. Do judges now require declassification before documents can be introduced?

Mr. RUSHFORTH. The Justice Department follows that rule, Senator Biden, and I am not sure whether it has been passed upon by a Federal district court judge as it may have been. But the general rule has been followed that declassification is required before a document is submitted into evidence.

There have been exceptions to that rule. There was an exception for example in the trial of William Kampiles and that exception was so important as to make the difference as to whether or not that prosecution could go forward because there were some extremely sensitive documents involved in that trial and had there been a requirement that those documents be declassified for purposes of that trial, I think there would have been some substantial possibility that that trial could not have gone forward.

Senator BIDEN. Can you deny the public or the press access to evidence admitted in a public trial?

Mr. RUSHFORTH. Well, that is exactly what would happen if allowed in without declassification. That material would then not be available either to the public or to the press.

I don't—I personally don't believe that that compromises the defendant's right to a fair trial in any way. His counsel would have full access to the material. The court would have full access to the material. The jury would have full access to the material, but the public and the press would not have access.

Senator BIDEN. Mr. Silver, the same section 8(c) of the administration's bill would authorize the court to dispense with the best evidence rule when classified information is involved. This rule was codified in rule 1002 of the Federal Rules of Evidence. It states, and I quote, "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required except as otherwise provided in these rules or by an Act of Congress."

Now, do I understand correctly that by eliminating the best evidence rule, and any of you can respond to this if you like, by eliminating the best evidence rule, the administration intends to allow the prosecution to prove that a defendant disclosed or transmitted a classified document relating to the national security or defense without allowing the court or jury to see that document?

Mr. SILVER. That's correct, Senator, in a limited variety of cases. I wouldn't anticipate that this would be used widely. Take a simple case,

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for example, the *Kampiles* case, where the defendant was accused of transmitting to a foreign power a manual for an intelligence collection system, a voluminous document full of information, some of it very sensitive, very hard to "sanitize," in the jargon of the trade, in any fashion. The statute in question requires that this be national security information in order for liability to attach. But that was not really a major issue in the case.

I find it difficult to see in that kind of case, or in cases involving classified photography or other documents of that sort, why the Government should not be allowed to introduce into evidence, let us say only the cover page of the document supported by whatever evidence there is for the fact that the defendant took or transmitted the document and then by witness testimony in general terms prove its national security character, subject to the rebuttal right of the defendant but without laying the entire document in the public record.

Senator BIDEN. Let me ask you. I should know this and I don't. Was the constitutionality questioned of that method of proceeding which was the method used in the *Kampiles* case, wasn't it? Isn't that how you did proceed?

Mr. SILVER. It was done with agreement of the defendant in that case. In other words, the issue of constitutionality did not arise.

Senator BIDEN. I see; but I assume you are of the view that it is constitutional. It would be constitutional if, in fact, it had had not been done by agreement, the court had ordered it and it was challenged by the defense.

Mr. SILVER. That is my belief, yes.

Senator BIDEN. It is a little worrisome to me. I understand the problem but I wonder—you know it is a little bit like proving possession of stolen goods without introducing the goods in evidence.

Mr. SILVER. That occurs all of the time. Possession of stolen goods is proved by testimony of witnesses who saw the defendant in possession of them. The defendant can be convicted of, let's say, stealing a television set without the wiring of the set having to be exposed in the courtroom or even the exterior case and many of the espionage cases that have arisen have involved a count of theft of Government property and have, as the *Kampiles* case did, involved the particular nature of the document in only its broadest outline with no real necessity to lay the entire thing before the court or the jury or, most importantly, the public.

Senator BIDEN. Do either of you gentlemen, like Mr. Silver have any difficulty with the provision that would require Justice to promulgate guidelines specifying factors to be used in deciding whether or not to prosecute?

Mr. SCHWARTZ. I have no problem with that provision. I share with Mr. Silver some minor pessimism as to what effect it will have, but I have certainly no problem with it.

Senator BIDEN. Can you elaborate on that for me? Why are you pessimistic?

Mr. SCHWARTZ. I assume, considering the normal prerogatives that the Justice Department holds to itself, that is the discretion to prosecute in an individual case, that any guidelines that would be promulgated by the Department would have sufficient leeway that there would

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be room to move within them. It would not be a detailed A through M kind of step-by-step process that would, that you could apply an instant and automatic formula and come out with the result at the end.

Mr. RUSHFORTH. I will only say, Senator Biden, that I fully share your concern that times change and people change, but I will add that there is absolutely no substitute, as far as I know, to having a person like Phil Heymann occupying his present position. There just is none.

Senator BIDEN. I appreciate your answers. One more question, and this requires a very subjective answer. It is all right if you want to decline answering it because it is so speculative. You three gentlemen have been involved a long time and have had to make these sometimes tortuous decisions as to whether or not to proceed, balancing the question of national security versus the desire to enforce the law and prosecute those who violate it or compromise our security.

No one is in a better position to tell us how much this bill, if enacted, will impact upon the ability to prosecute the offenders that have come before you, the instances that have been brought to your attention. Will it capture all of the cases? Do you think it will capture most of the cases? It seems obvious that this does not solve the whole problem. There are still going to be cases where the Government will have to decide, even under this legislation, not to proceed.

Can you quantify in any way what your best judgment as to how much of the problem will legislation of this nature be able to address itself to? You may not want to even take a guess at it.

Mr. SILVER. Well, with all the reservations that you built into the question, Senator Biden, my own view is that it would solve a very large majority of the cases with which I have had experience, maybe 75 to 95 percent of the problems. It will not solve the out-and-out blackmail phenomenon where someone holds secrets that are totally unrelated to prosecution and threatens to expose them if there is a prosecution. That is an extremely rare phenomenon. I personally don't know of any such case but it certainly is conceivable and no piece of legislation of this sort would stop that, but otherwise I think it would make a very significant improvement in the situation.

Mr. SCHWARTZ. From our standpoint I think that the largest impact would be on the other kinds of criminal cases not directly related to espionage kinds of cases where there may be material responsive to various kinds of discovery—defendant discovery—which causes us a great deal of problems in providing, even though they may be totally irrelevant or largely irrelevant to the specific kind of case at hand. This legislation would go a long way toward solving those kinds of problems for us.

Mr. RUSHFORTH. I think it would solve every case I have had anything to do with. That is not to make a prediction about the future. Very, very competent and clever defense lawyers are going to be able to make life difficult for prosecutors even under this legislation, but I agree with Mr. Silver that, based on my experience, it would go a very long way toward solving the problems in the overwhelming majority of the cases.

Senator BIDEN. I said I only had one more question, but there is an additional one I would like to ask and I promise this is the last

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question. In the House hearings, Mr. Heymann and the former CIA General Counsel, your predecessor, Mr. Lapham, testified that the—if my recollection serves my correctly—that the Jencks Act has not been a problem.

First of all, I would like to ask all three of you if you agree with that, assuming my recollection is correct and if you do agree and it is not a problem, why change it now?

Mr. RUSHFORTH. Well, I can only say in my experience it has not arisen in that context, in the litigation with which I am intimately familiar in this area.

I do however agree with Mr. Heymann's testimony on the point that if it did arise, and from my own experience I have to say that is a theoretical proposition and a hypothetical proposition at this point, but if it did arise, it would pose a problem that would be so serious as to perhaps warrant the dismissal of the case. It would be a very serious problem and the solution proposed by Mr. Heymann, it seems to me, is a solution which would not compromise the right of the defendant to have access to impeachment material.

Mr. SILVER. I would have said some time ago, Senator, that it was no problem, but I have been educated by experience in the meantime. I think it is a rare problem but, in fact, situations that have arisen suggest to me that these provisions on the Jencks Act may make a difference in actual cases.

Mr. SCHWARTZ. I have had no experience where this has been a problem although there clearly are situations where it could occur.

Senator BIDEN. Well, gentlemen, I have raised my last question. I appreciate your time and effort in this area and thank you for your cooperation, and tell Admiral Inman I said hello. If I were President I would make Admiral Inman king, I think. He is the sharpest person I have run across.

[The prepared statements of Messrs. Rushforth, Silver, and Schwartz follow:]

PREPARED STATEMENT OF BRENT N. RUSHFORTH

Mr. Chairman, I appear before you today as the representative of the Department of Defense to testify with respect to proposed legislation governing the use of classified information in criminal trials. In the course of this statement I will address S. 1482 and the companion bill in the House, H.R. 4745.

In the Attorney General's letter of July 9, 1979, transmitting the administration bill, H.R. 4745 to the Congress, he remarked that: "While it is not possible to resolve completely the tension between the Executive's prosecutorial responsibilities and its duty to guard against disclosure of sensitive national security information, we believe that the procedures contained in the proposed legislation would significantly enhance the governments' ability to discharge these responsibilities without undercutting the defendant's right to a fair trial." I support this proposition, and hope that the views expressed today will promote a full and objective deliberation of the issues.

As the statement by Assistant Attorney General Heymann provides an extensive analysis and rationale for the position of the executive branch, I will confine my remarks to a discussion of the interest of the Department of Defense in this legislation, and how and to what extent those interests have been met. The legislative proposals seek to create a workable, effective, and equitable system whereby criminal prosecutions involving national defense secrets may go forward without either undue risks to the national security, or to the due process rights of the defendant. Enactment of properly framed legislation would provide a long needed remedy.

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The first accomplishment of this legislation is the establishment of a carefully crafted set of procedures whereby classified information may be protected under carefully controlled conditions throughout the trial and appeal of a criminal case. During hearings before the House Intelligence Committee, there was extensive testimony about the evidentiary and safeguarding problems that arose in the prosecution of the *Kampiles* case involving a highly sensitive document. It is clear from the experience in that case, as well as in previous espionage prosecutions, that ad hoc procedures are unsatisfactory. Under the proposed legislation there would be an orderly procedure whereby evidentiary and testimonial issues involving classified information would be addressed and resolved in pretrial hearings. Of particular importance to the Department of Defense are inclusion of provisions which would:

(1) Require notice to the Government that classified information is to be disclosed;

(2) Require in camera proceedings to determine whether the information is relevant, material and otherwise admissible in evidence;

(3) Provide for rulings to determine whether pretrial or trial disclosure of classified information may be made, and in what form;

(4) Permit alternatives to disclosure of specific classified information in a manner consistent with a fair trial;

(5) Enable the Government to file interlocutory appeals from court orders relating to the disclosure of classified information; and

(6) Provide for specific protective orders to safeguard classified materials disclosed to the defendant.

H.R. 4745 addresses each of these matters, and to a lesser extent so does S. 1482. Of special importance to the Defense Department is the need to spell out the specific terms of the protective order as provided for in section 4(a) of H.R. 4745. S. 1482 does not, and should be amended so that uniform procedures would be employed in each of the courts faced with the handling, storage and access to national secrets.

The interests of the Department of Defense are also served in another way by this legislation. Heretofore, a number of espionage and leak cases have not been investigated or prosecuted because the risks of additional disclosure during trial were too high. With the protection provided the legislation, we believe that there will be less reluctance to prosecute offenders. In this connection, I refer not only to cases in which classified information is directly relevant to the prosecution of the case, e.g., *U.S.* v. *Dedeyan* and *U.S.* v. *Boyce and Lee* involving espionage, but also to instances in which classified information is part of the defendant's affirmative defense, e.g., the *Helms* case. Unless the Government acts in proper cases, not only will there be a loss of confidence in our judicial system, but also diminished observance of our security rules.

While S. 1482 and H.R. 4745 contain a number of common provisions, there are a number of distinctions that warrant comment.

Reciprocity.—Section 6(c) of S. 1482 provides that whenever the court determines that classified information may be disclosed the court may order the United States to disclose any rebuttal information to the defendant. Under section 6(b)(2) the United States shall upon request of the defendant also furnish a bill of particulars as to portions of the indictment that relate to the classified information at issue. In our view, under S. 1482 the information required to be provided by the defendant prior to trial is more than matched by the disclosure required of the United States. Section 6 of H.R. 4745, on the other hand, provides for a balanced exchange of information. Upon being notified that the defendant expects to use classified information the Government must notify the defendant about the information that will be in issue. It must then either identify the specific information if it has been previously released to the defendant, or if not previously released describe the information by generic category. There is no requirement to provide rebuttal documents or a bill of particulars, and in our opinion there should be none.

Prosecutive Guidelines.—Section 12(a) of S. 1482 calls for the issuance of prosecutive guidelines by the Attorney General, and for transmission of those guidelines to the appropriate congressional committees. While the Department of Defense is not fundamentally opposed to this provision, it questions the need for it. Under existing practice, agencies referring leak cases to the Justice Department for possible prosecution are routinely required to answer a series of questions regarding the validity of the classification, the degree of dissemi-

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nation of the material compromised, and whether the information can be declassified for purposes of prosecution.

The existing guidelines have been furnished to the appropriate congressional committees, and have been reprinted in committee reports available to the public. As a consequence, a statutory requirement seems unnecessary, at least as to the prosecution of espionage and leak cases.

Findings.—Section 12(b) of S. 1482 provides for the preparation and dissemination to the Congress of detailed written findings in any instance in which the United States decides not to prosecute because of possible revelations of classified information. To prepare and disseminate written reports that describe the classified information and the consequences of its disclosure in every case unnecessarily increases the risk of compromise. In some instances, the case will involve extremely sensitive matters. If the Oversight Committee needs information in a particular case, it can be provided in an appropriate briefing. Consequently, we strongly oppose the routine submission of written reports.

Jencks Act.—Section 10 of H.R. 4745 amends the Jencks Act, 18 U.S.C. 3500 (c), by providing that the portions of a witness' statement may be withheld from the defendant that are determined by the court to be (1) properly classified and (2) consistent with the witness' testimony. S. 1482 contains a similar provision, but requires an affidavit from the Justice Department certifying that the information is classified. In our view this affidavit should be furnished by the agency originating the document. We also believe that if the witness' statement is consistent with his testimony no provision should be made for offering the defendant a summary of the classified portion. In our view, the amendment in H.R. 4745 permits classified information to be protected without prejudice to the rights of the defendant.

In summary, H.R. 4745 is preferred because it offers greater protection to national security secrets. It would also provide a much needed legislative remedy for the "disclose or dismiss" dilemma. We commend the Committee's initiative and efforts in attempting to reconcile the several competing interests that must be accommodated in this legislation.

PREPARED STATEMENT OF DANIEL B. SILVER

Mr. Chairman and members of the committee, I appreciate the opportunity to testify concerning S. 1482, the Classified Information Procedures Act. The so-called "graymail" problem which this bill addresses is one of the most pressing concerns that I face in carrying out my duties. New law to deal with this problem is a principal legislative priority of the Central Intelligence Agency. Indeed, Admiral Turner has told me on several occasions that of all the difficult decisions he has faced as Director of Central Intelligence, some of the most agonizing have involved the tension between his statutory duty to protect intelligence sources and methods and his desire to facilitate enforcement of the criminal laws of the United States. I know that he wholeheartedly supports enactment of "graymail" legislation.

I will make a few brief remarks about specific features of S. 1482 as compared with the administration's own proposal, H.R. 4745. I want to note at the outset, however, that both bills contain common features that would bring about a significant improvement in the existing situation.

Under current law and practice, criminal litigation in which classified intelligence information may be involved creates severe problems for the intelligence community. These problems arise in three main areas:

The first is cases of espionage or unauthorized disclosure of classified information. In my experience, first as General Counsel of the National Security Agency and then as General Counsel of the Central Intelligence Agency, a substantial number of unauthorized disclosures and acts of espionage have not been pursued because it was evident that prosecution would force the Government to risk disclosing additional, even more damaging, classified information. To the extent that new law can ameliorate this problem, the intelligence community believes there is a pressing need to do so.

A second area of great concern is enforcement of the criminal laws in matters not directly affecting the interests of the intelligence community. In a variety of situations, tangential involvement of intelligence agencies with persons accused of

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crimes has enabled such persons to exploit the threat of disclosure of intelligence secrets as a means of hampering prosecution. As officers of the U.S. Government sworn to uphold the Constitution and laws of the United States, we deplore this phenomenon as much as do the attorneys in the Criminal Division of the Justice Department.

Nonetheless, we have a duty to protect intelligence sources and methods from disclosure in the interests of enhancing the national security. In doing so, we frequently become involved in painful differences of opinion with our colleagues in the Justice Department, and the intelligence agencies are often the subject of severe public criticism for allegedly preventing the prosecution of wrongdoers. Obviously, we have a strong interest in graymail legislation that would remove us from an uncomfortable position in which our motives are frequently misunderstood.

The third area of concern has to do with intelligence agency employees. Some of the proponents of graymail legislation seem to view as its principal advantage the notion that it will permit incarcerating a large number of intelligence officers. This is nonsense. As in any large organization, however, occasionally, but fortunately infrequently, an intelligence agency employee will commit a crime, such as misappropriation of Government funds. When such an employee has been engaged in clandestine intelligence activities, it is virtually impossible to prosecute the case without disclosing intelligence source and method information and without the risk that the defendant will contrive some means of dragging further information into the case. It is frustrating to the Agency's management and to our overwhelming majority of honest and upright employees that the full measure of the law cannot be visited on the occasional miscreant. We would welcome graymail legislation that would solve this problem.

The great advantage of both S. 1482 and H.R. 4745 is that these bills would bring about a substantial reduction in the number of difficult, and often unnecessary, confrontations between the interests of criminal law enforcement and the protection of intelligence sources and methods. They would do so by clearly confirming the power of the courts to employ procedures that will bring a measure of certainty and predictability to the prosecutorial decisionmaking process. The most important feature of the bills is that they create a procedural framework for orderly determination of what sensitive information will be needed to support a prosecution. The essential features of this framework are prior notification of intended use of classified information, early determinations of whether and in what manner the information at issue may be used in a trial or pretrial proceeding, and interlocutory appeal by the Government of adverse trial court rulings on these issues.

These are several points in which S. 1482, in my view, is less desirable than H.R. 4745, and I would urge this Committee to consider modifying the bill accordingly. These are as follows:

(1) Section 3 of S. 1482 provides that a court shall enter a protective order but does not define the acceptable scope of such an order. In contrast the analogous section of H.R. 4745 lists seven specific items that may be included in such a protective order. Experience in national security-related cases has demonstrated that these items are the most important kinds of protective provisions necessary to preserve the security of intelligence information and that the courts sometimes are in doubt as to whether they have power to impose them. The list is permissive rather than mandatory, but serves a useful purpose in making clear the authority of the courts to order certain protective measures.

(2) Another major difference between S. 1482 and the administration's bill, H.R. 4745, is the omission, in S. 1482, of the specific "relevant and material" finding that a court must make before classified information can be used at a pretrial or trial proceeding. We would, of course, prefer the stricter language of the administration bill in order to protect classified information from unnecessary disclosure.

(3) A third major difference between S. 1482 and H.R. 4745 is that S. 1482 omits the section (section 8(c)) which would permit the Government to prove the contents of a classified document without actually introducing the original or a duplicate into evidence. I strongly urge this committee to include such a section in S. 1482. Such a section would allow other evidence, such as testimony, to prove the matters for which a document would otherwise be admitted into evidence and, thus, enable the Government to protect some classified information

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in the document from unnecessary disclosure. This provision could be particularly useful in a case under 18 U.S.C. section 794, involving an unsuccessful attempt to deliver classified documents to an agent of a foreign government. Where attempted espionage has been nipped in the bud, it would be particularly unfortunate if the Government had to disclose publicly the very information it had prevented the defendant from passing to a foreign power. By relying on testimony to prove that the particular documents involved were related to the national defense, the Government could minimize the damage to the national security that would result from introduction of the documents in evidence. Through testimony the Government would be able to focus on specific matters of its choice to prove that a given document relates to the national defense, without exposing the entire document at public trial.

Classified photographs are a type of documentary evidence for which subsection 8(c) of H.R. 4745 would seem particularly well suited. The defendant would be free, of course, to cross-examine in detail on any matter put into evidence by the Government or to introduce classified information on his own behalf if notice has been given under section 5 and the procedure established by section 6 has been followed.

I would like briefly to comment on provisions of S. 1482 that I consider particularly important:

(1) Section 4 is indispensable. Without it, the remaining protections in the bill can be rendered nugatory by aggressive discovery tactics on the part of defendants.

(2) Section 8(b) empowers the court to order the excision of part or all of the classified information contained in a document to be admitted in evidence. This provision will allow for the protection of classified information not central to the purpose for which the document is to be admitted into evidence. The Government was able to delete some sensitive, classified information from the highly classified manual that was introduced in the *Kampiles* espionage prosecution because the defendant gave his consent. Section 8(b) would allow the court to order such deletions over a defendant's objection.

(3) The final provision in section 8 permits the Government to object during the examination of any witness to a question or line of inquiry that may result in the disclosure of classified information that has not been found previously to be admissible pursuant to the procedure established by section 6. This provision is of great importance in order to prevent the intentional or inadvertent premature disclosure of classified information at trial, by permitting the Government to object and obtain a ruling from the court on the applicability of the in camera procedure established by section 6.

(4) A particularly important feature of the bill, found in section 8(a), provides for documentary evidence to be admitted at trial without change in its classification status. This would permit the Government to introduce a document classified "secret" as it is, with no requirement for formal declassification or removal of classification markings. In the past, CIA and other entities of the intelligence community have been called upon by the Department of Justice to declassify documents said to be needed to support a prosecution. If such documents are validly classified, however it makes little sense to call for their declassification simply because they will be used in some fashion at trial.

Declassification necessitates a finding that public disclosure will not harm the national security—a finding at odds with an essential element of the crime under many espionage laws. Furthermore, the rules on classification do not require that a document be declassified in order to be shown to a limited number of uncleared users, if circumstances make it in the interest of national security to do so. The use at trial of a validly classified document recognizes the reality of a situation in which a national security risk is being taken to achieve a law enforcement purpose that cannot be achieved without some risk. Under section 8(a), it would be left up to the agency involved to determine if a particular document has been so compromised through use at trial as to require formal declassification. If no declassification is classed for, such a document would be subject to continued protection under the security procedures called for by section 9.

(5) The security procedures required under section 9 are also of great importance to the intelligence community. I suggest inclusion in the bill of the security measures listed in section 4 of H.R. 4745, pending the establishment of more specific procedures by the Chief Justice.

The CIA views the security procedures required by the bill to be a necessary part of the procedural framework established by the legislation. Under the bill,

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classified information will be submitted to the courts in a variety of contexts. Some classified evidence may be introduced at trial in a manner which will not put it in the public domain. For example, classified information would be submitted to the court by the Government under section 6 of S. 1482 to demonstrate to the court that an in camera proceeding is warranted. It is contemplated that some such submissions would involve disclosures of classified information to the court in greater detail than would be necessary for trial. Such submissions will call for the highest degree of protection. After the in camera proceeding and the court's ruling on admissibility, there is the possibility of appeal by either or both the Government and the defendant. In such situations the documents involved will presumably leave the custody of the trial court and be transferred to a court of appeals. On appeal, classified briefs may be written and classified affidavits filed. The appellate process will present great risks of inadvertent disclosure or loss of classified materials unless there are uniform and strict procedures to guard against such occurrences. Fortunately, the Foreign Intelligence Surveillance Act of 1978 has broken the ground in this area. Under that Act, the Chief Justice, in consultation with the Attorney General and the Director of Central Intelligence, has promulgated security procedures that effectively safeguard the classified information involved in applications to the FISA court. I am confident that similar effective procedures will be established if S. 1482 is enacted.

In closing, I would like to thank the committee for this opportunity to present my views on this important legislation, and to commend the committee for its efforts to find a solution to the legitimate but painful dilemmas that arise when sensitive intelligence information is drawn into the prosecution of criminal cases. I believe S. 1482 contains the elements of a sound and equitable solution to the graymail problem, although it could be strengthened in certain ways. If this legislation is enacted, I am confident that the Director of Central Intelligence, the intelligence community, the CIA, and the Department of Justice will be able largely to eliminate the graymail phenomenon and to protect legitimate national security information from unnecessary disclosure, while at the same time ensuring effective and impartial enforcement of the laws and a fair trial for every defendant.

PREPARED STATEMENT OF DANIEL C. SCHWARTZ

I appreciate this opportunity to testify on behalf of the Director of the National Security Agency concerning S. 1482, the Classified Information Procedures Act. This proposed legislation, the so-called "graymail legislation," would establish specific pretrial and trial procedures governing the use of classified information in connection with criminal prosecutions. S. 1482 is similar to the proposed legislation submitted on behalf of the administration, H.R. 4745. The Justice Department and each of the agencies of the intelligence community have participated in the development of the administration proposal. Each of us view this legislation from the standpoint of a number of issues of common concern, as well as some issues that are unique to our individual missions.

Because of the extensive hearings that have already occurred, and the other testimony presented today, I do not believe it is necessary to present a detailed description and analysis of this legislation. Instead, I propose to describe, in general terms, the particular concerns of the National Security Agency, and how those concerns would be affected by this legislation. In general, we support the enactment of S. 1482, and believe that it would provide a significant step forward in improving the Government's incentive and ability to prosecute existing criminal statutes without forcing the unnecessary publication or dissemination of classified information. This legislation establishes uniform procedures for the handling of classified information which are, in my view, a healthy compromise among the interests of the intelligence agencies in protecting classified information, the interest of the Justice Department in prosecuting the range of cases in which classified information may become relevant, and the interests of defendants in such cases.

My own experience with the type of case that has given impetus to this legislation and with the legislation itself has been rather brief. However, during my short tenure as General Counsel at NSA, I have been closely involved in several cases currently being prosecuted by the Department of Justice or being con-

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sidered for prosecution which span the relevant issues and which demonstrate the problems posed by such cases for the National Security Agency and for the proper protection of sensitive, classified information.

As you are aware, the signals intelligence mission of the National Security Agency requires a unique set of security protections because of the fragility of the sources of that intelligence. Even obscure references to information derived from signals intelligence can alert a knowledgeable observer to the source of the information, and, thus, can result in countermeasures that deny that source to us, often negating years of effort, and adversely affecting the use of complex and costly technical systems.

Most of NSA's classified information is protected by a particularly stringent law enacted because of congressional recognition of the sensitivity of our sources. Section 798 of title 18, United States Code, provides severe penalties for the knowing and willful disclosure of classified information in the limited categories encompassing the two missions of NSA, signals intelligence and communications security. These categories include codes, ciphers, cryptographic systems and techniques related thereto, communications intelligence, techniques and activities related thereto, and the results of communications intelligence activities. Nonetheless, despite the existence of 18 U.S.C. 798 and other statutes, pending or proposed prosecutions under other criminal laws bring increased pressure for the release of information that we regard as properly classified and often not directly relevant to the central issues in these cases.

Because of the nature of NSA's mission, its materials and documents may become the subject of discovery and production disputes in both espionage or "leak" related cases and a widely disparate group of criminal prosecutions. In fact, this problem is not limited to criminal prosecutions, and we have experienced the same pressures in civil actions relating, for example, to the antitrust laws.

In this regard, two points are especially troubling. There is an increasing tendency to pressure the Agency to release in unredacted form classified information not specifically relevant to the issues simply because the defense has asked for the information. Second, there is substantial resistance to proposals to substitute summaries for the actual classified documents.

The requirements of the Jencks Act can also force many of these conflicts to occur in such cases. Similarly, motions under section 3504 of title 18, United States Code, with respect to the existence of any indication of the use of any electronic, mechanical, or other surveillance device in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto, raise similar questions. Defense counsel now almost routinely use such authorities in an attempt to locate any sensitive information, regardless of its relevancy, in an effort to dissuade the Government from prosecuting a particular criminal case.

Once classified documents have been obtained, under proper security procedures, the defense usually requests the court to release some or all of the documents, despite their classification. While many reasons for release are advanced, perhaps the most difficult to counter is the argument that there has been an unauthorized and unsubstantiated public disclosure of portions of the information. The fact that an unsubstantiated leak or speculation has occurred may cause substantial harm in and of itself. The fact that little if any investigation and no prosecution is likely to occur as a result of that leak is, of itself, particularly perplexing to us in the intelligence community. But to claim such disclosures as a basis for making public sensitive, classified information and documents greatly increases our collective chagrin.

The leak or speculation may be part fact and part fiction or sufficiently garbled that foreign observers are not able to attribute the information to a particular source or technique with a sufficient degree of reliability to warrant or justfiy the institution of countermeasures. The release of an official confirmation at trial, however, is likely to provide the necessary information to identify the source and justify the countermeasures.

For example, look at the case of classified information the source of which is confirmed as NSA. It is public knowledge that NSA has basically one intelligence mission, that is signals intelligence, and basically one source for that intelligence. Once NSA is associated with certain classified information, even the average foreign observer can accurately deduce the source of the information or, at least, narrow the options, and take appropriate countermeasures. Thus, there is an

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obvious and understandable reluctance on the part of NSA to accede to involvement in court cases that risk disclosure of its sources and methods.

There are a number of steps that would be taken in S. 1482 to improve this situation, and to recognize more clearly the national security needs to protect classified information while addressing the very real concerns of both the prosecution and the defense. These include:

1. Establishing procedures that would permit the identification of all intended use of classified information by the defense in a criminal case without disclosure of the information, and a ruling by the court in camera on the admissibility of such information as evidence prior to the beginnnig of the trial.

2. Establishing procedures to permit interlocutory appeal of adverse court decisions on these points.

In addition, S. 1482 takes steps toward limiting disclosure of classified documents or materials to a jury in espionage cases.

Although I favor the Administration bill, S. 1482 provides a significant improvement over present procedures and goes a long way towards meeting the concerns I have mentioned.

Senator BIDEN. Our next witness is Mr. Morton Halperin, Center for National Security Studies. Good morning. Mr. Halperin I should also not—correct me if I am mistaken—you are also representing the ACLU? Is that correct?

Mr. HALPERIN. That is correct. I want to introduce my colleague Alan Adler and we are appearing here——

Senator BIDEN. Beg your pardon, the last name?

Mr. HALPERIN. Adler.

Senator BIDEN. Adler.

Mr. HALPERIN. Representing the American Civil Liberties Union as well as the Center for National Security Studies, I would like to ask that our statement be made part of the record.

Senator BIDEN. It will in its entirety.

STATEMENT OF MORTON H. HALPERIN, CENTER FOR NATIONAL SECURITY STUDIES, ACCOMPANIED BY ALLAN ADLER

Mr. HALPERIN. Since I am aware of how familiar you are with the issues, I thought the most useful thing might be just to focus on some of the issues that have come up this morning and which still remain in controversy. I want to reiterate our view that there is a substantial measure of agreement. I think the main problem is the willingness of the Government to be willing to go forward in these cases. I think we are persuaded that these procedures would help give them the willingness and the confidence to go forward and in that context we think this could be an improvement over the current situation.

The basic principle that we think needs to be protected in this legislation is that as far as the right of the defendant to have access information and to introduce that information, the standard should not change because the information is classified. We think with one exception this bill does that and we would oppose the changes suggested by the administration which we think deviate from that position.

One provision of this bill which deviates from that rule is, of course, the Jencks Act amendment. The Supreme Court, whether it was proceeding in terms of its supervision of the Federal judiciary or constitutionally, clearly said the process of the judge deciding ex parte whether the material can be used for impeachment purposes is disfavored is not permitted. The judge simply can determine whether it

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is on the same subject. Whether it can be used for impeachment, whether it is inconsistent, is not a task that the judge can perform. This bill would say except when the information is classified.

Senator BIDEN. Now, for purposes of the record and for my education, repeat that one more time, please.

Mr. HALPERIN. The Jencks Act decision says very clearly that the procedure of having the trial judge decide, let me just read the sentence: "The practice of producing Government documents to the trial judge for his determination of relevancy and materiality without hearing the accused is disapproved," and that seems to me a very simple and a very clear statement.

The court goes on, in the very next paragraph, to talk about the national security character of some of these documents—and I think the decision makes it absolutely clear that the court was talking about classified information as well as information which the Government might not want to make public on some other grounds—said very clearly the Government has to choose between not making it public, or not turning it over to the defendant, and dropping the prosecution.

It said the burden is on the Government not to be shifted to the trial judge to make those determinations. I think there is a question, to be sure, whether the Congress could constitutionally alter that decision but, in our judgment, it would be a mistake to do so. We also think it would be unconstitutional. We think that the classified information should be treated the same as any other kind of information. I would also note that—excuse me one moment.

Senator BIDEN. Mr. Halperin, have you or the ACLU submitted to this committee a memorandum outlining your rationale for why you believe it would be unconstitutional for us to proceed the way in which we do in this legislation to alter the Jencks rule?

Mr. HALPERIN. We have not specifically addressed that. I would like, if I might, to submit a memorandum to you.

Senator BIDEN. I don't want to make more work but as you point out, it is a very, very important issue and I would like very much if you could do that, and as rapidly as you could because we would like to proceed with this legislation relatively soon if we could. I think it is very important for us to have that.

Mr. HALPERIN. We will submit that to you as soon as possible.

[The memorandum was supplied and is listed in the appendix.]

Senator BIDEN. Thank you very much. I notice you looked at Mr. Adler. Sorry, Mr. Adler. You didn't want to do anything this weekend anyway.

Mr. HALPERIN. I should point out that the Government seems to be confused about what the Jencks Act requires. It requires turning the information over to the defendant. The question of whether it could then be introduced would as I understand it, be subject to all the procedures of this bill.

Senator BIDEN. That is my question, and that is why I asked you to repeat and read the sentence, that you are making the distinction. You are suggesting that the Government failed to make the distinction between having the defendant present and party to the determination as to whether or not.

Mr. HALPERIN. That's right.

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Senator BIDEN. And not whether or not you could walk out of the chambers and into the courtroom and then proceed to disclose that information.

Mr. HALPERIN. Absolutely. As I understand what would happen, the material would have to be turned over if the trial judge decided it was on the same subject. The Government could then invoke the procedures of this bill to say that if they are going to try to introduce it, we want an in camera, adversary hearing on whether or not it is relevant. The Government would then have the opportunity to argue to the trial judge that it is not relevant for impeachment.

Senator BIDEN. In the presence of——

Mr. HALPERIN [continuing]. In the presence of——

Senator BIDEN [continuing]. The defendant.

Mr. HALPERIN. Of the defendant, but under a protective order which would prohibit further disclosure of that information, and that seems to me to protect the interest the Government has. The bill in general requires them to turn over material which is classified and I just don't understand why they propose a different procedure for the Jencks material, which is the one area where the Supreme Court has spoken very clearly and very precisely on this issue.

I want to say, part of the same principle applies to three other issues that have come up. One is the question of the admissibility standard. It is obviously very confused as to what the standard is, both for discoverability of material and admissibility. We would object to the relevant and material standard if it purports to change it, if it purports to have a higher standard for classified information than unclassified. We think there cannot be a different standard. We think the cases make that clear. If relevant and material is the standard for all information, which it may be, then there would not be an objection, but since the purpose of the Justice Department asking for that change is to have a higher standard, we would object to that.

I should note that the standard in the *Roviaro* case is relevant and helpful and not relevant and material. So I think it is a little misleading for the Justice Department to say that the relevant and material standard comes out of that case and I think, indeed, that case, while it is always cited as establishing the privilege, was the case in which the court overruled the Government's attempt to assert that privilege and said in effect where the information is helpful to the defendant——

Senator BIDEN. That is the word used, helpful?

Mr. HALPERIN. Relevant and helpful is the standard that—the decision was written by Justice Brennan and the dissent only argues as to whether in fact it was helpful to the defendant. So the view that this case is support for the proposition that even for the informant standard you can withhold it from the defendant on some higher standard than any other evidence seems to me to be misplaced.

In any case, the court in that case is very clear to say that the privilege comes from the obligation of the citizen to report crimes to the police and therefore the requirement of the court to protect the citizen who brings forward that information.

I think there is no suggestion in any case that I know of that the right of the Government to withhold national security information derives from that kind of requirement.

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Senator BIDEN. So you are making the distinction between, again, the party to be protected?

Mr. HALPERIN. That's right, and just as you did in the case of rape?

Senator BIDEN. Let's take the example that was offered by one of the agencies this morning. Or maybe it was the Justice Department where the information attempting to be excised by the prosecution relates to the naming of an unrelated, unconnected, not helpful CIA agent. The disclosure of that name would jeopardize that person's personal security. Now, what you are suggesting here is that the court should not be in a position to be able to on its own make the determination that that person's name is irrelevant or immaterial in this case, and that the prosecution would at that point have to make a judgment as to whether to proceed or drop the case.

Mr. HALPERIN. But, not making it public. Giving it to the defendant under a protective order and then if the Government is right that it was not an inconsistent statement, could not be used to impeach the witness, they would argue that before the judge in an adversary in camera hearing and if they were right presumably the judge would sustain them on the basis of that adversary hearing and then the information would not be made public.

It is also the case that they can call a different witness. The problem arises only if the Government has only one witness to some portion of the transaction that it has to prove, who apparently not aware of what the Jencks Act requires, put in a statement which he made—information which was not in fact relevant and which was highly classified.

I would suggest the Government might want to inform people involved in such cases of the requirements of the Jencks Act. The Jencks Act does not require the preparation of statements, it simply says that if there are prior written statements of a witness they have to be turned over and it seems to me that the certain amount of administrative care can deal with this problem and that it is seldom the case that the witness is indispensable.

Now, the one case that we know about, which may have been one of the cases that the CIA witness was alluding to was the *Trung* case which as we point out in our statement, there is a great deal of controversy precisely about the question of the relevance of material for the impeachment of the Government's key witness in that case. There were prior statements. She was a key to the case, she is the only evidence to the alleged transaction. That case, I think, shows precisely the problem of having the trial judge decide that because the question of what is an inconsistent statement is, as the appeal briefs in that case show, a matter of substantial controversy.

What seems to the defense lawyers, and let me say what seems to me in reading the brief, clearly information that was relevant to the impeachment of the witness and went to inconsistent statements, was in the position of the Government not an inconsistent statement. It seems to me in that case at the very least the trial judge ought to have an adversary hearing where he makes that determination.

On the question of proof by not introducing the document, here again, the proposed change by the Government would violate what seems to me the basic rule that the fact that the information is classified should not change the way in which a trial is conducted. If the

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best evidence rule requires the introduction of it, it should in fact be introduced. The Government should not be able to introduce evidence about the content of the document.

Here I would distinguish as well in discussing the question of declassification which is the last issue I want to mention. The problem for the Government in espionage cases is that the content of the document is relevant to the proof. Unlike a television set—I mean it would be as if you had a statute that prohibited you from stealing television sets only of a certain quality and you wanted to prove that without turning on the TV set.

The statutes require that you prove that the information relates to the national defense. The Supreme Court has said that that is factual issue for the jury and therefore the Government has to prove something about the content of the document and to suggest that it can prove it without introducing the document seems to me to violate all the principles of a public trial.

I would say that even more clearly about the proposal that the information not have to be declassified. This issue did come up in the Pentagon papers case in the indictment of Ellsberg and Russo. It was briefed extensively, argued in that case. There was a ruling by the district court judge that it was very clear. He said the material did not have to be declassified, that it is an administrative decision of the Government, but the information has to be public. The Supreme Court in the case involving the Watergate tapes, I think, made it clear, that what is introduced in evidence in a trial is public and is available for public inspection and that is the essence of a public trial.

We do not object to the provision that says that the information does not have to be declassified because we think the question of declassification is an administrative decision to the executive branch. But, if that provision is read to mean that secret evidence can be introduced at a trial, which goes to the jury for them to make a factual determination, without that information being made public, then we think that is clearly unconstitutional. We would object to the inclusion of that provision unless this committee made it very clear that it was simply saying it is an administrative matter, the Government need not be declassifying but the evidence is nevertheless available for public inspection in the courthouse according to the normal rules of the court as to the availability for public inspection of Government documents.

The only other point I want to make and I don't think there is a controversy about this, although it is not clearly on the record yet, I think there is a possible ambiguity in the language which would permit the court to issue a protective order which would prevent a defendant from making public outside the trial information which was in his possession prior to the beginning of the indictment. We think that is clearly unconstitutional. The Government should not be able to use this procedure to get around the presumption against prior restraint by indicting somebody who has access, who knows something classified, and then moving for a protective order within the case. I don't think that is anyone's intent and the Justice Department testimony talks about material provided by the Government to the defendant but I think that should be made clear.

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Finally let me say——

Senator BIDEN. That is the intention of the drafter of the legislation.

Mr. HALPERIN. I think that is right, but I would prefer at least in the report it be made absolutely clear that that is not permitted.

Let me say finally that on reflection about this, we prefer the procedure in the House bill, reported now by the subcommittee rather the procedure of this bill as it relates to the order in which the judge makes his determinations.

The House bill has the judge determining the question of discovery or admissibility before he grapples with the issue of whether it can be redrafted or summarized or an admission being made of a fact, rather than having the judge do that at once, which this bill seems to require. It seems to us a more orderly process and it avoids the danger that the court will take account of the classification of the material in making that initial decision which we don't think the court ought to do.

Let me, Mr. Chairman, express my admiration to you for your persistence in dealing with this issue and relate our feeling that in fact there is very little disagreement. As I heard the testimony from the various agencies, despite what they said in the end in specific response to the Jencks Act, I think most of what they want is embodied in provisions of the bill that are clearly constitutional and they are not controversial and it would seem to me that we ought to try to move ahead on the basis of that agreement.

Senator BIDEN. Thank you very much, both for the compliment and the testimony. I would like to pursue the protective order question a little bit further but from a slightly different angle. I think it should be noted for the record that at least it is my intention that a protective order as encompassed in this legislation is not intended to be a mechanism to invoke prior restraint through the back door or front door or whatever.

But, would a protective order suffice to protect national security interests if disclosure of that highly classified material to an allied agent, a foreign government, for example, at a Jencks hearing, might further the mission of the agent? If he would still get more information? I mean the protective order really doesn't help much there does it?

Mr. HALPERIN. Well, if the person is in fact the agent of a foreign power in a clandestine relationship, the protective order is not only a problem with the Jencks Act material, it is a problem with all the material turned over under the protective order. If you think you are dealing with people who are going to secretly provide all of the information you give them under the protective order to a foreign power, that is not a problem peculiarly related to the Jencks Act; it is the problem of all the material that you turn over under the protective order in a criminal trial of this kind.

I think in the case of the Jencks Act, the way to deal with that is for the Government to order its procedures in terms of who gives prior statements and what they contain. As far as the more general issue is concerned. I think to speak personally, my view is that the problem is with the content of the espionage statute and that this issue can only be dealt with by revision of the espionage laws and not by

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changing these procedures because as long as the law requires that the Government prove something to the jury about the content of the document, I don't see how you would get around that problem and I think the issue is whether some actions ought to be made, independent of the actual content of the document.

Senator BIDEN. You noted, Mr. Halperin, your primary concern in your statement is the first amendment ramifications of this legislation. Is it your position that a judge cannot prevent the defendant from publicly disclosing classified information that he or she intends to use at a trial?

Mr. HALPERIN. It depends on where the defendant got the information from. If it was provided by the Government at the direction of the court under a protective order, clearly I think the court can prevent further disclosure in or out of the courtroom. If it was information that was in the head or the written possession of the defendant prior to the indictment, then I think it would be unconstitutional to prohibit the release of it outside the trial. The judge can, I think, prohibit the release of it within the trial if it is not relevant material to the case.

Senator BIDEN. As usual you made your arguments very well, very concisely, and very much to the point. I must tell you, as when I introduced the legislation, I indicated I had questions about the provision relating to the Jencks Act. You have not helped me clear them up. You have continued to—you have added to my dilemma. I am still not certain it should be in. I am inclined toward your position on that particular issue. But, that is why I would like very much, also to have the legal memorandum and you need not worry about footnoting it as much as you would for a court, but, just the rationale would be important to me to have.

Mr. HALPERIN. Let me say a practical thing about that. The ACLU would very much like to be in the position of not opposing the movement of this legislation through the Congress. Unless we could be reasonably assured that a Jencks Act provision would not end up in the bill in the end of the process, our position would have to be because of our strong feelings about that provision, to urge the bill not move. I am persuaded on the merit that it is not important, that it is unconstitutional, and that the provisions of his bill are adequate to deal with that problem as well as the others. But I would also add that practical——

Senator BIDEN. No, I understood that to be your position and I appreciate it. Thank you very much, gentlemen. I look forward to that memo and I appreciate your taking so much time with the committee.

Mr. HALPERIN. Thank you, Mr. Chairman.

[The prepared statement of Mr. Halperin follows:]

PREPARED STATEMENT OF MORTON H. HALPERIN

Mr. Chairman, we appreciate the opportunity to testify before this subcommittee on S. 1482, the Classified Information Procedures Act. Our appearance today is on behalf of the American Civil Liberties Union, a national membership organization of some 200,000 members dedicated to the defense of freedoms guaranteed in the Bill of Rights.

The problem of "graymail" is no less distressing for civil libertarians than it is for the Department of Justice or concerned members of Congress. While the danger of incidentally disclosing classified information has in the past thwarted the investigation or prosecution of private individuals suspected of

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such serious crimes as murder, bribery, and drug trafficking, it has also frustrated efforts to hold Government officials accountable under our criminal justice system.

"Graymail" is perhaps most vexatious in the context of executive officials who criminally abuse governmental authority and then escape punishment by threatening to disclose or cause the disclosure of secrets to which they obtained access by virtue of the same authority.

For executive officials who perform or are even tangentially connected with the performance of intelligence functions, "graymail" can mean a virtual immunity from Federal criminal investigation or prosecution "in the interests of national security"—even where criminal acts performed under color of office deprive others of their constitutional rights.

From a civil liberties point of view, the rights of individuals cannot be fully and effectively protected if such criminal conduct by Government officials cannot be investigated and prosecuted to the full extent of the law. A solution to the "graymail" dilemma would facilitate the administration of justice and contribute to the protection of individual rights.

With respect to the proposed legislative solution now before this subcommittee, we would offer two initial caveats concerning what the bill's procedures would and would not do.

What the procedures in S. 1482 would clearly do is affect the rights of all criminal defendants at trial. They would place upon such defendants an affirmative obligation to notify the Government before trial of any intent to use "classified information" in pursuit of a particular line of defense. Specific sanctions restricting the defendants' ability to defend themselves could result from defendants' failure to comply with notification requirements. If compliance is forthcoming, the procedures would, almost without fail, steer criminal proceedings into the judges' chambers, out of the presence of juries, the public, the press and, in certain instances, the defendants themselves.

In short, the procedures proposed in S. 1482 would thrust the oft-misused claim of "national security interests" into what we believe is the heart of our criminal justice system—the criminal defendant's constitutional right to a speedy, public and fair trial.

What the procedures in S. 1482 would not do is solve the "graymail" problem. Those procedures would not substitute for a firm willingness on the part of the Government to fully pursue the investigation and prosecution of official lawlessness, especially in the cases where the fair administration of justice would require it to "bite the bullet" and make public classified information that is relevant and otherwise admissible for purposes of defense or prosecution.

In our view, a lack of such willingness has been the primary impediment to prosecutions directed at former top Government officials such as Richard Helms and L. Patrick Gray. It is quite possible that the Government's apparent discomfort in criminal investigations and prosecutions which raise the spector of disclosing classified information has encouraged "graymail" efforts that were really "fishing expeditions" rather than legitimate discovery requests for classified information. Some criminal defendants have probably been heartened to "bluff" the risk or disclosure by noting the relative ease with which the Government can be made to back down in such situations.

Our concern for the rights of criminal defendants and our view of the true nature of the "graymail" dilemma do not, however, lead us to object to the concept behind the procedures of S. 1482; that is, to permit a more orderly process for deciding whether to go forward with prosecutions. The procedures would permit the Government, in many cases, to learn before trial what classified information would have to be made public to fully pursue prosecution. They provide the Government with a means to avoid needlessly disclosing classified information which is not relevant to the defendant's case or is otherwise inadmissible.

To the extent that the procedures would protect the existing rights of criminal defendants, and still facilitate the prosecution of intelligence agency and other officials who under control of law commit criminal acts which violate the constitutional rights of others, we welcome consideration of S. 1482 and the holding of these hearings.

Mr. Chairman, it is important to emphasize that we would oppose this legislation if it were interpreted to authorize secret trials, or to permit judges to issue gag orders prohibiting the press from publishing what it learns about

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any pretrial proceedings or the trial itself. We do not believe that it can be interpreted in this way nor that it was intended to be.

We would also oppose this legislation if its effect was to authorize trial judges to inhibit criminal defendants from releasing any information which was in their possesison prior to discovery in a criminal trial except in connection with the trial or pretrial proceedngs. Thus, for example, if the bill were read to authorize a judge to prohibit a defendant from making a speech or publishing an article revealing information in the defendant's possession, we would oppose it on first amendment grounds. Any such provision would enable the Government to circumvent the very strong presumption against prior restraints even as they relate to national security information, *New York Times Co.* v. *United States*, 403 U.S. 713(1971), *Nebraska Press Association* v. *Stuart*, 427 U.S. 539(1976), by indicting the person and invoking the procedures of this act.

Section 5(a) of S. 1482 may be subject to an interpretation authorizing such orders, despite the reference in the section-by-section analysis to disclosure "in a trial" and "during trial." Its language should be clarified so that such possible interpretations must be rejected without dispute.

To pass constitutional muster, the contemplated procedures must adhere closely to certain constitutional principles enunciated by the Supreme Court. Although S. 1482 intends to be consistent with such principles, we believe that hearings and possible amendments, together with a precise legislative history of the bill, would make that unmistakably clear.

The first and most fundamental principle is that the standard for discovery and admissibility of evidence cannot be affected in any way by the fact that the information involved is classified. This rule and the important considerations of fairness that underlie it have been stated by the Supreme Court as follows:

* * * in criminal cases "* * * the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense * * *" 345 U.S. at 12.

In *United States* v. *Andolscheck*, 142 F.2d 503, 506 Judge Learned Hand said:

"* * * While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bear directly upon the criminal transactions, and those which may be only directly relevant. Not only would such a distinction be extremely difficult to apply in practice, but the same reasons which forbid suppression in one case forbid it in the other, though not, perhaps, quite so imperatively. * * *"

Jencks v. *U.S.*, 353 U.S. 657 (1957).—Indeed the government has generally conceded this point. For example, the Supreme Court noted in a case involving highly sensitive national security electronic surveillance records:

"The government concedes that it must disclose to petitioners any surveillance records which are relevant to the decision of this ultimate issue (of whether illegally seized evidence was used). And it recognizes that this disclosure must be made even though attended by potential danger to the reputation and safety of third parties or to the national security—unless the United States would prefer dismissal of the case to disclosure of the information."

Alderman v. *U.S.*, 394 U.S. 165, 181 (1969).—Indeed the Supreme Court in that case was unanimous in holding that a defendant was entitled to "arguably relevant material whatever its impact on national security might be." Id. at 184 n. 15.

The second fundamental principle which the bill must reflect is that the "burden is the Government's not to be shifted to the trial judge, to decide whether

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the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets." *Jencks* v. *U.S.* at 672.

The trial judge must not make the decision as to whether the injury to national security is limited enough to justify release of the information to continue the prosecution. It is the judge's task to tell the Government that the court intends to permit the information to be introduced into Evidence; it is then the Government's duty to make the decision to proceed with the case.

In this context, we believe it would be a major error to permit the Government to explain to the court why the information at issue is classified, or even the basis for the classification, prior to a judicial determination of relevance. The danger is that the trial judge could permit the decision on relevance to be colored by the claims of national security, real or exaggerated, made by the Government.

The third principle is that of reciprocity. The bill's requirement that defendants disclose prior to trial what classified information, if any, they intend to introduce at the trial, is constitutional only if it is accompanied by a requirement for reciprocal disclosure by the Government. In *Williams* v. *Florida*, 399 U.S. 78(1970) and *Wardius* v. *Oregon*, 412 U.S. 470(1973), the Supreme Court considered the due process aspects of a criminal defendants' reciprocal discovery rights when forced to comply with a State "notice-of-alibi" rule. In holding that such rules could not be constitutionally enforced without providing the defendant reciprocal rights of discovery, the court in *Wardius* strested that:

"* * * [i]n the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trial be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses.

"It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the States." 412 U.S. at 475–476.

Having stated these principles, Mr. Chairman, we would now briefly discuss the four substantial areas in S. 1482 in which they must be most carefully applied.

The most objectionable part of this bill is the provision which would modify the Jencks Act. We understand that this proposal originated with the administration and is virtually identical to the provision in H.R. 4745, which was introduced in the House by Mr. Rodino at the behest of the administration. We would strongly oppose passage of S. 1482 or any other classified information procedures legislation if any provision amending the Jencks Act were included.

Such a provision violates the fundamental principles that no otherwise discoverable information can be withheld from a criminal defendant because it is classified. The provision would permit Federal trial judges to do for classified material precisely what the Supreme Court said they cannot do for any information, classified or not, that is included in a prior statement of a Government witness which relates to that witness's trial testimony:

"The practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved. Relevancy and materiality for the purpose of production and inspection . . . are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility—e.g. evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial and irrelevant." *Jencks* at 669. Citation and footnote omitted.

That this rule must apply even when information properly comes within the state secrets privilege was made clear by the Supreme Court in *Dennis* v. *U.S.*, 384 U.S. 855 (1966) and *Alderman, supra.*

In *Dennis* the Court stated that it is not:

"* * * realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purpose, however conscientiously made, would exhaust the possibilities. In our adversary system it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate." 384 U.S. at 874–875.

The Court went on to note that the trial judge's function is limited to such measures as protective orders when "the nation's security" is involved. *Id.*, at 875. It ruled that a task analogous to the determination of relevancy—deter-

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mining if illegally seized evidence had tainted evidence introduced at trial—could not be performed by the trial judge ex parte. The Court explicitly rejected a proposal by the Government, supported by two members of the Court, that national security information be treated differently, and held that even when national security information might be revealed the trial judge could not be permitted to determine if evidence was tainted. In reasoning directly analogous to the task of determining if a statement can be used to impeach a witness, the Court noted: "The task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court." *Alderman* at 182.

The recent experience in *U.S.* v. *Humphrey*, Civ. No. 78-5177 (4th Cir., appealed August 16, 1978), illustrates the danger of any proposal to modify the Jencks Act in "graymail" legislation. In its brief to the court of appeals in that case, the Government conceded that under current law the trial judge may not withhold prior statements of Government witnesses even if they are classified. The Government argued, however, that certain material turned over to the court late in the trial and partially made available to the defendants is not *Jencks* material, and that even if it was it could not have been used to impeach the Government's chief witness at trial.

The defense in *Humphrey* argued vigorously that the material was clearly within the *Jencks* rule and that it could have been used to discredit the witness to degree that an acquittal would have been likely.

Without going into the merits of this particular case, the controversy illustrates the difficulty of having the trial judge decide what might be used to impeach a witness. The case also demonstrates the inappropriateness of relying on appellate review to correct any mistakes of the trial judge, since appellate courts are less familiar with the facts and are in a far worse position to determine if the material could have been used effectively for impeachment. Moreover, the appellate court's traditional deference to the trial judge on factual matters will mean that few convictions would be reversed for failure to provide classified *Jencks* material.

Our second major area of concern involves the timing of the court's decision on relevance and when it is informed by the Government as to the reasons for the classification of the information. S. 1482 and H.R. 4745 permit the Government to make an *ex parte in camera* presentation to the court of the reasons for classification before the court determines whether the information is admissable. Although not intended by this provision, the court may well consider the consequences of disclosure in determining admissability. We would, therefore, urge that this committee preserve the procedures outlined in H.R. 4736, the "graymail" bill introduced in the House by the chairman of the House Intelligence Subcommittee on legislation, Morgan Murphy. These procedures may appear to be more cumbersome because of the careful way the bill spells out each step. However, in practice they would be no more complicated than the procedures in the administration bill.

The third major issue is that of the reporting requirements. We want to clearly state our view that these provisions are among the most important in the bill. In this context, we want to reiterate our earlier point that the problem in this area is not "graymail" at all, but the Governmental will to prosecute. By requiring the adoption of procedures and reports to the Congress, the legislation would make it less likely that fears of institutional embarrassment over illegal or ill-advised Government activities could successfully masquerade as a national security concern. Section 12 of S. 1482 would not in any way interfere with the executive's responsibility for determining when prosecution should be pursued. But that power, like all powers of the executive, is open to oversight and scrutiny by the Congress. Oversight is also relevant to Congress' legislative power since it bears on such issues as whether Congress should create a special office to conduct all prosecutions involving classified information.

We believe that the reporting requirements in S. 1482 are well-suited to the task, and we would strongly urge this subcommittee to resist any efforts which might be made to dilute such requirements along the lines of the House Intelligence Subcommittee mark-up amendment to the reporting requirements in H.R. 4736. That amendment reduced the case-by-case summaries, without specifying the necessary written findings which must be included for each decision not to prosecute. Such a provision would make a mockery of the clear objective of reporting requirements.

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One final major concern in regards to S. 1482 is the lack of an appropriate standard for the exercise of the court's discretion to authorize the Government to avoid disclosure of relevant classified materials by deleting specified items, substituting a summary for the information desired, or substituting a statement admitting relevant facts that the classified information would tend to prove. Section 4 of the bill provides no standard at all, while section 6(b)(4)(B) offers only the vague standard of not prejudicing the defendant's right to a fair trial.

We would recommend that S. 1482 be amended to include for such purposes the standard adopted for H.R. 4736 in the House intelligence subcommittee's mark-up of H.R. 4736. That standard would permit such deletions or substitutions only if the court found that that standard would, for purposes of discovery and court-ordered disclosures, permit such deletion or substitution only "if the court finds that such action will provide the defendant with substantially the same ability to prepare for trial or make his defense as would disclosure of the specific classified information."

Mr. Chairman, permit us to state that we have a number of other objections to H.R. 4745. We should also note that we prefer the structure and procedures of H.R. 4736 to those of S. 1482.

Senator BIDEN. Our next witness is Mr. Michael Scheininger, but before we proceed, there is a vote on, and I will recess this proceeding for 10 minutes to go vote and we will come back and proceed and then our last two witnesses will appear as a panel: Mr. Silbert and Professor Greenhalgh of Georgetown Law Center. The hearing is recessed for 10 minutes.

[Brief recess.]

Senator BIDEN. Mr. Scheininger, how do I pronounce your name correctly?

Mr. SCHEININGER. That is correct, Mr. Chairman.

Senator BIDEN. Why don't you proceed in any way that is most comfortable for you.

STATEMENT OF MICHAEL SCHEININGER

Mr. SCHEININGER. Thank you, sir. Mr. Chairman, I am very pleased to have been invited to appear before the subcommittee this morning to express my personal views on a bill with which I have had some familiarity, having testified before the House and having been involved in some cases involving national security. I have prepared a statement and, in view of the subcommittee's familiarity with the issues, I would ask to have this statement submitted as part of the record.

Senator BIDEN. It will be in its entirety.

Mr. SCHEININGER. I would just like to address one or two issues that I have not discussed in my statement and then invite any questions. It was apparent from listening to the witnesses this morning that there was great unanimity of opinion on the importance of legislation in this graymail area.

I share the view that legislation in this area is necessary. My problem, however, is that I believe that the Senate bill 1482, as well as the administration bill, go too far. They take an extra step, they change present law, and in that sense, they perform major surgery where only minor surgery is needed.

Let me say at the outset that I support the following procedures contained within the Senate bill 1482: Mandatory notice by a defendant of his intention to use and disclose classified information, manadatory

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pretrial hearings, interlocutory appellate review, and, of course, the housekeeping provisions to safeguard classified information once it is disclosed.

Having said that, I submit that it is unnecessary to go beyond that and to provide, as do the deletion and substitution provisions of S. 1482, that relevant and material information may be kept from a defendant in a criminal case. I think the best way of pointing up the danger of this kind of provision is to outline the way I contemplate the bill would work in a normal trial situation. The bill addresses two situations, one in which the defendant himself already has knowledge of the classified information. This was the case in the *ITT-Chile* cases in which I was one of the counsels of record.

The other situation and the more common one, I submit, is where the defendant seeks to gain access, through discovery of classified information in the hands of the Government. Addressing first what would occur in the discovery situation, I would, as defense counsel, make a request to the court under rule 16 to discover all documents within a given category; let's say, all communications among various people that relates to an issue in my defense, such as inducement, or what have you.

Now, assuming that the information I seek is classified, the Government would resist disclosure, but they wouldn't in the first instance resist it on the ground that it is national security. They have a front line, and their front line is that it is not relevant material. They would resist my request on the basis that my inquiry, on its face, should be determined by the court to be not relevant and material.

The Government in resisting discovery always urges on the court a very strict standard of relevance and materiality. They would argue that my request for all communications will not "advance issues of guilt or innocence in the trial." I will respond that under rule 16 I am entitled to any information which helps "prepare me" to defend the case. Obviously, it is difficult for me, as defense counsel, to demonstrate the relevance of information that I have not seen and don't have access to. In the vast majority of cases where this arises, I will lose; I will not gain access to this information, not based on any claim by the Government of privilege or classified information, but based simply on the argument that my request is not sufficiently detailed to demonstrate that it is relevant and material.

That is the first line of defense that the Government has. Now assuming that I have made my argument well, and the judge says, "Mr. Scheininger, it seems to me that you are right, that this information probably is relevant and material," then the Government has a second line. Beyond arguing the relevance of the inquiry, they ask the court to review in camera and ex parte this body of documents I have requested. The ostensible purpose of the Government's request to the court to actually look at the documents is because there are additional details within the documents that advance the Government's argument that the documents are not relevant or material.

Now, under the bill, under 1482, I would have no opportunity to argue with the judge concerning this ex parte, in camera viewing of the document. Parenthetically, I suggest to the subcommittee, that a fairer way of proceeding under the bill, at this stage of the dis-

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covery process, would be if defense counsel could obtain a generic description of these additional details that the documents contain so that counsel can argue at least in a semiadversary proceeding, the relevance and admissibility of the documents. I submit that sections 3 and 4 of S. 1482 should contain the same generic category provision provided in section 6 of the bill.

Going back to my hypothetical, let us assume that the court rules that my showing of materiality and relevancy is so great that I am entitled to examine these classified documents. At this point, under this bill, the documents still need not be disclosed. The Government has an opportunity to appeal the trial court's decision to the court of appeals. Only if the court of appeals says that the trial judge was right, that the documents are relevant and material to my case, would I get access to the information. Even then, the documents wouldn't be public. I would likely be subjected to a strict protective order which would preclude me or my client from divulging the information. The court's ruling would not be a determination that the information could be admitted at trial, but only a determination that I could use this information in the preparation of my defense, subject to later argument at trial as to whether it was admissible.

Now, Mr. Chairman, I submit that all these layers of insulation are sufficient to protect the Government's interest in the national security. I submit that the incremental value to the prosecution, of precluding the defense access to information that a trial court and court of appeals has said is relevant material, as authorized in the substitution and deletion provisions of sections 4 and 6(b)(4) of your bill, is not worth the damage that such provisions would potentially cause to the adversary process.

I think an argument can be made, and I have tried to make it in my prepared statement, that it would be unconstitutional to preclude the defendant access to relevant and material information. I concede that there can be honest disagreement on that issue, but I urge the committee to scrutinize these provisions with a view to whether they are necessary to satisfy the Government's interest in this matter.

I would like to address one other aspect of the bill that is particularly bothersome to me, and that is what I will call the trigger mechanism. Under section 6(b) of the administration bill, Mr. Chairman, if the Government desires to have a hearing on the issue of national security, they are required to demonstrate that "the information reasonably could be expected to cause damage to the national security."

That provision is not contained in Senate bill 1482. Now I think that the administration's provision is good in one sense and bad in another. It is good because the Government should be required to demonstrate that national security is properly invoked. Indeed, even with individual privileges such as the marital privilege and the attorney client privilege, the party seeking to invoke the privilege has the burden to demonstrate that there is, indeed, an attorney client relationship; to show that others were not privy to the conversation between an attorney and his client; to show that the communication was about legal matters as opposed to business matters, and so forth. So, even in the case of individual privileges, the privilege must be properly invoked. I think to the extent that the Government is required by section 6(b)

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of their bill, to prove that national security is properly invoked, it is a proper requirement to place on them.

However, the provision in the administration bill is bad in the sense that it doesn't open the inquiry to the adversary process. More importantly, it is bad because it allows the prosecution to confuse and intermingle the issue of proper classification, on the one hand, with the issue of relevance—with whether or not the information should be disclosed in the particular proceeding.

The House bill introduced by Congressman Murphy resolves this difficulty in sections 102 and 103 by separating issues of classification from issues of relevance. With all due respect, Mr. Chairman, I suggest that Senate bill 1482 has adopted only the worst aspect of section 6(b) of the administration bill, in that section 6(a) of your bill allows the Government to submit an explanation for why the information is classified, thus permitting the Government the opportunity to comingle issues of relevance with issues of classification, yet it does not require that the court make a finding that the classification is properly invoked.

I think that is a difficulty with this bill, and I commend to the subcommittee the resolution of the problem that is contained in Congressman Murphy's bill.

Aside from the issues I addressed in my prepared statement, those are the major aspects of this legislation which most trouble me. I say in conclusion that the diligent and fair-minded efforts of this committee and others to work out the graymail problem is appreciated by everyone in the defense bar with whom I have discussed the matter. However, the concern is that the Congress has gone one step too far by permitting a judge to restrict access to even relevant and material information by allowing deletions and substitutions. As I said, the remaining provisions of the bill go far enough to protect national security.

Senator BIDEN. Thank you very much. Both the bills authorize the imposition of sanctions short of dismissal of the whole indictment if the Government refuses to disclose relevant and admissible classified information. What is your opinion about these provisions, both the House and Senate bills?

Mr. SCHEININGER. I support the hierarchy of sanctions that the bills impose, Mr. Chairman. I think it is entirely fair to the defense that the court be authorized, instead of dismissing an indictment outright, to find against the Government on a particular count, or to preclude a witness; sanctions similar to those contained in the Jencks Act. I am not troubled by that.

Senator BIDEN. In your written statement, you suggest that in the *ITT-Chile* case, the district court had ruled the disputed information to be relevant and admissible and the Government sought mandamus to reverse the ruling. The Government, on the other hand, suggested that it was the district court's refusal to make such ruling before trial that was the subject of the mandamus petition. Could you clarify this discrepancy for us?

Mr. SCHEININGER. Well, I am not familiar with where the Government makes the claim that the judge did not rule pretrial on the

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relevancy of information we sought to introduce. I think that is what happened in the *ITT*——

Senator BIDEN. Apparently Heymann said this in the House hearings.

Mr. SCHEININGER. I don't recall that, but perhaps I can explain what my recollection of that matter was. The Government was distressed with Judge Aubrey Robinson's decision not to grant them, in haec verba, a broad protective order. The court of appeals later said the court's protective order showed proper sensitivity to national security. However, I submit that the real reason why the Justice Department went to the court of appeals was not the protective order issue, but was because they didn't like the judge's ruling pretrial on admissibility of evidence.

The *ITT-Chile* case was one in which the defendant was in the possession of national security information, which we honestly, and in good faith, and as officers of the court, believed was relevant to our defense. The Government asked that we proffer whether we were intending to introduce it, and the way we were going to introduce it, in advance of trial. We agreed to do that.

The Government then said: Your Honor, the proffered information is not relevant to a legally cognizably defense because entrapment and or inducement, which were our defenses as it pertained to that information, are not proper in these circumstances.

Judge Robinson ruled against them. He ruled that we could use the classified information. The Government used the protective order issue as a vehicle to seek appellate review on the evidentiary issue. They sought a petition for mandamus, and I know, Senator Biden, that you, as a former defense counsel yourself, know that mandamus is disfavored, that the court of appeals will not rule interlocutorily on issues of evidence. They refused to do so in this case. So, the judge's pretrial ruling on evidence was the issue.

Just as a final concluding remark, if the Congress passes a bill such as 1482, which will allow the court to have an interlocutory appellate review, the Government will not be in the appellate bind they were in, in the *ITT* case. They would have obtained a court of appeals ruling as to whether Judge Robinson was right or wrong in saying that the evidence could come in.

Senator BIDEN. I see. Well that helps the record here for our purposes. I don't have any further questions for you. I do appreciate your time and interest and the expertise you bring to bear on this matter. Obviously you have been involved in one of the more celebrated cases in this area and have had first-hand experience with the problems from a different prospective but nonetheless, different than the Justice Department. That is very helpful for us in our deliberations Thank you very much for your time.

Mr. SCHEININGER. Thank you, Senator.

[The prepared statement of Mr. Scheininger follows:]

PREPARED STATEMENT OF MICHAEL G. SCHEININGER

Mr. Chairman, I am honored by the invitation to address you on the so-called "graymail" legislation now pending before this subcommittee. I speak as a member of the bar who has participated in the defense of criminal cases involving national security.

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In the last 2 years, hearings before various committees of both Houses of Congress have established the need for new legislation in this area. Two aspects of the "graymail" problem have been identified: cases in which the Justice Department has been forced to retreat from a decision to prosecute because of exaggerated defense threats to reveal State secrets, and cases in which our national security agencies have refused to cooperate with the Justice Department in an investigation because of their fear that state secrets extraneous to issues of guilt or innocence will be disclosed. The "graymail" phenomenon was aggravated by the problem of overclassification and the absence of interagency procedures to handle classified information.

While the problems of overclassification and interagency procedures have in recent years been the subject of remedial action by the agencies themselves and by executive order, there remain areas of legitimate concern. There is a clear need to enact uniform and predictable courtroom procedures to safeguard classified information in criminal trials. For this reason, I support legislation requiring mandatory notice by a defendant of his intention to disclose classified information, mandatory pretrial hearings, interlocutory appellate review, and fixed procedures to safeguard classified material once it is disclosed. Enactment of these measures would assure that extraneous classified information was not disclosed in criminal trials.

The problem with the Justice Department bill (H.R. 4745), as well as that now pending before this subcommittee, is that both go beyond remedying past abuses and seek to enact a broad State secrets law that is unnecessary and dangerous. These bills would change the existing state of the law by permitting the court to authorize the prosecution to withhold or provide only summaries of classified information that is admittedly relevant and material to the defense. Moreover, these bills seek to establish this qualified privilege within the context of a procedural structure which focuses inordinate judicial concern on the issue of national security. For example, under S. 1482, the prosecution is not only entitled to argue for nondisclosure in ex parte sessions with the judge, but is, in addition, able to urge nondisclosure on grounds extraneous to the issues of the trial, viz. potential damage to foreign relations. The effect of this proposed legislation in the courtroom will be to severely restrict a defendant's access to information relevant and material to his defense.

There is a distinct danger to such broadly conceived legislation. As Michael Tigar said in testimony on these bills before the House, the experience of other nations is that creating a special body of law for offenses involving secrets of state tends to foster repression. Moreover, these bills retreat from the principal enunicated by the Supreme Court in *United States* v. *Reynolds*, 345 U.S. 1 (1953): "(It) is unconscionable to allow government to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."

See Jencks v. *United States*, 353 U.S. 657, 670–71 (1957); *United States* v. *Andolschek*, 142 F.2d 503, 506 (2nd Cir. 1944). By authorizing the withholding of classified information through deletions or substitutions in lieu of actual material, these bills tend to deprive the defense of its constitutional right to confrontation and compulsory process. *See* P. Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567 (1978).

The proper balance between preserving the integrity of our adversary system and safeguarding state secrets can be struck without enacting these broad changes in the rules of evidence and criminal procedure. The difficulty with present procedures is not that they are inadequate, but that they are discretionary with each judge in each case. In the *"ITT-Chile"* cases in which I was one of the counsel of record, the judge used existing procedures to: (1) issue a comprehensive protective order under Fed. R. Crim. P. 16(d)(2), limiting access and disclosure of classified information; (2) order that notice be given by the defense of its intention to use classified information; (3) require the defense to demonstrate relevance and materiality of that information at an in camera pretrial conference held pursuant to Fed. R. Crim. P. 17.1. In this case, the Justice Department disagreed with the court's eventual decision to permit the classified information to be used and sought review by way of a petition for writ of mandamus. See Fed. R. App. P. 21.

In denying the petition, the U.S. court of appeals held that the trial judge had "shown a proper sensitivity to the requirements of national security." *In*

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Re United States, U.S. App. D.C. No. 78–2158 (Jan. 26, 1979). By enacting procedures to make mandatory the discretionary procedures available under existing law, as exemplified in the *ITT* case, and by providing for an interlocutory appeal to review decisions adverse to the government, the Congress will impose uniformity and predictability on the system, while assuring that state secrets extraneous to issues of guilt or innocence are not disclosed. No broader legislation is justified.

While reasonable men and women may, and do, disagree on the constitutionality of the various provisions of these bills, few will disagree that an overriding concern for fairness requires that any new legislation in this area should be drawn as narrowly as possible to take into account those concerns of the State which have been shown to require remedial action. It is from this perspective that the subcommittee should examine the additional provisions of the bills discussed below.

I. PROTECTIVE ORDERS INITIATED BY THE PROSECUTION

Sections 3 and 4 of S. 1482 authorize the prosecution at any time to obtain a protective order as to any classified information it does not wish disclosed. As a practical matter, these provisions allow the prosecution to submit pretrial and ex parte to the trial judge discovery material to which a defendant would ordinarily be entitled, either because it is intended for use by the Government as evidence in chief, or because it is material to the preparation of the defense. Fed. R. Crim. P. 16(a)(1)(C). These provisions empower a judge to alter, by substitution or summary or even deletion, admittedly relevant and material information without affording the defense notice or an opportunity to be heard. Sections 3 and 4 swallow all of the protections provided to the defense elsewhere in the bill. For example, under section 6(b) and (c) of the bill, deletions, substitutions and summaries are permitted only after an adversary hearing, prior to which the defense is given sufficient information to enable it to participate in an intelligent manner. There is no legitimate reason why these same protections should not be afforded under sections 3 and 4.

The Justice Department has argued in favor of provisions similar to sections 3 and 4 (see section 4(b) of H.R. 4745) on the ground that they provide the Court with no different authority than is already provided in Fed. R. Crim. P. 16(d)(1). In this context, it should be noted that although when originally promulgated, it was foreseen that rule 16(d)(1) might be used in national security cases, see Advisory Committee's note, 34 F.R.D. 411, 425 (1964); *Dennis* v. *United States*, 384 U.S. 855, 875 (1966), there is not a single reported case where it has been so used. Thus, if sections 3 and 4 merely restate rule 16(d)(1), they would be at worst superfluous. But a detailed comparison between these sections and existing Fed. R. Crim. P. 16(d)(2) reveals that there are indeed, significant differences. First, rule 16(d)(1) requires that any submission made for consideration by the judge alone, must be made in writing. Sections 3 and 4 contain no such requirement. Second, rule 16(d)(1) provides that whenever the judge grants relief restricting discovery following an ex parte showing, all the written submissions shall be preserved for appeal. Sections 3 and 4, by contrast, mandate such preservation only if relief is granted and the defendant objects. Thus, under the provisions of sections 3 and 4, a prosecutor would be free to make any sort of oral representation to a judge, and there would be no record available for appellate review.

Moreover, even where some written materials were submitted, they would not be preserved for review unless the defendant objected to the court's decision. Since, under this section, the defendant is not even entitled to notice that the procedure has taken place, one can only wonder how a defendant ever will be sufficiently informed to make an objection. Thus, sections 3 and 4, if enacted, would significantly dilute the protections available to defendants under present Fed. R. Crim. P. 16(d)(1).

II. STANDARDS FOR NONDISCLOSURE

S. 1482 omits any standards by which the trial judge shall decide on what basis to withhold disclosure of classified information. While I understand that the intent of this omission is to permit "prevailing standards" to govern, I believe that within the context of the bill, the omission will be viewed by judges as an invitation to withhold information and to restrict cross-examination. Thus, sec-

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tion 6(b)(4)(A) should be revised to provide that no classified information may be withheld if it is relevant and material to the offense, to the preparation of the defense, or to the credibility, bias or interest of any witness.

While the standard for withholding is omitted, the bill does provide a standard for determining whether alternatives to full disclosure may be used. Section 6(b)(4)(B). However, that standard, "that the defendant's right to a fair trial will not be prejudiced," is unfairly restrictive. The section should be revised to provide that no deletion, substitution or summarization can interfere with the confrontation and cross-examination rights of the defendant. The legislative history should clearly establish that it is not the intent of this section to place the defendant in a substantially different posture than if the actual classified information had been disclosed.

III. RECIPROCITY

Reciprocity of two types is provided by S. 1482. Whenever a defendant is required to disclose particular aspects of his defense under section 6, he is entitled to a bill of particulars detailing portions of the indictment related to the classified information at issue in the hearing. Under section 6(c), if the defendant's right to use classified information is sustained by the trial court, the defendant is entitled to be advised of the information, but not the witnesses, which the Government intends to use to rebut the particular classified information.

The bill of particulars provision has been criticized on the ground that where the defense discloses only documentary evidence, that evidence would ordinarily have been disclosed anyway by the defendant under the reciprocal discovery obligations of Fed. R. Crim. P. 16 (b), thus there is no need to afford the defense a bill of particulars for purposes of reciprocity. The fallacy in this argument is the assumption that only documentary evidence will be disclosed. As a practical matter, in order to demonstrate at a section 5 hearing that classified information needs to be disclosed, the defense will be required to detail its proposed use of the documents, and to reveal and justify its legal theory in order to establish the relationship between the classified documents and the defense case. Moreover, this disclosure will be made at a time when the defendant has not yet heard the case against him, and even the judge will be forced to weigh defense disclosure requests in a factual vacuum. Thus, the bill of particulars provision not only serves to compensate the defense for the complete disclosure required of it, but serves, too, to fix a factual context for the court's ruling.

In my view, both types of reciprocal discovery provided for in this bill are constitutionally mandated. As the Supreme Court stated in *Wardius* v. *Oregon*, 412 U.S. 470, 476 (1973):

"It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State."

IV. SECURITY CLASSIFICATION

Under section 6(a) of S. 1482, the prosecution is entitled, at its option, to submit to the court "the classified information along with an explanation of the basis for the classification." The bill says this submission is to be made in camera. In context, this presumably means ex parte. In my view, authorizing the prosecution to explain "the basis for the classification" is both unnecessary and prejudicial to the defendant.

It is unnecessary because the trial judge does not need to know the basis for the security classification simply to determine whether or not to hold a hearing. It is sufficient that the Attorney General or his designated deputy or assistant has certified the information as classified.

The provision is prejudicial because it permits the prosecution to intermingle the issue of relevancy, which goes to disclosure vel non, with the issue of harm to national security, which, if appropriate at all, goes only to the form of disclosure.

The importance of separating the two issues is properly recognized in sections 102 and 103 of H.R. 4736, introduced by Congressman Murphy. These sections provide that the judge is not to consider the basis for the classification until after he determines that the material at issue is producible. Only then is the judge permitted to consider the basis for classification and only to determine the form that the disclosure shall take. This scheme properly separates the two independent decisions which the court must make, and protects against information

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relevant only to type and degree of disclosure "spilling over" and coloring the determination of whether the information should be disclosed at all.

V. JENCKS ACT

On introducing S. 1482, Senator Biden expressed reservations about section 10, which would revise the Jencks Act. That reservation is extremely well-founded.

Under the present statute, 18 U.S.C. 3500, once a witness has testified on direct examination for the prosecution, the only ground upon which a prior statement by that witness may be withheld from the defense is that the statement "contains matter which does not relate to the subject matter of the testimony of the witness," 18 U.S.C. 3500(c). In these circumstances, the court, after an in camera inspection, orders excision of the irrelevant material and production of the remainder. The proposed amendment would require the court to order the deletion of admittedly relevant matter, if it finds that the matter "is consistent with the witness' testimony."

The provision is both unnecessary and prejudicial to the defense. The act, as presently codified, already meets all of the objectives which this new bill seeks to accomplish. It is uniformly applicable in all Federal courts, 18 U.S.C. 3500(a). It precludes discovery until after a witness has testified, thus preventing premature and unnecessary disclosure, 18 U.S.C. 3500(a). It requires the excision of irrelevant matter, 18 U.S.C. 3500(c). It permits the prosecutor the option of refusing to produce the discoverable statement, and it provides a hierarchy of sanctions for nondisclosure, which do not necessarily require the termination of the prosecution, 18 U.S.C. 3500(d). Therefore, additional legislation in this area in order to deal with national security problems is totally unnecessary.

The proposed amendment would require the deletion of material from a statement, if the trial judge found it to be consistent with the witness' testimony. Demonstrable inconsistency has never been the test for production of *Jencks* material, and for very good reasons. As the Supreme Court stated in *Jencks* v. *United States*, 353 U.S. 657, 667–68 (1957):

"Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency.

"The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise until after the witness has testified, and unless he admits conflict, as in *Gordon* v. *United States* (344 U.S. 414 (1953)), the accused is helpless to know or discover conflict without inspecting the reports. A requirement of a showing of conflict would be clearly incompatible without standards for the administration of criminal justice in the Federal courts and must therefore be rejected."

Although the Jencks Act was intended to limit application of the doctrine established by the court in its decision, the ruling that a defendant need not demonstrate inconsistency prior to obtaining an otherwise producible statement, has not been altered. *See, e.g., Clancy* v. *United States*, 365 U.S. 312, 316 (1961).

In sum, the proposed Jencks Act amendment is an unwarranted intrusion upon the defendant's right to obtain relevant material, so that he may effectively confront the witnesses against him, as guaranteed by the Constitution. *See, e.g., United States* v. *Missler*, 414 F.2d 1293, 1303 (4th Cir. 1969), *cert. denied*, 397 U.S. 913 (1970).

Senator BIDEN. The next two witnesses I would like to invite to come forward as a panel, Mr. Earl Silbert and Mr. William Greenhalgh. Gentlemen, welcome.

Thank you for being so patient and willing to testify through your lunch hour. I appreciate it. It might be best if we proceed in that order. Mr. Silbert first and then Professor, you next, if we could. Mr. Silbert.

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PANEL REPRESENTING ABA:

STATEMENTS OF EARL J. SILBERT AND PROF. WILLIAM W. GREENHALGH, GEORGETOWN LAW CENTER

Mr. SILBERT. Good morning, Senator. Thank you for the opportunity to appear here before you. Just a word to explain my role here. I was requested by the standing Committee on Law and National Security to serve as a consultant for them on the issue of graymail.

Senator BIDEN. Of the ABA?

Mr. SILBERT. Of the ABA. It is one of the standing committees of the American Bar Association. I did do that, study the legislation and the various testimony that had already occurred in the House, submitted a report to the Committee on Law and National Security which thereafter adopted a position, a position that was in fairest respects, inconsistent with a prior position taken by the criminal justice section of the ABA which is represented here today by Professor Greenhalgh.

Professor Greenhalgh and I subsequently got together to see if we could resolve our differences. We came up with a proposed draft resolution of our differences that was thereafter submitted to both the standing Committee on Law and National Security and the Criminal Justice Section. Both of those sections and or committees approved the draft resolution that Professor Greenhalgh and I had prepared.

Earlier this week on Monday, Senator, that was submitted to the House of Delegates which accepted the joint resolution on the joint substitute resolution of the standing Committee on Law and National Security and the Criminal Justice Section with the one change as I have previously informed Mr. Gitenstein that with respect to the subject of interlocutory appeal, by motion on the floor of the house of delegates, that right was granted to the defendant in the criminal case as well as to the United States.

I might say that this was done notwithstanding the joint opposition expressed on the floor of the house of delegates by Professor Greenhalgh and myself, speaking in behalf of our respective committees. We pointed out to the house that none of the proposed legislation had such a recommendation in it or provision and it had no precedent to our knowledge, at least certainly to my knowledge in prior Federal statutory law and that I wasn't aware, although there may be some, of any real support for it by a testimony or other recommendations in either the House or here. There may have been some but certainly not strong support. Notwithstanding that it was accepted by a voice vote after about 5 minutes debate on the floor of the house of delegates and I would simply, so far as that is concerned, reiterate before here my feeling that that is an unwise decision principally because the defendant already has a right of appeal. The only reason for 3731 in title 18 to begin with is to grant the Government limited rights of appeal because ordinarily the Government has not such right of appeal.

The amendment that was proposed and is contained in S. 1482 and other legislation is simply to include, as part of the provision according the Government the right of interlocutory appeal, the right to

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appeal in the situation that we are now discussing, from an adverse ruling with respect to a judgment made by the trial court on national security ground.

I should also stress that of course I do not speak here in any official capacity in behalf of either the American Bar Association or the standing committee, but solely in my individual capacity. With that stated, so far as the pending legislation is concerned and I think as Mr. Scheininger correctly pointed out, there seems to be widespread agreement, one, for the need of legislation, two, that in such legislation there should be a mandatory pretrial proceeding provided for at which the questions with respect to disclosure of classified information can be resolved by the trial judge, and third that if there is a decision adverse to the Government, that it should have a right to appeal that ruling both prior to or even during trial if that is necessary.

In addition all the proposed legislation and now the ABA by its policy, agrees that the procedure should be initiated by ex parte submissions by the Government of classified information. It can also be triggered by the defendant if the defendant chooses to disclose classified national security information as part of his defense, or seeks from the Government as part of discovery material that is classified.

It is also agreed that the resolution of such submissions can, on Government request, be held by the court in camera and that it can make its review based on ex parte submissions. Now, as far as I can tell, the bill seemed to be fairly consistent in most of the support but not all. It is consistent with the ABA's recommendation that the judge should have the discretion to require all classified information to be disclosed over the objection of the Government. However, if he determines that the defendant can receive all the information that is relevant and material either to the elements of the offense with which the defendant is charged, the defense that the defendant chooses to raise, or to the bias, credibility or interest of the witnesses, if that can be satisfied by means other than full disclosure of the documents in toto, then changes can be made. The changes may consist of deletions of material. They may consist of summaries of the material. They may consist of simply a stipulated or a stipulation of fact that the parties could agree to.

But, for example, based on what I just heard Mr. Scheininger testify to, I think his underlying objection to the legislation is wrong in the sense that he says the legislation would enable the Government or the courts to deny the defendant information that is admittedly relevant and material. That certainly was not my recommendation to the standing committee. It is not the position that was taken by the ABA as I read it's resolution—the joint proposal that Professor Greenhalgh and I drafted. Our theory is that if the document has material that is relevant and material and that cannot be accommodated by substitutes, by deletions or excisions, by stipulations, then the defendant has to get it all.

If the Government objects to the defendant being able to disclose or being able to itself, or of having to turn over through discovery, then the Government has to make some choices. It may for example choose not to turn it over and sacrifice a witness to it and subject itself to the sanctions that are provided for by the legislation. I think we

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have, at least the ABA recommendation, and certainly our position and my understanding of the position in the legislation is that a defendant is not to be deprived of specific facts that a court deems to be both relevant and material and if he isn't given that information, he is then not put in the same position that he would have been if they were full disclosure.

I want to turn briefly to the Jencks Act. As I stated in my report as a consultant, a copy of which has been submitted to the committee and which I would ask be made part of the record.

Senator BIDEN. It will be.

Mr. SILBERT. Thank you. In going through the least written statements of a number of the witnesses, I have felt that the issue had been exaggerated and overblown. I do not agree with the proposed draft of the amendment contained in S. 1482 or the administration bill; that is, that in addition to the usual test for determining relevancy, the judge may delete material that is consistent with the testimony of the witness. I do not understand that test as it would apply to the Jencks Act. If it is consistent to me it means he, the witness, he or she has already testified to it and it has already come out, and I for the life of me, although I have talked with the people that have proposed it, have still not been able to come to an understanding of how that term consistency would be applied.

On the other hand I do not share the view that the world is coming to an end if the Jencks Act is modified, or amended. I don't think that any legislation is written stone, that if the need arises, it cannot be amended, or modified to meet that need. The ABA adopted a compromise, simply saying that it opposed the language, the specific language in S. 1482 and in the administration bill, Senator, and then rather than resolve the issue, what it did say that if there is going to be an amendment, let's make sure that the amendment properly accommodates the interest of the Government against unwarranted disclosures of national security information and the rights of a defendant to a fair trial.

Senator BIDEN. Do you have any suggested language?

Mr. SILBERT. I do and I included that in my report. I think the test ought to be not whether or not—the present law says the defendant gets everything that is relevant related to the subject matter of the direct testimony. I could envision situations in which what comes within the general scope area of his testimony might include classified information, that the Government would not want to disclose. I would then say to the judge, he has the authority to review it and excise that material if he finds, but only if he finds, that it is immaterial, immaterial to the credibility, the interests, the bias, or prior conduct of the witness.

That I think is a test to me that makes a lot more sense, and, as I said, I do not understand the application of consistency, the consistency test that has been proposed by the administration. But, if you can show and the judge makes a finding which would always be subject to review on appeal, that that information, or whatever it is that is contained in the prior statement, is immaterial to bias, credibility, interest, or prior conduct of the witness, I simply do not see how the defendant can be harmed. I must take issue with those who say that the Jencks Act——

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Senator BIDEN. Isn't the issue there though really questioning whether or not the judge should have the right to make that decision?

Mr. SILBERT. All right, now that is the question. I was just going to say that I do not agree with those that claim that what we are talking about is a due process right. The Jencks Act itself was a modification, was a response to the prior Supreme Court decision. I have never known it to be stated that it is based on constitutional principles. If it were its equivalent would be necessary in all the States of the Union and there are many States that do not have the equivalent of Jencks Act statements.

I do agree with the Jencks Act itself. I mean that to me is basically a fair statute. The one area, it is just the one that you pointed out Senator, on which reasonable people may have a differing approach and that is who should make the assessment on materiality, the defendant or the court.

That is a judgment decision that has to be made. It is not as though the proposal to have the judge make it is unique. That it is something that has not occurred prior in our jurisprudence. There are many situations that call for judgments to be made by the judge, by the court, without the benefit, argument either for example by the defense, or by the prosecution. Indeed in this very legislation——

Senator BIDEN. Are there many though where the judgment is made by the judge, the basis of that judgment, not being known to the defendant.

Mr. SILBERT. The Jencks Act itself, Your Honor—excuse me, Senator.

Senator BIDEN. Thank you. Thank you for the compliment.

Mr. SILBERT. The Jencks Act itself, although there the issue is not materiality, but it is whether or not the subject of the statement is related. Now it was in every single case in which Jencks Act material, prior statements of a witness are to be turned over to the defense. If the Government wishes to challenge the fact, or assert the fact that part of the prior statement is not related to the scope of the direct examination, it makes an ex parte submission of that material, which is right within the provisions of the statute to the court and the court makes an ex parte determination with no input or opportunity from input from the defendant.

I say, that occcurs in every Jencks Act situation so that I don't think extending the authority of the court in the area of classified information to make the further judgment of materiality is, as I say, something that would transform a statute from being constitutional to unconstitutional.

I certainly recognize the fact that the argument remains that those kind of ex parte determinations should be limited in their number to those that are deemed, you know, essential. That they should not be expanded because they are inconsistent with the normal flow and processes of the adversary system that we have. As I say, to me it is not a question of constitutional law. It is a question of policy or judgment but I do think that in this sensitive area, if the test is to be that the disclosure would unduly jeopardize national security interest, but that still have to be made unless the court is prepared to make a finding that it is immaterial to bias, interest, credibility, which are fairly

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broad tests of the defendant, I think that makes a reasonable accommodation.

I guess there is one other issue that I should address because there are some differences in the proposed legislation and that has to do with what are called reciprocity and bill of particulars. So the Murphy bill provides for the bill of particulars. Now the ABA has come out stating that that is unnecessary and I fully agree with that. That was my initial position. To me the question is one of discovery, Senator. I do not see it at all as related to the question of a bill of particulars which is designed to inform the defendant of the charge that has been placed against him more so than the indictment so that he can prepare his defense and make a subsequent claim of double jeopardy.

So that I don't think asking wth respect to disclosure of national security information, the issuance of a bill of particulars—they just don't address the problem. The problem is properly addressed in discovery. H.R. 4736 provides that if any information is denied a defendant, then the Government has to, in rebuttal, disclose all of its witnesses. I think that the Government should be put under a burden of reciprocity as your bill provides.

I do not agree however that these should necessarily have to be a disclosure of witnesses. In my view what should be done, and again the ABA adopted this position, is that the reciprocity should be equal if, for example, the defendant is required to disclose by the judge the identity of his witnesses who will testify to national security information.

Then I think fairness would require that the Government in turn be required to disclose its witnesses. If, however, all that the defendant is required to do is disclose the information that he or she would seek to be allowed to come out of trial, then I think to make the reciprocity equal or properly balanced, the Government should only have the burden in rebuttal of producing the information that it will produce to counter or to rebut that information.

I think the provision in S. 1482 more properly addresses that question. The administration bill I think is deficient and doesn't make any provision for it at all. I would include a reciprocity provision and I would simply make sure that language along the line that I think the ABA has now adopted and that Professor Greenhalgh and I recommended to them, that there be whenever the defendant be required to produce under this legislation, information as discovery that he or she is not otherwise required to produce by the ordinary rules of criminal procedure, then there should be a corresponding obligation on the part of the Government to produce like information on which it will rely in rebuttal.

That is if it is just information, information. If it is identity of witnesses, identity of witnesses. Ordinarily I don't think it will happen that often because I think primarily we are going to be talking about documents and documents the defense already has an obligation to disclose as part of its discovery. It has a right to obtain from the Government all documents that the Government intends to use in its case in trial and then it has the corresponding obligation to produce all documents it intends to introduce in behalf of the defense. That is under existing law in the Federal Rules of Criminal Procedure.

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So while we are talking about a document, there is no additional burden placed on the defendant by this procedure. But, if there is an additional burden, then I think the Government should have a corresponding obligation to provide like information.

Senator, I think that completes what I would like to present initially to the court. After, or before, Professor Greenhalgh speaks I would certainly be pleased to try and answer whatever questions you and anyone else might have.

Senator BIDEN. Well, I think maybe it would be best to hear Professor Greenhalgh and I should point out that for the first 8 months I was in the U.S. Senate, I would instead of addressing the presiding officer on the Senate floor as Mr. President, I would always stand and say may it please the court. It has taken me 7 years and I can fully understand your referring to me as Your Honor. It took me 7 years to get over it. Professor?

Professor GREENHALGH. Senator, I would like to zero in on this piece of legislation, especially since it had your name on it, S. 1482, with regard to section 10 and that is the proposed amendments to the Jencks Act. I have submitted a rather short but succinct statement with regard to my testimony as an individual law professor.

Mr. Silbert has pointed out something that happened on the way to Chicago earlier this week which resolved in agreement between the two groups as to the Committee of Law and National Security and the Criminal Justice Section of the ABA which happily was resolved in that regard.

Unlike my distinguished colleague, I have very strong feelings about the Jencks Act. Probably one of the reasons, Senator, was when I was in the Internal Security Division of the Department of Justice one of my cases was Clinton E. Jencks and I have fond memories of one informant by the name of Harvey Matuso who went sour and as a result caused the Supreme Court in no unmitigated fashion to reverse the Jencks Case out of the fifth circuit back in 1957.

Be that as it may, the importance in a criminal trial with regards to the Jencks Act especially in a national security case as I envision it—and I have taught Federal trial, criminal trial advocacy for 17 years—is the Jencks Act is the only mandatory trial discovery permitted a defendant absent the sixth amendment of the Constitution of the United States. Everything else we have been talking about this morning, up front with regard to pretrial conferences and discussions of admissibility and material and relevant, only goes to pretrial preparation and the only way you are going to reverse a Federal judge on that is to demonstrate that a marvelous amorphous standard known as abuse of discretion. It rarely happens unless the abuse is so violently opposed, for instance, in fair play and a public court will review it as such. Not so with title 18 U.S.C. 3500. The only test is relevancy once that witness has testified.

It is the only form of mandatory trial discovery absent your right to cross-examination of the confrontation clause as I hope to develop some aspect of effective assistance to counsel in being permitted to confront one's accuser.

Second, it is uniformly applicable in all 94 districts, U.S. district courts. We are not dealing here with the idiosyncrasies of a Federal

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judge as to excisions with regard to classified information or a word where I am really concerned, Senator. In your bill is the first time and the only time in, all three pieces of legislation is mentioned—is the word summaries. What is a summary in section 10 of your bill? That is the only place, the Department's bill doesn't use the word summaries. It is certainly nonexistent as we know in Congressman Murphy's bill.

But, for some unknown reason, it is in your bill and I suggest to you and I will get to that more pertinently in just a moment.

The Government controls its prosecution if they are concerned about production, a witness statement's under 3500, they certainly can order the number of witnesses. Who is going to testify and who is going to say what? If they don't want to, once that witness has testified, sanctions are provided for anonymous closure, and they are in descending order of priority ultimate to the dismissal of the case.

I think it is important also that we understand how the Jencks Act operates today. There are four major prerequisites for its operation. What are they? Material must be in possession of the Government. There must be a defense request. It must be a statement as defined in either E1, E2, or E3 and it must relate to the direct testimony of the witness on direct examination by the Government. Now, it is important I think to get to your major question which concerns me as that is the so-called ability of the learned Federal trial judge dealing with his supervisory power in handling Jencks Act disclosures as to where he performs his role in this type of proceeding.

Now the Supreme Court of the United States in two landmark decisions, titled *Campbell One* and *Campbell Two* in its interpretation of 3500 says the court has a role to play with regard to the ascertainment of fairness concerning certain procedures as to the production of these statements. I think it is important that *Campbell One* and *Campbell Two* be read into context of what would happen in a national security case because of excision on the part of the Government and the court being forced to do this if the Government requests it, or through the use of a thing called a summary.

I am not sure—what I am trying to tell you Senator—I am not sure how *Campbell One* and *Campbell Two* are going to come out if this legislation goes through as written and I think those are important cases with regard to the mechanics of developing a Campbell-type hearing in national security, national security cases.

Getting to the word summaries. You realize of course the Supreme Court of the United States has already ruled that summaries are not producible. Are not producible under the Jencks Act in *Palermo* v. *United States*. Now if the Department has put that language or suggested that to you in your bill, I sugest that we ought to, all of us, reread *Palermo* once again, because I don't think that is what you intend. At least I sincerely don't think that is what the intention should be.

Getting to the constitutional issue which my distinguished colleague takes issue of, and Mr. Heymann alluded to it this morning. You know, Jencks isn't the constitutional issue. As decided, no it wasn't, but what has happened to the status of the law since 1975 especially in two major areas concerning two clauses in the sixth amendment. One

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is the right to confront one's accusers as well as the assistance of counsel clause. I don't know of anything more important in the defense of a criminal trial than the ability of counsel to be able to have tools at his disposal for the purpose of rendering effective assistance to counsel and the right of confrontation that is impeachment.

If, for example, counsel is proscribed from his ability to use documents after the witness has testified in direct examination because of excision, it is not a violation because of disablement to rendering assistance of counsel absent the confrontation clause.

Now, I have put in four cases albeit certainly not on point. The Supreme Court of the United States has decided since 1957 dealing with three State statutes where it was per se rendition of interfering with the effective assistance of counsel because of State action that was taken against counsel in order to run his own particular case, Ferguson, Brooks, Herring, and then, of course, the infamous judge who told the lawyer you can't talk to your client overnight in order to prepare the witness as such in *Geders* which was thrown out. As I recall the Chief Justice——

Senator BIDEN. You are extending that principle to——

Professor GREENHALGH. Confrontation. The ability to be able to use documentary evidence which will be forbidden because of the power of a Federal judge to excise under the present legislation.

Senator BIDEN. And that is because, again, to make sure I understand your argument, that the sixth amendment as—I will use my word—broadened——

Professor GREENHALGH. True.

Senator BIDEN. In your opinion, it would encompass what heretofore was not contained in a standing interpretation of the confrontation provision of the sixth amendment.

Professor GREENHALGH. Right. I think the law has been most helpful, albeit Mr. Silbert, who has been a prosecutor, now is about to enter into what we call the real world in the dealing with the Department of Justice. We will understand more as time goes on. I am saying in my judgment and my submission as an argument——

Senator BIDEN. I understand that——

Professor GREENHALGH. I think it is a valid argument and of course we will not know.

Senator BIDEN. I think it is a persuasive argument. I just wanted to make sure I understood it.

Professor GREENHALGH. Sure. Now, along with that the leading case which has been conspicuous by its absence from departmental memorandum and testimony up until now. It is a case which has been on the books for almost 50 years, and that is *Alford* v. *United States* dealing with the Federal judge sustaining objection by defense counsel, asking a witness in exploratory fashion where he lived or resided.

Now the interesting thing is, guess where that particular witness resided. He was incarcerated in jail pending certain proceedings, and the purpose for that exploratory question was to make a determination which the Supreme Court in 1931 thought was most important to test that witness's bias and prejudice with regard to why he may be testifying against this particular defendant.

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The *Alford* case in the Federal court since 1931 became the law of the land under the new process clause in 1968 in the case called *Smith* v. *Illinois*. Senator, it has been given new life as late as 1974 in a very famous confrontation case which has some similar overtones because it dealt with legislation in *Davis* v. *Alaska*.

You may recall in *Davis* it was a question again of trying to ask a juvenile witness about his prior criminal record, which was prohibited by Alaska State law and Chief Justice Burger in 1974 said societal interest with regard to protection of juveniles must give way to the right of confrontation in the sixth amendment context.

It is true the minute the word is breathed, national security, Federal judges sit up and take notice, and maybe it can be thought of some way that the analogy of the societal interest that was sought to be protected by the Alaska State legislation can be overridden by the U.S. Congress. I suggest to you, no, because the language in *Davis* v. *Alaska* is very strong with regard to reaffirmation of *Alford* and *Smith* and it is cited through——

Senator BIDEN. I am not sure that they are applicable, and forgive me for questioning an eminent professor on the detail of a case that I—once I got out of law school and stopped practicing law I stopped reading cases. So that when you got—I was with you until 1969. When you hit 1974—but let's examine that last point you are making. Again, if I understand your line of reasoning, in the *Davis* case, Burger writing to the majority said that the societal interest outweighs the right of confrontation but——

Professor GREENHALGH. No; the other way.

Senator BIDEN. The other way around?

Professor GREENHALGH. The other way.

Senator BIDEN. That the right of confrontation outweighs the societal interest. Was the societal interest an interest that was related to the right of the individual or a general societal right?

Professor GREENHALGH. No; to protect the so-called rights of the juvenile not to be cross-examined as to a prior juvenile record, and they said that has to give way because of the right of confrontation in the proceeding under which it was had.

Senator BIDEN. OK.

Professor GREENHALGH. I'm sorry.

Senator BIDEN. No, I misunderstood you. I told you I stopped reading in 1959. Now I understand. I misunderstood you.

Professor GREENHALGH. I probably overstepped myself on doing something but I really didn't mean to.

Senator BIDEN. That is easy to do when you are referring to Justice Burger.

Professor GREENHALGH. In any event, let me summarize at least my personal feeling in this matter. Senator, I am sorry you didn't ask the Assistant Attorney General, Philip Heymann, the same question that Congressman Mazzoli asked him on August 7, 1979. The question went something like this: Mr. Heymann, in national security cases, has there been a problem with regard to the Jencks Act? Answer: It has not been a substantial problem in the area. End of answer.

Senator BIDEN. The reason I didn't ask it is that I didn't have to because I quoted it today when I asked the——

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Professor GREENHALGH. The other three.

Senator BIDEN [continuing]. The other three. So I already knew his answer.

Professor GREENHALGH. OK, good. Sometimes if you know the answer, you want to ask it. It is helpful to do that.

Senator BIDEN. Well, I think we have got it in the record, anyway, didn't we?

Professor GREENHALGH. Right. For that reason, I don't think it is as necessary to the life of this legislation as one would suppose. Another illustration, Senator, is in looking at the legislation, a substitute that came out of the Subcommittee on Legislation of the House Select Committee on Intelligence, which you will see there is no addition of the same section 10 to that and if you look after their mark up in their proceedings, there wasn't even a motion made to include it as such.

I do not think, therefore, that it is essential to this piece of legislation in that regard. Second, as Mr. Silbert suggested, he and I both worked out this joint substitution with the house of delegates. Now he has got his own language in a personal capacity with regard to immateriality. I just disagree. I think the test should still be relevancy, and then also the good faith of an experienced trial judge, and I talked to several of them, how they would handle this, and they say, Bill, the most important thing, if you have got responsible counsel you can get this thing ironed out.

I think if you trust the Federal judiciary and you have got responsible and professional people dealing on both sides, not only the Justice Department but all of them.

Senator BIDEN. You are asking a lot.

Professor GREENHALGH. Well, I think so, but even in Mr. Scheininger's case, that particular solution can be met now with national legislation and an amendment to 3731.

Senator BIDEN. Isn't really though the reason we even have much of this, the need for the legislation is because not all counsel is responsible and not all Federal judges are all that bright. At any rate, I won't belabor the point but they are two big ifs, and I am not being facetious when I say that. I really am not.

Professor GREENHALGH. All right.

Senator BIDEN. Because the argument is that, one of the backup arguments as Justice uses in this matter is that you know, if all counsel were responsible we wouldn't have a problem, but what our problem is we have a lot of irresponsible counsel. Now I am not subscribing to that position, but that is at least implicit in the argument that Justice is making.

Conversely the argument is that, well, if we had, if all judges were responsible and knowledgeable in these affairs and fair, then defense counsel would be less concerned. Notwithstanding, the constitutional argument remains, but the defense counsel would be less concerned about the ex parte and in camera proceeding because they would know they had fair and well-informed judges.

Please don't misread what I have just said. I am not suggesting that all judges are unfair, or even many, or that all counsel are incompetent. But, really, there are two of the very practical prob-

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lems we have and if I may, Professor, I am most troubled by the constitutional arguments raised against the provision which the three of us have been discussing here that appear in my bill.

That bothers me a great deal. But assume that it was resolved to my satisfaction, which may be irrelevant for any reason other than whether or not it is going to stay in the bill, assume it is resolved to my satisfaction that it is constitutional. Then it seems to me we get into a different realm of arguments. You asked, or you stated that as an attempt, I assume, to offer some persuasive evidence of the lack of necessity of this provision, that the House doesn't have it in there and that the Justice Department has indicated that heretofore it has not been a problem. But, we get into the—speaking of the real world—the real world whether or not we are going to get a bill. We have fairly strong assertions from the administration, on the one hand, that absent this provision, they are not sure they are going to be willing to support the legislation.

On the other side you heard the testimony of the competent counsel in my opinion, representing the ACLU, that if in fact it remains in, then the ACLU and possibly the defense bar would not be prepared to support the legislation. So that is really where I am once I get by the question, assuming I can, once I resolve the constitutional question, is whether or not on balance it is more important to get a bill which everyone acknowledges, at least almost everyone acknowledges is badly needed, in what has turned to be I think, Professor, a very sour environment.

Things have changed and I think it is unfortunate maybe because I spent—the little time I did spend practicing law was all on the wrong side of the track according to most folks in the ABA. I was in the defense bar, the criminal bar, defense criminal bar, and I see something occurring and I apologize for this little oration, but I think it is pertinent to the last point you raised, the mood of the country is changing. The mood of this Congress is changing and it scares me. We are now at a point where we have very competent women and men in this body and the other body who heretofore have been willing to acknowledge the need to restrict, monitor, and continually and contemporaneously oversee the activities of the intelligence communities and the handling of classified information, its use and misuse, now saying that national security, the changed times, the overregulation and overburdensome requirements that you liberals, Biden, you civil libertarians have put upon the agencies, now call for a radical change in what we have been doing the last 3 or 4 years. The last 6 years. It is not just saying we are going to, for example, withdraw, to give you one example, from the requirement that eight committees be informed. We are going to contest whether or not even one committee should be informed contemporaneously about covert activity.

We think maybe the Freedom of Information Act has gone so far that we really should essentially emasculate it. And again, in the name of national security so that I am just being very blunt with you, Professor, that my concern is that I think we have a very small window and I may not be all that good of a lawyer any more, and maybe I never was, but I am not a half bad politician and I can tell you that window, that window of opportunity for the first time, codifying the

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safeguards that I think are necessary for the American people and their security, to secure them against abuse by the intelligence agencies in the name of classification, is closing and it is closing very rapidly. If we miss the shot this time, I think it is going to be a long, long time before we have the opportunity again to bring into line the conduct and activity of these agencies and administrations, on a basis other than relying on the good faith and solid judgment of the women or men who happen to occupy the post.

So that doesn't speak to the substance of your concerns about my legislation, and I think they are very well founded. As I indicated when I introduced the legislation—there is no reason why you would know this—but at the press conference I indicated that I was very skeptical about inclusion of the alteration of the Jencks Act. I was very, very skeptical about it, but for purposes of debate and discussion I was going to introduce it and make it part of the legislation because it was a major bone of contention with many people.

Having said all of that, my dilemma at this point is the constitutional one and when that is resolved, then it becomes a political determination in hopefully the best and broadest sense of that term. I don't mean in an unpartisan sense, but that is how I got to where we are in this legislation which is sort of an implicit question you have had throughout your testimony, and I don't know how in the heck did the summary creep into the legislation when it hadn't been used before. Why in section 10 in our act, in my legislation and not in the House side. At any rate, I have spoken too much and you have been kind enough to sit through almost all the testimony. I notice you were here from the outset.

Let me ask you both a question that hopefully will clarify a statement enabling you to help me clarify a statement made earlier by Phil Heymann. I am even foggier now than I was when he made the statement. That is when I asked him, I am trying to think of a specific question, when I asked him about the Jencks Act, his response was, well, the ABA—I am paraphrasing—the ABA as recently as this weekend resolved that question and the Justice Department is inclined to agree with—please staff correct me if I am wrong about this—is inclined to agree with the compromise they came up with and that I believe that the question I had asked was, the Justice Department has argued long and hard for an amendment to the Jencks Act, could you tell me how Justice envisions the provision of the bill to work in practice?

As I read section 8 of the ABA substitute resolution, it says the provisions in the pending graymail legislation amending the Jencks Act be opposed as presently drafted, but that if alternative amendments are proposed that they appropriately accommodate and balance the need of the Government to avoid unwarranted disclosures of national security information and the need to assure that the accused in the criminal cases bear rights to a fair trial. Some would argue that that is what we attempted to do in section 10 as it now stands.

Now so that as I understand it, there is no specific wording offered by the ABA.

Mr. SILBERT. That is correct, Senator, and I suspect that I am the one that is probably responsible for the confusion at least as came

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out before you earlier today. I didn't hear Mr. Heymann's testifying to this. But I explained, or tried to explain to him what the resolution of the ABA was without having available to me the language.

Senator BIDEN. I see.

Mr. SILBERT. But then I went on to tell him—I told him, look, I disagree with the language—I personally happen to disagree with the language that was originally proposed by the administration and in my own report submitted a proposed substitute. And he asked me what it was and I told him.

Senator BIDEN. All right.

Mr. SILBERT. And that is to what he may have been referring.

Senator BIDEN. I suspect that may be it.

Mr. SILBERT. May have mistakenly thought that that is what the ABA——

Senator BIDEN. Yes, he then, not to say corrected himself, but then went back and said he would like the record to be kept open on that because he wasn't absolutely sure.

Professor GREENHALGH. In defense of him, Senator, he had a very bad week in Chicago because certain other forces within the American Bar Association ganged up on him on Tuesday with knocking out or rather reversing of their policy of supporting governmental appeal of sentences. He flew especially to Chicago to oppose that maneuver exercised by other sections of the American Bar Association and I think even more so he has been most busy in the last 2 or 3 days with other matters.

Senator BIDEN. I was going to say, as they say in the east side of my city, Wilmington, that boy is in a world of hurt, and he better be able to show what he has is correct because, if he doesn't, I tell you that there is going to be one hailstorm that you ain't never seen before up on this Congress. I just hope he is right.

Mr. SILBERT. Senator, in response to your earlier comments about, with respect to national security and the changing mood. Actually this legislation is really designed, as I look at it, to promote the ability through the Congress enacting it and therefore the executive enforcing it to curb some excesses by those who work in the area of the so-called national security by not permitting those who are charged with abusing that to escape responsibility for their conduct by cloaking themselves in the mantel of national security and preventing the Government from doing anything about that.

Senator BIDEN. That is precisely right. That is precisely right and I think it is important that this legislation, or some version of this legislation pass so as to establish the precedent this year which states essentially that we are going to continue to be concerned about intelligence activities and that it is our intention to deal with the abuses wherever they may lie whether it is in terms of disclosure and/or in terms of abuse of power.

May I ask you, and I am sorry to keep you so long, but it is so important. Would you, and I have not read it, Mr. Silbert, would you quote us or cite for us the recommended language that you, not the American Bar Association, had suggested. That you have suggested. I should say.

Mr. SILBERT. Well, in my report, it is at page 17 of what was submitted that I precisely sent to Mr. Gitenstein and the language as I

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said would flow along the lines of, he has to disclose all information unless the court finds that it is immaterial to the direct testimony with respect to credibility, bias, interest or prior conduct of the witness.

Senator BIDEN. Now, how does that differ in substance from what the Justice Department is supporting?

Mr. SILBERT. Well, the Justice Department's language says the judge need not disclose it if the information is consistent with the testimony. I have trouble discussing this simply because I don't understand how that would apply. To me, that provision makes no sense.

As I said earlier, Senator, if a person testified about *x* subject, and then you are going to say that what is in his prior statement is consistent with *x* and therefore not be disclosed, to me, if, in effect, it is consistent, it has been disclosed. So that I don't understand how that provision would apply at all.

Senator BIDEN. Professor, does the language suggested by Mr. Silbert in any way speak to your concern, or is it any less offensive than the Justice Department's language?

Professor GREENHALGH. I can't go along with it because again it is a judicial determination and counsel should make that determination not the court.

Senator BIDEN. So really the issue as far as you are concerned and if I understand Mr. Halperin's testimony and the testimony of Mr. Scheininger, goes to that question. Whether or not counsel should be there to, in an adversary role, to be able to argue whether or not it meets the test.

Professor GREENHALGH. Right.

Senator BIDEN. So that any alteration of the language relating to amending Jencks, if it doesn't speak to that issue, then it really is deficient and you would object to it. The only way you can speak to that issue, in the way in which you are suggesting to maintain your position, is to not amend the Jencks Act.

Professor GREENHALGH. Right.

Senator BIDEN. I mean there is no way as far as you are concerned that you could conceive of to accommodate your basic concern and compromise on the Jencks Act.

Professor GREENHALGH. I think if you read and review as well as staff reread Campbell One and Two, you will possibly gather from that what the true role of the court is as the Jencks adversary—I mean not an adversary—the Jencks-type hearing.

Senator BIDEN. Right.

Professor GREENHALGH. I think that is very important in all due respect to understand that.

Senator BIDEN. No, I don't disagree with that a bit. I just want to make sure that I have, at least now in this issue, that I understand that because what I would not like, the impression I would not like left at the conclusion of this hearing today, is that somehow the basic issue is amenable to compromise.

That as a practical matter we are either going to go with a workable alteration of Jencks, but nonetheless an alteration of Jencks or we are going to stay where we are. Now, moving to your concern, Mr. Silbert, I don't discount the necessity, assuming we reach across the first watershed which is that Jencks can't, and/or should be altered in

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some way. Then we get into the discussion of what is the best way, and what is the best way to accommodate the desire which——

Mr. SILBERT. I agree with that. I agree that it seems to be an either or situation. That is if the objection is that defense counsel has to be able to see the statement, then the particular language becomes immaterial. Obviously you want the language to be the best.

Senator BIDEN. Right.

Mr. SILBERT. But if that is a fundamental objection, I simply with all respect to Professor Greenhalgh, disagree with his analysis of the constitutional law. For example he has made a reference to summaries, the language inclusion, inclusion of the language here in saying that already the Supreme Court has held that summaries are unavailable. I mean, that is correct. That is what Palermo said. That a summary is not a Jencks statement but you only get under this legislation if you are going to follow anything to the point of considering, if you conclude that this material, that this information or statements are immaterial. But that you never want to put the defendant in the same position he would be by giving him all portions of the statement or perhaps a summary of the information except for that those facts that are immaterial to any use he could have in all fairness, due process or other requirements. That is the issue and then that ultimately comes down in my thinking to a judgment, or you called it a policy question, who is going—is the defendant required not as a matter of constitutional law because I don't think he is, but as a matter of policy, is he going to be required to assist in that determination.

Senator BIDEN. Professor, one last question for you. I am sorry, I have so many more that I want—but I could keep you all here till 5 o'clock but I have to ask one more.

Can you either now or in writing later give this committee an example of abuses that might flow from alterations as envisioned in section 10 of this legislation. What are we looking at. I mean the thing that I have found so good about all the testimony this morning is that there have been, we all have gone back to and reverted to—using your phrase again—a real world examples of how things work. Your point about the Jencks case in 1957 and really what was in issue and what happened. It is important to understand it—it seems to me.

Could you provide for the committee your version of the worst case in areas that would flow from alteration of the Jencks Act. I understand and I realize I am sort of asking you to argue an alternative because clearly you have taken the position that it is unconstitutional to alter it any way. So that the proposal we are making here is unconstitutional. But, getting beyond that question, without compromising your point on that, what happens, how does the real world begin to work with Jencks amended. What are the abuses that would flow from that if any. Do you understand my question?

Professor GREENHALGH. Yes.

Senator BIDEN. And if you could think about that a little bit and maybe provide the committee with—nothing you know particularly elaborate, I think it would be helpful.

Professor GREENHALGH. I think what it will probably involve is the typical situation that was confronted the defense counsel in Alford and that is the ability to begin to commence exploratory cross-exam-

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ination and in that light but not really knowing at that time where you are going. But to be cut off at that point by a Federal judge is going to be difficult and this is the thing I found out when I talked about consistency and it may very well be troubling Earl because consistency at times will breed inconsistency because of new answers that will be in a particular statement, to ask questions to explore them, particularly with you who know, with an object or a goal in mind. I will try to evolve——

Senator BIDEN. That is sufficient. But if you think you would like to add to that, please feel free to do so.

Professor GREENHALGH. Sure.

]The prepared statements of Mr. Silbert and Professor Greenhalgh follow:]

PREPARED STATEMENT OF EARL J. SILBERT

I. INTRODUCTION

In recent years, in a limited but highly visible number of cases, the U.S. Department of Justice has been confronted with the problem of disclosure at either the investigative or trial stages of national security information. The threat to expose such information by a target of criminal investigation or a defendant in a criminal trial has been called "graymail." The problem, however, can arise in situations in which the Government itself finds it necessary or appropriate to introduce evidence that is classified, national security information. As a result of the feared disclosure of national security information, some investigation and prosecutions have been aborted. This in turn has raised questions in the minds of some whether the Government was overreacting to potential disclosures of national security information with the result that Government officials, especially in intelligence and law enforcement agencies, were unjustifiably escaping prosecution for crimes they committed.

In response to this problem, several bills have been introduced into Congress: H.R. 4745, an administration bill introduced by the chairman of the House Judiciary Committee, Congressman Rodino; H.R. 4736, introduced by Congressman Murphy and cosponsored by several members of the Permanent Select Committee on Intelligence, Subcommittee on Legislation; and S. 1482, introduced by Senator Biden, chairman of the Rights of Americans Subcommittee of the Senate Intelligence Committee. Introduction of these bills was preceded by extensive discussions among members of the Congress, Justice Department, American Civil Liberties Union, and others. Since introduction of the various bills, statements have been submitted and testimony received from the Justice Department, persons with experience attempting to cope with the problem of graymail, and other persons interested in the subject matter. The American Bar Association has not appeared in an official capacity. The Criminal Justice Section created a three-person ad hoc committee on the proposed graymail legislation. This three-person committee prepared a majority report challenging a number of the provisions of the proposed legislation and a minority report supporting the legislation. Both members of the majority did testify in their individual capacities, not in behalf of the American Bar Association. The Criminal Justice Section has adopted the position of the majority of its ad hoc committee.

The American Bar Association Committee on Law and National Security came into existence in August 1978. It is a successor committee which combines the efforts of two previous committees of the ABA. The name of the committee itself demonstrates that the subject of graymail legislation is properly of great interest and concern to it. It has, accordingly, requested that a study be made of the legislative proposals and the differences among them and that a report be submitted which contains the results of and recommendations from the study. This is the report.

II. THE BASIC PURPOSES OF THE PROPOSED GRAYMAIL LEGISLATION

Noncontroversial and support recommended.—The principal problems confronting the Department of Justice in responding to threatened exposure of national security information arising from criminal investigations or trials have

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been two: First, there is no existing mandatory pretrial procedure at which questions relating to the disclosure of national security information can be submitted to and resolved by the trial judge. Second, there is no procedure by which the United States can take an interlocutory appeal from what it considers to be an adverse decision by the trial judge.

All three legislative proposals address themselves to and resolve both these problems: They provide a mandatory pretrial procedure at which the trial judge is to resolve questions of disclosure of national security information and from adverse decisions. Significantly, there is virtually unanimous agreement by all those who have testified about the legislation that there should be a mandatory pretrial procedure at which the problems of graymail can be presented to the trial judge and resolved, and also the United States should be allowed in appropriate circumstances to take an interlocutory appeal.

Thus there is no basic challenge to the underlying purposes of the bill. Neither proposal constitutes a substantial departure from existing law. For example, rule 17.1 of the Federal Rules of Criminal Procedure provides for a pretrial conference. It does not, however, require one. The proposed legislation would require pretrial rulings on graymail problems. The only change, therefore, is to advance the timing of rulings on certain issues, issues which under present procedure need not be resolved by the trial judge until they arise during the course of the trial. With respect to the proposal for an interlocutory appeal, the Government now has some existing rights of pretrial appeals, for example, from pretrial orders suppressing evidence. 18 U.S.C. 3731. The proposed legislation simply extends the right of pretrial appeal to graymail issues and allows appeal during the trial itself.

These basic proposals are not controversial. They make eminent good sense. They should be endorsed by the Committee on Law and National Security.

III. IMPLEMENTATION PROVISIONS

Some are controversial: Recommendations.—Despite the widespread support for a mandatory pretrial conference to resolve questions of disclosure of national security information prior to trial, there is opposition to the proposed procedures the trial court is to follow in determining what disclosures to allow and prohibit and what standards to employ. To summarize briefly, the proposed legislation provides for the Government to submit pretrial to the trial judge discovery material which the accused would ordinarily be entitled to review. The Government can request by its ex parte submission that the court order (1) disclosure under a protective order (an existing procedure—rule 16(d)(1), F.R., Crim P.) or (2) nondisclosure with alternatives available such as deletion of portions of the materials or substitutes of summaries of the material (use of summaries is new).

The proposals also require an accused who plans to introduce classified material at a trial to give prior notice of his intention, with a brief description of the material. The Government then has the opportunity to seek from the trial judge a pretrial disclosure ruling with the court making in camera rulings on relevance and materiality of the information and whether the information can be disclosed or alternative procedures employed. Similar procedures are available for classified information the Government intends to introduce at trial. Standards by which the trial court is to make its rulings are provided.

Set forth below are the issues in dispute. Not all require the Committee on Law and National Security to take a position. Some, however, are critical to obtaining the obvious goal of this legislation: to accommodate the need of the Government to avoid unwarranted disclosure of national security information without jeopardizing the rights of the accused to a fair trial. These include at least the issues discussed in sections C, D, and I. Recommendations are provided for all the controversial issues.

A. Format: Straight legislation or amendments to the Federal rules

Most of those who have testified about the legislative proposals have recommended that they take the form of amendments to the Federal Rules of Criminal Procedure and the Federal Rules of Evidence. This is also the position of the Criminal Justice Section. This general proposal is desirable because the amendments as finally enacted would be subject to the continuing supervision and oversight of the Judicial Conference and the Supreme Court. See 18 U.S.C. 3771,

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3772; 28 U.S.C. 2076. This oversight and supervision would allow the judiciary to propose modifications that may be found to be necessary after experience with the new procedures. No need exists at all, however, to start the process from the beginning, that is, to return these proposals to the Judicial Conference and the Supreme Court for their initial review. Legislative proposals have been introduced, they meet a definite need, and any delay to return to the starting point would be most unfortunate.

One problem of having this legislation in the format of amendments to the rules is that the legislation deals with the subject matter of a number of rules: some matters relate to pretrial discovery, other matters relate to pretrial conference, others relate to initial rulings, others relate to interlocutory appeals, and still others relate to rules of evidence. It would be confusing, certainly to the private practitioner, to have all matters relating to the problem of graymail dispersed in a great number of rules. To avoid this problem, it would be preferable to have all the graymail changes incorporated into either one Rule of the Federal Rules of Procedure or one Rule of the Federal Rules of Evidence. Even if logically portions of the proposals belong as amendments to different rules, placing all changes in one Rule will secure the benefits of Supreme Court and Judicial Conference oversight and ease of use by judges and lawyers.

B. Invocation of the new graymail procedures

Both S. 1482 and H.R. 4736 require the Attorney General, the Deputy Attorney General or a designated Assistant Attorney General to initiate or authorize the invocation of certain of the graymail procedures, file affidavits, or make designated certifications. The administration bill contains no comparable requirements. Any restrictions of this kind, particularly those that require approval from Washington, D.C., are generally objectionable because they cause undue delay and inefficiency. However, given the sensitivity of national security information and the fact that most, if not all, prosecutions that involve national security information will be closely supervised by the Department of Justice, the requirement that the Attorney General, the Deputy Attorney General or a designated Assistant Attorney General initiate use of the graymail procedure is, on balance, not obectionable. At the very least, the procedures should not be initiated without the personal approval, if the case is being tried by a U.S. attorney's office, by the U.S. attorney.

It should, however, be sufficient that a Presidential appointee—Attorney General, Deputy Attorney General, Assistant Attorney General, or U.S. attorney—invoke the graymail procedures. Contrary to the two legislative proposals, they should not be subsequently required to submit affidavits or make certifications. For example, since the Solicitor General of the United States must approve all appeals, it should not be necessary, as both S. 1482 and H.R. 4736 require, that one of these other Justice Department officials "certify" to the district court that an interlocutory appeal is not taken for the purpose of delay.

C. Ex parte and in camera proceedings

All of the legislative proposals make some provision for ex parte submission by the Government to the courts and either no or limited disclosure to the defense. Some have objected to such a procedure on the grounds that it is unconstitutional since the defendant or counsel is necessary to inform the court of relevancy and materiality to the defense. They cite in support of their position the Supreme Court cases of *Alderman* v. *United States*, 394 U.S. 165 (1969) and *Jencks* v. *United States*, 353 U.S. 657 (1957).

It is unquestionable that use of ex parte proceedings should be strictly limited. This does not mean, however, that they are not permissible at all. Congress, the Supreme Court, and lower Federal courts have previously authorized ex parte and in camera proceedings. Congress, for example, has authorized ex parte proceedings in the Jencks Act, 18 U.S.C. section 3500: under § 3500(c), the Government may submit ex parte to a judge a prior statement of a Government witness in camera to determine whether portions of that prior statement are not relevant to the subject matter of the direct testimony of the witness. See also, rule 412, Federal Rules of Evidence, which requires an in camera hearings if the accused in a rape case attempts to introduce evidence of the victim's prior sexual conduct.

The Supreme Court has upheld in camera proceedings in *United States* v. *Nixon*, 418 U.S. 683 (1974). It has also approved ex parte resolutions of issues. See *Giordano* v. *United States*, 394 U.S. 310, 314 (1969) (Stewart, J. Concurring); *Taglia-*

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netti v. *United States*, 394 U.S. 316 (1969) (*Per Curiam*). Neither *Alderman* v. *United States*, *supra* nor *Jencks* v. *United States*, *supra*, preclude all ex parte submissions by Government in criminal cases. "Nothing in *Alderman* v. *United States* [and oher cases] requires an adversary proceeding and full disclosure for resolution of every issue by an electronic surveillance." *Taglianetti* v. *United States*, *supra*, 394 U.S. at 317. Finally, the Freedom of Information Act "contemplates that the courts will resolve fundamental issues in contested cases on the basis of an in camera [and ex parte] examination of the relevant documents." *Philippi* v. *Central Intelligence Agency*, 546 F.2d 1009, 1011, 1012–13 (D.C. Cir. 1976). The Supreme Court has upheld the propriety of this procedure when classified information is at issue. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (1973).

Contrary to critics of the proposed legislation, in camera proceedings by the trial judge to review ex parte submissions are not unconstitutional. They have been authorized to meet particularly sensitive problems. Unwarranted disclosure of national security information is such a sensitive problem and warrants the proposed procedures provided that appropriate safeguards are present to preserve a defendant's right to a fair trial and to present and prepare his defense.

The proposed graymail legislation, particularly the administration bill, does contain appropriate safeguards. The administration bill, for example, requires the Government to disclose to the defense notice of the classified information or at least to identify or describe the information by generic category. The Government must satisfy the court that disclosure of the classified information could reasonably be expected to damage the national security. The defendant has a right to be heard at an in camera hearing. Properly classified material is not to be disclosed unless relevant and material to "an element of the offense or a legally cognizable defense." This test in the administration bill (the other legislative proposals do not contain such provisions) is too narrow. It should be expanded to provide that the defense is also entitled to disclosure if the classified information is relevant and material to the credibility, bias, or interest to witnesses. If so expanded, the procedures set forth on this difficult issue merit support.

D. Use of alternatives to disclosure of classified material

All the bills permit the court, on request of the Government, to provide alternative procedures to disclosure of classified information. These include, among others, the substitution of summaries of the specific classified information or statements admitting relevant facts that the specific classified information would tend to prove. If the court determines to follow these procedures, the underlying classified documents are to be made part of the record and preserved for appeal by the defendant. While neither the problem nor the resolution is an easy one, the procedures set forth in the proposed legislation, particularly those in the administration bill, do pass constitutional muster and clearly have a basis in precedent. The ABA Minimum Standards, *Discovery and Procedure Before Trial*, § 11–2.6(c) (2d ed. Approved 1978), for instance, provide that if constitutional rights are not infringed, disclosure of national security information need not be made at all in discovery. If evidentiary material is deleted and substitutions made, however, the courts will have to take great pains to assure that the alternatives (1) do not in any way deprive the defense of information to which it is legitimately entitled, and (2) place the accused in substantially the same position had the actual classified information been disclosed.

There is one change that should appropriately be made in the legislative proposals. Their test for the use of substitutes for deleted classified information is whether the substitutes would deprive or prejudice the right of the defendant to a fair trial. It would provide the courts with greater guidance and afford greater protection to the defense if, before the court was permitted to provide the defendant a substitute for classified information, the court was required to find that the substitute would not materially impair the ability of the accused to prepare for trial or present his defense. This required finding by the trial court, while it does not satisfy the outright objection of those who oppose to any such procedure, provides a reasonable balance between unwarranted disclosures of classified information and protecting the rights of the accused. In addition, it is important that any legislation make clear that all ex parte submissions by the Government to the court be in writing and all such writings and all documents not disclosed be made part of the record for appeal.

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E. Reciprocity and bill of particulars

Both bills, S. 1482 and H.R. 4736, provide that if a defendant is required to disclose prior to trial classified information upon which he intends to rely, the prosecution must provide reciprocity and also a bill of particulars. The Criminal Justice Section supports the provisions for a bill of particulars and the reciprocity provision in H.R. 4736.

(1) Reciprocity.—H.R. 4736 requires that the prosecution, once the defense discloses the classified information it intends to rely on at trial, must provide to the defendant not only information, but also the identity of the witnesses it intends to call to provide this rebuttal. Supporters of his reciprocity provision, including the Criminal Jusitce Section, claim tnat this disclosure is constitutionally necessary under *Wardius* v. *Oregon*, 412 U.S. 470 (1973). This is not so. If the disclosure of classified information by the defense consists of documents, such documents would ordinarily be disclosed as part of the defense pretrial discovery to the prosecution under rule 16(b) of the F.R. Crim. P. The only effect of the graymail legislation, therefore, is to require the defendant in this instance to disclose the classified nature of the information so that appropriate protective procedures may be pursued by the Government if it chooses to do so. Since, so far as documents are concerned, no additional discovery from the defense is required, no additional discovery with respect to documents should be required from the Government.

If the classified information which the defendant is required to disclose would be from the testimony of witnesses, however, then fairness would require that the Government disclose to the defense its rebuttal information. There should, however, be no requirement that the Government disclose the identity of its rebuttal witnesses unless the defense is required not only to disclose the classified information, but also the identity of its witnesses that will be testifyipg about this information. Reciprocity must be truly equal. In H.R. 4736, § 107, reciprocity is not equal. It is, therefore, objectionable. The Administration provision is deficient, however, because it provides for no reciprocity at all, even when the disclosures required by the defense reveal identity of it witnesses.

(2) Bill of Particulars.—Both S. 1482 and H.R. 4736 provide that the Government must provide a bill of particulars with respect to those portions of the indictment or information as to which the defendant is forced to disclose classified information. These provisions misconstrue the purpose of a bill of particulars. The purpose is to permit a defendant to prepare his defense and to protect him against a subsequent charge for the same offense; that is, to preserve his right against being placed in double jeopardy. It is hornbook law that the purpose of a bill of particulars is not to provide evidence or to inform the defense of the Government's legal theory. Thus, the requirement that the Government furnish a bill of particulars with respect to classified information disclosed by the defense simply makes no sense. It should be fully sufficient that the Government provide the discovery required by rule 16 and the reciprocal information specified in the preceding paragraph.

F. Proposed Jencks Act amendment

Perhaps the most controversial provision in both the administration and Senator Biden's bills, though hardly the most important, is the proposal to amend the Jencks Act to insert a new section 3500(c). Under this provision, the court would be allowed to excise from the prior statement of a Government witness, not only classified material which is not relevant to the subject matter of the witness' direct testimony (which can be excised under the existing statute) but also relevant classified material which is "consistent with the witness' testimony".

The Criminal Justice Section strongly objects to this provision as do a number of witnesses who have testified. The purpose of the provision, however, is not unreasonable. Under existing section 3500(c), there can be classified information which, though related to the subject matter of the witness' direct testimony and which consequently must be disclosed to the defense under current law, is not at all material to the defendant's credibility or to his bias, interest, or prior conduct. This classified information can safely be deleted without jeopardizing constitutional or other rights of the accused. The test contained in the administration bill and S. 1482, however, that material can be deleted from the prior statement if it is "consistent" with the direct testimony does not make sense. Consistency or inconsistency, for that matter, are not appropriate tests.

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What the court should be allowed to do upon Government request is to delete not only information that is not related to the subject matter of the direct testimony (existing law), but also classified information that is immaterial to the direct testimony so far as credibility, bias, interest, or prior conduct are concerned. If the proposals are amended as suggested, they are not unacceptable.

G. Limiting disclosure of witnesses when they testify

All the bills contain provisions that permit the Government to object to questioning of a witness that may elicit classified information during trial. Legislation should make clear, as the various proposals do not, that the procedures to be followed in this situation are the same procedures that apply to the pretrial graymail procedures. This is necessary to assure that the rights of the accused are adequately protected by determinations of whether or not information is classified and can be disclosed and if it cannot be disclosed, whether alternative procedures can be determined that will not materially impair the right of the defendant to present his defense.

H. Introduction and proof of contents of classified documents at trial

The administration bill contains three provisions that relate to the introduction and proof of contents of classified documents at trial that are not present in either S. 1482 or H.R. 4736. The most important provision would authorize the court to allow either the introduction into evidence of only a portion of a classified document or the deletion of some or all of the classified information from a document, recording, or photograph introduced in a criminal case. The defendant is provided, of course, the right to argue against the deletions and is free to contend that the excised portions should be disclosed because they are relevant and material to his defense. Another provision would permit the Government to minimize the disclosure of classified information by providing the contents of a classified writing, recording, or photography without introducing the original or a duplicate into evidence. This provision is inconsistent with the best evidence rule (rule 1002 of the Federal Rules of Evidence), but it would apply to situations in which it is impractical to delete sensitive material from the document and yet afford an alternative procedure that in no way interferes with the rights of the accused. These provisions are reasonable and afford solutions to problems that can arise at trial with respect to the introduction of documents containing classified material.

I. Special oversight in reporting requirements

Both S. 1482 and H.R. 4736 require the Department of Justice to prepare written findings detailing the reasons for any decision not to prosecute because of graymail type problems and report its findings to certain congressional committees. This requirement would appear to be inconsistent with the separation of powers and independence of the prosecution function of the executive branch of Government. The reporting requirement is an unwarranted intrusion into the deliberations and the files of the Justice Department. If the intelligence committees of the Congress are concerned about the nonprosecution of a particular case, inquiry can be made on a more discreet and focused basis. There is no precedent for such a detailed reporting requirement and there is no pattern of practice of the Department of Justice refusing to provide appropriate information to the Congress on a case-by-case basis.

Certainly Congress has a legitimate concern to assure itself that prosecutions of Government officials are not being dismissed or inadequately investigated because of overblown, exaggerated fears of disclosures of classified information. The question is whether the proposals in S. 1482 and H.R. 4736 are necessary to protect against this possible abuse. Absent a track record of noncooperation from the Department of Justice in disclosing pertinent material, a more measured approach is appropriate.

CONCLUSION

There does not seem to be serious opposition to the underlying purposes of the proposed graymail legislation. There are significant differences about the most desirable procedures to effectuate these underlying purposes. The objections of the Criminal Justice Section are such that they would operate to prevent a resolution of the graymail problem. They would permit a mandatory pretrial conference and an interlocutory appeal. However, they would allow the court no

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discretion to delete or excise classified material or to provide alternative substitutes. The courts would also have no authority to review the ex parte submissions by the Government in camera despite ample precedent for so doing. If the court cannot review the material in camera and if the court cannot, after such review, make decisions to delete certain material or provide alternative substitutes, then the purposes of the graymail legislation to resolve the potential conflict between unwarranted disclosures of national security information and protecting the rights of the accused cannot be accomplished. Contrary to the Criminal Justice Section, reasonable accommodation can be made along the lines suggested in this report.

PREPARED STATEMENT OF PROF. WILLIAM W. GREENHALGH

My name is Prof. William W. Greenhalgh of Georgetown University Law Center. I am a former Chief Assistant U.S. attorney for the District of Columbia. I have been teaching Federal criminal trial advocacy at the graduate level (E. Barrett Prettyman Fellowship Program—L.L.M. in Trial Advocacy) since 1963. I also am presently Chairperson of the Criminal Justice Section's Committee on Criminal Code Revision of the American Bar Association, as well as its faculty advisor to the American Criminal Law Review.

In connection with the Prettyman Fellowship Program, the 90 that have gone through its intensive, concentrated course of individual criminal trial litigation have represented, conservatively, over 2,000 indigents charged with various felonies both in U.S. District Court for the District of Columbia and the Superior Court for the District of Columbia. The program has likewise prosecuted well over 100 appeals before the U.S. Court of Appeals for the D.C. Circuit and the District of Columbia Court of Appeals. I offer this background only in the context of some familiarity with criminal trial procedure.

I support the concept of S. 1482, entitled "The Classified Information Criminal Trial Procedures Act," familiarly known as the Biden bill. The Biden bill addresses a serious problem which the Congress should resolve. However, I do not believe that separate legislation is necessary to accomplish this.

I feel that the best way to address the issues is through the oversight capability of the Advisory Committees of the U.S. Judicial Conference relative to the Federal Rules of Criminal Procedure and/or Federal Rules of Evidence. As you know, the Supreme Court of the United States then promulgates rule changes, and you, the Congress, may then work your legislative will on proposed amendments. It is my position that this method provides for greater superintendence by involving the academic community, the practicing bar, the Federal judiciary and the legislature. There seems to be more flexibility in this approach than to lock into legislative concrete a highly complex, albeit important, technically procedural piece of legislation.

Also, it appears that the Congress has jurisdiction to amend either the Federal Rules of Criminal Procedure or the Federal Rules of Evidence even at this point in legislative time. I have in mind "The Privacy Protection for Rape Victims Act of 1978," which amended article IV of the Federal Rules of Evidence by adding new rule 412. Rape Cases; Relevance of Victim's Past Behavior P.L. 95–540, 95th Congress; 92 Stat. 2046 (1978).

I, therefore, support modest amendments to existing rules and one statute. For, if anything has surfaced during the hearing held by the Legislation Subcommittee of the House Permanent Select Committee on Intelligence on August 7, 1979, it was the fact that existing Federal rules appear to be adequately meeting the graymail problem. The *ITT-Chile* case was the only one mentioned where an interlocutory appeal procedure would have been helpful to the Justice Department, and since that remedy was lacking, mandamus was not appropriate.

I believe that the objectives of section 101 of the Biden bill could be better accomplished by the following action:

(1) Amend present rule 17.1 of the Federal Rules of Criminal Procedure in cases involving classified information to provide a mandatory pretrial conference to be ordered by the court on motion of either party.

This will still effectuate the saluatory goal of section 101 by insuring that issues involving pretrial and trial discovery will be handled in such a manner as to "promote a fair and expeditious trial."

(2) Amend either rule 12 of the Federal Rules of Criminal Procedure (new Rule 12.3) or the appropriate Federal Rule of Evidence to include a new pro-

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vision that would require mandatory procedure for determination of classified information disclosure either pretrial or during trial (section 102). This amendment should also include the provision found in section 107 of the Biden bill requiring the Government to provide the defendant with reciprocal disclosure. This discovery vis-a-vis reciprocity section is extremely important in view of *Wardius* v. *Oregon*, 412 U.S. 470 (1973). I believe that the inclusion of the provision relating to the entitlement of the defendant to be advised of information and witnesses which the Government intends to sue to rebut particular classified information, as well as some form of discovery but not called a bill of particulars as contained in section 107, detailing related aspects of the prosecution's case, is essential to the fundamental fairness of this new rule.

(3) Amend title 18 U.S.C. 3731 to provide for an interlocutory appeal in classified information cases by the Government before or during trial. This amendment should provide also for expeditious determination of pretrial appeals. The provisions of section 3731 as to pretrial release should be closely followed, as well. A simple amendment to section 3731 is all that is necessary.

Moving along to the most controversial section of the Biden bill (section 10), in my submission, I flatly oppose any amendments to 18 U.S.C. 3500, familiarily known as the Jencks Act. It has worked pretty well in Federal criminal trials for some 22 years. It is the only mandatory trial discovery permitted the defendant. It is uniformly applicable in all Federal criminal courts. It mandates excission only of unrelated matter. It permits the Government the option of refusing to produce the witness statements. It also provides a list of sactions for nondisclosure, which do not necessarily indicate the termination of the prosecution. To create a classified information exception will predictably lead to other proposed exceptions, with the end nowhere in sight.

While it is true that the House of Delegates of the American Bar Association in August 1978 in New York adopted a new Standard 11-2.6(c) of the "Standards Relating to Discovery and Procedure Before Trial," which provides that "disclosure shall not be required when it involves substantial risk of grave prejudice to national security and where a failure to disclose will *not* infringe the Constitutional rights of the accused," [emphasis added], I believe proposed section 10 will so intrude. I contend that its enactment will severely impinge on the right of the defendant to have the assistance of counsel during the course of a Federal criminal trial, as well as seriously restrict counsel's ability to confront the Government's accusers.

A look at how the Jencks Act now operates will reinforce my point. There are now four prerequisites for production of material under the act: That the material be in the possession of the Government; that the defense request production of the documents that the material constitute a statement as defined in the act (statements written and signed or adoped by the witness, substantially verbatim contemporaneously recorded statements, and grand jury testimony); and that the witness' statement relate to the subject matter of the direct examination. A prosecutor's notes of his interview with the witness prior to trial are also producible under the Jencks Act, *Goldberg* v. *U.S.*, 425 U.S. 94 (1976). This will become a problem for government prosecutors who are actively preparing a graymail case for trial.

The court's supervisory powers in handling Jencks Act disclosure were spelled out in two cases. *Campbell* v. *U.S.* (Campbell I), 365 U.S. 85 (1961), and *Campbell* v. *U.S.* (Campbell II), 373 U.S. 487, 493 (1963). At a *Campbell* hearing, the court determines such matters as whether the documents exist, whether the material constitutes a statement under the Jencks Act, and whether the statement relates to the subject mater of the testimony. It is unclear how the *Campbell* hearing procedure will mesh with the Jencks Act exception which would be created by this legislation. The Supreme Court has also held that summaries are not producible under the Jencks Act. *Palermo* v. *U.S.*, 360 U.S. 343 (1959). It is also unclear what the ramifications of that case on the pending legislation would be, especially where summaries would be substituted.

Again, I repeat, enactment of this Jencks Act change will severely impinge on the right of the defendant to have the effective assistance of counsel during the course of a criminal trial, since it will impair his ability to cross-examine effectively. It will also seriously restrict his constitutionally-granted right to confront his accusers.

Turning to the first of these constitutional infirmities, excision of a portion of the Government witness' statement because of consistency or substitution of

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a summary when consistent would deny the defense lawyer access to one of the most important criminal trial rights—impeachment. The lawyer in our adversary system should make the decision as to whether or not to use the statement not the court. *Dennis* v. *U.S.*, 384 U.S. 874–875 (1966) ; *Anders* v. *California*, 386 U.S. 738, 744 (1967) ; *Alderman* v. *U.S.*, 394 U.S. 165, 182–183 (1968). Only the lawyer knows the value of impeachment material. *Jencks* v. *U.S.*, 353 U.S. 657, 667–668 (1957). In an adversary system of criminal justice, there is no right more essential than the right to assistance of counsel. *Lakeside* v. *Oregon*, 435 U.S. 333, 341 (1978). But the attorney must not be denied the means with which to effectuate that right.

Statutory procedures that impair the accused's enjoyment of the sixth amendment in disabling counsel from fully assisting and representing his client are, in my view, unconstitutional. The Supreme Court has struck down three State statutes and one court order where there was disablement by statute or order of counsel's ability at trial to render effective assistance—where a statute would not let a lawyer elicit testimony on direct examination, *Ferguson* v. *Georgia*, 365 U.S. 570 (1961) ; where a statute failed to let counsel decide who to put on the stand, *Brooks* v. *Tennessee*, 406 U.S. 605 (1972) ; where a statute prohibited counsel from arguing in summation in a nonjury case, *Herring* v. *New York*, 422 U.S. 853 (1975) ; and where an attorney was prohibited by the court from talking with his client during an overnight recess, *Geders* v. *U.S.*, 425 U.S. 80 (1976).

My impairment of confrontation argument is equally blunt. You can't cross-examine with a summary. Yet cross-examination is a matter of right. A lawyer may ask a witness concerning identification with the community in light of one's environment. He may surely discredit a witness by demonstrating that the testimony is untrue or biased. All these great constitutional principles were clearly enunciated by the Supreme Court almost 50 years ago in *Alford* v. *U.S.*, 282 U.S. 687, 691–692 (1931).

In summary, excision denies counsel access for purposes of cross-examination, and producing a summary disables counsel from effectively pursuing the right of cross-examination, *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974). In either case, the accused is denied effective assistance of counsel. Section 10, in my submission, cannot pass constitutional muster.

Senator BIDEN. Gentlemen, thank you very much. The hearing is adjourned.

[Whereupon, at 1:50 p.m., on Thursday, February 7, 1980, the hearing was adjourned.]

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APPENDIX

II

96TH CONGRESS
1ST SESSION

S. 1482

To provide certain pretrial, trial, and appellate procedures for criminal cases involving classified information.

IN THE SENATE OF THE UNITED STATES

JULY 11 (legislative day, JUNE 21), 1979

Mr. BIDEN (for himself, Mr. BAYH, Mr. HUDDLESTON, and Mr. KENNEDY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To provide certain pretrial, trial, and appellate procedures for criminal cases involving classified information.

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

DEFINITIONS

SECTION 1. (a) "Classified information", as used in this Act, means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection

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against unauthorized disclosure for reasons of national security and any restricted data, as defined in section 2014(y) of title 42, United States Code.

(b) "National security", as used in this Act, means the national defense and foreign relations of the United States.

PRETRIAL CONFERENCE

SEC. 2. At any time after the filing of the indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. Following such motion, or on its own motion, the court shall promptly hold a pretrial conference to establish the timing of requests for discovery, the provision of notice required by section 5 of this Act, and the initiation of the procedure established by section 6 of this Act. In addition, at the pretrial conference the court may consider any other matters which relate to classified information or which may promote a fair and expeditious trial.

PROTECTIVE ORDERS

SEC. 3. Upon request of the Government, the court shall issue a protective order to guard against the compromise of any classified material disclosed to the defendant.

DISCLOSURE OF CLASSIFIED INFORMATION TO DEFENDANTS

SEC. 4. The court may authorize the Government to delete specified items of classified information from docu-

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ments to be made available to the defendant, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The Government's motion requesting such authorization and materials submitted in support thereof shall, upon request of the Government, be considered by the court in camera and not disclosed to the defendant.

NOTICE OF DEFENDANT'S INTENTION TO DISCLOSE CLASSIFIED INFORMATION

SEC. 5. (a) NOTICE BY DEFENDANT.—If a defendant reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant, the defendant shall, within the time specified by the court or where no time is specified within thirty days prior to trial, notify the attorney for the Government and the court in writing. Whenever a defendant learns of additional classified information he reasonably expects to disclose at any such proceeding, he shall notify the attorney for the Government and the court in writing as soon as possible thereafter. Such notice shall include a brief description of the classified information. No defendant shall disclose any information known or believed to be classified in connection with a trial or pretrial proceeding until notice has been given

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under this subsection and until the Government has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in section 6 of this Act.

(b) FAILURE TO COMPLY.—If the defendant fails to comply with the requirements of subsection (a) the court may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the defendant of any witness with respect to any such information.

PRECEDURE FOR CASES INVOLVING CLASSIFIED INFORMATION

SEC. 6. (a) MOTION FOR HEARING.—After the United States receives notification pursuant to section 5 or otherwise learns of any classified information that the defendant may disclose or cause to be disclosed at a trial or pretrial proceeding, the Government may, within the time specified by the court, move for a hearing concerning any such information. In connection with its motion, the Government may submit the classified information along with an explanation of the basis for the classification to the court for its examination in camera and shall provide the court with an affidavit of the Attorney General, the Deputy Attorney General, or a designated Assistant Attorney General certifying that the information is classified. The hearing, or specified portion thereof, shall be held in camera whenever the Government certifies

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that a public proceeding may result in the compromise of classified information.

(b) HEARING.—(1) Prior to the hearing, the Government shall provide the defendant with notice of the information that will be at issue. This notice shall identify the specific classified information that will be at issue whenever that information has previously been made available to the defendant in connection with the pretrial proceedings. The Government may describe the information by generic category rather than identifying the specific information of concern to the Government when the Government has not previously made the information available to the defendant in connection with the pretrial proceedings.

(2) Where the Government moves for a hearing prior to trial, the Government shall upon request of the defendant provide the defendant with a bill of particulars as to the portions of the indictment or information which the defendant identifies as related to the classified information at issue in the hearing. The bill of particulars shall be provided prior to the hearing.

(3) Following a hearing, the court shall determine whether and the manner in which the information at issue may be used in a trial or pretrial proceeding. As to each item of classified information, the court shall set forth in writing the basis for its determination. Where the Government's

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motion under subsection (a) is filed prior to the trial or pretrial proceeding, the court shall rule prior to the commencement of the relevant proceeding.

(4)(A) If the court determines that the information may not be disclosed or elicited at a pretrial or trial proceeding the record of the hearing shall be sealed and preserved by the Government in the event of an appeal. The defendant may seek reconsideration of the court's determination prior to or during trial.

(B) In lieu of authorizing disclosure of the specific classified information, the court shall, if it finds that the defendant's right to a fair trial will not be prejudiced, order—

(i) substitution of a statement admitting relevant facts that the specific classified information would tend to prove, or

(ii) substitution of a summary or portion of a specific classified information.

(C) If the court determines that these alternatives to full disclosure may not be used and the Government provides the court with an affidavit of the Attorney General, Deputy Attorney General, or designated Assistant Attorney General objecting to disclosure of the information, the court shall issue any order which is required in the interest of justice. Such an order may include, but need not be limited to an order—

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(i) striking or precluding all or part of the testimony of a witness; or

(ii) declaring a mistrial; or

(iii) finding against the Government on any issue as to which the evidence relates; or

(iv) dismissing the action, with or without prejudice; or

(v) dismissing specified counts of the indictment against the defendant.

Any such order shall permit the Government to avoid the sanction for nondisclosure by agreeing to permit the defendant to disclose the information at the pertinent trial or pretrial proceeding. The Government may exercise its right to take an interlocutory appeal prior to determining whether to permit disclosure of any classified information.

(c) RECIPROCITY.—Whenever the court determines pursuant to subsection (b) that classified information may be disclosed in connection with a trial or pretrial proceeding, the court shall, unless the interest of fairness do not so require, order the Government to provide the defendant with the information it expects to use to rebut the classified information. The court may place the Government under a continuing duty to disclose such rebuttal information. If the Government fails to comply with its obligation under this subsection, the court may exclude any evidence not made the subject of a

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required disclosure and may prohibit the examination by the Government of any witness with respect to such information.

INTERLOCUTORY APPEAL

SEC. 7. (a) An interlocutory appeal by the United States taken before or after the defendant has been placed in jeopardy shall lie to a court of appeals from a decision or order of a district court in a criminal case requiring the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information, if the Attorney General, Deputy Attorney General, or designated Assistant Attorney General certifies to the district court that the appeal is not taken for purposes of delay.

(b) An appeal taken pursuant to this section either before or during trial shall be expedited by the court of appeals. Prior to trial, an appeal shall be taken within ten days after the decision or order appealed from and the trial shall not commence until the appeal is resolved. If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved and the court of appeals (i) shall hear argument on such appeal within four days of the adjournment of the trial, (ii) may dispense with written briefs other than the supporting materials previously submitted to the trial court, (iii) shall render its decision within four days of argu-

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ment on appeal, and (iv) may dispense with the issuance of a written opinion in rendering its decision. Such appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

INTRODUCTION OF CLASSIFIED INFORMATION

SEC. 8. (a) CLASSIFICATION STATUS.—Writings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status.

(b) PRECAUTIONS BY COURT.—The court, in order to prevent unnecessary disclosure of classified information involved in any criminal proceeding, may order admission into evidence of only part of a writing, recording, or photograph, or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the classified information contained therein.

(c) TAKING OF TESTIMONY.—During the examination of a witness in any criminal proceeding, the Government may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible. Following such an objection, the court shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any

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classified information. Such action may include requiring the Government to provide the court with a proffer of the witness' response to the question or line of inquiry and requiring the defendant to provide the court with a proffer of the nature of the information he seeks to elicit.

SECURITY PROCEDURES TO SAFEGUARD AGAINST COMPROMISE OF CLASSIFIED INFORMATION DISCLOSED TO THE COURT

SEC. 9. (a) Within one hundred and twenty days following the date of enactment of this Act, the Chief Justice of the United States, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, shall prescribe security procedures for protection against the compromise of classified information submitted to the Federal district courts, the courts of appeals, and the Supreme Court.

(b) Until such time as procedures are promulgated pursuant to subsection (a), the Federal courts shall in each case involving classified information adopt procedures to protect against the compromise of such information.

JENCKS ACT EXCEPTION FOR CLASSIFIED INFORMATION

SEC. 10. (a) Chapter 223 of title 18, United States Code, is amended by adding after subsection 3500(c) the following new subsection:

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"(d) If the United States claims that any statement otherwise producible under this section contains classified information, the United States may deliver such statement for the inspection of the court in camera and provide the court with an affidavit from the Attorney General, Deputy Attorney General, or designated Assistant Attorney General identifying the portions of the statement that are classified. If the court finds that any such portion of the statement is consistent with the witness' testimony, the court may substitute a summary for the classified portion or excise the portion from the statement. With such material replaced by a substitution or excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement as well as the affidavit submitted by the United States shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the court of appeals for its examination for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be

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reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.".

(b) Chapter 223 of title 18, United States Code, is amended as follows:

(1) Present subsections 3500(d) and 3500(e) shall be redesignated subsections 3500(e) and 3500(f), respectively.

(2) In new subsection 3500(e), following the word "under" replace "subsection (b) or (c)" with "subsection (b), (c), or (d).".

(3) In new subsection 3500(f), following the words "used in" replace "subsection (b), (c), and (d)" with "subsection (b), (c), (d), and (e).".

IDENTIFICATION OF INFORMATION RELATED TO THE NATIONAL DEFENSE

SEC. 11. In any prosecution in which the Government must establish that material relates to the national defense or constitutes classified information, the Government shall notify the defendant, within the time specified by the court, of the portions of the material that it reasonably expects to rely upon to establish the national defense or classified information element of the offense.

ATTORNEY GENERAL GUIDELINES

SEC. 12. (a) Within one hundred and eighty days of enactment of this law, the Attorney General shall issue guide-

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lines specifying the factors to be used by the Department of Justice in rendering a decision whether to prosecute a violation of Federal law in which, in the judgment of the Attorney General, there is a possibility that classified information will be revealed. Such guidelines shall be transmitted to the appropriate committees of Congress.

(b) When the Department of Justice decides not to prosecute a violation of Federal law pursuant to subsection (a), an appropriate official of the Department of Justice shall prepare written findings detailing the reasons for the decision not to prosecute. The findings shall include—

(1) the intelligence information which the Department of Justice officials believe might be disclosed,

(2) the purpose for which the information might be disclosed,

(3) the probability that the information would be disclosed, and

(4) the possible consequences such disclosure would have on the national security.

(c) Consistent with applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches, the Attorney General shall make available to the Permanent Select Committee on Intelligence of the United States House of Representatives and the Select Committee on Intelligence of the United States

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Senate all findings under subsection (b) not later than thirty days after the decision not to prosecute is made.

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ADDITIONAL SUBMISSIONS OF PHILIP A. LACOVARA

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February 7, 1980

BY HAND

The Honorable Joseph R. Biden, Jr.
Chairman, Criminal Justice
Subcommittee
United States Senate
Committee on the Judiciary
Washington, D. C. 20510

Attention: Mark Gitenstein

Re: Graymail Legislation/S. 1482

Dear Senator Biden:

I appreciate your invitation of January 14 to appear at today's hearings on the graymail legislation. Other commitments have prevented me from accepting your invitation.

As a member of the House of Delegates of the American Bar Association, I wish to bring to your attention the action taken on behalf of the American Bar Association at our midyear meeting in Chicago on February 4, 1980. At that session, the House adopted the enclosed resolution generally endorsing the graymail legislation and making a number of specific recommendations. These statements of position are generally in accord with my own views, and I submit them for the subcommittee's consideration.

The one exception is paragraph 6 of the resolution, which was amended on the floor to recommend allowance of interlocutory appeals by defendants as well as the government from adverse procedural rulings. Since the defendant has a right to appeal from a final judgment against him and the government has no similar right, I consider this recommendation unnecessary and ill-advised.

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I am also enclosing for insertion in the record, if you consider it appropriate, copies of my earlier testimony before other committees on the questions posed by S. 1482.

Sincerely,

Philip A. Lacovara

Enclosures

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JOINT SUBSTITUTE

SUBSTITUTE RESOLUTION

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

AND

STANDING COMMITTEE ON LAW AND NATIONAL SECURITY

REPORT

TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, that the American Bar Association supports enactment of "graymail" legislation which will appropriately accommodate and balance the need of the government to avoid unwarranted disclosure of national security information in criminal investigations and trials and the need to assure the accused in criminal cases their right to fair trial. To accomplish these objectives, the American Bar Association recommends:

1. That Congress amend either the Federal Rules of Criminal Procedure or the Federal Rules of Evidence to incorporate the proposed legislative changes;

2. That in cases involving classified information, a mandatory pre-trial conference be ordered by the court on motion of either the prosecution or defense;

3. That the mandatory pre-trial conference be held in camera at the request of the government to avoid unwarranted disclosure of classified information;

4. That after reviewing (1) the ex parte submission by the prosecution of classified information, or (2) the classified information which the defense proposes to disclose, and after both the prosecution and defense have had an opportunity to be heard, the court may order that,

   (a) all of the classified information be disclosed to the defense and/or be available for use at trial or other proceedings; or

   (b) only portions of the classified information be so disclosed and/or available; or

   (c) only summaries of some or all of the classified information be so disclosed and/or available; or

   (d) none of the classified information be so disclosed and/or available; or

   (e) the prosecution may proffer a statement admitting for purposes of the proceedings or trial any relevant facts such classified information would tend to prove,

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provided that the court must proceed pursuant to subsection (a) above if it finds that, with use of the other alternatives, disclosure of the classified information would remain relevant and material to an element of the criminal offense, to a legally cognizable defense, or to the credibility, bias, or interest of any witness;

5. That all classified information not disclosed to an accused be placed under seal of the court and be secured and maintained for appeal;

Required amendments adopted.

6. That 18 U.S.C. § 3731 be amended to provide for interlocutory appeal ~~by the United States~~ before or during trial from an order of the trial court in a criminal case requiring the disclosure of classified information, imposing sanctions for nondisclosure of classified information or refusing a protective order to prevent the disclosure of classified information, provided that provision be made for expeditious resolution of any such appeal and the provisions of Section 3731 on pre-trial release be followed;

7. That the Attorney General, Deputy Attorney General, or a designated Assistant Attorney General be required to make to the court the initial invocation of these classified information procedures;

8. That provisions in pending graymail legislation amending the Jencks Act (18 U.S.C. § 3500) be opposed as presently drafted; but that if alternative amendments are proposed, that they appropriately accommodate and balance the need of the government to avoid unwarranted disclosure of national security information and the need to assure the accused in criminal cases their right to a fair trial.

9. That if as a result of the procedures adopted in the graymail legislation the defense is required to disclose information it would not otherwise be required to disclose under the Federal Rules of Criminal Procedure, then the government shall be required to disclose to the defense that information it will rely on to rebut what the defense has disclosed, (thus providing that if the defense is required to reveal the identity of its witnesses who will disclose the particular classified information at issue, the government will disclose the witnesses it will call in rebuttal); and that in light of this, inclusion of a "bill of particulars" provision in the "graymail" legislation is unnecessary.

10. That provisions in pending "graymail" legislation should be opposed which would impose on the Department of Justice automatic, detailed reporting requirements to the Congress whenever a decision is made not to prosecute a person because of the possibility that classified information will be revealed.

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Statement of

PHILIP A. LACOVARA*

before the

UNITED STATES HOUSE OF REPRESENTATIVES
PERMANENT SELECT COMMITTEE ON INTELLIGENCE
SUBCOMMITTEE ON LEGISLATION

on

PROPOSED LEGISLATION TO ESTABLISH CLASSIFIED
INFORMATION TRIAL PROCEDURES
H.R. 4736 AND H.R. 4745

SEPTEMBER 20, 1979

Mr. Chairman:

It is a privilege to accept the invitation to testify on the two bills that the Subcommittee has under consideration. Each of these bills represents a substantial and worthwhile effort to resolve the "disclose or dismiss" dilemma that has frustrated otherwise warranted criminal investigations and has aborted important criminal prosecutions.

These bills are the response to hearings held last year by the Subcommittee on Secrecy and Disclosure of the Senate Select Committee on Intelligence and earlir this year by this Subcommittee. One major focus of those inquiries was

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the so-called "gray mail" problem. That term describes a threat by a suspect in a criminal investigation or by a defendant in a criminal prosecution to force the disclosure of national security information if the prosecution proceeds. In a number of cases, the government's concession to those threats has effectively conferred immunity from the federal criminal laws.

Even apart, however, from overt threats asserted as a matter of bargaining strategy, the historic reluctance of the intelligence community to risk compromising its information and the resulting tensions between the intelligence agencies and the Justice Department have led federal authorities to abandon seemingly justified criminal investigations in a mood of premature despair.

The burden of the testimony that other witnesses and I gave before the two subcommittees is that this problem is a real one; that, while it affects a relatively small number of cases, they tend to be cases of unusual public importance; that greater flexibility on the part of the intelligence agencies, greater determination among federal prosecutors, and greater imagination by trial judges could reduce the scope of the problem; and that legislative prescription of new procedures and alternatives could usefully accommodate the public interest in vigorous criminal investigation and enforcement with the constitutional right to a fair trial.

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Rather than repeat my earlier testimony, I am instead annexing (as Appendix A and Appendix B) copies of my earlier prepared statements. They explain why I believe a problem exists, why it merits legislative attention, and what I believe are some of the appropriate responses. Those statements reflect my own experiences and observations and contain my legal analysis of the issues.

In my testimony this morning, I shall focus on the two bills that have emerged from the earlier deliberations. In particular, I shall address what I perceive to be the principal issues of policy and procedure raised by the bills and by the limited differences between them. In general, while I regard both bills as worthwhile, I prefer the general organization and format of the Department of Justice bill, H.R. 4745. I disagree with some of its features, however, including its failure to include some provisions that are included in the subcommittee bill, H.R. 4736.

General Overview: The Purpose and the Process

The theme of both bills is that the public interest in legitimate law enforcement and the defendant's interest in a fair trial may be reconciled by the early, careful, and measured intervention of a trial judge. The basic approach taken by both bills is to ensure that the trial judge, upon request, screens classified information that the defendant

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wishes to obtain in discovery or proposes to use in his defense. The purposes of the screening are (1) to ensure that the information is genuinely relevant to the issues in the case and (2) to decide whether some alternative form or statement of the information will adequately satisfy the defendant's interests without gratuitously compromising properly classified data.

The procedures outlined in the legislation are hardly revolutionary, since they are modelled on existing provisions of the Federal Rules of Criminal Procedure and the Federal Rules of Evidence. What makes the legislation important is that there has been uncertainty and inconsistency in the application of those general provisions in "national security" cases. The legislation is worthwhile, therefore, in expressing a clear congressional judgment that the federal courts must give these issues careful and methodical treatment in accordance with a clearly defined process.

Preferable Format: Amendments to Federal Rules

In this context, I wish to note my agreement with the observation of some earlier witnesses that, wherever possible, legislation of this sort should take the form of amendments to the Federal Rules of Criminal Procedure and the Federal Rules of Evidence. There are two persuasive reasons for using that format.

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First, I regard it as desirable to avoid the construction of what would otherwise seem to be a special, separate code of procedures for secrecy-related cases. I do not believe that the pending bills may properly be criticized as excesses, but Congress should be sensitive to the need to avoid even the appearance of downgrading the constitutional rights of persons suspected of violations that may be peculiarly notorious or controversial. It is far better, in my judgment, to integrate these proposed procedures into the general body of federal procedural and evidentiary jurisprudence.

Second, insertion of these new procedures into the Criminal Rules and the Rules of Evidence would make them subject to the continuing oversight of the Supreme Court and the Judicial Conference of the United States. See 18 U.S.C. §§ 3771, 3772; 28 U.S.C. § 2076. That oversight would permit the judiciary, after due deliberation, to fashion modifications that may be necessary over time to fine-tune the legislation. Of course, any proposed amendments to the rules of procedure and evidence would lie before Congress before taking effect. In addition, Congress would retain its right to initiate alterations independently at any time it is so inclined.

Limited Scope of Restriction on Disclosure

It is worth emphasizing that this legislation is not intended to serve as an American equivalent of the British

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Official Secrets Act. It does not purport to confer any general power on the courts to muzzle private citizens or the press in order to prohibit them from disclosing classified information. The focus of the bills is simply on the prospective disclosure of classified information by the defendant "in connection with" a pending federal criminal case. See § 102(a)(1) of H.R. 4736; § (5)(a) of H.R. 4745.

As a result, the bills would not add any further restrictions, beyond those already in force, that would prohibit a suspect in an investigation from disclosing classified information prior to indictment. Obviously, also, the bills add no new provisions to guard against either espionage or leaks.

Moreover, although both bills prohibit disclosures of classified information "in any manner" in connection with a pending prosecution, I do not understand the bills to control what a defendant may say or write independently of the criminal proceeding. That is, if a defendant possesses classified information that he acquired prior to the discovery process in the case, any restriction on his right to discuss it or write about it would come only from other federal statutes, regulations, and executive orders, to the extent applicable. As I understand it, this legislation is designed solely to regulate what a defendant and his counsel do about disclosures in court papers and in the courtroom and to superintend the use they

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make of information that is provided to them as part of the discovery process. I regard it as quite appropriate for Congress and the courts to define the boundaries of the proper use of classified information "in connection with" federal trials.

Both bills, however, contain some ambiguity about the scope of the restriction. The ban on disclosure "in any manner" might be construed as restricting the defendant's ability to discuss classified information with his counsel or as restricting counsel's ability to discuss it with the prosecutor or the court. Restrictions of that sort would not be warranted. The bills should specify, however, that the restrictions apply not only to the defendant personally but also to his counsel. Thus, for example, § 102(a)(1) of the Committee bill should be modified to provide that "neither the defendant nor his counsel" may disclose or cause the disclosure of the classified information "except to the attorney for the United States or to the court in connection with proceedings under § 102(b)-(f)."

Role of the Attorney General: Limited Delegation

The subcommittee bill, H.R. 4736, specifies that a number of certifications and requests may be made only by "the Attorney General". Dealing unambiguously with a question similar to the one that led to the frustration of hundreds of

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criminal cases under the Supreme Court's wiretapping-authorization decisions a few years ago,[1] § 112 of the subcommittee bill provides that the Attorney General's functions may be delegated as far down as an Assistant Attorney General, but no further. The Justice Department bill, by contrast, would allow any federal prosecutor to make the judgments about invoking these special procedures, reserving to the presidential appointees within the Justice Department only the function of certifying that an interlocutory appeal is not taken for purposes of delay. I support the subcommittee bill on this issue.

The procedures and certifications that the subcommittee bill would place under the immediate supervision of the Attorney General or his delegate are sufficiently important and peremptory to justify the requirement of personal involvement at least by the Assistant Attorney General. Although it is a bit more cumbersome to obtain the approval of an Assistant Attorney General, the cases to which these procedures may apply are inherently sensitive and are likely, in any event, to be conducted under the active supervision of the Criminal Division in Washington.

1/ United States v. Giordano, 416 U.S. 505 (1974); United States v. Chavez, 416 U.S. 562 (1974).

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Propriety and Scope of "In Camera" and "Ex Parte" Proceedings

One of the most delicate features of both bills is their extensive provision for in camera -- secret -- proceedings.

Largely in response to the Supreme Court's decision a few month ago in Gannett Company v. DePasquale, ___ U.S. ___, 61 L.Ed. 2d 608 (1979), in which the Court held that the public and the press could be barred from a pretrial suppression hearing in order to avoid prejudicial publicity, there has been considerable furor about the dangers of "secret" criminal proceedings. The Sixth Amendment expressly guarantees to a person charged with a crime the "right to a speedy and public trial." The Court held in Gannett that, at least where the accused joins in a request for the closing of a pretrial proceeding, the public interest in open judicial proceedings does not prohibit a court from granting that request.

Two things are notable about the Gannett decision. First, the Court emphasized that it was dealing only with pretrial proceedings related to the admissibility of evidence and not with the actual trial of guilt or innocence. Secondly, the Court emphasized the importance of the defendant's own consent to the in camera proceeding.

The question raised by Gannett is whether Congress may constitutionally establish a requirement that, when requested

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by the government, a court must conduct in camera pretrial or ancillary procedures concerning the scope of discovery or the admissibility of evidence. Although the matter is not wholly free of doubt, it is my judgment that the Constitution permits Congress to require that proceedings of that type take place in camera when there is an important governmental interest in doing so. The preservation of classified information against needless disclosure surely constitutes a legitimate governmental interest in the conduct of in camera proceedings. See United States v. Nixon, 418 U.S. 683, 713-16 & n.21 (1974); United States v. Reynolds, 345 U.S. 1 (1953). Both bills provide reasonable protection against the abuse of this device.

While unusual, in camera pretrial proceedings are not exceptional, even without the concurrence of the defendant. As I have described in my earlier testimony (Appendix B, pp. 12-15), the Supreme Court and lower federal courts have approved the use of in camera proceedings in handling classified information as well as in other settings. The Congress has expressly provided for such proceedings in civil cases under the Freedom of Information Act, including of course cases concerning classified information. 5 U.S.C. § 552(a)(4)(B) and (b)(1). In the Nixon Tapes Case, supra, the Supreme Court expressly authorized Judge Sirica to review the White House tapes in camera to remove extraneous matter, including state

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secrets. United States v. Nixon, supra, 418 U.S. at 713-16 & n.21. Last year, Congress added new Rule 412 to the Federal Rules of Evidence, requiring an in camera hearing whenever a defendant in a rape case seeks to introduce evidence of the victims past sexual behavior.

A related question is whether the ordering of an in camera hearing should be automatic, as the subcommittee bill seems to provide whenever the Attorney General so requests. See §§ 102(a)(2)(B), 102(b)(2)(B), § 103(a), § 109(b)). By contrast, the Justice Department bill requires that it make a preliminary showing that the information involved is properly classified. See § 6(b). It is interesting that there has been criticism of the Justice Department approach, even though it gives more discretion to the trial judge. There is some fear that the ex parte submission concerning the sensitivity of the information may prejudice the judge's ruling on its relevance and on its producibility in its pristine form.

This is a hard problem, but on balance I would endorse the Justice Department approach. The risk of tainting the trial judge seems small, especially when one realizes that the judge is equally likely to be exposed to the government's arguments about the delicacy of the information at the actual hearing. There is no reason to believe that the defendant will be unable to make whatever counter arguments are weighty at that time. I am more concerned about allowing the govern-

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ment the power to trigger in camera proceedings automatically, and I thus endorse the requirement that there must be some preliminary showing to justify that course.

A related issue is the extent to which each bill permits ex parte proceedings, that is, an in camera proceeding in which only one party -- the government -- is fully participating. Most of the in camera proceedings would involve the defendant and his counsel, in the sense that they would be physically present and would have access to the information at issue in litigating about its disclosure. There are exceptions, however.

For example, under § 102(e) of the subcommittee bill, the United States need only describe by generic category the information that is of concern to it in a screening hearing if the information has not previously been made available to the defendant, such as during government employment. That means that, to a considerable extent, the defendant must endeavor to show the relevance of information without actually seeing the information itself. I know that some witnesses have criticized this approach, pointing out that the Supreme Court in cases like Jencks v. United States, 353 U.S. 657, 659 (1957), and Alderman v. United States, 394 U.S. 165, 183-86 (1969), has held that the defendant is entitled to participate in the determination of relevance.

These cases, however, do not require direct examination of the sensitive information by the defendant and his counsel.

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There is abundant legislative and judicial support upholding the ability of trial judges to make analogous determinations ex parte and the propriety of establishing that procedure in selected settings. Congress expressly overruled the Jencks decision in the so-called Jencks Act, 18 U.S.C. § 3500. Under § 3500(c), the trial court is now required to examine a prior written statement by the government witness in camera -- and ex parte -- to see whether the government is correct in arguing that some or all of the prior statement is irrelevant to the witnesses's testimony. If so, the statement is to be withheld or excised. The courts have regularly implemented that legislatively established procedure over the last 20 years, exercising generally satisfactory judgment.

The Alderman approach, too, is distinguishable. The Supreme Court in Alderman was assuming that the classified material consisted of information obtained as the result of an illegal search in violation of the defendant's constitutional rights. Balancing the respective interests, the Court held that the defendant should be entitled to access to the illegally acquired material in order to argue its relevance as a taint upon his prosecution. Shortly thereafter, however, the Court acknowledged that the trial judge may properly act ex parte in passing upon related questions, like the defendant's standing to object and the legality of the seizure, when classified information is involved. See Giordano v. United

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States, 394 U.S. 310, 314 (1969) (Stewart, J., concurring); Taglianetti v. United States, 394 U.S. 316, 317-18 (1969) (per curiam).

There are other instances in which the judge is called upon to make similar determinations without providing the defendant direct access to the material in issue. For example, under Title III of the 1968 wiretapping legislation, 18 U.S.C. § 2518(10)(a), a trial judge passing upon a suppression motion has the discretion whether to make some or all of the intercepted communication available either to the defendant or to his counsel, but he is not required to do so.

As illustrated by the Nixon Tapes Case, supra, a subpoena under Rule 17(c) of the Federal Rules of Criminal Procedure, seeking the production of potential evidence prior to trial, may depend upon a generic showing of relevance and admissibility, even without access to the information. The judge may rule upon those questions without providing access to the documents themselves. See 418 U.S. at 715 n.21.

In addition, as I indicated above, the Freedom of Information Act "contemplates that the courts will resolve fundamental issues in contested cases on the basis of an in camera [and ex parte] examination of the relevant documents." Phillippi v. Central Intelligence Agency, 549 F.2d 1009, 1112-13 (D.C. Cir. 1976). The courts have upheld the propriety of that procedure when classified information is at issue. E.g., Environmental

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Protection Agency v. Mink, 410 U.S. 73 (1973); Fensterwald v. Central Intelligence Agency, 443 F. Supp. 667 (D.D.C. 1977).

Under this analysis, as § 102(e) seems permissible. For similar reasons, so does § 109(b). Section 109(b) authorizes an ex parte motion for a protective order that would substitute summaries or admissions for classified data or that would delete specified, irrelevant items. This procedure would place some burden on the trial judge because he would have to be familiar with the defendant's theory of the case. That familiarity, however, should emerge from the pretrial proceedings that are contemplated under each bill and from the defendant's statement of need when he pursues documentary discovery from the government.

If this Committee decides to authorize limited ex parte submissions for these purposes, the approach taken by the Justice Department bill in §§ 4(b), 6(b), and 6(c)(1) seems to me to be preferable. The Justice Department approach is more comprehensive and it also enumerates in detail several alternative actions that the trial judge should consider taking.

Validity of Substitutes

Some witnesses have questioned the constitutionality and fairness of permitting the court to decide that some other form of the information sought by the defendant will adequately protect the defendant's interest. Their argument, which is

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quite plausible and deserves serious consideration, is that the defendant and his lawyer are in the best position to make the judgment about the effective use of relevant evidence. The judge, they insist, is in no position to usurp that function. I am persuaded, however, that a provision for careful judicial inquiry into the development of alternatives that will satisfy a defendant's legitimate interests could be fairly administered. As I shall explain in a moment, however, the balance should be titted a bit further in the defendant's direction.

Under § 4(b)(1) of the Department of Justice bill, the court is to make original information available in discovery if that disclosure "is necessary to enable the defendant to prepare for trial." Similarly, under § 6(c)(3), the original information may be used at trial if the "use of the classified information itself is necessary to afford the defendant a fair trial." The subcommittee bill contains less specificity about the alternatives or the grounds for their use, and makes the availability of alternatives turn on a finding that "the defendant's right to a fair trial will not be prejudiced thereby." § 103(a). Compare § 106(b).

The assumption underlying the provisions in each bill is that the defendant's legitimate interest in acquiring and using classified information may often be fully satisfied in some other way. I regard that assumption as generally sound.

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Where, for example, it may be necessary or relevant for the defendant to offer evidence to show that he or someone else had access to nuclear missile data, the government's admission of that fact should be a sufficient substitute for the physical production of the missile specifications themselves. It will be up to the courts, of course, aided by arguments from the defendant's counsel, to craft the alternatives in such a way that they provide the defense with the full and equivalent measure of evidentiary support to which the defense is legitimately entitled.

The constitutionality of this process seems to me beyond question. The Supreme Court has already suggested in the informer-privilege cases that some "sanctions" short of outright dismissal may be appropriate where the government elects to withhold the identity of an informant. See Appendix B, p. 11. Under the Jencks Act, 18 U.S.C. § 3500(d), Congress has provided that the government's refusal to produce for the defendant a prior statement of a government witness will ordinarily result only in the striking of that witness's testimony.

Rule 16(d)(2) of the Federal Rules of Criminal Procedure, specifies, in a similar vein, that if the government refuses to permit particular discovery, the court may prohibit it from introducing the specific item withheld or may enter any other corrective order as the court "deems just under the circumstances."

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The basic test is that the sanction or alternative should put the defendant in substantially the same position that he would be in if he had actually obtained the information sought. In an analogous context, the Supreme Court has upheld the constitutionality of the "use immunity" statute, 18 U.S.C. §§ 6001-05, on the ground that its prohibition against the use of compelled testimony in a criminal case offers a reluctant witness substantially the same protection as that guaranteed by the Fifth Amendment privilege against self incrimination, even though there may be some other collateral disadvantages. See Kastigar v. United States, 406 U.S. 441 (1972). That analysis seems fully applicable to provisions like §§ 4(a) and (b) and § 6(c) of the Justice Department bill and §§ 103 and 105 of the subcommittee bill.

I do suggest, however, that the standard contained in both bills may be too lax or vague and may not provide sufficient protection for the defense. As drafted, the bills require the court to withhold classified information from the defendant, upon the government's request, unless it would be "necessary" for the defendant to have it, as provided in the Justice Department bill (§ 4(b)(1) and § 6(c)(3)), or unless its non-disclosure would "prejudice" the defendant's right to a fair trial, (as in § 103(a) of the subcommittee bill). I suggest, instead, that the use of alternatives be made permissible "unless the court finds that no alternative will provide

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the defendant with substantially the same ability to prepare for trial or to make his defense as would the disclosure of the specific classified information."

Reciprocity of Pre-trial Disclosure

Section 107 of the subcommittee bill contains a provision for reciprocal disclosure by the government whenever the defendant has had to specify the evidence he proposes to use at trial and the court has substantially upheld his right to use either that evidence or an adequate substitute for it. The Justice Department bill contains no similar guarantee. Indeed, Assistant Attorney General Heymann actively opposes that provision.

In my view, the subcommittee's guarantee of reciprocity is fully warranted. The Supreme Court has emphasized that reciprocal disclosure is a necessary ingredient in any scheme that requires pretrial disclosure of defense evidence or defense strategy. Compare Wardius v. Oregon, 412 U.S. 470 (1973), with Williams v. Florida, 399 U.S. 78 (1979). Each of these two bills requires the defendant to provide the government with substantial information about his trial strategy. If the court upholds the legal soundness of that strategy, it is only fair to insist that the government disclose prior to trial its proposed rebuttal evidence. Since the government will have advance notice of some of the evidence

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the defense plans to use, I am satisfied that even-handedness requires equivalent disclosure by the United States.2/

Moreover, I see no particular prejudice to the government's interest. The reciprocity provision simply requires advance disclosure of information that the government plans to produce at trial. To the extent that the information consists of some classified elements, the government may resort to the procedures established by these bills to safeguard against improvident disclosure of specific data.

Jencks Act Revision

Witnesses have sharply divided over the desirability of § 10 of the Justice Department bill, the proposal to amend the Jencks Act to insert a new § 3500(c). The new provision would permit the court to excise from the prior written state-

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2/ Analogous rules are, admittedly, not consistent on this point. Rule 12.1 of the Federal Rules of Criminal Procedure does require reciprocal disclosure by the government in response to the defendant's duty to give advance notice of the witnesses he proposes to call in support of an alibi defense. Rule 412 of the Federal Rules of Evidence, added by Congress in 1978, however, requires the defendant in a rape case to demonstrate prior to trial the relevance and importance of proposed evidence about the victim's prior sexual behavior. The Rule makes no provision for the government to give pre-trial notice of its rebuttal evidence.

Rule 12.2 of the Federal Rules of Criminal Procedure, requiring advance notice of an insanity defense, contains no provision for reciprocity, but that omission is meaningless. The Rule does not compel the defendant to disclose anything about the defense, even the identity of his expert witnesses, and thus reciprocity is not an apt concept.

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ment of a government witnesses not only irrelevant classified material -- which can be deleted under the present statute -- but also to excise relevant classified material that is "consistent with the witness' testimony".

The Justice Department offers a plausible explanation for this change. Critics of it question its fairness and its feasibility. They suggest that even material that is not flatly contradictory in an earlier statement may be useful in impeaching a witness. For this truism they cite the Jencks decision, 356 U.S. at 667-68, where the Supreme Court noted that even the arrangement of facts in a different order or a contrast in emphasis may be useful in testing credibility.

I have little doubt that, as a constitutional matter, Congress may adopt the amendment sought by the Department of Justice. Marginal utility in cross examination is not constitutionally protected under either the Due Process Clause of the Fifth Amendment or the Compulsory Process Clause of the Sixth Amendment. Congress has adopted or approved a number of evidentiary rules, including the Jencks Act itself and Rules 403 and 412 of the Federal Rules of Evidence, that restrict a party's use of marginally relevant evidence.

The need for the amendment, however, may be overstated, since the interests that the Justice Department wishes to protect may secure adequate protection under the other provision of the two bills. Those provisions would allow the court

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to screen out detailed information that would not be necessary or helpful to the defense.

Perhaps a compromise is in order. There might be less ground to object to the Justice Department proposal if the adverb "fully" is inserted on page 13, line 2 of H.R. 4745, thus permitting the trial judge to excise a portion of the prior statement only when he finds, after hearing the witness testify and after examining the prior statement, that the prior statement is "fully consistent" with the witness's testimony.

Congressional Oversight of Prosecutorial Discretion

Title II of the subcommittee bill would require the Attorney General to promulgate guidelines specifying the factors to be used in deciding whether to prosecute federal violations where there is a possibility that classified information will be disclosed. That bill would also require that federal prosecutors prepare detailed memoranda expressing the reasons for a decision not to prosecute based on those grounds. Those memoranda would have to be reported to the oversight committees of both Houses.

I question the utility of the requirement in § 201 of H.R. 4736 that the Attorney General issue guidelines governing the exercise of prosecutorial discretion in these cases. In doing so, I know that I am out of step not only with the

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assumption made in the subcommittee draft but also with the recent recommendation of the House Government Operatons Committee, which recommended that the existing Justice Department memorandum laying out the process for making these decisions should be replaced by more formal, permanent regulations.3/ Nevertheless, I suggest that an attempt to enumerate these factors is bound to be so vague as to be susceptible to any interpretation or application that circumstances may warrant. It is not that I find § 201 objectionable, just that I regard it as pointless.

The real issue, it seems to me, is one that is not confronted by either bill. The legislation should clearly fix the responsibility for deciding within the Executive Branch whether to prosecute cases implicating national security information. As I explained in my earlier testimony (Appendix B, pp. 18 - 20), the clash between the responsibilities of the Attorney General and those of the Director of Central Intelligence makes this area somewhat murky. There appears to be a modus vivendi today between Attorney General Civiletti and Admiral Turner, under which the Attorney General is guaranteed full acess to intelligence files in making the decision that properly belongs to him. I submit, however, that it would be

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3/ See House Committee on Gov't Operations, Justice Department Handling of Cases Involving Classified Data and Claims of National Security, H. Rept. No. 96-280, 96th Cong., 1st Sess. at 22 (1979).

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worthwhile for Congress to make the policy determination that the Attorney General is entitled to unrestricted access to national security information in connection with his funtions and that, subject to presidential control, he is ultimately responsible for deciding whether the public interest in prosecuting a federal crime outweighs the public interest in protecting a state secret. That type of statutory provision seems to me more useful than § 201 of the subcommittee bill.

Section 202 requires the preparation of detailed memoranda explaining decisions not to prosecute and demands that the Justice Department routinely forward those memoranda to the congressional oversight committee. I support the Justice Department's objections to these requirements.

Let me say at the outset that I support the principle of congressional oversight. That is not at issue. Even with a statutory directive, it is virtually certain, as a practical matter, that Justice Department files will include a "prosecution memorandum" in sensitive cases of this sort. Hence, the record will be there for examination when necessary. It is also certain, though, that few cases are likely to involve seriously questionable judgments that will deserve congressional attention.

Accordingly, it seems to me that due respect for the separation of powers and for the independence of the Executive's prosecution function counsels in favor of minimal

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intrusion into Justice Department deliberations and files. Here too, a compromise solution seems best designed to reconcile legitimate but conflicting interests. At most, legislation ought to require the Attorney General to report to the two oversight committees the name of the prospective defendant and the offense or offenses for which he was under investigation. If either committee believes that it is worthwhile to pursue a particular matter, the inquiry can be handled on a more discrete and sharply focused basis.

Potpourri

Several technical or structural questions may also merit comment. For instance, earlier witnesses have suggested that the procedure for obtaining a protective order under § 4(b) of the Justice Department bill should track more closely the requirements of Rule 16(b)(1) of the Federal Rules of Criminal Procedure, the provision that generally authorizes the trial judge to regulate discovery in criminal cases. I concur with the proposal to conform the procedures under the bill with those that are generally applicable, including the requirement of a written submission by the government that may be maintained under seal for possible appellate review.

Both § 102(f) of the subcommittee bill and § 8(d) of the Justice Department bill contain provisions that I find quite ambiguous. In providing the government with an opportunity to

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object to a line of questioning of a witness when that line has not previously been screened, each provision directs the court to "take such ['suitable'; H.R. 4745] action to determine whether the response is admissible as will safeguard against the ['compromise'; H.R. 4745] ['disclosure'; H.R. 4736] of any classified information." Stated that way, these provisions on their face suggest that the court is to gag the witness permanently if his testimony would reveal classified information. The provisions appear to make the prevention of disclosure the overriding duty of the trial judge. That is certainly not what is intended. Rather, the trial judge should be required to protect against disclosure until admissibility and alternatives are screened in accordance with the other sections of each bill.

Both bills provide that the government may take interlocutory appeals from disclosure orders that may threaten its ability to proceed with a case. An interlocutory appeal by the government has ample statutory precedent in other situations, and I support this approach. Certain ambiguities, however, should be clarified.

Both bills provide for the trial court to defer or adjourn the trial until the appeal is "decided" or "resolved". See § 108(b)(1), H.R. 4736; § 7(b), H.R. 4745. Lest there be any uncertainty that might magnify the delay and interfere with the interest of both the public and the accused in a

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speedy trial, legislation on this subject should specify that a petition for review by the Supreme Court will not lie at that interlocutory stage.

Moreover, both bills suggest that, in meeting the tight timetable for disposing of an appeal taken during trial, the appellate court may dispense with the issuance of a written opinion. Since there is no requirement at present that appellate courts file written opinions, and since they often dispense with them when circumstances seem to warrant, a legislative suggestion to that effect seems both gratuitous and patronizing.

Section 109(a) of the subcommittee bill directs that, upon motion of the United States, "the court shall issue an order to protect against the disclosure of any classified information" made available in discovery. That formulation seems unintentionally too sweeping. What I believe the subcommittee intended is to restrict the disclosure of classified information that is made available to the defendant in discovery except to the extent that disclosure is otherwise authorized in connection with the proceedings and in accordance with the statutory screening procedures. A change that makes that intent clear would be useful.

Finally § 8 of the Justice Department bill would modify several provisions of the Federal Rules of Evidence concerning the admissibility of duplicates, summaries, or excerpts of

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writings. These changes are within the power of Congress and leave sufficient discretion to the trial judge to avoid unfairness to the defendant.

Conclusion

The bills pending before the Subcommittee invite it to confront boldly a number of complex and vexing problems. The enterprise is well worth the effort. With the adjustments that I have proposed, either of these two bills -- or, I hope, a restructured synthesis of the two of them -- would make a major contribution to the resolution of the "disclosure or dismiss" dilemma.

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Statement Of

Philip A. Lacovara*/

Before the

United States House of Representatives
Permanent Select Committee On Intelligence
Subcommittee On Legislation

"Protection And Use Of National
Security Information"

January 31, 1979

Mr. Chairman:

I am pleased to be back before this Subcommittee to offer some thoughts about another group of problems that you are now considering. When I testified before this Subcommittee in the last Congress on various proposals for a Foreign Intelligence Surveillance Act, which has now been enacted into law, the members of the Subcommittee were very gracious in listening to my comments. Against that backdrop, I am especially pleased to have been invited back.

The Two Faces of the Problem: Disclosure in the Field and Disclosure in the Courtroom

In considering the protection that should be afforded to

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legitimate national security information, the Subcommittee must confront two distinct challenges. One is to decide what information should be subject to statutory restrictions against disclosure, especially by unauthorized or extra-legal means. The other is to develop a system of adjudication that reduces the danger of unnecessarily compromising national security information in litigation. The two faces of the problem are quite different.

A. Protecting What Against Whom?

The first branch of the problem involves the deliberate, surreptitious disclosure of what have been variously termed "state secrets", "classified information", "restricted data", and so forth. For the sake of conformity, I shall refer to this information as "national security information." In this phase of the problem, the objective of the person disclosing the information is to achieve its dissemination, and it is to be distinguished from the second situation, which I shall discuss in a few moments, where the disclosure of national security information is incidental to some other proceeding, such as a civil or a criminal trial.

In the first category fall two distinguishable types of conduct: deliberate espionage and the official "leak". In coping with either espionage or with the leak, the first issue that Congress must address is the definition of information

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that should be subject to a substantive restriction against disclosure.

The Subcommittee is well aware of the array of objections to the current espionage statutes, which are quite cloudy in defining the contours of the information that is to be protected. In addition, those statutes are utterly ill-suited to the phenomenon of the official "leak." Although the selective leaking of the otherwise secret government information is as old as our Republic -- and is probably as old as secrecy itself -- Congress has not really tried to come to grips with legislative restrictions on such conduct.

Pending before the Subcommittee is an almost dizzying variety of suggestions for the definition of legitimate "national security information" that should be protected against the spy and against the leaker. My own experience with classified information, as with other information arguably subject to some governmental privilege, is that government officials tend to err far on the side of secrecy when they come to designating information they want to withhold. Often, it is difficult to discern the basis for a classification.[1/] I suggest that the balance should be legislatively

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1/ I acknowledge that my first-hand experience pre-dates the new executive order governing the classification process, but I would be surprised to learn that human nature has changed dramatically.

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tipped in the other direction -- much as the Freedom of Information Act now does -- and the presumption ought to be that information is disclosable unless there is an articulable basis for shielding it.

I would urge the Subcommittee, if it decides to fashion legislation on this subject, to propose a narrow formulation, rather than one that is open-ended. Such a formula could then be tested against any concrete examples that may be furnished by the defense, foreign policy, and intelligence communities of other types of information that must be kept secret. At the drafting stage, the burden of persuasion should be placed on those experts to produce real instances and substantial reasons showing why more expansive coverage should be given in defining protected "national security information."

The Subcommittee should also be sensitive -- as I know it will be -- to the deep policy implications of enacting anything remotely resembling an Official Secrets Act, a law that makes mere disclosure of official information a crime. There is a natural tendency to reach for that deceptively alluring solution to a complex and important problem. This country, however, has had several chapters in its history in which a desire for security was allowed to submerge our concern for personal liberties of speech, press, and travel. Those episodes are now regarded with shame, and must not be repeated.

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National security is, of course, a legitimate and indeed a compelling goal of any government, but Congress must not, in the course of striving for security, loose sight of the nature of the society in which we want to be secure. It bears repeating that the Preamble to the Constitution says that one of the goals of the Union is to "secure the Blessings of Liberty to ourselves and our Posterity". What the Congress should be most concerned about securing, therefore, when there is a tension between freedom and security, is our personal liberties. There are great dangers to any proposal that seeks to avoid difficult questions of subjective intent and probable effect by making them wholly irrelevant.

The shades of intent underlying disclosures of national security information are best illustrated in the "leak" context. The effort to regulate "leaking" must necessarily be a vexing one. First, as the Committee may fairly assume from my position in the Nixon Tapes Case,[2/] I am instinctively skeptical about governmental claims to secrecy, and I believe that they should be given the narrowest possible cabin. The First Amendment reflects the two underlying postulates of our democratic society: that the people -- not the government -- are ultimately responsible for the course of our society, and that, in order to make informed choices, the people must have

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2/ United States v. Nixon, 418 U.S. 683 (1974).

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adequate current access to pertinent information. As St. John put it in a somewhat eschatological context: "And ye shall know the truth, and the truth shall make you free."3/

Second, the use of the term "leak" tends to oversimplify the range of motives and consequences that may be involved. The leak is sometimes used as a technique of government policy, sometimes to inform the public "off-the-record". Often, however, it is used to provide a selective view of a message the government wants to convey. At the other end of the spectrum, a leak may come from a disgruntled government employee who concludes that only public knowledge will divert the government from a policy that he feels -- rightly or wrongly -- is folly.

One mechanism for reconciling some of these divergent interests is to provide a procedure by which a person may obtain prompt administrative review of a classification that would otherwise restrict disclosure. The existence of that type of safety valve would, I believe, fairly permit Congress to be somewhat more embracing in its definition of the categories of national security information.

I have only one suggestion to make about that definition. Many of the reasons for public disclosure of government infor-

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3/ St. John 9:32

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mation apply to policy-related information, not to details. Thus, for example, the public might have a legitimate right to know that the Defense Department is developing a new weapons system like a neutron bomb,in order to assert an intelligent judgment about the non-technical implications of that course. But there would be little justification for concluding that the scientific and engineering plans for such a device should similarly be disclosable. This kind of distinction might also put into separate catgegories the disclosure of the general existence of intelligence activities abroad, on the one hand, and disclosure of the names of active intelligence operatives or sources in particular countries, on the other. The distinction may be easier to state in the abstract than it would be to apply in practice, but I suggest it as a starting point in determining what should be secret and what should not be.

B. To Proceed, or Not to Proceed? That is the Question.

The other major facet of the problem before the Subcommittee involves the disclosure of national security information in the course of legal proceedings. Here, too, the general issue can be subdivided into two distinct situations. One is where the government itself must use national security information in the course of a proceeding in order to prove a material fact. The other, sometimes called "graymail," involves the threat or demand by the other party to the litigation --

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often, but not always, a defendant in a criminal case -- to have national security information disclosed in the course of the proceedings. In either situation, the government may be confronted with the "disclose or dismiss" dilemma in which the government must either compromise national security by disclosing sensitive information or else forego the effort to vindicate the public's legal rights.

In a statement I submitted in March 1978 to the Subccommittee on Secrecy and Disclosure of the Senate Select Committee on Intelligence,[4/] I addressed some of these questions at length and made a number of suggestions for avoiding or resolving that dilemma. Some of my recommendations involved steps that might be taken by the Executive Branch, with the cooperation of the courts. Others might require a legislative action. I was pleased that, when the Senate subcommittee released its report, it endorsed some of the suggestions that other witnesses and I made for more imaginative and aggressive action within the Executive Branch.[5/] I shall not repeat that testimony. Instead, I am submitting a copy of my prepared

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4/ "The Use of Classified Information in Litigation," Hearings before Senate Select Comm. on Intelligence, Subcomm. on Secrecy and Disclosure, 95th Cong., 2d Sess. 53-81 (1978).

5/ "National Security Secrets and the Administration of Justice", Report of Senate Select Comm. on Intelligence, Subcomm. on Secrecy and Disclosure, 95th Cong., 2d Sess. 26-32 (1978).

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statement as an addendum to my testimony this morning.

Several additional points, however, are in order. In my statement last March, I commented that the Department of Justice had not taken the available steps to avoid the dilemma that had apparently been the basis for the Department's failure to proceed with a number of otherwise justifiable criminal prosecutions. Since that time, the reins of the Criminal Division have been taken over by my former colleague in the Special Prosecutor's Office, Philip B. Heymann, and I have noted a dramatic shift of position. Assistant Attorney General Heymann is thoughtful, sensitive, and knowledgeable, and is concerned with reconciling civil liberties and criminal justice. His experience with the problems of national security information in litigation springs in large part from the same cases as does mine, and he is actively exploring realistic approaches to the problems.

The Subcommittee is no doubt aware that the Department of Justice has recently been taking steps, with varying degrees of success, to obtain court orders -- in the form of protective orders -- that will protect the important constitutional rights of the accussed while at the same time protecting the government's legitimate interests in national security information. Useful protective orders were entered in the CIA spy satellite

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espionage trial,[6] in the FBI break-in case,[7] and the Humphrey/Truong espionage case.[8]

In the ITT perjury case,[9] the district judge initially granted a protective order prohibiting the defendant or his lawyer from disclosing, without prior court approval, the information contained in classified CIA documents he was allowed to review as part of pretrial discovery. But the judge has recently denied a further protective order that would establish a procedure for in camera screening of any classified information the defendant might want to disclose at trial. The government petitioned the United States Court of Appeals for the District of Columbia Circuit to issue a writ of supervisory mandamus directing the district judge to establish fair and orderly procedures for this purpose. The Court of Appeals, however, denied this petition on January 26, 1978.[10] The government's briefs in the court of appeals

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6/ United States v. Kampiles (N.D. Ind. Crim. No. HCR 78-77).

7/ United States v. Gray, et al. (D.D.C. Crim. No. 78-000179).

8/ United States v. Humphrey, et al. (E.D. Va. Crim. No. 78-25-A.).

9/ United States v. Berrellez (D.D.C. Crim. No. 78-00120).

10/ In Re United States (D.C. Cir. No. 78-2158). The Court of Appeals held that the protective order was not properly reviewable by the extraordinary mandamus procedure.

(footnote continued on following page)

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provide an excellent compilation of the case law supporting the constitutionality of the proposed screening procedure.

Review of the various protective orders that have been entered or sought will show that there are some common features, like a limitation on further dissemination of classified information obtained in discovery, but there are also a number of variables. In order to standardize the proceedings in which national security information may have to be used, it would be worthwhile for Congress to enact formal standards and procedures for cases of this type.11/ While Congress cannot eliminate the constitutional questions that may be raised, I believe the courts will accord substantial deference to the choices Congress makes, if it develops a careful and balanced procedural scheme.

A comprehensive approach to this issue would include a number of features. At the outset, Congress should designate the official who, short of the President, will have the

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(footnote continued from previous page)

One of the defendants in the FBI break-in case (United States v. Gray) has recently petitioned the Court of Appeals for similar mandamus review of the protective order in that case.

11/ Indeed, the Court of Appeals' recent refusal to overturn by mandamus the district court's denial of a further protective order in Berrellez -- thereby effectively denying the government the opportunity to appeal the district court's decision -- underscores the need for congressional action laying down reasonably clear guidelines for district courts and litigants in this area.

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primary authority within the Executive Branch to resolve the disclose-or-dismiss dilemma if it becomes necessary to address it. I believe the Attorney General is the proper official to make that judgment because his responsibilities to enforce the law comprehend the more specific statutory obligations given to other federal officials, like the Director of Central Intelligence.

In addition, Congress should reinforce the Attorney General's right to access to any information in the government's possession that he considers necessary to the discharge of his responsibilities. He should be required, however, to consult with the affected agencies with a view toward achieving a fair prosecution with a minimum adverse impact on national security concerns. This requirement should be axiomatic, but there is no reason not to guarantee the national security community this opportunity.12/

The Federal Rules of Civil Procedure and Criminal Procedure can be amended to require pretrial notice of an intent to use national security information, either by the prosecution or by the defense, so that adequate protective conditions may

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12/ The problem of reconciling a criminal prosecution with national security concerns is not new. See, for example, Anders, The Rosenberg Case Revisited: The Greenglass Testimony And The Protection Of Atomic Secrets, 1978 American Historical Review, 388.

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be established and screening of the material can be conducted. Building on the existing statutory provisions for government appeals from suppression orders,[13] Congress should allow the government to appeal from a disclosure order upon certification by the Attorney General that the disclosure might cause grave injury to the national security.[14]

The Congress should also consider establishing special procedures when national security information must be used at a trial. As explained in my Senate statement last year, there are at least certain kinds of proceedings that may be conducted in camera.[15] To the extent that the constitutional right to a public trial may give either the defendant or the public the right to open proceedings,[16] it might be possi-

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13/ 18 U.S.C. § 3731; D.C. Code §§ 11-721(a)(3) & 23-104.

14/ The need for a statutory appeal process for such orders -- and the inadequacy of mandamus as a means of appellate review in these cases -- is highlighted by the District of Columbia Circuit's denial of the Government's mandamus petition in Berrellez. See note 10, supra.

15/ See Hearings, supra note 4, at 57-58.

16/ The Supreme Court now has before it the constitutionality of a court order excluding the public and the press from certain portions of a criminal proceeding, where there was a concern about generating prejudicial pre-trial publicity. See Gannett Co. v. DePasquale (Sup. Ct. No. 77-1301) (argued Nov. 7, 1978; see 47 U.S.L.W. 3330). For quite different views of this problem, compare Gannett Co., Inc. v. DePasquale, 43 N.Y. 2d 370, 401 N.Y.S. 2d 756, 372 N.E. 2d 544 (1978), cert. granted, U.S.L.W. 3679 (U.S. May 1, 1978) (No. 77-1301), with United States v. Cianfrani, 573 F.2d 835 (3d Cir. 1978).

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ble to provide that the documentary evidence be maintained under seal and shown only to the jury. It might also be appropriate to permit a brief delay before the commencement of a trial in order to allow the government to determine whether it has cause to believe that any of the prospective jurors may not be able to safeguard national security information that comes into their possession in the course of a trial. Those jurors would then be subject to challenge. It also seems to me well within the legitimate powers of a court to place counsel and the jury under an injunction of secrecy, with care being taken to impose the minimum restraint necessary to protect the most sensitive national security information.

Finally, Congress should consider establishing a rule of evidence to cope with national security information. To the extent the information is relevant, a number of options -- subject to court supervision -- seem feasible. One would be to permit the government to produce a concession or stipulation about the basic substance of the information without actually producing the information itself. In many instances, a description of the nature of the material, without letting out its specifics, may sufficiently cover the point that a defendant may be entitled to make.

As a further alternative, Congress could draw upon the "missing witness" instruction as a parallel, and could autho-

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rize the court to instruct the jury to infer from the failure to produce information that the information would tend to establish the fact asserted by the defendant. Or, going one step beyond that instruction, the jury might be told that it must take as established a particular proposition advanced by the defendant. Rule 37(b) of the Federal Rules of Civil Procedure suggests a number of alternative sanctions for failure to make discovery in a civil case, and there is no compelling reason why that approach may not be borrowed in a criminal case as well.

Furthermore, Congress may develop the point made by Rule 403 of the Federal Rules of Evidence, which permits relevant evidence to be excluded if its probative value is "substantially outweighed" by certain other considerations. Congress could consider modifying that rule of evidence to provide that the risk of grave injury to the national security is one of those considerations.17/

In the last year alone, we have witnessed a number of federal cases in which national security information played, to one degree or another, a part in the proceedings. We can only surmise that there are other cases that should have been brought but were not because of the apparent security risks in attempting to proceed. With this recent experience

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17/ Compare Davis v. Alaska, 415 U.S. 308 (1974).

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in mind, there seems to be ample justification for this Subcommittee to develop a comprehensive legislative package that will deal with the issues I have addressed.

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STATEMENT OF PHILIP A. LACOVARA*/
BEFORE THE
SUBCOMMITTEE ON SECRECY AND DISCLOSURE
OF THE
SENATE SELECT COMMITTEE ON INTELLIGENCE

"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.

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1. Relationship Between National Security and Prosecutorial Discretion:

The prosecution of a federal offense invariably involves a continuing series of 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.

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.

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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

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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 illegal 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.

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Similar problems can arise in numerous contexts other than espionage cases, and are easier to deal with in 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

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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

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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 issue 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 indict-

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ment 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.

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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

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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

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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 analogous 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

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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

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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

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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

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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

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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 court 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

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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, provide 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.

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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 infor-

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mation 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*/ 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.

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*/ 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.

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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 disaster.

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ADDITIONAL SUBMISSIONS OF MORTON HALPERIN

Center for National Security Studies

122 Maryland Avenue, N.E. Washington, D.C. 20002 (202) 544-5380

March 7, 1980

The Honorable Joseph R. Biden, Jr.
Chairman
Criminal Justice Subcommittee
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman,

When we appeared before your subcommittee on February 7, 1980 to testify on S.1482, the proposed Classified Information Procedures Act, you requested that we submit a supplemental memorandum explaining our views on the constitutionality of the bill's proposed amendment to the Jencks Act, 18 U.S.C.§3500.

That memorandum is enclosed for the record on behalf of the American Civil Liberties Union and the Center for National Security Studies. We apologize for the delay in submitting this response.

Sincerely,

Morton H. Halperin
Director

Allan Adler
Legislative Counsel

Enclosure

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Memorandum of Morton H. Halperin and Allan Adler

SUPPLEMENTAL STATEMENT ON THE CONSTITUTIONAL DIMENSIONS OF THE JENCKS DECISION AND THE JENCKS ACT

As we understand it, Section 10 of S.1482 would amend the Jencks Act to permit the Government to withhold portions of any statement which is "otherwise producible" under the Act if the Government claims that such portions are "classified" and the court finds them to be "consistent with the witness' testimony." Before the statement would be delivered to the defendant "for his use", the court, at its discretion, could either substitute summaries for the classified portions or simply excise them from the statement.

The amendment is supported by the Justice Department on the grounds that the Jencks Act would otherwise "require the disclosure to the defendant of classified information which, though related to the subject matter of the witness's direct testimony, is not at all inconsistent with the witness's testimony and is thus of no value for impeachment purposes." (Statement of Philip Heymann, Assistant Attorney General, Criminal Division, Before the Committee on the Judiciary, Subcommittee on Criminal Justice, United States Senate, Concerning S.1482, February 7, 1980, p.29)

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Acknowledging that there is substantial opposition to the amendment, the Justice Department asserts that "the issue is one of policy, not constitutional law." According to the Department, there is "absolutely no constitutional problem posed by the adoption of section 10" since the Supreme Court has stated that the Jencks decision and the Jencks Act were not "cast in constitutional terms", and since the Act itself "demonstrates that Congress may constitutionally assign to the courts the responsibility for determining whether aspects of a witness's statement should be deleted before being provided to the defendant and his counsel." (Statement of Philip Heymann, Id. at 30-31.)

This analysis is not persuasive.

The seemingly conclusive statement by the Supreme Court in United States v. Augenblick, 393 U.S. 348, 356 (1969), on which the Justice Department relies, is not in fact conclusive. Justice Douglas, the author of the Court's unanimous decision in that case, cited Justice Brennan's concurring opinion in Palermo v. United States, 360 U.S. 343 (1959), as authority for the proposition that neither the decision in Jencks v. United States, 353 U.S. 657 (1957) nor the Jencks Act were "cast in constitutional terms." However, Justice Brennan, the author of the Jencks decision, writing for four Justices in the first Supreme Court decision "to determine the scope and meaning" of the Jencks

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Act, discussed the basis for the Court's Jencks ruling in terms that challenge the Justice Department's argument:

> It is true that our holding in Jencks was not put on constitutional grounds, for it did not have to be; but it would be idle to say that the commands of the Constitution were not close to the surface of the decision; indeed, the Congress recognized its constitutional overtones in the debates on the statute [footnote omitted]
>
> 360 U.S. at 362-363 (Brennan, with Warren, Black and Douglas concurring in the result)

The first part of Justice Brennan's explanation of the Jencks holding indicates that the Court in Jencks was following its traditional policy of "strict necessity" with regard to the constitutional issues. See, e.g., Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 570-571 (1947). It was unnecessary for the Court to justify its holding on constitutional grounds since the issue in dispute -- whether the trial judge had erred in denying the defendant's motion for inspection of reports written by government witnesses -- could be decided by the Court "[e]xercising [its] power, in the absence of statutory provision, to prescribe procedures for the administration of justice in the federal courts." Palermo, supra, at 345. See also, Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §3529 (1975) ("Avoidance of constitutional grounds for decision has the obvious advantage of leaving a more inviting path for subsequent

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congressional action... It will be seen that many decisions implementing specific justiciability concepts are ambiguous or silent on the choice between constitutional and non-constitutional grounds for decision. However frustrating this may seem at times, the tendency is desirable and can be expected to continue.")

But, as the remainder of Justice Brennan's statement clearly indicates, the Court's rationale in Jencks was substantially, albeit inferentially, grounded in constitutional fair trial and due process guarantees. See, e.g., Keeffe, Jinks and Jencks: A Study of Jencks v. United States in Depth, 7 CATH.U.L.REV. 91 (May 1958); Karen, The Right to Production for Inspection of Documents in Possession of the Government: Guaranteed By the Due Process Clause?, 31 SO.CAL.L.REV. 78 (1957); Legislation: The Jencks Case and Public Law 85-269, 7 AM.U.L.REV. 32 (1958); Schwartz, Commentary on the Constitution of the United States, Part III: Rights of the Person, Macmillan Co., N.Y.: 1968, P.125-127; Grossman and Wells, Constitutional Law and Judicial Policy Making, Wiley & Sone, Inc., N.Y.: 1972, p.829.

The broad notion of "justice" as an amalgam of constitutional due process rights pervades the majority opinion in Jencks, see, e.g., 353 U.S. at 668-69 and 671,

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and while specific constitutional "commands" were not identified in the decision it was clear to Congress that legislation pursuant to Jencks could not be "designed to nullify, or to curb, or to limit the decision of the Supreme Court insofar as due process is concerned." S.RPT. NO.981, 85th CONG., 1st SESS., p.3; 103 CONG.REC. 15, 249 (1957) (remarks of Rep. Celler, Chairman of the House Judiciary Committee, in offering the Conference Report in the House). See also 7 AM.U.L.REV., supra, at 34 ("Members of Congress were extremely aware of the susceptibility of such legislation to an attack on grounds of denial of due process. Consequently, Congress was determined to draft legislation which assured the protection of constitutional rights.")

The Court in Jencks had held that

> the defense in a Federal criminal prosecution was entitled, under certain circumstances, to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses. These statements were therefore to be turned over to the defense at the time of cross-examination if their contents related to the subject matter of the witness's direct testimony, and if a demand had been made for specific statements which had been written by the witness or, if orally made, as recorded by agents of the Government.
>
> Palermo, supra, at 345-346.

In discussing the defendant's need of the disputed reports, the Court in Jencks focussed on the subject of impeachment:

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> The crucial nature of the testimony of Ford and Matusow to the Government's case is conspicuously apparent. The impeachment of that testimony was singularly important to the petitioner. The value of the reports for impeachment purposes was highlighted by the admissions of both witnesses that they could not remember what reports were oral and what written...."
>
> Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness's testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contract in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness's trial testimony.
>
> 353 U.S. at 667.

The significance of cross-examination in the design of due process protections provided for criminal defendants by the Sixth Amendment cannot be overstated. The Apocryphal lesson of Susanna and the Elders had long-since become a procedural fixture of English common-law by the time our Constitution guaranteed "the accused" in all criminal prosecutions the right "to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." But it was not until fifteen years after the Jencks decision that the

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Supreme Court formally recognized each of these Sixth Amendment rights as "a fundamental right essential to a fair trial in a criminal prosecution" and made them obligatory upon the States by the Fourteenth Amendment. See, Pointer v. Texas, 380 U.S. 400 (1965) (right to confrontation); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process), and Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel).

In Pointer, supra, the Court clearly indicated that one right was inextricably bound in the other when it spoke of the "Sixth Amendment's guarantee of confrontation and cross-examination" (emphasis added):

> It cannot seriously be doubted... that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case..."
>
> 380 U.S. at 404.

A generation earlier, the Court, in Alford v. United States, 282 U.S. 687 (1931), had upheld the right of defense counsel to impeach a witness through cross-examination showing that the witness's testimony was biased because he was incarcerated in federal prison at the time of trial. The Court discussed cross-examination

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as a "matter of right" in a manner that foreshadowed the tone of the Court's discussion of impeachment in Jencks:

> It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. [Cites omitted] To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.
>
> 282 U.S. at 691-692.

More recently, in Davis v. Alaska, 415 U.S. 308 (1974), the Court again declared how and why a defendant must be permitted to demonstrate the weakness of prosecution testimony through impeachment in cross-examination:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness... A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand...

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> We have recognized that the exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.
>
> 415 U.S. at 316.

The Court also reaffirmed the validity of its Alford ruling, noting that "[a]lthough Alford involved a federal criminal trial and we reversed because of abuse of discretion and prejudicial error, the constitutional dimension of our holding in Alford is not in doubt." 514 U.S. at 318, n.6. (See discussion of the Court's "strict necessity" policy, supra.)

In the context of these prior and subsequent rulings, it would be specious to argue that either the Court or Congress could regard the Jencks decision and the Jencks Act as bereft of constitutional scope. Accord, see Jencks, supra, at 674 (cites Alford with approval); Palermo, supra, at 362 (Brennan, with Warren, Black and Douglas, concurring in the result, discusses potential violation of Sixth Amendment confrontation and compulsory process rights through denial of Jencks request); Augenblick, supra, at 356, ("It may be that in some situations, denial of production of a Jencks Act type of a statement might be a denial of a Sixth Amendment right."); Grossman and Wells, supra, p.829; Schwartz, supra, p.125.

> Congress made crystal clear its purpose only to check extravagant interpretations of Jencks in the lower courts while reaffirming the basic holding that a defendant on trial should be entitled to statements helpful in the cross-examination of government witnesses who testify against him.

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> Palermo, supra, at 365 (Brennan, with Warren, Black, and Douglas, concurring in the result). See also S.RPT. No.981, 85th CONG., 1st SESS., supra, at p.3, and H.RPT. No.700, 85th CONG., 1st SESS., p.3-4.

The proposed amendment to the Jencks Act in S.1482, then, must be examined closely with respect to constitutional considerations embodied in the Jencks decision and in the Act itself. Under such scrutiny, it could well be concluded that "[l]ess substantial restrictions than this of the common-law rights of confrontation of one's accusers have been struck down by this Court under the Sixth Amendment." Palermo, supra, at 362 (Brennan, with Warren, Black, and Douglas, concurring in the result.)

The first problem with the proposed amendment is that it would permit the defendant to inspect a concededly producible prior statement of a government witness only after the court has made a determination of inconsistency with regard to the witness's testimony. Such a conditional showing of inconsistency prior to delivery to the defendant was precisely the requirement rejected by the Court in Jencks:

> We also held that the trial judge was not to examine the statements to determine if they contained material inconsistent with the testimony of the witness before deciding whether he would turn them over to the defense. Once the statements had been shown to contain related material only the defense was adequately equipped to decide whether they had value for impeachment.
>
> Palermo, supra, at 346.

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The Court in Jencks rejected such a requirement as "clearly incompatible with our standards for the administration of criminal justice in the federal courts...". 353 U.S. at 668. In so doing, the Court went beyond the defendant's own request, which did not seek inspection of the entire documents but only "those portions of the reports which the trial court might determine to have evidentiary value for impeachment purposes..." 353 U.S. at 673 (Concurring opinion of Justice Burton, joined by Justice Harlan). But the Court's ruling, that the defense must initially be entitled to see the reports to determine what use may be made of them, was not lightly reached. "Justice requires no less," said the Court, 353 U.S. at 669, citing the analogous reasoning of Chief Justice John Marshall in United States v. Burr, 25 Fed. Cas.No. 14694, at 187 (C.C.Va. 1807).

Congressional enactment of the Jencks statute did not change this rule in any way. If the Act can in any way be interpreted to require that the defendant not receive Jencks material prior to laying a sufficient foundation, it is only indirectly through the requirement that the witness testify on direct examination during trial before the defendant is entitled to production. See, 7 A.M.U.L.Rev., supra at 36.

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In Dennis v. United States, 384 U.S. 855 (1966), where the Court determined that a government witness's prior statements to a grand jury were producible under the Jencks Act, a similar judicial inspection procedure was again flatly rejected, with the Court noting that it was 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. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate.
>
> 384 U.S. at 874-875.

By allowing the court, in its discretion, to excise or substitute summaries for those portions of the prior statement which the court finds "consistent with the witness's testimony," the procedure in S.1482's proposed amendment to the Jencks Act would maximize the prejudice to the defendant that results from thrusting the discretionary authority of the court into a situation clearly implicating the defendant's Sixth Amendment right to assistance of counsel as well as his right to confrontation.

Congress, in enacting the Jencks legislation, was quite explicit with respect to the trial court's power to excise portions of otherwise producible statements. That power, according to the statute, can be exercised only when directed toward matter "which does not relate to the subject matter of the testimony of the witness." 18 U.S.C. §3500(c). Where

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all of the material relates to the subject matter of the witness' testimony, no further judicial inquiry - i.e., for inconsistency - is either required or permitted by the Act. "If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use." 18 U.S.C. §3500(b). See also Palermo, supra, 360 U.S. at 353 n.10. ("Of course the statute does not provide that inconsistency between the statement and the witness' testimony is to be a relevant consideration.")

Nor does the Jencks Act permit a "summary" of a prior statement by a government witness to be given to the defendant as a "Jencks statement." Palermo, supra, at 352-353. Although the Court in Palermo was specifically addressing the issue of legislative intent with respect to summaries of oral prior statements by government witnesses and the meaning of the term "statement" as used in the Act, its rationale would seem to apply with equal force to the proposed "summary" procedure in S.1482:

> It is clear that Congress was concerned that only those statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment. It was important that the statement could fairly be deemed to reflect fully and without distortion what had been said to the government agent. Distortion can be a product of selectivity as well as the conscious or inadvertent infusion of the recorder's

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> opinions or impressions. It is clear... that the legislation was designed to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral recital. Quoting out of context is one of the most frequent and powerful modes of misquotation.
>
> 360 U.S. at 352.

The most serious problem with the proposed amendment, however, is not embodied in these procedural departures from the Jencks decision and the subsequent Jencks legislation. It lies instead with the fact that they would be required as part of a newly-created "classified information" exemption to the Jencks Act. The court's "consistency" review would be triggered by the government's claim that an "otherwise producible" statement "contains classified information." Once a portion of the statement is identified by the government as classified, and declared by the court to be consistent with the witness' testimony, it would be lost to the defendant in the only form permissible for impeachment purposes.

Such a result could hardly be reconciled with the Jencks decision. The Court in Jencks was presented with the issue of government privilege in a rather oblique manner, which elicited guidance for future situations rather than a finding for facts immediately before it:

> In the courts below the Government did not assert that the reports were privileged against disclosure on grounds of national security, confidential character of the reports, public interest or otherwise. In its brief in this Court, however, the Government argues that, absent a showing of contradiction, '[t]he rule urged by petitioner... disregards the legitimate

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> interest that each party - including the Government - has in safeguarding the privacy of its files, particularly where the documents in question were obtained in confidence. Production of such documents, even to a court, should not be compelled in the absence of a preliminary showing by the party making the request.
>
> 353 U.S. at 660-670. But see, contra S.RPT. No.981, supra, p.5 (Court did not in any way deny the privilege of Government papers).

After quoting at length from its own ruling in United States v. Reynolds, 345 U.S. 1 (1953), and from Judge Learned Hand's seminal decision in United States v. Andolschek, 142 F.2d. 503 (2nd Cir. 1944), the Court held that

> the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. [citations omitted] The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession.
>
> 353 U.S. at 672.

Justice Clark, the lone dissenter in Jencks, warned of the danger the Court's majority ruling would unleash with respect to national security:

> Unless the Congress changes the rule announced by the Court today, those intelligence agencies of our Government engaged in law enforcement may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets. This

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> may well be a reasonable rule in state prosecutions where none of the problems of foreign relations, espionage, sabotage, subversive activities, counterfeiting, internal security, national defense, and the like exist, but any person conversant with federal government activities and problems will quickly recognize that it opens up a veritable Pandora's box of troubles. And all in the name of justice.
>
> 353 U.S. at 681-682 (Clark, dissenting)

The public uproar which followed the Jencks decision, fueling the rush to precipitous corrective Congressional action, was largely the result of Justice Clark's inflammatory dissent. See, 103 CONG.REC. 14400 (1957) (remarks of Sen. Ervin); Grossman and Wells, supra, at 830 ("This wholly inaccurate charge, and virtually no other part of the decision, made the press and media headlines the following day and was widely used by members of Congress seeking to reverse the Jencks ruling."); 67 YALE L.J. 674, 680 (1958) ("Popular reaction to the Supreme Court's decision in Jencks was entirely out of proportion to the limited import of the holding... Sparked by [Justice Clark's] statement, the public widely misinterpreted Jencks as allowing far broader rights of discovery than were actually contemplated by the decision.")

The Department of Justice and the FBI pressed the argument for legislative clarification of the Jencks decision by asserting that widespread judicial misinterpretation of the ruling in the lower courts had resulted in orders for pretrial disclosure of statements and reports, disclosure of entire FBI and Secret Service investigative

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files, disclosure of grand jury testimony, and disclosure of other kinds of materials such as lists of potential witnesses. See 103 CONG.REC. 14, 550-554, N.14 (1957) (brief submitted to Congress by the Justice Department). But see 67 YALE L.J., supra, at 683, n. 34 ("No case involved an erroneous court order exposing information which would affect the national security. Most of the disputed information seems of the most trivial significance.")

The resulting legislation, according to the Senate Judiciary Committee, "cleared away" misinterpretations and misunderstandings of the Jencks decision by setting forth a detailed procedure "both to protect individual rights during criminal prosecutions and to protect confidential information in the possession of the Government." See S.RPT. No. 981, supra.

The Jencks Act, as enacted in 1957 and amended in 1970, calls upon the trial court to make two determinations: first, whether the material at issue is a "statement" as defined in 18 U.S.C.§3500(e); and, second, whether such statement relates to the subject matter of the witness' direct testimony. 18 U.S.C. §3500(c). Once these determinations are made in the affirmative, the Act requires the trial court to "order the United States to produce" the statements to the defendant "for his use." There is no third determination based upon the Government's characterization of the material as secret, confidential or otherwise privileged.

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Grounds asserted outside the boundaries of the Jencks Act for nondisclosure of "otherwise producible" material have been repeatedly rejected by the courts. For example, in West v. United States, 274, F.2d. 885 (6th Cir. 1960), cert. denied, 365 U.S. 819 (1961), the Court of Appeals upheld the trial judge's action in excising a portion of a report made by an FBI agent who testified for the prosecution:

> [The trial judge] did not sustain the making of the excisions on the basis of internal security considerations. On the contrary, he held that even though the statements might affect internal security, nevertheless, if they contained matters relevant to the testimony of the witness, they would have to be furnished or the case dismissed.
>
> 274 F.2d. at 890.

Similarly, in Ogden v. United States, 303 F.2d. 724 (9th Cir. 1962), the Court of Appeals commented on the trial court's in camera deletions from requested Jencks materials:

> At one point in the record the trial court stated that it had 'eliminated certain portions [of the statement] which it felt were of a confidential nature for the Federal Bureau of Investigation...' This, if true, would have been error. [cite omitted]. The sole basis upon which the trial court may excise portions of a producible statement is that they 'do not relate to the subject matter of the testimony of the witness.' 18 U.S.C. §3500(c)."
>
> 303 F.2d at 739. See also Lloyd v. United States, 412 F.2d. 1084 (5th Cir. 1969). ("internal government document")

In Dennis v. United States, supra, the Supreme Court concluded that the secrecy privilege generally accorded to grand jury testimony does not bar production of the grand jury testimony of government witnesses pursuant to the Jencks Act.

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Nor would the Court exempt otherwise producible statements on a claim of attorney work-product privilege, Goldberg v. United States, 425 U.S. 94 (1976):

> We see nothing in the Jencks Act or its legislative history that excepts from production otherwise producible statements on the ground that they constitute the work product of Government lawyers."
>
> 425 U.S. at 101.

The clear import of these decisions, with respect to the proposed amendment in S.1482, is reinforced by the language in subsection (d) of the Jencks Act. That provision, with one significant change, codifies the Jencks holding in situations"when the Government, on the ground of privilege, elects not to comply with an order to produce..." 353 U.S. at 672. Although Congress substituted the possibility of striking the witness's testimony for the Court's more peremptory remedy of dismissal, the holding of the Court, that the burden of considering the consequences of disclosing "state secrets and other confidential information" rests, solely with the government and not with the trial judge, was left undisturbed. See, e.g., 103 CONG.REC. 15784 (comments of Sen. Ervin), 15935 (statement of Sen. Hruska) and 16488 (comments of Sen. Javits)(1957). Also, 68 YALE L.J. 1409, 1412 (1959) ("By negative inference, the proposition that institution of a criminal suit constitutes waiver of any governmental privilege was also accepted.")

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Thus each important aspect of S.1482's proposed amendment to the Jencks Act -- i.e., court inspection for inconsistency, court discretion in excision or substitution of summaries where consistency is determined, and Government assertion of privilege to withhold "otherwise producible" statements from the defendant -- runs afoul of the prescriptions of the Jencks decision, the Jencks Act, and a host of authoritative precedents and progeny clarifying the meaning and intent behind both. Their cumulative effect would be to deny criminal defendants to whom they are applied "the right to effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' [cites omitted]. Smith v. Illnois, 390 U.S. 129." Davis v. Alaska, supra, at 318.

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ADDITIONAL PREPARED STATEMENT

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Association of Former Intelligence Officers

AFIO

4 February 1980

Senator Joseph R. Biden, Jr.
Chairman, Criminal Justice Subcommittee
Senate Judiciary Committee
Washington, DC 20510

Dear Senator:

Thank you for your letter of January 14, 1980 inviting me to testify before the Subcommittee on S. 1482, the Classified Information Procedures Act. While I shall be unable to testify I wish to submit this statement and request that it become a part of the hearing record.

The Association of Former Intelligence Officers (AFIO) strongly supports the objectives of S. 1482 and recommends favorable action. For years the courts have attempted to deal with the problem of classified information involved in criminal prosecutions. Various judges have dealt with the matter in different ways and prosecuting attorneys have approached the problem in differing ways.

The defense in many cases will ask the courts to permit use of classified information and in certain of these cases will attempt to thwart prosecution by frivolous demands for classified documents. S. 1482 would establish a procedure and a means of reaching orderly decisions in a particular case. Such legislative guidelines will be most useful for the courts and prosecuting attorneys and will provide a means of dealing with frivolous demands of the defense designed to hide behind the smoke-screen of classified information.

No one believes there can be a simple solution to the problem of classified information in criminal prosecutions. Certainly, S. 1482 is not a panacea but it is a strong constructive approach which will eliminate many problems. In many cases there will remain the necessity for the exercise of careful and reasoned prosecutorial discretion.

Permit me to point out what appears to be a simple error -- the word "intelligence" in line 12 on page 13 of the bill should be "classified".

Thank you again for your invitation to testify. I hope this letter will be useful in the Subcommittee's consideration of S. 1482.

Sincerely,

John S. Warner

John S. Warner
Legal Advisor

JSW:sgb

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