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THE PETER LEE CASE

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

MARCH 29, APRIL 5, and APRIL 12, 2000

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THE PETER LEE CASE

WEDNESDAY, MARCH 29, 2000

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter presiding.

Also present: Senators Grassley, Thurmond, Sessions, and Torricelli.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Good morning, ladies and gentlemen. The hour of 9:30 a.m. having arrived, the subcommittee will now proceed. Our hearing today is a continuation of oversight on the activities of the Department of Justice and related Federal departments and agencies, and we are continuing to take a look at activities which relate to alleged espionage efforts by the People's Republic of China as those efforts relate to the PRC's efforts to become a nuclear power.

In conjunction with the technology transfers, there is an apparent development of this kind of nuclear power by China, and our inquiry is to make a determination as to how effective the Department of Justice and related Federal departments and agencies have been in dealing with that issue.

The subject matter of today's hearing is Dr. Peter Lee, who confessed to two major breaches of security, one involving the disclosure of a hohlraum, which is a very important aspect of nuclear power for nuclear weapons, in 1985, when he made disclosures to key scientists in the People's Republic of China, and later disclosures by Dr. Peter Lee relating to the physics of submarine detection.

We will be looking at a series of questions on the handling of this investigation. One of our inquiries will be directed to finding out why there was not a renewal of warrants under the Foreign Intelligence Surveillance Act, where a renewal was not made by the Department of Justice at a time when there was very substantial information about Dr. Lee's suspect activities.

We will inquire further to determine why the Department of Defense, the Navy, took a stand in issuing a memorandum before there was a damage assessment. The memorandum, according to

the Department of Justice, caused very substantial so-called Brady problems on providing what could have been exculpatory evidence on Dr. Lee's defense, and then a determination as to why the plea bargain was entered into before there was a full damage assessment as to what Dr. Lee had disclosed on the submarine detection issue.

There is a very serious question as to whether the assistant U.S. attorney in charge of the case knew that there had been authorization for the prosecution of Dr. Lee under section 794 which contains the potential of the death penalty and the alternative of a life sentence. I am not saying that Dr. Lee would have been subjected to that, but that he could have been charged. But according to some information, the assistant U.S. attorney was not advised of that.

And then the sentencing occurred without the judge having knowledge of what was in the pre-sentence report—pardon me—the pre-sentence report did not contain the damage assessment and the sentence was imposed where the judge had not been informed of the damage assessment. And where Dr. Lee could have received a very stiff penalty under the applicable laws, he ended up with community service and a fine and probation, and the Government recommendation was only for a short period of incarceration as opposed to asking for anything more substantial than that, another point that the subcommittee will be inquiring into.

That is a very brief statement of some of the issues we will be looking at, so that the witnesses who are here today can direct their attention to those points of inquiry.

We are joined by the distinguished chairman of the subcommittee, Senator Grassley. Again, let me publicly acknowledge my thanks to Senator Grassley for his willingness to cooperate with the subcommittee on this inquiry. We have been colleagues since January 3, 1981, and he handed me the gavel for the limited purpose of conducting this oversight on the Department of Justice.

Senator Grassley.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Well, I am proud to be associated with your leadership in this area because you have a fine record both before coming to the Congress and after coming to the Congress of getting to the truth. So I thank you very much for taking on the additional responsibilities.

I would just like to say a few general comments before you start your testimony, if I could, Senator Specter, and that is that a lot of this work has had to be done behind closed doors, and that is justifiable when much of the information is classified. And that would be true whether it is Waco or whether it is Wen Ho Lee or whether it is this case that we are looking at today, and I hope the public understands that and you would expect it of issues that are of this importance.

There seems to be a common thread throughout each of these cases, and that thread is something that we can talk about so that the public will be informed. We will be seeing that thread pop up during today's hearing. Our investigation into these cases has

shown a pattern of failed coordination between Government agencies.

For whatever reason, agencies, it seems to me, have done a poor job of communicating with each other. It could be a turf battle, it could be negligence, or it could be outright stonewalling, and I would give you a couple of examples. This morning, I think we are going to be treated to what I believe is a gross lack of communication between the Navy and the FBI and the Justice Department in this Peter Lee case.

The FBI and the Department of Justice didn't provide enough information that it had to the Navy so that the Navy could do a proper damage assessment caused by Dr. Lee's disclosures. The Navy, in turn, it seems to me, did nothing to proactively seek out more information that they should have known existed. And a vaguely worded communication from the Navy about the damage caused by Peter Lee probably contributed to the Department of Justice's reluctance to go tougher on Dr. Lee. The Department of Justice did nothing to seek clarification of the vagueness of that memo.

To me, this is a total breakdown of communication and coordination among agencies charged with protecting our national security. In the Wen Ho Lee case, we witnessed the brazen withholding of documents from both Congress and the Justice Department by the Federal Bureau of Investigation. Those documents had a direct bearing on who fell down on the job when the Department of Justice turned back a FISA warrant application from the FBI. The withholding of those documents and the later discovery makes it look like the FBI withheld important information from the Congress and the Department of Justice to hide its own mistakes in that case.

This matter is still under investigation by the task force, and I would just remind the Federal Bureau of Investigation that they are neither above constitutionally-mandated congressional oversight nor are they above accountability from the Department of Justice. Stonewalling by the agency continues to undermine public confidence in Federal law enforcement.

Now, these are just two significant examples that we have uncovered so far of failures of coordination and cooperation between Government agencies and between branches of Government. It is something that I hope the subcommittee's efforts can and will address. I believe it is an area that the chairman and the ranking member, meaning Senator Specter and Senator Torricelli, have shown leadership in, particularly in the crafting of the legislation that builds a consensus on how to fix these problems that we have uncovered. So I look forward to continuing to work with my colleagues as we learn these lessons and we seek corrective action.

Thank you.

Senator SPECTER. Thank you very much, Senator Grassley.

We are joined by our distinguished colleague, Senator Sessions, who brings to this subcommittee's work a very extensive background in law enforcement as U.S. Attorney, attorney general, and a very competent lawyer.

Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Senator Specter. I won't take but just a minute to say that this case strikes me as too much like a number of cases I have seen over the years as a Federal prosecutor when agencies and departments whose employees and contractors are under supervision would just as soon not have the case go to trial. It is just not a pleasant experience for them to have to have their employees come forth and testify and it oftentimes could result in some embarrassment to the supervisors and to the agency involved. I don't know if that is the matter here or not, but that is probably one aspect of it.

I am also troubled that the Department of Justice apparently has not had experienced litigators making these decisions. Too often, those who haven't tried a lot of cases take counsel of their fears. They see the problems and difficulties and lose sight of the moral imperative that if someone is transmitting important secrets of the United States to a foreign power, that is a matter of the most highest national importance and they ought to be prosecuted vigorously and effectively. And if they promise to cooperate and testify truthfully, and if they flunk polygraph tests that say they are not cooperating truthfully, then the Government should not give them a lenient sentence.

Frankly, I think we need to have some people looking at the death penalty for providing some of the breaches of security we have seen in this country. I think we need to make sure that everybody involved in laboratories and top-secret agencies of this Government understand completely that we do not accept this kind of behavior. It is not a college campus mentality that people who violate the law will go to jail for long periods of time.

I think this conclusion of this case is insufficient, in my opinion, and I am interested in trying to figure out what happened. And thank you for providing the leadership on the issue, Senator Specter.

Senator SPECTER. Thank you very much, Senator Sessions.

We are joined by the President Pro Tempore of the U.S. Senate, former chairman of the full committee.

Senator Thurmond, do you care to make an opening statement?

Senator THURMOND. You have had enough talk. I don't think it is necessary.

Senator SPECTER. That is the shortest opening statement in the history of the Judiciary Committee.

We have now been joined by our very distinguished ranking member, Senator Torricelli, whom we give the floor to at this time.

Senator TORRICELLI. I would like to break Senator Thurmond's record. No.

Senator SPECTER. It looks like it is a tie to me.

We have a distinguished panel of witnesses today from the Department of Defense, the Department of Energy, the Department of Justice, including the FBI. And our lead witness to give us an outline as to the activities of Dr. Peter Lee will be Assistant Special-Agent-in-Charge of the Los Angeles Field Office, Mr. Dan Sayner.

Our witnesses are Mr. Stephen Preston, Mr. John G. Schuster, Mr. Dan Sayner, Dr. Richard Twogood, and Dr. Thomas Cook. And before we start the testimony, if you gentlemen will all rise for the administration of the oath?

Do each of you solemnly swear that the testimony and information that you will provide before this subcommittee of the Judiciary Committee of the United States Senate will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. SAYNER. I do.

Dr. TWOGOOD. I do.

Mr. COOK. I do.

Mr. PRESTON. I do.

Mr. SCHUSTER. I do.

Senator SPECTER. May the record show that each of the witnesses has responded "I do."

Mr. Sayner, would you state your full name and title, please?

STATEMENT OF DANIEL K. SAYNER, ASSISTANT SPECIAL-AGENT-IN-CHARGE, LOS ANGELES DIVISION, FEDERAL BUREAU OF INVESTIGATION, LOS ANGELES, CA

Mr. SAYNER. My name is Daniel K. Sayner. I am an Assistant Special-Agent-in-Charge of the Los Angeles Field Office of the Federal Bureau of Investigation.

Senator SPECTER. And what role, if any, did you have on the investigation of Dr. Peter Lee?

Mr. SAYNER. I was the program manager for foreign counterintelligence, which includes espionage investigations.

Senator SPECTER. And for what period of time did you hold that position?

Mr. SAYNER. From November 1996 to present.

Senator SPECTER. So that your tenure encompassed the key portions of the FBI investigation of Dr. Lee?

Mr. SAYNER. Yes, sir.

Senator SPECTER. OK; would you proceed to give a chronology of the FBI investigation of Dr. Lee?

Mr. SAYNER. I have an opening statement to go with that, sir.

Senator SPECTER. You may proceed as you choose. All statements will be made a part of the record, but handle it in any way which is comfortable for you, Dr. Sayner.

Mr. SAYNER. Good morning, Mr. Chairman and members of the subcommittee. I am Daniel Sayner, currently Assistant Special-Agent-in-Charge of the Los Angeles Division of the FBI. I am here this morning to discuss certain aspects of the foreign counterintelligence investigation of Peter Lee conducted by the Los Angeles Field Office.

I would first like to provide the subcommittee with a brief description of my background. I joined the Bureau in 1982 as a special agent. I was assigned to Baltimore and Atlanta to work violent crimes, assigned to New York City from 1984 to 1988 in foreign counterintelligence, then to Washington, DC, as a headquarters supervisor in foreign counterintelligence for 2 years. And then in Newark, New Jersey, from 1990 to 1995, I was in charge of the terrorism task force, and then for 1½ years organized crime and drug

investigations, until I was assigned to the Los Angeles Division as Assistant Special-Agent-in-Charge.

While in Los Angeles, I also oversee other programs which would include civil rights, hate crimes matters, domestic terrorism, international terrorism, national infrastructure protection program, and foreign counterintelligence, and I had that responsibility to oversee in the Peter Lee case.

Mr. Chairman, I would like to reaffirm the FBI's commitment to cooperate with the subcommittee in its important oversight mission. As you know, we have provided subcommittee staff with unprecedented access to our case files and to our personnel. Last month, subcommittee staff traveled to the Los Angeles FBI office, where they interviewed myself as well as Peter Lee case agents, Special Agent Gil Cordova, C-o-r-d-o-v-a, and Special Agent Serena Alston, A-l-s-t-o-n, and their supervisor——

Senator SPECTER. It wasn't just the staff, it was me, too.

Mr. SAYNER. I am coming to that, sir. That was prior to your visit.

And their supervisor, Special Agent James J. Smith. Several weeks later, Mr. Chairman, you also traveled to the Los Angeles FBI office to conduct on-the-record interviews of these FBI agents and others. At your request, we tape recorded and transcribed those interviews in order that you would have a record to utilize at hearings such as this.

I am ready now to provide a chronology of the investigation.

Senator SPECTER. Please proceed.

Mr. SAYNER. In April 1991, the Los Angeles Division opened its case on Peter Lee based on sensitive information. Shortly thereafter, in 1993, we elevated that case to a full investigation, and in February 1994 started technical surveillance on the subject.

In May 1997, Peter Lee traveled to China, and in June 1997 the FBI conducted a nonconfrontational interview of Peter Lee to discuss this trip to China. At that time, knowing before he had made the trip, it was concluded after the interview of Peter Lee that he lied to the FBI, stating that he engaged in no technical scientific discussions with the People's Republic of China, PRC, and that he paid for the trip himself, which was found to be not true.

On August 5, 1997, the FBI again interviewed Lee and he admitted that he lied to his employer, TRW, on post-travel questionnaire about the purpose of his travel and about the contacts during the trip, but maintained at that point that he still paid for the trip.

I can now go into a verbatim on the affidavit regarding the interviews that were conducted August 5 through October 7 through 8, which also included his admissions to passing classified documents in 1985, Senator, if you wish.

Senator SPECTER. Please do.

Mr. SAYNER. On August 5 and August 14, 1997, agents interviewed Peter Lee in a Santa Barbara, California, hotel room. During these interviews, Peter Lee confessed to the agents that he had knowingly lied on both his foreign travel form and post-travel questionnaire regarding the purpose of his trip to the PRC and his foreign national contacts during that trip.

Peter Lee admitted that he traveled to the PRC with the intention of giving scientific lectures to the PRC scientists. In addition,

Peter Lee admitted to agents that he lied when he said that he had not received requests from foreign nationals for technical information, and lied when he said that no attempts were made to persuade him into revealing or discussing classified information.

Peter Lee admitted that he had received requests from foreign nationals for technical information, and attempts were made to persuade him into revealing and/or discussing classified information. Lee also admitted that he did not report personal contact with several PRC scientists January 1993 and April 1994, when they visited the United States.

In answer to specific questions, Peter Lee continued to claim that he had paid for his trip to the PRC with his own money. During the August 5, 1997, interview, Peter Lee agreed to voluntarily take a polygraph examination administered by the FBI. During the August 14, 1997, interview, the agents asked Peter Lee to provide them with any receipts which would verify that he paid for his May 1997 trip to the PRC.

Based on the investigation, we were able to obtain information that Peter Lee did not indeed pay for those trips to the PRC and that the trips were paid by a scientist in the PRC. And in late August, Peter Lee contacted that scientist and requested him to provide receipts indicating that he had made that trip to the PRC, and asked him that those receipts contain his and his wife's name in English and that they were paid in cash.

On September 3, 1997, Peter Lee then provided the agents of the FBI with copies of the hotel and airline receipts for his 1997 May trip to the PRC which appeared to indicate that Peter Lee paid cash to cover his expenses for the trip. Peter Lee indeed did not pay for the trip to the PRC.

On October 7, 1997, Peter Lee voluntarily underwent a polygraph examination at the FBI office in Los Angeles, California, which was administered by an FBI polygraph examiner. According to the polygraph examiner, the examination results indicated deception on three pertinent questions, which were: have you deliberately been involved in espionage against the United States. His answer: no. Have you ever provided classified information to persons unauthorized to receive it? Answer: no. Have you deliberately withheld any contacts with any non-U.S. intelligence service from the FBI? No.

Agents then conducted a videotaped interview of Peter Lee immediately following the administration of the polygraph examination. Peter Lee was told that he appeared to have been deceptive in answering the three questions described above. Peter Lee confessed that he had indeed been deceptive.

In summary, Peter Lee then confessed to having communicated classified national defense information to representatives of the PRC, knowing that it could have been used by the PRC to its advantage. Specifically, Peter Lee confessed to having passed classified national defense information to the PRC twice in 1985, and to lying on his post-travel questionnaire in 1997.

When asked why he did it, Peter Lee told agents that he did it because the PRC "is such a poor country," and one of the scientists asked for his help. Peter Lee said he wanted to bring the PRC's scientific capabilities closer to the United States. Specifically, Peter

Lee described the two events in which he passed the classified information to the scientists of the PRC.

Now, we will go back to the 1985 trip which Peter Lee then describes. The first event during that trip, Peter Lee said that on or about January 9, 1985, while in a hotel room, he met by a Chinese scientist in Beijing, PRC. The scientist asked Peter Lee to help after telling him that China needed help because it was a poor country. Peter Lee described a detailed conversation in which the scientist indicated that he had questions to ask that were classified, that Peter Lee did not have to answer these questions verbally, but could nod his head yes or no.

Peter Lee said he knew the scientist was asking for classified information. The scientist drew for Peter Lee a diagram of what Peter Lee believed was a hohlraum and asked Peter Lee questions about the drawing. Peter Lee specifically remembered answering questions about the hohlraum, what the hohlraum looked like, and where the capsule of the target was located in the hohlraum. Some other questions that the scientist asked Peter Lee he could not specifically answer.

Peter Lee said that he knew this information was classified when he provided it to the scientist. The scientist then told Peter Lee that other PRC scientists would be interested in talking to him. The scientist asked Peter Lee to come the next day to meet with these scientists and Peter Lee agreed.

The second event then occurred when Peter Lee, on or about January 10, 1985, was picked up at his Beijing hotel by a PRC scientist and driven to another hotel where a group of PRC scientists were waiting for him in a small conference room. Peter Lee said for approximately two hours he answered questions from the group and drew several diagrams for them, including several hohlraum diagrams, specific numbers which described the hohlraum design experimental results, and he discussed some problems the U.S. was having in its weapons research, in simulation programs.

Peter Lee also admitted to discussing with the Chinese scientists at least one portion of a classified Department of Energy document which Peter Lee wrote in 1982. This document, titled "An Explanation for the Viewing Angle Dependence of Temperature from Care and Targets," was authored by Peter Lee when he worked at Lawrence Livermore National Laboratory. It was declassified in 1996. Peter Lee said he knew that when he provided this information to PRC scientists in 1985, it was classified. Peter Lee identified several of the Chinese scientists that were in attendance.

On October 14 and 15, agents of the FBI did interviews with Lawrence Livermore to corroborate a lot of this information.

Senator SESSIONS. 1997?

Mr. SAYNER. 1997, yes, sir.

Going back to September 3, Peter Lee provided the fraudulent receipts which he obtained from PRC scientists to the agents, and at that time our technical surveillance had expired. The arrest warrant we had prepared in October, then, was never issued inasmuch as Mr. Lee retained counsel and entered into plea negotiations with the Department of Justice in the Assistant U.S. Attorney's Office in Los Angeles.

On December 8, Dr. Lee pled guilty to one count of violating 18 U.S.C. 793(d), and one count of violating 18 U.S.C. 1001. As part of his plea agreement, Mr. Lee agreed to provide full cooperation with the Government. The FBI conducted a polygraph of Dr. Lee on February 26th, 1998, which showed deception when asked whether he had lied to the FBI since his first polygraph. The FBI followed up with additional discussions, after which Dr. Lee's counsel advised that he would not submit to further polygraph examinations.

The FBI supplemented its arrest affidavit and converted it for use at Dr. Lee's sentencing hearing on March 26, 1998. The fact that Dr. Lee failed the polygraph, the February 26, 1998, polygraph, was included with the affidavit in the form of a declaration from Special Agent Cordova. Therefore, at the time of sentencing the court was made aware that Dr. Lee had shown deception on a polygraph administered after the plea agreement had been entered.

Dr. Lee was sentenced March 26, 1998, to 5 years' suspended sentence with 3 years' probation, 1 year incarceration in a halfway house, and 3,000 hours of community service.

That is all I have, Senator Specter.

Senator SPECTER. Thank you very much, Mr. Sayner. We will proceed with 5-minute rounds of questions by the Senators.

With respect to the warrant under the Foreign Intelligence Surveillance Act, was that renewed while this investigation was being conducted?

Mr. SAYNER. It went through several——

Senator SPECTER. Start the lights at 5 minutes, please.

Mr. SAYNER. Senator Specter, it was initiated February 1994 and it went through several renewal processes up until September 1997, when it expired.

Senator SPECTER. And was it renewed after September 3, 1997?

Mr. SAYNER. No, sir.

Senator SPECTER. With respect to the hohlraum issue, did the potential violation come within the purview of Section 794 which relates in part, "directly concerning nuclear weaponry," to raise the potential of a sentence of life imprisonment or death?

Mr. SAYNER. At the time that it was passed in 1985, yes, sir.

Senator SPECTER. Was there an authorization given, according to the FBI records, for a charge to be made under section 794 if there was not a plea agreement to a slightly reduced charge?

Mr. SAYNER. There were discussions between Internal Security Section, Department of Justice, and the Assistant U.S. Attorney's Office on the use of 794 as leverage in the plea agreement or plea negotiations.

Senator SPECTER. And was authorization given that there could be a prosecution under 18 U.S.C. 794?

Mr. SAYNER. That, I think, is something you need to discuss with the Assistant U.S. Attorney, Jonathan Shapiro. It is my understanding that he was orally advised that he could use it in his negotiations.

Senator SPECTER. Is there an e-mail among the FBI records which states the following, "according to J.J., ISS/Dion said that if R.T. doesn't accept the plea proffer, then he gets charged under 18 U.S.C. 794, the heftier charge?"

Mr. SAYNER. Yes, sir.

Senator SPECTER. And who is J.J.?

Mr. SAYNER. He is Supervisory Special Agent James J. Smith, who was the line supervisor for this investigation.

Senator SPECTER. And who is ISS/Dion?

Mr. SAYNER. He is a trial attorney with the Internal Security Section of the Department of Justice.

Senator SPECTER. And who is R.T.?

Mr. SAYNER. That is a code name for the case at the time, Royal Tourist.

Senator SPECTER. With respect to the hohlraum material and declassification, what occurred?

Mr. SAYNER. I don't think I have the technical expertise to address the hohlraum and when it was declassified, sir.

Senator SPECTER. With respect to the plea agreement for cooperation from Dr. Lee, what, in fact, occurred on that after the post-plea interviews?

Mr. SAYNER. He was interviewed approximately ten times, one of which there was a polygraph administered which he failed. That information that he failed the polygraph was provided as a declaration to the affidavit that was submitted to the sentencing judge. His cooperation was limited at that point, sir.

Senator SPECTER. What do the FBI records show with respect to the earliest point at which Dr. Lee—the information showed that Dr. Lee was compromising the anti-submarine information? Was that as early as the 1990's?

Mr. SAYNER. It would be—he began work at TRW in 1991. It appears that his trip in 1997, he may have compromised some anti-submarine warfare technical information at that point.

Senator SPECTER. And was that information compromised as early as the early 1990s?

Mr. SAYNER. We don't have it documented as occurring. It could have, since he worked at TRW.

Senator SPECTER. What information did Dr. Lee write about in 1999?

Mr. SAYNER. Dr. Lee—in 1999?

Senator SPECTER. 1995. That was the date of that article which Dr. Lee wrote.

Mr. SAYNER. I have provided that information. Let me find it here. All I have, Senator, is the title of the article. I don't know the content.

Senator SPECTER. Let me yield at this time to—my time is expired. I will yield to Senator Torricelli.

Senator TORRICELLI. Thank you, Mr. Chairman, very much.

Mr. Sayner, when the FISA coverage of Dr. Lee expired in September of 1997, was there consideration given to reapplying for FISA coverage?

Mr. SAYNER. Yes, sir.

Senator TORRICELLI. And what was the determination?

Mr. SAYNER. We made an application to our headquarters and there was discussion between our headquarters and the Department of Justice to renew the FISA at that time.

Senator TORRICELLI. And what was the determination?

Mr. SAYNER. Not to renew.

Senator TORRICELLI. And on what was that judgment based?

Mr. SAYNER. I think one of the key points was the information in the preceding 90 days which you have to use to renew FISAs was stale.

Senator TORRICELLI. It was considered stale, after only 90 days?

Mr. SAYNER. Yes.

Senator TORRICELLI. Do you consider, based on your experience, that 90 days has been an operational standard in all cases in which you have been involved?

Mr. SAYNER. I can't really speak for negotiations between our headquarters and DOJ, but——

Senator TORRICELLI. The only thing I know that goes stale in 90 days is a loaf of bread. That does not seem to me to be very much of a history.

Mr. SAYNER. The FISA had been ongoing for several years, and they took the take of the FISA into account to make that judgment, also, not only——

Senator TORRICELLI. But you don't personally feel that you have enough experience with these cases to know whether or not 90 days is the standard?

Mr. SAYNER. That alone shouldn't be the standard for——

Senator TORRICELLI. That alone should not be the standard?

Mr. SAYNER. You should take in previous—what occurred in a case previously to 90 days.

Senator TORRICELLI. So who made this judgment ultimately not to proceed with the FISA request?

Mr. SAYNER. It would be Department of Justice Office of Intelligence Policy Review.

Senator TORRICELLI. And to the best of your knowledge, that is where the judgment was made?

Mr. SAYNER. Yes.

Senator TORRICELLI. Do you believe that the Department of Defense and the Navy genuinely understood and were informed by the FBI of the severity of Dr. Lee's revelations to the Chinese?

Mr. SAYNER. We passed the information that we had to our headquarters. It is my understanding that they passed it on to the Department of the Navy.

Senator TORRICELLI. You don't know for a certainty, however?

Mr. SAYNER. No.

Senator TORRICELLI. Therefore, you are not in a position really to know either whether the Department of Defense or the Navy knew that if they did not participate and cooperate that there might never be a case developed against Dr. Lee?

Mr. SAYNER. No, Senator, I am not.

Senator TORRICELLI. You are not aware of that either.

Thank you, Mr. Chairman.

Senator SPECTER. Senator Grassley.

Senator GRASSLEY. Mr. Chairman, I am not going to have any questions. And I also wanted to explain that the Budget Committee is marking up the budget, so I am going to have to be gone the rest of the morning.

Senator SPECTER. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Sayner, during an interview with the staff of this committee regarding the Peter Lee investigation, FBI Field Supervisor John Smith stated that the Foreign Intelligence Surveillance Act, or FISA, process is very slow, especially with so many levels of approval having to sign off.

Would you please describe the FBI review and approval process regarding the application for a FISA warrant?

Mr. SAYNER. Senator, the field would prepare a document, the letterhead memorandum, which would be an extensive summary of the investigative results that would be forwarded to our headquarters for review and then transmitted to the Office of Intelligence Policy and Review at the Department of Justice, where an application would be made for a FISA warrant. A FISA court would be held and a judge would then sign that FISA warrant, sir.

Senator THURMOND. Mr. Sayner, what suggestions or recommendations can you make to this committee that you believe would streamline the FISA review and approval process in order to enhance and prioritize this law enforcement tool and its use by field investigative personnel?

Mr. SAYNER. Senator, I understand that the Director met about this issue recently and he supported the committee's recommendation for legislative change which would include the staleness factor being reviewed and not as much weight put on the 90-day staleness of information.

Senator THURMOND. Mr. Sayner, Special Agents Cordova and Alston stated to the staff members of this committee that Dr. Lee was not truthful and was not cooperative when they interviewed him after the plea bargain was entered into. This interview took place prior to sentencing. Would you explain how this lack of truthfulness and lack of cooperation was ultimately reported to the court, and if not reported, why not?

Mr. SAYNER. Senator, that lack of cooperation, as I stated earlier, was attached to the affidavit in the form of a declaration of Special Agent Cordova that was used—that was provided to the sentencing judge.

Senator THURMOND. Thank you, Mr. Chairman.

Senator SPECTER. Thank you very much, Senator Thurmond.

Senator Sessions.

Senator SESSIONS. Mr. Sayner, I am looking at the affidavit of Gilbert Cordova for complaint and arrest warrant that was prepared. In it, he says Peter Hoong-Yee Lee, an American citizen and employee of TRW, Inc., has been acting clandestinely, corruptly, and illegally as a conduit of classified information to the PRC, the People's Republic of China. By his actions, he has committed violations of 18 U.S.C. 793(d); that is, with reason to believe that it would be used to the injury of the United States and the advantage of a foreign nation, he has unlawfully and knowingly conspired to communicate, transmit, and deliver to representatives of a foreign government, specifically the PRC, information relating to the national defense of the United States.

That is a pretty serious charge.

Mr. SAYNER. Yes, sir.

Senator SESSIONS. That was under your supervision?

Mr. SAYNER. Yes, sir.

Senator SESSIONS. Were you the Assistant Special-Agent-in-Charge of the Los Angeles field office?

Mr. SAYNER. Yes, sir.

Senator SESSIONS. And you had foreign counterintelligence under your supervision?

Mr. SAYNER. That is one program of several, yes, sir.

Senator SESSIONS. One of the programs you had. Did Agents Cordova and Alston report directly to you or was there another level of reporting?

Mr. SAYNER. Their supervisor—actually, Agent Cordova was an agent in one of our resident agencies at that time, Redondo Beach, which had its own line supervisor. But a determination to streamline case reporting was that SA Cordova, along with SA Alston, who is on a headquarters Los Angeles city squad, would report to one supervisor, and that is the supervisor James J. Smith.

Senator SESSIONS. And Smith reported to you?

Mr. SAYNER. Yes, sir.

Senator SESSIONS. So who in terms of dealing with the Department of Justice and the United States Attorney in Los Angeles—well, first, let me ask you, were your primary communications with the Department of Justice with the assistant U.S. attorney or the U.S. attorney in Los Angeles, or were they with Washington?

Mr. SAYNER. Well, in an espionage case the U.S. Attorney's Office isn't aware. Initially, the call to go into prosecution on an espionage case or an intelligence case, to be converted into a criminal matter, is made at the Department of Justice, and that is in consultation with our headquarters here. So there are discussions between our headquarters substantive desk here, and in this case it would be ISS, Internal Security Section, of the Department of Justice.

Senator SESSIONS. Now, who talks with whom? Does the paperwork go up through the FBI to the FBI headquarters and they talk to the Department of Justice, or were Department of Justice employees and attorneys at this time dealing directly with Agents Cordova and Alston who were working the case?

Mr. SAYNER. Senator, the reporting would go to our headquarters, who would then go to DOJ.

Senator SESSIONS. So to your knowledge, there was little, if any, direct contact between the Department of Justice people who were reviewing this case and the actual agents investigating it?

Mr. SAYNER. Not until they notified and we briefed in the U.S. Attorney's Office in California. At that time, most of the communications were between the Department of Justice and Assistant U.S. Attorney Jonathan Shapiro.

Senator SESSIONS. With regard to the plea agreement that was entered into, who called the shots on that?

Mr. SAYNER. That would be in the purview of the U.S. Attorney's Office, with consultations with us.

Senator SESSIONS. What about the Department of Justice in Washington? Is that Mr. Dion?

Mr. SAYNER. Yes, they would be involved also, sir.

Senator SESSIONS. They would be involved. Is anybody assuming final responsibility for this plea bargain, if you had to state here—

you are under oath—who was responsible finally for the approval of this plea bargain?

Mr. SAYNER. The Department of Justice.

Senator SESSIONS. And would you say that was delegated to the Los Angeles U.S. Attorney's Office or was it to Mr. Dion in Washington, or did the Attorney General herself sign off on it?

Mr. SAYNER. Sir, that is something I think that should be asked of the Department of Justice, U.S. Attorney's Office.

Senator SESSIONS. But as you understand it, the Department of Justice handles the pleas and does the plea agreement. The FBI does not have the final say-so in that.

Mr. SAYNER. The FBI would still have some input with the U.S. Attorney's Office in his negotiations with the Department of Justice, yes, sir.

Senator SESSIONS. Now, you indicated that in October, after these interviews, this arrest warrant affidavit was prepared, and then it was not issued because the defendant, Lee, got counsel and entered into plea discussions. Is that right?

Mr. SAYNER. Yes, sir.

Senator SESSIONS. How soon after this was prepared did that occur?

Mr. SAYNER. It was occurring almost simultaneously.

Senator SESSIONS. So throughout all this bureaucratic process, the people in the headquarters of the FBI, local FBI, local assistant U.S. attorneys, and U.S. attorneys in Washington—within days, a plea agreement was reached?

Mr. SAYNER. There were several items that had to be straightened out, including attempting to get the classified documents from DOD, getting authority to use those possibly in a trial on 794, or if 793 went to trial; discussions with scientists regarding the results of the discussions that——

Senator SESSIONS. Well, I guess my time is out, but my question was——

Senator SPECTER. That is all right. Go ahead, Senator Sessions.

Senator SESSIONS. How did this happen so quickly? How do we have a plea agreement so quickly after this interview in which he made confessions? It seems to me like this is a matter of national importance, and very great care should have been undertaken before up and committing to a plea agreement without fully understanding the ramifications of it.

Mr. SAYNER. I don't think we went into a plea agreement immediately. It was actually entered early December. We had to know what we could go——

Senator SESSIONS. It would be in October he made the confession. In early December, you were entering a plea.

Mr. SAYNER. The plea was entered in early December.

Senator SESSIONS. That is still pretty quick, isn't it?

Mr. SAYNER. Yes.

Senator SESSIONS. And you probably reached the agreement sometime before the plea actually went down in court. How long before?

Mr. SAYNER. Well, during that time again, Senator, we had to find out or figure what we had a result of that confession. We weren't expecting to get all the information that we did in that Oc-

tober confession. We were very fortunate to the degree of the experience of the two special agents that interviewed Mr. Lee. We got a lot of information that had to be corroborated, and we also had to find out just where it was as far as the classification process.

Senator SESSIONS. Well, I guess that was my concern. It seems like there was quite a fast moving to a guilty plea and some decisions were made that look to me to have been made in haste, such as according to the affidavit of Agent Cordova, Lee confessed to having passed classified national defense information to the PRC twice in 1985 and once in 1997. Yet, 1997 seemed not to be a part of the plea agreement.

Mr. SAYNER. Senator, those questions should be best directed to Assistant U.S. Attorney Jonathan Shapiro.

Senator SESSIONS. Well, I will just say, Mr. Chairman, it seemed like to me there were some big decisions being made in an awfully hurried point of time.

Senator SPECTER. I think the record will bear you out on that. Senator Thurmond.

Senator THURMOND. I have another engagement and have to leave. I will ask that the rest of my questions be answered for the record.

Senator SPECTER. We will do just that, Senator Thurmond. Thank you very much.

We are in the last stages of a vote and we will recess very briefly and we will return very promptly to proceed with the hearing. Thank you.

[The subcommittee was recessed from 10:21 a.m. to 10:45 a.m.]

Senator SPECTER. Mr. Sayner, let me review some of the material on information which has been provided by the FBI to the subcommittee on unclassified comments. And if anything comes up which is classified, I know I don't have to say to you, say so, and we will do it in closed session. But these have all been reviewed by my staff and the FBI, and I want confirmation from you as to the January 7, 1997, Los Angelas headquarters teletype that, "The FBI investigation raised concerns that Dr. Lee could have been compromising antisubmarine information in the early 1990's."

The first question is, is that in the teletype?

Mr. SAYNER. That information would be correct. I am not aware of that teletype. Since he worked at TRW and that was the area of his expertise, that was our fear, yes, Senator.

Senator SPECTER. You say you are or are not aware of the teletype?

Mr. SAYNER. I don't know the content of that communication, sir.

Senator SPECTER. Well, are you familiar with the fact that the FBI provided to the subcommittee this data that on January 7, 1997, there was an Los Angelas headquarters teletype that I just read?

Mr. SAYNER. If that was provided by Los Angelas, then that is the information that was put together.

Senator SPECTER. Well, the question is whether you know it was provided by the FBI.

Mr. SAYNER. No, I was not aware of that particular document, no, Senator.

Senator SPECTER. Ms. Kalisch, for the record would you confirm that that teletype has been provided to the subcommittee?

Ms. KALISCH. The teletype itself has not been provided. We have provided access to your staff.

Senator SPECTER. Would you step forward here so we can hear you?

Ms. KALISCH. I believe that your staff has had access to our documents, including that teletype.

Senator SPECTER. Well, the question is, for the record, has the FBI provided to the subcommittee this information, quote, "January 7, 1997, Los Angelas HQ teletype, 'the FBI investigation raised concerns that Dr. Lee could have been compromising anti-submarine information in the early 1990s.'"

Ms. KALISCH. Yes, sir, that is correct.

Senator SPECTER. And would you identify yourself for the record, please?

Ms. KALISCH. My name is Eleni Kalisch, that is K-a-l-i-s-c-h.

Senator SPECTER. And your position?

Ms. KALISCH. I am Special Counsel in the Office of Public and Congressional Affairs.

Senator SPECTER. Thank you.

For the record, again, Mr. Sayner, would you confirm that the FBI has provided this information—or maybe it will be Ms. Kalisch again—August 28, 1997, Los Angelas Headquarters, NSD, "In August 1997, the FBI was aware that allegedly in the early 1980's Dr. Lee gave the Chinese classified information that greatly assisted their nuclear weapons program?"

The question is has the FBI provided that information to the subcommittee?

Mr. SAYNER. It was the 1985 results of the confession going back to the mid-1980s, and possibly with his previous trips to the PRC that would be a conclusion, yes, Senator.

Senator SPECTER. Ms. Kalisch, you have nodded in the affirmative. Would you confirm that, please?

Ms. KALISCH. That is correct.

Senator SPECTER. OK, and similar confirmation that in June 1998, in the Royal Tourist FBI analysis, one of the scientists said, quote, "It seems likely that Peter Lee at least partially compromised every project, classified or unclassified, he was involved with at Livermore, LLNL, and TRW."

Can you confirm that, Mr. Sayner?

Mr. SAYNER. Yes, Senator.

Senator SPECTER. Ms. Kalisch, can you confirm that?

Ms. KALISCH. Yes, sir.

Senator SPECTER. And on April 3, 1998, "FBI files indicated that Dr. Lee gave the antisubmarine lecture not once, but twice, with the second lecture coming several days after the first and in a different city." Can you confirm that, Mr. Sayner?

Mr. SAYNER. Yes, Senator.

Senator SPECTER. Ms. Kalisch.

Ms. KALISCH. Yes, sir.

Senator SPECTER. Mr. Sayner, are you able to confirm that the Department of Defense and Navy did not have the transcripts and

the tape of Dr. Lee's confession at the time Mr. Schuster wrote the memorandum of November 14, 1997?

Mr. SAYNER. I am not able to confirm that, no, sir.

Senator SPECTER. Well, do you know when the transcript and tape was transmitted to the Department of the Navy?

Mr. SAYNER. No, Senator. I can get that information, though.

Senator SPECTER. Well, Agents Cordova and Alston have that information, but you do not?

Mr. SAYNER. I don't have the date that it was transmitted to our headquarters, no, Senator.

Senator SPECTER. Well, OK. It may be necessary to bring in Agents Cordova and Alston to get that kind of information.

Are you in a position to confirm that the damage assessment which was completed in February of 1998 was not provided to Judge Hatter, the sentencing judge, for his consideration imposing sentence?

Mr. SAYNER. No, Senator.

Senator SPECTER. Senator Torricelli.

Senator TORRICELLI. Nothing at this time, Mr. Chairman.

Senator SPECTER. Senator Sessions?

Senator SESSIONS. This is a troubling memorandum. What troubles me on the most basic level is that you had evidence that Mr. Lee was not cooperating. I am sure that Senator Specter before I did noted the part where you said you were more interested in gaining intelligence that punishing felons, which I think is an unwise way to articulate the matter.

But this was in November. As I understand it, prior to the entry of the plea, he had flunked the polygraph test and the judge was advised of that.

Mr. SAYNER. Correct, Senator.

Senator SESSIONS. But isn't it a fact that particularly in a case of espionage, an espionage-type case, that a judge is going to tend to rely on the recommendations of the FBI and the Department of Justice, and it is your responsibility to make sure when a plea is recommended that it is a good one? Would you agree with that?

Mr. SAYNER. I agree, yes, sir.

Senator SESSIONS. Did the FBI recommend this plea agreement and support this plea agreement, or who initiated it? As I read this, it looks like the FBI recommended to the Department of Justice that the plea go down in a light fashion.

Mr. SAYNER. No, it wasn't—it is not our recommendation, sir. It is the Department of Justice.

Senator SESSIONS. Well, you told me earlier you talked with them about it.

Mr. SAYNER. We spoke to pre-sentencing that prepares the report for the judge that gives out the sentence. Both agents and I believe Jonathan Shapiro had an opportunity to talk to pre-sentencing to give them all the details of his not being cooperating with us and his deception.

Senator SESSIONS. All right. Well, let me go back to this point. Do you now dispute that the affidavit that Cordova filed saying that Lee had confessed to 1997 violations of the law—do you dispute the accuracy of that or do you continue to believe that was accurate?

Mr. SAYNER. That was accurate.

Senator SESSIONS. So we go down to a plea now and I want to know, did the FBI and Mr. Shapiro—were they in accord with this recommendation? I am sure you discussed it—Mr. Shapiro, what are we going to recommend—recognizing ultimately the Department of Justice attorney speaks for the Department of Justice and the FBI. But did you agree with his recommendation or not?

Mr. SAYNER. The departmental attorney from ISS—I think it is Michael Liebman—actually flew out here and had discussions with Jonathan Shapiro.

Senator SESSIONS. ISS. That is the Department of Justice?

Mr. SAYNER. Yes, Internal Security Section, sir. They had discussions, and I know there was a great deal of frustration on the part of Jonathan Shapiro and that he just was not given enough leverage to be able to use 794, and that may have been what went into his reasoning if he did go along with the sentencing that was approved by the Department of Justice.

Senator SESSIONS. And Mr. Shapiro was the person handling the case?

Mr. SAYNER. That is correct, sir.

Senator SESSIONS. He was living with it on the ground in Los Angeles?

Mr. SAYNER. He was the assistant U.S. attorney.

Senator SESSIONS. And it was assigned to him?

Mr. SAYNER. Yes.

Senator SESSIONS. So you noted frustration from Mr. Shapiro in terms of what information or for what leverage or ability he was given to charge more serious charges?

Mr. SAYNER. Yes.

Senator SESSIONS. And that was denied him by the Department of Justice, Mr. Liebman?

Mr. SAYNER. I don't know what went on between their discussions. I just know——

Senator SESSIONS. But apparently he was not being given the liberty to be as aggressive as he would like to be. That is your impression?

Mr. SAYNER. That is my impression, yes, sir.

Senator SESSIONS. Now, with regard to this plea, was the FBI told we want to recommend this, do you agree?

Mr. SAYNER. Yes.

Senator SESSIONS. And what did the FBI respond?

Mr. SAYNER. Our reasoning was that if he had a period of confinement, which we felt he would get out of this, we would have more time to debrief him to find out what else he may have done and more serious intelligence matters that may have occurred if he had been incarcerated for at least a year.

Senator SESSIONS. But, of course, there was no need to rush this plea in any case, was there? I mean, the plea could have been taken 6 months later.

Mr. SAYNER. I can't answer for the process.

Senator SESSIONS. Well, you are an experienced agent. You know that if a person comes in with a lawyer and wants to plead guilty and you want to discuss some things and work out some details, you don't have to run to court tomorrow to offer a plea. I mean,

you can hold that off, keep it secret, and nobody would know for months, even years. Isn't that right?

Mr. SAYNER. But I would have to—I can't think for Jonathan Shapiro or ISS. They may have felt that this was the best they could do to get it, and that we could get—the national security reward of having him confined and being able to access for him while he is incarcerated would outweigh not rushing a plea. He may have not negotiated a plea any further.

Senator SESSIONS. Well, Mr. Sayner, the point is this. Once that plea is taken and the judge imposes a sentence, the leverage is gone. You have no leverage, isn't that correct?

Mr. SAYNER. That is correct.

Senator SESSIONS. And why did not the FBI, who apparently wanted further intelligence, take the position that if he flunked the polygraph test which indicated he was not fully cooperative on what he was sharing with the FBI—why would you want to go on and rush this plea and give him this sweetheart deal?

Mr. SAYNER. I can't answer that. That was—I can't answer that, Senator.

Senator SESSIONS. Well, maybe you can tell me why all references to Peter Lee's confession as it related to the 1997 disclosures were omitted from Agent Cordova's two sworn affidavits for sentencing purposes. They were submitted to the Federal judge. Why was that left out?

Mr. SAYNER. That was—the only thing he was charged in 1997 with was 1001 because we were having difficulty getting a read on the classification of the material that may have been passed in 1997 from DOD.

Senator SESSIONS. What was the 1001 false statement?

Mr. SAYNER. That is lying to——

Senator SESSIONS. To the agent?

Mr. SAYNER. Lying to the agent on the travel.

Senator SESSIONS. But it appeared that, and his lawyer argued, did he not, to the judge that he hadn't done anything wrong since 1985? Why wasn't the judge told there were very serious matters involving 1997?

Mr. SAYNER. The judge was apprised through pre-sentencing of everything that occurred in this investigation.

Senator SESSIONS. Well, it is not in the pre-sentence report, I don't believe.

Mr. SAYNER. Presentence was advised by the two agents, and I believe Jonathan Shapiro, on everything that had occurred.

Senator SESSIONS. Well, the fact is ultimately there was a question of the will and determination of the prosecutor and the FBI to reject this plea or accept it.

The way I would see it, Mr. Chairman, is the opportunity was there. What normally should have happened in any two-bit robbery case or whatever you are prosecuting in the country is if the person agrees to cooperate and you run a polygraph and he flunks it, then you don't go forward with the plea. You say we are going to go to the wall; we are going to lock you up as long as we can unless you want to tell the full truth.

Were you able to obtain any valuable information from Mr. Lee, if you are able to say that in this hearing?

Mr. SAYNER. At the debriefings, afterwards?

Senator SESSIONS. After the plea went down.

Mr. SAYNER. No, sir.

Senator SESSIONS. Which is not unusual, is it?

Mr. SAYNER. No, sir.

Senator SESSIONS. Once he got his sentence and his halfway house 6 months and his little fine, he had no incentive to cooperate any further.

Mr. SAYNER. Correct, sir.

Senator SESSIONS. And under the law, double jeopardy would apply and he couldn't be reprosecuted for it, is that right?

Mr. SAYNER. Right.

Senator SPECTER. Well, are you sure about that now? I don't want this record to close off——

Senator SESSIONS. Well, that is a good question. It may not.

Senator SPECTER. I don't want to answer for Mr. Sayner, but that is a complex legal question and it may well be that there is still a possible prosecution for the 1997 disclosures.

Senator SESSIONS. I would just say that with regard to what he pled to, he couldn't be resentenced or sentenced any more severely for it.

Senator SPECTER. I agree with you about that, Senator Sessions.

Senator SESSIONS. And I would withdraw my other statement as being overbroad, as the chairman, a good prosecutor, knows.

Senator SPECTER. Senator Sessions, let me associate myself with your remarks about the questionable plea bargain, and we are going to get into that in greater detail. And I think it is true that Mr. Sayner does not have the information which Mr. Shapiro has, or Mr. Liebman, and we haven't been able to talk to Mr. Liebman, which is why we had to issue a subpoena for him. But we will have that hearing next week.

[The prepared statement of Mr. Sayner follows:]

PREPARED STATEMENT OF DANIEL SAYNER

Good morning, Mr. Chairman and members of the Subcommittee. My name is Daniel Sayner and I currently serve as Assistant Special Agent in Charge (ASAC) of the Los Angeles Division of the FBI. I am pleased to be here this morning to discuss certain aspects of the foreign counterintelligence investigation of Peter Lee conducted by my office.

I would first like to provide the Subcommittee with a brief overview of my FBI employment. I have been a Special Agent with the FBI for eighteen years. Upon joining the Bureau in 1982, I was assigned primarily to violent crimes investigations in both the Baltimore and Atlanta Divisions. From 1983 to 1988, I was assigned to Foreign Counterintelligence, or FCI, investigations, in the New York Division followed by two years as FCI supervisor at Headquarters in Washington, DC. From 1990 to 1995, I was assigned to the Terrorism Task Force in Newark, New Jersey and also served as the Organized Crime Drug Coordinator in Newark.

Since November 1996, I have served in my current position as ASAC of the Los Angeles Division. As ASAC, my responsibilities include Program Manager of several important FBI programs including Civil Rights, Hate Crimes, Domestic Terrorism, National Infrastructure Protection, and Foreign Counterintelligence. It is as FCI Program Manager that I have had responsibility for overseeing the Peter Lee investigation.

I understand that the Subcommittee would like for me to provide a chronology of the FBI's involvement in the Peter Lee investigation, from the time the case was opened in 1991 until the time that Dr. Lee was sentenced in 1998. I am happy to do so.

* * * * * * *

4/1991—FBI opens Preliminary Inquiry on LEE.
3/1993—FBI opens Full Field Investigation on LEE.
2/1994—FBI initiates technical surveillance on LEE.
5/1997—LEE travels to China.
6/1997—FBI conducts non-confrontational interview of LEE to discuss his trip to China; LEE lies to FBI by stating that he engaged in no technical scientific discussions with the PRC and that he paid for the trip.
8/5/1997—FBI again interviews LEE; he admits that he lied to his employer, TRW, on post-travel questionnaire about the purpose of his trip and about contacts during the trip, but maintains that he paid for the trip.
8/14/1997—FBI again interviews LEE and asks him to produce receipts to prove he paid for trip to China. Also, LEE agrees to take polygraph.
8/25/1997—LEE contacts PRC scientist (GUO HONG) and asks him to provide fraudulent receipts indicating that LEE paid for the trip to China.
9/3/1997—LEE provides FBI with fraudulent receipts; technical surveillance expires.
10/7–8/1997—FBI interviews LEE and he confesses to unauthorized disclosure of confidential information to PRC in 1985 and in 1997.

At this point, Mr. Chairman, I would like to step back in time and discuss the 1985 disclosures that Dr. Lee confessed to in the October 7, 1997 interview.

1/9/85—LEE visited China and was approached by an individual (CHEN NENGKUAN) who asked LEE technical questions and suggested that LEE shake his head yes or no. LEE was aware that his responses were disclosing classified information relating to hohlraums.
1/10/1985—LEE is taken (by CHEN NENGKUAN) to meet with PRC scientists (including YU MIN) to provide the hohlraum information.

Following Dr. Lee's confession on October 7 and 8, 1997, the FBI consulted nuclear weapons experts at the Department of Energy regarding the substance of Dr. Lee's confession. According to DOE experts, the information Dr. Lee admitted to disclosing to the PRC was, in fact, classified. On October 21, 1997 the FBI completed a draft affidavit for the arrest of Dr. Lee on charges of Title 18 USC Section 793(d) (attempting to transmit national defense information in aid of a foreign government) and Title 18 USC Section 1001 (making a material, false statement to a federal official).

The arrest warrant was never issued for Dr. Lee inasmuch as he retained counsel and enterer plea negotiations with the Department of Justice. On December 8, 1997, Dr. Lee pled guilty to one court of violating Title 18 USC Section 793(d) and one count of violating Title 18 USC 1001. As part of his plea agreement, Dr. Lee agreed to provide full cooperation with the government. The FBI conducted a polygraph of Dr. Lee on February 26, 1998 which showed deception when asked whether he had lied to the FBI since his first polygraph. The FBI followed up additional discussion, after which Dr. Lee's counsel advised that he would not submit to further polygraph examination.

The FBI supplemented its arrest affidavit with a declaration stating that Dr. Lee had shown deception on the February 26, 1998 polygraph examination. The declaration and the arrest affidavit, which had been converted to a government pleading, were presented to the court at Dr. Lee's sentencing hearing on March 26, 1998. Therefore, at the time of sentencing, the court was made aware that Dr. Lee had shown deception on the polygraph administered after the plea agreement had been entered.

Dr. Lee was sentenced on March 26, 1998 to a five-year suspended sentence with three years probation, one year incarceration in a half-way house and 3000 hours of community service.

Mr. Chairman, I would like to conclude by reaffirming the FBI's commitment to cooperate with the Subcommittee in its important oversight mission. As you know, we have provided the Subcommittee Staff with unprecedented access to our case files and to our personnel. Last month, Subcommittee Staff traveled to the Los Angeles FBI office where they interviewed myself as well as the Peter Lee case agents, SA Gil Cordova and SA Serena Alston, and their supervisor, SSA J.J. Smith. Several weeks later, Mr. Chairman, you also traveled to the Los Angeles FBI office to conduct on-the-record interviews of these FBI agents and others. At your request, we tape interviewed and transcribed those interviews in order that you would have a record to utilize at hearings such as this.

I would like to thank the Subcommittee for allowing me the opportunity to testify this morning. I will be happy to respond to any questions you may have.

Senator SPECTER. Dr. Twogood, thank you very much for joining us. We turn to you at this point. Would you give us your full name and position for the record?

STATEMENT OF RICHARD TWOGOOD, FORMER PROGRAM LEADER, IMAGING AND DETECTION PROGRAM, LAWRENCE LIVERMORE NATIONAL LABORATORY, LIVERMORE, CA

Dr. TWOGOOD. Richard Twogood, and I am Deputy Associate Director for Electronics Engineering at the Lawrence Livermore National Laboratory.

Senator SPECTER. And that is part of the Department of Energy?

Dr. TWOGOOD. Yes.

Senator SPECTER. And would you state briefly your qualifications, your background and your experience, education?

Dr. TWOGOOD. I have a short statement I will read. Mr. Chairman, I appreciate the opportunity to appear before your subcommittee to testify regarding your assessment of how the Peter Lee investigation was conducted.

Since 1996, I have held the position of Deputy Associate Director for Electronics Engineering at the Lawrence Livermore National Laboratory. In that role, I manage the 750-person department which provides electronics engineering support to all laboratory programs.

From 1988 to 1996, I held the position of Program Leader for the Imaging and Detection Program at LLNL. The single largest project in that program was the Joint UK/US Radar Ocean Imaging Program, which was a DOD-sponsored program executed by OASDI/C3I in the Department of Defense. LLNL was the lead U.S. technical organization, and I was the Technical Program Leader for the Joint UK/US Radar Ocean Imaging Program from 1990 through 1995. Peter Lee worked as a contractor employed by TRW on that same OSD program.

The Joint UK/US radar program has made important discoveries and significant advances in the development of methods to detect submarine signatures with remote sensing radars. Many of the important details of this work are classified. While at TRW, Dr. Lee had access to these results at the DOD secret level. Dr. Lee also admitted to revealing classified information regarding this program while in China in 1997.

To fully understand what may have been inappropriately revealed to the Chinese, as well as its potential significance, requires a detailed analysis of Dr. Lee's statements and an understanding of the R&D thrusts of the Joint UK/US radar program. A complete analysis would require discussion of classified material. Several such discussions have taken place since 1997 within the Department of Justice and most of these issues have been explored in some detail.

I welcome the opportunity to assist the committee in addressing any concerns you have regarding these issues. Thank you.

Senator SPECTER. Thank you very much, Dr. Twogood. Did you have occasion to examine the transcript and videotape of Dr. Lee's confession?

Dr. TWOGOOD. Yes.

Senator SPECTER. And what was the appropriate classification for the kinds of information that he turned over to scientists from the People's Republic of China?

Dr. TWOGOOD. Peter himself admitted that he had passed confidential information and stated it was confidential. When I saw

the videotape and the audio tape, my immediate response was that it is at least confidential, and I thought it was likely DOD secret and that——

Senator SPECTER. You say you thought it was secret?

Dr. TWOGOOD. Yes, that is how I would have classified it.

Senator SPECTER. And what is your background and experience, credentials, on classification of security matters?

Dr. TWOGOOD. Well, formally I am an authorized derivative classifier, so I do take materials, usually technical materials, not videotape confessions, and make appropriate judgments based on classification guidance written by others, and that is what I did in this case. I also personally wrote some of the guidance that we were using in the OSD program.

Senator SPECTER. Would you say that his disclosures constituted the key to the whole program?

Dr. TWOGOOD. I would say that his disclosures went right to the heart of what I consider the number one technical achievement of the UK/US program up until 1995.

Senator SPECTER. And are you familiar with the total cost of the research on this program?

Dr. TWOGOOD. It is on the order of $100 million on the U.S. side and a smaller amount in the UK.

Senator SPECTER. Order of how much again?

Dr. TWOGOOD. 100 million.

Senator SPECTER. Dr. Twogood, when did you review the video and transcript?

Dr. TWOGOOD. October 15, 1997.

Senator SPECTER. Dr. Twogood, did you ever talk to anybody from the Department of Justice about your conclusions that the information disclosed by Dr. Lee was secret?

Dr. TWOGOOD. Yes, I did. I believe on October 15, 1997, I speculated that it probably was secret, and then in a further——

Senator SPECTER. You talked to whom?

Dr. TWOGOOD. Well, Mr. Cleveland, who—and I believe Ms. Alston was at the October 15th discussion at Livermore.

Senator SPECTER. Special Agent Alston was there?

Dr. TWOGOOD. I believe that is correct, yes.

Senator SPECTER. And you gave her the information that you believed that this was secret information?

Dr. TWOGOOD. Yes.

Senator SPECTER. And Mr. Cleveland?

Dr. TWOGOOD. Mr. Cleveland, who was former FBI, I believe, and at that time in 1997 was responsible for the security programs at Livermore. So he had become a Livermore employee.

Senator SPECTER. Did you talk to anybody else from the Department of Justice?

Dr. TWOGOOD. There were at least one or two others in the room where I saw these videotapes and audio tapes, but I don't recall who they were.

Senator SPECTER. Were you ever contacted by Mr. Jonathan Shapiro?

Dr. TWOGOOD. Yes.

Senator SPECTER. And what conversation did you have with him and when was it?

Dr. TWOGOOD. I do not know when that date was. I believe he was not present at the first meeting, but then at a subsequent meeting I had the same discussion with Mr. Shapiro. And probably more importantly, there was an interim period for the month after the October 15 review when I provided to Mr. Cleveland the classification guidelines that I would use to base the secret classification on.

Senator SPECTER. Well, approximately when did you talk to Mr. Shapiro? Was it in the October time frame?

Dr. TWOGOOD. October-November, I believe, yes.

Senator SPECTER. Did anybody from the main Department of Justice contact you?

Dr. TWOGOOD. Mr. Cleveland was basically the liaison. I provided all my information to him and he provided it to the FBI. I did fly to Los Angeles on March 11, 1998, and Ms. Alston was there and Mr. Cordova was there, and that is the date when I actually interviewed Peter with his lawyer present.

Senator SPECTER. But did Mr. Liebman or Mr. Dion or Mr. Richards from Main Justice, Washington, ever contact you?

Dr. TWOGOOD. Not to my recollection, no.

Senator SPECTER. Did anybody from the Department of the Navy ever contact you?

Dr. TWOGOOD. No.

Senator SPECTER. Mr. Schuster, Mr. Preston, or anybody from the Navy, Captain Dewispelaere?

Dr. TWOGOOD. No.

Senator SPECTER. Senator Sessions.

Senator SESSIONS. So you reported in 1997 based on your analysis of the classification procedure that you thought it was secret?

Dr. TWOGOOD. Yes.

Senator SESSIONS. Is this assessment the same one you gave to Agent Cordova?

Dr. TWOGOOD. Yes.

Senator SESSIONS. Has anything occurred that would cause you to change your assessment on that?

Dr. TWOGOOD. No. Let me stress it is a judgment call.

Senator SESSIONS. My question was did you ever change your assessment to anyone?

Dr. TWOGOOD. Not to my recollection. I believe from the first day I thought it was, at least confidential and possibly secret. And then after further review between October and November 1997, I made the recommendation that it be considered secret, and that was documented in a memo sent from Livermore to the FBI.

Senator SESSIONS. That would have been in November, prior to the plea agreement that went down in December of 1997, I believe.

Dr. TWOGOOD. Yes.

Senator SESSIONS. I believe Cordova's affidavit that he filed in October 1997 quotes you as saying it was confidential.

Dr. TWOGOOD. I have always thought that it was at least confidential and possibly secret.

Senator SESSIONS. I think you have made yourself clear. Thank you.

Senator SPECTER. Thank you very much, Senator Sessions.

Dr. Cook, thank you for joining us.

STATEMENT OF THOMAS L. COOK, NONPROLIFERATION AND INTERNATIONAL SECURITY DIVISION, LOS ALAMOS NATIONAL LABORATORY, LOS ALAMOS, NM

Senator SPECTER. We know you and Dr. Twogood have come from the West Coast, is that correct?

Dr. COOK. Dr. Twogood from the West Coast and I am from New Mexico.

Senator SPECTER. New Mexico. Well, they are long distances.

Do you have a prepared statement?

Dr. COOK. Yes, sir, I do.

Senator SPECTER. Would you proceed to present it to the subcommittee at this time?

Dr. COOK. Surely.

Senator SPECTER. Thank you.

Dr. COOK. It is a pleasure for me to testify before this subcommittee as the DOE technical witness in the case *United States* v. *Peter Hoong-Yee Lee,* which was heard March 26, 1998, in U.S. district court, Central District of California, the Hon. Judge Terry J. Hatter presiding.

Dr. Lee confessed in a plea bargain to having knowingly passed a document classified secret/restricted data to——

Senator SPECTER. Could you speak up just a little?

Dr. COOK. Oh, sorry.

Senator Specter. Senator Thurmond always says, "pull the machine a little closer."

Dr. COOK. OK. Dr. Lee confessed and plea bargained to having knowingly passed a document classified secret/restricted data to China Academy of Engineering Physics, CAEP, associates during one of his trips to the People's Republic of China. The CAEP and its subordinate institutes and laboratories are responsible for the nuclear weapons design and development programs in China.

My involvement in the case began in the fall of 1997 when I was on a change of station at Department of Energy headquarters in the Office of Energy Intelligence working for Notra Trulock, who at the time was serving both as the Director of Intelligence and of Counterintelligence, Acting Director.

I supported the FBI investigation, code name Royal Tourist, and my role was to provide DOE assessments of technical information emerging from the FBI interrogations. In February 1998—let's see; I guess I stand corrected on that now. It must have been March 11th that we were out there. I participated in the two-day interrogation session with the FBI agents assigned to the case and Dr. Twogood, and we were interrogating Dr. Lee at the classified level and were asking questions S/RD and secret level. Also present was a laser fusion expert assigned to the Department of Energy, formerly from Lawrence Livermore, and the ones I have already mentioned.

We were allowed to ask these questions at the classified level, and Dr. Peter Lee repeatedly denied any knowledge of or any interest in classified programs and publications. He was, however, the author and/or the technical editor on some of these publications which he denied knowledge of. Some of his work would be declassified by post-1993 guidelines and some of it would not have been.

I attended the sentencing of Dr. Peter Hoong-Yee Lee, and DOE Headquarters Safeguards and Security Officer Director Joe Mahaley and I were declared witnesses for the U.S. Government. If Judge Hatter had requested additional testimony beyond the written submissions, Mr. Mahaley would have taken the stand in open court and I would have testified in camera at the secret, no foreign, SRD level.

Department of Energy Headquarters Intelligence Office Director Notra Trulock was also present as a potential witness, and security personnel Don Temple and Larry Wilcher from DOE, Germantown. And I had worked with Don and Larry throughout this entire interaction in the support that the DOE provided to the FBI, Los Angeles.

Had we gone in camera, my testimony would have included a description of detailed classified Nevada test site diagnostic systems that Dr. Lee worked on or helped develop, and it would have expanded my assessment of the impact such knowledge could have had on PRC nuclear weapons science. I would not have been able to declare that I knew with certainty of specific additional classified information passed beyond that plea bargained.

It is my assessment that Dr. Peter Lee is a world-class diagnostician who has expertise relevant to nuclear weapons science. Development of methods for measuring the nuclear weapons performance was a serious challenge for the PRC in the 1980s, and this would have been especially true if, as has been reported in the press, they moved underground and tested neutron bomb concepts and more modern strategic weapons.

At this time, I would read my official damage assessment with the court or I will answer questions, as you choose.

Senator SPECTER. Was your damage assessment made available to Chief Judge Hatter?

Dr. COOK. Yes, sir, it was.

Senator SPECTER. Well, we will have that made part of the record. Do you have a copy of that with you?

Dr. COOK. Yes, sir.

Senator SPECTER. Would you hand that to the court reporter? We will make it part of the record. Mark it Exhibit 1 on this hearing date.

[The document referred to follows:]

EXHIBIT 1

DECLARATION OF TECHNICAL DAMAGE TO UNITED STATES NATIONAL SECURITY ASSESSED IN SUPPORT OF UNITED STATES V. PETER HOONG-YEE LEE

I, Thomas L. Cook, being duly sworn, do hereby depose and say:

A. Introduction

1. I am a Technical Staff Member at the Los Alamos National Laboratory. I have spent more than 26 years in professional research associated with various aspects of US nuclear weapon programs. I have actively participated in Atomic Energy Commission and Department of Energy (DOE) research programs at the Nevada Test Site and in weapons effects simulations sponsored by Defense Nuclear Agency and Department of Defense.

2. Through the Counter Intelligence Division of DOE/OEI, I have assisted the Federal Bureau of Investigation (FBI) in their assessment of the impact on the PRC nuclear weapon program of classified technical information determined to have been transferred by Peter Hoong-Yee Lee to representatives of institutions in, subordinate to, or associated with tasks in support of programs of the Chinese Academy

of Engineering Physics (CAEP). My review of Peter Hoong-Yee Lee's publications lead me to assess that he is an excellent diagnostician whose focus has been on the development and implementation of, and on the interpretation of data from, experimental systems that measure radiation-matter interactions at extreme conditions, such as those attainable in direct and indirect laser-produced and nuclear-weapon-produced plasmas. I expand these concepts below.

B. Technology discussion

1. The research and development programs pursued by Peter Hoong-Yee and coworkers during this years at two DOE national laboratories, Lawrence Livermore National Laboratory and Los Alamos National Laboratory, generally relate to the design of diagnostic schemes and equipment associated with measuring the interaction of electromagnetic radiation with matter. The research related to the design and evaluation of fusion capsules and to measuring and engineering the transport of radiation in special cavities. During the early 1980's the DOE spent billions of dollars in classified research, conducted in underground nuclear tests at the Nevada Test Site and in high-energy laser laboratories, to explore the physics of these processes. The studies had both military and commercial objectives. The laser simulation component of the U.S. science based stockpile stewardship program, which is so important to certifying nuclear weapon reliability under the "zero-yield" constraints of a Comprehensive Test Ban Treaty (CTBT), has its foundations in this early research.

2. Information contained in the classified DOE document that Peter Hoong-Yee Lee admits to having transferred to the PRC presents a scheme for interpreting temperature measurements made with x-ray detectors on radiation emerging from a plasma in a hollow cavity. References in the paper document Lee's formal participation in broad classified intertial confinement fusion (ICF) diagnostic development programs. These programs had specific classified objectives; including the measurement of material properties necessary for benchmarking classified computer code simulations, calibration of underground nuclear test (UGT) data in fusion laboratories, and adaptation of ICF diagnostic techniques for use in UGT's. Some technologies with which Peter Hoong-Yee Lee was associated are now unclassified because of academic developments in ICF research; others remain classified nuclear weapon science.

c. Significance

1. The measurement of radiation-matter interactions and time-resolved and time-integrated laser-plasma diagnostics represent exactly the critical technologies important to a developing nuclear weapon state that has an active nuclear testing program. The capability to measure the performance of various parts of the nuclear weapon facilitates the evolution from rudimentary nuclear devices to intermediate and advanced designs. These characteristics of the warhead determine the deployment options and the appropriateness of mission. Possession of only rudimentary and/or intermediate class warheads limit these military options. Advanced nuclear warheads could be important to the Chinese for use on cruise missiles, on road-mobile intercontinental ballistic missiles (ICBMs), and on submarine launched ballistic missiles (SLBMs) and as multiple re-entry vehicles (MRV) and multiple independent re-entry vehicles (MIRVs).

2. The above facts are true and correct to the best of my knowledge and belief.

THOMAS L. COOK, PHD.,
Technical Staff Member, Los Alamos National Laboratory.

Senator SPECTER. Dr. Cook, what was the total cost to the Federal Government of the hohlraum research?

Dr. COOK. The programs with which Dr. Lee was associated which had to do with both the inertial confinement fusion programs and the underground testing programs have been estimated at a total cost by the Department of Energy of about $6 billion.

Senator SPECTER. A total of $6 billion?

Dr. COOK. Six billion, yes, sir.

Senator SPECTER. With respect to declassification, what occurred there?

Dr. COOK. In the early days of the programs, which were referred to as Haylight Centurion where one was taking laser-driven capsules and testing them in underground nuclear tests, as well as in

the laboratory with lasers, the concepts of the radiation drive of these capsules—certainly, the details have been classified because they not only relate to the production of energy, but also to the performance of a secondary and a nuclear weapon.

As the inertial confinement fusion programs matured and became more widely disseminated in the university scene, some of those kinds of physics have been declassified, but not all, and the move to declassify——

Senator SPECTER. So some of the information which Mr. Lee gave to the People's Republic of China scientists has not been declassified?

Dr. COOK. The specific document with which he plea bargained, the document that he confessed to having passed in 1985, has been reviewed by our classifiers and by Livermore's classifiers and Department of Energy classifiers, and post-1993 it would be unclassified.

Senator SPECTER. But there are indications that Dr. Lee told the PRC scientists materials which he did not confess to?

Dr. COOK. Yes, sir, that is our assessment, and it was the assessment of all of the technical people with whom I was associated who debriefed him.

Senator SPECTER. Including you?

Dr. COOK. Yes, sir, including me.

Senator SPECTER. And that was based on what?

Dr. COOK. Dr. Lee repeatedly denied knowledge of classified information that there is absolutely no doubt that he had knowledge of. For example, in 1981–82, a classified technical document was published by Livermore and in that document there is a very classified section with weapons information and with the hohlraum kinds of studies to which Dr. Lee was the technical editor. It was the diagnostic section. So if he is the technical editor, he has to have had some interest in or some knowledge of the things he denied having knowledge of.

The second thing that really bothered me was when we discussed physics with Dr. Lee, he very willingly would share information that he had taught the representatives of the China Academy of Engineering Physics. And these concepts were basically freshman physics and the people with whom he was interacting were the pillars of Chinese nuclear weapons science. I mean, these men were extremely capable scientists.

Senator SPECTER. Dr. Cook, I am about to have handed to you the impact statement prepared by Robin Staffin, Notra Trulock and Joseph Mahaley, and ask if you had an opportunity to review that?

Dr. COOK. Yes, sir, I did.

Senator SPECTER. Take a look at it. We are going to mark it number 2 for the record.

[The document referred to follows:]

EXHIBIT 2

IMPACT STATEMENT

Dr. Peter Lee, a former employee of Lawrence Livermore National Laboratory (LLNL), has confessed to providing US classified information to the Peoples Republic of China (PRC) in 1984 and 1985. He admits to providing information from documents classified as Secret/Restricted Data concerning the Inertial Confinement Fusion (ICF) Program. ICF Program information was classified as Secret/Restricted

Data under the Atomic Energy Act of 1954, as amended. Dr. Lee further acknowledges that he knew the information was classified when he revealed it to the PRC. Dr. Lee has stated during debriefings that his activities have not damaged US national security. Contrary to Dr. Lee's suggestion that US ICF technology is not related to nuclear weapons technology, it remains an integral part of the US nuclear weapons program.

Dr. Lee was recently interviewed by LLNL and US Government technical experts. These experts believe that Dr. Lee's intimation that the classified information he released to the PRC is limited to what he has confessed, is not credible. For example, Dr. Lee claimed to the interviewers to have very little knowledge of certain sensitive classified programs; however, former colleagues of his at the national laboratories have stated he did have a working knowledge of these programs. In addition, Dr. Lee engaged in over 300 e-mail messages with his Chinese colleagues between 1994 and 1997. There were also in excess of 300 letters between Dr. Lee and his PRC contacts between 1981–1987. After 1987, and until 1997, Dr. Lee continued to exchange numerous letters with his Chinese colleagues. These communications contain details of other, non-ICF related classified programs. Many of these messages describe activities at LLNL far beyond his area of assignment; although none were specifically found to contain classified information. Given the nature of the subjects addressed, however, and his access to other program areas in the laboratory, there is a strong possibility that in addition to the classified ICF related data, other information may have been passed by Dr. Lee that would have caused serious damage to national security.

With respect to the ICF information Dr. Lee has admittedly compromised, the following information is provided:

- In basic terms, the ICF process involves striking a cylindrical gold container with several laser beams arranged concentrically around the cylinder. When all the laser beams strike the cylinder at once (within several trillionths of a second), the cylinder is super-heated and causes the resultant x-ray energy from the cylinder wall to strike and compress an ICF target resulting in thermonuclear fusion.
- The ICF Program, when developed in conjunction with an already existing nuclear weapon program, could assist in the design of more sophisticated nuclear weapons. Therefore, certain details of this technology can be used by other countries or proliferants to assist in the design of a thermonuclear weapon. Through December 1993, the Department of Energy (DOE) classified most of the details of the ICF process to prevent the spread of nuclear weapons.
- Scientists working in the ICF Program recognized that it could be used for peaceful purposes, such as the generation of electricity. A great deal of research on ICF has been performed in foreign countries for use in non-weapon applications. As a result of the large number of foreign publications on ICF, DOE declassified many, though not all, aspects of the ICF process in 1993. Nevertheless, DOE ICF research is much more advanced than that of foreign research in this area, and plays an important role in the US nuclear weapons program. Indeed, ICF experiments have been fielded on a series of underground nuclear tests during the 1980's. The data resulting from these tests are key to the design of nuclear weapons relevant experiments to be conducted on the National Ignition Facility for nuclear weapons stockpile maintenance and reliability. One indication of its importance is the greater than $5.8 billion spent on the ICF Program since its inception in 1972 to the present.
- US intelligence analysis indicates that the ICF data provided by Dr. Lee was of significant material assistance to the PRC in their nuclear weapons development program. [Details to be provided in camera]. For that reason, this analysis indicates that Dr. Lee's activities have directly enhanced the PRC nuclear weapons program to the detriment of US national security.
- As a US government-cleared LLNL employee with an access authorization (security clearance), Dr. Lee was obligated by National Security Decision Directive and DOE Order to advise the Department each time he had contact, in any form, with citizens of the PRC. Dr. Lee had continuous unreported contact with representatives from the PRC. Dr. Lee failed to adhere to this requirement, which resulted in the compromise of classified information.

In summary, Dr. Lee has confessed to compromising classified nuclear weapon design information. The information was properly classified at the time of compromise and US intelligence analysis indicates that this information, in conjunction with other information, was of material assistance to the Peoples Republic of China in advancing their nuclear weapons program. Compromise of this information reasonably could be expected to cause serious damage to US national security. Of equal importance, we do not believe Dr. Lee has been fully cooperative in identifying or

describing other classified information he may have compromised. We believe Dr. Lee has confessed to compromising selected classified information in the hope his other, more damaging activities would not discovered or fully investigated.

ROBIN STAFFIN,
Deputy Assistant Secretary, for Research and Development, Office of Defense Programs.

NOTRA TRULOCK, III,
Senior Intelligence Officer, Office of Energy Intelligence.

JOSEPH S. MAHALEY,
Director, Office of Security Affairs, Office of Nonproliferation and National Security.

Mr. Chairman, I appreciate the opportunity to appear before your subcommittee to testify regarding your assessment of how the Peter Lee investigation was conducted.

Since 1996, I have held the position of Deputy Associate Director for Electronics Engineering at the Lawrence Livermore National Laboratory. In that role, I manage the 750-person department, which provides electronics engineering support to all Laboratory programs.

From 1988 to 1996, I held the position of Program Leader for the Imaging and Detection Program at LLNL. The single largest project in that program was the Joint UK/US Radar Ocean Imaging Program, which was a DoD-sponsored program executed by OASD/C3I in the Department of Defense. LLNL was the lead US technical organization, and I was the Technical Program Leader for the Joint UK/US Radar Ocean Imaging Program from 1990 through 1995. Peter Lee worked as a contractor employed by TRW on that same OSD program.

The Joint UK/US Radar program has made important discoveries and significant advances in the development of methods to detect submarine signatures with remote sensing radars. Many of the important details of this work are classified. While at TRW, Dr. Lee had access to these results at the DoD Secret level. Dr. Lee also admitted to revealing classified information regarding this program while in China in 1997.

To fully understand what may have been inappropriately revealed to the Chinese, as well as its potential significance, requires a detailed analysis of Dr. Lee's statements and an understanding of the R&D thrusts of the Joint UK/US Radar program. A complete analysis would require discussion of classified material. Several such discussions have taken place since 1997 within the Department of Justice, and most of these issues have been explored in some detail.

I welcome the opportunity to assist the committee in addressing any concerns you may have regarding these issues.

DR. RICHARD E. TWOGOOD.

Senator SPECTER. Is that an accurate copy of the referenced report?

Dr. COOK. Yes, sir, it is.

Senator SPECTER. And do your report and this report elaborate upon the fact that it was concluded that Dr. Lee provided classified information to the PRC scientists beyond that which had been declassified in 1993?

Dr. COOK. It is our assessment and it is my assessment that he did provide more information than that on which he plea bargained, and that that information was essential and crucial to the development of modern nuclear weapons.

Senator SPECTER. And with respect to the information which was declassified in 1993, was there substantial value to the PRC in having that information in the interim between 1985 and 1993, when it was classified?

Dr. COOK. Yes, sir, I believe there was and——

Senator SPECTER. And why?

Dr. COOK [continuing]. That is an assessment, but the value of the information provided depends not only on the content of the information, but on the degree of maturity in the nuclear weapons program which acquires it. And in that time frame, the information

provided was a semi-analytical treatment of a method for interpreting temperature inside a hohlraum, basically for interpreting experiments for the way radiation and matter interact.

Now, at Livermore and Los Alamos, we had moved beyond semi-analytical treatments. We were using computer models, and I assessed that the Chinese program at that time would not likely have been advanced enough to have taken full advantage of computer modeling.

Senator SPECTER. So the essence is that when China had that information in 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992 and into 1993 before it was declassified, it was of material assistance to the PRC in developing their own nuclear weapons system?

Dr. COOK. That is my assessment.

Senator SPECTER. And that information had been acquired by the U.S. Government at a very high cost?

Dr. COOK. Yes, sir, the programs were very expensive.

Senator SPECTER. Up to $6 billion?

Dr. COOK. Yes, sir.

Senator SPECTER. With respect to the possible charge under Section 794 which relates to nuclear weaponry—that is the statutory language—does this fall into the category of nuclear weaponry?

Dr. COOK. In my opinion, it does, given that I am an amateur at understanding those kinds of guidelines. However——

Senator SPECTER. Well, you may be an amateur at the statute, but you are not an amateur at what is nuclear weaponry, are you?

Dr. COOK. No, sir. And, in fact, if I—my assessment has always been that if you were moving, as China, we assess, was doing in the early 1980's, from large, heavy, crude nuclear weapons to neutron bombs and more sophisticated strategic ones in the 1980's, the one thing you would need would be a diagnostician to help you measure the performance of those weapons.

Senator SPECTER. And Dr. Lee was that kind of a diagnostician?

Dr. COOK. Dr. Lee was that kind of diagnostician.

Senator SPECTER. Senator Sessions.

Senator SESSIONS. I believe your report here refers to him as a world-class diagnostician.

Dr. COOK. That was my impression. When I first became involved and I scanned down the publications list that Dr. Lee had and the diverse interests that he had, he kept moving from one technology to another. And to be able to do that and continue to publish without a large gap in time, I think, takes a first-class scientist.

Senator SESSIONS. Well, Dr. Cook, I appreciate your approach to this. I think it is common sense and sound. My experience in thousands of cases is that when people admit something, they usually don't admit all they did. I mean, that is just basic criminal law that you deal with people and they will admit what they think you can prove, but don't want to admit any more. So I think it is quite possible, and even likely, that more was given out than Dr. Lee admits that he gave out.

And in addition to that, I think you made two excellent points that he was lying about other matters by saying he denied knowledge of classified information and material that he had written about specifically and been involved in. It also was interesting that

he would rapidly tell you all about basic physics matters he was discussing with China's greatest scientists, but would be reluctant to discuss anything of a technical matter. So I think that indicates deception. In addition to that, we have the FBI's polygraph showing deception.

So it would be pretty clear to me that regardless of proof beyond a reasonable doubt in court, reasonable leaders of the United States of America concerned about trying to make a decision about what he actually gave out would have to conclude he gave out more than he admitted. And I think you are correct to have concluded that and I thank you for your analysis.

I was interested in that there were reports produced by Doctors Storm and Lindford. Do you know who caused those analyses of this matter to be conducted?

Dr. COOK. I don't know. I have passing familiarity with their comments, I believe.

Senator SESSIONS. My understanding was that the Defense Department asked for that independent review, basically, of your analysis. Is that correct?

Dr. COOK. I believe that is correct. Refresh my memory. Is this the analysis that suggested that he was never involved in anything beyond academic ICF science?

Senator SESSIONS. There was a report, yes, that really minimized the damage by Doctors Storm and Lindford, and it strikes me as almost bizarre that that would happen. Do you have any thoughts about it?

Dr. COOK. Yes, sir, I do.

Senator SESSIONS. Would you share those with me?

Dr. COOK. Surely, thank you. One has to ask that if ICF and ICF science has no relevancy to nuclear weapons science, then why is it a major part of our stockpile stewardship program. Furthermore, the words that you are obviously familiar with in my damage assessment that I filed with the court—I pulled three of those phrases directly out of a Lawrence Livermore classified document that had been declassified. At least that paragraph had been declassified where they state the relevance of the Haylight Centurion research in the early 1980's to nuclear weapons science.

And those were, one, they were conducting experiments in their laser laboratories that would allow them to certify, normalize, validate their computer code models of radiation matter interaction. Two, they were helping design classified experiments and the Nevada test site. And, three, they were helping interpret classified experiments at the Nevada test site. And so those are direct Livermore quotes that are now no longer classified, and that is in opposition to Dr. Storm and——

Senator SESSIONS. Well, I misspoke. I think I said they were Defense Department, but they were the defense lawyers' report. That is quite a difference.

Well, thank you for your cooperation and assistance, and for, I think, your accurate analysis of this matter.

Senator SPECTER. Thank you, Senator Sessions.

Dr. Cook, returning to this evaluation from Staffin, Trulock and Mahaley, it contains the notion, "U.S. intelligence analysis indicates that the ICF data provided by Dr. Lee was of significant and

material assistance to the PRC in their nuclear weapons development program. Details to be provided in camera. For that reason, this analysis indicates that Dr. Lee's activities have directly enhanced the PRC nuclear weapons program, to the detriment of U.S. national security." Do you agree with that?

Dr. COOK. Absolutely.

Senator SPECTER. And another paragraph, quote, "In summary, Dr. Lee has confessed to compromising classified nuclear weapon design information. The information was properly classified at the time of compromise, and U.S. intelligence analysis indicates that this information, in conjunction with other information, was of material assistance to the People's Republic of China in advancing their nuclear weapons program. Compromise of this information reasonably could be expected to cause serious damage to U.S. national security. Of equal importance, we do not believe Dr. Lee has been fully cooperative in identifying or describing other classified information he may have compromised. We believe Dr. Lee has confessed to compromising selected classified information, in the hope his other more damaging activities would not be discovered or fully investigated."

Do you agree with that?

Dr. COOK. Yes, sir, I do.

Senator SPECTER. Thank you very much.

[Responses of questions from Senator Leahy follows:]

RESPONSES OF THOMAS COOK TO QUESTIONS FROM SENATOR LEAHY

SUBJECT: Disagreement over the Significance of PHY Lee's 1985 Disclosures

Question A. Are you aware of any scientists or experts who disagree with your conclusions about the nature and significance of the information disclosed by Lee in 1985?

Answer A. Yes.

Question B. The answer to (1)(A) is affirmative, please provide the names of any such scientists or experts and the nature of the disagreement.

Answer B. I think several experts working in Inertial Confinement Fusion (ICF) programs at Lawrence Livermore National Laboratory (LLNL) disagreed with the damage assessment. The paper Dr. Lee admitted to having passed to the PRC was declassified by the time of the hearing—about 10 years after the transfer of information. I understand that this/these scientist(s) wrote a letter to Judge Hatter in Dr. Lee's defense. The one name I know is Dr. Eric Storm.

Regarding the nature of the disagreement, I have not spoken with Dr. Storm, but I assure that he will argue that Lees involvement in the classified Halite-Centurion programs was only on the academic side of ICF research. But in fact, Dr. Lee published several reports classified SECRET RESTRICTED DATA in the early 1980's and he was the technical editor of a classified LLNL Laser Monthly specifically dedicated to a Halite-Centurion test during that time frame as well.

The physics involved in ICF research is also the physics of thermonuclear weapons (TNWs), albeit at very different pressures, temperatures and length scales. If ICF science is not relevant to TNW science why is the National Ignition Facility (NIF) a component of the US science-based-stockpile-stewardship (SBSS) program?

Senator SPECTER. Mr. Preston, thank you for joining us here today, and if you would identify yourself, and I believe you have a prepared statement and we will be pleased to hear it at this time.

TESTIMONY OF STEPHEN W. PRESTON, GENERAL COUNSEL, DEPARTMENT OF THE NAVY, WASHINGTON, DC

Mr. PRESTON. Thank you, Mr. Chairman and Senator Sessions. My name is Stephen Preston. I am General Counsel at the Department of the Navy. I do have a prepared statement. I think in lieu

of reciting it for the committee, I would just ask that it be submitted for the record.

Senator SPECTER. All right. It will be made a part of the record, as you have requested.

Do you care to make an opening statement?

Mr. PRESTON. No, sir. I would be happy to answer your questions, though.

Senator SPECTER. Have you had an opportunity to examine the memorandum for General Counsel of the Department of Defense submitted by Mr. Wayne W. Wilson, Director of Technology and Evaluation; Mr. John G. Schuster, CNO; and Ms. Donna Kulla, Intelligence Systems Support Office, dated March 9th, which says, "As requested, my office, the Navy, in 1987, and the Intelligence Systems Support Office undertook a review of the FBI transcript of interviews with Mr. Peter Lee dated October 7, 1997, and October 8, 1997. We found these transcripts substantially consistent with the affidavit provided to the Department in 1997. The statements provided by Peter Lee and the transcripts are consistent with the previous determination that the material he provided to the People's Republic of China was confidential," close quote.

Mr. PRESTON. Yes, sir, I have seen that memo.

Senator SPECTER. Referring to your letter of May 21, 1999—and we will have this March 9, 2000, memorandum marked next in sequence, and your letter of May 21, 1999, marked subsequently in sequence.

[The documents referred to follow:]

EXHIBIT 3

MEMORANDUM FOR GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Classification Review of Peter Lee Material

As requested my office, the Navy (N87), and the Intelligence Systems Support Office undertook a review of the FBI Transcripts of interviews with Mr. Peter Lee dated 10–7–97 and 10–8–97.

We found these transcriptions substantially consistent with the affidavit provided to the Department in 1997. The statements provided by Peter Lee in the transcripts are consistent with the previous determination that the material he provided to the People's Republic of China was Confidential.

WAYNE W. WILSON,
Director, Technology & Evaluation DASD(I).

DONNA KULLA,
Intelligence Systems Support Office.

JOHN G. SCHUSTER,
CNO N875.

EXHIBIT 4

GENERAL COUNSEL OF THE NAVY,
Washington, D.C., May 21, 1999.

The Hon. CHRISTOPHER COX, Chairman,
The Hon. NORM DICKS, Ranking Minority Member,
Select Committee on U.S. National Security and Military/Commercial Concerns With the People's Republic of China,
U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN and REPRESENTATIVE DICKS: Following up on recent discussions with Committee staff concerning the Peter Lee matter, I am writing to express the Department's continuing concern that the draft Committee report is inaccurate in its account of Lee's May 1997 disclosure, and to provide information and documentation that we hope will assist the Committee in clarifying the facts as it finalizes its report.

We believe that the draft report mischaracterizes the substance and significance of the disclosure made by Lee during his trip to Beijing in 1997. for example, the report repeatedly suggests that the disclosure of Lee's research, "if successfully completed, could enable the PLA to threaten previously invulnerable U.S. nuclear submarines." There is no support for this proposition in the affidavits submitted by the Government at sentencing (public records that we understand the Committee has). Nor is there any support for it in the contemporaneous assessment of the 1997 disclosure provided by the Navy to the Justice Department in connection with the latter's consideration of prosecution (a copy of which is attached).[1] To the contrary, that assessment indicated that the information disclosed by Lee, while possible classified in part, was similar to information available from unclassified publications. Accordingly, the Navy concluded, it would be difficult to make a case that significant damage had occurred.

The draft report's description of the Defense Department's input into the Justice Department's determination not to prosecute Lee for the 1997 disclosure in Beijing is likewise incomplete and thus remains misleading. The report states: "In 1997, the decision was made not to prosecute Lee for passing this classified information on submarine detection to the PRC. Because of the sensitivity of this area of research, the Defense Department requested that this information not be used in a prosecution."

As noted above, in connection with the Justice Department's consideration of prosecution, the Navy advised that the information disclosed by Lee was similar to information available from unclassified publications and that it would be difficult to show significant damage as a result. In addition, the Navy was concerned about a prosecution that could lead to a broader inquiry, quite apart from the substance of Lee's 1997 disclosure, in the area of anti-submarine warfare, and it conveyed that concern to the Justice Department.

The Department condemns any disclosure of classified information on Lee's part and supported the prosecution in which he ultimately pled guilty. However, the current draft Committee report creates the erroneous impression that the technology Lee discussed during his 1997 Beijing trip was highly sensitive and previously unknown, and that his disclosure to the PRC caused grave harm to the national security, imperiling our submarine forces. In the considered judgment of the Navy, fortunately that is not the case.

We appreciate your consideration in this matter.

Sincerely yours,

STEPHEN W. PRESTON.

Senator SPECTER. Had you had access to the tapes and transcript of Dr. Lee's confession which has been testified to by Dr. Twogood?

Mr. PRESTON. No, sir.

Senator SPECTER. In your letter of May 21, 1999, to Congressman Cox, you took issue in the second paragraph with the Cox Commission's statement, "If successfully completed"—I will start a little earlier. This is your letter, and first I ask if this is accurately read.

"For example, the report repeatedly suggests that the disclosure of Lee's research, if successfully completed, could enable the PLA to threaten previously invulnerable U.S. nuclear submarines." Is that an accurate reading?

Mr. PRESTON. I believe so, yes, sir.

Senator SPECTER. And when you said PLA, what do you mean by that?

Mr. PRESTON. I believe that is a reference to the Chinese military.

Senator SPECTER. At the time that you wrote this, did you have access to any information beyond Mr. Schuster's memorandum of November 14, 1997?

Mr. PRESTON. Senator, that was the principal record evidence that we had of damage and classification assessment. In addition,

[1] The assessment was originally classified and has been reviewed for declassification. The redacted version attached is unclassified.

we had an affidavit and submission that had been submitted in connection with the sentencing, and we also had the recollections of those DOD and Navy personnel who had been previously involved in this and the views of the cognizant offices. But the principal document reflecting and constituting the communications with Justice about the assessment of the disclosures was the memorandum prepared by Dr. Schuster.

Senator SPECTER. Well, what do you mean by previous recollections? You have identified three things. You have identified the affidavit by the special agent, you have identified Mr. Schuster's letter, and you talk about previous recollections.

Mr. PRESTON. I am just referring, sir, in the process leading up to the preparation and transmission of this letter, a number of people were involved in addressing the situation and——

Senator SPECTER. Well, who were they and what did they say?

Mr. PRESTON. I allude to a number of them in my prepared statement. Within the Department of the Navy, I was assisted by Special Assistant to the Under Secretary for Special Projects and Intelligence, the Deputy Director of the Special Programs Division. That was Captain Dewispelaere's successor.

Senator SPECTER. Well, did any of them have access to Dr. Lee's confession tapes and transcript?

Mr. PRESTON. Not to my knowledge, sir, I don't believe so.

Senator SPECTER. Did you make any effort to talk to Dr. Twogood before writing this letter of May 21st?

Mr. PRESTON. No, sir.

Senator SPECTER. Did you make any effort to obtain the transcripts or tapes of Dr. Lee's confession before writing this letter of May 21st?

Mr. PRESTON. No, sir.

Senator SPECTER. Had you known about the specifics of the tapes and the transcripts and Dr. Twogood's evaluation of Dr. Lee's confession as classifying secret information and, as you have heard him testify here, giving away the essence of this Navy program, would you have written this line disagreeing with the Cox Commission's conclusion?

Mr. PRESTON. Sir, in the May 1999 time frame the issue that we were wrestling with and the concern at DOD was not focused on the level of classification of the information, but rather on the assessment as to damage done and the availability or non-availability of the information or similar information that was disclosed in public, open sources.

So the specific level of classification—my understanding had been that it was classified as confidential, although that was a proposition that was not free from doubt or in the sense of possible challenge to the extent that there was information in the public domain concerning this, as well as the method by which the classification guide would be applied.

But our focus in May 1999 was on the extent to which there had been actual damage to the national security and the extent to which Peter Lee's disclosures disclosed things that were or were not already in the public domain.

Senator SPECTER. Well, Mr. Schuster's memorandum—we are about to get to that—was ambiguous even as to whether it was confidential. Isn't that a fact?

Mr. PRESTON. I would have to concede, sir, that it is not a model of clarity. I understood it to be saying that the information was confidential, but that that was a matter that was not free from doubt.

Senator SPECTER. So it was ambiguous? I don't want to settle for "not a model of clarity." If you think it was not ambiguous, say so, or if you agree it was ambiguous, say so.

Mr. PRESTON. I don't believe it was deliberately ambiguous.

Senator SPECTER. I am not asking about deliberateness. Was it ambiguous or not?

Mr. PRESTON. I could see how it could admit of different readings, yes, sir.

Senator SPECTER. Dr. Twogood, I think you have testified to this, but let's sharpen it up even more. Was the material which you heard Dr. Lee confess to on the tapes in the public domain?

Dr. TWOGOOD. Not to my knowledge, no.

Senator SPECTER. And I think you have already testified to this——

Dr. TWOGOOD. There were some classified portions. Much of what was on the tapes might have been in the public domain, but a few key segments which included the classified information——

Senator SESSIONS. Well, there was classified information in Dr. Lee's confession that was not in the public domain.

Dr. TWOGOOD. That is correct.

Senator SPECTER. And you have already testified to this, but let's sharpen it up. There was significant damage to U.S. national security interests by what Dr. Lee had told the PRC scientists, correct?

Dr. TWOGOOD. That is my opinion, yes.

Senator SPECTER. Well, Mr. Preston, if you had had access to those tapes and had talked to Dr. Twogood, would you have written this letter of May 21, 1999?

Mr. PRESTON. Sir, I am not sure my access to the tapes would have made any difference. What I was doing—what we were doing in the May 1999 time frame was relying on the professional judgment of the program experts which was reflected chiefly in Mr. Schuster's memorandum and——

Senator SPECTER. Well, they didn't have——

Mr. PRESTON. Excuse me.

Senator SPECTER. Go ahead.

Mr. PRESTON. And the views of virtually every cognizant office within DOD and the Navy that——

Senator SPECTER. Cognizant office?

Mr. PRESTON. An office with an interest in the program area, the program legal policy, as well as program. We——

Senator SPECTER. Well, those are a lot of big, fancy words, but did anybody there talk to Dr. Twogood or examine the tapes or the transcript?

Mr. PRESTON. Well, as I said earlier, I don't know of anyone that examined the tapes or transcripts, and I couldn't speak to whether anyone had had any conversations with Dr. Twogood.

Senator SPECTER. Well, I think the answer is no, and we are going to talk to Mr. Schuster, but we have talked about this on the record before. But let me repeat the question. If you had talked to Dr. Twogood and had examined the tapes or not examined the tapes—perhaps you are not competent to make an evaluation, but if you talked to Dr. Twogood and heard that there was classified information which was not in the public domain and there was damage to national security—had you taken the time to make those inquiries, would you have written this letter of May 21?

Mr. PRESTON. Sir, I would have had to have deferred to the program experts on that.

Senator SPECTER. Well, does that mean you wouldn't have written that letter unless the program experts had backed up this letter?

Mr. PRESTON. I believe that the concern at that point in time was that the Cox committee report had the potential of creating a widespread misperception that by virtue of Lee's disclosures the submarine force had been rendered vulnerable to adversaries. And I frankly as I sit here am unable to parse between what I have heard Dr. Twogood say, what I understand Dr. Schuster and others to have believed, and frankly is not within my area of expertise to make that judgment.

Senator SPECTER. Well, all right. If you can't parse it and you couldn't come to a conclusion, then would you have written this letter which does come to a conclusion?

Mr. PRESTON. I don't know that I can answer your question any more satisfactorily than I have, sir.

Senator SPECTER. Well, I will try some more. We are about to take up Mr. Schuster's memorandum. Mr. Schuster hadn't talked to Dr. Twogood either. Mr. Schuster hadn't reviewed the tapes. Mr. Schuster didn't know the full import as to what Dr. Lee had said and the Navy was not operating with all the information. Nobody had taken the trouble to go back and find out.

I think somebody should have told you about that. I think the Department of Justice should have told you about that.

Mr. PRESTON. Well, sir, let me speak to that. My understanding, and I think the understanding of others in the May 1999 time frame was that the classification and damage assessment that was performed was performed on the basis of the product of the FBI's investigation of the Peter Lee matter.

Senator SPECTER. Well, was there a damage assessment? There wasn't a damage assessment by the Navy, was there?

Mr. PRESTON. Well, sir, I am referring, of course, to Mr. Schuster's memorandum which reviewed the matter for classification as well as damage to national security.

Senator SPECTER. Isn't it a fact, Mr. Preston, that there wasn't a damage assessment based on those tapes and the scientific information until after this subcommittee asked the Navy to do that?

Mr. PRESTON. I don't believe that the program people looked at tapes or transcripts prior to that time. What I was getting at, Senator, was my understanding of your interest in the process that was followed here, interest in improving the process, one which we share. And to be frank, if this was a circumstance where the program people did not have access to material that they felt they

needed and that would make a difference, I think that is an issue with the process.

But all I can tell you is in the May '99 time frame, our understanding was that the assessment was performed on the basis of information provided by the FBI reflecting the product of their investigation. And I was not aware of, and I don't know of anyone else that was aware of any deficiencies in that information at that time.

Senator SPECTER. Well, Mr. Preston, you are correct that what we are looking for here is a way to prevent these problems from recurring. There may also be some inquiry as to whether there can still be a prosecution of Dr. Lee for this issue on these disclosures in 1997.

But it seems to me that your letter of May 21st was based upon totally incomplete information, and it should have been presented to you by the Department of Justice or you could have made an inquiry on your own. But I don't think it is a very complicated matter that this statement disagreeing with the Cox Commission has no foundation in light of what information was available from Dr. Twogood and the specifics of Dr. Lee's confession and the scientific assessment that there had been damage to national security.

Now, if you say you still weren't certain because there was a contrary opinion—I don't know that you had a contrary opinion; we are going to talk to Dr. Schuster in a moment or two—you still had no basis for saying this if you were not convinced that Twogood was right or wrong.

Mr. PRESTON. Senator, I think there were two propositions of which we were aware and of which we understood the Cox committee not to be aware that we thought were material to understanding the circumstance in terms of damage to the national security and the security of the submarine force.

One of those propositions was the fact that information that Dr. Lee disclosed in May of 1997 was similar to information found in unclassified briefings and publications, according to Mr. Schuster's memo. The second proposition was the judgment by Mr. Schuster and the program people that it would be difficult to show that there had been significant damage to the national security.

We felt that we should provide that information to the Cox committee so that their report—they would have an opportunity to provide a complete report, or a more complete report, and therefore a report that was less subject to misinterpretation, less subject to the misperception that Lee's disclosures had in themselves rendered the submarine force vulnerable.

Senator SPECTER. Had you known of what Dr. Twogood found, would you have written this letter of May 21?

Mr. PRESTON. I think it would be fair to say that I would have consulted—I think all of us involved in this would have consulted the program experts to find out whether they viewed that as material to their assessment.

Senator SPECTER. So you wouldn't have written this letter until you had taken another step. That is what you just said, consulting your experts.

Mr. PRESTON. I guess what I am trying to say is if we had had additional information or additional input, presumably we would

have taken that into account. It wouldn't have been my personal judgment, frankly, but the judgment of the program professionals.

Senator SPECTER. Well, I can understand your writing this letter not knowing the facts. I can't understand your defending this letter knowing the facts.

Senator Sessions.

Senator SESSIONS. Thank you, Senator Specter. You have raised some very important points.

You are the General Counsel for the Navy?

Mr. PRESTON. Yes, sir.

Senator SESSIONS. And so when you write a letter to a Congressman of the recognized brilliance and capability and dedication of Congressman Cox, that is a serious matter, is it not?

Mr. PRESTON. This most certainly was a serious matter.

Senator SESSIONS. Don't you owe it to him to have complete information?

Mr. PRESTON. Senator Sessions, we provided that information that was available to us based on the findings of the program professionals, based on the views of those who had some contemporaneous involvement of this in the fall of 1997, and based on the views of virtually every cognizant office we could identify in both the Navy and the Office of the Secretary of Defense.

Senator SESSIONS. Well, you have already acknowledged there was other information readily available that you didn't obtain.

Mr. PRESTON. I am not sure I agree with that proposition. It is my understanding now that when the damage and classification review was performed in the fall of 1997 that it was based on an affidavit, a draft affidavit summarizing the findings of the FBI and their investigation, and that the transcripts and tapes of the confessions were not provided.

Senator SESSIONS. Did you ask for them?

Mr. PRESTON. I don't know whether anyone asked for them in the fall of 1997. I was not in office during that period.

Senator SESSIONS. When you wrote your letter.

Mr. PRESTON. I beg your pardon?

Senator SESSIONS. When you wrote your letter.

Mr. PRESTON. In May 1999, we did not ask for tapes and transcripts.

Senator SESSIONS. How did it come to the General Counsel of the Navy that this matter needed to be responded to?

Mr. PRESTON. Well, sir, as I recite in my prepared statement, our attention to this in the May——

Senator SESSIONS. I mean, who within the Navy contacted you to say there is a problem with this, or outside the Navy?

Mr. PRESTON. I couldn't tell you from recollection what the first contact was. There were press reports in May, on May 10, that generated a good deal of attention and concern in both the Office of the Secretary of Defense and the Department of the Navy. I was one of the people involved in responding to that situation.

Senator SESSIONS. Well, it looks pretty clear to me that this was a political response through and through, and it was designed to attack the integrity of the Cox report. And it does appear to me that it was hastily drawn and inaccurate and not possessed of sufficient information.

As a lawyer, particularly chief counsel for the Navy, when a lawyer goes to court and makes a representation, doesn't he indicate that he has exhausted all reasonable opportunities to receive information and that that representation is based on a good-faith and honest analysis of all pertinent information? Isn't that a duty of a counsel in a court of law?

Mr. PRESTON. Senator, most respectfully, I cannot accept your characterization of what the impetus was for this letter, nor the process that generated it.

Senator SESSIONS. Well, it was first drafted as a press release, was it not?

Mr. PRESTON. It was—the substance of it was first prepared in the form of a press statement, in the form of a letter to the editor of the New York Times, the principal concern being the possibility of a widespread public perception with respect to damage to national security and the security of the submarine force and an effort to dispel that misimpression.

Senator SESSIONS. I think you are stretching that.

Mr. PRESTON. I feel compelled to point out, sir, that that press release wasn't issued. Instead, we engaged with the Cox committee prior to the issuance of its report, and that effort eventuated in sending a letter which was not released to the press. It was sent to the Cox committee and the Cox committee staff for their benefit to try to apprise them of information and to provide them with a pertinent document that we understood they were unaware of.

Senator SESSIONS. The Cox report—how did it get released?

Mr. PRESTON. How did the Cox report get released?

Senator SESSIONS. The letter get released?

Mr. PRESTON. To my knowledge, sir, the Department of Defense and the Department of the Navy have never released this document publicly.

Senator SESSIONS. You are not aware of how it became public?

Mr. PRESTON. It was provided to the chairman and the vice chairman.

Senator SESSIONS. Well, of course, it would be provided to the minority members of the committee, too, wouldn't it?

Mr. PRESTON. It was provided to the chairman and the vice chairman.

Senator SESSIONS. And the vice chairman, the minority——

Mr. PRESTON. It was provided to this subcommittee early in its work last fall.

Senator SESSIONS. Well, how long did it take that thing to pop out of the Cox committee and into the newspapers?

Mr. PRESTON. I will be honest with you, sir. I have not made a study of the matter. I have not seen this letter referred to in the press.

Senator SESSIONS. Well, the fact that this analysis was challenged has been in the press, has it not?

Mr. PRESTON. I have no idea what sort of coverage this subcommittee's efforts is getting. I will just repeat——

Senator SESSIONS. I mean back at the time you wrote the letter.

Mr. PRESTON. No, sir, I am not aware of any press coverage making reference to the letter. I have not done a database search or read all the papers for that purpose. As a matter of fact, when the

Cox committee report came out, the determination was made that we would not release the letter because there was nothing to be achieved by further airing the disagreement in interpretation.

Senator SESSIONS. Let me ask this just to get the record straight. How did it fall to you to do the letter? Do you normally respond to inaccurate congressional reports within the Department of Defense, reports you believe to be inaccurate?

Mr. PRESTON. Sir, I think it probably fell to me in two respects. First of all, in the November of 1997 time fame, it had been a Navy assessment that was prepared that was transmitted by the then Navy General Counsel in November of 1997. If you fast-forward to May 1999, this was an issue that was being actively worked in both OSD and the Department of the Navy. And in terms of trying to deal at a staff level with the Cox committee, it fell to me as a matter of being assigned the laboring oar to interface with the Cox committee.

Senator SESSIONS. Did you personally talk with the Secretary of Defense about it?

Mr. PRESTON. I have never spoken to the Secretary of Defense about this.

Senator SESSIONS. Has there been any reference to you at any time leading up to the preparation of this letter that the White House had requested the Navy to respond?

Mr. PRESTON. I don't recall any White House request to the Navy to respond.

Senator SESSIONS. So there could have been?

Mr. PRESTON. I am just offering you my best recollection.

Senator SESSIONS. So there could have been. You don't recall?

Mr. PRESTON. I think if there had been, I would recall, but I don't recall.

Senator SESSIONS. Thank you, Mr. Chairman.

Senator SPECTER. Thank you, Senator Sessions.

[The prepared statement of Mr. Preston follows:]

PREPARED STATEMENT OF STEPHEN W. PRESTON

Stephen W. Preston is the General Counsel of the Department of the Navy. He was appointed, with the advice and consent of the Senate, on September 25, 1998. The General Counsel is the chief legal officer of the Department and serves as the principal legal advisor to the Secretary of the Navy. He oversees an office of 650 attorneys in this country and abroad, providing legal counsel to the Secretariat and components of the Navy and Marine Corps.

For the previous three years, Mr. Preston served as a Deputy Assistant Attorney General at the U.S. Department of Justice, where he was in charge of the Appellate Staff of the Civil Division. He was responsible for civil litigation in the courts of appeals on behalf of the United States.

From 1993 to 1995, Mr. Preston served in the Office of General Counsel of the Department of Defense, initially as Deputy General Counsel (Legal Counsel), then as the Principal Deputy General Counsel and, from March 1994 through September 1994, as Acting General Counsel. Upon his departure, he was awarded the Department of Defense Medal for Distinguished Public Service.

Before entering government service, Mr. Preston was a partner in the Washington, D.C. law firm of Wilmer, Cutler & Pickering. There, from 1986 to 1993, he was engaged in a trial and appellate litigation practice with emphasis on federal securities law.

From 1984 to 1985, Mr. Preston was a visiting fellow in the Washington, D.C. office of the Center for Law in the Public Interest. From 1983 to 1984, he served as a law clerk to the Honorable Phyllis A. Kravitch on the U.S. Court of Appeals for the Eleventh Circuit.

A member of the District of Columbia bar, Mr. Preston is active in the American Bar Association's Section of Litigation, currently serving as Co-Chair of the Government Litigation Counsel Committee.

In 1979, Mr. Preston received his bachelors degree (summa cum laude) from Yale University. He completed a graduate program (with First Class Honors) at Trinity College, University of Dublin, in 1980. In 1983, he received his law degree (magna cum laude) from Harvard University.

Thank you, Mr. Chairman and members of the Subcommittee.

I have been asked to appear before the Subcommittee today in connection with its inquiry as it pertains to the matter of Peter Lee, specifically Lee's disclosure to the Chinese during a trip to Beijing in May 1997. As I did not become General Counsel of the Navy until September 1998, I have no first-hand knowledge of events in 1997 relating to Lee, including communications between the Department of Justice and the Department of Defense in the fall of 1997 concerning possible prosecution. I am, however, familiar with the circumstances of a May 21, 1999 letter to the Cox Committee, in which the Subcommittee staff has expressed interest. I will endeavor to address that aspect of the matter at this time.

The Peter Lee matter received a great deal of attention within the Department of Defense between May 10, 1999, and May 25, 1999. Beginning on May 10th, a number of newspaper stories referring to Lee's May 1997 disclosure caused considerable concern in the Office of the Secretary of Defense and the Department of the Navy over a misperception that Lee had disclosed highly sensitive and previously unknown technology imperiling America's submarine force. One or more of these stories pointed out that the Peter Lee case would figure in the report of the Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China (referred to as the "Cox Committee"), the release of which was said to be imminent.

Examination of the relevant portion of a draft of the Cox Committee report compounded the concern over misperception of Lee's May 1997 disclosure in terms of its substance and significance, as well as the account of later contacts between DOJ and DOD. There followed an effort to apprise the Cox Committee of that concern and provide clarifying information, which was received apparently in all good faith, but unfortunately to limited effect. DOD's continuing concern prompted transmission of my May 21, 1999 letter to the Cox Committee and, as an attachment, the assessment of Lee's May 1997 disclosure provided by the Navy to DOJ in November 1997. The report of the Cox Committee was produced over the holiday weekend and issued on May 25, 1999.

My understanding of events in the fall of 1997 is as follows: In connection with DOJ's consideration of prosecution, the Navy was asked to review a draft affidavit summarizing the product of the FBI's investigation of Peter Lee in order to assess the level of classification of the information disclosed by Lee in Beijing and the extent of damage to the national security resulting from the May 1997 disclosure. The Navy's assessment, set forth in a memorandum dated November 14, 1997, was transmitted to DOJ on November 19, 1997. That assessment found that the information disclosed by Lee, evidently drawn from a document previously classified CONFIDENTIAL by compilation, was similar to information available from unclassified publications. The assessment further concluded that it would be difficult to make a case that significant damage had occurred as a result of the May 1997 disclosure. Finally, the memorandum expressed concern about public proceedings that could draw attention to the area of antisubmarine warfare.

From DOD's perspective, the problem with the draft Cox Committee report, as of May 21, 1999, was essentially one of omission. The draft report alluded to the impact of Lee's disclosure on the security of the submarine force, as well as contacts between DOJ and DOD concerning possible prosecution. It did not, however, make any reference to the fact that the techniques Lee discussed with the Chinese were discussed in open sources and the judgment that it would be difficult to show significant damage to the national security. In this sense, the draft report was viewed as incomplete in its treatment of the May 1997 disclosure and subject to misinterpretation. The Cox Committee presumably was unaware of the Navy's contemporaneous assessment before it was brought to the staff's attention in mid-May 1999. It was to stress DOD's concern in this regard, and to furnish a copy of the November 14, 1997 memorandum, that the May 21, 1999 letter was sent to the Cox Committee.

In understanding the circumstances of the May 21, 1999 letter to the Cox Committee, it may be useful to consider the process by which that letter was generated. First, underlying the letter was the November 14, 1997 memorandum setting forth the Navy's assessment of the May 1997 disclosure. That assessment was performed by the Science and Technology Branch of the Submarine Warfare Division on the

Chief of Naval Operations Staff. It was signed out by the Head of the Branch (N875), and concurred in by the Deputy Director of the Division (N87B), the Assistant Deputy Chief of Naval Operations for Resources, Warfare Requirements and Assessments (N8B) and the Vice Chief of Naval Operations (and, in addition, the General Counsel of the Navy). In short, the assessment was the work of the Navy experts responsible for submarine warfare science and technology, and it was approved all the way up the OPNAV chain of command.

The substance of the May 21, 1999 letter was originally drafted as a press statement (in the form of a Letter to the Editor). This was a collaboration of the Office of the Under Secretary of Defense for Acquisition and Technology, the Office of the Under Secretary of Defense for Policy, the Office of the Assistant Secretary of Defense for Command, Control, Communications and Intelligence, the Office of the Assistant Secretary of Defense for Public Affairs, the DOD Office of General Counsel and myself. During this timeframe, I was assisted by the Deputy Director of the Special Programs Division (N89B), the Assistant to the Under Secretary of the Navy for Special Programs and Intelligence, a Special Agent in the Counterintelligence Department of the Naval Criminal Investigative Service and Counsel for the Special Projects Division. The letter to the Cox Committee itself was prepared by DOD OGC and myself, and then distributed for coordination. The final draft received concurrences from OASD(C3I), DOD OGC, OUSN/ASP&I, the Deputy Director of Naval Intelligence (N2B), the Deputy Director of the Special Programs Division (N89B) and the Vice Chief of Naval Operations, as well as the OSD and DON legislative offices.

The principal cognizant offices—OSD and DON, program, policy and legal, civilian and military—having participated in its preparation and review, I was (and remain) confident that the May 21, 1999 letter reflected the considered judgment of program professionals with respect to Lee's May 1997 disclosure and the corporate view of DOD with respect to the draft Cox Committee report.

I appreciate your attention and am prepared to answer questions.

Senator SPECTER. Dr. Schuster, the memorandum that you prepared dated November 14, 1997, will be marked part of the record.

[The memorandum referred to follows:]

EXHIBIT 5

MEMORANDUM FOR REQUEST FOR CLASSIFICATION GUIDANCE (U)

1. (u) The signal analysis techniques briefed by the subject are UNCLASSIFIED when applied to environmental data and they have been presented and published in several unclassified forums. Any application of the technique to submarine wake signatures, however, would be classified at the SECRET level, as called but in current classification guides.

2. (u) The material that was briefed appears to have been extracted from a CONFIDENTIAL document. This classification was applied based on concern that the document, taken as a whole, might suggest a submarine application even though it was not explicitly stated. Given that the CONFIDENTIAL classification cannot be explicitly supported by the classification guides and that material similar to that briefed by the subject has been discussed in unclassified briefings and publications, it is difficult to make a case that significant damage has occurred. Further, bringing attention to our sensitivity concerning this subject in a public forum could cause more damage to national security than the original disclosure.

3. (u) Based on the above, it is recommended that the disclosure of this material should not be considered as the sole or primary basis for further legal action.

J.G. SCHUSTER. JR.,
Head, Science & Technology Branch.

Senator SPECTER. I will ask you at the outset if that is an accurate memorandum that you prepared?

STATEMENT OF JOHN G. SCHUSTER, JR., BRANCH HEAD, SUBMARINE SECURITY AND TECHNOLOGY, DEPARTMENT OF THE NAVY, WASHINGTON, DC

Mr. SCHUSTER. Yes, sir.

Senator SPECTER. Thank you for joining us and we would be pleased to hear any opening statement you care to make.

Mr. SCHUSTER. Yes, sir. My name is John G. Schuster. I am the Branch Head for Submarine Security and Technology, and I report to the Director of Submarine Warfare on the staff of the Chief of Naval Operations. In this position, I am responsible for the SSBN security program, including all the projects in submarine warfare related to non-acoustic anti-submarine warfare.

In the fall of 1997, I received a request from Captain Earl Dewispelaere, who was then OPNAV N89B, to review an FBI affidavit regarding the disclosure of potentially classified material by Mr. Peter Lee to the People's Republic of China. I was asked to give my opinion on the seriousness of the disclosure made by Mr. Peter Lee and to evaluate whether level of damage caused justified a prosecution that might risk exposure of other non-acoustic ASW information.

I reviewed the affidavit, as well as additional published information authored by Mr. Peter Lee, and wrote an internal memorandum to Captain Dewispelaere summarizing my conclusions on November 14, 1997, which is the letter just referred to. In this letter, I stated that classified information at the confidential level had been divulged, but that the information released did not cause significant damage to national security. Moreover, it was my opinion that bringing attention to our sensitivity concerning this subject in a public forum could cause more damage to national security than the initial disclosure.

In the spring of 1999, I was asked by Captain Dewispelaere to review the classification of the November 14 memorandum for release to the Cox committee. I concluded that the memorandum was unclassified and could be released.

The above actions describe my total involvement in the Peter Lee case prior to being questioned in connection with the investigations of the Senate Judiciary subcommittee starting last fall.

Senator SPECTER. Dr. Schuster, the memorandum which you cosigned with Mr. Wilson and Ms. Kulla dated March 9, 2000, had been prepared after you had an opportunity to review what materials?

Mr. SCHUSTER. That was after we reviewed the transcripts of the, I believe, October 7 and 8 interviews with Mr. Peter Lee.

Senator SPECTER. And was that review essentially done at the request of this subcommittee?

Mr. SCHUSTER. Yes, sir.

Senator SPECTER. In this memorandum, you say that the statements of Dr. Lee constituted a disclosure of confidential information?

Mr. SCHUSTER. Yes, sir.

Senator SPECTER. Had you reviewed the transcripts before you wrote your memorandum of November 14, 1997——

Mr. SCHUSTER. No, sir.

Senator SPECTER. Well, I was about to say, had you done so, would you have come to a firm conclusion in that November 14, 1997, memorandum that Dr. Lee's disclosures were confidential?

Mr. SCHUSTER. My intention on November 14th, '97, was that they were confidential.

Senator SPECTER. Do you think that memorandum says they were confidential?

Mr. SCHUSTER. I believe it does. That was my interpretation. That is the way I wrote it.

Senator SPECTER. You don't think it is ambiguous?

Mr. SCHUSTER. I understand that question has been asked. I didn't think so at the time.

Senator SPECTER. It hasn't been asked to you.

Mr. SCHUSTER. I'm sorry, sir?

Senator SPECTER. It hasn't been asked to you today.

Mr. SCHUSTER. Yes, sir. I understand the statement has been made.

Senator SPECTER. Do you think your memorandum is ambiguous?

Mr. SCHUSTER. I understand, you know, as I said, that perhaps there could be different interpretations. My intention was to make it clear, but——

Senator SPECTER. You have heard Dr. Twogood's testimony that he thinks the information disclosed by Dr. Lee was appropriately classified at the secret level. Why do you disagree with that?

Mr. SCHUSTER. Based on my review——

Senator SPECTER. I don't want you to get into anything, I don't have say, classified.

Mr. SCHUSTER. I will not.

Senator SPECTER. But if you can't answer it without doing so—but if you can, we would like to know your answer.

Mr. SCHUSTER. It was based on my review of the—I mean, certainly, in the affidavit the information he was alleged to have disclosed and the sources of that information which were classified at the highest level, confidential. And the majority of that information that was classified confidential had been previously published at the unclassified level.

Senator SPECTER. Well, isn't Dr. Twogood—whether you may disagree with his classification or not, isn't it true that, as Dr. Twogood has testified, there were materials disclosed by Dr. Lee to the PRC scientists that had not been in the public domain?

Mr. SCHUSTER. There was a confidential report. Clearly, that was not in the public domain. Peter Lee, in the information we had, said that he released the details of that report. So therefore he did release confidential information that was not in the public domain. However, the majority of that information, the confidential report, had been separately published in unclassified publications.

Senator SPECTER. Well, but isn't Dr. Twogood correct that there were portions as to what Dr. Lee admitted giving to the PRC which was not in the public domain?

Mr. SCHUSTER. Certainly, I understand.

Senator SPECTER. Although you have evaluated the materials as confidential and Dr. Twogood has evaluated the materials as secret, would you say that there was a rational basis for the disagreement, and that is that Dr. Twogood had a rational basis for a different classification at the secret level?

Mr. SCHUSTER. There certainly can be disagreements on the interpretation of these sorts of things. I believe the evidence supports the confidential classification and that is what I have stated.

Senator SPECTER. But was there sufficient latitude here for a reasonable classification by Dr. Twogood of secret?

Mr. SCHUSTER. I don't agree with the classification at the secret level based on the information I have seen.

Senator SPECTER. So there was no reasonable basis for his classification of secret?

Mr. SCHUSTER. I am not aware of a basis for secret classification.

Senator SPECTER. Dr. Twogood testified that he gave away the heart, the core—you heard his testimony; I am paraphrasing it—of the information. Would you disagree with that?

Mr. SCHUSTER. He was talking about the information in the program. This is not my program and I don't know that I could speak to the hard core of that program.

Senator SPECTER. So that is beyond the purview of your expertise or knowledge?

Mr. SCHUSTER. Yes, sir, relative to the program.

Senator SPECTER. So based on your knowledge, you wouldn't have a basis for disagreeing with what Dr. Twogood said?

Mr. SCHUSTER. Not in that sense. I couldn't comment, no, sir.

Senator SPECTER. And how about Dr. Twogood's conclusion that there was significant damage done to U.S. national security interests? Would you disagree with that?

Mr. SCHUSTER. I would disagree with that, yes, sir.

Senator SPECTER. Well, what is the basis for your disagreeing with that if you don't have sufficient information to evaluate Dr. Twogood's conclusion that Dr. Lee gave the core and heart of the information to the PRC?

Mr. SCHUSTER. My understanding was he said the core and heart of the program information. I mean, that depends on what the program is, I mean, and it was not my program. It was an OSD program. We were only asked to comment on the information in the affidavit.

Senator SPECTER. Okay, so you don't know the details of the program. I understand that, and that is why you didn't disagree with Dr. Twogood's statement about giving away the heart and core of the program. But the next question which logically follows is what is the import for national security, and if you don't know the program, what is your basis for disagreeing with Dr. Twogood's conclusion that it was a serious national security breach?

Mr. SCHUSTER. My basis for the assessment of the lack of serious damage was my review of the materials of Peter Lee. The details of that assessment obviously get into classified information.

Senator SPECTER. Senator SESSIONS.

Senator SESSIONS. Is your analysis and your statement based solely upon what Peter Lee admitted having said? Did you analyze his confession?

Mr. SCHUSTER. Yes, Senator.

Senator SESSIONS. Are you aware or do you dispute the fact that he could have given away more?

Mr. SCHUSTER. Not at all.

Senator SESSIONS. What do you mean?

Mr. SCHUSTER. I don't dispute that at all.

Senator SESSIONS. That he couldn't have given away more?

Mr. SCHUSTER. It is possible.

Senator SESSIONS. If it had given away more, would your analysis be correct? In other words, your basic analysis in this memorandum was based solely on the specific information he provided?

Mr. SCHUSTER. Yes, sir.

Senator SESSIONS. That he admitted he gave?

Mr. SCHUSTER. Yes, sir.

Senator SESSIONS. Do you acknowledge, as Dr. Cook does, and would you dispute my statement I made earlier that it is likely he gave away more than he admitted?

Mr. SCHUSTER. It is certainly possible. I mean, I didn't attempt to speculate at that, and at the time, based on the affidavit, we certainly didn't have the information in the affidavit that would allow us to draw that conclusion.

Senator SESSIONS. Do you dispute the fact that he had access to more information?

Mr. SCHUSTER. He did have a secret clearance and my understanding is that he had access to more classified information. But I don't know the—again, it is not my program. I don't know the level. I mean, I don't know the details of all the access he had.

Senator SESSIONS. Well, how did you come to write this memo?

Mr. SCHUSTER. I was asked to review the affidavit, to look at what was in the affidavit and make an assessment based on that as to what the seriousness of disclosure was.

Senator SESSIONS. So if we are dealing with systemic problems, wouldn't you recognize that you have to be real careful here because your memorandum is based solely on the information that he admitted giving to the Chinese?

Mr. SCHUSTER. Yes, sir.

Senator SESSIONS. And could be misinterpreted?

Mr. SCHUSTER. It could be.

Senator SESSIONS. Would you have any comment on the view that this memorandum was a body blow to the prosecutor's case?

Mr. SCHUSTER. I have no opinion. I did not write the memorandum for the Justice Department.

Senator SESSIONS. But ultimately it could have that effect. You would recognize that an internal Department of Defense memorandum, Department of the Navy memorandum, could have the effect of undermining the ability of a prosecutor to proceed with his case in a case like this?

Mr. SCHUSTER. I assume that could be possible. I mean, the memorandum I wrote was what I wrote to the best of my ability, given the information I had.

Senator SESSIONS. Well, given the information you had, would you admit that that is a dangerous situation? Did you realize at the time that this memorandum could eventually have to be produced for the defense and that it could undermine the prosecution of the case when you wrote it?

Mr. SCHUSTER. No, I did not.

Senator SESSIONS. Do you think that would be something important for people to know in the future?

Mr. SCHUSTER. Yes, sir.

Senator SESSIONS. Did you have any occasion to discuss with any other people in the Navy or the Department of Defense the con-

tents of your memorandum? Was it ever reviewed and sent back to you with suggestions for change and that kind of thing?

Mr. SCHUSTER. No, sir. I only talked to Captain Dewispelaere.

Senator SESSIONS. Captain who?

Mr. SCHUSTER. Captain Dewispelaere, who was the one who asked me to generate the memorandum.

Senator SESSIONS. Well, I think that is how we get in a fix. It is dangerous business to have memorandums floating around by people who don't have access to all of the facts, because when the prosecutor has got to try this case, he has got to say that Mr. Schuster, head of the Science and Technology Branch of the Navy, has said thus and so. And so he has got to prove his case beyond a reasonable doubt and if you have generated some internal document or a document that was expected to be used outside or otherwise that hastily makes opinions about the validity of a prosecution, those can be devastating blows. I am not sure this document is that. I am not sure it is that clear, but it is certainly not a positive event for the Department of Justice, in my view.

Thank you.

Senator SPECTER. Thank you, Senator Sessions.

Dr. Schuster, you didn't talk to Jonathan Shapiro about this matter?

Mr. SCHUSTER. No, sir.

Senator SPECTER. Or anybody from the Department of Justice?

Mr. SCHUSTER. No, sir.

Senator SPECTER. Turning to your memorandum, and this is an unclassified memorandum, correct?

Mr. SCHUSTER. Yes, sir.

Senator SPECTER. You start off, quote, "The signal analysis techniques briefed by the subject are unclassified when applied to environmental data and they have been presented and published in several unclassified forums. Any application of the techniques to submarine wake signatures, however, would be classified at the secret level, as called out in current classification guides."

Doesn't that statement lend some support to Dr. Twogood's conclusion of a secret classification contrasted with your conclusion on March 9 of a confidential classification?

Mr. SCHUSTER. The intent of that paragraph was to summarize the range of the classification guide. The reference to the secret level is the threshold that I would take to make the material secret, and I saw no evidence in any of the material I saw that he released information on submarine wake signatures.

Senator SPECTER. Going on, the memorandum says, "The material that was briefed appears to have been extracted from a confidential document. This classification was applied based on concern that the document taken as a whole might suggest a submarine application even though it was not explicitly stated. Given that the confidential classification cannot be explicitly supported by the classification guides and material similar to that briefed by the subject has been discussed in unclassified briefings and publications, it is difficult to make a case that significant damage has occurred."

Isn't it a fair reading of that sentence, Dr. Schuster, that you are raising a question as to even a confidential classification?

Mr. SCHUSTER. Yes, sir. I think the issue is, if you look at the classification guides, there is no clear statement that says at this level it is unclassified and at this level it is confidential. The confidential determination on the report was made by the program manager of the program when the report was published and it was based on their concern that the compilation of several sources of data was at the confidential level.

But you can't go back and say here is a statement in the classification guide and clearly when these two things happened it became confidential. It was classified confidential, however, and he knew that. It was a report that had been classified at the confidential level. It was a report that he was involved in and he should have been aware it was confidential.

Senator SPECTER. Well, I don't understand your answer. Would you say that this does raise a question or an ambiguity as to whether you thought it was confidential?

Mr. SCHUSTER. I clearly—I thought I clearly stated that the document was confidential that he took this material from. Therefore, the material was confidential. If you try to go back and prove that it is confidential based on the classification guides, it is very difficult because the classification guides don't make an explicit statement of, coupling these two things together, they are confidential.

Senator SPECTER. But when you later found out that there was more to it after reviewing the transcript and tapes, as noted in your March 9, 2000, memorandum, there was no doubt that it was confidential, at least confidential?

Mr. SCHUSTER. There was no doubt at that time, and previously, that it was the material from the confidential report and therefore was confidential.

Senator SPECTER. No doubt previously that what you had just from the affidavit and not the tapes that it was confidential?

Mr. SCHUSTER. Yes, that the material he took was from a confidential report and he disclosed that material.

Senator SPECTER. So that what he had disclosed, even before you saw the transcript and tapes, was confidential?

Mr. SCHUSTER. Yes, sir.

Senator SPECTER. And your last line here, "Based on the above, it is recommended that the disclosure of this material should not be considered as the sole or primary basis for further legal action." As you and I have discussed before when we talked in closed session, that is because you thought that it might be appropriate for prosecution along with the hohlraum issue?

Mr. SCHUSTER. Yes, sir.

Senator SPECTER. Dr. Schuster, when the classification talks about filtering techniques, doesn't that put it into the secret category?

Mr. SCHUSTER. Sorry, sir. Filtering techniques?

Senator SPECTER. Filtering techniques. When the classification guide refers to filtering techniques, doesn't that put it in the secret classification?

Mr. SCHUSTER. I don't believe so.

Senator SPECTER. In the affidavit which you had reviewed prior to your November 14 letter, there is a statement, "Peter Lee said he told his audience that his lecture was on microwave scattering

from ocean waves. Someone from the audience questioned Peter Hoong-Yee Lee about its application to antisubmarine warfare and Peter Hoong-Yee Lee said that he agreed with the questioner that that was its application."

So isn't there really an issue here of the application which is contrary to what you said earlier?

Mr. SCHUSTER. No, sir, I don't believe it is contradictory. Certainly, Peter Lee worked in anti-submarine warfare. There were other authors on unclassified papers that worked in anti-submarine warfare, and the extension to say that there was a possibility that this stuff could be related, I think, is a conclusion somebody could draw.

What I didn't see in any of the information was that there was specific data given as this is how you would apply it to submarine warfare or that submarine signatures were involved in any of the data he showed, or that performance for any submarine warfare was disclosed, which is what I think you would need to make it secret.

Senator SPECTER. Anything further, Senator Sessions?

Senator SESSIONS. Well, I think the memorandum was ill-advised. And we are talking about Peter Lee being in some Chinese hotel room, after having lied about how he got there and what he was doing originally, talking about the application. According to this affidavit, he said he told the PRC scientists that you filter the Doppler spectrum at the void and peak to enhance detection. It sounded like to me he admitted talking about some of the matters that would have been perhaps something at the secret level.

Mr. SCHUSTER. I believe what he was referring to was surface ship detections which were part of the confidential report. I mean, that is my interpretation based on the data I saw.

Senator SESSIONS. I suppose we will be talking more about the plea bargain later. Is that what you are——

Senator SPECTER. Lots.

Senator SESSIONS. OK; well, I will withhold my comments on that.

Senator SPECTER. Gentlemen, thank you very much for coming. The thrust of what we are looking for is to improve the procedures. That is what we want to do here, and I think that when we deal with matters of this importance—and I think everyone will agree—there has to be the kind of communication, interaction and thought so that we all know what is involved.

The Department of the Navy should have been provided with information by the Department of Justice, beyond any question, and the matter should have been deferred until that was done. And it is a different question as to the duty of the Navy to make inquiries in the absence of that information being provided.

But we request what you all are doing. You are all in very, very important positions, carrying out very, very important matters for the U.S. Government, and we appreciate what you are doing. We are all on the same team and Congress has the responsibility to take a look from time to time at what is going on.

The whole theory of oversight, which is a constitutional responsibility, is that there will be a lot of people paying attention to what we are doing here, so that when Congress does take the time to

take a look, it has a ripple effect throughout the entire Government. We are too busy and too preoccupied to do very much of this. Very, very little oversight is done.

We will be getting into the heart of the matter next week when we take up the issues of the plea bargain, and on those occasions Senator Sessions and I may know a little more about what we are talking about than getting into the details of the hohlraum and wakes and all the rest of it.

We thank you for what you do generally and we thank you for coming here today.

Mr. SAYNER. Senator, before we conclude I would like to just pass on that we will give to the subcommittee information regarding when those tapes were sent to our headquarters, the confession tapes. I have a summary here that there were repeated efforts to contact DOD, and I don't have the dates from our headquarters or who they talked to, but we will provide that information to you.

Senator SPECTER. Well, that is very important as to what the FBI did in an affirmative way.

We have other potential witnesses who were not called upon to testify because their testimony would have been cumulative, but we thank Ms. Donna Kulla and Mr. Wayne Wilson, and their prepared statements will be made a part of the record.

[The statements of Ms. Kulla and Mr. Wilson follow:]

PREPARED STATEMENT OF DONNA KULLA

I was the Program Manager for the Advanced Sensors Applications Program (ASAP) from October 1990 through October 1999. I was then, and still am, an employee of the Intelligence Systems Support Office (ISSO). This office primarily supports OSD (Command, Control, Communications and Intelligence (C3I)).

In the fall of 1997, I participated in meetings with representatives of the Department of Justice, DoD General Counsel, and the Department of the Navy regarding Peter H. Lee, a TRW employee. These meetings concerned the Department of Justice's request for the relevant classification guide and for an evaluation of the appropriate classification of information reported to have been passed by Dr. Peter Lee to the PRC, as described in an affidavit prepared by Special Agent Cordova of the Federal Bureau of Investigation.

I reviewed the affidavit and publicly-available information on non-acoustic ocean imaging, including several articles by Dr. Lee. I also reviewed charts I received directly from Assistant U.S. Attorney Jonathan Shapiro, which he told me during the course of a telephone conversation Peter Lee had used during his lecture in the PRC. Subsequently, my office complied and forwarded a literature review, including Peter Lee's articles and the charts noted above, as well as a classification guide, to the DOD General Counsel.

The above actions describe my total involvement in the Peter Lee case prior to being questioned in connection with the investigation of the Senate Judiciary Subcommittee on Administrative Oversight and the Courts starting last fall.

PREPARED STATEMENT OF WAYNE WILSON

I am the Director of the Office of Technology and Evaluation in the Office of the Deputy Assistant Secretary of Defense (intelligence) in the Office of the Secretary of Defense. Since late 1996 I have had oversight responsibility of the Department's Advanced Sensor Applications Program (ASAP). ASAP is directly managed in the Intelligence Systems Support Office (ISSO) which I also oversee.

In the fall of 1997 my staff participated in one meeting that included the Justice Department, the DoD General Counsel, and the Department of the Navy regarding Peter H. Lee, a TRW employee. The DoD General Counsel tasked my staff to provide the classification guide to the Justice Department and to search for related unclassified information. We provided that information to the Justice Department and to the DoD General Counsel. That package of information has been provided to the Subcommittee. During this time, my staff also participated in telephone conversations with members of the Justice Department on these same subjects.

Apart from internal DoD discussions on the details of the incident, this describes my staff's involvement prior to being questioned by this Subcommittee.

Senator SPECTER. That concludes the hearing.

[Whereupon, at 12:24 p.m., the subcommittee was adjourned.]

THE PETER LEE CASE

WEDNESDAY, APRIL 5, 2000

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room SH–216, Hart Senate Office Building, Hon. Arlen Specter, presiding.

Also present: Senators Grassley, Thurmond, Sessions, Torricelli, and Leahy (ex officio).

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. We have waited for a few minutes here for the arrival of some of the Senators from the minority, but we are a little past starting time, and we are going to have a complicated morning because two votes have been scheduled at 11 o'clock. So we will start at this time.

The Subcommittee on Oversight of the Department of Justice is going to proceed now with its second hearing on the plea bargain of Dr. Peter Lee, which involves a matter which is very, very serious, concerning two matters of espionage, one where Dr. Lee in 1985 informed scientists of the People's Republic of China about nuclear secrets, and again in 1997 when Dr. Lee informed scientists of the People's Republic of China about ways to detect submarines.

The Department of Justice entered into a plea bargain which, in the face of offenses that could have carried the death penalty or life imprisonment, resulted in a recommendation by the Department of Justice of a short period of incarceration, which not unexpectedly resulted in a sentence which had no jail at all but had only community service, a fine, and probation. That plea bargain was entered into without any damage assessment by the Department of Defense.

The assistant U.S. attorney, the trial attorney, was unaware, according to testimony or according to a statement which I took from Mr. Jonathan Shapiro in Los Angeles on February 15, that he was authorized to proceed under 794, which is a tough provision, but said that his only instruction was to secure a plea bargain, 793 and 1001, and could get nothing more by way of authorization from the Department of Justice.

In interviews with ranking DOJ officials, that was never disclosed to this subcommittee. But documents have been discovered from the FBI and the Department of Defense that if that plea bargain was declined, there was authorization to prosecute under 794, again, a fact, at least according to the assistant U.S. attorney, not made known to him.

We have had a request by Attorney General Reno not to subpoena line attorneys and had an extended meeting with the Attorney General yesterday afternoon, a meeting attended by Senator Hatch, Senator Grassley, Senator Torricelli, Senator Leahy, and a good many officials from the Department of Justice, FBI, and staff.

After considering the request of the Attorney General, it was my judgment that this hearing ought to proceed and it ought to proceed with the subpoena standing. The Attorney General raised an objection that it was inappropriate to subpoena a line attorney, but there is an overwhelming weight of authority to the contrary. The Congressional Research Service has summarized the issue, and I will make a part of the record a memorandum on this subject.

Senator SPECTER. But suffice it to say for these purposes at this time that there are many, many, many authorities supporting congressional—many precedents supporting congressional authority to subpoena line attorneys. As recently as last June 9, 1999, a line attorney was subpoenas by the Governmental Affairs Committee. In 1992 to 1994, Government line attorneys were subpoenaed with respect to the DOJ influence on the Environmental Protection Agency. Line attorneys testified in the Rocky Flats investigation in 1992. In 1975, line attorneys were subpoenaed by the FBI and the Department of Justice on domestic intelligence issues. Line attorneys were subpoenaed in Watergate, testified in Iran-contra. In many of the situations, line attorneys were not subpoenaed but testified voluntarily, and this authority goes all the way back to Teapot Dome and is as recent as last year.

The Attorney General raised an issue about morale in the Department of Justice, and I do believe it is a fair observation that the Department of Justice survived on the morale issue on these many, many other occasions where line attorneys testified.

I have had some experience myself in the field, having been a line attorney, as an assistant district attorney in Philadelphia for some 4 years, and I know what that is like. And then I was district attorney there for 8 years, so I have some appreciation and insights as to what it is to have an office. The Attorney General said to me yesterday that I didn't understand what it was like being Attorney General. And I didn't disagree with that because I haven't been Attorney General. But I have had some experience both as a prosecutor and as a Senator on the Judiciary Committee for almost 20 years now. And I commented about the scope of my office, 160-plus attorneys, 30,000 prosecutions, and 500 homicide cases, and said that if one of my assistants was called upon or if I had been called upon under circumstances that are present in this matter, I wouldn't object; and that, in fact, I think it can have a salutary effect on the morale of the Department of Justice, or should have, when these questions are raised. And if there are answers, I am prepared to hear them.

But this subcommittee has conducted a far-ranging search and hasn't found answers. And what we have found is a concerted and persistent pattern by the Department of Justice in obstructing Senate oversight, a consistent and persistent pattern of obstructing Senate oversight.

When we have made requests for documents, they have not been produced. When we have made requests for eliminating redactions, we have had no cooperation. When we have interviewed ranking DOJ officials and have come to the subject of what was done in this case, nobody told us that there was authority for prosecution under 794. And it was only last night that we received from the Department of Justice information that the Department of Energy damage assessment had been provided to the Department of Justice, a fact concealed from this committee.

Now, we are going to inquire about that as well. And it may well be that the so-called Department of Justice is guilty of obstruction of justice. And we intend to get to the bottom of that. Mr. Robinson, shaking your head in the negative. We sit and deliberate on subpoenas, and the Department of Justice, Mr. Robinson, who apparently disagrees with my last statement, sends a letter to the ranking Democrat commenting about me without sending me a copy.

I will also make a part of the record a long list of requests which have been made to the Department of Justice and the Attorney General specifically where commitments at hearings were made by Attorney General Reno, commitments were made by her which she did not fulfill, including my request on May 5th for the specifics on the plea bargain as to Peter Lee and my request again on June 8th as to the specifics on the report of the plea bargain on Peter Lee.

[The list follows:]

HEARINGS

July 15, 1998—Judiciary Committee Hearing—Oversight of the Department of Justice

- You asked for the Attorney General's opinion as to whether it was "specific and credible" evidence of a legal violation when Mr. Karl Jackson testified that Mr. Huang said within earshot of President Clinton, "elections cost money, lots and lots of money, and I am sure that every person in this room will want to support the reelection of President Clinton." The Attorney General responded that she would be "happy to review it with the task force and get back to you." She did not do so.

March 12, 1999—Judiciary Committee Hearing—Dept. of Justice FY2000 Budget Oversight

- You requested that the Attorney General make available to the Committee any writings, memoranda or documents which "deal with Mr. LaBella with respect to his recommendations on independent counsel . . ., or whether that issue came up in any of the Department of Justice documents which led to the appointment of Mr. Vega. Attorney General Reno responded that she would be "happy to furnish you anything that I can appropriately furnish you on any matter relating to that." The Attorney General did not follow up by furnishing information or even to say that there was nothing she could "appropriately" furnish.
- When you stated that Mr. LaBella was quoted as saying that he did not even get a phone call from the Justice Department that Mr. Vega was going to be nominated, the Attorney General responded that it was her understanding that he did, but that she would check and let you know. Notwithstanding this commitment to respond, she did not do so.

May 5, 1999—Judiciary Committee Hearing—Oversight of the Department of Justice

- The Attorney General agreed to respond in writing as to whether there were any ongoing investigations as to Mr. Fowler and Mr. Sullivan. She did not do so.
- The Attorney General agreed to respond in writing as to her thoughts on the plea bargain of Peter Lee, specifically the propriety of the sentence given the seriousness of the offense. Notwithstanding this commitment, the Attorney General did not respond.

June 8, 1999—Judiciary Committee Hearing—Closed Hearing

- In response to your questions, the Attorney General promised to provide you with the following three things:
  1. A report within a month on where DoJ stood on prosecuting WHL.
  2. A report on the Peter Lee plea bargain.
  3. Details of the Chung plea bargain.

  Notwithstanding this commitment, the Attorney General did not provide any of these items.

LETTERS

December 2, 1997

- You wrote to the Attorney General requesting that a copy of the Freeh memorandum be made available to the Judiciary and Governmental Affairs Committees. You received a response from Attorney General Reno and Director Freeh on December 8 stating that they must decline your request.

July 10, 1998

- You wrote to the Attorney General reiterating your request from December 2, 1997, that a copy of the memorandum from FBI Director Freeh recommending appointment of Independent Counsel on campaign financing reform matters be made available. No response.

July 23, 1998

- You wrote to the Attorney General requesting a copy of the LaBella report recommending Independent Counsel. No response.

July 22, 1999

- You wrote to the Attorney General (Senator Hatch signed on) requesting all documents in the Department's possession relating to (1) the Department's investigation of illegal activities in connection with the 1996 federal election campaigns, and (2) the Department's investigation of the transfer to China of information relating to the U.S. nuclear program. DOJ staff responded by providing very little information.

September 9, 1999

- Together with Senators Hatch and Torricelli, you wrote to the Attorney General regarding the redactions in the transcript of the June 8 closed session hearing. The Attorney General did not respond to you, but instead met separately with Senators Hatch and Leahy on the issue.

September 29, 1999

- You wrote to the Attorney General to request the ten pieces of intelligence information mentioned in the United States Department of Justice, Office of Inspector General Special Report on the Handling of FBI Intelligence Information Related to the Justice Department's Campaign Finance Investigation (July, 1999). You further requested any analysis available to the Department of Justice related to the validly of the information and its suitability for use in a prosecution or relevance to a plea agreement. No response.

September 29, 1999

- You wrote a follow-up letter to the Attorney General regarding the documents you requested on July 22, 1999. Again, no response.

March 15, 2000

- Your counsel, David Brog, was invited to DOJ offices to review the partially unredacted LaBella memo which had already been reviewed by other members of Congress. When he arrived, he was informed that he could not review the memo, since the new head of the Campaign Finance Task Force had to review it in order to see if further redactions were necessary in light of some ongoing cases.

March 24, 2000

- You wrote to the Attorney General regarding a letter from Assistant Attorney General James Robinson which was sent to Senator Leahy in time for the Judiciary Committee executive business meeting on March 23. You asked her for her view of whether it was proper for Mr. Robinson not to send you a copy of the letter even though you were a topic of the letter. No response.

Senator SPECTER. When Attorney General Reno has appeared at oversight hearings, she has had the consistent response, "I will review that and get back to you." So yesterday at the session, while Attorney General Reno was present and we were talking about the Peter Lee plea bargain, I asked her what participation she had. I knew the answer was she had none because I had found that out. But I said to her, eyeball to eyeball, this is a matter that the Attorney General should have supervised. And she gave me the same answer: "I am not going to answer that at this time, but I will later."

Now, in this context, it seems to me that this subcommittee would not be doing its job if we didn't pursue this matter at this time in this open session. This is not the only matter that this subcommittee has to work on, and to get information has been a long, tortuous struggle. And if at the last minute the Attorney General is going to come in and say don't proceed with your hearing, submit written interrogatories, which is, as any trial attorney knows, totally unsatisfactory because of the absence of follow-up, or take a deposition and re-evaluate at a later time, we wouldn't be doing our duty.

And this is not the only matter on the agenda of this subcommittee. We have to pursue Wen Ho Lee where we have met fierce resistance from the Department of Justice on getting at the Attorney General's redacted statement from June 8 so badly you can't tell what the testimony was. We have under request now subpoenas for FBI Director Louis Freeh and former special assistant Charles LaBella. We have questions outstanding for the plea bargains in John Huang and Charlie Trie and Johnny Chung. We have the Pauline Kanchanalak case to investigate. We have the Maria Hsia matter to look into. We have the issues of Vice President Gore's soliciting hard campaign contributions from the White House, the refusal of the Attorney General to appoint independent counsel. And if we take a long, tortuous road, tougher than extracting bicuspids, and at the last minute fooled and say we will do something else, we wouldn't be doing our job, and we would have no chance to finish this investigation in the 9 months remaining in this administration.

Now, those are just a few of my thoughts. If in the course of this hearing we approach any classified information, we will adjourn and have a closed session.

I don't know if it is worth noting or not, the letter which was put on my desk from the National Association of Former U.S. Attorneys objecting to the calling of line attorneys, representing to speak for a great many people with a single signature. But let it be noted that the author did not hear the subcommittee's point of view. And if the association has anything to say, we would be glad to hear them in a formal session.

I want to yield to my distinguished colleague, Senator Grassley, who has shared the podium with me since January 3, 1981, who

is the chairman of this full subcommittee, and I again thank him for allowing me to take the lead on this limited DOJ oversight aspect.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Well, and I feel very comfortable having a very competent person like you, not only a competent Senator but also the reputation you had as a prosecutor, to take the lead on a very difficult situation. And it is too bad that you have to go through so many hoops to just do our constitutional responsibility of oversight, and I thank you for being willing to fight hard for that and to tell you how proud I was yesterday to listen to you at your meeting with the Attorney General to stand up for the right of Congress having the information that we need to carry out our constitutional responsibility of oversight. And every Senator should be proud of what you are doing because the extent to which you would be run over in this process, every Senator would be diminished to a considerable degree in each of us fulfilling our constitutional responsibility of oversight.

And so let me thank you for that, and let me say that probably the credibility of the Justice Department in the case of line attorneys testifying might be a little more legitimate and credible if there had not been a history of several other instances of stonewalling in efforts of Congress to get information or even getting answers to our questions in open hearing when they didn't have the information available or there wasn't time to give that information. So thank you very much for doing that.

I have got just a short statement on a small concern of mine that I want to give today, and as I did last week in our first hearing on the Peter Lee case, I would like to commend you, first of all, for your hard work and diligence. And as I also mentioned last week, this case seems to show a communication breakdown among the various agencies involved. I think today's hearing should answer a lot of those questions. I think it is important that we find out who in the Justice Department made key decisions about how the case would be prosecuted and charged and why. And it is also important to find out how much of the evidence was shared or not shared with the Navy and who made that decision and why that decision was the way it was.

Was the prosecuting attorney as aggressive as he should have been? Or were his hands tied by Main Justice? We expect that the witnesses today from the Justice Department can help answer these and other questions so that we can gain some accountability and make some reasonable judgment as to their actions.

As a side note, but an important one, we have uncovered a discrepancy since last week's hearing, and I think it is something we need to get to the bottom of. Last week, we received testimony from the FBI's Daniel Sayner from the Los Angeles office. He was asked about the FISA coverage expiring September 1997 and if there was a request for it to be renewed. Mr. Sayner said yes, but it was turned down by the Justice Department because the activity in question was stale.

This week, representatives from the Justice Department briefed us that there was no such record of their turning down a FISA renewal, and they would never have characterized the activity as stale for what they called "obvious reasons." We had this exact same problem in the Wen Ho Lee case. It was also on a FISA application.

The Federal Bureau of Investigation blamed the Justice Department for turning down the FISA request in 1997. The Justice Department says the FBI was told it needed to do more homework.

Subsequent documents that we have discovered show the Justice Department may have been right, in my view. I hope this subcommittee does what it can to resolve these discrepancies. If we allow finger-pointing to go unchallenged, we fail to get accountability, which is what we are here for and what this whole set of hearings are all about under the direction of Senator Specter.

To really learn the lessons from these cases, we have to know who played what role. We have the first matter under investigation, and I believe this discrepancy should be investigated as well.

I look forward to today's testimony, and once again, Mr. Chairman, I thank you and commend you for your hard work.

Senator SPECTER. Thank you very much, Senator Grassley.

Senator Thurmond.

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Mr. Chairman, I commend you for holding these hearings to discuss the Dr. Peter Lee espionage investigation, the plea-bargaining process that was involved, and the subsequent sentencing of Lee.

The damage done by espionage, whether nominal or egregious, to our national security interests is something that each of us must consider very seriously. After gathering full information and facts, we on this committee must take a positive approach regarding this oversight to determine what we can do to assist our law enforcement agencies not only to curtail espionage but also to focus on swift, certain, and proper punishment to those involved in any type of espionage against our country.

I have serious concerns about the plea bargain allowed in this case. It appears that Lee's sentence was extremely light given the seriousness of his conduct, his failure to cooperate, and his failure even to be truthful with authorities.

I believe these hearings are important in regard to protecting our national security interests. Mistakes and shortcomings of the past cannot be wiped clean, but we can take steps that will hopefully serve to preclude identified mistakes of the past from occurring in the future.

I welcome our witnesses to this hearing and look forward to discussing this important matter with them today.

Thank you, Mr. Chairman.

Senator SPECTER. In order of sequence, which is our practice, Senator Sessions?

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Chairman Specter.

I have served as an assistant U.S. attorney, a line prosecutor, for two and a half years and as a U.S. attorney for 12. I have seen this matter from both sides. I have had hearings in this committee where my assistants have testified on matters, at least in the House committee, and it strikes me odd that people would suggest that a public servant could never be called and should never be called to discuss matters occurring.

I have read your questioning of Mr. Shapiro, Senator Specter, and I think his testimony is a crystal-clear, ringing testimony of a competent, experienced, capable assistant U.S. attorney whose knowledge of the case was extraordinary, whose dedication to justice was total, and who was blocked time and time and time again by people in the Department of Justice from doing what he knew to be his duty. It is plain. Anybody who reads it knows it, who has been there and who has dealt with prosecutors knows it. And I have seen people in the Department of Justice and I have seen the line prosecutors on the question of the validity of a case, whether or not it will be successful at trial, experienced trial attorneys in the field have the best judgment time and time and time again. And this is a classic example of it. The people in Washington who were denying him the right to go forward in the way that case in my view should have gone forward were far less experienced in actually handling cases in court than he was. And I think we need to look at that. That is a systemic problem.

There is also a systemic problem with institutions like the Navy who don't want cases to go forward because they are afraid some of their people will have to testify under oath and the institution may be embarrassed in the course of it. So they are more concerned about the embarrassment potential to their institution and some terror that somebody might say something that would embarrass them or give away some secret that they just don't want any case to go forward. And that is the responsibility of the Department of Justice. They are the Department of Justice, and they have to say to institutions we are not concerned about that. We have a responsibility, we have an individual who was a spy against the United States, who met in a hotel room in Beijing with a top scientist of China and gave away and discussed American secrets.

I will tell you one thing: I don't think Mr. Shapiro would have had a problem getting a conviction on that. He confessed to it and I don't think any jury is going to believe that he was there for his health and a casual conversation to have two different meetings in Beijing hotel rooms with top Chinese scientists. There is no business for that, and anyone with common sense would understand it.

So I just would suggest that we ought not to lightly subpoena line attorneys. I think that is a legitimate concern. But we have had a number of plea bargains here in recent weeks that have come to my attention by this Department of Justice that raises troubling concerns. We don't have a special prosecutor law anymore. Who is going to—is the fox going to guard the henhouse? Is the Department of Justice able to say you can't subpoena line at-

torneys so nobody anywhere can ever really find out what happened in a case that went awry? We can never do that?

The constitutional responsibility of this Senate is to provide oversight, and how can we do it if we can't talk to the people who were actually involved? What if we have got political appointees who are not actually giving us a clear picture? We have had testimony on this matter previously in secret hearings, but the tone of it was quite different when you heard the testimony of Mr. Shapiro and how his perspective of it was from the field and wanted to go forward. I think we needed his testimony.

So the Department of Justice is just going to have a right to say to the Congress of the United States we are never going to submit an assistant U.S. attorney under oath to testify about a case? It ought not to be lightly done, but to say it is never going to be allowed to be done, I do not believe that is sound. How can we ever—the defendant is happy with the outcome of the case. He got a sweetheart deal. He ought to be happy. Who is going to challenge the prosecutor? Who is going to ask the questions? We don't have an independent counsel. I submit it only can be the Congress that does that.

I care about the rule of law. I care about Justice in America. And I care about spying and giving away American secrets to a communist nation. And we have had a lot of that lately, and I haven't observed that we have done a very good job of prosecuting it.

So I think it is time to go forward, Chairman Specter. Thank you for your leadership. I thought your work has been extraordinary. You have had frustration after frustration. The Department of Justice and the White House have delayed in a stonewall mode from day one. You have had a hard time even getting any additional help. You have personally committed your personal time to mastering this case. And we wouldn't be here today if you hadn't showed the kind of determination to overcome these obstacles that you have, and I thank you for it.

Senator SPECTER. Thank you very much, Senator Sessions.

Senator THURMOND. Mr. Chairman?

Senator SPECTER. Yes, Senator Thurmond.

Senator THURMOND. I have another commitment and have to leave. I have some questions I would like to be answered for the record.

Senator SPECTER. Senator Thurmond, they will be answered for the record. Thank you very much for joining us, and we understand your other commitments.

Senator SPECTER. Thank you, Senator Sessions, for your comments based on your experience as a U.S. attorney and an Attorney General, and I think the indignation in your voice ought to be shared by everyone.

Senator Torricelli, the ranking on the subcommittee, declines an opening statement, and Senator Leahy, while not a member of this subcommittee, maybe ex officio, ranking of the full committee, but regardless of any of the technicalities, we will call on him now for an opening statement.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. I thank you, Mr. Chairman, for your usual courtesies.

Senator Specter has been an advocate for pursuing this investigation of how the Justice Department, the FBI, the Defense Department, the Navy, and the Energy Department handled the case against Peter Lee. He has raised questions that our agencies responsible for protecting our national security failed—in this case, the Justice Department, the FBI, the Defense Department, the Navy, and the Energy Department.

Those are serious allegations. They have profound implications, both for how our friends and our enemies view our Nation's response to espionage that is targeted at our nuclear secrets.

Now, I should state at the outset that while we may have some disagreements in this case, Senator Specter has every right to raise questions about the prosecution of Peter Lee and to leave no stone unturned. I do feel, however, that this oversight investigation into the prosecution of Peter Lee does not reveal new items of significance. So I will state my reasons for earlier objecting to the Senator from Pennsylvania's request for and the Judiciary Committee's approval on a party-line vote of subpoenas to two of the witnesses appearing here today.

Michael Liebman, who is a current line attorney at the Department of Justice, and Jonathan Shapiro, a former assistant U.S. attorney in Los Angeles, are not and were not supervisory lawyers or political appointees within the Department of Justice. These attorneys were not ultimately responsible for the prosecutorial decisions in the Peter Lee matter, though they certainly helped execute those decisions.

To the extent there are factual questions about which Mr. Liebman and Mr. Shapiro could testify, the answers to those questions could and should have been obtained from the Justice Department by other means, whether by deposition, interviews, closed session, or otherwise. This was not done. I feel, as I said before, that Mr. Liebman and Mr. Shapiro should not be here today.

I remain concerned about this committee subpoenaing line attorneys. Compelling line attorneys to testify publicly before congressional oversight committees runs the serious risk of chilling the free exchange of opinions within prosecutors' offices and making prosecutors look over their shoulders at the politicians when they decide to make a particular charge or not and whether they will then be second-guessed in this kind of a forum.

Now, I know well that internal discussions and debates and even disagreements between and among line prosecutors and supervisors about the course of a prosecution and the merits of a case are invaluable. And line prosecutors should be free to express their candid opinions about a prosecution, even free to play devil's advocate on a particular case if they wish, without feeling that they are someday going to be testifying about it. We want them to express their opinions candidly without second-guessing.

Now, my concerns are not new, nor are they partisan, nor do they have anything to do with the subject matter of this particular hearing about which I have other unrelated questions. They pre-

viously have been voiced by others, including the chairman of this committee, Senator Hatch, who has said that line attorneys should never be subjected to congressional inquiry, not even in exceptional circumstances.

Now, whether such an exception should be warranted is irrelevant here because there has been no showing of need in this investigation. Let me summarize.

First, Senator Specter says that the Department of Justice did not tell Mr. Shapiro when he was serving as a Federal prosecutor in California that he was authorized to charge Peter Lee with violating the most serious espionage law, 18 U.S.C. 794. Well, that is not right. At the time of the plea agreement, the Federal prosecutor had not been authorized to indict Lee on the 794 charge. Internal FBI and DOD memoranda relied upon by the chairman of the subcommittee suggest only that if Lee had refused to accept the plea offer that the Justice Department may then have authorized and brought a 794 case. Since that contingency never came to pass, there was never any such authorization.

Second, he said that the Department of Justice agreed to a plea bargain with Peter Lee before a damage assessment had been completed regarding the information Lee confessed to passing to the Chinese. That is wrong. Prior to Lee's plea, Justice Department attorneys had numerous contacts with representatives of both DOD and the Navy. Representatives of DOJ and the FBI met with the agencies and provided a copy of FBI Special Agent Gil Cordova's draft affidavit, which summarized Lee's disclosures. In addition, there were numerous telephone conversations about the issue between the prosecutors and the officials at DOD and the Navy.

To the extent the claim that no damage assessment had been completed is based on the fact that DOD and Navy officials reviewed only the case agent's affidavit to assess the information Lee disclosed, instead of his own statements, is immaterial. DOD and Navy officials have now reviewed the transcripts of Lee's confessions and confirmed they are substantially consistent with the affidavit that had been provided in 1997.

Third, he said that when the damage assessment was completed, the Navy agreed with the Department of Energy that the information Peter Lee confessed to passing to the Chinese was classified. That is not the point. The Navy has always agreed with the Department of Energy that the information was classified, though healthy and thoughtful internal debate occurred among the agencies over the appropriate level of classification.

The point is that the Navy and the Department of Energy looked at the information Peter Lee confessed to passing and determined that most of it was in the public domain, either at the time he passed it to the Chinese or shortly thereafter. It does not take a prosecutor to realize that when you are arguing to a jury that classified information turned over to foreigners could hurt the United States, the jury might not believe you. They could go on the Department of Energy Web site and find most of the same information right there.

To the extent the information Peter Lee disclosed to the Chinese was not in the public domain, the Navy made clear that focusing on the reasons that this information would harm our national secu-

rity would not be helpful and, in fact, "bringing attention to our sensitivity concerning this subject in a public forum could cause more damage to national security than the original disclosure." That was in John Schuster's memorandum of November 14, 1997.

We should look at the scope and intensity in the investigation of Peter Lee's activities. He is a naturalized U.S. citizen who worked from October 1976 until 1991 at Lawrence Livermore National Laboratory as a research physicist. He was cleared to have certain access, and he worked at TRW—and I will put all this in the record.

But the FBI has been investigating him since 1991. In February 1994, the FBI sought and obtained permission to conduct secret electronic surveillance under FISA, and this secret surveillance continued for over 3 years, until September 1997. During the time of this surveillance, Lee, with the knowledge of the FBI, traveled to China, maintained his secret-level clearance at TRW, and had access to classified material.

In June 1997, he was interviewed by the FBI about a trip he had taken to China a month earlier, and he falsely told the FBI that he had not engaged in technical scientific discussions in the PRC and that he had paid for his trip. Later he said that he had participated in scientific discussions. He was given a polygraph examination, and his answers were found to be deceptive.

After he failed the polygraph, he was interviewed at length by the FBI over the course of 2 days, and then he confessed to providing confidential information to the PRC on two separate occasions. He admitted that 12 years earlier he had passed information relating to hohlraums, devices used in the simulation of nuclear detonations. Then in May 1997, he relayed information about the radar ocean imaging project he had worked on at TRW.

The case was brought by the FBI to the U.S. Attorneys Office for the Central District of California. Then, because it involved espionage, all decisions were coordinated with the Internal Security Section of the Department of Justice. The supervisors in that unit were ultimately responsible for the decisions in the case. Jonathan Shapiro was the line assistant U.S. attorney assigned in California. He is here. Michael Liebman, also here, was the line attorney assigned to the case in the Internal Security Section.

The case against Dr. Lee, as I have seen it, was a tough one to make. As I understand it, the primarily, if not only, evidence against Lee were his confessions. But there may have been problems anyway.

The information Lee said he disclosed in 1985 has since been declassified. In 1993, all or virtually all of the information relating to hohlraums was declassified. Now, this would not have stopped them bringing a case, but it certainly hurt the jury appeal of the case, again, if this matter is all in the public domain anyway. As a defense attorney, I can imagine him saying, when asked how much this was hurting the Government, he might say let's just click on the Web site.

Every appropriate charge relating to the 1985 hohlraum disclosure was barred by the statute of limitations. Now, one exception, of course, section 794, which includes the death penalty, that could have been brought. I suspect on the facts in this case, juries, if not

the presiding judge himself, might say that might be a tad bit of overreaching on the part of the prosecution.

Third, significant exculpatory information would have undermined a prosecution of Lee for his 1997 disclosure about the radar imaging project. Among other things, Mr. Schuster said that the confidential classification cannot be explicitly supported by the classification guidelines and raised other questions that I have already said. In fact, prosecutors described this memorandum as a body blow to the 1997 case. Not only did it suggest some equivocation as to the classification of the material disclosed, but it also revealed that similar information was available in the public domain.

Problem 4: No expert from the Department of Defense or the Navy was prepared to testify on behalf of the Government. Although Dr. Richard Twogood, a former director of the radar imaging program, was available to testify, prosecutors believed that his testimony could have been rebutted by a plethora of experts from the Defense Department and Navy who would have had to testify on behalf of Dr. Lee.

So I think in light of all these problems, one could make a very strong argument for the plea agreement. Considering the nature of the evidence against Dr. Lee and the formidable obstacles of a trial, the plea agreement negotiated by former AUSA Shapiro and his supervisors at the Department of Justice should be praised. Under the terms of the agreement, Dr. Lee agreed to cooperate. He pled guilty to two counts. Both counts were felonies. They did expose Lee to a maximum of 15 years in jail. What is remarkable, actually, is that the prosecutors convinced Lee to plead guilty to a serious count, the 793(d) charge, even though the statute of limitations had expired on it. We ought to be praising the prosecutors for getting somebody to plea to something when the statute had run.

Now, questions have been raised about why the prosecutor did not push harder for a lengthy prison term for Peter Lee. I happen to agree with Senator Specter that Peter Lee got a lenient sentence. We are in agreement on that. But the prosecutor's role in sentencing is limited. That is up to the judge.

So, Mr. Chairman, as I said, there are a number of areas where we do agree. I disagree, however, that there has been obstruction of Senate oversight. The Justice Department has cooperated. They have provided thousands of documents. They have made personnel available for interviews. They have provided Congressional staff with access to raw investigative files and to classified files, something that I have rarely ever seen happen.

Senator SPECTER. I am sorry that Senator Leahy was not here for my opening statement, and I would refer him to the detailed report filed by Dobie McArthur, all of which are at substantial variance with his representation of the facts.

Senator LEAHY. I understand, and I will read both——

Senator SPECTER. Excuse me, Senator Leahy. Excuse me, Senator Leahy. You are not recognized, and I am speaking.

Senator LEAHY. I am awfully sorry. I am terribly——

Senator SPECTER. You are not—you—when you say you are awfully sorry, I might have to agree with that.

As I was saying very briefly in response to that lengthy statement, when Senator Leahy makes the statement that the Navy always said the matter was classified, it is not true. And he then comes back to a comment that Dr. Schuster raised a question about classification. And it is not true that the nuclear matters were all declassified or that the submarine detection was all in the public domain. And when the assertion is made about being barred by the statute of limitations, there is an immediate correction on that by Senator Leahy himself that there was no statute of limitations to bar section 794.

But since Senator Leahy has absented himself, there is not much point in continuing the dialogue in his absence.

Senator Torricelli had said he did not have an opening statement, but let me call on you.

Senator TORRICELLI. Well, Mr. Chairman, I am just anxious because of the constraints of time to get to our witnesses. There are things I would like to say, but I think it is better we proceed to the witnesses before we lose members of the committee.

Senator SPECTER. Fine. Thank you very much, Senator Torricelli.

Mr. Jonathan Shapiro, would you step forward? And you have an attorney with you. He is welcome to come.

Mr. ROBINSON. Mr. Chairman, may I inquire? I understood that I was going to be allowed to make a brief statement.

Senator SPECTER. Well, you will be, but that will be when you come forward with your own witnesses at that time.

Mr. Shapiro, will you raise your right hand, please? Do you solemnly swear that the testimony you will give before this subcommittee of the Judiciary Committee of the U.S. Senate will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. SHAPIRO. I do.

Senator SPECTER. Mr. Shapiro, at the outset, I thank you for meeting with me in Los Angeles on February 15 and for responding to an entire series of questions. We appreciate your coming in today, and as I said to you at the time of our session on February 15, with respect to your participation, there is no criticism, expressed or implied, and that we have questions which we appreciated your answering before and we appreciate your answering now.

There has been an issue raised by your attorney as to some classified matters which you may have to refer to, and if you do, we will defer those answers, and we will conduct that inquiry in a closed session to protect any area of confidentiality. We think that this is a very important case on its own, and it is a very important case as to how espionage cases have to be handled and a very important case as an example as to what Senate oversight means in this country.

Mr. Shapiro, if you would identify your counsel, I would appreciate it.

STATEMENT OF JONATHAN S. SHAPIRO, FORMER ASSISTANT U.S. ATTORNEY, CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES, CA; ACCOMPANIED BY TOM CONNOLLY, COUNSEL

Mr. SHAPIRO. I would like to introduce my attorney, Mr. Tom Connolly, who has a brief statement he would like to make.

Mr. CONNOLLY. Mr. Chairman, good morning.

Senator SPECTER. Your name, sir, again, is what?

Mr. CONNOLLY. My name is Tom Connolly. Good morning, Mr. Chairman and other members of the subcommittee. I represent Mr. Shapiro, Jonathan Shapiro, a former Assistant United States Attorney in the Central District of California, who was an integral member of the prosecution of Peter Lee.

We are honored to appear before you today. I volunteered to represent Mr. Shapiro because of my longstanding admiration for him as a prosecutor and as a person. I believe he chose me as his attorney because of my experience as a Federal prosecutor.

I had the honor, gentlemen, of also prosecuting espionage cases. In the last few years, I prosecuted two of the most significant espionage cases in this country: the case of James Nicholson, who was a CIA spy, the highest-ranking CIA officer ever convicted of espionage, and David Seldon Boone, who was—we prosecuted him. He was an NSA cryptologist who provided documents to the Russians.

Mr. Shapiro is here with my help with recognition that espionage cases are inordinately complex and difficult. I don't think there is any question about that. The Peter Lee case also was very complex. I believe, however, after the subcommittee hears from Mr. Shapiro shortly and has the full story of this case, there is no question that his conduct in this case was extraordinary in an effort to bring Peter Lee to justice.

Now, Mr. Shapiro has prepared his own opening statement. I respectfully ask that he can read that, and after he reads that, he will be available to answer any questions. I will note, however, for the record the following: We are not—I do not represent the Department of Justice. I am not—we have not fought this battle with respect to Mr. Shapiro appearing before you. He has appeared, sir, in front of Senator Specter for interview. He has answered, I believe, any question posed to him by Senator Specter in that interview. And the subcommittee has a full transcript of that interview before it.

He is now available—he is volunteering today—it is a voluntary appearance today before this subcommittee, and I just want to note that for the record.

Senator SPECTER. Thank you, Mr. Connolly.

Mr. Shapiro.

Mr. SHAPIRO. Mr. Chairman, distinguished members of the committee, my name is Jonathan S. Shapiro. I am currently the chief of staff for California Lieutenant Governor Cruz M. Bustamante, and I am also an adjunct law professor at the University of Southern California School of Law, where I teach criminal procedure. I am a 1985 graduate of Harvard University where I received my bachelor's and master's degree in history. I received a Rhodes scholarship in 1987 and studied at Oriole College, Oxford University, where I received my second master's degree. I am a graduate of the University of California-Berkeley, Boalt Hall School of Law,

1990, and while I was in law school, I also worked full-time as a staff writer for the San Francisco Recorder newspaper covering the courts.

In 1990, I received what I consider to be the finest opportunity of my life. I was hired as a trial attorney with the U.S. Department of Justice Criminal Division through the Honors Program. To my parents' horror and pride, I turned down a high-paying job with a Los Angeles law firm to make what I believe was $23,000—it may have been $27,000—a year. After approximately 2 years of service, I transferred home to the U.S. Attorney's Office for the Central District of California, where I served as an assistant U.S. attorney.

During my 8 years as a Federal prosecutor, I handled countless cases, every kind of drug, fraud, violent crime, civil rights violation, gambling, government procurement case. I received numerous awards and commendations. But like most prosecutors, the cases that I am most proud of were the tough ones, the cases where, but for my work, the defendant would have escaped justice.

When California officials declined to pursue a gynecologist who sexually abused his patients, I spent 2 years building a fraud case against him, convicted him at trial, and brought some justice to his victims.

When local officials declined to pursue two sheriff's deputies accused of civil rights violations, I pursued the case and obtained convictions based on irrefutable evidence that they beat confessions out of suspects.

I spearheaded what became the prosecution of the largest HUD fraud in the history of California. I obtained the first convictions that stuck against operators of illegal gaming establishments. I was always willing, I was eager to try tough cases, and I was always willing to lose them if I thought the case merited prosecution.

My last case as a prosecutor, I attempted to convict an officer, a police officer accused of excessive force against a victim who was a heroin addict. The jury hung. But I am very proud that I tried that case, and I am very, very proud of the work I did in helping to bring Peter Lee to justice.

It is no secret that in the Peter Lee prosecution I strongly advocated for the most aggressive approach in pursuing Mr. Lee on charges of espionage. It is also no secret that I had disagreements with my supervisors at the U.S. Attorney's Office and with the Department of Justice about how the case should be investigated and charged.

I took a more aggressive approach. I do not believe my supervisors were operating in anything other than good faith. And I would like to emphasize four points.

First, there has been a suggestion that, as a line assistant U.S. attorney, I made charging and plea decisions in this case. This is not true. As reflected in the March 23, 2000, letter from Mr. Robinson, chief of the Criminal Division, to Senator Hatch, these decisions were made by my supervisors, each of whom the subcommittee has already interviewed. Moreover, the Department's supervisory personnel and not its line attorneys make prosecution decisions in espionage cases.

Second, there has been a suggestion that the Department of Justice officials negotiating the plea did not appear to have consulted

with the FBI or the Department of Defense. This is not true. The committee has before it hundreds of pages of documents, numerous declarations, witness statements, court filings, and correspondence showing that I and members of DOJ were in extensive and constant contact with both the FBI and the Department of Defense. Indeed, every step I took was in concert and consultation with the FBI and my supervisors at DOJ.

Third, there has been a suggestion that the seriousness of Peter Lee's conduct was not brought to the attention of the sentencing judge. This is not true. The subcommittee has before it my personal numerous, extensive sentencing position papers in which I outlined in detail all of the criminal conduct described to the committee, including impact statements from the FBI, the Department of Energy, Dr. Richard Twogood, who was my witness, and others.

Furthermore, the subcommittee has before it the entire sentencing transcript in which I again articulated the seriousness of the crimes, and I urge you to read it. I am proud of the advocacy that you will read in that transcript.

Moreover, an independent branch of the criminal justice system, the U.S. Probation Department, produced a lengthy pre-sentence report to the judge, which, as I recall, is about 70 pages long and which I do not have access to as a former prosecutor, in which the judge was provided yet another detailed analysis of the seriousness of the crime.

Finally, there has been a suggestion that DOJ entered into the plea agreement before a sufficient damage assessment was conducted. Let me make this point as clear as I possibly can. This is not true. I am eager to explain why I can make that assertion in full confidence. However, I cannot—I cannot do so in an open public setting for reasons that we have explained to staff because of my continuing sworn obligation to maintain the security of specific classified information. That is why, as late as yesterday, we urged that at least a portion of these hearings be conducted in closed session.

Representing the United States of America was more than a job for me. It—it was the greatest honor of my life. No one cared more about the results. No one fought harder for the client. And I am very proud of the work that I did, both in the Peter Lee case and in the hundreds of other cases that I handled.

Senator SPECTER. Thank you very much, Mr. Shapiro.

I repeat that we appreciate your being here. We appreciated your responding to questions on February 15, and there is no criticism, expressed or implied, as to anything you have done. And all we seek to do is to inquire to find out what happened here, both as to this case and as to a guide for future cases.

Mr. Shapiro, as you have emphasized, you wanted to prosecute under section 794. Would you state briefly what 794 provides and why you felt you had a case to proceed under 794?

Mr. SHAPIRO. My attitude about the case, Senator—and I appreciate your comments—I think were expressed pretty clearly by Senator Sessions. In my view, coupling the 1985 charge with the 1997 charge with what I thought was a dead-bang case—and I think there is total agreement on the false statement, the 1001 case. Those counts added together I felt I was going to convict him of

something, and I had a very strong sense that at sentencing all that information could have been considered by the judge.

My frustration with this case—and I have made reference to the fact that I took an aggressive approach in this case—was that unlike the hundreds of other cases I prosecuted, I did not have a free hand in making these decisions. The line assistant in an espionage case wouldn't. In my experience as a Federal prosecutor, there were a handful—there were three cases where I didn't have——

Senator SPECTER. Mr. Shapiro, before you come to that, would you focus on the provisions of 794, what they are, and why you felt the evidence was worth prosecuting under 794?

Mr. SHAPIRO. Well, at what point? Because I do want to be clear on one fact. My feelings about the case—and I can't—I don't know that the subcommittee has focused on this. My attitude about the case has got to be understood a little bit in the context of when I got involved, when we got involved. There apparently was a FISA investigation of Peter Lee. Obviously, the U.S. Attorney's Office was not involved in that. FISA is not a tool for obtaining evidence in criminal prosecution.

My involvement in the case started when Peter Lee's wife found a listening device in their phone. At that point the FBI came to the U.S. Attorney's Office and explained the situation and asked: Is there anything we can prosecute this man for?

At that point, the only count that was available to us was 1001. There had been no confession at that point. So at that point, I didn't know or really have any reason to think that there could be a 794 count.

As the case developed, I began to think perhaps the elements could be met, the elements being that an individual, the defendant, provided information of a classified nature that could help a foreign nation or could be a hindrance to the United States with the specific intention of doing so, and, in fact, did so.

As far as the 794 in this case, both in 1985 and 1997, the information was to have referred to nuclear weaponry—would have had to have referred to nuclear weaponry. So those were my elements. And as the Federal prosecutor, I don't classify information. I can't testify. We needed to find a witness who would say this stuff is classified, this nuclear weapon material.

Now, if this was your run-of-the-mill drug case or if this was your run-of-the-mill fraud case, I personally would have gone out and gotten the evidence together and pursued my case. Because of the nature of the espionage case, this went to Internal Security, and it was their responsibility to get the classifications, although——

Senator SESSIONS. Security in Washington, DC, Department of Justice.

Mr. SHAPIRO. Yes, that's right. And I have to say beyond that there is more I can say on this issue, and I'd like to do, and I think it gives a good context to what happened. But I cannot in an open session.

Senator SPECTER. Well, when you talk about the classification, we will proceed later into closed session to hear that testimony.

Isn't it true, Mr. Shapiro, that you were only given authorization to prosecute under 1001, false official statement?

Mr. SHAPIRO. I was given authority to pursue a plea agreement and obtain a plea agreement on 793 for the 1985 offense, if I could manage to get the defendant to waive the statute of limitations and take that plea, and the count of 1001. Had I had authority, Senator, to charge 794, I would have charged 794.

Senator SPECTER. Mr. Shapiro, were you aware of an FBI document dated November 25, 1997, which states in part—and this will be made a part of the record.

[The document follows:]

Royal Tourist (8) & (9)

From: MICHAEL DORRIS
To: HQD5.DSPO5.JHASYCHA
Date: 11/25/97 8:25pm
Subject: Royal Tourist

John H.:

After we spoke yesterday, 11/25/97, I heard from JJ Smith.

As he understands it, ISS/Dion's instructions to the AUSA in L.A. were to offer RT an opportunity to plead to 18 USC 793(d) and 18 USC 1001.

Section 793 is the "Gathering, transmitting, or losing defense information" section. Conviction can yield a maximum prison sentence (per count) of 10 years; also, a fine can be levied by the Judge. If you look at 793(d), you can see that RT clearly violated it in 1997 (although you may not be able to prove it in court).

Section 1001 is the "False statements" section. Conviction can yield a maximum prison sentence (per count) of 5 years; also, a fine can be levied by the Judge.

Based on reports of a meeting that took place last Friday (11/21), JJ thinks RT will agree to plea. (I'm not so sure, but my reasons are not really logical. I believe cultural factors will cloud RT's decision making capacity). JJ said that RT and his attorneys met with AUSA Shapiro on Friday (I think Gil and/or Serena may have been there) and several interesting items were revealed. First, Shapiro grilled RT for about 4 hours, eliciting even more self-incriminating statements (unfortunately, none of which can be used to prosecute him). This is helpful because it reassures AUSA Shapiro of the correctness of prosecuting RT, and it demonstrates to RT's lawyers how much trouble he is facing. Second, one of RT's lawyers privately advised AUSA Shapiro that RT does not really have enough money to mount a complicated, long-term defense. Therefore, as RT's attorneys know he is culpable and broke, they will probably advise him to deal.

FBI EQUITIES AT THIS POINT:

I told JJ that he must remind AUSA Shapiro (vigorously and repeatedly) that the FBI is much more interested in the intel yet to be garnered than in punishing felons. Therefore, any plea agreement must contain language permitting a thorough consensual search and complete cooperation by RT. JJ/Gil/Serena should be able to articulate to the AUSA everything they could possibly have hoped to gain from a search warrant, plus anything else they can think of, and be sure that RT agrees to let the FBI have unfettered access to all those things. He must also agree to tell all. Maybe even submit to a polygraph, who knows. Anyway, I think you get the idea.

ALTERNATIVE SITUATION:

According to JJ, ISS/Dion said that if RT doesn't accept the plea proffer, then he gets charged with 18 USC 794, the heftier charge.

MY THOUGHTS:

1) I think the government should charge him with 794 first, then make the plea offer. I think this will help RT and his lawyers focus.

2) I don't think RT is emotionally and culturally equipped to cop a plea just yet, no matter what his attorneys tell him to do.

I hope I'm wrong on both points.

Mike, ext. 4-6485

CC: HQD5.DSPO5.JKILROY, DEVANS

(8)

Senator SPECTER. "According to J.J."—who is J.J. Smith of the FBI—"ISS/Dion said that if R.T."—referring to Dr. Lee—"doesn't accept the plea proffer, then he gets charged with 18 U.S.C. 794," the heftier charge.

When you handled this case, had you been aware of that document?

Mr. CONNOLLY. Pardon me, Senator. Mr. Shapiro just got his security clearance reinstated on Monday. We have been hampered in our efforts to get every single document before him because we did not have an opportunity because of classification issues to provide everything. I believe Mr. Shapiro has seen that document, but maybe only on one occasion, and that was in the last day or so.

If there is a copy available, I would ask that the Senator provide a copy to Mr. Shapiro to talk on it, because I don't think he has a familiarity with this, having not seen something in three and a half years.

Senator SPECTER. Mr. Connolly, the subcommittee provided both of those copies on Monday, which was as early as we could do it.

Mr. CONNOLLY. No blame whatsoever do I suggest to your staff or anyone else, Your Honor. I am just suggesting that I don't want him to answer any questions on a document that he doesn't have before him.

Senator SPECTER. Fine.

Mr. SHAPIRO. Thank you. Senator, I saw this document for the first time on Monday.

Senator SPECTER. Referring now to a document from Acting Assistant Secretary of Defense to the Secretary of Defense and the Deputy Secretary of Defense—and I believe this was provided to you on Monday as well. We did that as soon as we——

Mr. SHAPIRO. Senator, can I ask you a question about the first document? Because as you've been talking, I just got it and I just read it.

As I said, I saw this document for the first time Monday. I don't know who created it, and I don't know where it came from. I do note that it says, "I told J.J."—which you just, I think, quoted, and that's J.J. Smith who I worked with—"that he must remind AUSA Shapiro vigorously and repeatedly that the FBI is much more interested in the intel yet to be garnered than in punishing felons."

And I bring this to your attention because I don't—again, I don't know who generated this, but this sentence reflects, I think, an important point for the subcommittee, which is from my experience, part of my problem in this case was there were individuals who weren't interested in prosecuting Peter Lee so much as they were interested in, as they say here, garnering intel, getting intelligence.

And that was one of the fundamental frustrations that the Department of Justice and I faced, particularly with the FBI, but also with other agencies. I'm—I'm a one-trick pony. I do one thing. I prosecute cases. They bring them to me. I prosecute them, I investigate them. I'm not an intelligence gatherer.

Senator SPECTER. It is not inconsistent with having a tough prosecution to get intelligence. That sentence refers to a line which the FBI has expanded upon otherwise that they wanted him convicted so that there would be leverage to get intelligence information. They——

Mr. SHAPIRO. Absolutely.

Senator SPECTER. They weren't adverse to a conviction or a jail sentence.

Mr. SHAPIRO. I completely agree. I just wanted to point out—and perhaps you could give me, provide to us the expansion of the FBI's statement. But this I think is an important point for the subcommittee's consideration.

Senator SPECTER. The point that I want to come to—and want to come to in fairly short order, because there are many other Senators to question and we have got a vote which has now been moved up to 10:45, but we will be back. Referring to the DOD document, which is about the same, the second full paragraph, "Should Lee decline the offer, the U.S. Attorney will seek an indictment against him for violation of Section 794."

Have you ever seen that document before this week?

Mr. SHAPIRO. I don't know what document you're referring to. I will—I will tell you that without more information I am a little hamstrung in commenting on it. If it's the document that—I mean, you know, maybe you could give me a document so I could see it.

Senator SPECTER. Mr. Shapiro, I believe you have had the document just at the same time you had the companion document.

Mr. SHAPIRO. Again, Senator, I'm sorry. I don't have it. Could you show me——

Senator SESSIONS. It is in that next to the last paragraph, alternative situation, down toward the bottom. You may have missed that language in the——

Mr. SHAPIRO. I'm sorry. It's another document, Senator Sessions. But I see it.

Again, the first time I saw this memo, your staff person was the one who showed it to me, I believe.

Senator SPECTER. Well, had you ever been told, Mr. Shapiro, by the supervisors, your supervisors in the Department of Justice or anyone else, that if Dr. Lee didn't accept the plea bargain, you had the authority to charge him under 794?

Mr. SHAPIRO. In reference to this document?

Senator SPECTER. Well, I first covered the documents you hadn't seen.

Mr. SHAPIRO. Yes.

Senator SPECTER. And now the question is: Beyond that, did anybody tell you that if Dr. Lee did not accept the plea bargain, you had authority to prosecute him under 794?

Mr. SHAPIRO. Again, Senator—and I think we covered this when I spoke to you in Los Angeles.

Senator SPECTER. We covered it in great detail.

Mr. SHAPIRO. And I remember it well. But I don't—as I said then and as I say now, I never had authority to charge 794. If I had it, I'd have charged it. And if anyone told me I had authority to charge 794, I'd have charged it.

Senator SPECTER. When Dr. Lee lied after the plea bargain was entered into and the plea bargain required his cooperation, I had asked you in some depth—I am going to try to abbreviate this so we can turn to other Senators. I had asked you in some detail about why you didn't go after him on the lies and seek a tougher sentence. At that time you told me—and I just want to confirm it

now—that you didn't because you had nothing to fall back on, because if you didn't get the limited plea bargain which you had with the limitations on it, that you couldn't charge on anything else, that you couldn't charge him on 794 or any tougher charge. Is that correct?

Mr. SHAPIRO. I think I said two things. I said that and, in fact, I think I went further. I said it would have been—it would have been asinine, it would have been stupid for me to withdraw a plea agreement where in doing so I would have lost the most significant charge I had obtained. If I withdraw the plea agreement, Senator, the statute of limitations barred me going on the 793 for the 1985 offense. And I never would have done that. I'd have been up in front of OPR if I had done that.

Senator SPECTER. And since you had no 794 authority, you had nowhere to go.

Mr. SHAPIRO. Well, the second thing I told you was, if I had authority to charge 794, I'd have charged it. I mean, that's what I was spending my days and nights trying to get.

Senator SPECTER. Abbreviating the conclusions again here, Mr. Shapiro, when I questioned you in detail about why you asked for a short period of incarceration, your explanation was that you couldn't do anything more because that is the best you could get on the plea agreement where you had no authority to charge 794. Is that correct?

Mr. SHAPIRO. Well, I think I even said more than that, Senator. I said that was the best I was going to do in front of Judge Hatter. And you must understand the context. Senator Sessions, I really appreciate what you said about the line assistant in the field. You know, we know the judges because we're in front of them all the time. Judge Hatter, a wonderful man, is a man who, from the U.S. Attorney's Office—and I can say this because I'm no longer there—is seen as being a little lenient at sentencing. I'm saying that with all due respect, and I'm—I'm minimizing it.

To be in front of Senator Hatter——

Senator TORRICELLI. With all due respect.

Mr. SHAPIRO. With all due respect, in light of the strong advocacy I made at sentencing, in which I laid out all the lies, in which I provided all the evidence that any judge in my view would have needed to hammer him for the lies—the judge knew about the failed polygraph. The judge knew about the lies. The judge knew about the e-mails. I very strenuously noted that he had passed nuclear weapons research material. I talked about how in Los Angeles our economy is very much tied into national defense and how scientists throughout the Southland have a responsibility to keep the secrets, and Peter Lee violated those. I thought Judge Hatter had more than enough to hammer him. You know that he didn't. I'm not the first prosecutor to not be happy with the sentence.

Senator SPECTER. Well, didn't Chief Judge Hatter say that he found out more about this case after it was over than he did before he imposed sentence?

Mr. SHAPIRO. Not to me. He didn't say that to me.

Senator SPECTER. Mr. Shapiro——

Mr. SHAPIRO. And I must say, I've had lunch with Judge Hatter since, and he didn't say it to me.

Senator SPECTER. Mr. Shapiro, why was there no damage assessment, if you know, by the Department of Defense prior to the plea bargain?

Mr. SHAPIRO. Senator, thank you for asking me that because it gives me a chance to say again, to suggest there was no damage assessment is wrong. And in order for me to tell you why that's wrong, I need to be in closed session. And I don't want to be in closed session, but as late as Monday, the Department of Justice asked me to once again sign, to reaffirm an oath that I didn't need to reaffirm because I know that oath follows me for the rest of my life, which is to maintain classified information. And I'm not going to release it in an open setting here, but I'd be more than happy——

Senator SPECTER. Well, Mr. Shapiro, nobody is asking you to. The fact is——

Mr. SHAPIRO. But I can't answer that question, Senator, unless you allow me to do so.

Senator SPECTER. If you think you can't, I will accept that.

Mr. SHAPIRO. Thank you.

Senator SPECTER. There was a damage assessment made by Dr. Twogood of the Department of Energy. Can you answer that?

Mr. SHAPIRO. Which—and I don't mean to be funny here, but which assessment from Dr. Twogood are you referring to?

Senator SPECTER. I am referring to a damage assessment made by Dr. Twogood November 17, 1997.

Mr. SHAPIRO. Mr. Connolly informs me I don't have it front of me. Maybe someone could——

Senator SPECTER. Well, we will proceed with this in another way, but the facts are and the subcommittee is prepared to establish that Dr. Twogood of the Department of Energy had a damage assessment classifying what Dr. Lee disclosed as secret, and that, in fact, Dr. Lee had confessed to disclosing matters about the submarine detection beyond what had been in the public domain, and that the Department of Defense did not have any damage assessment and did not make one until this subcommittee asked that one be made.

Mr. SHAPIRO. Senator, that's not true. I don't know what you're referring to. What I put in the affidavit and what I as an officer of the court swore to and what Gil Cordova swore to as my affiant was the damage assessment that Dr. Twogood issued that I believe classified the information as confidential.

I'll also tell you as a prosecutor that as a witness Dr. Twogood—who was, by the way, the best I could come up with. I mean, there was a host of scientific angels on the other side who were prepared to testify, and you have the documents because the defense lawyer gave them to the judge that the stuff that he passed wasn't classified.

Nevertheless, I had Twogood and I was going to use Twogood. However, I had a bit of a Brady problem with Twogood, I think, in that Dr. Twogood's opinion evolved. And this happens. I don't think it's inappropriate so long as any inconsistencies are provided to the defense, and I fully intended to provide them. I know the defense was aware of it. But Dr. Twogood, in my view, would have gone down in blue flames on cross-examination.

Now, I still think I'd have gotten by based on the 1985, the 1997, the 1001. But, you know, Dr. Twogood—the Navy didn't give me anybody. I was stuck with Dr. Twogood.

Senator SPECTER. Well, if you are disagreeing with what I said, I said that Dr. Twogood made a damage assessment classified secret, and you say it was confidential.

Mr. SHAPIRO. And you have the document. It's Gil Cordova's affidavit and it lists Dr. Richard Twogood giving his classification.

Senator SPECTER. And then I also said that the Department of Defense did not make a damage assessment until this subcommittee asked the Department of Defense to a little while——

Mr. SHAPIRO. And I said that—I said that was wrong, and I can explain why that's wrong if you'll allow me to go into closed session.

Senator SPECTER. We certainly will, but we have the facts to the contrary. But we will be glad to listen to what you have to say on that subject, and that the matters related to the nuclear disclosures were secret until 1993, and some of them remained secret after partial declassification in 1993.

And my question to you is: Was there a significant damage to the United States security interest by having matters disclosed in 1985 by Dr. Lee even if they were partially declassified in 1993?

Mr. SHAPIRO. Senator, my view was that what he did in 1985 was a viable 794, and to me, I'd have prosecuted it. And I wanted to.

The response of Main Justice is, you know, valid, I guess, because, frankly, if you're going to pursue—and Senator Leahy's point is well taken. If you're going to pursue an espionage case which is about secrets, you're going to have a tough time in Los Angeles in front of a jury where the secret that you're accusing the guy of is available on the Internet, and not only available on the Internet, we were going to have—and I recognize this—a bunch of scientists who were going to say—and, in fact, I got—you know, this criticism today is not the first criticism I received. We heard from scientists——

Senator SPECTER. But those scientists, Mr. Shapiro, were character witnesses for Dr. Lee.

Mr. SHAPIRO. No, I'm talking about those, Senator. I'm talking about the scientists who called me up to complain that I was destroying First Amendment academic freedoms by prosecuting a guy for being a scientist and accused me of racism on top of it.

I'm talking about the other criticism of all the scientists who worked at Lawrence Livermore and Los Alamos, and, frankly, I kind of wish the subcommittee would consider that issue because that's why this case was so important. It was the lax attitude of the scientific community——

Senator SPECTER. We are—we are considering that issue.

Mr. SHAPIRO. I think that is——

Senator SPECTER. But there were disclosures made by Dr. Lee in his confession above and beyond what was on the Internet. Isn't that correct?

Mr. SHAPIRO. You would have—again, Senator, we agree that the 1985 charge was a viable 794, and if they had given me authority, I'd have charged it.

Senator SPECTER. And with respect to the 1997 disclosures, there were matters confessed to by Dr. Lee beyond what was in the public domain and on the Internet.

Mr. SHAPIRO. Again, my view of the 1997 disclosure was that it was a viable 794.

Senator SPECTER. Senator Torricelli.

Senator TORRICELLI. Thank you, Mr. Chairman, very much.

Mr. Shapiro, thank you very much for being with the committee today. I think it bears repeating that it is not the interest or intention of this committee to involve itself in the prosecution of individual cases. It is not our role or responsibility to provide oversight to individual line attorneys.

This Senate does confirm appointees of the President of the United States to senior positions at the Justice Department. It is our constitutional responsibility to ensure that they are doing their duty, that the laws are being enforced, and that the Department is run consistent with the objectives of elected officials of this Government.

Now, that is important because I don't want other line attorneys to think that in each and every case in which they are involved there is an elected official looking over their shoulder. But I do want everyone confirmed by the Senate to understand we are looking over their shoulder.

So that goes to the heart of the issue here about the judgments that were made. Judgments could be right or they could be wrong. We are interested in whether they were made for the proper reason and on an informed basis as a matter of policy, because this is not only illustrative of the past, it is instructive for the future.

I want to go to inquire then into where decisions were made in addition to, as Senator Specter has attempted, whether or not they were proper. Were your contacts at the Department limited to Mr. Liebman and Mr. Dion in your communications about the judgments to be made in prosecuting the case?

Mr. SHAPIRO. I'm only hesitating—my initial answer is yes. I'm only hesitating because I reached out to other prosecutors in the Department of Justice throughout the country who had done espionage cases to obtain SEPA information——

Senator TORRICELLI. That wasn't really the thrust of my question.

Mr. SHAPIRO. I'm sorry.

Senator TORRICELLI. But in terms of the judgments that were being made, the counseling that you were getting from superiors, that was generally limited to Mr. Liebman and Mr. Dion?

Mr. SHAPIRO. Yes.

Senator TORRICELLI. During your conversations with them, as they related the policy judgments being made about prosecuting the case, is it your belief that those judgments were resting with Mr. Dion and Mr. Liebman, or they simply were transmitting decisions made elsewhere?

Mr. SHAPIRO. Certainly at Mr. Dion's level or higher up.

Senator TORRICELLI. So, indeed, you believe Mr. Dion himself was receiving instructions elsewhere about the policy judgments to be made?

Mr. SHAPIRO. Well, and I could speak more fully on that issue in closed session, but yes.

Senator TORRICELLI. Do you believe that Mr. Liebman and Mr. Dion had, in retrospect, access to everything that was at your disposal? Indeed, did you allow them to make a full, fair, and complete judgment based on everything that you had learned and you now know the FBI knew about the case?

Mr. SHAPIRO. Absolutely. I had an obligation to do so in this kind of a case, and they had access to everything I had.

Senator TORRICELLI. In retrospect, do you believe that you could have as a matter of law succeeded with the 794 case?

Mr. SHAPIRO. Look, every trial lawyer thinks he can win every case, and I thought I could win the case. But I have—I have——

Senator TORRICELLI. But you retained some doubts?

Mr. SHAPIRO. Well, I—I'm not a magician, but I thought I would have had a pretty good shot.

I should also say I viewed my role in this chain of command as being the grunt who advocated for the most serious charge that he thought he could support, and I did that.

Senator TORRICELLI. Was it made clear to you that the decision by your superiors not to proceed with the case was a questioning of whether the evidence was sufficient to prevail or whether it was a policy judgment for some other reason not to pursue the case?

Mr. SHAPIRO. Oh, I should also say—when you asked—just before I answer that, I was also reporting to my supervisors at the U.S. Attorney's Office as well as Mr. Dion and Mr. Liebman. So that was Mr. Drurian and the U.S. Attorney.

But in answer to your question whether it was evidence or policy, at least I felt it was—it was evidence. But I never know when the next questions——

Senator TORRICELLI. In your conversations with them, it was—that is your impression. But in your conversations with Mr. Liebman and Mr. Young, it was not made clear that, for example, notwithstanding the evidence and their extraordinary confidence in you personally, nevertheless, for a policy reason they decided not to pursue the case.

Mr. SHAPIRO. Well, you're talking about—my difficulty is you're talking about a mixed question of evidence and policy. I thought their decisions——

Senator TORRICELLI. That is the way life works, and I am asking you to make a judgment.

Mr. SHAPIRO. It's the way it seems to work here, but the fact of the matter is there was policy based on the evidence, I think. And what they conveyed to me was they didn't think the evidence was as strong as I saw it. They also saw other problems with the case, particularly with the open source questions, and so to the degree Internal Security has policies about when they let line assistants go forward, I guess that evidentiary consideration informed their policy decisions. But, to me, it was evidence.

Senator TORRICELLI. In fact, you are giving me a mixed answer, that there was a question of confidence in the evidence and sustaining the case, but there were elements of a policy decision not to proceed as well.

Mr. SHAPIRO. You asked me a mixed question. I gave you a mixed answer.

Senator TORRICELLI. OK; so——

Senator SPECTER. Senator Torricelli, time has elapsed on the vote, and we are now in the 5-minute overtime. So my suggestion would be that we go vote and we will be able to do both of them very close and come right back.

We will stand in recess for just a few minutes.

[Recess 11:02 a.m. to 11:30 a.m.]

Senator SPECTER. The subcommittee will resume.

Senator Torricelli has not yet returned, but in consideration of our limited time, I think we will proceed with Senator Sessions, and then we will return to Senator Torricelli at the conclusion of Senator Sessions so that Senator Torricelli may finish.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

Mr. Shapiro, I have seen over the years instances in which good prosecutors—and I consider you one. You are experienced; you have tried a variety of cases. That is the kind of background you need to make a tough decision in any case, in my view, whether it is a complex white-collar fraud cause or an espionage case. Once the statute is studied a little bit, it is pretty clear what you have got to prove, isn't it? It is not that complex. The statute said whoever with reason to believe this information could be used to injure the United States or to the advantage of another nation.

So I think, first of all, that your experience and judgment on this matter strikes me as precisely correct. And Mr. Dion testified before, and I respect him. He has been there for a long time. I am sure he knows all kinds of things about the intricacies of espionage law. But in answering my question, he has never tried a case, and he is not prepared to, in my view, make the kind of judgment on the ground that you were able to make uniquely.

The question about proceeding with 794 in the memo that was raised to you before that indicated that the FBI had said that 794 could be charged if the plea was rejected, from what I understand you to be saying, you were flying back to Washington, calling on a daily basis, asking for the right to charge 794, and you were really not likely to be mistaken about that, are you?

Mr. SHAPIRO. I don't feel I am mistaken about that.

Senator SESSIONS. And if they had told you that if this plea bargain attempt you had to make, last-ditch plea attempt fails, you can charge 794, you would have gone in with a lot different attitude, wouldn't you?

Mr. SHAPIRO. Well, I was——

Senator SESSIONS. You would remember that, wouldn't you?

Mr. SHAPIRO. Yes, and I was given—I was given the authority to use the 794 as leverage. I do need to make that clear, although I think the subcommittee understands that I was not flying solo here. Main Justice was involved in all the decisions, including the decision to allow me to use the 794 as leverage in the plea agreement.

The question as to whether I had authority to charge 794, no, I think I'm very clear on that.

Senator SPECTER. You are very clear that you did not have authority to charge 794 even if the plea bargain broke down?

Mr. SHAPIRO. I did not believe I did.

Senator SPECTER. OK.

Mr. SHAPIRO. But I do believe that—I know I had authority to use 794 as leverage in plea negotiations, and I know both of you understand the distinction——

Senator SPECTER. Well, pardon me for interrupting, Senator Sessions.

That is an important distinction. You can talk about 794, but the critical factor—and you have already answered this—is that if the plea bargain broke down, you did not know you had authority to charge 794.

Mr. SHAPIRO. I think I have answered that before, yes, that is right.

Senator SPECTER. My statement is correct?

Mr. SHAPIRO. Yes.

Senator SPECTER. Thank you.

Senator SESSIONS. And that was the hammer that could allow you to drive the plea agreement on the terms that you were concerned with?

Mr. SHAPIRO. That is right.

Senator SESSIONS. And as it went down, not having that even when you are in the process of the plea and the defense lawyer said some things that I think you were not happy with and minimized the defendant's involvement in matters beyond justice and fairness, you are still handicapped because you know ultimately you are not able to bring the one charge that could have brought order to the chaos you were involved in.

Mr. SHAPIRO. I think that is right. I should also add, as a former U.S. attorney, I am sure you can appreciate if you have an espionage case in your office, you know about it. And I was reporting to the first assistant U.S. attorney, Richard Drurian, every step of the way, and I kind of want to clear this up because I want to make sure Senator Torricelli's answer is clear.

I was not just trying to serve supervisors at Main Justice. I was also serving, more pointedly, the supervisors at the U.S. Attorney's Office, Richard Drurian, the first assistant, and Nora Minella, the U.S. attorney. And they approved everything, as did Main Justice. Now, you know, I don't particularly like having a lot of supervisors; it is something I dislike.

It is my right, as a guy who never became a supervisor, to complain about it, and in this case I had more supervisors than you could imagine. I mean, I had my supervisors at the U.S. Attorney's Office who I was reporting to several times a day. I had the supervisors at Main Justice, not all of whom I was even talking to.

Senator SESSIONS. Well, let me ask you about there in the U.S. Attorney's office, your direct supervisor, Mr. Drurian. Did he also believe you should not charge 794? Was that his position?

Mr. SHAPIRO. Mr. Drurian, again—and I said before, I will say it again—I thought my supervisors, who were also my friends, and the people at the Department of Justice all operated in good faith. We disagreed, and an absolute brutal, no-holds-barred disagreement among prosecutors is not only common, it is appropriate, be-

cause if we don't fight it out, we are going to get killed in front of the jury.

Senator SESSIONS. Well, I would just say to you that this concern over the Schuster memorandum that waffles by the Navy whether or not there was a classification, this Web site matter and some of the other Brady material matters, I believe you would have handled.

I believe Mr. Schuster couldn't withstand your cross-examination because I believe he virtually couldn't withstand Senator Specter's examination. It was classified material, and the facts were the truth would have come out in a fully contested trial. And if any of these scientists had come in there with their half-baked ideas that this was some sort of free speech question, I think you would have handled them, also, and I believe the jury would have seen a fair and complete picture.

And I am absolutely confident that he would have been convicted on 794, and I believe your people, at best—the best spin I can put on the Department of Justice view is they took counsel of their fears. They are over there worried about all these, oh, there is Brady material, oh, oh, oh. But sometimes when you have got an important case, you have got to take it to the jury.

Let me ask you this. Was the standard they were utilizing on to what extent the classifications were violated—was that standard based on what he admitted to having given to the Chinese?

Mr. SHAPIRO. They will have to answer that. My understanding was they were considering everything that I provided them, as well as the open source material.

Senator SESSIONS. Well, it is a complex point, but the point is this. To my way of thinking, Mr. Lee undoubtedly gave a lot more than he said he gave. In evaluating the case from a strictly legal point of view, you may have to say, well, we ought to consider only what he has admitted giving, but I am confident he gave more than that.

My experience is they never tell everything they have done. Do you agree with that?

Mr. SHAPIRO. I do, and that is why it is frustrating for me to sit here because I have information that I could provide the committee that would alleviate those concerns, because they alleviated them for me. And I will tell you, in the many cases I had with a cooperating defendant or a defendant who pled guilty who was debriefed, I never had the kind of information to corroborate what was said as I did in this case. And, you know, I have traveled 3,000 miles to be here voluntarily and I am looking forward to the chance to go another 28 feet in a closed session so that I can tell you why I can say that with total confidence.

Senator SESSIONS. Well, I want you to talk about some things here in public, and maybe we have done it. The point, I believe, is the Department of Justice was in error. I believe you were correct. Everybody has made mistakes. I have made mistakes in my career. But I believe when you shake this down, there wasn't but one clear decision, and that is to charge him with espionage. And if he got a light sentence, it would be because of serious cooperation.

As it turned out, the FBI said they wanted intelligence. That was even more important to them than a plea, but they didn't get intelligence, did they?

Mr. SHAPIRO. You would have to—again, you would have to ask them that, but I take your point.

Senator SESSIONS. But it appears that his cooperation was less than candid and less than complete. You wouldn't dispute that, would you?

Mr. SHAPIRO. I would agree with your statement that very often it isn't.

Senator SESSIONS. And had he been facing the most serious charge that could have even carried a death penalty, perhaps the clarity of that event would have caused him to be fully cooperative. As a professional, isn't it true that when you are negotiating a plea, you have to get the defendant's full attention because they generally don't like to talk about what they have done?

And to obtain that cooperation, they have to be faced with a choice and cooperating has got to be less painful than not cooperating. And you were not allowed to proceed with the leverage that you had, and two bad things occurred. You did not get full and honest cooperation. And, number two, you got a sentence too light, in my opinion.

Mr. SHAPIRO. Well, Senator, I would let—DOJ and my attorney supervisors at L.A. could answer this as well. From my standpoint, the most important leverage that we could have had on Peter Lee was through an arrest, and it was my desire to arrest him as soon as the confession was obtained.

Again, just on my experience, the period of time where the cuffs are placed on the suspect very often, particularly in this case, I think would have produced perhaps more information. Again, in any other case I would have been the person calling the shots and I would have made the—in fact, I did fill out the arrest complaint. Gil Cordova's affidavit was initially an affidavit in support of an arrest warrant and a search warrant.

Senator SESSIONS. And what caused the arrest not to go forward? You could have arrested him on 1001.

Mr. SHAPIRO. And that is what we intended to do. The original complaint——

Senator SESSIONS. And 1001 is, just for the record, a false statement on a travel voucher or any false statement to the Government, which carries a maximum of 2 years still?

Mr. SHAPIRO. Yes, I believe so, and it would have been—but it would have been sufficient for our purposes, which was to put the cuffs on him and let him taste incarceration. Because this was an espionage case, even the decision to arrest was not mine, nor was it one that my supervisors at the U.S. Attorney's Office could make on their own, nor was it one, frankly, that my supervisors at the U.S. Attorney's Office were comfortable in making without DOJ approval. And so my frustrations in this case began when I wasn't allowed to hook Mr. Lee up.

Senator SESSIONS. I think that is correct, and your judgment strikes me as being correct on that issue, also, and it is unfortunate that did not occur because later you did get cooperation, and so forth, or at least progress toward that.

Mr. Chairman, I don't want to take too much of your time.

Senator SPECTER. We will come back to you, Senator Sessions.

Senator SESSIONS. Could I proceed with one more thing, lest it gets off my mind?

Senator SPECTER. Sure.

Senator SESSIONS. In the sentencing disclosures to the judge, there was excised from the sentencing memorandum Agent Cordova's original—lines from his original affidavit referring to the 1997 activities. Was that your decision or was that a decision from any other source?

Mr. SHAPIRO. I am not quite sure what we are referring to. I don't have the document in front of me. I will tell you that my actions at the sentencing hearing were informed primarily by the information that I cannot reveal in open setting.

Senator SESSIONS. Well, I will just the original arrest converted affidavit had this sentence in it: "Peter Hoong-Yee Lee admitted to knowing this lecture, in 1997, was providing information to the PRC scientists which was classified confidential." That was left out of the——

Mr. SHAPIRO. But it was contained in the position papers that I provided, and was also contained, as I recall, in the pre-sentence report. And I think if you look at my allocution at sentencing, I made reference to the 1997 material very clearly. As a matter of fact, I recall Mr. Henderson talking about the submarine material first.

Senator SESSIONS. Well, our review of the record indicates there is nothing in the record that indicates that Lee had actually confessed to passing classified information.

Mr. SHAPIRO. I am very confident it was in the pre-sentence report. And I think if you look at the sentencing allocution, both Mr. Henderson's comments and my comments, and the judge's comments, I do think it is in there.

Senator SESSIONS. It seems almost the affidavit of March 1998 was crafted to avoid saying that he confessed.

Mr. SHAPIRO. And to that point, Senator, I would like to answer that point on that issue, but I cannot in this setting.

Senator SESSIONS. Well, very good, thank you.

Senator SPECTER. Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman.

Going back to his second to the last question, why weren't you allowed to arrest Mr. Lee, and did Main Justice have a rationale?

Mr. SHAPIRO. As I recall, Senator, the request was made of Main Justice from the U.S. Attorney's Office after my supervisors at the U.S. Attorney's Office reviewed the matter for some period of time. The affidavit was sent to Main Justice and the decision to not go forward with the arrest, as I recall—and I don't have documents here, but as I recall, the decision was based in part because of the need for an assessment of the information that Peter Lee passed; that is, Main Justice did not want to proceed with an arrest warrant until they had had an opportunity to assess what it is that he passed to determine, first of all, if, in fact, it was classified because I think they felt if you are going to arrest somebody on 1001 but you are going to make reference to potential 794 charges, this becomes a very public case.

My feeling was obviously that the complaint and the arrest warrant would be sealed and that we wouldn't necessarily have to get into that. Nevertheless, DOJ had to go to the Navy, had to go to the Department of Energy, and had to get the information before they could make an assessment as to the damage before they could give me the approvals.

As a result, I asked, and the FBI agreed at some expense, to place Mr. Lee on 24-hour, 7-day-a-week surveillance, my fear being that he would flee. And so my concern from that period of time in the case was that we not lose him and allow him to avoid prosecution entirely.

Senator GRASSLEY. Do you agree with Main DOJ's rationale in this matter?

Mr. SHAPIRO. I don't know how to answer that. I had my position. I didn't have the authority to make the call. They made their call and my job was to accept it. I recognized that they had concerns, and I think the concerns were in good faith. And I must tell you, when I complained about it to my supervisors at the U.S. Attorney's Office, which I did with some regularity, my supervisors at the U.S. Attorney's Office did agree with that decision.

Senator GRASSLEY. I want to go back to prior to the vote and a word you used in answering a question for Senator Specter, the word "evolved." It was in regard to Dr. Twogood's assessment. You said it evolved. What did you mean by "evolved?" Explain what you mean by "evolved."

Mr. SHAPIRO. Well, Senator, it was my feeling, and it is not an uncommon experience particularly in dealing with complicated issues—and I had never dealt with a case with so many complicated scientific issues. Either because I am not asking the right questions or perhaps the person is not focused on what I am asking, Dr. Twogood's initial position on the classification was different than what his ultimate decision on the classification was.

I have been told that at some point he has said recently that it was secret, and that is news to me. I will also tell you that Dr. Twogood, who was a witness that I put in my affidavit and I would have put up, used a specific form of classification, a mosaic form of classification, which was not the form of classification that people in the Navy used.

I will tell you—and I know Senator Sessions will understand this—you know, sometimes witnesses' egos get involved, and the more one side says it is A, the harder the other side says it is B. Sometimes you wonder if it is on the merits or if it is based on other reasons, but Dr. Twogood's opinion evolved. And I think it is in the paperwork that I have seen, the documents, that it has evolved. You have documents where he says at one point it is confidential and at another point it is something else.

And I in no way am casting aspersions because this is not uncommon. Nevertheless, it is material for a defense lawyer, which I would have turned over and which he knew about, that would have been brutal on Dr. Twogood. But I would have prepared him for trial and we would have gotten through it.

Mr. CONNOLLY. Senator, may I have just one moment with Mr. Shapiro?

[Witness conferring with counsel.]

Mr. SHAPIRO. Senators, if I could just add one more—Senator Sessions, my attorney has provided to me the affidavit—oh, I am sorry. My sentencing position paper of March 26, 1998, which I provided to Judge Hatter and which has been provided to this committee, it was my response to the defendant's position with regard to sentencing factors. And at page 16, paragraph 30, which takes all of 16, 17, and paragraphs 31, 32, I do discuss the issue that we talked about, namely the submarine information and Peter Lee's giving the lecture, his admissions about it, and so forth.

That was my recollection, and I brought up Mr. Henderson having brought it up first because in my mind I recall it was sort of a counter-punch to what Mr. Henderson was saying and it was my response to his position paper.

Senator SESSIONS. Well, it was omitted from Agent Cordova's two sworn affidavits of February 27, and March 23, 1998, for some strange reason.

Mr. SHAPIRO. And I can tell you why, I think, without violating classification, and I think you will understand it if I say it. I took it out of his declaration and put it in my papers so that he could not be cross-examined at sentencing on that issue.

Senator GRASSLEY. Despite the evolution of Dr. Twogood's position, why did you still have confidence in him as a witness?

Mr. SHAPIRO. Well, two reasons. One, he was the only one I had. And, two, he was, in my view, sincere in his beliefs. I did not think he was dishonest. I felt he was a truth-teller. I would never put him up there if I thought he was a liar.

Having said that, you put witnesses on the stand sometimes who have inconsistent statements that you are going to have to deal with, and he had those. Now, I do know that my supervisors at the U.S. Attorney's Office were particularly because they said, if he is your whole case, doesn't he have to basically be unimpeachable? And I was never fortunate enough to have unimpeachable witnesses, so I was prepared to go forward with Twogood. And, again, the 1985, with the 1997, with the 1001—even I would have convicted him of something. I am sure of it.

Senator GRASSLEY. I appreciate your testimony and your candor, and I thank you for helping the subcommitte with its work of oversight.

Thank you, Mr. Chairman.

Senator SESSIONS. Mr. Chairman, can I ask one little follow-up on that?

Senator SPECTER. Sure.

Senator SESSIONS. It strikes me that on examination, study, and what you could have brought out on cross-examination, Dr. Twogood was correct. Even the defendant himself admitted that it was classified information. He never waffled on whether or not it was classified information, and I think the danger from all that is exaggerated. I think you could have handled that fine at trial.

Senator SPECTER. Thank you, Senator Grassley. Thank you, Senator Sessions.

Mr. Shapiro, coming back to what Dr. Twogood said at what time, there is a document which I have asked to be provided to you which is dated November 10, 1997, which goes to some of the

points which we have raised here that Dr. Twogood had a conclusion that this material was secret at the very outset.

Now, the subcommittee did not get this information until late yesterday. And may I inquire of you, Mr. Iscoe, why so late in coming? Mr. Iscoe, why is this memorandum dated November 10 so late in coming to the subcommittee?

Mr. ISCOE. Can I see that memorandum, Senator?

Senator SPECTER. Would you identify yourself for the record, Mr. Iscoe?

Mr. ISCOE. Craig Iscoe from the Department of Justice.

I have a memorandum in front of me dated 11/13/97 addressed to Michael, James J. Smith at the bottom. I don't see one with a November 10 date on it.

Senator SPECTER. Well, part of this sequence is a memorandum dated——

Mr. ISCOE. I have just been handed another one dated November 10, 1997. I received these——

Senator SPECTER. Aren't they all together, Mr. Iscoe?

Mr. ISCOE. Well, they were not in the way they were handed to me, Senator.

Senator SPECTER. But aside from the way they were handed to you, don't they all fit together as part of the same memo transmission?

Mr. ISCOE. I am not certain. I have a fax cover sheet that is page 2 of 34. The November 10 one is page 6 of 34, and the November 13 one is page 3 of 34. I haven't been able to determine how they fit together. I received these for the first time, Senator, at approximately 5 p.m., as the date line on the fax indicates, "OPCA front office." That, Senator, is the FBI's congressional and public affairs front office.

I received them for the first time at the time indicated, April 4, 2000, and then when I got those I promptly transmitted them to the Senate Judiciary Committee. I had not seen them before that time, Senator. That is the most I can say as to my knowledge of how they came to get to us. I can say that upon learning that they were in my office, I immediately transmitted them to the Judiciary Committee.

Senator SPECTER. Well, would you make an inquiry as to why you didn't get them until the time you specified, because this subpoena has been outstanding for a long time and we got them on the eve of the hearing today and the subcommittee would like to know what the sequence was in their coming to light and why we got them so late.

Mr. ISCOE. Well, Senator, we will be glad to do that. It may be other witnesses can shed light on that as well, but I do want to assure the committee that as soon as we obtained these documents, we did provide them to you.

Senator SPECTER. OK, let's find out the details behind that.

Mr. Shapiro, these three documents have been presented to me as going together and it is a maze and a labyrinth to find out exactly what is what, but the representation made to my staff is that they go together.

We are going to make these as 1, 2, 3, and the one marked number 1 will be the one of November 10th, which at the bottom says,

"This is in response to Jonathan Shapiro's request of 10/30/97," and the subject is radar ocean imaging.

There is a second document which shows that the matter is to DOJ/ISS, attention Michael Liebman. And the third page has on item number 3, "Application of classification Crimson Stage experimental data and analyses." And it is represented to me that this is the analysis by Dr. Twogood and says, "Processing techniques which, when applied to unclassified or classified data, yield a significant enhancement and signature detectability which might apply to the submarine case, Secret/Crimson Stage."

[The documents referred to follow:]

UNCLASSIFIED Exhibit 1

SAFE

UNCLASSIFIED TELEFAX NO. (510) 423-1935
CLASSIFIED TELEFAX NO. (510) 423-2430
CONFIRMATION NO's. (510) 422-2055
(510) 424-6499

NONPROLIFERATION, ARMS CONTROL AND INTERNATIONAL SECURITY (NAI)
SAFE PROGRAM

DATE: November 10, 1997

TO: SA Dave LeSueur FROM: Al Heimark

SUBJECT: Radar Ocean Imaging (ROI) Classification Guidelines.

MESSAGE: Attached received from Rick Twogood on 11/10/97.

Appendix A.
Number 3.
specifically covers the information reportedly divulged by your subject during May 1997.

This is in response to Jonathan Shapiro's request of 10/30/97.

Total pages (including cover sheet): 10

Lawrence Livermore National Laboratory
University of California

UNCLASSIFIED

APR-04-2000 19:11 OPCA FRONT OFFICE 202 324 6490 P.02/34

Exhibit 2

FEDERAL BUREAU OF INVESTIGATION
LOS ANGELES FIELD OFFICE
11000 WILSHIRE BLVD., SUITE 1700
LOS ANGELES, CA. 90024
TELEPHONE (310)477-6565

send secure fax

FBILA

202 514-9207

CLASSIFICATION:
O TOP SECRET
X SECRET
O CONFIDENTIAL
O UNCLAS E F T O
O UNCLAS

PRECEDENCE:
X IMMEDIATE
O PRIORITY
O ROUTINE

TO: DOJ / ISS
ATTENTION: MICHAEL LEHMAN
FAX #: (202) 514-0959

FROM: SSA JAMES J SMITH
TELEPHONE: (310) 996-3545

SUBJECT: ROYAL TOURIST
PAGES SENT (INCLUDING COVER PAGE): 35
DATE: 11/13/97
APPROVED:

HAND CARRY
ASAP
MICHAEL LEHMAN

Exhibit 3

APPLICATION OF CLASSIFICATION FOR CRIMSON STAGE EXPERIMENTAL DATA AND ANALYSES

1. Unprocessed experimental data with unclassified targets (surface ships). (Unclassified)

2. Processed data and images with unclassified targets. (Unclassified)

3. Processing techniques which, when applied to unclassified or classified data, yield a significant enhancement in signature detectability which might apply to the submarine case. (Secret/Crimson Stage)

4. Unprocessed experimental data with submarine targets. (Secret)

5. Submarine operational parameters (e.g. speed, depth, etc.). (Secret)

6. Analyses of the potential performance of air-borne and space-borne radar platforms for submarine detection based on advanced detection concepts or system studies generated by the joint US/UK Radar Ocean Imaging Program. (Secret/Crimson Stage)

APPENDIX A

Senator SPECTER. Had you seen these documents before today?

Mr. SHAPIRO. This is the first time I have seen these documents, I can guarantee you, in the past 2½ years. As far as whether I have seen them before, I have difficulty saying. You know, this is some time ago.

Senator SPECTER. Well, I can understand that. We are going to go into closed session this afternoon at 3:00, so we will be able to talk about the other materials.

Mr. SHAPIRO. I think the subject matter, as I just perused it, would be appropriate to talk about in closed session. I think I could add something.

Senator SPECTER. Well, I made a representation earlier and I have confirmed it with Dobie McArthur that we have the classified details from Dr. Twogood on a secret level. But these documents confirm what Mr. McArthur had pointed out to me earlier this morning that Dr. Twogood had made the classification of secret as early as November 10, and that it had been transmitted to the attention of Mr. Liebman. We will have to ask him whether he ever saw it. And as noted, it was, "in response to Jonathan Shapiro's request of 10/30/97."

So you are really not in a position to say with certainty whether you had seen this before or not?

Mr. SHAPIRO. Well, I wouldn't want to without having a greater recollection. I will tell you that I was constantly requesting that the Bureau obtain from Dr. Twogood a clear classification, as I was asking the Bureau to get clear classifications from the Navy and from the Department of Energy. I mean, those were the elements that I needed to meet. This was the stuff of my case. And I see that these were sent at my request, which doesn't surprise me because I was making these requests of everybody all the time.

Senator SPECTER. Well, this is a clear classification of secret.

Mr. SHAPIRO. I will read the document. I will tell you that the affidavit that Gil Cordova signed under oath, where he said that the information was confidential, Gil Cordova was telling the truth absolutely. And I recall when Dr. Twogood said the information was confidential classified. Now, if that changed or if that evolved——

Senator SPECTER. What was the date of Agent Cordova's statement?

Mr. SHAPIRO. You have it, Senator. It is the declaration both in support of the arrest search warrant and also part of the declaration in regard to sentencing.

Senator SPECTER. Well, I am advised by Mr. McArthur that it was October 21. So there may have been—well, we will have to find out from Agent Cordova what the basis was for his saying confidential as opposed to secret. But as of November 10—that is a short time after Agent Cordova's affidavit—Dr. Twogood says it is secret.

Mr. SHAPIRO. And as we talk about this, I also recall in the context of trying to get the Navy to come forward me saying, you know, we think this stuff is secret. I mean, my approach to the Department of Defense and Navy was always I think this stuff is secret. That was my understanding, probably based, the more I think about it, on talking to Dr. Twogood ultimately and others.

But the reason we were going to the Navy is we wanted them to say the stuff is secret. That was going to be the witness, in my view, was the Navy. The Navy should have been the witness in this case.

Senator SPECTER. Let me read into the record at this point Dr. Twogood's testimony from last week. My question: "Did you have occasion to examine the transcript and videotape of Dr. Lee's confession?" "Mr. Twogood: yes." "Senator Specter: And what was the appropriate classification for the kinds of information that he turned over to scientists from the People's Republic of China?" "Mr. Twogood: Peter himself admitted that he had passed confidential information and stated it was confidential. When I saw the videotape and the audiotape, my immediate response was that it is at least confidential and I thought it was likely DOD secret." "Senator Specter: You say you thought it was secret?" "Mr. Twogood: Yes, that is how I would have classified it."

Mr. SHAPIRO. And, Senator, I will completely agree that that evolution was exactly what I recall, Dr. Twogood seeing the tape, saying it is confidential, then growing into a belief that it was secret. Those problems aside, as I have said a number of times, and you have the documents, Dr. Twogood was my witness. When I went to the Navy asking for someone to step forward and say it was secret so I could try my case, it was Dr. Twogood that I was using.

So as I see these documents, my memory is refreshed, and that is why in answer to Senator Sessions' question I was willing to try the case with Dr. Twogood, despite the warts that he may have had.

Senator SPECTER. Well, if by evolution you mean as early as November 10, which was pretty early in the process, then I understand what you are saying because at least the information we have is that by November 10 he had submitted to Main Justice and Mr. Liebman the document classifying it as secret.

Mr. SHAPIRO. But I had been in touch with Dr. Twogood for a period of time before that. I mean, I had gone to Lawrence Livermore. I had talked to him and to others, and so this document, you know, to me, reflects sort of the end of the process. I had been talking to Dr. Twogood——

Senator SPECTER. But by November 10?

Mr. SHAPIRO. If that is what the date is, certainly.

Senator SPECTER. But that is well in advance of the plea bargain agreement.

Mr. SHAPIRO. And well after I first talked to Dr. Twogood, in my recollection. I mean, we were trying to push the process, push the Navy into stepping up and provided a witness, and I was using Dr. Twogood to do that. And the way I was able to do that was by talking to Dr. Twogood.

Senator SPECTER. Well, the plea agreement was entered into on December 8, so you had at least Dr. Twogood's classification of secret subject to the considerations you have already raised. And you have testified that you thought you could have defended your witness, but I just wanted to put on the record these documents we got last night.

When we talk about the Navy—we will have this one marked No. 4—you have the memorandum from—I am not sure whether it is

Mr. Schuster or Dr. Schuster, so I am going to call him Dr. Schuster, dated November 14, 1997, which we have talked about at length before and is the height of ambiguity on its face.

We questioned Dr. Schuster about this at length last week, and then we questioned him about the classification that the Department of the Navy and the Department of Defense finally put on this matter as confidential—that is dated March 9, not even a month ago, March 9, 2000—which they finally did at the request of this subcommittee. And we will be interested to hear in closed sessions your comments about any other classification that you have from the Department of Defense.

[The memorandum referred to follows:]

Exhibit 4

DEPARTMENT OF THE NAVY
OFFICE OF THE CHIEF OF NAVAL OPERATIONS
2000 NAVY PENTAGON
WASHINGTON, D.C. 20350-2000

UNCLASSIFIED

IN REPLY REFER TO
3120
Memo 53017-97
14 NOV 97

MEMORANDUM FOR [redacted]

Subj: REQUEST FOR CLASSIFICATION GUIDANCE (U)

1. (U) The signal analysis techniques briefed by the subject are UNCLASSIFIED when applied to environmental data and they have been presented and published in several unclassified forums. Any application of the technique to submarine wake signatures, however, would be classified at the SECRET level, as called out in current classification guides.

2. (U) The material that was briefed appears to have been extracted from a CONFIDENTIAL document. This classification was applied based on concern that the document, taken as a whole, might suggest a submarine application even though it was not explicitly stated. Given that the CONFIDENTIAL classification cannot be explicitly supported by the classification guides and that material similar to that briefed by the subject has been discussed in unclassified briefings and publications, it is difficult to make a case that significant damage has occurred. Further, bringing attention to our sensitivity concerning this subject in a public forum could cause more damage to national security than the original disclosure.

3. (U) Based on the above, it is recommended that the disclosure of this material should not be considered as the sole or primary basis for further legal action.

J. G. SCHUSTER, JR
Head
Science & Technology Branch

Declassified by: OPNAVINST 5510.1H
21 May 1999 by
Dcno (Resources, Warfare Req, Assessments)

Classified by: Multiple Source
Declassify on: X1 Per OPNAVINS 5513.20

Concur. [signature] N87B 11/17/9
Concur [signature] L23 11/17/
Concur [signature] VCNO 11/17

UNCLASSIFIED
[redacted]

Senator SPECTER. With respect to the disclosures from 1985, I think we have already covered your judgment that there were very serious disclosures detrimental to the U.S. Government on the nuclear matters, the hohlraum, disclosed by Dr. Lee in 1985. Even though some of it was declassified in 1993, that interim did substantial damage to the national security interests of the United States Government.

That is correct?

Mr. SHAPIRO. My feeling on that, and I will say it again, was supervisors at the U.S. Attorney's Office and the Department of Justice did know—and I think it is still true—that a hundred percent of what Peter Lee passed was declassified. And the Department of Energy wasn't going to do me any good when I am trying to convict a guy of passing a secret that is on their Web site.

However, to me—and I was the defense procurement fraud coordinator at the time for the U.S. Attorney's Office—I thought that the message had to be sent to the scientific community that works on these defense projects that whether the stuff has been declassified or not, you have an obligation to keep it secret. And as I said at sentencing, we don't leave it up to the individual scientist to make that call, and that, to me, was why that case had great validity.

Senator SPECTER. Well, when Dr. Lee disclosed the information in 1985, it hadn't been declassified.

Mr. SHAPIRO. That is just my point, that is just my point, Senator. And as I told Judge Hatter at sentencing, this is precisely the kind of case we ought to prosecute. I mean, 2½ years after I have left the U.S. Attorney's Office, not even you, with all due respect, Senator, can make me divulge something that I have been told is secret, and I won't. For Peter Lee to do it, in light of the access that he had, was wrong.

And I have to tell you, the reason I am proud of having brought Peter Lee to justice is because if it hadn't been for the work of the FBI in Los Angeles, Michael Liebman at DOJ, Peter Lee would not have been brought to justice. He would have walked on that 1985 and no one would have known about it.

So I don't say that I am proud of that case for no reason. My father was a Russian language specialist for 4 years in the U.S. Air Force 17 miles off the Siberian coast monitoring Soviet air traffic during the Korean War. In my family, we take these secrets kind of seriously.

Senator SPECTER. Well, Mr. Shapiro, everything that you have testified to shows your diligence in your pursuit in trying to bring Dr. Lee to justice. I just don't want to be silent here for my participation in agreeing that he was brought to justice. I think you did what you could, but we have to pursue the matter further because I do not think he was brought to justice.

I had asked you this question before, but I think it is worth putting on the record now. Do you think there is some possibility, however slight, that Peter Lee could still be prosecuted for the 1997 disclosures?

Mr. SHAPIRO. If they were coupled—I end with where I began this whole case. If the 1997 count had been coupled with the 1985 count and the 1001 count, I think that that was a viable prosecu-

tion. I say that and recognize that the Navy's Schuster memo was a knockout punch in some ways as a piece of Brady if one was just going to charge the 1997, and that we were going to have a whole lot of scientists on the other side for the defense, as well as apparently nobody from the Navy for Mr. Lee.

Senator SPECTER. Well, my question doesn't go to whether it is viable. He cannot be prosecuted now for the 1985 matter because he has been prosecuted. That is barred by double jeopardy, or the 1001. And I understand your point on viable if they were joined together; they can't be.

But there is a different question as to whether he could technically be prosecuted for the 1997 disclosures, and that is my question to you.

Mr. SHAPIRO. You would have to ask the lawyers of the Department of Justice, of whom I am no longer one, unfortunately.

Senator SPECTER. Well, they might not have the final answer either.

On the 1985 matters, Mr. Shapiro, you have testified that, or as I understand your testimony—or perhaps I should ask you, do you think that everything that Peter Lee told the PRC in 1985 was declassified in 1993, because we got information just last night, again very late—and I would ask Mr. Iscoe to have the same pursuit as to why we got this late.

And I will ask that these pages be marked in sequence, a DOE fax which itemizes the declassification. It has a 1993 fax stamp and then an April 4, 2000, fax imprint. And on page 2, it refers to some information which has not been declassified that Dr. Lee disclosed. "There is some inertial confinement fusion information that will remain classified." This relates to weapons research, and there is a chart which shows the percent of matters declassified.

[The document referred to follows:]

APR-04-2000 19:17 OPCA FRONT OFFICE 202 324 6490 P.19/34
12/06/93 12:56 ☎30. 903 6140 USDOE GERMANTOWN

Exhibit 5

DOE FACTS

DECLASSIFICATION OF INERTIAL CONFINEMENT FUSION INFORMATION

The Department of Energy has declassified inertial confinement fusion information to assist development of a potential new energy source for the 21st century. Inertial confinement fusion is a method of energy production that uses an energetic laser, or other "driver," to compress and heat a very small capsule of fuel containing isotopes of hydrogen to the density and temperature that cause the fuel to ignite.

Inertial confinement fusion experiments involve the use of laser or particle beams to deliver energy to the outer surface of pellets that contain a mixture of hydrogen isotopes, deuterium, and tritium. Specifically, the Department of Energy has declassified the following facts:

- Information concerning laboratory inertial confinement fusion targets.
- Calculations, modeling, and experimental data on hydrodynamic instabilities and mix on unclassified inertial confinement fusion targets.
- Information relevant to the energy applications of inertial confinement fusion.
- Inertial confinement fusion equipment fabrication techniques.

BACKGROUND:

- Since the beginning of the Department of Energy's inertial confinement fusion program in 1963, similarities between inertial confinement fusion and nuclear weapons research resulted in classification restrictions on information developed in the U.S. inertial confinement fusion program. However, in recent years, other countries have developed and published information in this area. Some of the technical information being published abroad was developed earlier in the United States, but our scientists were prevented from publishing or discussing their findings because of classification restrictions.

(MORE)

U.S. Department of Energy
Office of Public Affairs
Contact: Sam Grizzle
(202) 586-5806

42 77/19

Exhibit 6.

- There is some inertial confinement fusion information that will remain classified. This relates to weapons research. We will continue to review the classified portion of inertial confinement fusion to see if more information can be released.

BENEFITS:

- U.S. scientists will be able to publish more inertial confinement fusion papers in the open literature and participate more effectively in the world fusion community.
- Timely advances may result in inertial confinement fusion research for a clean commercial energy source due to a more open dialogue between U.S. and foreign scientists.
- U.S. classification policies will more realistically reflect the information already widely available.
- Release of previously secret information should also encourage other nations to declassify similar information.

WHO ARE THE KEY STAKEHOLDERS?:

- Scientific Community. Advances may be accelerated toward achieving clean and plentiful civilian power through fusion energy by broader international cooperation.
- Environmentalists. The information that now can be made available to the public will better explain the benefits of fusion as a potential source of energy.
- Power Industry. Enable the power utilities to better evaluate the current status and potential of inertial confinement fusion as a future energy source.
- The Public. Better enable the public to make informed decisions concerning support for the inertial confinement fusion program.

(MORE)

47
T/8

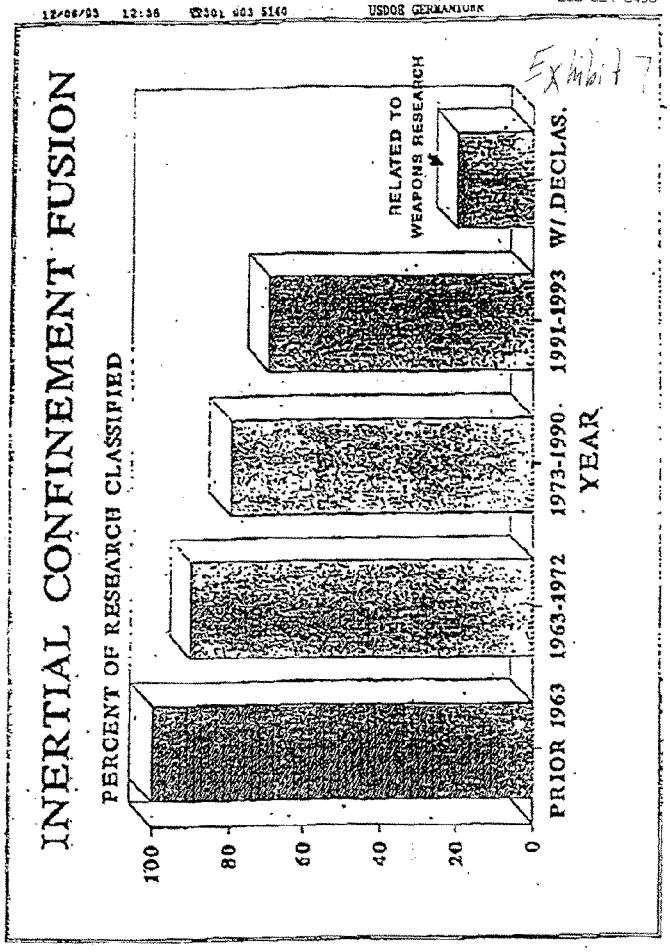

Exhibit 7

(MORE)

Senator SPECTER. Prior to today, have you ever seen that before?

Mr. SHAPIRO. Even to this moment, I haven't seen it. I don't have it in front of me and I don't know what you are talking about.

Senator SPECTER. Well, would you take a look at it and——

Mr. SHAPIRO. As soon as I get it, I would be happy to.

Senator SPECTER. You don't have a copy?

Mr. CONNOLLY. If you would identify it by the fax number page, because that is where we got lost here.

Senator SPECTER. Ok; these are fax pages 19/34, 20/34, 21/34.

Mr. CONNOLLY. Very good, thank you. And, again, we understand the Senator got this information late last night and this is the first time we have had an opportunity to see this. Your staff has been very kind in getting information as it has come across the transom and we don't suggest otherwise. I just wanted to make that note.

Mr. SHAPIRO. I have the document in front of me, Senator, and I—is your question have I ever seen this before?

Senator SPECTER. Well, that is question one, and I know the answer is no. And you are looking at it now, and on page 2, to try to abbreviate this—and I don't know that you can really add much to the statement, but would you confirm that page 2 says, "There is some inertial confinement fusion information that will remain classified which relates to weapons research?"

Mr. SHAPIRO. It does seem to say that on page 2.

Senator SPECTER. Well, OK, let's leave it there. You really can't add anything to that. This goes to the issue which the subcommittee concludes, or this Senator concludes and I think the subcommittee will ultimately, that some of the materials passed in 1985 were not ultimately declassified in 1993.

And you just don't know about that, correct?

Mr. SHAPIRO. That is right.

Senator SPECTER. When Senator Torricelli's line of questioning was interrupted, he was asking you about supervisors disagreeing on policy. And again to abbreviate, you and I went into this at some length on February 15, and at that time you had said that they wouldn't authorize the case, one, either already available in the public domain, and that it was not nearly enough classified for them to pursue it.

This is on page 60 of a long answer, big paragraph, starting about a third of the page down. The question is that your view as to why you couldn't get authority from Main Justice to go forward on the 794.

Mr. SHAPIRO. Well, the answer I gave was in response to your question about the limited approach and whether it would have satisfied the Navy's interests. And I attempted to answer your question regarding dealing with the Navy in Washington and the problems with classification and I——

Senator SPECTER. Well, you answered a little more broadly, and you——

Mr. SHAPIRO. Yes, I did.

Senator SPECTER [continuing]. Included Internal Security's view as well, as you see there.

Mr. SHAPIRO. Yes, and my purpose in doing so was to explain to you, as I have, that Internal Security and the U.S. Attorney's Office supervisors looked at the case, and as I recall it, among the

problems they had with it was the open source material, the fact that so much of the stuff was out there.

I must tell you there was also some concern about the judge we were in front of and the sort of evidentiary rulings we might get. Not uncommon, as you know, to consider those things, I guess, if you're a supervisor.,

The Internal Security Office, besides the open source information, was concerned about the fact the Navy would not step up and give us a classification. And as I think I reflected, is reflected here in the transcript, I told you that I gave them the—I forwarded all the information I had, including, I specifically told you, the Twogood information.

Senator SPECTER. And you also forwarded them the tapes of Dr. Lee's confession and the transcript of the tapes of Dr. Lee's confession.

Mr. SHAPIRO. That's right. And I—that's right.

Senator SPECTER. Well, at that stage, you did not have a damage assessment by DOD?

Mr. SHAPIRO. At what stage?

Senator SPECTER. At the stage that you were testifying about on page 60?

Mr. SHAPIRO. I don't think we were talking about a particular stage then, Senator. I was answering your question about the Navy at that point.

Senator SPECTER. Well——

Mr. SHAPIRO. I'm happy to answer the question, but what stage are you talking about?

Senator SPECTER. At what stage did you—you say you did have a damage assessment by the Department of Defense.

Mr. SHAPIRO. I had a damage assessment which I cannot relate or refer to in this hearing, and I won't——

Senator SPECTER. Well, I understand that, but can you tell me when you had it?

Mr. SHAPIRO. My understanding in consultation with DOJ is to—to even tell you—I can give you the date, but to do that even is classified. And I don't like that.

Senator SPECTER. It is classified. I am not asking you to say anything that is classified.

Mr. SHAPIRO. I understand that, and——

Senator SPECTER. I recall your statement that even I couldn't get you to say something was classified.

Mr. SHAPIRO. Right, and that includes the date——

Senator SPECTER. But even I wouldn't try.

Mr. SHAPIRO. I appreciate that. But that even includes dates of things that are classified, so I'm not going to answer that.

Senator SPECTER. Well, let me just say, not as to you, but that is ridiculous as to a date of classification.

Mr. SHAPIRO. Well, Senator, your staff, when this issue came up, did say that it's your feeling or the staff's feeling that this classification issue specifically is ridiculous. But I got to tell you, I'm in no position, just like Peter Lee was in no position, to on my own declassify information.

Senator SPECTER. OK; I agree, and we will handle that through the Senate. The Senate can declassify information over the objec-

tion of the executive branch. We have ways to do that. We don't do it lightly, but we can do that. But we have found the Department of Defense hiding behind a tremendous amount of material which they classify. We have the Attorney General's June 8, 1999, testimony so badly redacted you couldn't tell anything. You have the LaBella report so badly redacted you couldn't tell anything. And we are getting it unredacted, and it is a slow laborious, tortuous process, but we are doing it.

Mr. Shapiro, would it be convenient for you to come back into closed session at 3 o'clock this afternoon?

Mr. SHAPIRO. Senator, whatever you'd like. Although it would be more convenient to do it sooner, I would do it whenever would be convenient for you.

Senator SPECTER. Well, it is 12:22 p.m. now, and there are other—I have other commitments in the Senate. But what I would like to do is do it at 3 p.m. and get you out as soon as we can.

Mr. SHAPIRO. I'll be here.

Senator SPECTER. It is going to be in S–407. Mr. Connolly, do you have a statement you want to make?

Mr. CONNOLLY. Just for scheduling purposes. Mr. Shapiro—I just want to make this clear—is not hiding behind classification for any subject matter. He is more than willing to share with this subcommittee information that he has that he believes would take less than 5 minutes to share with the subcommittee. We just want to make that clear in terms of scheduling at 3 o'clock. We don't think it will take any longer than 5 to 10 minutes for him to get the information out. And, more importantly, we want to make it clear that he is not hiding behind this——

Senator SPECTER. Well, that is fine. I would like to do it in 5 minutes or 10 minutes. Mr. Shapiro and I haven't been able to get too much done in 5 or 10 minutes up until now, but I would be willing to accept the responsibility for that, or at least part of it.

Mr. SHAPIRO. Well, I'll accept part of it, too.

Senator SPECTER. We are going to be in S–407, and we will do it—we have S–407 at 3 o'clock.

Mr. Robinson, we are going to have to proceed with the testimony of Mr. Dion and Mr. Liebman at a later date. We just cannot do it now. And if you want to make a statement now, I would be glad to entertain it, or if you want to wait until we come back, we can do it then, at your pleasure.

Mr. ROBINSON. I would leave it to the Senator in terms of when you would like me to do it. I would like to make a brief statement.

Senator SPECTER. Ok; fine. Thank you very much, Mr. Shapiro and Mr. Connolly. Thank you, Mr. Connolly, for representing Mr. Shapiro. Thank you, Mr. Shapiro, for all of the good work you have done for the U.S. Government.

Senator SPECTER. Yes, come forward.

STATEMENT OF JAMES K. ROBINSON, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC; ACCOMPANIED BY JOHN C. KEENEY, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. ROBINSON. Senator, I want to thank you for affording me this brief opportunity to make our position clear on the subject of the subpoenas. I know there is some disagreement. I know the Senator has strongly held views, and Senator Sessions, and I respect that and I hope you will respect my concern and the fact that I would like to——

Senator SPECTER. Mr. Robinson, I think you should have an opportunity to say whatever you want to publicly and put it on the record, and we will take it from there.

Mr. ROBINSON. Thank you very much.

Senator, as you know, since you were there at my confirmation hearing, I have been the Assistant Attorney General for the Criminal Division since June of 1998. I am here today with Deputy Assistant Attorney General John Keeney, who was Acting Assistant Attorney General for the Criminal Division during the Peter Lee prosecution. My purpose in making these brief remarks is to express the Department's continuing concern about the subpoenas issued to non-supervisory line prosecutors.

In my view, the actions of the subcommittee in forcing line prosecutors under the threat of subpoena to testify in a public proceeding for actions that they took in their official capacities in a particular case is contrary to the public interest. These are career prosecutors, not political appointees or supervisors.

There was a time in this country, thankfully, many, many years ago, when with each change of national administration United States Attorneys would replace on a patronage basis Assistant United States Attorneys throughout the country. Fortunately, for the last 30-plus years, that method of selecting our Nation's prosecutors has been abandoned, and these critical positions have been filled on the basis of merit without regard to political considerations.

The career prosecutors in this country served the people of America well under both Republican and Democratic administrations, and I think that Mr. Shapiro's testimony here today indicates that we have outstanding prosecutors serving in these capacities.

The power of public prosecutors is awesome. They decide who to investigate. They decide how intrusive those investigations will be. They decide who to charge with crimes and for what alleged crimes. They determine what terms to accept in plea agreements. They decide what punishment to seek from the courts and what consideration, if any, will be given for cooperation with the Government.

These are difficult, delicate, quasi-judicial judgment calls. The fairness of our system, in my view, depends on entrusting this power to people who will not be making these important decisions on the basis of any factors other than the merits of the case at hand, and I know the Senator agrees with that.

Certainly, political considerations can have no place in the process, and I know the Senator agrees with that as well.

It is critical that prosecutorial decisions by line prosecutors not be made in a climate where those decisions by line prosecutors—not supervisors, not political appointees, who I think are expected and given the Senate's oversight to come up here and answer the questions, but to line prosecutors who are not making these judgment calls. I believe that the rights of persons who may be subject to Federal investigation can be seriously implicated by the measures we take as a Government to insulate career prosecutors, nonsupervisory prosecutors from the political process.

There are ample ways of responding to the needs of congressional oversight, in my view, without subjecting these dedicated prosecutors to the glare of public second-guessing of some of their decisions.

The objections to this process have been bipartisan. Former Attorneys General Barr and Civiletti have argued against it, as has former Acting Attorney General Stuart Gerson. The American Bar Association has also argued against it. The ABA made the point worth repeating here that congressional oversight "must be carried out in a manner that is consistent with this country's longstanding commitment to the doctrine of separation of powers and prosecutorial independence from political interference."

The bipartisan National Association of Former United States Attorneys in a letter to me yesterday, which has been shared and the Senator has commented on, made the point that the effect on the morale and ability to perform of Assistant United States Attorneys as a result of the awareness of the possibility that they may be called before a congressional committee to explain their decisions could be devastating to the prosecutorial process.

The National Association of Former United States Attorneys is a bipartisan organization of former presidentially appointed United States Attorneys from every administration since that of President Eisenhower. I was honored to have once served as the president of the National Association of Former United States Attorneys.

In my view, the public examination of line prosecutors is not necessary for congressional oversight. The information they have, however, should be made available. We shouldn't be hiding from that, and there ought to be as I think over the years efforts have been made to accommodate the tension between congressional oversight, a very real and important responsibility the Congress has to conduct that oversight and this very different issue of whether line prosecutors should be here.

I also understand that the Senator has been of the view that the Department has not been as responsive in responding to the subcommittee's requests as it should have been. We have some disagreements about the extent of that cooperation. We have provided volumes of materials, made our key supervisory people available for interview and testimony, and we are willing to do more and to try harder to accomplish that result.

My visa, if you want to call it that, as a politically appointed official in the Government will no doubt expire one day, and perhaps for those sooner rather than later, but, nevertheless, I will return to private life. I will not, however, rest easier, and I believe that

no American should, knowing that thousands of Federal prosecutors throughout the country will be making their sensitive prosecutorial decisions knowing that if Members of Congress disagree with them, their judgment may well be second-guessed, they may be subpoenaed to a public proceeding to explain why they failed to authorize a particular search of someone's home, why they failed to seek a tap on someone's phone, why they failed to seek an indictment or seek particular charges, why they sought to seek the maximum punishment available under the law.

It is for these reasons, unrelated to this matter, which is quite appropriate for this subcommittee to inquire into, that I am here to express support for the line prosecutors and to express the reasons why we continue to object, as we will in other matters as well, to the examination of non-supervisory line prosecutors and hope that in the future we can work out an accommodation with this subcommittee as to how they can get their information necessary to conduct the oversight without subjecting these line prosecutors to these kinds of proceedings.

I appreciate the Senator's willingness to allow me to express these views, and I know we are in disagreement on these matters. But I do appreciate your willingness to hear me out. Thank you.

Senator SPECTER. Mr. Robinson, I have great respect for you individually and for your position, and I have a very sharp disagreement with the response of the Department. And we had the subpoenas authorized and issued back in November, and there are many documents which are being dribbled in at the last minute, and it has been extraordinarily difficult to deal with the Department in many, many ways. And I handed the Attorney General personally a list yesterday and put it in the Congressional Record, but her appearances before Senate committees, both this committee and the Governmental Affairs, where I am also a member, are available to her to go through.

And when you made a request yesterday to appear here and to make a statement, you got a response within a matter of minutes. Now, I didn't have to rummage through any documents, but I thought you were entitled to know exactly what my view was, and I got back to you immediately.

And we are all on the same team, and that is the way I think it ought to be.

Mr. ROBINSON. Yes.

Senator SPECTER. And when you defend line attorneys, I know that is your responsibility, but there is an enormous body of authority for line attorneys to testify. And the Governmental Affairs Committee subpoenaed one last June 9th, and on September 22nd FBI agents, who are even more sensitive than line attorneys, or as sensitive, and there are a whole string of investigations which go back to 1992 and 1994 and the DOJ's influence on the Environmental Protection Agency, in 1992 Rocky Flats, and Iran-contra and Watergate in 1975, the FBI, DOJ domestic intelligence, and the Congressional Research Service has said that, "A review of congressional investigations that have implicated DOJ or DOJ investigations over the past 70 years, from Palmer Rates and Teapot Dome to Watergate, through Iran-contra, Rocky Flats, demonstrates that DOJ has been consistently obliged to submit to con-

gressional oversight regardless of whether litigation is pending"—which is always the defense DOJ makes—"so that Congress is not delayed unduly in investigating misfeasance, malfeasance, or maladministration in DOJ or elsewhere."

Then continuing a little later, "In a majority of instances reviewed, the testimony of subordinate DOJ employees such as line attorneys and FBI field agents was taken, formally or informally, and included detailed testimony about specific instances of the Department's failure to prosecute alleged meritorious cases."

Now, we aren't just interested in political appointees, and the Attorney General used the word "politicize" yesterday, which I strenuously resented because espionage is not a matter for politicization. And I think my record as an individual stands beyond that. I have cooperated with President Clinton on many, many matters and continue to do so and cross party lines with regularity. And this inquiry is being conducted meticulously and scrupulously to avoid any sense of politicization. And we have worked against extraordinary difficulties without any staff, without any funding.

And as I said yesterday, the Governmental Affairs Committee was worn out by the responses of the minority and the responses of the people who came in from the Government. And we are not going to be worn out.

Mr. ROBINSON. I am sure that is true, Senator. We are, by the way, working on being responsive to the list you provided yesterday, and I do have a list I can share with the Senator of the materials provided related to this matter to the subcommittee, which——

Senator SPECTER. Listen, I know you have given us a lot of materials, but sometimes all the material isn't too helpful. Sometimes it is a data dump. But McArthur goes through documents like a meat grinder. So we read them all.

Listen, we will continue to work with you, and I am sorry to not be able to finish the hearing today. I did not know that Mr. Keeney was involved in this matter. I thought that he had not been involved in the Peter Lee case, but has he been?

Mr. KEENEY. I was the final decisionmaker in the plea agreement.

Senator SPECTER. Well, I had thought that you had recused yourself. It may be, Mr. Keeney, that you and I ought to talk in advance of the next hearing.

Mr. KEENEY. I am in no way——

Senator SPECTER. I can't hear you.

Mr. KEENEY. Senator, I am no way recused in this matter. My participation was limited in that I was Acting Attorney General and gave the final approval to the plea agreement.

Senator SPECTER. Well, I think it would be useful if you and I talked in advance of the next hearing, if that is agreeable with you. And you are signifying it is.

Thank you.

Mr. ROBINSON. Thank you for your courtesy.

Senator SPECTER. We will be in touch further as to the next hearing date. That concludes the session.

[Whereupon, at 12:38 p.m., the subcommittee was adjourned.]

THE PETER LEE CASE

WEDNESDAY, APRIL 12, 2000

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:32 a.m., in room SH–216, Hart Senate Office Building, Hon. Arlen Specter, presiding.

Also present: Senators Grassley and Sessions.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. The hour of 9:30 having arrived, the Judiciary Subcommittee on Department of Justice oversight will now proceed.

This is our third hearing inquiring into the matter of Dr. Peter Lee, who had confessed to two serious incidents of espionage involving the disclosure of nuclear secrets to scientists of the People's Republic of China in 1985 and the disclosure of important detective devices for locating submarines in 1997. And there was a plea bargain entered, and Dr. Lee received community service, probation, and a fine, and no jail.

At the outset I again raise my concerns with the Department of Justice on the very tardy response to a subpoena which has been outstanding for many weeks. Yesterday, the Department of Justice turned over some 800 pages of documents which required a last-minute review by a very limited staff. This same issue was raised last week when some critical documents were turned over at the last minute right before last Wednesday's hearing with the attempted explanation that the Department of Justice thought the documents were in the hands of the subcommittee from the FBI. The same excuse was offered yesterday, although, in fact, many of the documents were not in the possession of the FBI at any time but were all Department of Justice documents.

It raises a natural question as to whether there are still documents which have not been turned over in response to the subpoena, which would be a very serious matter, could amount to obstruction of justice. And the subcommittee intends to get to the bottom of that in the course of these proceedings.

There has been some comment about the issue of line attorneys being made available to testify at these hearings, which is a little hard for me to understand in light of the long line of precedents

where line attorneys have testified. They testified on the hearings in 1992 through 1994 on the Department of Justice's influence on the Environmental Protection Agency; in 1992 on Rocky Flats; in 1995 in the FBI-Department of Justice domestic intelligence issues; on Iran-contra, in Watergate, going all the way back to Teapot Dome, which led the Congressional Research Service to conclude, "In the majority of instances reviewed, the testimony of subordinate DOJ employees such as line attorneys and FBI field agents was taken, formally or informally, and included detailed testimony about specific instances of the Department's failure to prosecute alleged meritorious cases."

There was an issue raised last week about whether there had been a damage assessment before the plea bargain was entered into, and we had a closed session, and in the closed session, there was nothing to contradict the subcommittee's earlier conclusion that there had been no damage assessment prior to the entry of the plea bargain. The only damage assessment was one by the Department of Energy as to the nuclear issue from the 1985 transmission of material to the People's Republic of China scientists. And there has never been a damage assessment on the submarine disclosures. There had only been conclusions by Dr. Twogood about the classification of the information which was disclosed, but not a damage assessment as to what injury was caused to the U.S. Government.

We had a meeting with Mr. Keeney and, after talking to Mr. Keeney, decided to include him as a witness today when he told us that had he known that there would be a recommendation by the trial assistant of only a "short period of incarceration," he would not have approved the plea bargain. And then his concern about using an attempt charge as opposed to a substantive offense, which is an issue which has concerned the subcommittee since there was not an attempt but, rather, the completed act of espionage and the disclosure of materials in both 1985 and 1997 to the scientists from the People's Republic of China.

With that very brief introduction, I would like to call Mr. John C. Keeney now. If you would step forward, Mr. Keeney, and raise your right hand? Do you solemnly swear that the testimony which you are about to present to this subcommittee of the Committee of the Judiciary of the United States Senate will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. KEENEY. I do.

Senator SPECTER. Please be seated. I know you have a prepared statement, and we will proceed at this time with whatever opening statement you care to make. Your full statement will be made a part of the record.

STATEMENT OF JOHN C. KEENEY, PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. KEENEY. Thank you, Mr. Chairman.

I appreciate the opportunity to appear here to clarify the position of the Department of Justice with respect to the Dr. Peter Lee case.

As you know, Senator, I am the Principal Deputy——

Senator SPECTER. Mr. Keeney, would you pull the microphone closer to you and speak into it, please?

Mr. KEENEY. OK; is that better?

Senator SPECTER. Yes.

Mr. KEENEY. OK; thank you.

I am the Principal Deputy Assistant Attorney General in the Criminal Division of the Department of Justice. At the time that Peter Lee pled guilty, the position of Assistant Attorney General was vacant, and as the Principal Deputy, I became the Acting Assistant Attorney General, and it was I who approved the accepting of the plea from Peter Lee.

I will return to the plea agreement in a minute, but before doing so, I would like to clarify, if I may, the relationship between the U.S. Attorneys' Offices and Main Justice with regard to espionage cases.

The U.S. attorney's manual provides that in espionage cases, the U.S. attorney must consult with, and seek approval from, Main Justice. The reason for this is clear. These cases are the among the most sensitive and difficult faced by Federal prosecutors. They require close coordination and expert advice.

That expert advice is provided by the Internal Security Section of the Criminal, and that section has helped secure so many important espionage convictions over the years, and that is due in no small measure to the efforts of John Dion, who will appear today as a witness. He is the Acting Chief of the section.

Although he would be too modest to cite his achievements to you himself, Senator, Mr. Dion is one of the most outstanding public servants I have known during my service at the Department of Justice. He has served in the Internal Security Section for 20 years. During that time he has played a central role in this Nation's most critical espionage cases.

He has been repeatedly recognized by both Republican and Democratic administrations for his espionage prosecutions. In 1987, Attorney General Meese awarded him the John Marshall Award for Outstanding Achievement for his work on the prosecution of John Walker and his confederates for espionage on behalf of the Soviet Union. He received a second Marshall Award in 1997 for his work in two other prosecutions: Special Agent Earl Pitts of the FBI and CIA Case Officer Harold Nicholson, the latter—both for espionage on behalf of the Soviet Union and the Russian Federation. In 1995, the Director of Central Intelligence awarded him the Intelligence Community Seal Medallion.

John has also been consistently praised by the U.S. attorneys and assistant U.S. attorneys who have worked with him. I would request that you allow me, Senator, to make part of the record correspondence sent to the Department by a U.S. attorney and two former assistant U.S. attorneys praising John's role in the Squillacote prosecution.

Senator SPECTER. Praising his role in which prosecution?

Mr. KEENEY. Squillacote.

[The correspondence follows:]

Santa Cruz, CA, April 4, 2000.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR CHAIRMAN HATCH: I am writing to you concerning the upcoming hearings into the Justice Department's handling of the investigation and prosecution of Peter

Lee. I left the Justice Department last year to work for a private company on the West Coast, and had no direct involvement in the Lee matter. Nonetheless, as a former supervisory federal prosecutor who has handled a number of national security prosecutions, I would like to share my views with you about the outstanding work done by the Justice Department's Internal Security Section and its Acting Chief John Dion.

I joined the U.S. Attorney's Office in the Eastern District of Virginia in 1987, and from 1994 through 1999 I served as the head of that office's major crimes unit. In that capacity, I personally supervised or handled more than twelve national security prosecutions, including the prosecutions of C.I.A. employees Aldrich Ames and Harold James Nicholson, and F.B.I. Special Agent Edwin Earl Pitts. Through a coincidence of timing, my position offered me the opportunity to work with the Internal Security Section on more national security related cases than any other Assistant U.S. Attorney in the country during the last decade. I offer these observations based on my numerous experiences with Mr. Dion and the Internal Security attorneys on his staff.

The Internal Security Unit was, to me, the most important section in the Justice Department. I found espionage cases to be the most complex matters I ever handled as a prosecutor, more difficult than complex wire frauds, bankruptcy frauds or computer crimes. They present difficult legal issues that do not exist in most criminal cases, and sensitive issues in dealing with intelligence agencies and national secrets. These cases are often handled in the glare of the public spotlight, with enormous pressures. In these difficult circumstances, federal prosecutors need experienced, capable support from the Department. We always got that support from John Dion and his team.

In particular, John Dion was always there in difficult cases with unerring good judgment and advice. Even in my last year as a prosecutor, with a number of espionage cases under my belt; I would not take any significant step in any national security matter without discussing it thoroughly with John Dion. Often, he recommended tough, aggressive positions; at times, when appropriate, he counseled restraint. On many occasions, he saved me from making legal mistakes and poor strategy decisions, and he presented new angles to issues that I never considered. I don't ever recall him being wrong on any issue. Incredibly, I don't ever recall him stepping out of the background and taking credit for a successful prosecution, even though he deserved that credit more than I did.

I have been informed that, in connection with this committee's review of the *Lee* prosecution, some have suggested that the Internal Security Section was insufficiently aggressive. I know little about the *Lee* case, but I do know John Dion. In all my experiences with John Dion, he was never afraid to take a tough position, to insist that more serious charges should be sought, to urge a harder stance in a plea negotiation, or to take a national security case to trial. John Dion and his staff were always dedicated to the aggressive prosecution of national security cases, even in the face of opposition from national security agencies. In all my dealings with the Internal Security Section. I never saw a lack of prosecutorial zeal or aggressiveness.

I can appreciate that dedicated public servants may have honest differences about the appropriate disposition in a particular criminal case: I was involved in dozens of such disputes during my time as a prosecutor. I've been on the harder line side in some of the debates. But I've learned that a decision to charge a lesser offense is not necessarily a sign of weakness or lack of zeal, but is often a sign of good judgment that can protect larger, more important interests. I've learned that the person arguing for a tougher stance is not necessary the better prosecutor, but perhaps the more inexperienced one. The best lawyers, the ones like John Dion, demonstrate both zeal *and* good judgement.

I write this letter to you reluctantly. I don't write letters to Congress, and my days as a public servant worrying about particular cases and inter-office battles are behind me. No one in the Justice Department asked me to write this, or even knows that I'm writing it. And I'm not writing it because of any personal relationship I have with John Dion or his staff. I've never met John Dion's family, never been to his house, and rarely saw him outside of our offices. I haven't spoken to him or his staff in months. I'm writing because I know that John Dion is the Department of Justice's most important asset, and the finest attorney I served with. His judgment, his experience, and his knowledge are badly needed in this critical area. I benefited tremendously from the advice of John Dion and his staff at critical points in some of the most sensitive criminal prosecutions of the last decade.

Thank you for the opportunity to share these views with your Committee. If you have any questions, or if I may provide any further information, please contact me.

Sincerely,

ROBERT C. CHESNUT.

Mr. KEENEY. In short, I know of no prosecutor in the United States who has had more experience in handling espionage cases than John Dion. But, of course, John does not work alone. The success of our espionage cases—and there has been tremendous success in espionage cases, Senator, as you well know, over the last 15 years. Prior to that, we brought very, very few espionage cases because of the classification problems related to such prosecution.

The success of our espionage cases has turned on the work of the younger trial attorneys in the Internal Security Division—Section. I say "division" because it used to be a division, and when it was a division, I was part of that. I worked there. One of the finest of these attorneys has been Michael Liebman.

As you can see from my statement, he has an outstanding academic record at the University of Michigan and at the George Washington Law School. He served as a clerk—he served a clerkship and then he came into the Department of Justice under the Honors Program, the same year as Jonathan Shapiro came in, whom you had heard from last week.

In his time in the Internal Security Section, Mr. Liebman has helped prosecute some of the Nation's most important espionage cases, most important cases of the 1990s. These include: Steven John Lalas, a Department of State employee sentenced to 14 years for spying for Greece; Aldrich Ames, the CIA officer sentenced to life for spying for the Soviet Union and Russia; Robert Stephan Lipka, a former NSA analyst sentenced to 18 years for spying for the Soviet Union; and former DOD lawyer Theresa Squillacote, and her husband, Kurt Alan Stand, who were sentenced just last year to 20 years and 18 years, respectively, for spying for East Germany and the Soviet Union and South Africa.

I mentioned Michael has received commendatory letters from a number of people, and I would like to offer those for the record.

He is currently assigned to two of our most important cases: Wen Ho Lee, and the McDonnell Douglas export violations case. As the members of the subcommittee know, he has had to put off his preparations for these critical prosecutions in order to prepare for these hearings. Indeed, as you are aware, Senator, Mr. Liebman was supposed to argue this morning on behalf of the United States in a hearing in the McDonnell Douglas case. In deference to the subcommittee's request, the Department has made him available to appear here instead.

Let me just add this: As his record indicates, no one has ever suggested that Michael Liebman is afraid of a tough case. He has helped to send more spies to jail than any other lawyer of his generation.

Needless to say, the efforts of the U.S. Attorneys' Offices are also essential to these prosecutions. We rely on them for their expertise in trial work. You had as your witness last week Jonathan Shapiro, who, as you probably will appreciate, is an outstanding—or was an outstanding AUSA. And, Senator, you had a chance to speak to

him former supervisor, the former First Assistant United States Attorney.

Let me turn now to my involvement in this case. My contact with the case was relatively brief. As Acting Assistant Attorney General, I was responsible for all the matters in the Criminal Division. Nonetheless, I do recall being briefed about this case by Mark Richard, who at the time was the Deputy Assistant Attorney General who supervised the Internal Security Section.

In his briefing, Mr. Richard made clear that he thought the proposed two felony plea was a good disposition of this case since there were potential serious obstacles to prosecution. I relied heavily on the advice of Mr. Richard, who was a 30-year veteran of the Criminal Division and who supervised all our espionage cases for much of that time.

As you know, Mr. Chairman, from my discussions with you, at the time I approved the proposed plea agreement, I was not aware that it would call for only a short period of incarceration or would charge only an attempted 793 charge. Had this been our opening position in the plea negotiations, I doubt that I would have approved it, particularly the "short period of incarceration."

But I should add——

Senator SPECTER. Mr. Keeney, on that point, you had said to me that had you known there would have been a request of sentencing only for a "short period of incarceration," you would not have approved the plea.

Mr. KEENEY. I would not have approved it, and I would have told our people to go back to the table and carry on further discussion.

Senator SPECTER. So you would not have approved the plea bargain under those terms.

Mr. KEENEY. Under those terms at that time, on what I knew at the time. Now, there were subsequent developments and there was input from the U.S. Attorney's Office, and they were of the view that—they and our people were of the view that this was a difficult case, we might or might not be successful, and we were getting as much out of it as we could get.

On that basis, with some reluctance, if it came before me now with all that before me, I would have approved it, reluctantly, because I still don't like the idea of a short period of incarceration for somebody who's charged with espionage.

Senator SPECTER. But at the time you made the judgment and made the approval, you did not know there would be a request for only a short period of incarceration, and at that time you would not have approved that.

Mr. KEENEY. Would not have approved it as such. No, I would have sent them back to the table.

Senator SESSIONS. Could I ask about that?

Senator SPECTER. Sure.

Senator SESSIONS. Well, Jack, who is supposed to tell you that? You are supposed to be—were you the highest official to be briefed on the plea?

Mr. KEENEY. I was.

Senator SESSIONS. And isn't it incumbent on those briefing you to tell you all the facts about the case?

Mr. KEENEY. As far as I know, Senator Sessions, they did not know about this short period of incarceration provision at the time the matter was presented to me.

Senator SESSIONS. Are you saying that was a decision made by the prosecutor on the ground and was not conveyed to the——

Mr. KEENEY. It was a decision made by the prosecutor on the ground. It was conveyed at some point to our people, Mr. Dion in particular, but——

Senator SESSIONS. They didn't bother to check with you?

Mr. KEENEY. I think—you're going to have to ask him. I think he——

Senator SESSIONS. No, you are the responsible highest official, and you made a decision based on incomplete evidence.

Mr. KEENEY. Right.

Senator SESSIONS. And I want to know why you didn't have the complete evidence.

Mr. KEENEY. Well, I didn't, Senator, and my understanding is that they became aware of the short period of incarceration period at a later date when the thing had been agreed to.

Senator SESSIONS. Well, you would then admit the system did not work well if the approving authority, you, wasn't given the complete information about what was to occur?

Mr. KEENEY. Well, it wasn't perfect, Senator, but as you know, we U.S. attorneys have a great deal of discretion, and we do defer.

Senator SESSIONS. Not in espionage cases.

Mr. KEENEY. Well, even in espionage cases, Senator, we give a great deal of deference.

Senator SESSIONS. Well, do you dispute the fact that the prosecutor was denied the right to proceed under 794?

Mr. KEENEY. He was never given the authority to proceed under 794. It was left open. He could discuss 794 with counsel for the defendant, but he did not have authority to proceed under 794. If it came down to an issue of 794, he was supposed to come back and discuss it further with us. We didn't rule it out, but——

Senator SESSIONS. You don't dispute, then, that he wanted to proceed under 794 and you didn't hesitate to tell him no on that, and now you are criticizing him apparently for using language of a short sentence when you denied him the ammunition, the strength that he needed to negotiate a tough plea?

Mr. KEENEY. No, we didn't, Senator. That's what I was trying to make clear. We left on the table for him to discuss with defense counsel 794. We didn't rule it out at that——

Senator SESSIONS. But he knew he couldn't proceed with it. He——

Mr. KEENEY. We didn't authorize him to proceed with it, but we left it open he could come back to us if he thought that he wanted to press on 794. But he could discuss it with defense counsel.

Senator SESSIONS. Well, I am just going to tell you, if you got a prosecutor out on the front line and he knows he doesn't have the right to charge the one charge that would allow him to negotiate a good plea or proceed to victory, which I think he would have——

Mr. KEENEY. Well, I'm not sure——

Senator SESSIONS. He has been undermined, and it is hard—it is unbelievable to me you are criticizing him now for not being able to negotiate a tough plea. I think that is unacceptable.

Mr. KEENEY. I am not criticizing him, Senator. I am just——

Senator SESSIONS. Who are you criticizing? You said it is not Mr. Richard didn't tell you the truth. You are suggesting he didn't tell you——

Mr. KEENEY. I'm telling you that what the facts were with respect to the chronology, and I'm saying that I did not approve the short term of incarceration. He worked that out and he concluded that that was the best deal he could get.

Senator, looking back now, I think he got the best deal he could get, and I stand behind the plea agreement. But I still don't like the idea of anybody pleading guilty to espionage and not getting a jail term.

Senator SESSIONS. He didn't—he couldn't charge the 794, the espionage count.

Mr. KEENEY. That's——

Senator SESSIONS. No wonder he was unable to negotiate a good plea.

Mr. KEENEY. Well, he negotiated on the basis that the 794 was an open issue.

Senator SESSIONS. Well, he knew he didn't have the ultimate leverage, and he had to—you all wanted a plea, and he got a plea, the best he could do, in my view. He should have been charged and indicted with it, and then he could negotiate with some strength. Don't you agree?

Mr. KEENEY. Senator, don't let me mislead you. I think that knowing all the facts as I do now, I think the disposition was a good one. And I'm not at all positive—and I know you don't share this—that we would have convicted this guy. But that's my judgment. We——

Senator SESSIONS. He met in two motel rooms with Chinese top scientists in China and admitted to sufficient facts to justify a guilty plea.

Mr. KEENEY. Senator, there are a lot of——

Senator SESSIONS. He thought our case was going to be lost before a jury, and I know Mr. Dion, you say, is experienced, but he hasn't been in a courtroom ever, I don't think. And I have. And so had the prosecutor in this case, and he wanted to go forward with it.

Mr. KEENEY. Mr. Dion is——

Senator SESSIONS. I am sorry, Mr. Chairman. Mr. Keeney is a great member of the Department of Justice. He has even had the burden of defending me, when I was U.S. attorney, before congressional hearings, and he is a great man. And I am sorry to suggest I may not have anything but the greatest respect. Thank you, Jack.

Mr. KEENEY. Thank you.

Senator SPECTER. Mr. Keeney, it is my view to let you finish your opening statement. I wanted you to clarify that one point, and, of course, Senator Sessions is welcome to raise the questions which he has. But what the subcommittee intends to do is to hear your opening statement——

Mr. KEENEY. Well, I have pretty much——

Senator SPECTER. Let me finish——and then to proceed with Mr. Liebman and Mr. Dion, and then come back to you for some policy matters. But you may continue, unless you have finished your statement.

Mr. KEENEY. Senator, in response to your questions and Senator Sessions, I pretty much stated what I wanted to say with respect to these—to the disposition in this case, my confidence in the people who were handling it. And I might also just in conclusion point out that Mr. Shapiro's superiors in the United States Attorney's Office in Los Angeles agreed finally that the disposition that was obtained was the best that could be obtained.

Senator SPECTER. We have been joined by the distinguished chairman of this subcommittee. We will turn to Senator Grassley.

Senator GRASSLEY. Mr. Chairman, I think that last week's hearing with Mr. Shapiro was a good case study on why we should have access to line attorneys. I think we learned a lot from him that we didn't know before. Of course, there are legitimate reasons for the Justice Department to be concerned about Congress talking to line attorneys. We should take great care, of course, not to politicize law enforcement or even to leave the perception that we are politicizing law enforcement.

However, in special circumstances, it is very important to get a line attorney's perspective of a case, and I think Mr. Shapiro gave us valuable information and a perspective that we have been unable to get from either the Department of Justice or the FBI. And this was the information about that late October 1997 meeting that he and others attended at the FBI. There was certain information he gave that we have been unaware of, despite 7 months of briefings, meetings, and testimony from the Department of Justice and the FBI.

That information was provided by him in a closed session and, of course, is classified. But to me it is very significant and might alter our views of how this case was handled.

Today, we hear from another line attorney, Mr. Liebman, and I think his testimony should also fill in a lot of holes that we still have in the Peter Lee case. So I hope we remember this experience and the importance of having access to line attorneys in certain situations in the future, because sometimes it helps break through the bureaucratic views of what happened and helps us better understand the truth. And I think this is an example that hopefully is an example of why Members of Congress have some cynicism about the legitimacies of certain bureaucracies not wanting to give information and something that could have been handled with Senator Specter in a very early stage and a very open—very open with Senator Specter, albeit the information is classified, could have been given and we wouldn't have had all these problems and built up the distrust that there might be between branches of Government.

Mr. Keeney, what was the reason why Mr. Shapiro was not given authority to pursue a 794 charge?

Mr. KEENEY. The judgment was made—and I think you ought to pursue this better with Mr. Dion—that we couldn't succeed, that the probabilities of success on a 794 were pretty low.

Senator GRASSLEY. Considering the fact that you are a high-ranking official in the Justice Department, how closely do you read and examine plea agreements prior to approving?

Mr. KEENEY. I do not go into them in great detail where I'm the Acting Assistant Attorney General and there is a Deputy Assistant Attorney General who has charge of the responsibility for that particular section.

Now, if—I am the Deputy Assistant Attorney General and I have responsibility for organized crime, public integrity, appellate, and our Office of Enforcement Operations. Now, if any of those litigation sections had come with a plea agreement, I would feel it incumbent upon me to look at them much more closely because I didn't have the benefit of the views of the supervisor of that group.

The answer is it depends on what my position is, Senator.

Senator GRASSLEY. Ok; you were present at the closed hearing last week at which Mr. Shapiro testified about the significance of the late October 1997 meeting between the Department of Justice and FBI officials. Did you feel that Mr. Shapiro properly interpreted the significance of that meeting in regard to how it relates to the prosecution of Peter Lee?

Mr. KEENEY. I'm sorry, Senator. I don't fully understand what you're getting at. I'm sorry.

Senator GRASSLEY. Well, you were present last week.

Mr. KEENEY. I was, yes, sir.

Senator GRASSLEY. And you heard what Mr. Shapiro said about the significance of that October 1997 meeting.

Mr. KEENEY. With respect to the briefing that he got——

Senator GRASSLEY. Yes.

Mr. KEENEY [continuing]. And new information, yes.

Senator GRASSLEY. So my question, then, let me repeat, is: Did you feel that Mr. Shapiro properly interpreted the significance of that meeting in regards to how it relates to the prosecution of Peter Lee?

Mr. KEENEY. I think so. I think he came away from that, as I understand it, impressed with the seriousness of what we were dealing with.

Senator GRASSLEY. That is the end of my questions.

Senator SPECTER. Well, Mr. Keeney, during that session, Senator Grassley had other commitments and couldn't be there, but he was represented by staff. But you told us at that time that you didn't place the same emphasis on the information that Mr. Shapiro had. Didn't you tell us that?

Mr. KEENEY. I didn't place the same?

Senator SPECTER. The same emphasis or consider it as important as Mr. Shapiro had? Senator Grassley has broached an important subject here which we have to handle in a circumspect way because it was classified. But on the meeting which we had last week, you told me and staff that you didn't agree with Mr. Shapiro and didn't place the same emphasis on the information that Mr. Shapiro had. I think that is the point that Senator Grassley is getting to here.

Mr. KEENEY. Well, Senator, if I said that, I misspoke because I thought that the briefing we got was very important. It impressed upon all of us the importance of the prosecution, but it didn't add anything whatsoever to the viability of the prosecution.

Senator SPECTER. Well, I think that is what Senator Grassley was looking for. It didn't add anything to the viability of the prosecution. It was a collateral point, didn't have anything really to do with the merits of the case, or the viability of the prosecution, as you just said.

Mr. KEENEY. Well, I make a distinction between the viability and the merits of the case. It left me with the idea that what we were doing was right, Senator.

Senator SPECTER. OK; what do you mean by viability, then?

Mr. KEENEY. The ability to prosecute successfully.

Senator SPECTER. OK; I would call that merits, but one way or another, it is semantics.

Mr. Keeney, if you would stay at the hearing, because there are some other questions we are going to want to come to in just a moment, but the subcommittee would now like to turn to Mr. Michael Liebman.

Mr. KEENEY. You want me to step back?

Senator SPECTER. Yes, would you step back, please?

[The prepared statement of Mr. Keeney follows:]

PREPARED STATEMENT OF JOHN C. KEENEY

Mr. Chairman, Members of the Subcommittee, I appreciate the opportunity to appear before you today in connection with the Peter Lee case.

I am the Principal Deputy Assistant Attorney General in the Criminal Division of the Department of Justice. At the time that Peter Lee pled guilty I was the Acting Assistant Attorney General of the Criminal Division. In that position, I approved accepting a plea from Peter Lee on two felony counts, one under 18 U.S.C. 793(d)—willfully transmitting national defense information to a person not entitled to receive it—and the other under 18 U.S.C. 1001—false statements.

In a moment, I will return to that plea agreement. Before doing so, however, I would like to clarify the nature of the relationship between United States Attorneys' Offices and Main Justice with regard to espionage cases like that involving Peter Lee. The United States Attorney's Manual provides that in espionage cases, the United States Attorney must consult with, and seek approval from, Main Justice. USAM 9–90.020. The reason for this is clear: these cases are among the most sensitive and difficult faced by federal prosecutors. They require expert advice.

That expertise is located in the Internal Security Section of the Department of Justice. That the Internal Security Section has helped secure so many important espionage convictions over the years is due in no small part to John Dion, the Acting Chief of the Internal Security Section, who is one of the witnesses appearing before you today.

Although he would be too modest to cite his achievements to you himself, Mr. Dion is one of the most outstanding public servants I have known during my 49 years of service at the Department of Justice. Mr. Dion himself has served in the Internal Security Section for 20 years. During that time he has played a central role in this nation's most critical espionage cases.

John has been repeatedly recognized by both Republican and Democratic Administrations for his espionage prosecutions. In 1987, Attorney General Meese awarded Mr. Dion the John Marshall Award for Outstanding Achievement for his work on the prosecution of John Walker and his confederates for espionage on behalf of the Soviet Union. John received a second John Marshall award in 1997 for his work in two other prosecutions: those of FBI Special Agent Earl Pitts and CIA case officer Harold Nicholson for espionage on behalf of the Soviet Union and the Russian Federation. In 1995, the Director of Central Intelligence awarded John the Intelligence Community Seal Medallion.

John also has been consistently praised by the United States Attorneys and Assistant United States Attorneys who have worked with him. I would request that you make part of the record a letter sent to the Department by the United States Attorney for the Eastern District of Virginia praising John's role in the Squillacote prosecution. I also would request that you make part of the record two unsolicited letters sent to Senator Hatch by two former senior Assistant United States Attorneys who worked with John.

In short, I know of no prosecutor in the United States who has had more experience in prosecuting espionage cases than John Dion. But, of course, John does not work alone. The success of our espionage cases also has turned on the work of the younger trial attorneys in the Internal Security Section. One of the finest of those attorneys has been Michael Liebman.

Mr. Liebman graduated magna cum laude from the University of Michigan and with honors from the George Washington Law School, where he was an editor of the Law Review. After a clerkship, he joined the Department of Justice in the Honors program in 1990, the same year as Mr. Jonathan Shapiro. In addition to serving in the Internal Security Section, Mr. Liebman has been a Special Assistant United States Attorney, and is currently a Reserve Officer in the Army's Judge Advocate General's Corps.

In his time in the Internal Security Section, Mr. Liebman has helped prosecute some of the nation's most important espionage cases of the 1990s. Those cases include: Steven John Lalas, a Department of State employee sentenced to 14 years for spying for Greece; Aldrich Ames, the CIA Officer sentenced to life for spying for the Soviet Union and Russia; Robert Stephan Lipka, a former NSA analyst sentenced to 18 years for spying for the Soviet Union, and former DOD lawyer Theresa Squillacote, and her husband Kurt Alan Stand, who were sentenced just last year to 22 years and 18 years, respectively, for spying for East Germany, the Soviet Union, Russia, and South Africa. In connection with his role as a member of the Squillacote trial team, Mike was awarded last year the Attorney General's Award for Excellence in Furthering the Interests of National Security.

Mike is currently assigned to two of our most important cases; Wen Ho Lee; and the McDonnell Douglas export violations case. As the members of the Subcommittee know, Mike has had to put off his preparations for these critical prosecutions in order to prepare for these hearings. Indeed, as you are aware, Mr. Liebman was supposed to argue this morning on behalf of the United States in a hearing in the McDonnell Douglas case. In deference to the Subcommittee's request, however, the Department has made him available here instead.

Let me just add this: As his record indicates, no one has ever suggested that Michael Liebman is afraid of a tough case. Mike Liebman has helped send more spies to jail than any other lawyer of his generation.

Needless to say, the efforts of the United States Attorneys' Offices are also essential to these prosecutions. We rely on the United States Attorneys' Offices for their outstanding trial lawyers and their knowledge of the local courts. You had as your witness last week Mr. Jonathan Shapiro, who, as you know, was one such outstanding AUSA. And, Senator Specter, you have had a chance to speak to his former supervisor, another highly-experienced trial lawyer who at the time was the First Assistant United States Attorney in Los Angeles.

Let me turn now to my involvement in this case. My contact with the case was relatively brief. As Acting Assistant Attorney General, I was responsible for all matters coming before the Criminal Division—which is a tremendous volume of cases. Nonetheless, I do recall being briefed about this case by Mark Richard, who at the time was the Deputy Assistant Attorney General who supervised the Internal Security Section.

In his briefing, Mr. Richard made clear that he thought the proposed two felony pleas was a good disposition of this case, since there were potential serious obstacles to prosecution. I relied heavily on the advice of Mr. Richard, who was a 30-year veteran of the Criminal Division, and who had supervised all of our espionage cases for much of that time.

As you know, Mr. Chairman, from my discussions with you, at the time I approved the proposed plea agreement I was not aware, so far as I recall, that it would call only for a short period of incarceration or would charge only an attempted 793 charge. Had this been our opening position in plea negotiations, I doubt that I would have approved it, particularly, the "short period of incarceration."

But I should add that this does not mean that I disagree with the ultimate plea agreement. I stand by that plea. It is critical in plea negotiations to permit the local United States Attorneys' Office to have some leeway. Mr. Shapiro explained to you his reasoning in accepting the short period of incarceration language: that this was the best that could be hoped for given the sentencing practices of the courts in the Central District of California.

Indeed, since speaking to you I have been informed that the term "short period of incarceration" was a term of art in use at the time in pleas in the Central District of California. In making recommendations, the USAO could choose one of three alternatives: probation; a short period of incarceration; or a long period of incarceration. I certainly think that it was proper to allow the USAO—in a decision that I understand was ratified by Mr. Shapiro's experienced supervisors in that Office—

to elect the alternative that reflected an assessment of what realistically could be achieved before the Court.

In closing, let me state the obvious: nobody wishes more than the Department of Justice does that Peter Lee had been incarcerated for his crimes. I promised you, Mr. Chairman, that I would look again at this case, and I have. After reviewing the record, I remain convinced that the plea negotiated here was a good one. It is my view as a 49-year career prosecutor that any trial might well have resulted in an acquittal in light of at least three factors: the subsequent declassification of the information Lee revealed in 1985; the information publicly available on the Lawrence Livermore Web Site, and elsewhere, relating to the disclosures Lee made in 1997; and the highly damaging statements of the Navy in the Schuster memorandum. As you are aware, of course, there are also factors that would have greatly complicated this prosecution that cannot be discussed in an open hearing. Mr. Dion and Mr. Liebman are prepared to discuss these factors in greater detail.

In short, in my judgment, Lee might have escaped conviction had he gone to trial. Instead, against the odds, we secured a plea to two felonies—one of which was barred by the statute of limitations. Even more importantly, we brought an end to the possibility that Lee might disclose further secrets. Imagine, if you will, that we had taken Lee to trial, and lost, allowing him to continue his employment. I dare say that we would be up here before you explaining how we could have such a result come to pass.

I understand that you, Mr. Chairman, and other members of the Committee may disagree with my analysis. But I hope that we all can agree that, while reasonable minds can differ about the likelihood of success of *any* prosecution, that is *all* that is at issue here—the disagreement of reasonable minds. Indeed, there was some such disagreement, obviously, at the time, between Mr. Shapiro, on the one hand, and his supervisor in the United States Attorneys' Office and at Main Justice, on the other.

But there was no abuse here; no bad faith of any kind. Instead, this is a case in which highly talented, and highly dedicated, public servants—including the two witnesses appearing before you today—worked long hours, under difficult circumstances, in order to achieve the best result they believed possible for the United States. John Dion, Michael Liebman, Jonathan Shapiro, and the FBI agents who worked with them, all did their best to end Peter Lee's espionage career. They did end that career. In my opinion, we should be here to praise their hard work on this and many other espionage cases—work that too often goes unrecognized. Our nation is safer because of their efforts.

Senator SPECTER. Mr. Liebman, would you step forward? Would you raise your right hand, please? Do you solemnly swear that the testimony and evidence you are about to give to this subcommittee of the Committee on the Judiciary of the U.S. Senate will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. LIEBMAN. I do.

Senator SPECTER. Mr. Liebman, at the outset, the subcommittee thanks you for rearranging your schedule to be here today, and I believe you have a prepared statement, and you may proceed at this time, as you wish.

STATEMENT OF MICHAEL LIEBMAN, LINE ATTORNEY, INTERNAL SECURITY SECTION, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC; ACCOMPANIED BY BRUCE C. SWARTZ, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. LIEBMAN. Thank you, Senator. Mr. Chairman and distinguished members of the subcommittee, good morning. I just have a few brief opening remarks.

As Mr. Keeney noted, since joining the Internal Security Section in 1991, I have worked on some of the major espionage cases of the 1990's: the Lalas case, the Ames case, the Lipka case, and the Squillacote case. All of these cases were prosecutions under section

794, and all resulted in prison sentences for the defendants ranging from 14 years to life.

Of these, I am most proud of a case that actually doesn't get much press coverage these days—or even at the time—and that's the Lipka case, where I helped build an historical case where the investigation did not even begin until roughly 25 years after the crime. And Mr. Lipka received an 18-year prison term.

I also take pride in the 1998 Squillacote and Stand case, where I was part of the trial team for a 2-week jury trial against a well-financed defense, which resulted in guilty verdicts on all counts and sentences of 22 years and 18 years, respectively. In connection with that trial, I was awarded last year the Attorney General's Award for Excellence in Furthering the Interests of U.S. National Security. Finally, I am, of course, proud of the Ames case, for which Mr. Dion and I received an award from the U.S. Attorney for the Eastern District of Virginia.

Turning to the Peter Lee case, at the time of Peter Lee's admissions in October 1997, I fully expected that they would lead to another case in my string of section 794 cases.

Within about 2 or 3 days after Peter Lee made his admissions in early October 1997, I flew out to Los Angeles and I met with prosecutors from the U.S. Attorney's Office and FBI special agents from the Los Angeles Division to discuss the case. Our office, the Internal Security Section, had first been briefed on the case in August 1997, when it was still just a false statement case because Lee at that time had merely admitted to telling lies. In my trip in October, I spent several hours meeting with then-Assistant U.S. Attorney Jonathan Shapiro and FBI Special Agents Gil Cordova and Serena Alston at the Los Angeles Division FBI Office, where we also listened closely to the tapes of the October 1997 interviews.

To the best of my recollection, it was then that I first learned that the information Lee had compromised in 1985, while classified secret then, was no longer classified in 1997, and that the information Lee compromised in 197 was, for the most part, only classified under a mosaic theory and only at the confidential level. By mosaic theory, I mean, of course, that the items of information considered separately are unclassified, but when grouped together they somehow become classified.

I also recall that, with respect to the 1997 compromise, the FBI in Los Angeles showed me a copy of a 1995 document authored in part by Lee that was marked confidential. It concerned research into detecting the wakes of surface ships conducted under Department of Defense auspices through the use of radar directed at the ocean's surface.

Although the overall document was classified confidential, every single portion of the document was separately marked unclassified, with one exception. The exception was a single paragraph on the first page that explained that, considered as a whole, the document was "sensitive."

Later, after I returned to Washington, I obtained tapes of Lee's October confession and determined that as to the 1997 compromise, the 1995 confidential document essentially contained all the significant information Lee had confessed to giving the Chinese in May 1997, with one important exception: The 1995 document was all

about using radar to detect surface ship wakes. It said nothing about using radar to detect submarines or anything below the surface of the ocean. I knew that Lee had admitted to the FBI that he had told the Chinese in May 1997 that the radar technique discussed in the 1995 document could be used to detect submarines, although he minimized that disclosure by telling the FBI that the Chinese already knew this.

In my estimation, both then and now, the weakness in the case was the questionable significance of the information Lee compromised, both in 1985 and in 1997. As to Lee's 1985 disclosure, I knew, for instance, that the Department had never prosecuted a case under 794 where the compromised information, as in the case of Lee's 1985 disclosure, had been declassified prior to the crime being discovered. Let me emphasize this. The information Lee admitted disclosing in 1985 has been declassified. While some aspects of the government's research in this area might remain classified, as shown by updated classification guides, what Lee confessed to disclosing regarding inertial confinement fusion research in 1985 was fully declassified by 1993.

Furthermore, what I later determined was that the information was actually declassified over the 1990 to 1993 time period, not just in 1993. Department of Energy documents I believe this committee has show that inertia confinement fusion research, including details disclosed by Lee to the PRC, began being declassified on March 21, 1990, for reasons that included the fact that the rest of the world was catching up in this important field.

Another reason for the declassification, I was told, was that DOE considered it in the U.S. national interest to educate countries on how to simulate nuclear weapons explosions in a laboratory setting in order to discourage them from actually detonating nuclear devices. Moreover, I was advised—and, again, this is documented—that the debate over declassification in DOE had actually begun at least as early as January 1989, only 4 years after Lee's disclosures and 8 years before the confession.

Now, why is any of this relevant? Why does it matter that the information was declassified after the crime? Because section 794 does not penalize disclosure of classified information. It does not use that term. What it penalizes is the disclosure or attempted disclosure of items, documents, and information related to the national defense. And what the case law, including Supreme Court case law, says is that this is a jury issue, not to be decided by a classifier merely testifying that certain information or was classified at the time of the offense.

The Government needs to be able to describe how a disclosure of classified information might benefit an enemy of the United States, and publicly available information that tends to suggest that the classified information is not all that significant may well be found by a court to be relevant and admissible in an espionage prosecution.

The DOE documents indicated to me that there would be a significant issue at any trial whether the ICF disclosures Lee made in 1985 related to the national defense at the time he made them. Most alarming to me was the notion that Lee could claim that he made the disclosures to encourage China not to conduct nuclear

weapons tests in the field, and he would likely be supported by internal Government documents or even testimony of former U.S. Government or Livermore officials that that was actually one of the reasons the U.S. Government declassified the information beginning in 1990.

In other words, Lee would have been able to credibly argue that his actions were in the U.S. national interest.

I soon discovered there were similar obstacles to bringing a section 794 prosecution based on the 1997 disclosure. To analyze this, it is helpful to begin with the 1995 confidential document, every last substantive part of which, when considered independently, is unclassified. Recall that this document discusses a radar technique in which the wakes of surface ships can be detected by bouncing radar signals off the surface of the ocean.

I have a copy of this document right here today. I have it double wrapped.

The best way to explain the problem with basing a prosecution on this document is as follows: Under the classification guidance on this document, I could remove any single paragraph in here, just cut it out, maybe even a line, and then take the remainder of the document over to that press table, and I would not be guilty of a crime. I would not even be guilty of a security violation because this document is only classified when it is intact as a whole. Remove any single paragraph from it, and you have a group of unclassified paragraphs.

Now, I recognized that problem with the 1997 compromise as soon as I got to Los Angeles. But there was one crucial piece of Lee's admissions that I thought at the time could make the case viable, even viable under section 794. Lee had confessed to telling the Chinese scientists that the technique described in the document could also be used to detect submarines. Surely, I thought, it must be a well-kept secret that the U.S. Government is investigating the detection of submerged submarines by utilizing radar aimed at the ocean's surface.

When I returned to Washington, as I said, I began analyzing the confession in some detail. Approximately 2 weeks after returning, on October 23, 1997, I attended a meeting in the Main DOJ building with the FBI, Criminal Division attorneys, and Mr. Shapiro and his supervisor, then First Assistant U.S. Attorney Richard Drooyan. The problems with the information which I just described were discussed, along with other issues in the case. Immediately after that meeting, I attended a briefing by the FBI in the case along with Mr. Shapiro, and I believe Mr. Drooyan as well, and I will not go into that briefing here in open session.

A few days after that meeting, I attended a meeting with DOD officials to discuss the 1997 information. I have recently been reminded by the testimony of DOD and Navy officials to this subcommittee last month that that meeting occurred on October 28, 1997.

The main purpose of that meeting from my perspective was to inquire of DOD as to what publicly available information could potentially undermine an espionage prosecution for the 1997 compromise.

Another issue for me was what could the Government say about the program generally in a public forum if the case were to go to trial. I did not know, for instance, if I could have said at a trial what I just said a few minutes ago about the program.

About a week after the meeting, I received a stack of public articles from DOD related to the radar ocean imaging generally. One thing they also sent me was extremely surprising. Among the articles was a printout from a Lawrence Livermore National Laboratory Website, last updated in March 1995, well in advance of Lee's 1997 trip to China. I have a copy of the printout right here.

I quickly confirmed after receiving it that the Website was a public one and available to anyone in the world with a computer and a modem. I offer it into the record now, and I would like to read some portions of it out loud.

[The information follows:]

radar ocean imaging

L-band synthetic-aperture-radar image of a surface-ship-generated internal wave.

This project focuses on the detection by radars of surface manifestations of moving, submerged submarines. LLNL's role is overall technical program management of all U.S. activities in this joint UK/US effort. Technology being explored includes hydrodynamic signature generation and propagation; surface wave interactions and electromagnetic scattering; radar system development and deployment; and advanced signal processing and detection methods for this problem.

Achievements of the Joint UK/US Radar Ocean Imaging Program

- Demonstration of new methods that achieve an order of magnitude or more improvement in detecting weak signatures by radar imaging of the ocean surface.
- Discovery of the importance of low grazing angle, polarimetric radars in remote sensing of the ocean surface.
- Discovery of new non-Bragg scattering effects that appear critical to this problem.
- Development and demonstration of a framework for multi-channel detection that has shown significant signal processing enhancement for detecting weak ocean signals by polarimetric and interferometric radars.

These results of the Joint UK/US Radar Program have led to a re-direction of research in radar ocean imaging. There is now no controversy within the community that radars offer any potential for this problem. Rather, the UK/US program's pioneering work in low grazing angle radars, multi-channel detection, synthetic-aperture radar (SAR) interferometry, scattering theory, and radar polarimetry has led to a near consensus on needed research. More importantly, this program has made impressive advances in understanding and exploiting radar remote sensing of the ocean for important national defense needs.

Fiscal Year 1995 Technical Focus of the UK/US Radar Ocean Imaging Program

During Fiscal Year 1995, the UK/US program's focus has included the following:

- Development of new airborne radar systems tailored to exploit these recent discoveries.
- Initiation of a world-class wave tank research effort at the University of California at Santa Barbara (UCSB) to address many critical hydrodynamic and scattering theory issues.
- Theoretical and modeling activities to understand the discoveries of this program.
- Signal processing and detection research to improve on the dramatic results already achieved.
- Additional field experiments to expand our databases to a broader range of environmental, radar system, and target parameters.

Imaging and Detection Home Page

Last modified on 3/29/95 by Scott Dougherty and Delores Mason
For information about this page, contact:
Document Services, Laser Programs (510)423-5997-- lasers-docservices@llnl.gov
For questions about the server, contact: Rey Santos--santos6@llnl.gov

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Mr. LIEBMAN. The title of the page is "Radar Ocean Imaging," and the first line of tests states, "This project focuses on the detection by radars of surface manifestations of moving submerged submarines." Later it says that as a result of "achievements" in the project, "there is now no controversy within the community that radars offer any potential for this problem"—that is, to detect submarines. It concludes, "This program has made impressive advances in understanding and exploiting radar remote sensing of the ocean for important national defense needs."

In addition, a few days after receiving the Website printout, DOD gave me a copy of the prepared remarks of Dr. Twogood of the Lawrence Livermore National Laboratory presenting in open session to a subcommittee of the House Armed Services Committee in April 1994. I also have a copy of that testimony, and I would like to offer it into the record and quote from significant portions of it.

[The information follows:]

STATEMENT ON THE INDEPENDENT NON-ACOUSTIC ANTI-SUBMARINE WARFARE PROGRAM

SUBMITTED TO THE

RESEARCH AND TECHNOLOGY SUBCOMMITTEE HOUSE ARMED SERVICES COMMITTEE

(By Dr. Richard E. Twogood of the Lawrence Livermore National Laboratory, April 1994)

Madam Chairwoman, I appreciate the opportunity to appear before your subcommittee to testify on the technical and programmatic aspects of the Independent Non-Acoustic Anti-submarine Warfare (INAASW) Program.

I manage the Imaging and Detection Program at the Lawrence Livermore National Laboratory. My primary responsibility is to serve as the technical program leader for the Joint United Kingdom/United States Radar Ocean Imaging Program, the single largest project in this DoD program.

The Joint UK/US Radar program has made important progress in the development of methods to detect submarine signatures with remote sensing radars, especially over the last two years. While the details are classified, the following can be said:

(1) We have discovered new phenomena that are not fully understood, nor explained by any known models, that appear to be very important to the sensing of surface effects produced by undersea disturbances. These new phenomena are also likely to be important in the development of environmental remote sensing techniques by radar. We have planned a vigorous program to investigate these phenomena.

(2) We have developed new signal processing and detection techniques that, to our knowledge, have never before been successfully applied to this problem.

(3) We have applied these new methods in both classified and unclassified experimental settings. Results have been achieved that I believe are not only impressive, but also offer great promise for future improvement of these capabilities.

(4) These discoveries bring into question the validity of all previous assessments that were based on models that did not include these effects. In addition, the nature of our results also raises the possibility that certain claims by Russian scientists and officials that they have achieved non-acoustic ASW successes with radars merits serious consideration.

Our results have been briefed extensively at high levels in both the United Kingdom and the United States. The UK view is exceptionally supportive of this work, and concluded that "the program has provided new insights into submarine detection and is well balanced and soundly structured." In addition, the UK is devoting significant resources into this Joint UK/US program, and the Ministry of Defence has made a 3-year commitment (through 1996) for its continued funding. We have received uniformly positive feedback from U.S. officials that the results appear significant and merit further work. I would welcome the opportunity to provide a classified briefing on these results to members of the committee or anyone else you wish be briefed. I have with me a copy of such a recent briefing, at the SECRET level,

should you desire a copy. Researchers in this program are also publishing these new results in both the classified and unclassified literature.

I have been told that the Congress in general, and this committee in particular, is very concerned about the status of this program due to recent actions in the DoD that have impacted our progress. I am familiar with some of these concerns in some detail, but have only peripheral knowledge of others. The main concern of immediate importance to me as the Joint UK/US Technical Program Leader is the failure of the DoD to provide funding for our work this year. As of this date, we have received no FY94 funding despite the fact that Congress appropriated the funding. This is a recurring problem, and these delays have had major negative impacts on the UK/US program. I have documented these impacts in memos to the DoD program manager, copies of which I have with me.

In conclusion, I would like to say that I appreciate the support and concern this committee has demonstrated. We have achieved important new scientific and detection results, and I urge you to take the steps needed to continue this research.

Mr. LIEBMAN. "The Joint US/UK Radar Program has made important progress in the development of methods to detect submarine signatures with remote sensing radars, especially over the last 2 years." It also states, "We have developed new signal processing and detection techniques that, to our knowledge, have never been successfully applied to this problem. We have applied these new methods in both classified and unclassified settings. Results have been achieved that I believe are not only impressive but also offer great promise for future improvement."

So there it was. There was no secret at all that the U.S. Government was working on a program to detect enemy submarines with radar aimed at the ocean's surface. There was not even any secret that we had achieved a potential breakthrough. The Website and Dr. Twogood's testimony, coupled with the fact that the underlying 1995 document was only classified under a mosaic theory, convinced me that there was no section 794 case on the 1997 compromise. In my estimation, Senators, it was not even a close call.

I arrived at that conclusion even before I received the Schuster memorandum of November 14, 1997. That memo only served to reaffirm my position. Particularly significant was the Navy's determination that it could not support the confidential classification of the 1995 document, and that, in any event, Peter Lee's disclosure did not cause significant damage. I would note that the Schuster memorandum had the concurrence of the Vice Chief of Naval Operations, the second highest ranking Navy official.

Now, just because a compromise of classified information cannot be prosecuted under section 794, it does not mean that there are no other statutes with serious criminal penalties that might apply. There are other provisions of the espionage code, specifically, 18 U.S.C. 793 and 798. In addition, there is the Internal Security Act, specifically, title 50, U.S.C. section 783. Each of these carries a 10-year penalty. The problem was that none of them applied. Section 793 was out because it, too, used the term "national defense information," just like section 794. Section 798 was out because it applies only to communications intelligence and crytopgraphic information. And the Internal Security Act was out because it applied only to defendants who ere U.S. Government employees or employees of U.S. Government-owned corporations. That was the biggest disappointment, and I remember discussing that with Mr. Shapiro over the phone following my trip out to Los Angeles. The statute does not apply to employees of Government contractors, such as a TRW employee.

Shortly thereafter, I recommended to Mr. Dion that we offer a plea to Lee under 18 U.S.C. 793 or section 224(b) of the Atomic Energy Act of 1954 for the 1985 compromise. Both statutes carry a maximum penalty of 10 years and would require Lee to waive the statute of limitations. The U.S. Attorney's Office elected to offer Lee the plea under 18 U.S.C. 793.

At some point in early 1997, it became apparent that Lee was balking at a plea with a potential 10-year exposure for the 1985 incident. I then recommended to Mr. Dion that, although the section 794 case for that incident in 1985 had problems, it was sufficiently robust that we could ethically use it as leverage. This was communicated to the U.S. Attorney's Office by Mr. Dion, I believe, in a phone call, I think at this point to Mr. Shapiro himself.

Shortly thereafter, the plea agreement was entered. Lee, in fact, did waive the statute and plead guilty to section 793, along with a violation of section 1001 of title 18 for lying about the circumstances of his 1997 travel to China.

It goes without saying, I hope, that I was extremely disappointed that Peter Lee was not sentenced to prison. It is the only espionage prosecution I have worked on that did not result in a prison term. But let me add that I am proud of my work on that case and proud that Jonathan Shapiro and I ensured that Peter Lee would not remain free to continue to make sensitive disclosures to foreign governments.

That concludes my remarks.

Senator SPECTER. Mr. Liebman, would you refer to two memoranda which will be provided to you——

Mr. JENNINGS. Excuse me for interrupting. My name is Jon Jennings, the Deputy Assistant Attorney General in Legislative Affairs. It was our understanding that this was to be a panel of Mr. Dion, Mr. Keeney, and Mr. Liebman. I respectfully request the subcommittee to allow Mr. Bruce Swartz to sit with Mr. Liebman as his counsel, and he is also a supervisor of Mr. Liebman.

Senator SPECTER. We would be glad to have Mr. Swartz present. No problem with that at all.

Mr. JENNINGS. Thank you, sir.

Mr. SWARTZ. Thank you, Mr. Chairman.

Senator SPECTER. There were no commitments given as to a panel, although I don't understand the relevancy of the comment as an introduction to asking Mr. Swartz to be here, but the subcommittee would be pleased to have Mr. Swartz sit with Mr. Liebman.

Mr. SWARTZ. Thank you, Mr. Chairman.

Senator SPECTER. Mr. Liebman, referring to a memorandum which is dated November 25, 1997, at about three-fourths of the way down—and I know you are familiar with this——

Mr. LIEBMAN. A few minutes, Senator. November 25th memorandum.

Senator SPECTER. It is marked in the upper righthand corner.

Mr. LIEBMAN. I have a memo for the Secretary of Defense———

Senator SPECTER. I am referring now to a memorandum from Michael Doris——

Mr. LIEBMAN. I found it, Senator.

Senator SPECTER. And referring only to one section here to try to get to the crux of the matter and move ahead, the line, "According to JJ"—referring to JJ Smith—"ISS/Dion said that if RT"—which refers to Dr. Lee—"doesn't accept the plea proffer, then he gets charged with 18 U.S.C. 794, the heftier charge." And now referring to the DOD memo, the line you had referred to earlier, "Should Lee decline the offer, the U.S. Attorney will seek an indictment against him for violation of 794."

Now, those documents state, obviously, that there was authority to charge Dr. Lee with U.S.C. 794 if he doesn't accept the plea proffer. And my question to you is: Why wasn't that information conveyed to Mr. Shapiro?

Mr. LIEBMAN. These documents do not accurately reflect the state of affairs at the time, actually. What Mr. Shapiro had authority to do was to use a section 794 prosecution in leverage for plea negotiations. Had the plea broken down, we would then have regrouped, hashed it out, and perhaps considered a section 794 prosecution for the 1985 compromise.

Senator SPECTER. So these documents are flat-out wrong?

Mr. LIEBMAN. Not flat-out wrong. I would say they're slightly wrong.

Senator SPECTER. But they are wrong that there was no authorization to proceed under section 794?

Mr. LIEBMAN. On that point, they are wrong. And I would note they're written by people who were not involved in the discussions between our office and the U.S. Attorney's office.

Senator SPECTER. Well, that is the big question. Since you brought it up, who were the people involved in the discussions? Tracing from Mr. Shapiro to you to whom? Something we have tried to find out very hard, but your unavailability and the unavailability of documents until the last minute and the representation by many people in the Department of Justice and the Department of Defense and the Navy that there were no documents has made it very, very difficult for this subcommittee to find anything out. But now——

Mr. LIEBMAN. Well——

Senator SPECTER. Let me finish. But now when you say these people didn't know better, what these documents say is wrong, a subject we will get into in great detail, who was privy to the discussions? Who did you talk to in the Department of Defense?

Mr. LIEBMAN. Mr. Shapiro, Mr. Drooyan, myself, and Mr. Dion I think were the central figures in discussing the plea negotiations that were going on——

Senator SPECTER. Do you recall my question?

Mr. LIEBMAN. Yes. I think I just answered it, sir.

Senator SPECTER. Whom did you talk to in the Department of Defense?

Mr. LIEBMAN. As to the plea discussions? Absolutely no one.

Senator SPECTER. And whom did you talk to in the Department of Defense about anything?

Mr. LIEBMAN. Whom did I talk to, sir?

Senator SPECTER. That is my question.

Mr. LIEBMAN. I met with Department of Defense officials on October 28, 1997, at a meeting. Since—I believe it was people like who testified before this subcommittee last month.

Senator SPECTER. You believe it was people like who testified before the subcommittee last month? Do you have any records as to whom you talked to in the Department of Defense?

Mr. LIEBMAN. I have some documents I got in November 1997 that were faxed to me indicating the various public record information that was available on the 1997 compromise, and I believe the documents came from Donna Kulla in the Department of Defense, and I think she was also at the meeting in late October.

Senator SPECTER. Could you produce those documents for this subcommittee?

Mr. LIEBMAN. I think you have those, Senator.

Senator SPECTER. Why do you think we have those?

Mr. LIEBMAN. If you're talking about the public record documents——

Senator SPECTER. I don't know what I am talking about. This is something you mentioned. I don't know what you are talking about. That is what I am trying to find out.

Mr. LIEBMAN. There was a thick stack——

Senator SPECTER. If I say I don't know what I am talking about, I am asking you to produce documents which I have no knowledge of which you have referred to. So don't ask me where the documents are.

Mr. LIEBMAN. I don't think I did that, sir. These documents were public documents relating to the 1997 compromise.

Senator SPECTER. What do you mean by public documents?

Mr. LIEBMAN. These are various articles and research pieces about—from scientists on the issue of radar ocean imaging and directed at the ocean surface.

Senator SPECTER. Mr. Liebman, I am trying to find out whom you talked to in the Department of Defense, and my question to you, when you make a generalized reference like people who testified before, and you mentioned Ms. Donna Kulla, I am asking you: Are there any records which specify whom you talked to in the Department of Defense?

Mr. SWARTZ. Mr. Chairman, perhaps I could help clarify this. The documents that Mr. Liebman is referring to are the documents that were faxed to him. This subcommittee has them, and they refer to one of the people he spoke to at the Department of Defense on this matter.

Senator SPECTER. They were faxed to the subcommittee when?

Mr. SWARTZ. No, no. I am sorry. They were provided to the subcommittee. They were faxed to Mr. Liebman.

Senator SPECTER. When were they provided to the subcommittee?

Mr. SWARTZ. I believe—for some time. I would have to check, but——

Senator SPECTER. Are you talking about—Mr. McArthur gives me a thick pack that were handed to him this morning. Are these the ones you are talking about?

Mr. SWARTZ. No, Mr. Chairman. These are the documents that I believe you have seen before for some period of time.

Senator SPECTER. Now, wait a minute. Don't tell me about the documents that I have seen, please. These are the documents that you have seen before, Mr. Chairman?

Mr. SWARTZ. I believe so——

Senator SPECTER. Please do not tell me what I have seen.

Mr. SWARTZ. I am sorry. These are documents provided to the subcommittee some period of time ago that we have referred to—that have been referred to throughout these hearings. These are the Web pages from the Lawrence Livermore Lab that refer to the ocean imaging. Those are the documents that Mr. Liebman is referring to.

Senator SPECTER. Well, we will not pursue this further, but we will handle it with staff after the session is over. Mr. McArthur, who has done a phenomenal job going through 800 pages yesterday that were presented, hands me this thicket of papers about an inch thick with a notation, "These were handed to me this morning."

Now, I will say for the record I haven't seen the notes, but we do want to see what records there are. But for the moment, in the interest of time, we will proceed to ask Mr. Liebman whom he talked to at the Department of Defense.

Mr. LIEBMAN. I believe, in addition to Donna Kulla, I think Earl Dewispelaere was there. He also testified before this subcommittee last month, and I think in his statement he mentions that he was at the meeting as well.

I know—I cannot recall the other people from the Department of Defense who were there. I know Gil Cordova from the FBI was also there.

Senator SPECTER. Did you make a record notation of that meeting which would include the identification of the people who were at the meeting?

Mr. LIEBMAN. No, I did not, sir.

Senator SPECTER. Why not?

Mr. LIEBMAN. It didn't strike me as a crucial piece of information at the time.

It was also the preliminary meeting. Had the case had gone forward, that would have led to many, many more additional and much more important meetings where I would have kept better track of who I was talking to and when.

Senator SPECTER. Well, since you didn't have any other meetings and since you were looking to the Navy and the Department of Defense for an evaluation as to this matter, why do you classify it or say it is a meeting which wasn't of sufficient importance to maintain some sort of a written record as to what happened?

Mr. LIEBMAN. It is not my habit and it is not our office's habit to maintain detailed written records of all the meetings we have with the Department of Defense and the Intelligence Agency, and——

Senator SPECTER. Well, I am not talking about detailed records. I am just talking about a record which would give you the date, the people who were present, and a generalized statement as to what they said.

Mr. LIEBMAN. Well, the purpose of the meeting, Senator, was merely to get a general idea of what kind of public information might be out there that would affect the viability of a section 794

prosecution of the 1997 compromise as well as to find out what we could say generally about the program if we were to go to trial. It was a very preliminary meeting, in my estimation, and had we gotten over those initial hurdles, there would have been many more meetings of much more significance.

Senator SPECTER. But that was the only meeting you ever had with representatives of the Department of Defense.

Mr. LIEBMAN. It was the only meeting, but I do recall speaking to Donna Kulla after the meeting and getting some additional documents.

Senator SPECTER. But that was the only meeting?

Mr. LIEBMAN. Correct, sir.

Senator SPECTER. And did you inquire at that time as to what damage was done in the view of the Department of Defense by these disclosures?

Mr. LIEBMAN. No, I did not, and let me explain. That is not something we typically do. We don't ask the Department of Defense to do damage assessments before we answer a plea or consider an indictment.

Senator SPECTER. Well, it seems to me that it is pretty important to know what the Department of Defense thinks about the matter and how badly they have been damaged.

Mr. LIEBMAN. But not——

Senator SPECTER. Let me finish.

Mr. LIEBMAN. I thought you were finished. I'm sorry.

Senator SPECTER. Very briefly, so that you have some assessment as to what the damage is to national security, an issue which you have raised, before you preclude a prosecution by a plea bargain.

Mr. LIEBMAN. A formal damage assessment, which is something we never ask for prior to a plea or prior to an indictment, is something that takes at least, in my experience, over a year. It is an all intelligence community assessment of the damage caused in a case. It usually results in a very thick, highly classified report that we cannot disclose to defense counsel or the defendant, and that is why we do not ask the agencies to do a damage assessment.

We will, however, if the case is moving forward and we see that there is some viability to it, meet with the owners of the information to have them articulate to us why the information is classified, why it relates to the national defense.

Senator SPECTER. But it is possible, Mr. Liebman, to get a damage assessment in much less than a year, isn't it?

Mr. LIEBMAN. Not in my experience. Not the kind of formalized damage assessments that have been done in other espionage cases.

Senator SPECTER. So you have gotten formalized damage assessments in other espionage cases?

Mr. LIEBMAN. I am aware they have been done. They've all been done after the conviction, which is the standard practice because at that point there is usually more information that has come out.

Senator SPECTER. Well, we will take a look at your standard practices, Mr. Liebman, but when we have the discussion with Mr. Keeney, we will get into this later, there, I think, is agreement among the upper echelons at the Justice Department that there need to be some fundamental changes in what you do, that there has to be a better understanding by the agency, like the Depart-

ment of Defense, about the Confidential Information Protection Act and a more formalized understanding if these cases are to be plea bargained and not to be decided without some real inquiry and pursuit as to what the Department of Defense thinks. But we will get into that in due course. And we will take a look at the length of time it takes and what information a prosecutor ought to have before he enters a plea bargain to know what the case is all about. But we have heard your view, and we will proceed with our assessment of that.

Just a couple more questions, Mr. Liebman, before yielding to my colleagues.

Mr. Shapiro testified about his determination—he characterized it his "aggressiveness"—to move under 794, thinking that he could get a conviction under 794. That attitude by Mr. Shapiro was conveyed to you, wasn't it?

Mr. LIEBMAN. Yes, it was.

Senator SPECTER. But you disagreed with it?

Mr. LIEBMAN. Yes, I did.

Senator SPECTER. Mr. Liebman, when you talk about the issue of classification, you did know that beyond the information which was in the confession that the FBI was aware of other information that Dr. Lee had revealed that was not declassified. For example, a June 1998 FBI report cites three other instances in which Dr. Lee revealed classified information. And another FBI document indicates that in the early 1980's Dr. Lee gave the Chinese classified information that greatly assisted their nuclear weapons program.

You were aware of that, weren't you?

Mr. LIEBMAN. Senator, I am reluctant to go into that in open session. I was aware——

Senator SPECTER. I am not asking you to go into anything. I am asking you to respond to a very carefully calibrated question which does not disclose any classified information.

Mr. SWARTZ. Mr. Chairman, I do believe that this is something, to allow Mr. Liebman to respond to fully, we would have to be in closed session.

Senator SPECTER. Then we will proceed into closed session.

Mr. SWARTZ. Thank you.

Senator SPECTER. We will honor that request because we are not going to take any chances, although I think that question calls for a simple "yes" or "no" answer, but we will have a closed session.

Mr. Liebman, you make a big point about the materials being declassified at some later point, but isn't it true that when you have a multibillion-dollar program like this and the scientists from the People's Republic of China have access to the information for a period of time, from 1985 to 1990, 1991, 1992, 1993, 1994, that there is substantial value in having at that time—although the Government later declassifies it, it is not really up to Dr. Lee to make a disclosure or to claim an excuse that it was later declassified. At the time it is disclosed, there is a serious espionage breach, isn't there?

Mr. LIEBMAN. It certainly is—I am not going to dispute that there might have been a substantial benefit to the Chinese to get this information in 1985. Nor do I think Dr. Lee, or Peter Lee—I don't think he is deserving of that title anymore—is entitled to

use it as an excuse. However, I do think the declassification and the reasons for the declassification are quite relevant to whether the information was national defense information at the time he disclosed it.

Senator SPECTER. Well, why is that? The time of disclosure is a critical time. We agree on that, and it was classified at that time. And the damage assessment which was made—the impact statement which was made on February 17 of 1998, the declaration of technical damage to the United States national security assessment in support of *U.S.* v. *Dr. Peter Lee* from Dr. Cook which is in February of 1998, well short of the year you talk about, or the impact statement of February 17, 1998, signed by Messrs. Staffin, Trulock and Mahaley, specified the damage to U.S. national security at the time they were disclosed.

Mr. LIEBMAN. But there are other documents, Senator, talking about the reasons for the declassification and the debate that began in 1989 specifically about the fact that the rest of the world was catching up. If the Department of Energy was discussing the fact that the rest of the world was catching up in 1989, I think a reasonably competent defense attorney will be able to scour the public record in this country and other countries to point out that some of the same information the Department of Energy was relying upon to declassify the information in 1990, to begin talking about it in 1989, was available also in 1985.

Now, I am not saying that reasonable people can't disagree about the viability of a section 794 case on the 1985 compromise. I fully understand that, and that is why I recommended to Mr. Dion that we use the section 794 potential charge for the 1985 compromise as leverage in plea negotiations. And had those plea negotiations broken down, there would have been further meetings that might have led to an assessment to actually go forward with that 1985 compromise.

Senator SPECTER. Well, just two more questions before yielding. All of that means that you didn't have an insurance policy for a conviction, but trial prosecutors don't necessarily have insurance policies for a conviction. You had Mr. Shapiro, who was an experienced trial attorney, and I am not doubting your credentials, Mr. Liebman, and I am pleased to hear about your good work and I have only the highest respect for you as an attorney. I don't know what the relevance of all of that is to our proceeding, but I am pleased to have it put the record, as Mr. Keeney wanted to put it in the record. But I think it would be relevant to contrast you and Mr. Shapiro to put on the record your experience as a trial attorney.

Mr. LIEBMAN. In conducting trials, Senator? Well, I would first like to also point out that my position on the section 794 charge was matched by experienced prosecutors in the U.S. Attorney's office, as well as my own superiors.

Senator SPECTER. Could you focus on my question first and then——

Mr. LIEBMAN. Yes, I will.

Senator SPECTER [continuing]. Make any amplification you think helps your case?

Mr. LIEBMAN. I had significant trial experience, as I define the term, in 1991 when I was a special assistant U.S. Attorney, numerous bench trials and two jury trials over a six-month period. I also was on the trial team for the only section 794 prosecution in the last 12 years.

Senator SPECTER. How many espionage cases have you tried?

Mr. LIEBMAN. Have I tried, Senator?

Senator SPECTER. Yes.

Mr. LIEBMAN. There has only been one espionage trial, as I define the term, under section 794 since I came to the Department of Justice and I was——

Senator SPECTER. Would you answer my question and then amplify?

Mr. LIEBMAN. And I was on that trial team.

Senator SPECTER. You were on the trial team. How many lawyers were there?

Mr. LIEBMAN. I believe there were two assistant U.S. Attorneys and myself.

Senator SPECTER. Mr. Liebman, when you testify about what was on the Web site, you are aware of the fact that Dr. Lee's confession went far beyond what was on the Web site, and that on information provided to you by Dr. Twogood—and I believe you have this document marked in the upper righthand corner P12–34.

Mr. SWARTZ. Mr. Chairman, can you give us a reference to that? We have a numbered set of documents here. I don't know if you have got the same provided by your subcommittee.

Senator SPECTER. Number 3, quote, "processing techniques"—this is referring to what Dr. Lee confessed turning over to the PRC scientists—"processing techniques, which, when applied to classified or unclassified data, yield a significant enhancement in signature detectability which might apply to the submarine case (secret/Crimson Stage)," which was Dr. Twogood's classification that above and beyond what was in the public domain, that the material disclosed by Dr. Lee were secret. You are aware of that?

Mr. LIEBMAN. I am aware of that. It went above and beyond the Web site. It did not go above and beyond the mosaic document that is only classified at the confidential level. And as I said before, there are numerous——

Senator SPECTER. Did not go beyond what?

Mr. LIEBMAN. It did not go above and beyond this document right here, which is classified confidential only under a mosaic theory. There are so many unclassified paragraphs in that document, I could recite them out loud and this committee would not be committing a security violation, and I would not be going beyond what Peter Lee confessed.

Senator SPECTER. Can you identify the document you are referring to in the double-wrapped envelope?

Mr. LIEBMAN. Yes, I can.

Senator SPECTER. Why do you have it in a double-wrapped envelope if you are going to take it out now?

Mr. LIEBMAN. Pardon me, sir?

Senator SPECTER. Why do you have it in a double-wrapped envelope if you are going to take it out now?

Mr. LIEBMAN. I wasn't sure you wanted me to take it out, and it is a classified document. It has a cover sheet.

Senator SPECTER. I just asked you to identify it. I didn't ask you to take it out.

Mr. LIEBMAN. I can't recall the title of the document offhand, Senator. It is written on the document.

Senator SPECTER. Well, let's move into that, and we can give my colleagues a chance to question, but the point is that knowing all that Dr. Lee had said publicly and what was in the public domain, what he had written and what was on the Web site, Dr. Twogood said that his confession disclosed secret information. Didn't Dr. Twogood come to that conclusion?

Mr. LIEBMAN. I know that Mr. Shapiro had his own doubts about Dr. Twogood's opinions and their evolution, but also I think Dr. Twogood's opinions have to be measured against the opinions of the Navy——

Senator SPECTER. Do you remember my question?

Mr. LIEBMAN. Yes, I do.

Senator SPECTER. What was my question? My question was, isn't it true Dr. Twogood classified this as secret?

Mr. LIEBMAN. I don't think he has original classification authority. He may have opined that it was secret. And whether not it is secret or confidential, the fact is every single paragraph that this document—that Peter Lee confessed to disclosing is marked unclassified.

Senator SPECTER. Mr. Liebman, we will take your statement that he opined that it was secret. I think that is all anybody can do. Even those people across the street in the Supreme Court of the United States who hand down life-and-death decisions put the classification under opinions——

Mr. SWARTZ. Mr. Chairman——

Senator SPECTER. Wait just a minute.

Mr. SWARTZ. Thank you.

Senator SPECTER. Just an observation, Mr. Liebman. What this subcommittee is trying to do is find out the facts, but so frequently when I ask you a question, you give me a thesis on why what you did was correct, such as asking you about Dr. Twogood's classification, his evaluation, his judgment, his opinion, his statement that it was secret. You tell me why it is not worth anything.

But all I am trying to find out is whether you knew that he opined that it was secret.

Mr. LIEBMAN. Yes, I did, Senator.

Senator SPECTER. You did?

Mr. LIEBMAN. I did know that.

Senator SPECTER. OK, thank you.

Senator Sessions?

Senator SESSIONS. I think Senator Grassley——

Senator GRASSLEY. He said I could go first.

Senator SPECTER. That is fine.

Senator GRASSLEY. It is my understanding that Peter Lee multiple times confessed to disclosing classified information. I want to know—and remember I am a non-lawyer, but why wasn't that confession in and of itself enough to convict him of a 794 or a 793, based on the 1997 disclosures?

Mr. LIEBMAN. Senator, both section 793 and 794 require that the Government prove there was a compromise of national defense information. It is not enough that the information or the document at issue merely be classified. And even though the Department of Defense may, in good faith and full propriety, classify a document or classify certain information, if, in fact, the information is not significant, if, in fact, there is substantially the same information available to the public, then it is not national defense information, and therefore not a violation of those provisions.

Senator GRASSLEY. The Department of Defense officials have stated that Peter Lee documents provided by your office for determination of classification was an unclassified FBI affidavit of Agent Cordova. They have repeatedly stated in hearings and briefings in this subcommittee that they were not supplied with the videotape confession of Peter Lee. FBI Agent Sayner testified that the Department of Defense was supplied with the Cordova affidavit, as well as the videotaped confessions.

Since you were a liaison between Justice and the DOD on this Peter Lee case, what exactly did you supply to the Department of Defense in order for them to make their classification? And I would like to have the names of those individuals at the Department of Defense that you supplied the information to.

Mr. LIEBMAN. The purpose of my initial meeting with the DOD in late October 1997 was not to get a formal classification determination. So I did not supply any information to DOD for that purpose. The people I did give some information to while we were at that meeting, I believe, include Captain Dewispelaere and Donna Kulla, because I think now they were at that meeting.

And the information I provided was a draft affidavit from the FBI which summarized, in my estimation, the important points of the confession of October 1997, and also made note of the fact that the confession had been taped. So if the Department of Defense or the Navy had desired a tape, they knew one existed and they could have asked for one.

Senator GRASSLEY. Then you did not transmit the videotaped confession to the Department of Defense?

Mr. LIEBMAN. No, sir.

Senator GRASSLEY. My staff advised me, why not?

Mr. LIEBMAN. Because at that point, at the initial meeting, the purpose was not to get a final classification determination or even a preliminary classification determination on the information. It was only to find out one of two things: what publicly available information might be out there that could potentially compromise a section 794 prosecution on the 1997 compromise, and what could we say about the program generally, as I have here today, in an open trial setting.

Senator GRASSLEY. Mr. Shapiro testified last week in a closed hearing that his prosecution of Peter Lee was greatly impacted by the October 1997 meeting that he had with the FBI and the Department of Justice officials here in Washington. He says you were at that meeting. Was your interpretation at that meeting the same as Mr. Shapiro's, and did you think that meeting had an impact on the prosecution of Peter Lee?

Mr. LIEBMAN. Excuse me, Senator.

[Witness conferring with Mr. Swartz.]

Mr. LIEBMAN. I would say I was in the meeting, so that is correct, sir. And I think it did have an impact, and I would be happy to go into that specifically in closed session.

Senator GRASSLEY. The chairman will follow up on that in a closed meeting because I won't be able to be present.

Mr. Shapiro stated last week that a Department of Defense memo written by Mr. Schuster was, quote, "a body blow to the prosecution." What follow-up action did you take, if any, with the Department of Defense regarding what is known as the Schuster amendment? In other words, did you seek clarification from the Department of Defense or the Navy?

Mr. LIEBMAN. No, I did not seek any further clarification, sir. My opinion had pretty much been fully decided even prior to getting the Schuster memorandum. And once I got the Schuster memorandum—and I would agree with previous testimony that it was a body blow. Mr. Shapiro said a knock-out punch, I think. And therefore based on what I knew about the case already, and this memorandum, I quickly was satisfied there was no section 794 case on the 1997 compromise, particularly where the Schuster memorandum has the concurrence of the Vice-Chief of Naval Operations.

Senator GRASSLEY. Thank you, Mr. Chairman.

Senator Specter. Thank you, Senator Grassley.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

On Mr. Shapiro's views and yours, the chairman asked you about trials. As I understand it, you were on the trial team of one 794 trial, is that correct?

Mr. LIEBMAN. That is correct, sir, but as I——

Senator SESSIONS. Have you ever tried another case before a jury?

Mr. LIEBMAN. Yes, I have.

Senator SESSIONS. How many?

Mr. LIEBMAN. Two other cases.

Senator SESSIONS. What kind of cases?

Mr. LIEBMAN. Immigration and drug cases.

Senator SESSIONS. Mr. Shapiro had 8 years as a trial attorney and tried a lot of complex cases, had he not?

Mr. LIEBMAN. Yes, he did, obviously, sir.

Senator SESSIONS. And he was aware of the Schuster memo?

Mr. LIEBMAN. Yes, sir.

Senator SESSIONS. And he was prepared to proceed with 794?

Mr. LIEBMAN. Yes, he was, but apparently he didn't have the——

Senator SESSIONS. I just asked you, he was prepared to proceed, was he not?

Mr. LIEBMAN. Yes, he was, sir.

Senator SESSIONS. Now, you have examined witnesses.

We don't have a lot of time; we have to just ask a few questions.

So he was prepared to proceed. Who made the decision that he could not proceed with 794?

Mr. LIEBMAN. It was Mr. Drooyan, the first assistant U.S. attorney at the U.S. Attorney's Office, Mr. Shapiro's supervisor. It was Mr.——

Senator SESSIONS. Wait a minute. Let me ask you this: the authority to approve a 794 is not with his supervisor in that office, is it? The authority is in the Department of Justice, isn't it, in Washington?

Mr. LIEBMAN. I believe it is at the Assistant Attorney General level.

Senator SESSIONS. In Washington, DC?

Mr. LIEBMAN. Yes, sir.

Senator SESSIONS. Who in Washington, DC, made the decision to not allow him to go forward with 794?

Mr. LIEBMAN. I believe Mr. Keeney testified that he approved the plea agreement which had in it that there would not be a section 794 prosecution.

Senator SESSIONS. Mr. Keeney didn't know a lot about the case and said he wouldn't have had the same decision had he known more about it. Were you the person that was in charge of collecting the data for some officials to make final decisions on?

Mr. LIEBMAN. I wouldn't say I was in charge of that, sir.

Senator SESSIONS. Who was?

Mr. LIEBMAN. I think it was a combination of the U.S. Attorney's Office and our office, the Internal Security Section.

Senator SESSIONS. Well, Mr. Chairman, I think one thing is absolutely clear. In this whole process, everybody is passing the buck. Mr. Keeney is passing the buck, Mr. Dion is passing the buck, Mr. Liebman is passing the buck, and now they want to blame the U.S. Attorney's Office. But the fact is, and I will repeat again—and I know how this works because I had them tell me no on cases where the Department of Justice has final authority.

The Department of Justice had final authority, not the U.S. Attorney's Office, did they not?

Mr. SWARTZ. Senator Sessions, may I clarify on this issue, if I may for a moment?

This is a case, as you know, that went up through the U.S. Attorney's Office, not just Mr. Shapiro but also through the first assistant and the U.S. attorney to the Internal Security Section. No one is passing the buck in that regard, Senator. The decision was made at Main Justice, but was concurred——

Senator SESSIONS. All right. That is why I am asking.

Mr. SWARTZ. But it was concurred in——

Senator SESSIONS. The U.S. attorney's opinion is worthless when it comes to the authority to make the decision, responsibility to make the decision.

Mr. SWARTZ. The U.S. attorney can concur in or disagree with section opinion, and here the U.S. attorney agreed with—and so did the first assistant—that decision. The person who did not agree, of course, as you know, was Mr. Shapiro.

Senator SESSIONS. And you disagreed with Mr. Shapiro?

Mr. LIEBMAN. Yes, I do, Senator.

Senator SESSIONS. And Mr. Dion disagreed with Mr. Shapiro?

Mr. LIEBMAN. I have talked to him about it. Yes, I believe he does, sir.

Senator SESSIONS. Now, the Schuster memo laid out there as a detriment to the case for sometime. Did anybody ever seek to get another analysis of it? I saw Senator Specter examine Mr.

Schuster, and I will tell you what I concluded from that examination. Mr. Schuster's memo was wrong, and he was in error, and he acted too hastily. And he had never seen the confession on tape, and he didn't know hardly anything about the case. And I know at first glance—and I have tried a lot of cases and supervised lawyers trying cases, and I have seen them panic over bad memos in the file. But you have to go beyond that. This is a matter of great importance to me.

Did you ever attempt to get any other analysis from the Department of Defense contrary or different from Mr. Schuster's?

Mr. LIEBMAN. I didn't, sir, but I know that the Department of Defense—or the Navy, that is—did re-analyze this issue for the Cox committee last year.

Senator SESSIONS. Well, but when you were making a decision of whether or not to prosecute, you allowed this half-baked memo to lie out there and be an excuse not to proceed with the case, it seems to me, without ever proceeding. Isn't it true, Mr. Liebman, that a case like this would have had the potential to embarrass the Department of Defense?

Mr. LIEBMAN. I'm not so sure about that, but——

Senator SESSIONS. Well, you are not sure about it. Okay.

Mr. LIEBMAN. That's correct, sir.

Senator SESSIONS. All right. But you went through here and described for us some things I thought were pretty stunning that you found that were on public record that I got the impression you were dubious about whether it should have ever been made a part of the public record. Would you express an opinion about that?

Mr. LIEBMAN. What part of the public record should I not have——

Senator SESSIONS. You were saying some of these matters had subsequently been made public on the Web site and other things and that the Department of Defense had released some of these matters and that the Department of Defense actually wanted other countries to know some of these things.

Is that accurate? It sounded like to me——

Mr. LIEBMAN. No, sir——

Senator SESSIONS [continuing]. The Department of Defense——

Mr. LIEBMAN. No, sir, that's not accurate.

Senator SESSIONS [continuing]. Being critical of the Department of Defense.

Mr. LIEBMAN. No, sir. What I was referring to was the 1985 compromise in terms of what I was told that the Department of Energy had factored into the declassification of that information, not the Department of Defense with respect to the 1997 compromise.

Senator SESSIONS. All right. Well, with regard to the—I find it very difficult to understand how you could suggest that this was not a Department of—this was not a national security information.

Mr. LIEBMAN. Which information precisely?

Senator SESSIONS. I mean, it clearly went to serious national defense issues. It wasn't a matter about something you could debate, say it is computers, it had commercial and military applications. This was purely a defense-type security question, was it not, had no civilian uses?

Mr. LIEBMAN. You're talking about the 1997 information now, Senator?

Senator SESSIONS. Well, 1985, too.

Mr. LIEBMAN. Well, in the 1985, I think I testified that it was a little bit of a closer case, which is why I recommended it be used as leverage——

Senator SESSIONS. Well, I think 1985 was closer because your basis there for saying it was originally when he released it, it was classified secret, was it not?

Mr. LIEBMAN. It was classified secret, but I'm not sure it would have been ultimately found to be national defense information at the time he compromised it.

Senator SESSIONS. Well, what was it about?

Mr. LIEBMAN. National defense information, sir, is a term of art under the espionage statute. It's the subject of numerous—several court opinions. While it may relate to the national defense in the colloquial sense, I think there was significant doubt, and there was a significant doubt in my mind, whether it related to national defense for the purposes of the espionage statute.

Senator SESSIONS. Well, what was the subject of the 1985 disclosures?

Mr. LIEBMAN. The 1985 disclosure, the subject was the hohlraum, inertial confinement fusion, and the use of——

Senator SESSIONS. Nuclear weapons.

Mr. LIEBMAN. Nuclear weapons research, that's——

Senator SESSIONS. Testing, yes, and if that is not national security, I don't know what is. And I don't believe there is any law anywhere that would say that kind of information is not.

Mr. LIEBMAN. Senator, I think there is, actually, and I would refer to the Supreme Court's opinion in Gorin, the opinion of Judge Learned Hand in Hein, and I would like to say I argued this precise issue before the Fourth Circuit last month, so I'm pretty well up to speed on it.

Senator SESSIONS. Well, Messrs. Staffin, Trulock, and Mahaley said, "In summary, Dr. Lee has confessed to compromising classified nuclear weapon design information. This information was properly classified at the time of compromise, and U.S. intelligence analysis indicates that this information, in conjunction with other information, was of material assistance to the People's Republic of China in advancing their nuclear weapons program. Compromise of this information reasonably could be expected to cause serious damage to United States national security."

So I don't believe there is any case law that would get around that.

Mr. LIEBMAN. I'd respectfully disagree, Senator.

Senator SESSIONS. And Mr. Shapiro testified, I think correctly, that whereas it had subsequently been declassified perhaps, maybe not all of it, but say it was, then it was still classified at the time. And you could—— his phrase was, after the D Day invasion, you could reveal the plans of the D Day invasion, but not before. Timing is a critical factor, is it not?

Mr. LIEBMAN. It is, Senator. However, the D Day invasion analogy, which, by the way, was my analogy when I discussed the general issue of national defense with Mr. Shapiro, is not apt in this

case. Certainly on June 7, 1944, the timing and place of the D Day invasion is no longer an issue. However, in this case, there was gradual and—gradual release or gradual catching up of the rest of the world in this area of research, which is why the Department of Defense ultimately decided to begin declassifying it in 1990. It was a gradual scientific process. It is not——

Senator SESSIONS. It wasn't declassified in 1985.

Mr. LIEBMAN. Correct, but it's got to be national defense information.

Senator SESSIONS. And if you reveal—the element of the offense is you reveal classified documents relating to—all right. Counsel is over here shaking his head. State it for me, counsel. What are the elements of the offense?

Mr. Swartz. National defense information, Senator.

Senator SESSIONS. All right. So the elements of the offense of 794 was met when he revealed that information, and he confessed and admitted that it was classified, had he not?

Mr. LIEBMAN. I'm not sure the elements of the offense were met because of my subsequent study of DOE documents for the reason of the declassification. It was a questionable case. I recommended we use the 794 prosecution as leverage in plea negotiations, and had the plea agreement broken down, had negotiations broken down, we would have revisited the issue.

Senator SESSIONS. Did you convey that to Mr. Shapiro?

Mr. LIEBMAN. I conveyed it to Mr. Dion, who I believe conveyed it to Mr. Shapiro.

Senator SESSIONS. So you don't know whether Mr. Dion conveyed it or not to Mr. Shapiro?

Mr. LIEBMAN. I guess you can talk to him about that, Senator.

Senator SESSIONS. But you didn't convey it to Mr. Shapiro?

Mr. LIEBMAN. Precisely the fact that he had leverage to use section 794?

Senator SESSIONS. No. Whether or not he could charge it if the plea negotiations broke down. The implication of your testimony to what you told Mr. Shapiro was that he couldn't do it if the negotiations broke down. Ethically, you felt he could bluff with it, basically is what you said in your written statement.

Mr. LIEBMAN. That's not what I said, Senator. What I said was that if plea negotiations broke down, we would have regrouped and reconsidered the issue. He was never told that had plea negotiations broken down in advance—he wasn't told in advance that he could then charge with 794.

Senator SESSIONS. Well, all I want to do is get the truth on this matter, and I think we are going around in circles here on it. But I think in your statement you don't say that you ever told him he could go forward. In fact, you suggest just the opposite.

Well, let me just say this: In my view, the elements of the charge were met on the 1985 disclosure; that you were basing your analysis primarily on what he admitted that he disclosed. Is that not correct?

Mr. LIEBMAN. That's correct, and it's because we couldn't prove anything else, Senator.

Senator SESSIONS. I know that, but we are rational human beings. We can expect he may have disclosed more than that. Don't you agree?

Mr. LIEBMAN. As to what else he might have disclosed or did, in fact, disclose, I'm happy to address that in closed session.

Senator SESSIONS. Well, this is the way I would analyze the case, and I think this is the way Mr. Shapiro analyzed it, and he was one that would be the lead trial attorney, would he not?

Mr. LIEBMAN. I'm not sure if he would have been the lead or Mr. Drooyan would also have been the lead.

Senator SESSIONS. He would have had to carry—he was prepared to carry the burden, put his neck on the line and litigate the case, and he believed he had sufficient evidence to proceed. That is what he testified in his testimony.

Mr. LIEBMAN. He also testified that his own supervisor disagreed.

Senator SESSIONS. I understand that, which is an interesting question. But I think what we are doing here is looking back over it, and looking back over it, I think Mr. Shapiro was correct. You had national security information. You had meetings in a private hotel room. You had the defendant—you had it classified secret at the time it was revealed, and you had the defendant himself admitting on tape that he had revealed classified information.

Now, I believe you can get to a jury with that, and I believe that case should have been charged as 794, and if the legal technicalities gave you trouble, I believe that you could have been able to negotiate a much better plea agreement. But, frankly, I believe the case could have gone forward, and perhaps the Department of Defense and Navy would have been embarrassed at the way they had been releasing information. Perhaps Lawrence Livermore Lab and these people who think they have a right under free speech to say what they want to would have had to have come forward and explained some of the declassifications that occurred, which I think is unjustified, and I don't think a jury would have had a hard time with this case, Mr. Chairman. I think a jury would have sized this up in a heartbeat and figured that—and I believe you would have had a conviction on 794 and it would have been upheld on appeal.

I thank you.

Senator SPECTER. Thank you, Senator Sessions.

Mr. Liebman, from the tenor of your testimony, I conclude you disagree with Senator Sessions that the jury would have convicted in a heartbeat, but do you disagree with former U.S. Attorney Sessions that there was a jury question on 794?

Mr. LIEBMAN. As to the 1985 compromise, I think it was a very close call. Perhaps it was a jury question. And I think reasonable prosecutors can disagree on whether we should have gone forward with the 794 prosecution.

Senator SESSIONS. And the decision in the Department of Justice denied the jury the right to make that call.

Senator SPECTER. That is the 1985 matter?

Mr. LIEBMAN. Yes.

Senator SPECTER. But how about the 1997 matter? Jury question?

Mr. LIEBMAN. Respectfully, Senator, I don't think so. I think it's not even a close call. I think it would have been a Rule 29 before it went to the jury.

Senator SPECTER. You referred in response to Senator Sessions' question as to other DOD documents which undercut the 1997 incident. Are those matters you would want to discuss in closed session?

Mr. LIEBMAN. No. Those are publicly available documents, Senator.

Senator SPECTER. Fine. Well, what documents are you referring to?

Mr. LIEBMAN. That's the big thick stack I think Mr. McArthur was showing to you earlier of articles, and, frankly, Senator——

Senator SPECTER. This is the stack that you opened?

Mr. LIEBMAN. I'm not sure, Senator.

Senator SPECTER. It says, "These were handed to me this morning." McArthur is a speed reader, but not that speedy. May the record show I thumbed the papers.

Mr. LIEBMAN. Senator, actually, those documents weren't all as troubling as the Twogood testimony in open session of the Armed Services Committee and the Web site. They were just additional—they're additional documents about—public documents about radar ocean imaging that's out there in the public literature.

Senator SPECTER. All right. The subcommittee will consider your testimony on that.

As to the issue about Dr. Lee's disclosures going well beyond the article and what was on the Web site, there are two documents: one, November 17, 1997, and another dated November 21, 1997, the second of which we got just—we don't have that yet. Mr. McArthur says we saw it last night for the first time, but we will go into that in a closed session.

I had handed to Senator Sessions a couple of documents when he was questioning you, Mr. Liebman, and one of them is an impact statement signed by Staffin, Trulock, and Mahaley that I referred to, February 17, 1998, which concluded—or I will read the paragraph. It is short. "In summary, Dr. Lee has confessed to compromising classified nuclear weapon design information. The information was properly classified at the time of compromise, and U.S. intelligence analysis indicates that this information, in conjunction with other information, was of material assistance to the People's Republic of China in advancing their nuclear weapons program. Compromise of this information reasonably could be expected to cause serious damage to U.S. national security." With the emphasis on "Compromise of this information reasonably could be expected to cause serious damage to U.S. national security."

Do you disagree with their conclusion about damage to U.S. national security, Mr. Liebman?

Mr. LIEBMAN. I don't disagree, Senator, but there are other DOE documents that put that kind of statement—other DOE documents that would have been relevant at a trial that would have made this a much closer issue.

Senator SPECTER. So it would be a jury question?

Mr. LIEBMAN. For the 19—this impact statement is as to the 1985 compromise, and as I said before, I think it was a close ques-

tion, a close call, and reasonable minds could differ on the propriety of going forward with the section 794.

Senator SPECTER. OK, but it was a jury question as to what Staffin, Trulock, and Mahaley concluded was national security information.

Mr. LIEBMAN. Senator, just because it's a jury question doesn't mean we should bring a section 794 prosecution.

Senator SPECTER. There you go again. I just asked you if it was a jury question. It doesn't mean that because it is a jury question you are going to bring it. I just asked you if it was a jury question.

Mr. LIEBMAN. Under the case law——

Senator SPECTER. Why so defensive, Mr. Liebman?

Mr. SWARTZ. Mr. Chairman, he wasn't being defensive. He's already answered that he believed it was a jury question before. He was just amplifying on that.

Senator SPECTER. No, he had answered it overall, but not as to the national security question, Mr. Swartz. It was a jury question as to the national security matters, Mr. Liebman?

Mr. LIEBMAN. As a matter of law, it's always a jury question whether information relates to the national defense.

Senator SPECTER. Oh, now, Mr. Liebman, it isn't always a matter of law it is a jury question. Judges take a lot of issues away from the jury and do not make them jury questions as a matter of law. Isn't that correct?

Mr. LIEBMAN. Not with respect to the espionage statute, and I would refer you to *United States* v. *Gorin,* a Supreme Court opinion.

Senator SPECTER. Senator Sessions' staff would like to have this question asked, which I will read. Wouldn't the fact that discussions began in 1989 about declassification because the rest of the world was catching up be aggravating evidence rather than mitigating because Lee helped them catch up?

Mr. LIEBMAN. There was no—Senator, there was no information that DOE documents that the rest of the world was catching up because of the compromise by Peter Lee. In fact, the intelligence community had no knowledge of the 1985 compromise prior to Peter Lee's confession in October 1997.

Senator SPECTER. Mr. Liebman, in taking a look at 793 and 794, without reading the whole sections, 793 contains the clause "relating to the national defense or information relating to the national defense," which is virtually identical, at least in one portion, to 794, "information relating to the national defense."

So when you say that there was a requirement in 794 that couldn't be met as to national defense, but you could proceed under 793, aren't the requirements as to that element of proof the same in the two sections?

Mr. LIEBMAN. Yes, Senator, but he pled guilty to 793. He would not have pled guilty to 794. We would have had a trial on that issue.

Senator SPECTER. But the point that you made, at least as I understood it, was that you didn't have an evidentiary base to meet all of the requirements of 794, which is why you didn't charge it, because you couldn't prove that it related to national defense;

whereas, you did proceed as to 793. You think you couldn't have proved it as a 793 either if he hadn't entered a guilty plea?

Mr. LIEBMAN. No. I think we could have proved it, but I do think a trial would have been extremely difficult and might not have resulted in a conviction had there been a trial issue on——

Senator SPECTER. As to 793 either.

Mr. LIEBMAN. Had we gone to trial, Senator, we would not have gone to trial under 793.

Senator SPECTER. Would you have not authorized a trial, a prosecution under 793?

Mr. LIEBMAN. We did authorize a prosecution under 793, Senator.

Senator SPECTER. Would you not have authorized going forward to trial if there hadn't been a plea bargain?

Mr. LIEBMAN. There could not—we could not have gone forward, Senator, because the statute of limitations had run on section 793.

Senator SPECTER. But you could have gone forward under 794 because there was no statute of limitations.

Mr. LIEBMAN. That's correct, Senator, had we thought the elements could have been proven beyond a reasonable doubt.

Senator SPECTER. Are you aware, Mr. Liebman, that when the Navy finally got around to looking at the tapes of Dr. Lee's confession that Schuster, Wayne W. Wilson, and Donna Kulla wrote an unequivocal, albeit brief, conclusion, quote, the statements saying that it was at the confidential level?

Mr. LIEBMAN. Are you referring to the March 2000 document, Senator?

Senator SPECTER. Yes.

Mr. LIEBMAN. Could I just have a brief—could I look at that? I think it have it here.

Senator SPECTER. Sure.

[Pause.]

Mr. LIEBMAN. Yes, I am aware of that letter, Senator.

Senator SPECTER. Mr. Liebman, I congratulate you on your decision to be in public service in the Department of Justice. I think it is a very high calling, and there is no doubt that an attorney of your ability could earn a great deal more somewhere else. And when we are conducting these hearings, there is no suggestion of any sort of any challenge to your competency. Of course, there is no challenge to your integrity or your ability or your good faith. We want to find out what happened here.

I think there are certain areas of disagreement, and our oversight function is to take a look at what you have done and to see if we can recommend improvements. When we finished up with the Foreign Intelligence Surveillance Act matters under Wen Ho Lee, we introduced legislation which has been sponsored by almost everybody, thinking that we have added a little bit to improving your procedures, and we may be in a position to do that again here. We are going to get into some of that with Mr. Keeney.

And we don't like to interrupt any of your work because you are doing important work, regardless of what you are doing, but I understand you are doing extremely important work at the present time. But we have our responsibilities on oversight, something that the Congress does precious little of. And we have gotten into a fair

amount of controversy on line attorneys, and I was a line attorney once.

Somebody asked me once if the best job I had was Senator, and I said, no, being district attorney was better than Senator. And they said, was disrict attorney the best job you ever had? And I said, no, being assistant district attorney was better than being district attorney.

So I have some appreciation of what it is like to be a line attorney. And I know the Department regulations frown on line attorneys, and I have already put into the record all the line attorneys who have testified. One testified before the Governmental Affairs Committee last June. I am on that committee as well.

And if you would care to make a comment, you appeared here under subpoena, which is the rules of the Department of Justice. And when we sought to talk to you in advance of your appearance here, you declined, and you had every right to decline. We thought it might be easier if we had an informal discussion to let you know what we were looking for, but we respect your declination.

My own thinking is that it is a healthy thing, not an unhealthy thing, from time to time to have men like you in your position testify beyond what Mr. Keeney testifies to or Mr. Dion testifies to, because you are an important link. And your testimony about why you did what you did and your limited contact with the Department of Defense, this is the first time I knew about that. And we can only get that from you.

Somebody said that the subcommittee had made an arrangement that if line attorneys appeared that we wouldn't call them in the public session. We never made any such arrangement. I wouldn't make any deal like that, or really any other deal.

And there is no way for somebody in my position to make a judgment about what ought to be public until I know what it is. And if it is classified, sure, it is going to be in closed session.

To repeat, I respect what you said about the classified information. But if you would care to give an opinion, I would be interested in your views, and this violates the cardinal principle about never asking a question that you don't know the answer to. But do you think this is generally in the public interest for the Senate to find out why you did what you did, say specifically with respect to not conferring further with DOD officials?

Mr. LIEBMAN. Senator, I actually leave it to my superiors to—who are more up to speed on the reasons for—behind the line attorney policy. I'd rather not comment on that.

Senator SPECTER. Fine.

Mr. LIEBMAN. But I would like to point out that the decision not to meet with you in advance was made by my superiors.

Senator SPECTER. Oh, I know that. No, I am not—as I said, I respect it and I am in no way being critical. We are going to have to decide the line attorney issue on other matters, and I respect your statement that the policies in your view ought to be articulated by somebody else.

We made arrangements to go into the Intelligence Committee room adjacent when we finish Mr. Dion's testimony. So if you will stand back, we will do that. It is a small room for having a hearing, but we can accommodate ten people, and we are going to draw lots

to see who gets to go into the closed session. Maybe I will be lucky and draw the short lot and won't be able to get to go in.

[The prepared statement of Mr. Liebman follows:]

PREPARED STATEMENT OF MICHAEL LIEBMAN

Mr. Chairman and distinguished members of the subcommittee, good morning/afternoon. I'd like to make a few opening remarks, after which I look forward to answering your questions.

As Mr. Keeney noted, since joining ISS in 1991, I have worked on some of the major espionage cases of the 1990s—the Lalas case; the Ames case; the Lipka case; the Squillacote case. All of these cases resulted in prison sentences ranging from 14 years to life.

All of these were prosecutions under 18 U.S.C. § 794. Of these, I am most proud of the Lipka case, where I helped build an historical case where the investigation did not even begin until roughly 25 years after the crime. I also take pride in the 1998 Squillacote/Stand case, where I was part of the trial team for a two-week jury trial against a well-financed defense, which resulted in guilty verdicts on all counts and sentences of 22 years and 18 years. In connection with that trail, I was awarded last year the Attorney General's Award for Excellence in Furthering the Interests of U.S. National Security. Finally, I am, of course, proud of the Ames case, for which John Dion and I received an award from the U.S. Attorney for the Eastern District of Virginia.

At the time of Peter Lee's admissions in October 1997, I fully expected that they would lead to another case in my string of § 794 cases. But almost from the outset I encountered significant obstacles.

Within about two or three days after Lee made his admissions in early October 1997, I flew out to Los Angeles and met with prosecutors from the USAO and FBI special agents from the LA Division to discuss the case. Our office had first been briefed on the case in August 1997, when it was still just a false-statements case because Lee had merely admitted to telling lies. In my trip in October, I spent several hours meeting with then-AUSA Jonathan Shapiro, and FBI special agents Gil Cordova and Serena Alston, at the LA Division FBI office, where we also listened closely to the tapes of the October interviews. To the best of my recollection, it was then that I first learned that the information Lee had compromised in 1985, while classified "Secret" then, was no longer classified in 1997, and that the information Lee compromised in 1997, was, for the most part, only classified under a mosaic theory and only at the "Confidential" level. By mosaic theory, I mean that the items of information considered separately are unclassified, but when grouped together they become classified.

I also recall that, with respect to the 1997 compromise, the FBI in Los Angeles showed me a copy of a 1995 document authored by Lee that was marked "Confidential." It concerned research into detecting the wakes of surface ships, conducted under DOD auspices, through the use of radar directed at the ocean surface. Although the overall document was classified "Confidential," every single portion of the document was separately marked "Unclassified," with one exception. The exception was the single paragraph on the first page that explained that considered as a whole the document was "sensitive."

Later, after I returned to Washington, I obtained tapes of Lee's October confession and determined that as to the 1997 compromise, the 1995 "Confidential" document essentially contained all the significant information Lee had confessed to giving the Chinese in May 1997, with one important exception. The 1995 document was all about using radar to detect surface ship wakes; it said nothing about using radar to detecting submarines or anything below the surface. I knew that Lee had admitted to the FBI that he told the Chinese in May 1997 that the radar technique discussed in the 1995 document could be used to detect submarines, although he minimized the disclosure by telling the FBI that the Chinese already knew this.

In my estimation, both then and now, the sole weakness in the case was the questionable significance of the information Lee compromised, both in 1985 and 1997. As to Lee's 1985 disclosure, I knew, for instance, that the Department had never prosecuted a case under 794 where the compromised information, as in the case of Lee's 1985 disclosure, had been declassified prior to the crime being discovered. Let me emphasize this: the information Lee admitted disclosing in 1985 had been declassified. While some aspects of the government's research in this area might remain classified, as shown by updated classification guides, what Lee confessed to disclosing regarding ICF research in 1985 was fully declassified by 1993. And on

this issue, I would refer the subcommittee to the FBI's October 15, 1997 interview of Dr. Roy R. Johnson, of Lawrence Livermore National Laboratory.

Furthermore, what I later determined was that the information was actually declassified over the 1990–93 time period, not just in 1993. DOE documents that I believe this subcommittee has shown that ICF research, including details disclosed by Lee to the PRC, began being declassified on March 21, 1990, for reasons that included the fact that the rest of the world was catching up. Another reason for the declassification, I was told, was that DOE considered it to be in the U.S. national interest to educate countries on how to simulate nuclear weapon explosions in a laboratory setting, in order to discourage them from actually detonating nuclear devices. Moreover, I was advised, and again this is documented, that the debate over declassification had begun at least as early as January 1989, only four years after Lee's disclosures.

Why is any of this relevant? Why does it matter that the information was declassified after the crime? Because section 794 does not penalize disclosures of classified information. It does not even use that term. What it penalizes is the disclosure, or attempted disclosure, of items, documents and information related to the national defense. And what the caselaw, including Supreme Court caselaw says is that this is a jury issue, not to be decided by a classifier merely testifying that certain information is or was classified at the time of the offense. The government needs to be able to describe how a disclosure of classified information might benefit an enemy of the United States. And publicly available information that tends to suggest that the classified information is not all that significant may well be found by a court to be relevant and admissible in an espionage prosecution.

The DOE documents indicated to me that there would be a significant issue at any trial whether the ICF disclosures Lee made in 1985 related to the national defense at the time he made them. Most alarming to me was the notion that Lee could claim that he made the disclosures to encourage China not to conduct nuclear weapons tests in the field, and he would likely be supported by internal government documents or even testimony of former USG or Livermore officials that that was actually one of the reasons the U.S. government declassified the information beginning in 1990. In other words, Lee would have been able to argue his actions were in the national interest.

I soon discovered that there were similar obstacles to bringing a § 794 prosecution based on the 1997 disclosure. To analyze this, it is helpful to begin with the 1995 "Confidential" document, every last substantive part of which, when considered independently, is unclassified. Recall that this document discusses a radar technique in which the wakes of surface ships can be detected by bouncing radar signals of the ocean surface. I have a copy of it right here today.

The best way to explain the problem with basing a prosecution on this document is as follows. Under the classification guidance on this document, I could remove any single paragraph, perhaps even a single line—just cut it out—and then take the remainder of the document over to that press table, and I would not even be committing a security violation, because the document is only classified when considered as a whole.

I recognized that problem with the 1997 compromise as soon as I got to Los Angeles. But there was one crucial piece of Lee's admissions that I thought, at the time, could make the case viable, even viable under section 794. Lee had confessed to telling the Chinese scientists that the technique described in the document could also be used to detect submarines. As I've said, that goes beyond the document. Surely, I thought, it must be a well-kept secret that the U.S. government is investigating the detection of submerged submarines by utilizing radar aimed at the ocean surface.

When I returned to Washington, as I said, I began analyzing the confession in some detail. Approximately two weeks after returning, on October 23, 1997, I attended a meeting at the Main DOJ building with the FBI and other Criminal Division attorneys, along with Mr. Shapiro and his supervisor, then-FAUSA Richard Drooyan. The problems with the information, which I've just described, were discussed, along with other issues in the case. Immediately after that meeting, I attended a briefing by the FBI on the case, along with Mr. Shapiro and I believe Mr. Drooyan. I will not go into that briefing here in open session.

A few days after that meeting, I attended a meeting with DOD officials to discuss the 1997 information. I've recently been reminded, by the testimony of DOD and Navy officials to this subcommittee last month, that the meeting occurred on October 28, 1997. The main purpose of that meeting, from my perspective, was to inquire of DOD as to what publicly available information could potentially undermine an espionage prosecution for the 1997 compromise. Another issue for me was what

could the government say about the program generally, in a public forum, if the case were to go to trial.

About a week after the meeting, I received a stack of public articles from DOD related to radar ocean imaging generally. One thing they also sent me was extremely surprising. Among the articles was a print-out from a Lawrence Livermore National Laboratory web site, last updated in March 1995, well in advance of Lee's 1997 trip to China. I have a copy of the print-out here. I quickly confirmed, after receiving it, that the web site was a public one and available to anyone in the world with a computer and a modem. I offer it into the record now and I'd like to read some portions of it out loud.

The title of the page is "radar ocean imaging." The first line of text states: "This project focuses on the detection by radars of surface manifestations of moving, submerged submarines." Later, it says that as a result of "achievements" in the project, "[t]here is now no controversy within the community that radars offer any potential for this problem," that is, to detect submarines. It concludes: "[t]his program has made impressive advances in understanding and exploiting radar remote sensing of the ocean for important national defense needs."

In addition, a few days after obtaining the website printout, DOD gave me a copy of the prepared remarks of Dr. Richard E. Twogood of the Lawrence Livermore National Laboratory, presented in open session to a subcommittee of the House Armed Services Committee in April 1994. I have a copy of those remarks and I offer it into the record now, and I'd like to quote from the most significant portions: "The Joint US/UK Radar program has made important progress in the development of methods to detect submarine signatures with remote sensing radars, especially over the last two years." It also states: "We have developed new signal processing and detection techniques that, to our knowledge, have never been successfully applied to this problem. We have applied these new methods in both classified and unclassified settings. Results have been achieved that I believe are not only impressive, but also offer great promise for future improvement."

So there it was. There was no secret at all that the USG was working on a program to detect enemy submarines with radar aimed at the ocean surface. There was not even any secret that we had achieved a potential breakthrough. The website and Dr. Twogood's testimony, coupled with the fact that the underlying 1995 document was only classified under a mosaic theory, convinced me that there was no section 794 case on the 1997 compromise.

I arrived at that conclusion even before I received the Shuster memorandum of November 14, 1997. The memo only served to reaffirm my position. Particularly significant were the Navy's determination that it could not support the "Confidential" classification of the 1995 document and that, in any event, Peter Lee's disclosures did not cause significant damage. I would note that the Shuster memorandum had the concurrence of the vice chief of naval operations, the second highest ranking Navy official.

Now, just because a compromise of classified information cannot be prosecuted under section 794 does not mean that there are no other statutes with serious criminal penalties that might apply. There are other provisions of the espionage code, specifically 18 USC 793 and 798. In addition, there is the Internal Security Act, specifically 50 USC 783. Each of these carries a ten-year penalty. The problem was that none of them applied. Section 793 was out because it too used the term national defense information, just like section 794. Section 798 was out because it applies only to communications intelligence and cryptographic information. And the Internal Security Act was out because it applied only to defendants who were USG employees or employees of USG-owned corporations. That was the biggest disappointment, and I remember discussing that with Mr. Shapiro over the phone following my trip out to Los Angeles. The statute does not apply to employees of government contractors, such as TRW.

Shortly thereafter, I do not recall precisely when, I recommended to Mr. Dion that we offer Lee a plea under 18 USC 793 or section 224(b) of the Atomic Energy Act of 1954 (42 USC 2274(b)) for the 1985 compromise. Both statutes carry a maximum penalty of ten years, and would require Lee to waive the statute of limitations. The USAO elected to offer Lee the plea under 18 USC 793.

At some point in early December 1997, it became apparent that Lee was balking at a plea with a potential ten-year exposure for the 1985 incident. I then recommended to Mr. Dion that, although the section 794 case for that incident had problems, it was sufficiently robust that we could still ethically use it as leverage. This was communicated to the USAO by Mr. Dion, I believe, in a phone call to Mr. Drooyan. Shortly thereafter, the plea agreement was entered. Lee did in fact waive the statute and plead guilty to a violation of 18 USC 793, along with a violation of 18 USC 1001 for lying about the circumstances of his 1997 travel to China.

It goes without saying, I hope, that I was extremely disappointed that Peter Lee was not sentenced to prison. It is the only espionage prosecution that I have worked on that did not result in a jail sentence. But let me add that I am proud of my work on the case, and proud that Jonathan Shapiro and I ensured that Peter Lee would not remain free to continue to make sensitive disclosures to foreign governments. That concludes my remarks.

Senator SPECTER. OK; Mr. Dion. Will you step forward? Mr. Dion, would you raise your right hand, please? Do you solemnly swear that the testimony you are about to give before this subcommittee of the Committee of the Judiciary of the U.S. Senate will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. DION. I do.

Senator SPECTER. Now, Mr. Dion, is Mr. Swartz an interloper or do you want him sitting there?

Mr. DION. Mr. Chairman, Mr. Swartz is my supervisor.

Senator SPECTER. Well, that still doesn't answer my question.

Mr. DION. I would like to have him with your leave, sir.

Senator SPECTER. OK; may the record show that Mr. Swartz continues to accompany the witness, Mr. John Dion.

Mr. SWARTZ. Thank you, Mr. Chairman.

Senator SPECTER. Mr. Dion, I know you have an opening statement, and we would be pleased to hear from you, and you may proceed now in any way you see fit.

STATEMENT OF JOHN DION, ACTING CHIEF, INTERNAL SECURITY SECTION, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC; ACCOMPANIED BY BRUCE C. SWARTZ, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. DION. Thank you, Mr. Chairman.

Mr. Chairman and members of the subcommittee, I am the Acting Chief of the Internal Security Section. I held that position in the fall 1997 as the Peter Lee case was being considered for prosecution. As Mr. Keeney noted, I have devoted most of my career to prosecuting espionage cases. In all, I have been involved in the prosecution of more than 70 defendants charged with espionage or related offenses.

Let me discuss briefly the background of my involvement in the Peter Lee case. In August 1997, I was advised by an FBI agent from headquarters that Lee had recently been interviewed by agents of the Los Angeles FBI office and was believed to have made false statements. I asked that steps be taken to get the United States Attorney's office briefed on the case, and I assigned Mr. Liebman, the line attorney in the section with the most experience in espionage cases, to monitor developments in the investigation.

When we learned of Lee's admissions in his interviews with the FBI in October, I asked Mr. Liebman to travel to Los Angeles to work directly with Mr. Shapiro and the agents. Over the ensuing weeks, I had numerous conversations with Mr. Shapiro, and I was kept apprised by Mr. Liebman of the inquiries being made on classification issues and the searches of open source materials. I should note that these inquiries are made in every espionage case considered for prosecution. In turn, I regularly briefed my supervisor,

Deputy Assistant Attorney General Mark Richard on all significant developments.

On October 23, 1997, I attended a meeting at the Department, chaired by Mr. Richard, to discuss the case with Mr. Shapiro and his supervisor, Mr. Drooyan, and agents from Los Angeles and FBI headquarters. The facts and issues as we understood them at the time were discussed at length.

In late November or early December, I received approval from Mr. Richard to authorize Mr. Shapiro to engage in plea negotiations with counsel for Lee in the following terms. Mr. Shapiro was authorized to seek a plea of guilty by Lee to a violation of 18 U.S.C. § 793(d) for his 1985 disclosures and to a violation of the false statement statute, 18 U.S.C. § 1001. As such a plea would require Lee to waive the 10-year statute of limitations, Mr. Shapiro was authorized to advise counsel that no final decision had been made as to the prospect of charging Lee with a violation of section 794. I conveyed these terms to Mr. Shapiro by telephone.

Senator SPECTER. You say no final decision had been made——

Mr. DION. That's correct.

Senator SPECTER [continuing]. As to whether he would be charged with 794?

Mr. DION. That's correct, sir.

In closing, I would note that we fully anticipated that Lee would receive a sentence of incarceration for his plea. I believe that Mr. Shapiro vigorously represented the Government in the papers filed with the court and in his allocution. We were, of course, extremely disappointed in the sentence imposed. But I am proud that we put a stop to Mr. Lee's disclosures, and I am very proud of the work done on the case by Mr. Liebman and Mr. Shapiro.

That concludes my statement, sir.

Senator SPECTER. Thank you, Mr. Dion.

Mr. Dion, when you say no decision had been made—and I interrupted you at that point—as to what would happen if the plea bargain broke down, Mr. Shapiro testified very emphatically that he wanted to proceed with 794 but was told that all he could do was do the best he could under the authorized plea bargain, so that is why he proceeded as he did, asking only for a short period of incarceration and not taking action when Dr. Lee lied on his polygraph and did not give further answers. But are you suggesting, if that plea bargain had broken down, that you might have reconsidered and authorized a 794 prosecution?

Mr. DION. We definitely would have reconsidered our course of action, sir.

Senator SPECTER. Well, did you tell Mr. Shapiro that?

Mr. DION. I don't recall specifically if we discussed that or not. We did discuss that no final decision had been made on the 794 and that he should proceed with plea negotiations on that basis.

Senator SPECTER. But, Mr. Dion, that is a very important point. If Mr. Shapiro knew that if the plea broke down he would have a shot at 794, he testified that he was very unhappy with what Main Justice had done, that he wanted to go on 794, that he didn't have an insurance policy or a guarantee, as none of us trial attorneys ever does, but he wanted to proceed under 794, and he really felt hamstrung. I don't know that he used the word "hamstrung," but

felt that he had to take what he could get and that he couldn't ask for a longer sentence of jail, he couldn't complain about lies which Dr. Lee told, at least as disclosed by the polygraph. So he had no inkling, according to his testimony, as I understood his testimony, that there was a possibility that he could go under 794. I think he would have liked to have chucked the plea bargain and gone on 794.

But you say you never really told him or you don't recall telling him that he could have gone under 794 if the plea bargain broke down.

Mr. DION. Well, I definitely did not tell him that he had approval to go forward on a 794 if plea negotiations terminated. I would also say, though, that we never had a conversation at the time where he told me that he or his office—and he did testify that he was reporting regularly, in fact, many times a day to Mr. Drooyan, that they felt that their position in plea negotiations was hamstrung if they did not have that final authority. If that had been the position of the office that they could not have engaged in vigorous negotiations without that final authority, then I think we would have had to reconsider our position.

Senator SPECTER. Well, do you agree with Mr. Keeney that if you had known he was going to ask for a "short period of incarceration" that you wouldn't have approved the plea bargain?

Mr. DION. That Mr. Keeney would not have approved the plea bargain?

Senator SPECTER. Well, Mr. Keeney said he wouldn't have approved the plea bargain if he had—Mr. Keeney is in the room at the time hearing me say this—that he wouldn't have approved the plea bargain if he had known that there was going to be a request of a trial prosecutor for only a "short period of incarceration." My question to you is: Would you have approved the plea bargain had you known of that recommendation as to sentencing?

Mr. DION. I knew that recommendation was in the plea offer as the offer proceeded and neared the end, that that was the concession that Mr. Shapiro had made, and it was one that——

Senator SPECTER. It was a concession, you say? I didn't hear what you said.

Mr. DION. It was a concession in the sense that it—that he did not ask for a long period of incarceration, which was the other formulation that his office used in pre-guidelines pleas. But it was a thing negotiated by Mr. Shapiro when we left it to him to negotiate the plea.

Senator SPECTER. So you did——

Mr. DION. It was approved by his superiors as well.

Senator SPECTER. So you did approve the plea bargain knowing that it was a short period of incarceration?

Mr. DION. I did.

Senator SPECTER. Now, Mr. Keeney says that after the fact he doesn't disagree with the conclusion, but at the time he would not have approved the plea bargain. But you did. All right. If that is your testimony, that is your testimony.

Were you aware that Mr. Shapiro felt he was unable to go back at Dr. Lee for the lies he told because he had no alternative but

to take the authorized plea bargain or he would have nothing else to fall back on?

Mr. DION. My understanding is that during the closed session that I attended, Mr. Shapiro discussed the difficulties in seeking a breach of the agreement because of the reasons of classified information.

Senator SPECTER. Would you repeat that, please?

Mr. DION. During the closed session last week, Mr. Shapiro discussed the difficulties in seeking a breach of the agreement because of the reservations that the agents had in the polygraph failures as to Mr. Lee's cooperation, that there were classified information issues at stake with respect to going forward and seeking a breach of the plea.

Senator SPECTER. Well, there is no doubt, in my mind, at least—and I think the specifics of the testimony will bear it out—that Mr. Shapiro wanted to go forward with 794 and accepted all of these concessions because he had no greater authority. But the long and short of it is—and this is repetitious, but I think worth repeating—that you never told Mr. SHAPIRO that if the plea bargain broke down, you would reconsider a prosecution under 794.

Mr. DION. I don't know that we ever had that conversation, Senator.

Senator SPECTER. OK; there are these——

Mr. DION. May I amplify a previous answer, though?

Senator SPECTER. You may say anything you choose, Mr. Dion.

Mr. DION. Thank you, sir. I appreciate that.

I would note that in Mr. Shapiro's testimony last week, in response to a question to you, he said that he thought that he was—you asked him about asking for the short period of incarceration, and he stated in response that that was the best he was going to do in front of Judge Hatter.

Senator SPECTER. Well, that was one of the factors, but only one of the factors, as other of his testimony will show.

These two statements, Mr. Dion, one quotes you directly from the memo from Michael Doris, dated November 25, 1997, "According to JJ"—J.J. Smith—"ISS/Dion said that if RT"—referring to Lee—"doesn't accept the plea proffer, then he gets charged with 18 U.S.C. 794, the heftier charge."

Is that statement incorrect?

Mr. SWARTZ. Mr. Chairman, could we get that document?

Senator SPECTER. Yes.

Mr. SWARTZ. Thank you.

Mr. DION. I have had an opportunity to read that passage, sir. It is not correct.

Senator SPECTER. It is not correct?

Mr. DION. I'm sorry. Reading that—I think I've been confused by reading the first sentence and then the sentence that's marked down at the bottom here. The sentence that you read me, as I understand it, sir, was, "According to JJ, ISS/Dion said that if RT doesn't accept the plea proffer, then he gets charged with 18 U.S.C. 794, the heftier charge." That decision had not been made.

Senator SPECTER. And the accompanying memorandum from the Department of Defense, undated—and it is hard to understand how

these documents float around undated, but I know you have the document before you, or let me inquire if you do.

Mr. DION. You're referring to the second full paragraph on the page, sir?

Senator SPECTER. Yes. "Should Lee decline the offer, the U.S. Attorney will seek an indictment against him for violation of section 794."

Mr. DION. Yes, sir. Again, that authority had not been given to Mr. Shapiro or his office.

Senator SPECTER. Shapiro was never told that if Dr. Lee turned down the plea bargain, he could proceed under 794.

OK; we will make the interpretation of all this conflicting testimony as best we can sort through it.

Mr. DION, were you aware that Dr. Lee had given the PRC scientists a great deal more information than was encompassed in his confession on the 1985 disclosures?

Mr. DION. I am not sure I understand your question, sir.

Senator SPECTER. Well, we went into this with Mr. Liebman, and we can go the long route, but I cited certain documents which represented that Dr. Lee had given the PRC scientists a great deal more information about the hohlraum nuclear power than was contained in his confession. Were you aware of that?

Mr. DION. I think that's a matter that would require us to go into closed session. I think that Mr. Liebman is familiar with that.

Senator SPECTER. Go into closed session and Mr. Liebman is familiar with that, but you are not?

Mr. DION. No. Mr. Liebman is more directly familiar with that information than I am, and I recall him requesting that we go into closed session to discuss it.

Senator SPECTER. Do you disagree with this assessment made by Staffin, Trulock and Mahaley that compromise of the information relating to the nuclear energy "compromise to this information" reasonably could be expected to cause serious damage to U.S. national security?

Mr. DION. We are looking for the document, sir.

I have no reason to dispute that passage, sir.

Senator SPECTER. Do you disagree with the statement made by Dr. Cook, again, which was read to Mr. Liebman, the second full paragraph? "Information contained in the classified DOD document that Peter Hoong-Yee Lee admits to having transferred to the PRC, represents the scheme for interpreting temperature measurements made with X-ray detectors"—are you with me on this?

Mr. DION. I am reading with you, sir.

Senator SPECTER. [continuing]. "on radiation emerging from a plasma in a hollow cavity"—references to the paper document, Lee—"formal participation and broad classified inertial confinement fusion, ICF, diagnostic development programs. These programs had specific classified objectives including the measurement of material properties necessary for benchmarking classified computer code simulations, calibration of underground nuclear test at infusion laboratories and adaptation of ICF diagnostic techniques for use in UGT. Some technologies with which Peter Hoong-Yee Lee was associated are now unclassified because of academic developments in ICF research. Others remain classified in nuclear weap-

on science with emphasis on 'others remain classified in nuclear weapon science.'" Do you disagree with that, Mr. Dion?

Mr. DION. I have no basis to dispute the statement that he was associated with both classified and unclassified information.

Senator SPECTER. Mr. Dion, Senator Thurmond's staff has asked that a question be propounded as to whether you knew about the lies that Dr. Lee had told at least as disclosed by the polygraph and whether you had considered trying to abrogate the plea bargain on that basis. For a variety of reasons, Mr. Shapiro decided not to, but did you join in that decision not to seek to abrogate the plea agreement in the light of those lies?

Mr. DION. I was familiar that Dr. Lee had shown deceptive—deception on the polygraph. I did not have any discussion that I can recall with Mr. Shapiro or anyone else where the issue was directly raised should we seek to breach the plea agreement.

I think the reason for that was—as you know was disclosed in Mr. Shapiro's closed-session testimony.

Senator SPECTER. Mr. Dion, as with Mr. Liebman, I congratulate you. Thank you for being in public service. You, like virtually everyone in the Department of Justice, could do a lot better financially. Public service is a very high calling, and to repeat what I said to Mr. Liebman, he had asked me to testify where no way challenging your competency, obviously not challenging your integrity or your dedication. And I know the policy of the Department of Justice is not to object to talking to somebody in your position.

How do you define and distinguish your role from the so-called line attorneys?

Mr. DION. I am the first-level supervisor for line attorneys in our section.

Senator SPECTER. You are a first-level supervisor?

Mr. DION. Yes. We have a very small section, Senator. We only have 10 employees.

Senator SPECTER. So, if you are a supervisor, that takes you out of the category of line attorney?

Mr. DION. Sir, I am not so familiar with the line attorney policy that I would be able to answer.

Senator SPECTER. Neither am I. That is what I am trying to find out, but I am learning more. It is a tough learning curve.

Would you care to comment on the utility of your appearing here today to answer questions on Senate oversight? Do you think it is a good idea?

Mr. DION. I don't care to comment, sir.

Senator SPECTER. Okay. Thank you very much, Mr. Dion.

[The prepared statement of Mr. Dion follows:]

PREPARED STATEMENT OF JOHN DION

Mr. Chairman and members of the Subcommittee, I am the Acting Chief of the Internal Security Section. I held that position in the fall of 1997 as the Peter Lee case was being considered for prosecution. As Mr. Keeney noted, I have devoted most of my career to prosecuting espionage cases. In all I have been involved in the prosecution of more than 70 defendants charged with espionage or other Internal Security offenses.

Let me discuss briefly the background of my involvement in the Peter Lee case. In August 1997, I was advised by an FBI agent from headquarters that Lee had recently been interviewed by agents of the Los Angeles FBI office and was believed to have made false statements. I asked that steps be taken to get the United States

Attorney's Office briefed on the case and I assigned Mr. Liebman, the line attorney in the Section with the most experience in espionage cases, to monitor developments in the investigation.

When we learned of Lee's admissions in his interviews with the FBI in October, I asked Mr. Liebman to travel to Los Angeles to work directly with Mr. Shapiro and the agents. Over the ensuing weeks, I had numerous conversations with Mr. Shapiro and I was kept apprised by Mr. Liebman of the inquiries being made on classification issues and the searches of open source materials. I should note that these inquiries are made in every espionage case considered for prosecution. In turn, I regularly briefed my supervisor, Deputy Assistant Attorney General Mark Richard on all significant developments.

On October 23, 1997, I attended a meeting at the Department, chaired by Mr. Richard to discuss the case with Mr. Shapiro and his supervisor, Mr. Drooyan, and agents from Los Angeles and FBI headquarters. The facts and the issues as we understood them at the time were discussed at length.

In late November or early December I received approval from Mr. Richard to authorize Mr. Shapiro to engage in plea negotiations with counsel for Lee in the following terms. Mr. Shapiro was authorized to seek a plea of guilty by Lee to a violation of 18 U.S.C. § 793(d) for his 1985 disclosure and to a violation of the false statement statute, 18 U.S.C. § 1001. As such a plea would require Lee to waive the ten-year statute of limitations, Mr. Shapiro was authorized to advise counsel that no final decision had been made as to the prospect of charging Lee with a violation of 794. I conveyed these terms to Mr. Shapiro by telephone.

In closing, I would note that we fully anticipated that Lee would receive a sentence of incarceration for his plea. I believe that Mr. Shapiro vigorously represented the government in the papers filed with the court and in his allocation. We were, of course, extremely disappointed in the sentence imposed. But I am proud that we put a stop to Mr. Lee's disclosures. And I am very proud of the work done in this case by Michael Liebman and Jonathan Shapiro.

Senator SPECTER. Mr. Keeney, you are being recalled, briefly.

Mr. Keeney, you don't want Mr. Swartz at the table with you, do you?

Mr. KEENEY. No, thanks.

Senator SPECTER. Do you care to call any other attorney?

Mr. KEENEY. No. No, thank you, Senator. I appreciate the courtesy, though.

Senator SPECTER. Mr. Keeney, before I got to the meeting last Thursday, you had had an extended discussion with Mr. Dobie McArthur who has done such an outstanding job in reviewing reams of documents here, and you had a discussion with him at some length. And then you and I had a very brief discussion about what may be learned from this process, and I would like to put on the record what we were talking about.

Do you think it would be a good idea to get a written classification review by the agency involved whose secrets were taken before decisions were made with regard to a plea? And I refer to the kind of documents that Dr. Cook prepared here, the document which Staffin, Trulock and Mahaley prepared, and at least a reflected judgment by the Navy on whether it was confidential which we finally got from Schuster and others. Do you think that that would be a desirable procedure for handling future espionage cases?

Mr. KEENEY. I think it would be a desirable procedure to clarify under the extent that we can get a written statement with respect to the agency's position on the classification and impact on national security of disclosure of that information.

Senator SPECTER. So that the Department of Justice would at least know what the security classification was? That is important?

Mr. KEENEY. It is important, and, Senator, just if I may, my understanding is that we do this—we do this review, and we do have

the contact with the agencies. We may not have formalized it as much as would be desirable.

Senator SPECTER. Do you think it would be desirable to formalize it, to have that done in writing by the agency so there is no doubt as to what they view the classification of the compromised material and the impact on national security?

Mr. KEENEY. I would—yes. I would prefer to have their assessment in writing.

Senator SPECTER. And another item which was discussed last Thursday was to formalize the procedures for ensuring that the agency understands the Classified Information Protection Act which allows court cases to go forward even where they involve classified information so that there is an assessment by the Justice Department and the agency as to what the disclosures would be. Do you think that is desirable?

Mr. KEENEY. That is desirable in—you know, we do get into that at some point in our evaluation process, but it is something that should be done, and we do it. But maybe it should be clarified as to what stage we do it and tell them what we are going to have to put into evidence in order to maximize the likelihood of conviction and determine from them what that information or evidence has to be protected under CIPA.

Senator SPECTER. Do you think that that ought to be formalized in writing, too, so there is no misunderstanding as to what the Department of Justice can protect and what has to be disclosed, so the Department of the Navy, as in this case, would understand what their risks were on public disclosures?

Mr. KEENEY. I don't know that we have to do that in writing, Senator, but we ought to lay it out to them in the discussions with them when we—when they know what evidence we are going to have to utilize.

Senator SPECTER. If you do not do it in writing, then do your line attorneys have to make notes as to whom they talked to and what they said so that there is some check as to what was done?

Mr. KEENEY. Well, I think there should be some record of what the agreement was with respect to the utilization of CIPA, the necessity to utilize CIPA.

Senator SPECTER. Wouldn't the simplest way be to do it in writing so that there is a statement by the Department of Justice as to what can be protected and a statement by the Department of Defense as to what they can live with?

Mr. KEENEY. Senator, I agree that it would be desirable to have it in writing. What I am hedging a little bit and maybe being a little hesitant about is requirements as to what has to be in writing, how much detail has to be in writing.

What we need is a meeting of minds so that the agency, intelligence agency, knows what exposure they have if we go ahead, and that should be communicated.

Senator SPECTER. And a meeting of the minds so each knows what the other is saying and there is some way that you can have some congressional oversight instead of guessing as to what was said at these meetings years ago where no notes are maintained.

Mr. KEENEY. Well, it is desirable to have records, but as I think you are getting from the sense from these hearings that there is

a reluctance with respect to certain matters to take notes, and I think you will agree with respect to some of the matters that have come out in this hearing that it would be inappropriate to take notes.

So I do not want to put us in a vise here, Senator.

Senator SPECTER. Well, I think that the documents have to be carefully constructed, but even if they move over into the classified section, if they are available only to the Department of Justice and the Department of Defense, you representatives of those two agencies see secret and classified documents all the time and then the Senate can see them or the House can see them under appropriate procedures. It does not have to be in the public domain, but wouldn't it be desirable to have it in writing so there is no misunderstanding about the positions of either agency?

Mr. KEENEY. It is desirable to have the things in writing so there is no misunderstanding, Senator. I agree with that, and we are certainly happy to look at our procedures and see if they can be clarified and made more useful to everybody.

Senator SPECTER. Where should the ultimate decision be, Mr. Keeney, if the Department of Defense says we do not want to go forward and the Department of Justice says we can protect this information, and if there is a trial ruling—cases are frequently withdrawn when a trial judge will rule that more information has to be presented. So the Government always has the option of withdrawing the prosecution if there would be disclosure of something which would be deemed more serious for the Government than the loss of the prosecution.

Mr. KEENEY. Yes, that is true.

Senator SPECTER. So who ought to have the judgment as to—or let me lead you just a little. Should it be the Department of Justice judgment as to whether you go forward after considering what the Department of Defense has to say?

Mr. KEENEY. If there is a disagreement between the Department of Justice and the—another agency, Department of Defense in this case, the matter should be raised at the Cabinet level for a decision.

Senator SPECTER. Raised at the Cabinet level?

Mr. KEENEY. Yes, sir.

Senator SPECTER. And decided by the National Security Council?

Mr. KEENEY. National Security Council or the President, if it is appropriate.

Senator SPECTER. With all of the confusion as to the plea bargain in this case, wouldn't it be a good idea that on matters of espionage, you don't have so very many of these that——

Mr. KEENEY. Senator, could I just make a comment——

Senator SPECTER. Sure.

Mr. KEENEY [continuing]. With respect to—you have been asking questions, and Senator Sessions was, with respect to how many of these cases have been tried.

You know, a very significant number of these are the subject of pleas, and have been in the last 10 years. I just wanted to make that point. I do not think that was clear.

Senator SPECTER. Well——

Mr. KEENEY. And these people have been involved deeply——

Senator SPECTER [continuing]. You mentioned Senator Sessions. Do you see how fast he reappeared?

Mr. KEENEY. Yes, he has come back. Welcome back, Senator.

Senator SESSIONS. I have to keep an eye on him.

Senator SPECTER. May the record show that Senator Sessions had other pressing business and absented himself briefly, and here he is again. Mr. Keeney—these men have a long relationship, when Mr. Keeney was Mr. Sessions' boss.

I just want to close up, and then I will turn to Senator Sessions—see if you agree that on espionage cases, you do not have all that many and they are decided a lot of times by pleas. Shouldn't there be a writing as to whether a man like Mr. Shapiro knows that if the plea bargain falls through on 793, the Department will reconsider 794 instead of having misambiguity and confusion?

Mr. KEENEY. Well, if I understand what you are saying, there should be some communication to the United States Attorney or Assistant indicating the extent of his authority in this matter, and in this case, that would include you are not at this point authorized to go on 794. You are authorized to not take it off the table insofar as plea discussions are concerned. If the plea breaks down and you want to go 794, you are going to have to come back and we are going to have to look at the whole matter.

Senator SPECTER. Right. Shouldn't that be in writing so that Mr. Shapiro knows what is in Mr. Dion's mind?

Mr. KEENEY. It will be desirable to have it in writing, Senator, but I would like to look at this as to whether or not we want to insist upon it being in writing in every situation.

Senator SPECTER. Well, I am not saying in every situation, but in every situation——

Mr. KEENEY. It is desirable.

Senator SPECTER [continuing]. Where you have espionage and the potential for the death penalty?

Mr. KEENEY. I think we ought to be very clear where we are considering the utilization of the death penalty provision, yes.

Senator SPECTER. I had 500 homicide cases a year when I was District Attorney, but if the death penalty was required, that was a judgment which I thought the District Attorney ought to make, nobody else.

We are in the process of taking a look at some remedial legislation, and we will submit it to you, but if you say it is desirable to have it in writing, I think it ought to be mandatory, but we will take it from there.

Senator Sessions, you have the last word——

Senator SESSIONS. Well——

Senator SPECTER [continuing]. Before the closed session.

Senator SESSIONS. All right. Mr. Keeney, when I ask about trial experience, I was not referring to espionage cases. All espionage cases—is just a complex trial.

Mr. KEENEY. Right.

Senator SESSIONS. I think if you are in a big espionage case, I hope you do not limit the attorneys who are going to prosecute it to those who have had experience in espionage trials because there are not enough of them to get any experience. What you need is

an experienced litigator, someone who is ready to go to court, and you had that in Mr. Shapiro, a Harvard graduate, Rhodes Scholar, 8 years on the firing line, tried every kind of cases. They could do that. He was ready to go forward, and people reading the paper who had not that kind of litigating experience made the decision. And I believe it was not a good decision.

I also am troubled to see the Department of Justice attempt to pass the buck a bit.

Mr. KEENEY. Senator, I don't think we are passing the buck. I have told you from my standpoint that if I had seen the original—at the initiation of those proceedings, I would have said do not agree to that, go back to the table again, don't agree to that short period of——

Senator SESSIONS. Who was to blame for you not having the right information?

Mr. KEENEY. Well——

Senator SESSIONS. Who is responsible for it?

Mr. KEENEY. It got lost, but the ultimate thing is, Senator, what I was saying——

Senator SESSIONS. It was not Mr. Shapiro's fault because he was trying to push for 794 and go forward with it.

Mr. KEENEY. Right. And there was a disagreement both within his office and back with the Internal Security Section with respect to that.

Senator SESSIONS. I want to talk about this responsibility. I think the chairman——

Mr. KEENEY. Senator, could I—all right. Go ahead. I'm sorry.

Senator SESSIONS. In certain cases, the Department of Justice takes unto itself the litigating authority and responsibility for decision-making cases. They are involved in—Hobbs Act cases have to be approved or extortion cases have to be approved in the Department of Justice. RICO has to be approved in the Department of Justice.

Mr. KEENEY. RICO does, yes.

Senator SESSIONS. I have been told no by the Department of Justice on cases I wanted to go forward with. It was my neck on the line, but I accept that ultimate authority. With espionage, ultimate authority and responsibility lies within the Department.

Now, did the Attorney General of the United States know about this case?

Mr. KEENEY. I do not know. I didn't discuss it with her. Mark Richard may well have mentioned it to her, but I did not.

Senator SESSIONS. Now, who is Mark Richard?

Mr. KEENEY. Mark Richard is the—he was the Deputy Assistant Attorney General who supervised, as Mr. Swartz does now, the Internal Security Section.

Senator SESSIONS. All right. And you supervise——

Senator SPECTER. On that point, will you get back to us? It is my understanding that Attorney General Reno did not know about the case.

Mr. KEENEY. To my knowledge, she did not, Senator. Let me put it——

Senator SPECTER. We had a session with Senator Hatch, and I asked her about it. She declined to answer the question, which is

not unusual, but would you get back to us? Because if she did know about it, we will want to hear from her on the facts, and if she did not, we would like to have that of the record.

Mr. KEENEY. She didn't hear about it from me. She may have been—what we have—we have frequent meetings with the Attorney General, and she is brought up to date with respect to important cases. Mark may have done that. I did not.

Senator SPECTER. We would like to know what the facts are.

Mr. KEENEY. OK.

Senator SPECTER. Senator?

Senator SESSIONS. I don't want to take too much of your time. Do I have a few minutes?

Senator SPECTER. Sure.

Senator SESSIONS. OK; to pursue that, what about Mr. Holder? WAS he your supervisor?

Mr. KEENEY. Yes, sir.

Senator SESSIONS. Did he know about this? Was he briefed on the case?

Mr. KEENEY. He wasn't briefed by me, Senator.

Senator SESSIONS. And to your knowledge, he was not briefed on the case?

Mr. KEENEY. There are certain things that are—the Assistant Attorney General from the Criminal Division can make the decision and does not have to go upstairs with it and certain other things, if they think the Deputy or the Attorney General should be apprised of it, we do that.

Senator SESSIONS. Well, I am just trying to——

Mr. KEENEY. But there were no——

Senator SESSIONS. So you were the highest official to have—to your knowledge that had a formal briefing on the matter?

Mr. KEENEY. Yes.

Senator SESSIONS. And how long was that?

Mr. KEENEY. It was very brief, Senator, at the——

Senator SESSIONS. But then you do not deny that the responsibility for this case was yours?

Mr. KEENEY. Yes.

Senator SESSIONS. The final decision was yours?

Mr. KEENEY. Yes, it was.

Senator SESSIONS. And you don't deny that from a legal point of view that the U.S. attorney and the assistant attorney did not have the authority to decide whether to go forward with 794 or not?

Mr. KEENEY. That's right.

Senator SESSIONS. And you do not deny that the Department of Justice declined to allow Mr. Shapiro, the trial attorney, to charge 794?

Mr. KEENEY. That's right.

Senator SESSIONS. And if 794 had been charged, don't you think that would have enhanced the ability of Mr. Shapiro to negotiate a good plea agreement?

Mr. KEENEY. It might, yes.

Senator SESSIONS. It probably have, would it not?

Mr. KEENEY. It would put additional pressure on the defendant. It would make him probably more receptive, yes. I have to agree with that.

Senator SESSIONS. And I think you would agree that in one sense, he had one hand tied behind him when he went into the negotiations when he was not able to charge 794?

Mr. KEENEY. No. Senator, I don't—I don't agree with that. Now, he was entitled and authorized to discuss with defense counsel a plea or a charge, and 794 was not taken off the table, but he was told that if this breaks down and you want to bring 794, you are going to have to come back to Washington and we are going to have to discuss it. So it was not taken off the table.

Senator SESSIONS. Let's get that straight now.

Mr. KEENEY. As far as his negotiations were concerned, the defendant was not told that 794 was not on the table.

Senator SPECTER. Mr. Keeney, he was not told that. Nobody has testified to that, that Mr. Shapiro was told—you can ask the question.

Senator SESSIONS. Well, I was going to ask. Isn't it a fact that Mr. Shapiro has not stated and as—stated that he did not—he was not told he could ultimately charge 794? He was told he could not charge 794?

Mr. KEENEY. He was told he could not charge 794, but he was told that if the negotiations broke down and he still wanted to charge 794, he would have to come back to Washington.

Senator SPECTER. Well, who told him that, Mr. Keeney? Nobody has testified to that.

Mr. KEENEY. Well, I had understood Mr. Dion had testified to that, Senator.

Senator SPECTER. No, he did not testify to that. Mr. Dion is still here.

Mr. KEENEY. Well, I am mistaken, then.

Senator SPECTER. He said he does not—he did not recollect having any conversation with Mr. Shapiro that if the plea bargain broke down that Mr. Shapiro could come back and they would reconsider a——

Mr. KEENEY. He is the one that told them, Senator. You will have to take his testimony. I am just getting information into the record.

Senator SPECTER. Well, we will take his testimony or anybody else who was present and was a party to a conversation.

Mr. KEENEY. I was not. So——

Senator SPECTER. OK; well, may the record show that Mr. Dion is still in the room.

Senator SESSIONS. The matter strikes me—did you have any indication from the Defense Department that they did not want to proceed with this case because of a potential embarrassment to them?

Mr. KEENEY. Well, we had what has been discussed here. We had the reservations that have been indicated, yes.

Senator SESSIONS. Those are security type?

Mr. KEENEY. Yes.

Senator SESSIONS. Well, what about the way they had handled security information in general, the laxity of their rules, the fact that there was matter on the Internet that were apparently still classified and issues like that? Is that a reason for them not to want this case to go forward?

Mr. KEENEY. It might be a reason in their mind, but I saw no indication of objections on that ground, Senator. Somebody else may have.

Senator SESSIONS. As an experienced person within the Department of Justice, am I wrong to say you are the most experienced member of the Department of Justice?

Mr. KEENEY. I am one of the more experienced.

Senator SESSIONS. As an experienced member there, isn't it true the Department of Justice is the one that has to stand tall for justice because when agencies are involved, oftentimes they have parochial agency interests that tend to undermine the pursuit of justice?

Mr. KEENEY. I think it is our responsibility to go forward if we think the prosecution is appropriate.

Senator SESSIONS. And the Department of Justice has to say no, I know you would like to plead this case out, but this is a not sufficient sentence, or this case has got to be charged, or sometimes it cannot be charged even if you want to charge it.

So, when you are dealing with an agency, it is not often—I mean, it is not unusual that you have to go back to them if they are dragging their feet on a case.

Mr. KEENEY. Yes.

Senator SESSIONS. Do you think the Department of Justice was aggressive enough in assisting that authoritative persons objectively analyze this data and provide information that would have confirmed or perhaps discounted the Schuster memo?

Mr. KEENEY. I think it was sufficient. We looked at, Senator—and we had—we had information indicating that the position of the agency with respect to classification was not crystal-clear, and——

Senator SESSIONS. And it never got clarified?

Mr. KEENEY. It got clarified by a plea.

Senator SESSIONS. But the plea was weakened because of the ambiguity of the Navy and their lack of interest in seeing the case go forward, it seems to me.

Mr. KEENEY. Well, I don't know about the lack of interest in seeing it go forward, but——

Senator SESSIONS. Wouldn't you say that basically was true here?

Mr. KEENEY. Well——

Senator SESSIONS. Wouldn't you say the Navy wanted this case to go away?

Mr. KEENEY. Well, that's—I'm sorry. Yes, they did indicate at one point that they were not enthusiastic about it, right.

Senator SESSIONS. You know, Mr. Chairman, it is easy to go back and blame these lawyers and everybody for what happened. I would say that a couple of things that are a problem to me—one is that the people making these decisions that the most experienced and the highest level were not engaged and that even the people above Mr. Keeney—it should have been probably in this case—were not even aware of it.

With regard to the others, I believe there is a lack of trial experience in the highest levels of the Department of Justice, individuals who have the highest integrity or legal skill, but are not familiar with the dynamics of a courtroom. And in a big case like this, you

really needed to call this case, in my view, with a litigator who understands the dynamics of a courtroom. It strikes me that Mr. Peter Lee would have a hard time convincing a jury that his acts were not espionage and they should have been charged with it, and if that had happened, you would have either tried the case and probably got a conviction or convict him on the lesser offenses and got a bigger sentence than you got now or the plea bargain would have been healthier, and that this Department of Justice allowed the Department of Defense, who had a lack of interest in proceeding with this case, for what I would consider fundamentally to be they didn't want to be embarrassed. And they were not required and forced to come forward with sufficient information to strengthen your case that I believe was there as you have brought out in this hearing.

Mr. KEENEY. Senator, may I just make a comment? Several times you have mentioned the fact of lack of the experienced litigators in the—in the Internal Security Section. We don't claim that these people are extensive, active litigators. We claim that they are good lawyers and they are experts in their field.

With U.S. attorneys, you will notice Shapiro was the lead attorney, Shapiro or his first assistant. That is the arrangement that the Internal Security has in the espionage cases. We provide the expertise. United States Attorneys who are our litigators provide the expert litigators who are the chief litigators in the case. I thought that was worth making the point because we do not claim to have, particularly in the Internal Security Section, very—people spend a lot of time in cases.

Now, Michael Liebman has been our expert on a number of these cases, but he has not been the lead prosecutor. We have an experienced litigator from the United States Attorney's Office.

Senator SESSIONS. You need that before you tell an experienced litigator no. Somebody who tells him no ought to also have a good level of trial experience.

Mr. KEENEY. Right, and——

Senator SESSIONS. I know the chairman has got to go forward.

Senator SPECTER. We have got to go into the closed session. We are going to have to conclude that by 12:30 p.m.

I would ask you to provide to us for the record whether Attorney General Reno personally participated in the decisions in this case.

Mr. KEENEY. Well, I will give you the answer to that. She did not personally participate in the decision.

Was she aware of it? I will have to get that.

Senator SPECTER. Well, give us the specifics as to what her actions were or wherever—whatever specifics, and also as to the Deputy Attorney General, and those are the only others in the chain of command, right?

Mr. KEENEY. Yes, sir.

Senator SPECTER. I asked you this question when we met informally, and I know it is an up-in-the-air question, but let's put it in the record. Could Dr. Lee still be prosecuted for the 1997 incidents?

Mr. KEENEY. I don't think so, sir. We get into all sorts of problems——

Senator SPECTER. Well, that is a different answer than you gave me when we talked about it informally.

Mr. KEENEY. Theoretically, I am not sure. Practically, I am sure that he could not be—we could not mount a successful prosecution.

Senator SPECTER. Well, let us ask you to give us a formal opinion on that, Mr. Keeney.

Mr. KEENEY. OK.

Senator SPECTER. We are going to go into Room 219 which is right down the hall for the closed session, and all the staffers who want to come, let's see how many we can squeeze into the room. We will try to accommodate everybody.

[Whereupon, at 12:09 p.m., the committee was adjourned, to reconvene in closed session.]

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CRS Report for Congress

Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry

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TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY

SUMMARY

The adversarial, often confrontational, and sometimes high profile nature of congressional investigations sets it apart from the more routine, accommodative facets of the oversight process experienced in authorization, appropriations or confirmation exercises. While all aspects of legislative oversight share the common goals of informing Congress so as to best accomplish its tasks of developing legislation, monitoring the implementation of public policy, and of disclosing to the public how its government is performing, the inquisitorial process also sustains and vindicates Congress' role in our constitutional scheme of separated powers and checks and balances. The rich history of congressional investigations from the failed St. Clair expedition in 1792 through Teapot Dome, Watergate, Iran-Contra and Whitewater has established, in law and practice, the nature and contours of congressional prerogatives necessary to maintain the integrity of the legislative role in that constitutional scheme.

This report will provide an overview of some of the more common legal, procedural and practical issues, questions, and problems that committees have faced in the course of an investigation. Following a summary of the case law developing the scope and limitations of the power of inquiry, the essential tools of investigative oversight--subpoenas, staff interviews and depositions, grants of immunity, and the contempt power -- are described. Next, some of the special problems of investigating the executive are detailed, with particular emphasis on claims of presidential executive privilege, the problems raised by attempts to access information with respect to open or closed civil or criminal investigative matters, or to obtain information that is part of the agency deliberative process, and the effect on congressional access of statutory prohibitions on public disclosure. The discussion then focuses on various procedural and legal requirements that accompany the preparation for, and conduct of, an investigative hearing, including matters concerning jurisdiction, particular rules and requirements for the conduct of such proceedings, and the nature, applicability and scope of certain constitutional and common law testimonial privileges that may be claimed by witnesses. The case law and practice respecting the rights of minority party members during the investigative process is also reviewed. The report concludes with a description of the roles played by the offices of House General Counsel and Senate Legal Counsel in such investigations.

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INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY

I. INTRODUCTION

The adversarial, often confrontational, and sometimes high profile nature of congressional investigations sets it apart from the more routine, accommodative facets of the oversight process experienced in authorization, appropriations or confirmation exercises.[1] While all aspects of legislative oversight share the common goals of informing Congress so as to best accomplish its tasks of developing legislation, monitoring the implementation of public policy, and of disclosing to the public how its government is performing, the inquisitorial process also sustains and vindicates Congress' role in our constitutional scheme of separated powers and checks and balances. The rich history of congressional investigations from the failed St. Clair expedition in 1792 through Teapot Dome, Watergate, Iran-Contra and Whitewater has established, in law and practice, the nature and contours of congressional prerogatives necessary to maintain the integrity of the legislative role in that constitutional scheme.

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[1] For a general overview of the oversight process see Congressional Research Service, Congressional Oversight Manual (February 1995).

II. THE LEGAL BASIS FOR OVERSIGHT

Numerous Supreme Court precedents establish and support a broad and encompassing power in the Congress to engage in oversight and investigation that reaches all sources of information that enable it to carry out its legislative function. In the absence of a countervailing constitutional privilege or a self-imposed statutory restriction upon its authority, Congress and its committees, have virtually, plenary power to compel information needed to discharge its legislative function from executive agencies, private persons and organizations, and within certain constraints, the information so obtained may be made public.

More particularly, although there is no express provision of the Constitution which specifically authorizes the Congress to conduct investigations and take testimony for the purposes of performing its legitimate functions, numerous decisions of the Supreme Court have firmly established that the investigatory power of Congress is so essential to the legislative function as to be implicit in the general vesting of legislative power in Congress.[2] Thus, in *Eastland v. United States Servicemen's Fund* the Court explained that "[t]he scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] In *Watkins v. United States* the Court further described the breadth of the power of inquiry: "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statues."[4] The Court went on to emphasize that Congress' investigative power is at its peak when the subject is alleged waste, fraud, abuse, or maladministration within a government department. The investigative power, it stated, "comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste."[5] "[T]he first Congresses", it continued, held "inquiries dealing with suspected corruption or mismanagement of government officials"[6] and subsequently, in a series of decisions, "[t]he Court recognized the danger to effective and honest conduct of the Government if the legislative power to probe corruption in the Executive Branch were unduly hampered."[7] Accordingly, the Court stated, it recognizes

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[2] *E.g., McGrain v. Daugherty,* 272 U.S. 135 (1927); *Watkins v. United States,* 354 U.S. 178 (1957); *Barenblatt v. United States,* 360 U.S. 109 (1950); *Eastland v. United States Servicemen's Fund,* 421 U.S. 491 (1975); *Nixon v. Administrator of General Services,* 433 U.S. 425 (1977); see also, *United States v. A.T.T.,* 551 F.2d 384 (D.C. Cir. 1976) and 567 F.2d 1212 (D.C. Cir. 1977).

[3] 421 U.S. at 504, n. 15 (quoting *Barenblatt, supra,* 360 U.S. at 111).

[4] 354 U.S. at 187.

[5] *Id.*

[6] *Id.* at 182.

[7] *Id.* at 194-95

"the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government."[8]

But while the congressional power of inquiry is broad, it is not unlimited. The Supreme Court has admonished that the power to investigate may be exercised only "in aid of the legislative function"[9] and cannot be used to expose for the sake of exposure alone. The *Watkins* Court underlined these limitations: "There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress ... nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself, it must be related to, and in furtherance of, a legitimate task of the Congress."[10] Moreover, an investigating committee has only the power to inquire into matters within the scope of the authority delegated to it by its parent body.[11] But once having established its jurisdiction and authority, and the pertinence of the matter under inquiry to its area of authority, a committee's investigative purview is substantial and wide-ranging.[12]

The foundation cases establishing Congress' broad power to probe are illustrative and illuminating. They arose out of the Teapot Dome investigations, the 1920's scandal regarding oil company payoffs to officials in the Harding Administration. A major concern of the congressional oversight investigation was the failure of Attorney General Harry M. Daugherty's Justice Department to prosecute the alleged government malefactors. When congressional committees attempting to investigate came up against refusals by subpoenaed witnesses to provide information, the issue went to the Supreme Court and provided it with the opportunity to issue a seminal decision describing the constitutional basis and reach of congressional oversight. In *McGrain v. Daugherty*,[13] the Supreme Court focused specifically on Congress' authority to study "charges of misfeasance and nonfeasance in the Department of Justice." The Court noted with approval that "the subject to be investigated" by the congressional committee "was the administration of the Department of Justice -- whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and

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8 *Id.* at 200 n. 33.

9 *Kilbourn v. Thompson,* 103 U.S. 168, 204 (1880).

10 *Watkins v. United States, supra,* 354 U.S. at 187.

11 *United States v. Rumely,* 345 U.S. 41, 42, 44 (1953); *Watkins v. United States, supra,* 354 U.S. at 198.

12 *Wilkinson v. United States,* 365 U.S. 408-09 (1961).

13 273 U.S. 135, 151 (1927).

prosecution of proceedings to punish crimes ...."[14] In its decision, the Court sustained the contempt arrest of the Attorney General's brother for withholding information from Congress, since Congress "would be materially aided by the information which the investigation was calculated to elicit."[15] Thus, the Supreme Court unequivocally precluded any blanket claim by the Executive that oversight could be barred regarding "whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings."[16]

In another Teapot Dome case that reached the Supreme Court, *Sinclair v. United States,*[17] a different witness at the congressional hearings refused to provide answers, and was prosecuted for contempt of Congress. The witness had noted that a lawsuit had been commenced between the government and the Mammoth Oil Company, and declared, "I shall reserve any evidence I may be able to give for those courts. . . and shall respectfully decline to answer any questions propounded by your committee."[18] The Supreme Court upheld the witness's conviction for contempt of Congress. The Court considered and rejected in unequivocal terms the witness's contention that the pendency of lawsuits gave an excuse for withholding information. Neither the laws directing that such lawsuits be instituted, nor the lawsuits themselves, "operated to divest the Senate, or the committee, of power further to investigate the actual administration of the land laws."[19]

The Court further explained: "It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits."[20] In other words, those persons having evidence in their possession, including officers and employees of executive agencies, can not lawfully assert that because lawsuits are pending involving the government, "the authority of [the Congress], directly or through its committees, to require pertinent disclosures" is somehow "abridged."

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[14] *Id.* at 177.

[15] *Id.*

[16] *Id.*

[17] 279 U.S. 263 (1929).

[18] *Id.*, at 290.

[19] *Id.* at 295.

[20] *Id.* at 295.

The Supreme Court in the Teapot Dome cases therefore enunciated in the clearest manner the independence of Congress' power to probe. The coincidental focus on the Justice Department and the ability of committees to look deeply into all aspects of its sensitive law enforcement function underlines the potential breadth of that power with respect to other Executive Branch agencies and private sector entities as well.

III. THE TOOLS OF OVERSIGHT

A. The Subpoena Power

The power of inquiry, with the accompanying process to enforce it, has been deemed "an essential and appropriate auxiliary to the legislative function."[21] A properly authorized subpoena issued by a committee or subcommittee has the some force or effect as a subpoena issued by the parent House itself.[22] To validly issue a subpoena, individual committees or subcommittees must be delegated this authority. Both Senate[23] and House[24] rules presently empower all standing committees and subcommittee to require the attendance and testimony of witnesses and the production of documents. Special or select committees must be specifically delegated that authority by Senate or House resolution.[25] The rules or practices of standing committees may restrict the issuance of subpoenas only to full committees or in certain instances allow issuance by a committee chairman alone, with or without the concurrence of the ranking minority member.

As previously indicated, committees may issue subpoenas in furtherance of an investigation within their subject matter jurisdiction as defined by Senate[26] and House[27] rules which confer both legislative and oversight jurisdiction. Subpoenas may be issued on the basis of either source of authority.

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21 *McGrain v. Daugherty, supra,* 273 U.S. at 174-75.

22 *Id.* at 158.

23 Senate Rule XXVI(1)(All Senate rules hereinafter cited were in effect as of 1993 unless otherwise indicated and may found in Sen. Doc. No. 103-3 compiled by the Senate Committee on Rules and Administration).

24 House Rule XI(2)(m)(1)(All House rules hereinafter cited were in effect as of 1993 unless otherwise indicated and may be found in "Rules Adopted By The Committee of the House of Representatives", compiled by the House Rules Committee as a committee print).

25 See, *e.g.*, S.Res. 23, 100th Cong. (Iran-Contra); Sen. Res. 495, 96th Cong. (Billy Carter/Libya).

26 Senate Rule XXV.

27 House Rule X.

Congressional subpoenas are most frequently served by the U.S. Marshal's office or by committee staff, or less frequently by the Senate or House Sergeants-at-Arms. Service may be effected anywhere in the United States. The subpoena power reaches aliens present in the United States.[28] Securing compliance of United States nationals and aliens residing in foreign countries presents more complex problems.[29]

A witness seeking to challenge the legal sufficiency of a subpoena, *i.e.*, the committee's authority, alleged constitutional rights violations, subpoena breadth, has only limited remedies available to raise such objections. The Supreme Court has ruled that courts may not enjoin the issuance of a congressional subpoena, holding that the Speech or Debate Clause of the Constitution[30] provides "an absolute bar to judicial interference" with such compulsory process.[31] As a consequence, a witness' sole remedy generally is to refuse to comply, risk being cited for contempt, and then raise objections as a defense in a contempt prosecution.

Challenges to the legal sufficiency of subpoenas must overcome formidable judicial obstacles. The standard to be applied in determining whether the congressional investigating power has been properly asserted was articulated in *Wilkinson* v. *United States*: (1) the committee's investigation of the broad subject matter area must be authorized by Congress; (2) the investigation must be pursuant to "a valid legislative purpose"; and (3) the specific inquiries must be pertinent to the broad subject matter areas which have been authorized by the Congress.[32]

With respect to authorization, a committee's authority derives from the enabling rule or resolution of its parent body. In construing the scope of such authorizations, the Supreme Court has adopted a mode of analysis not unlike that ordinarily followed in determining the meaning of a statute: it looks first to the words of the authorizing rule or resolution itself, and then, if necessary, to the usual sources of legislative history, including floor statements, reports and past committee practice.[33]

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[28] *Eisler v. United States,* 170 F.2d 273, 279 (D.C. Cir. 1948), *cert. dismissed,* 338 U.S. 883 (1949).

[29] See generally, Gary E. Davidson, Congressional Extraterritorial Investigative Powers: Real or Illusory ?, 8 Emory International Law Review 99 (1994).

[30] U.S. Const., Art. I, sec. 6, cl. 1.

[31] *Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 503-07 (1975).

[32] 365 U.S. 399, 408-09 (1961).

[33] *Barenblatt v. United States,* 360 U.S. 109, 117 1959); *Watkins v. United States, supra,* 354 U.S. at 209-215.

As to the requirement of "valid legislative purpose," the Supreme Court has made it clear that Congress does not have to state explicitly what it intends to do as a result of an investigation.[34] When the purpose asserted is supported by reference to specific problems which in the past have been, or in the future may be, the subject of appropriate legislation, it has been held that a court cannot say that a committee of Congress exceeds its power when it seeks information in such areas.[35]

Finally, in determining the pertinency of questions to the subject matter under investigation, the courts have required only that the specific inquiries be reasonably related to the subject matter under investigation.[36] An argument that pertinence must be shown "with the degree of explicitness and clarity required by the Due Process Clause" has been held to confuse the standard applicable in those rare cases when the constitutional rights of individuals are implicated by congressional investigations with the far more common situation of the exercise of legislative oversight over the administration of the law which does not involve an individual constitutional right or prerogative. It is, of course, well established that the courts will intervene to protect constitutional rights from infringement by Congress, including its committees and members.[37] But "[w]here constitutional rights are not violated, there is no warrant to interfere with the internal procedures of Congress."[38]

B. Staff Depositions

Committees normally rely on informal staff interviews to gather information preparatory to investigatory hearings. However, with more frequency in recent years, congressional committees have utilized staff conducted depositions as a tool in exercising the investigatory power.[39] Staff depositions afford a number of advantages for committees engaged in complex investigations. Staff depositions may assist committees in obtaining sworn

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[34] *In re Chapman,* 166 U.S. 661, 669 (1897).

[35] *Shelton v. United States,* 404 F.2d 1292, 1297 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1024 (1969).

[36] *Sinclair v. United States, supra,* 279 U.S. at 299; *Ashland Oil, Inc. v. F.T.C.,* 409 F.Supp. at 305.

[37] *See, e.g., Yellin v. United States,* 374 U.S. 109, 143, 144 (1969); *Watkins v. United States, supra; United States v. Ballin,* 144 U.S. 1, 5 (1892).

[38] *Exxon Corporation v. F.T.C.,* 589 F.2d 582, 590 (D.C. Cir. 1978). The issues raised by witness claims of constitutional and common law privileges are more fully discussed below at pp. 53-85. On claims that a committee subpoena is overbroad or burdensome see discussions, *infra,* at pp. 40-42.

[39] *E.g.,* S. Res. 229, 103d Cong. (Whitewater); S. Res. 23, 100th Cong. (Iran-Contra); H. Res. 12, 100th Cong. (Iran-Contra); H. Res. 320, 100th Cong. (impeachment proceedings of Judge Alcee Hastings); S. Res. 495, 96th Cong. (Billy Carter/Libya).

testimony quickly and confidentially without the necessity of Members devoting time to lengthy hearings which may be unproductive because witnesses do not have the facts needed by the committee or refuse to cooperate. Depositions are conducted in private and may be more conducive to candid responses than would be the case at a public hearing. Statements made by witnesses that might defame or even tend to incriminate third parties can be verified before they are repeated in an open hearing. Depositions can enable a committee to prepare for the questioning of witnesses at a hearing or provide a screening process which can obviate the need to call some witnesses. The deposition process also allows questioning of witnesses outside of Washington thereby avoiding the inconvenience of conducting field hearings requiring the presence of Members.

Certain disadvantages may also inhere. Unrestrained staff may be tempted to engage in tangential inquiries. Also depositions present a "cold record" of a witness's testimony and may not be as useful for Members as in person presentations. Finally, in the current absence of any definitive case law precedent, legal questions may be raised concerning the ability to enforce a subpoena for a staff deposition by means of contempt sanctions, and to the applicability to such a deposition of various statutes that proscribe false material statements.[40]

At present neither House has rules that expressly authorize staff depositions. On a number of occasions such specific authority has been granted pursuant to Senate and House resolutions.[41] When granted, a committee will normally adopt procedures for taking depositions, including provisions for notice (with or without a subpoena), transcription of the deposition, the right to be accompanied by counsel, and the manner in which objections to questions are to be resolved.[42]

C. Congressional Grants of Immunity

The Fifth Amendment to the Constitution provides in part that "no person . . . shall be compelled in any criminal case to be a witness against himself ... " The privilege against self-incrimination is available to a witness in a congressional investigation.[43] When a witness before a committee asserts his

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[40] See Jay R. Shampansky, Staff Depositions in Congressional Investigations, CRS Report No. 91-679, August 27, 1991 (suggesting that the criminal contempt procedure would be available if a committee adopted rules of procedure providing for Member involvement if a witness raises objections and refuses to answer; and that analogous case law under false statements and obstruction of Congress statutes would support prosecutions for false statements made during a deposition.).

[41] See examples cited at note 39, *supra*.

[42] See, *e.g.*, Senate Permanent Committee on Investigations Rule 9; House Iran-Contra Committee Rule 6, H. Res. 12, 133 Cong. Rec. 822 (1987).

[43] See *Watkins v. United States*, 354 U.S. 178 (1957); *Quinn v. United States*, 349 U.S. 155 (1955).

constitutional privilege, the committee may obtain a court order which compels him to testify and grants him immunity against the use of his testimony and information derived from that testimony in a subsequent criminal prosecution. He may still be prosecuted on the basis of other evidence.

The privilege against self-incrimination is an exception to the public's right to every person's evidence. However, a witness' Fifth Amendment privilege can be restricted if the government chooses to grant him immunity. Immunity is considered to provide the witness with the constitutional equivalent of his Fifth Amendment privilege.[44] Immunity grants may be required in the course of an investigation because "many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime."[45] Such grants may be militated when a committee is convinced that the testimony elicited will produce new or vital facts that would otherwise be unavailable or to allow a witness to implicate persons of greater rank or authority. Grants of immunity have figured prominently in a number of major congressional investigations, including Watergate (John Dean and Jeb Magruder) and Iran-Contra (Oliver North and John Poindexter).

The scope of the immunity which is granted, and the procedure to be employed, are outlined in 18 U.S.C. §§ 6002, 6005. If a witness before the House or Senate or a committee or subcommittee of either body asserts his privilege, or if a witness who has not yet been called is expected to assert his privilege, an authorized representative of the House or of the committee may apply to a federal district court for an order directing the individual to testify or provide other information sought by the Congress.[46] If the testimony is to be before the full House or Senate, the request for the court order must be approved by an affirmative vote of a majority of the Members present of the House or Senate. If the testimony is to be given before a committee or subcommittee, the request for the order must be approved by an affirmative vote of two-thirds of the Members of the full committee.[47]

At least ten days prior to applying to the court for the order, the Attorney General[48] must be notified of the Congress' intent to seek the order,[49] and

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[44] See generally *Kastigar v. United States*, 406 U.S. 441 (1972).

[45] *Kastigar v. United States,* 406 U.S. at 446.

[46] 18 U.S.C. § 6005(a); See also *Application of Senate Permanent Subcommittee on Investigations,* 655 F.2d 1232 (D.C. Cir.), *cert. denied,* 454 U.S. 1084 (1981).

[47] 18 U.S.C. § 6005(b).

[48] Notice should be given to an independent counsel where one has been appointed, since he would have the powers usually exercised by the Justice Department. See 28 U.S.C. § 594.

issuance of the order will be delayed by the court for as much as twenty additional days at the request of the Attorney General.[50] Notice to the Attorney General is required so that he can identify in his files any information which would provide an independent basis for prosecuting the witness, and place that information under seal. Neither the Attorney General nor an independent counsel would have a right to veto a committee's application for immunity.[51] The role of the court in issuing the order is ministerial and therefore, if the procedural requirements under the statutes are met, the court may not refuse to issue the order or impose conditions on the grant of immunity.[52] However, although the court lacks power to review the advisability of granting immunity, it might be able to consider the jurisdiction of Congress and the committee over the subject area and the relevance of the information that is sought to the committee's inquiry.[53]

After an immunity order has been issued by the court and communicated to the witness by the chairman, the witness can no longer decline to testify on the basis of his privilege, "but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."[54] The immunity that is granted is "use" immunity, not "transactional" immunity.[55] That is, neither the immunized testimony that the witness gives to the committee, nor information derived from that testimony, may be used against him in a subsequent criminal prosecution, except one for falsely testifying to the committee or for contempt. However, he may be convicted of the crime (the "transaction") on the basis of evidence independently obtained by the prosecution and sealed before his congressional testimony, and/or on the basis of information obtained after his congressional appearance but which was not derived, either directly or indirectly, from his congressional testimony.

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[49](...continued)

[49] 18 U.S.C. § 6005(b). The Justice Department may waive the notice requirement. *Application of Senate Permanent Subcommittee on Investigations,* 655 F.2d at 1236.

[50] 18 U.S.C. § 6005(c).

[51] See H.R. Rept. No. 91-1549, 91st Cong., 2d Sess. 43 (1970).

[52] *Id.* See also S.Rept. No. 91-617, 91st Cong., 1st Sess. 145 (1969); *Application of U.S. Senate Select Committee on Presidential Campaign Activities*, 361 F.Supp. 1270 (D.D.C. 1973).

[53] *Application of U.S. Senate Select Committee,* 361 F.Supp. at 1278-79.

[54] 18 U.S.C. § 6002.

[55] The constitutionality of granting a witness only use immunity, rather than transactional immunity, was upheld in *Kastigar v. United States, supra.*

In determining whether to grant immunity to a witness, a committee may consider, on the one hand, its need for his testimony in order to perform its legislative, oversight, and informing functions, and on the other, the possibility that the witness' immunized congressional testimony could jeopardize a successful criminal prosecution against him. If a witness is prosecuted after giving immunized testimony, the burden is on the prosecutor to establish that the case was not based on the witness' previous testimony or evidence derived therefrom.[56]

Recent appellate court decisions reversing the convictions of key Iran-Contra figures Lt. Colonel Oliver North[57] and Rear Admiral John Poindexter[58] appear to make the prosecutorial burden substantially more difficult, if not insurmountable, in high profile cases. Despite extraordinary efforts by the Independent Counsel and his staff to avoid being exposed to any of North's or Poindexter's immunized congressional testimony, and the submission of sealed packets of evidence to the district court to show that the material was obtained independently of any immunized testimony to Congress, the appeals court in both cases remanded the cases for a further determination whether the prosecution had directly or indirectly used immunized testimony.

The court of appeals in *North* emphasized that the insulation of the prosecution from exposure to the immunized congressional testimony does not automatically prove that this testimony was not used against the defendant.[59] The court held that "*Kastigar* is instead violated whenever the prosecution puts on a witness whose testimony is shaped, directly or indirectly, by compelled testimony, regardless of how or by whom he was exposed to that compelled testimony."[60] From this the court reasoned that "the use of immunized testimony . . . to augment or refresh recollection is an evidentiary use" and must therefore be strictly scrutinized under the *Kastigar* standard.[61] Thus, the court of appeals held that the presentation of "testimony of grand jury or trial witnesses that has been derived from or influenced by the [defendant's]

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56 *Kastigar v. United States, supra,* 406 U.S. at 460.

57 *United States v. North,* 910 F.2d 843 (D.C. Cir.), *modified*, 920 F.2d 940 (D.C. Cir. 1990) cert. denied, 111 S.Ct. (1991).

58 951 F.2d 369 (D.C. Cir. 1991).

59 *United States v. North,* 920 F.2d at 942.

60 *Id.* (emphasis in original).

61 *United States v. North,* 910 F.2d at 860. Because several years passed between the events at issue and the trial of North, the Independent Counsel had allowed potential witnesses to refresh their recollection with North's immunized testimony before they testified at the grand jury and at trial. *Id.*

immunized testimony" was a forbidden use of the compelled testimony under both the Fifth Amendment and *Kastigar*.[62]

Upon remanding the case to the district court, the court of appeals insisted that a strict application of the *Kastigar* test be applied to the government's evidence if the prosecution of *North* was to continue. The lower court was required to hold a full *Kastigar* hearing that would:

> inquire into the content as well as the sources of the grand jury and trial witnesses' testimony. That inquiry must proceed witness-by-witness; if necessary, it will proceed line-by-line and item-by-item. For each grand jury and trial witness, the prosecution must show by a preponderance of the evidence that no use whatsoever was made of any of the immunized testimony either by the witness or by the Office of Independent Counsel in questioning the witness. This burden may be met by establishing that the witness was never exposed to North's immunized testimony, or that the allegedly tainted testimony contains no evidence not "canned" by the prosecution before such exposure occurred.[63]

Similarly, in *Poindexter*, the D.C. Circuit Court of Appeals reversed all five of Poindexter's convictions because the Independent Counsel failed to show that Poindexter's compelled testimony was not used against him at his trial, in violation of 18 U.S.C. § 6002 and the Fifth Amendment.[64] Relying on the *North* standards outlined above, the appeals court held that the testimony of many of the prosecution's key witnesses, including that of Oliver North himself, was impermissibly influenced by the witnesses' exposure to Poindexter's immunized testimony for purposes of refreshment.[65] Upon remand in both cases, the Independent Counsel moved to dismiss the prosecutions upon his determination that he could not meet the strict standards set by the appeals court in its decisions.

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[62] *Id.* at 865. See also *id.* at 869 ("Where immunity testimony is used before a grand jury, the prohibited act is simultaneous and coterminous with the presentation; indeed, they are one and the same."). The court of appeals criticized the district court for failing to inquire into "the extent to which the substantive content of the witnesses' testimony may have been shaped, altered, or affected by the [defendant's] immunized testimony." *Id.* at 863. The court further noted that it was legally irrelevant under *Kastigar* if the witnesses themselves, rather than the government, presented the immunized testimony. *Id.* at 871.

[63] *Id.* at 872.

[64] *United States v. Poindexter, supra*, 951 F.2d at 375-77.

[65] *Id.*

While the *North* and *Poindexter* rulings in no way diminish a committee's authority to immunize testimony or the manner in which it secures immunity pursuant to the statute, it does alter the calculus as to whether to seek such immunity. Independent Counsel Lawrence E. Walsh observed that "[t]he legislative branch has the power to decide whether it is more important perhaps even to destroy a prosecution than to hold back testimony they need. They make that decision. It is not a judicial decision or a legal decision but a political decision of the highest importance."[66] It has been argued that the constitutional dimensions of the crisis created by the Iran-Contra affair required the type of quick, decisive disclosures that could result from a congressional investigation but not from the slower, more deliberate criminal investigation and prosecution process.[67] Under this view, the demands of a national crisis may justify sacrificing the criminal prosecution of those involved in order to allow Congress to uncover and make public the truth of the matter at issue. The role of Congress as overseer, informer, and legislator arguably warrants this sacrifice. The question becomes more difficult as the sense of national crisis in a particular circumstance is less acute, and the object is, for example, to trade-off a lesser figure in order to reach someone higher up in a matter involving "simple" fraud, abuse or maladministration at an agency. In the end, case-by-case assessments by congressional investigators will be needed, guided by the sensitivity that these are political judgments.

IV. ENFORCEMENT OF THE INVESTIGATIVE POWER

A. The Contempt Power

While the threat or actual issuance of a subpoena often provides sufficient leverage for effective compliance with investigative information demands, it is through the contempt power that Congress may act with ultimate force in response to actions which obstruct the legislative process in order to punish the contemnor and/or to remove the obstruction. The Supreme Court early recognized the power as an inherent attribute of Congress' legislative authority, reasoning that if it did not possess this power, it "would be exposed to every indignity and interruption that rudeness, caprice or even conspiracy may mediate against it."[68]

There are three different kinds of contempt proceedings available. Both the House and Senate may cite a witness for contempt under their inherent contempt power or under a statutory criminal contempt procedure. The Senate

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[66] Lawrence E. Walsh, The Independent Counsel and the Separation of Powers, 25 Hous. L. Rev. 1, 9 (1988).

[67] Michael Gilbert, The Future of Congressional Use Immunity After *United States, v. North,* 30 Amer. Crim.L.Rev. 417, 430-31 (1993). See also, Arthur L. Limon and Mark A. Belnick, Congress Had to Immunize North, Wash. Post, July 29, 1990, at p. C7.

[68] *Anderson v. Dunn,* 19 U.S. (6 Wheat) 204 (1821).

also has a third option, enforcement by means of a statutory civil contempt procedure. The three proceedings may be briefly described.[69]

(1) Inherent Contempt

Under the inherent contempt power, the individual is brought before the House or Senate by the Sergeant-at-Arms, tried at the bar of the body, and can be imprisoned in the Capitol jail. The purpose of the imprisonment or other sanction may be either punitive or coercive. Thus, the witness can be imprisoned for a specified period of time as punishment, or for an indefinite period (but not, at least in the case of the House, beyond the end of the Congress) until he agrees to comply. When a witness is cited for contempt under the inherent contempt process, prompt judicial review is available by means of a petition for a writ of *habeas corpus.* In an inherent contempt proceeding, although Congress would not have to afford the contemnor the whole panoply of procedural rights available to a defendant in a criminal case, notice and an opportunity to be heard would have to be granted. Also, some of the requirements imposed by the courts under the statutory criminal contempt procedure might be mandated by the due process clause in the case of inherent contempt proceedings.[70]

The inherent contempt power has not been exercised by either House in over sixty years because it has been considered to be too cumbersome and time consuming for a modern Congress with a heavy legislative workload that would be interrupted by a trial at the bar.

(2) Statutory Contempt

Recognizing the problems with use of the inherent contempt process, a statutory criminal contempt procedure was enacted in 1857 which, with only minor amendments, is codified today at 2 U.S.C. §§192 and 194. Under 2 U.S.C. § 192, a person who has been subpoenaed to testify or produce documents before the House or Senate or a committee and who fails to do so, or who appears but refuses to respond to questions, is guilty of a misdemeanor, punishable by a fine of up to $1,000 and imprisonment for up to one year. Section 194 establishes the procedure to be followed if the House or Senate refers a witness to the courts for criminal prosecution. A contempt citation must be approved by the subcommittee, the full committee, and the full House or Senate (or by the presiding officer if Congress is not in session). The criminal procedure is punitive in nature. It is not coercive because a witness generally will not be able to purge himself by testifying or supplying subpoenaed documents after he has been voted in contempt by the committee and the House or the Senate. Under the statute, after a contempt has been certified by the President of the

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69 For a more comprehensive treatment of the history and legal development of the congressional contempt power, see Jay R. Shampansky, Congress' Contempt Power, CRS Report No. 86-83A, February 28, 1986.

70 See, *Groppi v. Leslie,* 404 U.S. 496 (1972).

Senate or the Speaker of the House, it is the "duty" of the U.S. Attorney "to bring the matter before the grand jury for its action." It remains unclear whether the "duty" of the U.S. Attorney to present the contempt to the grand jury is mandatory or discretionary, since the sparse case law that is relevant to the question provides conflicting guidance.[71]

This potential conflict between the statutory language of §194 and the U.S. Attorney's prosecutorial discretion was highlighted by the inability of the House of Representatives in 1982 to secure a contempt prosecution against the Administrator of the Environmental Protection Agency, Ann Burford. Burford, at the direction of President Reagan, had asserted executive privilege as grounds for refusing to respond to a subpoena demand for documents. She was cited for contempt by the full House and the contempt resolution was certified by the Speaker and forwarded to the U.S. Attorney for the District of Columbia for presentment to the grand jury. Relying on his prosecutorial discretion he deferred doing so.

The Burford controversy may be seen as unusual, involving highly sensitive political issues of the time. In the vast majority of cases there is likely to be no conflict between the interests of the two political branches, and the U.S. Attorney can be expected to initiate prosecution in accordance with § 194.

(3) Civil Contempt

As an alternative to both the inherent contempt power of each House and criminal contempt, Congress enacted a civil contempt procedure which is applicable only to the Senate.[72] Upon application of the Senate,[73] the federal district court is to issue an order to a person refusing, or threatening to refuse, to comply with a Senate subpoena. If the individual still refuses to comply, he may be tried by the court in summary proceedings for contempt of court, with sanctions being imposed to coerce his compliance. Civil contempt might be employed when the Senate is more concerned with securing compliance with the subpoena or with clarifying legal issues than with punishing the contemnor. Civil contempt can be more expeditious than a criminal proceeding and it also provides an element of flexibility, allowing the subpoenaed party to test his legal defenses in court without necessarily risking a criminal prosecution. Civil contempt is not authorized for use against executive branch officials refusing to comply with a subpoena.

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[71] See Todd D. Peterson, Prosecuting Executive Branch Officials for Contempt of Congress, 66 NYUL Rev. 563 (1991); Hearing, "Prosecution of Contempt of Congress", Before the Subcomm. on Administrative Law and Governmental Relations, House Comm. on the Judiciary, 98th Cong. 1st Sess. 21-35 (1983) (Statement and Testimony of Stanley Brand).

[72] See 2 U.S.C. 288d and 28 U.S.C. 1364.

[73] Usually brought by the Senate Legal Counsel. 2 U.S.C 288 d(a).

(4) Alternatives to Contempt

When an executive branch official refuses to comply with a congressional subpoena and the dispute cannot be resolved by negotiation and compromise, none of the three types of contempt proceedings may be completely satisfactory. The statutory civil contempt procedure in the Senate is inapplicable in the case of a subpoena to an executive branch official. Inherent contempt has been described as "unseemly" and cumbersome. And if the criminal contempt method is utilized, the U.S. Attorney, who is an executive branch appointee may, as occurred in the Burford case, rely on the doctrine of prosecutorial discretion as grounds for deferring seeking an indictment. There are, however, various alternatives to the three modes of contempt in the case of an executive branch official. (1) The contemnor could be cited for criminal contempt and be prosecuted by an independent counsel, rather than by the U.S. Attorney, if the standards under the law governing the appointment of such counsels are satisfied; (2) the committee can seek declaratory or other relief in the courts; (3) the appropriations for the agency or department involved can be cut off or reduced when requested information has not been supplied; and (4) in an exceptional case, the official might be impeached.

B. Perjury and False Statements Prosecutions

(1) Testimony Under Oath

A witness under oath before a congressional committee who willfully gives false testimony is subject to prosecution for perjury under 18 U.S.C. 1621 of the United States Code. The essential elements for such prosecution are: (1) a false statement, (2) "willfully" made, (3) before a "competent tribunal", (4) involving a "material matter.". The requirement of a competent tribunal is important to note because it is an element of the offense within the particular control of committees.

For a legislative committee to be competent for perjury purposes a quorum must be present.[74] The problem has been ameliorated in recent years with the adoption of rules establishing less than a majority of Members as a quorum for taking testimony, normally two members for House committees[75] and one member for Senate committees.[76] The requisite quorum must be present at the time the alleged perjurious statement is made, not merely at the time the session convenes. No prosecution for perjury will lie for statements made only in the presence of committee staff unless the committee has deposition authority and has taken formal action to allow it.

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[74] *Christoffel v. United States,* 378 U.S. 89 (1949).

[75] House Rule XI (2) (h) (1).

[76] Senate Rule XXVI (7) (a) (2).

(2) Unsworn Statements

Most statements made before Congress, at both the investigatory and hearing phases of oversight, are unsworn. The practice of swearing in all witnesses at hearings is a rare practice. But prosecutions may be brought to punish congressional witnesses for giving willfully false testimony not under oath. Under 18 U.S.C. 1001 false statements before a "department or agency of the United States" are punishable by a fine of up to $10,000 or imprisonment up to five years, or both. The courts have held that section 1001 is applicable to false statements made to congressional committees.[77]

Until recently it was thought that 18 U.S.C. 1505, which proscribes attempts to obstruct congressional proceedings, was applicable to unsworn false statements. However, the Court of Appeals for the District of Columbia Circuit ruled in 1991 that section 1505 applies only to corrupt efforts to obstruct congressional inquiries by subverting witnesses, not to false statements by the defendant himself in such proceedings.[78]

V. INVESTIGATING THE EXECUTIVE BRANCH

When Congress directs its investigatory powers at Executive Branch departments and agencies, and at times at the White House itself, such probes have often become contentious, provoking the Executive to assert rights to shield from disclosure information Congress deems essential to carry out its oversight functions. The variety of grounds proffered are often lumped in an undifferentiated manner under the rubric "executive privilege". However, in order to evaluate and assess the weight of such withholding claims, it is more useful, and accurate, to distinguish between claims that have a constitutional basis and those that do not, and then to separate out amongst the non-constitutional claims those based on law from those resting on executive policy preferences.

A. Presidential Claims of Executive Privilege

In some, rare, instances the executive response to a congressional demand to produce information may be an assertion of presidential executive privilege, a doctrine which, like Congress' powers to investigate and cite for contempt, has constitutional roots. No decision of the Supreme Court has yet resolved the question whether there are any circumstances in which the Executive Branch can refuse to provide information sought by the Congress on the basis of executive privilege. Indeed, most such disputes are settled short of litigation

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[77] *United States v. Bramlett*, 348 U.S. 503, 509 (1955); *United States v. Poindexter*, 951 F.2d 369, 386-88 (D.C. Cir. 1991).

[78] *United States v. Poindexter, supra*, 951 F.2d at 377-86.

through employment of the political process and negotiations,[79] and the few that reach a judicial forum find the courts highly reluctant to rule on the merits.[80] However, in *United States v. Nixon*,[81] involving a judicial subpoena issued to the President at the request of the Watergate Special Prosecutor,[82] the Supreme Court found a constitutional basis for the doctrine of executive privilege in "the supremacy of each branch within its own assigned area of constitutional duties" and in the separation of powers,[83] and although it considered presidential communications with close advisors to be "presumptively privileged," the Court rejected the President's contention that the privilege was absolute, precluding judicial review whenever it is asserted.[84]

Having concluded that in the case before it the claim of privilege was not absolute, the Court resolved the "competing interests" (the President's

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[79] Joel D. Bush, Congressional-Executive Access Disputes: Legal Standards and Political Settlements, 9 J. of Law and Politics, 717, 735-46(1993); Peter M. Shane, Legal Disagreements and Negotiation in a Government of Laws, 71 Minn. L. Rev. 461 (1987); Stephen W. Stathis, Executive Cooperation: Presidential Recognition of the Investigatory Authority of Congress and the Courts, 3 J. of Law and Politics 183 (1986); Richard Ehlke, Congressional Access To Information From The Executive: A Legal Analysis, CRS Report No. 86-50A, March 10, 1986.

[80] See, *e.g.*, *United States v. AT&T*, 551 F.2d 784 (D.C. Cir. 1976) and 567 F.2d 121 (D.C. Cir 1977), where the appeals court twice refused to balance the asserted constitutional interests, instead remanding the case for further negotiations under the supervision of the district court; and *United States v. U.S. House of Representatives*, 556 F.2d 150, 152 (D.D.C. 1983), where the district court refused to enjoin transmission by the House of Representatives of a contempt citation of the Administrator of the EPA to the United States Attorney on grounds alleging constitutional executive privilege, stating that when "constitutional disputes arise concerning the separation of powers of the legislative and executive branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted . . . judicial restraint is essential to maintain the delicate balance of powers among the branches established by the Constitution." In both instances negotiated resolutions ultimately ended the immediate disputes.

[81] 418 U.S. 683 (1974).

[82] The subpoena was for certain tape recordings and documents relating to the President's conversations with aides and advisors. The materials were sought for use in a criminal trial.

[83] 418 U.S. at 705, 706. See also *id.* at 708, 711.

[84] *Id.* at 705, 708. Citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), the Court held that it had the authority to review the President's claim of executive privilege. 418 U.S. at 703-05. The materials in question in *United States v. Nixon* related to confidential communications between the President and his advisors. The Court indicated that it might proceed differently and accord more deference to the executive's claims in a case involving military or diplomatic matters. *Id.* at 706.

need for confidentiality vs. the judiciary's need for the materials in a criminal proceeding) "in a manner that preserves the essential functions of each branch,"[85] and held that the judicial need for the tapes outweighed the President's "generalized interest in confidentiality ..." [86] The Court was careful to limit the scope of its decision, noting that "we are not here concerned with the balance between the President's generalized interest in confidentiality ... and congressional demands for information".[87]

Although *United States v. Nixon* did not involve a presidential claim of executive privilege in response to a congressional subpoena, in *Senate Select Committee on Presidential Campaign Activities v. Nixon,*[88] the court of appeals, prior to the *Nixon* ruling, reviewed the President's assertion of executive privilege as grounds for not complying with a Senate committee subpoena for tape recordings.[89] The appeals court found that "the presumption that the public interest favors confidentiality [in presidential communications] can be defeated only by a strong showing of need by another institution of government--a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations . . . ." According to the court, "the showing required to overcome the presumption favoring confidentiality" rests "on the nature and appropriateness of the function in the performance of which the material [is] sought, and the degree to which the material [is] necessary to its fulfillment . . . . [T]he sufficiency of the committee's showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the committee's functions."[90] The court found that, in the circumstances of that case, the need for the tapes was "merely cumulative" in light of the fact that the House Judiciary Committee had begun an inquiry, with express constitutional authority, into impeachment of the President, and the fact that the Judiciary Committee already had copies of the tapes subpoenaed by the Senate Committee.[91]

Since the Kennedy Administration it has been established by executive policy directives that presidential executive privilege may be asserted only by the

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85 *Id.* at 707.

86 *Id.* at 713.

87 Id. at 712, n. 19.

88 498 F.2d 725 (D.C. Cir. 1974).

89 The subpoena was for tapes of conversations between the President and presidential counsel John Dean. The committee sought a declaratory judgment that its subpoena was lawful and that the President's refusal to comply with it, on the basis of executive privilege, was unlawful.

90 498 F.2d at 730.

91 *Id* at 732-33.

President personally. The latest such directive, issued by President Reagan in November 1982,[92] and still in effect, requires that when an agency head believes that a congressional information request raises substantial questions of executive privilege he is to notify and consult with the Attorney General and the Counsel to the President. If the matter is deemed to justify invocation of the privilege, it is reported to the President who makes his decision. If the President invokes the privilege, the agency head advises the requesting committee.

There has been only one instance in which the full House or Senate has voted a contempt citation against the head of an executive department or agency, that of Anne Gorsuch Burford, Administrator of the Environmental Protection Agency, in 1982.[93] Several cabinet members have been found in contempt by committees or subcommittees, although these disputes were resolved before contempt votes by the parent body. In two instances, cabinet members were cited for contempt by full committees.[94] Five other cabinet secretaries have been cited for contempt by subcommittees.[95]

B. Effect of Statutory Prohibitions on Public Disclosure on Congressional Access

Upon occasion Congress has found it necessary and appropriate to limit its access to information it would normally be able to obtain by exercise of its

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[92] Memorandum from the President to the Heads of Executive Departments and Agencies on Procedures Governing Responses to Congressional Requests for Information (November 4, 1982), *reprinted in* Congressional Oversight Manual, *supra* note 1, at pp. 197-98. The Department of Justice Office of Legal Counsel lists 64 instances of presidential invocation of executive privilege in the face of congressional requests for information between 1792 and October 1981. 6 OLC 751 (1982). President Reagan invoked the privilege in November 1982 in the EPA investigation. See, "Contempt of Congress", H. Rept. No. 97-968, 97th Cong., 2d Sen. 1982. The last recorded invocation was by President Bush in August 1991. See Congressional Oversight Manual at pp. 199-204; and Mark J. Rozell, Executive Privilege in the Bush Administration: Constitutional Problems, Bureaucratic Responses, 1 Miller Center Journal 63, 71-72 (1994).

[93] H. Res. 632, 97th Cong., 128 Cong. Rec. 31746-76 (1982).

[94] H.R. Rept. No. 94-693, 94th Cong., 1st Session (1975)(Secretary of State Henry R. Kissinger); H.R. Rept. No. 97-898, 97th Cong. 2d Sess. (1982)(Secretary of the Interior James G. Watt).

[95] Secretary of Commerce Rogers C.B. Morton (1975); Secretary of Health Education and Welfare Joseph Califano (1978); Secretary of Energy Charles Duncan (1980); Secretary of Energy James Edwards (1980); and Attorney General William French Smith (1984).

constitutional oversight prerogatives.[96] But where a statutory confidentiality or non-disclosure provision barring public disclosure of information is not explicitly applicable to the Congress, the courts have consistently held that agencies and private parties may not deny Congress access to such information on the basis of such provisions. [97] Release to a congressional requestor is not deemed to be disclosure to the public generally.[98] Moreover, courts may not require agencies to delay the surrender of documents to Congress in order to give advance notice to affected parties, "for the judiciary must refrain from slowing or otherwise interfering with the legitimate investigating functions of Congress".[99] Once documents are in congressional hands, the courts have held they must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties.[100] Nor may a court block congressional disclosure of information obtained from an agency or private party, at least when disclosure would serve a valid legislative purpose.[101] Finally, the legal obligation to surrender requested documents has been held to arise from the official request[102]

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[96] See, *e.g.,* 1 U.S.C. 112b limiting congressional access to international agreements, other than treaties, where, in the opinion of the President, public disclosure would be prejudicial to the national security, to the foreign relations committees of each House under conditions of secrecy removable only by the President; 26 U.S.C. 6103(d), 6104(a)(2) limiting inspection of tax information to the Senate Finance Committee, House Ways and Means Committee, and the Joint Committee on Taxation, or any committees "specifically authorized by a resolution of the House or Senate"; 10 U.S.C. 1582, which provides that in reporting to Congress on certain sensitive positions created in the Defense Department, "the Secretary may omit any item if he considers a full report on it would be detrimental to the national security"; and under 50 U.S.C. 402g, j(b), the Congress' ability to obtain information about the Central Intelligence Agency, particularly with regard to expenditures, is very limited.

[97] See, *e.g., F.T.C. v. Owens-Corning Fiberglass Corp.,* 626 F.2d 966, 970 (D.C. Cir. 1980); *Exxon Corp. v. F.T.C.,* 589 F.2d 582, 585-86 (D.C. Cir. 1978), *cert. denied,* 441 U.S. 943 (1979); *Ashland Oil Co., Inc. v. F.T.C.* 548 F.2d 977, 979 (D.C. Cir. 1976).

[98] *F.T.C. v. Owens-Corning Fiberglass Corp.* 626 F.2d at 970; *Exxon Corp. v. F.T.C.,* 589 F.2d at 589; *Ashland Oil Co., Inc. v. F.T.C.,* 548 F.2d at, 979; *Moon v. CIA,* 514 F.Supp. 836, 840-41 (SDNY 1981).

[99] *F.T.C. v. Owens-Corning Fiberglass Corp.,* 626 F.2d at 970; *F.T.C. v. Anderson,* 631 F.2d 741, 747 (D.C. Cir. 1970); *Exxon Corp. v. F.T.C.,* 589 F.2d at 588-9.

[100] *F.T.C. v. Owens-Corning Fiberglass Corp.,* 626 F.2d at 970; *Exxon Corp. V. F.T.C.,* 589 F.2d at 589; *Ashland Oil Corp. v. F.T.C.,* 548 F.2d at 979; *Moon v. CIA,* 514 F.Supp at 849-51.

[101] *Doe v. McMillan,* 412 U.S. 306 (1973); *F.T.C. v. Owens-Corning Fiberglass Corp.* 626 F.2d at 970.

[102] *Ashland Oil Co., Inc. v. F.T.C.,* 548 F.2d at 980-81.

Executive agencies have in the past unsuccessfully raised several statutes of general applicability as potential barriers to the disclosure of information to congressional committees. Agencies have attempted to withhold documents on the basis of the deliberative process exemption incorporated by Exemption 5 of the Freedom of Information Act (FOIA).[103] But the courts have made it plain that the agency privileges made applicable to public requesters by Exemption 5, as well as all the other exemptions of the FOIA, are expressly inapplicable to the legislature: "This section is not authority to withhold information from Congress."[104] In *Murphy* v. *Department of the Army* an appeals court explained that FOIA exemptions were no basis for withholding from Congress because of "the obvious purpose of the Congress to carve out for itself a special right of access to privileged information not shared by others. Congress, whether as a body, through committees, or otherwise, must have the widest possible access to executive branch information, if it is to perform its manifold responsibilities effectively. If one consequence of the facilitation of such access is that some information will be disclosed to congressional authorities but not to private persons, that is but an incidental consequence of the need for informed and effective lawmakers".[105] A similar provision in the Privacy Act also prevents its use as a withholding vehicle against Congress.[106]

A frequently cited statute used to justify non-disclosure is the Trade Secrets Act, 18 U.S.C. 1905, a criminal provision which generally proscribes the disclosure of trade secrets and confidential business information by a federal officer or employee "unless otherwise authorized by law." There is no indication in the legislative history of its revision and codification that it was intended to prevent agency disclosures to committees or to have it apply to Congress and its employees or any other legislative branch support agency or its employees,[107] and as a matter of statutory construction it would have been unusual for Congress to have subjected, *sub silento*, its staff to criminal sanctions for such disclosures, particularly in light of its well-established oversight and investigative prerogatives, and its speech or debate privilege. In any event, there appears little doubt that disclosure to Congress of proprietary information covered by § 1905 would be deemed to be "authorized by law". The Supreme Court in *Chrysler v. Brown*[108] held that disclosure authorization can stem from both congressional enactments and agency regulations. In this instance, there are at least two potential sources of disclosure authorization. The first is

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[103] 5 U.S.C. 552(b)(5).

[104] 5 U.S.C. 552(d).

[105] 612 F.2d 1151, 1155-58 (D.C. Cir. 1979).

[106] 5 U.S.C. 552a (b)(9).

[107] See discussion of legislative history in *CNA Financial Corp. v. Donovan,* 830 F.2d 1132, 1144-52 (D.C. Cir. 1987).

[108] 441 U.S. 281, 301-16 (1979).

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[108] 441 U.S. 281, 301-16 (1979).

closed cases that included prosecutorial memoranda, FBI investigative reports, summaries of FBI interviews, memoranda and correspondence prepared during the pendency of cases, confidential instructions outlining the procedures or guidelines to be followed for undercover operations and the surveillance and arrests of suspects, and documents presented to grand juries not protected from disclosure by Rule 6(e) of the Federal Rules of Criminal Procedure, among other similar "sensitive" materials.

The reasons advanced by the Executive for declining to provide information to Congress about civil proceedings have included avoiding prejudicial pre-trial publicity, protecting the rights of innocent third parties, protecting the identity of confidential informants, preventing disclosure of the government's strategy in anticipated or pending judicial proceedings, the potentially chilling effect on the exercise of prosecutorial discretion by DOJ attorneys, and precluding interference with the President's constitutional duty to faithfully execute the laws.[112]

As has been recounted previously, the Supreme Court has repeatedly reaffirmed the breadth of Congress' right to investigate the government's conduct of criminal and civil litigation.[113] The courts have also explicitly held that agencies may not deny Congress access to agency documents, even in situations where the inquiry may result in the exposure of criminal corruption or maladministration of agency officials. The Supreme Court has noted, "[B]ut surely a congressional committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding . . . or when crime or wrongdoing is exposed."[114] Nor does the actual pendency of litigation disable Congress from the investigation of facts which have a bearing on that litigation, where the information sought is needed to determine what, if any, legislation should be enacted to prevent further ills.[115]

Although several lower court decisions have recognized that congressional hearings may have the result of generating prejudicial pre-trial publicity, they have not suggested that there are any constitutional or legal limitations on Congress' right to conduct an investigation during the pendency of judicial proceedings. Instead, the cases have suggested approaches, such as granting a

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[112] A leading statement of the executive branch position is found in an opinion of Attorney General Robert Jackson. 40 Op. A.G. 45 (1941).

[113] See discussion of case law, *supra* at notes 2-8 and 13-20, and accompanying text.

[114] *Hutcheson v. United States,* 369 U.S. 599, 617 (1962).

[115] *Sinclair v. United States,* 279 U.S. 263, 294 (1929).

continuance or a change of venue, to deal with the publicity problem.[116] For example, the court in one of the leading cases, *Delaney v. United States,* entertained "no doubt that the committee acted lawfully, within the constitutional powers of Congress duly delegated to it" but went on to describe the possible consequences of concurrent executive and congressional investigations:

> We think that the United States is put to a choice in this matter: If the United States, through its legislative department, acting conscientiously pursuant to its conception of the public interest, chooses to hold a public hearing inevitably resulting in such damaging publicity prejudicial to a person awaiting trial on a pending indictment, then the United States must accept the consequences that the judicial department, charged with the duty of assuring the defendant a fair trial before an impartial jury, may find it necessary to postpone the trial until by lapse of time the danger of the prejudice may reasonably be thought to have been substantially removed.[117]

The *Delaney* court distinguished the case of a congressional hearing generating publicity relating to an individual not under indictment at the time (as was Delaney):

> Such a situation may present important differences from the instant case. In such a situation the investigative function of Congress has its greatest

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[116] See e.g., *Delaney v. United States,* 199 F.2d 107 (1st Cir. 1952); *United States v. Mitchell,* 372 F.Supp. 1239, 1261 (S.D.N.Y. 1973). For discussion of issues in addition to prejudicial publicity that have been raised in regard to concurrent congressional and judicial proceedings, including allegations of violation of due process, see, Contempt of Congress, H.R. Rpt. No. 97-968, 97th Cong., 2d Sess. 58 (1982; and the discussion of the potential consequences of congressional grants of testimonial immunity on criminal trials, *supra,* at notes 57-67 and accompanying text.

[117] 199 F.2d 107, 114 (1st Cir. 1952). The court did not fault the committee for holding public hearings, stating that if closed hearings were rejected "because the legislative committee deemed that an open hearing at that time was required by overriding considerations of public interest, then the committee was of course free to go ahead with its hearing, merely accepting the consequence that the trial of Delaney on the pending indictment might have to be delayed." 199 F.2d at 114-5. It reversed Delaney's conviction because the trial court had denied his motion for a continuance until after the publicity generated by the hearing, at which Delaney and other trial witnesses were asked to testify, subsided. See also, *Hutcheson v. United States,* 369 U.S. 599, 613 (1962)(upholding contempt conviction of person who refused to answer committee questions relating to activities for which he had been indicted by a state grand jury, citing *Delaney.*)

> utility: Congress it is informing itself so that it may take appropriate legislative action; it is informing the Executive so that existing laws may be enforced; and it is informing the public so that democratic processes may be brought to bear to correct any disclosed executive laxity. Also, if as a result of such legislative hearing an indictment is eventually procured against the public official, then in the normal case there would be a much greater lapse of time between the publicity accompanying the public hearing and the trial of the subsequently indicted official than would be the case if the legislative hearing were held while the accused is awaiting trial on a pending indictment.[118]

The absence of indictment and the length of time between congressional hearing and criminal trial have been factors in courts rejecting claims that congressionally generated publicity prejudiced defendants.[119] Finally, in the context of adjudicatory administrative proceedings, courts on occasion have held that pressures emanating from questioning of agency decisionmakers by Members of Congress may be sufficient to undermine the impartiality of the proceeding. [120] But the courts have also made clear that mere inquiry and oversight of agency actions, including agency proceedings that are quasi-adjudicatory in nature, will not be held to rise to the level of political pressure designed to influence particular proceedings that would require judicial condemnation.[121]

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[118] 199 F.2d at 115.

[119] See, *Silverthorne v. United States,* 400 F.2d 627 (9th Cir. 1968), *cert. denied,* 400 U.S. 102 (1971)(claim of prejudicial pretrial publicity rejected because committee hearings occurred five months prior to indictment); *Beck v. United States*, 298 F.2d 622 (9thCir. 1962)(hearing occurred a year before trial); *United States v. Haldeman*, 559 F.2d 31, 63 (D.C. Cir. 1976), *cert. denied,* 433 U.S. 933 (1977); *United States v. Ehrlichman,* 546 F.2d 910, 917 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 1120 (1977); *United States v. Mitchell,* 372 F.Supp. 1239, 1261 (S.D.N.Y. 1973)(post-indictment Senate hearing but court held that lapse of time and efforts of committee to avoid questions relating to indictment diminished possibility of prejudice); *United States v. Mesarosh*, 223 F.2d 449 (3rd Cir. 1955)(hearing only incidentally connected with trial and occurred after jury selected).

[120] See, *e.g., Pillsbury Co. v. FTC,* 354 F.2d 952 5th Cir. (1968).

[121] See *e.g., ATX, Inc. v. Department of Transportation* 41 F.3d 1522 (D.C. Cir. 1994); *State of California v. FERC,* 966 F.2d 154 (9th Cir. 1992); *Peter Kiewet Sons' v. U.S. Army Corps of Engineers,* 714 F.2d 163 (D.C. Cir. 1983); *Gulf Oil Corp. v. FPC,* 563 F.2d 588 (3d Cir. 1977), *cert. denied,* 434 U.S. 1062 (1978); *United States v. Armada Petroleum Corp.,* 562 F.Supp 43 (S.D. Tex. 1982). See also, Morton Rosenberg and Jack Maskell, Congressional Intervention in the Administrative Process: Legal and Ethical Considerations (CRS Report No 90-440A, Sept. 7, 1990).

Thus, the courts have recognized the potentially prejudicial effect congressional hearings can have on pending cases. While not questioning the prerogatives of Congress with respect to oversight and investigation, the cases pose a choice for the Congress: congressionally generated publicity may result in harming the prosecutorial effort of the Executive; but access to information under secure conditions can fulfill the congressional power of investigation and at the same time need not be inconsistent with the authority of the Executive to pursue its case. Nonetheless, it remains a choice that is solely within Congress' discretion to make irrespective of the consequences.[122]

In the past the executive frequently has made a broader claim that prosecution is an inherently executive function and that congressional access to information related to the exercise of that function is thereby limited. Prosecutorial discretion is seen as off-limits to congressional inquiry and access demands are viewed as interfering with the discretion traditionally enjoyed by the prosecutor with respect to pursuing criminal cases.

Initially, it must be noted that the Supreme Court has rejected the notion that prosecutorial discretion in criminal matters is an inherent or core executive function. Rather, the Court noted in *Morrison v. Olson,* [123] sustaining the validity of the appointment and removal conditions for independent counsels under the Ethics in Government Act, that the independent counsel's prosecutorial powers are executive in that they have "typically" been performed by Executive Branch officials, but held that the exercise of prosecutorial discretion is in no way "central" to the functioning of the Executive Branch.[124] The Court therefore rejected a claim that insulating the independent counsel from at-will presidential removal interfered with the President's duty to "take care" that the laws be faithfully executed. Interestingly, the *Morrison* Court took the occasion to reiterate the fundamental nature of Congress' oversight function (" . . . receiving reports or other information and oversight of the independent counsel's activities . . . [are] functions that we have recognized as generally incidental to the legislative function of Congress," citing *McGrain v. Daugherty.*)[125]

The breadth of *Morrison's* ruling that the prosecutorial function is not an exclusive function of the Executive was made clear in a recent decision of the Ninth Circuit Court of Appeals in United States ex rel Kelly v. The Boeing Co.,[126] which upheld, against a broad based separation of powers attack, the

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122 See remarks of Independent Counsel Lawrence E. Walsh, *supra n.*66 and accompanying text.

123 487 U.S. 654 (1988).

124 *Id.* at 691-92.

125 *Id.* at 694.

126 9 F.3d 743 (9th Cir. 1993).

constitutionality of the *qui tam* provisions of the False Claims Act vesting enforcement functions against agencies by private parties.[127]

Prosecution, not being a core or exclusive function of the Executive, cannot claim the constitutional stature of Congress' oversight prerogative. In the absence of a credible claim of encroachment or aggrandizement by the legislature of essential Executive powers, the Supreme Court has held the appropriate judicial test is one that determines whether the challenged legislative action "'prevents the Executive Branch from accomplishing its assigned functions',"

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[127] Boeing argued, *inter alia*, that Congress could not vest enforcement functions outside the Executive Branch in private parties. Applying *Morrison* the appeals court emphatically rejected the contention.

> Before comparing the *qui tam* provisions of the FCA to the independent counsel provisions of the Ethics in Government Act, we must address Boeing's contention that only the Executive Branch has the power to enforce laws, and therefore to prosecute violations of law. *It is clear to us that no such absolute rule exists. Morrison* itself indicates otherwise because that decision validated the independent counsel provisions of the Ethics in Government Act even though it recognized that "it is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." 487 U.S. at 695. The Court also stated in *Morrison* that "there is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch." 487 U.S. at 692 (emphasis added). Use of the world "typically" in that sentence, considered in light of the Court's ultimate conclusion upholding the independent counsel provisions, must mean that prosecutorial functions need not always be undertaken by Executive Branch officials. See Stephanie A.J. Dangel, Note, Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent, 99 Yale L.J. 1069, 1070 (1990)(Framers intended that prosecution would be undertaken by but not constitutionally assigned to executive officials, and that such officials would typically but not always prosecute). *Thus, we reject Boeing's assertion that all prosecutorial power of any kind belongs to the Executive Branch.*

9 F.3d at 751 (emphasis supplied).

and, if so, "'whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress'." [128]

Congressional oversight and access to documents and testimony, unlike the action of a court, cannot stop a prosecution or set limits on the management of a particular case. Access to information by itself would not seem to disturb the authority and discretion of the Executive Branch to decide whether to prosecute a case. The assertion of prosecutorial discretion in the face of a congressional demand for information is arguably akin to the "generalized" claim of confidentiality made in the Watergate executive privilege cases. That general claim -- lacking in specific demonstration of disruption of Executive functions -- was held to be overcome by the more focused demonstration of need for information by a coordinate branch of government.[129]

Given the legitimacy of congressional oversight and investigation of the law enforcement agencies of government, and the need for access to information pursuant to such activities, a claim of prosecutorial discretion by itself would not seem to be sufficient to defeat a congressional need for information. The congressional action itself does not and cannot dictate prosecutorial policy or decisions in particular cases. Congress may enact statutes that influence prosecutorial policy and information relating to enforcement of the laws would seem necessary to perform that legislative function. Thus, under the standard enunciated in *Morrison v. Olson* and *Nixon v. Administrator of General Services,* the fact that information is sought on the Executive's enforcement of criminal laws would not in itself seem to preclude congressional inquiry.

In light of the Supreme Court's consistent support of the power of legislative inquiry, and in the absence of a countervailing constitutional prerogative of the Executive, it is likely that a court will be "sensitive to the legislative importance of congressional committees on oversight and investigations and recognize that their interest in the objective and efficient operation of ... agencies serves a legitimate and wholesome function with which we should not lightly interfere."[130]

D. Access to Grand Jury Materials

Rule 6(e) of the Federal Rules of Criminal Procedure provides that members of the grand jury and those who attend the grand jury in its proceedings may not "disclose matters occurring before the grand jury, except as otherwise

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[128] *Nixon v. Administration of General Services,* 433 U.S. 425,433 (1977); *Commodity Futures Trading Commission v. Schor,* 487 U.S. 833, 851 (1986); *Morrison v. Olson,* 487 U.S. 654, 693-96 (1988).

[129] *U.S. v. Nixon,* 418 U.S. 683, 705-706, 711-712 (1974).

[130] *Gulf Oil Corp. v. FPC,* 563 F.2d 588, 610 (3d Cir. 1977).

provided in these rules."[131] The prohibition does not ordinarily extend to witnesses. [132] Violations are punishable as contempt of court. [133]

There is some authority for the proposition that Rule 6(e), promulgated as an exercise of congressionally delegated authority and reflecting pre-existing practices, is not intended to address disclosures to Congress. [134] As a general rule, however, neither Congress nor the courts appear to have fully embraced the proposition.

But, not all matters presented to a grand jury are embraced by the secrecy rule. Thus, "when testimony or data is sought for its own sake - for its intrinsic value in the furtherance of a lawful investigation - rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury."[135] Congressional committees have gained access to documents under this theory, the courts ruling that the committee's interest was in the documents themselves and not in the events that transpired before the grand jury.[136] However, with respect to matters that "reflect exactly what transpired in the grand jury," such as transcripts of witness testimony, Rule 6(e) has been held to be a bar to congressional access.[137]

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[131] Fed. R. Crim. Pro. 6 (e) (2).

[132] *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983); *In re Sealed Motion*, 880 F.2d 1367, 1373 (D.C. Cir. 1989).

[133] Fed. R. Crim. Pro. 6(e) (2).

[134] See *In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami)*, 669 F.Supp. 1072, 1074-75 (S.D. Fla. 1987), *aff'd on other grounds*, 833 F.2d 1438 (11th Cir. 1987); *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F.Supp. 1219, 1230 9D.C.C. 1974), *petitions for writs of prohibition and mandamus den'd sub nom., Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974); *In re Grand Jury Investigation of Ven-Fuel*, 441 F.Supp. 1299, 1304-308 (M.D. Fla. 1977).

[135] *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Circ. (1960)). See also, *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C.C. Cir. 1980); *In re Grand Jury Investigation (New Jersey State Commission of Investigation)*, 630 F.2d 996 (3rd Cir. 1980); *Davis v. Romney*, 55 F.R.D. 337 (E.D. Pa. 1972).

[136] *In re Grand Jury Impanelled October 2, 1978*, 510 F.Supp. 112, 115 (D.C.C. 1981); *In re Grand Jury Proceedings, Newport News Drydock & Shipbuilding Co., Mem. Opinion* (E.D. Va. Nov. 12, 1984); *In re Senate Banking Committee Hearings*, 19 F.R.D. 410 (N.D. Ill. 1956).

[137] *In re Grand Jury Investigation Uranium Industry*, 1979-2 Trade Cas. 78, 639 (D.D.C. (1979)); *In re Grand Jury Impanelled October 2, 1978*, 510 F.Supp. 112 (D.D.C. 112 (D.D.C. 1981).

The case law would appear to indicate that Rule 6(e) would not preclude disclosure of the following types of documents:

1. Documents within the possession of the Department of Justice concerning a particular case or investigation, other than transcripts of grand jury proceedings and material indicating "the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like." Material that would not otherwise be identifiable as grand jury material does not become secret by Department of Justice identification.[138]
2. Immunity letters, draft pleadings, target letters, and draft indictments.[139]
3. Plea agreements as long as particular grand jury matters are not expressly mentioned.[140]
4. Third party records which pre-exist the grand jury investigation even if they are in the possession of the Department of Justice as custodian for the grand jury.[141]
5. Memoranda, notes, investigative files, and other records of FBI agents or other government investigators except to the extent those documents internally identify or clearly define activities of the grand jury.[142]

VI. INVESTIGATIVE OVERSIGHT HEARINGS

A. Jurisdiction and Authority

A congressional committee is a creation of its parent House and only has the power to inquire into matters within the scope of the authority that has been delegated to it by that body. Thus, the enabling rule or resolution which gives the committee life is the charter which defines the grant and limitations of the committee's power.[143] In construing the scope of a committee's authorizing charter, courts will look to the words of the rule or resolution itself,

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138 *Senate of Puerto Rico v. U.S. Department of Justice,* 823 F.2d 574, 583, 583n. 30 (D.C. Cir. 1987); *In Grand Jury Impanelled October 2, 1978 (79-2),* 510 F.Supp. 112, 114-15 (D.D.C. 1981).

139 *In re Harrisburg Grand Jury* -- 83-2, 638 F.Supp. 43, 47 n.4 (M.D. Pa. 1986); *In re Grand Jury Matter (Catania),* 682 F.2d 61, 64 n.4 (3d Cir. 1982)

140 *Washington Post v. Robinson,* 935 F.2d 282, 290-91 (D.C. Cir. 1991).

141 *S.E.C. v. Dresser Industries, Inc.,* 628 F.2d 1368, 1382-83 (D.C. Cir. 1980); *United States ex rel Woodard v. Tynan,* 757 F.2d 1085, 1087-88 (10th Cir. 1985).

142 *Anaya v. United States,* 815 F.2d 1373, 1380-81 (10th Cir. 1987).

143 *United States v. Rumely,* 345 U.S. 41, 44 (1957); *Watkins v. United States,* 354 U.S. 178, 201 (1957); *Gojack v. United States,* 384 U.S. 202, 208 (1966).

and then, if necessary to the usual sources of legislative history such as floor debate, legislative reports, past committee practice and interpretations.[144] Jurisdictional authority for a "special" investigation may be given to a standing committee,[145] a joint committee of both houses, [146] or a special subcommittee of a standing committee, [147] among other vehicles. In view of the specificity with which Senate[148] and House[149] rules now confer jurisdiction on standing committees, as well as the care with which most authorizing resolutions for select committees have been drafted in recent years, sufficient models exist to avoid a successful judicial challenge by a witness that noncompliance was justified by a committee's overstepping its delegated scope of authority.

B. Rules Applicable to Hearings

Rules of both Houses [150] require that committees adopt written rules of procedure and publish them in the Congressional Record. The failure to publish has resulted in the invalidation of a perjury conviction.[151] Once properly promulgated, such rules are judicially cognizable and must be "strictly observed.[152] The House[153] and many individual Senate committees require that all witnesses by given a copy of the committee's rule.

Both the House and Senate have adopted rules permitting a reduced quorum for taking testimony and receiving evidence. House hearings may be

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144 *Barenblatt v. United States,* 360 U.S. 109, 117 (1959); *Watkins v. United States, supra*, 209-215.

145 See Senate Resolution 229, 103d Cong., 2d Sess., directing the Senate Banking, Housing and Urban Affairs Committee to conduct a limited hearing on the Whitewater affair. 140 Cong. Rec. S 6675 (daily ed. June 9, 1994).

146 See Sen. Res. 23 and H.Res. 100th Cong., 1st Sess. (1987), establishing the Iran-Contra joint investigating committee.

147 A Senate Judiciary Subcommittee to Investigate Individuals Representing the interests of Foreign Governments was created by unanimous consent agreement of the Senate. 126 Cong. Rec. 19544-46 (1980).

148 Senate Rule XXV.

149 House Rule X.

150 House Rule XI(2); Senate Rule XXVI(2).

151 United States v. Reinecke, 524 F.2d 435 (D.C. Cir 1975)(failure to publish committee rule setting one Senator as a quorum for taking hearing testimony held sufficient ground to reverse perjury conviction).

152 *Gojack v. United States* 384 U.S. 702, 708 (1966); *Yellin v. United States*, 374 U.S. 109 (1963).

153 House Rule XI(2)(k)(2).

conducted if at least two members are present;[154] the Senate permits hearings with one only member in attendance.[155] Although most committees have adopted the minimum quorum requirement, some have not, while others require a higher quorum for sworn rather than unsworn testimony. For perjury purposes, the quorum requirement must be met at the time the allegedly perjured testimony is given, not at the beginning of the session.[156] Reduced quorum requirement rules do not apply to authorization for the issuance of subpoenas. Senate rules require a one-third quorum of a committee or subcommittee and the House a quorum of a majority of the members, unless a committee delegates authority for issuance to its chairman.[157]

Senate and House rules limit the authority of their committees to meet in closed session.[158] A House rule provides, however, that testimony "shall" be held in closed session if a majority of a committee or subcommittee determines it "may tend to defame, degrade, or incriminate any person".[159] Such testimony taken in closed session is normally releasable only by a majority vote of the committee.[160] Similarly, confidential material received in a closed session requires a majority vote for release.[161] A release of confidential materials in accordance with applicable rules effectively minimizes objections by a submitting witness.[162] Moreover, the Speech or Debate clause[163] will protect a member who discloses such information on the floor from legal redress, although not from the possibility of internal discipline.[164]

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154 House Rule XI(2)(h)(1).

155 Senate Rule XXVI(7)(a)(2).

156 *Christoffel v. United States,* 338 U.S. 84 (1949).

157 Senate Rule XXVI(7)(a)(2); House Rule XI(2)(h)(1).

158 Senate Rule XXVI(5)(b); House Rule X1(2)(g)(2).

159 House Rule XI(2)(k)(5).

160 House Rule XI(2)(k)(7).

161 *Id.*

162 *Doe v. McMillan,* 566 F.2d 713, 713-16 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 969 (1978).

163 Art. I, sec. 6, cl. 2.

164 The purposes of the Speech or Debate Clause are to assure the independence of Congress in the exercise of its legislative functions and to reinforce the separation of powers established in the Constitution. *Eastland v. United States Servicemen's Fund,* 421 U.S. 502-03 (1975). The Supreme Court has read the Clause to broadly effectuate its purposes. *Id.*; *United States v. Swindall*, 971 F. 2d 1531, 1534 (11th Cir. 1992). The Clause protects "purely legislative activities", including those inherent in the legislative

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House Rule XI(3)(e) provides that the broadcast of open committee hearings may be permitted by a majority vote of the committee in accordance with written rules adopted by the committee. Individual committees have adopted a variety of rules with respect to such coverage. House Rule XI(3)(f)(2) affords an absolute right to a subpoenaed witness to demand no broadcast or photographic coverage of his testimony. There is comparable rule in the Senate, that body allowing each committee to adopt its own policy.[165]

C. Conducting Hearings

The chairman of a committee or subcommittee, or in his or her absence, the ranking majority member present, normally presides over the conduct of a hearing. An opening statement by the chair is usual, and in the case of an investigative hearing is an important means of defining the subject matter of the hearing and thereby establishing the pertinence of questions asked the witnesses. Not all committees swear in their witnesses; some committees require that all witnesses be sworn. Most leave it to the discretion of the chair. If a committee wishes the potential sanction of perjury to apply, it should swear its witnesses, though false statements not under oath are subject to criminal sanctions.[166]

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[164](...continued)
process. *Chastain v. Lundquist*, 833 F. 2d 311, 314 (D.C. Cir. 1987) (quoting *U.S.* v. *Brewster*, 408 U.S. 501, 512 (1972), *cert. denied* 487 U.S. 1240 (1988). Actions protected under the provisions include those taken in the regular course of the legislative process and the motivations of the legislators for their actions. *United States* v. *Helstoski*, 442 U.S. 477, 489 (1979). In addition to shielding "words spoken in debate", *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880), the Clause encompasses such activity integral to lawmaking as voting, *id.*, circulation of information to other members, *Doe v. McMillan* 412 U.S. 306 (1973), *Gravel v. United States*, 408 U.S. 606, 625 (1972), and participation in committee investigative proceedings, and reports. *Id., Eastland v. U.S. Servicemen's Fund, supra; Dombrowski v. Eastland*, 387 U.S. 82 (1967); *Tenney v. Brandhove*, 341 U.S. 367 (1951).

However, activities only casually or incidentally related to legislative affairs are outside the ambit of Speech or Debate protection. Thus newsletter and press releases circulated by a member to the public are not shielded because they are "primarily means of informing those outside the legislative forum". *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). Also a member may be prosecuted for accepting a bribe or for other unlawful conduct so long as the prosecution "does not draw in question the legislative act of the defendent Member of Congress". *United States v. Brewster, supra,* 408 U.S. at 510 (quoting *United States v. Johnson*, 383 U.S. at 185). The key consideration is the act presented for examination, not the actor. Activities integral to the legislative process may not be examined, but peripheral activities not closely connected to the business of legislating do not enjoy the protection of the Clause. *Walker v. Jones*, 733 F. 2d, 927, 929 (D.C. Cir. 1984).

[165] Senate Rule XXVI(3)(c).

[166] See discussion, *supra* at notes 77-78 and accompanying text.

A witness does not have a right to make a statement before being questioned,[167] but that opportunity is usually accorded. Committee rules may prescribe the length of such statements and may also require that written statements be submitted in advance of the hearing. Questioning of witnesses may be structured so that members alternate for specified length of time. Questioning may also be done by staff. Witnesses may be allowed to review a transcript of their testimony and to make non-substantive corrections.

The right of a witness to be accompanied by counsel is recognized by House rule[168] and the rules of Senate committees. The House rule limits the role of counsel as solely "for the purpose of advising them [witnesses] concerning their constitutional rights." Some committees have adopted rules specifically prohibiting counsel from "coaching" witness during their testimony.[169] A committee has complete authority to control the conduct of counsel. Indeed, House Rule XI(2)(k)(4) provides that "[t]he chairman may punish breaches of order and decorum, and of professional ethics on the part of counsel, by censure or exclusion from the hearings; and the committee may cite the offender for contempt." Some Senate committees have adopted similar rules.[170] There is no right of cross-examination of adverse witnesses during an investigative hearing.[171]

D. Constitutional and Common Law Testimonial Privileges of Witnesses

(1) Constitutional Privileges

It is well established that the protections of the Bill of Rights extend to witnesses before a legislative inquiry.[172] and thus may pose significant limitations on congressional investigations. The scope of the protections of the Fifth, First and Fourth amendments and the manner of the their invocation are briefly reviewed.

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[167] 2 U.S.C. 191.

[168] House Rule XII(2)(k)(3).

[169] See, *e.g.*, Senate Permanent Committee on Investigations Rule 8.

[170] See, e.g., Senate Aging Committee Rule V. 8; Senate Permanent Subcommittee on Investigations Rule 7.

[171] *United States v. Fort*, 443 F.2d 620, 678-79 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971).

[172] 2 U.S.C. 191.

(a) Fifth Amendment

The Fifth Amendment provides that "no person ... shall be compelled in any criminal case to be a witness against himself." The privilege is personal in nature,[173] and may not be invoked on behalf of a corporation,[174] small partnership,[175] labor union,[176] or other artificial entity.[177] The privilege protects a witness against being compelled to testify but not against a subpoena for existing documentary evidence.[178] However, where compliance with a subpoena *duces tecum* would constitute an implicit testimonial authentication of the documents produced, the privilege may apply.[179]

There is no particular formulation of words necessary to invoke the privilege. All that is required is that the witness' objection be stated in a manner that the "committee may be reasonably expected to understand as an attempt to invoke the privilege".[180] To the extent there is any doubt about the witness' intent, it is incumbent on the committee to ask the witness whether he or she is in fact invoking the privilege.[181] But a witness before a congressional committee may not remain silent. The privilege must be invoked

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173 See *McPhaul v. United States*, 364 U.S. 372 (1960).

174 *Hale v. Henkel,* 201 U.S. 43 (1906).

175 *Bellis v. United States*, 417 U.S. 85 (1974).

176 See *United States v. White,* 322 U.S. 694 (1944).

177 *Bellis v. United States,* 417 U.S. at 90. See also *Rogers v. United States*, 340 U.S. 367 (1951)(Communist Party).

178 *Fisher v. United States,* 425 U.S. 391, 409 (1976); *Andresen v. Maryland,* 427 U.S. 463 (1976). These cases concerned business records and there may be some protection available in the case of a subpoena for personal papers. However, in *Senate Select Committee on Ethics v. Packwood,* 845 F.Supp 17, 22-23 (D.D.C, 1994), *stay pending appeal denied*, 114 S.Ct. 1036 (1994), the court upheld disclosure to the Senate Ethics Committee of a Senator's diaries, holding that the Fifth Amendment "does not protect against [the diaries'] incriminating *contents* voluntarily committed to paper before the government makes demand for them" (emphasis in original).

179 *United States v. Doe,* 465 U.S. 605 (1984); *Fisher v. United States*, 425 U.S. 391 (1976). But *c.f., Doe v. United States,* 487 U.S. 201 (1988), where the Court upheld a lower court order compelling the target of a grand jury investigation to sign a consent directive authorizing foreign banks to disclose records of any and all accounts over which he had a right of withdrawal, holding it not to be testimonial in nature.

180 *Emspak v. United States, supra*, 349 U.S. at 194.

181 *Quinn v. United States, supra*, 349 U.S. at 164.

in response to a specific question that might incriminate him. Nor may a witness refuse to take the oath on Fifth Amendment grounds.[182]

A witness may plead the Fifth Amendment not only to questions whose answers would in themselves support a conviction, but also to those questions which, if answered, would serve as a "link in the chain of evidence" that would tend to incriminate him.[183]

The committee can review the assertion of the privilege by a witness to determine its validity, but the witness is not required to prove the precise hazard that he fears. In regard to the assertion of the privilege in judicial proceedings, the Supreme Court has advised:

> To sustain the privilege, it need only be evident, from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result .... To reject a claim, it should be perfectly clear from a careful consideration of all the circumstances of the case that the witness is mistaken and that the answers cannot possibly have a tendency' to incriminate.[184]

The basis for asserting the privilege was elaborated upon in a lower court decision:

> The privilege may only be asserted when there is reasonable apprehension on the part of the witness that his answer would furnish some evidence upon which he could be convicted of a criminal offense... or which would reveal sources from which evidence could be obtained that would lead to such conviction or to prosecution therefor.... Once it has become apparent that the answers to a question would expose a witness to the danger of conviction

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182 *Eisler v. United States*, 170 F.2d 273 (D.C. Cir. 1948), *cert denied*, 338 U.S. 887 (1949).

183 *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Where a witness asserts the privilege, a committee may seek a court order under 18 U.S.C. 6002, 6005 which directs him to testify and grants him immunity against use of his testimony, or other evidence derived from his testimony, in a subsequent criminal prosecution. See discussion of procedure to obtain such an immunity order, *supra* at notes 45-56 and accompanying text.

184 *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).

> or prosecution, wider latitude is permitted the witness in refusing to answer other questions.[185]

The privilege against self-incrimination may be waived by declining to assert it, specifically disclaiming it, or testifying on the same matters as to which the privilege is later asserted. However, because of the importance of the privilege, a court will not construe an ambiguous statement of a witness before a committee as a waiver.[186]

Finally it should be noted that the due process clause of the Fifth Amendment requires that "the pertinency of the interrogation to the topic under the ...committee's inquiry must be brought home to the witness at the time the questions are put to him."[187] "Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto."[188] Additionally, to satisfy both the requirement of due process as well as the statutory requirement that a refusal to answer be "willful", a witness should be informed of the committee's ruling on any objections he raises or privileges which he asserts.[189]

(b) First Amendment

Although the First Amendment, by its terms, is expressly applicable only to *legislation* that abridges freedom of speech, press, or assembly, the Court has held that the amendment also restricts Congress in conducting investigations.[190] In the leading case involving the application of First Amendment rights in a congressional investigation, *Barenblatt v. United States*,[191] the Court held that "where first amendment rights are asserted to bar government interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." Thus, unlike the Fifth Amendment

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185 *United States v. Jaffee,* 98 F.Supp. 191, 193-94 (D.D.C. 1951). See also *Simpson v. United States*, 241 F.2d 222 (9th Cir. 1957)(privilege inapplicable to questions seeking basic identifying information such as the witness' name and address).

186 *Emspak v. United States*, 349 U.S. 190 (1955). See also *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

187 *Deutch v. United States*, 367 U.S. 456, 467-68 (1961). As the court explained in that case, there is a separate *statutory* requirement of pertinency.

188 *Watkins v. United States*, 354 U.S. 178, 214-15 (1957).

189 *Id.; Deutch v. United States*, 367 U.S. 456 (1961).

190 *Watkins v. United States*, 354 U.S. 178, 197 (1957).

191 360 U.S. 109, 126 (1959).

privilege against self-incrimination, the First Amendment does not give a witness an absolute right to refuse to respond to congressional demands for information.[192]

The Court has held that in balancing the personal interest in privacy against the congressional need for information, "the critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness."[193] In order to protect the rights of witnesses, in cases involving the First Amendment the courts have emphasized the requirements discussed above concerning authorization for the investigation, delegation of power to investigate to the committee involved, and the existence of a legislative purpose.[194]

The Supreme Court has recognized the application of the First Amendment to congressional investigations, and although the Amendment has frequently been asserted by witnesses as grounds for not complying with congressional demands for information, the Court has never relied on the First Amendment as grounds for reversing a criminal contempt of Congress conviction.[195]

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192 *Id.*

193 *Watkins v. United States,* 354 U.S. at 198. A balancing test was also used in *Branzburg v. Hayes*, 408 U.S. 665 (1972), the leading case on the issue of the claimed privilege of newsmen not to respond to demands of a grand jury for information. In its 5-4 decision, the Court concluded that the need of the grand jury for the information outweighed First Amendment considerations, but there are indications in the opinion that "the infringement of protected first amendment rights must be no broader than necessary to achieve a permissible governmental purpose," and that "a State's interest must be 'compelling' or 'paramount' to justify even an indirect burden on first amendment rights." *Id.* at 699-700. For application of the compelling interest test in a legislative investigation, see *Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539 (1963). See also, James J. Mangan, Contempt for the Fourth Estate: No Reporter's Privilege Before a Congressional Investigation, 83 Geo. L.J. 129 (1994) (arguing that bases for reporter's privilege are outweighed by governmental interests in a congressional investigation).

194 *Barenblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *United States v. Rumely,* 345 U.S. 41 (1953).

195 Although it was not in the criminal contempt context, one court of appeals has upheld a witness' First Amendment claim. In *Stamler v. Willis,* 415 F.2d 1365 (7th Cir. 1969), *cert. denied*, 399 U.S. 929 (1970), the court ordered to trial a witness' suit for declaratory relief against the House Un-American Activities Committee in which it was alleged that the committee's authorizing resolution had a "chilling effect" on plaintiff's First Amendment rights. In other cases for declaratory and injunctive relief brought against committees on First Amendment grounds, relief has been denied although the courts indicated that relief could be granted if the circumstances were more compelling. *Sanders v. McClellan*, 463 F.2d 894 (D.C. Cir. 1972); *Davis v. Ichord,* 442 F.2d 1207 (D.C. Cir. 1970); *Ansara v. Eastland,* 442 F.2d 751 (D.C. Cir. 1971). However, in *Eastland v. United States Servicemen's Fund,* 421 U.S. 491 (1975), the Supreme Court

(continued...)

However, the Court has narrowly construed the scope of a committee's authority so as to avoid reaching a First Amendment issue.[196] And the Court has ruled in favor of a witness who invoked his First Amendment rights in response to questioning by a state legislative committee.[197]

(c) Fourth Amendment

Dicta in opinions of the Supreme Court indicate that the Fourth Amendment's prohibition against unreasonable searches and seizures is applicable to congressional committees.[198] It appears that there must be probable cause for the issuance of a congressional subpoena.[199] The Fourth Amendment protects a congressional witness against a subpoena which is

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[195](...continued)
held that the Constitution's Speech or Debate clause (art. I, sec. 6, cl. 1) generally bars suits challenging the validity of congressional subpoenas on First Amendment or other grounds. Thus, a witness generally cannot raise his constitutional defenses until a subsequent criminal prosecution for contempt unless, in the case of a Senate committee, the statutory civil contempt procedure is employed. See *United States v. House of Representatives,* 556 F.Supp. 150 (D.D.C. 1983).

[196] *United States v. Rumely,* 345 U.S. 41 (1953).

[197] *Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539 (1963). In the majority opinion, Justice Goldberg observed that "an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition [is] that the State convincingly show a substantial relation [or nexus] between the information sought and a subject of overriding and compelling state interest". *Id.* at 546.

[198] *Watkins v. United States,* 354 U.S. 178, 188 (1957); *McPhaul v. United States,* 364 U.S. 372 (1960).

[199] Fourth Amendment standards apply to subpoenas, such as those issued by committees, as well as to search warrants. See *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186 (1946). A congressional subpoena may not be used in a mere "fishing expedition." See *Hearst v. Black,* 87 F.2d 68, 71 (D.C. Cir. 1936), quoting, *Federal Trade Commission v. American Tobacco Co.,* 264 U.S. 298, 306 (1924) ("It is contrary to the first principles of justice to allow a search through all the record, relevant or irrelevant, in the hope that something will turn up."). *Cf. United States v. Groves,* 188 F.Supp. 314 (W.D. Pa. 1937) *(dicta).* But see *Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 509 (1975), in which the Court recognized that an investigation may lead "up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result".

unreasonably broad or burdensome.[200] The Court has delineated the test be used in judging the reasonableness of a congressional subpoena:

> Petitioner contends that the subpoena was so broad as to constitute an unreasonable search and seizure in violation of the Fourth Amendment.... 'Adequacy or excess in the breath of the subpoena are matters variable in relation to the nature, purposes, and scope of the inquiry' . . . The subcommittee's inquiry here was a relatively broad one ... and the permissible scope of materials that could reasonably be sought was necessarily equally broad. It was not reasonable to suppose that the subcommittee knew precisely what books and records were kept by the Civil Rights Congress, and therefore the subpoena could only 'specify ... with reasonable particularity, the subjects to which the documents...relate....' The call of the subpoena for 'all records, correspondence and memoranda' of the Civil Rights Congress relating to the specified subject describes them 'with all of the particularity the nature of the inquiry and the [subcommittee's] situation would permit' ....' The description contained in the subpoena was sufficient to enable [petitioner] to know what particular documents were required and to select them accordingly.'[201]

If a witness has a legal objection to a subpoena *duces tecum* or is for some reason unable to comply with a demand for documents, he must give the grounds for his noncompliance upon the return of the subpoena. As a court of appeals stated in one case:

> If [the witness] felt he could refuse compliance because he considered the subpoena so broad as to constitute an unreasonable search and seizure within the prohibition of the Fourth Amendment, then to avoid contempt for complete noncompliance

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200 *McPhaul v. United States,* 364 U.S. 372 (1960); *Shelton v. United States*, 404 F.2d 1292 (D.C. Cir. 1968), cert. denied, 393 U.S. 1024 (1969). In *Senate Select Committee on Ethics v. Packwood*, 845 F.Supp. 17, 20-21 (D.D.C. 1994), *stay pending appeal denied*, 114 S.Ct. 1036 (1994), the court rejected a claim of overbreadth with regard to a subpoena for a Senator's personal diaries, holding that committee's investigation was not limited in its investigatory scope to its original demands "even though the diaries might prove compromising in respects the committee has not yet foreseen".

201 *McPhaul v. United States*, 364 U.S. at 382.

> he was under [an] obligation to inform the subcommittee of his position. The subcommittee would then have had the choice of adhering to the subpoena as formulated or of meeting the objection in light of any pertinent representations made by [the witness].[202]

Similarly, if a subpoenaed party is in doubt as to what records are required by a subpoena or believes that it calls for documents not related to the investigation, he must inform the committee. Where a witness is unable to produce documents he will not be held in contempt "unless he is responsible for their unavailability... or is impeding justice by not explaining what happened to them . . ."[203]

The application of the exclusionary rule to congressional committees is in some doubt and will depend on the precise facts of the situation. It seems that documents which were unlawfully seized at the direction of a congressional investigating committee may not be admitted into evidence in a subsequent unrelated criminal prosecution because of the command of the exclusionary rule.[204] In the absence of a Supreme Court ruling, it remains unclear whether the exclusionary rule bars the admission into evidence in a contempt prosecution of a congressional subpoena which was issued on the basis of documents obtained by the committee following their unlawful seizure by another investigating body (such as a state prosecutor).[205]

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202 *Shelton v. United States,* 404 F.2d at 1299-1300.

203 *McPhaul v. United States,* 364 U.S. at 378.

204 *Nelson v. United States*, 268 F. 2d 505 (D.C. Cir.), *cert denied*, 346 U.S. 827 (1953)

205 In *United States v. McSurely*, 473 F.2d 1178, 1194 (D.C. Cir. 1972), the court of appeals reversed contempt convictions where the subcommittee subpoenas were based on information "derived by the subcommittee through a previous unconstitutional search and seizure by [state] officials and the subcommittee's own investigator." The decision of the court of appeals in the contempt case was rendered in December, 1972. In a civil case brought by the criminal defendants, Alan and Margaret McSurely, against Senator McClellan and the subcommittee staff for alleged violations of their constitutional rights by the transportation and use of the seized documents, the federal district court in June, 1973, denied the motion of the defendants for summary judgment. While the appeal from the decision of the district court in the civil case was pending before the court of appeals, the Supreme Court held in *Calandra v. United States,* 414 U.S. 338 (1974), that a grand jury is not precluded by the Fourth Amendment's exclusionary rule from questioning a witness on the basis of evidence that had been illegally seized. A divided court of appeals subsequently held in *McSurely v. McClellan,* 521 F.2d 1024, 1047 (D.C. Cir. 1975), that under *Calandra* "a congressional committee has the right in its investigatory capacity to use the product of a past unlawful search and seizure."

(continued...)

(2) The Common Law Attorney-Client and Work Product Privileges

The precedents of the Senate and the House of Representatives, which are founded on Congress' inherent constitutional prerogative to investigate, establish that the acceptance of a claim of attorney-client or work product privilege rests in the sound discretion of a congressional committee regardless of whether a court would uphold the claim in the context of litigation. In practice, committee resolutions of claims of these privileges have involved a pragmatic assessment of the needs of the individual committee to accomplish its legislative mission and the potential burdens and harms that may be imposed on a claimant of the privilege if it is denied.

Thus the exercise of committee discretion whether to accept a claim of attorney-client work product privilege has turned on a "weighing [of] the legislative need for disclosure against any possible resulting injury."[206] More particularly, the process of committee resolution of claims of privilege has

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[205](...continued)

The decision of the three-judge panel in the civil case was vacated and on rehearing by the full District of Columbia Circuit, five judges were of the view that *Calandra* was applicable to the legislative sphere and another five judges found it unnecessary to decide whether *Calandra* applies to committees but indicated that, even if it does apply to the legislative branch, the exclusionary rule may restrict a committee's use of unlawfully seized documents if it does not make mere "derivative use" of them but commits an independent Fourth Amendment violation in obtaining them. *McSurely v. McClellan,* 553 F.2d 1277, 1293-94, 1317-25 (D.C. Cir. 1976) *(en banc).* The Supreme Court granted *certiorari* in the case, 434 U.S. 888 (1977), but subsequently dismissed *certiorari* as improvidently granted, with no explanation for this disposition of the case, *sub nom. McAdams v. McSurely,* 438 U.S. 189 (1978). Jury verdicts were eventually returned against the Senate defendants, but were reversed in part on appeal. 753 F.2d 88 (D.C. Cir. 1985), *cert. denied,* U.S. (1985).

More recently, in a contextually relevant situation, a district court quashed subpoenas issued on behalf of tobacco companies against two members of Congress for testimony and production of documents relating to a congressional investigation of the company's knowledge of the health hazards and addictiveness of tobacco. *Maddox v. Williams,* 855 F. Supp. 406 (D.D.C. 1994), *appeal pending in the D.C. Circuit.* The companies had contended that the documents had been stolen and disclosed in violation of the attorney-client privilege. The court held that "use by a congressional committee of information that is gathered illegally is nevertheless protected by the Speech or Debate Clause, provided the use occurs in the course of a legitimate congressional investigation, and Congressmen were not personally involved in the criminal activity." 855 F. Supp. at 411-12 (citing, *inter alia, Dombroski v. Eastland,* 387 U.S. 82,85,87 (1967) and *Eastland v. United States Servicemen's Fund, supra,* 421 U.S. at 501). The court also rejected the companies' reliance on *McSurely* as "misplaced". Its opinion described *McSurely* as "holding that, even if material comes to a legislative committee by means that are unlawful, subsequent committee use of that material is nevertheless privileged", 855 F. Supp at 412 note 18, 417.

[206] Hearings, "International Uranium Cartel", Subcomm. on Oversight and Investigations, House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess., Vol. 1, 123 (1977).

traditionally been informed by weighing considerations of legislative need, public policy, and the statutory duty of congressional committees to engage in continuous oversight of the application, administration, and execution of laws that fall within its jurisdiction,[207] against any possible injury to the witness. In the particular circumstances of any situation, a committee may consider and evaluate the strength of a claimant's assertion in light of the pertinency of the documents or information sought to the subject of the investigation, the practical unavailability of the documents or information from any other source, the possible unavailability of the privilege to the claimant if it were to be raised in a judicial forum, and the committee's assessment of the cooperation of the witness in the matter, among other considerations. A valid claim of privilege, free of any taint of waiver, exception or other mitigating circumstance, would merit substantial weight. But any serious doubt as to the validity of the asserted claim would diminish its compelling character.

The discussion will begin with a brief overview of the constitutional origins and basis for Congress' discretionary control over such claims of privilege and recent examples of committee exercises of that discretion, followed by a review of the requirements for assertion of the attorney-client and work product privileges. Next the law with respect to waiver of the privilege and exceptions to assertion of the privilege is detailed.

(a) The nature and development of Congress' discretionary control over witness' claims of privilege

As with the legislature's inherent authority to investigate,[208] the discretion to entertain claims of privilege traces back to the model of the English Parliament. Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament, the definitive authority on English parliamentary procedure, specifically notes:

A witness is, however, bound to answer all questions which the committee sees fit to put to him, and cannot excuse himself, for example, on the ground that he may thereby subject himself to a civil action, or because he has taken an oath not to disclose the matter about which he is required to testify, or because the matter was a privileged communication to him, as where a solicitor is called upon to disclose the secrets of his client ... some of which would be sufficient grounds of excuse in a court of law.[209]

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[207] *See* 2 U.S.C. 190d.

[208] *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927); *Watkins v. United States*, 354 U.S. 178, 187 (1957); *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

[209] Erskine May's Treatise at 746-747 (20th ed. 1983). May's Treatise has been relied upon as an authoritative guide to parliamentary and congressional investigatory authority. *See, e.g., McGrain v. Daugherty, supra*, 273 U.S. at 161 note 15.

The rare instances of the exercise of the prerogative to deny use of the privileges have been consistent in the rejection of the applicability of the privileges. In the nineteenth century, Charles W. Woolley, an attorney, was found in contempt of the House and imprisoned for refusal to answer questions about a scheme for bribing senators during Andrew Johnson's impeachment proceeding despite a claim of attorney-client privilege.[210] Also, in the notable investigation into the financing of the Union Pacific Railroad and the activities of the Credit Mobilier, a House Committee held Joseph B. Stewart in contempt notwithstanding his assertion of attorney-client privilege.[211] More recently, a Subcommittee of the House Energy and Commerce Committee has on a number of occasions rejected claims of attorney-client privilege.[212] No court has ever questioned the assertion of the prerogative, and both Houses of Congress have rejected opportunities to impose the attorney-client privilege as a binding rule for committee investigations.[213] Contemporary congressional practice has, in fact, evolved a delicate balancing process to ensure its fair application. Thus the exercise of committee discretion has been held to turn on a "weighing [of] the legislative need against any possible injury" to one asserting the privilege and the application of this test has involved painstaking examinations of potential detriment and relevant judicial precedents.[214]

Perhaps the most emphatic and authoritative assertion of the committee prerogative in this area is the 1986 House action holding Ralph and Joseph Bernstein in contempt for refusal to give the Subcommittee on Asian and Pacific Affairs of the House Committee on Foreign Affairs requested information pertaining to their relations with Ferdinand and Imelda Marcos. Their refusal

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[210] Millet, The Applicability of Evidentiary Privileges For Confidential Communications Before Congress, 21 John Marshall L. Rev. 309, 312-313 (1988)(Millet).

[211] Millet, *ibid.*, at 313-314. See also, *Stewart v. Blaine*, 1 MacArthur 453 (D.C. 1874); Eberling, Congressional Investigations 349-350 (1928); Proceedings Against Ralph Bernstein and Joseph Bernstein. H.Rept. No. 99-462, 99th Cong., 2d Sess. 13 notes 12-14 (1986)(Bernstein Contempt Report.).

[212] See, Attorney-Client Privilege, Memoranda Opinions of the American Law Division, Library of Congress, Committee Print 98-I, (98th Cong. June 1983)(CRS Memoranda). See also Hearings, International Uranium Cartel, before Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess. Vol. 1 (1977).

[213] See, S. Rept. No. 2, 84th Cong., 1st Sess. 27-28 (1954); CRS Memoranda, *supra* note 212, at 24-26.

[214] See, *e.g.*, Hearings on the International Uranium Cartel Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 60, 123 (1977); see also CRS Memoranda, *supra*, at 1-2, 27-36, 108-115.

rested primarily on the assertion of attorney-client privilege.[215] The Subcommittee rejected these claims on two grounds: "That the claim of privilege would not be upheld even in a court, and that a congressional committee was obliged to decide whether to accept such claims of privilege apart from whether a court would uphold the claim."[216] The full Committee, bowing to the concerns and preferences of some members that it was not necessary under the circumstances of the matter to rely equally on the broader second ground, recommended that "the U.S. attorney, in presenting this matter, proceed primarily and strongly with emphasis on the primary ground relied on by the Subcommittee that this claim of privilege would not have been upheld even in a court."[217] Thus it is clear that the recommendation to the full House, which was adopted by an overwhelming vote of 352-34,[218] encompassed full recognition of the prerogative to deny assertions of attorney-client privilege.

Senate practice and precedent are in strong and complementary accord with that of the House. Two denials by Senate committees of claims of privilege serve to illustrate. In March of 1989, the Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works commenced investigating claims that settlement agreements were being entered between employers and employees of nuclear facilities which placed restrictions on an employee's ability to testify in Nuclear Regulatory Commission proceedings relating to licensing and safety matters with respect to such facilities. The Subcommittee was seeking to determine the nature and extent of such restrictive agreements at a particular facility and the prevalence and potential impact of such agreements in the industry generally. Subpoenas were issued and several were not complied with on the grounds of the attorney-client and work product privileges. On July 19, 1989, the Subcommittee issued a formal opinion rejecting the claim of privilege. The opinion asserted that

> [W]e start with the jurisdictional proposition that this Subcommittee possesses the authority to determine the validity of any attorney-client privilege that is asserted before the Subcommittee. A committee's or subcommittee's authority to receive or compel testimony derives from the constitutional authority of the Congress to conduct investigation and take testimony as necessary to carry out its legislative powers. As an independent branch of government with such constitutional authority, the Congress must necessarily have the independent authority to determine the

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215 132 Cong. Rec. 3028-3062 (1986); Bernstein Contempt Report, *supra* note 211, at 1.

216 Bernstein Contempt Report, at 14.

217 *Id.* at 14-15.

218 132 Cong. Rec. at 3061-62.

> validity of non-constitutional evidentiary privileges that are asserted before the Congress. [219]

The opinion continued by observing that while it recognized its "independent authority to rule on an assertion of the attorney-client privilege... the Subcommittee will nonetheless look to judicial and other rulings in this area to guide the Subcommittee's determination." [220] Finding that the holder of the privilege (the employee in question) "has made extensive disclosures concerning communications between himself and his attorneys [the claimants of the privilege] regarding the agreement, and has called the competence of his former attorneys into question," the Subcommittee ruled that the privilege would have been deemed waived by a court, denied the claim, and ordered the attorneys to testify. [221]

More recently, the Senate Permanent Subcommittee on Investigations of the Governmental Affairs Committee denied a claim of attorney-client privilege under unusual circumstances. The Subcommittee was investigating allegations that under the Medicare Secondary Payer (MSP) program insurance companies, including Provident Life and Accident Company (Provident), had failed to comply with their obligations to pay certain claims as the primary payer with Medicare being the secondary payer, which resulted in sizeable overpayments by Medicare. The Subcommittee subpoenaed many documents, including one from Provident which it refused to give upon the ground that it was cloaked by the attorney-client privilege. Provident also argued that the Subcommittee was bound by a ruling to that effect made by a Federal district court in a pending civil suit. In order to prevent the author of the document from testifying before the Subcommittee, Provident sought an injunction from the district court to prevent her testimony. The court denied the injunction, ruling that Provident had failed to allege a case or controversy, that the issue was not ripe for judicial determination, and that Provident had failed to fulfill the equitable requirements for preliminary injunctive relief. The court also noted that its earlier ruling on the attorney-client privilege "which is not of constitutional dimensions, is certainly not binding on the Congress of the United States."[222] Subsequently, the Chairman heard testimony and arguments on the claim in executive session. He noted that "[t]he burden, then, as I see it, is on you as the party claiming the privilege to demonstrate that the privilege exists and to tell us why." On June 15, 1990 the Chairman ruled that Provident had waived any

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219 "Subcommittee on Nuclear Regulation [Senate Committee on Environment and Public Works] Ruling on Claims of Attorney-Client Privilege," to Ms. Billie P. Garde from Chairman John Breaux and Senator Alan K. Simpson, dated July 19, 1989, at pp. 12-13 (Copy on file in the American Law Division, CRS).

220 *Id.* at 14.

221 *Id.* at 15, 18-19.

222 *In the Matter of Provident Life & Accident Co.,* E.D. Tenn., S.D., CIV-1-90-219, June 13, 1990 (per Edgar, J.).

privilege that might have attached to the document in question when it provided the document to the Department of Justice.[223]

This historic congressional practice appears reflective of the widely divergent nature of the judicial and legislative forums. The attorney-client privilege is a product of a judicially developed public policy designed to foster an effective and fair adversary system. The courts view the privilege as a means to foster client confidence and encourage full disclosure to an attorney. It is argued that free communication facilitates justice by promoting proper case preparation.[224] It is also suggested that frivolous litigation is discouraged when, based on full factual disclosure, an attorney finds that his client's case is not a strong one.[225] Of critical importance here is the understanding that the role of attorney-client privilege is designed for, and properly confined to, the adversary process: the adjudicatory resolution of conflicting claims of individual obligations in a civil or criminal proceeding. But the necessity to protect the individual interest in the adversary process is less compelling in an investigative setting where a legislative committee is not empowered to adjudicate the liberty or property interests of a witness. This is the import of those cases which have recognized that "only infrequently have witnesses ... [in congressional hearings] been afforded procedural rights normally associated with an adjudicative proceeding."[226]

Indeed, the suggestion that the investigatory authority of the legislative branch of government is subject to non-constitutional, common law rules developed by the judicial branch to govern its proceedings is arguably contrary to the concept of separation of powers. It would, in effect, permit the judiciary to determine congressional procedures and is therefore difficult to reconcile with the constitutional authority granted each House of Congress to determine its own rules.[227] Moreover, importation of the privileges and procedures of the judicial forum is likely to have a paralyzing effect on the investigatory process of the legislature. Such judicialization is antithetical to the consensus, interest oriented approach to policy development of the legislative process.

Finally, an assertion that the denial of the privilege in the congressional setting would destroy the privilege elsewhere appears neither supported by

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223 See, Hearings before the Senate Permanent Subcomm. on Investigations, Committee on Governmental Affairs, "Health Care Fraud/Medicare Secondary Payee Program," 101st Cong., 2d Sess., July 11 and 12, 1990, at pp. 3-10.

224 See, *e.g.*, *Upjohn v. United States*, 449 U.S., 382, 389 (1981).

225 *Id.*

226 *Hannah v. Larche*, 363 U.S. 420, 425 (1960); see also, *United States v. Fort*, 443 F.2d 670 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971) (rejecting contention that the constitutional right to cross-examine witnesses applied to a congressional investigation).

227 U.S. Const., Art. I, Sec. 5, cl. 2.

experience nor reason. Parliament's rule has not impaired the practice of law in England nor has its limited use here inflicted any apparent damage on the practice of the profession. Congressional investigations in the face of claims of executive privilege or the revelations of trade secrets have not diminished the general utility of these privileges nor undermined the reasons they continue to be recognized by the courts. Moreover, the assertion implies that current law is an impregnable barrier to disclosure of confidential communications when in fact the privilege is, of course, an exception to the general rule of disclosure and, is riddled with qualifications and exceptions, and has been subject as well as to the significant current development of the waiver doctrine. Thus, there can be no absolute certainty that communications with an attorney will not be revealed.[228]

Moreover, with respect to the work-product privilege, it has always been recognized that it is a qualified privilege which may be overcome by a sufficient showing of need. The Supreme Court indicated, in the very case in which it created the doctrine, that "[w]e do not mean to say that all [ ] materials obtained or prepared ... with an eye toward litigation are necessarily free from discovery in all cases."[229] Thus, the courts have repeatedly held that the work product privilege is not absolute, but rather is only a qualified protection against disclosure.[230] As one court has indicated, "its immunity retreats as necessity and good cause is shown for its production in a balance of competing interests."[231]

In fact, because the work product doctrine is so readily overcome when production of material is important to the discovery of needed information, some courts have refused to call the doctrine a privilege. For instance, in *City of Philadelphia v. Westinghouse Corp.*,[232] the court stated that the work product principle "is not a privilege at all; it is merely a requirement that very good cause be shown if the disclosure is made in the course of a lawyer's preparation of a case."

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228 For example, see discussion of difficulties in corporate confidentiality and the development of the doctrine of waiver, in CRS Memoranda, *supra* note 212 at 26-32, 102-107. See also *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971) (In shareholder derivative suits "the availability of the privilege [should] be subject to the right of stockholders to show cause why it should not be invoked in the particular instance.").

229 *Hickman v. Taylor*, 329 U.S. 495, 511 (1974).

230 See, *e.g.*, *Central National Insurance Co. v. Medical Protective Co. of Fort Wayne, Indiana*, 107 F.R.D. 393, 395 (E.D. Mo. 1985); *Chepanno v. Champion International Corp.*, 104 F.R.D. 395, 396 (D. Or. 1984); *American Standard, Inc. v. Bendix Corp.* 71 F.R.D. 443, 446 (W.D. Mo. 1976).

231 *Kirkland v. Morton Salt Co.*, 46 F.R.D. 28, 30 (N.D. Ga. 1968).

232 210 F.Supp. 483, 485 (E.D. Pa. 1962), *cert. denied sub. nom. General Electric Co. v. Kirkpatrick*, 372 U.S. 943 (1963).

(b) Requirements for Assertion of the Attorney-Client Privilege

In making the assessment whether to accept a claim of attorney-client privilege, committees often have reference to whether a court would accept the claim had it been in that forum. This section and those that follow detail the judicial requirements for a proper assertion of the claim, how the privilege may be waived, and circumstances under which it may not be claimed at all.

Although the attorney-client privilege today is seen to rest on the theory that encouraging clients to make the fullest disclosure to their attorneys enables them to act more effectively, justly, and expeditiously, and that these benefits outweigh the risks posed by not allowing full disclosure in court,[233] even its leading proponent, Dean Wigmore, concedes the unverifiability of the assumption and advises that its use be strictly limited.

> Its benefits are all indirect and speculative, its obstruction is plain and concrete...It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.[234]

The courts have heeded Wigmore's admonition.[235]

One important manifestation of the judicial policy of strict confinement is the universal recognition that the burden of establishing the existence of the privilege rests with the party asserting the privilege.[236] Moreover, blanket

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233 *Fisher v. United States*, 425 U.S. 391 (1976).

234 8 Wigmore, *Evidence,* §2291 at 554 (McNaughton rev. 1961).

235 *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 451 (6th Cir. 1983). *See also, In re Shargel*, 742 F.2d 61, 62 (2d Cir. 1984); *U.S. v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983); *U.S. v. Goldfarb*, 328 F.2d 280 (6th Cir.) *cert denied* 370 U.S. 976 (1964).

236 *See, e.g., In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 450-51 (6th Cir. 1983); *U.S. V. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983); *In re Grand Jury Witness (Salas)*, 695 F.2d 359, 362 (9th Cir. 1982); *In fe Walsh*, 623 F.2d 489, 493 (7th Cir.), *cert denied*, 449 U.S. 994, 101 S. Ct. 531, 66 L.Ed. 2d 291 (1980); *Liew v. Breen* 640 F. 2d 1046, 1049 (9th Cir. 1981); *United States v. Stern* 511 F.2d 1364, 1367 (2nd Cir. 1975); *United States v. Landof* 591 F.2d 36, 38 (9th Cir. 1978); *In re Grand Jury Empaneled February 14, 1978 (Markowitz)*, 603 F.2d 469, 474 (3d Cir. 1979); *United States v. Hodgson*, 492 F.2d 1175 (10th Cir. 1974); *United States v. Tratner*, 511 F.2d 248, 251 (7th Cir. 1975); *United States v. Demauro*, 581 F.2d 50, 55 (2d Cir. 1978); *United States v. Ponder*, 475 F.2d 37, 39 (5th Cir. 1973); *United States v. Bartlett*, 449 F.2d 700, 703 (8th Cir. 1971), *cert. denied*, 405 U.S. 932 (1972); *In re Application of John Doe, Esq.*, 603 F.Supp. 1164, 1166 (E.D.N.Y. 1985); *In re Grand Jury Subpoena December 18, 1981*, 561 F.Supp. 1247, 1251 (E.D.N.Y. 1981).

assertions of the privilege have been deemed "unacceptable"[237], and are "strongly disfavored."[238] The proponent must conclusively prove each element of the privilege. Thus a claimant must reveal specific facts which would establish that the relationship was one of attorney and client. Conclusory assertions are insufficient. And it must demonstrate that the privilege has not expressly or impliedly waived.

Finally, it should be noted that the assertion that the disclosure of privileged material to a congressional committee would waive the privilege in any future litigation was specifically considered, and rejected, by the D.C. Circuit Court of Appeals in *Murphy v. Department of the Army*.[239] Indeed, there appears to be no case holding otherwise and several which have followed *Murphy*.[240]

(c) Waiver of the Attorney-Client Privilege

Because of the privilege's inhibitory effect on the truth-finding process and its impairment of the public's "right to every man's evidence,"[241] modern liberal discovery rules have taken a narrow view of the privilege.[242] This tendency toward limiting the privilege is most clearly manifested in the strict standard of waiver.[243] Thus the voluntary disclosure of privileged information, whether by the client or the attorney with the client's consent, waives the privilege[244] because it destroys the confidentiality of a communication and thereby undermines the justification for preventing

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237 *SEC v. Gulf and Western Industries, Inc.*, 518 F.Supp. 675, 682 (D.D.C. 1981).

238 *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 454 (6th Cir. 1983); *U.S. v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983); *In re Grand Jury Witness (Salas)*, 695 F.2d 359, 382 (9th Cir. 1982); *U.S. v. Davis*, 636 F.2d 1028, 1044 n. 20 (5th Cir. 1981); *U.S. v. Cromer*, 483 F.2d 99, 102 (9th Cir. 1973); *Colton v. U.S.*, 306 F.2d 633, 639 (2d Cir. 1962).

239 613 F.2d 1151, 1155 (D.C. Cir. 1979).

240 See, *In re Sunrise Securities Litigation*, 109 Bankr. 658, 1990 U.S. Dist. Lexis 168, U.S.D.C. E.D.Pa., Jan. 9, 1990; *In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel*, 9 E.B.C. 1929, 1987 U.S. Dist. Lexis 10912, U.S.D.C. N.D. Ill.

241 8 J. Wigmore §2192, at 70.

242 *Magida ex rel. Vilcon Detinning Co. v. Continental Can Co.*, 12 F.R.D. 74, 77 (S.D.N.Y. 1951).

243 See, *e.g.*, *Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981); *United States v. AT & T Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

244 8 J. Wigmore, §2327, at 632-39.

compelled disclosures.[245] Waiver need not be express,[246] nor is it necessary that the client waive the privilege knowingly.[247] Waiver may be evidenced by word or act,[248] but may be inferred from a failure to speak or act when words or action would be necessary to preserve confidentiality.[249] Courts regularly hold that the privilege is waived as to the material disclosed when the client or his attorney deliberately discloses the contents of a privileged communication, such as when answering interrogatories, testifying in court or at examination before trial, submitting affidavits or pleadings to the Court, or in transacting business with a third party.[250]

Furthermore, the courts have held that less than full disclosure will often cause a waiver, not only as to disclosed communications, but also as to communications relating to the same subject matter that were not themselves disclosed.[251] By partial disclosure, the client may be voluntarily waiving the privilege as to that which he considers favorable to his position, but attempting to invoke the privilege as to the remaining material, which he considers unfavorable.[252] Selective assertion or disclosure usually involves a material issue in the proceeding, and there is a great likelihood that the information disclosed is false or intended to mislead the other party.[253] Thus, pleading an "advice of counsel" defense, which puts the attorneys advice in issue,[254] has

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245 *United States v. AT & T Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980); *In re Horowitz*, 482 F.2d 72, 82 (2d Cir.) *cert. denied*, 414 U.S. 867 (1973).

246 *Blackburn v. Crawford*, 70 U.S. (3 Wall.) 175, 194 (1965).

247 *In re Grand Jury Investigation of Ocean Transp.*, 604 F.2d 672 (D.C. Cir.), *cert. denied*, 444 U.S. 915 (1979).

248 *Magida ex rel. Vulcan Determining Co. v. Continental Can Co.*, 12 F.R.D. 74, 77 (S.D.N.Y. 1951).

249 *Id.*

250 8 J. Wigmore, §2327.

251 *Teachers Ins. & Annuity Assn. of America v. Shamrock Broadcasting Co.*, 521 F.Supp. 638, 641 (S.D.N.Y. 1981); *R.J. Hereley & Sons Co. v. Stotler & Co.*, 87 F.R.D. 358, 359 (N.D. Ill. 1980); *Hercules, Inc. v. Exxon Corp.*, 434 F.Supp. 136, 156 (D. Del. 1977); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1161-62 (D.S.C. 1974).

252 *Perrigrion v. Bergen Brunswick Corp.*, 77 F.R.D. 455, 461 (N.D. Calif. 1978); *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 156 (D. Eel. 1977); *Duplan v. Deering Milliken*, 397 F.Supp. 1146, 1161-62 (D.S.C. 1974); *IT &T v. United Tel. Co.*, 60 F.R.D. 177, 188-86 (M.D. Gla. 1973).

253 *United States v. Aronoff*, 466 F.Supp. 855, 862 (S.D.N.Y. 1979).

254 *E.g., United States v. Woodall*, 438 F.2d 1317, 1323-24 (5th Cir. 1970), *cert. denied*, 403 U.S. 933 (1971); *Transworld Airlines v. Hughes*, 332 F.2d 602, 615 (2d Cir.

(continued...)

been held to waive the privilege as to all communications relating to that advice. The rationale for the subject matter waiver rule is one of fairness. Professor Wigmore has stated the principle as follows: "[W]hen [the client's] conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. It is therefore designed to prevent the client from using the attorney-client privilege offensively, as an additional weapon."

The courts also have severely limited the attorney-client privilege through the development of an implied waiver doctrine. Thus where a client shares his attorney-client communications with a third party, the communications between attorney and client are no longer strictly "confidential", and the client has waived his privilege over them.[255] Even if the client attempts to keep communications confidential by having the third party agree not to disclose the communications to anyone else the courts will still consider "confidentiality" between attorney and client breached and the communication no longer privileged.[256] Courts have applied this concept of confidentiality narrowly to prevent corporations from sharing an attorney-client communication with an ally and then shielding the communication from a grand jury or adversary.[257] As a general rule, courts also apply the waiver rule to disclosures made to government agencies.[258] Thus a person or corporation who voluntarily discloses confidential attorney-client communications to a government agency loses the right to later assert privilege for those communications.

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[254](...continued)
1964), *cert. dismissed*, 380 U.S. 248 (1965); *Barr Marine Prods. v. Borg-Warner Corp.*, 84 F.R.D. 631, 635 (E.D. Pa. 1979); *Hangards, Inc. v. Johnson & Johnson*, 413 F.Supp. 926, 929 (N.D. Calif. 1976).

[255] *See, e.g., United States v. El Paso Co.*, 682 F.2d 530, 539, 540 (5th Cir. 1982) (documents created with knowledge that independent accountants may need access to them to complete audit waives privilege.); *Permian Corp. v. United states*, 665 F.2d 1214, 1219 (D.C. Cir. 1981)(disclosure of documents to SEC waives privilege); *United States v. Miller*, 660 F.2d 563, 567-68 (5th Cir. 1981)(previous delivery of accounting books to IRS vitiates privilege.); *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 464 (E.D. Mich. 1954)(privilege waived on disclosure to Justice Department).

[256] 8 J. Wigmore, Evidence, §2367 at 636 (McNaughton rev. ed. 1961).

[257] *Permian Corp. v. U.S.*, 665 F.2d 1214, 1221-22 (D.C. Cir. 1981).

[258] *See, e.g., United States v. Miller*, 660 F.2d 563, 567-68 (5th Cir. 1981)(disclosure to IRS); *In re Grand Jury Investigation of Ocean Transp.*, 604 F.2d 672 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 915 (1979)(to Antitrust Div. of Dept. of Justice); *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 585 (N.D. Ill. 1981)(to Dept. of Labor); *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 27 Fed. R. Serv. 2d (Callaghan) 819 (S.D.N.Y. 1979)(to district attorney); *In re Penn. Cent. Commercial Paper Litig.*, 61 F.R.D. 453, 462-64 (S.D.N.Y. 1973)(to SEC); *D'Ippolito v. Cities Serv. Co.*, 39 F.R.D. 610 (S.D.N.Y. 1965)(to Antitrust Div. of Dept. of Justice).

While some lower courts have adopted a "limited waiver" rule, which allows corporations to share their confidential attorney-client communications with agencies such as the SEC without having to waive the privileged status of these documents against other parties,[259] it is a distinctly minority view. The prevailing view, enunciated in decisions of the Second[260], Fourth[261], and District of Columbia Circuits,[262] hold that "if a client communicates information to his attorney with the understanding that the information will be revealed to others, that information, as well as 'the details underlying the data which was to be published', will not enjoy the privilege."[263]

The facts and circumstances of *In re Martin Marietta Corporation*[264] illustrate the strict manner in which the courts have applied the waiver doctrine. In that case a mail fraud defendant sought documents, and the underlying factual details for statements made in them, submitted by his former employer to the United States Attorney and the Department of Defense in its efforts to settle criminal and administrative proceedings then pending against it. The court noted that in a Position Paper to the U.S. Attorney describing why the company should not be indicted, it was asserted: "of those consulted within the Company all will testify that any qualms they had about the arrangement had nothing to do with worries about fraud" and "there is no evidence, testimonial or documentary, that any company officials in the meeting [of November 17, 1983] except Mr. Pollard and his Maxim employees, understood that Maxim had departed from the strict procedures of its IVI contract."[265] The appeals court held that these, and similar disclosures made to the Defense Department in an Administrative Settlement Agreement, waived whatever privilege it had with respect to the submitted documents and their underlying details.

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259 *See, e.g., Diversified Industries v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977); *Byrnes v. IDS Realty Trust Co.*, 85 F.R.D. 679, 687-89 (S.D.N.Y. 1980); *In re Grand Jury Subpoena*, 478 F.Supp. 368, 372-73 (E.D. Wisc. 1979).

260 *In re John Doe Corporation*, 675 F.2d 482 (2d Cir. 1982).

261 *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988); *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984); *In re Grand Jury Proceedings*, 727 F.2d 1352, 1356 (4th Cir. 1984).

262 *In re Subpoena Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984); *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981).

263 *In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988).

264 *Id.*

265 856 F.2d at 623.

(d) Exceptions to the Attorney-Client Privilege

Absent waiver, the attorney-client privilege generally protects from disclosure communications from a client to his lawyer or his lawyer's agent relating to the lawyers rendering of legal advice which was made with the expectation of confidentiality, but not in furtherance of a future crime, fraud, or tort. However, the courts have strictly confined the privilege and developed a number of important qualifications and exceptions.

First, the case law has consistently emphasized that one of the essential elements of the attorney-client privilege is that the attorney be acting as an attorney and that the communication be made for the purpose of securing legal services. The privilege therefore does not attach to incidental legal advice given by an attorney acting outside the scope of his role as attorney. "'Acting as a lawyer' encompasses the whole orbit of legal functions. When he acts as an advisor, the attorney must give *predominantly* legal advice to retain his client's privilege of non-disclosure, not solely, or even largely, business advice."[266]

In order to ascertain whether an attorney is acting in a legal or business advisory capacity the courts have held it proper to question either the client or the attorney regarding the general nature of the attorney's services to his client, the scope of his authority as agent and the substance of matters which the attorney, as agent, is authorized to pass along to third parties.[267] Indeed, invocation of the privilege may be predicated on revealing facts tending to establish the existence of an attorney-client relation.

A further manifestation of the judicial proclivity to confine the scope of the privilege is the general rule requiring disclosure of the fact of employment, the identity of the person employing him or the name of the real party in interest, the terms of the employment, and such related facts as the client's address, occupation or business and the amount of the fee and who paid it.[268] The courts have reasoned that the existence of the relation of attorney and client is not a privileged communication. The privilege pertains to the subject matter and not to the fact of the employment as attorney.

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[266] *Zenith Radio Corp. v. Radio Corp. of America*, 121 F.Supp. 792, 794 (D. Del. 1954) (emphasis supplied); *SCM Corp. v. Xerox Corp.*, 70 FRD 508, 517 (D. Conn. 1976).

[267] *Colton v. U.S.*, 306 F.2d 633, 636, 638 (2d Cir. 1962); *U.S. v. Tellier*, 255 F.2d 441 (2d Cir. 1958); *J.P. Foley & Co., Inc. v. Vanderbilt*, 65 FRD 523, 526-27 (S.D.N.Y. 1974).

[268] *In re Shargel*, 742 F.2d 61, 62 (2d Cir. 1984); *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 451-52 (6th Cir. 1983); *In re Grand Jury Proceedings in Matter of Freeman*, 208 F.2d 1581, 1575 (11th Cir. 1983); *In re Grand Jury Proceedings (Robert Twist, Sr.)*, 689 F. 2d 1351, 1352 (11th Cir. 1982); *Colton v. United States*, 306F.2d 633, 637-38 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *United States v. Pape*, 144 F.2d 778, 783 (2d Cir.), *cert. denied*, 323 U.S. 752 (1944).

Another significant exception to the privilege occurs when a communication between client and attorney is for the purpose of committing a crime or perpetuating a fraud at some future time.[269] The policy reasons for this exception are obvious. Society has an interest in protecting the confidences of a client to his lawyer even concerning already committed crimes, frauds and torts. The harm from nondisclosure is limited because the past event can no longer be prevented. Society also has an interest in protecting the confidence of a client who seeks legal advice about neutral acts. But society has no interest in facilitating the commission of contemplated but not yet committed crimes, torts or frauds. On the contrary, society has every interest in forestalling such acts. Therefore, the attorney-client privilege has been held not to attach to such acts.

VII. RIGHTS OF MINORITY PARTY MEMBERS IN THE INVESTIGATORY PROCESS

The role of members of the minority party in the investigatory oversight process is governed by the rules of each House and its committees. While minority members are specifically accorded some rights (*e.g.*, whenever a hearing is conducted on any measure or matter, the minority may, upon the written request of a majority of the minority members to the chairman before the completion of the hearing, call witnesses selected by the minority, and presumably request documents[270]), no House or committee rules authorize ranking minority members or individual members on their own to institute official committee investigations, hold hearings or to issue subpoenas. Individual members may seek the voluntary cooperation of agency officials or private persons. But no judicial precedent has recognized a right in an individual member, other than the chair of a committee,[271] to exercise the authority of a committee in the context of oversight without the permission of a majority of the committee or its chair.

The question of the nature and scope of the rights of minority party members in the investigatory process came into sharp focus in the 103d Congress. Then, for the first time in over a decade, both Houses and the White House were in the control of one party, while at the same time the Whitewater

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269 See, *e.g.*, *In re John Doe Corporation*, 675 F.2d 482 (2d Cir. 1982); Union *Camp Corp. v. Lewis*, 385 F.2d 143, 144-45 (4th Cir. 1967); *United States v. Bob*, 106 F.2d 37, 40 (2d Cir.), *cert. denied*, 308 U.S. 589 (1939).

270 House Rule XI 2(j)(1); House Banking Committee Rule IV. 4.

271 *Ashland Oil Co., Inc., v. FTC*, 548 F.2d 977, 979-80 (D.C. Cir. 1976), *affirming* 409 F.Supp. 297 (D.D.C. 1976). See also *Exxon v. Federal Trade Commission*, 589 F.2d 582, 592-93 (D.C. Cir. 1978) (acknowledging that the "principle is important that disclosure of information can only be compelled by authority of Congress, its committees or subcommittees, not solely by individual members ..."); and *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 791 (5th Cir. 1979)(refusing to permit two congressmen from intervening in private litigation because they "failed to obtain a House Resolution or any similar authority before they sought to intervene.")

matter began to emerge as a matter of serious political importance. Principal jurisdiction over many of the areas of concern fell within mandates of the House and Senate Banking Committees.

The Ranking Minority Member of the House Banking Committee was particularly aggressive in seeking to obtain documents and testimony from the Office of Thrift Supervision (OTS) and the Resolution Trust Corporation (RTC), the agencies handling the investigation of the failure of the Madison Guarantee Savings & Loan Association and related matters. The agencies refused to turn over what were claimed by the Ranking Minority Member to be key documents and were supported by the chairman of the Banking Committee who directed the agencies not to cooperate on the grounds that no investigation had been authorized by the committee nor were hearings on the matter contemplated. The Ranking Minority Member brought suit to compel disclosure of the documents.[272]

An obstacle to the suit was a 1983 court ruling in *Lee v. Kelley.* [273] There a court held, *inter alia,* that an attempt by Senator Jesse Helms to intervene in the case in order to unseal FBI tapes and transcripts concerning Martin Luther King to enable him to utilize the information as part of the debate on legislation proposing to establish a national holiday commemorating King's birth, would be dismissed as an exercise of the courts "equitable discretion" because Senator Helms' action was an effort to enlist the court in his dispute with fellow legislators. Helms had argued that because no committee hearings were being conducted to inform Senators of facts to justify or defeat the passage of the legislation, he was seeking to fill that void by performing the investigative function the Senate leadership had decided to forego.[274] The district court ruled that "[i]t is not for this court to review the adequacy of the deliberative process of the Senate leadership .... [T]o conclude otherwise would represent an obvious intrusion by the judiciary into the legislative arena. In any event, the proper forum for this [dispute] is the Senate, 'for [i]t would be unwise to permit the federal courts to become a higher legislature where a congressman who has failed to persuade his colleagues can always renew the battle.'"[275]

In an attempt to avoid the adverse consequences of *Lee,* the Ranking Minority Member sought to compel disclosure of the documents under the

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272 *Leach v. Resolution Trust Corporation,* 860 F.Supp 868 (D.D.C. 1994). Unless otherwise indicated, the factual context of the suit is as described in court's opinion and the briefs submitted by the parties.

273 *Lee v. Kelley,* 99 F.R.D. 340 (D.D.C. 1983), *aff'd sub. nom. Southern Christian Leadership Conference v. Kelley,* 747 F.2d 777 (D.C. Cir. 1984),

274 99 F.R.D. at 342.

275 *Id.* at 343. The appeals court affirmed on the ground that Senator Helms lacked standing because he had not asserted any interest protected by the Constitution, and that his complaint was actually with his fellow Senators. 747 F.2d at 779-81.

Freedom of Information Act (FOIA),[276] which explicitly exempts Congress from its withholding provisions, [277] and under the Administrative Procedure Act (APA),[278] alleging that the documents were arbitrarily and capriciously withheld. It was not successful. While finding the claims "technically justiciable",[279] the district court held that it had to invoke the District of Columbia Circuit's doctrine of equitable or remedial discretion and dismiss the claims since this was a case "in which a congressional plaintiff's dispute is primarily with his or her fellow legislators." The court concluded that "[i]t is clear . . . that Representative Leach's complaint derives solely from his failure to persuade his colleagues to authorize his request for the documents in question, and that Plaintiff thus has a clear 'collegial remedy' capable of affording him substantial relief."[280]

Despite the apparent difficulty in obtaining judicial redress, some measure of practical success was achieved as a result of intense public pressure brought to bear by the minority and its supporters on the majority party and the White House. A Justice Department investigation into the handling of the RTC recommendation to the United States Attorney's office for a further criminal investigation was commenced in November 1993; the White House in December, 1993 authorized turning over Whitewater documents to the Justice Department team investigating the handling of the matter; in January 1994 the White House agreed to the appointment by the Attorney General of an independent counsel with broad authority to investigate Whitewater matters; both Houses agreed in principle in March 1994 to hold hearings; and in July and August 1994 hearings were held by the House and Senate Banking Committees. The legal challenge thus may be viewed as part the overall strategy to force public hearings by Congress, although in the long run the precedent established may have virtually foreclosed future resort to the courts under analogous circumstances.

The *Leach* court also suggested that the possibility of a "collegial remedy" for the minority exists, pointing to 5 U.S.C. 2954 under which small groups of members of the House Government Reform and Oversight and Senate Governmental Affairs Committees can request information from executive

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276 5 U.S.C. 552 (1988).

277 See 5 U.S.C. 552(d) stating that "This section is not authority to withhold information from Congress."

278 5 U.S.C. 702, 706 (1988).

279 860 F.Supp. at 871-72.

280 *Id.* at 874-76.

agencies without the need of formal committee action. [281] However, the precise scope and efficacy of this provision is uncertain.

5 U.S.C. 2954 is derived from section 2 of the Act of May 29, 1928,[282] which originally referred not to the current committees generally overseeing government agency operations but their predecessors, the House and Senate Committees on Expenditures in the Executive Departments. The principal purpose of the 1928 Act, embodied in its first section, was to repeal legislation which required the submission to the Congress of some 128 reports, many of which had become obsolete in part, and which, in any event, had no value, served no useful purpose, and were not printed by the House of Representatives.[283]

Section 2 of the 1928 Act contains the language which has been codified in 5 U.S.C. 2954. The legislative history, however, indicates that the purpose of the 1928 Act was not to assert a sweeping right of Congress to obtain any information it might desire from the executive branch. Rather, the aim of the section was far more limited. Thus, the Senate Report stated that its purpose was to make "it possible to require any report discontinued by the language of this bill to be resubmitted to either House upon its necessity becoming evident to the membership of either body."[284] Or, in the words of the House Report: "To save any question as to the right of the House of Representatives to have furnished any of the information contained in the reports proposed to be abolished, a provision has been added to the bill requiring such information to be furnished to the Committee on Expenditures in the Executive Departments or upon the request of any seven members thereof."[285]

It would appear, then, that the scope of 5 U.S.C. 2954 is closely tied to the 128 reports abolished by section 1 of the 1928 legislation.[286] Moreover, the

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281 *Id.* at 876 note 7. 5 U.S.C 2954 provides: " An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee."

282 45 Stat. 996.

283 H.R. Rep. No. 1757, 70th Cong., 1st Sess., pp. 2 - 3 (1928). A study of the Bureau of Efficiency had recommended their elimination. H.R. Rep. 1757, at p. 2; S. Rep. No. 1320, 70th Cong., 1st Sess., p. 1 (1928).

284 S. Rep. No. 1320, *supra*, at 4.

285 H.R. Rep. No. 1757, *supra*, at 1.

286 In codifying Title 5 in 1966, Congress made it clear that it was effecting no substantive changes in existing laws: "The legislative purpose in enacting sections 1-6 of this Act is to restate, without substantive change, the laws replaced by those sections on the effective date of this Act." Pub. L. 89-544, sec. 7(a).

provision lacks a compulsory component. Agency refusals to comply would not be subject to existing contempt processes, and the outcome of a civil suit to compel production on the basis of the provision is problematic despite the *Leach* court's suggestion. Further, the provision applies only to the named committees; thus members of all other committees would still face the *Leach* problem. Finally, even members of the named Committees are still likely to have to persuade a court that their claim is no more than an intramural dispute.

The rules of the Senate provide substantially more effective means for individual minority party members to engage in "self-help" to support oversight objectives than their House counterparts. Senate rules emphasize the rights and prerogative of individual Senators and, therefore, minority groups of Senators.[287] The most important of these rules are those that effectively allow unlimited debate on a bill or amendment unless an extraordinary majority vote to invoke cloture.[288] Senators can use their right to filibuster, or simply the threat of filibuster, to delay or prevent the Senate from engaging in legislative business. The Senate's rules also are a source of other minority rights that can directly or indirectly aid the minority in gaining investigatory rights. For example, the right of extended debate applies in committee as well as on the floor, with one crucial difference: the Senate's cloture rule may not be invoked in committee. Each Senate committee decides for itself how it will control debate, and therefore a filibuster opportunity in a committee may be even greater than on the floor. Also, Senate Rule XXVI prohibits the reporting of any measure or matter from a committee unless a majority of the committee are present, another point of possible tactical leverage. Even beyond the potent power to delay, Senators can promote their goals by taking advantage of other parliamentary rights and opportunities that are provided by the Senate's formal procedures and customary practices such as are afforded by the processes dealing with floor recognition, committee referrals, and the amending process.[289]

VIII. ROLE OF THE OFFICES OF SENATE LEGAL COUNSEL AND HOUSE GENERAL COUNSEL

For almost two decades the offices of Senate Legal Counsel and House General Counsel have developed parallel yet distinctly unique and independent roles as institutional legal "voices" of the two bodies they represent. Familiarity with the structure and operation of these offices and the nature of the support they may provide committees in the context of an investigative oversight proceeding is essential.

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287 See Stanley Bach, Minority Rights and Senate Procedures, Congressional Research Service, Report No. 94-978, December 5, 1994.

288 Senate Rule XIX.

289 See Bach, supra note 287 at pp. 8-11.

A. Senate Legal Counsel

The Office of Senate Legal Counsel[290] was created by Title VII of the Ethics in Government Act of 1978[291] "to serve the institution of congress rather than the partisan interests of one party or another."[292] The Counsel and Deputy Counsel are appointed by the President pro tempore of the Senate upon the recommendation of the Majority and Minority Leaders. The appointment of each is made effective by a resolution of the Senate, and each may be removed from office by a resolution of the Senate. The term of appointment of the Counsel and Deputy Counsel is two Congresses. The appointment of the Counsel and Deputy Counsel and the Counsel's appointment of Assistant Senate Legal Counsel are required to be made without regard to political affiliation. The office is responsible to a bipartisan Joint Leadership Group, which is comprised of the Majority and Minority Leaders, the President pro tempore, and the chairman and ranking minority member of the Committees on the Judiciary and on Rules and Administration.[293]

The Act specifies the activities of the office, two of which are of immediate interest to committee oversight concerns: representing committees of the Senate in proceedings to aid them in investigations and advising committees and officers of the Senate.[294]

(1) Proceedings to Aid Investigations by Senate Committees

The Senate Legal Counsel may represent committees in proceedings to obtain evidence for Senate investigations. Two specific proceedings are authorized.

18 U.S.C. § 6005 provides that a committee or subcommittee of either House of Congress may request an immunity order from a United States district court when the request has been approved by the affirmative vote of two-thirds of the Members of the full committee. By the same vote, a Committee may

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290 A full description of the work of the Office of Senate Legal Counsel and its work may be found in Floyd M. Riddick and Alan S. Frumin, Riddick's Senate Procedure, S.Doc. No. 28, 101st Cong., 2d Sess. 1236 (1992).

291 Pub. L. No. 95-520, secs. 701 *et seq.*, 92 Stat. 1824, 1875 (1978), *codified principally in* 2 U.S.C. secs. 288, *et seq.*

292 S.Rep. No. 95-170, 95th Cong., 2d Sess. 84 (1978).

293 2 U.S.C. 288(a) and (b), 288a.

294 In addition, the Office is called upon to defend the Senate, its committees, officers and employees in civil litigation relating to their official responsibilities or when they have been subpoenaed to testify or to produce Senate records; and to appear for the Senate when it intervenes or appears as amicus curiae in lawsuits to protect the powers or responsibilities of the Congress.

direct the Senate Legal Counsel to represent it or any of its subcommittees in an application for an immunity order.[295]

The Senate Legal Counsel may also be directed to represent a committee or subcommittee of the Senate, and also the Office of Senate Fair Employment Practices,[296] in a civil action to enforce a subpoena. Prior to the Ethics in Government Act of 1978, subpoenas of the Senate could be enforced only through the cumbersome method of a contempt proceeding before the bar of the Senate or by a certification to the United States attorney and a prosecution for criminal contempt of Congress under 2 U.S.C. §§ 192, 194. The Ethics Act authorizes a third method to enforce Senate subpoenas, through a civil action in the United States District Court for the District of Columbia.[297] The House chose not to avail itself of this procedure and this enforcement method applies only to Senate subpoenas. Senate subpoenas have been enforced in several civil actions. See, for example proceedings to hold in contempt a recalcitrant witness in the impeachment proceedings against Judge Alcee L. Hastings[298] and proceedings to enforce a subpoena *duces tecum* for the production of diaries of Senator Bob Packwood.[299]

The statute details the procedure for directing the Senate Legal Counsel to bring a civil action to enforce a subpoena. In contrast to an application for an immunity order, which may be authorized by a committee, only the full Senate by resolution may authorize an action to enforce a subpoena.[300] The Senate may not consider a resolution to direct the Counsel to bring an action unless the investigating committee reports the resolution by a majority vote. The statute specifies the required contents of the committee report; among other matters, the committee must report on the extent to which the subpoenaed party has complied with the subpoena, the objections or privileges asserted by the witness, and the comparative effectiveness of a criminal and civil proceeding.[301] A significant limitation on the civil enforcement remedy is that it excludes from its coverage actions against officers or employees of the federal government

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295 2 U.S.C. 288b(d),(e), 288f.

296 2 U.S.C. 1207(f).

297 The procedure for applying for an immunity order is detailed, *supra*, at notes 47-56 and accompanying text.

298 See S.Rep. No. 98, 101st Cong., 1st Sess. (1989).

299 See, *Senate Select Committee on Ethics v. Packwood,* 845 F.Supp 17 (D.D.C. 1994), *petition for stay pending appeal denied,* 114 S.Ct. 1036 (1994).

300 2 U.S.C. 288d and 28 U.S.C. 1365.

301 See R.Rep. No. 98, 101st Cong., 1st Sess. (1989).

acting within their official capacities. Its reach is limited to natural persons and to entities acting or purporting to act under the color of state law.[302]

(2) Advice to committees and officers of the Senate and other duties.

The Ethics Act details a number of advisory functions of the Office of Senate Legal Counsel. Principal among these are the responsibility of advising officers of the Senate with respect to subpoenas or requests for the withdrawal of Senate documents, and the responsibility of advising committees about their promulgation and implementation of rules and procedures for congressional investigations. The office also provides advice about legal questions that arise during the course of investigations.[303]

The Act also provides that the Counsel shall perform such other duties consistent with the non-partisan purposes and limitations of Title VII as the Senate my direct.[304] Thus in 1980 the Office was used in the investigation relating to Billy Carter and Libya and worked under the direction of the chairman and vice-chairman of the subcommittee charged with the conduct of that investigation.[305] Members of the Office have also undertaken special assignments such as the Senate's investigation of Abscam and other undercover activities,[306] the impeachment proceedings of Judge Harry Claiborne,[307] Judge Walter L. Nixon, Jr.,[308] and Judge Alcee L. Hastings, Jr., [309] and the confirmation hearings of Justice Clarence E. Thomas.

In addition, the Counsel's office provides information and advice to Members, officers and employees on a wide range of legal and administrative matters relating to Senate business. Unlike the House practice, the Senate Legal Counsel plays no formal role in the review and issuance of subpoenas. However, since it may become involved civil enforcement proceedings, it has welcomed the opportunity to review proposed subpoenas for form and substance prior to their issuance by committees.

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302 See, *Senate Select Committee on Ethics v. Packwood*, 845 F.Supp 17 (D.D.C. 1994), *petition for stay pending appeal denied*, 114 S.Ct. 1036 (1994).

303 2 U.S.C. 288g(a)(5) and (6).

304 2 U.S. 288g(c).

305 See S.Rep. No. 1015, 96th Cong., 2d Sess. (1980).

306 See S.Rep. No. 682, 97th Cong., 2d Sess. (1982).

307 See S.Rep. No. 812, 99th Cong., 2d Sess. (1986).

308 See S.Rep. No. 164, 101st Cong., 1st Sess. (1989).

309 See S.Rep. No. 164, 101st Cong., 1st Sess. (1989).

B. House General Counsel

A non-statutory office, the House General Counsel has evolved in an ad hoc, incremental manner since the mid-1970's, from its historic role as a legal advisor to the Clerk of the House on a range of administrative matters that fell within the jurisdiction of the Clerk's office, to that of lawyer for the institution. At the beginning of the 103d Congress it was made a separate House office, reporting directly to the Speaker, charged with the responsibility "of providing legal assistance and representation to the House."[310] However, as a consequence of administrative restructuring at the start of the 104th Congress, the Office was again placed in the Clerk's Office. While the function and role of the House General Counsel and the Senate Legal Counsel with respect to oversight assistance to committees and protection of institutional prerogatives are similar,[311] there are significant differences that need be noted.

The General Counsel and the Deputy General Counsel are appointed by the Speaker and serve at his pleasure. Traditionally the General Counsel has tendered his resignation to a new incoming Speaker. Authorization for actions by the General Counsel to represent the interests of the House in court is often given by the Joint Leadership Group, consisting of the Speaker, Majority Leader, Majority Whip, Minority Leader and Minority Whip.[312] On other occasions, the Office will act pursuant to the direction of the majority leadership or the Speaker alone.[313]

Unlike the Senate, subpoenas may only be issued over the seal of the Clerk of the House. In practice, committees work closely with the General Counsel in drafting subpoenas and every subpoena issued by a committee or officer is reviewed by the Office for substance and form. Similarly, in the absence of civil enforcement authority, committees often seek the assistance of the General Counsel in navigating the statutory contempt process in instances of witness non-compliance with a subpoena which may culminate in a floor proceeding to authorize a contempt citation. For example, during a committee investigation into the real estate holdings in the United States of the Philippines President Ferdinand E. Marcos and his wife, two brothers who allegedly assisted the Marcos's in their dealings were called to testify. They declined to answer numerous questions, claiming attorney-client privilege. The General Counsel

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310 See H.Res. 5, sec. 11, 139 Cong. Rec. H5 (daily ed. Jan. 5, 1993).

311 Thus, like the Senate Legal Counsel, the House General Counsel may be called upon to defend the House, its committees, officers, and employees in civil litigation relating to their official responsibilities, or when they have been subpoenaed to testify or to produce House records (see House Rule 50); and to appear for the House when it intervenes or appears as amicus curiae in lawsuits to protect the powers or responsibilities of the Congress.

312 See, *e.g.*, *U.S. v. McDade*, 28 F.3d 283 (3th Cir. 1994).

313 See, *e.g.*, *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994).

was called in to evaluate the claims and to render an opinion whether contempt proceedings would be appropriate. His findings served as the basis for the resolution passed by the House holding the brothers in contempt.[314]

Like the Senate Legal Counsel's office, the House General Counsel's office devotes a large portion of its time rendering informal advice to individual members and committees. Unlike its Senate counterpart, however, the General Counsel will often provide formal advice in the form of memorandum opinions[315] and, at times, testimony at hearings.[316]

Finally, the Office also takes on special tasks as, for example, when the deputy general counsel served as special counsel to the joint committee investigation the Iran-Contra affair and played an active role in establishing procedures for the investigation.

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[314] See, 132 Cong. Rec. 3036-38 (1986).

[315] See, e.g., 131 Cong. Rec. 25793-95 (1985)(opinion on the constitutionality of the Competition in Contracting Act.)

[316] See, *e.g.*, Hearings, "Environmental Crimes at the Rocky Flats Nuclear Facility", before the Subcommittee on Investigation and Oversight, Committee on Science, Space and Technology, 101st Cong., 2d Sess. 1645-67 (1992) (Statement of Deputy General Counsel Charles Tiefer on requiring the President to claim executive privilege.)

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DoD 5220.22-M

INDUSTRIAL SECURITY MANUAL FOR SAFEGUARDING CLASSIFIED INFORMATION

DEPARTMENT OF DEFENSE
JANUARY 1991

SECTION 2. GENERAL REQUIREMENTS

1-200. General. Contractors are responsible for protecting all classified information to which they have access or custody. In furtherance of this requirement, the contractor shall comply with the general provisions set forth in this Section.

1-201. Facility Security Officer (FSO). The contractor (senior management officials) has the primary responsibility for ensuring that classified information entrusted to the facility is properly safeguarded. This responsibility cannot be delegated, however, the contractor can delegate authority to a cleared employee to perform security control functions and to implement and enforce the facility's industrial security program. In furtherance of this requirement, the contractor shall appoint a U.S. citizen employee, who is required to be cleared as part of the facility clearance (FCL), to supervise and direct security measures necessary for the proper application of U.S. Government furnished guidance or specifications for classification, downgrading, upgrading, and for safeguarding classified information. The facility security officer (FSO), or those otherwise performing security duties, shall complete security training as specified in Chapter 3 and as deemed appropriate by the cognizant security office (CSO).

1-202. Standard Practice Procedures. The contractor shall prepare and maintain written standard practice procedures (SPP) that implement the requirements of this Manual which are applicable to the classified operations in each of its cleared facilities. The SPP shall be sufficient in scope to provide cleared employees with the procedures necessary to ensure the safeguarding of classified information consistent with their involvement with classified information. The SPP will be reviewed by the CSO to determine if it adequately implements the requirements of this Manual to safeguard the classified information entrusted to the contractor. The contractor shall modify the SPP on notification from the CSO that it does not adequately implement the requirements of this Manual. The SPP shall be revised as necessary due to changes in the contractor's involvement with classified information. The SPP shall be revised within 4 months after receipt of a revision to this Manual that affects the contractor's procedures for safeguarding classified information. A copy of the SPP shall be furnished to the CSO upon request.

a. Multiple facility organizations (MFO's), or collocated parent-subsidiary facilities, may publish a consolidated SPP applicable throughout the organization, but it shall then be adapted as necessary to adequately address the requirements of this Manual at each operating location. A copy of the SPP shall be furnished to the appropriate CSO upon request.

b. The SPP for a facility at which only one employee or management official is assigned shall provide for the notification to the CSO of the death or incapacitation of that employee. Specifically, such an SPP shall:

(1) identify by name, address, and telephone number, the individual who will notify the CSO of such an occurrence (this individual does not require access to classified information and need not be cleared); and

(2) include provisions for keeping the CSO advised of the current combination to the security container, or in the case of an MFO, include provisions for keeping the home office FSO advised of the current combination to the container.

1-203. Security Clearance Requirements. Contractors shall be responsible for the following in connection with security clearances.

a. Initiate clearance action for certain management personnel, such as, owners, officers, directors, partners, regents, trustees, and executive personnel (OODEPs), as advised by the CSO.

b. Maintain a current list of all OODEPs, and furnish a copy to the CSO. The list shall designate by name those individuals granted a clearance, those who are being

processed for a clearance, and those who have been excluded from access to classified information. Such a list shall be signed by an OODEP of the facility.

c. Establish a system to limit the number of employees processed for a clearance to a minimum, consistent with contractual obligations.

d. If notified, in writing, by the DIS that the personnel clearance of any cleared employee has been denied, suspended, or revoked, the contractor shall promptly preclude access to classified information by the affected individual. A case-by-case evaluation of the assigned duties and responsibilities of such affected individuals shall be undertaken to determine whether functional or physical reassignment will be necessary. When a personnel clearance has been denied or revoked, application for a new clearance may not be made until one year after the date of denial or revocation.

e. Exclude from those parts of their plants, facilities, or sites where classified work is being performed, any employee whom the Head of a User Agency concerned, or his or her authorized representative, in the interest of security, may designate in writing. Exclusion does not mean that the affected employee must be dismissed or denied employment in another part of the plant, facility, or site. This should be resolved consistent with normal employer-employee arrangements, agreements or applicable collective bargaining contracts.

f. Require each employee, who is an applicant for a personnel clearance and who claims U.S. citizenship, to produce proof of citizenship.

g. Require all cleared employees to promptly notify the contractor if (i) a member of the employee's, or his or her spouse's, immediate family takes up residence in a Designated country; or (ii) through marriage, he or she acquires relatives who are citizens or residents of a Designated country.

h. Require all cleared employees to notify the contractor immediately of (i) any personal exchange with nationals or representatives of Designated countries; (ii) intended travel to or through a Designated country, (iii) planned attendance at any meeting, regardless of the geographic location, when it can be anticipated that representatives of Designated countries will participate or be in attendance; or (iv) plans to host a visit by representatives of Designated countries. Contractors shall administer a Defense Security Briefing to such employees.

i. Require all cleared employees to notify the contractor immediately if they become a Representative of a Foreign Interest.

j. Advise supervisory and managerial personnel of their responsibilities for notifying the FSO of the existence of any adverse information coming to their attention concerning any cleared employee.

k. Fully cooperate with representatives of DIS or other federal investigative agencies during official inspections, investigations concerning the handling of classified information, and during the conduct of personnel security investigations of present or past employees. This includes providing suitable arrangements within the facility for conducting private interviews with employees during normal working hours, making employment and security records available for review, on request, and otherwise rendering necessary assistance.

1-204. Agreements with Foreign Interests. Contractors shall establish procedures to ensure compliance with the Department of State's International Traffic in Arms Regulation (ITAR) (Parts 124 and 125) before executing any agreement or arrangement with a foreign interest that involves transmitting U.S. classified information abroad. Prior to the execution of such agreements, review and approval is required by the State Department and release of the classified information must be approved by the cognizant User Agency. Failure to comply with Federal licensing requirements may render a contractor ineligible for a facility clearance.

1-205. Security Training and Briefings. Contractors are responsible for advising all

court, amount and complainant, or attach a copy of the garnishment order); the name and telephone number of the individual to contact for further information regarding the matter; and the signature, typed name and title of the individual submitting the report. If the individual is employed on a User Agency installation, a copy of the report shall be furnished to the Commander or Head of that installation. Furthermore, the contractor shall also notify such UA installations of the favorable resolution of the reported information after DISCO so notifies the contractor via letter. **NOTE:** In two court cases, Becker vs. Philco and Taglia vs. Philco (389 U.S. 979), the U.S. Court of Appeals for the 4th Circuit decided on February 6, 1967, that a contractor is not liable for defamation of an employee because of reports made to the Government pursuant to the requirements of this Manual.

b. **Change in Employee's Status.** Contractors shall report (i) the death; (ii) a change in name; (iii) the termination of employment; (iv) a layoff or leave of absence for an indefinite period, or for a prescribed period in excess of 1 year; and (v) residence or assignment outside the U.S., Puerto Rico, Guam, or the Virgin Islands for a period in excess of 90 consecutive days during any 12-month period, for cleared employees. Such changes shall be reported by submission of a DISCO Form 562, "Personnel Security Clearance Change Notification."

c. **Relationships in Designated Countries.** Contractors shall submit a report of a cleared employee who, through marriage, acquires relatives who are citizens or residents of a Designated country, or if a member of the employee's, or his or her spouse's, immediate family takes up residence in a Designated country.

d. **Representative of a Foreign Interest.** Any cleared employee, who becomes a representative of a foreign interest (RFI) or whose status as an RFI is materially changed.

e. **Changed Intention and Foreign Residence or Assignment of Intending Citizens.** A report of: (i) residence, the assignment or a visit of an intending citizen outside the U.S. in excess of 90 consecutive days, or (ii) a change in the intentions of an intending citizen to reside permanently in the U.S. and to become a U.S. citizen as soon as becoming eligible. These circumstances negate the basis on which the limited access authorization (LAA) was issued, and the LAA will be administratively terminated without prejudice on receipt of the contractor's notification.

f. **Citizenship by Naturalization.** A cleared intending citizen who becomes a citizen through naturalization. Submission of this report shall be made on DISCO Form 562, setting forth in the "Remarks" block: (i) city, county, and state where naturalized; (ii) date naturalized; (iii) court; and (iv) certificate number. On receipt of such a report, DISCO will issue a new Letter of Consent (LOC).

g. **Contact with Designated Country Representatives.** Contact with Designated country nationals or representatives by cleared employees. Reports submitted under this paragraph shall include the employee's full name, clearance status, date and place of birth, a brief description of the projects, including the category of classified information to which the employee had access during the past 2 years. A narrative statement of the circumstances surrounding efforts by a Designated country representative to obtain information from, to compromise the employee or to establish a continuing relationship with the employee, shall be included, as appropriate. For cleared employees assigned overseas, a copy of the report shall be submitted to the Office of Industrial Security, International (OISI). Reports are required for:

(1) any personal exchange with nationals or representatives of Designated countries. This report shall include the name of the national or representative, the Designated country involved, and the circumstances of the exchange to include an indication if it will be continuing.

(2) completed travel to or through a Designated country. This report shall include the countries visited, the dates of the travel, and the employee's statement of the purpose and objective of the travel.

1-302

(3) attendance at an international meeting, regardless of geographical location, where Designated country representatives participated or attended. This report shall identify the meeting attended and the date and location of the meeting.

h. **Employees Desiring Not to Perform on Classified Work.** Evidence that an employee no longer wishes to be processed for a clearance or to continue an existing clearance.

i. **Standard Form (SF) 312.** Refusal by an employee to execute the "Classified Information Nondisclosure Agreement" (SF 312) or to sign the debriefing portion of the SF 312.

1-303. Reports to be Submitted to the CSO. Contractors shall immediately submit a written report to the CSO of any of the following:

a. **Changed Conditions Affecting the Facility Clearance.**

(1) Any change of ownership, including stock transfers that affect control of a corporation.

(2) Any change of operating name or address of the facility(s) covered by the DD Form 441.

(3) Any change to the information which was previously submitted for owners, officers, directors, partners, regents, trustees, or executive personnel, (OODEPs) including, as appropriate, the names of the individuals they are replacing. In addition, a statement shall be made indicating: (i) whether the new OODEPs are cleared, and if so, to what level and when, their dates and places of birth, social security numbers, and their citizenship; (ii) whether they have been excluded from access; or (iii) whether they have been temporarily excluded from access pending the granting of their clearances. A new complete listing of OODEPs need only be submitted at the discretion of the contractor and/or when requested in writing by the CSO.

(4) Action to terminate business for any reason, imminent adjudication or reorganization in bankruptcy, or any change that might affect the validity of the DD Form 441.

(5) Any change which affects the information previously reported by the contractor on the DD Form 441s, "Certificate Pertaining to Foreign Interests." This report shall be made by the submission of a revised DD Form 441s. When submitting a revised DD Form 441s, it is not necessary to repeat answers which have not changed. When entering into discussions or consultations with foreign interests which may reasonably be expected to lead to the introduction or increase of foreign ownership, control or influence, the contractor shall report the details by letter. Additionally, when the contractor is under contract to be sold to a foreign owner or the contractor becomes aware of negotiations for the sale or transfer of securities to a foreign interest, such contract of sale or transfer shall be reported by letter. If the contractor has received a Schedule 13D from the investor, a copy shall be forwarded with the report. A new DD Form 441s shall also be executed whenever advised that the form is required for an official purpose. **NOTE:** Reports made under this paragraph are presumptively proprietary and will be protected from unauthorized disclosure and handled on a strict need-to-know basis. When such reports are submitted in confidence, and so marked, applicable exemptions to the Freedom of Information Act will be invoked to withhold them from public disclosure. In cases where the contractor considers the information to be particularly sensitive or delicate and wishes to further restrict dissemination, the report may be appropriately marked and submitted to the Director, DIS, ATTN: Deputy Director (Industrial Security), 1900 Half Street, S.W., Washington, DC 20324-1700.

b. **Change in Controlled Areas, Vaults, and Strongrooms.** The establishment or any change in the extent or location of closed areas, restricted areas, vaults, or strongrooms created in the facility.

c. **Change in Storage Capability.** Any change in the storage capability that would raise or lower the level of classified information the facility is able to safeguard.

Declassification. The determination that classified information no longer requires, in the interest of national security, any degree of protection against unauthorized disclosure, together with removal or cancellation of the classification designation.

Declassification Event. An event that eliminates the need for continued classification of information.

Defense Transportation System. Military controlled terminal facilities, Military Airlift Command controlled aircraft, Military Sealift Command controlled or arranged sealift and Government controlled air or land transportation.

Department of Defense. The Office of the Secretary of Defense (OSD) (including all boards, councils, staffs, and commands), DoD agencies, and the Departments of Army, Navy, and Air Force (including all of their activities).

Derivative Classification. A determination that information is in substance the same as information currently classified and the application of the same classification markings. Persons who only reproduce, extract, or summarize classified information, or who only apply classification markings derived from source material or as directed by a classification guide, need not possess original classification authority. Persons who apply derivative classification markings shall observe and respect original classification decisions and carry forward to any newly created documents any assigned authorized markings. The declassification date or event that provides the longest period of classification shall be used for information classified on the basis of multiple sources.

Designated Countries. Those countries whose policies are inimical to U.S. interests: Afghanistan, Albania, Angola, Bulgaria, Cuba, Czechoslovakia, Ethiopia, Hungary, Iran, Iraq, Kampuchea (formerly Cambodia), Laos, Libya, Mongolian People's Republic (Outer Mongolia), Nicaragua, North Korea, People's Republic of China (including Tibet), Poland, Rumania, South Yemen, Syria, Union of Soviet Socialist Republics (USSR) (includes Estonia, Latvia, Lithuania, and all other constituent republics, Kurile Islands and South Sakhalin (Karafuto), Vietnam, and Yugoslavia.

Document. Any recorded information, regardless of its physical form or characteristics, including, without limitation, written or printed matter, data processing cards, tapes, charts, maps, paintings, drawing, engravings, sketches, working notes and papers; reproductions of such things by any means or process; and sound, voice, magnetic, or electronic recordings in any form.

Downgrade. A determination that classified information requires, in the interest of national security, a lower degree of protection against unauthorized disclosure than currently provided, together with a changing of the classification designation to reflect a lower degree of protection.

Embedded System. An AIS that performs or controls a function, either in whole or in part, as an integral element of a larger system or subsystem such as, ground support equipment, flight simulators, engine test stands, or fire control systems.

Escort. A cleared employee, designated by the contractor, who accompanies a shipment of classified material to its destination. The classified material does not remain in the personal possession of the escort but the conveyance in which the material is transported remains under the constant observation and control of the escort.

Evaluated Products List (EPL). A documented inventory of equipments, hardware software, and/or firmware that have been evaluated against the evaluation criteria found in DoD 5200.28-STD.

Executive Personnel. Those individuals in managerial positions, other than owners, officers, or directors, who administer the operations of the facility. (This category includes such designations as general manager, plant manager, plant superintendent, or similar designations, and facility security officer.)

Peter Lee Time Line

- On **August 24, 1976**, Peter Lee signed a US Energy Research and Development Administration Security Acknowledgment (form ERDA-15).[1] As a result, Peter Lee has been required to report to his employers all personal and professional contacts with foreign nationals. Contacts include all telephone conversations, letters, facsimiles, e-mail, and personal visits.[2]

- **Since 1976**, Peter Lee has also been required to report all foreign travel. After each trip, Lee was required to complete a Post-Travel Questionnaire, which included the following questions:[3]
    1. Were there any requests from Foreign Nationals for technical information (reports, papers, etc.)?
    2. Were there any attempts made to persuade you into revealing and/or discussing classified information, or to establish a continuing relationship?

- In **October 1976**, Peter Lee was hired to work at Lawrence Livermore National Laboratory as a research physicist specializing in the use of laser power to initiate nuclear reactions.[4]

- **From 1976 to 1991**, Peter Lee did research related to nuclear weapons detonation simulations, including, but not limited to experiments involving the use of laser energy, in the Department of Energy.[5]

- **Between April, 1980, and May, 1997**, Peter Lee traveled to the PRC approximately five times.[6]

- **December 22, 1984 to January 19, 1985 Trip** [7]
    - On January 9, 1985:[8]
        - In Chen Nengkuan's hotel room in Beijing, Chen asked Peter Lee

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[1]DOJ-P.LEE00133

[2]DOJ-P.LEE00133

[3]DOJ-P.LEE00134

[4]DOJ-P.LEE00131

[5]DOJ-P.LEE00133

[6]DOJ-P.LEE00135

[7]DOJ-P.LEE00141 to 00145

[8]DOJ-P.LEE00141 to 00142

for help because China is a poor country.

- Chen had classified questions to ask, and Peter Lee did not have to answer these questions verbally. Peter Lee could nod yes or no.
- Peter Lee knew Chen was asking for classified information.
- Chen drew a diagram of a hohlraum, and Chen asked questions about the drawing.
- Peter Lee answered questions about what the hohlraum looked like and where the capsule or target was located in the hohlraum.
- Peter Lee cannot remember the other questions Chen asked him.
- Peter Lee knew the information was classified when he provided it to Chen.[9]
- Chen told Peter Lee that other PRC scientists would like to talk with him, and asked Peter Lee to meet with them the next day.
- Peter Lee agreed to meet with other PRC scientists on January 10, 1985.

2. On January 10, 1985:[10]
   - Peter Lee was picked up from his hotel in Beijing by a PRC scientist and driven to another hotel.
   - The group of scientists waiting for Peter Lee at the hotel in a small conference room included Chen Nengkuan, Yu Min, Wang Shiji, Tao Zucong, all of the CAEP, and three to five others who Peter Lee could not recall their names.[11]
   - For approximately two hours, Peter Lee answered questions from the group and drew several diagrams.
   - The diagrams included several hohlraum diagrams, which describe the hohlraum design and experimental results.
   - Peter Lee discussed problems the US was having in its nuclear weapons testing simulation program.
   - Peter Lee discussed "at least one portion"[12] of the classified "An Explanation for the Viewing Angle Dependence of Temperature from Cairn Targets" that Peter Lee wrote in 1982 while employed at Lawrence Livermore National Laboratory and was declassified in 1996.
   - Peter Lee knew that when he provided the information in 1985, it was classified.[13]

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[9]DOJ-P.LEE00142

[10]DOJ-P.LEE00142 to DOJ-P.LEE00143

[11]DOJ-P.LEE00143

[12]DOJ-P.LEE00143

[13]DOJ-P.LEE00143

- On **June 3, 1991**, Peter Lee signed a US Department of Defense Information Nondisclosure Agreement (SF-312),[14] in which he agreed that he would never divulge classified information to anyone not authorized to receive it without prior written authorization from the United States.

- **From 1991 to 1998**, Peter Lee was [redacted] involved in a joint US-UK Radar Ocean Imaging project with anti-submarine warfare applications, under the Department of Defense[15]

- On the Foreign Travel Form, filled out **prior to the May 1997** trip, Peter Lee checked the box indicating that he was traveling to the PRC for pleasure, and not for company business or an international conference.[16]

- **Between April 30, 1997, and May 22, 1997**, Peter Lee traveled, via Hong Kong, from the United States to:
    - Guangzhou
    - Shanghai
    - Beijing
    - Chengdu
    - Mianyang
    - And other cities

- **April 30 to May 22, 1997 Trip** [17]
    1. On May 11, 1997:
        - Peter Lee gave a lecture on microwave scattering from ocean waves at the PRC Institute of Applied Physics and Computational Mathematics, Beijing, PRC.
        - During the lecture, Peter Lee provided to PRC scientists information concerning his work on the Radar Ocean Imaging Project.
        - The PRC scientists with IAPCM and CAEP in attendance included:[18]
            - He Xiantu
            - Du Xiangwan
            - Chen Nengkuan

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[14]DOJ-P.LEE00132

[15]DOJ-P.LEE00132

[16]DOJ-P.LEE00135

[17]DOJ-P.LEE00144 to 00145

[18]DOJ-P.LEE00145

    - Yu Min
    - Approximately 25 other scientists, who Peter Lee did not know, nor can he recall their names.
  - When questioned, Peter Lee confirmed that the technology had applications to anti-submarine warfare.
  - Peter Lee showed the audience the image of a surface ship wake, which he had brought from the US to show them.[19]
  - Peter Lee also drew a graph, and showed where to filter data to enhance the ability to locate the ocean wake of a vessel.[20]
  - Peter Lee explained the underlying physics and it applications.
  - Peter Lee erased the graph and took the ship wake image with him, and tore the image to shreds upon exiting the IAPCM.[21]

- During the **June 25, 1997,** interview with [redacted], Peter Lee said that he had paid all his own expenses during his trip to the PRC, and that his trip to the PRC has only been for sightseeing and pleasure.[22] Lee repeated denied that he had any technical or scientific discussions with anyone in the PRC.

- **On August 5 and August 14, 1997**, FBI agents interviewed Peter Lee at Santa Barbara, CA, hotel room. Peter Lee confessed to a number of offenses.[23]

- On **August 5, 1997**, Peter Lee agreed to take a polygraph examination administered by the FBI.[24]

- On **August 14, 1997**, Peter Lee was asked to provide any receipts which would verify that he paid for his May 1997 trip.[25]

- On **August 25, 1997**, in e-mail and facsimile contact with Guo Hong, Peter Lee refers to an "extremely urgent matter."[26] He further asks Guo Hong to furnish receipts with his name and the name of his wife in English indicating that Peter Lee paid for his trip in

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[19]DOJ-P.LEE00145

[20]DOJ-P.LEE00145

[21]DOJ-P.LEE00145

[22]DOJ-P.LEE00135

[23]DOJ-P.LEE00138 - 000139

[24]DOJ-P.LEE00139

[25]DOJ-P.LEE00139

[26]DOJ-P.LEE00140

cash.

- On **September 3, 1997**, Peter Lee provided FBI agents with copies of hotel and airline receipts for the 1997 trip, which indicate that Peter Lee paid in cash to cover the trip expenses.[27] These receipts are false.

- On **September 19, 1997**, [redacted] interviewed [redacted], a Security Representative of the TRW Foreign Travel/Contact Office, responsible for maintaining security clearances.[28]

- On **October 7, 1997**, Peter Lee voluntarily underwent polygraph examinations at the FBI office in Redondo Beach, CA.[29] The three pertinent questions were:
    1. Have you deliberately been involved in espionage against the United States? (Peter Lee reply: No)
    2. Have you ever provided classified information to persons unauthorized to receive it? (Peter Lee reply: No)
    3. Have you deliberately withheld any contacts with any non-U.S. intelligence service from the FBI? (Peter Lee reply: No)

- On **October 7, 1997**, after the polygraph test, the FBI conducted a videotaped interview of Peter Lee.[30] Peter Lee confessed:
    - He had been deceptive.
    - He communicated classified national defense information to representatives of the PRC, knowing that it could be used by the PRC to its advantage.
    - He passed classified national defense information to the PRC twice in 1985.
    - He lied on his post-travel questionnaire in 1997.
    - He did it because the PRC is "such a poor country" and one of the scientists asked for his help.
    - He wanted to bring the PRC's scientific capabilities closer to the United States.

- **On October 14 and 15, 1997**, when FBI agents interviewed Dr. Roy Johnson, Lawrence Livermore National Laboratories Classification Officer, Johnson confirmed that Peter Lee's answers to Chen's questions were classified Secret-Restricted Data in 1985. Johnson also confirmed that the drawing of the hohlraum and the specific discussions,

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[27]DOJ-P.LEE00140

[28]DOJ-P.LEE00135

[29]DOJ-P.LEE00140

[30]DOJ-P.LEE00141

including technical data and hohlraums, were classified Secret-Restricted Data in 1985.[31]

On October 14 and 15, 1997, in discussions with the FBI, Dale Nielsen, Sr, Associate Director Emeritus, LLNL, labeled Yu Min as the "Edward Teller"[32] of the PRC nuclear weapons program.[33] Nielsen noted "the fact that Yu was part of the discussion indicates the high priority the PRC scientists placed on Peter Lee's information, and the technical level of the questions the PRC scientists asked."[34]

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[31]DOJ-P.LEE00144

[32]Edward Teller is considered the most important contributor to the US thermonuclear bomb effort.

[33]DOJ-P.LEE00144

[34]DOJ-P.LEE00144

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unclassified

~~SECRET~~ JD/ses attached

GENERAL COUNSEL OF THE NAVY
WASHINGTON, D. C. 20350-1000

November 19, 1997

MEMORANDUM FOR MR. JOHN DION, ACTING CHIEF
INTERNAL SECURITY SECTION,
CRIMINAL DIVISION,
DEPARTMENT OF JUSTICE

As I discussed earlier this afternoon with Jonathan Shapiro, please find attached a SECRET memorandum concerning the subject of our discussion. As the Department of the Navy official with responsibility for such matters, I concur in the opinions expressed in the memorandum, with which the Vice Chief of Naval Operations also concurs. I look forward to discussing the matter with Mr. Shapiro and other representatives of the Department of Justice tomorrow.

Steven S. Honigman

OPTIONAL FORM 99 (7-90)

FAX TRANSMITTAL # of pages ▶ (2)

To John Dion	From Georgia Osterman
Dept./Agency DoJ	Phone # [redacted]
Fax # [redacted]	Fax # OUSN (ASP)

[redacted] 5099-101 GENERAL SERVICES ADMINISTRATION

MAR-31-2000 FRI 03:29 PM OSD DRI FAX NO. 7036141441 P. 02

ASSISTANT SECRETARY OF DEFENSE
6000 DEFENSE PENTAGON
WASHINGTON, DC 20301-6000

COMMAND, CONTROL, COMMUNICATIONS, AND INTELLIGENCE

SENSITIVE INVESTIGATIVE INFORMATION – CLOSE HOLD

MEMORANDUM FOR SECRETARY OF DEFENSE
DEPUTY SECRETARY OF DEFENSE

FROM: ACTING ASSISTANT SECRETARY OF DEFENSE (C3I)
(Prepared by: COL Dan Baur, DASD(I&S)/IWSCI, 697-9586, 26 Nov 1997)

SUBJECT: Possible Espionage Arrest Update (U) - INFORMATION MEMORANDUM

PURPOSE: (S) To update the SECRETARY on the possible arrest of a DoD contractor on charges of espionage.

DISCUSSION: (S/NF) The FBI advised today that DoJ has granted the US Attorney in LA authority to offer Peter HOONG-YEE LEE a plea agreement. In short, the US Attorney will offer to let Lee plead guilty to violations of Title 18, Section 793 (Gathering, transmitting or losing defense information) and Section 1001 (Fraud and False Statements) in order to avoid being charged under Section 794 (Gathering or delivering defense information to aid a foreign government). Section 794 is the harshest of the espionage related statutes. The offer will be made through Lee's attorneys, and could be made as early as today.

(S/NF) Should Lee decline the offer, the US Attorney will seek an indictment against him for violation of Section 794. The FBI did not know how quickly that would occur, should it be necessary.

(S/NF) The US Attorney will use Lee's alleged passing of Nuclear Weapon Testing information to the Chinese in 1985 as justification for the charges, but will not use his alleged passing of radar imagery research material in 1997. Apparently, the classification status of the research material is still in question.

Previous memoranda to the Secretary are at TABS A and B.

31 Mar 00

This document was declassified by FBI on 31 March 2000.
Troy L. Sullivan, Special Assistant for CI

D000304

DERIVED FROM: Dir FBI Memo, SAB
DECLASSIFY ON: X-1

SECRET/NOFORN

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA Plaintiff, v. PETER LEE, Defendant.	No. CR 97-1181- FILING OF PLEA AGREEMENT (Under Seal)

The United States, through its attorney, Jonathan S. Shapiro, Assistant United States Attorney, Central District of California, hereby files the signed plea agreement for the above-referenced case.

Dated: December 5, 1997

Respectfully submitted,
NORA M. MANILLA
United States Attorney

DAVID C. SCHEPER
Assistant United States Attorney
Chief, Criminal Division

JONATHAN S. SHAPIRO
Assistant United States Attorney

PLEA AGREEMENT

United States v. Dr. Peter Lee,
CR 97-

INTRODUCTORY PARAGRAPH

1. This constitutes the plea agreement that has been offered to you by the United States Attorney's Office for the Central District of California ("this Office") in the above-referenced case. This agreeme is limited to the United States Attorney's Office for the Central District of California and cannot bind any other federal, state or loc prosecuting, administrative or regulatory authorities. This agreement applies only to criminal violations relating to you, except as otherwi set forth. If, after discussing this offer with your attorney, you an your attorney decide to accept this offer, please sign in the spaces provided below. If you do not accept this offer in writing by Decembe 5, 1997 at 5:00 p.m., it is automatically withdrawn. In order to resolve this matter fairly and in a manner that accurately reflects yo conduct, the terms of the agreement are as follows:

PLEA

2. You agree to waive indictment and plead guilty to a two count information in United States v. Peter Lee, No. CR 97-____, charging yo with one count of 18 U.S.C. § 793(d): Transmitting Defense Information, and one count of 18 U.S.C. § 1001: False Statement to Government Agenc

To be guilty of Count One of the information, Transmitting Defens Information, (18 U.S.C. § 793(d), you must admit that between January and continuing to on or about January 30, 1985, (1) while having lawfu possession of information relating to the national defense of the Unit States, (2) you willfully communicated the information to representatives of the People's Republic of China, (3) with reason to believe that the information could be used to the advantage of the People's Republic of China.

To be guilty of Count Two of the information, False Statement to Government Agency, you must admit that you (1) willfully made a false statement about contacts with foreign representatives during a 1997 tr to the People's Republic of China, (2) these false statements were mad in a matter within the jurisdiction of the United States and were material because they related to you continuing to possess a security clearance to work on classified projects for the United States.

MAXIMUM SENTENCE AND RESTITUTION

3. Pursuant to 18 U.S.C. § 793(d), the maximum sentence that the Court can impose for a conviction on Count One is 10 years imprisonment a fine of $250,000, and you must forfeit to the United States any property constituting, or derived from, any proceeds you obtained,

directly or indirectly, from any foreign government. As to Count Two, the maximum sentence that the Court can impose is five years imprisonment, a $250,000 fine, a three year term of supervised release and a mandatory special assessment of $100.

4. If you are placed on supervised release for Count Two following imprisonment and you violate one or more of the conditions o: supervised release, you may be returned to prison for all or part of tl term of supervised release, which could result in your serving a total term of imprisonment greater than the statutory maximum stated above. The Court can also order you to pay the costs of your imprisonment. Y agree to pay your special assessment when you are sentenced.

WAIVER OF STATUTE OF LIMITATIONS

5. As to Count One, you agree to waive any defense based on the statute of limitations. That is, you agree to waive any claim that Count One is barred by the statute of limitations. In exchange, this Office will not charge you with any other conduct related to the conduc referred to in paragraph 11 of this plea agreement.

COUNT ONE: PRE-SENTENCING GUIDELINES

6. As to Count One, because the offense occurred in 1985, the Sentencing Guidelines do not apply as to this Count, and the Cout may, within its discretion, impose any sentence up to and including the statutory maximum.

COUNT TWO: SENTENCING GUIDELINES

7. As to Count Two, you understand that a sentencing guideline range for your case will be determined by the Court pursuant to the Sentencing Reform Act of 1984 at Title 18, United States Code, §§ 3551 through 3742 and Title 28, United States Code, §§ 991 through 998. You further understand that the Court will impose a sentence within that guideline range, unless the Court finds there is a basis for departure because there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.

CONSIDERATION BY THIS OFFICE

8. In exchange for your guilty plea and your complete fulfillmen of all of your obligations under this agreement, this Office agrees:

a. To recommend a two-point reduction in the applicable sentencing guideline offense level for Count Two, pursuant to sentencin guideline 3E1.1, provided you continue to demonstrate an acceptance of

responsibility for this offense by virtue of your conduct up to and including the time of sentencing, and provided you accept the terms of this agreement.

b. "Acceptance of Responsibility" as used herein requires that you make full restitution for any losses caused by the offenses referenced herein, if any, and that to the extent you are unable to do so, you disclose to law enforcement officials the existence and status of all monies, property or assets, of any kind, derived from or acquir as a result of, or used to facilitate the commission of, your illegal activities.

c. The government agrees to recommend that any sentence imposed on Count One and Count Two be served concurrently.

d. At sentencing, the government will make a factual basis regarding your conduct and will recommend a short period of incarceration.

e. This Office will not prosecute you for any further conduct relating to paragraph 11 of this plea offer.

COOPERATION

9. You agree to cooperate fully with this Office, the Federal Bureau of Investigation, and any other federal, state or local law enforcement agency, as directed by this Office. As used in this Agreement, "cooperation" requires you:

a. to respond truthfully and completely to any and all questions or inquiries that may be put to you, whether in interviews, before a grand jury or at any trial(s) or other court proceeding(s);

b. to attend all meetings, grand jury sessions, trials and other proceedings at which your presence is requested by this Office o: compelled by subpoena or court order; and

c. to produce voluntarily any and all documents, records, (other tangible evidence relating to the matters about which this Offic inquires.

Nothing in this agreement requires the government to accept any cooperation or assistance that you may choose to proffer. The decisio: whether and how to use any information and/or cooperation that you provide (if at all) is in the exclusive, reasonable discretion of this Office.

ASSETS

10. In addition to the cooperation set forth herein, you further agree to disclose to law enforcement officials the existence and statu of all monies, property or assets, of any kind, derived from or acquir as a result of, or used to facilitate the commission of, your illegal activities. You further agree not to contest the forfeiture to the government of such items. You further agree not to assist any other individual in contesting those forfeitures on your behalf and agree th there was reasonable cause to seize the aforementioned currency, property or assets. You finally agree to prevent the disbursement of any and all monies, property or assets derived from unlawful activitie if said disbursements are within your direct or indirect control.

STATEMENT OF FACTS

11. You and this Office agree and stipulate to the following statement of facts in support of this plea:

Between on or about January 1 through January 30, 1985, while you were employed at Los Alamos National Laboratories as a research physicist, you traveled to the People's Republic of China. At the time of your visit, you possessed security clearances and had received security briefings that allowed you to do research into classified projects relating to the national defense. During your visit to the People's Republic of China, you were asked by representatives of the People's Republic of China to provide classified information relating t laser plasma physics that had applications to the national defense of the United States of America.

Though you knew this information was classified, though you knew you should not have disclosed this information to the representatives of the People's Republic of China, and though you had reason to believe that the information could be used to the advantage c the People's Republic of China, you willfully communicated the information to the representatives of the People's Republic of China over the course of two days.

Between or about April 30, 1997, to on or about May 22, 1997, while you were employed at TRW, Inc., as a senior scientist, you traveled to the People's Republic of China. At the time of your visit, you possessed security clearances and had security briefings that allowed you to do research into classified projects relating to the national defense. On or about May 27, 1997, after your trip, you were required to file a Post-Travel Questionnaire with your employer's security officer in order maintain your security clearance to work on projects for the United States Department of Defense. On the form, you made a material false statement. Specifically, you falsely stated that

while in the People's Republic of China, there were no requests from foreign nationals for technical information. In fact, you were asked numerous questions for technical information by representatives of the People's Republic of China.

SENTENCING FACTORS

12. The parties agree that as to Count Two, the following Guideline calculations are appropriate, noting that the government wil recommend that any sentence given for Count Two will run concurrently with any sentence given for Count One:

Base Offense Level [U.S.S.G. § 2F1.1]	6
Acceptance of Responsibility [U.S.S.G. § 3E1.1]	-2
Adjusted Total:	4

You understand that neither the United States Probation Office no the Court is bound by the stipulation herein and that the Court will, with the aid of the presentence report, determine the facts and calculations relevant to sentencing. You further understand that both you and this Office are free to supplement these stipulated facts by supplying relevant information to the United States Probation Office, and this Office specifically reserves its right to correct any and all factual misstatements relating to the calculation of your sentence. Y understand that the Court cannot rely exclusively upon the parties' stipulation in ascertaining the factors relevant to the determination your sentence. Rather, in determining the factual basis for the sentence, the Court will consider the stipulation, together with the results of the presentence investigation, and any other relevant information. You understand that if the Court ascertains factors different from those contained in the stipulation, you cannot, for tha reason alone, withdraw your guilty plea.

13. You understand that there is no agreement as to your crimina history or criminal history category.

MUTUAL WAIVER OF APPEAL OF SENTENCE

14. You understand that Title 18, United States Code, Section 37 gives you the right to appeal the sentence imposed by the Court. Acknowledging this, you knowingly and voluntarily waive your right to appeal any sentence imposed by the Court and the manner in which the sentence is determined so long as your sentence is within the applicab

guideline range contemplated in this Agreement.

15. The government likewise agrees to voluntarily waive its righ to appeal any sentence imposed by the Court and the manner in which th sentence is determined so long as the sentence is within the applicabl guideline range contemplated in this Agreement.

WAIVER OF CONSTITUTIONAL RIGHTS

16. You understand that by pleading guilty, you will be giving u the following Constitutional rights: You have the right to plead not guilty, the right to be tried by a jury, or if you wish, and with the consent of the government, to be tried by a judge. At a trial, you would have the right to an attorney and if you could not afford an attorney, the Court would appoint one to represent you. During the trial, you would be presumed innocent and a jury would be instructed that the burden of proof is on the government to prove you guilty beyo a reasonable doubt. You would have the right to confront and cross-examine witnesses against you. If you wished, you could testify on yo own behalf and present evidence in your defense. On the other hand, i you did not wish to testify or present evidence, that fact could not b used against you and a jury would be so instructed. You would also ha the right to call witnesses on your behalf. If you were found guilty after a trial, you would have the right to appeal that verdict to see any errors had been committed during trial that would require either a new trial or a dismissal of the charges. By pleading guilty, you will be giving up all of these rights, except the right to appeal a sentenc pursuant 18 U.S.C. § 3742, with the exceptions noted above. By pleadi guilty, you understand that you may have to answer questions posed to you by the Court both about the rights that you will be giving up and about the facts of this case. Any statements made by you during such hearing would not be admissible during a trial, except in a criminal proceeding for perjury or false statements.

Furthermore, by signing this agreement, appearing before the Cour and pleading guilty, you are also waiving you right to challenge your conviction either on direct or collateral appeal based on any claimed conflict of interest arising out of your attorney's representation of others. By this plea agreement, you acknowledge that you and your lawyer have discussed fully all possible conflicts arising from your lawyer's representation of you in this matter in which you are a party, and your lawyer's representation of others in unrelated cases. and bot of you are in agreement that no such conflict exists, or, if it exists, if is knowingly and intentionally waived by you.

COURT NOT A PARTY

17. You understand that the Court is not a party to this agreeme and the Court is under no obligation to accept this Office's recommendation regarding the sentence to be imposed. Further, if the Court should impose any sentence up to the maximum established by statute, you cannot, for that reason, withdraw your guilty plea, and will remain bound to fulfill all of your obligations, excepted as stat under this agreement. You understand that neither the prosecutor, you attorney, nor the Court can make a binding prediction or promise regarding the sentence you will receive.

NO ADDITIONAL AGREEMENTS

18. Except as expressly set forth herein, there are no additione promises, understandings or agreements between the government and you your counsel concerning any other criminal prosecution, civil litigati or administrative proceeding relating to any other federal, state or local charges that may now be pending or hereafter be brought against you, or the sentence that might be imposed as a result of your guilty plea pursuant to this Agreement. Nor may any additional agreement, understanding or condition be entered into unless in writing and signe by all parties.

If you fully accept each and every term and condition of this Agreement, please sign and have your attorney sign the original and return it to me promptly. The enclosed copy is for your records.

_____
JONATHAN S. SHAPIRO
Assistant United States Attorney
Public Corruption & Government Fraud Section

I have read this agreement and have carefully reviewed every part of it with my attorney. I understand it, and I voluntarily agree to it Further, I have consulted with my attorney and fully understand my rights with respect to the provisions of the Sentencing Guidelines whi may apply to my case. No other promises or inducements have been made to me, other than those contained in this letter. In addition, no one has threatened or forced me in any way to enter into this agreement. Finally, I am satisfied with the representation of my attorney in this matter. Finally, I have talked with my attorney about all possible conflicts. I waive on direct, indirect, or collateral appeal based an claim of conflict of interest. By signing this, I affirm, again, that in the face of possible conflicts to which I was informed by the government and this Court, I discussed the matter with my attorney, chose him to remain my lawyer, and waive any future complaints based o

any conflict argument.

12/5/97
Date

DR. PETER LEE
Defendant

I have carefully reviewed every part of this agreement with my client. Further, I have reviewed with my client the provisions of the Sentencing Guidelines which may apply in this case. In addition, I ha shared the government's concerns about a conflict of interest. To my knowledge, my client's decision to enter into this agreement is an informed and voluntary one as to all aspects of the agreement.

12/5/97
Date

JAMES HENDERSON, ESQ.
Counsel for Defendant

FILED

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Unsealed

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA Plaintiff, PETER LEE, Defendant.	No. CR 97-1181 I N F O R M A T I O N [18 U.S.C. § 793(d): Attempt to Communicate National Defense Information to A Person Not Entitled To Receive It; 18 U.S.C. § 1001: False Statement to Government Agency]

The United States Attorney Charges:

COUNT ONE

[18 U.S.C. § 793(d)]

On or about January 8, 1985, in the People's Republic of China, defendant PETER LEE, now a resident of Los Angeles County, within the Central District of California, having lawful possession of information relating to the national defense of the United States, did willfully attempt to communicate said information to a person not entitled to receive it, namely an

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1 agent of the People's Republic of China, with reason to believe
2 that said information could be used to the advantage of the
3 People's Republic of China.
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COUNT TWO

[18 U.S.C. § 1001]

On or about May 27, 1997, in Los Angeles County, within the Central District of California, defendant PETER LEE knowingly and willfully made false, fictitious, and fraudulent statements and representations as to material facts within the jurisdiction of the United States Department of Defense; specifically, defendant PETER LEE knowingly submitted a Post-Travel Questionnaire with the security officer of his employer, TRW, Inc., in which defendant PETER LEE falsely stated that while visiting the People's Republic of China from on or about April 30, 1997, to on or about May 22, 1997, he was not approached by foreign nationals and asked questions about technical information. In truth and fact, as defendant PETER LEE well knew, he had been repeatedly approached by foreign nationals seeking technical information during his visit to the People's Republic of China.

NORA M. MANELLA
United States Attorney

DAVID C. SCHEPER
Assistant United States Attorney
Chief, Criminal Division

JEFFREY C. EGLASH
Assistant United States Attorney
Chief, Public Corruption & Government Fraud

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December 12, 1997, Friday, Final Edition

SECTION: A SECTION; Pg. A23

LENGTH: 635 words

HEADLINE: Taiwan-Born Scientist Passed Defense Data; Ex-Los Alamos Worker Gave Secrets to China

BYLINE: William Claiborne, Washington Post Staff Writer

DATELINE: LOS ANGELES

BODY:

A Taiwanese-born physicist who had access to classified nuclear secrets while working at the Los Alamos National Laboratory in New Mexico will be sentenced on Feb. 23 after pleading guilty to passing national defense data to Chinese scientists during a 1985 visit to mainland China.

More recently, **Peter H. Lee,** a scientist at TRW Space and Electronics Group in Manhattan Beach, Calif., had been involved in research on the use of satellite radar imaging for locating submarines undersea and tracking their movements, a federal law enforcement source confirmed.

In addition to passing data on simulated nuclear detonations to the Chinese in 1985, Lee admitted he had contact with Chinese agents during a trip to mainland China last April and May during which he addressed scientific groups. Lee admitted he lied about the contacts in a post-trip security form he filed with his employer in which he denied having been approached for technical information, according to the criminal complaint. In fact, Lee was repeatedly approached by Chinese agents seeking technical information, prosecutors said.

It was not clear whether the information Lee had on ocean imaging was classified or not, but technical data on the use of space stations to pinpoint submarines presumably would have anti-submarine warfare intelligence value to the Chinese, who maintain a submarine fleet.

A law enforcement source confirmed that Lee had been invited to attend a classified scientific conference in England last month and speak on radar ocean imaging.

Officials at TRW, including Lee's former boss, Bruce Lake, would not discuss what kind of research the scientist was doing for the firm. A company spokesman said Lee worked for the defense contracting firm in the 1970s, left and returned in 1991. He was dismissed after he entered his guilty plea, the spokesman said.

Lee, 58, who is an expert on laser energy, admitted in federal court here Dec. 8 that while working on laser projects relating to the simulation of nuclear detonations he met with Chinese scientists and provided them with detailed information that he knew was classified.

Lee, who remains free after posting a $ 250,000 property bond, faces a maximum sentence of 15 years in federal prison at his scheduled sentencing before U.S. District Judge Terry J. Hatter. A plea agreement was filed under seal and prosecutors declined to reveal the recommended sentence.

Assistant U.S. Attorney Jonathan S. Shapiro said the information passed by Lee in 1985, although later

declassified, had "important military applications related to nuclear weapons." He declined to elaborate on the nature of Lee's research. Lee, contacted by telephone, refused to comment.

The charge of attempting to communicate national defense information specifies that Lee had "reason to believe that said information could be used to the advantage of the People's Republic of China."

Shapiro said Lee appeared to be motivated more by empathy with China than by money. Although Lee received compensation for travel and accommodation expenses, Shapiro said, "We don't think money was the primary motive. Clearly he had non-financial reasons for doing what he did."

"That doesn't make it any less serious or less criminal," Shapiro added. "This is a case of a scientist passing real information and violating the espionage statutes. It should be a reminder to scientists throughout the country that the oath they take to protect national secrets are serious, and if they violate that oath and we find out, we'll prosecute."

Before arresting Lee, the FBI invoked the Foreign Intelligence Surveillance Act and obtained Attorney General Janet Reno's approval of electronic surveillance and a covert search of the suspect's house, law enforcement sources said.

LOAD-DATE: December 12, 1997

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View Related Topics

May 10, 1999, Monday, Late Edition - Final

SECTION: Section A; Page 1; Column 1; Foreign Desk

LENGTH: 2289 words

HEADLINE: Reports Show Scientist Gave U.S. Radar Secrets to Chinese

BYLINE: By JEFF GERTH and JAMES RISEN

DATELINE: WASHINGTON, May 9

BODY:
A scientist working on a classified Pentagon project in 1997 provided China with secrets about advanced radar technology being developed to track submarines, according to court records and government documents.

Submarine detection technology is jealously guarded by the Pentagon because the Navy's ability to conceal its submarines is a crucial military advantage.

The information about the radar technology, which is considered promising and has been in development for two decades, was divulged to Chinese nuclear-weapons experts during a two-hour lecture in Beijing in May 1997 by **Peter Lee,** an American scientist, court records show. Mr. Lee was then working for TRW Inc., which had been hired by the Pentagon.

Federal prosecutors in Los Angeles wanted to charge Mr. Lee with espionage but were unable to, in part because Navy officials in Washington would not permit testimony about the technology in open court, law-enforcement officials said.

The Justice Department in Washington, having some questions of its own, would not approve the prosecution either, the officials said.

Instead, Mr. Lee ended up pleading guilty to filing a false statement about his 1997 trip to China and to divulging classified laser data to Chinese scientists during an earlier trip to China in 1985.

Despite the failure to prosecute Mr. Lee over the radar technology, the case shows that the scope of Chinese espionage is broader than the assertions of nuclear thefts at the Los Alamos National Laboratory, which officials say involved another American scientist, Wen Ho Lee.

The two men are not known to be related. The submarine technology in the **Peter Lee** case was developed at Lawrence Livermore National Laboratory, a weapons lab in California.

The **Peter Lee** case is also significant because it clearly demonstrates that the American Government believed that China was successfully engaged in espionage -- obtaining American defense secrets -- during President Clinton's second term.

While the Los Alamos disclosures earlier this year prompted an array of investigations, Mr. Clinton, two months ago, said no one had brought suspicions of Chinese espionage to him, and Administration officials initially portrayed the problem as one confined to earlier Administrations.

Today on the NBC News program "Meet the Press," Energy Secretary Bill Richardson acknowledged that there had been espionage by China during the Clinton Administration, but he did not go into detail.

Egregious Mistakes Or Intent to Spy?

The breach involved in the **Peter Lee** case -- code-named Royal Tourist by the F.B.I. -- occurred in 1997, a point made in a classified November 1998 counterintelligence report ordered by and then sent to the White House.

"It was my desire and the desire of my office and the Federal Bureau of Investigation to pursue espionage counts," the prosecutor in the **Peter Lee** case, Jonathan S. Shapiro, said in an interview.

Indeed, at Mr. Lee's sentencing on March 26, 1998, Mr. Shapiro told the judge that Mr. Lee's activities struck at the heart of national security, according to witnesses at the hearing.

But Mr. Lee and his lawyer argued that the Taiwanese-American scientist had simply made egregious mistakes and never intended to help a foreign country or harm the United States. Mr. Lee's lawyer, James Henderson, said in an interview that Mr. Lee never intended to spy and has been hurt by insinuations he did.

The judge declined to put Mr. Lee in prison and sentenced him to 12 months in a halfway house with three years' probation and a fine of $20,000.

Rear Adm. Tom Jurkowsky, a Navy spokesman, said, "The Navy cooperated fully with the F.B.I. from the start to the finish in their investigation." Admiral Jurkowsky declined to comment on whether the Navy prevented prosecutors in the **Peter Lee** case to use information about the anti-submarine warfare technology in open court.

The Justice Department spokesman, Myron Marlin, said: "The matter was handled in a way in which many parties had a chance to make their views known. In a case of this nature, we obviously cannot go into details, but there are often a number of reasons as to why a certain course of action is taken."

The November 1998 counterintelligence report citing the **Peter Lee** case was part of a comprehensive review ordered by President Clinton as part of his effort to improve security at United States weapons laboratories, which are run by the Department of Energy.

That report states that as late as 1997, Mr. Lee had "provided China with classified information."

Samuel R. Berger, Mr. Clinton's national security adviser, was briefed about the **Peter Lee** case by Energy Department intelligence officials in July 1997. Mr. Berger's spokesman, David Leavy, declined to say when President Clinton first learned about Mr. Lee's activities.

Counterintelligence agents from the F.B.I. watched **Peter Lee** from the early 1980's, officials said. But the bureau did not prevent Mr. Lee from traveling to Beijing in 1997 to discuss his work on anti-submarine warfare.

Mr. Lee failed to report his trip to superiors at his company, TRW, who did not know about it until informed by the F.B.I., court records show.

The Justice Department's 1997 decision not to approve the espionage prosecution of Mr. Lee contrasts with some spy cases involving the former Soviet Union or Israel in which ways were found to protect secrets and bring charges.

The 1997 decision not to prosecute came a few months after the Justice Department turned down a request from the F.B.I. to put a covert wiretap on Wen Ho Lee, then a scientist at Los Alamos National Laboratory.

Now Congress and the Justice Department are examining how the Wen Ho Lee case was handled as a result of recent assertions that he transferred more than 1,000 classified files containing a virtual history of American nuclear-weapons development to an unsecure computer system at Los Alamos.

On Thursday, Wen Ho Lee's lawyer, Mark Holscher of Los Angeles, denied any wrongdoing by his client.

The **Peter Lee** case and the investigation of Wen Ho Lee figure in a secret Congressional report soon to be released in part by a committee led by Representative Christopher Cox of California.

Submarine Detection And National Security

The technology at issue in the **Peter Lee** case involves a radar ocean imaging program developed in cooperation with Britain.

The former manager of the program, Richard Twogood, said in an interview that because the project was still in the developmental stage, there was a debate in the Government over its significance.

Some see it as vital to American national security, since submarines and anti-submarine warfare are crucial to the defense of the United States. But others are uncertain about how useful the technology will prove to be, according to Dr. Twogood.

It is also unclear how immediately valuable the submarine-detection technology would have been to the Chinese. China does not have a strong navy and has only a modest submarine fleet, but it has been looking for ways to improve its military power at sea.

Dr. Twogood told the F.B.I. that the information Mr. Lee provided the Chinese in 1997 was "classified and sensitive," court records show.

The radar program seeks to detect the physical traces, briefly left as signatures on water surfaces, of the undersea motions of submarines. Remote sensing devices located, for example, on an airplane pick up the traces. "The Navy has invested a lot in this area for 20 years and so by definition that implies it's important," said Dr. Twogood, currently the deputy associate director for electronic engineering at Lawrence Livermore.

The Soviet Union worked hard to develop this technology during the cold war. Recent American advances suggested that Soviet assertions of success in anti-submarine measures should be taken more seriously, Dr. Twogood told Congress in 1994.

The United States has made considerable efforts over the years to make sure its submarines are difficult to detect. Ballistic-missile submarines form a critical part of the American nuclear arsenal, and are especially valuable because they are extremely difficult to track when submerged. Submarines also are used to attack an enemy's surface ships and submarines and increasingly to launch other long range weapons, like cruise missiles with conventional warheads.

Peter Lee was born in China in 1939. His father was an ardent anti-Communist and moved his family to Taiwan in 1951. They later immigrated to the United States. Mr. Lee became a naturalized citizen in 1975 after graduating from California Institute of Technology with a Ph.D in aeronautics.

From 1976 to 1984, he worked as a physicist in a program at Lawrence Livermore that specialized in the use of laser power to initiate nuclear reactions. In 1985, he moved to Los Alamos, where he worked on the laser program as a contract employee. In January 1985, Mr. Lee met with top Chinese nuclear scientists, where he twice divulged secrets about his laser work and "discussed problems the United States was having in its nuclear weapons testing simulation program," according to court records.

Mr. Lee had traveled to China with a group of scientists at the invitation of a Chinese visitor to his laboratory. Mr. Lee was supposed to act as a translator for the American delegation, according to the

1998 report on threats to the Department of Energy.

Mr. Lee later told the bureau that on or about Jan. 9, 1985, in a Beijing hotel room, a Chinese nuclear-weapons scientist asked for Mr. Lee's help, saying that China was a "poor country." Mr. Lee told the F.B.I., according to court records, that he decided to help because he wanted to bring China's scientific capabilities "closer to the United States."

The Chinese scientist drew a diagram and asked Mr. Lee questions about his laser research, according to court records filed in connection with his sentencing. Mr. Lee said he responded with detailed answers.

The next day, Mr. Lee was picked up at his hotel and driven to another hotel to meet a group of Chinese scientists. He answered their questions for two hours, drawing diagrams and providing specific mathematical and experimental results related to laser fusion research.

The laser fusion research that he gave to the Chinese was declassified by Energy Secretary Hazel O'Leary in 1993, prompting several of Mr. Lee's former colleagues to recommend a lenient sentence to the sentencing judge.

Mr. Lee stayed at Los Alamos until 1991, when he went to the space and electronics group of TRW Inc., in Redondo Beach, Calif. At TRW he worked on the classified radar imaging research program, which was financed by the Pentagon, but managed by Lawrence Livermore.

In 1994 or 1995, Mr. Lee applied for another job at Los Alamos, but the F.B.I., having intensified its investigation of Mr. Lee, warned the Energy Department of its counterintelligence concerns, and, according to one official, Mr. Lee's application was rejected.

In the spring of 1997, Mr. Lee made a three-week trip to China as a paid guest of China's Institute of Applied Physics and Computational Mathematics, which handles the design of China's nuclear weapons, according to an F.B.I. affidavit filed in Mr. Lee's case.

The affidavit was based in part on what it called Mr. Lee's "confession" in interviews with F.B.I. officials from October 1997 to early 1998.

Mr. Lee filed a report with his company, TRW, saying that he planned to travel to China only for sightseeing and pleasure. But before he left, he contacted a Chinese scientist to tell him that he would be giving lectures on laser and nuclear energy at several Chinese institutes, the affidavit states.

Mr. Lee also sent a message that there was another subject that he planned to lecture on and discuss with Chinese scientists, but would only discuss it after he arrived in China.

Navy's Decision To Protect Information

While in Beijing on May 11, 1997, he gave a lecture about his work on the radar ocean imaging project at the Institute of Applied Physics and Computational Mathematics to a group that included Chinese nuclear-weapons scientists.

He was questioned about its applications for anti-submarine warfare, and showed the audience a surface ship wake image that he had brought with him from his lab. After a two-hour, detailed discussion of the physics of his work and its submarine applications, he tore the ship wake image "to shreds" after leaving the meeting, Mr. Lee told the F.B.I., court records show.

After Mr. Lee initially admitted his encounters in China and his false statement about his travel, the United States Attorney's Office in Los Angeles believed it could move forward with an espionage case, law-enforcement officials said. But any indictment required approval from Washington.

A series of meetings and phone calls ensued in the fall of 1997 involving lawyers in Los Angeles and top Justice and Pentagon officials in Washington.

Officials from the Navy took varying positions, but officials said that in the end the Navy refused to let prosecutors disclose information about the submarine detection technology in open court. "The Navy was adamant in protecting the information," said an official.

So Mr. Shapiro, the prosecutor, lacked a crucial component of an espionage case, a witness to testify about the classified nature of the information. He then negotiated a plea bargain. And on Dec. 5, 1997, the United States Attorney's Office filed a two-paragraph criminal information against Mr. Lee in the United States District Court for the Central District of California, ending a 15-year F.B.I. investigation.

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March 13, 1999, Saturday, Late Edition - Final

SECTION: Section A; Page 4; Column 1; Foreign Desk

LENGTH: 871 words

HEADLINE: An Earlier China Spy Case Points Up Post-Cold War Ambiguities

BYLINE: By JAMES BROOKE

DATELINE: LOS ALAMOS, N.M., March 10

BODY:
Within two weeks, **Peter H. Lee,** a Taiwan-born physicist who once worked at the nuclear weapons laboratory here, will complete a one-year sentence to a halfway house in California, winding up a murky case that speaks of the ambiguities surrounding resurfaced suspicions of Chinese espionage.

As Peter Lee returns to normal life, Wen Ho Lee, another Taiwan-born physicist, is starting life in limbo. On Monday, he was dismissed from the Los Alamos National Laboratory for security violations. He has not been charged with any crime.

No relation to each other, the two are linked only by official investigations seeking to determine how China may have gained access to American nuclear secrets. With lab approval, both made trips to China and addressed groups of scientists.

Peter Lee's involvement with China dates back to 1981, Federal prosecutors say, when he began a correspondence with Chinese scientists that mounted to more than 600 letters and e-mail messages by 1997, the year of his arrest.

After his arrest, he pleaded guilty to passing classified national defense information to Chinese scientists on a visit to Beijing in 1985. He also pleaded guilty to lying to a government agency after he described on a security form a May 1997 visit to China as a pleasure trip. In reality, Dr. Lee, then a researcher for an American military contractor, met extensively with Chinese scientists.

"U.S. intelligence analysis indicates that the data provided by Dr. Lee was of significant material assistance to China in their nuclear weapons development program," the Department of Energy said in a presentencing statement submitted last year to Federal District Judge Terry J. Hatter in Los Angeles.

Facing a possibility of 10 years in prison, Dr. Lee pleaded guilty under an arrangement with the court and was sentenced to one year in the halfway house, ordered to pay a $20,000 fine, and to perform 3,000 hours of community service. He lost his security clearance. At the sentencing, Judge Hatter said, 'You cannot leave to a scientist the discretion of what should be classified."

Mr. Lee's lawyer, James Henderson Sr., said in an interview today: "My guy was at a conference of scientists and he ended up talking too much. His offense was tied to information that was subsequently declassified."

Indeed, as part of a sweeping opening of weapons laboratories after the end of the cold war, most of the information that Dr. Lee was accused of giving the Chinese in the 1980's had been declassified by the time of his arrest years later.

"Lee was a little ahead of his time," said Christopher Paine, an arms control specialist for the Natural Resources Defense Council, a public policy group. "Today if he discussed those things, there would be no penalty at all. After the cold war the Department of Energy and the laboratories made a unilateral decision to declassify a large amount of information. Time had overtaken his crime."

In the 1980's, Dr. Lee was one of dozens of American scientists who traveled to China on trips authorized by officials of the laboratory here. Dr. Lee is an expert in using lasers to create fusion, a field that can be used for simulating nuclear explosions, but also for generating electricity through nuclear energy.

A naturalized American citizen, he received his doctorate from California Institute of Technology, and worked at the Los Alamos lab from 1981 to 1987. Now 59, he is expected to return to living full time at his family home in Rancho Palos Verdes, near Los Angeles. Today, he did not return a telephone call left at his family home, and his lawyer said he would not talk to a reporter.

Dr. Lee told the judge that he had been carried away by "scientific enthusiasm."

On his 1997 trip to China, Dr. Lee had discussed his work using satellite radar imaging to track submarines, an area of interest to the Chinese. Dr. Lee was conducting this work for TRW Space & Electronics Group, a Redondo Beach, Calif., company, where he was employed from 1991 until his plea, in December 1997.

By 1997, Dr. Lee was the target of an F.B.I. investigation and agents tailed him in China, wiretapped his telephones in California and surreptitiously searched his computers for incriminating information.

"Here is a highly respected physicist, working on secret projects that had weapons applications, giving up the secrets," recalled Jonathan S. Shapiro, who prosecuted the case. Noting that the science was classified when Dr. Lee discussed it in Beijing in 1985, he added, "It is not up to individual scientists, on their own, to waive their oath on behalf of a foreign country."

In California, the reaction was "no harm, no foul, because the stuff had been declassified" recalled Mr. Shapiro, who added that he was disappointed last year by the lack of press interest in the case and the light sentence handed down.

"I received phone calls and letters from physicists and scientists who were offended that I prosecuted the case," said the former prosecutor. "The case represented the inherent tensions between the scientists' desire for free and open exchange of information, and the need to keep information classified and secret for the nation's security."

http://www.nytimes.com

LOAD-DATE: March 13, 1999

Peter Lee
[redacted]

January 12, 1998

The Honorable Terry J. Hatter
U.S. District Court
312 N. Spring Street
Los Angeles, CA 90012

Dear Honorable Judge Hatter:

I am writing this letter to beg for leniency. I, Peter Lee, have pleaded guilty to two felony counts and await your sentencing on 23 February. I deeply regret my commission of these egregious mistakes. There was never any intention to help a foreign government or to harm our country. They were foolish mistakes and very, very bad judgment on my part.

For these mistakes, I have been severely punished. Immediately after I pleaded in court on Dec. 8, 1997, I was fired from my job at TRW as a scientist. I have worked hard all my life and have dedicated myself to research and the advancement of science, to the benefit of our country. I was once a very productive and respected scientist. Suddenly, my career went from resounding success to complete repudiation by TRW. Now, my scientific life has been irreversibly terminated, and my lifelong profession has been completely destroyed. The sudden loss of a decent income pales by comparison with the abrupt and brutal excommmunication from my profession. For me, this profound loss has been emotionally devastating, and the mental anguish grows more intense with each passing day. The shame, I will suffer until the day I die. I have learned the harshest lesson of my life.

I do, however, believe in redemption and rehabilitation while one is still living. I have vigorously searched and have recently found employment in the commercial electronics and multimedia industry. With employment, I may earn a living, continue to support my family, and take care of my aging, widowed mother, who will be 84 years old in February. I am the eldest son in the family. It is tradition for the eldest son to take care of one's aging parents. If I am granted probation, I will be able work in my present capacity and continue to make positive contributions to our society. If I am incarcerated, however, then I will neither be able to work nor care for my family, and considering my age (I will be 59 in April), my chances of finding employment after incarceration will be greatly diminished. I dread becoming a useless burden to society.

Please, Your Honor, I beg of you, in your infinite capacity for mercy, that you grant me probation. Please, allow me to continue to work for a living, so that I may redeem myself and rebuild my life, for myself and my family.

Very sincerely Yours,

Peter Lee

Erik Storm
[redacted]

January 31, 1998

The Honorable Terry J. Hatter
United States District Judge
312 North Springer Street
Los Angeles, CA 90012

Dear Judge Hatter:

I am writing this letter on behalf of Dr. Peter H. Y. Lee based upon my personal and professional knowledge of him and my 24 years professional experience in Inertial Confinement Fusion (ICF) and Nuclear Weapons and US National Security, and in particular the classified connection between the two subjects.

Summary of Observations:

i) I have worked in the field of Inertial Confinement Fusion (the area in which Dr. Lee allegedly imparted classified information in 1985), and in the nuclear weapons program since 1974, and have access to secret and top secret nuclear weapons information (See I below for details). I have known Dr. Lee since 1968, and supervised his work from 1976 to 1981. (See II below).

i) If Dr. Lee only imparted Sigma-11 Indirect-Drive ICF information, this information was already available in the open literature, and was declassified 5 years later. (See III below)

ii) Release of this information would have had NO impact on US national security or released any information of any value with respect to the design and operation of nuclear. (See IV and V below)

iii) Possession of a Q Clearance (as Dr. Lee had while at LLNL and Los Alamos), does not give automatic access to Sigma 1,2 and 3 information (nuclear weapons design and operation and nuclear weapons stockpile information). Access to such data is on a strict Need-to-Know basis, and
Dr. Lee did not have such a need at LLNL, nor at Los Alamos, and access to such data would have been recorded. Thus, unless LLNL and Los Alamos records show such access, Dr. Lee could not have imparted nuclear weapons sensitive data.
(See IV and V below)

I. My Background and Relevance of my Experience to the Case:

1) I am currently the Deputy Director for Defense and Nuclear Technologies (DNT) at the Lawrence Livermore National Laboratory (LLNL) DNT is responsible for maintaining the safety and reliability of the LLNL portion of US Nuclear Weapons Stockpile. I have a full Q Clearance with access to Secret and Top Secret information concerning the US Nuclear Weapons Stockpile and Nuclear Weapons Design Information.

2) I started work at LLNL in the ICF/Laser program in 1974, and by 1981 was the Assistant to the Director of the Laser Program. I left LLNL for 12 months in 1981 and 1982, but remained in the ICF field of work. I returned to LLNL in 1982, and worked for 2 years in the Nuclear Weapons Program, and was responsible for leading a series of (then classified) underground nuclear tests. In 1984 I became Deputy Director for the Laser Program, and Program Leader for the ICF Program at LLNL. In 1992 I became the Principal Deputy for the Laser Program, and from 1993 through the Summer of 1997 I was on a special assignment in France which lead to a 10 year US-French collaboration on in the fields of High Power Lasers, ICF, and High Energy Density Physics with Applications to Nuclear Weapons Physics.

II. My Personal and Professional Knowledge of Dr. Lee:

3) I have known Dr. Lee since 1968 when we were graduate students at the Aeronautics Department at the California Institute of Technology.

4) I introduced Dr. Lee to LLNL, and he worked under my supervision in the ICF Program at the LLNL from 1976 to 1981. Dr. Lee was an excellent scientist with a preference for experimental work. Of nature he was shy and introvert, and tended to stick to his own field of expertise and interest. I recall that in my performance evaluations of him I remarked that style left him less effective than his intelligence and scientific capabilities promised, and suggested that he interact more with other parts of and people in the Program outside his immediate interest. However, during my time of working with Dr. Lee, he remained working essentially independently. His contributions were primarily focus and advanced diagnostics and their applications to the study and interpretations of high intensity laser plasma interactions. in the field of Inertial Confinement Fusion.

5) Together with Dr. Krupke and Dr. Emmet (The Deputy Director and Director of the Laser Program at that time) Dr. Lee and I participated in a 3 week scientific conference in China in 1980. Since this conference was basically focused on Laser Science and Technology, Dr. Lee's participationwas to some extent motivated by the fact that he spoke and wrote Chinese fluently, and could thus render us invaluable assistance.

6) Upon my return to LLNL I had less professional contact with Dr. Lee, although we continued to interact socially.

7) After he left LLNL for Los Alamos National Laboratory in 1984 we have had sporadic contact through letters and phone calls, and Dr. Lee kept me àjour with his professional work by mailing me copies of his technical journal publications.

8) I have great respect for Dr. Lee as a human being. His sense of honesty and integrity is above the norm. Although we do not communicate often, I still consider him one of my few friends, and someone I know I could call upon if I ever needed help "above and beyond the call of normal duty".

III. Concerning ICF, the Formerly Classified Part of ICF and the Connection Between and Relevance of ICF to the Physics of Nuclear Weapons:

9) The goal of Inertial Confinement Fusion (ICF) has, since its inception in the early 1970's been to reproduce on a micro-miniature scale some of the thermonuclear processes that occur in the center of stars and in the thermonuclear portion of nuclear weapons (the secondary). If (and when) we are successful, the ICF process could produce net energy gain from the Deuterium that is present in natural water, and would make available an essentially inexhaustible energy source for mankind. That practical prospect, however, is still many decades away in the future.

10) In the simplest sense, the ICF process consists of using ultra high intensity lasers to heat the surface of tiny (human hairs size) plastic shells filled with Deuterium and Tritium (a form of Hydrogen) to several tens of millions of degrees, and then compress them to many hundreds of times the density of lead, and in the process produce effectively a micro-miniature star that would last for only the briefest fraction of a second, but during that time could produce a net source of energy by thermonuclear fusion, the way the sun does.

11) Since the late 1970's, one of the ways to heat and compress the tiny plastic shells, was to put them inside a tiny (mm size) metal cylinder, focus the laser beams inside the cylinder, and convert the laser light to x-rays and let the x-rays heat and compress the plastic shell and deuterium. This is called the Indirect-Drive approach to ICF. **(I apologize for the short physics lecture, but it is essential if the connection between ICF and the physics of nuclear weapons id to be appreciated.)** Because x-rays are also used to compress and heat the thermonuclear portion (or secondary portion) of a nuclear weapon, the Indirect-Drive approach was initially classified. However, the details of the physics of production of the x-rays in an ICF target (conversion of laser light in an unclassified metal cylinder to low temperature, low energy x-rays) and in a nuclear weapon (conversion of the energy released from a high explosives driven fission primary to the still classified regime of extremely high temperature, high energy x-rays in classified materials in a classified container in a classified geometry in the secondary portion of the nuclear weapon) is sufficiently different that to classify Indirect-Drive ICF because of it also uses x-rays to compress and heat Deuterium and Tritium, is in a sense equivalent to classifying the technology of the 2-cycle lawn mower motor because of its similarity to a super high temperature, high efficiency turbine driven supersonic jet engine. *(As all analogies, this one is not perfect, but reasonable.)*

The **relevance** of ICF to the physics of thermonuclear weapons, and what is currently called the Nuclear Stockpile Stewardship Program, comes from how someone with **already** detailed knowledge of how a nuclear weapons works (i.e. a nuclear weapons designer), could either (a) use the thermonuclear fusion results from a successful ICF experiment to expose materials and equipment of relevance to a nuclear weapon to neutron and gamma ray fluxes of interest, or (b) design specific experiments that, when properly scaled, (several orders of magnitude), and with foreknowledge of what is important for a nuclear weapons design, would allow him to test **portions** of the physics regimes and **parts** of computer codes and algorithms he uses to maintain his nuclear weapons design confidence.

12) This imbalance between (correct) classification of nuclear weapons physics and (unreasonable) classification of the physics of Indirect-Drive ICF was noted by researches at LLNL and Los Alamos, and from the beginning of use of the Indirect-Drive approach they (myself included) argued that the DOE classification ruling on Indirect-Drive ICF was not only unjustified, but untenable. The latter point became evident, when as early as 1982/83, papers describing the physics of Indirect-Drive ICF started appearing in scientific journals and the general open technical literature. By 1984, papers by prestigious scientists from well known universities and research institutions in Germany, Italy and Japan, (to name a few) had essentially described all the relevant physics of Indirect-Drive ICF, and by 1985 at a conference in Kyoto in Japan, the continued US stance of keeping Indirect-Drive ICF classified had become untenable, in that there was essentially nothing left to keep classified. However, given the slowness with which the government bureaucracy moves, it took until 1990/91 before the physics of Indirect-Drive ICF was declassified in the US.

IV. Access to Nuclear Weapons Sensitive Information by Someone with a Q Clearance working with Indirect-Drive ICF.

Until 1990/91 when the Indirect-Drive ICF was declassified in the US, it was classified as Sigma-11 classified data. Nuclear weapons sensitive information (design information, stockpile data etc.) was, and remains classified at the higher, more restricted Sigma-1, 2 or 3 classification level. Having a Q clearance (such as Dr. Lee had) does **NOT** automatically give you access to Sigma-1, 2 or 3 level information. Access to Sigma-1, 2 or 3 information is on a strictly **Need-to-Know** basis. Access to the weapons vaults, or access to specific instruction material, or courses, or seminars, or the computer codes used by the weapons designers is on a strictly need-to know basis, and access is strictly controlled. Access to any of this material would have to be justified, and a formal documented authorization given.

To re-emphasize. Access to Sigma -11 (or Indirect-Drive ICF data) during the time Dr. Lee was working for the ICF Program at LLNL would not have given him a Need-to-Know for Sigma-1, 2 or 3 data, and access to such data would have been authorized and recorded.

I personally know that from 1976 until 1981 while Dr. Lee was either directly or indirectly under my supervision, no such authorization was give, and I doubt that it

was given during his continued stay at LLNL. When Dr. Lee went to Los Alamos, his work changed, and although he would have kept his Q clearance, there would have had even less justification for his need-to-know of Sigma-1, 2 or 3 information.

V. Potential Damage to US National Security from Dr. Lee's Alleged Disclosure of Sigma-11, Indirect-Drive ICF Data in 1985.

i) Disclosure of any Sigma-11, Indirect-Drive ICF information that Dr. Lee could have disclosed would have imparted NO information of any value for the design and/or operation of nuclear weapons primaries or secondaries, and would have had no impact in a US national Security sense for nuclear weapons or the US nuclear weapons Stockpile.

ii) Any Sigma-11 data or information Dr. Lee could have disclosed in 1985 (or later), would already have been in the open literature, and although confirmation of such Sigma-11, Indirect-Drive ICF data was (at that time) against the US classification rules, again it had no relevance to nuclear weapons or nuclear weapons data.

iii) Further, Sigma-11 access would not have given Dr. Lee access to Sigma-1, 2 or 3 nuclear weapons sensitive information or data, and unless an administrative record of access to such data by Dr. Lee is available, Dr. Lee would not have been capable of imparting any Sigma-1, 2 or 3 data or information, as he would never had had access to such information.

iv) Finally any and all of any Sigma-11 data Dr. Lee may have imparted in 1985, should have been unclassified at that time, and in fact was declassified five years later.

Dr. Lee clearly violated the US and DOE classification rules if in fact he disclosed Sigma-11 Indirect-Drive ICF data in 1985. However, if that is all he did, the potential damage and impact to US National Security from the nuclear weapons point of view is not just negligible, but zero.

Sincerely

Erik Storm

MEMORANDUM OF POINTS AND AUTHORITIES

I

INTRODUCTION

Plaintiff, the United States of America, hereby notifies the Court that the government concurs with the Presentence Report's (hereinafter "PSR") application of legal principles relating to defendant's conviction under the pre-sentencing guidelines law (Count One), and under the current sentencing guidelines law (Count Two). (PSR at ¶ 34). The PSR has gotten the law right, and defendant's sentence should be structured at suggested in the PSR. (PSR Recommendation Letter at 1-5). Furthermore, the government concurs with the PSR's sentencing guideline recommendation as to Count Two, and agrees that any sentence imposed on Count One and Count Two should run concurrently. (PSR at ¶¶ 93-95).

However, the government takes exception with the PSR's factual basis for its recommendation, and, more importantly, the PSR's recommended sentencing range. Because the PSR significantly understates the seriousness of defendant's conduct and its impact on the United States, the PSR recommends a sentencing range and sentence that does not adequately address defendant's criminal activity.

II

ARGUMENT

A. Factual Errors in the PSR

The PSR states that because "scientists understand the technical aspects of [defendant]'s work better, certainly than the Probation Office" (PSR Recommendation Letter at 4), the PSR will rely on scientists in arriving at defendant's sentencing range.

Science is one thing; defendant's admitted conduct is quite another. Neither the scientists quoted nor the Probation Office seem to understand the facts that defendant himself concedes are true; instead, the PSR relies on inaccurate statements and conjecture regarding defendant's crimes made by those with no knowledge of this case. Specifically, the government vehemently objects to the PSR'S reliance on inaccurate statements from individuals neither involved in the investigation of this matter nor cognizant of crimes that defendant himself confessed to and does not deny. (PSR Recommendation Letter at 3-5; Declaration of [redacted] at ¶¶ 24-33).

For example, the PSR quotes and relies on Eric Baum's statement that defendant did not work on classified projects, an extraordinary statement that casts defendant in a very specific and inaccurate light. (Id. at 4). In fact, defendant himself admits that he worked on classified projects, and that the information he passed in 1985 related to classified projects. (Defendant's Plea Agreement at 4-5; PSR at ¶¶ 62, 79; Declaration of [redacted] at ¶¶ 7-12). Furthermore, Eric Baum appears to be talking about defendant's work in 1997 while defendant was working at TRW, not about defendant's criminal conduct in 1985, which defendant confessed to having committed, and about which defendant claims to have sincere remorse.

Later, the PSR quotes and relies on Jeff Thompson's statements that he is sure that defendant "did not intend to compromise the security of the United States, and that in fact he did not do so," and that defendant did not do "one iota of harm" to the United States. (PSR Recommendation Letter at 4). In fact, defendant admits having intentionally divulged security material over a two

day period to the People's Republic of China (the "PRC"), and has never denied the seriousness of his conduct. Furthermore, the Department of Energy Impact Statement and the declaration of scientist Thomas L. Cook makes clear that defendant did a great deal of harm to a multi-billion dollar research project with national defense significance. (Impact Statement; Declaration of Tom Cook). Neither Thompson nor Baum appear to have any idea what defendant actually passed to the PRC. Neither appears to know what defendant has admitted to having done. (Impact Statement of February 17, 1998). One would think that of all professionals, scientists might be more circumspect about drawing conclusions before they have the facts before them.

Furthermore, the PSR relies on inappropriate statements to mitigate the sentencing range. Quoting Dr. Toshi Kubota regarding his own feelings about helping graduate students, the PSR mitigates defendant's sentencing range on the ground that defendant was simply acting in the role of teacher, trying to help young scientists. In so doing, the PSR utterly ignores the fact -- as defendant admits -- that defendant briefed a number of senior PRC scientists, the leaders of that nation's nuclear weapons program. (PSR at ¶¶ 27-31; Declaration of [redacted] at ¶¶ 22-31). The PSR later relies on statements from Dr. Gary Linford and Eric Storm that if defendant did pass classified information, the information should not have been considered classified, though neither man appears to be a classification official or specialist, and, again, neither seems to know what defendant actually passed to the PRC.

The government urges this Court to disregard the statements of scientists quoted by the PSR, urges the PSR writer to view the

statements as misguided and incorrect assertions from defendant's friends, and suggests that defendant's sentencing range should not be based on these statements.

B. Impact of Defendant's Disclosures

Through no fault of the PSR writer, the PSR makes a recommendation about sentencing without considering the impact of defendant's conduct on the nation's security. (PSR ¶ 25). This is an extraordinary, albeit blameless, omission in a case involving the disclosure of national defense information. In light of the Impact Statement filed by the government, as well as the declaration of Thomas L. Cook, the government urges the PSR writer to reevaluate its recommended sentencing range based on the impact of defendant's actions, and increase the recommended sentencing range to reflect that impact. Failure to consider the sentencing range in light of the impact statement would be to totally ignore the victim's perspective in this case.

C. Defendant's Cooperation

From the beginning, defendant voluntarily met with agents of the FBI to discuss his contacts with the PRC. (Declaration of [redacted] at ¶¶ 7-27). Defendant denied having passed classified information to PRC scientists over the course of his first five interviews with the FBI. (Id.). Defendant eventually confessed to passing classified information to the PRC in 1985, and confessed to lying on a TRW security form about his contacts with representatives of the PRC in 1997. (Id.). Defendant, along with his attorney, then voluntarily met agents of the FBI and Assistant United States Attorney Jonathan Shapiro, where he was questioned about his contacts with the PRC.

After confessing his crimes, defendant waived indictment and entered a guilty plea to a two count information. Pursuant to a plea agreement that required that defendant truthfully answer all questions put to him, defendant talked with agents of the FBI 10 more times. Defendant also gave consent to federal agents to search his home and office, and remained in daily telephone contact with the agents.

Much information provided by defendant cannot be verified. The government has concerns that defendant has still not been completely forthcoming about the nature, quality and extent of his improper contacts with scientists of the PRC. Though he has entered a plea to one count of filing false information to the United States regarding his contacts with members of the PRC scientific community (Count Two), defendant sent hundreds of e-mail communications and letters to scientists of the PRC that he did not report as required, pursuant to his security clearance from the United States Department of Defense and the Department of Energy. Moreover, defendant had numerous face-to-face meetings with scientists of the PRC that he did not report, as he was required to do. However, the government credits defendant with confessing his crime, submitting to debriefings, and remaining available to law enforcement.

III

CONCLUSION

Having provided the Court with a complete and accurate factual basis for defendant's sentencing, including an impact statement from the victim agency not previously taken into account by the PSR, the government believes that the recommended sentencing range should be

adjusted upward to adequately reflect the seriousness of defendant's conduct.

The government recommends that defendant receive a short period of incarceration, based on the more accurate sentencing range, to run concurrently with defendant's sentence to Count Two, and leaves that sentence to the discretion of this Court, as is appropriate in a pres-Sentencing Guidelines case.

DATED: February 27, 1998

Respectfully submitted,

NORA M. MANELLA
United States Attorney

DAVID C. SCHEPER
Assistant United States Attorney
Chief, Criminal Division

JONATHAN S. SHAPIRO
Assistant United States Attorney

Attorneys for Plaintiff
UNITED STATES OF AMERICA

DECLARATION OF [redacted]

I [redacted] declare:

1 I am a Speical Agent of the Federal Bureau of Investigation.

2 According to the Atomic Energy Act of 1946 and relevant Classification Guide for Safeguards and Security Information (U.S. Dept. Of Energy CG-SS-3, issued October 16, 1995), any information classified as "restricted-data" refers to information relating to nuclear weaponry.

3. Defendant was given two polygraph examinations by the FBI over the course of his debriefings. The first examination was given on October 7, 1997. Defendant was asked three separate questions regarding whether or not he provided classified information to the People's Republic of China (hereinafter "the PRC"). Defendant said he had not. Defendant failed this polygraph examination, thereby indicating that he provided classified information to the PRC. After failing the polygraph examination, defendant confessed to passing classified information to the PRC in 1985. Defendant was debriefed numerous times by the FBI regarding whether or not he disclosed any other classified information. Defendant claimed he had not. On February 26, 1998, defendant was given a second polygraph, where he was asked whether he had lied to the FBI since his last polygraph examination regarding passing classified information. For a second time, defendant failed a polygraph examination. Defendant later explained to me that he had failed to provide certain information to the agents about his contacts with the PRC because they did not ask specific enough questions. I was told by security officials at TRW, Inc., that had defendant

Attachment 000083

truthfully filled out his pre-travel security form, he would not have been allowed to present the detailed lecture that he confessed to having given in 1997.

4. On March 11, 1998, Dr. Richard Twogood told me that what defendant discussed in 1997 was classified and sensitive information. Dr. Twogood told me the same thing in October, 1997 when I first contacted him about this case.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: March 23, 1998.

NEWS RELEASE

For Immediate Distribution

March 26, 1998

NORA M. MANELLA
United States Attorney
Central District of California

[redacted]

NUCLEAR PHYSICIST SENTENCED TO ONE YEAR IN CUSTODY FOR PASSING CLASSIFIED DEFENSE INFORMATION TO SCIENTISTS OF THE PEOPLE'S REPUBLIC OF CHINA

A nuclear physicist convicted of two felony charges, including passing classified national defense information to representatives of the People's Republic of China, was sentenced today to spend one year in a community corrections facility, United States Attorney Nora M. Manella announced.

Dr. Peter H. Lee, 58, a laser energy expert who resides in Manhattan Beach, was one of only three people convicted of espionage charges in 1997.

Lee, who worked at key research facilities for more than 30 years, pleaded guilty on December 8, 1997, to willfully passing national defense information to Chinese scientists during a 1985 visit to China. He also pleaded guilty to providing false information in 1997 to his then-employer, TRW, Inc., regarding his contacts with Chinese scientists.

United States District Judge Terry J. Hatter sentenced Lee, stating that a "message needs to be sent to other scientists...that oaths are not to be violated." In addition to the one-year custody term, Judge Hatter ordered Lee to serve three years of probation, to perform 3,000 hours of community service and to pay $20,000 in fines.

Lee passed the classified information in 1985 while he was doing research at the time at Los Alamos National Laboratory in New Mexico. Lee had traveled to China, where he was asked by a Chinese scientist to discuss the construction of hohlraums, a diagnostic device used in conjunction with lasers to create microscopic nuclear detonations.

At the time, Lee possessed security clearances that allowed him access to classified information and prohibited him from disclosing any classified information. The information sought by the Chinese scientist was classified as "secret restricted data" because it had applications to nuclear weapon design and maintenance. Lee admitted to agents with the Federal Bureau of Investigation that he disclosed the restricted data with the knowledge that the information was classified as secret.

The day after he initially revealed the classified information, Lee gave a lecture to approximately 30 Chinese nuclear scientists in which he again gave away secret restricted data regarding the manufacture and use of hohlraums. Lee told the FBI that he disclosed the information because he wanted to help his Chinese counterparts and he wanted to enhance his reputation there.

"Lee broke an oath to the United States and threatened research projects important to national security," United States Attorney Manella said. "The conviction should remind everyone involved in this nation's defense that the price for violating security restrictions is high."

The second charge against Lee concerns disclosures he failed to make in 1997 while he was working on classified research projects for TRW. Before he traveled to China on vacation, Lee was required to fill out a security form in which he stated that he would not be giving lectures on his work. Upon his return, he had to fill out a second form in which he confirmed that he did not give any lectures of a technical nature. However, as Lee later confessed to the FBI, he lied on both forms because he intended to and did, in fact, deliver lectures to Chinese scientists that discussed his work at TRW.

"Most scientists would not have committed such a crime for love or money," Assistant United States Attorney Jonathan S. Shapiro wrote in a sentencing position memorandum filed in United States District Court. "[Lee] admits he committed this crime out of self-love and his need to enhance his standing in the eyes of his PRC hosts. The tawdry nature of his motives ought not to diminish the seriousness of his crime."

The 1985 conduct occurred before the implementation of the Federal Sentencing Guidelines, meaning that Judge Hatter had discretion to sentence Lee to as much as 10 years in prison. Federal statutes do not prescribe any minimum sentence. Judge Hatter initially imposed a five-year prison sentence -- which was then suspended – and finally imposed probation with the terms and conditions outlined above.

This case was the result of an extensive investigation by the Federal Bureau of Investigation's Foreign Counterintelligence Squad and agents with the United States Department of Energy's Office of Security Affairs.

CONTACT: Assistant United States Attorney Jonathan S. Shapiro

[redacted]

Release No. 98-067

Erik Storm
[redacted]

March 18, 1998

The Honorable Terry J. Hatter
United States District Judge
312 North Springer Street
Los Angeles, CA 90012

Re: Technical Damage to US national security from the admitted release of information contained in the 1982 classified document (UCRL 53278) by Dr. Peter H. Y. Lee in 1985 to scientists in the Peoples Republic of China.

Dear Judge Hatter:

In a letter to you dated January 31, 1998 I argued in some detail that while I do not condone, nor excuse Dr. Lee for having released to the Chinese (in 1985) Inertial Confinement Fusion (ICF) data which at that time was classified, the specific information Dr. Lee admitted to giving the Chinese would have had no impact on US national security, nor would it have given the Chinese any information of any value with respect to the design, testing or operation of nuclear weapons or of the US nuclear weapons stockpile.

Since in that same letter I also summarized my professional background and my credentials for being able to express a credible opinion on the above matter, I will not repeat that information in this letter.

The purpose of this letter is **specifically, and only** to:

1) Further comment on the classified information contained in Dr Lee's 1982 document (UCRL 53278) which Dr. Lee admitted to having discussed with the Chinese in 1985, and the potential damage to U.S. national security from the release of that specific information, and

2) Comment on the assessment of the technical damage done to U.S. national security by the release of this information in a deposition made by Dr. Thomas L. Cook of Los Alamos National Laboratory.

Comments on information contained in the document UCRL 53278, written by Dr. Lee in 1982, and its relevance to the design, testing or operation of nuclear weapons, and/or the U.S. nuclear weapons stockpile.

In 1982, while working at the Lawrence Livermore National Laboratory (LLNL), Dr. Lee wrote a paper entitled "An Explanation for the Viewing-Angle Dependence of Temperature from Cairn Targets". The document was given the LLNL identification UCRL 53278. The paper dealt with explaining why measurements of the radiation temperature in a specific ICF cavity used at that time for ICF research (given the code name CAIRN) depended on the viewing angle of the diagnostic tools used by Dr. Lee. Although the diagnostic tools themselves, as well as the equations used to explain this phenomenon were (and are) unclassified, the fact that all work done on and with ICF cavities was at that time deemed classified, the document was classified, even though the physical conditions obtained in the CAIRN cavities were in a regime of temperature and density not even remotely connected to conditions obtained in nuclear weapons. This latter fact is also the reasons why (after many years of arguments by the US ICF community), the Department of Energy later declassified this ICF research, and today Dr. Lee's document is unclassified. However, in 1985 when Dr. Lee discussed his UCRL with the Chinese, both the document and the information concerning ICF cavities in the document, were still classified. (See my January 31 letter for further details.)

During the last week, I have personally re-read Dr. Lee's 1982 paper. I stand by my conclusion of my January 31, 1998 letter, namely that although by revealing information in that paper in 1985, Dr. Lee violated US classification rules, the diagnostic tools described, the physics discussed, and in particular the physics of the ICF cavities discussed in that paper, would have imparted no information of any value for the design, testing and/or operation of nuclear weapons primaries or secondaries, and would have had no impact in a US national security sense for nuclear weapons or the US nuclear weapons stockpile.

I also asked the head of the LLNL Thermonuclear Weapons Design Division to read the paper, and he concurred with my views expressed in the paragraph above.

Comments on the declaration made by Dr. Thomas L. Cook on the damage done to U.S. national security by 1985 revelations by Dr. Lee of the information in the document UCRL 53278.

Dr. Cook makes a large number of statements and observations about Dr. Lee, the physics and diagnostics described in his UCRL, and the ICF research (still classified in 1985) which are in general correct, or with which at most I would have minor disagreements (Several of his comments, however, tend to leave a reader not familiar with ICF and nuclear weapons with the impression of a much stronger connection between Dr. Lee's 1982 paper and nuclear weapons that I believe is justified. See examples below). The result is that Dr. Cook's statements, and implied conclusion in the section entitled "**Significance**" when taken out of context,

or in the absence of detailed knowledge of the actual state of the classified ICF research described in Dr. Lee's 1982 paper, could easily lead a non-technical reader and/or a non-expert on nuclear weapons to believe that the US security had not only been seriously compromised by Dr. Lee's release of the information in the 1982 UCRL 53278, but also that this information would have helped the Chinese develop advanced nuclear warheads such as those used (for example) on cruise missiles, ICBM's and SLBM's.

In the **"Significance"** section of his deposition, Dr. Cook essentially makes the following observations:

1) The measurement of radiation-matter and time-resolved and time-integrated laser-plasma diagnostics are important technologies for a developing nuclear weapons state with an active nuclear testing program. **(This is correct)**

2) The capability to measure the performance of nuclear weapons facilitates the evolution from rudimentary nuclear devices to intermediate to advanced designs. **(Again this is obviously correct)**

3) Characteristics of a warhead determine employment options, and possession of only rudimentary and/or intermediate class warheads limit military options. **(Again this is obviously correct)**

4) Advanced nuclear warheads could be important to the Chinese for use on cruise missiles, ICBM's etc. **(Again this is obviously correct)**

However, since all this is expressed in the context of Dr. Lee's classified 1982 paper (point # 2 in Dr. Cook's Technology Discussion section), a non-technical reader and/or a non-expert on nuclear weapons is led to believe, or at least find it credible that there is a connection between the two, i.e. that release by Dr. Lee in 1985 of the information in his 1982 paper could have been instrumental in helping the Chinese develop advanced nuclear cruise missiles.

It is my assertion that this is not the case. (Again see my January 31, 1998 letter for details). My assertion on this point is also agreed to by the head of the LLNL Thermonuclear Weapons Design Division.

Frankly, we both agreed that implying that information from Dr. Lee's 1982 paper could be helpful to develop advanced nuclear weapons is essentially logically equivalent to an assertion of the following kind:

1) A rock can not fly. **(True)**
2) I can not fly **(True)**

and then imply the conclusion

3) Therefore I am a rock

Below are two examples of how (in my opinion) statements in Dr. Cook's deposition over-emphasize connections between Dr. Lee's paper and nuclear weapons research.

Although Dr. Cook is correct in his "**Technology Discussion**" where he states "The laser simulation component of the U.S. science based stockpile stewardship program, which is so important to certifying nuclear weapon reliability under the 'zero-yield' constraints of a Comprehensive Test Ban Treaty (CTBT), has its foundation in this early research", one could easily be led to believe that the tools and experiments available and discussed in Dr. Lee's 1982 paper was equally valuable and applicable to nuclear weapons science. However, the diagnostic techniques used by Dr. Lee in his 1982 paper were all unclassified, and could not be used on nuclear weapons tests. In addition the cavities used and discussed by Dr. Lee were vacuum cavities dominated by hot electrons and only reached radiation temperatures of approximately 100-150 eV, conditions not even remotely close to those in nuclear weapons. In fact, in that period nuclear weapons scientists doubted that ICF cavities and experiments would ever have any practical value for nuclear weapons physics. It was not until the late 1980's and the early 1990's when a whole new generation of laser facilities had been constructed and operated, and a whole new set of experimental techniques and diagnostic tools had been developed and demonstrated that it was generally agreed that the physics studied in ICF experiments could be scaled to have some applicability to certain portions of the parameter space of nuclear weapons physics.

In the same "**Technology Discussion**", Dr. Cook states that "During the early 1980's the DOE spent billions of dollars in classified research, conducted in underground nuclear tests at the Nevada Test Site and in high-energy laser laboratories, to explore the physics of these processes". From his previous discussion it is clear that Dr. Cook does not by "these processes" mean to encompass the activities of the entire national nuclear weapons program, in which case the term "billions of dollars" would have been appropriate, but rather the national ICF program, in which case the accumulated expenditure from 1980 through 1985 was considerably less than one billion dollars, including funds spent on the Halite/Centurion Program conducted at the Nevada Test Site. As I was personally responsible for the Halite program at the LLNL in the early 1980's and responsible for the entire ICF program at LLNL from 1984 through 1991, I am well aquatinted with the actual annual expenditures.

There are other minor points where Dr. Cooks perhaps stretches things a bit, but on the whole he is correct in his individual points and/or statements. It is only the implied conclusion, that release of the information in Dr. Lee's classified 1982 paper could have helped the Chinese with advance nuclear weapons that is not justified.

Sincerely,

Erik Storm

[redacted]

9 March 1998

The Honorable Terry J. Hatter
United States District Judge
312 North Spring Street
Los Angeles, California 90012

Dear Judge Hatter:

I am writing this second letter on behalf of Dr. Peter H. Y. Lee based upon my first-hand knowledge as a physicist active within the defense community of the United States during the past thirty-five years. This letter is intended to respond to incorrect allegations made by Dr. Thomas L. Cook in his undated deposition entitlted, "*Declaration of Technical Damage to United States National Security Assessed in Support of United States v. Peter Hoong-Yee Lee.*" I reviewed my qualifications as a physicist active in the U. S. defense community in my previous letter to you of 5 January 1998.

Although I am a member of the international inertial confinement fusion (ICF) community, Dr. Thomas J. Cook is unknown to me. Aside from a few generally meaningless asides, Dr. Cook's deposition contains several false, misleading, or exaggerated statements unsupported by either the facts, the literature or the technology. Thomas Cook states that Peter Lee "transferred" a "classified DoE document" to Chinese scientists. This statement is untrue. Subsequently, Dr. Cook makes a technically absurd assertion in Section C. of his deposition: "*. . .measurement of radiation-matter interactions and time-resolved and time-integrated laser-plasma diagnostics represent exactly the critical technologies important to a developing nuclear weapon state that has an active nuclear testing program.*"

I, and many other of my fellow physicists in the USA, routinely have used measurements of radiation-matter interactions and time-resolved and time-integrated laser-plasma diagnostics for entirely unclassified research and development programs during the past thirty years without leaking nuclear weapons design secrets or endangering the defense of the United States. This laser technology is neither classified nor is it sophisticated. Any competent scientist in the world with access to an undergraduate physics textbook would be able to reproduce the essential elements of this technology.

Since Thomas Cook has evidently never worked in inertial confinement fusion, his misleading testimony may be his honest, but misguided, opinion. Certainly his opinion should be given less credence than opinions of experienced ICF scientists. As an experienced ICF physicist, I claim there is no reasonable design connection between thermonuclear weapons and 1985 laser fusion target design. To so assert is to suggest that knowledge of the anatomy of a fruit fly allows one to design a modern jet fighter.

I continue to recommend strongly a suspended sentence and no punitive fine. If I can supply any additional information or particulars, please feel free to contact me.

Sincerely,

Gary J. Linford

Dr. Gary J. Linford

[redacted]

To The Honorable Terry J Hatter
U.S. District Court
312 N. Spring Street
Los Angeles, Ca 90012

REGARDING: DR. PETER LEE

A brief description of my background. I worked at the Jet Propulsion Laboratory in the wind tunnels and environmental labs for 5 years, TRW Space and Defense for the last 32 years. I am presently at TRW, as a Member of the Technical Staff (MTS). My background is in mechanical engineering and designing. I also own my own business in the Telecommunications field of which I employ about 40 people.

Over the years I have worked with a lot of people but I can only think of a couple who have had the experimental insight and technical expertise that Dr. Peter Lee has. I have know Peter since the early 70's. When he first joined TRW and started doing experiments in the lab. Peter left, then returned to TRW in the early 90's. to join the Ocean Technology Department as the "Experimental Group" Manager. I am a member of that experimental team. I would say that Peter has been one of the fairest and most helpful supervisor's that I have ever had. For the last 6 years Peter has worked very hard to create a top notch experimental team. He has spent countless hours of planning and report writing, often on Saturdays or Sundays. Due to this enormous effort and contribution Peter has made, our program has gained recognition and we have become the leader in the scientific community. This has been a truly dedicated effort on his part and as my supervisor and sometimes mentor, he has always tried to help me further my career, and the other team members as well. If one looks at the TRW reports or publications you will see his generosity, every body's name is included that participated, whereas the majority of managers only mention their own name and their boss's.

TRW and the scientific community will suffer a tremendous loss without Peter's continued contributions. On a personal level, had it not been for Peter's leadership and friendship I would have retired by now.

Sincerely

Kenneth L Beach

Kenneth L Beach

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff,	)	CASE NO. CR 97-1181-TJH
vs	)	**JUDGMENT and COMMITMENT/ PROBATION ORDER**
PETER LEE, Defendant.	)	

On this 26th day of March, 1998, came the attorney for the government and the defendant appeared in person with counsel, James Henderson, for the imposition of sentence.

On his plea of guilty, the defendant has been convicted of the offenses of attempt to communicate national defense information to a person not entitled to receive it and making a false statement to a government agency in violation of, respectively, 18 United States Code, Sections 793(d) and 1001 as charged in Counts One and Two of the Information.

THE COURT asked whether the defendant had anything to say why judgment should not be pronounced, and, because no sufficient cause to the contrary was shown, ORDERED that:

IT IS ADJUGED that the defendant is herby committed to the custody of the Bureau of Prisons for imprisonment for a period of five (5) years on Count One; and, shall pay a FINE in the amount of Ten Thousand Dollars ($10,000) to the United States. The execution of the sentence as to imprisonment is hereby suspended and the defendant is placed on probation for a period of three (3) years.

IT IS FURTHER ADJUDGED, pursuant to the Sentencing Reform Act of 1984, on Count Two, that the defendant is hereby placed on probation for a period of three (3) years which shall run consecutively to the period of probation on Count One; shall pay a FINE in the sum of Ten Thousand Dollars ($10,000) to the United States; and, shall pay a mandatory special assessment in the sum of Fifty Dollars ($50) to the United States.

STANDARD AND SPECIAL CONDITIONS OF PROBATION:

The defendant shall comply with the Standard Conditions as set forth on the reverse side of this page and with the rules and regulations of General Order 318.

The defendant shall serve a period of six (6) months in a community-corrections-center on each of the probationary period for a total period of twelve (12) months.

(Continued Page Two)

At the direction of the probation officer, the defendant shall perform 3000 hours of community-service work.

At the direction of the probation officer, the defendant shall pay the fines and special assessment.

The Court may change the conditions of probation, at any time, during the probationary period, and may issue a warrant and revoke probation for a violation occurring during the probationary period.

IT IS ORDERED that the defendant shall report to the designated facility by 12:00 p.m. on April 27, 1998, unless modified by the probation officer for a later date.

IT IS ORDERED that the Clerk shall deliver a certified copy of the Judgment and Commitment/ Probation Order to the U. S. Marshal.

TERRY J. HATTER, JR.
Chief Judge, United States District Court

FILED: MARCH 27, 1998
CLERK, U. S. DISTRICT COURT

by _____
Deputy Clerk

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this Judgment:

1. The defendant shall not commit another Federal, state or local crime;
2. the defendant shall not leave the judicial district without the written permission of the court or probation officer;
3. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5. the defendant shall support his or her dependents and meet other family responsibilities;
6. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7. the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
8. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
9. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;
10. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
11. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
12. the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
13. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
14. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to conform the defendant's compliance with such notification requirement;
15. the defendant shall not possess a firearm or other dangerous weapon;
16. the defendant shall, upon release from any period of custody, report to the probation officer within 72 hours

These conditions are in addition to any other conditions imposed by this Judgment.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____ the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

UNITED STATES MARSHAL

DATED: _____ BY: _____

CERTIFICATE

DOJ-P.LEE00194

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

CLERK, U.S. DISTRICT COURT

1
2 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
3 WESTERN DIVISION

4 HONORABLE TERRY J. HATTER, JUDGE PRESIDING

5 UNITED STATES OF AMERICA,)
PLAINTIFF.)
6)
VS.) CR. 97-1181 TJH
7)
PETER LEE.)
8 DEFENDANT.

CERTIFIED COPY

9
10
REPORTER'S TRANSCRIPT OF PROCEEDINGS
11 LOS ANGELES, CALIFORNIA
THURSDAY, MARCH 26, 1998
12

13 BETH E. ZACCARO
OFFICIAL COURT REPORTER
14 C.S.R. 2489, R.P.R.
414 UNITED STATES COURTHOUSE
15 312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012
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2 APEARANCES:
FOR THE PLAINTIFF: JONATHAN SHAPIRO, ESQ.
3 FOR THE DEFENDANT: JAMES HENDERSON, ESQ.

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1 LOS ANGELES, CALIFORNIA, ON THURSDAY, MARCH 26, 1998
BEGINNING AT APPROXIMATELY 9:30 A.M.
2
3 THE CLERK: CRIMINAL ACTION 97-1181. U.S.A. VERSUS
4 PETER LEE. COUNSEL, PLEASE STATE YOUR APPEARANCE.
5 MR. SHAPIRO: GOOD MORNING, YOUR HONOR, JONATHAN
6 SHAPIRO ON BEHALF OF THE UNITED STATES. I AM JOINED AT THE
7 TABLE BY [redacted] AND [redacted].
8 THE COURT: THANK YOU TO ALL THE AGENTS AS WELL AS
9 THE A.U.S.A.
10 MR. HENDERSON: GOOD MORNING, JIM HENDERSON WITH
11 PETER LEE WHO IS PRESENT IN COURT ALONG WITH HIS WIFE AND
12 HIS MOTHER LILLIAN WHO IS SITTING IN THE SECOND ROW.
13 THE COURT: I TAKE IT YOUR EYES REQUIRE YOU TO WEAR
14 DARK GLASSES?
15 MR. HENDERSON: THAT'S CORRECT, YOUR HONOR.
16 THE COURT: THAT'S FINE.
17 THIS MATTER IS HERE FOR SENTENCING. I TAKE IT THAT
18 YOU HAVE GONE OVER THE PRESENTENCE REPORT AND THE VARIOUS
19 MOVING PAPERS WITH YOUR CLIENT, HAVE YOU, MR. HENDERSON?
20 MR. HENDERSON: YES, I HAVE, YOUR HONOR.
21 THE COURT: ALL RIGHT. I WILL HEAR FROM YOU NOW
22 WITH REGARD TO ANY FACTUAL CORRECTIONS, ANYTHING THAT YOU
23 HAVE TO SAY ABOUT THE GOVERNMENT'S PAPERS, ANYTHING ABOUT
24 THE RECOMMENDATION OF THE PROBATION OFFICER.
25 MR. HENDERSON: THANK YOU. THE FIRST THING I WANTED

1 TO MENTION WAS SOMETHING THAT I TOOK A LITTLE PERSONALLY
2 AND PERHAPS I AM GETTING CARRIED AWAY AS I ACCUMULATE MORE
3 YEARS IN THIS PROCESS, BUT THE GOVERNMENT'S MOST RECENT
4 FILING INDICATES THAT THERE IS A SECTION CALLED MISQUOTING
5 EXPERTS IN WHICH IT INDICATES I HAD MISQUOTED A DR., DR.
6 TOOGOOD.
7 I WANT TO TELL THE COURT THAT THAT IS NOT IN FACT
8 CORRECT, THAT I NEVER MISQUOTED ANYONE TO ANY COURT EITHER
9 PURPOSEFULLY OR OTHERWISE, TO MY KNOWLEDGE, AND THE QUOTES
10 IN MY PAPER FROM DR. TOOGOOD WERE TAKEN FROM THE DEBRIEFING
11 WHICH I SAT IN ON AND WHICH ARE NOT TAPED, YOUR HONOR, IF
12 THERE IS ANY DISPUTE ABOUT THOSE.
13 IF DR. TOOGOOD SAID SOMETHING TO THE AGENTS
14 OUTSIDE MY PRESENCE AT THAT DEBRIEFING, I HAVE NO WAY TO
15 KNOW THAT.
16 ALL I CAN TELL YOU IS WHAT HE SAID DURING THE
17 SESSION AS IT TOOK PLACE AND THOSE ARE TAPE-RECORDED
18 STATEMENTS, AND I AM NOT SURE THAT IT MATTERS ANYHOW, BUT
19 IT JUST BOTHERED ME A LITTLE BIT TO HAVE SOMEONE FILE
20 SOMETHING WITH THE COURT INDICATING THAT I HAD MISQUOTED
21 SOMETHING TO THE COURT, SO I WANTED TO CLEAR THAT UP
22 INITIALLY.
23 THE COURT: ALL RIGHT. EXCUSE ME. WHAT IS IT? ARE
24 YOU READING, SIR?
25 MR. KIRKLAND: I AM GREGORY KIRKLAND.

1 THE COURT: I AM GLAD THAT YOU HAVE MADE YOUR
2 APPEARANCE. HOWEVER, I DON'T KNOW WHAT SOME OF THESE OTHER
3 INDIVIDUALS ARE DOING. PERHAPS THEY ARE WITH THE MEDIA.
4 GO AHEAD, MR. HENDERSON.
5 MR. HENDERSON: ANOTHER POINT RAISED IN THE
6 GOVERNMENT'S RESPONSE TO MY SENTENCING MEMORANDUM WAS THE
7 FACT THAT MR. LEE HAD NOT BEEN ABLE TO SUCCESSFULLY PASS A
8 POLYGRAPH TEST THAT WAS CONDUCTED RECENTLY.
9 THE COURT: WELL, SEVERAL, EVIDENTLY AND ONE MORE
10 RECENTLY.
11 MR. HENDERSON: RIGHT. THOSE INITIAL POLYGRAPH
12 TESTS THAT HE WAS GIVEN WHICH HE FAILED, AND THAT IS WHAT
13 FLUSHED ALL THIS OUT IN THE FIRST INSTANCE. THEN THERE WAS
14 A FOLLOW-UP POLYGRAPH TEST CONDUCTED RECENTLY IN WHICH HE
15 WAS UNSUCCESSFUL IN PASSING. I WANTED TO MAKE A COUPLE OF
16 POINTS, AND I THINK YOUR HONOR IS AWARE OF THESE BECAUSE I
17 HAVE BEEN IN THIS COURTROOM BEFORE WHEN THERE HAVE BEEN
18 DISCUSSIONS LIKE THIS.
19 THE REASON TESTS LIKE THAT ARE INADMISSIBLE IN
20 EVIDENCE ARE CLEAR FOR A NUMBER OF REASONS. I THINK I CAN
21 DO IT BEST BY EXAMPLE.
22 I REMEMBER SPECIFICALLY WHEN I WAS WITH THE
23 GOVERNMENT THE F.B.I. POLYGRAPHED 3 POLICE OFFICERS WHO
24 WERE ACCUSED OF BEING INVOLVED IN AN EXTORTION PLOT.
25 ACCORDING TO THE F.B.I.'S POLYGRAPH RESULTS, THOSE 3

1 POLICE OFFICERS WERE INNOCENT, AND THEY MADE A
2 RECOMMENDATION TO OUR OFFICE THAT THEY SHOULD NOT BE
3 PROSECUTED.
4 THOSE 3 POLICE OFFICERS WERE CONVICTED AFTER THE
5 CASE.
6 I HAD A DISCUSSION WITH ONE OF THE OFFICERS IN THE
7 HALL AND ASKED HIM HOW HE PASSED THE POLYGRAPH TEST, AND HE
8 INDICATED THAT HE DIDN'T HAVE THE FAINTEST IDEA, THAT HE
9 AND THE OTHER OFFICERS WERE GUILTY OF THE CRIME. THEIR
10 LAWYERS HAD THEM TAKE THE TEST TO SEE WHAT WOULD HAPPEN AND
11 BECAUSE OUT OF THE THREE OFFICERS TWO OF THEM PASSED AND
12 ONE OF THE RESULTS WAS INCONCLUSIVE, THEY GAVE THOSE
13 RESULTS TO THE U.S. ATTORNEY'S OFFICE SPECIFICALLY IN ORDER
14 TO KEEP FROM BEING PROSECUTED.
15 OBVIOUSLY THEY WERE WRONG, AND IT WAS A BUREAU
16 POLYGRAPH TEST.
17 MORE RECENTLY ONE OF THE LAWYERS THAT I WORKED WITH
18 WHO YOUR HONOR MAY RECALL WAS INVOLVED IN A LOCAL CASE IN
19 WHICH A MAN WAS ACCUSED BY HIS WIFE OF MOLESTING HIS SON.
20 THE POLICE POLYGRAPH EXAMINATION INDICATED THAT HE IN FACT
21 HAD DONE IT, AND THERE WAS A FOLLOW-UP POLYGRAPH
22 EXAMINATION TAKEN BY ANOTHER POLYGRAPHER THAT INDICATED
23 THAT HE HADN'T DONE IT. AGAIN IT IS HARD TO TELL WHAT
24 THOSE POLYGRAPH TESTS WITH REGARD TO ANY SPECIFIC
25 INDIVIDUAL ARE REALLY WORTH.

1 WITH REGARD TO DR. LEE, THE DAY AFTER THE POLYGRAPH
2 TEST IN QUESTION HERE WAS TAKEN I BROUGHT IN A LOCAL
3 POLYGRAPHER WHO I THINK IS THE BEST IN TOWN WHO USED TO DO
4 THE POLYGRAPH TESTS FOR THE C.I.A. AND HE WAS ASKED THE
5 SAME QUESTIONS THAT DR. LEE WAS ASKED IN THE F.B.I.
6 POLYGRAPH TEST AND ON MY INSTRUCTIONS GAVE THE OPPOSITE
7 ANSWER, SO HE HAD ANSWERED YES TO THE QUESTIONS FOR TWO
8 BUREAU TESTS, AND IT CAME OUT THAT HE COULDN'T PASS.
9 THEN HE ANSWERED NO. THE OTHER RESPONSE TO ONE THAT
10 THE BUREAU CONTENDED SHOULD HAVE BEEN THE CORRECT RESPONSE
11 HE ANSWERED THE OTHER WAY AND THE TEST CAME OUT THAT HE
12 STILL COULDN'T PASS THE TEST AND BASED ON THAT THE
13 POLYGRAPHER THAT I UTILIZED REACHED A CONCLUSION THAT THIS
14 WAS PROBABLY ONE OF THOSE INDIVIDUALS IN WHICH THERE ARE A
15 NUMBER THAT JUST COULDN'T EVER BE ADEQUATELY EVALUATED BY
16 THIS POLYGRAPH TEST.
17 LIKE I SAY, THAT IS ONE OF THE MAIN REASONS WHY
18 THESE KINDS OF THINGS ARE INADMISSIBLE AS EVIDENCE IN
19 CASES, AND I THINK THIS IS PROBABLY AS GOOD AN EXAMPLE AS
20 ANY IN THAT REGARD.
21 I SAT THROUGH THESE DEBRIEFINGS. AS YOUR HONOR KNOWS
22 MY BACKGROUND, THIS IS NOT THE FIRST ONE THAT I HAVE SAT
23 THROUGH INCLUDING SOME MAJOR DEBRIEFINGS OF PEOPLE LIKE
24 JIMMY GRATIANO AND OTHERS.
25 THIS WAS ONE OF THE MOST CANDID DEBRIEFINGS.

1 SURE, THERE WERE SOME PROBLEMS. THERE ALWAYS ARE.
2 YOU CAN'T QUESTION SOMEBODY FOR 10 OR 11 OR 12 DAYS WITHOUT
3 COMING UP WITH DISCREPANCIES. YOU COULDN'T QUESTION YOU AND
4 I ABOUT WHAT WE DID LAST WEEK WITHOUT COMING UP WITH
5 THINGS.
6 THE COURT: YOU ARE RIGHT, PARTICULARLY WITH REGARD
7 TO MATTERS THAT ARE 10 OR MORE YEARS AGO.
8 MR. HENDERSON: ABSOLUTELY. I THOUGHT HE WAS
9 COMPLETELY CANDID. I HAD MANY DISCUSSIONS OUTSIDE THOSE
10 DEBRIEFINGS WITH HIM. I SAW HIM AGONIZE AND I SAW HIS TEARS
11 TRYING TO FIGURE OUT WHAT MORE THEY COULD POSSIBLY WANT,
12 WHAT MORE WAS THERE, AND I AM TELLING YOU, YOUR HONOR, FOR
13 WHATEVER MY REPUTATION IS WORTH, I THINK THIS WAS A
14 STRAIGHT FORWARD DEBRIEFING AND --
15 THE COURT: WELL, YOU KNOW VERY WELL, MR. HENDERSON,
16 YOU CAN'T VOUCH. YOU CAN'T TESTIFY.
17 MR. HENDERSON: YOU ARE GETTING THE AGENTS' TAKE ON
18 THIS, AND I WANT TO TELL YOU WHAT MY TAKE IS.
19 THE COURT: I APPRECIATE THAT, BUT I SUGGEST YOU
20 MOVE ON TO ANOTHER AREA.
21 I AM NOT PARTICULARLY MOVED BY POLYGRAPH RESULTS AT
22 THIS POINT. JUST A MINUTE. WE ARE BOTH TALKING AND THE
23 COURT REPORTER CAN'T TAKE US BOTH DOWN AT THE SAME TIME. I
24 AM MORE CONCERNED WITH THE FIRST POLYGRAPH TEST AND ITS
25 RESULTS WHICH, OF COURSE, PRECIPITATED THE CONFESSION.

1 MR. HENDERSON: ABSOLUTELY.

2 THE COURT: SO WE HAVE THAT AS A MATTER OF FACT. I
3 AM NOT PARTICULARLY CONCERNED ABOUT THE MORE RECENT ONE IN
4 FEBRUARY OF THIS YEAR.

5 MR. HENDERSON: OKAY.

6 THE COURT: IT CAN BE EXPLAINED BY NERVOUSNESS OR A
7 NUMBER OF OTHER THINGS. I AM MORE CONCERNED ABOUT OTHER
8 PARTS OF THIS CASE, SO PLEASE GO ON.

9 MR. HENDERSON: ALL RIGHT. DURING MY ASSOCIATION
10 OVER THE PAST MANY WEEKS WITH DR. LEE, WHEN I SAT DOWN LAST
11 NIGHT TO THINK ABOUT MY COMMENTS TO THE COURT HERE TODAY I
12 THINK THERE IS 4 THINGS THAT HAVE BECOME PARTICULARLY CLEAR
13 TO ME WHICH I THINK ARE RELEVANT TO YOUR HONOR'S DECISION.
14 NUMBER ONE IS DR. LEE DOESN'T HAVE A POLITICAL BONE IN HIS
15 BODY. NONE OF THIS WAS ABOUT POLITICS. I AM GOING TO TALK
16 A LITTLE BIT MORE ABOUT THAT LATER.

17 IF THERE IS ANY POLITICAL INCLINATIONS THAT DR. LEE
18 HAS, THEY ARE CERTAINLY ANTICOMMUNIST. HIS FAMILY WAS
19 DRIVEN OUT OF CHINA BECAUSE OF HIS HISTORY AND HIS UNCLE
20 WAS JAILED FOR 27 YEARS. HIS GRANDPARENTS WERE KILLED, AND
21 THEY HAD TO LEAVE. ANY POLITICAL LEANINGS ARE CERTAINLY
22 ANTI-GOVERNMENT.

23 THIS IS SOMETHING THAT IS ABOUT SCIENTISTS -- IT IS
24 BAD JUDGMENT -- AND SCIENTIFIC CAMARADERIE.

25 IN THE SAME LIGHT, OTHER THAN HIS WIFE ROBIN AND HIS

1 MOTHER LILLIAN FOR WHICH HE IS THE SOLE SUPPORT, DR. LEE IS
2 BASICALLY A SCIENTIST THROUGH AND THROUGH. HIS LIFE HAS
3 BEEN NOTHING BUT SCIENCE.
4 AS YOU SAW FROM -- I THINK FROM THE RESUME ATTACHED
5 I BELIEVE AS EXHIBIT B TO MY SENTENCING MEMORANDUM, HE HAS
6 PUBLISHED IN EXCESS OF ONE HUNDRED INTERNATIONALLY
7 RECOGNIZED SCIENTIFIC PUBLICATIONS BOTH BY HIMSELF AND
8 JOINTLY WITH OTHER WORLD REKNOWN SCIENTISTS.
9 SOME OF THE PERFORMANCE EVALUATIONS WHICH I ATTACHED
10 FROM HIS LATER JOB NOTED THAT HIS WORK IS OF QUOTE HISTORIC
11 IMPORTANCE. ANOTHER ONE INDICATES THAT HIS WORK IS AMONG
12 THE FINEST EXAMPLES OF GOOD SCIENCE WHICH HAS EVER BEEN
13 DONE FOR THE ANTI SUBMARINE PROGRAM, ALL WORK DONE ON
14 BEHALF OF THE UNITED STATES. THIS IS A MAN WHO COULD HAVE
15 MADE A FORTUNE IN THE PRIVATE SECTOR BUT CHOSE TO FOLLOW
16 ANOTHER CALLING, AND THAT IS, HE HAS DEVOTED HIS LIFE TO
17 SCIENCE.
18 THE LETTERS THAT HAVE BEEN SUBMITTED ARE SO REPLETE
19 THAT THERE IS NO SENSE IN POINTING OUT ANY SPECIFIC ONE.
20 THE THIRD POINT THAT I THOUGHT STRUCK ME WAS THAT
21 ALTHOUGH THE GOVERNMENT ESPECIALLY IN THE DECLARATIONS
22 SUBMITTED BY AGENT [redacted] CONTINUES TO SAY THAT BECAUSE OF
23 ALL THE E-MAILS AND CORRESPONDENCE BACK AND FORTH BETWEEN
24 SCIENTISTS IN CHINA AND DR. LEE THAT HE MAY HAVE PASSED
25 SOME OTHER INFORMATION, FIRST OF ALL, THAT IS NOT WHAT THIS

1 CASE IS ABOUT.

2 SECOND OF ALL, IT IS SIMPLY NOT SO. THE F.B.I. HAS
3 APPARENTLY REVIEWED THOSE E-MAILS AND CORRESPONDENCE.
4 THERE IS NOTHING THAT CAN BE PRESENTED IN THEM THAT
5 INDICATES THAT ANY OTHER CLASSIFIED INFORMATION WAS
6 PASSED.

7 THEY CONDUCTED A SEARCH OF HIS OFFICE AND HIS HOME.
8 THEY HAVE HAD A TAP ON HIS TELEPHONE AND A BUG IN HIS
9 RESIDENCE FOR WHO KNOWS HOW LONG. YET THE ONLY CONCLUSION,
10 AND IT IS EVEN RECOGNIZED IN THE DEPARTMENT OF ENERGY'S
11 IMPACT STATEMENT, IS THAT THERE IS NOTHING SPECIFICALLY
12 THAT CAN BE POINTED TO IN ANY OF THOSE COMMUNICATIONS THAT
13 IS DIFFERENT FROM AN ORDINARY CONTACT THAT THERE WOULD BE
14 BETWEEN SCIENTISTS WHO WERE WORKING ON JOINT PROJECTS AND
15 WHO WERE FRIENDS.

16 I NOTICE THAT THE PRESENTENCE REPORT ADDENDUM
17 ADDRESSES THIS SPECIFIC POINT IN WHICH IT STATES AFTER
18 REVIEWING MORE THAN 600 COMMUNICATIONS BETWEEN DR. LEE AND
19 HIS PEOPLE, REPUBLIC OF CHINA CONTACTS, THE GOVERNMENT
20 CONCEDES THAT NONE OF THESE MESSAGES CONTAIN CLASSIFIED
21 INFORMATION, BUT NEVERTHELESS, SPECULATES AS TO THE DAMAGE
22 LEE MAY HAVE CAUSED.

23 I DON'T THINK SPECULATION GETS IT DONE, ESPECIALLY
24 IN A COURT OF LAW.

25 THERE WASN'T ANYTHING THAT WAS DISCLOSED THAT HAS

1 BEEN DISCLOSED AS A RESULT OF THIS CASE THAT WAS PASSED,
2 AND THERE IS NO REAL EVIDENCE THAT IN FACT THERE WAS.
3 NOW THE FOURTH POINT THAT STRUCK ME THAT I THOUGHT
4 WAS PARTICULARLY RELEVANT WAS THE REASON THAT DR. LEE
5 DISCLOSED THE INFORMATION HE DID.
6 I THINK IT IS PRETTY CLEAR FROM A LOT OF THE
7 CORRESPONDENCE TO THE COURT INDICATING THAT THE TYPE OF
8 PERSON DR. LEE IS THAT THIS WAS A SCIENTIFIC THING, AND
9 THAT IS ALL IT WAS.
10 WHAT HE DISCLOSED WAS HIS OWN INFORMATION FROM HIS
11 OWN PAPER THAT HAD BEEN CLASSIFIED. CERTAINLY HIS EGO GOT
12 THE BEST OF HIM. IT WAS A PROJECT WHICH WAS ADDITIONALLY
13 ONE OF THE WORST KEPT SECRETS IN THE SCIENTIFIC COMMUNITY.
14 THERE HAVE BEEN PUBLICATIONS RELATING TO IT. OTHER
15 SCIENTISTS WERE ALREADY AWARE OF IT, AND IT WAS
16 SUBSEQUENTLY DECLASSIFIED AS YOUR HONOR KNOWS, BUT HE DID
17 IT. THERE IS NO QUESTION BUT THAT HE DID IT.
18 ONE OF THE COLLEAGUES TO WHOM I SPOKE, AND I SPOKE
19 TO MANY IN THE COURSE OF PREPARING FOR THIS PROCEEDING,
20 INDICATED THAT HE HAD ALWAYS READ DR. LEE'S PERSONAL
21 PHILOSOPHY AS CONSISTENT WITH THAT OLD PROVERB "IF YOU GIVE
22 A MAN A FISH YOU FEED HIM DINNER. IF YOU TEACH HIM HOW TO
23 FISH YOU FEED HIM FOR A LIFETIME," AND I THINK THAT IS
24 EXACTLY WHAT WAS GOING ON HERE.
25 PROFESSOR KUBOTA WHO I QUOTED IN MY SENTENCING

1 MEMORANDUM WHO I NEVER MET OR TALKED TO AND HE WAS
2 UNSOLICITED SUBMITTED A LETTER WHICH WENT TO THE COURT
3 WHICH I THOUGHT INDICATED A LOT ABOUT WHAT WAS HAPPENING
4 HERE, AND IT SEEMED TO ME THAT IT WAS RIGHT ON. ACCORDING
5 TO PROFESSOR KUBOTA I BELIEVED WHEN PETER LEE WAS
6 DISCUSSING TECHNICAL PROBLEMS WITH CHINESE SCIENTISTS, HE
7 WAS OVERCOME BY HIS DESIRE TO HELP THEM IN ANY WAY HE CAN.
8 HIS MIND MUST HAVE BEEN WORKING LIKE MINE WHEN I WAS
9 A PROFESSER TRYING TO HELP GRADUATE STUDENTS, CAPABLE, BUT
10 YOUNG AND INEXPERIENCED. THAT IS WHAT HAPPENED HERE. THAT
11 IS WHAT WAS GOING ON, THE WORST OF JUDGMENT BUT NOT THE
12 WORST OF MOTIVES.
13 INTERESTINGLY, I ATTACHED SOME E-MAIL CORRESPONDENCE
14 AS ONE OF THE EXHIBITS IN WHICH I THINK DR. LEE'S DESIRE TO
15 HELP YOUNG SCIENTISTS, WHETHER IT BE CHINESE OR OTHERWISE,
16 WAS ILLUSTRATED FAIRLY VIVIDLY IN WHICH, YOUR HONOR, IF YOU
17 READ THAT YOU NOTICE HE WAS ENCOURAGING THAT YOUNG
18 SCIENTISTS LEAVE CHINA AND COME TO THE UNITED STATES AND DO
19 HIS RESEARCH AND HIS WORK HERE.
20 NOW WITH ALL THAT IN MIND, I GUESS I NEED TO GET TO
21 THE GOVERNMENT'S POSITION THAT SOMEHOW THIS LASER FUSION
22 PHYSICS WAS RELATED TO NUCLEAR WEAPONS.
23 I THINK WE DISCUSSED THAT FAIRLY DETAILED THROUGHOUT
24 THE FILINGS.
25 A COUPLE OF QUICK POINTS.

1 FIRST OF ALL, IT SEEMS TO ME THAT THIS ISN'T OF
2 MAJOR SIGNIFICANCE AT THIS POINT.
3 THIRTEEN YEARS AFTER THE FACT WHEN THE INFORMATION
4 HAS BEEN DECLASSIFIED, THE PRESENTENCE REPORT CONTAINS A
5 QUOTE AND IN THAT REGARD ACCORDING TO SCIENTISTS WHO SHOULD
6 KNOW IT IS UNLIKELY THAT HE COMPROMISED ANY NATIONAL
7 SECURITY.
8 AS I NOTED THROUGHOUT MY SENTENCING MEMORANDUM, THE
9 SCIENTISTS WHO WORKED ON THE PROJECT INCLUDING THE
10 SUPERVISOR, DR. STORM, WHO IS ONE OF THE SUPERVISORS -- IT
11 IS FAIR TO SAY I GUESS THERE WERE SEVERAL -- ARE VIRTUALLY
12 UNANIMOUS THAT THE DECLASSIFICATION WASN'T EVEN NECESSARY.
13 NOW CERTAINLY THAT DOESN'T EXCUSE WHAT DR. LEE DID,
14 AND THAT IS NOT THE POINT THAT I AM TRYING TO MAKE.
15 I AM JUST TRYING TO MAKE THE POINT THAT THIS
16 STATEMENT THAT SOMEHOW THIS RELATED TO NUCLEAR WEAPONRY AND
17 ON AND ON REALLY OVERSTATES WHAT HAPPENED HERE.
18 THE GOVERNMENT SUBMITTED A DECLARATION OR A LETTER
19 FROM DR. COOK, A REKNOWN SCIENTIST WHO I HAD THE PRIVILEGE
20 OF MEETING WHO IS OF THE OPINION THAT IT DID SOMEHOW RELATE
21 TO NUCLEAR WEAPONS.
22 THE POINT I WANTED TO MAKE IS THAT THE PEOPLE WHO
23 ACTUALLY WORK ON THAT PROJECT AND THE PEOPLE WHO EVENTUALLY
24 PARTICIPATED IN CAUSING IT TO BE DECLASSIFIED BECAUSE IT
25 DIDN'T RELATE TO NUCLEAR WEAPONS ARE THE ONES WHO SEEM TO

1 BE THE MOST KNOWLEDGEABLE AND KNOW THE BEST.
2 THE PRESENTENCE REPORT AFTER REVIEWING THOSE
3 MATERIALS HAS REACHED THE SAME CONCLUSION. I REALLY THINK
4 IT IS THE ONLY CONCLUSION THAT ONE CAN FAIRLY REACH.
5 CERTAINLY DR. LEE BELIEVED IT DIDN'T RELATE IN ANY
6 WAY AND THE SUBSEQUENT DECLASSIFICATION ONLY REENFORCES
7 THAT VIEW THAT IT WASN'T SOMETHING THAT BEING DISCLOSED WAS
8 REALLY TO THE DETRIMENT OF THE UNITED STATES.
9 I AM TRYING TO RECALL WHICH OF THE SUBMISSIONS AND
10 WHETHER IT WAS FROM DR. THOMPSON -- I BELIEVE THAT IS WHO
11 IT WAS WHO WORKED ON THE PROJECT BUT IT MAY HAVE BEEN DR.
12 STORM -- INDICATED THAT WHAT THIS PROJECT WAS REALLY ABOUT
13 FROM THEIR PERSPECTIVE WAS ITS POTENTIAL TO PROVIDE AN
14 ENERGY SOURCE THAT COULD HAVE BENEFITTED THE ENTIRE WORLD,
15 AND THAT IS WHERE DR. LEE WAS COMING FROM.
16 HE SHOULD HAVE WAITED BUT HE DIDN'T.
17 HIS JUDGMENT WAS AS BAD AS YOU CAN GET, BUT
18 FORTUNATELY IT DIDN'T CAUSE ANY HARM, AND THERE WAS NO
19 INTENTION TO CAUSE HARM OR TO HARM THIS COUNTRY IN ANY WAY.
20 IT WAS A SCIENTIFIC THING, AND I GUESS WE HAVE
21 PROBABLY SAID ENOUGH ON THAT ONE.
22 I GUESS THE QUESTION NOW IS WHERE DOES THIS LEAVE
23 US. DR. LEE IS NO SPY. HE IS TRULY A DECENT MAN. HE HAS
24 COMMITTED A CLASSIFIED INFORMATION VIOLATION, AND ALTHOUGH
25 HE SHOULDN'T HAVE DONE IT, IT IS ONE THAT HE BELIEVED WOULD

1 HAVE DONE NO HARM AS THE INFORMATION WAS ALREADY APPEARING
2 PUBLICLY IN PUBLICATIONS THROUGHOUT THE WORLD. THE
3 VIOLATION OCCURRED 13 YEARS AGO. THE INFORMATION WAS LATER
4 DECLASSIFIED.
5 HIS PRIOR RECORD CONSISTS OF ONE TRAFFIC TICKET.
6 HE IS 59 OR 60 YEARS OLD. AT THIS POINT HE HAS LOST
7 HIS SECURITY CLEARANCE AND HIS JOB AND OBVIOUSLY WILL HAVE
8 NO CHANCE TO EVER AGAIN BE ABLE TO REPEAT ANY VIOLATIONS
9 SUCH AS THIS. HE IS THE SOLE SUPPORT OF HIS WIFE, AND THE
10 SOLE SUPPORT OF HIS ELDERLY MOTHER. HE HAS BEEN OFFERED
11 EMPLOYMENT IN SAN DIEGO WHICH WOULD BE AN OFFER WHICH WOULD
12 ENABLE HIM TO PUT HIS LIFE BACK TOGETHER AND TO REMAIN
13 PRODUCTIVE WHICH COULD BE DONE UNDER STRICT SUPERVISION
14 FROM THE COURT.
15 HE IS PROBABLY THE BEST PROBATION RISK THAT I HAVE
16 SEEN IN MY 25 YEARS IN THIS BUSINESS, ALTHOUGH I CERTAINLY
17 DON'T CLAIM TO HAVE SEEN AS MANY INDIVIDUALS IN THIS
18 POSITION AS YOUR HONOR HAS.
19 NOT EVERYBODY NEEDS TO GO TO JAIL.
20 I DON'T THINK DR. LEE IS THE PERSON OR THE KIND OF
21 PERSON THAT BELONGS IN A JAIL CELL. I WOULD ASK THE COURT
22 BASED ON ALL THE MATERIALS IN FRONT OF IT IN THIS CASE AND
23 THE MATERIALS CONTAINED AND ATTACHED TO MY SENTENCING
24 MEMORANDUM TO SERIOUSLY CONSIDER EITHER A PERIOD OF
25 PROBATION OR SERVE THE PROBATION REPORT RECOMMENDATION, IF

1 YOUR HONOR IS INCLINED TO ADOPT THAT, OF ELEVEN MONTHS
2 INCARCERATION, THAT THAT ELEVEN MONTHS BE SERVED IN A
3 PERIOD OF HOME DETENTION SO THAT AT LEAST HE COULD REMAIN
4 EMPLOYED AND COULD REMAIN PRODUCTIVE AND CONTINUE TO CARE
5 FOR HIS FAMILY.
6 IF THERE IS A PROBLEM ALONG THE WAY, AND IT IS
7 INCONCEIVABLE THAT THERE WOULD BE, THE COURT HAS THE POWER
8 AT ANY TIME TO DEAL WITH THAT PROBLEM AS YOUR HONOR WELL
9 KNOWS. WITH THAT I THANK THE COURT.
10 THE COURT: THANK YOU, MR. HENDERSON.
11 MR. SHAPIRO.
12 MR. HENDERSON: AND YOUR HONOR, I'M SORRY.
13 OBVIOUSLY MR. LEE WOULD LIKE TO ADDRESS THE COURT.
14 THE COURT: HE WILL HAVE THAT OPPORTUNITY.
15 MR. HENDERSON: AND SO WOULD HIS WIFE.
16 THE COURT: WELL, THAT WILL NOT BE NECESSARY, BUT I
17 HAVE READ A VERY MOVING LETTER FROM HIS WIFE AS WELL AS
18 FROM HIS SISTER-IN-LAW, HIS WIFE'S SISTER AND A NUMBER OF
19 OTHER RELATIVES, ALL OF HIS SIBLINGS, HIS MOTHER.
20 IN FACT, I THINK I HAVE NOT SEEN QUITE AS MANY
21 LETTERS SINCE ONE OF THE DEFENDANTS THAT YOU PROSECUTED IN
22 A MATTER BEFORE ME 18 OR MORE YEARS AGO.
23 MR. SHAPIRO: MAY IT PLEASE THE COURT, GOOD MORNING,
24 YOUR HONOR. MR. HENDERSON SAYS THAT THIS IS ABOUT A
25 SCIENTIFIC THING.

1 MORE THAN SCIENCE, THIS CASE INVOLVES PERSONAL
2 RESPONSIBILITY.
3 THE DEFENDANT SWORE AN OATH IN AUGUST OF 1976, AND
4 HE WAS BOUND BY THAT OATH VOLUNTARILY UNTIL 1997.
5 HE SWORE THAT HE WOULD KEEP THE NATION'S CLASSIFIED
6 INFORMATION SECRET, AND HE SWORE THAT HE WOULD REPORT ALL
7 HIS CONTACTS WITH FOREIGN NATIONALS.
8 THIS OATH GAVE HIM ACCESS TO SECRET INFORMATION.
9 IT ALLOWED HIM TO EXCEL IN HIS FIELD OF STUDY.
10 IT GAVE HIM THE OPPORTUNITY TO PUBLISH.
11 IT GAVE HIM THE PRIVILEGE OF EMPLOYMENT FOR OVER 30
12 YEARS.
13 IT GAVE HIM A LIVELIHOOD. IT GAVE HIM THE
14 OPPORTUNITY TO WORK AT THE NATION'S TOP RESEARCH
15 FACILITIES.
16 IN RETURN FOR ALL IT GAVE HIM, ALL THAT THE OATH
17 REQUIRED WAS THAT HE SHOW PERSONAL RESPONSIBILITY AND NOT
18 DIVULGE SECRETS AND REPORT CONTACTS.
19 YOUR HONOR, THE DEFENDANT BROKE HIS WORD. HE LIED.
20 HE LIED FOR ALMOST HALF THE TIME HE WAS EMPLOYED AND BOUND
21 BY THIS OATH.
22 HE COMPROMISED THE SECURITY OF PROJECTS HE WORKED
23 ON, NOT TO THE DISADVANTAGE OF THE UNITED STATES
24 NECESSARILY, BUT CLEARLY PURSUANT TO HIS PLEA AS MADE CLEAR
25 IN THE STATUTE IN ORDER TO HELP A FOREIGN NATION WHICH IS

1 THE VIOLATION.

2 HE COMPROMISED THE INTEGRITY OF THE INSTITUTIONS HE

3 WORKED IN.

4 RATHER THAN SERVING THE UNITED STATES AS HE SWORE HE

5 WOULD, HE TRIED TO HELP CHINA.

6 IN ONE SENSE THEN THIS DEFENDANT STANDS BEFORE THIS

7 COURT LIKE ANY OTHER CRIMINAL DEFENDANT WHO ABUSES THE

8 TRUST OF THOSE FOR WHOM HE WORKED, BUT UNLIKE OTHER

9 DEFENDANTS, THIS DEFENDANT PUT AN IMPORTANT PART OF THE

10 UNITED STATES' NUCLEAR RESEARCH PROGRAM AT RISK.

11 MR. HENDERSON SAYS HE DID IT OUT OF A SPIRIT OF

12 SCIENTIFIC CAMARADERIE, BUT THAT IS NOT REALLY RELEVANT.

13 UNDER THE STATUTE THE VIOLATION IS DOING THE CRIME

14 IN ORDER TO HELP A FOREIGN NATION, AND THAT IS WHAT PETER

15 LEE DID.

16 I WOULD LIKE TO FOCUS ON WHAT I THINK IS THE MOST

17 IMPORTANT PART OF THIS CASE, AND THAT IS THE PATTERN OF

18 DECEPTION. THIS IS NOT AN ISOLATED EVENT.

19 MR. HENDERSON NEVER REFERRED IN HIS STATEMENT TO THE

20 COURT TO THE SECOND FELONY COUNT.

21 THE DEFENDANT ENTERED A PLEA WHICH OCCURRED NOT 12

22 OR 13 YEARS AGO BUT IN 1997.

23 I WOULD LIKE TO FOCUS ON THE PATTERN OF DECEPTION

24 FROM THE BEGINNING WHEN IT STARTED BECAUSE WE KNOW WITHOUT

25 DOUBT IT STARTED ON JANUARY 9, 1985.

1 WE KNOW BECAUSE PETER LEE HAS CONFESSED TO THAT.
2 ON JANUARY 9, 1985 WHILE VISITING CHINA ON A
3 VACATION IN A BEIJING HOTEL ROOM PETER LEE WAS APPROACHED
4 BY A CHINESE SCIENTIST, AND HE WAS ASKED BY THE CHINESE
5 SCIENTIST TO DISCUSS HOHLRAUMS. I HAVE SPELLED IT FOR YOUR
6 COURT REPORTER.
7 A HOHLRAUM IS A DIAGNOSTIC DEVICE. I HAVE BROUGHT
8 ONE IN THE COURT FOR THE COURT TO SEE.
9 THE COURT: YES.
10 MR. SHAPIRO: IT IS YOU CAN IMAGINE ROUGHLY THE SIZE
11 OF 50 HUMAN HAIRS. INSIDE THE HOHLRAUM IS A GLASS GLOBE.
12 LASERS ARE FIRED INTO THE HOHLRAUM WITH SUCH FORCE
13 THAT THEY COLLAPSE THE GLOBE AND CREATE A SMALL NUCLEAR
14 DETONATION WHICH IS THEN STUDIED AND USED IN THE DESIGN OF
15 NUCLEAR WEAPONS.
16 THAT IS WHY IN 1985 ANYTHING RELATING TO HOHLRAUMS
17 WAS CLASSIFIED AS RESTRICTED DATA UNDER THE ATOMIC ENERGY
18 ACT OF 1956. ANYTHING CLASSIFIED AS RESTRICTED DATA
19 REFERRED TO THE DESIGN OR MAINTENANCE OF NUCLEAR WEAPONS,
20 AND PETER LEE HIMSELF HAS CONFESSED TO KNOWING THAT ON
21 JANUARY 9, 1985, BECAUSE HE HAS CONFESSED WHEN HE WAS
22 APPROACHED BY THE CHINESE SCIENTIST IN THAT BEIJING HOTEL
23 ROOM HE CONFESSED TO KNOWING IT WAS WRONG, YET GIVING THE
24 CLASSIFIED INFORMATION TO THE CHINESE SCIENTIST.
25 NOW IF HE HAD STOPPED THERE -- IF HE HAD SIMPLY MADE

1 A MISTAKE THAT WOULD BE A VERY DIFFERENT CASE.
2 THAT IS NOT WHAT HAPPENED.
3 PETER LEE SLEPT ON IT.
4 HE HAD A WHOLE NIGHT TO REFLECT ON WHAT HE DID.
5 HE KNEW HE HAD PASSED CLASSIFIED INFORMATION.
6 HE KNEW HE HAD VIOLATED HIS OATH.
7 HE KNEW HE HAD COMPROMISED THE INTEGRITY OF THE
8 INSTITUTION HE WORKED IN.
9 HE KNEW HE HAD VIOLATED HIS PROMISE TO HIS FELLOW
10 AMERICAN SCIENTISTS, AND HE DIDN'T STOP BECAUSE THE VERY
11 NEXT DAY HE WENT TO A SECOND BEIJING HOTEL, AND THERE IN A
12 CONFERENCE ROOM IN FRONT OF 30 OR 40 CHINESE SCIENTISTS HE
13 GAVE A TWO HOUR DETAILED LECTURE ABOUT HOHLRAUMS, KNOWING
14 AS HE HAS CONFESSED THAT EVERY PIECE OF INFORMATION THAT HE
15 GAVE WAS CLASSIFIED.
16 IT IS NOT UP TO THE WHIM OF AN INDIVIDUAL SCIENTIST
17 TO DETERMINE IF SOMETHING IS CLASSIFIED. IT REALLY
18 SHOULDN'T BE, AND HE IS NOT GOING TO HONOR THAT. PETER LEE
19 HAVING HAD TIME TO REFLECT, HAVING HAD A NIGHT TO SLEEP ON
20 IT THE NEXT DAY GIVES A LECTURE IN WHICH HE DRAWS DIAGRAMS,
21 HE GIVES SPECIFIC DIMENSIONS, DIAMETER NUMBERS, ETC.
22 REGARDING HOHLRAUMS.
23 BEAR IN MIND, YOUR HONOR, THIS IS ONE OF THE
24 NATION'S TOP SCIENTISTS FROM ONE OF THE NATION'S TOP
25 RESEARCH NUCLEAR WEAPONS FACILITIES GIVING A TWO HOUR

1 LECTURE REGARDING CLASSIFIED INFORMATION TO THE TOP NUCLEAR
2 SCIENTISTS OF CHINA.
3 THE PATTERN OF DECEPTION THERE IS CLEAR, AND IT
4 CONTINUES. HE RETURNS TO THE UNITED STATES HAVING
5 COMMITTED THIS GROSS VIOLATION AND DOESN'T TELL ANYONE
6 ABOUT IT. HE IS ASKED ABOUT IT. HE LIES.
7 HE THEN CARRIES ON YEARS OF COMMUNICATION WITH
8 CHINESE SCIENTISTS, HUNDREDS OF E-MAILS, HUNDREDS OF
9 LETTERS, NONE OF WHICH HE REPORTS.
10 THE IMPORTANT ASPECT OF THOSE HUNDREDS OF E-MAILS
11 THAT MR. HENDERSON REFERS TO IS NOT THAT HE DIDN'T PASS
12 CLASSIFIED INFORMATION.
13 THE IMPORTANT POINT IS HE SHOULD HAVE UNDER HIS OATH
14 REPORTED EVERY SINGLE ONE OF THOSE CONTACTS.
15 HE KNEW HOW TO DO IT.
16 WHEN HE HAD CONTACTS WITH ENGLISH SCIENTISTS HE
17 REPORTED THEM.
18 WHEN HE HAD CONTACT WITH RUSSIAN SCIENTISTS HE
19 REPORTED IT, BUT HUNDREDS OF TIMES HE HAS CORRESPONDENCE
20 WITH CHINESE SCIENTISTS THAT HE KNOWS TO REPORT AND HE
21 DOESN'T.
22 THE DECEPTIONS WHICH BEGAN IN JANUARY OF '85
23 CONTINUE ALL THE WAY TO MAY OF 1997.
24 THERE ARE CONSTANT COMMUNICATIONS DURING THAT ENTIRE
25 TIME. MR. HENDERSON SAID THERE WAS A BUG AT HIS HOUSE, A

1 MICROPHONE.

2 THERE WAS BEGINNING IN AUGUST OF '96, AND THE

3 DEFENDANT'S WIFE FOUND THE BUG WHICH SOMEWHAT COMPROMISED

4 ITS VALUE TO LAW ENFORCEMENT.

5 NEVERTHELESS, LAW ENFORCEMENT WAS ABLE TO ESTABLISH

6 ABSOLUTELY HIS HUNDREDS OF COMMUNICATIONS WITH THE CHINESE

7 THAT HE DID NOT REPORT.

8 IT SAYS A LOT ABOUT THE DEFENDANT THAT WHEN HE KNEW

9 HE DID WRONG IN JANUARY OF '85, AND HE CONFESSES THAT HE

10 KNEW IT WAS WRONG, IT SAYS A LOT ABOUT HIM THAT HE NEVER

11 STOPPED UNTIL THE F.B.I. CAUGHT HIM.

12 THE WEB OF DECEPTION, YOUR HONOR, CONTINUED TO MAY

13 OF 1997.

14 IN MAY OF 1997 THE DEFENDANT IS WORKING FOR T.R.W.

15 HE HAS THE SAME SECURITY CLEARANCES AS I HAVE DISCUSSED

16 EARLIER. HE IS REQUIRED TO FILL OUT A FORM PRIOR TO HIS

17 TRIP TO CHINA INDICATING WHAT HE IS GOING TO DO THERE.

18 HE LIES ON THAT FORM AND SAYS HE IS JUST GOING TO BE

19 THERE AS A TOURIST.

20 HE GOES TO CHINA WITH THE DELIBERATE INTENTION OF

21 GIVING SCIENTIFIC LECTURES. HOW DO WE KNOW?

22 WE KNOW BECAUSE HE CONFESSED TO BRINGING WITH HIM

23 GRAPHS AND DOCUMENTS NECESSARY TO GIVE THOSE LECTURES.

24 HAVING FILLED OUT THAT FORM, HE GOES TO CHINA AND GIVES

25 THOSE TECHNICAL LECTURES.

1 HE RETURNS TO THE UNITED STATES AND IS FORCED TO
2 FILL OUT A SECOND FORM, A POST-TRAVEL FORM AND HE LIES ON
3 THAT FORM. WHEN HE IS ASKED, "DID ANYONE -- ANY FOREIGN
4 NATIONAL ASK YOU FOR TECHNICAL INFORMATION," PETER LEE LIES
5 AND SAYS NO, BUT HE KNOWS THE ANSWER IS YES.
6 THE ONLY ISSUE ABOUT POLYGRAPHS THAT I WOULD TOUCH
7 UPON, YOUR HONOR, IS WHATEVER THEIR VALUE IS IN COURT THE
8 FIRST POLYGRAPH TEST HE TOOK MUST HAVE HAD SOME VALUE
9 BECAUSE IT SAID HE WAS LYING AND PETER LEE ADMITTED THE
10 TEST WAS RIGHT. HE DID LIE.
11 IT WAS ONLY AFTER THE FIRST POLYGRAPH THAT HE
12 CONFESSED TO HIS DECEPTION AND HIS PATTERN OF DECEPTION,
13 AND I WOULD POINT OUT, FINALLY, THAT THE F.B.I. INTERVIEWED
14 MR. LEE FIVE TIMES BEFORE THAT FIRST POLYGRAPH WAS GIVEN.
15 HE HAD FIVE OPPORTUNITIES TO TRY AND REHABILITATE
16 HIS HONOR, TO TRY AND SHOW THAT HE WAS AN HONORABLE PERSON,
17 TO SHOW SOME PERSONAL RESPONSIBILITY, FIVE TIMES.
18 AFTER OVER A DECADE OF DECEPTION HE HAD HIS CHANCE,
19 AND HE DIDN'T ADMIT HIS CRIMES UNTIL HE HAD FAILED THAT
20 POLYGRAPH EXAM.
21 LET ME JUST CONCLUDE THEN, YOUR HONOR, BY NOTING
22 THAT THE SCIENTISTS WHO ACTUALLY KNOW WHAT THE DEFENDANT
23 DID, I AM NOT TALKING ABOUT THE LETTERS THAT THE COURT HAS
24 RECEIVED FROM FRIENDS AND FROM FORMER SUPERVISORS WHO MAY
25 HAVE MOTIVES, SOME GOOD, SOME NOT SO GOOD TO TRY AND MAKE

1 WHAT HE DID SEEM LESS SERIOUS, I AM TALKING ABOUT
2 SCIENTISTS WHO HAVE SEEN HIS VIDEOTAPED CONFESSION. I AM
3 TALKING ABOUT SCIENTISTS WHO KNOW WHAT HE DID, SCIENTISTS
4 WHO FILLED OUT THE IMPACT STATEMENTS, SCIENTISTS LIKE TOM
5 COOK AND SCIENTISTS LIKE DR. JOHNSON WHO WE HAVE REFERRED
6 TO IN OUR DECLARATION.
7 THEY SAY WITHOUT QUESTION WHAT HE PASSED IN 1985 WAS
8 CLASSIFIED.
9 SOME OF THOSE PEOPLE ARE HERE, JOSEPH MAHALEY, THE
10 DIRECTOR OF SECURITY AFFAIRS FOR THE DEPARTMENT OF ENERGY,
11 MR. TRULAKE WHO IS THE CENTER'S INTELLIGENCE OFFICER FOR
12 THE DEPARTMENT OF ENERGY, AND DR. COOK IS ALSO HERE. ALSO
13 MR. BOB GREER, DIRECTOR OF SECURITY FOR T.R.W. IS HERE, BUT
14 THE PAPERS I THINK SPEAK FOR THEMSELVES, AND WE ARE
15 PREPARED TO SUBMIT ON OUR PAPERS.
16 YOUR HONOR, THE DEFENDANT FACES A WIDE RANGE OF
17 CRIMES AND SIGNIFICANT PUNISHMENT FOR WHAT HE DID.
18 THE GOVERNMENT WHICH HAS BEEN CRITICIZED IN THE PAST
19 FOR NOT BEHAVING REASONABLY IN CERTAIN CASES I THINK HAS
20 BEHAVED REASONABLY IN THIS CASE.
21 WE HAVE GIVEN HIM AN OPPORTUNITY TO PLEAD TO A COUNT
22 THAT ALLOWS THIS COURT TOTAL DISCRETION. THIS COURT CAN
23 DECIDE WHAT THIS DEFENDANT RECEIVES.
24 THE GOVERNMENT CONCEDES HE IS NOT A MASTER SPY. IT
25 WOULD BE ABSURD TO SAY HE IS. WHAT HE IS, HOWEVER, IS A

1 PERSON WHO LACKED PERSONAL RESPONSIBILITY TO SUCH A DEGREE
2 THAT HE WAS ABLE TO LIE TO HIS BOSSES AND TO HIS FELLOW
3 AMERICAN SCIENTISTS FOR OVER A DECADE.
4 HE IS THE KIND OF PERSON WHO WAS WILLING TO
5 COMPROMISE THE INTEGRITY OF A NUCLEAR WEAPONS-RELATED
6 PROJECT BECAUSE HE WANTED TO HELP THE CHINESE IN THIS
7 PATTERN OF DECEPTION THAT STRETCHES OVER SO MANY YEARS AND
8 WHICH INCLUDES THE COUNT MR. HENDERSON NEVER EVEN MENTIONED
9 AND THE HUNDREDS OF CONTACTS THAT COULD HAVE BEEN MENTIONED
10 FOR HIS HAVING SHARED NUCLEAR INFORMATION WITH CHINA'S TOP
11 SCIENTISTS AT A TIME WHEN THAT INFORMATION WAS CLASSIFIED.
12 THE DEFENDANT DESERVES PRISON TIME AND SHOULD RECEIVE
13 PRISON TIME.
14 THE GOVERNMENT HARKENING BACK TO THE CASE BEFORE THE
15 SENTENCING GUIDELINES WHEN A.U.S.A.'S WOULD RECOMMEND ONE
16 OF THREE THINGS, THEY WOULD RECOMMEND EITHER PROBATION, A
17 SHORT PERIOD OF INCARCERATION OR A LONG PERIOD OF
18 INCARCERATION, WE RECOMMEND A SHORT PERIOD OF
19 INCARCERATION, AND WE DO SO, YOUR HONOR, BECAUSE WHAT HE
20 DID WAS NOT IN ANY WAY ISOLATED TO THOSE TWO DAYS IN 1985.
21 THE COURT: THANK YOU, MR. SHAPIRO.
22 MR. HENDERSON, DO YOU WISH TO RESPOND?
23 MR. HENDERSON: VERY BRIEFLY.
24 THE COURT: CERTAINLY.
25 MR. HENDERSON: FIRST OF ALL, ONE OF TWO POINTS THAT

1 MR. SHAPIRO MADE I DON'T REALLY UNDERSTAND.
2 THERE HAS NEVER BEEN ANY DENIAL THAT WHAT WAS PASSED
3 IN '85 WAS CLASSIFIED. HE INDICATED THERE WERE SEVERAL
4 SCIENTISTS THAT WOULD BACK-UP HIS INFORMATION THAT THE
5 INFORMATION PASSED WAS CLASSIFIED.
6 IT IS CLEAR FROM OUR SENTENCING PAPERS AND FROM THE
7 DEFENDANT'S PLEA THAT IT WAS CLASSIFIED AND THAT HE KNEW
8 THAT, SO I DON'T WANT -- IF ANYONE HAS BECOME CONFUSED,
9 THEY SHOULDN'T BE.
10 NUMBER 2, I DIDN'T REFERENCE COUNT 2 IN THE
11 INFORMATION ESSENTIALLY BECAUSE I TALKED ABOUT IT I THINK
12 TO THE EXTENT THAT IT IS DESERVED IN MY SENTENCING
13 MEMORANDUM, AND LAWYERS ALWAYS SEEM TO TALK TOO MUCH WHEN
14 THEY GET UP HERE ANYHOW.
15 THAT COUNT IS NOT WHAT THIS CASE IS ALL ABOUT AS THE
16 COURT WELL KNOWS.
17 THAT INFORMATION THAT WAS OMITTED ON THAT T.R.W.
18 FORM AS TO THE 1997 LECTURE SHOULD HAVE BEEN ON THERE.
19 THE FACTS ARE THAT DR. LEE OBTAINED PERMISSION TO
20 GIVE THAT LECTURE IN 1996 BUT NEVER WENT IN 1996. THEN
21 WHEN HE WENT IN 1997 HE SHOULD HAVE GOTTEN PERMISSION AND
22 REPORTED THE CONTACTS AND TOLD THEM HE WAS GOING TO GIVE
23 THE LECTURE THEN AND HE DIDN'T.
24 AS I POINT OUT IN THE SENTENCING MEMO WITH DR. LEE,
25 I THINK IT BECAME ONE OF THOSE THINGS. HE HAD SO MANY

1 FRIENDS AND SCIENTISTS THAT EVERY TIME HE ATE DINNER WITH
2 ONE, AND IT SHOULD HAVE BEEN REPORTED, YOU GET TO THE POINT
3 WHERE YOU JUST DON'T DO IT BECAUSE IT IS OVERKILL, AND YOU
4 KNOW THAT THERE WAS NOTHING PASSED, AND IN YOUR OWN MIND
5 YOU HAVEN'T DONE ANYTHING THAT IS INAPPROPRIATE, AND THAT
6 IS WHAT THAT IS ALL ABOUT, AND THAT IS WHAT HAPPENED IN
7 1997.
8 THE PLEA AGREEMENT AND THE PRESENTENCE REPORT BOTH
9 MAKE RECOMMENDATIONS THAT THAT COUNT BE -- WHATEVER THE
10 SENTENCE IMPOSED -- BE SERVED CONCURRENTLY WITH THE OTHER
11 COUNT ANYHOW, AND FOR THOSE REASONS I DIDN'T REALLY MAKE A
12 POINT OF IT IN THE INITIAL PRESENTATION. I WASN'T TRYING TO
13 HIDE IT OR OMIT IT, AND I THINK YOUR HONOR UNDERSTANDS IT.
14 THE COURT: ALL RIGHT. THANK YOU. LET ME ASK IF OUR
15 SUPERVISING PROBATION OFFICER HAS ANYTHING TO ADD?
16 THE PROBATION OFFICER: NOTHING ADDITIONAL, YOUR
17 HONOR.
18 THE COURT: ALL RIGHT. I TAKE IT YOU STAND BY YOUR
19 OFFICE'S REPORT AND RECOMMENDATION BOTH?
20 THE PROBATION OFFICER: I DO.
21 THE COURT: THANK YOU.
22 DR. LEE, WOULD YOU COME TO THE LECTERN, SIR.
23 I HAVE RECEIVED A LETTER FROM YOU. I APPRECIATE
24 YOUR HAVING TAKEN THE TIME TO WRITE TO THE COURT.
25 AS I INDICATED PREVIOUSLY, I HAVE RECEIVED MORE THAN

1 AN INORDINATE AMOUNT OF LETTERS FROM OTHERS.
2 I APPRECIATE THE CONCERN THAT THEY HAVE FOR YOU.
3 THE DEFENDANT: THANK YOU, YOUR HONOR.
4 THE COURT: IT CERTAINLY EXHIBITS SOMETHING ABOUT
5 YOU AND YOUR CHARACTER THAT THIS MANY PEOPLE -- NOT JUST
6 RELATIVES ALONE -- BUT INDIVIDUALS WHO SUPERVISED YOU,
7 OTHERS WHOM YOU SUPERVISED, PEOPLE WHO HAVE KNOWN YOU FOR
8 MANY YEARS, CHILDHOOD FRIENDS IN GRAMMAR SCHOOL,
9 DISTINGUISHED PROFESSORS IN CANADA, ALL OF THESE ARE PEOPLE
10 WHO KNOW YOU, AND AS I SAID JUST BY WRITING TO THE COURT,
11 TAKING THE TIME TO DO SO INDICATES SOMETHING ABOUT YOUR
12 CHARACTER, AND IT IS APPRECIATED, BUT NOW IS THE TIME FOR
13 YOU TO SPEAK TO ME DIRECTLY.
14 IF YOU CARE TO DO SO, GO AHEAD.
15 THE DEFENDANT: YES, YOUR HONOR. WORDS CANNOT
16 DESCRIBE HOW REMORSEFUL I FEEL FOR THE EGREGIOUS MISTAKE I
17 COMMITTED OVER 13 YEARS AGO. IT WAS TRULY A SITUATION
18 WHERE I GOT CARRIED AWAY WITH PROFESSIONAL CAMARADERIE.
19 THE COURT: WELL, LET ME STOP YOU FOR A MOMENT.
20 IT ISN'T JUST AN ACTIVITY OF 13 YEARS AGO, BUT THERE
21 IS THE OTHER COUNT, THE FALSE STATEMENT MUCH MORE RECENTLY.
22 THE DEFENDANT: THAT'S CORRECT. THROUGHOUT THE YEARS
23 THERE WERE PERSONAL FRIENDSHIPS THAT I NURTURED, AND I HAVE
24 MANY, MANY FRIENDS OVER THERE, AND THE '85 INCIDENT TRULY
25 WAS DUE TO UNBRIDLED SCIENTIFIC PRESENTATION, AND, OF

1 COURSE, IN THE PROCESS I ADMIT I VIOLATED A SACRED OATH NOT
2 TO DISCUSS SECRETS. I AM DEEPLY SORRY AND REGRETFUL FOR MY
3 ACTIONS. FOR THIS MISTAKE I HAVE BEEN PUNISHED. MY CAREER
4 HAS ENDED PREMATURELY. I HAVE WORKED HARD ALL MY LIFE TO
5 BUILD A SCIENTIFIC REPUTATION. NOW THAT HAS BEEN TOTALLY
6 DESTROYED. THIS HURTS A LOT. OF COURSE, ON ACCOUNT OF MY
7 VERY FOOLISH BEHAVIOR I HAVE ALSO INFLICTED ENORMOUS
8 SUFFERING ON MY FAMILY MEMBERS. I AM VERY SORRY FOR THAT,
9 YOUR HONOR. I DON'T KNOW HOW TO TELL YOU THIS BUT THERE IS
10 NOT A WAKING MOMENT THAT I DO NOT FEEL INTENSE PAIN OF
11 REGRET AND THIS PAIN AND SHAME I SHALL HAVE TO ENDURE FOR
12 THE REST OF MY LIFE, SO I NOW STAND BEFORE YOU, YOUR HONOR,
13 WITH HUMILITY AND REMORSE, AND I WOULD LIKE TO BEG FOR
14 LENIENCY. PLEASE, YOUR HONOR, DON'T PUT ME IN JAIL. I WOULD
15 LIKE TO PICK UP THE PIECES OF MY LIFE. I WOULD LIKE TO HAVE
16 THE OPPORTUNITY TO REDEEM MYSELF. I WOULD LIKE TO DEDICATE
17 MYSELF IN WHATEVER CAPACITIES I CAN TO CONTRIBUTE TO
18 SOCIETY AGAIN. THAT IS ALL I CAN SAY. THANK YOU, YOUR
19 HONOR.
20 THE COURT: THANK YOU FOR THAT, MR. LEE.
21 THE GOVERNMENT POINTS OUT THAT THERE HAS BEEN A
22 PATTERN OF DECEPTION HERE.
23 THE DEFENDANT: RIGHT.
24 THE COURT: I THINK YOU DISAGREE WITH THAT. THE
25 MOTIVATION FOR THE DECEPTION IS, OF COURSE, STILL AT ODDS

1 BETWEEN YOU AND THE GOVERNMENT.
2 THERE IS AN INSTRUCTION --
3 THE DEFENDANT: IT WAS -- EXCUSE ME, YOUR HONOR. IT
4 WAS NOT INTENDED TO BE ANY FORM OF DECEPTION BECAUSE IF
5 THAT WERE THE CASE, I WOULD NOT HAVE KEPT ALL MY LETTERS
6 WHICH THEY HAVE IMPOUNDED. EVERYBODY KNOWS THAT I HAVE
7 THESE FRIENDS, AND SOME OF THEM I INVITED THEM TO GO OUT TO
8 LUNCH OR DINNER WITH ME -- WITH THESE FRIENDS, SO IT WAS
9 CERTAINLY NOT SOMETHING DONE IN A CLANDESTINE FASHION, AND
10 THERE WAS NO CONCEALMENT INTENDED.
11 THE COURT: WELL, IT STILL, AS I INDICATED, WOULD
12 APPEAR THAT THERE WAS A PATTERN OF DECEPTION.
13 THE DEFENDANT: RIGHT.
14 THE COURT: MOTIVATION IS SOMETHING THAT IS AT ODDS
15 BETWEEN YOU AND THE GOVERNMENT.
16 THE DEFENDANT: YES, YOUR HONOR.
17 THE COURT: THERE IS AN INSTRUCTION THAT IS NORMALLY
18 GIVEN AT THE END OF A JURY TRIAL BY THE COURT TO THE JURY
19 THAT MOTIVATION IS REALLY NOT AT ISSUE.
20 YOU HAVE ADMITTED THAT YOU HAVE BROKEN THE LAW.
21 YOU HAVE ADMITTED THAT YOU HAVE PASSED CLASSIFIED
22 INFORMATION TO A FOREIGN NATION.
23 THE FACT THAT THAT INFORMATION LATER BECAME NON-
24 CLASSIFIED IS NOT AT ISSUE HERE.
25 THE DEFENDANT: YES, YOUR HONOR.

1 THE COURT: AS THE GOVERNMENT POINTS OUT, YOU CAN'T
2 LEAVE TO AN INDIVIDUAL SCIENTIST THE DETERMINATION OF
3 WHETHER SOMETHING OUGHT TO BE CLASSIFIED OR NOT.
4 THERE IS MUCH THAT IS CLASSIFIED IN THE BELTWAY THAT
5 PERHAPS NEVER SHOULD HAVE BEEN, SHOULD NOT BE NOW AND MAY
6 ALWAYS BE.
7 THERE ARE OTHER THINGS THAT WE HAVE DATELINES ON
8 THAT WE KNOW WILL SOON BE UNCLASSIFIED, AND ONCE WE SEE
9 THEM WE WILL PROBABLY ASK WHY WERE THEY EVER CLASSIFIED,
10 BUT NEVERTHELESS, THIS WAS CLASSIFIED. YOU ADMIT THAT YOU
11 KNEW IT WAS CLASSIFIED AND THAT YOU DIVULGED IT, SO THAT IS
12 NOT BEFORE US AT THIS POINT EXCEPT I HAVE ACCEPTED YOUR
13 PLEA OF GUILTY.
14 WHILE MOTIVATION IS NOT IMPORTANT IN DETERMINING
15 WHETHER THE ELEMENTS OF CRIME ARE PROVEN BEYOND A
16 REASONABLE DOUBT OR FOR THE TAKING OF A GUILTY PLEA,
17 CLEARLY MOTIVATION IS IMPORTANT AT THE TIME OF SENTENCING.
18 WHY DID YOU DO IT?
19 THE GOVERNMENT SAYS THAT IS IMMATERIAL.
20 THE FACT THAT YOU DID IT IS IMMATERIAL FOR THE
21 ACCEPTANCE OF YOUR PLEA OF GUILTY SINCE YOU DID IT WITH
22 KNOWLEDGE AND WITH INTENT, BUT FOR THESE PURPOSES HERE
23 TODAY IT IS VERY RELEVANT. IT IS VERY MATERIAL. IT DOESN'T
24 EXCUSE WHAT YOU DID. IT HELPS EXPLAIN IT. IT IS A SERIOUS
25 MISTAKE ON YOUR PART.

1 WHAT IS ALSO CLEAR IS THAT YOU DID NOT DO IT FOR
2 MONETARY GAIN, BUT THAT BEING SAID DOESN'T MEAN THAT YOU
3 DIDN'T DO IT FOR SOME GAIN.
4 YOU DID IT FOR THE GAIN OF SELF ESTEEM WITH THESE
5 FRIENDS THAT YOU HAVE IN THE ACADEMIC AND SCIENTIFIC
6 COMMUNITIES WITHIN THE PEOPLE'S REPUBLIC OF CHINA.
7 AS THE GOVERNMENT POINTED OUT, YOU HAVE HAD A NUMBER
8 OF CONTACTS WITH SCIENTISTS FROM OTHER NATIONS DURING THE
9 WORLD, SOME CONSIDERED FRIENDS OF THE UNITED STATES, OTHERS
10 NOT.
11 YOU REPORTED THOSE DUTIFULLY AS YOU SHOULD HAVE.
12 FOR WHATEVER REASON YOU DID NOT DO IT WITH REGARD TO
13 THE PEOPLE'S REPUBLIC OF CHINA.
14 I AM VERY CONCERNED, I MUST SAY, THAT YOU DID NOT,
15 WHEN GIVEN AN OPPORTUNITY TO TELL EVERYTHING ABOUT YOUR
16 INVOLVEMENT, DO SO.
17 I CAN UNDERSTAND AGAIN WHY YOU PROBABLY DID NOT.
18 YOU PROBABLY WANTED TO BURY IT HOPING THAT IT WOULD NEVER
19 BECOME APPARENT TO OTHERS INCLUDING FAMILY, FRIENDS,
20 CERTAINLY NOT TO THE F.B.I. NOR TO THE UNITED STATES
21 ATTORNEY'S OFFICE, BUT THAT AGAIN WAS A HUMAN FAILING AND
22 FOR THAT YOU MUST BE PUNISHED. I AM THANKFUL THAT I AM NOT
23 FETTERED COMPLETELY AS I AM IN MOST CASES THESE DAYS BY THE
24 SO-CALLED SENTENCING GUIDELINES. I CAN SENTENCE YOU
25 ACCORDING TO WHAT I THINK IS JUST WHILE BEARING IN MIND THE

1 NEEDS OF OUR SOCIETY, TOGETHER WITH WHAT OUGHT TO BE A JUST
2 PUNISHMENT FOR THE INDIVIDUAL STANDING BEFORE ME, AND THAT
3 HAPPENS TO BE YOU HERE TODAY. IT IS A DELICATE BALANCE.
4 AS MR. HENDERSON HAS POINTED OUT, NOT EVERYBODY
5 NEEDS TO GO TO PRISON. THAT IS CERTAINLY TRUE. THE MESSAGE
6 IS MESSAGES DO NEED TO BE SENT TO OTHER SCIENTISTS AND
7 INDIVIDUALS WHO TAKE AN OATH SUCH AS YOU TOOK, ONE, THAT
8 THAT OATH IS NOT TO BE VIOLATED, PARTICULARLY WHEN THE
9 NATIONAL INTERESTS OF OUR COUNTRY ARE AT STAKE.
10 THE FACT THAT IT WAS NOT COMPROMISED I THINK WE ARE
11 FORTUNATE, AND JUST TALKING IN TERMS OF WHAT COULD HAVE
12 BEEN DONE FROM A DEFENSE STANDPOINT IS ONLY ONE PART OF
13 IT.
14 COMMERCIALLY OUR NATION COULD BE DAMAGED AND STILL
15 COULD BE.
16 HOPEFULLY THAT WILL NOT BE THE CASE.
17 I THINK YOU WERE NOT MOTIVATED BY FACTORS OF TRYING
18 TO PUT CHINA AHEAD OF THE UNITED STATES, A COUNTRY THAT YOU
19 CHOSE TO BE YOURS. I DON'T ASSUME THAT FOR A MINUTE. I DO
20 THINK, HOWEVER, THAT YOU MADE SERIOUS, SERIOUS MISTAKES IN
21 TRYING TO HELP INDIVIDUALS WITHIN THE SCIENTIFIC COMMUNITY
22 IN THE PEOPLE'S REPUBLIC OF CHINA IN THE FASHION WHICH YOU
23 CHOSE TO DO AND THEN TO HAVE THAT LONG PERIOD OF COVER-UP.
24 AS YOU POINTED OUT, YOU HAVE BEEN PUNISHED ALREADY.
25 YOU CAN NEVER CONTINUE WITH WHAT HAD BEEN YOUR

1 LIFE'S WORK, BUT THERE ARE OTHER IMPORTANT KINDS OF THINGS
2 THAT YOU CAN DO. YOU CAN REDEEM YOURSELF IN THAT WAY.
3 YOU CAN'T UN-DO WHAT HAS BEEN DONE HERE, HOWEVER. I
4 AM NOT GOING TO ATTEMPT TO PREACH TO YOU ANY FURTHER. I
5 PROBABLY HAVE DONE ENOUGH AT THIS TIME, SO I AM GOING TO
6 SENTENCE YOU AS FOLLOWS, SINCE I DO HAVE MORE LEEWAY THAN I
7 NORMALLY HAVE. WITH REGARD TO COUNT ONE, IT IS NOT COVERED
8 BY THE SO-CALLED SENTENCING GUIDELINES. I AM GOING TO
9 SENTENCE YOU PURSUANT TO 18 UNITED STATES CODE SECTION
10 4205(A).
11 I AM GOING TO SENTENCE YOU PURSUANT TO THAT SECTION
12 TO THE CUSTODY OF THE ATTORNEY GENERAL OF THE UNITED
13 STATES, OR HER AUTHORIZED REPRESENTATIVE, FOR A PERIOD OF 5
14 YEARS, AND I AM GOING TO SUSPEND THE IMPOSITION OF THE
15 SENTENCE AND PLACE YOU ON PROBATION FOR A PERIOD OF THREE
16 YEARS. ONE OF THE CONDITIONS OF THAT PROBATION IS THAT YOU
17 SPEND SIX MONTHS IN A COMMUNITY CORRECTIONAL CENTER. YOU
18 ALSO OBEY ALL FEDERAL AND LOCAL LAWS, ALL RULES AND
19 REGULATIONS OF THE UNITED STATES PROBATION OFFICE,
20 INCLUDING GENERAL ORDER 318 WHICH WILL BE EXPLAINED TO YOU
21 FULLY BY THE PROBATION OFFICER. YOU WILL ALSO PAY A FINE
22 IN THE AMOUNT OF
23 $10,000. THERE IS NO SPECIAL ASSESSMENT UNDER THIS
24 PARTICULAR COUNT. WITH REGARD TO COUNT 2 WHICH IS COVERED
25 BY THE SO-CALLED SENTENCING GUIDELINES, I FIND THAT THE

1 PROBATION OFFICER'S RECOMMENDATION AS TO THE CRIMINAL
2 HISTORY CATEGORY ONE IS APPROPRIATE. THE SENTENCING RANGE
3 IS APPROPRIATE, ZERO TO SIX MONTHS, AND I AM GOING TO
4 SENTENCE YOU CONSISTENT WITH THAT PARTICULAR SENTENCING
5 SCHEME TO PROBATION, AND AS A CONDITION OF PROBATION YOU
6 WILL SPEND 6 MONTHS IN A COMMUNITY CORRECTIONAL CENTER, AND
7 THAT WILL BE CONSECUTIVE TO COUNT ONE FOR A TOTAL OF ONE
8 YEAR IN A COMMUNITY CORRECTIONAL CENTER. NOW ALL OF THE
9 OTHER CONDITIONS THAT WERE SET FORTH FOR THE FIRST COUNT
10 WILL APPLY TO THE SECOND COUNT. THE ONLY DIFFERENCE IS THE
11 SECOND COUNT WILL BE CONSECUTIVE TO THE FIRST COUNT. YOU
12 WILL PAY AN ADDITIONAL FINE OF $10,000 ON THE SECOND COUNT,
13 AND THERE IS A SPECIAL ASSESSMENT OF 50 DOLLARS.
14 NOW, I UNDERSTAND THAT YOU DO HAVE THIS JOB IN SAN
15 DIEGO, AND SAN DIEGO USE TO BE A PART OF THIS DISTRICT AT
16 ONE TIME BACK WHEN I WAS A PROSECUTOR AS MR. SHAPIRO IS
17 NOW, AS MR. HENDERSON WAS. IT IS NOW A SEPARATE DISTRICT.
18 IT IS THE SOUTHERN DISTRICT OF CALIFORNIA. HOWEVER, THERE
19 ARE ARRANGEMENTS MADE BETWEEN THE VARIOUS COURTS OF THE
20 DISTRICTS, AND IT IS QUITE LIKELY THAT WITH THE APPROVAL OF
21 THIS COURT AND THE PROBATION OFFICE OF THIS COURT THAT WE
22 CAN HAVE THE JURISDICTION FOR YOUR PERIOD OF PROBATION
23 WHICH IS 3 YEARS ON EACH OF THESE COUNTS BE UNDER THE
24 SOUTHERN DISTRICT OF CALIFORNIA, AND THEY HAVE ADEQUATE
25 FACILITIES WHERE YOU CAN BE IN A COMMUNITY CORRECTIONAL

1 CENTER, AND IN ANY COMMUNITY CORRECTIONAL CENTER YOU WILL
2 BE ABLE TO WORK. YOU WILL NOT BE HOME IN THE EVENINGS, BUT
3 YOU CAN GO TO WORK, SO YOU CAN GET YOUR CAREER STARTED
4 AGAIN, BUT THERE MUST BE SOME PUNISHMENT, AND AS I SAY A
5 MESSAGE MUST GO OUT. THE GOVERNMENT HAS THAT RIGHT TO SEND
6 THE MESSAGE IN THIS KIND OF A SITUATION. EXCUSE ME. AND
7 FURTHER, WITH REGARD TO EACH COUNT -- ACTUALLY, WITH REGARD
8 TO COUNT ONE THERE WILL BE 3,000 HOURS OF COMMUNITY SERVICE
9 THAT YOU MUST PROVIDE, AND YOU HAVE A GOOD BIT OF EXPERTISE
10 THAT WILL BE HELPFUL TO THE COMMUNITY I AM SURE. THAT IS
11 APPROXIMATELY ONE THOUSAND EACH YEAR. THE TERMS OF
12 SUPERVISION WILL BE A TOTAL OF 3 YEARS. THE ONLY THING
13 THAT IS CONSECUTIVE IS THE PERIOD OF INCARCERATION IN THE
14 COMMUNITY CORRECTIONAL CENTER, SO THAT THAT DOES TOTAL ONE
15 YEAR.
16 OUR CLERK IS GOING TO HAVE DIFFICULTY PUTTING THIS
17 TOGETHER BECAUSE IT IS UNUSUAL, BUT WE WILL GET IT DONE.
18 THERE WILL BE A TOTAL OF $20,000 IN FINES, $10,000 ON EACH
19 COUNT. THERE WILL BE A TOTAL OF 3,000 HOURS OF COMMUNITY
20 SERVICE, 3,000 ON EACH OF THE COUNTS TO RUN CONCURRENTLY SO
21 THAT IS NOT MAXIMIZED. THE ONLY THING THAT HAS BEEN IS THAT
22 THE PERIOD OF TIME IN THE COMMUNITY CORRECTIONAL CENTER
23 WILL TOTAL ONE YEAR.
24 MR. HENDERSON: ONLY ONE POINT, YOUR HONOR. I
25 APPRECIATE THE TIME YOU OBVIOUSLY SPENT IN TRYING TO

1 FASHION SOMETHING HERE, BUT I AM LOOKING SITTING HERE AS
2 YOU SPEAK AT SECTION 5(E)1.2 WHICH INDICATES THE MAXIMUM
3 FINE ON COUNT 2 CAN ONLY BE 5 THOUSAND DOLLARS.
4 THE COURT: UNDER THE SO-CALLED GUIDELINES, I AM
5 DEPARTING.
6 MR. HENDERSON: THAT IS TRUE WHETHER YOU COME OUT AT
7 OFFENSE LEVEL 4 OR 6, EITHER ONE.
8 THE COURT: THAT MAY BE, AND OTHER THAN DEPARTING
9 UPWARDLY, I WILL MAKE IT 15 THOUSAND DOLLARS ON COUNT 1 AND
10 5 THOUSAND DOLLARS ON COUNT 2.
11 MR. HENDERSON: THE PROBLEM IS THAT COUNT ONE, THE
12 MAXIMUM ALLOWED IS 10 THOUSAND DOLLARS.
13 THE COURT: AS I UNDERSTAND IT, IT IS $250,000.
14 MR. HENDERSON: THAT STATUTE WAS PASSED
15 SUBSEQUENTLY.
16 THE COURT: YOU ARE SAYING THAT IT IS NO LONGER
17 AVAILABLE?
18 MR. HENDERSON: YES. I WENT THROUGH THAT WITH THE
19 PRESENTENCE OFFICER AND HE AGREES WITH THAT ANALYSIS.
20 MR. SHAPIRO: IT IS CERTAINLY WITHIN YOUR DISCRETION
21 AS TO COUNT 2 TO DEPART UPWARD, AND YOUR HONOR HAS
22 CERTAINLY MADE A FACTUAL BASIS ALREADY. IF YOUR HONOR WANTS
23 TO ADOPT THOSE REASONS FOR THE UPWARD DEPARTURE, I THINK
24 THAT IS APPROPRIATE.
25 THE COURT: YES, I THINK YOU ARE RIGHT. YES, THANK

1 YOU. IT WILL REMAIN AS I HAVE INDICATED, 10 THOUSAND
2 DOLLARS ON EACH COUNT, AND IF IT REQUIRES UNDER THE
3 RIDICULOUS SO-CALLED GUIDELINES TO DEPART UPWARDLY I WILL
4 DEPART UPWARDLY, AND THE FACTUAL BASIS FOR SUCH A FINDING
5 HAS ALREADY BEEN STATED ON THE RECORD AS MR. SHAPIRO POINTS
6 OUT.
7 MR. HENDERSON: THAT IS FINE. WE ARE NOT GOING TO
8 DISPUTE THAT.
9 THE COURT: I UNDERSTAND.
10 LET ME JUST INDICATE, DR. LEE, YOU HAVE 10 DAYS
11 AFTER THE FILING OF THIS JUDGMENT IN THIS CASE TO NOTICE AN
12 APPEAL TO THE NINTH CIRCUIT IF YOU CARE TO DO SO.
13 IF YOU CANNOT APPOINT A LAWYER FOR PURPOSES OF
14 APPEAL, THEN ONE WILL BE APPOINTED TO REPRESENT YOU.
15 I CERTAINLY WISH YOU GOOD LUCK, AND I KNOW THAT YOU
16 ARE, INDEED, REMORSEFUL FOR WHAT YOU HAVE DONE HERE, AND WE
17 ARE ALL SORRY ABOUT IT AS WELL.
18 MR. SHAPIRO.
19 MR. SHAPIRO: ONE QUESTION. AS FAR AS A SURRENDER
20 DATE --
21 THE COURT: YES. HE SHOULD REPORT TO THE PROBATION
22 OFFICE UPSTAIRS HERE BEFORE HE LEAVES TODAY, AND I WILL
23 ALLOW 30 DAYS FOR HIM TO REPORT. IF, INDEED, THERE IS TO BE
24 A TRANSFER TO THE SOUTHERN DISTRICT, I WILL REPORT TO THE
25 PROBATION OFFICE, AND THEY WILL SCHEDULE HIM INTO A

COMMUNITY CORRECTIONAL CENTER WITHIN THAT 30 DAY PERIOD.

WHAT IS 30 DAYS FROM TODAY, MISS KATO?

THE CLERK: YOUR HONOR, THAT CALLS FOR SUNDAY. MAKE IT THE 27TH.

THE COURT: THE 27TH OF APRIL?

THE CLERK: YES, YOUR HONOR.

THE COURT: ALL RIGHT. SO YOU WILL REPORT UPSTAIRS TO THE PROBATION OFFICE HERE RIGHT NOW, AND THEN YOU WILL HAVE UNTIL THE 27TH OF APRIL TO REPORT TO THE DESIGNATED COMMUNITY CORRECTIONAL CENTER.

YOUR PROBATION OFFICER WILL LET YOU KNOW WHERE THAT IS.

ANYTHING FURTHER?

MR. HENDERSON: ONE FINAL HOUSEKEEPING MATTER, YOUR HONOR. YOU MAY RECALL THAT ATTORNEY LELAND STARK WHO HAS BEEN A LONG TIME FAMILY FRIEND PUT UP HIS HOME FOR COLLATERAL ON THE BOND WITH REGARD TO DR. LEE.

AT THIS POINT I CAN'T ENVISION ANY GOVERNMENT OBJECTION TO YOUR HONOR EXONERATING THE BOND OR AT LEAST EXONERATING IT AS OF THE 27TH OF APRIL.

THE COURT: AS OF THE 27TH OF APRIL.

MR. SHAPIRO: THAT WOULD BE OUR HOPE, YOUR HONOR.

THE COURT: THAT WILL BE THE ORDER.

1 C E R T I F I C A T E

2

3

4 STATE OF CALIFORNIA :

5 : CR. 97-1181 TJH

6 COUNTY OF LOS ANGELES :

7

8

9 I HEREBY CERTIFY THAT THE FOREGOING MATTER

10 ENTITLED UNITED STATES OF AMERICA VERSUS PETER LEE IS

11 TRANSCRIBED FROM THE STENOGRAPHIC NOTES TAKEN BY ME AND IS

12 A TRUE AND ACCURATE TRANSCRIPTION OF THE SAME.

13

14

15

16

17

18

19

20

21 BETH ESTHER ZACCARO DATED: 5-25-99

22 OFFICIAL COURT REPORTER

23

24

25

ORIGINAL

LAW OFFICES OF JAMES D. HENDERSON
JAMES D. HENDERSON
11100 Santa Monica Boulevard
Suite 800
Los Angeles, California 90025-3384
[redacted]

Attorney for Defendant
PETER LEE

FILED
MAR 19 2 56 PM '98
CLERK, U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. PETER LEE, Defendant.	NO. CR 97-1181 TJH **DEFENDANT'S SENTENCING MEMORANDUM** DATE: March 26, 1998 TIME: 3:00 p.m.

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CODES

18 U.S.C. Section 793(d) 1,2,6

18 U.S.C. Section 1001 1,2,5,6

OTHER AUTHORITY

Federal Sentencing Guidelines Section 2F1.1 2,6

Federal Sentencing Guidelines Section 3E1.1 2,6

1 NOW COMES the Defendant, Peter Lee, by and through his
2 counsel-of-record, James D. Henderson, and files this memorandum
3 relating to his sentencing in this matter currently scheduled for
4 March 26, 1998, at the hour of 3:00 p.m., before the Honorable
5 Terry J. Hatter, United States District Judge.
6
7 **INTRODUCTION AND BACKGROUND OF THE CASE**
8 The Defendant Peter Lee was charged in a 2 count Information
9 on or about December 5, 1997, with (1) divulging at a symposium
10 of scientists in 1985, classified information relating to laser
11 plasma physics, and with (2) not reporting every foreign contact
12 he had which should have been listed on his post-travel
13 questionnaire following his 1997 travel to the Peoples Republic
14 of China. These actions were in violation of Title 18, United
15 States Code, Sections 793(d) and 1001, respectively. On
16 December 8, 1997, pursuant to a plea agreement on file with the
17 court, the defendant entered a plea of guilty to both counts of
18 the Information and sentencing has been set for March 26, 1998.
19 Pursuant to paragraph 3(d), page 3, of the plea agreement, the
20 Government is recommending to the court "a short period of
21 incarceration" and is also recommending that whatever sentence
22 the court imposes on Count 2 of the Information be served
23 concurrently with the sentence imposed on Count 1. The
24 pre-sentence report also recommends a short period of
25 incarceration (11 months) but is silent as to a recommendation of
26 / / /
27 / / /
28 / / /

how it should be served.[1] For the reasons set forth in this memorandum, it is the position of counsel for the defendant that a period of probation is an adequate punishment and that incarceration in this matter is neither necessary nor appropriate. It is noted that the principal charge in the Information, the §793(d) violation, having occurred during January of 1985, is an offense committed prior to the enactment of the Federal Sentencing Reform Act and is, therefore, not controlled by the Act's guidelines. The Section 1001 violation, having occurred during May of 1997, is a violation controlled by the Federal Sentencing Guidelines and carries a sentencing range in this case of from 0-6 months in Zone A, pursuant to Sections 2F1.1 and 3E1.1.

The executed plea agreement in this cause sets forth a factual stipulation as to Sections 793(d) and 1001 violations which the defendant has acknowledged to the court, the Probation Office, the U.S. Attorneys Office, and the F.B.I. Various additional facts, however, are relevant in understanding completely the circumstances under which the violations were committed, as well as the type of man who committed them.

THE DEFENDANT'S BACKGROUND

The Defendant Peter Lee is a 58 year old happily married man who was born on April 20, 1939, in Chungking, China. At that time, China was ruled by the Nationalist Chinese Government of

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[1]Concurrent with its preparation of the pre-sentence report, the Probation Office visited the defendant's house and found it to be a suitable home detention residence should the court wish to consider such a disposition.

1 Chiang Kai-shek. Both the defendant's father, Thomas Chi-Fu Lee,
2 and his uncle, Chao Hai Lee, were ardent anti-communists and
3 Thomas Lee was a high ranking official in the Nationalist Army.
4 Following the governmental takeover by the Communist Party, the
5 defendant's uncle (his father's brother) was jailed as a
6 political prisoner and remained incarcerated for almost 27 years.
7 (See the letter attached as Exhibit "A" from Leland Stark. Also
8 included in this exhibit is a letter from schoolmate and long
9 time friend Daniel Kwoh who emphasizes that Peter Lee has
10 "neither love nor respect for the communist regime which rules
11 China today.") Relatedly, both of the defendant's grandparents
12 (on his father's side) were killed by the Communist regime. (See
13 numbered paragraph 58 of the pre-sentence report.) As a result
14 of this political persecution, and the related turmoil and
15 ideological repercussions caused by the civil war in China, the
16 family was forced from the country to Hong Kong in 1948, and
17 eventually to Taiwan in the Summer of 1951. Following his
18 subsequent graduation from National Taiwan University in 1961 and
19 his honorable discharge from the Taiwan Air Force, Peter Lee
20 studied and researched at the Technical University of Aachen in
21 Germany from 1963 to 1968. In December of 1967, Peter Lee
22 temporarily immigrated to the United States following his
23 parents. Thereafter, in September of 1968, he was granted
24 admission to graduate studies at Cal Tech (California Institute
25 of Technology, Pasadena) where he obtained a research and
26 teaching assistantship. In June 1973, Peter Lee graduated from
27 Cal Tech with a Ph.D. degree in Aeronautics. He married Robin
28 Haft in 1970 and became a naturalized U.S. citizen in 1975. From

1 the date of his Cal Tech graduation, Peter Lee's entire life has
2 been devoted to scientific research. He has declined various
3 opportunities in the private sector to dramatically increase his
4 income over the years and has lived a modest existence. The only
5 alternatives to scientific research which he has seriously
6 considered have been teaching positions which would pay him even
7 less. Peter Lee has worked (1) at TRW in Redondo Beach from June
8 1973 through October 1976 in plasma physics, fluid mechanics, and
9 microwave scattering from water waves; (2) at Lawrence Livermore
10 National Laboratory in Livermore, California, from October 1976
11 through January 1984, in laser fusion experiments and diagnostic
12 development; (3) at Los Alamos National Laboratory in Los Alamos,
13 New Mexico, from January 1984 through April 1991 on experiments
14 in pulsed power physics and strong-field physics using sub-ps
15 lasers; and (4) again at TRW in Redondo Beach from April 1991
16 through December 1997, in microwave ocean scattering physics.
17 During his scientific career, Peter Lee has authored or
18 co-authored in excess of 100 scientific publications (see
19 attached Exhibit "B"), has been a member of several scientific
20 organizations such as the Society of Sigmi Xi, the American
21 Meteorological Society, the Optical Society of America, and is a
22 life member of the American Physical Society. He was appointed
23 an Associate Editor of IEEE Transactions on Antennas and
24 Propagation (a scientific journal) in July 1997. He has devoted
25 countless hours to this well recognized scientific publication
26 without pay, his only reward being the satisfaction of performing
27 a much needed service to the scientific community. During the
28 debriefing process undergone by Dr. Lee in this case, the

numerous contributions to scientific development in this country which have been made by Dr. Lee have been specifically noted. In short, as is also apparent from the numerous letters and accolades received from his co-workers and scientists at TRW and Livermore, and from others, attached hereto as Exhibit "C," Peter Lee is, and has always been, a scientist through and through. His life has been totally devoted to making the world a better place in which to live, and to his family and marriage which has now prospered for almost 28 years.[2]

THE NATURE OF THE CHARGES

As set forth above, the defendant has entered a guilty plea to two counts. The second count, pursuant to 18 U.S.C. §1001, is a false statement violation relating to the submission of a Post-Travel Questionnaire at TRW, Inc. concerning the listing of all individuals with whom he had been in contact during his 1997 travels, while on vacation, in the Peoples Republic of China. Although the defendant has violated the false statement statute, this conduct was a result of his merely attempting to avoid the often burdensome paperwork and debriefings which accompany the disclosures of foreign contacts when the defendant felt that the contacts were both harmless, unrelated to classified matters, and often took place during his personal and/or vacation time. The recent F.B.I. debriefings of the defendant have confirmed this

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[2]Although these statements are well supported by the defendant's pre-sentence report, perhaps the best and most succinct recitation of them may be found in attached Exhibit "A;" letters from attorney Leland Stark and Daniel Kwoh, both friends and acquaintances of Peter Lee and his family.

1 fact and the defendant has learned that the saving of a few
2 moments time in the past has cost him hours, substantial
3 attorneys' fees, loss of his job, and harm to his previously
4 untarnished and well-deserved reputation in the international
5 scientific community. As the court knows, 18 U.S.C. §1001,
6 pursuant to Federal Sentencing Guidelines Section 2F1.1, carries
7 a base offense level of 6. This offense level calls for a
8 sentence of from 0 to 6 months. Because an offense level of 6 is
9 in Zone A, the defendant is eligible under the Guidelines for a
10 sentence of probation should the court deem it appropriate. In
11 view of the defendant's acceptance of responsibility for this
12 offense, he is eligible for a 2 point offense level reduction
13 pursuant to Guidelines Section 3E1.1. This calculation,
14 recommended by the pre-sentence report, by lowering the
15 defendant's already probation eligible offense level to a 4,
16 appears to strengthen the belief of the defendant's undersigned
17 counsel that the §1001 offense, for the Defendant Peter Lee,
18 deserves no more than a sentence of probation. Also, it should
19 be recalled that the plea agreement on file with the court [in
20 paragraph 3(c), page 3] specifically recommends that the sentence
21 imposed for the §1001 violation be served concurrently with that
22 imposed for the other violation set forth in the Information.
23 Count 1 of the Information charges the defendant with
24 violating 18 U.S.C. §793(d) by communicating classified
25 information relating to laser plasma physics to scientists
26 employed in the Peoples Republic of China during January of 1985.
27 As noted above, this offense, because it occurred in excess of 13
28 years in the past, is not covered by the Federal Sentencing

1 Guidelines. The violation, it is undisputed, took place while
2 Dr. Lee was on a lecture tour relating to laser plasma physics in
3 Beijing. Dr. Lee, as the court knows, has repeatedly admitted
4 this indiscretion and has clearly expressed his remorse for it.
5 As noted in numbered paragraph 29 of the pre-sentence report, the
6 defendant's behavior "occurred in a spirit of scientific
7 camaraderie and was not a political act." Interestingly, two of
8 those who know the defendant best, Dr. Toshi Kubota and Dr. Eric
9 Baum, based on their long-standing associations with the
10 defendant, have both offered views of Dr. Lee completely
11 consistent with his simple non-political desire to work with and
12 assist other scientists. Correspondence to the court from both
13 Dr. Kubota and Dr. Baum is attached hereto as Exhibit "D."
14 According to Dr. Kubota:

15 > I believe that, when [Peter Lee] was
16 > discussing technical problems in which he was
> an expert with Chinese scientists, he was
17 > overcome by his desire to help them in any
> way he can. His mind must have been working
18 > like mine when I was a professor trying to
> help graduate students, capable but young and
19 > inexperienced.

20 According to Dr. Baum:

21 > It is my impression that [Peter Lee] would
22 > prefer to be a scientist in the academic
> tradition, with free interchange of ideas in
23 > the open literature.

24 Dr. Lee wishes to address the court in this regard on the date of
25 sentencing, and has openly expressed his readiness to endure
26 whatever the punishment may eventually be. Against this
27 background, undersigned counsel calls to the court's attention a
28 variety of points. First, the classified hohlraum research which

was disclosed, in fact, at the time it was disclosed, was far from a secret in the international scientific community. As pointed out in the attached correspondence (Exhibit "E") from Dr. Gary Linford and Dr. Jeff Thompson who both worked closely with Dr. Lee on the hohlraum project, (a) the classified information on hohlraum concepts possessed and disclosed "had already been published in open literature," (b) scientists from other countries "would discuss their target designs openly and leave chalk designs of fusion targets out for all to criticize," (c) to those who worked on the project, there was "no realistic connection between nuclear weapons and laser fusion target fuel pellets . . . [or] between fusion energy research and nuclear weapons design,"[3] and (d) the project's real vitality was its potential to provide energy self-sufficiency to populations in need throughout the world.[4] Second, it is noteworthy that the hohlraum information was declassified in approximately 1993 in part because of the views of many who worked closely in the field that there was no need to classify it. Dr. Erik Storm, for example, has informed undersigned counsel that he, and others, lobbied strenuously for many years to have this information declassified because there was no need to classify it. Dr. Storm was the defendant's supervisor from 1976 until 1981 while Dr. Lee

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[3] Attached hereto as Exhibit "F" is correspondence addressed to the court from Dr. Erik Storm (who supervised the defendant's work on the laser fusion/hohlraum project), Dr. Jeff Thompson and Dr. Gary Linford, who also worked on the project setting forth clearly their beliefs that the information at issue here was not nuclear weapon related.

[4] Copies of additional letters to the court, from Dr. Linford and Dr. Thompson, may be found attached to this memorandum, as part of Exhibits "F" and "J."

was working on the laser fusion project which is the subject of Count 1. The above noted Dr. Gary Linford, as illustrated by attached Exhibit "G," strongly agrees with Dr. Storm's assessment that there was, in actuality, no need to even have classified the information disclosed by Dr. Lee. In further accord with Dr. Storm's belief, it should be noted, is the 1982 Order signed by then President Ronald Reagan indicating that basic science research not clearly related to national security "may not be classified."[5] This order, coupled with the concerns of those such as Dr. Storm and others that classification was unnecessary, obviously were critical factors in declassification of the laser fusion project. Third, the subject violation here took place more than 13 years ago with the defendant engaging in years of service productive for the United States since it took place. In this regard, for example, during November and December of 1997, Dr. Bruce Lake, the defendant's supervisor at TRW, informed undersigned counsel that even though Dr. Lee was working on an unclassified project (microwave ocean scattering physics), because of his leadership and critical contributions, it would be a "tremendous blow" to this beneficial project should Dr. Lee be precluded from working further on it. Attached hereto as Exhibit "I" are copies of a performance evaluation from Dr. Lake and an e-mail letter from Dr. Lake which characterize Dr. Lee's work as possibly "the finest example of good science that has ever come from these NAASW programs," and "Peter's work is destined to become of historic importance." Dr. Lake's evaluation is

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[5] A copy of this Order is attached hereto as Exhibit "H."

consistent with everyone to whom this counsel has spoken regarding the defendant's work history and contributions, as well as with information contained throughout the attached Exhibit "C." Against this background, it is difficult to perceive just how now placing Dr. Lee in jail would accomplish anything beneficial or productive.

Attached hereto as Exhibit "J" are copies of correspondence from two potential employees, one for full-time employment in San Diego, and the other for part-time consulting work in Los Angeles. Either placing the defendant on probation, or adopting the pre-sentence report of a sentence of 11 months, if such could be served in home confinement, would allow Dr. Lee to remain productive, provide for his wife and mother who he supports, and still remain subject to the court's supervision should unexpected problems subsequently arise. Dr. Lee's past includes no violations other than a single traffic ticket. Due to his being dismissed at TRW as a result of this case, he no longer has, and never again will have, access to any classified information or defense-related work of any type. As a result, there is no threat of recidivism. The entirety of this situation indicates simply that Dr. Lee, as a probation risk, could not be a better one. In undersigned counsel's 26 years of federal practice, he has not seen a better candidate.

THE GOVERNMENT'S SENTENCING FILINGS

Although the Government's plea agreement in this matter sets forth its recommendation to the court as "a small period of incarceration," the prosecution has filed various documents with

1 the court which should be addressed. First, the Government's
2 "Position With Respect To Sentencing Factors" (hereinafter the
3 "Position Paper") recites perceived deficiencies in the stated
4 opinions of Dr. Jeffrey Thompson, Dr. Gary Linford, and Dr. Erik
5 Storm, and the similar conclusion reached in the pre-sentence
6 report, to the effect that the 1985 information revealed by the
7 defendant was not nuclear weapon related. What the Position
8 Paper ignores, however, is that these three learned scientists
9 are precisely those who worked on the project with Dr. Lee, and
10 that they are the individuals most familiar with exactly what it
11 was, the potential which it had, and its adequacies and
12 inadequacies. Dr. Storm, in fact, was one of the project's
13 supervisors. While the Government, in Exhibit "B" to its
14 Position Paper, offers the opinion of Los Alamos Technical Staff
15 Member Thomas L. Cook that the laser fusion work of Dr. Lee did
16 have a weaponry relationship, Mr. Cook has little, if any,
17 experience in laser fusion physics. Although it seems far from
18 clear to this counsel why this scientific argument is
19 particularly relevant thirteen years after the fact when the
20 information has been declassified, having reviewed the opinion of
21 Thomas Cook, those most knowledgeable about the project continue
22 to insist that it is erroneous. Attached hereto as Exhibit "K"
23 is the correspondence in this regard written by Dr. Storm, Dr.
24 Linford, and Dr. Thompson, all concluding that Mr. Cook is simply
25 wrong. The rebuttal by Dr. Storm interestingly notes that he has
26 even consulted with the head of the Lawrence Livermore National
27 Laboratory Thermonuclear Weapons Design Division, who concurs in
28 Dr. Storm's views on this issue.

1 Accompanying the Government's Position Paper, in addition to
2 the Cook opinion, is a declaration from F.B.I. Agent [redacted]
3 [redacted], who conducted the some 13 days of F.B.I. post-plea
4 debriefing of the defendant in this cause. All of these
5 debriefings were also attended by the undersigned counsel. Agent
6 [redacted] declaration contains both inaccurate and misleading
7 statements. At page 5 and elsewhere in the declaration, for
8 example, Agent [redacted] states that Peter Lee's work between 1976
9 and 1991 "related to nuclear weapons simulations . . ." This
10 inaccuracy has been noted above and is specifically refuted by
11 those who worked with Dr. Lee, as is set out in attached Exhibits
12 "F" and "J." Second, at page 6, Agent [redacted] states that Dr.
13 Lee has had numerous letters, facsimiles, e-mail exchanges,
14 telephone calls, and personal visits with representatives of the
15 Peoples Republic of China, including contact with Wang Ganchang
16 "considered the 'father' of the PRC nuclear weapons program," and
17 Xu Zhizhan and Deng Ximing. What Agent [redacted] has chosen to
18 omit, however, is the fact that Wang Ganchang, at the time he
19 first met the defendant in 1980, was some 74 years old, had been
20 out of nuclear weapons research for approximately 10 years, and
21 was working in the area of pulse power and excimer lasers
22 (totally unrelated to weaponry) at the time of his acquaintance
23 with the defendant. Agent [redacted] has also chosen not to include
24 the fact that the defendant, over the years, has been involved
25 with Xu Zhizhan in authoring at least nine scientific
26 publications of value to the international scientific
27 / / /
28 / / /

1 community,[6] or that Deng Ximing was a scientist who had
2 previously co-chaired with Dr. Lee a session at an International
3 Laser Plasma Conference in 1980 with them thereafter becoming
4 friends. Relatedly, the [redacted] declaration fails to bring to
5 the court's attention that Peter Lee's projects with Xu Zhizhan,
6 and others, have produced a number of friendships with fellow
7 scientists and their families (both on a professional and social
8 level) that have no relationship whatsoever to the politics of
9 the two nations. As set out above, Dr. Lee is staunchly anti-
10 communist and the e-mail transmissions, facsimiles,
11 communications, correspondence, and other materials referenced
12 and reviewed by Agent [redacted] contain no classified information
13 or indications that any has been disclosed. In addition to not
14 informing the court of these facts, the [redacted] declaration does
15 not recite that the e-mail transmissions, facsimiles, and the
16 like, include communications to other scientific counterparts
17 such as colleagues in Italy, Britain, and the United States, or
18 that the communications included ones such as attached Exhibit
19 "I" in which Dr. Lee can be seen encouraging a young Chinese
20 scientist to leave that country and come to the United States.
21 In Exhibit "K," Peter Lee specifically queries the young
22 scientist to which he is corresponding: "Have you noticed the
23 freedom that you have been able to enjoy in the U.S.?" The
24 communications as a whole merely contain the type of unclassified
25 academic interchange to be expected between scientists who are
26
27 [6] These publications can be found among the list of some
28 100 in which Dr. Lee has participated, which is attached to his attached resume. See Exhibit "B."

1 acquaintances and have worked on joint projects. To imply that
2 there may have been more wrongdoing than has been admitted is not
3 supported by any demonstrable credible evidence, and is an unfair
4 effort to taint this court's perception of the defendant. It may
5 be recalled that the Government has previously filed a Foreign
6 Intelligence Surveillance Act notice of electronic monitoring in
7 this case. Not only were his telephones monitored and a "bug"
8 placed in his residence, but his residence and office were
9 searched by the F.B.I. Finally, his detailed personal diaries
10 which he has maintained continuously since 1974, were
11 photographed and reviewed. Despite all of this, no evidence
12 exists that Dr. Lee ever revealed any classified information
13 other than what he has disclosed.
14 At page 10 of the [redacted] declaration appears the statement
15 that, prior to one of his lectures in China, Dr. Lee indicated
16 that there was a subject he planned to discuss in China and that
17 he "would only discuss it upon arrival in the PRC." This
18 statement is included by Agent [redacted] apparently, to indicate
19 to the court that perhaps Dr. Lee revealed something
20 inappropriate on this occasion. Omitted from the declaration,
21 however, is the fact that the debriefing of Dr. Lee revealed that
22 Dr. Lee, in this instance, was referring to the subject matter of
23 a public lecture which related to his dislike of the world's
24 nuclear weaponry, and which was taken completely from an
25 unclassified article published in the September 1996 issue of The
26 Bulletin Of The Atomic Scientists entitled "The Stewardship
27 Smokescreen" which was strongly anti-weaponry. A copy of this
28 article was provided to the F.B.I. during the defendant's

1 debriefing. Dr. Lee's secrecy in this regard was no more than an
2 effort to increase the suspense surrounding his talk, and to
3 maximize his audience. To omit such information from the Cordova
4 declaration is, at the least, far from equitable.
5 Finally, at page 17 of the [redacted] declaration appears a
6 discussion of statements made in 1997 by Dr. Lee during a
7 scientific lecture in China. The declaration somehow implies
8 that such statements may have been inappropriate. The
9 declaration fails to inform the court, however, that none of this
10 information was classified and that such has been confirmed to
11 the undersigned counsel by Dr. Bruce Lake at TRW who supervised
12 the project about which Dr. Lee gave his talk. As illustrated by
13 attached Exhibit "M," specific information concerning this
14 project can easily be accessed by the general public over the
15 Internet. Further, following the defendant's post-plea
16 debriefing by Dr. Richard Twogood of the Lawrence Livermore
17 Laboratory, who formerly headed the radar imaging program, Dr.
18 Twogood informed those present that the information about which
19 Dr. Lee spoke during his 1997 lecture was "clearly all
20 unclassified" and "meaningless." As an aside, Dr. Twogood also
21 commented to Dr. Lee, "you did a lot of outstanding work." Once
22 more, it seems, the [redacted] declaration fails to recognize that
23 there exists, in actuality, no real evidence to support any
24 implied inappropriate behavior.
25 In closing, reference is made to the so-called "Impact
26 Statement" filed by the Department of Energy with reference to
27 the 1985 information disclosed by Dr. Lee. In substance, this
28 Impact Statement relies on the opinion of Thomas Cook to support

its conclusion that the information did have weaponry application. The inaccuracy of Mr. Cook's opinion has been disclosed above. In addition, surprisingly, the Impact Statement volunteers the conclusion that Dr. Lee "may have" revealed additional classified information because of the numerous e-mail messages and similar contacts he had with his scientific colleagues. Unlike the Cordova declaration, however, the Impact Statement at least admits that no classified information was discovered in any of the referenced contacts. Once more counsel for the defendant notes that the judicial system does not, and cannot, operate equitably on the basis of the opinions of those who cannot offer the court real evidence in support of their merely speculative views.

CONCLUSION

The defendant Lee has no prior record, has been a productive member of society since his immigration to this country, is a dedicated family man, and spent his years bypassing worldly goods in devoting his life to the scientific community. He admits his mistakes to the court and has lost his position and reputation as a result. Never again can he participate in his life's work. He is no threat to ever appear again in a criminal court and the behavior which, in reality, brings him before this court is 13 years in the past and relates to a disclosure of information which was subsequently declassified with the concurrence of those most knowledgeable and who worked most closely with it. Neither the plea agreement nor the pre-sentence report asks for a lengthy sentence. In the face of the above, it is respectfully suggested

that Dr. Lee be placed on probation or, at the most, be allowed to serve a sentence under home detention while employed full-time in the capacities now available to him as set out in attached Exhibit "H." Peter Lee's own letter to the court is attached hereto as Exhibit "N."

DATED: March 19, 1998

Respectfully submitted,

By: James D. Henderson
JAMES D. HENDERSON
Attorney for Defendant
PETER LEE

FILED
MARCH 24
Unsealed

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. PETER H. LEE, Defendant.	No. CR 97-1181-TJH GOVERNMENT'S RESPONSE TO DEFENDANT'S POSITION WITH RESPECT TO SENTENCING FACTORS; DECLARATIONS OF JONATHAN SHAPIRO; ATTACHMENTS Sentencing Date: 3/26/98 Sentencing Time: 9:30 a.m.

Plaintiff United States of America, by and through its counsel of record, hereby files its response to defendant's position with respect to sentencing in the above-referenced case, along with the attached declarations of Assistant United States Attorney Jonathan S. Shapiro, Federal Bureau of Investigation case agent [redacted] and an attachment regarding nuclear physicist Thomas L. Cook. This response is based upon the attached memorandum of points and authorities, the files and records in this case, and on such

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jss

further evidence as the Court, in its discretion, may permit at any hearing on this matter.

DATED: March 24, 1998

Respectfully submitted,

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United States Attorney

DAVID C. SCHEPER
Assistant United States Attorney
Chief, Criminal Division

JONATHAN S. SHAPIRO
Assistant United States Attorney

Attorneys for Plaintiff
UNITED STATES OF AMERICA

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I

3 ARGUMENT

4 A. Defendant's Efforts at Minimizing His Criminality

5 In papers filed on March 19, 1998, defendant falsely represents
6 the seriousness of his criminal conduct to this Court. Defendant
7 states that the classified information that he passed in 1985 was
8 unimportant, and had no relevancy to nuclear weaponry. (Defendant's
9 Position Paper at 7-8). This is absolutely false on its face.
10 Defendant does not and can not dispute the conclusions of Dr. Roy
11 Johnson, Lawrence Livermore Laboratory Classification Officer.
12 (Attachment A: February 27, 1998 Declaration of [redacted] at
13 ¶ 28). Based on a review of defendant's own taped confession,
14 statements that defendant does not and can not deny, Dr. Johnson
15 concluded that defendant confessed to having passed classified
16 "Secret-Restricted Data" to scientists of the People's Republic of
17 China. (Id. at ¶ 28).

18 According to the Atomic Energy Act of 1946 and relevant
19 Classification Guide for Safeguards and Security Information (U.S.
20 Dept. Of Energy CG-SS-3, issued October 16, 1995), any information
21 classified as "restricted-data" refers to information relating to
22 nuclear weaponry. (Attachment B: March 23, 1998 Declaration of
23 [redacted] at ¶ 2).

24 It is not for individual scientists to decide what should or
25 should not be classified. If it were, the nation's weapons research
26 programs and classified scientific projects would be subject to the
27 whim of misguided, egotistical individuals who value their own
28 reputations in the scientific community over the security of their

country. Defendant swore that he would maintain classified information. Based on that oath, defendant was given the privilege to be employed doing work on classified projects for the United States. Thousands of other scientists have taken similar oaths and honored them. Defendant was not one of those scientists. He dishonored his oath, threatened the security of important research projects, and brought discredit to himself.

Moreover, defendant's criminal activity was not a single event or accident. Defendant divulged classified information in a cavalier, promiscuous and deliberate way over two days during his 1985 visit to the PRC. (Attachment A at ¶¶ 25-26). Most scientists would not have committed such a crime for love or money. Defendant admits he committed this crime out of self-love, and his need to enhance his standing in the eyes of his PRC hosts. The tawdry nature of his motives ought not diminish the seriousness of his crimes.

B. Factual Corrections

A. Debriefings of Defendant

Defendant makes a number of claims that are not factually accurate. First, defendant suggests that he was debriefed by agents of the FBI, and his truthfulness and version of events were confirmed by these debriefings. (Defendant's Position Paper at 5-6). The government noted in its original position paper that defendant was debriefed numerous times by the FBI.

However, the government disagrees with defendant regarding his claim that the debriefings confirmed his truthfulness. In fact, the government has serious concerns about defendant's truthfulness over the course of these debriefings. Defendant was given two polygraph

examinations by the FBI over the course of his debriefings. The first examination was given was on October 7, 1997. (Attachment B: at ¶ 3). Defendant was asked three separate questions regarding whether or not he provided classified information to the People's Republic of China (hereinafter "the PRC"). (Id.). Defendant said he had not. Defendant failed this polygraph examination, thereby indicating that he provided classified information to the PRC. (Id.). After failing the polygraph examination, defendant confessed to passing classified information to the PRC in 1985. (Id.).

Defendant was debriefed numerous times by the FBI regarding whether or not he disclosed any other classified information. Defendant claimed he had not. (Id.). On February 26, 1998, defendant was given a second polygraph, where he was asked whether he had lied to the FBI since his last polygraph examination regarding passing classified information. (Id.). For a second time, defendant failed a polygraph examination. (Id.). Defendant later explained that he had failed to provide certain information to the agents about his contacts with the PRC because they did not ask specific enough questions. (Id.). The government disagrees with defendant's claim that his debriefings affirm his truthfulness or his version of events in this case.

B. Count Two: False Statements

Defendant entered a guilty plea to failing to report to his supervisors at TRW, Inc., that while traveling in the PRC in 1997, he was contacted and asked to reveal technical information to PRC scientists, which he in fact did. (Information: Count Two). Defendant minimizes his criminality by claiming that he failed to report his contacts in 1997 while in the PRC because it entailed

"burdensome paperwork and debriefings." (Defendant's Position Paper at 5).

In fact, defendant reported numerous contacts with foreigners, filling out all appropriate paperwork, when those foreigners were not from the PRC. (Attachment A at ¶ 15).

Furthermore, defendant fraudulently filled out a pre-travel security form before his trip to the PRC in which he indicated that he would not be lecturing on technical matters. (Id. at ¶ 18). In fact, defendant confessed to the FBI that he deliberately falsified his pre-travel security form by failing to indicate that he traveled to the PRC with the express intention of lecturing on his then current scientific work at TRW, Inc. (Id. at 29-31). Indeed, defendant traveled to the PRC with documents to use during his lecture. (Id. at 30). Had defendant truthfully filled out his pre-travel security form, he would not have been allowed to present the detailed lecture that he confessed to having given in 1997. (Attachment B: ¶3).

C. Misquoting Experts

Defendant takes exception with Agent [redacted] declaration. Generally, defendant relies on the statements of defendant's friends who do not have any knowledge of what defendant confessed to having done. This Court should not rely on ill-informed and misguided statements. In fact, Dr. Twogood has told the FBI that what defendant discussed in 1997 was classified and sensitive information. (Attachment B: ¶4).[1]

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[1]Finally, it should be noted that despite defendant's assertions to the contrary, Dr. Thomas Cook's knowledge and experience with the applications of defendant's work is unassailable (Attachment 2: Thomas Cook Biography)

II

CONCLUSION

Having provided the Court with a complete and accurate factual basis for defendant's sentencing, including an impact statement from the victim agency not previously taken into account by the PSR, the government believes that the recommended sentencing range should be adjusted upward to adequately reflect the seriousness of defendant's conduct. The government recommends that defendant receive a short period of incarceration, based on the more accurate sentencing range, to run concurrently with defendant's sentence to Count Two, and leaves that sentence to the discretion of this Court, as is appropriate in a pre-Sentencing Guidelines case.

DATED: March 23, 1998

Respectfully submitted,

NORA M. MANELLA
United States Attorney

DAVID C. SCHEPER
Assistant United States Attorney
Chief, Criminal Division

_____
JONATHAN S. SHAPIRO
Assistant United States Attorney

Attorneys for Plaintiff
UNITED STATES OF AMERICA

INSPECTOR GENERAL
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400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202

(Investigations)

REPORT OF INVESTIGATION

98100810-31-OCT-97-50LA-J0L/F

September 11, 1998

LEE, Peter Hoong-Yee, [redacted]
DPOB: April 20, 1939, Chungking, Sichuan, China
Employer: TRW Corporation

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98100810-31-OCT-97-50LA-J0L/F

Narrative

1. This investigation was initiated based on the request of Assistant United States Attorney (AUSA) Jonathan Shapiro, assigned to the Public Corruption and Government Fraud Section for the Central District of California. AUSA Shapiro contacted reporting agent and requested investigative assistance concerning a Federal Bureau Of Investigations (FBI) case regarding the possible compromise of classified information by Subject to representatives of the People's Republic of China (PRC), a violation of Title 18, United States Code (USC) Section 793(d) (transmission of Defense information). The classified information deals with Department of Defense (DOD) contract, #DMA800-94-C-6008, with TRW as the prime contractor, between the United States and the United Kingdom. The contract is controlled by the Deputy Assistant Secretary of Defense for Intelligence and Security, and focuses on an Ocean Imaging project with anti-submarine warfare applications.

2. On October 14, 1997, AUSA Shapiro contacted reporting agent and related it was extremely important to immediately verify if the information divulged by Subject to representatives of the PRC was classified, and the verification needed to come from a DOD representative who is knowledgeable of the contract. AUSA Shapiro explained that it would take the FBI too long to accomplish this task which would significantly jeopardize the entire case. On October 15, 1997, AUSA Shapiro was provided with the identification of a Ph.D. Donna Kulla, assigned to the Intelligence Systems Support Office (ISSO) located in Arlington, Virginia, who was the Contracting Officer/Technical Representative (COTR) for the contract. Immediate contact with Dr. Kulla was established wherein she reviewed the data in question and determined it was classified confidential. AUSA Shapiro requested that reporting agent continue to provide any additional investigative support as determined and be the liaison coordinator with the ISSO.

3. AUSA Shapiro provided documentation which disclosed Subject had confessed to providing classified information to PRC representatives on more than one occasion while lecturing in China, and to destroying a possible classified document, that was relevant to the contract, while in China during April/May 1997. Additionally, Subject has been witnessed through surveillance techniques by the FBI to have taken documents from TRW to his residence, and from his residence to the home(s) of a relative(s). It is believed that these documents are government property and may contain classified information, a violation of Title 18 U.S.C section 641 (theft of government property).

4. On December 8, 1997, Subject pleaded guilty to an Information on two counts in violation of 18 U.S.C. section 793(d), Transmission of Defense Information, and 18 U.S.C. section 1001, Providing a False Statement to a Government Agency.

5. On March 26, 1998, Subject was sentenced in accordance with his plea agreement to 5 years in prison (suspended sentence), 3 years probation, one year confinement in a community detention center, 3,000 hours of community service, and a $10,000 fine. Additionally, on August 17, 1998, Subject received a Notice of Debarment from contracting with the Federal Government for a period of three years starting on May 21, 1998, and ending on May 20, 2001.

CLASSIFICATION:

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6. As a result of the sentencing and Notice of Debarment all investigative effort is completed. This investigation is closed. No safety issues or systemic weaknesses were identified therefore, no Management Control deficiency Report will be generated.

CLASSIFICATION:

FOR OFFICIAL USE ONLY

WARNING

This document is the property of the Department of Defence Inspector General and is on loan to your agency. Contents may not be disclosed to any party under investigation nor within this

Dear Peter,

Gary Linford and I were very sad to hear of your recent troubles. Although our knowledge of the details is very sketchy, just confined to what was in the paper, we both feel that disclosing data on laser fusion that was later declassified could not have materially harmed the security of this country. We are sure that your motives were to help your mother country gain energy self sufficiency, rather than to harm the USA.

If we can be of help, perhaps writing to somebody on your behalf, please do not hesitate to call me [redacted] or Gary [redacted].

Jeff Thomson

Jeff Thomson

73 205 608

[illegible]

The Honorable Terry J. Hatter
United States District Judge
312 North Spring Street
Los Angeles, CA 90012

Dear Sir.

I wrote previously to you regarding Peter Lee. My background as a physicist working on the laser fusion program at about the same time as Dr. Lee qualifies me, I believe, as an expert on the subject of the relevance of the classified material that I understand he transmitted. Based upon my assessment, I believe that the material had no deleterious effect on the security of the United States, and therefore I suggested that you give Dr. Lee as lenient a sentence as possible.

Recently a deposition given by a Thomas L. Cook was called to my attention by Dr. Lee's lawyer. There seems to be some major factual mistakes in this deposition that I would like to call to your attention.

First, Dr. Cook refers to a "classified DOE document that Peter Hoong-Yee Lee admits to having transferred to the PRC..." It is my understanding that Dr. Lee transmitted orally during a seminar or technical discussion some aspects of a classified target design - i.e. that secondary x-rays from laser radiation of a metallic cavity were to be used to compress the target.

Second, Dr. Cook claims that Dr. Lee transmitted only "... a scheme for interpreting temperature measurements made with x-ray detectors on radiation emerging from a plasma in a hollow cavity." If this is actually the case, then Dr. Lee shouldn't even be on trial, since measurement schemes were never, to my knowledge, classified.

Dr. Cook refers to "References in the paper [that] document Lee's formal participation on broad classified inertial confinement fusion diagnostic development programs." I believe what he is referring to here are bibliography references to Dr. Lee's extensive publications in the open scientific literature. Although the program had some classified components, it is hard to imagine why Dr. Cook should relate unclassified publications to the present discussion.

Finally Dr. Cook states "The measurement of radiation-matter interactions and time-resolved and time-integrated laser-plasma diagnostics represent exactly the critical technologies important to a developing nuclear weapon state that has an active nuclear testing program." This is not true and not even relevant. During the entire development of the United States nuclear arsenal, laser-plasma diagnostics were not utilized because no nuclear weapon has ever used a laser to set it off. It is not relevant because these types

of measurement techniques were not classified. If Dr. Cook is stating that this is the only reason that Dr. Lee is being prosecuted, then he should be set free.

I'm sure that Dr. Cook is stating his views honestly. However, his background appears to be associated with designing and testing of nuclear weapons. Since my background is related to the Livermore laser fusion program and to laser-plasma interactions, I believe I am in a better position to judge the effects of Dr. Lee's actions, as far as I know them, and I believe there has been no deleterious effect on the national security of the United States.

I continue to urge leniency for Peter Lee.

Yours Truly,

Jeffrey Thomson

Jeffrey Thomson
[redacted]
[redacted]

9/11/98

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
PROBATION OFFICE

ROBERT M. LATTA
CHIEF PROBATION OFFICER

600 U. S. COURT HOUSE
312 N. SPRING STREET
LOS ANGELES 90012-4708

December 17, 1998

PLEASE REPLY TO:
501 WEST OCEAN BLVD.
SUITE 6340
LONG BEACH, CA 90802-4222

Wonderful! Please convey my thanks to Mr. Lee!
TJH Jr.

Honorable Terry J. Hatter, Jr.
Chief United States District Judge
United States Court House
Los Angeles, California 90012

Re: LEE, Peter
Docket No. 97-01181

Dear Judge Hatter:

The purpose of this letter is to report on the progress Mr. Lee has made with regard to community service, as ordered by the Court.

On December 8, 1997, Peter Lee pled guilty to a violation of 18 USC 793(d): Attempting to communicate national defense information to a person not entitled to receive it, as well as a violation of 18 USC 1001: False statement. On March 26, 1998, Mr. Lee was committed to the custody of the Bureau of Prisons for a term of five years and fined $20,000. The execution of this sentence, as to the imprisonment, was suspended and Mr. Lee was placed on probation for a term of three years. Additionally, Mr. Lee was ordered to perform 3,000 of community service and serve a 12-month period in a Community Correction Center (CCC).

Mr. Lee began doing his community service in April, 1998. He has been completing his community service work in excess of 40 hours per week at the Recording for the Blind and Dyslexic, located in El Segundo, California. This nonprofit organization records books that become part of a master tape library in Princeton, New Jersey, where more than 80,000 books are available for use by visually or physically handicapped students throughout the country and around the world. All of these books have been produced by volunteers.

From April to October, 1998, Mr. Lee has completed 1,057 hours of community service. His wealth of knowledge, in conjunction with his fluency in numerous languages have helped the agency immensely in that most of the books that are being recorded are texts for students who understand different languages. According to the director, Mr. Lee has been and continues to be a great asset to their organization. He is extremely reliable, versatile, trustworthy and compatible. According to Mr. Lee, his experience

with this organization has proven to be an enormous project for his personal growth, and he plans to continue with this organization well past his required hours.

As most letters to the Court identify problems on supervision, it is a pleasant experience to acknowledge an offender who is not only in full compliance with the Court's orders, but has made tremendous progress while on supervision, both for himself and for the aforementioned community service agency.

Respectfully,

ROBERT M. LATTA
Chief U. S. Probation Officer

Marla S. Weisenfeld

MARLA S. WEISENFELD
U. S. Probation Officer
Telephone No. [redacted]

Michael A. Terrell

Supv. PO Terrell, ([redacted]

MSW:zdm
G:\DOCS\PR04\LEE.CRT

Ms. Marla Weisenfeld
U.S.P.O.
U.S. District Court
501 W. Ocean Blvd., Suite 6340
Long Beach, CA 90802

August 16, 1999

Dear Marla,

In the time he has been with us, Peter Lee has done the South Bay Studio, and for that matter, the entire Los Angeles Unit of RFB&D a world of good. He has learned virtually every aspect of what we do in a relatively short period of time and, besides performing these tasks, he became a trainer of new volunteers in all of these areas. He has recorded reading proficiency tests and has provided us with more than one exemplary Reading Proficiency Test tape. Such tapes are used as examples for new readers to listen to before taking a reading test.

Peter is extremely bright, dependable and pleasant to work with. We are glad that after completing the 3,000 hours of community service, he plans to continue his volunteering work with us.

Sincerely,

Dennis A. Smith
Assistant Studio Director
So. Bay Studio, RFB&D

5022 Hollywood Boulevard, Los Angeles, CA 90027-6192 [redacted]
300 N. Sepulveda Boulevard, Suite 2035, El Segundo, CA 90245 [redacted]
6700 Fallbrook Avenue, Suite 126, West Hills, CA 91307-3530 [redacted]

RECORDING FOR THE BLIND & DYSLEXIC

Ms. Marla Weisenfeld
U.S.P.O.
U.S. District Court
501 W. Ocean Blvd., Suite 6340
Long Beach, CA 90802

August 16, 1999

Dear Marla,

Peter Lee, who began on April 13, 1998, has now completed 3,000 hours of community service/volunteering at the South Bay of Recording for the Blind & Dyslexic as of August 16, 1999.

We have grown quite dependent on Peter, because of his willingness and desire to learn all aspects of what we do here. These tasks include marking of books prior to reading, directing recording sessions, reading books on various subjects, describing complicated maps, tables and graphs, conducting orientations of new volunteers, reviewing reading proficiency examinations, checking tapes for quality control, duplicating cassettes for students, correcting errors on volunteer-produced tapes, various clerical functions, machine maintenance and repair, and covering for staff in emergencies.

Peter is continuing to volunteer at least two hours per week and in fact we're expecting him to run the studio this Friday (8/20/99) to make it possible for us (the staff) to attend an annual meeting.

Please send us another Peter.

Sincerely,

Daniel C. Holt

Daniel C. Holt
South Bay Studio Director

5022 Hollywood Boulevard, Los Angeles, CA 90027-6192 [redacted]
300 N. Sepulveda Boulevard, Suite 2035, El Segundo, CA 90245 [redacted]
6700 Fallbrook Avenue, Suite 126, West Hills, CA 91307-3530 [redacted]

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

July 17, 2000

The Honorable Arlen Specter
Chairman
Department of Justice Oversight Investigation
Subcommittee on Administrative Oversight
and the Courts
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on S. 2089, the "Counterintelligence Reform Act of 2000," as reported by the Senate Committee on the Judiciary and referred to the Committee on Intelligence. The Department commented on an earlier version of this bill in our letter of May 17, 2000. We support much of the current version of the legislation and favor the bill's passage subject to the following concerns.

S. 2089 as Reported by the Committee on the Judiciary

Section 4 requires that regulations be promulgated regarding disclosure for law enforcement purposes of information acquired under the Foreign Intelligence Surveillance Act of 1978 ("FISA"). To the extent that further clarification regarding such disclosures is necessary, it is not apparent that regulations are the appropriate vehicle for doing so. Such regulations are likely to complicate espionage or terrorism prosecutions by engendering litigation over whether the regulations afford defendants procedural or substantive rights. The Department would be pleased to keep the appropriate Congressional committees informed of the Department's own review of the issue of disclosure and the conclusions reached by that review.

Additionally, under section 6(c) of the bill, the Attorney General would be required to report to the Committees on the Judiciary of the Senate and the House of Representatives, within 120 days, on "actions that have been or will be taken by the Department" to centralize the handling of national security issues.

An appropriate alternative to a formal reporting requirement would be for the Department to brief the appropriate Congressional committees on the important issues implicated by section 6(c), so that approaches may be developed about how to improve the manner in which the Department conducts its national security missions -- approaches that are agreeable both to the committees and the Department of Justice.

Finally, section 6(a), page 24, line 1 of the bill, should be modified by moving "and" from its current location and placing it immediately after "Policy."

Amendment Modifying the Classified Information Procedures Act

We understand that the Committee may consider an amendment to S. 2089 that would modify section 9 of the Classified Information Procedures Act ("CIPA") to establish "certain administrative requirements relating to the prosecution of cases involving classified information." Although broadly worded to cover all cases involving classified information, the amendment plainly is directed toward espionage cases. We strongly oppose this amendment.

First, the amendment does not clearly define the types of cases that its provisions would affect. For example, it would mandate that "victim" agencies[1] in cases "involving classified information" submit to the Attorney General a damage assessment for the case. We note that many Federal criminal cases potentially "involve" classified information.[2]

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[1]That is, Government agencies that are victimized by espionage.

[2] The revised draft of this amendment does nothing to change our opposition to this proposal. The new draft does not describe with certainty the cases to which it applies. As the new definition of the required damage assessment refers to "information alleged to have been gathered or transmitted in violation of federal law," (f)(2)(A), the section seems aimed at <u>any</u> violation of 18 U.S.C. 793, 794, or 798. Accordingly, it would include in addition to foreign espionage, all unauthorized disclosures of classified information, including media leaks, and other conduct covered by these provisions no matter how de minimus. As the Department has advised the Committee, and as the

Second, the guidelines issued by the Attorney General pursuant to section 12 of CIPA already provide the guidance necessary to enable prosecutors to assess the nature and importance of classified information involved in Federal criminal cases, including espionage cases. See Attorney General Guidelines For Prosecutions Involving Classified Information, §b (1981).

Third, the amendment would require that prosecutors obtain and review a written damage assessment before making a final decision on whether to take a case to trial or to offer a plea bargain. As described below, this requirement not only would provide a potentially discoverable road map to the case, but could restrict prosecutors in developing trial strategies.

In espionage cases, one of the key elements the Government must prove is that the compromise of classified information relates to the national defense and could be used to injure the United States or benefit a foreign country. Gorin v. U.S., 312 U.S. 19 (1941); U.S. v. Heine, 151 F.2d 813 (2d Cir. 1945), cert. denied, 328 U.S. 833 (1946). Since a damage assessment would address these issues, there is a possibility that it would be discoverable, providing a road map to the defense on the Government's likely proof with respect to this element. Certainly the fact that an assessment is statutorily required would lead the defense in every case to litigate its discoverability. Moreover, the fact that the document might be discoverable could lead the agency whose information has been disclosed to dilute its findings in order to protect against the disclosure to the defense of sensitive classified information, distorting the seriousness of the defendant's activities. Finally, the requirement likely would lock the Government into using the person who prepared the assessment as a witness on the issue of national defense relatedness and damage, even if another person would be a more effective trial witness. For all of these reasons, it has been our practice not to obtain a written damage assessment in espionage cases until after trial or conviction.[3]

Attorney General recently testified regarding the proposed legislation on unauthorized disclosure of classified information, we are concerned that that legislation as drafted would criminalize inadvertent disclosures.

[3] Nor is our view changed by the provision in the revised amendment that would allow the Assistant Attorney General to

Fourth, the amendment would require the prosecution team to brief the head of the victim agency or that person's designee on the status of the case on a recurring basis; record, for inclusion in the case file, any and all objections by the victim agency to the proposed handling of the case by the Attorney General; and require the Department of Justice's Internal Security Section to reduce to writing key instructions to prosecutors in the field, which instructions would have to be approved by the FBI and the victim agency for clearance before they could be implemented. These rigid requirements also would impede espionage prosecutions, by introducing extensive briefing requirements and burdensome paperwork. In addition, since the determination that a case could result in prosecution is usually made during the investigatory stage, there very well may be grand jury disclosure issues under Rule 6(e) of the Federal Rules of Criminal Procedure arising from the requirement that the agency head be kept "fully and currently informed" of the status of a case. Beyond this, while it has been our practice to brief agency heads generally about espionage investigations and prosecutions that concern their agencies, there may be sound investigative reasons for not doing so, *e.g.*, to prevent leaks during the pendency of an arrest.

Documenting an agency's concerns about the potential discovery, use, and relevance of sensitive, classified information could prove to be a monumental task. But more importantly, it also could create undue pressure on prosecutors

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assessment upon a written determination that: exigent circumstances necessitate proceeding without one; or that the prosecution is "untenable," or "in conjunction" with the victim agency, that the production of a damage assessment would have an "adverse impact on the outcome of the case." Apart from the obvious ambiguity of the term "untenable," the requirement to have the Assistant Attorney General render such a determination in every case where prosecution is declined is both unproductive and unduly burdensome. That consideration may be given by the drafters to elevating this determination to the Attorney General only makes this provision more problematic. Finally, having the victim agency participate in the determination that prosecution would be adversely impacted by a damage assessment dilutes the authority of the Assistant Attorney General by including agencies in significant litigation decisions when they are unlikely to possess the requisite litigation or prosecutorial expertise.

to satisfy agency concerns, which could delay proceedings and ultimately jeopardize or weaken the Government's case. Further, the creation of a file of complaints about how the Department is handling the case will lead inevitably to discovery requests by espionage defendants for access to a road map to the case and repository of prosecution strategy.

Fifth, the amendment would mandate that key instructions from the Internal Security Section to the United States Attorneys' Offices be reduced to writing and transmitted to the FBI and the victim agency for comment before a final decision is made on the treatment of the case by the United States Attorney. While there are some key instructions in espionage cases that are discussed routinely in advance with either the victim agency, the FBI, or both (proposed dispositions by plea, for example), many are not. As head of the Justice Department, the Attorney General and not the FBI must retain the ultimate authority to manage the Government's litigation.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of further assistance. The Office of Management and Budget advises us that from the standpoint of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Robert Raben

Robert Raben
Assistant Attorney General

IDENTICAL LETTER TO BE SENT TO THE HONORABLE RICHARD C. SHELBY, CHAIRMAN, SELECT COMMITTEE ON INTELLIGENCE; THE HONORABLE RICHARD BRYAN, RANKING MINORITY MEMBER, SELECT COMMITTEE ON INTELLIGENCE; THE HONORABLE ORRIN G. HATCH, CHAIRMAN, COMMITTEE ON THE JUDICIARY; THE HONORABLE PATRICK J. LEAHY, RANKING MINORITY MEMBER, COMMITTEE ON THE JUDICIARY; THE HONORABLE CHARLES E. GRASSLEY, CHAIRMAN, SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS, COMMITTEE ON THE JUDICIARY; AND THE HONORABLE ROBERT G. TORRICELLI, RANKING MINORITY MEMBER, SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS, COMMITTEE ON THE JUDICIARY