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STATEMENT

OF

JOHN ASHCROFT
ATTORNEY GENERAL OF THE UNITED STATES
U.S. DEPARTMENT OF JUSTICE

BEFORE
THE

UNITED STATES SENATE
SELECT COMMITTEE ON INTELLIGENCE

CONCERNING

UNAUTHORIZED DISCLOSURE OF CLASSIFIED INFORMATION

September 5, 2001

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DRAFT –September 4, 2001

Chairman Graham, Vice Chairman Shelby, and Members of the Select Committee:

Thank you for the opportunity to appear before the Committee to discuss the vexing problem of unauthorized disclosures of classified information.

LEAKS DAMAGE NATIONAL SECURITY

At the outset, let me state emphatically: the Bush Administration shares the Committee's concern about the damage caused to our national security by leaks of classified information. There should be no mistake--leaks of classified information do substantial damage to our national security interests. As a government, we must find effective measures to stop this troubling and damaging practice.

Leaks of classified government information expose extremely sensitive government information, which is critical to our national security, to every potential adversary of the United States. Capabilities have been lost, assets have been compromised, legitimate government policies have been hampered, and our national security interests have suffered as a result. Nearly every element of the US Intelligence

Community has sustained losses to capabilities, sources, and methods as a result of leaks. The Department of Justice has also been victimized by leaks. Although this hearing focuses on leaks of classified information, it is important to note that many of our most sensitive espionage and terrorism investigations have been jeopardized or compromised by leaks of sensitive law enforcement information, as well as classified information.

US government employees who leak classified information breach the trust placed in them when granted a security clearance. The Department of Justice strongly supports the position that government employees who leak classified information should be sanctioned, and where possible prosecuted to the full extent of the law.

While there are some arguable gaps in the current statutory scheme criminalizing intentional unauthorized disclosures of classified information, that has not been the problem in prosecuting leak cases. Rather, the problem has been difficulties in identifying the responsible person and difficulties in being able to prove the case at trial.

Indeed, I am not aware of a single case involving the unauthorized disclosure of classified information that would have been prosecuted but could not be because of the lack of statutory coverage. Consequently, while the proposed statute would fill some arguable gaps in statutory coverage it is unlikely to lead to any increase in prosecutions. As such, it is not a law enforcement priority for the Administration.

CURRENT LAW PROVIDES CONSIDERABLE COVERAGE

Several existing statutes proscribe the unauthorized disclosure of certain types of classified information: The "Intelligence Identities Protection Act," 50 U.S.C. §421, prohibits the disclosure of the names of covert intelligence agents. 18 U.S.C. §798 protects from unauthorized disclosure information relating to communications intelligence activities and cryptographic systems. 18 U.S.C. §794 proscribes the disclosure of national defense information or materials to any foreign government or agent thereof. 18 U.S.C. §793(d) and (e) prohibits the disclosure of information "relating to the national defense" having reason to believe the information could be used to the injury of the United States or to the advantage of any foreign nation. §793(d) is the statute of

broadest applicability for unauthorized disclosures of national security information by government officials and employees. 18 U.S.C. §952 prohibits the unauthorized disclosure of diplomatic codes or matter prepared in any such code. 42 U.S.C. §§2274, 2275, and 2276 prohibit the unauthorized disclosure of, receipt of, and tampering with Restricted Data (certain data relating to nuclear material and atomic weapons).

The Department has long held that these and other statutes provide a basis on which to investigate and prosecute leaks of classified information, including unauthorized disclosures to the press. These statutes include within their reach a wide range of classified information, to include military information, intelligence information, and potentially even information relating to foreign relations.

The Department's position on this issue is informed by the case of Gorin v. United States, 312 U.S. 19 (1941). In Gorin, the Court approved a jury instruction setting out the definition of "relating to national defense" found in 18 U.S.C. §793 as including all matters directly and reasonably

connected with the defense of the nation against its enemies. The Court also held that the term "national defense" was a generic concept of broad connotation and referred to the military and naval establishments and the related activities of national preparedness. Id. at 28. The Department notes, as well, that the Fourth Circuit held in United States v. Truong Dinh Hung, 629 F.2d 908, 918 (4th Cir. 1980) (citing United States v. Boyce, 594 F.2d 1246 (9th Cir.), cert. denied, 444 U.S. 855 (1979)), that "relating to the national defense" is not limited to "strictly military matters."

INVESTIGATORY DIFFICULTIES

Notwithstanding the breadth and potential reach of the currently available statutory prohibitions, there has only been one successful prosecution and conviction for the unauthorized disclosure of classified information to the press in the last 25 years: United States v. Morison.

However, the recurring problem in prosecuting these matters has not been the lack of statutory authority. Rather, the lack of indicted leaks cases is a manifestation of a basic evidentiary problem that exists largely due to the typically

large numbers of people with access to classified information throughout our government. Additionally, the application of a longstanding Departmental policy governing contacts with media entities as witnesses, subjects, or targets presents some difficulty in pursuing these cases.

The Department's practice, embodied in the policy promulgated by Attorney General William French Smith in 1981, has been to focus a leaks investigation on the universe of potential leakers rather than on the reporter. While this practice has made the Department's task more difficult, it represents a policy judgment that takes into account First Amendment principles.

Given that the focus of these investigations has been on the pool of people with access to the leaked information, rather than on the single individual who received the leaked information, identifying the leaker, as noted, is an extremely difficult task. It is typical that the universe of individuals with authorized access to the leaked information is so large as to render impractical, at the outset of an

investigation, any additional efforts to identify the irresponsible leaker.

Because of the enormous difficulty of conducting leak investigations, almost all are closed without having identified the culprit. Of course, investigators and prosecutors may have their personal suspicions, but it is impermissible for a prosecutor to bring criminal charges unless sufficient evidence to sustain a conviction exists. Thus, establishing proof beyond a resonable doubt that one, of potentially hundreds of people with access, leaked the information to the media has almost always been an unattainable goal. Even still, the Department is prepared to prosecute vigorously those we can identify and prove to be accountable for the leak of classified information.

THE PROPOSED LEGISLATION

The provision being contemplated by the Committee, would, if enacted, criminalize the "knowing and willfull disclosure" of "properly classified" information if given to a person without authority to receive the information, knowing that the person was without authority to receive the information.

In the Department's view, the proposal does not run afoul of constitutional principles. The measure focuses on the actions of the government employee or former government employee and requires the "knowing and willfull disclosure" of classified information. Thus, it avoids criminalizing the merely negligent or inadvertent disclosure of classified information. This is a level of protection to all government employees-current and former-who may inadvertently err and accidentally disclose information that is classified. It also adds an additional mental state element: the violator must know that the recipient is not authorized to receive the classified information being disclosed. This element further protects the discloser from prosecution where an honest mistake was made regarding one's level of clearance and authority to receive classified information. Finally, it would be an element of the offense that the information was "properly" classified.

The proposal does not discriminate as to the types of classified information covered by its terms. Rather, it covers all "properly" classified information. No doubt this

is an effort to fill in perceived gaps in protection for classified information left uncovered by current statutes.

The Department recognizes that an argument can be made that current laws, some of which date to 1917, could be clarified to ensure there are no gaps in coverage. However, it is unlikely that the contemplated provision, if enacted, would prove more effective than the current statutory prohibitions aimed at deterring leaks or will improve the government's ability to investigate and convict leakers. The Department is not aware of any cases not prosecuted because of a lack of coverage.

OTHER AVENUES OF RESOLVING THE LEAKS PROBLEM

The Administration should be permitted to pursue whether stricter personnel security practices and the imposition of administrative sanctions, including the revocation of security clearances, could prove more effective at limiting the leak problem. Additionally, the Administration should be given some time to explore new ways of dealing with leaks within the executive branch. Without taking a position on the specific legislative proposal now being contemplated by the Committee,

passage and enactment of such a measure is not a priority of the President's legislative agenda.

Let me stress that this Administration is committed to establishing an appreciation for best security practices throughout government. A culture of, and appreciation for, security must pervade the actions of all government employees who are privileged to handle classified information and who must utilize such information to carry out the business of the Nation.

When government employees, contractors, or consultants fall short in fulfilling their obligations to the nation in their treatment and handling of classified information, their clearances for access to that information should be rescinded. In our view, the DCI has all the necessary authorities to revoke the clearances for access to the DCI's Sensitive Compartmented Information (SCI) from individuals throughout the Intelligence Community who are found to have engaged in leaks or otherwise have mishandled that information. Likewise, other department and agency heads, including myself, can and should pursue all available and appropriate

administrative actions against employees, contractors, and consultants who violate their duty to protect classified information. The Department's Civil Division is committed to pursuing appropriate civil actions for injunctive relief or monetary remedies against government officials and former government officials who violate their secrecy agreements or who make financial profits from unauthorized disclosures of classified information. The Department of Justice is also prepared to support other Departments and agencies that pursue administrative actions, such as suspension, revocation of security clearances, or removal from government employment.

Given the implications and the potential impact this legislative proposal may have on liberties protected by the First Amendment, as well as upon the policies of the Department of Justice, it is important for this Administration to proceed thoughtfully before endorsing any specific legislation.

NEW REVIEW PROPOSED

Let me add that I have proposed to DCI Tenet that the Department of Justice lead an inter-agency group to conduct a

comprehensive review and assessment of the administrative, civil, and criminal responses currently available to combat leaks. It has been almost 20 years since the so-called "Willard Report," which was the result of an inter-agency working group commissioned by then Attorney General William French Smith in 1982. I believe it is time for a fresh review. One of the issues that should be examined, in my view, is the impact of new technology and whether we have adequately and appropriately taken into account those technological advancements in our strategies to prevent and investigate leaks.

Mr. Chairman and Mr. Vice Chairman, in your invitation letter you asked for the Department's assessment of the effectiveness of current criminal, administrative, and civil remedies to address leaks. That assessment can be even more completely informed by this inter-Agency review.

CONCLUSION

The torrent of classified information that finds its way into the public realm hurts all of us. It damages the nation's security, it puts our men and women serving this

nation overseas at substantial risk, it hampers our foreign policy initiatives, and it compromises our public safety interests. The primary beneficiaries of leaks of national security and intelligence secrets are the enemies and potential adversaries of the United States. I cannot say it more forcefully: leaks of classified government information are terribly harmful to the well-being of the Nation.

I want to thank the Committee for allowing me the opportunity to express the views of the Department on this important subject. I would now be happy to answer any questions you may have.