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8/23/83

To: Hazel Stewart

From: Ida Cerra

Here is the Blumenthal report,to be placed in one of Merrick Garland's files. Thanks.

C195

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General — Washington, D.C. 20530

April 29, 1983

Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is in response to your letter of February 14, 1983 requesting access for two staff members of your Committee to the confidential version of the "Blumenthal report."

As you know, the "Blumenthal report" is a non-public document that was prepared by the Department for internal use only. However, upon the request of the Senate Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice, we agreed to disclose the report to two specified staff members or any Member of that Committee. The staff members were permitted to read the report at FBI headquarters, on the understanding that they would not copy the report, take notes, or disclose the contents of the report to anyone other than the Members of the Committee.

We will be happy to honor your request for access to the "Blumenthal report" under an arrangement similar to that worked out with the Senate Committee. At their convenience, Catherine LeRoy, Janice Cooper and minority staff member Phil Kiko, as well as any Member of the Committee who wishes, will be permitted to review the confidential version of the "Blumenthal report" at the Department of Justice, subject to the understanding that they will not take notes or make copies of the report, and that neither they nor any Member of the Committee will disclose any of the contents of the report.

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If this arrangement is acceptable to you, we are prepared to provide access to the report at any time. Please contact C. Marshall Cain, Deputy Assistant Attorney General, Office of Legislative Affairs, on 633-4054 to make the necessary arrangements.

Sincerely,

Robert A. McConnell
Assistant Attorney General

Agreed to: _____ Date: _____

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U.S. House of Representatives
Committee on the Judiciary
Washington, D.C. 20515
Telephone: 202-225-3951

February 14, 1983

RECEIVED
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O.L.A.

The Honorable William French Smith
U.S. Attorney General
Department of Justice
Washington, D.C. 20530

Dear Mr. Attorney General:

I am writing to request access to the confidential version of the Department of Justice's report on Unauthorized Disclosures regarding ABSCAM, Pendorf and Brilab (the Blumenthal report).

I understand that selected staff of the Senate Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice were shown that report. I would propose that the House Committee on the Judiciary, (which, as you know, has been conducting oversight hearings on FBI undercover activities for several years) be afforded a similar opportunity under a similar agreement of confidentiality.

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GENERAL

The two staff members appropriate for this task are Catherine LeRoy, Chief Counsel to the Subcommittee on Civil and Constitutional Rights and Janice Cooper, Special Counsel assigned to the Committee's review of undercover activities. As FBI records will show, both counsel previously have been the subject of FBI background checks for their Committee work on FBI matters.

Should you desire any further assurances or information, please do not hesitate to call me or my General Counsel, Alan Parker.

Sincerely,

PETER W. RODINO, JR.
Chairman

8300237

PWRJ:jcw

cc: Robert A. McConnell
Assistant Attorney General

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This is a report of an investigation begun at the direction of Attorney General Benjamin R. Civiletti on February 11, 1980, into unauthorized disclosures appearing in the news media regarding three separate Federal criminal investigations: ABSCAM, PENDORF and BRILAB. The disclosures, which occurred predominantly during the period February 2nd through February 9th, were of a scope and magnitude virtually unprecedented in Department of Justice history, and were condemned promptly and strongly by the Attorney General. The mission of this investigation set forth by him was to determine the identities of individuals responsible for the unauthorized disclosures, to ascertain motives and causes, and to recommend remedies to help prevent such improper disclosures in the future.

The decision was made early in the investigation, at the Attorney General's direction, to conduct it as an administrative inquiry, without foreclosing the possibility that a criminal investigation might be commenced if specific evidence of criminal violations were found. It was essential to proceed as quickly and completely as possible, exposing the full range of any government misconduct. An administrative inquiry appeared to be the most thorough and expeditious method to develop the facts. A criminal investigation was expected to encounter objections from potential witnesses and subjects, generally eliciting less candid and prompt cooperation. Equally important, there was no indication of criminal intent, and hence, no justification for invoking criminal investigative processes such as Grand Jury or witness immunity.

Every person interviewed was informed of the administrative nature of the inquiry. There were no grants of immunity, either administrative or criminal, of any kind.

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The investigation was conducted through the FBI Office of Professional Responsibility, with substantial and continual guidance from Michael Shaheen and his staff in the Department of Justice's Office of Professional Responsibility as well. It was supervised jointly by me and John Otto, Assistant Director, FBI. There was agreement on all major policy decisions and investigative steps.

The investigation was conducted through three separate teams of agents and attorneys assembled specifically for this purpose. Thirty agents were selected from FBI Field Offices; each team of ten agents was lead by an inspector. All were chosen for their demonstrated competence as investigators. Five attorneys were selected following consultation with United States Attorneys and Department of Justice officials. Each was a Chief Assistant in his respective office, among the Department's most experienced and able investigative and trial lawyers. None were from offices involved in any way in the underlying investigation. The teams investigating ABSCAM and BRILAB leaks each were assigned two attorneys, and PENDORF was assigned one. While each investigation was relatively compartmentalized in order to maximize security, general investigative insights were shared; specific results were communicated whenever advisable, and were exchanged more fully at later stages of the inquiry.

The first task of the investigation was to determine the identities of all agents or attorneys who had knowledge of each operation prior to the disclosures. All of these individuals were contacted and interviewed. Almost all cooperated by providing signed, sworn statements describing the extent of their knowledge, the number and substance of their contacts with particular members of the press, and other pertinent details. Reinterviews were conducted with many of these individuals in order to clarify points of conflict or confusion, and elicit additional information. Some provided second sworn statements, at our request. Efforts also were made to explore and exhaust other sources

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of information. Records of toll calls made from telephones located both in government offices and homes were obtained by voluntary disclosure, when requested.

Selective and judicious use was made of the polygraph as an investigative technique. Requests to submit to polygraph examinations were made pursuant to the policy and procedure established by the Attorney General's memorandum of May 14, 1980, and Director William Webster's directive of May 13, 1980. As to each potential polygraph candidate, a judgment was made on the basis of all available information whether a substantial objective basis existed to request an examination. Requests were made to assess conflicting versions of material facts, or to resolve other questions raised by circumstantial evidence or inconsistent statements. Only when there was a substantial objective basis, and when other available investigative measures had been fully utilized, was any individual requested to do so. Each individual was informed at the time of the request that an adverse inference might result from a refusal and that the results could be used in disciplinary decisions. While every individual interviewed was asked whether he or she would be willing to submit to a polygraph examination, if requested to do so, actual requests were made only of 18 individuals. Three additional individuals volunteered for examinations.

The scope of this investigation has been unusually broad. Some 1253 interviews have been conducted, consisting of 259 in connection with the ABSCAM disclosures, 290 in regard to PENDORF and 704 for BRILAB. Members of the investigative teams have visited a total of 77 cities in order to obtain interviews and sworn statements. Detailed questions have been asked of all persons regardless of present or former position in the government. Interviews have been conducted of individuals who were never actual government employees but who gained knowledge of the pertinent criminal operations.

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One important limitation has been rigorously observed in accordance with the Attorney General's instructions. No approach has been made to any member of the news media or anyone associated with any news media organization. No information has been solicited or received from any such person. The policy of the investigation has been that we never would reject information if volunteered by newsmen, but we never would request them to divulge anything. Contacts creating even an appearance of approaching the press were scrupulously avoided. In conducting the investigation, we have sought to minimize any potential chilling effects on press activities. We have emphasized in interviews and all private conversations, as the Attorney General has stated publicly, that this has been an investigation of misconduct on the part of government employees, not of the press. As a practical matter, the possibility of obtaining information regarding reporters' sources within the government seemed highly remote, even under the threat of compulsion, and almost certainly would have resulted merely in a distracting and devisive confrontation.

Another limitation has been observed: No use has been made of transcripts, testimony or other records of proceedings in connection with criminal charges now pending as a result of the ABSCAM and BRILAB investigations. No access to any such materials has been sought. Our objective has been to conduct this inquiry as an independent, purely administrative matter, without even an appearance of exploiting testimony compelled or offered in criminal proceedings. Also, sequestration orders imposed on potential witnesses in these proceedings arguably apply to individuals conducting our inquiry, making a review of others' testimony improper. Any additional facts relating to the leaks revealed during criminal litigation may be given such use as is appropriate in the future.

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Within these constraints, and the inevitable limitations of time, this inquiry has developed evidence supporting a number of general findings:

Disclosures appear to have resulted from separate, individual action on the part of various individuals, without approval or authorization from either the Attorney General or FBI Director, and without any general agreement or conspiracy.

No evidence exists of any intent to obstruct justice, or any direct personal financial gain.

Sufficient evidence exists to initiate disciplinary actions against specific individuals, including both attorneys and FBI agents.

Motivations appear to have been as varied as the types of disclosures, ranging from pride and self-promotion to pressures of preserving and protecting a covert investigation.

Disclosures adversely affected each of the criminal investigations — by endangering agents and compelling a premature end to the covert stage in BRILAB; and by alerting potential defendants, and providing support for defense motions in all three.

The report treats leaks concerning each operation in a separate section, analyzing the nature of disclosures that occurred and their impact, factual findings as to sources of these disclosures, and results of requests to submit to polygraph examinations. Another section discusses causes and motivations, followed by a final section dealing with recommendations as to general remedies that should be considered to help prevent recurrences of such disclosures. Appended to this report are separate memoranda submitted by Michael Shaheen, Counsel of the Office of Professional Responsibility in the Department of Justice, to the Attorney General; and Richard Long, Assistant Director of the Administrative Services Division, FBI, to the Director of the FBI, suggesting specific disciplinary recommendations to be taken against particular individuals.

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A. ABSCAM

Operation ABSCAM began in November, 1978, with the aim of recovering stolen property, including two valuable paintings, through use of undercover FBI agents posing as Arab sheiks and their representatives. The investigation shifted its focus to political corruption in a second phase, when middlemen introduced the undercover agents to political figures and officials willing to accept payments for helping the sheik's business, and performing certain services in connection with the sheik's possible attempt to obtain potential asylum in this country. Several public officials, including Philadelphia councilmen and Congressmen from Philadelphia, New York and Florida, have been indicted by Federal Grand Juries as a result of the investigation.

Although press inquiries of a very general nature were received as early as the Fall of 1979, they had no effect on the ongoing investigative effort. The more detailed and specific inquiries — indicating that there had been a leak and that disclosures might be imminent — did not occur until late January, 1980. By then, the covert phase of the operation was nearing conclusion. There appears to be virtual unanimity among those involved in the investigation that the major reason for ending the undercover operation was that its significant investigative objectives had been achieved and its energies and resources were near exhaustion. While the leaks did not precipitate a premature end to this covert phase, they may have alerted potential grand jury witnesses and targets as to the details of the government's case and furnished the defendants with factual ammunition for their defenses and motions. One potential witness declined to cooperate, telling prosecutors that his decision had been affected by publicity surrounding the leaks.

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1. THE DISCLOSURES

Well before any public disclosures occurred, various inquiries were made by reporters who never actually succeeded in getting the ABSCAM story. One of the earliest press contacts regarding ABSCAM appears to have been made by David Ignatius, of The Wall Street Journal, who called David Margolis, Chief of the Organized Crime and Racketeering Section of the Department, during the summer of 1979. According to Margolis, he asked vaguely about a possible political corruption investigation. At about the same time, he also called Philip Heymann, Assistant Attorney General, Criminal Division. During December, 1979, Margolis says, Ignatius renewed his request for information from Margolis, and other reporters contacted Justice Department and FBI officials appearing to know that some kind of undercover operation was in progress but without having any details sufficient to make a story. After February 2nd and the ABSCAM disclosures became public, Margolis says, Ignatius expressed considerable displeasure that he had not been more forthcoming.

Margolis also recalls that Gene Goldenberg of Scripps-Howard Newspapers inquired prior to Christmas in December, 1979, about a massive political corruption investigation in Philadelphia. Margolis "absolutely denied" the report, he says. Goldenberg made similar general inquiries of Heymann and Charles Ruff, U. S. Attorney for the District of Columbia, in December. Ruff recalls Goldenberg opening their conversation with the words, "I understand you have pictures of Senators taking bribes." Ruff responded that he did not know what Goldenberg was talking about. On December 20, 1979, Goldenberg called Thomas Henderson, Chief of the Public Integrity Section, and asked, "Do you have a case on Pete Williams?" later adding, "I have information he is about to be indicted in Washington, D. C." According to Henderson, he told Goldenberg, "I don't know what

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you're talking about," and suggested that he call the U. S. Attorney's office for the District of Columbia, which would be responsible for any prosecution in that jurisdiction.

Lovida Coleman, Special Assistant to the Attorney General, recalls a call from Goldenberg in November or December, 1979. He asked whether she knew of any investigation of Senator Williams. She recalls responding that she did not. Goldenberg told her that he had received the information from a source in the Justice Department, that Williams had been surveilled and videotaped at a particular place involved in an organized crime surveillance. Goldenberg told her that he was seeking confirmation, she says, because his source did not have direct knowledge but had heard this report from someone else. On February 3rd, after the public disclosures, Goldenberg told her that he had given up on the story four weeks previously because he had been unable to get reliable confirmation. Goldenberg also called Margolis, after the public disclosures on February 2nd, complaining that he had been mislead by Margolis' denial.

Telephone inquiries were made by various New Jersey newspaper reporters, although none produced stories prior to February 2nd. Both Lawrence Sharf, Special Counsel to the Brooklyn Strike Force, and James Harmon, Assistant Attorney in Charge of the Brooklyn Strike Force, were called by a Shrewsbury, New Jersey reporter, whose name they do not recall, inquiring about a possible case on Senator Harrison Williams. Both responded that no such case existed in their office. These calls were received during the summer of 1979.

On October 23, 1979, the Newark FBI office received a call from Robin Goldstein of ~~The Daily Register~~ in Shrewsbury, New Jersey. She stated that she knew of a political corruption investigation involving a U. S. Senator. A similarly general inquiry was received on November 26, 1979, by Robert Havel, a Justice Department press officer, in a call from a ~~Newark Star Ledger~~ reporter. He does not recall the reporter's name.

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Robert Rudolph of The Newark Star Ledger visited U. S. Attorney Robert Del Tufo near the end of the week of January 21st to advise him that his newspaper intended to print a story about an undercover investigation involving a very high New Jersey public official. The target was not specifically named but was identifiable from his description as Senator Williams. He told Del Tufo that his information had been obtained from Newhouse National News Service personnel in Washington. Del Tufo gave him no comment. Similarly, Rudolph sought confirmation for his story from Edward Plaza, Executive Assistant U. S. Attorney in Newark, at about the same time. Plaza concluded that much of Rudolph's information was incorrect, and denied the accuracy of his report. Approximately one week to ten days prior to February 2nd, Robert Wright, Assistant Special Agent in Charge of the Newark FBI office, spoke to Rudolph, and denied his account of an ongoing investigation involving significant political figures in New Jersey, New York and Philadelphia.

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The first public reports of ABSCAM appeared on Saturday evening, February 2nd, when NBC aired reports at 6:30 and 10:00 p.m. Other extensive reporting on the undercover operation appeared in the Sunday edition of The New York Times also available on Saturday evening, and in the Sunday edition of Newsday. The reporters responsible for these stories were, respectively, Brian Ross and Ira Silverman at NBC, Leslie Maitland at The New York Times, and Anthony Marro at Newsday.

The most detailed account of ABSCAM appeared in The New York Times in an article by Leslie Maitland that repeated virtually verbatim portions of the prosecutive memorandum prepared in December, 1979, by Thomas P. Puccio, Chief of the Brooklyn Strike Force. The article included language, anecdotes, and other material that could not have been obtained without access to the memorandum. Attributed to "law enforcement authorities," the story set forth names of public officials, amounts of money paid to them by undercover agents, and described alleged services that they promised to perform. It did not mention two Congressmen who were targets of the investigation but were not named in the Puccio memorandum. It included the following quotation:

> Law enforcement officials said the investigation was the most sweeping inquiry into political corruption undertaken by the FBI in at least 25 years. It comes at a time when the Bureau has stated that it would focus more attention on political corruption, organized crime and white collar crime, shifting emphasis away from violent crime and bank robberies.

In another edition, the Times printed a picture of then Assistant Director Neil J. Welch near this quotation and noted that the operation, based in the FBI Resident Agency in Hauppauge, Long Island, "has been under the supervision of . . . Welch . . . and Thomas P. Puccio." While the February 3rd Times article made no reference to the cooperation of any individuals, a report appearing on February 4th indicated that Howard

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Criden, a Philadelphia lawyer, had been "persuaded" to "cooperate." The attribution again was to law enforcement officials.

Subsequent articles in The New York Times, dated respectively February 5th and March 12th, concerned the role of United States Attorney Robert Del Tufo of New Jersey in ABSCAM and other investigations. The February 5th article reported that Del Tufo had recommended against the prosecution of Senator Harrison A. Williams of New Jersey on grounds of insufficient evidence but that he had been overruled by Attorney General Benjamin R. Civiletti. The subject of the March 12th article was a series of allegations made by an ABSCAM target in various conversations monitored and recorded during the ABSCAM investigation. The allegations concerned Del Tufo's role regarding an investigation unrelated to ABSCAM in its subject matter — a criminal tax investigation of Newark Mayor Kenneth Gibson. The target, George Katz, was overheard — without his knowledge -- as claiming that the Gibson investigation had been terminated after an approach by Gibson to Carter Administration officials, who in turn, had influenced United States Attorney Del Tufo to extricate Gibson. In the March 12th article by Leslie Maitland and Edward Pound, Katz' allegations were reported virtually verbatim as recorded on ABSCAM tapes and transcripts.

The NBC account appeared initially at 6:30 p.m. Saturday evening as a "flash report" and, more extensively, at 10:00 p.m. during NBC's Prime Time Saturday, a news magazine show. It included names of subjects and reports of bribe payments, without specific amounts. It was the only report appearing that evening to include videotape of the undercover residence at 4407 W Street, Washington, D. C., showing a black limousine arriving. It aired shots of relevant public places as well, such as the Plaza Hotel in New York.

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NBC also exclusively filmed the arrival of FBI agents at Senator Harrison Williams' home, and succeeded in confronting him almost immediately after the agents concluded interviewing him. Videotape taken earlier that day showed him departing for his office. The overall impression conveyed by the report was that it had been virtually stage-managed by government officials so that it would portray the ABSCAM operation dramatically and favorably.

The February 3rd Newsday story, though slightly less detailed than the Times' account, accurately described the essentials of ABSCAM — names of subjects, pertinent locations, and approximate total amounts of payments made to the public officials involved. It also reported the investigation had been "started in the Hauppauge, New York office of the FBI, headed by Resident Agent John Goode" (sic), and later continued:

> Thomas Puccio, director of the Eastern District Strike Force in Brooklyn, has coordinated the actual field investigation for the Justice Department. As the probe developed, Goode (sic) stayed with it as the supervising FBI agent. At FBI headquarters, here, the project was coordinated by Michael B. Wilson, a supervisor in Division 6, (criminal investigations), William Riley, a unit chief in the division, and Oliver B. Revel (sic), the deputy assistant director for investigations. Among the federal prosecutors who supervised the operation were Michael (sic) Del Tufo, the U. S. Attorney in Newark, and Peter Vaira, his counterpart in Philadelphia.

Newsday characterized the undercover operation as a "rather loosely coordinated effort." Subsequent articles published a photograph of FBI electronic equipment in the basement of the undercover location and a profile and brief interview with informant Mel Weinberg.

The Philadelphia aspect of ABSCAM was reported first on Sunday, February 3rd, in The Philadelphia Inquirer under the byline of Jan Schaffer and Tom Masland. In addition to the Congressmen allegedly implicated in the investigation, this report also quoted "federal sources" as stating that the investigation concerned Philadelphia City Council

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President George X. Schwartz, Majority Leader Harry P. Janotti, and Councilman Louis Johanson. The Inquirer article reported that a location of ABSCAM activities in Philadelphia was the Barclay Hotel on Rittenhouse Square, and that various payments had been made to Philadelphia officials. The article correctly reported that the undercover operation was code-named ABSCAM for the dummy corporation Abdul Enterprises, Inc., plus "Scam." Also, various quotes were attributed to a "federal source" or a "Justice Department source," such as, "It all started as an ordinary sting operation . . . you let it be known that you want to spend money. . . ."

The Philadelphia Bulletin on February 4th, reported details of the Philadelphia phase not included in the Inquirer's article, primarily attributed simply to "sources." These details included the name of an undercover agent, the use of a bogus Arab word, and other anecdotes, such as the laughter prompted by the use of that word in an adjacent room where the ABSCAM conversations were being monitored by agents and attorneys. The Philadelphia Bulletin article was reported by Thomas M. Burton and others on the newspaper's staff.

The Washington Post story on February 3rd, written by Charles Babcock, consisted largely of the same information reported by NBC, the Times and Newsday, though it contained a number of unique quotes attributed to Justice Department sources.

Articles appearing subsequently in other newspapers and media repeated many of the facts contained in these initial stories and elaborated on them with quotes from various named and anonymous officials. Time magazine's February 18th issue, for example, recapitulated details that had become public previously, beginning with a colorful comment attributed to a "former prosecutor": "Everybody was laughing at what was happening . . . the tapes are hilarious."

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2. FINDINGS

The New York Times

The New York Times appears to have obtained a copy of the Puccio prosecutive memorandum at some point during the period between 6:00 p.m. on January 31st, and approximately 10:00 a.m. the following morning. All individuals with access to this memorandum deny providing it to Maitland. Only three individuals have acknowledged any significant contact with Maitland regarding ABSCAM — Puccio, Welch and Quentin Ertel, Special Agent and Media Representative in the New York FBI office. The task of tracing the memorandum and its dissemination is made difficult by the substantial number of agents and attorneys who eventually had access to it.

Copies of the Puccio prosecutive memorandum were made available to all local offices of the FBI, Organized Crime Strike Force and U. S. Attorneys involved in Philadelphia, Newark, and Brooklyn, as well as officials of the Department of Justice in Washington. Consequently, some twenty copies may have been circulated initially, and many more reproduced later. During the week preceding February 2nd, agents unfamiliar with the investigation were briefed in preparation for the interviewing stage. Many of them received portions of the memorandum relevant to their particular interview assignments.

Of the agents and attorneys who received and read the memorandum, however, only a few appear to have had contact with any New York Times reporter. Even fewer had any substantive discussion whatsoever with Maitland or others regarding ABSCAM. During the pertinent period, the most significant events consisted of a series of telephone conversations and meetings with Maitland involving Welch, Ertel and Puccio. For this reason, the investigation has focused on these three individuals and their contacts with Maitland.

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The first relevant contact with the Times appears to have been on December 28, 1979, when Welch and Ertel attended a luncheon with various Times staff members. One reporter at the luncheon, Howard Blum, who has been associated with Maitland on various stories, made reference to a particular Special Agent and remarked that she was involved in "that big investigation." Ertel states he knew that the particular agent was indeed involved in ABSCAM. There was no indication at that time, however, that the Times or any other newspaper had extensive knowledge of the operation.

Ertel's first acknowledged discussion with Maitland regarding ABSCAM occurred on the afternoon of January 30th when she visited the FBI office in New York. According to Ertel, she appeared to know then that a major undercover operation was in progress, that it involved "politicians, the biggest being Senator Williams," and that something was going to happen that weekend." Ertel states that he did not "commit myself in any way to her." He claims that he then called the FBI Public Affairs Office at Headquarters, and "told them of the Maitland inquiry" although he cannot recall specifically with whom he spoke. He was told, according to him, that various other reporters already had "significant details regarding ABSCAM," and he later reviewed an FBI teletype pertaining to ABSCAM inquiries that advised all personnel to refer questions from the press to Headquarters. Consequently, he claims, he called Maitland and advised her to direct her inquiry to the Public Affairs Office at Headquarters.

No call from Maitland to FBI Headquarters' Press Office is recalled by anyone there. Indeed, Homer Boynton, then Executive Assistant Director and the FBI's chief spokesman at the time, says: "~~The New York~~ Times never made an inquiry of me about ABSCAM and this was the first time in five years that I was not contacted by ~~The New York~~ Times under such circumstances."

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Maitland called Ertel again later the same day, notwithstanding his previous instruction to her. Ertel says that he does not recall details of the conversation, but he does know, "I . . . again told her I could not tell her anything." Ertel's recollection is that Maitland "did not have a great deal of information about ABSCAM based upon what she presented to me" at that time. He recalls that he "may have mentioned" his conversation with Maitland to Welch, as would have been "routine" for him to do. He says: "I may have mentioned something to the effect that it appears The New York Times has the story now. However, I do not know that I, in fact, did this."

Maitland called Ertel again the following morning, and, as he recalls the conversation:

> She threw some names at me, however, I did not pay too much attention to what she was saying. In fact, I was getting irritated with her persistence and I may have slammed down the phone. This conversation did not last long. . . I did not tell anyone about this conversation.

During this conversation, Maitland asked Ertel whether the names "meant anything" to him. He states that he was "not familiar" with them, and that he told her that "I did not know anything and she should call Washington."

Later that afternoon, January 31st, Ertel says that he spoke to Senior Resident Agent John Good in Brooklyn on the telephone, while attempting to reach Welch on another matter. He says, "while talking with SA John Good, I informed him Maitland may be contacting Puccio for information relating to ABSCAM. I would have informed Puccio of this, however, he was not in the office at the time." He cannot recall the "exact conversation in any detail" with Good.

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Maitland arrived at the Brooklyn Strike Force office at 3:00 p.m. on January 31st, according to Brooklyn Strike Force records. A meeting had been scheduled for 3:00 p.m. between Puccio and Welch to discuss the interview phase of ABSCAM, scheduled for Saturday. Among those invited were Special Agents Good and Sharp, who were responsible for helping to supervisethis phase. Maitland evidently knew of the meeting, or at least that Welch would be present. Upon arriving, she indicated that she was there to see Puccio, Good or Welch, according to Strike Force records. Welch had not yet arrived because he had been delayed by an unrelated meeting in New York. Puccio says that he had not arranged any meeting with Maitland for that time. Indeed, when informed by his secretary that Maitland wished to talk to him, he assumed that she was on the phone, not in his office, and told his secretary that he would get back to her later.

Maitland then waited in the reception area at Puccio's office for approximately two hours without asking again to see Puccio or anyone else, according to those present. Maitland's appearance at the Brooklyn Strike Force office was itself somewhat unusual. Although she has phoned Puccio in connection with previous investigative stories, face-to-face meetings between them have been rare. Her presence, indeed, was noted by several attorneys and secretaries. At some point that afternoon between the time of her arrival and 5:00 p.m., Maitland requested permission to use a telephone, and was overheard saying that she did not have "it" yet, but expected "to get it." *

Maitland was still waiting in the Brooklyn Strike Force reception area when Welch and Ertel arrived at 4:50 p.m.,according to Strike Force records, almost two hours late for their meeting with Puccio. They were accompanied by two other agents, Senior

* The witness to this remark, Special Attorney Luther Genge of the Brooklyn Strike Force, recalls that it occurred on Friday, February 1st. Other witnesses, however, state that Maitland was in the office on Thursday, January 31st, but not Friday. Genge does not recall any specific occurrence or other fact that would enable him to associate her presence in the office with a particular date. He was present in the office library, where Maitland made the call, on every day that week. Therefore, it seems more probable that this event occurred on Thursday rather than Friday.

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Special Agent Martin Crowe and Special Agent in Charge Ken Walton. Crowe and Walton were not involved in ABSCAM but were to be briefed by Welch regarding an unrelated matter during the trip to Brooklyn. After the 10 or 15 minute drive, the four spent several minutes sitting in their car discussing this unrelated matter. As they entered the Strike Force reception area, Ertel states that he saw Maitland and asked her "what she was doing there." She told him that "she had been there for three hours, waiting to see Puccio." Ertel and Welch then entered Puccio's office area, according to Ertel, and told him that Maitland was outside. Puccio replied, according to Ertel, "yeah, I know." Ertel then suggested that they should "bring her in, and he agreed."

Puccio's version of the events of that afternoon differs in some respects from Ertel's. Puccio denies that he was aware that Maitland was waiting to see him. According to him, Maitland did not specify any names of targets — though he questioned her intensely as to how much she knew — in contrast to Ertel's contention that she knew some names that morning during his telephone conversation with her.

Puccio says that Maitland argued that she already had the story and, therefore, should be provided with more details. Puccio "pressed" her, he says, and determined that actually she had no substantial information. According to Puccio, she did not even appear to know that members of Congress were involved. It was in her interest to state fully her knowledge — even exaggerate it — in order to persuade Puccio to give her the complete story and thereby avoid any inaccuracy. At various points in the conversation, Puccio temporarily left the room. While he was gone, Welch and Ertel remained with Maitland. Puccio does not know what was discussed while he was absent. Puccio states that Welch and Ertel were more or less silent while Maitland attempted to persuade him to provide additional information.

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After the conversation with Maitland ended, there was little, if any, discussion pertinent to the actual purpose of the meeting, the interview phase of ABSCAM.* Welch, accompanied by Ertel, Crowe and Walton, left very shortly after the Maitland meeting, at 6:00 p.m. As they left the building, Maitland also was departing. ** Crowe recalls holding the door open for her and noticing that she was wearing a brown fur coat. He recalls commenting about the coat, and her responding "with something to the effect that she needed it as she had been cooling her heels all day." He had the impression that she was "upset." According to Ertel, Maitland was offered a ride back to Manhattan, but she declined saying that she had made her way there on her own and would return in the same fashion. He contends that he did not see her or talk to her again that evening and remained in the office late that night until approximately 10:00 p.m. — official records indicate 11:00 p.m. — explaining "I had some telephone calls to return and some paperwork to do." He said that he did not see Welch, Crowe or Walton again that evening after returning to the office.

According to Puccio, he received a phone call from Maitland on the following morning, February 1st, at approximately 10:00 a.m. in which she told him, "I was so pissed off at you and Welch last night that I went out and got the story myself." She proceeded to recite a list of targets and amounts of payments, revealing virtually complete knowledge

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* The Brooklyn Strike Force that afternoon was a beehive of activity — a swirl of formal meetings and briefings, informal conversations and gatherings, involving numerous agents and attorneys who were present to prepare for the end of ABSCAM's covert phase. A large number of interviews with witnesses and targets was planned for Saturday, and many agents without previous ABSCAM involvement were briefed throughout the week. Copies of investigative materials were around the office. No evidence suggesting theft has been found by this investigation.

** Brooklyn Strike Force records show that Maitland left at 6:00 p.m., the same time of departure stated for Welch, Ertel, Crowe and Walton.

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of investigative details, including the case involving Senator Williams. In addition, Puccio recalls that she knew of certain unsubstantiated allegations against various public officials — information available only in his prosecutive memorandum. He urged her not to use it.

Ertel, too, reports receiving a telephone call from Maitland on Friday morning. She simply asked him, according to Ertel, whether "anything had changed since Thursday." He insists that he told her nothing, and that he did not return another call made by her to him later on February 1st.

Puccio states that Maitland telephoned his home and office "numerous times over the next several days." Puccio continued to urge her to hold the story, and he also called New York Times editor Sidney Shamberg in an unsuccessful effort to delay publication until Monday or Tuesday. He succeeded only in persuading Maitland to delete from her story references to a number of the unsubstantiated allegations, and some matters on which investigative developments might be affected adversely by premature publication.

Ertel was present on Saturday at the Brooklyn Strike Force office while numerous interviews were occurring with ABSCAM witnesses. An interview with one witness whose anticipated cooperation would be critical to the case began at approximately 1:30 p.m. Initially, this witness indicated that he would cooperate. Subsequently, early that evening, he refused to do so. Ertel departed from the Brooklyn Strike Force office at approximately 4:00 p.m., prior to the witness' change of mind. The situation as portrayed in the February 4th New York Times story was essentially as it existed at the time of Ertel's departure: the potential witness was reported to be cooperating.

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On February 1st, the day after the meeting with Maitland, Welch was in Scranton, Pennsylvania, he says, on unrelated business, and he remained there through Saturday. He denies any conversations with Maitland on those days. With respect to the January 31st meeting with Maitland, Welch denies recalling any specifics of the conversation. (At one point during the investigation, he denied any recollection of an actual meeting with Maitland at Puccio's office.) He recalls that Maitland directed her questions solely at Puccio. As to his reason for including Ertel in the meeting, despite FBI teletypes directing all press inquiries to Washington, Welch states that even a "no comment" to the press must be handled expertly. He also acknowledges that he did not actually discuss with anyone, including Ertel, how to deal with the press in connection with ABSCAM inquiries, since this was a task for Headquarters.

Welch acknowledges receiving a copy of the Puccio prosecutive memorandum dated December 12th and recalls reading it but does not know its present whereabouts. In an initial interview, Welch claimed that he might have placed it in his "out" box. His secretary has no recollection of seeing it and contends that she would not have known how to file it, and, therefore, would remember having asked where it should be kept. In a subsequent interview, Welch denies any recollection as to how he may have disposed of the memorandum, indicating that he might have thrown it away. No reliable records exist in the New York FBI office for the evening of January 31st or any other time that would indicate whether copies may have been made of this memorandum. A check of the ABSCAM file maintained by the office, and other normal places where it might have been kept, failed to locate Welch's copy.

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Notwithstanding the prominent reference to him in the Times article, Welch's actual role in supervising ABSCAM was relatively insignificant, as is indicated by his absence from the office during the critical interviewing phase on Saturday. The FBI's involvement in the investigation, Welch acknowledges, was directed predominantly by Headquarters. Information obtained during this investigation indicates that Welch has negotiated with at least one publisher regarding possible publication of a book covering prominent cases during his FBI career, including ABSCAM. On May 2, 1980, he announced his retirement, effective May 16, 1980. He is now Secretary of Justice in Kentucky. It is not known when negotiations with the publishers began, or what stage they have reached.

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NBC

The earliest known contact by NBC with the government regarding ABSCAM was a phone call in November, 1979, from Brian Ross to U. S. Attorney Peter Vaira of Philadelphia, a personal friend whom he has known for approximately seven years. At that time, Vaira says, Ross knew that there was a "heavy" investigation regarding Senator Williams. He had no additional information, and Vaira states that he gave him none.

Ross called Vaira again shortly before Christmas, 1979, and informed him that he knew of an investigation concerning politicians on the East Coast with the code name "ABSCAM." Vaira's recollection is that Ross again may have mentioned Senator Williams' name. Vaira says he declined to confirm any of this information and suggested that he should be cautious about using it since undercover agents' lives might be jeopardized. Vaira conveyed the substance of this contact with Ross to Department of Justice officials shortly after it occurred.

A third contact between Vaira and Ross took place in Washington on the evening of January 29th. Ross called from Washington and invited Vaira to dinner there. Vaira came to Washington, and their conversation revealed that Ross knew names of subjects, including several Congressmen from Philadelphia and from southern states. Ross was aware, too, that the investigation might well be terminating shortly. He indicated that he knew of locations where agents had met with subjects. In a subsequent conversation after February 2nd, Vaira says, Ross told him that his reason for being in Washington that evening was to film the house used for various undercover meetings.

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Crediting Vaira's version of his conversations with Ross, it would appear that NBC reporters had general knowledge of the existence of a major undercover operation for at least approximately two months prior to February 2nd, but did not acquire detailed information until January, 1980. This inference is supported by reports in the press, very possibly based on interviews with Ross and Silverman themselves. An article in Time magazine dated February 18th, states that NBC "had been dogging the story for more than two months" prior to February 2nd. In accounts of NBC's obstensible reporting coup, TV Guide, in its February 18th and May 31st issues, stated that Ross and Silverman knew of ABSCAM as early as November but did not acquire information as to names of subjects, pertinent locations, and other details until the week of January 28th. As TV Guide described the state of their knowledge in November and December, 1979, "What did Silverman and Ross know? The truth is, not much . . .." It was during the third week of January that the reporters "pressed their sources" and "hit paydirt." During that week, according to TV Guide, probably on January 30th, they were given access not only to numerous specifics, but also the address of the undercover W Street location. According to TV Guide they thus were to set up a "stakeout" at this location and at homes of subjects, thereby using special equipment to obtain exclusive video accounts of an FBI investigation in progress.

While Ross and Silverman may have contacted many individuals for their early knowledge, the valuable information given them during the week of January 28th, appears to have come from a single source. The TV Guide article makes reference to "eight and a dozen people at various law enforcement agencies who gave them solid,

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if partial information" prior to Christmas, 1979. But the W Street address, the article implies, was furnished possibly by one of the sources whom they pressed for additional information on or about January 30th.*

During the week of January 28th, Ross and Silverman were in contact with Assistant Director Homer Boynton on a number of occasions. Boynton was familiar with ABSCAM and other undercover operations, as a result of his participation in briefings provided to the Director. On January 29th, they contacted then Deputy Assistant Director Oliver Revell, who, in turn, informed Boynton that NBC appeared to have some knowledge of ABSCAM. They may have attempted to reach Boynton on that date as well, but Boynton states that they did not actually talk to him until January 30th. An interview was arranged for January 31st. At that time, Boynton states, Ross and Silverman had specific knowledge of ABSCAM, including the "public" locations of ABSCAM meetings, the scheduling of interviews for February 2nd, and the use of a yacht during the investigation.

According to Boynton, he asked them to hold the story until February 3rd. They asked what damage would be done by a report done earlier than that date, Boynton recalls, and they requested that he furnish the address of the undercover residence. He told them that he would check whether he could do so. He contends that he called at least one supervisory FBI official — possibly then Assistant Director Francis Mullen Jr. — and learned that this information could not be disclosed. Subsequently, Boynton states, he called Ross and told him that the undercover location address could not be provided.

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* This theory as to the timing of the NBC leak was corroborated by Anthony Insolia, Editor and Vice-President of Newsday, speaking at the Third Annual Alicia Paterson Foundation Conference on Press and Government on April 7, 1980, in Washington, D. C. Appearing at the conference — entitled "ABSCAM: Who Got Stung?" — Insolia commented that NBC did not get the story until "even later" than The New York Times, which would have been after January 31st. See 3 Alicia Paterson Foundation Reporter 8 (May, 1980), and p.28 infra of this report.

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Boynton acknowledges having contacted Ross "several times" on Saturday, February 2nd, in an effort to delay the report at least until 10:00 p.m. He denies having furnished the W Street location address and contends that no one on his staff had any contact with the press at his guidance or instruction. Specifically, he denies any recollection that he directed them to make any inquiries of agents involved in the investigation.

Boynton's version is contradicted in a number of significant respects by various FBI supervisory agents and members of his own staff. According to three supervisory agents — Douglas Gow, Bob Ricks and Michael Wilson — Boynton contacted them to inquire whether photographs of the so-called "public" locations could be provided to the media and whether the address of the undercover location could be disclosed. Boynton spoke to Gow and Wilson on January 30th or 31st when he informed them of his contact with the media and asked them whether any information could be made available to reporters including photographs or addresses. The agents say that they objected to any disclosures and that no final decision was reached.

At a second meeting, Boynton spoke with Gow and Wilson, along with Ricks, who was supervisor of a Washington Field Office undercover squad. At that time, according to all three agents, Boynton asked them to specify which information, if disclosed, would be least damaging to the ABSCAM investigation. All three state that they objected to furnishing any information, but Boynton insisted that some degree of disclosure would be necessary to preclude publication or airing of the story prior to Sunday, February 3rd.

Wilson recalls receiving inquiries on ABSCAM from Homer Boynton and David Divan, a member of Boynton's staff, prior to February 2nd. Ricks states that David Cassens, another member of Boynton's staff, was "continually questioning" Gow, Wilson or himself regarding specifics of ABSCAM during the two weeks prior to February 2nd. Divan acknowledges making inquiries of Wilson of this nature. Ricks recalls Wilson or

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Gow later telling him that one of them had heard from Boynton that no information would be made public by the media prior to Sunday, February 3rd.

Sometime after the NBC report appeared, U. S. Attorney Vaira asked Ross how NBC obtained information regarding the undercover addresses in Washington. Ross responded that he had gone to the Bureau, confronted them with what he knew, and received considerable help in exchange for agreeing to hold the story. This account is consistent with the T.V. Guide report, which summarizes the Ross and Silverman approach as "an implied threat: help us or we'll go on the air with what we have and most of your case will be blown."

Boynton has stated that any comments or information furnished by him to the press have been "consistent" with his legitimate press functions and have been in the nature of "general background." As Executive Assistant Director, he was responsible for operations of the FBI Public Information Office, and functioned in effect as the FBI's chief press spokesman. Previously, he served as the FBI's Public Affairs Officer. He served as Executive Assistant Director a little less than a year, retiring on May 30, 1980.

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At approximately this same time, Robert Havel of the Department of Justice Public Information Office reports that Marro telephoned him and stated that he had a story concerning politicians. Marro asked whether Havel knew of any other press inquiries regarding such an investigation. Havel responded that no such inquiries had been received. Marro said that he would "sit on the story," in Havel's words. Havel himself had no significant knowledge of ABSCAM. During the following week of January 28th, Marro again called Havel, seeking an interview on ABSCAM with Assistant Attorney General Heymann. No meeting between Heymann and Marro was ever arranged.

In a call to Thomas Puccio on January 28th, Marro indicated that he had the entire story and requested an interview. According to Puccio, he agreed to the interview, but delayed it until February 1st, seeking to "buy time." Immediately after this conversation, he says that he phoned Boynton in Washington to advise him of the conversation, and of the planned interview. Puccio told Boynton that he would make an effort to persuade Marro to delay publication of the story until after February 2nd. According to Puccio, Boynton indicated to him that he believed Marro would hold the story.

Boynton, too, acknowledges receiving calls from Marro. He says they occurred on January 29th and 30th. At some point, he states, he asked Marro to hold the story until after the weekend of February 2nd. According to Boynton,

> He agreed to do so without asking anything in return. There was never any quid pro quo . . . Marro would have held the story until the following week. When NBC broke the story on Saturday night, February 2, 1980, however, there was no reason for Marro to delay publication any longer.

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until it was pretty late.

Mr. Insolia: That's right: NBC even later!

Mr. Hersh: You were sitting there being a good guy holding on and you got piggybacked!

Id. at 8.

On Thursday, January 31st, Marro called Thomas Henderson, Chief of the Public Integrity Section and inquired, "What do you know about ABSCAM?" Henderson says that he declined to provide any information or to continue the discussion, and immediately called Assistant Attorney General Heymann to tell him of the inquiry. Henderson recalls that Heymann was unavailable, but he was informed by Heymann's secretary that Marro had called "everyone." After hearing from Havel of Marro's ABSCAM knowledge — Havel had been called by Boynton — Heymann instructed one of his assistants on January 30th to prepare a one sentence addition to the daily Attorney General's report indicating that Marro appeared to have a "rather complete" ABSCAM story.

On January 30th or 31st, U. S. Attorney Peter Vaira reports, Marro also sought an appointment with him, saying that he had the story and that it was written and in the computer. He indicated to Vaira that he was not going to use it immediately, but would do so in the event that "something happened over the weekend," in Vaira's words. If nothing happened, he intended to hold the story, according to Vaira, and said that he would see Puccio on February 1st. Vaira so informed Puccio, who said that "he had it squared away and that Marro was going to hold off on the story." Sometime during the week of January 28th, Marro called Robert Smith, Special Assistant to the Attorney General and Director of the Office of Public Affairs, indicating that he had the story and was holding publication. Smith says that Marro was not seeking confirmation or information, and that he gave him neither.

Another aspect of Newsday's ABSCAM coverage involves Mel Weinberg, the government's informant. Weinberg admits to a long-standing personal relationship with Robert Greene, an editor at Newsday. He acknowledges that he was interviewed by Greene for a profile that appeared in that newspaper. He says that he has discussed ABSCAM with Green, although he insists that he revealed nothing prior to February 2nd.

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Another aspect of Newsday's ABSCAM coverage involves Mel Weinberg, the government's informant. Weinberg admits to a long-standing personal relationship with Robert Greene, an editor at Newsday. He acknowledges that he was interviewed by Greene for a profile that appeared in that newspaper. He says that he has discussed ABSCAM with Green, although he insists that he revealed nothing prior to February 2nd.

Weinberg acknowledges meeting Greene on two occasions - both, he insists, unplanned - while ABSCAM was ongoing as a covert operation. His acknowledged relationship with Greene contrasts with his stated refusal to cooperate with other media representatives. This claim of non-cooperation is substantiated at least as to The New York Times. *

Weinberg was present at the undercover W Street location at various times during ABSCAM's covert phase. On one occasion in 1979, he was observed by Agents to have a camera in his possession and to take a number of photographs. At that time, electronic surveillance equipment was located in the basement of the W Street house in an area to which Weinberg had access. The photograph of the electronic equipment appearing in Newsday on February 4th, has been determined to depict the electronic equipment as it was positioned at the time of his visit. It is not a reproduction of any known FBI photograph made during the undercover operation. FBI Agents have unsuccessfully attempted to recover the film from Weinberg. Weinberg denies providing this photograph to the press.

Weinberg acknowledges that he has retained a literary agent, and has entered into negotiations with various publishers in anticipation of writing an account of ABSCAM and other experiences. He has prepared an outline of the proposed autobiographical work. His literary agent now has a copy and may have shown it to publishers. Weinberg says that he has rejected at least one proposed venture — a television semi-documentary

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* According to Weinberg, efforts were made by Leslie Maitland of The New York Times to interview him in West Palm Beach during late February, 1980. Weinberg says that Maitland "camped out" at his front door, and contacted family members and at least one friend, seeking his cooperation. He claims that he refused to be interviewed, despite a note signed by her written to his wife, which included the following:

> We do not wish to cause you any trouble or to harass you by waiting outside your home.
>
> It therefore seems most reasonable for you to have someone contact me to let me know whether your husband would consent to speak with me. I would be pleased to speak with him on the telephone.
>
> However, unless you respond my editors in New York will instruct me to remaining outside your house to speak with you.

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project dealing with similar general subject matter — partly because he is concerned about jeopardizing movie rights relating to the book. He says that Greene of Newsday is seeking to collaborate on the book, and probably will be a co-author.

Summary. Marro sought to reach a number of Department of Justice officials during the week of January 28th. The only officials who acknowledge discussing ABSCAM substantively with him on or prior to January 30th were Puccio and Boynton. Boynton was the first person to request that Marro hold the ABSCAM story. He also was the first to know definitely that Marro would do so. He acknowledges giving Marro some information but contends it was only of a "background" or "general" nature.

[redacted]

There is circumstantial evidence indicating Weinberg's possible involvement in leaks to Newsday: his relationship with Greene; his collaboration on a book dealing in part with ABSCAM; his preparation of an outline to be submitted to publishers; his acknowledged disclosures to Greene after February 3rd regarding ABSCAM; and his interview with Greene.

[redacted]

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Philadelphia Inquirer and Philadelphia Bulletin

U. S. Attorney Peter Vaira was in Brooklyn at the Strike Force office almost the entire day on February 2nd. He was aware that The Philadelphia Inquirer did not have any information regarding ABSCAM because he had received an inquiry from Jan Schaffer the previous day regarding Senator Williams — a very general inquiry pertaining to a government program completely unrelated to ABSCAM. While at Puccio's office, he became aware at 6:30 p.m. that NBC had the story and that The New York Times would also cover it in the Sunday edition appearing that evening. As he has acknowledged, he "called Jan Schaffer in Philadelphia and told her about The New York Times story and that my office was involved in the case." If Schaffer had been aware of the story, Vaira says, she would have contacted him on her own or raised the matter in their conversation on February 1st when she mentioned Senator Williams' name. Vaira denies, however, that he disclosed to Schaffer details of the investigation such as names of subjects. He states, "within a couple of hours she called me back and from what she told me, it was apparent that in that short period of time, she had put together all the relevant Philadelphia aspects of ABSCAM. I do not know what the source of her information was." Vaira also acknowledges having confirmed information that Schaffer had obtained elsewhere from other sources during the evening of February 2nd.

Vaira recalls four separate telephone conversations with Schaffer that evening. During the third call, Vaira reports, she thanked him for "getting her involved in the story." The last of their conversations occurred at approximately 1:30 a.m. on Sunday morning, when Schaffer reached him in his hotel room. Vaira recalls that she discussed the number of stories that were breaking and sought to determine whether anything significant would happen on Sunday.

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Schaffer also contacted Vaira's First Assistant, John Penrose, and Assistant U. S. Attorney Joseph Fioravanti. Penrose states that she called him at approximately 6:30 - 7:00 p.m., which would have been almost immediately after speaking with Vaira. He acknowledges providing comments that appeared in Schaffer's February 3rd article. One such statement, attributed to "one Federal source," was prompted by her inquiry as to how such an undercover operation might happen. Penrose acknowledges responding to Schaffer that it was a sting operation and it started to bring in Congressmen. He also has acknowledged that he is the source of the unattributed quotation in Jan Schaffer's article of February 4th, "We did the whole thing in less than 10 days in Philadelphia." He says that he told Schaffer that the undercover phase of the operation was ending at this time due to disclosures to the media, and that interviews were being conducted simultaneously so that subjects could not compare notes. In addition, he provided information for the last paragraph stating that the bribe money is recoverable through civil suit. He also admits being the source of various unattributed quotations that appeared in an article on the issue of entrapment appearing in The Philadelphia Inquirer on February 4th.

Penrose acknowledges responsibility for the following quotation appearing in The Philadelphia Bulletin article of February 4th, in which he referred to monitoring videotapes involving middleman Howard Criden:

> Only what I've seen on the monitor. He is amazing.
> It is amazing to all of us that we never heard of him before.
> He was not known to us as a key player or a guy with this
> kind of incredible political muscle . . . we were as flabergasted
> as everybody else that this clown could deliver who he said
> he could deliver.

Penrose made this statement in a conversation on February 3rd, with Stuart Ditzen, a Bulletin reporter.

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In his sworn statement, Penrose acknowledges that after the Barclay Hotel had been mentioned in Philadelphia newspapers, he "might" have confirmed to Jan Schaffer that the Barclay was used by the undercover team. He denies disclosing the concocted Arab word "MUFTA" to any member of the press. [redacted] Penrose acknowledged that he revealed to reporters the use of the fictitious Arab words. He said that "MUFTA" was the only one he knew and that he "may" have disclosed it to reporters. Penrose stated that the disclosure would have been to Stewart Ditzen of The Philadelphia Bulletin on about February 3rd, and possibly to other Philadelphia reporters. Penrose also acknowledged that he had disclosed to Philadelphia reporters the alias and assigned office of the undercover agent as well as the amount of money available for the operation. He insisted that he had not named the councilmen specifically, but that it was possible that Schaffer would have guessed their identity by his conversation and by the local reputation of the councilmen. [redacted] Penrose stated that he was certain that he did not give Jan Schaffer the names of the city councilmen. Penrose also denied that he had provided any information that lead to the identification of the city councilmen.

Penrose continues to deny that he disclosed to Jan Schaffer the names of the Philadelphia city councilmen involved in the investigation. He says that Schaffer did not have the councilmen's names when she called him. According to Fioravanti, however, Schaffer knew some of the names at approximately 8:30 - 9:00 p.m. that evening. He says that she called then seeking confirmation as to these names, stating that she was certain of two and knew that the third was one of two others. Fioravanti informed her that a story mentioning both would be partially libelous. She persisted with additional

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questions. At one point, he was speaking to both Vaira and Schaffer at the same time, on separate phones, and was overheard asking Vaira, according to Special Agent William Perry, "something like 'am I authorized to tell her that?' " Finally, Fioravanti says, he suggested that she speak directly to Vaira in New York. She phoned him again at 11:00 a.m. the following day, and he recalls that she became angry when he would not discuss the case with her saying, "I have spoken to Peter Vaira and now I want to speak with you." Fioravanti says he again referred all calls to Vaira.

Vaira has reported a recent conversation with Tom Burton of the Bulletin, in which Burton claimed to have known the name of at least one local ABSCAM target on February 1st. Burton told Vaira that he unsuccessfully sought to interview Councilman George Schwartz, on Friday evening, February 1st, and that he had the details of the story but lacked sufficient confirmation to print it on February 2nd. Philadelphia FBI media representative Paul Lorenzetti says that Burton called him on Friday evening, February 1st, and inquired generally about ABSCAM, mentioning the code name. Lorenzetti says that he knew virtually nothing about ABSCAM and that he provided no information to Burton.

Summary. Disclosures and comments to both The Philadelphia Inquirer and The Philadelphia Bulletin were acknowledged in substantial part during this investigation by those responsible for them. U. S. Attorney Peter Vaira admits that he alerted Jan Schaffer to the Inquirer during the early evening of February 2nd that there was a Philadelphia angle to the story, after learning of other news reports. Later he confirmed information that she had obtained regarding the local Philadelphia political figures involved.

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His First Assistant, John Penrose, acknowledges providing information and comments to both the Inquirer and to the Bulletin in connection with their stories.

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New York Times: Gibson/Katz

The March 12th The New York Times article reported allegations made by George Katz, an ABSCAM target, as to inappropriate efforts by administration officials, including United States Attorney Robert Del Tufo, to help extricate Mayor Gibson from a criminal investigation regarding his finances. The Times printed these allegations, as recorded during various ABSCAM undercover meetings and conversations, without making any claim as to their accuracy. A Department of Justice spokesman vigorously disputed them as "false and without foundation," as The Times also mentioned. The mere reporting of them, however, tended to be harmful to Del Tufo's reputation.

Only a small number of persons had access to transcripts of the undercover meetings that were the subject of the March 12th New York Times article. A large number received copies of the Del Tufo memorandum regarding possible prosecution of Senator Williams, disclosed in the February 4th article. The Times article claims

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that a "partial" transcript of the meeting on October 5 — one of the undercover sessions in which Katz made his allegations — was "read to a reporter." There is no reason to doubt this claim. All persons with access to pertinent documents and other materials have been interviewed extensively. All deny any involvement in providing information regarding these matters to The New York Times.

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There is presently no basis to focus on any other particular individuals in the group having access to the relevant material. The number of individuals with knowledge or access to the Del Tufo memorandum is too large to permit productive investigative focus. At this time, therefore, there appears to be no possibility of further progress regarding this aspect of the leaks.

The Washington Press

The end of the covert phase of ABSCAM on Saturday morning, February 2nd, precipitated a deluge of press calls to Justice Department officials. The calls came primarily from reporters in Washington, D. C., who had been alerted that something big was breaking. Their knowledge and questions varied in specificity and detail. Stories

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appeared on February 3rd in The Washington Post, Washington Star, and in various other newspapers and broadcast media.

According to Assistant Attorney General Philip Heymann, several reporters called him on Saturday, including Fred Graham of CBS-TV, Robert Zelnick of ABC-TV, and Charles Babcock of The Washington Post. Heymann recalls that they "all had wind of the stories and were trying to catch up." He gave them all a "no comment," he says, except for Zelnick, whom he corrected as to the amount of cash that one of the targets was alleged to have received. When told of certain information the reporter was planning to use, Heymann says, he told Zelnick, "I would not run that."

Another recipient of numerous press inquiries was Thomas Henderson, Chief of the Public Integrity Section, who recalls speaking to George Lardner of The Washington Post, Britt Hume and Carl Bernstein of ABC-TV, and others at various times on Saturday. By early afternoon, he says, the calls reflected greater factual detail, and some reporters were aware of the targets' names. At approximately 10:30 a.m. that morning, Henderson says, Babcock called and knew then that something was happening in New York but had no details. Henderson told him, he recalls, that he should call the FBI in New York or Washington Headquarters, or the Brooklyn Strike Force.

Babcock called Homer Boynton at FBI Headquarters shortly thereafter, at about 11:00 a.m. Boynton says that Babcock seemed to have little knowledge. By approximately 2:00 p.m., however, Babcock knew a substantial amount of detail, according to Richard Rogers of the Office of Professional Responsibility, whom Babcock called at that time. Rogers recalls that Babcock told him that he had already discussed ABSCAM with Anthony Marro of Newsday, who had the story. Hearing Babcock recite the details,

Rogers concluded that the reporter "knew much more about the operation than I." (Rogers had not been involved in the investigation, and, therefore, had very limited knowledge of ABSCAM.) Rogers recalls telling Babcock that he would advise of misinformation, if he knew of any, and that he believed one Congressman had declined a payment during the investigation.

Later that afternoon, according to Rogers, Babcock called again, reciting even more detailed knowledge as to the background of the investigation, and then asked for his reaction. Based on Babcock's account, Rogers recalls his reaction: "It sounds to me like sharks going after blood in the water." This quotation later appeared in Babcock's story. According to Rogers, Babcock asked for confirmation as to the name of the "clean Congressman." Rogers says he told Babcock he could not confirm it because he did not know it. In their second conversation, he recalls, Babcock told him that he had "talked to 88 or 89 people regarding 'ABSCAM.' "

Among other officials called was Assistant U. S. Attorney John Kotelly, in Washington, D. C., who says that Babcock queried him, "I hear you have been very busy." Kotelly says he replied that he had been busy but he was not going to discuss it. Babcock also called David Margolis, Chief of the Organized Crime Section, sometime between 2:00 and 3:00 p.m. asking for comment on the names of three subjects that he had learned by them. He recalls Babcock telling him that he had received word of the story the previous evening and that his editor wanted him to call the three subjects for comments. Margolis states that he requested that Babcock delay his calls for awhile, and recontact him at 5:00 p.m. According to Margolis, the reporter also wanted to know whether the Governor of a southwestern state was involved. Margolis denied it.

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When Babcock called again at 5:00 p.m. he had several more names of targets and asked Margolis to tell him whether he was in error. Margolis declined to do so. He recalls that Babcock did not have all the targets' names. Babcock asked who was in charge of the investigation, and, according to Margolis, he told him that it was Puccio.

At approximately 8:30 p.m. that evening, according to Margolis, he received a third call from Babcock, who told him that he was jealous of the detailed New York Times story. He read Margolis the article that he was writing and told him that he knew that a particular witness was cooperating. Margolis told Babcock that he would tell him whether any of his names of targets were incorrect, but all appeared to be accurate.

Late Saturday afternoon, Michael Shaheen recalls, Babcock called and said that "he'had' Tony Marro's story on 'ABSCAM' which he proceeded to read to me in great detail." Requested to confirm the story, Shaheen declined comment. Babcock asked Shaheen's view of possible entrapment issues that might arise, and he responded that he was confident that the people in charge of the operation were sensitive to possible defenses in this regard. He recalls telling Babcock that he had viewed portions of one of the videotapes involved in the investigation. After Babcock read him a list of names, Shaheen recalls, he refused further comment.

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Summary. The large number of officials called by the Washington, D. C. press, and the varying degrees of specificity and detail in the resulting stories, preclude productive investigation. No circumstantial evidence indicates involvement of any particular Justice Department attorney or agent in leaks on Saturday, February 2nd, leading to the stories that appeared the following day. Some press may have been alerted by other reporters — original recipients of leaks — or witnesses who, by this time, had become aware of the operation as a result of FBI interviews. During their conversations, Justice Department officials may have confirmed information, or provided reporters with some of the details that were later disclosed. As to this aspect of the matter, no further investigation appears warranted at this time.

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B. PENDORF

Operation PENDORF is an extensive investigation into union corruption involving electronic surveillance under court order pursuant to Title III. The disclosures on February 6th, concerned only a small part of this broad inquiry, initiated by the FBI almost two years previously, into dealings between union officials and organized crime, as well as possible political corruption. Unlike ABSCAM and BRILAB, it involved no undercover activities. In the opinion of those involved in the investigation, however, the leaks definitely adversely affected the ongoing operation, possibly alerting potential defendants to the existence of electronic surveillance and enabling them to prepare defenses to prosecution.

1. UNAUTHORIZED DISCLOSURES

The most extensive and detailed report on PENDORF and Senator Howard Cannon's involvement in the investigation appeared in The New York Times on February 6th under the bylines of Edward Pound and Jeff Gerth. It reported the duration, origin and genesis of the investigation, including the use of court-authorized wiretaps on phones belonging to Alan F. Dorfman. He was characterized as "a Chicago businessman" who had been convicted previously on a federal charge of conspiring to facilitate a loan from the Teamsters Central States Pension Fund in return for a $55,000 kickback. The focus on a possible relationship between Dorfman and Senator Cannon, the article reported, had resulted from a conversation monitored by means of one such wiretap. The article reported details of an alleged land transaction involving Dorfman and Senator Cannon, the possibility that Senator Cannon's activities regarding trucking deregulation legislation were related to this transaction, and the background of the Teamsters Central States Pension Fund management. It included background details as to trucking deregulation,

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the particular Nevada land in question, and individuals associated with it. The essential allegation under investigation, the article reported, was the possibility of improper influence on Senator Cannon by Dorfman, Teamsters' officials, and possible organized crime figures in connection with his activities regarding trucking deregulation legislation that would favor positions taken by the Teamsters Union. It quoted Senator Cannon as denying any wrongdoing or impropriety.

While less extensive than The New York Times article, a report by ABC news on the evening of February 5th, occurred first among the public disclosures. It covered broadly the same allegations involving Senator Cannon. Presenting the story, Britt Hume stated that the "FBI suspects that Alan Dorfman, a Teamsters crony with organized crime connections, found a way to reward Senator Cannon for steering" trucking deregulation legislation to his Congressional Committee "where it has since died." The report, lasting only a few minutes, indicated that the FBI was considering the possibility that Senator Cannon had been "enriched through a land transaction in his home town of Las Vegas, although just how remains unclear." The Senator was quoted as "vigorously" denying any improprieties, while acknowledging meeting with Dorfman in his office in Las Vegas and possibly discussing with him the "land in question" as well as the trucking deregulation legislation. Hume stated, "FBI sources say none of the information from this investigation has yet been presented to a grand jury, and there was no certainty "at this time whether it will be."

A Wall Street Journal article appearing on February 6th under the byline of Jim Drinkhall implicated a public official mentioned in no other article regarding PENDORF: Senator Birch Bayh of Indiana. The Drinkhall article reported essentially the same allegation included in the Times and ABC reports involving Senator Cannon. Like the Times article, it reported that court-authorized wiretaps in Chicago had been

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utilized. While the Times article stated that "law enforcement officials" had declined to disclose the contents of any overheard conversations, The Wall Street Journal article reported that "FBI agents supposedly overheard Mr. Dorfman discussing on several occasions how he had arranged for a parcel of land to be given to a nominee for Senator Cannon and that he had directed an insurance company to make an interest-free $100,000 loan to Senator Bayh." The monitored conversations, according to the article, indicated that these beneficial terms on the loan were consideration for unspecified legislative matters. The Drinkhall article described the investigation as "the biggest government effort ever launched against the Mafia" in the opinion of "law enforcement sources." According to the article, the investigation was related to federal efforts ongoing in San Diego, Las Vegas, Chicago and Cleveland "for more than two years." This article was the shortest of any appearing on PENDORF and did not specifically mention the trucking deregulation bill, referring simply to "unspecified legislative matters." It made no mention of grand jury activity.

The Valley Times in Las Vegas, Nevada, carried its own exclusive article under the byline of Ned Day on February 6th. It was extremely detailed, particularly regarding the alleged Nevada land deal and other local aspects of the PENDORF story. It did not actually make reference to "PENDORF" as the code name for the investigation. Nor did it mention Senator Bayh. It implied that the investigation was centered in Las Vegas, stating that the wiretaps were part of the Las Vegas casino probe.

Finally, an article appeared in The Washington Post incorporating parts of ABC's information and attributing it accordingly. Like the Times and ABC News, the Post attributed to Cannon a denial of any connection between the deregulation bill and his possible involvement with Dorfman regarding the land matter. The story also quoted "sources" saying that the investigation involved deregulation legislation "that

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has been languishing in Cannon's committee since its introduction last year." According to these "sources," the article said, "FBI agents in Chicago and Las Vegas have been focusing. . . on a reported effort by Cannon to obtain a loan from the Teamsters Central States Pension Fund." The "sources" were not associated in the article with any particular agency.

2. FINDINGS

New York Times

Edward Pound and Jeff Gerth have been in contact frequently with federal law enforcement officials around the country on a variety of subjects, as many individuals acknowledge. Their first known inquiry regarding PENDORF was in mid-January 1980, in a telephone call from Pound to James G. Richmond, a former Assistant United States Attorney now in private practice in Hammond, Indiana. Richmond recalls that Pound referred to an investigation that Richmond now understands to be PENDORF. Pound mentioned a Nevada land deal involving Senator Cannon and possibly also said that Birch Bayh had a problem. According to Richmond, Pound asked the name of the Strike Force attorney in Chicago whom he might contact.

Richmond says that he was aware of the investigation as a result of a conversatio in March, 1979, with Strike Force Attorney Gary Shapiro of Chicago. At the time, both were involved in trying a case in Hammond, Indiana. Richmond was under consideration for employment as a Special Attorney with the Chicago Strike Force, and had been tentatively offered a position. Richmond recalls that Shapiro told him that the Chicago Strike Force had a "good case" in progress involving Dorfman. According to Richmond, Shapiro also told him "we got a number of tapes" and "we got some politicians." Richmond recalls that his impression at the time was that Shapiro told him of the case in light of his potential position with the Chicago Strike Force. He does not recall hearing the word "PENDORF"

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or reference to Senator Cannon or Senator Bayh. This version of the substance of their conversation is consistent with Shapiro's recollection.

Richmond recalls giving Pound the names of Chicago Strike Force Attorneys Shapiro and Emil Tonkovich, in their conversation of January , 1980. Although there is no indication that Pound talked with either of these attorneys, he did call Chicago Strike Force Chief Doug Roller on February 4th or 5th. The call was not unexpected. Tonkovich recalls that Richmond had alerted him that Pound might be calling about the "Birch Bayh" investigation, and Tonkovich, in turn, relayed word to Roller. In the call to Roller on February 4th or 5th, according to Roller, Pound mentioned both Cannon and Bayh with specific information that he was seeking to confirm. He gave Roller the impression, Roller recalls, that he had all the details. Roller states that he did not confirm anything and subsequently brought these inquiries to the attention of Department of Justice officials in Washington.

On February 4th, Pound made inquiries to Deputy Assistant Attorney General Nathan in Washington, indicating that he knew of "PENDORF" and the involvement of Senators Cannon and Bayh. Nathan says that he neither confirmed nor denied Pound's information but did tell Pound that part of his story was incorrect and unfair. Nathan recalls inquiring, in turn, of Pound as to where he had received this information. Pound responded, Nathan says, "I was formerly a Chicago reporter and had good sources in the Bureau in Chicago." After discussion with Attorney General Civiletti, Assistant Attorney General Heymann and Special Assistant Robert Smith, according to Nathan, he called Pound back on February 5th to tell him that his information concerning Senator Bayh was incorrect, but he made no comment concerning Cannon.

The only acknowledged telephone conversation of any consequence with any Chicago FBI agent was made by Gerth to Philip M. Urich on February 4th. After

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hearing Gerth's fairly complete version of PENDORF, Urich says, he gave him a "no comment." Urich recalls that Gerth said that he would call his sources in Washington. On the following day, February 5th, Pound called Boynton, who states that he refused to confirm or deny the PENDORF story. Assistant Director Francis Mullen, Jr. recalls a subsequent meeting on February 7th, at which Senator Cannon was discussed by Boynton with both Gerth and Pound. Although the PENDORF story had broken by this time, according to Boynton, the two reporters indicated that they were continuing with their own investigative piece on Senator Cannon.

A second conversation regarding PENDORF, occurring on or after February 6th, is recalled by Richmond. Richmond says that Pound asked him whether he had read The Wall Street Journal article regarding Bayh: "Did you see the article on Bayh? They got the facts all screwed up. We had the information and didn't run it. I am really hot on Bayh. They had picked up Bayh on a wire." Pound and Richmond have known each other, according to Richmond, for five to six years. Pound was an investigative reporter with The Chicago Sun-Times. Richmond was an agent with both the IRS and the FBI and, later, an Assistant U. S. Attorney.

In addition to Richmond, a second former Justice Department attorney with knowledge of PENDORF was John W. Palmer, an Assistant U. S. Attorney in Columbus, Ohio, from August, 1976 to July, 1978. Currently a professor at Capitol University School of Law, he lectured at a training seminar at the FBI Academy held during December 10-14, 1979. As recorded on a videotape of one session, Palmer said during his presentation, "That involves Alan Dorfman and there are some real heavy things going on in Chicago

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right now." A number of individuals attending the session were associated with agencies other than the Department of Justice. Palmer states that he heard the term "PENDORF" at the seminar, and that he was aware that it was a labor-related investigation. He further states that no other details regarding PENDORF were mentioned at that time and that a number of other investigations were discussed.

ABC

No inquiry by ABC News is known to have been made earlier than February 4th. On approximately that date, Lowell Bergman called Strike Force attorney Roller, in Chicago. * According to Roller, he inquired as to an investigation of a United States Senator in connection with a land deal. Strike Force Attorney Michael DeFeo in Kansas City says that Bergman attempted also to reach him, but was unsuccessful. Assistant Attorney General Heymann recalls receiving a call from Robert Zelnick, News Editor for ABC in Washington, D. C., on February 4th or 5th. Heymann says that Zelnick appeared to be well versed regarding PENDORF, and the possible involvement of Senators Cannon and Bayh. On February 4th or 5th, Heymann recontacted Zelnick and informed him that his information on Bayh was incorrect.

The Wall Street Journal

Reporter Jim Drinkhall has been in contact frequently with Department of Justice investigators and prosecutors regarding ongoing cases. He is known to have provided documents and material, for example, to the Las Vegas FBI office through a Post Office Box number given to him by Special Agents Thomas R. Parker and Cluster Hall. Correspondence was addressed on at least one occasion to both Parker and Hall, as indicated

* Roller does not recall the name of the reporter. An FBI teletype dated February 5th, however, reports that Roller on February 4th, received an inquiry from Lowell Bergman of ABC-TV News.

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by a document obtained during this investigation. Parker recalls that he was introduced to Drinkhall by Hall. This contention is denied by Hall. In his second sworn statement, he says that Drinkhall was introduced to him by Parker.

Hall has acknowledged that he spoke to Drinkhall regarding the PENDORF investigation prior to February 4th, and, "I mentioned to him that we had a Nevada politician under investigation". He admits that he possibly identified the politician as Senator Cannon. Hall also has acknowledged confirming the continued existence of the investigation in a telephone conversation with Drinkhall concerning PENDORF approximately two days prior to publication of The Wall Street Journal article. At that time, he admits, he provided Drinkhall the name of the case agent in Chicago.

[redacted]

Drinkhall called the Press Office at FBI Headquarters with more or less the full story on or about February 4th, according to Boynton. He also spoke to Roller in Chicago on February 5th indicating knowledge of PENDORF, Roller says. Learning of the inquiry to the Press Office, Boynton recalls alerting Sean W. McWeeney, Organized Crime Section Chief of the FBI at Headquarters. McWeeney says that he, in turn, contacted Supervisory Special Agent James A. Oppy of the same section, knowing that he was acquainted with Drinkhall. At the suggestion of McWeeney and Supervisory Agent Bob C. Reutter,

[redacted]

Oppy states that he contacted Drinkhall in their presence, and told him that the article might seriously jeopardize an investigation in certain cities. Although Oppy suggested no city in particular, Oppy says Drinkhall responded by mentioning New Orleans and Milwaukee. (The article eventually published by The Wall Street Journal did not mention, in fact, either one.) Others were present at the time of this conversation between Oppy and Drinkhall, and their recollection is consistent with Oppy's.

The Valley Times

The only known inquiry from Ned Day was received on the evening of February 5th by Parker. The conversation predominantly concerned another matter, according to Parker, but Day mentioned that he was aware of an investigation involving Senator Cannon, a land deal, the Teamsters Union and federal trucking deregulation. Parker says that he responded with a "no comment."

Interviews with Las Vegas FBI agents, including Special Agents Parker and James Perry, established that Hall was believed to have been in frequent contact with Andrea Boggs, a news director at a local radio station. Hall has acknowledged such contacts. According to Parker, inquiries were made by Boggs on matters with which only Hall was familiar while he was assigned to the Las Vegas office. Boggs formerly was a reporter for a local TV station. According to Parker and others, she is believed to have furnished information in the past to Day since they are non-competitors and sometimes have assisted each other with stories.

In his sworn statements Hall has denied furnishing information regarding PENDORF to Day or Boggs.

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Insufficient evidence is available at this time to identify any other individuals as likely sources for the disclosures regarding PENDORF.

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C. BRILAB

This nationwide undercover operation focused on kickback schemes and other corrupt connections between organized crime, public officials, and union figures dealing with public employee insurance plans. It utilized court authorized electronic surveillance as well as consensual monitoring of meetings between undercover agents, informants, targets and others. With the cooperation of Joseph Hauser, a twice convicted insurance promoter, FBI undercover operatives posing as independent insurance agents were introduced to allegedly corrupt public officials and union figures in Louisiana, Texas, Oklahoma and other states. The investigation also produced evidence of attempts by a major organized crime figure to influence Immigration and Naturalization officials as to travel restrictions imposed on him.

The seed of BRILAB's demise probably was planted when it became linked to PORNEX, another investigation. PORNEX had produced a prosecution styled United States v. Brooklier, et. al., involving charges of violations of the RICO statute in connection with organized crime and pornography in the southern California area. During a meeting in October, 1979, between Hauser, Carlos Marcello, and one of the Brooklier defendants, a discussion occurred as to the possibility of bribing U.S. District Court Judge Harry Pregerson, who was presiding in the Brooklier case.

Although the alleged underlying offenses in Brooklier were not directly related to BRILAB, prosecutors decided that they were obligated to inform Judge Pregerson of the bribery conversation. They did so, and requested that it not be revealed. Judge Pregerson decided that he should recuse himself from the case, but he agreed to delay this action and any public announcement, in order to avoid premature disclosure of the on-going covert operation. Among the representations he received from the government was a letter from Philip Heymann dated January 31st, indicating that the FBI was "in the process of taking critical steps in an investigation of a sensitively placed, corrupt

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public official" and was "on the verge of developing evidence regarding a massive nationwide conspiracy relating to the allocation of territories in the United States for certain types of illicit activities." An affidavit presented to the court by Hamilton P. Fox, then Deputy Chief of the Organized Crime and Racketeering Section, described the undercover project as "one of the most important investigations ever undertaken by the United States." A continuance in the trial date was announced in open court on November 19, 1979, shortly before trial in Brooklier was scheduled to begin. A new trial date was set for March 15th. The actual reason for the delay was not revealed.

The Brooklier trial date postponement enabled BRILAB to continue as a covert operation. At that point, it was anticipated that the investigation would become overt in late December. The overt phase, however, subsequently was delayed a number of times, first to January 15th, then to January 28th, and finally to February 8th.

The Brooklier trial delay aroused only minimal and very general press interest. Not until January 28th did the pace and intensity of press inquiries approach an alarming order of magnitude. In anticipation of the overt phase of BRILAB on that date, subpoenas had been prepared and interviews planned in Houston, New Orleans, Albuquerque, and other cities. Press inquiries coincided with these preparations. During the week of January 28 Justice Department officials learned that Jon Standefer, a San Diego Union reporter, had the BRILAB story although it appeared that he would not use it until given permission. A spate of specific inquiries also came from reporters in New Orleans and Houston — and, during the week of February 4th, from The Washington Post and The New York Times.

In a series of telephone conversations and meetings between January 28th and February 7th, Justice Department and FBI officials debated the risks and advantages of continuing BRILAB as a covert operation. They knew that Judge Pregerson had planned a vacation for 10 days beginning February 9th. His recusal, therefore, would have to

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be announced either before February 9th or after his return on the 19th. As of the close of business on February 6th, it appeared possible to extend BRILAB's covert phase through the 19th. On February 7th, however, FBI officials advised that they favored ending the undercover operation in light of apparent leaks to the media and resulting risks of serious harm to the entire investigation. The decision to close the undercover operation and to commence overt interviews was made on February 7th at the highest levels of the FBI and the Department of Justice and was communicated to Strike Force Attorney Michael DeFeo in Kansas City, who, in turn, reached Strike Force Attorney James Henderson in Phoenix at approximately 2:30 p.m. (MST). Henderson called Judge Pregerson, who scheduled his recusal for 5:00 p.m. (PST) on the following day.

The BRILAB documents released by Judge Pregerson at the time of his recusal on the afternoon of February 8th — including the Heymann and Fox materials — provided only a "sketchy outline" of BRILAB as The New York Times later observed. The documents included no names of targets and no amounts of money paid to any named persons. Several of the February 9th newspaper stories reporting the recusal, by contrast, were replete with confidential BRILAB details. In a second phase or subsequent round of leaks, various newspapers exposed related aspects of BRILAB.

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1. THE DISCLOSURES

An article in The Los Angeles Times appearing on February 9th, under the byline of Robert Rawitch contained numerous details not available in Judge Pregerson's documents. It included, for example, names of potential defendants such as Carlos Marcello, William Clayton, Jimmy Fitzmorris, Louis Lambert, and others. The article mentioned the code name "BRILAB," stated that the undercover operation extended to Louisiana, Texas, Oklahoma, and Arkansas, and disclosed the identity of the government informant Joseph Hauser. It also reported "reputed efforts by Marcello and a Washington, D. C. expediter to provide a plush job in the private sector to a one-time top level official with the Immigration and Naturalization Service if the official could get INS travel restrictions on Marcello dropped." The article stated that the operation "was coordinated by a Los Angeles based Strike Force headed by James Henderson and a squad of local FBI agents under the direction of Special Agent Jack Barron."

A New York Times story under the bylines of Edward Pound and Jeff Gerth was transmitted on the Times wire service shortly before 5:30 p.m. (PST), on February 8th, appearing almost simultaneously with The Los Angeles Times story. Bearing a Chicago dateline, it was entitled "U.S. Aides Disclose A Wide Inquiry Into Alleged Southwest Corruption", and reported that government documents released by a federal judge in Los Angeles revealed an investigation in which "thousands of dollars were spent by the Bureau to pay state and local officials and some union leaders." While the article noted that the documents provided no names, it said that "a top New Orleans crime figure, Carlos Marcello, and local politicians in Texas, Louisiana and elsewhere" were targets of the investigation. It stated also that Joseph Hauser was involved, but did not specify his role, quoting his attorney as declining comment on whether his client was cooperating. The article also reported,

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> The BRILAB investigation involved extensive court-authorized electronic surveillance as well as undercover operations, according to the federal officials, and was handled secretively within the Bureau.

It said:

> Late yesterday FBI and Justice Department officials, uneasy about their ability to keep BRILAB a secret, decided to speed up the investigation by sending out teams of agents in Texas and Louisiana.

It also reported this investigation was one of a number of "major investigations into organized crime" operating in Kansas City, Chicago, Las Vegas and Philadelphia, indicating "increased emphasis by the Bureau recently on organized crime and corruption cases, as well as political corruption and labor racketeering."

An article in The San Diego Union on February 9th under the bylines of Jon Standefer and Peter Kaye included many of the details that appeared in the Times story. It quoted verbatim the portions of the Times story dealing with electronic surveillance and the anticipated presentation of evidence to a grand jury. Other language in The San Diego Union story ("this latest FBI investigation is code named BRILAB. . . it spread quickly throughout the Southwest. . .") also was identical to the Times account. (The San Diego Union is a subscriber to the Times news service.) The San Diego Union story also stated — exclusively — that those implicated in BRILAB included:

(1) Joseph Montoya, II, Albuquerque insurance man and son of the former New Mexico Senator;

(2) Former United States Attorney General Richard Kleindienst, now a Tucson lawyer; and

(3) An unidentified official of the U.S. Probation Office in Washington, D.C.

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An article in The Washington Post appearing on February 9th consisted essentially of Rawitch's Los Angeles Times story, as it appeared on the Times-Post service. The Post piece had a deletion: it did not include Rawitch's report of possible "efforts by Marcello and a Washington, D. C. 'expediter' " to eliminate Marcello's travel restrictions through a former INS official. The Post had its own exclusive story the next day, February 10th, on this Washington, D. C. aspect. Under the byline of Charles Babcock and Timothy Robinson, it covered in detail dealings of I. Irving Davidson, identified as "a Washington public relations man," Mario Noto, a former high level INS official and Maron (Babe) Sheehi, an INS employee. The article quoted Davidson at length; he stated that he had been interviewed for four hours on Friday by the FBI regarding "his relationship with reputed New Orleans Mafia boss Carlos Marcello and Noto." The Post report stated that FBI agents were investigating allegations that Noto, while second in command at INS, "interceded on Marcello's behalf in return for promises by Davidson of future employment." This information came, the article said, from "persons familiar with the investigation of Noto." Attributed to Davidson was the information that FBI agents had questioned him as to his possible involvement in alleged assistance by Sheehi to a Dominican Republic doctor.

These facts were confirmed, the Post article stated, by "Justice Department sources", who said that Sheehi also was under investigation for alleged improper handling of immigration matters. Davidson's account of his own role in the investigation, according to the article, was "later generally confirmed by sources close to the investigation." One aspect of Davidson's account was disputed. Davidson contended that he had been told by FBI agents that his conversations had been "bugged" for a year, but Justice Department sources said "the bug was not in place that long."

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Although The Daily Oklahoman on February 9th carried only an Associated Press story, subsequent reports by Jack Taylor revealed information which had not been disclosed previously. These articles were dated February 10th, 13th, 15th, 16th, 17th, and 24th; they occasionally also carried the bylines of Paul Wenske and John Greiner, reporters for the same newspaper. An extensive article by Taylor and Wenske on February 10th mentioned the involvement in BRILAB of Oklahoma State Senator Gene Howard, his former aide Barry Paul Wright, and a millionaire Oklahoma oilman. The article contained statements by Howard in a press conference on February 9th. suggesting entrapment as a defense. The press conference was reportedly called after Howard was confronted by The Daily Oklahoman and told facts that the newspaper already knew. On February 13th, Taylor quoted "three sources close to the investigation and familiar with the Howard investigation" as denying flatly that entrapment might have occurred.

Howard's involvement in various insurance and investment matters was the subject of an article by Taylor on February 14th, and Wright's role was discussed in stories on February 15th and 16th, attributing information to "a source familiar with the case." Wright was alleged to have sold a stolen Cadillac to FBI agents, in another undercover operation. According to the articles, this matter as well as others would be presented to a federal grand jury in the hope that Wright might be persuaded to cooperate in the investigation of Howard. The February 16th article disclosed, for the first time, that Oklahoma State Senator Gene Stipe had discussed insurance matters with BRILAB undercover agents. A meeting with L.G. Moore, a Houston labor leader also implicated in BRILAB, was described. The February 17th article concerned a possible request from the FBI to postal inspectors that an investigation be conducted in connection with "mail tampering" at the Los Angeles "undercover business front used in BRILAB."

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The Daily Oklahoman's article of February 24th entitled "FBI Quiz Thwarts Multi-Million Dollar Mafia Plot" contained more extensive disclosure of sensitive information than almost any other BRILAB article. It began with the statement that "the Oklahoman learned Saturday that an organized crime scheme to swindle a Teamsters' Union fund out of millions of dollars was by far the most sinister plot thwarted by the FBI's year-long undercover operation, 'BRILAB'." According to the article, written by Taylor, the plot involved Mafia families and the Teamsters' Health and Welfare funds in various areas. The article stated that the plot had been "concocted" by Carlos Marcello and reported various other "previously undisclosed matters," including that:

(1) Telephone conversations intercepted by FBI wiretaps on Marcello's phones had picked up details of an alleged plot by mob bosses and a millionaire Oklahoma oilman with Louisiana interests to intimidate witnesses;

(2) Undercover agents had held meetings with a widely-known Chicago lawyer influential in Illinois politics;

(3) The undercover operation in Oklahoma City had been arranged by "Oklahoma based FBI agents" to link up with an ongoing undercover operation there;

(4) Virtually all the politicians who were subjects of BRILAB had not been "originally suspected by the FBI, but had been introduced to undercover agents by middlemen."

The article also included abundant anecdotal material, such as the fact that Marcello became so friendly with FBI agents that he frequently took them to dinner, chauffeured them around New Orleans in his limousine, and chatted openly and candidly with them. The court-ordered electronic surveillance of his telephones, according to the article, was the first in more than a decade.

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The Houston Post's February 9th article was based on wire service reports, but a story the following day entitled, "Probe Implicates Westmoreland," described the electronic surveillance utilized in BRILAB:

> "The Houston phase of the investigation included lengthy electronic surveillance by the FBI of several persons in the area. Those whose telephones were tapped during about the past six months have not been notified. Videotape was not used."

Also, on March 12th an article written by Bill Inman concerning Marcello, L.G. Moore and BRILAB stated that the FBI and Internal Revenue Service were investigating the B.&B. Vending Company of Dallas, along with L.G. Moore's role as head of the Texas Amusement Machine Commission and his connections to Marcello and the Pelican Vending Company of Louisiana.

Shortly after February 8th, television newscasts concerning BRILAB appeared on New Orleans television channels WVUE-TV (Channel 8) and WWL-TV (Channel 4). A Channel 8 newscast by Richard Angelico featured a story showing the motel in New Orleans where FBI agents had conducted a surveillance of Marcello's business office. This report stated also that conversations between Marcello and high-ranking state officials were among those intercepted and recorded through court-authorized wiretaps.

2. FINDINGS

Los Angeles Times

The timing and content of Rawitch's Los Angeles Times story strongly suggest that it was written with the assistance of a government source even before the formal announcement of Judge Pregerson's recusal. Indeed, there was no reference to Judge Pregerson, or the documents he released, in the first "edition" of the Rawitch article that was circulated on the Times-Post news service wire. Judge Pregerson invited Rawitch to his chambers at approximately 3:00 p.m. (PST) on February 8th, told him of his decision and provided him with copies of the documents that he released publicly at 4:30 p.m

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Rawitch also later was observed in the courtroom for the formal announcement. His first story was communicated to wire service subscribers at approximately 5:00 p.m. (PST), leaving little or no time for writing. In subsequent editions, the initial article changed only slightly; a reference was added, for example, to the documents released by Judge Pregerson.

FBI agents and Justice Department attorneys in Los Angeles acknowledge knowing Rawitch and dealing with him on various stories unrelated to BRILAB. With regard to BRILAB, however, there is no evidence of any inquiry initiated by him to any government official for information or confirmation concerning BRILAB prior to February 8th. Only two individuals are known to have had substantive contact with Rawitch on this story: FBI Supervisor Jack Barron, and Strike Force Chief James Henderson. *

Both Barron and Henderson were fully knowledgeable as to BRILAB's progress. They had access to all information, participated in conferences with other agents and attorneys involved in the operation, and visited Judge Pregerson on several occasions to seek delays in the Brooklier trial. Both are mentioned in the Rawitch article. Barron had been the primary supervisory FBI agent responsible for BRILAB in the field -- essentially, in charge of the day-to-day operations of the investigation in his office. He was the member of the Los Angeles Office with practical authority. Before the conclusion of the investigation and the leaks surrounding it, he acknowledges, he had decided to retire in December, 1980, and had accepted a position in the private sector.

Barron acknowledges persuading Rawitch on October 29, 1979, to refrain from reporting certain information that might have revealed Hauser's cooperation. On that date, representatives of the government appeared in federal court, along with Hauser

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* At approximately 9:00 a.m. on February 8th, Rawitch did call Tom Sheil, media representative in the Los Angeles Office, inquiring about the BRILAB investigation, by code name. Sheil made no comment, and referred him to Bureau Headquarters.

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and his attorney, to request that Chief Judge Irving Hill delay the date of Hauser's incarceration so that he could continue to participate in BRILAB. None of this was known to Rawitch when he appeared in Judge Hill's courtroom that day, and observed Strike Force Chief Henderson and United States Attorney Andrea Ordin approach the bench to request the postponement. A previous request by government attorneys to proceed in-camera had been denied by Judge Hill, making the open court proceeding necessary.

Fearing that Rawitch would overhear the side bar conference or open court proceedings bearing on Hauser's cooperation in BRILAB, Barron recalls that he approached Rawitch and ushered him out of the courtroom, saying, "Bob, would you come out a minute. Do me a favor, don't report the Hauser sentencing." His approach, as he describes it, combined a promise of reward with a threat of retaliation. He states that he promised Rawitch that he would give him something on the Hauser matter when it was feasible to do so. He also told him, he recalls, "You could endanger the lives of some agents that I have undercover if you don't agree to leave and not report this proceeding. You won't ever get a case out of the FBI again." After this conversation with Rawitch, lasting little more than a minute, he returned to the courtroom alone, and told Henderson, "It's taken care of. Henderson says Barron gave him the impression that the FBI would repay the favor in some manner sometime in the future. United States Attorney Andrea Ordin recalls Barron saying in effect, "I got Bob out of there." According to Special Agent William Fleming, who was involved in handling Hauser, Barron said they would have to decide at a later date what to do for Rawitch.

A number of telephonic and face-to-face contacts occurred between Rawitch and Barron during the period immediately prior to February 8th. Telephone toll records show that two calls — one at 4:59 p.m. and another at 6:28 p.m. — were made on February 6th to Rawitch's home from the off-site undercover location utilized in Los Angeles. The

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agent who made the toll records available says that Barron admitted to him making these calls. (In his first sworn statement, Barron said that he had no contact with Rawitch until the afternoon of the following day, February 7th. After learning that the investigative team had obtained copies of these toll records, Barron acknowledged calling Rawitch on February 6th.) Also on February 6th, at approximately 6:15 p.m., Barron dispatched a teletype to FBI Headquarters reporting that Judge Pregerson's recusal was imminent, and would occur on either February 8th or February 19th. In Henderson's opinion, according to the teletype, February 8th was the more probable date.

Barron acknowledges calling Rawitch again on February 7th to arrange a meeting at the Hyatt House Hotel in the City of Commerce, California. Barron states that he called Rawitch following a call from Henderson informing him of the decision in Washington to conclude the undercover phase. Barron recalls hearing from Henderson that The New York Times had the story, that it would break over the weekend, and that Judge Pregerson would announce his recusal in Brooklier the following day.

The purpose of the February 7th meeting, Barron states, was to alert Rawitch to Judge Pregerson's scheduled recusal. Barron recalls informing Rawitch that "Hauser was helping us in an undercover operation involving Special Agents of the FBI and the next day Judge Pregerson was going to recuse himself from the Brooklier case giving his reasons and this would explain why I had him leave the courtroom that day." He also told Rawitch, he acknowledges, that newspaper reporters in Houston and New Orleans were on to the story and he should contact his Times offices in those cities. Rawitch queried him, "Tell me something more. What's it all about? What can I tell my editor?"

Barron recalls that he "felt an obligation to tell Rawitch about the recusal because of the favor he did for me on October 28, 1979, by not reporting the Hauser sentencing hearing. . . ." He also says, "I did not feel it would be right for Rawitch to be 'scooped' on the BRILAB story by other newspapers in other states." He was aware,

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he states, that numerous media inquiries were occurring in other cities. On the basis of his meeting, he says, he concluded that Rawitch had "no detailed information about BRILAB." He states that he disclosed nothing to Rawitch.

Henderson arranged a meeting with Rawitch on February 8th after he was advised by Judge Pregerson early in the morning that Rawitch would be invited to the Judge's chambers an hour before the public recusal announcement and would be provided with the documents to be released. Henderson says that his purpose in calling Rawitch was to attempt to persuade him to avoid using Hauser's name in his story. Although Hauser was not specifically mentioned in any of Judge Pregerson's documents, Henderson says that in his opinion Rawitch had to know that Hauser was cooperating with the government as of October, 1979, due to the nature and circumstances of events surrounding the hearing then.

During their meeting, Henderson says, Rawitch revealed that he already had the entire story. Rawitch said he had spoken to Jack Barron, and recited the details that he intended to report, including specific names and places, indicating a clear understanding of the overall BRILAB operation. Henderson acknowledges that his actions and words — nodding at various points, for example, or saying "words to the effect of 'that's right' " — were such as to confirm Rawitch's information. Henderson also admits that he furnished some additional information including the number of anticipated indictments, the payment of money to subjects of the investigation, and the probable return of indictments in six months.

After this conversation with Rawitch, but before the public disclosures of BRILAB, Henderson spoke with Barron and mentioned that Rawitch had considerable information about the investigation. Henderson says that Barron acknowledged speaking

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with Rawitch. Henderson denies involvement in any commitment to provide information to Rawitch in connection with the Hauser proceeding in October, 1979. He says, "Barron told me it was taken care of and as far as I was concerned, there was no question about what was going on with Rawitch." Henderson states that he was unsuccessful in his attempt to persuade Rawitch to refrain from using Hauser's name, and it did appear in the Los Angeles Times story on February 9th.

On several occasions, Barron has failed to reveal fully his contacts with Rawitch in response to official communications that clearly called for such information. He did not disclose his February 6th contacts with Rawitch until he became aware that this investigation had obtained telephone toll records for the off-site location from which he had called Rawitch. Also, by teletype of February 5, 1980, FBI Headquarters advised all field divisions involved in BRILAB that a "no comment" response was to be provided to any BRILAB inquiries and that immediate notification of any such inquiries should be provided to Headquarters and the Los Angeles Field Office. A teletype from the Los Angeles FBI Office on February 8th to the Director of the FBI -- prepared by Barron-- reported that he had been contacted by New York Times reporter Jeff Gerth and that he had made no comment. Barron's contacts with Rawitch were not reported.

After the commencement of the leak inquiry, all field offices involved in BRILAB were directed to forward BRILAB news articles to FBI Headquarters, specifying portions of the articles that appeared to involve unauthorized disclosures. On March 3rd, Barron authored the airtel submitted by the Los Angeles Office to Headquarters in response to this request. The airtel indicated that Rawitch's article could have been based on information already known by the media, as indicated by inquiries received from reporters in at least ten named cities. Therefore, the airtel stated the Los Angeles

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Office would not attempt to identify items in the Rawitch story that could have resulted exclusively from unauthorized disclosures. In his sworn statement, Barron says that he did not report his own meetings or conversations with Rawitch because "I felt my contact with Rawitch would single me out as the individual responsible for the leaks."

Summary. Both Henderson and Barron acknowledge contact with Rawitch regarding BRILAB. Barron says that he persuaded Rawitch in October, 1979, to refrain from reporting certain information regarding Hauser. He admits meeting with Rawitch, and alerting him to Judge Pregerson's scheduled recusal on February 8th. He denies furnishing Rawitch, however, with any information regarding BRILAB. Henderson has provided this investigation with two statements as to events and facts pertinent to the leak to The Los Angeles Times.

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The San Diego Union

A number of FBI Agents in San Diego acknowledge dealing with Jon Standefer of The San Diego Union in the past on a variety of matters, and he is generally regarded as a "friend" of the San Diego FBI Office. He was so described by Assistant Special Agent in Charge John McGinley in introducing Special Agent John Blair to him on January 17th.

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Standefer was invited to office functions -- former Special Agent in Charge Roger Young's "going away" party, for example. He attended a social function in connection with a public corruption seminar in San Diego on October 2, 1979, telling Assistant U.S. Attorney Woods of Houston that he was there as a guest of the FBI and U. S. Attorney's office. During the period November 1, 1979 to February 19, 1980, FBI office logs show seven visits toMcGinley, ranging in time from approximately 20 minutes to an hour.

The timing and content of Standefer's BRILAB inquiries indicate that his understanding of BRILAB's investigative progress initially reflected the information available to the San Diego FBI Office. Never directly involved in BRILAB, this office received only limited formal communication as to the investigation. A teletype sent late on the afternoon of January 24th from Albuquerque, for example, indicated that grand jury proceedings in BRILAB would take place on January 28th. The San Diego Office was not among those that received a teletype transmitted late in the afternoon of January 25th postponing the overt phase of BRILAB from January 28th to a later time. Agents in San Diego were aware that Judge Pregerson was going to announce his recusal in the PORNEX case in a Los Angeles hearing at the same time that BRILAB became overt. Not until Monday, January 28th did the San Deigo Office learn that neither Judge Pregerson's recusal nor BRILAB's termination would occur on that day. Reflecting this fact was McGinley's telephone call to the Los Angeles FBI Office on the morning of January 28th inquiring as to the time of the PORNEX hearing.

Standefer indicated the same understanding of the BRILAB schedule in a call to Aaron Kohn, former Chairman of the New Orleans Organized Crime Commission, at approximately 11:00 p.m. on January 27th. Kohn recalls Standefer saying that Judge Pregerson would recuse himself from the Brooklier case on the following day, January 28th, and would reveal a bribery plot at that time. In addition, Standefer asked Kohn about

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indictments to be returned the next day in New Orleans, at least one of them pertaining to Carlos Marcello. According to Kohn, he also indicated knowledge that the investigation concerned city councilmen in Houston and New Orleans, possibly including the Governor and other Louisiana state officials, and that arrests would begin in Houston and New Orleans on January 28th. On the same day, Assistant United States Attorney Frederica L. Homberg of New Orleans received a call from Clarence Dubos of The New Orleans Times-Picayune, who inquired about an investigation of Carlos Marcello. According to Homberg, he indicated that the initial source was a San Diego newspaper — "apparently good and close to the FBI," in her words.

At about the same time, inquiries reflecting similar knowledge were made by reporters with The Houston Post, the newspaper for which Standefer had been a reporter before joining The San Diego Union. According to Special Agent John McAuliffe, he received a call at 3:00 p.m. on January 28th from Peter Wittenberg of the Post, who asked whether there would be arrests that day in connection with a labor-related investigation regarding New Orleans and Albuquerque. On the same day, Wittenberg called United States Attorney J. A. (Tony) Canales inquiring as to the reason that the grand jury had been canceled for that day. Francis M. Mullen, Jr., then Assistant Director of the FBI for Criminal Investigations, was called on January 28th or 30th by Rick Nelson of the Post; he indicated detailed knowledge of the investigation, and told Mullen that stories would be appearing in the near future.

On January 30th, Nelson also called Eades Hogue, Chief of the Strike Force in New Orleans, with extensive knowledge of BRILAB. According to Hogue, Nelson was aware that Carlos Marcello, Houston City officials, and others were involved in the inquiry, and that the investigation had a possible Albuquerque aspect. George Flynn, Assistant

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City Editor at the Post made inquiries of Assistant U.S. Attorneys Wendell Odom and Ronald Woods of Houston at various times before February 9th. Woods has known Flynn for a number of years, and has seen him socially. According to Woods, "Flynn is 'a good friend of Jon Standefer' and 'visited Standefer some time in the fall.' " Flynn is associated with both Nelson and Wittenberg in his current position at the Post. Despite these inquiries by Houston Post reporters, that newspaper never printed an exclusive BRILAB story.

Within the San Diego Office, there are primarily three individuals with knowledge of BRILAB who acknowledge knowing Standefer and dealing with him on various matters previously: Assistant Special Agent in Charge John C. McGinley, Jack Blair, Supervisor of the Organized Crime Squad, and Special Agent Nicholas Lore, also of the Organized Crime Squad. Their respective roles in BRILAB, however, were quite distinct. Lore and McGinley were substantially involved in PORNEX, but they had no direct or formal role in BRILAB. They learned of BRILAB only after the fates of the two investigations became linked in November, 1979. By contrast, Blair was the case agent for the New Mexico phase of BRILAB while assigned to the Albuquerque, Office. Indeed Blair was instrumental in persuading the Los Angeles Division to facilitate Hauser's involvement in an on-going investigation in Albuquerque for which Blair was responsible. After "discussions with the Los Angeles Division," Blair recalls, a meeting was arranged between Hauser, FBI undercover agents, and Joseph Montoya, II. This conversation provided information for a Title III affidavit regarding Montoya that Blair himself prepared. Blair acknowledges attending a critical conference in Houston in October, 1979, where agents and attorneys from all districts involved in BRILAB were present.

Although his transfer to San Diego in December of 1979 ended Blair's direct responsibility for BRILAB, he says that he continued to be familiar with developments in the investigation. By the January 24th teletype from Albuquerque, the San Diego

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Office was advised that Blair was to be in Albuquerque on January 28th in connection with grand jury proceedings in BRILAB. Blair departed San Diego on Friday, January 25th, spending the weekend in Albuquerque and reporting to the Albuquerque FBI Office on Monday, January 28th. He acknowledges that he did not learn until January 28th that the BRILAB schedule had been altered.

On the evening of January 27th, Blair called Standefer from Albuquerque. BRILAB, he says, was not discussed. The purpose of his call, he states, was to complain about a January 26th article done by Standefer and two other reporters regarding the so-called Ellenberger investigation. This probe, centered in Albuquerque, concerned allegations involving, among other things, falsification of academic records of athletes at the University of Mexico. Blair was the case agent for the Ellenberger investigation as well as BRILAB while assigned to Albuquerque, although the two probes concerned separate and distinct subject matters.

Blair has acknowledged -- after first denying -- that he disclosed certain information regarding the Ellenberger investigation contained in The San Diego Union January 26th article. This story stated:

> Bill Byrne, the new Assistant Athletic Director at San Diego State University, has been subpoenaed Monday before a grand jury in Albuquerque, New Mexico, to answer questions regarding the expanding investigation into fraudulent athletic credits. . . .

It also said:

> Tim Vezie, former basketball coach at San Diego State, has been interviewed by the FBI. He reportedly asked his views of possible point-shaving by the University of New Mexico team. . . .

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These facts and others -- reported correctly -- were attributed to "law enforcement officials". The article also stated — incorrectly — that William E. Davis would be indicted for perjury unless he recanted his recent testimony before the federal grand jury probing his role in the "fake credit scandal."

In his first statement, denying discussion of the Ellenberger investigation with Standefer at any time, Blair said:

> I am aware that Standefer had written an article regarding the Ellenberger case. I recall that Standefer at one point in time asked me if there was any active investigation regarding the coach or athletic director at San Diego State. I told him there was not. Standefer never asked me, and I never provided any information regarding the Ellenberger investigation.

In a second interview, he acknowledged that he did discuss Ellenberger with Standefer on January 17th, admitting specifically that he told Standefer that Byrne had been subpoenaed. He also acknowledged talking with him about Vezie. In fact, he had been one of the agents conducting the Vezie interview on January 15th. He continues to deny any responsibility, however, for the report of Davis' possible indictment.

In his January 27th call, Blair recalls telling Standefer of his reaction to the Ellenberger article:

> I believe I reached him at The San Diego Union newspaper and informed him that I was quite unhappy over this article because it was written at an inappropriate time and contained information which he obviously had in his possession and failed to provide me.

Blair says that he declined additional comment during this conversation. As a result of his continuing "concern," he says, he called Assistant Special Agent in Charge McGinley, on January 29th, and took a plane to San Diego that same morning. He met with McGinley for approximately two hours and then immediately returned to Albuquerque. He says he acknowledged to McGinley discussing Ellenberger with Standefer, but denied then, as he does now, telling Standefer of a possible indictment of Davis.

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On the previous day, January 28th, McGinley says that Standefer visited his office "and stated to me that several newspapers around the country knew about an FBI investigation of labor racketeering and public corruption and of an approach being made to a judge in Los Angeles." This was McGinley's first substantive contact with Standefer regarding BRILAB. A second conversation occurred the next day, when Standefer called to inform McGinley that Wall Street Journal reporter Jim Drinkhall and Sacramento Bee reporter Denny Walsh appeared to have BRILAB information, implying that they were sources for him. He also mentioned New Orleans and Kleindienst. Concerned with Standefer's inquiries and others from The Houston Post, McGinley says, FBI Headquarters on January 31st inquired as to what Standefer might write at the time of Judge Pregerson's recusal; McGinley told Headquarters officials that he knew Standefer well enough to call and ask him. According to McGinley, Standefer told him on January 31st that he would hold the story as long as publication would jeopardize an ongoing investigation. McGinley agreed to let him know when Judge Pregerson would publicly announce the recusal.

McGinley says that FBI Headquarters informed him that Standefer was continuing to make inquiries around the country. He assured these officials, he says, that Standefer was committed to holding the story. McGinley acknowledges calling Standefer on February 8th, after learning that Judge Pregerson's recusal announcement would occur that day. He acknowledges telling him that he might want to be in Judge Pregerson's courtroom at approximately 5:00 p.m.

Shortly before 5:30 p.m. (PST) on February 8th, Standefer arrived at the San Diego FBI Office with a New York Times wire service story on BRILAB in hand. McGinley and Special Agent in Charge Roger Young met with him. Young recalls Standefer

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stating that he had done a great deal of work in connection with the BRILAB investigation, that he was aware of the New Orleans and Los Angeles aspects of the case, and that "he would be quite shaken if something should occur as happened in the 'ABSCAM' investigation where a reporter from a rival newspaper obtained detailed information and 'scooped' him on the story." Young informed Standefer that he was unaware whether any information had been released by FBI Headquarters Press Office, but placed a call to Homer Boynton at approximately 5:30 or 5:45 p.m. (PST), so that they could discuss the matter. The conversation with Boynton was conducted on a speaker phone, with both McGinley and Young present. Young recalls that Standefer sought confirmation as to names of individuals that he believed were targets of the BRILAB investigation, including Kleindienst and Marcello. He says that,

> Mr. Boynton declined to furnish information, other than general comments, to Mr. Standefer. Mr. Boynton furnished no new information to Mr. Standefer.

According to Boynton, Standefer also mentioned Montoya in connection with the investigation. He recalls "being surprised that a reporter from a relatively small newspaper would be able to obtain such detailed information. I made no comment on his inquiry."

Lore was not present for this conversation or others on BRILAB involving Standefer and McGinley or Blair. He recalls no individual contacts with Standefer regarding BRILAB. Like McGinley, he had no direct involvement in the investigation. He had access to BRILAB information, however, and had predominant responsibility in San Diego for the PORNEX prosecution. Standefer was extremely interested in PORNEX, followed it closely, and inquired of agents in the San Diego Office as to its progress. Following Judge Pregerson's announcement of the continuance of the PORNEX-related Brooklier case in November, 1979, Standefer told McGinley that he knew that the reasons stated by Judge Pregerson for his action were not the actual reasons. Lore has admitted that

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he may have been responsible for Standefer knowing that the PORNEX trial was continued for reasons other than those stated in court. Lore says that he recalls a conversation with Standefer from which Standefer very well may have drawn that inference.

During the leak investigation, allegations were made by Special Agent John Barron — on the basis of information provided to him by an individual outside the government -- that facts brought to his attention in late January or early February, 1980 indicated Lore's possible involvement in the BRILAB leaks. Barron stated that he had been advised by these sources that newspapers were aware of the undercover operation in late January or early February as a result of disclosures by Lore to a San Diego reporter. Information from other sources indicated Lore's possible responsibility for a previous leak to Standefer regarding information on organized crime figures. The disclosures were contained in an article appearing on April 12, 1979 under the bylines of Carl M.Cannon and Jon Standefer in The San Diego Union, entitled "Ex-Mayor Alioto Linked to Mafia by FBI Informers." The alleged disclosures concerned information provided by a witness in the PORNEX investigation, and a deceased FBI informant. Lore has denied any involvement in these leaks.

Summary. Circumstantial evidence and acknowledged contacts with Standefer indicated possible involvement by three individuals in BRILAB disclosures to The San Diego Union. All three — Blair, McGinley, and Lore — had access to BRILAB information. Blair formerly the Albuquerque BRILAB case agent, was most directly involved in the actual investigation. While in Albuquerque, he also was the case agent for the Ellenberger investigation, acknowledges talking with Standefer about it, thereby providing at least some of the material later appearing in The San Diego Union article on Ellenberger.

McGinley's primary investigative responsibilities concerned PORNEX, which became connected to BRILAB as a result of the bribery plot in Brooklier, and he acknowledges speaking with Standefer during the week of January 28th in an effort to

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ascertain what Standefer knew and when he was likely to write it. He was the one to learn first that Standefer would hold the story, and reported this fact to FBI Headquarters. Later, on February 8th, he was present when Standefer sought information and confirmation in a conference call with Homer Boynton. Lore was the subject of allegations regarding leaks in BRILAB and another instance. He denies involvement in either disclosure. Both McGinley and Blair deny any involvement in the BRILAB leaks.

FOIA(b)(6)
FOIA(b)(7) - (C)

The Houston Post

The timing and content of calls made by Houston Post reporters, as described in the previous section, were similar to Standefer's inquiries. Conversations with Nelson, Wittenberg and Flynn prior to January 28th suggested that their knowledge was vague and general. Following that date, their inquiries became more specific and frequent. At approximately 10:00 p.m. on the evening of February 2nd, following the ABSCAM NBC disclosure, Nelson spoke with Special Agent Charles Steadman, in Houston, and inquired, "Should I run my BRILAB story?" Stedman says, "My distinct impression was that Nelson had a prepared story, was not asking me for a comment confirming the investigation, but rather, when he should run the story."

Notwithstanding this pattern in calls made by Houston Post newsmen and others, Nelson initiated separate and independent BRILAB inquiries, some to individuals whom he knew as a reporter in Tampa, Florida, before joining the Post. One of Nelson's

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earliest calls, on January 14th, was to Eades Hogue. They initially had met several years ago while Nelson was covering a major case prosecuted by Hogue in Tampa. Hogue, now Chief of the Strike Force in New Orleans, recalls Nelson asking him, "What's going on in New Orleans?" without making any reference to BRILAB. By the time of his second call to Hogue on January 30th or 31st, discussed earlier, Nelson had substantial knowledge of the investigation.

Nelson called Assistant Director Mullen on January 28th or 30th in Honolulu, where Mullen was attending an organized crime conference -- reaching him at his hotel room after tracking him down through the Honolulu Visitor's Bureau. Mullen recalls that Nelson said that he and numerous reporters were working on a story indicating that the FBI was investigating high level Texas politicians and a Louisiana hoodlum, whom Mullen assumed to be Carlos Marcello. Mullen told him that he had no idea what Nelson was talking about, and, even if he did, he would have absolutely no comment to make. Mullen says he met Nelson while he was assigned to Tampa as Special Agent in Charge in 1975-76. Nelson also contacted Dana E. Caro, at FBI Headquarters where he currently serves as Deputy Assistant Director of the Criminal Investigative Division. Caro does not recall precisely the date of this inquiry, but believes that it was subsequent to both Nelson's call to Mullen and reports of BRILAB in the press. According to Caro, Nelson primarily was attempting to confirm information, and he declined comment. He had known Nelson during his assignment to the Tampa FBI Office, during the period 1975 to 1977.

In addition to these inquiries, FBI officials were advised by an informant -- while BRILAB was ongoing -- that Nelson appeared to have nearly the full story. During the leak investigation, this same informant has stated that Rick Nelson told him that

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BRILAB information was provided by Agent Randy Cunningham of the Bureau of Alcohol, Tobacco and Firearms and his partner, Agent W.M. Rothgeb. The FBI was first advised of the leak to Nelson on February 4th, prior to the appearance of BRILAB leaks. Our investigative team was apprised subsequently of a call by Nelson to the informant, in which Nelson indicated specific knowledge of interviews with Cunningham and Rothgeb. According to the informant, Nelson stated that whatever information was obtained from Rothgeb or Cunningham originally came from Strike Force Attorney Dougald D. McMillan.

Both Cunningham and Rothgeb acknowledge knowing Nelson. According to Special Agent Steadman and other FBI agents interviewed, Nelson has "excellent sources" in AT&F, and has accompanied AT&F agents on arrests. This statement is denied by both Cunningham and Rothgeb. Nelson and other reporters, according to Rothgeb, "have provided my office with confidential information which they obtained from outside sources on investigations we were conducting." Rothgeb acknowledges introducing Nelson to both Cunningham and McMillan at separate times. He says that Nelson, in a conversation sometime after April 2, 1980, stated that he was close to an Assistant Director of the FBI and could call him for assistance when necessary, even in the middle of the night. Rothgeb says that he is responsible, as Group Supervisor, for "making press releases regarding activities involving my organization," and therefore is familiar with Nelson as well as other Houston Post reporters. Both Cunningham and Rothgeb were involved in the recent prosecution of Raymond Conti (aka, Raymond Freda), a Houston arson case. Nelson covered it. On a number of occasions, according to Cunningham, Nelson has visited AT&F's office to "generally solicit information" concerning Conti. Cunningham says, "Nelson's reporting appears to be law enforcement oriented."

Both Cunningham and Rothgeb deny knowing anything about BRILAB prior to February 9th. Rothgeb acknowledges, however, an inquiry from Nelson around

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the time of January 16-18 about a possible FBI investigation into the Teamsters and Marcello. Rothgeb says that Nelson may have explained that he had been getting pieces of the story regarding the FBI's investigation, and that his response to the inquiry, if he made any, would have been that he knew nothing about the investigation.

McMillan denies speaking to Cunningham, Rothgeb or Nelson about BRILAB prior to February 9th. He acknowledges working with Rothgeb and Cunningham on the Conti prosecution. Indeed, he says that he was introduced to Nelson by Rothgeb at a hearing relating to Conti on February 14th in Houston. Prior to February 9th, he says, he spoke with only one reporter regarding BRILAB -- Charles Babcock of The Washington Post on February 8th. The conversation with Babcock, he says, was a "general" one regarding McMillan's background, a "big operation in New Orleans, and Carlos Marcello." He advised Babcock that he did not know anything about the investigation. He denies ever speaking to any reporter regarding the so-called B.&B. Vending Company investigation, and says that the article written by William Inman of the Houston Post, contained numerous inaccuracies, as he has told Inman and others.

McMillan's knowledge of BRILAB, he says, resulted in part from his review of Title III applications and other work done in New Orleans during October and November, 1979. Special Agent Harold Hughes, the BRILAB case agent in New Orleans, briefed McMillan on BRILAB, at Hogue's request. The Strike Force office in Dallas, where McMillan works, was the only one in the country among all jurisdictions where BRILAB was ongoing to have no role in the investigation. In Texas, all responsibility for the undercover operation was assigned to the United States Attorney's office in Houston.

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New Orleans

One of the earliest and best informed inquiries regarding BRILAB in New Orleans came on August 22, 1979, from Sid Bowman, a reporter for WWL radio/TV. He called Special Agent Clifford H. Anderson, media representative in the New Orleans Office, and stated that he had observed FBI vehicles for periods of time in the vicinity of Carlos Marcello's office and had concluded that the FBI was conducting a surveillance. Anderson recalls Bowman advising him that he "wanted to make the FBI aware that they were being obvious," and he concluded the conversation by "wanting to be advised first if and when the press was notified."

Bowman again contacted Anderson on September 10th, telling him that other reporters were getting pieces of the story and he did not want to be scooped. At a meeting on September 11th, Bowman explained that his news editor, Phil Johnson, recently had told him of a Marcello investigation. According to Anderson, Bowman said that the Department of Justice "is looking to put the arm on" organized crime figures

such as Marcello. Johnson's sources, Bowman told Anderson, were probably in Washington, D.C. at The Washington Post or CBS. According to Anderson, Bowman "volunteered that the FBI's biggest leak is the use of the radio. Agents are saying things in the clear that anyone with a scanner could pick up." At that time, and again on October 15th, Bowman indicated that the surveillance was easily observable -- and would be so, he thought, to Marcello himself. In his October 15th call, Anderson recalls,Bowman described increased activity near the surveillance site, leading him to believe that the FBI was accelerating its investigation, possibly causing his competition to use the story.

Anderson says that he declined comment in response to all of Bowman's inquiries and statements, saying only that he would provide appropriate information if a time ever arrived when a response was possible. Bowman also contacted Special Agent Albert Lee Simms, Jr. (retired) in the fall of 1979 to inquire whether the FBI had anything going on in the vicinity mentioned to Anderson. Simms says that he responded that he was unaware of any investigation in that area, and that he advised Anderson of this conversation. All of Anderson's conversations with Bowman were reported to appropriate FBI supervisors.

As the pace and intensity of New Orleans inquiries increased after January 28th, calls were received from Dean Baquet of The New Orleans States-Item by Assistant United States Attorneys Irving J. Warshauer, and Richard Simmons, as well as by Anderson. In late January, Warshauer also received an inquiry from Pierre DeGruy of the Times-Picayune. All these inquiries were general in nature, indicating no detailed knowledge of BRILAB. None produced exclusive stories on or prior to February 9th. During the week of February 4th, calls to then Assistant Director Mullen were made by DeGruy, Baquet, and Richard Boyd of The New Orleans States-Item. According to Mullen, who

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summarized his conversations in a February 11th memorandum, they were seeking confirmation of "material already in their possession," and he gave none. Mullen says that Baquet "apparently had detailed information" regarding BRILAB undercover contacts with Carlos Marcello.

Interviews in New Orleans indicated that Richard Angelico of WVUE-TV has been furnished information by Special Agent Robert Isakson regarding ongoing investigations. In their sworn statements, these agents allege leaks to Angelico in connection with cases involving "the Magic Touch Massage Parlor," the "Decatur Street case," and a race-fixing matter. On numerous occasions, Isakson and Angelico have been seen socializing —"drinking and partying", according to one agent. Isakson is said to be the only agent in New Orleans with so close a relationship with Angelico.

Isakson and Angelico were observed on Saturday, February 16th at Club 4141 in New Orleans by Assistant U.S. Attorney Richard Simmons. Angelico approached Simmons, saying that he had been informed that the United States Attorney had requested that the BRILAB investigation be extended so that the case against a particular target could be strengthened. Simmons declined comment. He says that he could not overhear any of the conversation between Angelico and Isakson.

Isakson was knowledgeable about BRILAB as a result of his assignment to the Organized Crime Squad in the New Orleans Office. He acknowledges that he became acquainted with many media people while serving as a supervisor of another squad in New Orleans — including reporters for The Houston Post, Time Magazine and The New York Times — and that these reporters still telephone him. He says that he has not discussed BRILAB with any of them.

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Two or three weeks before February 9th, Isakson acknowledges, he received a call from Angelico, who said "something to the effect 'what's this about indicting Carlos Marcello?' " According to Isakson, Angelico stated that he had four different sources for this information. Isakson recalls that he was contacted by Angelico on the evening of February 8th. Angelico told him, he says, that his boss was very upset that he had been on a road trip and therefore unavailable when the story first appeared on the wire services. According to Isakson, he provided no information concerning BRILAB to Angelico or any other reporter. Angelico is a friend of Jack Taylor of The Daily Oklahoman, Isakson says.

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The New York Times

The timing and content of The New York Times story regarding BRILAB strongly suggest that it was written sometime prior to Judge Pregerson's public recusal announcement with the assistance of a source in the government. When Jon Standefer of the San Diego Union appeared at the FBI office in San Diego shortly before 5:30 p.m.on February 8th he had with him a copy of the Times wire service story on BRILAB. Judge Pregerson's announcement was scheduled for 5:00 p.m. — almost precisely the time that the Times story moved on its wire — although tha proceeding actually began one half hour earlier. Attributing various information to "top level FBI officials", the article describes under a February 8th Chicago dateline, a decisionmaking process occurring the previous day, February 7th, in Washington, D. C.:

> "Late yesterday FBI and Justice Department officials, uneasy about their ability to keep BRILAB a secret, decided to speed up the investigation . . ."

No substantive contact with either Pound or Gerth regarding BRILAB is acknowledged by any agent or attorney prior to February 7th.* There is evidence, however, that the Times reporters had obtained BRILAB information by that date. A call was received around January 13th by Aaron Kohn, former Chairman of the New Orleans Organized Crime Commission, from a Times reporter — Kohn believes it was Gerth — who inquired about a possible investigation of Marcello and politicians in Louisiana, possibly including the Governor of that state. Also, circumstantial evidence indicates that substantive

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* On February 1st, Gerth called Special Agent Jack Barron in Los Angeles, saying that he was not following Barron's case, but was interested in an FBI investigation involving the "trucking thing", Alan Dorfman and some Senators. Recognizing the reference to PENDORF, Barron suggested that Gerth call Special Agent Philip Urick, who was a Chicago supervisor directly involved in PENDORF. Urick received a call from Gerth on February 4th. He recalls Gerth asking a number of questions concerning PENDORF, and also some questions pertaining to BRILAB, specifically mentioning Houston and New Orleans. Urick had only limited knowledge of BRILAB, and says that he provided no information on either investigation.

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contacts were occurring throughout the week of February 4th, as the decision to close BRILAB was made.

During that week, various Justice Department officials were informed that The New York Times appeared to have the BRILAB story — or a large part of it — and that a meeting was planned with Times reporters. According to David Margolis, he was informed on February 6th by Sean McWeeney, Chief of the Organized Crime Section at FBI Headquarters, that New York Times reporters would be meeting with officials at FBI Headquarters later in the week to discuss BRILAB. McWeeney confirms this account and says that information pertaining to this planned meeting would have come from a telephone conversation with Homer Boynton. Similarly, United States Attorney Canales in Houston recalls Bob Reutter of the Organized Crime Section at FBI Headquarters advising him on February 7th that two reporters from The New York Times would be in FBI Headquarters for an appointment regarding BRILAB. Both McWeeney and Reutter were under the supervision of Francis Mullen, Jr., then Assistant Director for the Criminal Investigative Division.

The decision to terminate BRILAB's covert stage was made by Mullen on February 7th, and communicated by him to McWeeney and Reutter, as well as to Justice Department attorneys. At approximately noon on that day, McWeeney and Reutter recall, Mullen advised them of his decision. The Criminal Division of the Justice Department had favored ending the operation because of its continuing effect in delaying the Brooklier trial. Also, the increasing pace and intensity of press inquiries after January 28th had argumented concern for the safety of the undercover agents and others involved. Reutter, McWeeney and others in the FBI, however, had endeavored to continue BRILAB'S covert phase, seeking additional investigative results. Still hoping to change Mullen's mind,

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they called Margolis and met with him in his office in an attempt to persuade him to intervene through his own superiors. Margolis' log for February 7th indicates that this meeting occurred at 2:03 p.m. He declined to join in an effort to reverse Mullen's position, and Mullen himself reaffirmed it to them shortly thereafter.

That afternoon, according to McWeeney and Reutter, they were contacted by Boynton and were requested to give him a briefing on BRILAB. McWeeney recalls that Boynton told them that he was to have an interview on BRILAB with the Times and that McWeeney was to be present. Reutter says that he, too, was asked to attend the interview. This was unusual, he recalls, since he had never been invited to attend such a meeting with the press before. While they were at the briefing in Boynton's office, according to McWeeney and Reutter, Mullen called to indicate he, not they, would represent the Criminal Investigative Division at the Times interview. The meeting with Boynton ended, and Reutter recalls suggesting to Boynton, "find out how much they know." He says that he was upset and wanted to know what was going on.

The meeting with Pound and Gerth is reflected in the visitor's log for FBI Headquarters. The log indicates that they arrived to see Boynton at 3:07 p.m. Within the hour, Margolis was called by Reutter and advised that the Times reporters were meeting at FBI Headquarters with Mullen and Boynton on BRILAB. A short time thereafter, Margolis says, he received a telephone call from either Assistant Attorney General Heymann or his Deputy, Irvin Nathan. (Margolis' telephone logs reflect that it was probably Nathan). According to Margolis, he was advised that Mullen had recently called to report that Pound and Gerth were at Headquarters, that they had the BRILAB story and that the FBI was attempting to dissuade them from printing it at that time.

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Margolis' recollection of these events is corroborated by the account he gave contemporaneously to other prosecutors as he relayed the latest report received from Mullen and the decision to close BRILAB. Strike Force Deputy Chief Michael DeFeo in Kansas City recalls Margolis telling him that Times reporters had the BRILAB story, that a meeting was occurring at FBI Headquarters, and that the FBI was attempting to persuade them to hold it. As they spoke, DeFeo made notes of his conversation to this effect. DeFeo recalls then calling Strike Force attorney Henderson in Phoenix, and advising him of the decision to go overt, along with the message that The New York Times had the BRILAB story. Henderson transmitted this message to Special Agent John Barron in Los Angeles, according to both Henderson and Barron.

Others in the field were given much the same account in calls from FBI Headquarters. According to U. S. Attorney Canales, he received a call from someone at FBI Headquarters -- possibly Reutter -- advising him that a Times reporter had met with someone there, that they had the story, and that they would publish it during the weekend. Similarly, McGinley in San Diego says that Reutter phoned him on February 8th saying that the Times had the story.

The meeting between Boynton, Mullen, Pound and Gerth ended at approximately 4:00 p.m. Mullen had a scheduled appointment with a Time Magazine photographer for that time. Heymann's telephone logs reflect that he spoke with Mullen at 4:16 p.m. Nathan's logs reflect a conversation with Mullen at 4:22 p.m. and with Pound at 4:24 p.m. All of these were actually return calls. Mullen had attempted unsuccessfully, to reach both Heymann and Nathan at 3:23 p.m., according to their logs. Also, Pound had called Nathan that afternoon at approximately 2:20 p.m.*

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* At approximately this same time, 4:22 p.m., DeFeo received a call from Wallace Turner of The New York Times' Chicago Bureau. Turner asked him whether officeholders "here", in DeFeo's words, might have the same problem others did in ABSCAM. The conversation lasted one and one-half minutes, according to DeFeo, and he declined to comment.

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Mullen has no recollection of the specific subject matter of these conversations with Heymann and Nathan. He feels certain that he informed Nathan at some point of the decision to go overt in BRILAB, though he cannot recall whether this was discussed during these or other conversations on February 7th with Nathan or Heymann. He says that he did not tell Margolis, Nathan or Heymann that The New York Times had the BRILAB story, or that an attempt was being made to persuade the Times to hold it. He has no recollection of knowing about the briefing for Boynton by McWeeney and Reutter.

Mullen acknowledges that he was present at the meeting with Boynton, Pound and Gerth for approximately 45 minutes that afternoon. According to him, Boynton invited him to attend and the reporters already were in Boynton's office when he arrived. If the meeting was planned in advance, he says, he had no knowledge of this fact. He says that Pound and Gerth appeared to have been in contact with The Los Angeles Times, and to have learned that Judge Pregerson was about to announce something. Pound asked during the meeting, he says, whether it would be worthwhile to go to Los Angeles. The reporters were told, Mullen says, that it was their decision. Mullen says that it was his impression that Pound and Gerth mistakenly related Judge Pregerson to the PENDORF case. He says that only PENDORF and Senator Cannon were discussed. BRILAB was not mentioned, according to Mullen, and "the conversation did not include any information on the FBI's method of handling undercover operations." A story regarding PENDORF and Senator Cannon's involvement in that investigation had already appeared in The New York Times on February 6th. Mullen says, however, that Pound and Gerth were continuing to pursue possible wrongdoing by Cannon, as is indicated by subsequent stories on this subject.

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According to Mullen,

> The reporters were annoyed with Senator Cannon because they caught Senator Cannon in a lie and "were out to do a number on him." They were aware that PENDORF involved wiretaps and they said they had done a background on Cannon. I was uneasy about how much they knew about Cannon. Although they were seeking additional information concerning the case, none was furnished by either Boynton or myself . . . Based upon their remarks it was my impression that they had mistakenly related Judge Pregerson to the PENDORF case. They knew something but not enough to skip Chicago or Las Vegas for Los Angeles. Consequently, this meeting was not a factor in my decision to have BRILAB go overt and we had no reason to instruct them to hold the BRILAB story.

Mullen's statement that the meeting exclusively concerned PENDORF is contradicted by a memorandum prepared by him to Executive Assistant Director Lee Colwell on February 11th. He reports in the memorandum that he "sat in with Executive Assistant Director Homer Boynton on three interviews with the news media" during the week of February 4th — one of them the interview with Pound and Gerth. "The purpose of these interviews," he says, "was to discuss the great care taken with regard to supervision of undercover operations and details of specific investigations were not discussed." PENDORF, however, involved no undercover work. Both BRILAB and ABSCAM were undercover operations.

Mullen says that he received a telephone call from Pound, at approximately 3:00 p.m. on February 8th. Pound said he was in Chicago, and asked whether it would be worthwhile for him to go to Los Angeles, according to Mullen, but did not mention BRILAB. Mullen says that he made no suggestion in response to Pound's question. Earlier on the same day, a teletype to FBI Headquarters from the Los Angeles Office reported that Gerth had called Special Agent Jack Barron on February 8th and had told him that he and Pound knew that BRILAB was breaking and that documents would be filed showing

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organized crime involvement with corrupt politicians in Texas, Oklahoma and Louisiana. Gerth told Barron, according to the teletype, that he knew that Barron was the supervisor in the case, and he volunteered that many reporters already had the story and that it definitely would be breaking in the press.

Other inquiries made by Gerth and Pound on the same date suggest that they had the story by that time. According to Bruce Kelton, a Los Angeles Strike Force attorney, Gerth called him on February 8th to inquire as to the offense on which Hauser had been convicted in Phoenix, and when he would be sentenced. Kelton says that his impression was that Gerth had the BRILAB story, and was simply gathering background information on Hauser. Gerth and Pound also attempted to reach Hogue in New Orleans; he did not return their call.

Boynton acknowledges a telephone conversation with Pound regarding BRILAB on February 7th,

> "Pound had a few more details than Babcock and was aware that Carlos Marcello was involved. He also knew that the investigation was an undercover operation and he may have made reference to politicians being targets in Louisiana and Texas. I again made no comment to the inquiry."

It may have been during this February 7th conversation — or possibly earlier, Boynton says — that the February 8th interview was arranged. *

Boynton acknowledges requesting that McWeeney and Reutter brief him in preparation for the Pound-Gerth interview on February 7th, and that he planned for them to attend the interview. He cannot recall precisely the subject matter of the briefing:

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* His reference to Babcock, as indicated by his statement, is to Charles Babcock of The Washington Post, who called him sometime during the early part of the week of February 4th, inquiring about BRILAB but lacking sufficient information on which to base a story.

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It may have been either PENDORF or BRILAB. Nor can he recall how McWeeney and Reutter were disinvited from attending. He is certain, however, that he was not the one to make the decision that Mullen would attend the Pound-Gerth interview instead of them. Prior to this briefing, he says, he had obtained information on BRILAB while attending briefings for Director Webster by the Criminal Investigative Division. He denies inviting Mullen or requesting that Mullen substitute for McWeeney and Reutter.

Boynton acknowledges that he may have been alone with Pound and Gerth prior to Mullen's arrival at his office. Indeed, Mullen's calls to Heymann and Nathan at 3:23 p.m., as shown on their logs, indicates that Mullen was still in his own office as of that time. Boynton denies, however, that there was any discussion of BRILAB at any time.

Boynton says Pound called him from Chicago on February 8th saying "that he had heard that a judge in Los Angeles intended to release information on a big investigation and he asked if it would be worthwhile for him to go out and cover the story." Boynton says that he "replied in the affirmative." According to Boynton, Pound and Gerth told him that they were enroute to Las Vegas, where they intended to "look into the Senator Cannon matter," in Boynton's words. This statement is consistent with a call made on February 8th at approximately 10:00 a.m. by Pound to Special Agent Peter Wacks in Chicago. According to Wacks, Pound said that he and Gerth were visiting Chicago for the purpose of gathering information about an investigation concerning Senator Cannon, and that he was aware that Wacks was the PENDORF case agent.*

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* Wacks referred him to the Chicago FBI media representative but he recalls that Pound expressed reservations about dealing with a "media person," saying that such contacts generally were not very productive.

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Boynton's statement that BRILAB was not discussed with Pound and Gerth on February 7th conflicts with his report to McWeeney shortly after the interview ended. According to McWeeney, Boynton called and

> advised me basically that The New York Times "did not have very much on BRILAB and they had a lot of work to do." Boynton stated that he was amazed that they didn't have more of the story.

Summary. Circumstantial evidence and other information developed during the investigation indicate Homer Boynton's involvement in leaks to Pound and Gerth, either on February 7th at their interview or some other time prior to February 9th. The timing and content of the Times story itself, which appeared almost simultaneously with Judge Pregerson's public announcement of his recusal, indicate that disclosures were made to the Times sufficiently in advance of the announcement to permit a detailed account of the investigation to be written. Boynton arranged the interview, he acknowledges, possibly after his conversation with Pound regarding BRILAB on February 6th. In preparation for the interview, Boynton requested a briefing on BRILAB from McWeeney and Reutter. The nature and circumstances of this meeting make it similar to the meetings on ABSCAM arranged by Boynton in connection with his interview on January 31st with Ross and Silverman.

After the Pound-Gerth interview, Boynton reported to McWeeney and Reutter that the Times did not have much on BRILAB, indicating that BRILAB was discussed in some fashion. He says that BRILAB was not mentioned at any time, but acknowledges being alone with the reporters before Mullen's arrival at his office. His contention that someone else decided that Mullen should attend the interview is at odds with Mullen's statement that Boynton extended the invitation.

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[redacted]

Various unresolved factual issues are raised by statements of Mullen and others. Mullen denies telling anyone on February 7th, the day of his decision to terminate BRILAB, that The New York Times had the story. In contrast are statements made by Margolis, DeFeo, and others. He says that he was not involved in disinviting McWeeney and Reutter from the Pound-Gerth interview, which Boynton had planned for them to attend. McWeeney, Reutter and Boynton have different recollections. His contention that BRILAB was not mentioned at the Pound-Gerth interview must be weighed against his own memorandum of February 11th, as well as Boynton's report to McWeeney and Reutter after the interview. He states that Pound asked his advice as to whether to go to Los Angeles on February 8th, and that there was no substantive discussion of BRILAB during this telephone conversation on that date. The Barron teletype made earlier on the same date, however, indicates that Pound and Gerth may have decided already to go to Los Angeles.

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The Washington Post

On the evening of February 8th, Charles Babcock of The Washington Post called David Margolis, Chief of the Organized Crime and Racketeering Section, to tell him that his newspaper would be using The Los Angeles Times BRILAB story. While the Post had no exclusive story of its own on the following day, February 9th, Babcock apparently was aware of BRILAB, and inquired about it early in the week of February 3rd. A number of contacts with Babcock are acknowledged to have occurred during that week regarding BRILAB and undercover operations generally. None of them, however, pertained to the aspect of the BRILAB story that the Post reported exclusively on February 10th, regarding Davidson's dealings with Marcello and allegations of INS corruption. Another newsman, Timothy Robinson, is the only Post reporter known to have made any inquiries on this subject. Only one individual, Assistant U.S. Attorney Donald Campbell, acknowledges any substantive conversations with him about it.

Babcock's first BRILAB inquiry was to Homer Boynton on February 4th or shortly thereafter.* Boynton recalls him saying that he had heard there was another undercover operation similar to ABSCAM going down in the south, but Babcock did not mention the code name BRILAB, and did not appear to have sufficient information on which to base a detailed story. Boynton's response was no comment, but at some point he agreed to an interview. On February 7th at 11:32 a.m., Babcock was escorted to Boynton's office, and met there with him and Mullen. According to Mullen, the subject of the briefing was "undercover operations in general." Boynton had requested, Mullen says, that he brief Babcock concerning the Undercover Operations Review Committee

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* The first actual query by Babcock relating to BRILAB may have occurred on Saturday afternoon, February 2nd, when Babcock called Margolis and asked whether the Governor of a southwestern state was involved in ABSCAM. While this information was incorrect, and Margolis so stated, the question indicates some knowledge of an undercover operation underway in the southwest.

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and to furnish him basically the same type of information given on the previous day to Time Magazine reporter Sandy Smith: FBI procedures regarding approval of undercover operations, the method by which they are started and monitored, etc. According to Mullen, "Babcock planned to write a favorable article on the FBI in the investigation of ABSCAM. BRILAB was not mentioned or discussed during this portion of the meeting at which I was present, which lasted between 15 and 20 minutes. . ."

Following this briefing, at approximately 12:48 p.m., Babcock arrived at Margolis' office.* Margolis recalls that Babcock at some point -- probably on February 7th at lunch -- mentioned "BRILAB" by name. He says that he is not certain that Babcock used the code word prior to the evening of February 8th, but believes that if Babcock did so it would have been at lunch on February 7th. At 3:27 p.m. on the same day, Babcock interviewed Deputy Assistant Attorney General Nathan regarding undercover operations in general. Nathan recalls no mention of BRILAB. At 3:53 p.m., Babcock spoke again with Margolis by telephone.

An article entitled "FBI Has 50 Major Cases Undercover" appeared in The Washington Post on February 8th under Babcock's byline, quoting Nathan, Director Webster, and "a high ranking FBI official." No mention of BRILAB was made in the story, but Babcock continued his inquiries on February 8th, joined by other Post reporters. During the afternoon on that day, for example, he called Special Agent Lloyd Harrell and Strike Force attorney McMillan in Dallas, inquiring as to the Texas aspects of BRILAB. According to McMillan, Babcock was aware of a big New Orleans investigation involving Marcello.

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* FBI logs show Babcock's departure time as 2:10 p.m. Inquiry as to procedures followed at the FBI Headquarters visitor's desk indicates that actual times of departure are not always stated. Rather, individual visitors' badges are collected as they depart, along with records pertaining to them, and computer entries are made periodically by inserting the visitor badge into the machine. The time stated on the computer printout sheet is that of the notation, not that of the visitor's departure. Thus, Babcock's actual departure occurred substantially before 2:10 p.m., the time the record was made.

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Harrell recalls Babcock mentioning BRILAB by name, comparing it to ABSCAM, and asking about activities in Texas. On the same day, at 11:52 a.m., Babcock visited Nathan for approximately 12 minutes. Meanwhile, reporters George Lardner and Scott Armstrong called various individuals in New Orleans, including Assistant Special Agent in Charge Hal Helterhoff. According to Helterhoff, Armstrong told him to call Babcock with any information he might be able to provide. All of the individuals contacted on February 8th by Babcock, Lardner and Armstrong say that they disclosed nothing. The last known call made by Babcock on that day was to Margolis to inform him that the Post would use The Los Angeles Times story. Margolis says that he refused to discuss BRILAB, and referred Babcock to Nathan. Nathan recalls no call from Babcock.

While Babcock was calling sources in the Department of Justice, Robinson was making inquiries of individuals in the United States Attorney's Office in the District of Columbia. Robinson's first known inquiry was to United States Attorney Charles Ruff, who recalls that Robinson advised him that he was aware something was happening regarding possible organized crime contacts with the Immigration and Naturalization Service in Washington, D. C. This call, according to Ruff, occurred on February 4th or 5th; he says that Robinson had already called either Assistant U.S. Attorney Donald E. Campbell or Assistant U.S. Attorney Charles Harkins. Sometime between February 4th and 6th, Assistant U.S. Attorney E. Lawrence Barcella, Jr. says, Robinson called and said that he and another reporter were on to something, but that he would have to think about it a little more before asking any questions. He did not mention BRILAB, according to Barcella, and ended this "oblique call" by saying he would call again, though he never did. Assistant U.S. Attorney Harkins says that he was advised of a call from Robinson, probably on February 5th or 6th, but that he was in New Orleans at the time, and referred the inquiry to Campbell.

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According to Campbell, the first BRILAB inquiry from Robinson occurred on the afternoon of February 6th or morning of February 7th. Robinson told him, Campbell recalls, that he had learned of an ABSCAM type of investigation involving public officials in Louisiana, and Southern California, Nevada and Arizona, and utilizing a "wire" in the District of Columbia. Campbell says that he immediately advised both Harkins and United States Attorney Charles Ruff of this call. He and Ruff discussed what he should tell Robinson. Campbell states:

> I called Mr. Robinson back and advised that this information has some degree of accuracy to it, and it was most important that the information not be disseminated any further. I advised Mr. Robinson that if he would do nothing with the story at this time and stop making inquiries—that when the operation was ready to be closed out, I would attempt to give him some advance notice of that closeout and, if possible, give him at that time whatever information I legitimately and properly could. Mr. Robinson agreed and I felt that I had provided a real service to the Department of Justice by stopping a premature and potentially very harmful story from appearing in the press.

Following the decision to close BRILAB's covert phase late Thursday afternoon, February 7th, Campbell unsuccessfully attempted to reach Robinson. He did not speak to him until sometime Friday morning. At that time, he says,

> I advised Mr. Robinson that he should be on stand-by the next couple of days since things were beginning to happen. He wanted to know what was "happening." I told him that I could say nothing else at this time and at some later date it would be clear as to why I could say nothing more. At this point, I had done what I promised to do — I had given Mr. Robinson some notice that the investigation was going to surface. I was under no further obligation to provide any information.

Robinson told him that "there was a lot of information floating around and he proceeded to run approximately five names by me." Campbell advised Robinson that these names were unfamiliar to him, and provided them to Assistant U.S. Attorney Bernard Panetta, who also was involved in the investigation. There were approximately three more

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calls from Robinson on Friday afternoon. According to Campbell, "he would always inquire if there was anything at that time I could tell him." Campbell continued to advise Robinson that "he was just going to have to bear with me and as soon as certain events took place — I would know what I could or could not tell him." Among the events that Campbell anticipated, he says, was a possible interview with I. Irving Davidson, and an attempt to obtain Davidson's cooperation in the investigation. If that attempt proved successful, the District of Columbia phase of BRILAB would remain covert. He says that he gave Robinson no information regarding Davidson or any other aspect of BRILAB, and does not know how the Post focused on Davidson. After each call from Robinson, he says, he advised Panetta of the names or other information that Robinson indicated might be "floating around." He also spoke with Harkins after his return from New Orleans in mid-afternoon. Campbell recalls Robinson saying at one point that he could not get a handle on what was happening. On Friday evening, Robinson called him at home, and read parts of The Los Angeles Times story, advising him generally as to the article's contents.

According to Campbell, Robinson next called him on the afternoon of February 9th, and advised that he had interviewed I. Irving Davidson earlier that day. Robinson stated that the FBI had spoken with Davidson -- this had been disclosed,he sai d,by Davidson himself — and he related various questions and areas of interest covered during the FBI interview. It was Campbell's impression, he says, that Robinson "knew as much, or more, about the investigation than I did." He says,

> While my recollection of the details of this Saturday conversation with Mr. Robinson is rather vague, my impression is that I was basically receiving information from Mr. Robinson and that he was not particularly pressing me for information or confirmation since he already had the story. It is possible that either through my silence or from statements I may have made during this call, Mr. Robinson concluded that the information he received from I. Irving Davidson was basically on the mark.

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In order to refresh his memory of conversations with Robinson, Campbell says that he has spoken with him several times, attempting to reconstruct the telephone calls as accurately as possible. Robinson has advised him that he does not believe he was the reporter who came up with Davidson's name, and he does not remember who actually did. He sayd that "it is my understanding from speaking to Robinson that Mr. Robinson's primary role in the story was the Davidson interview whereas Mr. Babcock's primary role was to confirm the Davidson interview." Babcock is not known to have made a single inquiry regarding Davidson on February 9th or any other time.

Campbell describes his relationship with Robinson as follows:

> I have known Mr. Robinson of The Washington Post for probably five (5) to six (6) years. During that time I have had an excellent professional working relationship with him. I have great respect for Mr. Robinson as a fair and responsible newspaper man. On a number of occasions, Mr. Robinson has agreed not to print a story concerning an ongoing investigation of which he had knowledge. During this period, I have tried to maintain a professional working relationship with Mr. Robinson as well as the other members of the press who cover the Courthouse. I do not consider myself a "source" for Mr. Robinson. However, if Mr. Robinson received information about a matter and requested to know whether the information was "off the wall" or if Mr. Robinson asked me to confirm for him something that was already in the public domain, I might and in some circumstances probably would tell him, provided it would not jeopardize the integrity of an investigation or the safety of law enforcement officers or witnesses. This is the same relationship that I believe that a number of other supervisors in the office have with Mr. Robinson and I firmly believe that the record of this office in maintaining the confidentiality of investigations is excellent.

Ruff says that he is "now aware that Don Campbell did have conversations with Robinson and that he and Robinson had a long standing, but, to my knowledge, in no way improper, relationship prior to my becoming United States Attorney. . ." Ruff's recollection of various events differs in some degree from Campbell's. Ruff recalls

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speaking to Campbell about Robinson's possible knowledge of BRILAB sometime between 24 and 48 hours of the close of the investigation's covert phase. Although he does not remember the specific details of the conversation, he says,

> My recollection is I told Campbell to talk to Robinson to see if he would sit on it. I do not recall specifically suggesting to Campbell to tell Robinson that if he would agree to not make inquiries, that our office would give him a jump on it when it went overt. It is not generally the kind of thing that I would do.

Ruff says, "I did not tell Campbell to tell Robinson to be on standby, once the decision had been made to go overt." According to Ruff, his own conversation with Robinson on February 4th or 5th followed a similar call to either Harkins or Campbell. One of them, he says, had mentioned to him that Robinson had pieces of the BRILAB story. Since Harkins says that he did not speak to Robinson, it must have been Campbell who spoke to Robinson, and then to Ruff, prior to Ruff's contact with Robinson on February 4th or 5th. Campbell acknowledges contacts with Robinson pertaining to BRILAB, but only on or after February 6th.

Harkins recalls that he and Campbell discussed Robinson's February 5th or 6th call, after it was referred to Campbell. According to Harkins, Campbell told him that

> "Robinson was 'off base' as far as BRILAB goes. Campbell told me Robinson mentioned Arizona and apparently knew of an undercover operation, but lacked complete facts."

Summary. Campbell says that he requested Robinson to refrain from reporting BRILAB on February 6th or 7th and indicated that he would provide "some advance notice" of the operation's "close out," and "if possible, give him at that time whatever information I legitimately and properly could." His recollection as to the time of his first BRILAB conversation with Robinson appears to be contradicted by Ruff. He states that this call occurred on February 6th or 7th, but Ruff's account indicates that Campbell told him

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sometime prior to February 4th or 5th that Robinson had pieces of the BRILAB story, evidencing contact between Campbell and Robinson regarding BRILAB before that date. His statement to Harkins that Robinson was "off base" on BRILAB — after a call from Robinson was referred to him probably on February 5th or 6th — contrasts with his present version of this call indicating that Robinson had various details of BRILAB at that time. He denies providing any unauthorized information to Robinson at any time but acknowledges the possibility that his statements or silence at points during their February 9th conversation had the effect of confirming information in Robinson's February 10th story regarding Davidson.

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The Daily Oklahoman

A number of government agents and attorneys acknowledge inquiries regarding BRILAB from Jack Taylor of The Daily Oklahoman on or after February 9th. Taylor has a "working relationship," according to Assistant Director Oliver B. Revell, with many of these individuals. Taylor attended a going away party for Revell, who was Special Agent in Charge of the Oklahoma City Office until September, 1979, when he became Deputy Assistant Director for the Criminal Investigative Division at FBI Headquarters. He has attended other Oklahoma City office functions, such as an "open house" given by the United States Attorney's office in December, 1979. According to individuals interviewed, Taylor has extensive sources throughout the country.

Only one person — Revell — acknowledges any inquiry from Taylor regarding BRILAB prior to February 9th, the day disclosures first appeared in the press. It was Taylor who advised Revell that BRILAB would become an "open investigation." Revell was on annual leave in Oklahoma City during the week of February 3rd, and, therefore, was not involved in the final decision to terminate the undercover aspect of the investigation. Taylor called Revell at his home in Oklahoma on February 8th, and Revell's wife paged him at a bank to tell him that Taylor wanted to speak to him. Revell returned the call from the bank. Taylor told him that he knew that subpoenas and search warrants were currently being served in connection with an FBI case known as BRILAB. He mentioned Joseph Hauser, and said that politicians and labor leaders in Louisiana and Texas were involved in the case.

Revell recalls telling Taylor that he could not confirm any of these facts, and that he knew of no subpoenas or search warrants being served. Taylor asked whether it would hurt the case if he published the information he had at that time. Revell says, "I requested Mr. Taylor not to make any of his information public because there was

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an ongoing investigation concerning some of the individuals that he had named." Taylor agreed to Revell's request, asking to be advised when he could publish his story. Questioned as to whether information might be available from a public source, Revell says he told Taylor that a federal judge in Los Angeles might be making information available in the next week or two. Revell says he was unaware of Judge Pregerson's recusal that day.

According to Revell, he then went to the Oklahoma City FBI Office, where he contacted Organized Crime Section Chief Sean McWeeney at FBI Headquarters, and learned that Taylor's information was substantially correct, and that Judge Pregerson had announced his recusal. Revell says that he next conferred with Special Agent in Charge Edmund Pistey in Oklahoma City, then Assistant Special Agent in Charge Wayne Gilbert, and possibly Supervisor Hayes Burleson, relaying to them "the information I had received in the telephone call from Jack Taylor and what I had learned from the telephone call to Mr. McWeeney at Headquarters." He requested that Taylor be contacted and "advised that I was not aware of the service of subpoenas when we spoke and I wished to apologize if my comments misled him." Pistey recalls a telephone conversation with Revell on that date, in which Revell advised him that Taylor was aware of a great deal of information in the BRILAB case, and that he had requested Taylor not to release it. "Revell furnished me the benefit of his contact with Taylor," Pistey says, "in the event I should be called by Taylor."

Revell was extremely knowledgeable about BRILAB because his office — the Criminal Investigative Division at Headquarters — was responsible for reviewing all major operational BRILAB decisions. He acknowledges that he originated the idea of introducing certain individuals in Oklahoma to the BRILAB undercover agents, thereby bringing the investigation to Oklahoma, after his move to FBI Headquarters. A number of these individuals

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had been subjects of FBI investigations while Revell himself was Special Agent in Charge in Oklahoma City. One of them publicly had attacked Revell personally, charging misconduct.

Revell acknowledges a "professional/confidential" relationship for several years with Taylor. According to Special Agent Wayne R. Gilbert, Taylor furnished information of value while Revell was assigned to Oklahoma City. Revell confirms that Taylor has been a source of information in several cases. Their conversations began, he says, shortly after Revell became Special Agent in Charge in March, 1978, when Taylor learned of Revell's intention to "vigorously pursue" cases on organized crime, white collar crime and official corruption. Revell says that Taylor "was convinced that I was serious about pursuing significant cases within these areas and gave me a general briefing concerning his extensive knowledge of official corruption in the State of Oklahoma." According to Revell, "Taylor's information predicated an investigation into the activities" of one public official who later became a BRILAB target. Revell says,

> Taylor requested confidentiality whenever he furnished any information of alleged irregularities but advised that he did not want to be considered an FBI informant. Taylor was never tasked to obtain information and he was never paid for any information that he furnished. In addition, he never asked for or, to my knowledge, expected me to leak information to him. He did ask for prompt notification when cases went public and for background information when possible.

Revell says that two individuals involved in BRILAB and described by Taylor's stories — a particular Tulsa oilman and a state public official — have been frequent topics of conversation. He and Taylor have discussed one of these individuals, he states, literally hundreds of times. He also has acknowledged talking to Taylor about two other BRILAB targets mentioned in The ~~Daily Oklahoman~~ articles.

Revell's acknowledged "professional/confidential" relationship with Taylor contrasts with the approach of his successor. Pistey says that he was called by Taylor on February 18th regarding BRILAB: this was his first contact with Taylor since becoming

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Special Agent in Charge. Taylor called again on February 22nd, asking for confirmation of various facts. According to Pistey, Taylor told him that he would not write his story if the FBI so requested. Pistey declined to make such a request. He also declined during this conversation, as on February 18th, to confirm or deny any information. As it happened, the facts for which Taylor sought confirmation on February 22nd never appeared in any of his stories. He has had only one contact with Taylor since February 22nd — an inquiry regarding an unrelated matter in April or May. He has instructed all Special Agents to refer calls from Taylor to him.

In addition to the conversation with Taylor on February 8th, Revell had three more contacts with him prior to February 24th. During one, he acknowledges, he asked Taylor whether he had ever heard of a connection between Carlos Marcello and the Tulsa oilman, mentioning him by name. He says that he knew at the time that the FBI in Oklahoma City was investigating an "'energy' case" involving the oilman and another individual who was allegedly connected with Marcello, and that a separate obstruction of justice case had been initiated as a result of certain conversations involving both Marcello and the oilman. Revell says,

> The purpose of my question of Taylor was to determine whether Taylor would have any information concerning (the Tulsa oilman). I was attempting to obtain further data on (the Tulsa oilman) which would be of value to our ongoing investigations. . . .
>
> Upon hindsight, I felt like my question to Taylor concerning (the Tulsa oilman) and Marcello had perhaps opened a door for Taylor to pursue a connection between the two persons, which may have led to the portion of his article on February 24, 1980, relating to a scheme between an Oklahoma oilman and Marcello and the possible intimidation of witnesses.

He says, however, that the conversation concerning this matter occurred on or after February 13th. A reference to the scheme already had appeared in Taylor's February 10th article. In none of his conversations with Taylor, according to Revell, did he provide

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any unauthorized information or confirm anything appearing in Taylor's article. Revell says that The Daily Oklahoman stories contain numerous inaccuracies — relating, for example, to participants at various undercover meetings, and the role of the Oklahoma City FBI Office in the investigation — demonstrating that Taylor's source must have been someone unknowledgeable about the investigation.

None of the individuals contacted by Taylor after February 9th — Special Agents Wayne Gilbert, John Warren, Richard Elroy, John R. DeWitt— say they provided any information or confirmation to Taylor. United States Attorney Larry Patton had a general conversation with Taylor regarding entrapment, but states that he refused to speak on this subject as it related specifically to BRILAB.

Another individual whom Taylor contacted regarding BRILAB was Assistant United States Attorney Teresa Black. She has acknowledged that she has seen Mr. Taylor and his wife socially on various occasions. In a conversation on February 18th or 19th, she says, Taylor told her about Hauser's role in BRILAB and other investigative details, including the relationship between the BRILAB undercover agents and Marcello. She recognized some of this material in Taylor's February 24th article. Black says that she had no knowledge of BRILAB prior to February 9th, a contention corroborated by United States Attorney Patton and FBI Agents in Oklahoma City, and she denies providing any information to Taylor regarding BRILAB. She acknowledges meeting Davidson in New Orleans while she was assigned there as a Strike Force attorney, and speaking to Taylor about Hauser on matters unrelated to BRILAB. During the leak investigation, Special Agent Isakson in New Orleans reported that a source in New Orleans had advised him that Black was responsible in part for the leaks to Taylor.

Summary. Circumstantial evidence indicative of Revell's possible involvement in leaks to Taylor includes his acknowledged "professional/confidential" relationship,

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his successful request that Taylor hold the BRILAB story, the substance of his other conversations after February 8th, and his conversations prior to that date regarding individuals involved in BRILAB, as well as his detailed knowledge of the investigation.

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II. CAUSES AND MOTIVATIONS

The sheer size and scope of ABSCAM, PENDORF and BRILAB gave rise to a substantial risk of premature exposure. In light of how many people they involved and how long they operated, preserving them as covert investigations for so long was no small achievement. The operation of the Title III wiretaps in BRILAB and PENDORF required assignment of a very large number of agents during a comparatively extended period of time. Accompanying applications to the courts for Title III reauthorizations were summaries in the form of affidavits and other documents, some of which were required to be made public eventually.

The risk of exposure also was increased tremendously by an expansive dissemination of information. Communication occurred through countless teletypes, airtels, memoranda, telephone calls, conferences and other means. Agents and attorneys not directly involved in the investigations were made privy to information since the targets were of wide, sometimes long-standing investigative interest. Whether such dissemination was necessary is assessed best by others. Many involved in the investigation, however, believe that lax security contributed to a general climate of opinion or attitude that made leaks more likely.

The risks of leaks was greatly enhanced, as well, by the sensitive and potentially sensational subject matter of these investigations. The stakes in each were substantial, as was the anticipated impact of possible prosecutions. Enormous gain or loss could be expected for all whose lives and careers were touched — not merely targets, but investigators and prosecutors, as well as their agencies. All knew that much would depend on how the press depicted them. The first factual version made public could be expected to leave a lasting impression.

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One apparent motivation for disclosures involved, ironically, an effort to preserve or protect ongoing investigations in a covert phase. As Department of Justice officials learned of leaks and were confronted by reporters, some in effect entered into agreements or understandings, explicit in varying degrees. Reporters were persuaded to hold their stories; something would be given later in return. In ABSCAM, for example, alarm spread as officials became aware that Newsday and NBC had the story. Statements and circumstantial evidence suggest that at least some information was provided on the understanding that no story be used until the interview phase was completed on February 2nd. Awareness that The Los Angeles Times knew of an informant's cooperation may have prompted an analogous arrangement in BRILAB. This motivation, however, could not have been the reason for any initial or original leak to Newsday or NBC in connection with ABSCAM, or to any of the other media organizations that had stories concerning PENDORF or BRILAB. In the leak of information to The Philadelphia Inquirer and The New York Times regarding ABSCAM, for example, reporters did not have detailed information until virtually the end of the investigation, well after the initial leaks. No evidence exists that either received information as a quid pro quo for holding stories they already had.

Promoting institutional image — either of the Department of Justice generally, or the FBI specifically — was another probable motivation. So-called media representatives are now assigned full-time to press activities in nearly every FBI office. A sizable staff of Special Agents is similarly assigned at Headquarters. The subject matter of the investigations involved here, and their extraordinary success, made them potentially rich sources of pride and acclaim. Investigators and attorneys working on them, as well as media relations people, had a natural interest in assuring that their stories were told, and told well. Many of them perceived their respective offices as making special contributions to the investigation, and deserving of particular credit in the competition for publicity that might follow.

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Rivalry and competition among offices and agencies occurred in each of these investigations. While natural, healthy, and inevitable to an extent, the tensions resulting from management of multi-district inquiries were conducive to unauthorized disclosures. In at least one instance, relating to the Gibson/Katz leak, such disclosures may have been motivated by a personal animus or bias resulting from present or past disputes. Whether the disagreements concerned major policy decisions, or small matters of logistics, they diluted feelings of loyalty and trust that normally operate among law enforcement people to discourage leaks.

Enhancing institutional image may have verged on self-promotion to some degree. The two motivations are difficult to distinguish precisely. Favorable publicity helps sell books and enhances employment opportunities outside the government. It also assists an agency in dealing with Congress or the public.

The commendable idea of "openness" in government sometimes may have been used as a justification for promoting individual careers or institutional image. It also helped create a climate conducive to close personal and professional relationships with reporters. There was nothing regarding any of these investigations that seemed to bear unfavorably on the government — nothing being concealed that called for "whistle blowing." Openness appeared to be in the government's interest — especially, openness to "friends." Some reporters were regarded as "friends" because they had done favorable articles on past cases, or even furnished tips or leads. One actually had been treated officially as a source or informant, not merely a friend. The context of some leaks was an ongoing flow of information both ways — a pattern of dealing characterized by candor and confidence. This phenomenon seems to have been particularly true, for example, of BRILAB leaks in San Diego and New Orleans.

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Some of the leaks may have resulted from misplaced trust or misunderstandings. Interviews with agents and attorneys have indicated, for example, widely divergent views as to the meaning of "off the record." The meaning of the term to some is that particular information disclosed to reporters may not be used at all. To others, it is that the information must be confirmed by other sources, without attribution to them. To still others, it means that the information may be used on a background basis without direct attribution. A number have lamented the ambiguity after seeing in print sentiments or information they believed they were conveying in confidence. *

Moments of weakness or general naivete may account for some of the disclosures. Individuals unaccustomed to dealing with the press may have been more susceptible to the aggressive and assiduous reporting techniques sometimes employed — techniques described recently by the Attorney General in his admonitions to Department of Justice employees, regarding leaks. The excitement generated by these investigations, especially as they neared an end or particularly successful turning point, added to the risks of too much talk. Initial leaks may have encouraged disclosure of other aspects of the same investigation. The ABSCAM leak may have precipitated subsequent disclosures in BRILAB and PENDORF.

The role of government informants in leaks cannot be ignored and may have constituted a contributing factor in one leak. The motives for such disclosures may be as complex and varied as the individuals themselves and cannot be analyzed reliably in the absence of additional information. Personal gain appears one likely motivation.

While none of these causes and motivations may be particularly noble, no evidence exists of payoffs or obstruction of justice. Nor is there any indication that the leaks were prompted by personal animus or other bias or prejudice against any of the potential targets. At some point, prior to passage of effective legislation dealing

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* There are indications that information given to at least one reporter "off the record" may have been shared by him with others, diluting its confidential character and prompting inquiries.

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with organized crime, there may have been a tendency on the part of law enforcement agencies to smear targets in the press rather than subject them to the criminal process. With more effective laws such as the RICO Statute and Title III, such smear tactics are less a temptation. The tendency to use them, never prevalent, now is regarded as a thing of the past. No evidence of them has been found in connection with these investigations or their targets.

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III. REMEDIES

Although disciplinary sanctions against the individuals deemed culpable for leaks in ABSCAM, PENDORF and BRILAB may serve to deter recurrences of such misconduct, as well as to vindicate the interests of justice, our investigation indicates that a number of more general remedial measures should be considered.

1. Improved Security Procedures.

More stringent procedures regarding treatment of sensitive files and information, combined with narrower dissemination of such information among offices or individuals, should be adopted in undercover operations. An actual "need to know" should be the criterion for distribution of information. Mere awareness of an operation such as ABSCAM, PENDORF or BRILAB should be strictly limited.

The theory and rhetoric of undercover operations currently may incorporate this approach, but the practice seems otherwise. Whatever the procedures set forth in manuals and regulations, this investigation has dramatized the deadness of that letter. Safeguards that have made the FBI an agency that performs so discreetly and effectively in foreign counterintelligence tasks should be applied to operations and procedures aimed at organized crime and political corruption.

Dissemination of materials associated with Title III intercepts should be subject to stringent procedures and safeguards similar to those that now apply to distribution of grand jury materials. These should be implemented by Department of Justice regulations. Compliance with them should be subject to close oversight.

As to all materials associated with undercover operations, one simple and highly desirable measure would be to mark and log copies of documents, thereby maintaining a record of distribution. Numbers of copies should be kept to a minimum, and access

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to them limited. Attorneys should be encouraged to be more sensitive to security considerations involved in handling and storing of documents and other materials.

Different methods of structuring undercover investigations are worthy of consideration. One alternative model deserving study would involve a small investigative team operating out of a single city, working full time on one case and traveling to locations where covert activities become appropriate. This approach is distinguishable from the current typical method of operation involving a large number of agents and attorneys scattered among offices around the country with varying degrees of participation, time commitments, supervision, and authority. Rivalries that sometimes arise during investigations would be reduced by temporary assignments to a single, relatively compact team operating under a tight command structure and reporting to a single official responsible for making and enforcing decisions. The base of the team need not be Washington itself, but a clear geographical center as well as chain of organization would appear to be advisable. This concept at least deserves study, bringing to bear insights and critical scrutiny from the Criminal Division, U.S. Attorneys, and law enforcement agencies.

2. General Press Policy Clarifications and Enforcement.

Most of the leaks here could have been avoided by strict adherence to the pertinent regulations and guidelines regarding press contacts. Compliance with these policies should be given greater attention. One means of heightening awareness of the dangers and pitfalls of straying from these rules would be to hold training sessions for all agents and attorneys, especially those who have positions of authority that put them in contact frequently with the press.

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The response "no comment" should be standard operating procedure in connection with an inquiry concerning a pending investigation or case. This rule now exists, but often is honored in the breach. Our investigation indicates that a "no comment" may be a futile gesture unless it is expressed vigorously at the outset of a conversation and insistently followed afterward. Mere silence may have the effect of confirming facts if a reporter believes that the official will deny misinformation.

Conversations "off the record" should be avoided. The lack of clarity that adheres to that term should give pause to prosecutors and investigators. As a practical matter, it is the reporter who has the last word as to what appears in print, and how it is portrayed in context and attributed. Accountability that accompanies direct attribution can be highly sobering — helping to prevent the spreading of speculation of rumor disguised as fact.

Whatever comment is made, the United States Attorney or Section Chief should be the predominate, if not exclusive, spokesman for the office. In theory, this proposition is espoused by almost all. In practice, like other rules discussed here, it is often ignored. The reasons for it are self-evident. Many Department of Justice attorneys are recent law school graduates with limited litigation experience, let alone background in press relations; they anticipate departure to private practice after a short period of years; they are on the litigation front line, more apt to be swayed by the excitement or emotion of an investigation or contentious litigation. For these reasons, and others, it is the U.S. Attorney or Criminal Division Section Chief who ought to speak publicly for an office. He or she is ultimately accountable for the activities of the office — the one responsible for major policy and personnel decisions, and the most likely to have

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the knowledge, experience and temperament necessary for the difficult task of dealing with the press. In the absence of specific authorization, substantial contacts by subordinates with reporters should be avoided.

General press policies in a number of areas also merit critical review. At a time when the FBI has sought to be more open and forthcoming, there may be a tendency to promote or "hype" its activities. The question seriously must be asked whether a bureau of criminal investigation can also function as a bureau of public information.

At the same time, in fairness to the FBI and other investigative agencies, better means must be found to give credit where it is truly due in connection with successful cases. Where the first public appearance in a case is a Grand Jury indictment, the law enforcement agency involved in the investigation may receive little or no real public recognition, though its contribution may have been critical. Often, the person most deserving of praise is the agent on the street, who may endure the greatest danger and discomfort. Upon indictment, it is the U. S. Attorney and his office who control the public aspect of the proceedings, issuing press releases that sometimes make no mention of the agency. Yet, the attorneys' work may have been only a part of the total effort. This fact creates a temptation to leak before a case reaches that stage. There should be a means for assuring that the agency receives proper recognition.

3. Reporters as Informants.

In general, the notion that relationships with reporters can be a two way street, or should be so, bears critical scrutiny. While confidential information concerning criminal wrongdoing may be provided by reporters to law enforcement authorities on an "off the record" basis, such tips or leads should be regarded with some caution. Wholly

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apart from questions as to the reliability of the information, the relationships are likely to lead to difficulties.

Specifically, our recommendation is that informant status for reporters be abolished and that agents and attorneys avoid dealings that assume even an appearance of such relationships. Under present regulations, explicit approval must be obtained from FBI Headquarters to designate any newsman formally as an informant, and in practice approval is given only sparingly and selectively. The mere possibility of informant status, however, fosters and legitimizes a range of relationships and dealings that may be perceived as leading eventually to formal designation. Individuals do not become informants instantaneously: they engage in a process of conversations and exchanges necessary to create mutual confidence and trust at some personal level. Where the potential informant is a newsman, this process itself may be dangerous. It exerts pressures and conflicts tending to compromise the agent or attorney, if not the reporter. Neither side is likely to get anything without giving something up.

The value to the government of tips or leads from informant newspeople is likely to be marginal at most. Truly trustworthy information probably will find its way into the public domain on the air or the printed page, since reporters are not likely to sit for long on a good story. Information that every citizen has a legal or moral obligation to provide, such as knowledge of an imminent or ongoing crime threatening life or property, will be furnished by reporters to the same extent regardless of whether they are informants. Newsmen need not be informants to volunteer information. Communication in other forms poses fewer dangers to law enforcement interests, as well as to our democratic institutions and system of free expression.

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4. Media Representatives.

Insights gained during this investigation — as well as some of our specific investigative results — suggest that this position probably should not exist.

Recognizing the limitations of our perspective, we recommend at least a thorough evaluation of the role of media representative. In addition to sometimes wasting scarce manpower, the position by its mere existence creates relationships and conflicts, often subjecting agents to pressures and expectations that are virtually impossible to meet successfully. They are expected to advance a favorable view of FBI activities without compromising investigations, inappropriately commenting on pending litigation, or alienating other agencies that may be involved in cooperative ventures. The task is extraordinarily difficult, and judgments must be made against the background of demands for "openness" and candor on the one hand and security considerations on the other.

An alternative to the present media representative role would be to make the Special Agent in Charge chief spokesperson for the office, as formerly was the practice, while assigning an agent, perhaps on a part-time basis, to deal with inquiries requiring only routine responses. The Special Agent in Charge would be the one responsible for responding to any inquiry regarding an ongoing case. Physical distribution of a press release, on the other hand, would be assigned to an agent with part-time press functions. The release itself might be drafted by such an agent, but no actual distribution of it would occur without personal approval by the Special Agent in Charge. Such a general restructuring of responsibilities should be implemented on an experimental basis in a sample of larger and smaller offices.

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Even if the position is preserved, its present form and procedures may merit revision. Access of the media representative to sensitive material, for example, ought to be stringently restricted — and publicly known to be so. In at least one office observed during this investigation, the public relations staff was directed to review routinely all incoming and outgoing teletypes. Such a practice creates obvious dangers of disclosure, whether purposeful or inadvertent. Narrowing the knowledge available to media representatives, however, may only dramatize the inherent difficulties of this job. The media representative often fields inquiries on behalf of the Special Agent in Charge on matters where nothing can be said publicly. If he truthfully knows nothing, he can do this job well, but eventually he will be ignored by many reporters, as they seek more cooperative sources. If he is knowledgeable, he risks the dangers of disclosure. The media representative's task, in this sense, may be truly untenable. If the position is retained, regardless of form, training for it should be improved, so that agents so assigned will be better prepared for the tremendous conflicting pressures that they must confront.

Individuals responsible for media relations should not be permitted to violate, in effect, the chain of command in divisions responsible for criminal investigations, as seems to have occurred here. Officials at FBI Headquarters should not be able to divulge to the press non-routine information regarding a pending or otherwise sensitive investigative matter — or directly contact supervisors or agents for that purpose — without clear and explicit approval from the Assistant Director for the pertinent Division. Similarly, individuals responding to press inquiries in field offices should be forbidden from approaching street agents for information in the absence of specific authorization from the Special Agent in Charge.

The rationale for such a rule relates to the pressure that may be brought to bear, purposely or otherwise, by individuals in positions of apparent authority. They

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may exert substantial pressure on agents to disclose information to them that they simply have no need to know. They may not appreciate fully the damage done by revealing particular facts or information.

5. Statutory and Regulation Revision.

Existing statutes and regulations pertinent to leaks suffer from vagueness and underbreadth. Imprecision afflicts, for example, the Privacy Act in ways that preclude effective enforcement. The meaning of a "system of records" should be further defined so that there are no doubts about its enforceability — or its application, for example, to facts such as those present here. Similarly, the Department of Justice regulations that pertain to dissemination of information should be clarified and narrowed. Even where their substantive prohibitions are clear, and adherence to them would have prevented the leaks that occurred here, the remedies or sanctions may be difficult to apply effectively.

Consideration should be given to adopting new statutes or regulations that would offer additional prohibitions and sanctions -- covering, for example, the possibility of civil remedies against leakers. Remedies should be available not merely to the victims of unauthorized disclosures, but also to the government. Making civil remedies available to the government would seem especially appropriate with respect to leakers who are no longer government employees, and who are immune from any administrative sanctions. The government is, in a real sense, a victim of leaks, particularly when they jeopardize prosecutions. Leaks discredit the entire law enforcement process, as well as undermine specific cases, and thereby damage legitimate governmental activities.

Another possibility would be to incorporate restrictions on dissemination of confidential information into contracts signed by agents and attorneys at the time they join the Department of Justice. An explicit contractual provision would enable the government to recover civil damages from individuals responsible for unauthorized

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disclosures regarding an ongoing investigation or similarly sensitive matter. The clause could be framed to pertain to activities following resignation or retirement as well as during government service.. The objective would be to reduce the profit or advantage to be gained by leaking information for self-promotion purposes.

6. Internal Enforcement.

To a large extent, the frequency of leaks will be affected by the vigor and energy devoted to pursuing leakers. To date, investigations generally have been unproductive, lacking strong support from the Department. The result has been a climate of acceptance, even tacit approval, among employees generally. Leaks in effect have become a way of life. Investigations of the kind directed by the Attorney General here, backed by unequivocal endorsement and necessary resources, would help alter the prevailing climate of opinion. Those responsible for this type of disclosure certainly are not whistle-blowers; they do not deserve the respect and admiration accorded those who actually alert the public to concealed governmental misconduct or error.

In the field, Special Agents in Charge and United States Attorneys should be required to report instances of unauthorized disclosures regarding pending investigations or prosecutions in their districts. They should be encouraged to investigate such leaks, and should be supported with manpower and other resources in their efforts. Where appropriate — in light of the magnitude of a particular leak, the sensitivity of the subject matter, or possible identity of suspects — special teams of agents or attorneys should be dispatched to undertake the investigation. The results of leak investigations should be formally communicated within the FBI and Department of Justice as a deterrent to unauthorized disclosures, and as an expression of the strong policy of the Attorney General and Director of the FBI that this type of misconduct will be subject to severe disciplinary sanction.

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7. Restrictions on Former Employees.

Regulations with respect to removing documents by government employees at the time of their departure should be made more specific, and penalties for violating them more stringent. One possible procedure would be to require individuals leaving governmental service to attest that no such documents are in their possession. An affidavit to this effect might be required, for example, as a condition of final financial compensation or retirement benefits. The danger of leaks would be reduced by stronger assurances that materials could not be copied and taken by retiring or resigning agents or attorneys. Civil remedies discussed above might be made applicable against former employees as well as present ones.

8. Informants.

The possible involvement of a government informant in the ABSCAM leak raises questions of a broader scope as to government relationships with individuals who cooperate in criminal investigations. Dealing with such individuals is an excruciatingly difficult and delicate task. Their motivations, backgrounds and modus operandi often make them resistant to control. Yet, at a certain point, the government may become legally and practically accountable for their actions.

Means must be devised to discourage and deter unauthorized disclosures and other misuse of confidential information by such individuals. One method would be to incorporate direct prohibitions, coupled perhaps with financial disincentives, in a formal understanding or agreement at the time an individual commences cooperating in an investigation. An informant or cooperating individual should not be permitted to profit from leaks or any other improper activity. At the very least, the government must know with as much certainty and precision as possible, the full scope of such an individual's activity. Without presuming dishonesty or concealment, periodic polygraph

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examinations would be one means of helping to verify an individual's truthfulness as to possible leaks. It may be, indeed, the only means, in light of the unavailability of reporters to corroborate the informant's version. Even when no publicly visible leaks have occurred, polygraph examinations would assist the government in learning of improper disclosures that may surface later.

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FINAL COMMENT

Despite the extraordinary effort made here, we do not claim to have ascertained the identities of all the leakers, or perhaps, all the sources of any particular news story. Certain of the leaks are essentially "unsolved." Many of the news stories very probably came from more than a single source, resulting from separate contacts with numerous individuals, each of whom furnished a piece of the puzzle or confirmed part of the overall account.

In doing this investigation we have sought to be mindful of the conflicting, powerfully important interests to be balanced in this mission. The press has a legitimate and critical role in covering the criminal process at every stage — investigative, prosecutive and judicial — on the streets and in the courts. Whatever the press finds out, it is legally free to print. Yet, there are certain things the government has an obligation to prevent the press from finding out and to keep out of the public domain. It has a duty to protect all citizens, whether innocent or guilty in its eyes, from the type of unauthorized disclosures that prompted this investigation. This duty springs from the fundamental guarantees of Sixth and Fifth Amendments — the rights to a fair trial and due process - as well as a practical sense of decency and fairness. These rights are no less sacred than First Amendment rights and deserve an equally generous reading.

We have sought to conduct this inquiry in a way that minimized any possible inhibition on press activities and any adverse effect on relationships with "sources" or on availability of information. We have recognized that the mere fact of the inquiry might have some effect in discouraging contacts with the media. But we have not said or done anything to chill legitimate contacts. A serious, responsible inquiry — which we hope this has been — should not have that effect. The results of the investigation,

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rather than the fact it was done, should be the source of any lasting impact. The results should speak for themselves.

Our hope is that these results justify the commitment of time and energy made to this important mission, and may help deter unauthorized disclosures by indicating that there is a risk of detection and discipline.

Office of the Attorney General
Washington, D. C. 20530

Return to Merrick to hold & keep available

MEMORANDUM FOR: The Attorney General

FROM: Merrick Garland MBG

SUBJECT: Amendments to CFR: Disclosure of Information Concerning Pending Criminal Investigations

At your request, I have drafted proposed amendments to the Code of Federal Regulations intended to clarify and tighten the obligations of Justice Department personnel with respect to disclosure of information concerning pending criminal investigations. The draft amendments are in the form of the strict "no comment" rule you requested. In addition a milder, "no prejudicial comment" option has been drafted.

The draft rules and a descriptive memorandum were distributed for comment to the Deputy, OLC, Dick Blumenthal, and each of the Divisions with criminal components. This memorandum describes 1) the existing regulations governing disclosure of investigative information, and 2) the proposed amendments. The section discussing the amendments attempts to describe, in abbreviated form, the views of those who commented on the proposal. As you might expect, some of the commentators had precisely opposite views -- some finding the draft regulations too strict; some finding them too lenient. Where possible, suggestions of the commentators have been incorporated into the draft regulations attached to this memo.

One final, and important, point. You indicated last week that you intended to announce the new disclosure regulations in your speech to employees this Wednesday. Dick Blumenthal, Civil Rights, and OLC all strongly oppose such a plan. Dick urges you to defer announcement of specific new regulations until the completion of his investigation. His principal argument is that an announcement now may undercut the government's position in administrative termination proceedings: Defendants could argue that the promulgation of new regulations constitutes an implicit admission that current regulations don't cover their behavior. OLC strongly agrees with Dick's position. They also suggest that the ABSCAM targets themselves could point to new regulations as evidence that the Department had not previously taken sufficient steps to prevent prejudice to their trials. Dick also notes that his investigation may produce insights that would be useful in rewording the regulations.

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The Civil Rights Division's principal argument is that we are proceeding with too much haste, and need more time to reflect. Specifically, they are concerned that there has not been time to consult United States Attorneys about the problems they face in this area. Again, OLC agrees. They argue that there are numerous problems with a flat "no comment" rule, and that time should be taken to consider the occasions upon which disclosure of investigative information might be necessary and appropriate.

The above presuades me that you should not describe the specifics of a new rule in your Wednesday speech. Instead, you could state that: (1) current regulations forbid any ABSCAM-like disclosures, and (2) you have ordered the drafting of a revision of the CFR to further clarify, and tighten, employee responsibilities in this area. OLC would then begin work on a final draft of the amendments, for publication whenever you deem appropriate.

If you accept the above recommendation, you do not need to read the balance of this memorandum at this time. You may, however, wish to read the first section, which describes the relevant current regulations. Moreover, OLC would appreciate guidance from you as to the kind of regulations you prefer (e.g., a flat "no comment" rule, a "no prejudicial comment" rule, etc.). The easiest way to provide that guidance would be -- at your leisure -- to read the remainder of this memo and make marginal comments regarding the various proposals discussed therein. Of course, if you decide you do want to announce a new regulation on Wednesday, please read the balance of this memo and indicate which of the alternative proposals you wish to adopt.

CURRENT REGULATIONS GOVERNING DISCLOSURE

Three segments of the current CFR are relevant to disclosures of the kind that occurred in the ABSCAM investigation. These existing regulations plainly prohibit disclosures of that nature. However, the regulations are neither as precise nor as stringent as you have indicated you desire.

1. 28 CFR §50.2 (Release of Information Relating to Criminal and Civil Proceedings). This is the most directly applicable, currently effective set of regulations. Although the criminal subsection, §50.2(b), purports to apply to "the release of information to news media from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise," the bulk of the section is more appropriately applicable to the post-charge stage. */ Nonetheless, the following portions of 50.2(b) clearly do preclude disclosures of the ABSCAM variety.

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*/ For example, §50.2(b)(3) permits disclosure of a defendant's name and background information, the substance of a charge, and "the length and scope of an investigation." [In context, the latter arguably refers only to investigations which have already resulted in charges, but this is not clear].

§50.2(b)(2) prohibits Department personnel from furnishing "any statement or information which could reasonably be expected to be disseminated by means of public communication, if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial." §50.2(b)(3) provides that "where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public." Finally, §50.2(b)(6) states that personnel "should refrain from making available . . . [s]tatements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial."

These regulations are reproduced in the United States Attorneys' Manual, 1-5.540. In July, Judge Bell issued a directive elaborating on §50.2, and listing a number of special cases where disclosures would be permitted (e.g., acknowledgment of investigations of publicized civil rights violations, and of investigations deriving from other agency referrals). That directive expired January 23rd. Judge Bell's directive, and a complete copy of §50.2, are attached.

2. 28 CFR §47.735-1(b) (ABA Canons). This regulation provides that "attorneys employed by the Department are subject to the canons of professional ethics of the American Bar Association." The Canons have now been superceded by the Code of Professional Responsibility. Since the regulation has not been changed, it is not clear which set of ABA rules applies to Department attorneys.

The most applicable of the old Canons was Canon 20 ("Newspaper Discussion of Pending Litigation"), which stated:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any ex parte statement.

While Canon 20 is no longer part of the ABA's ethics code, the District of Columbia Bar does continue to give it effect. It is incorporated as part of the current version of D.C.'s Code of Professional Responsibility.

The ABA's present Code of Professional Responsibility includes two Disciplinary Rules which could be applied to prohibit disclosures of investigative information. The first, DR 7-107(A), is the successor to the old Canon 20. Although it is entitled "Trial Publicity," it provides:

> A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:
> (1) Information contained in a public record.
> (2) That the investigation is in progress.
> (3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.
> (4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
> (5) A warning to the public of any dangers.

The other potentially applicable Disciplinary Rule is the Code's general catch-all section, DR 1-102(A)(5), which states that "A lawyer shall not . . . engage in conduct that is prejudicial to the administration of Justice."

3. 28 CFR §§16.40-16.57 (Privacy Act Regulations). 28 CFR §16.26(b)(8) provides that "Except to the extent permitted pursuant to the Privacy Act, employees of the Department shall . . . . [d]isseminate no information concerning individuals outside the Department except when authorized by 5 USC 552a . . ." On its face, this seems to apply to any and all disclosures of information about targets of criminal investigations. (Indeed, if applied literally it would prohibit numerous public announcements now made at all levels of the Department every day). However, the introduction to these regulations states that they "apply to all records contained in systems of records maintained by the Department which are retrieved by individual name or identifier . . . " 28 CFR 16.40(a). Thus, the regulations appear to apply only to disclosures from records contained within "systems of records," and not to all disclosures. The regulations therefore retain the same ambiguities, and the same problems with enforcement, possessed by the Privacy Act itself. These difficulties were discussed in detail in my memo of 2/11/80. Fred Hess, for the Criminal Divison, agrees with this conclusion. OLC, however, reaffirms its earlier-stated view that the "system of records" requirement does not represent a major stumbling block.

4. Miscellaneous Provisions. In addition to the above, a number of other more general OPM and Departmental regulations are arguably applicable to the ABSCAM leaks.*/ Also possibly applicable is 28 CFR 45.735(10), which prohibits an employee from making an "improper use of . . . information" which comes to him "by reason of his status as a Department of Justice employee." Although this section's applicability to mere disclosure alone is not completely clear as it is primarily aimed at "use for financial gain," the section does refer to "any other improper use." Finally, the FBI's internal regulations prohibit unauthorized disclosures by agents. See FBI Manual of Administrative Operations and Procedures §1-19(2); §11.

DRAFT AMENDMENTS

The draft amendments are the first attachment to this memo. They are cast in the form of additions to 28 CFR §50.2. (See page 2, supra.) The principal amendment is a new subsection, labeled §50.2(b), which will govern the release of information from the time a criminal investigation commences until the time formal charges are filed. Subsidiary amendments then recast the old §50.2 (b), relabeled §50.2(c), so that it now governs the period from the time a criminal charge is filed until all proceedings arising from the charge have been terminated. §50.2(d) [the old 50.2(c)] states the rules for civil investigations and litigation. No effort has been made to alter the substance of either of these latter two sets of rules [(c)&(d)]. The following comments concern problems which are lurking in the proposed amendments.

1. "No Comment" or "No Prejudicial Comment." Two alternative options for the core of the regulation are presented for your consideration. At your suggestion, Option I is worded as a flat "no comment" rule. It states: "No employee . . . shall release to any unauthorized person any information concerning specific criminal investigations." §(b)(2). Three somewhat narrow exceptions are provided in §(b)(3). The advantage of this formulation is that it creates a clear prohibition which reaches the problems that prompted the rule with a minimum of ambiguity. It leaves little room for post-hoc argument over whether a particular disclosure was covered by the rule. The Tax Division firmly supports this type of strict no-comment rule.

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*/ See, e.g., 5 CFR §§ 735.201a(c) (impeding government efficiency); (e) (making a government decision outside official channels); (f) (affecting adversely the confidence of the public in the integrity of the government); 735.209 (conduct prejudicial to the government); 28 CFR §§ 45.735.2(c)(3)(impeding government efficiency); (c)(6) (affecting adversely the confidence of the public in the integrity of the government); 45.735-18 (conduct prejudicial to the government).

The disadvantage of this kind of formulation is that it may be overinclusive, and hence may be seen as in conflict with the Department's general policy of openness and candor. OLC also suggests that the regulation's overbreath might raise First Amendment problems. Not every comment on a specific investigation would be detrimental either to the target or the investigation, and some comments (not all of which we can predict in advance) might well be beneficial. Criminal, Antitrust, Civil Rights, OLC, and Judge Bell's July Directive all offer illustrations of disclosures that might be warranted, but that a flat no-comment rule would bar. For example, such a rule would prevent confirmation that an investigation is underway in a case in which the public is clamoring for action. Civil Rights indicates that it has many cases of this character. It would also preclude acknowledgment that another agency has referred a case to DOJ. Further, the rule would bar a denial that an investigation has begun in a situation in which an individual's or institution's reputation would benefit from such a denial. It would also limit a prosecutor's ability to offer a newsman a background briefing in exchange for delaying the publication of a story during a critical stage in an investigation. And it would prevent a U.S. Attorney from announcing that a decision not to prosecute has been reached. Finally, the rule would limit the ability of Departmental officials to rebut embarassing public misstatements of facts about Departmental activities.

Of course, the provision permitting waiver of the regulations by the AG, DAG, or AAG's [(b)(4)] alleviates some of these difficulties, but in so doing it may place an unnecessary burden on these offices. OLC also warns that it could give rise to charges of censorship. And, employees may simply drop a matter rather than undergo the inconvenience of seeking a waiver, thus barring from disclosure some material which ought to be released.

Option II is a considerably narrower formulation, prohibiting the release of only that information "which might invade the privacy of individuals, damage their reputations, prejudice subsequent trials, or compromise investigations or investigators." Its advantage is that it bars disclosure of that information, and only that information, which we are truly concerned about releasing. Many of the difficulties described above would not arise under such a rule. Because of the wide variety of circumstances in which some comment is appropriate, and because of the difficulty of defining these circumstances precisely in advance, the Criminal Division prefers this Option. Its disadvantages are that it introduces somewhat ambiguous terms whose meaning might be subject to debate, and that it allows individual employees to determine, in the first instance, what information falls within and without the rule.

Finally, OLC suggests yet a third option in place of either a "no comment" or "no prejudicial comment" rule. Their proposal (which I am not completely clear on) appears to involve a listing of the specific kinds of disclosures which could be made (including some of the specific illustrations mentioned above). It might also involve the establishement of different rules for different Divisions, depending upon their different circumstances. OLC is not yet prepared to offer a draft of this option.

2. Definition of Unauthorized Person. The proposed amendments apply to the release of information to any "unauthorized person" rather than merely to "news media" as in the old rules. Although "unauthorized person" is a somewhat ambiguous phrase, it was deliberately chosen over a less ambiguous description such as "non-Departmental employee" in order not to preclude necessary disclosures to judges, state and local police, witnesses, grand juries etc. The Tax Division objects to the ambiguity of the phrase but offers no alternative. The Criminal Division concludes that the phrase should be used, and that no attempt should be made to precisely define it because it would be too difficult to list all appropriate recipients of information.

3. Waiver Provision. Section (b)(4) permits a waiver by the Attorney General, Deputy Attorney General or relevant Assistant Attorney General. As originally circulated, the proposal permitted waiver only by the AG and DAG. I have expanded the provision to take into account the views of the Divisions. (Antitrust proposes further extending the waiver power by permitting delegation of authority by the AAG's to their subordinates.) This will alleviate some of the inflexibility of the rule, as it will permit AAG's to adapt the rule to their Divisions' specific circumstances.

Attachments

1. Draft Regulations

2. Existing Regulations
   a. 28 CFR 50.2
   b. Judge Bell's July Directive

3. Comments on Draft Regulations by Selected OBBD's
   a. OLC
   b. Blumenthal
   c. Criminal
   d. Civil Rights
   e. Antitrust
   f. Tax

4. Draft Regulations sent to Selected OBBD's

DRAFT AMENDMENTS TO

28 CFR §50.2.

OPTION I

1. Insert a new subsection "(b)" to follow directly after the present "(a)(4)":

(b) Guidelines for criminal investigations.

(1) These guidelines shall apply to the release of information to any unauthorized person from the time a criminal investigation commences until the time formal charges are filed. Particularly stringent limitations are required during this period as it constitutes an extremely sensitive part of the criminal process. The unauthorized release of certain kinds of information at this stage may invade the privacy of individuals, damage their reputations, prejudice subsequent trials, and compromise investigations and investigators.

(2) No employee of the Department shall release to any unauthorized person any information concerning specific criminal investigations.

(3) This statement of policy is not intended to restrict the release of:

(i) General information regarding Department or field office policies, issues, priorities, or statistics;

(ii) Information concerning individuals who are fugitives from justice, appeals for assistance in obtaining evidence, or other reports to the public necessary to guarantee health or safety;

(iii) Information whose disclosure is protected under the Civil Service Reform Act of 1978, 5 U.S.C. §2302(b)(8) ("whistleblower" provisions).

(4) The Attorney General, the Deputy Attorney General, or the Assistant Attorney General with responsiblity for amatter may waive these guidelines if it appears that the release of information beyond that permitted by the guidelines would be in the interest of the fair administration of justice or the law enforcement process. Employees may apply to these officials for waivers, or may refer inquiries to the Office of Public Affairs, which will seek instructions from one of the aforenamed officials.

2. Reletter old subsections "(b) and "(c)" as "(c)" and "(d)" respectively.

3. Replace newly lettered subsection "(c)(1)" (previously lettered "(b)(1)"), with the following:

(1) These guidelines shall apply to the release of information to any unauthorized person from the time an individual is charged with a criminal offense until all proceedings resulting from such charge have been terminated.

4. Insert a new subsection "(e)" as follows:

(e) Cross Reference: See 28 CFR §§ 16.40-.57 (Protection of Privacy of Individual Records); 28 CFR §45.735 (Standards of Conduct).

OPTION II

Make all changes indicated for Option I except:

1. In §(b)(1), dDelete the last two sentences, and

2. Substitute the following for §(b)(2):

§(b)(2) No employee of the Department shall release to any unauthorized person any information which might invade the privacy of individuals or organizations, damage their reputations, prejudice subsequent trials, or compromise investigations or investigators.

United States Department of Justice

ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
WASHINGTON, D.C. 20530

Hold in LEAK Investig

22 FEB 1980

MEMORANDUM TO THE ATTORNEY GENERAL

Re: Use of Polygraph Examinations in Investigating Disclosure of Information about Pending Criminal Investigations

You have asked us to consider the following questions regarding the use of polygraphs in investigating unauthorized disclosures of information about pending criminal investigations: (1) may a Department employee be dismissed for refusing to submit to a polygraph test; and (2) may the results of a polygraph test be used against the employee in (a) administrative proceedings and (b) criminal proceedings. We conclude that the Attorney General may order Department employees to submit to polygraph tests to answer specific questions relating to pending criminal investigations and that employees who refuse to take polygraph tests may be discharged. If any employee is threatened with dismissal for refusing to take a polygraph test, then any evidence obtained through the test may not be used against the employee in a subsequent criminal proceeding. Employees should be warned prior to taking the test that their refusal to participate may lead to their dismissal, but that nothing they say can or will be used against them in a criminal proceeding. It is doubtful that evidence obtained by way of polygraph would, in any event, be admissible in a federal criminal proceeding, unless the employee stipulates to its admissibility.

Polygraphs and Federal Employment

The use of polygraphs for federal employment purposes has been the subject of controversy for a number of years. The discussion focusses on two conflicting trends: (1) the growing scientific acceptance of the reliability of polygraphy and (2) the increasing concern that polygraph examinations violate privacy rights and the Fourth, Fifth and Fourteenth Amendments.

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In 1965, the House Committee on Government Operations held hearings and issued a report on the use of polygraphs by the federal government. H. Rept. No. 198, 89th Cong., 1st Sess. (1965). The Committee Report noted that 19 federal agencies used polygraphs; the most frequently reported purpose of the use involved security matters. A total of just under 20,000 tests were administered in 1963. Eight agencies used polygraphs to investigate employee misconduct. (The Department of Justice indicated its use was limited to security and criminal matters). The Committee strongly criticized the use of polygraphs; it concluded that the accuracy of such tests was unproven and that operators were generally unqualified and undertrained. Id. at 1-2.

In 1968, the Civil Service Commission promulgated regulations which prohibit use of polygraphs in employment screening and personnel investigations for members of the competitive service, except for national security purposes. This regulation, which does not apply to the excepted service, is currently in force. Federal Personnel Manual, chapter 736, Appendix D. 1/

Senator Ervin introduced a number of bills which would have prohibited the use of polygraphs in the hiring or firing of federal employees and employees of industries affecting interstate commerce. S. 2156, 91st Cong., 2d Sess. (1971); S. 2836, 93d Cong., 1st Sess. (1973), reprinted in 119 Cong. Rec. 42681 (1973). See also H.R. 2596, 94th Cong., 1st Sess. (1975). None of these measures was enacted.

Additional Congressional hearings were held in 1974 before the House Government Operations Committee. 2/ Henry Dogin, then Deputy Assistant Attorney General for the Criminal Division, testified that polygraphs had proven useful in a small number of investigations involving a "closed" group of persons--e.g., persons with access to stolen or embezzled property. However, he noted that even in these circumstances,

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1/ The regulations require that agencies using polygraphs advise the individual of his or her privilege against self-incrimination and right to counsel. The individual must voluntarily consent to the examination and a refusal to consent may not be included in his or her personnel file.

2/ The Use of Polygraphs and Similar Devices by Federal Agencies, Hearings Before the House Committee on Government Operations, 93d Cong., 2d Sess. (1974)["Hearings"].

the Criminal Division viewed the results "with caution and opposes their introduction into evidence." Hearings at 414. A representative of the FBI, Supervisory Special Agent Bell P. Herndon, testified that "the FBI's official position has always been that [it does] not consider polygraph examinations sufficiently precise to permit absolute judgment of guilt or non-guilt--lie or truth--without qualifications." He added, however, that

> with proper ethics by the polygraph examiner and tight administrative control by the user agency, there is no question but that the polygraph can be a valuable investigative aid to supplement interrogation in selected criminal and national security cases. Interrogation is a basic tool of any investigative agency and the FBI considers the polygraph technique a thorough and specialized interview procedure in which a skillful interrogator is attempting to simply ascertain the truthful facts from a consenting individual regarding a matter in which we have jurisdiction.
>
> In some instances suspects will admit deception and furnish confessions and/or signed statements. In most instances valuable new information or investigative direction is developed as a result of the examination and followup interrogation.

Id. at 419. The use of polygraphs was strongly criticized by the ACLU on constitutional and scientific grounds. Id. at 2-84.

A study prepared in 1974 by the staff of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee reached a conclusion similar to the House Committee in 1965. It stated that

> [c]ompulsory submission to a polygraph test is an affront to the integrity of the human personality that is unconscionable in a society which values the retention of individuals' privacy . . . . The Congress should take legislative steps to prevent Federal agencies as well as the private sector from requiring, requesting, or persuading any employee or applicant for employment to take any polygraph test.

Staff of the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., Privacy, Polygraphs, and Employment 17-18 (Comm. Print 1974). The Study also concluded, after reviewing the literature on polygraphs, that "doubt must be cast upon the objectivity, accuracy, and reliability of the polygraph test." Id. at 9.

Based on the above, it is clear that use of polygraphs for federal employment purposes remains controversial. 3/ While civil service regulations prohibit their use for the competitive service, Congress has been made aware that no prohibition exists regarding the excepted service. Several bills which would have prohibited such use have not been enacted.

Attorney General's Authority to Terminate Employment

Analysis of the authority of the Attorney General to dismiss an employee for refusing to submit to a polygraph examination must begin with an understanding of the statutory and regulatory protections afforded different classes of Department employees.

Under the Civil Service laws, Department attorneys and employees of the FBI are in the excepted service. 28 U.S.C. § 536 (FBI); 5 C.F.R. § 213.3102(d)(government attorneys). The Office of Personnel Management ("OPM"), by regulation, has exempted personnel in the excepted service from the statutory provisions regarding removal of civil servants. See 5 C.F.R. § 752.401(c). However, persons in the excepted service who are non-probationary "preference eligibles," --primarily veterans and the spouses and mothers of disabled and deceased veterans--are afforded the civil service law protections. 5 U.S.C. § 7511(a)(1)(B). See id. § 2108 (defining "preference eligible"). The civil service law protections are substantive and procedural. A preference eligible employee may be removed "only for such cause as will promote the efficiency of the service." Prior to removal, an employee is entitled to 30 days' advance written notice of the reasons for the action, a reasonable time to respond to the charges, the assistance of an attorney, a written decision, and an appeal to the Merit System Protection Board ("MSPB"). 5 U.S.C. § 7513; DOJ Order 1752.1.

3/ States have taken an active role in limiting use of polygraphs in the employment context. Eighteen states have licensing procedures for polygraph examiners; fifteen states prohibit use of polygraphs. See Comment, Privacy: The Polygraph in Employment, 30 Ark. L. Rev. 35, 37-38 (1976).

Department employees who are in the excepted service and are not preference eligibles have no rights arising from a statute or OPM regulation to a statement of reasons for discharge or to an appeal from an adverse action. See Paige v. Harris, 584 F.2d 178, 181 (7th Cir. 1978). However, the Department is bound by its own substantive standards and procedures even though the employee may have no legitimate expectation of continued employment and could, under relevant statutes, be summarily discharged by the Attorney General at any time. See Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959); Paige v. Harris, 584 F.2d at 184; Mazaleski v. Treusdell, 562 F.2d 701, 717 n.38 (D.C. Cir. 1977). Department Order 1752.1 (1975), as supplemented by a March 27, 1979 Notice, establishes minimal procedures for Department attorneys who are not preference eligibles. Chapter 6 of the Order entitles them only to "a letter of termination prior to the effective date of termination . . . [which provides] a brief statement of the reasons for the termination." 4/

Substantively, Department attorneys are provided no protections by Department regulations. And since they are not covered by the "for cause" standard of the civil service laws, attorneys apparently serve at the pleasure of the Attorney General. The Attorney General's authority to remove AUSA's is expressly recognized by statute. See 28 U.S.C. § 542(b).

This conclusion must be qualified because of recent cases which have held that agency handbooks and informal understandings may establish substantive protections for federal employees. In Ashton v. Civiletti, No. 76-1142 (D.C. Cir., Oct. 4, 1979), the D.C. Circuit held that "the FBI has fostered rules and understandings which [entitle an FBI employee] to believe that he would lose his job only for a job-related reason." Slip op. at 12. 5/ The Court recognized that FBI employees are in the excepted service and that "[s]tanding alone, the exception could suggest to an employee that he held his job at the sufference of his employer." It went on to find, however, that the FBI Handbook, Manual of Instructions, and the plaintiff's letter of appointment

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4/ FBI employees are excluded altogether from DOJ Order 1752.1

5/ The case concerned the Bureau's discharge of an employee because of his admitted homosexuality. The Court held that the employee was entitled to a due process hearing prior to termination to determine whether his homosexuality constituted a job-related basis for his dismissal.

created an implied promise that the employee would be dismissed "only for failing to perform his duties satisfactorily and without prejudice to the FBI's achievement of its law-enforcement mission." Slip op. at 16-17. In essence, the court held that FBI employees, even though placed in the excepted service by statute, may be discharged only upon a finding of cause similar to that required for dismissal of members of the competitive service. 6/ Once it is determined that an employee has a legitimate claim to continued employment--i.e., that he or she may not be fired at any time--then procedural due process applies: the employee must be afforded a hearing and other procedural safeguards.

We are unaware of any handbooks or guidelines upon which Department attorneys could rely to establish a legitimate claim to continued employment. We cannot, however, rule out the possibility that an attorney could point to a letter of appointment or to informal understandings which a court would deem sufficient to establish a property interest. 7/

In sum, the Attorney General probably has the authority to dismiss a non-veteran Department attorney for any reason, and the attorney is entitled only to a statement of reasons for the discharge. Non-veteran FBI agents probably may be discharged only for job-related reasons, even though they are in the excepted service; they are entitled to a due process hearing. Department employees who are veterans may be discharged only for cause and are entitled to statutory, OPM and DOJ procedural rights.

6/ See also Paige v. Harris, 584 F.2d 178 (7th Cir. 1978) (HUD Handbook provides rules and understandings creating legitimate claim to continued employment for employees in the excepted service); Colm v. Vance, 567 F.2d 1125 (D.C. Cir. 1977)(remanding for consideration of whether Foreign Service Act requires promotion to be based solely on performance and merit, even though plaintiff could demonstrate no constitutional property entitlement to promotion).

7/ For example, it is conceivable that a court could find that when an AUSA agrees to a three year commitment with a U.S. Attorney's Office that that agreement constitutes a promise by the Department not to discharge the attorney during that period without good cause. A court might also hold that the Department's regulation requiring a statement of reasons for termination implicitly requires the Department to have a "good" reason.

What Constitutes "Cause"

As noted above, the civil service laws authorize removal of covered civil servants "only for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513. The D.C. Circuit has similarly held that an FBI employee may be dismissed "only for failure to perform his duties satisfactorily and without prejudice to the FBI's achievement of its law-enforcement mission." Ashton v. Civiletti, supra. 8/

8/ It is quite clear that the underlying conduct--disclosure of facts of a pending criminal investigation--permits removal of the offending employees. The conduct may violate various criminal statutes and plainly violates a number of OPM and DOJ standards of conduct. See, e.g., 5 C.F.R. §§ 735.201a(c) (impeding government efficiency); (e)(making a government decision outside official channels); (f)(affecting adversely the confidence of the public in the integrity of the government); 735.206 (misuse of information not made available to the general public); 735.209 (conduct prejudicial to the government); 28 C.F.R. §§ 45.735.2(c)(3)(impeding government efficiency); (c)(6)(affecting adversely the confidence of the public in the integrity of the government); 45.735-10(improper use of official information); 45.735-18 (conduct prejudicial to the government).

It is possible that an employee charged with unauthorized disclosure may assert a First Amendment defense: that the government may not constitutionally prohibit him or her from commenting on matters of public importance. While the employee may have an interest in commenting upon matters of public interest, this interest must be balanced against the government's interest in promoting the efficiency of the public services it performs through its employees. See Pickering v. Board of Education, 391 U.S. 563 (1968). The D.C. Circuit has identified the relevant factors in the "balancing test" as: the sensitivity and confidential nature of the employee's position and the government's consequently legitimate need for secrecy; the subject matter of the speech; the truth or falsity of the speech; the interference with job performance; the context of the speech; the effect of the speech on agency morale and working relationships with immediate superiors. Hanson v. Hoffman, Civ. 77-0857 (D.C. Cir. Feb. 7, 1980), slip op. at 18. It would appear that the government's interest in preventing disclosure is at its maximum in regard to information relating to pending criminal investigations.

The question is whether failure to obey an order to submit to a polygraph examination is sufficient cause for discharge under these standards. The following discussion assumes that at the time the employee is ordered to take the test, the employee is assured both that he or she may be discharged for refusing to take the test and that no information obtained in the course of, or as a result of, the examination may be used against him or her in a subsequent criminal proceeding. 9/

At the minimum, failure to obey a legitimate order of a superior constitutes insubordination--an offense punishable by removal. See FBI Manual of Instructions, Part I, sec. 1-20-2 (refusal to cooperate during an interview regarding work-related matters permits discipline for insubordination); sec. 13, Schedule of Offenses and Penalties for FBI Employees (insubordination punishable by censure to removal). A refusal to submit to a polygraph test also arguably impedes investigation of government misconduct. It thus directly effects the efficiency of the Department by hindering removal of offending employees and restoration of public confidence in the Department. The Schedule of Disciplinary Offenses and Penalties for DOJ Employees, included in DOJ Order 1752.1, identifies the offense of "refusal to cooperate in an official Government inquiry" and lists the suggested discipline as "official reprimand to removal."

The obligation of public officials to answer questions related to the performance of their public duties is well-recognized. The Supreme Court has upheld the right of public employers to fire employees solely for their refusal to sign affidavits or answer questions related to their fitness to perform their public functions. See, e.g., Lefkowitz v. Turley, 414 U.S. 70, 84 (1974); Sanitation Men v. Commissioner, 392 U.S. at 285; Beilan v. Board of Education, 357 U.S. 399 (1958). These holdings are based on the recognized public interest in the accountability of public servants. This interest appears at its zenith when the integrity of law-enforcement activities is at stake. As stated by Justice Harlan,

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9/ Without these assurances, an employee could not constitutionally be fired for refusing to take the polygraph test. See Kalkines v. U.S. 473 F.2d 1391 (Ct. Cl. 1973); see also Sanitation Men v. Sanitation Commissioner, 392 U.S. 280 (1968).

> [I]t is surely plain that [a State] may . . . require its employees to assist in the prevention and detection of unlawful activities by officers of the state government. The urgency of these requirements is the more obvious . . . where the conduct in question is that of officials directly entrusted with the administration of justice. The importance for our system of justice of the integrity of local police forces can scarcely be exaggerated.

Garrity v. New Jersey, 385 U.S. 493, 508 (1967)(Harlan, J., dissenting). 10/

Thus, if the use of polygraphs is deemed a necessary part of an investigation of leaks, then a refusal to submit to such a test could impede the investigation and consequently hinder the efficiency of the Department. Department standards of conduct recognize the affirmative duty of employees to cooperate with official investigations, and refusals to cooperate are deemed serious enough offenses to warrant removal in appropriate cases. We can see no meaningful difference between compelling an employee to answer questions or sign an affidavit and compelling an employee to submit to a polygraph test. 11/ While the results of the test may be open to question and debate, the refusal to take the test may properly be characterized as conduct which does not promote the efficiency of the

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10/ Although the Court held in Garrity that the incriminating statements of a public official obtained under threat of dismissal could not be used in a criminal proceeding, the majority did not disagree with Justice Harlan's statement regarding the public interest that public officers provide information about the conduct of their activities. See also Gardner v. Broderick, 392 U.S. 273, 278 (1968).

11/ We reach this conclusion even though we recognize that the use of a polygraph is a greater intrusion into an individual's privacy to the extent it probes unrelated matter, private thoughts and beliefs.

Department. Accordingly, we believe that an employee could be dismissed for refusing to take a polygraph examination. 12/

An arguable objection to this conclusion may be phrased as follows. Polygraph tests have not achieved recognized acceptance among the courts and the experts as accurate indicators of truth-telling. For example, the test may show deception where a truthful subject is nervous, tense, over-tired, angry or when an examiner asks misleading or inadequate questions. See United States v. Alexander, 526 F.2d 161, 165 (8th Cir. 1975). Thus, where an employee believes that the results of the polygraph will not be accurate, refusal to take the examination should not be grounds for removal.

We believe that if the investigator can establish a reasonable basis for the use of the polygraph in the course of the investigation, then a refusal by an employee to take the test would be impermissible, notwithstanding the subjective fear of the employee. A reasonable basis would be established by showing the need for use of the technology and the state of the art. We believe that adequate scientific evidence exists which would support an investigator's decision that polygraphy could be helpful in the pursuit of the investigation. See, e.g., United States v. De Betham, 470 F.2d 1367 (9th Cir. 1972)(per curiam), cert. denied, 412 U.S. 907 (1973)(although holding that district court did not abuse discretion in excluding polygraph evidence, court noted that evidence "vigorously support[ed] the accuracy of polygraphic evidence"); United States v. Oliver, 525 F.2d 731, 737 (8th Cir. 1975), cert. denied, 424 U.S. 973 (1976)(upholding admission of polygraph evidence where parties stipulated admissibility; court could not conclude that polygraph "is so unreliable as to be inadmissible in a particular case"); Tarlow, Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility In a Perjury-Plagued System, 26 Hastings L.J. 917 (1975). 13/ We recognize, however, that

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12/ One district court has upheld the authority of a city transit authority to fire employees suspected of intoxication who refuse to submit to urinalysis or blood tests. The court relied upon the Garrity line of cases for the proposition that public employees may be discharged for refusal to properly account for the performance of their duties. Division 241, Amalgamated Transit Union v. Suscy, 405 F. Supp. 750 (N.D. Ill. 1975), aff'd, per curiam, 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976).

13/ One factor frequently cited by courts for excluding polygraph evidence is the probability that the jury will accord it undue weight. Of course, this concern is not present when administrative proceedings are contemplated.

reliability of polygraphy remains hotly contested, and Courts of Appeals have permitted introduction of polygraph evidence only when the parties have stipulated to its admissibility. See, United States v. Alexander, supra (summarizing cases and denying trend of admitting polygraph evidence); Hearings, supra. 14/

The reasonableness of the use of a polygraph would be supported by a record establishing the reason for its use, the expected accuracy of the technology, the qualifications of the examiner, and the reliance upon other evidence to establish and corroborate the results of the investigation. 15/ Once the reasonable basis for the use of polygraphy is established, we do not believe that an employee can, with impunity, refuse to take the examination any more than he or she could refuse to submit to fingerprinting or blood-typing.

Use of the Results of a Polygraph Test

As long as the employee is promised that any evidence obtained in the course of the polygraph test will not be used in a subsequent criminal proceeding, the Fifth Amendment does not bar its use in an administrative proceeding. 16/ Of

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14/ The D.C. Circuit continues to adhere to its per se rule against admissibility as established by the leading case of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). See United States v. Skeens, 494 F.2d 1050 (D.C. Cir. 1974).

15/ Presumably, the quality of the examination and the qualifications of the examiner would be quite high if the examination is conducted by FBI polygraph experts.

16/ Because of the controversy surrounding the use of polygraphs, it is possible that an employee discharged solely on the basis of polygraphic evidence would challenge the dismissal as arbitrary and irrational agency action. We do not believe that, absent a cognizable property or liberty interest, an employee may challenge agency action as a violation of due process unless the agency has not followed its own regulations. See Paige v. Harris, 584 F.2d at 184; cf. Bishop v. Wood, 426 U.S. 341 (1976). At least one court, however, has held that a government decision is subject to challenge as arbitrary and capricious even where the employee has no property right in continued employment. Heaphy v. U.S. Treasury Dept., 354 F. Supp. 396 (S.D.N.Y. 1973)(Tyler, J.), aff'd on opinion below, 489 F.2d 735 (2d Cir. 1974). If a court were to permit a challenge to a dismissal based solely on the results of a polygraph examination, the non-arbitrariness of the action would depend upon such factors as the quality of the examination, the skill and training of the examiner, and the inherent credibility of the employees statements.

course, such a promise, and the Fifth Amendment, prohibit use in any criminal proceeding. Garrity v. New Jersey, supra.

Conclusion

We conclude that the Attorney General may discharge an employee for refusing to take a polygraph examination where the examination is necessary to an official investigation of unauthorized disclosures about pending criminal investigations, provided that the employee has been warned that failure to submit to the test could lead to his or her dismissal and that nothing obtained in the examination will be used against the employee in a subsequent criminal proceeding. Even if a court were to hold that Department attorneys may only be discharged "for cause," we conclude that generally failure to cooperate with an official investigation is adequate cause, although each situation must be evaluated on a careful case-by-case basis.

This memorandum has analyzed the substantive grounds for dismissal but has not detailed the procedures that must be followed prior to discharge for refusing to submit to an examination or for the underlying disclosure of information. We will address these issues in a memorandum which will be completed shortly.

Larry A. Hammond
Larry A. Hammond
Acting Assistant Attorney General
Office of Legal Counsel

cc: Richard Blumenthal

United States Department of Justice
Washington, D.C. 20530

ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

FEB [redacted]

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: ABSCAM: Unauthorized Leaks

At the request of your Special Assistant, Merrick Garland, we have reviewed the criminal statutes to determine whether any might be applicable to Departmental employees who may be found to have improperly disclosed information pertaining to the ABSCAM investigation. We have also reviewed the so-called "whistleblower" statutes that were designed to provide a framework for, and protection for, proper disclosures by Departmental employees. Our quick review of these matters suggests that there are several criminal statutes that might have application here and that nothing in the whistleblower legislation will provide ground for justifying any leaks that may have occurred here.

I. Criminal statutes

(1) Privacy Act

Under the Privacy Act, 5 U.S.C. 552a, a willful disclosure of information contained in a system of records by a federal officer or employee who has possession of or access to such records by virtue of his office or employment is punishable as a misdemeanor and subject to a fine of $5,000. 5 U.S.C. 552a(i). The disclosure must be prohibited by either the Privacy Act or a regulation promulgated thereunder in order for the statute to apply. Since the information that was disclosed was probably contained in FBI investigative files, which we are informed are part of the FBI's system of records, and since the disclosure would not be authorized under any of the categories listed in 5 U.S.C. 552a(b), the willful disclosure of such information would be prohibited by 5 U.S.C. 552a(b) and by departmental regulation, 28 CFR 16.56(8).

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(2) Theft of Government Property

Under 18 U.S.C. 641, a person who knowingly converts to his own use or the use of another any record or thing of value to the United States may be imprisoned for ten years and/or be fined $10,000. Recently, the government has argued in several cases that section 641 applies to unauthorized disclosure of government information because such information is a "thing of value" to the United States. The Second Circuit in United States v. Girard, 601 F.2d 69 (2d Cir. 1979), accepted the Government's theory and held section 641 applicable to the sale by a DEA employee of information contained in a DEA computer which concerned the identity of possible informers and the status of certain drug investigations. The court rejected the defendants' argument that construing section 651 to apply to the theft of information would make the statute vague and overbroad and would thus infringe on First Amendment rights, stating that there was no danger of vagueness or overbreadth there because the defendants must have known that the disclosure of such information was prohibited by DEA regulations. However, a district court in the District of Columbia has expressly rejected the Government's interpretation of section 641 on the ground that it would infringe on the First Amendment. United States v. Hubbard, 474 F. Supp. 64, 79 (D.D.C. 1979). The Third Circuit in United States v. DiGilio, 538 F.2d 972, 978 (3d Cir. 1976), finding that photocopies of government documents were stolen, made it clear that its decision to affirm the conviction on this ground shcould not be read to imply a rejection of the Government's theory that section 641 applies to theft of government information.

(3) Removal of Government Records

If original government records were removed, 18 U.S.C. 2071 would apply which punishes such removal with three years in prison and/or a $2,000 fine. If government records were photocopied on government equipment, and the photocopies were removed, 18 U.S.C. 641 may apply. United States v. DiGilio, 538 F.2d 972, 977 (3d Cir. 1976).

(4) Disclosure of Confidential Business Information

Under 18 U.S.C. 1905, it is unlawful for a government employee to disclose information coming to him in the course of his employment which relates to the amount or source of any income, profits, losses or expenditures of any person or firm. Violation of this statute may be penalized by a year's imprisonment, a $1,000 fine and/or removal from employment. Since the ABSCAM investigation may be viewed as generating information related to the source and amount of income of Congressmen, section 1905 may apply to the disclosure of such information. We do not know

whether section 1905 would be construed that broadly because we have not found any published opinion in which a prosecution was brought under that statute.

(5) Civil Rights Statutes

Under 18 U.S.C. 242, it is a crime for any person, "under color of any law, statute, ordinance, regulation, or custom," willfully to deprive any inhabitant of the United States "of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." If a person acquires information in his official capacity, and uses his official status to lend credibility to his statements when he discloses that information, his disclosure almost certainly would constitute action "under color of law," even if it is unauthorized.1/ Depending on the particular facts, the disclosure of ABSCAM information may have violated the constitutional rights of targets of the investigation in several ways; if the disclosures were intended to violate these rights, they were willful and therefore a crime.

First, by creating prejudicial publicity the disclosures may have violated the targets' rights to a fair trial. Relatedly, if the disclosures persuaded witnesses with exculpatory testimony not to come forward, they may have violated the targets' rights to compulsory process and due process of law.

Second, an argument can be made that the Constitution prohibits a member of the executive branch, acting under color of law, from tortiously undermining the effectiveness of a member of Congress. The speech or debate clause, the congressional privilege against civil arrest, see Art. I, §6, cl. 1, and the Constitution's strict limits on the circumstances under which a member can be removed, see Powell v. McCormack, 395 U.S. 486, 522-48 (1969)--as well as general principles of separation of powers--all suggest that members of Congress have some constitutional protection against efforts by executive branch officials to undermine their effectiveness as representatives. If those efforts take the form of a common law tort committed under color of law--here, perhaps defamation or an invasion of privacy by placing a person in a "false light"--an argument can be made that

1/ Depending on the facts, the disclosures might possibly violate 18 U.S.C. 241, under which it is a crime for "two or more persons [to] conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." Section 241 reaches actions that were not done "under color of law."

the members' constitutional protection has been violated. Cf. Wheeldin v. Wheeler, 373 U.S. 647, 653-67 (1963) (Brennan, J., dissenting) (malicious abuse of process by federal official may be actionable as tort under federal common law).

Third, the disclosure here may have violated the fifth amendment's guarantee that no person be deprived of liberty or property without due process of law. The Privacy Act and its implementing regulations probably give the persons they are designed to protect--here the targets about whom information was disclosed--a statutory entitlement that amounts to a "property" interest within the meaning of the due process clause. Any other statute or regulation which was designed to prevent the prejudicial disclosures of information gained in a criminal investigation would create a similar property interest, whether or not it provided criminal penalties. Reputation itself is probably not a "liberty" interest within the meaning of the fifth amendment's due process clause, see Paul v. Davis, 424 U.S. 693, 701-710 (1976),2/ but an injury to reputation combined with some additional significant injury can constitute a deprivation of "liberty" within the meaning of the clause. See id. Here, the undermining of the ability of a target to perform his legislative function as a member of Congress may constitute that additional injury. In these ways, the disclosures here may have deprived persons of their liberty or property without due process, thus--if willful--violating 18 U.S.C. 242.

We have also reviewed the obstruction of justice statutes but, given the facts as we presently understand them, we do not find them applicable. 18 U.S.C. 1503 applies only when a judicial proceeding is pending, and 18 U.S.C. 1505 applies only when an administrative proceeding is pending. The only obstruction of justice statute applicable to an investigation is 18 U.S.C. 1510 which is much narrower in scope than 1503 and 1505, punishing an endeavor by bribery, misrepresentation or intimidation to obstruct, delay or prevent the communication of information related to the violation of a criminal statute of the United States. However, if it can be shown that the purpose of the disclosure was to terminate the investigation and that bribery, misrepresentation or intimidation was involved, it could be argued that section

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2/ Paul v. Davis held, in a case involving a claim under 42 U.S.C. 1983, that reputation alone was not a "liberty" interest protected by the due process clause of the fourteenth amendment. Since the Court was explicitly concerned about "mak[ing] the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States," 429 U.S. at 701, an argument might be made that this holding does not apply to interests protected against invasion by federal officials.

1510 applies.3/

II. Whistleblower Protection

The Civil Service Reform Act of 1978 protects from agency reprisals employees who disclose information which they "reasonably believe evidences--(i) a violation of any law, rule, or regulation, or (ii) mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law. . . ." 5 U.S.C. 2302(b)(8)(A). This section covers positions in the competitive service, career appointee positions in the Senior Executive Service, and positions in the excepted services other than those at the policy level and those specifically excluded by the President. 5 U.S.C. 2302(a)(2)(B). It applies generally to all executive agencies, but enumerates exceptions, including the FBI. The FBI employees enjoy the more limited protection of 5 U.S.C. 2303, which prohibits reprisals against FBI employees who disclose information to the Attorney General or his designee.

If the Department decides to take a "personnel action" (defined broadly in 5 U.S.C. 2302(a)(2)(A)) against an employee for "leaking" information to the press, it must determine whether the employee is covered by the "whistleblower" protections. The head of each agency is responsible for prevention of reprisals prohibited by the Act. 5 U.S.C. 2302(c).

An employee of the FBI is not protected by the Act from reprisals for disclosure of information to the press. An employee of any other branch of the Department is protected only if (1) he is not in a position exempted from competitive service because of its confidential, or policy-making character; (2) the disclosure was not specifically prohibited by law, and (3) the employee reasonably believed that the information evidenced violations, abuses, or dangers specified by the Act. Since it is likely that any disclosure would be violative at least of the Privacy Act (if not other statutes), it appears to us that Departmental employees would find no protection in these provisions.

Larry A. Hammond
Acting Assistant Attorney General
Office of Legal Counsel

cc: Merrick Garland
Special Assistant to
the Attorney General

3/ If the purpose of the disclosure was to intimidate Congressmen and impair their effectiveness, it could conceivably be argued that 18 U.S.C. 372 applies. That statute punishes a conspiracy to prevent by force, intimidation or threat a person holding any office, trust or place of confidence under the United States from discharging his duties. Such an argument, however, may be founded on an overbroad construction of the term "intimidation."

ROUTING AND TRANSMITTAL SLIP

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REMARKS

This is the memo I submitted commenting on the proposed amendment to 28 C.F.R 50.2. The proposed definition of unauthorized person is in the form of an exception in subsection (l) (3) and is in numbered paragraph 1.

I was invited to lunch with the AG today & in response to a question about proposed regulations he said he was thinking about a need to know standard as perhaps to be included. Such a standard already exists under the Privacy Act - see 5 USC 552a (l)(1). We might want to flesh that out in our regulations.

Do NOT use this form as a RECORD of approvals, concurrences, disapprovals, clearances, and similar actions.

FROM *(Name, office symbol or location)*	DATE
Fred Hess	3-6-80
	PHONE 724-7030

UNITED STATES GOVERNMENT

memorandum

DATE: February 26, 1980

REPLY TO ATTN OF: FDH:rmr

SUBJECT: Proposed CFR Amendment Regarding Disclosure of Investigative Information

TO: Philip T. White
Acting Deputy Assistant Attorney General
Criminal Division

From: Frederick D. Hess
Acting Director, Office of Legal Support Services
Criminal Division

This is in response to your request for comments on the proposed amendment to 28 CFR 50.2.

1. Unauthorized Person. There is some difficulty in determining just who an unauthorized person in subsection (b)(2) would be. I assume it means that release can be made to any person where such release is compatible with the conduct of a criminal investigation. I am thinking of such things as reports to superiors, interviews with witnesses, plea bargains with prospective defendants and their attorneys, and presentation of evidence to grand juries. I am sure we do not intend to prohibit that type of disclosure and that is probably why the term "unauthorized person" is included. Unfortunately, the setting forth of specific exceptions in subsection (b)(3) is subject to the interpretation that those are the authorized exceptions. The result might be a hypertechnical interpretation of the regulation by attorneys and agents in the field and a flood of inquiries to the Deputy Attorney General for permission to do that which is otherwise patently appropriate and necessary. I would recommend that the term "to any unauthorized person" on line 2 of subsection (b)(1) and the word "unauthorized" on line 6 of subsection (b)(1) and on line 2 of subsection (b)(2) be stricken. In their place I would add a new paragraph (b)(3)(iv) so that the policy of (b)(1) and (2) will not apply to "Information whose disclosure is permitted by the usual uses and practices of a criminal investigation such as a report to a supervisor, an interview with a witness or target, or presentation of evidence to a court or grand jury."

2. I would prefer alternative 1 of subsection (b)(2) over the original draft language or alternative 2. Alternative 1 reaches the most serious form of leak — that which is identified to a specific individual. To release other information that merely indicates, for instance, that an investigation of bribery involving congressmen is underway may be reprehensible but is far less damaging. Any regulation or statute on this subject matter

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B-257

is subject to the criticism that it is restrictive of First Amendment rights, that it is a "gag" order, that it perpetuates an "official secrets" policy, and that it unduly restricts the press. One way to lessen that criticism is to draw the regulation narrowly and limit it to information about an identifiable individual as opposed to any information about an investigation. Alternative 2 is so detailed that enforcement of the regulation might be impossible. The test is too complex and puts a heavy burden on the Department to justify a violation. I believe alternative 1 is a good compromise between the extremes of the other two.

3. Decision Not to Charge. Page 5 of the memorandum suggests the possibility that the regulation could be changed so that a decision not to charge might be covered by these guidelines in perpetuity. Much as I would like such a rule because I believe this Department should speak in a criminal matter only in the form of an indictment or information or keep its mouth shut, the reality of the existing statutory law makes a perpetuity provision inappropriate. There are simply some allegations that some day will have to be made public under the Freedom of Information Act. The key there is to balance the public's right to know against the degree of invasion of personal privacy. Whenever the balance falls on the side of the public's right to know, release in response to a request is mandated by the FOI Act. Although we rarely release information about criminal allegations that are not the subject of formal charges, I can imagine situations in which it might be required. Secondly, we have in the past issued press releases closing cases and clearing people who had been the subjects of public allegations. The regulations should not bar such a practice.

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UNITED STATES GOVERNMENT

memorandum

DATE: January 19, 1981

REPLY TO ATTN OF: Merrick Garland
Special Assistant to the Attorney General

SUBJECT: Blumenthal Report: Attorney for Leslie Maitland

TO: The Files

1. John Koetl (212-752-6400), attorney for Ms. Maitland, called the evening of January 13 to register his request that Ms. Maitland (a reporter for the New York Times) be permitted to see in advance a copy of the report which was to be released publicly. He indicated that he understood that reporters were not targets of the investigation, but said that if she was mentioned in even an incidential fashion, a public report could be detrimental to her. I pressed him for hypothetical examples of how that might be, but he was unable to provide any. I indicated that I would transmit her request to the Attorney General, and would then call her back.

2. I communicated Mr. Koetl's request to the Attorney General. After consideration, he determined that there was no significant interest to be served by allowing third parties, not targets of the investigation, to see the report in advance.

3. The next day, January 14, I called Mr. Koetl and communicated the Attorney General's decision to him. He said that he understood, and thanked me for the call.

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

OPTIONAL FORM NO. 10
(REV. 7-76)
GSA FPMR (41 CFR) 101-11.6
5010-112

UNITED STATES GOVERNMENT

memorandum

DATE: January 16, 1981

REPLY TO ATTN OF: Merrick Garland
Special Assistant to the Attorney General

SUBJECT: Blumenthal Report: Attorney for Quentin Ertel

TO: The Files

1. Mr. Alan Kaufman (212/ 944-9445), attorney for Mr. Ertel called this morning. He wanted to transmit to the Attorney General his request that Ertel not be named in the publicity disclosures. He argued that Ertel had only recently been informed of the decision against him, that he planned to appeal, and that public disclosure before appeal was unfair. I told him that I understood his argument, that I would transmit it to the Attorney General, and that I would call him back.

2. I communicated Mr. Kaufman's argument to the Attorney General, who indicated that he had thought about the problem before, and at length, and ~~that he had~~ concluded that the public interest required publication at this time, given the grave concern in Congress and by the public regarding the sources and motives for the leaks. He also indicated that it was the FBI's standard practice to first discipline an individual, and then later permit an appeal which could result in a reduction in penalty. That, he said, was precisely the course being followed here.

3. I called Mr. Kaufman back around 2:30 p.m. and informed him of the Attorney General's decision and rationale. He thanked me for transmitting the message. He also asked whether the Office had received a telegram which put his argument on the record. After checking with the Office secretary (Ida Cerra), I informed him that it had been received.

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

B-2-59

OPTIONAL FORM NO. 10
(REV. 7-76)
GSA FPMR (41 CFR) 101-11.6
5010-112

NW# 49579 DocId:32609235

UNITED STATES GOVERNMENT

memorandum

DATE: November 6, 1980

REPLY TO ATTN OF: Merrick B. Garland MG
Special Assistant to the Attorney General

SUBJECT: Amendment to the Criminal Penalty Provisions of the Privacy Act

TO: Larry A. Hammond
Deputy Assistant Attorney General
Office of Legal Counsel

Thank you for your memorandum of November 6, commenting on a proposed amendment to the criminal penalty provisions of the Privacy Act. Contrary to the implications of the memo, however, the amendment was not proposed by me, but rather by the Criminal Divison -- I merely transmitted it to you for comment at the Attorney General's request. Indeed, I am in complete agreement with your conclusions regarding the First Amendment implications of the proposal. Accordingly, I am taking the liberty of returning the proposed amendment, along with a copy of your memorandum, to the Criminal Division.

Thank you again for your excellent research and analysis.



Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

OPTIONAL FORM NO. 10
(REV. 7-76)
GSA FPMR (41 CFR) 101-11.6
5010-112

B-260

UNITED STATES GOVERNMENT

memorandum

DATE: November 6, 1980

REPLY TO ATTN OF: Merrick Garland MG
Special Assistant to the Attorney General

SUBJECT: Proposed Amendment to Criminal Penalty Provisions of the Privacy Act

TO: Philip B. Heymann
Assistant Attorney General
Criminal Division

Last February, when serious leaks occured concerning the ABSCAM investigation, Criminal Division staff informally forwarded to the Attorney General a draft of a proposed amendment to the Privacy Act. At the Attorney General's request, I transmitted that proposal to the Office of Legal Counsel for comment. OLC has recently sent me its analysis of the issue, which I attach for your information. I agree with OLC's conclusions regarding the First Amendment problems which the proposed amendment could generate.

Attachment

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

OPTIONAL FORM NO. 10
(REV. 7-76)
GSA FPMR (41 CFR) 101-11.6
5010-112

U.S. Department of Justice
Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

6 NOV 1980

MEMORANDUM FOR MERRICK B. GARLAND

Special Assistant to the Attorney General

Re: Proposed Amendment to the Criminal Penalty Provisions of the Privacy Act of 1974, 5 U.S.C. 552a(i).

This responds to your request of February 25, 1980, for the Office of Legal Counsel's views on your proposed amendment to the criminal penalty provisions of the Privacy Act of 1974, 5 U.S.C. 552a(i). Attached you will find a memorandum to me from Gerry Alexis of our Office, which canvasses the issues that we think would be raised by this proposal. It also summarizes our views on a number of questions that might arise in attempting to bring a prosecution under the statute as it now exists. I concur in each of the conclusions set forth in her memorandum.

I am particularly concerned about the First Amendment implications of any legislation that would expand the coverage of the Privacy Act. The issues raised by any such expansion are quite similar to the kinds of First Amendment considerations that have surrounded this so-called "agents' identities" bill, which, as you know, has been pending in Congress for the last several months. I have attached, for your information, our most recent memorandum on that bill, but if you wish to pursue the First Amendment question further, I urge you to contact Gerry Alexis and Miles Foy (who worked on the agents' identities bill) directly. As is always the case, the proper application of the First Amendment in a situation like this requires a balancing of governmental and personal interests, and would require the development of facts. It would seem to me that among the most important questions to ask here is whether -- as a purely practical matter -- there is sufficient evidence of a need to curtail further the speech-related activities

of this Department's prosecutors and investigators. I think all of us would like to be able to conclude that leaks like the ABSCAM ones are aberrations and do not reflect a serious shortfall. */ The dimension of the problem is something that we simply do not have the information to resolve, but I think it is critical to your inquiry.

Larry A. Hammond
Deputy Assistant Attorney General
Office of Legal Counsel

Attachments

cc: Robert Saloschin
Director
Office of Information Law and Policy

Philip B. Heymann
Assistant Attorney General
Criminal Division

*/ To the extent that the final Blumenthal Report concludes that the several recommended personnel actions are sufficient both to punish those who erred and to deter similar indiscretions in the future, it would be difficult thereafter to mount a compelling case for the need for further criminal restrictions to deter others in the future.

Deputy Assistant Attorney General
Office of Legal Counsel

Department of Justice
Washington, D.C. 20530

29 AUG 1980

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Intelligence Identities Legislation

H.R. 5615 would amend the National Security Act of 1947 to create three new prohibitions against the unauthorized disclosure or publication of information identifying covert intelligence officers, agents, and sources. You have requested our views regarding the constitutional questions presented by the third and most controversial of these prohibitions, new § 501(c). The language of that section is setout in the margin. */

I.

As you know, the Department has participated in the effort to fashion new legislation in this field. In January the Department gave its support to a proposal that would make it an offense for anyone, including individuals outside Government, to publish information identifying a covert agent if the publication

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> Whoever, in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States, discloses, with the intent to impair or impede the foreign intelligence activities of the United States, to any individual not authorized to receive classified information, any information that identifies a covert agent knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both.

is knowingly based on "classified information." Section 501(c) departs from that proposal in at least two respects. First, although the Government would be required to prove in any prosecution under § 501(c) that the covert relationship disclosed by the defendant was classified */ and that the defendant knew that the United States was taking affirmative measures to conceal the relationship, the statute would not require the Government to prove that the disclosure was actually "based on" classified information. In other words, although it would require proof of a knowing disclosure of a secret relationship, it would not require proof that the defendant had direct or indirect access to human or documentary sources subject to the Executive order that establishes the classification system. This difference between the Department's proposal and § 501(c) broadens the potential coverage of the latter, although the two proposals would undoubtedly overlap at a number of points in their application to actual cases in the real world.

The second major difference between the two proposals lies in the requirement, imposed by § 501(c), that the Government prove that the defendant made his disclosure "in the course of an effort to identify and expose a covert agent with the intent to impair or impede the foreign intelligence activities of the United States." This requirement, which substantially narrows the coverage of § 501(c), apparently reflects the judgment that general public discussion of intelligence activities is desirable and that any new prohibition in this field must be narrowly drawn to preserve that general interest against unnecessary encroachment. In accordance with that principle, § 501(c) seeks to prohibit, not discussion generally, but a course of conduct in the nature of a criminal attempt. Section 501(c) is directed at the individual who takes it upon himself to bring intelligence activity to a halt. He does this, not by urging a change in public law or policy, but by ferreting out the identities of individuals who are involved in intelligence activities and by disclosing those identities with the intent that intelligence functions will be disrupted by the disclosure itself.

*/ The classification requirement is imposed, not by § 501(c) itself, but by the proposed definition of "covert agent." See § 506(A)(i).

II.

Any flat prohibition against public speech raises a substantial question under the First Amendment; but if the First Amendment permits no law abridging the freedom of speech, we must concede that the freedom of speech is not an absolute freedom. The Supreme Court has consistently held that the Nation has interests that can justify prohibitions against some kinds of speech in some circumstances. In particular, the Court has held that the Nation has a compelling interest in erecting and maintaining effective systems of national defense, including intelligence systems; and the Court has upheld prohibitions against unbridled speech that threatens necessary defense or intelligence systems in a direct and immediate way. See, e.g., Debs v. United States, 249 U.S. 211 (1919); Snepp v. United States, ____ U.S. ____ (1979).

The DOJ proposal -- a prohibition against disclosures knowingly based on classified information -- focuses directly on the national interest in protecting the integrity of internal government sources in the field of foreign and military affairs. Although there is no decision by the Supreme Court directly on point, that proposal finds substantial support from a constitutional standpoint in the separate opinions of a majority of the Justices in the Pentagon Papers case. New York Times v. United States, 403 U.S. 713 (1971). Those opinions suggest in dicta that the Government may proceed under a properly drafted criminal statute against a domestic publisher of secret defense documents in some circumstances.

The prohibition set forth in § 501(c) does not conform precisely to the Pentagon Papers model. It does require proof that the intelligence identity in question was classified and that the defendant knew that the Government was attempting to keep the identity secret. It thereby avoids a criticism that some judges have directed at other statutes in this field -- statutes that do not expressly confine their strictures to cases in which there is an actual "occasion for secrecy." See, e.g., United States v. Heine, 151 F.2d 313 (2d Cir. 1945)(Hand, J.). Yet the essence of the offense described in § 501(c) is not the knowing complicity of the defendant in a breach of the classification system. The essence of the offense is the defendant's attempt to create, through private speech, a direct and immediate obstruction to a necessary defense process. In this respect the prohibition set forth in § 501(c) resembles the prohibition that was upheld by the Court in Debs v. United States, supra. In an opinion by Mr. Justice Holmes, the Court ruled in that case that although Eugene Debs was free to criticize the public policy that

had taken the Nation into World War I, he was not free to engage in a deliberate attempt to obstruct a necessary defense process -- military recruitment. Because his speech to the citizens of Dayton, Ohio, created a clear and imminent danger that recruitment would in fact be obstructed, the Court concluded that Government could constitutionally proceed against him.

Congress may conclude that an ongoing enterprise designed to identify intelligence agents and to destroy their effectiveness through disclosure can threaten a necessary defense process. Prohibitions reaching analogous conduct are already on the books. */ One could argue persuasively that in a particular case there may be a legitimate individual interest in engaging in an enterprise of that sort; but in assessing the constitutional balance between that interest and the compelling national interest in maintaining an effective intelligence system, we cannot conclude, given the case law, that there is no instance whatever in which the Government can make such an enterprise unlawful. Accordingly, we conclude that the prohibition set out in § 501(c) has some constitutional applications.

Additionally, we conclude that this bill, if enacted, would not be struck down on what are generally referred to as "overbreadth" grounds. The Supreme Court has developed a doctrine that permits a criminal defendant whose conduct may be constitutionally punished to escape conviction if he can show that the relevant statute can be applied not only to him but also to others whose conduct is protected by the First Amendment; but in recent years the Court has narrowed that doctrine. The "overbreadth" of the statute must "not only be real but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). In our judgment, especially if the recommendations referred to below are accepted, this carefully tailored bill is not substantially overbroad within the Broadrick rule.

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*/ Congress has made it an offense, for example, to undertake to map and publish the location of certain military installations. See 18 U.S.C. §§ 795, 797.

We should add that we concur fully in the recommendations made previously by representatives of this Department concerning the form of the proposal. Those recommendations, which are designed to make clear the narrow scope of the prohibition and to prevent the prohibition from chilling bona fide debate over intelligence policy and practice, are described in the written statement dated August 19, 1980, submitted by the Associate Deputy Attorney General to the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary. A copy of that statement is attached.

Larry A. Hammond
Deputy Assistant Attorney General
Office of Legal Counsel

Attachment

U.S. Department of Justice
Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

NOV 5 1980

M E M O R A N D U M

TO: Larry A. Hammond
Deputy Assistant Attorney General
Office of Legal Counsel

FROM: Gerry Alexis
Attorney-Adviser
Office of Legal Counsel

SUBJECT: Proposed amendment to the criminal penalty provisions of the Privacy Act.

This responds to your request that I comment on an amendment to the criminal penalty provisions of the Privacy Act of 1974, 5 U.S.C. 552a(i) proposed by Merrick Garland, Special Assistant to the Attorney General, in a memorandum dated February 25, 1980. Attached to his memorandum are the views of the Criminal Division on the necessity of amending the Privacy Act's criminal penalty provision. The Criminal Division states that the present criminal penalty provision of the Act, 5 U.S.C. 552a(i)(1), may present the following questions in prosecuting a government employee under the Act for the disclosure of information related to an ongoing criminal investigation:

(1) Whether a record must be filed with the agency's central records to enter a "system of records";

(2) Whether the individual named in the disclosure must be the same individual whose name is used in filing the report in the system of records; and

(3) Whether the employee disclosing the information must acquire the information from an agency record.

I conclude that, for the Act to apply, the individual named in the disclosure must be the same individual whose name is used to retrieve the information from the system of records, and the information need not be filed in an agency's central records to enter a "system of records." Because the case law under the Privacy Act, albeit sparse, casts some doubt on whether the criminal penalty provision punishes disclosures of information not acquired from an agency record, it may be desirable to add a provision which clearly covers disclosures of information obtained in the course of a criminal investigation regardless of whether an agency's record was the source of the information. The proposed amendment, however, raises serious First Amendment questions primarily because it encompasses activity which may serve a legitimate "whistleblowing" function.

The relevant criminal penalty provision presently states:

> Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

5 U.S.C. 552a(i)(1).

The statute appears to require proof of the following elements:

(1) defendant was an officer or employee of an agency;

(2) defendant had possession of or access to agency records;

(3) such agency records contained individually identifiable information the disclosure of which is prohibited by the Privacy Act or by rules or regulations promulgated thereunder;

(4) the defendant knew that the disclosure of such material is prohibited by the Act; and

(5) the defendant willfully disclosed the material to a person or agency not entitled to receive it.

Furthermore, in order for the disclosure of the information to be prohibited by the Privacy Act, it must be contained in a record which is in a system of records. 5 U.S.C. 552a(b). A "record" is an item, collection or grouping of information about an individual that contains his name, identifying number, symbol or any other identifying particular assigned to the individual. 5 U.S.C. 552a(a) (4). A "system of records" is a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some other identifying symbol, number or particular. 5 U.S.C. 552a(a)(5).

Entry of a record into a system of records

A literal reading of the statute suggests that a "record" enters a system of records when an item of information is reduced to a tangible form, is under the control of an agency and is retrieved with an individual identifier. The Office of Information Law and Policy, which has the responsibility within the Department of interpreting and implementing the Privacy Act, informs us that, in most instances, an item of information enters a system of records as soon as it is collected in a tangible form. There is no requirement in the statute that the record be transmitted to an agency's central files in order to be included in a system of records. 1/ In fact many agency regional and field offices maintain their own systems of records. For example, see description of systems of records maintained by FBI field offices in 45 Fed. Reg. 2203-08 (1980).

1/ The General Counsel's Office of the Office of Management and Budget concurs in this view.

Retrieval of Individually Identifiable Information by Name of Another Individual

Under the Act, a "record" is any item of information about an individual which contains his name or any other identifier. A "system of records" is a group of records from which information is retrieved by the name of the individual. The use of the article "the" before the term "individual" in the definition of system of records suggests that the terms "record" and "system of records" should be read together and that information concerning an individual must be retrievable by that individual's name or other identifier in order to be contained in a system of records and protected against disclosure. The General Counsel's Office of the Office of Management and Budget concurs in this view.

Disclosure From Independently Acquired Information

The question whether the employee disclosing the information must acquire the information from an agency record is a more thorny problem. The Office of Legal Counsel indicated in its Memorandum of February 29, 1980 to Victor Kramer that an employee would violate the criminal penalty provision whenever he disclosed information he knew to be contained in a system of records, regardless of whether he acquired that information from participating in an investigation or by actually reviewing the record containing the information. I believe that our interpretation, which was a literal construction of the Act, 2/ is correct. Nevertheless, I recognize that a reasonable argument could be made that disclosure must result from a review of agency records. Such an argument would find support from language in the criminal penalty provision itself as well as from recent district court cases construing the Act.

The criminal penalty provision requires that the employee have possession of or access to agency records. It could be reasonably argued that this requirement suggests that, for a violation of this provision to occur, disclosure must result from the employee's possession of or access to agency records.

2/ The legislative history of the Act sheds no light on this question.

This construction would also find support from recent cases construing the civil remedies provision of the Act. A district court in Savarese v. HEW, 479 F. Supp. 304 (N.D. Ga. 1979), has held that the Act was intended to control the unbridled use of highly sophisticated and centralized information-collecting technology and that a disclosure would not be actionable under the civil remedies provision of the Act without proof that an information system was used to retrieve the disclosed information. In Savarese, a former government employee brought an action for damages under the Privacy Act claiming that his supervisor had disclosed information from agency records to his prospective employers. The government maintained that the disclosed information was based on independent knowledge acquired as the plaintiff's supervisor and not on agency records. Noting that at least a portion of the information disclosed was contained in a system of records, the court nevertheless found no violation of the Privacy Act because of the undisputed evidence that the supervisor had at no time referred to or otherwise used information retrieved from that system of records. In so holding, the court reasoned that, if the Act were construed to apply to this situation, "no government employee could utter a single word concerning any person without first reviewing all systems of records within the agency to determine whether or not the information in question was contained therein," 479 F. Supp. at 308. One could argue that the court's concern in Savarese-- that government employees would have to determine whether information was contained in a system of records before disclosing it-- would not be present in a prosecution under the criminal penalty provision because of that provision's requirement that the government employee know that disclosure is prohibited by the Act. 3/ It is unlikely, however, that a court would adopt a more expansive construction of the criminal penalty provision

3/ The Criminal Division mentions in its memorandum that the knowledge requirement could present difficulties in prosecuting a disclosure under the criminal penalty provision because it may require knowledge of the basics of a system of records as well as knowledge that the information has been entered into a system of records. We do not believe that the Act would require more than proof that the employee knew that the information concerning an individual was contained in a system of records and
(continued next page)

than of the civil remedies provision. Perhaps a court could be persuaded that the better course would be to read both the criminal penalty and civil remedy provision to require knowledge that the disclosed information is contained in a system of records. 4/

Two other district courts have also held that no violation of the Privacy Act occurs if the government employee recalled the individually identifiable information from memory. In Greene v. Veterans Administration, Civil No. 76-461 (M.D.N.C. July 3, 1978), the plaintiff charged that a government physician had disclosed certain facts about his medical history to a state investigator. The court held that the information was not a "record" within the meaning of the Act and granted summary judgment for the government on the claim. The court in King v. Califano, 471 F. Supp. 180 (D.D.C. 1980), adopted the same reasoning. There an administrative law judge alleged that government officials had disclosed his personnel and medical records to a newspaper. The court dismissed the claim holding that "the information alleged to have been divulged was a personal opinion stated from memory, not constituting a disclosure of a record within the meaning of the Privacy Act." Id. at 181.

Both courts, in dismissing the Privacy Act claims, relied on the Office of Management and Budget's interpretation 5/ of the term "record":

3/ (continued)

thus that the information was retrievable by the individual's name or other identifier. The difficulty in proving this element would probably depend upon the role of the employee in the agency. For example, a criminal investigator who is charged with the responsibility of making reports and who, during the course of his investigation may frequently review agency records, is likely to know that certain types of information are routinely placed in a system of records.

4/ The Civil Division which defends most of the civil actions under the Privacy Act may object to this broader interpretation.

5/ The Office of Management and Budget has the responsibility under section 6 of the Act, 88 Stat. 1909 (1974), to develop guidelines and regulations for the use of agencies in implementing the provisions of the Act.

> The term "record" as defined for purposes of the Act, means a tangible or documentary record (as opposed to a record contained in someone's memory) and has a broader meaning than the term commonly has when used in connection with record-keeping systems.

40 Fed. Reg. 28951 (1975).

Neither court questioned whether the disclosed information was also contained in a system of records, and, if so, whether the employees disclosing the information were aware of that fact or had ever reviewed an agency record containing the information. 6/

The government's position in these damage actions and the courts' narrow interpretation of the Privacy Act would pose serious difficulties in a criminal prosecution of an employee who acquired knowledge of the information from his investigation and perhaps never reviewed an agency record containing such information. Although I believe that a prosecution under such facts would not be foreclosed by the Act, it may be difficult to prevail given this trend in the case law and the courts' general disposition to construe criminal statutes narrowly. For that reason, an additional criminal penalty provision covering disclosures of information related to ongoing criminal investigations may be desirable if, in proposing such legislation, any contemplated or ongoing criminal prosecutions under the Privacy Act would not be jeopardized.

Proposed Amendment to the Criminal Penalty Provisions of the Privacy Act of 1974.

The proposed amendment raises the same First Amendment questions this Office discussed in its earlier memorandum commenting on the proposed regulation. See Memorandum of February 29, 1980 to Victor Kramer p. 6-7 n.8. There this Office pointed out that there may be instances in which the government's interest in suppressing the information may not outweigh an employee's interest in disclosing the information. I believe that this concern would be even greater in assessing the proposed amendment to the criminal penalty provision

6/ An attorney in the Civil Division handling King mentioned that the government submitted an affidavit in support of its motion to dismiss averring that none of the plaintiff's personnel records contained the words in haec verba attributed by the newspaper to HEW employees. The court did not question whether the substance of the information was contained in the plaintiff's personnel file.

because, unlike the proposed regulation, the provision does not permit "whistleblowing" disclosures. If a law enforcement officer reasonably believes that the government is covering up a crime or harassing individuals, his interest in disclosing the facts underlying his belief may far outweigh any governmental interest in protecting the information from disclosure. 7/

The proposed amendment presents other problems as well. The amendment's requirement that the law enforcement officer act in reckless disregard of the fact that the information is likely thereafter to be publicly disseminated is vague. The Criminal Division indicates that the intent of this requirement is to prevent only those disclosures to newspaper reporters and the like rather than disclosures to family and close friends. The requirement is not that narrowly drawn. If a law enforcement officer disclosed information obtained in the course of a criminal investigation to a family member or friend who is known by the officer to be a "gossip," it is not readily apparent that the proposed amendment would not apply to such disclosures.

There is also some lack of clarity in the proposed amendment's requirement that only those officers who disclose information "without authority," be penalized; it does not indicate what should be the source of an officer's authority. Must he be authorized by the Privacy Act, the Freedom of Information Act, departmental regulation or by the Attorney General? The source of his authority to disclose information should be specified.

Although it may be difficult to draft a criminal statute on this subject which would survive a First Amendment challenge, I do not believe it would be impossible. If the Criminal Division believes that proposing legislation to penalize the disclosure of information obtained in the course of a criminal investigation would not jeopardize any ongoing or contemplated prosecutions, I would be happy to work with them in drafting a statute which would be less likely to raise First Amendment problems.

7/ We recognize that the present criminal penalty provision may, in some circumstances, also apply to conduct protected by the First Amendment. To our knowledge, the provision has not been challenged under the First Amendment, but that phenomenon may be explained by the few prosecutions that have been brought under the Act.

Amendment to the Privacy Act of 1974

Subsection (i) of Section 552a of Title 5 United States Code is amended by adding thereto a new paragraph 4 as follows:

"(4)(A) Any law enforcement officer who, without authority, knowingly reveals any individually identifiable information that was obtained in the course of a criminal investigation to any person in reckless disregard of the fact that the information is likely thereafter to be publicly disseminated shall be guilty of a misdemeanor and fined not more than $5,000.

"(B) As used in this paragraph the term 'law enforcement officer' means an officer or employee of a federal agency authorized to engage in or supervise the prevention, detection, investigation, or prosecution of an offense."

Proposed Amendment to the Criminal Penalty Provisions of the Privacy Act of 1974

The proposed amendment to subsection (i) of the Privacy Act of 1974, 5 U.S.C. 552a(i)(4), makes it a misdemeanor for a law enforcement officer to knowingly release individually identifiable information that ~~he has~~ who obtained in the course of a criminal investigation if the release is without authority and if he is acting with a reckless state of mind as to the fact that the information is likely thereafter to be publicly disseminated.

While the provision is made part of the Privacy Act, it does not incorporate as an element of the offense that Act's concept of a disclosure being made from a system of records. This eliminates the difficult proof and legislative interpretation problems that are caused by the presence of that concept in the existing criminal penalties of the Privacy Act (5 U.S.C. 552a(i)(1)). However, since a basic aim of the amendment is to protect the privacy of those under investigation until or unless formal public charges of criminality are made, it is appropriate to place the new offense in the Privacy Act itself.

The proposal does not bar the release of any information about an ongoing investigation although such a statute might well be justified; instead, it bars the release only of individually identifiable information. Only if the information relates to a named person or is so phrased that the identity of the subject is apparent will the

offense be committed. This limitation restricts the criminal offense to the most serious of information leaks -- those that invade personal privacy and raise subsequent issues of unfair pretrial publicity.

The offense may only be committed by a law enforcement officer and it must involve information he obtained in the course of a criminal investigation. These limitations are set forth to restrict the scope of this type of offense to the narrowest range and reach those most likely to make such disclosures. The term "law enforcement officer" is specifically defined and limits the offense to officers and employees of a federal agency. The balance of the definition covers those federal officers and employees who engage in or supervise an investigation or prosecution.

The release of the information has to be made "without authority." This is intended to permit a number of releases that are clearly authorized whether by statute or by usual and appropriate law enforcement practice. Included in authorized releases would be such things as a presentation to a grand jury, testimony in court, making reports to superiors, plea bargaining with the defendant's attorney, and interviewing witnesses (where information might have to be imparted to obtain further information).

While the basic culpability that the defendant must act with is "knowingly" (generally defined to mean being aware of the nature of one's conduct), a further requirement of the provision is

that the release must also be such that the defendant is acting in reckless disregard of the fact that the information is likely thereafter to be publicly disseminated. Thus not all unauthorized releases are punishable; releases to the defendant's family or close friends, while reprehensible, simply will not violate the provision. Only if the release is to someone who will be likely to have it publicized -- newspaper reporters, radio and television reporters, those known to have continuing contacts with reporters, and the like -- will the crime be committed.

In keeping with the basic scheme of the criminal penalty section of the Privacy Act, an offense under this provision is punishable by a maximum fine of $5,000 and carries no imprisonment.

Criminal Division
Comments

Difficulties With Prosecution For Leaking Information About An Ongoing Criminal Investigation Under the Criminal Offense Provision of the Privacy Act of 1974.

Under 5 U.S.C. 552a(i)(1) it is a misdemeanor for an officer or employee of an agency who, by virtue of his position, has possession or access to agency records that contain individually identifiable information to willfully release such information to any person if, first, the disclosure of such information is prohibited by the Privacy Act of 1974 (5 U.S.C. 552a) or by rules or regulations issued pursuant to the Act, and, second, if the officer or employee knows the disclosure of the specific material is prohibited.

In the context of an investigative agent or a prosecutor leaking information about an ongoing investigation, prosecution under this provision faces certain difficulties. As a first premise, the disclosure has to be prohibited by the Privacy Act itself. The basic disclosure restriction of the Privacy Act is contained in subsection (b) of 5 U.S.C. 552a. That subsection prohibits disclosure of any information about an individual that is contained in a system of records without the consent of the person to whom the record pertains or the presence of one of the eleven specific exceptions none of which apply here. A system of records is a grouping of records about individuals maintained by a federal agency in which the records are retrieved by use of an individual identifier such as an alphabetically arranged group of names. All systems of records are also required to be listed in a notice published in the Federal Register. For a violation of the disclosure penalty section to have occurred, the specific information released would have to be entered into a written report

and filed in a system of records most probably under the name of the person to whom the disclosure of the records pertains prior to any disclosure.

One question that would have to be answered in a prosecution for leaking information would be exactly when a record enters a system -- when a file number is affixed, when the record or a copy is sent to headquarters, or when the record is placed with other records of the investigation, etc? It is quite possible that a record does not become part of a system of records until it is filed with the agency's central records. Such a requirement would create great difficulties in tracing leaked information in an ongoing investigation at the time of the leak to records already filed.

Another question is whether the individual named in the disclosure has to be the same individual whose name is used in filing the report in the system of records. Most likely it would have to be the same person, but it is less likely that the name disclosed will always be the one used in filing. A third question that arises is whether the release must, in fact, be from a written record or is it enough that the record itself is entered in a system of records even if the agent releasing the information has learned the information from his own observations or discussions with other agents on the case and thus can claim that the release is of information from his memory rather than from an agency record. All of these are unknowns especially as there have been few prosecutions under the Privacy Act. Moreover, the Act has a skimpy legislative history on the point and with few prosecutions there are no annotations interpreting the offense.

A second major difficulty is the requirement that the person revealing the information must know that the release is prohibited by the Privacy Act. This may require knowledge as to the basics of systems of records and the like as well as knowledge that the information has been entered into

such a system. This too raises the issue of the distinction between information learned through actual investigating and discussions and that gleaned directly from written records.

The criminal penalties of the Privacy Act were clearly aimed at the situation in which the offender obtains his information from a written record that has been entered into a system of records and he thereafter releases it with the requisite knowledge. It is, as noted above, not as clear that a case agent or prosecutor intimately involved in the day to day activities of the case commits the offense when he releases information obtained in his various activities and which is in his memory as well as in written form. At the least, prosecution under 5 U.S.C. 522a (i)(1), the criminal disclosure provision of the Privacy Act, is a more tenuous proposition.

There is a copy 2/29/80

Office of the Attorney General
Washington, D. C. 20530

MEMORANDUM FOR: The Attorney General

FROM: Merrick Garland MBG

SUBJECT: Amendments to CFR: Disclosure of Information Concerning Pending Criminal Investigations

At your request, I have drafted proposed amendments to the Code of Federal Regulations intended to clarify and tighten the obligations of Justice Department personnel with respect to disclosure of information concerning pending criminal investigations. The draft amendments are in the form of the strict "no comment" rule you requested. In addition a milder, "no prejudicial comment" option has been drafted.

The draft rules and a descriptive memorandum were distributed for comment to the Deputy, OLC, Dick Blumenthal, and each of the Divisions with criminal components. This memorandum describes 1) the existing regulations governing disclosure of investigative information, and 2) the proposed amendments. The section discussing the amendments attempts to describe, in abbreviated form, the views of those who commented on the proposal. As you might expect, some of the commentators had precisely opposite views -- some finding the draft regulations too strict; some finding them too lenient. Where possible, suggestions of the commentators have been incorporated into the draft regulations attached to this memo.

One final, and important, point. You indicated last week that you intended to announce the new disclosure regulations in your speech to employees this Wednesday. Dick Blumenthal, Civil Rights, and OLC all strongly oppose such a plan. Dick urges you to defer announcement of specific new regulations until the completion of his investigation. His principal argument is that an announcement now may undercut the government's position in administrative termination proceedings: Defendants could argue that the promulgation of new regulations constitutes an implicit admission that current regulations don't cover their behavior. OLC strongly agrees with Dick's position. They also suggest that the ABSCAM targets themselves could point to new regulations as evidence that the Department had not previously taken sufficient steps to prevent prejudice to their trials. Dick also notes that his investigation may produce insights that would be useful in rewording the regulations.

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The Civil Rights Division's principal argument is that we are proceeding with too much haste, and need more time to reflect. Specifically, they are concerned that there has not been time to consult United States Attorneys about the problems they face in this area. Again, OLC agrees. They argue that there are numerous problems with a flat "no comment" rule, and that time should be taken to consider the occasions upon which disclosure of investigative information might be necessary and appropriate.

The above presuades me that you should not describe the specifics of a new rule in your Wednesday speech. Instead, you could state that: (1) current regulations forbid any ABSCAM-like disclosures, and (2) you have ordered the drafting of a revision of the CFR to further clarify, and tighten, employee responsibilities in this area. OLC would then begin work on a final draft of the amendments, for publication whenever you deem appropriate.

If you accept the above recommendation, you do not need to read the balance of this memorandum at this time. You may, however, wish to read the first section, which describes the relevant current regulations. Moreover, OLC would appreciate guidance from you as to the kind of regulations you prefer (e.g., a flat "no comment" rule, a "no prejudicial comment" rule, etc.). The easiest way to provide that guidance would be -- at your leisure -- to read the remainder of this memo and make marginal comments regarding the various proposals discussed therein. Of course, if you decide you do want to announce a new regulation on Wednesday, please read the balance of this memo and indicate which of the alternative proposals you wish to adopt.

CURRENT REGULATIONS GOVERNING DISCLOSURE

Three segments of the current CFR are relevant to disclosures of the kind that occurred in the ABSCAM investigation. These existing regulations plainly prohibit disclosures of that nature. However, the regulations are neither as precise nor as stringent as you have indicated you desire.

1. 28 CFR §50.2 (Release of Information Relating to Criminal and Civil Proceedings). This is the most directly applicable, currently effective set of regulations. Although the criminal subsection, §50.2(b), purports to apply to "the release of information to news media from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise," the bulk of the section is more appropriately applicable to the post-charge stage. */ Nonetheless, the following portions of 50.2(b) clearly do preclude disclosures of the ABSCAM variety.

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*/ For example, §50.2(b)(3) permits disclosure of a defendant's name and background information, the substance of a charge, and "the length and scope of an investigation." [In context, the latter arguably refers only to investigations which have already resulted in charges, but this is not clear].

§50.2(b)(2) prohibits Department personnel from furnishing "any statement or information which could reasonably be expected to be disseminated by means of public communication, if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial." §50.2(b)(3) provides that "where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public." Finally, §50.2(b)(6) states that personnel "should refrain from making available . . . [s]tatements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial."

These regulations are reproduced in the United States Attorneys' Manual, 1-5.540. In July, Judge Bell issued a directive elaborating on §50.2, and listing a number of special cases where disclosures would be permitted (e.g., acknowledgment of investigations of publicized civil rights violations, and of investigations deriving from other agency referrals). That directive expired January 23rd. Judge Bell's directive, and a complete copy of §50.2, are attached.

2. 28 CFR §47.735-1(b) (ABA Canons). This regulation provides that "attorneys employed by the Department are subject to the canons of professional ethics of the American Bar Association." The Canons have now been superceded by the Code of Professional Responsibility. Since the regulation has not been changed, it is not clear which set of ABA rules applies to Department attorneys.

The most applicable of the old Canons was Canon 20 ("Newspaper Discussion of Pending Litigation"), which stated:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any ex parte statement.

While Canon 20 is no longer part of the ABA's ethics code, the District of Columbia Bar does continue to give it effect. It is incorporated as part of the current version of D.C.'s Code of Professional Responsibility.

The ABA's present Code of Professional Responsibility includes two Disciplinary Rules which could be applied to prohibit disclosures of investigative information. The first, DR 7-107(A), is the successor to the old Canon 20. Although it is entitled "Trial Publicity," it provides:

> A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:
> (1) Information contained in a public record.
> (2) That the investigation is in progress.
> (3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.
> (4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
> (5) A warning to the public of any dangers.

The other potentially applicable Disciplinary Rule is the Code's general catch-all section, DR 1-102(A)(5), which states that "A lawyer shall not . . . engage in conduct that is prejudicial to the administration of Justice."

3. 28 CFR §§16.40-16.57 (Privacy Act Regulations). 28 CFR §16.26(b)(8) provides that "Except to the extent permitted pursuant to the Privacy Act, employees of the Department shall . . . . [d]isseminate no information concerning individuals outside the Department except when authorized by 5 USC 552a . . ." On its face, this seems to apply to any and all disclosures of information about targets of criminal investigations. (Indeed, if applied literally it would prohibit numerous public announcements now made at all levels of the Department every day). However, the introduction to these regulations states that they "apply to all records contained in systems of records maintained by the Department which are retrieved by individual name or identifier . . . " 28 CFR 16.40(a). Thus, the regulations appear to apply only to disclosures from records contained within "systems of records," and not to all disclosures. The regulations therefore retain the same ambiguities, and the same problems with enforcement, possessed by the Privacy Act itself. These difficulties were discussed in detail in my memo of 2/11/80. Fred Hess, for the Criminal Divison, agrees with this conclusion. OLC, however, reaffirms its earlier-stated view that the "system of records" requirement does not represent a major stumbling block.

4. Miscellaneous Provisions. In addition to the above, a number of other more general OPM and Departmental regulations are arguably applicable to the ABSCAM leaks.*/ Also possibly applicable is 28 CFR 45.735(10), which prohibits an employee from making an "improper use of . . . information" which comes to him "by reason of his status as a Department of Justice employee." Although this section's applicability to mere disclosure alone is not completely clear as it is primarily aimed at "use for financial gain," the section does refer to "any other improper use." Finally, the FBI's internal regulations prohibit unauthorized disclosures by agents. See FBI Manual of Administrative Operations and Procedures §1-19(2); §11.

DRAFT AMENDMENTS

The draft amendments are the first attachment to this memo. They are cast in the form of additions to 28 CFR §50.2. (See page 2, supra.) The principal amendment is a new subsection, labeled §50.2(b), which will govern the release of information from the time a criminal investigation commences until the time formal charges are filed. Subsidiary amendments then recast the old §50.2 (b), relabeled §50.2(c), so that it now governs the period from the time a criminal charge is filed until all proceedings arising from the charge have been terminated. §50.2(d) [the old 50.2(c)] states the rules for civil investigations and litigation. No effort has been made to alter the substance of either of these latter two sets of rules [(c)&(d)]. The following comments concern problems which are lurking in the proposed amendments.

1. "No Comment" or "No Prejudicial Comment." Two alternative options for the core of the regulation are presented for your consideration. At your suggestion, Option I is worded as a flat "no comment" rule. It states: "No employee . . . shall release to any unauthorized person any information concerning specific criminal investigations." §(b)(2). Three somewhat narrow exceptions are provided in §(b)(3). The advantage of this formulation is that it creates a clear prohibition which reaches the problems that prompted the rule with a minimum of ambiguity. It leaves little room for post-hoc argument over whether a particular disclosure was covered by the rule. The Tax Division firmly supports this type of strict no-comment rule.

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*/ See, e.g., 5 CFR §§ 735.201a(c) (impeding government efficiency); (e) (making a government decision outside official channels); (f) (affecting adversely the confidence of the public in the integrity of the government); 735.209 (conduct prejudicial to the government); 28 CFR §§ 45.735.2(c)(3)(impeding government efficiency); (c)(6) (affecting adversely the confidence of the public in the integrity of the government); 45.735-18 (conduct prejudicial to the government).

The disadvantage of this kind of formulation is that it may be overinclusive, and hence may be seen as in conflict with the Department's general policy of openness and candor. OLC also suggests that the regulation's overbreath might raise First Amendment problems. Not every comment on a specific investigation would be detrimental either to the target or the investigation, and some comments (not all of which we can predict in advance) might well be beneficial. Criminal, Antitrust, Civil Rights, OLC, and Judge Bell's July Directive all offer illustrations of disclosures that might be warranted, but that a flat no-comment rule would bar. For example, such a rule would prevent confirmation that an investigation is underway in a case in which the public is clamoring for action. Civil Rights indicates that it has many cases of this character. It would also preclude acknowledgment that another agency has referred a case to DOJ. Further, the rule would bar a denial that an investigation has begun in a situation in which an individual's or institution's reputation would benefit from such a denial. It would also limit a prosecutor's ability to offer a newsman a background briefing in exchange for delaying the publication of a story during a critical stage in an investigation. And it would prevent a U.S. Attorney from announcing that a decision not to prosecute has been reached. Finally, the rule would limit the ability of Departmental officials to rebut embarassing public misstatements of facts about Departmental activities.

Of course, the provision permitting waiver of the regulations by the AG, DAG, or AAG's [(b)(4)] alleviates some of these difficulties, but in so doing it may place an unnecessary burden on these offices. OLC also warns that it could give rise to charges of censorship. And, employees may simply drop a matter rather than undergo the inconvenience of seeking a waiver, thus barring from disclosure some material which ought to be released.

Option II is a considerably narrower formulation, prohibiting the release of only that information "which might invade the privacy of individuals, damage their reputations, prejudice subsequent trials, or compromise investigations or investigators." Its advantage is that it bars disclosure of that information, and only that information, which we are truly concerned about releasing. Many of the difficulties described above would not arise under such a rule. Because of the wide variety of circumstances in which some comment is appropriate, and because of the difficulty of defining these circumstances precisely in advance, the Criminal Division prefers this Option. Its disadvantages are that it introduces somewhat ambiguous terms whose meaning might be subject to debate, and that it allows individual employees to determine, in the first instance, what information falls within and without the rule.

Finally, OLC suggests yet a third option in place of either a "no comment" or "no prejudicial comment" rule. Their proposal (which I am not completely clear on) appears to involve a listing of the specific kinds of disclosures which could be made (including some of the specific illustrations mentioned above). It might also involve the establishement of different rules for different Divisions, depending upon their different circumstances. OLC is not yet prepared to offer a draft of this option.

2. Definition of Unauthorized Person. The proposed amendments apply to the release of information to any "unauthorized person" rather than merely to "news media" as in the old rules. Although "unauthorized person" is a somewhat ambiguous phrase, it was deliberately chosen over a less ambiguous description such as "non-Departmental employee" in order not to preclude necessary disclosures to judges, state and local police, witnesses, grand juries etc. The Tax Division objects to the ambiguity of the phrase but offers no alternative. The Criminal Division concludes that the phrase should be used, and that no attempt should be made to precisely define it because it would be too difficult to list all appropriate recipients of information.

3. Waiver Provision. Section (b)(4) permits a waiver by the Attorney General, Deputy Attorney General or relevant Assistant Attorney General. As originally circulated, the proposal permitted waiver only by the AG and DAG. I have expanded the provision to take into account the views of the Divisions. (Antitrust proposes further extending the waiver power by permitting delegation of authority by the AAG's to their subordinates.) This will alleviate some of the inflexibility of the rule, as it will permit AAG's to adapt the rule to their Divisions' specific circumstances.

Attachments

1. Draft Regulations

2. Existing Regulations
   a. 28 CFR 50.2
   b. Judge Bell's July Directive

3. Comments on Draft Regulations by Selected OBBD's
   a. OLC
   b. Blumenthal
   c. Criminal
   d. Civil Rights
   e. Antitrust
   f. Tax

DRAFT AMENDMENTS TO

28 CFR §50.2.

OPTION I

1. Insert a new subsection "(b)" to follow directly after the present "(a)(4)":

(b) Guidelines for criminal investigations.

(1) These guidelines shall apply to the release of information to any unauthorized person from the time a criminal investigation commences until the time formal charges are filed. Particularly stringent limitations are required during this period as it constitutes an extremely sensitive part of the criminal process. The unauthorized release of certain kinds of information at this stage may invade the privacy of individuals, damage their reputations, prejudice subsequent trials, and compromise investigations and investigators.

(2) No employee of the Department shall release to any unauthorized person any information concerning specific criminal investigations.

(3) This statement of policy is not intended to restrict the release of:

(i) General information regarding Department or field office policies, issues, priorities, or statistics;

(ii) Information concerning individuals who are fugitives from justice, appeals for assistance in obtaining evidence, or other reports to the public necessary to guarantee health or safety;

OPTION II

Make all changes indicated for Option I except:

1. In §(b)(1), Delete the last two sentences, and

2. Substitute the following for §(b)(2):

§(b)(2) No employee of the Department shall release to any unauthorized person any information which might invade the privacy of individuals or organizations, damage their reputations, prejudice subsequent trials, or compromise investigations or investigators.

UNITED STATES GOVERNMENT

memorandum

DATE: February 12, 1980

REPLY TO ATTN OF: Victor Kramer

SUBJECT: Leaks

TO: Merrick Garland
Gordon Tucker

At breakfast this morning the Attorney General said he wanted to take or have taken the following initiatives:

He would address the members of the Department of Justice in Washington in the Great Hall with FBI employees watching the address on video in their own auditorium. He would also, somehow, transmit the message to all strike forces and U.S. Attorneys' offices. The address would include a discussion by him of the recent ABSCAM leaks, of employees' coexisting responsibilities regarding confidentiality, and of steps he has taken and will take to forestall future leaks. As I understand it, these steps have been and will be:

1. His directive to OPR to conduct an investigation with U.S. Attorney Blumenthal in charge. Former ABA President Justin Stanley, if he accepts the Attorney General's request, would review the steps taken in the investigation to be sure they were thorough, etc.

2. The Attorney General will make changes in CFR along the following lines: "With regard to criminal investigations and proceedings no employee shall communicate any facts, etc. to persons outside the Department." Moreover, within the Department, any inquiries in regard to same shall be referred to the Office of Public Affairs. In addition, we shall try to draft a regulation which would confine information regarding criminal investigations to persons on a need to know basis within the Department.

3. He will propose to the Congress an amendment to the Privacy Act to make it a misdemeanor with a fine of $5,000 for any person to leak. (We already have a written proposal from C.D.on this possible amendment.

4. All or some BODs (he said "Assistant Attorneys General") will "be used as a vehicle to discuss these changes." (I want to discuss with you how this "vehicle" will be operated.)

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OPTIONAL FORM NO. 10
(REV. 7-76)
GSA FPMR (41 CFR) 101-11.6
5010-112

Following the staff meeting the Attorney General said to me that we "should think through what we would be attempting to protect and who has to know in an undercover operation."

Also, at this same private meeting he described to me certain procedures that might be adopted to implement a "need to know" policy. I shall discuss this with you briefly.

Requests:

1. I hereby ask Garland to work on the CFR changes and the proposed legislation.

2. I ask Gordon to be in charge of arranging the speech in Washington to departmental employees, including FBI, getting the message to employees outside Washington, and preparation of ideas for inclusion by the Attorney General in his address in the Great Hall.

Office of the Attorney General
Washington, D. C. 20530

February 11, 1980

MEMORANDUM

TO : The Attorney General

FROM : Merrick Garland MBG

SUBJECT : ABSCAM: Criminal Sanctions for Unauthorized Disclosures

At your request, I have explored with OLC the question of criminal sanctions for unauthorized ABSCAM disclosures. Attached is an OLC memorandum setting out the various statutory alternatives. You and I briefly discussed all but one of these (the civil rights statutes) while at Lake Placid. I have varying degrees of difficulty with each of the options discussed in the OLC memorandum.

1. Privacy Act

OLC states that the Privacy Act's criminal sanctions (misdemeanor: $5,000 fine) would be applicable to willful disclosures. As we have discussed before, on balance I think there is some potential in the Privacy Act. However, OLC does not discuss the biggest difficulty with a Privacy Act prosecution: the "system of records" requirement.

5 USC 552a(i)(1) attaches criminal penalties to any agency employee who, having access to "agency records which contain individually identifiable information the disclosure of which is prohibited by this section," knowingly and willfully discloses such material.*/ The information, the "disclosure of which is prohibited," is described in 5 USC 552a(b) as "any record which is contained in a system of records." "System of records" is defined as "a group of any records . . .

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*/ The intent requirement includes knowledge "that disclosure of the specific material" was prohibited by the Privacy Act. Proving this may not be easy.

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from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 USC 552a(a)(5). Thus, what the Privacy Act prohibits is the disclosure of material contained in records indexed by individual names or identifiers.

The ambiguity in the Act is whether the leaker must actually have access to, and leak from, the individually-indexed files; or, instead, whether it is sufficient that the material leaked be contained in such files, regardless of where the leaker himself got the information. Assume that the facts are these: Individually-accessed files were kept on the ABSCAM targets at headquarters, but field units kept their records in some other manner -- e.g., indexed by dates or location of meetings, rather than by the names of targets. If the leak came from headquarters' files, Privacy Act liability would be clear. However, if the leak came from the field, the statute's ambiguity would become relevant. Defendants would argue that the information leaked did not come from individually-indexed files; the Government would argue that although the source of the leaker's information may have been from, e.g., a date-indexed file, the same information was contained in headquarters' individually-indexed files and thus its release was prohibited.*/

Unfortunately, there are no court opinions directly addressing this issue, as prosecutions under the statute have been exceedingly rare (I was unable to find any at all using LEXIS; Fred Hess of the Criminal Division believes there may have been one). However, those opinions which do discuss the "system of records" requirement, albeit in the context of other sections of the Act, support the position that the ABSCAM defendants are likely to take -- that the statute applies only to individually-indexed information.

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*/ Subsection (i)1 makes criminal the disclosure of materials whose release is prohibited by implementing regulations as well as by the Act. At first glance, DOJ regulations seem to eliminate the Act's own ambiguity as they provide that employees shall "Disseminate no information concerning individuals outside the Department except when authorized by 5 USC 552a . . . . " 28 CFR 16.56(8). However, the introduction to these regulations states that they "apply to all records contained in systems of records maintained by the Department which are retrieved by individual name or identifier . . . . " 28 CFR 16.40(a). Thus, the regulations possess the same ambiguity as the Act itself.

For example, Albright v. United States, C.A. No. 78-0397 (D.D.C. 1978), involved section (e)7 of the Act, which prohibits an agency that maintains a system of records from maintaining a record "describing how any individual exercises rights guaranteed by the First Amendment." Plaintiffs attacked HEW for retaining a videotape of a meeting in which they discussed personnel problems. Because the videotape was titled by date and not by the names of the plaintiffs, Judge Richey held that it was not part of the "system of records" and hence its retention was not prohibited: "It was not Congress' intent to protect individuals identified in records collected, but to protect individuals identified in systems of records." Citing another court, Judge Richey wrote that because "the . . . judicial remedies provided in the Act attach not to 'records' per se, but to 'systems of records' as defined in the Act,' the Privacy Act does not apply unless the record is incorporated into the system of records and is retrievable from within that system."*/

The above makes me less certain than OLC that a Privacy Act prosecution would hold up. I understand that Fred Hess, the Criminal Division's Privacy Act expert, shares my misgivings. Nonetheless, the statutory interpetation which would permit such a prosecution (described above) is certainly a reasonable reading of the section's language and of Congress' intent. There is no court opinion on 5 USC 552a(i)(1) which contradicts it, and the contrary cases mentioned supra could be distinguished as relating to different statutory sections which respond to different congressional concerns. Thus, although I do not favor it, a Privacy Act prosecution is a possibility at least worthy of further consideration. (Of course, if it turns out that the leaks were from individually-indexed files there would be no difficulty with prosecutions brought under the Act.) Also worthy of consideration would be the drafting of a clarifying amendment to the Act.

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*/ Similarly, Smiertka v. Treasury Department, 447 F. Supp. 221 (D.D.C. 1978), remanded on other grounds 604 F. 2d 698 (D.C. Cir. 1979), involved 5 USC 552a(d)(1), which guarantees and individual access to "any information pertaining to him which is contained" in an agency's system of records. Plaintiff sought access to IRS investigatory files concerning him, and also to IRS daily reports which included references to the investigation. As to the latter, Judge Sirica held that even though the reports contained information on the plaintiff, they were "not accessed by plaintiff's name or other personal identifier" and so "would not be considered part of a system as defined by the Act." Id., at 228-229.

2. Disclosure of Information as Theft of Government Property

18 USC 641 provides criminal penalties (ten years; $10,000) for one who "knowingly converts to his use or the use of another, or without authority . . . conveys or disposes of any record . . . or thing of value of the United States . . . ." As OLC points out, the Second Circuit has interpreted the statute as extending to the sale of information contained in government records, United States v. Girard, 601 F. 2d 69 (2d Cir. 1979).*/ The Third Circuit has reserved the question, United States v. DiGilio, 538 F. 2d 972, 978 (3rd Cir. 1976), and a federal district court in D.C. has expressly rejected such an interpretation, United States v. Hubbard, 474 F. Supp. 64, 79 (D.D.C. 1979).

Since the Second and Third Circuits are likely sites for ABSCAM leak prosecutions, OLC is correct in offering 18 USC 641 as a potential source of criminal sanctions. Any use of §641 in this manner, however, must be subject to this major caution: A similar theory of §641 was used by the government in the Ellsberg-Pentagon Papers case, and that use was subject to enormous criticism from civil libertarians as an infringement on First Amendment rights. See, Nimmer, National Security v. Free Speech, 26 Stan. L. Rev. 311, 315-324 (1974); United States v. Hubbard, 474 F. Supp. 64, 79 (D.D.C. 1979). Fred Hess describes reaction at the time as a "fire storm." The argument is that such a construction of the statute would render criminal unauthorized disclosure of all kinds of information, regardless of the weight of the secrecy interest involved, and that it therefore fails the "overbreadth" standard applicable under the First Amendment.

3. Removal of Government Records

If original records were removed, 18 USC 2071 provides criminal sanctions (3 years; $2,000). It does not apply to photocopies, United States v. Rosner, 352 F. Supp. 915 (SDNY 1972). However, some courts have held that 18 USC 641, discussed above, does apply to photocopies made on government equipment. See United States v. DiGilio, supra; United States v. Hubbard, supra.

4. Disclosure of Confidential Information

18 USC 1905 punishes the disclosure by an employee of the United States of any information which concerns or relates to the "amount or source of any income, profits, losses, or expenditures of any person . . . . " Whether release of

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*/ The court did not discuss whether it was necessary that the leaker receive money for the leak.

information concerning ABSCAM payments to congressmen would fit this description is unclear to both OLC and me, since we have been unable to find published opinions in prosecutions brought under the section.

5. Civil Rights Statutes

18 USC 242 makes it a crime for any person, under color of law, to willfully deprive a U.S. inhabitant "of any rights privileges, or immunities secured or protected by the Constitution or laws of the United States." OLC has three theories under which disclosure of ABSCAM information may have deprived the targets of their constitutional rights. In my view, all three are highly speculative and pose serious problems which the Department would do better to avoid.

First, OLC suggests that prejudicial publicity created by the disclosures may have violated the targets' rights to fair trials. Unfortunately, if we prove prejudice in order to prosecute a leaker, we will have put ourselves out of court in prosecutions against the ABSCAM targets themselves.

Second, OLC suggests that members of Congress may have constitutional protection against tortious interference with their effectiveness as representatives by executive branch officials, and that defamation may constitute such interference. However, (1) this theory has, so far as I know, never been tested in any forum, let alone a criminal prosecution; (2) a defamation theory, at least, would be inapplicable in any case where the leaked allegations were true; and (3) the broader implications of such a theory might well undermine the validity of ABSCAM itself.

Finally, OLC suggests that the disclosures may have violated the Fifth Amendment's guarantee that no person be deprived of liberty or property without due process of law. As OLC notes, however, Paul v. Davis, 424 US 693 (1976), held that damage to reputation alone is not a deprivation of "liberty". Thus, successful application of this theory requires establishing that the Privacy Act (or similar statutes) creates a "property" interest in protection against prejudicial leaks. Since demonstrating a Privacy Act violation would therefore be required, I see no reason to take this circuitous approach. If there were a Privacy Act violation here, why not attack it directly rather than piggy-backing it onto a civil rights statute?

6. Obstruction of Justice

As we had anticipated, OLC found the obstruction of justice statutes inapplicable. However, their reasons are somewhat different than those we considered (i.e., the intent problem). OLC concludes that 18 USC 1503 and 1505 apply only when judicial or administrative proceedings are pending, and that the remaining section, 18 USC 1510, is too narrow for our purposes in that it requires evidence of bribery, misrepresentation or intimidation.

7. Whistleblower Protection

OLC concludes that "whistleblower provisions" of the Civil Service Reform Act of 1978 would not provide ABSCAM leakers with protection.

Office of the Attorney General

Washington, D. C. 20530

February 21, 1980

MEMORANDUM FOR: ~~The Attorney General~~
Victor Kramer, Counselor to
the Attorney General

FROM: Merrick Garland
Special Assistant to the
Attorney General

SUBJECT: Amendments to CFR: Disclosure of Information Concerning Pending Criminal Investigations

At your request, I have drafted proposed amendments to the Code of Federal Regulations intended to clarify and tighten the obligations of Justice Department personnel with respect to disclosure of information concerning pending criminal investigations. This memorandum describes: 1) the existing regulations governing disclosure of investigative information, and 2) the proposed amendments. The most relevant CFR section now governing the area, the proposed amendments, and two alternative formulations are attached.

CURRENT REGULATIONS GOVERNING DISCLOSURE

Three segments of the current CFR are arguably relevant to disclosures of the kind that occurred in the ABSCAM investigation. None, however, is as precise or as stringent as you have indicated you desire.

1. 28 CFR §47.735-1(b) (Standards of Conduct). This regulation provides that "attorneys employed by the Department are subject to the canons of professional ethics of the American Bar Association." The Canons have now been superceded by the Code of Professional Responsibility. Since the regulation has not been changed, it is not clear which, if either, set of ABA rules applies to Department attorneys.

The most applicable of the old Canons was Canon 20 ("Newspaper Discussion of Pending Litigation"), which stated:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice

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> the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any ex parte statement.

While Canon 20 is no longer part of the ABA's ethics code, the District of Columbia Bar does continue to give it effect. It is incorporated as part of the current version of D.C.'s Code of Professional Responsibility.

The ABA's present Code of Professional Responsibility includes two Disciplinary Rules which may be applicable to disclosures of investigative information. The first, DR 7-107(A), is the successor to the old Canon 20. Although it is entitled "Trial Publicity," it provides:

> A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:
> (1) Information contained in a public record.
> (2) That the investigation is in progress.
> (3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.
> (4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
> (5) A warning to the public of any dangers.

The other potentially applicable Disciplinary Rule is the Code's general catch-all section, DR 1-102(A)(5), which states that "A lawyer shall not . . . engage in conduct that is prejudicial to the administration of justice."

2. 28 CFR §§16.40-16.57 (Privacy Act Regulations). 28 CFR §16.56(b)(8) provides that "Except to the extent permitted pursuant to the Privacy Act, employees of the Department shall . . . [d]isseminate no information concerning individuals outside the Department except when authorized by 5 USC 552a . . ." On its face, this seems to apply to any and all disclosures of information about targets of criminal investigations. However, the introduction to these regulations states that they "apply to all records contained in systems of records maintained by the Department which are retrieved by individual name or identifier . . . " 28 CFR 16.40(a). Thus, the regulations appear to apply only to disclosures from records contained within "systems of records," and not to all disclosures.

The regulations therefore retain the same ambiguities, and the same problems with enforcement, possessed by the Privacy Act itself. These difficulties were discussed in detail in my memo of 2/11/80.

3. 28 CFR §50.2 (Release of Information Relating to Criminal and Civil Proceedings. This is the most directly applicable, currently effective set of regulations. Although the criminal subsection, §50.2(b), purports to apply to "the release of information to news media from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise," the bulk of the section is more appropriately applicable to the post-charge stage.*/ Nonetheless, several portions are clearly relevant to disclosures of the ABSCAM variety.

§50.2(b)(2) prohibits Department personnel from furnishing "any statement or information which could reasonably be expected to be disseminated by means of public communication, if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial." The problem with using this subsection, of course, is that it requires the Department to assert a probability of trial prejudice -- an assertion that the investigation's target would use against us at a subsequent trial. §50.2(b)(3) provides that "where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public." Finally, §50.2(b)(6) states that personnel "should refrain from making available . . . . [s]tatements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial." These regulations are reproduced in the United States Attorneys' Manual, 1-5.540, and a complete set is attached to this memorandum.

PROPOSED AMENDMENTS

The proposed amendments are cast in the form of additions to 28 CFR §50.2. The principal amendment is a new subsection, labeled §50.2(b), which will govern the release of information from the time a criminal investigation commences until the time formal charges are filed. Subsidiary amendments then recast the old §50.2(b), relabeled 50.2(c), so that it now governs the period from the time a criminal charge is filed until all proceedings arising from the charge have been terminated. §50.2(d) [the old 50.2(c)] states the rules for civil investigations and litigation. No effort has been made to alter the substance of either of these latter two sets of rules [(c)&(d)]. The following comments concern problems which are lurking in the proposed amendments.

*/ For example, §50.2(b)(3) permits disclosure of a defendant's name and background information, the substance of a charge, and "the length and scope of an investigation." [In context, the latter arguably refers only to investigations which have already resulted in charges, but this is not clear.].

No comment v. No positive comment.

1. At your suggestion, the proposed amendment is worded as a flat "no comment" rule. It states: "No employee . . . shall release to any unauthorized person any information concerning specific criminal investigations." (b)(2). Three somewhat narrow exceptions are provided in (b)(3). The advantage of this formulation is that it creates a clear prohibition which reaches the problems that prompted the rule with a minimum of ambiguity. It leaves little room for post-hoc argument over whether a particular disclosure was covered by the rule.

The disadvantage of this kind of formulation is that it is probably overinclusive, and hence may be seen as in conflict with the Department's general policy of openness and candor. Not every comment on a specific investigation would be detrimental either to the target or the investigation, and some comments (not all of which we can predict in advance) might well be beneficial. For example, such a rule would prevent a field office from confirming that an investigation is underway in a case in which the public is clamoring for action. It would also preclude a denial that an investigation is underway in a situation in which an individual's or institution's reputation would benefit from such a denial. Finally, it would limit a prosecutor's ability to offer a newsman a background briefing in exchange for delaying the publication of a story during a critical stage in an investigation. Of course, the waiver provision in (b)(4) alleviates some of this difficulty, but in so doing it may place an unnecessary burden on the Attorney General and Deputy Attorney General. Employees may also simply drop a matter rather than undergo the inconvenience of seeking a waiver, thus barring from disclosure some material which ought to be released.

Two alternative formulations of (b)(2) are attached to this memorandum. The first limits the prohibition to information "concerning individuals who are subjects of criminal investigations." It is basically a restatement of the present Privacy Act regulation, 28 CFR 16.56(8), minus the ambiguous "system of records" requirement. Its advantage is that it alleviates some of the overinclusiveness problem of a total ban, while still covering the disclosures in the ABSCAM case. Its disadvantage is that although it would prevent release of most information damaging to individuals, it would not bar other disclosures which might compromise investigations or investigators.

"Alternative 2" is considerably narrower, prohibiting the release of only that information "which might invade the privacy of individuals, damage their reputations, prejudice subsequent trials, or compromise investigations or investigators." Its advantage is that it bars disclosure of that information, and only that information, which we are truly concerned about releasing. Its disadvantage is that it introduces somewhat ambiguous terms whose meaning might be subject to debate in the event of an alleged violation. If you adopt this version, it could appropriately be applied to civil as well as criminal investigations.

Period covered by rules

2. Subsection (b)(1) states that these guidelines shall apply "from the time a criminal investigation commences until the time formal charges are filed." The old (b)(1) is then relabeled (c)(1) and applies from the time of the charge until the termination of proceedings resulting from the charge. This leaves the guidelines' applicability uncertain in cases where charges are never filed. This is an ambiguity which you may, or may not, want clarified.

If you wish the (b)(1) guidelines to apply only until charges are filed, or a decision not to charge is made, then the underlined phrase should be added. This, of course, would then leave us with the need to formulate another rule to govern disclosures of potentially damaging information concerning individuals who are never charged. If, instead, it is determined that the guidelines should be made clearly applicable both during open investigations, and in perpetuity to investigations closed without charges, then the first sentence in (b)(1) could be modified to read: " . . . . . to any unauthorized person regarding open criminal investigations, or investigations closed without the filing of formal charges". Minor modifications of the next two sentences in (b)(1) would also be required.

Finally, since "perpetuity" is a rather long time, you may wish to leave the matter in its present, ambiguous form. As now written, the subsection does not indicate clearly what rules are applicable where a decision not to charge is reached. However, it could be argued that the subsection does reach such cases since it applies "until the time formal charges are filed" -- if they are never filed the rule would literally apply indefinitely.

Definition of "Unauthorized Person"

3. The proposed amendments apply to the release of information to any "unauthorized person" rather than merely to "news media" as in the old rules. Although "unauthorized person" is a somewhat ambiguous phrase, it was deliberately chosen over a less ambiguous description such as "non-Departmental employee" in order not to preclude necessary disclosures to judges, state and local police, etc. However, it may be that the permissability of such disclosures is so clear that a specific phrase could be used without disadvantage.

March 5, 1980

To: Victor Kramer

From: Merrick Garland

Re: Disclosure of Background File Information

At your request, I have quickly researched the following question: "Is disclosure to a private individual by an FBI agent of information from a federal judge's background file, without the approval of the Director, unlawful and/or criminal?" My answer is: It probably is unlawful; it possibly is criminal.

1. Lawfulness. The Privacy Act, 5 U.S.C. §552a(b), forbids an agency from disclosing any record contained in a system of records */ to "any person" unless the disclosure falls within one of eleven exceptions. The only exception potentially applicable here is (b)(3), the exception for "routine uses" compatible with the purpose for which the information was collected. For a use to be considered "routine," it must be designated as such by the agency and published in the Federal Register. 5 U.S.C. §§552a(b)(3), 552a(e)(4)(D).

According to Richard Huff, Deputy Director of the Office of Privacy and Information appeals, background files on judges are contained in the FBI's "Central Records System." The Bureau's description of the routine uses of records in that system is found at 43 Fed. Reg. 44693. The description contains numerous examples of disclosures to federal and state agencies which are considered "routine." However, it also states: "Upon specific approval of the Director, information may be disseminated from this system to individuals in the private sector in extenuating circumstances in order to protect life or property." The implication is that dissemination to private individuals is not generally permitted if the Director has not approved and if there are no extenuating circumstances involving the protection of life or property.**/ Since I understand that the facts of the instant

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*/ Such a "record" is defined as information about an individual which is retrievable by the name of the individual or other identifying particular. §552a(a)(4)&(5). The background files clearly fall within this definition.

**/ Certain specific disclosures to private individuals are expressly provided for, e.g., defendants and civil rights victims. There is also a provision for release of information to the media and general public pursuant to 28 CFR 50.2.

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case are not of this nature, the disclosure at issue would not constitute a routine use, and hence would not be excepted from the prohibition on disclosures found in §552a(b). The agency would therefore be subject to a civil suit for damages under §552a(g)(1).

The reason for qualifying my conclusion of unlawfulness as merely "probable" and not "certain" is that there is some general language in the FBI's description of routine uses that might be taken to encompass the disclosure at issue here. For example, the description states: "The records contained in this system are utilized by the FBI in support of its mission to conduct investigations within its jurisdiction . . . " 43 Fed. Reg. 44693*/ I do not believe that this general statement outweighs the implications of the section quoted in the preceding paragraph, but it is sufficient to lower the level of certainty of my conclusion.

2. Criminality. 5 U.S.C. §552a(i)(1) provides criminal sanctions for disclosures by agency employees that are prohibited by the Privacy Act. In addition to the requirement that the disclosure be prohibited, it must be demonstrated that the employee: (1) knew "that disclosure of the specific material [was] prohibited" and (2) "willfully" disclosed the material. The difficulty of proving "(1)" is what reduces the likelihood of a finding of criminality to the level of "possibly".

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*/ The description also states: "Information from these files is disseminated to appropriate Federal, State, local and foreign agencies where the right and need to have access to this information exists . . . Information is also disseminated to these agencies and to individuals and organizations, where such dissemination is necessary to elicit information from such agencies and individuals."

Office of the Attorney General
Washington, D. C. 20530

December 15, 1980

To: The Attorney General
From: Merrick Garland
Re: Blumenthal Report

At today's meeting, you asked me to transcribe the following list of items requiring your attention:

1. Set time limits.
   a. for responses of individuals named in Report: By 12/19?
   b. for release of Report: by 1/10/81?

Talked to Webster + Renfrew told them of 1/10/81 date

2. Solicit views of Judges Renfrew and Webster regarding whether to release Report. I have done so + they will.
3. Read Report. will do.
4. Revise any sections of Report requiring revision. —
5. Establish fair response process for named individuals.
6. Draft summary and explanation of administrative actions taken.

Yes if possible 1st during 1st 10 days of January with notice going out 1/2 if possible

I've Asked Bill + Charlie to do so!

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