

Statement of
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Before the
Committee on the Judiciary
United States Senate

Concerning
“Unauthorized Disclosures of Classified Information by the Press”

Presented on

June 6, 2006

Mr. Chairman and Members of the Committee, thank you for the opportunity to discuss with you today the difficult issue of unauthorized disclosures of classified information sometimes referred to as “leaks.” I intend to explain the position of the Department of Justice with respect to the scope of the relevant statutes as they relate to the press and the willful dissemination of classified information. In doing so, I cannot comment on any pending investigation or litigation.

In response to recent serious leaks of classified information, President Bush has stated that such leaks have damaged our national security, hurt our ability to pursue terrorists, and put our citizens at risk. Porter Goss, then-Director of the Central Intelligence Agency, stated in February of this year that leaks have alerted our enemies to intelligence collection technologies and operational tactics, and “cost America hundreds of millions of dollars” to repair the damage

caused by leaks. Members of Congress in both the Senate and the House have repeatedly acknowledged the damage caused by leaks, particularly in this post-September 11th environment.

The Department of Justice is committed to investigating and prosecuting leaks of classified information, and Congress has given the Department the statutory tools to do so. Several statutes prohibit the unauthorized disclosure of certain categories of classified information, the broadest of which is Section 793 of Title 18, which prohibits the disclosure of information “relating to national defense.” Also, Section 798 of Title 18 prohibits the unauthorized disclosure of information relating to communications intelligence activities.

On May 21st, 2006, Attorney General Gonzales was asked about the possibility of prosecuting members of the press for publishing classified information and he stated in part as follows: “There are some statutes on the books which, if you read the language carefully, would seem to indicate that that is a possibility.” There has been considerable attention paid to the Attorney General’s remarks. It is critical to note, however, that the Attorney General is not the first one to recognize the possibility that reporters are not immune from potential prosecution under these statutes. Many judges and commentators have reached this same conclusion. For example, in the Pentagon Papers case, the United States sought to restrain the New York Times from publishing classified documents relating to the Vietnam War. While the Supreme Court did not decide the question of whether the First Amendment immunizes the press from prosecution for publishing national defense information given to them by a leaker, five concurring Justices questioned the existence of such blanket immunity. *See New York Times v. United States*, 403 U.S. 713 (1971). In his concurring opinion, Justice White stated: “[F]rom the face of [the statute] and from the context of the Act of which it was a part, it seems undeniable

that a newspaper, as well as others unconnected with the Government, are vulnerable to prosecution under § 793(e) if they communicate or withhold the materials covered by that section.” *Id.* at 740. Further, the Court of Appeals for the Fourth Circuit has affirmed that the First Amendment does not prevent prosecutions under Section 793 for unauthorized disclosures of classified information and did so over the objections of various news organizations that appeared in the case as *amici* to support the defendant’s First Amendment arguments. *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988). Likewise, it is the conclusion of legal commentators, with respect to Section 798, that reporters are not exempt from the reach of this statute if its elements are otherwise met.

I would emphasize that there is more to consider here beyond the mere question of the reach of the laws as written. The Department recognizes that freedom of the press is both vital to our nation, and protected by the First Amendment.

The Department has never in its history prosecuted a member of the press under Section 793, 798, or other sections of the Espionage Act of 1917 for the publication of classified information, even while recognizing that such a prosecution could be possible under the law. As a policy matter, the Department has taken significant steps to protect as much as possible the role of the press in our society. This policy is embodied in Section 50.10 of Title 28, Code of Federal Regulations which requires that the Attorney General approve not only prosecutions of members of the press but also investigative steps aimed at the press, even in cases where the press is not itself the target of the investigation. This policy – voluntarily adopted by the Department – ensures that any decision to proceed against the press in a criminal proceeding is made at the very highest level of the Department. In a press conference last week, the Attorney General

stated that the Department's "primary focus" is on the leakers of classified information, as opposed to the press. The strong preference of the Department is to work with the press not to run stories containing classified information, as opposed to other alternatives. The Attorney General has consistently made clear that he believes the country's national security interests and First Amendment interests are not mutually exclusive and can both be accommodated.

I appreciate the opportunity to appear before you and would be happy to answer your questions.