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MEMORANDUM FOR HONORABLE JOHN W. DEAN III
Counsel to the President

Re: Criminal Prosecution for Disclosure of Classified Information Relating to Defense Department Vietnam Study.

I am responding to your request for a background memorandum concerning applicable federal criminal statutes for prosecuting government employees, private citizens, reporters and corporate newspaper entities who have taken part in the release and publication of the Defense Department study of United States involvement in Vietnam. In addition, the memorandum describes some of the more practical aspects of criminal litigation of this nature.

Criminal Statutes and Sanctions

The most directly applicable federal criminal statute is 18 U.S.C. 793(d),(e).1/ These subsections provide:

"(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal

1/ Some mention has been made of the possible applicability of 18 U.S.C. 798, captioned "Disclosure of Classified Information." We believe this statute would not be applicable for prosecution of any of those persons involved in the disclosure or publication of the Vietnam Study since it generally prohibits disclosure of information relating to cryptographic systems and communications intelligence activities of the United States. The subject matter here involved does not appear to include any of the special types of information listed in 18 U.S.C. 798. We are not, of course, certain that no information of the type covered by this section is involved, and hence this statute cannot be absolutely eliminated.

book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense, which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both." [Emphasis added.]

Criminal liability is incurred by those who (1) have possession, access or control of "information relating to the national defense" (2) communicate or attempt to communicate such information to any person not entitled to receive it, and (3) have reason to believe that such information could be used " . . . to the injury of the United States or to the advantage of any foreign nation . . ."

The language in the beginning of both subsections defines the persons covered and the nature of the information. The only variance between the subsections concerns whether or not the person who first disseminates the information had authority in the first instance to receive or possess it. Thus subsection (d) refers to "[w]hoever lawfully having possession" of the information, and subsection (e) refers to "[w]hoever having unauthorized possession" of such information. A corporation has been held to come within the term "[w]hoever" under a statutory predecessor of this Act. United States v. American Socialist Soc., 260 F. 885, 887 (S.D.N.Y. 1919), affirmed 266 F. 212 (2nd Cir. 1920). Although this case is not directly in point because it concerned obstructing the draft, it probably can be read for the general proposition that corporate entities, including newspapers, are prosecutable under 18 U.S.C. 793(e).

The question of when certain data is "information relating to the national defense" has been held to be an issue for the jury under proper direction. Gorin v. United States, 312 U.S. 19, 30 (1941). Although Gorin does not directly address itself to the issue, it would not seem absolutely necessary that the information be classified pursuant to Executive Order 10501 in order to invoke this statute.

In addition to the foregoing, it must be shown that the recipient of the defense information be unauthorized to receive it. Because the subsections speak to possession and communication of information either by those authorized

or by those unauthorized to have it, each of the four groups of persons set out earlier would be subject to criminal liability for disclosure to unauthorized persons, which, of course, would include the general public. On their face, these subsections appear to cover newspaper publication, which by any normal interpretation is a form of "communication."

The third element of the crime requires a showing of reasonable belief on the part of the person charged either that (1) the information could be used to the injury of the United States or (2) to the advantage of a foreign power. Reasonable belief of possible advantage to "any foreign nation" has been interpreted broadly, and it has been held not necessary to show an advantage to a foreign nation vis-a-vis the United States. Gorin v. United States, supra.

It is worth noting that the reported cases have dealt almost entirely with traditional espionage situations. More specifically, they have concerned transfers of information from individuals to foreign agents. Nevertheless, the Internal Security Division advises that this has resulted from previous policy decisions not to bring cases against newsmen and news entities rather than a belief that the statute would not apply in a situation such as has occurred with the disclosure of the Vietnam Study. Despite the absence of precedent for prosecutions for disclosures in the media, they have advised informally their belief that the statute would apply in the context of the disclosure of the Vietnam Study to each category of persons mentioned earlier.2/

We have considered the availability of the provisions of 50 U.S.C. 783(b), which proscribe communication of classified information by a government officer or employee

2/ It may be noteworthy that the predecessor of 18 U.S.C. 793 was upheld against attacks of vagueness and indefiniteness in Gorin, supra.

to a person ". . . whom such officer has reason to believe to be an agent or representative of any foreign government or an officer or member of any Communist organization . . ." By the terms of this provision, the actionable communication would have to have been made by a person then in government employment. It might be argued that this statute could be applied to employees of the government who might have disclosed the contents of the Vietnam Study on the theory that communication for purposes of publication carries with it the rather obvious certainty that foreign agents will receive the information. This may be somewhat at odds with the literal language of the statute, which seems to require a greater degree of privity between the government employee and the foreign agent than would be present if the information were simply supplied to a newspaper. We entertain some doubts that a court would hold it applicable to the Vietnam Study facts. Nevertheless, this kind of prosecution would be much more valuable strategically since declassification of the information might not be a prerequisite. See Scarbeck v. United States, 317 F. 2d 546, 559-560 (D.C. Cir. 1962).3/

There are additional theories of criminal liability on the part of the Times or its staff that may be presented, as unlawful procurement of commission of an offense against the United States, in violation of 18 U.S.C. 2, and conspiracy under 18 U.S.C. 371. Whether there has been any apparent violation of these or other provisions would depend upon facts in addition to those we now have.

3/ This issue is dealt with in greater detail, infra.

Practical Problems of Prosecution

In the main prosecution in this case would be subject to the same practical and procedural requirements as would any other Federal criminal prosecution. In addition to the usual characteristics of a Federal criminal prosecution, as trial upon indictment by grand jury, there are some special problems presented by this case.

Aside from the public policy and First Amendment questions that would be involved in prosecution of a newspaper for the contents of an article, the salient practical problem that would be involved in any prosecution as a result of this incident would be that of the classified nature of the subject matter. At the outset it should be noted that there is a well recognized evidentiary privilege for "state secrets," which the government may invoke in an appropriate case to prevent disclosure of such confidential matter. Totten v. United States, 92 U.S. 105 (1875); United States v. Reynolds, 345 U.S. 1, n. 11 at p. 7 (1953). In a criminal case, however, such a privilege has no bearing on the issues of admissibility or discovery by defense, and the privilege will not support suppression of such matter in a criminal prosecution. United States v. Andolschek, 142 F. 2d 503 (2d Cir. 1944). In that case Learned Hand stated the rule:

> ". . . While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any

> confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully." 142 F. 2d 503, 506 (2d Cir. 1944). See also Jencks v. United States, 353 U.S. 657 (1957).

Because the rule stated above applies both in instances of privilege based upon the rules of evidence and those based upon statute, the fact that public disclosure of material is protected by the espionage laws of the United States does not alter the posture of this case. See United States v. Beekman, 155 F. 2d 580, 584 (2d Cir. 1946).

What is particularly significant about the principle stated above is that there appears to be no authority to limit the accused's right to a public trial under the Constitution on the basis of the classified nature of the subject matter of the case. Although there is no case directly on point, in Re Oliver, 333 U.S. 257 (1948), the Supreme Court termed a public trial a "universal requirement" of American judisprudence. It found conduct of a criminal trial in camera to be wholly unprecedented, with the possible exception of military courts. Even in the military judicial system, this issue remains unresolved. See United States v. Nichols, 8 U.S.C.M.A. 119, 125, 23 C.M.R. 343, 349.

As an additional matter, because 18 U.S.C. 793 alludes to "information relating to the national defense," rather than information classified as such by Presidential authority, it is for the jury to decide in a given prosecution under that section whether the information in question comes within the ambit of the statute. Gorin v. United States, supra.

The fact of classification, under this rule, would not appear to be conclusive of the question of whether the information is protected by 18 U.S.C. 793, although it is not entirely certain that a judge could not hold otherwise.4/ Should the rule of Gorin be applied in the context of information classified under the current procedures, however, the material would have to be submitted to the jury if there existed any factual issue as to its characterization as defense information in the context of 18 U.S.C. 793.

The combination of these considerations, as a practical matter, would seem to require declassification of the matter in any case were prosecution is instituted. The only possible exception to that requirement would appear to be prosecution under 50 U.S.C. 783(b), which, instead of alluding to defense information, limits the subject matter unauthorized transfer of which is punishable to information classified pursuant to Presidential authority. Because the government is not required to show that the information was properly classified in a prosecution under this section, Scarbeck v. United States, 317 F. 2d 546, 558 (D.C. Cir. 1962), it would be more possible to limit or avoid disclosure of the matter in question when proceeding under this provision than under 18 U.S.C. 793. The problems occasioned by the defense's discovery rights, however, would exist nonetheless. As stated in the preceding portions of this memorandum, there is considerable doubt as to the viability of proceeding under 50 U.S.C. 783(b) in this case.

Time of Prosecution

Prosecution under 18 U.S.C. 793 is not governed by the general five-year limitation contained in 18 U.S.C. 3282. A prosecution may be had under 18 U.S.C. 793 provided an indictment is returned within ten years from commission of the offense. Act of Sept. 23, 1950, 64 Stat. 1005. Likewise

4/ In the leading case, Gorin v. United States, supra, it is not clear whether the information involved had been designated by the Executive as classified or sensitive defense information.

prosecution under 50 U.S.C. 783(b) is governed by a ten-year limitation, but the wording of the special limitation applicable to this offense does not employ return of an indictment as the critical occurrence but rather provides that a person may be "prosecuted, tried and punished" within 10 years of commission of the offense or termination of employment with the government. 50 U.S.C. 783(e). From the use of the conjunctive it is unclear whether this limitation would be construed as requiring completion of trial and review within the relevant time, but I have found no case which has construed this provision. Lastly, violation of 18 U.S.C. 2071 appears to be governed by the general five-year limitation contained in 18 U.S.C. 3282.

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