

The original documents are located in Box 6, folder “Intelligence - New York Times Articles by Seymour Hersh (2)” of the Richard B. Cheney Files at the Gerald R. Ford Presidential Library.

Copyright Notice

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material. Gerald Ford donated to the United States of America his copyrights in all of his unpublished writings in National Archives collections. Works prepared by U.S. Government employees as part of their official duties are in the public domain. The copyrights to materials written by other individuals or organizations are presumed to remain with them. If you think any of the information displayed in the PDF is subject to a valid copyright claim, please contact the Gerald R. Ford Presidential Library.

NATIONAL ARCHIVES AND RECORDS SERVICE
WITHDRAWAL SHEET (PRESIDENTIAL LIBRARIES)

FORM OF DOCUMENT	CORRESPONDENTS OR TITLE	DATE	RESTRICTION
1. Cable	Dick Cheney to Donald Rumsfeld (1 p.) opened - systematic 5/23/75	5/30/75	A
2. Memo	Bud McFarlane to Dick Cheney (1 p.) opened in full 6/19/89	5/30/75	A
3. Memo	Cheney to Rumsfeld (2 pp.) sanitized, NSC letter 1/6/93 ut 2/9/93	5/30/75	A
4. Memo	Copy of item 3 (2 pp.)	5/30/75	A
5. Memo	Don Rumsfeld to Dick Cheney (1 p.)	5/31/75	A
	<u>7. Cheney to Rumsfeld, 5/31/75</u>		
7a. Memo	Cheney to Rumsfeld (3 pp.) Sanitized, NSC letter 1/6/93 ut 2/9/93	5/31/75	A
7b. Memo	Handwritten draft of item 6a (4 pp.) sanitized date 6/20/83	5/31/75	A
	<u>8. Cheney to Rumsfeld, 5/31/75</u>		
8a. Memo	Cheney to Rumsfeld (1 p.) exempted 4/96, unexempted 6/03	5/31/75	A
8b. Report	Article to appear in June 1 New York Times (2 pp.) exempted 4/96.	5/31/75	C(A)
8c. Memo	Handwritten draft of item 7a (1 p.)	5/31/75	A
6. Note	Note on discussion with Marty Hoffman (1 p.)	5/30/75	C(A)
9. Report	Hills report re Marchetti file (1 p.) sanitized, ut 4/98	5/31/75	C(A)
10. Report	Article to appear in June 1 New York Times (1 p.)	ca. 5/31/75	C(A)

FILE LOCATION

Cheney Files
General Subject File
Intelligence - New York Times Articles (2) Box 7

RESTRICTION CODES

WHM, 5/30/85

- (A) Closed by Executive Order 12356 governing access to national security information.
(B) Closed by statute or by the agency which originated the document.
(C) Closed in accordance with restrictions contained in the donor's deed of gift.

OP IMMED
DE WTE12 #0009 1501735
OO//TT/SEN/EO
O 301544Z MAY 75
FM DON RUMSFELD BRUSSELS

DECLASSIFIED
E.O. 12958, Sec. 3.5
NSC Memo, 11/24/98, State Dept. Guidelines
By KBH, NARA, Date 5/23/00

TO DICK CHENEY

REF: WH 50988

- 1) LET ME KNOW WHEN SECDEF HAS MADE HIS RECOMMENDATION TO THE NSC AS TO WHETHER THE OPERATION SHOULD BE CONTINUED.
 - 2) THERE IS A DESIRE TO HAVE THE FBI INVESTIGATION BEGIN SOON. HOWEVER, THIS IS BASED ON AN ASSUMPTION THAT THE INVESTIGATION WOULD NOT ADVERSELY AFFECT THE OPERATION, IF IT IS TO CONTINUE.
 - 3) IF STARTING THE FBI INVESTIGATION WOULD ADVERSELY AFFECT THE OPERATION, OR IF THERE ARE OTHER FACTORS OF WHICH WE ARE UNAWARE, DO NOT INITIATE THE INVESTIGATION AND ADVISE ME. OTHERWISE, I WILL ASSUME THAT THE FBI INVESTIGATION WILL BEGIN AS PER THE DISCUSSION BETWEEN SCOWCROFT AND BUCHEN PRIOR TO OUR DEPARTURE, REGARDS.
- BT

***** WHSR COMMENT *****

CHENEY

PSN:002630 PAGE 01 OF 01 TOR:150/18:00Z DTG:301544Z MAY 75

MEMORANDUM

THE WHITE HOUSE
WASHINGTON

~~TOP SECRET/SENSITIVE/EYES ONLY-XGDS~~

May 30, 1975

MEMORANDUM FOR: DICK CHENEY
FROM: BUD MC FARLANE *RCM*
SUBJECT: Holystone

The Defense position is as follows: The Navy has expressed its tentative view that "planning" for the continuation of the operation should go forward. In terms of decision points, the next arrival in the operating area is not scheduled to occur until July 7th. Prior to that time, a decision to discontinue -- based primarily upon Soviet reaction in the meantime -- may be taken. To the extent that an investigation could generate publicity leading to a Soviet reaction, an investigation is considered a bad idea.

In sum, the Navy believes that, in the absence of any Soviet reaction, the operation can and should be continued and that to minimize the likelihood of a Soviet reaction, no investigation should be launched. Secretary Schlesinger has concurred in the Navy's position.



~~TOP SECRET/SENSITIVE/EYES ONLY-XGDS~~

DECLASSIFIED

AUTHORITY RAC NLF-RC-3-2-1-19/21/05
BY Wn nsc gundines
NLF, DATE 6/19/09

2. Work is proceeding to refine various options to take action to enforce laws against unauthorized disclosure of classified information.

3. I recommend that we prepare for review, upon your return, three broad options:

(a) Continuation of the operation. Take no action against those responsible for N. Y. TIMES story.

(b) Continuation of the operation. Take limited action to discourage further disclosures; i. e., private discussions with publishers, etc.

(c) Discontinue the operation. Initiate action to enforce the laws against unauthorized disclosures.

Question: Should we consider a private approach to the N. Y. TIMES before your return, to forestall publication of any additional stories? We have no indication that any additional stories are about to be published.

Please advise.

Regards --



Colby

5/31/75 —

Hoffman

Buckley

Hills

McFarlane

Cheney

Levi

Director of Naval Intelligence



1

GERALD R. FORD LIBRARY

4-6

This form marks the file location of item number 426 as listed
on the pink form (GSA form 7122, Withdrawal Sheet) at the front of the folder.

~~TOP SECRET/SENSITIVE/EXCLUSIVELY EYES ONLY~~

May 31, 1975

TO: RUMSFELD

FROM: CHENEY *R. Cheney*

SUBJECT: Your latest, directing immediate initiation of an FBI Investigation.

1. On receipt of your cable I met with Buchen, Hills, McFarlane, Colby, Levi, Hoffman, and Admiral Inman, Director of Naval Intelligence, at 11:00 A.M. EDT, Saturday, May 31.

2. are conducting internal reviews designed to identify all potential sources of information contained in the N. Y. Times story of May 25. The results will be provided to the Justice Department for any investigation undertaken by the FBI.

3. Levi has instructed the criminal division and the FBI to prepare a specific proposal for conducting an investigation into possible violations of the U. S. Criminal Code. The actual FBI investigation will not begin until that plan has been submitted for approval.

4. The above activities are being carried out in a manner designed to avoid any additional publicity. The Hersh story has not created any great amount of interest. Any visible investigatory activity directed at Hersh of the N. Y. Times is likely to stimulate additional publicity and give credence to the story which it does not now have.

5. There are additional complicating factors. The Attorney General properly feels that any FBI investigation must have sound legal justification

~~TOP SECRET/SENSITIVE/EXCLUSIVELY EYES ONLY~~

PHOTOCOPY FROM GERALD FORD LIBRARY

Photocopy from Gerald R. Ford Library

DECLASSIFIED • E.O. 12958 Sec. 1.8
With PORTIONS EXEMPTED
E.O. 12958 Sec. 1.5 (c) (d)

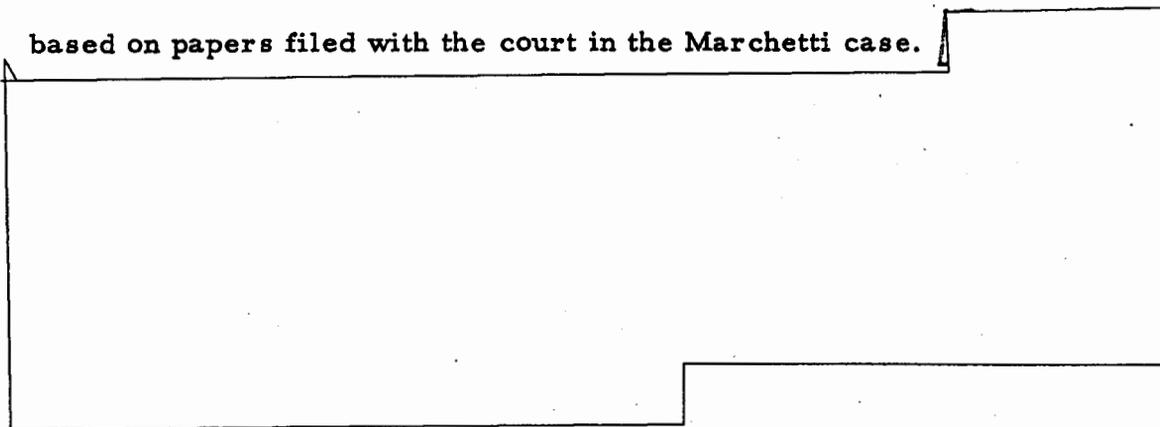
MS 00-28, #121, CIA-22, 1/15/16/

By del NARA Date 6/20/03

DP
GERALD R. FORD

It must be initiated on the basis of ascertaining the possibility of prosecution for the violation of federal law. In other words, we should not have an FBI investigation if there is no intention to prosecute. He is currently proceeding on the assumption that there is an intention to prosecute.

6. There is an additional complication affecting both the investigation and any possible prosecution. We believe the Hersh story of May 25 is based on papers filed with the court in the Marchetti case.



7. The Director of Naval Intelligence indicates that a careful review of the Hersh article shows the following: Much of the information was published previously. The details in the story indicate that the sources are probably ex-government employees and the Marchetti file. There is nothing in the story which indicates that security has been violated by current employees. (A telling indicator in this regard is the use of the outdated codename Holystone.)

8. We will proceed as follows:

(a) Justice will complete plans for an investigation.



(b) will complete current efforts to identify potential sources of information for the story. This will be made available to the FBI for use in their investigations.

(c) The actual investigation will go forward after the plan has been approved to insure that the investigation does not generate adverse publicity which would reduce prospects for continued operations.

(d) Once the plan has been approved, we will have the appropriate agencies formally ask Justice to conduct an investigation into possible criminal violations.

9. Regards.

Photocopy from Gerald R. Ford Library



GERALD R. FORD LIBRARY

This form marks the file location of item number 76-8, 10 as listed
on the pink form (GSA form 7122, Withdrawal Sheet) at the front of the folder.



OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

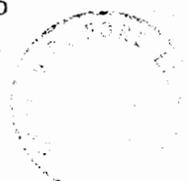
June 2, 1975

W. E. Colby, Director
Central Intelligence Agency
Washington, D.C. 20505

Dear Mr. Colby:

This letter refers to the article by Seymour Hersh in the New York Times of May 25, 1975. In order that we may move ahead with the first steps necessary for a prosecution and also for a determination whether a prosecution should be undertaken, it is necessary for the Department of Justice to have answers to the following questions:

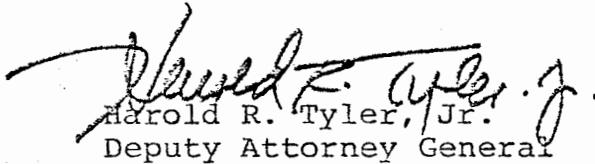
1. Date and identity of the article or release disclosing the classified information. (already known)
2. Specific statements which are classified and whether the data was properly classified.
3. Whether the classified data disclosed is accurate.
4. Whether the data came from a specific document and, if so, the origin of the document and the name of the individual responsible for the security of the classified data disclosed.
5. The extent of official dissemination of the data.
6. Whether the data has been the subject of prior official releases.
7. Whether prior clearance for publication or release of the information was sought from proper authorities.
8. Whether the material or portions thereof or enough background data has been published officially or in the press to make an educated speculation on the matter possible.
9. Whether the data can be declassified for the purpose of prosecution and, if so, the name of the person competent to testify concerning the classification.



Page two . . . Mr. Colby . . . June 2, 1975

10. Whether declassification had been decided upon prior to the publication or release of the data.
11. What effect the disclosure of the classified data could have on the national defense.

Sincerely yours,


Harold R. Tyler, Jr.
Deputy Attorney General

UNITED STATES GOVERNMENT

Memorandum

TO : The Attorney General

DATE: JUN 2 1975

FROM : Rex E. Lee, Assistant Attorney General
Civil Division

SUBJECT: John C. Keeney, Acting Assistant
Attorney General, Criminal Division

Recent Disclosure of Classified Information
in New York Times Article

Pursuant to your instructions, we are detailing the investigative steps which would be necessary to make a determination for possible criminal prosecution of a violation of 18 USC Sections 793 and 798 and for possible action to be filed with the court in the Eastern District of Virginia for a hearing on a contempt citation for possible leak of information from a document involved in the Marchetti case which is subject to a protective order of the Court.

The purpose of this memorandum is to identify the factual information which would be important in connection with each of those options, and the investigative steps which would have to be taken to develop the relevant facts.

In addition, this memorandum will set forth an additional option, not contained in your memorandum of May 29 to the President, and the facts and investigative steps related thereto.

To facilitate the correlation of this memorandum with that of May 29, sections 1 and 2 will discuss the investigative steps pertaining to options 1 and 2 discussed in the May 29 memorandum. Section 3 will deal with the civil contempt option.

I. Investigation by the FBI and possible Grand Jury action with a view to initiating a criminal prosecution under 18 U.S.C. 793 or 798.

If you should authorize the initiation of a preliminary investigation with respect to possible criminal prosecution in this matter, the first step taken by the Criminal Division



would be to request the Federal Bureau of Investigation to interview appropriate officials of the Central Intelligence Agency for the purpose of ascertaining the following facts with respect to the New York Times newspaper article by Seymour Hersch which was published on May 25, 1975:

1. Specific statements in the article which are classified and whether the data was properly classified.
2. Whether the classified data disclosed is accurate.
3. Whether the data came from a specific document and, if so, the origin of the document and the name of the individual responsible for the security of the classified data disclosed.
4. The extent of official dissemination of the data.
5. Whether the data has been the subject of prior official releases.
6. Whether prior clearance for publication or release of the information was sought from proper authorities.
7. Whether the material or portions thereof or enough background data has been published officially or in the press to make an educated speculation on the matter possible.
8. Whether the data can be declassified for the purpose of prosecution and, if so, the name of the person competent to testify concerning the classification.
9. Whether declassification had been decided upon prior to the publication or release of the data.
10. What effect the disclosure of the classified data could have on the national defense.

If the undersea communications intelligence operation, referred to in the article, both existed and was classified, a threshold question for the government to decide, in initiating or refraining from initiating an espionage case, is whether

the public interest is better served by confirming the accuracy of the compromised information, which would have to be done by expert testimony in open court, or whether the public interest is better served by not confirming the accuracy of the information, thereby foregoing criminal prosecution. This should essentially be covered by the answer to question No. 9, above.

In undertaking the prosecution of a newsman or newspaper for publishing classified information in violation of 18 USC 798, it would also be incumbent upon the Government to establish affirmatively, as part of its case in chief, that the defendant knew or had reason to believe that the information was classified at the time of publication, that is to say, he lacked authority to publish it because it had been restricted by proper governmental authority from dissemination to the general public. Anything less would fail to prove that the defendant had wilfully, knowingly and intentionally violated the statute.

Section 793 of Title 18, prescribes a standard of "reason to believe" that the information related to the national defense, but essentially the proof remains the same, i.e., the defendant knew or should have known he was under a proscription not to publish it.

In the instant case, it appears essential that further FBI investigation must be directed, inter alia, to obtaining positive identification of the source or sources which furnished the classified information to the media. This is necessary in order that we may establish that the source lacked the authority to declassify it. (For example, if the source proved out to be a Navy yeoman, it would be manifest that he was unauthorized to disseminate the information and that the newsman or publisher, therefore, was on notice that he published at his peril.)

Conversely, if the source was discovered to be the Secretary of the Navy, or an official of equivalent rank, with the undoubted authority to declassify and disseminate information, we obviously could not prove the essential element of classification, nor could we lay upon the publisher the mens rea required under the espionage statutes.

Although the prefatory language of the news article states that the information was derived from classified materials, it is neither all that clear that the author intended by that to

say that the information was now classified, nor that all of the information in the article, including the two items of prosecutive interest, were classified.

All of which leads inevitably to the conclusion that the FBI's investigation must have as a primary objective the discovery and identification of the leaker. Without that information, we cannot make an intelligent and informed prosecutive judgment.

If, as a result of the Bureau's preliminary inquiry, further investigation is authorized by the Department in this matter, the FBI would then immediately undertake the necessary investigative steps to determine the circumstances surrounding, and individual(s) responsible for, the disclosure or compromise of the classified material. In addition, efforts would be made to determine if the person(s) disclosing the information knew it was classified and also knew that the person(s) to whom the information was disclosed was not authorized to receive it.

The FBI would also attempt to uncover any available evidence bearing upon the requisite intent of person(s) involved.

In this particular instance, the initial step would be an interview with Seymour Hersch, under whose byline the article containing the classified information appeared in the May 25, 1975, edition of the New York Times. This interview could lead to numerous additional individuals who may have participated in the preparation of the article or who may have been involved in research or investigation prior to its preparation. Interviews with newspaper sources of information with an ultimate goal of identifying and interviewing persons who originally disclosed the information in question.

It is entirely possible that this avenue of investigation may lead to interviews with reporters and/or others associated with Laurence Stern, under whose byline a similar article appeared in the Washington Post on January 4, 1974, in addition to an interview of Stern himself. It is possible that Stern received considerable assistance from other individuals in an attempt to gather information for this article and these persons would necessarily need to be identified and interviewed. It

could be assumed that certain individuals involved may be or may have been part of dissident groups and this aspect would have to be pursued.

It can be anticipated from past experience in "leak" investigations that there will be a reluctance on the part of persons approached to submit to interview. If they do agree to be interviewed, the information furnished may be limited or of no value. Therefore, simultaneously, contact would be had with the involved government agencies who originally prepared and had custody of or access to this information. From this, persons identified would be interviewed in an effort to trace the document in question from its inception attempting to isolate any person(s) who may have disclosed or compromised it or any of its contents. Persons interviewed in this regard would include high ranking officials of the agencies involved.

Any and all pertinent interviews would include an attempt to obtain signed statements. An attempt would also be made to uncover individuals who would cooperate with the government in revealing details and of surfacing any conspiracy that may have existed to expose to public scrutiny the classified information. At any step in the investigation, it would be decided that additional interviews would be of little value and a more direct route to follow would be grand jury proceedings (i.e., subpoenaing of Hersch, Stern, et al).

In the "leak" case involving Daniel Ellsberg, et al., it was necessary for the Bureau to employ a headquarters staff of 11 supervisory Special Agents with corresponding clerical support as well as approximately 100 field Special Agents, all on a full time basis for an extended period of time. In that case, several thousands of interviews were conducted in addition to extensive research, record checks and background inquiries.

II. Investigation in connection with protective order violation in the Marchetti case

In order to pursue relief in connection with the Marchetti litigation, the following investigatory steps would have to be undertaken. The document which is quoted verbatim in the New York Times article (referring to a collision between American and Soviet submarines) was made available through discovery proceedings for use in the litigation. It was available to plaintiffs Marchetti and Marks, their various counsel (approximately 6 or 7 in number), secretaries at Cahill, Gordon, etc., in New York, and the American Civil Liberties Union in New York and their expert witness, Morton Halperin. The document was introduced into evidence and is part of the district court record, in camera, and was available to the district judge, his law clerks, the district court clerk, and the district judge's secretary. The document was printed in the Joint Appendix for use on appeal and was again made available to counsel, the Court of Appeals' judges and their clerks, and perhaps their secretaries as well as the clerk of the Court of Appeals. In addition, of course, the document was available to personnel from the CIA and the Department of Justice attorneys who were involved in the litigation. The CIA provided for the printing of the Joint Appendix. It should be noted that the document makes no reference to the circumstances relating to the plugging into communications cables.

Two alternative methods of investigation appear to be available in connection with a nonspecific criminal contempt proceeding:

(a) The FBI might attempt to interview all those who had access to the document. Such an investigation would no doubt be frustrated insofar as efforts would be made to get information from persons in the plaintiffs' camp.

(b) Another approach might be through supplementary discovery proceedings by way of depositions of persons who had access to the document. However, it is unlikely that the court would authorize such a procedure to be utilized since we would be using civil procedures for criminal matters. It is also likely that anyone involved might claim a Fifth Amendment privilege.

In pursuing the option to use a grand jury to investigate a possible criminal contempt, a series of FBI interviews of those who had access to the quoted document would be indicated,

and any person who balked at such an interview could be subpoenaed by a grand jury. However, any such witnesses before the grand jury would no doubt invoke a Fifth Amendment privilege which would be successful unless immunity were granted the witness. The most efficient use of this grand jury investigation, however, would require that it be directed at the journalist, but it would be necessary to immunize him in order to establish a basis for forcing him to disclose the source of his information.

III. Civil contempt option and pertinent investigation

An option not previously discussed would be a civil contempt proceeding against the New York Times, Mr. Hersh, or any of the parties or persons who had access to and made improper use of materials subject to the protective order in the Marchetti case. The only civil contempt remedy available would be for money damages to the interests of the United States resulting from publication of the article. This alternative has serious obstacles:

(1) The most serious is the difficulty of proving damages. The inherent problems of quantifying the harm to the United States from publication of such an article are compounded in this case by the following facts:

(a) In the Marchetti litigation, in which we sought specific relief, we took the position, on the record, that damages were an inadequate remedy because the harm from disclosure of national security secrets cannot ordinarily be quantified and therefore an injunction was appropriate.

(b) The most damaging part of this story--the cable-tapping information--did not come from the Marchetti record, and its disclosure, while harmful, is not a violation of the protective order. The masked document referred to a collision between an American and a Russian submarine, and the collision had been alluded to some 17 months earlier in the Post article.

(2) In order to establish liability, we would have to show that (a) the Times knew that it was publishing the contents of a document subject to a judicial protective order, and (b) it received the document from someone who was subject to the order.

(3) At the time our lawyers called to the judge's attention the impropriety of the Post article in 1974, he seemed more irritated with the government for raising the matter than with the fact of the apparent impropriety of the disclosure. Though the violation of the order is clearer this time, it is highly unlikely that the judge would be sympathetic to a contempt proceeding against the Times and Mr. Hersh, who were not parties to the Marchetti litigation.

Investigation pursuant to the civil contempt option would involve the following:

(1) Determine whether officials of the New York Times responsible for publication of the story knew that the document dealing with the submarine collision was subject to a judicial protective order.

(2) Determine who gave the document to Mr. Hersh (or some other Times' representative) and whether this person was subject to the protective order.

Investigation of these matters would necessitate interviewing Mr. Hersh and other representatives of the Times, as well as persons involved in the Marchetti litigation.

IV. Scope and legal consequences of such an investigation.

If the interviewing process of the FBI failed to develop sufficient usable evidence to establish a criminal violation or a violation of the protective order in the Marchetti case, the Department could then consider initiating a grand jury proceeding in an effort to develop further information. Since it is highly probable that no one associated with the newspapers would cooperate with the FBI and furnish useful information concerning its sources of information, this could lead us to issuing grand jury subpoenas requiring Stern and Hersh, for example, to appear and testify. As we have often experienced in the past, many reporters or persons associated with newspapers would claim alleged constitutional rights under the First Amendment to protect the confidential sources of news reporters and they might claim as well the Fifth Amendment right against self-incrimination.

In the face of a Fifth Amendment claim, we could, of course, consider the advisability of issuing a grant of immunity in an effort to compel their testimony.

If the news reporter were to stand on a refusal based solely on First Amendment grounds, he would, of course, be subject to being held in criminal contempt of court. We would, of course, anticipate that this would result in a full-scale claim by the reporter, aided generally by the news media, that the First Amendment affords the press an absolute right of confidentiality with respect to its confidential sources. This, of course, is not the law. But for a number of years, the press has been generally pushing this idea and has made extensive efforts to secure a statutory recognition of such a claimed right. In any event, regardless of the ultimate legal outcome which we anticipate would be favorable to our position, we would undoubtedly become involved in a side issue from the main investigation which would become a cause celebre for the press. Therefore, we might end up with litigation which pits the government against the press on this issue rather than pursuing a viable criminal prosecution for possible espionage violations.