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W A S H I N G T O N , D C

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The Honorable Patrick Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, DC 20510-6275

Dear Chairman Leahy:

At your request, this letter contains my responses to questions offered by members of the Subcommittee on Terrorism and Homeland Security arising out of my testimony at its May 12 hearing on “The Espionage Statutes: A Look Back and a Look Forward.” I would ask that these responses be included within the formal Committee record of the hearing.

In particular, Senator Cardin asked me to address two questions:

- 1) *One of the issues raised during the Subcommittee’s hearing was that some federal courts have not permitted defendants to argue that the information was not properly classified. What changes would you recommend to the existing statutes to take into account the fact that the modern classification system post-dates the enactment of the espionage act statutes?*

I would recommend two specific changes: *First*, the espionage statutes should generally be revised to prohibit the disclosure of “classified” information, as opposed to its current prohibitions of more ambiguous types of governmental material, including, for example, “information relating to the national defense.” With regard to identifying classified information, the specific statutory language I would recommend would be to prohibit the disclosure of information that has been “classified pursuant to an Act of Congress or executive order relating to classification.”

Second, I believe that the espionage statutes should be revised to take into account the possibility that the wrongfully disclosed information was, in fact, improperly classified. Such revisions could perhaps include the formal codification of an “improper classification” defense, which would allow defendants to prove at trial that the information they disclosed was not properly classified either pursuant to the relevant statute or the relevant Executive Order.

To be sure, I suspect that many would criticize such an amendment as providing an incentive to those in possession of information they believe to be wrongfully classified to disclose first, and face the consequences later. But even if government employees were willing to take such an extreme risk (i.e., willfully violating the Espionage Act and subjecting themselves to prosecution on the assumption that their defense would be successful), it might be possible to ameliorate this concern by requiring that the defendant have exhausted available *internal* remedies for challenging the classification before disclosing it publicly.

I don't mean to simplify things—this, to me, is the hardest single question that arises in the context of reforming the Espionage Act. But at the very least, I think that any attempt to revise the Espionage Act must take into account the documented problems with the current classification regime, and the reality that a substantial amount of information that might otherwise fall within the scope of the current Espionage Act is, in fact, wrongfully classified under section 1.7(a) of Executive Order 13,292, which provides that, “[i]n no case shall information be classified in order to: (1) conceal violations of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency; (3) restrain competition; or (4) prevent or delay the release of information that does not require protection in the interest of the national security.”

- 2) *If the Congress sought to limit the reach of the espionage statutes to only classic espionage cases as part of an effort to comprehensively legislate with respect other kinds of conduct, and using 18 U.S.C. § 793(d) and 793(e) as examples, please identify the changes that you think should be made to narrow the scope of these statutes to only address classic espionage cases.*

As I suggested at the hearing, if Congress sought to limit the scope of the espionage statutes to what we might colloquially understand as “classic” espionage cases (recognizing that Congress might elsewhere deal with leaking and whistleblowing), the easiest and most significant way to so narrow the statutes would be to codify a specific intent requirement. Thus, §§ 793(d) and (e), in particular, could be amended to require that the acts be undertaken “with the specific intent either to harm the national security of the United States or to benefit a foreign power.” Of course, such intent could be inferred, in appropriate cases, from the conduct of the defendant. But requiring proof of such intent would eliminate the possibility that individuals could be subject to liability under the Espionage Act for non-espionage-motivated (albeit still prohibited) disclosures of national security information.

There are other possibilities as well, including focusing more specifically on the nature of the disclosure, the identity of the individual to whom the information is disclosed, and so on. But if the goal is simply to narrow the current regime to only

cover classical espionage, my own considered view is that a specific intent requirement would do virtually all of the necessary work.

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I hope these answers are responsive to Senator Cardin's questions, and stand ready to assist you and your colleagues on the Committee if there is any additional information that I can provide.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Stephen I. Vladeck", with a long horizontal flourish extending to the right.

Stephen I. Vladeck