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WHITE HOUSE PROCEDURES FOR
SAFEGUARDING CLASSIFIED INFORMATION

Friday, March 16, 2007

House of Representatives,

Committee on Oversight and

Government Reform,

Washington, D.C.

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Committee Hearings

of the

U.S. HOUSE OF REPRESENTATIVES



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3344 But those are my comments, and I want to thank both of you
3345 for being here.

3346 We have a third panel waiting to come up.

3347 For panel number three, the Chair would like to call
3348 forward Mr. Mark Zaid, an attorney with the extent of
3349 experience representing government employees accused of
3350 mishandling classified information; and Ms. Victoria
3351 Toensing, an attorney in private practice and a former Senate
3352 staffer.

3353 I want to welcome you both to our hearing today. Your
3354 prepared statements will be in the record in their entirety.
3355 I would like to ask you for your oral presentation to be
3356 limited to 5 minutes.

3357 It is the practice of this committee to ask all
3358 witnesses to take an oath. So if you would please stand and
3359 raise your right hand.

3360 [Witnesses sworn.]

3361 Chairman WAXMAN. The record will reflect the witnesses
3362 answered in the affirmative.

3363 STATEMENTS OF MARK ZAID, ESQUIRE; AND VICTORIA LOENSING,
3364 ESQUIRE

3365 Chairman WAXMAN. Mr. Zaid, why don't we start with you.

3366 STATEMENT OF MARK ZAID

3367 Mr. ZAID. Thank you, Mr. Chairman, Members of the
3368 committee. It's my pleasure to testify again before this
3369 body.

3370 For nearly 15 years, I have been among a handful of
3371 attorneys nationwide who regularly handle civil litigation
3372 and administrative matters involving national security
3373 claims. This includes all aspects of security clearance
3374 suspensions, denials, revocations, statutory and first
3375 amendment challenge to classification decisions, leak
3376 investigations and general employment disputes that may arise
3377 within the Intel, military and law enforcement communities.
3378 In the exercise of my legal responsibilities, I often have
3379 authorized access to classified information.

3380 We've heard of the operative documents that pertain to
3381 this topic, Executive Order 12958, which was amended by
3382 13292, and also Executive Order 12968. Agencies throughout

3383 the Federal Government have adopted implementing regulations
3384 attuned to their specific situations. But those are the
3385 operative documents that we really rely on.

3386 Section 41 of EO 13292 deals with who actually grants or
3387 is accorded access to classified information. There has to
3388 be a favorable determination of eligibility. There has to be
3389 an executed, approved non-disclosure agreement; and there has
3390 to be a need-to-know determination.

3391 Each of these components is factually based. Indeed,
3392 whether a need to know exists is a question that is asked and
3393 answered by tens of thousands of Federal employees and
3394 contractors thousands of times every day as part of their
3395 routine responsibilities.

3396 However, the underlying premise of that first prong, the
3397 determination of eligibility, deals with a judgment
3398 determination, one of common sense that is often referred to
3399 as the "whole person concept."

3400 Unfortunately, the system is anything but uniform. The
3401 process by which clearances or where access is granted very
3402 significantly based on the level of clearance, interim
3403 clearances can be very easily granted with very little effort
3404 by an agency. Most agencies, as we have heard, will go
3405 through a periodic background investigation that usually
3406 extends 7 to 15 years for the individual; and periodic
3407 reinvestigations will reoccur between 5 and 10 years,

3408 | depending on the backlog of the agency involved and the level
3409 | of clearance.

3410 | To be blunt, we can discuss all day what the regulations
3411 | state, what minimal due process might be required or expected
3412 | in scenarios touching upon today's hearing topic and what
3413 | outcome a reasonable person would apply in any specific case;
3414 | and that would be an academically and legally fascinating
3415 | discussion, at least for me. But the fact is the recitation
3416 | of real-world anecdotal experiences by those who operate in
3417 | this field will educate you with very different results.

3418 | It is best to characterize any substantive discussion of
3419 | security clearances and agencies, and procedures surrounding
3420 | such determinations, as arbitrary and fraught with
3421 | inconsistencies. Periodically, every agency derives its
3422 | authorities from these operative documents. Implementation
3423 | varies across the board. With some agencies, the process
3424 | works very well. With others, it is particularly broken.
3425 | Overall, the system works but with numerous flaws, many of
3426 | which can be repaired through legislative oversight or
3427 | correction, though, to be sure, it is likely that any such
3428 | attempt will engender cries of constitutional overreach by
3429 | any White House.

3430 | Let me use this opportunity to go through a few
3431 | observations from cases I have handled over the years.

3432 | Whether the unauthorized disclosure of classified

3433 information results in administrative, civil, or criminal
3434 sanctions against an individual is a very fact-based inquiry
3435 for which no general rule truly exists. The suspension of an
3436 individual's security clearance can arise from the receipt of
3437 unsubstantiated anonymous allegations or can occur after a
3438 thorough internal investigation. At what stage suspension
3439 occurs is up to the specific agency.

3440 Moreover, the type of suspension is not deemed to
3441 be--this type of suspension is not deemed to be an adverse
3442 personnel action and therefore does not afford the person the
3443 substantive challenge rights as soon as he is notified of the
3444 substantive challenges that exist.

3445 Again, a very fact-based inquiry for which no general
3446 rule exists.

3447 Some agencies will utilize a security suspension to
3448 suspend the employee's employment altogether, pending
3449 conclusion of an investigation which could take years. This
3450 may be paid administrative leave, this may be unpaid
3451 administrative leave, and if that clearance is reinstated at
3452 some point in the future there is no compensation given to
3453 that individual whatsoever.

3454 Again, a very fact-based inquiry for which no general
3455 rule truly exists.

3456 Punishment for an unauthorized disclosure can range from
3457 no action to something as merely administrative as a

3458 reprimand, oral or written, in the file. Could be more
3459 serious, such as the revocation of a clearance or, depending
3460 on the factual circumstances, criminal prosecution.

3461 Again, a very fact-based inquiry.

3462 Significant inconsistencies exist governing agencies'
3463 determination of access to classified info. Significant
3464 inconsistencies exist governing an individual's ability to
3465 challenge a revocation or suspension or denial. Significant
3466 inconsistencies exist as to how agencies' security
3467 investigations are initiated or handled.

3468 Most agencies experience serious and harmful time delays
3469 with respect to security investigations that seriously impact
3470 an employee or contractor's life and, in fact, creates
3471 additional security concerns that did not previously exist.

3472 An appeal of a clearance revocation is usually--or
3473 denial--will take often 6 to 12 months; and if it is the CIA,
3474 we may be talking 2 to 3 years. Investigations into the
3475 leaks of classified information rarely result in either
3476 discipline or prosecution for a variety of reasons, including
3477 the failure of Federal agencies to cooperate with one
3478 another.

3479 And the training for authorized holders of classified
3480 info with respect to this need to know differs from the
3481 positions the executive branch will espouse in adverse
3482 litigation for judicial proceedings.

3483 In my testimony, I set forth a few recommendations that
3484 the committee can look into implementing. I will leave that
3485 in the record.

3486 I will just conclude by saying that this is an area that
3487 cries out for vigorous legislative oversight, especially
3488 given recent efforts by the executive branch to expand
3489 criminal penalties governing disclosures of classified
3490 information or unauthorized disclosure to beyond those under
3491 any affirmative obligations which protect such info.

3492 I encourage this committee to remain steadfast in its
3493 vision to ensure accountability, efficiency, and fairness
3494 while combating opposition from the executive branch, no
3495 matter which party may be in power.

3496 I am more than happy to provide an elaboration to any of
3497 those points or anything to this hearing topic or during any
3498 Q&A that is submitted later.

3499 Thank you.

3500 Ms. WATSON. [presiding.] Thank you.

3501 [Prepared statement of Mr. Zaid follows:]

3502 ***** COMMITTEE INSERT *****

3637 Chairman WAXMAN. I want to recognize Mr. Davis to start
3638 off.

3639 Mr. DAVIS OF VIRGINIA. Thank you. We didn't start with
3640 going into the covert--taking Ms. Plame at her word--

3641 Ms. TOENSING. I am having a hard time hearing you.

3642 Mr. DAVIS OF VIRGINIA. We didn't go into extensively
3643 whether it was covert or not. I asked her whether anybody
3644 told her she was versus what she thought. But the question
3645 was--clearly, there were no crimes committed.

3646 I'm going to ask each of you, can you name a leak case
3647 that you have dealt with that has undergone more scrutiny or
3648 investigation than this one? Mr. Zaid.

3649 Mr. ZAID. Not as much. Certainly nothing as public as
3650 this.

3651 Mr. DAVIS OF VIRGINIA. Either with grand jury.

3652 Mr. ZAID. There are numerous grand juries, even ones
3653 that are going on right now with leak investigations, and
3654 they haven't received the amount of publicity that this case
3655 has.

3656 Mr. DAVIS OF VIRGINIA. They have a special prosecutor
3657 on this and you can look at the hours of testimony. This has
3658 undergone as much scrutiny as any case you are aware of.

3659 Mr. ZAID. Sure.

3660 Ms. TOENSING. I used to tell Chairman Goldwater--he'd
3661 say, I want those leakers--in much more crusty language than

3662 that--I want those leakers prosecuted, and I would say, "It's
3663 the rule of 38. If 38 people knew about it, you are probably
3664 not going to get a prosecution," and so usually there is not
3665 a prosecution in the case.

3666 Mr. DAVIS OF VIRGINIA. I mean, the thing that strikes
3667 me through all of this is if the CIA fails to take
3668 affirmative steps to protect their own agents, how can you
3669 expect the recipients of information to know that the
3670 information is protected and take appropriate precautions?
3671 Mr. Zaid--I'll ask you both.

3672 Ms. TOENSING. I mean, the whole reason that we put that
3673 into the law was because we didn't want employees to be
3674 chilled from reporting wrongdoing, that the person had to
3675 know, have knowledge that the CIA was taking these
3676 affirmative measures to protect the identity and the
3677 relationship of that person. So if nobody is telling
3678 anybody, it is like, who knew? How would you know that
3679 something was not to be repeated?

3680 Mr. DAVIS OF VIRGINIA. The majority is pointing the
3681 finger at the White House, but the leak didn't come from the
3682 White House. And, secondly, there is no evidence--presented
3683 here today at least--that anybody in the White House knew
3684 that she was a covert agent.

3685 Ms. TOENSING. Not one person told anybody in the White
3686 House. We have no evidence.

3687 Mr. DAVIS OF VIRGINIA. Let me--

3688 Chairman WAXMAN. Excuse me. You are saying that
3689 conclusively. Do you know the facts? Or are you just saying
3690 there is no evidence?

3691 Ms. TOENSING. I know what facts are out there. If
3692 somebody wants to point to another fact, I will be glad to
3693 listen.

3694 Chairman WAXMAN. So what you have heard, you can reach
3695 that conclusion from. You don't know all of the information.

3696 Ms. TOENSING. From the testimony at trial.

3697 Mr. ZAID. I think we have to make a distinction between
3698 criminality and what type of administrative sanctions could
3699 possibly have been imposed. I have no personal information
3700 with respect to this case, other than what everybody else
3701 does in reviewing it with great interest, especially since
3702 it's in my subject matter knowledge.

3703 And Ms. Toensing is absolutely correct with many of her
3704 questions with respect to the Intelligence Identities Act,
3705 which has a very exacting standard. Ms. Plame, as she
3706 indicated, was covert. That is a distinction between
3707 possibly under the Intelligence Identities Act and that
3708 classified information was leaked and then the question then
3709 is of a criminal magnitude versus something less than that.
3710 And those could be any number of penalties.

3711 Mr. DAVIS OF VIRGINIA. But if you don't know she's

3712 | undercover, it is hard to put a penalty on somebody.

3713 | Mr. ZAID. That would be something like the previous
3714 | witness, where his office would have to investigate to see
3715 | how the leak came about.

3716 | Mr. DAVIS OF VIRGINIA. There is no question this should
3717 | never be leaked. We should never "out" any undercover
3718 | operative. I don't think anyone here can condone that in any
3719 | way, shape, or form.

3720 | The difficulty I am having, though, is we are focused
3721 | today just on the White House. The CIA bears some
3722 | responsibility.

3723 | Ms. Plame's own testimony today talked about they knew
3724 | the story was coming, and she did the appropriate thing in
3725 | reporting to her superiors that the story was coming, a story
3726 | that could end her career. And what did her bosses do? They
3727 | obviously didn't persuade Mr. Novak, but the question is, did
3728 | they send their A Team up there to talk to Mr. Novak? Did
3729 | they let them know that an agent could be outed? That is the
3730 | question.

3731 | Ms. Toensing, what is contemplated under a statute in a
3732 | case like that?

3733 | Ms. TOENSING. The statute has very high standards.
3734 | This is almost impossible for a journalist to be indicted
3735 | under, just a regular working journalist, not somebody who
3736 | has a specific intent.

3737 Mr. DAVIS OF VIRGINIA. No journalist in their right
3738 mind would do this on purpose.

3739 Ms. TOENSING. But an employee would have to be aware
3740 that the agency is taking affirmative measures to protect or
3741 conceal this person's relationship to the United States. If
3742 nobody even told the people who were being briefed--I mean,
3743 the State Department didn't know. Dick Armitage didn't know.

3744 Mr. DAVIS OF VIRGINIA. But the question is, once it
3745 gets to the press level, say someone inadvertently leaked
3746 this to the press, what should the CIA do? And
3747 notwithstanding the Act, from a policy perspective, what
3748 should the CIA do or be able to do to protect their
3749 operatives and what do you think they should do in this case?

3750 Ms. TOENSING. They didn't do anything in this case. To
3751 anybody looking at it from--as I view it, as I see all of the
3752 facts, I have no reason whatsoever to believe that Ms. Plame
3753 was covert under the statute.

3754 I mean, they can call--I have represented a covert
3755 officer. It is not an agent, actually. The statute uses
3756 that term, but Ms. Plame was a covert officer. I have
3757 represented a covert officer from the CIA; and let me tell
3758 you, in the course of my representation, the New York Times
3759 was going to print her name on its front page. And the New
3760 York Times reporter, a wonderful reporter, Tim Weiner, called
3761 me and said the CIA just called him and told him that they

3762 | were going to go after him criminally if they printed her
3763 | name. No such threat was ever given to Bob Novak. And good
3764 | for Tim Weiner. He went ahead and printed it anyway.

3765 | Mr. DAVIS OF VIRGINIA. Let me ask this. So the statute
3766 | at this point gives press almost an immunity on those kinds
3767 | of issues once they learn about it. Is that your reading of
3768 | the law?

3769 | Ms. TOENSING. Yes.

3770 | Mr. DAVIS OF VIRGINIA. What should the CIA have done in
3771 | this case if they wanted to protect an operative?

3772 | Ms. TOENSING. If this is a very big deal to the CIA,
3773 | they should have brought in the DCI, at least the Deputy, and
3774 | come in with Bob Novak and had a talk and say, "You cannot
3775 | print this name. This would just be terrible. This is
3776 | national security."

3777 | Mr. DAVIS OF VIRGINIA. Let me ask you, from a policy
3778 | perspective, notwithstanding where the law is today, that
3779 | sets a very high standard for the press. What should we
3780 | do--in future cases, what should the CIA do once--if you are
3781 | going to have an operative outed, a top-secret memo that
3782 | could damage national security, how should that be handled
3783 | from a policy perspective?

3784 | Mr. ZAID. I wouldn't in any way divert blame from the
3785 | CIA in this matter. There are many steps they could have
3786 | taken, and Ms. Toensing has identified them, and it wouldn't

3787 have been the first time where a very senior official in the
3788 CIA would go to a member of the press.

3789 I often represent covert officers. I mean, routinely.
3790 And I know the precautions that they try to impose on me,
3791 which I follow to protect them. Because if their identities
3792 are released it does put their lives in jeopardy; and, even
3793 more importantly, because when they are usually back here in
3794 the United States it puts everyone they ever had any contact
3795 with in their lives in jeopardy as well as operations.

3796 I don't know why the CIA didn't do more. That is a good
3797 question. The CIA should be here to explain that.

3798 Again, I would make a distinction between that we not
3799 only look at the criminality of this but we also look at the
3800 administrative disciplines that should have been meted out.

3801 I had a client that was disciplined because he was
3802 acting as a courier with classified information and he left
3803 the bag locked up in his locked car while he went into
3804 McDonald's to get a burger with the car in sight. That was
3805 the violation. It took me a year to get his clearance back.

3806 So the agencies will take it seriously when they wish
3807 to.

3808 Mr. DAVIS OF VIRGINIA. Thank you.

3809 Chairman WAXMAN. Thank you very much, Mr. Davis.

3810 I have questions, but I don't know whether I want to go
3811 into all of the time to ask questions.

3812 But I am stunned, Ms. Toensing, that you would come here
3813 with absolute conclusions she was not a covert agent. The
3814 White House did not leak it. No one seemed to know in
3815 advance that she was a CIA agent. Do you know those facts
3816 from your own first-hand knowledge?

3817 Ms. TOENSING. Well, let us take those one by one. As I
3818 said, I was there. I was the chief--

3819 Chairman WAXMAN. I am not asking for your credentials.
3820 I am asking for how you reached those conclusions.

3821 Ms. TOENSING. That's part of her credentials, because I
3822 know what the intent of the Act was.

3823 Chairman WAXMAN. I am not asking what the intent of the
3824 Act was. Do you know she was not a covert agent?

3825 Ms. TOENSING. She is not a covert agent under the Act.
3826 You can call her anything you want to in the halls of the
3827 CIA.

3828 Chairman WAXMAN. General Hayden, the head of the CIA,
3829 told me personally that she was--if I said that she was a
3830 covert agent, it wasn't an incorrect statement.

3831 Ms. TOENSING. Does he want to swear that she was a
3832 covert agent under the Act?

3833 Chairman WAXMAN. I am trying to say this as carefully
3834 as I can. He reviewed my statement, and my statement was she
3835 was a covert agent.

3836 Ms. TOENSING. He didn't say under the Act.

3837 Chairman WAXMAN. Okay. So you're trying to define it
3838 exactly under the Act.

3839 Ms. TOENSING. That's what--

3840 Chairman WAXMAN. No, no, no, no, no. I am not giving
3841 you--I am not yielding my time to you.

3842 So that is your interpretation. Do you know that the
3843 White House--no one in the White House leaked this
3844 information?

3845 Ms. TOENSING. Well, I don't know even know how to deal
3846 with the word "leak" here. I know that people in the White
3847 House--

3848 Chairman WAXMAN. Well, Karl Rove admitted he leaked it.
3849 Do you think he is not telling us the truth?

3850 Ms. TOENSING. Well, the words are important, and I'm
3851 not sure what--

3852 Chairman WAXMAN. So you want to completely define the
3853 words that are so narrow in meaning that your statements can
3854 be credible but not honest. I am not asking about the
3855 statute. I am not asking about the statute. Evidently, if
3856 there were a criminal violation, the Special Inspector
3857 General investigating this matter might have brought criminal
3858 actions. Put that aside. Karl Rove said he leaked the
3859 information. Do you think he did not?

3860 Ms. TOENSING. Let me give you an example.

3861 Chairman WAXMAN. I want a yes or no. I am asking you a

3862 direct question that could be answered yes or no.

3863 Ms. TOENSING. Well, it can't, but I will answer no then
3864 and explain--

3865 Chairman WAXMAN. Do you have first-hand information
3866 that none of the people at the White House had knowledge that
3867 she was a covert agent?

3868 Ms. TOENSING. There has no been no testimony. I can
3869 only go by that.

3870 Chairman WAXMAN. You stated it so affirmatively and
3871 conclusively that I thought maybe you had access to
3872 information that we didn't have.

3873 Ms. TOENSING. I have information to the testimony, and
3874 so because I know what the testimony is, that everybody--and
3875 I am sure that the Special Counsel would have brought in
3876 anybody who had anything to do with it in the trial--

3877 Chairman WAXMAN. Maybe he would have. We thought the
3878 White House would have investigated the matter, and they
3879 didn't.

3880 Mr. Zaid, in your experience with these kinds of cases,
3881 do agencies wait until a criminal investigation is complete
3882 before taking any action or do they sometimes say, while this
3883 is pending, we are going to take away the security clearance?

3884 Mr. ZAID. They do not wait, Mr. Chairman. There is no
3885 requirement that they wait. I could understand in some cases
3886 there could be a need for coordination. But very often, in

3887 my experience, by the time you got into a criminal matter,
3888 the employee or contractor clearance has already been
3889 suspended.

3890 Chairman WAXMAN. And if an agency's goal is to prevent
3891 additional security violations and protect classified
3892 information, doesn't it make sense for the agency to do
3893 something right away rather than wait as long as 3 years?

3894 I mean, this is 3 years now that the same people in the
3895 White House have had classified information given to them,
3896 even though they have already admitted in most cases that
3897 they disclosed that information.

3898 I don't think they should--does it seem right to you
3899 that they would wait until not only the investigation is
3900 complete but all of the prosecution has been handled?

3901 Mr. ZAID. I find it very disconcerting and inconsistent
3902 with what I have seen at other agencies. I have seen far
3903 less of a grave situation or clearance infraction that has
3904 been addressed far more quickly by an agency.

3905 Again, I don't know personally besides what we all know,
3906 most part, publicly from what transpired, but from an
3907 administrative standpoint I am very surprised that something
3908 has not been done. If it were one of my clients, I am sure
3909 something would have been done.

3910 Chairman WAXMAN. I am not sure if you are familiar with
3911 all of the administrative activities. You are knowledgeable

3912 about the law, whether it's a criminal violation, but, in
3913 your experience, do you know whether agencies will sometimes
3914 suspend people's security clearances while there is an
3915 investigation going on?

3916 Ms. TOENSING. Some do and some don't. It would depend
3917 on--as was said by the panel before on a case-by-case basis
3918 because--and here, if I were the lawyer for a person making
3919 the decision whether to do so, I would really want the
3920 decisionmaker to weigh whether it would appear to be
3921 obstruction of justice. If you start calling in witnesses
3922 and you start interviewing the witnesses and you're not part
3923 of the Justice Department--

3924 Chairman WAXMAN. That would go to an investigation
3925 where you could simply say there is an investigation going on
3926 in the meantime. I think it's more prudent not to allow you
3927 to get more classified information. That's done frequently.

3928 Ms. TOENSING. I didn't understand what your question
3929 was.

3930 Chairman WAXMAN. Rather than do a whole investigation
3931 that might put somebody in a situation where they got two
3932 investigations going on and so they're represented in the
3933 investigation-type case, but, in the meantime, we will
3934 suspend your access to classified information.

3935 Ms. TOENSING. That sometimes happens. It depends on
3936 what the violation is. It can happen. It cannot happen as

3937 Mr.--

3938 Chairman WAXMAN. It's not unheard of. Thank you.

3939 Mr. Cummings.

3940 Mr. CUMMINGS. Thank you very much, Mr. Chairman.

3941 I was sitting here listening to this, and it's just
3942 something I think is incredible to me, and I think we are
3943 losing sight of what went on here.

3944 We had an American who simply wanted to serve her
3945 country, who put her life, her life, on the line. And I
3946 don't know what Goldwater--what he was doing, you know. But
3947 one thing I do know is that we had a lady here who lost her
3948 job, lost the opportunity to carry out the things that she
3949 apparently wanted to do, it was her love, while risking her
3950 life. And out of all of this testimony I hope we don't lose
3951 sight of that.

3952 There is a reason why we have these rules, these laws
3953 and these executive orders; and those reasons basically go to
3954 trying to protect people, Americans, who want to go out there
3955 and protect us and try to make sure that they are not harmed.

3956 Were you here, Ms. Toensing, when Ms. Valerie Plame
3957 testified?

3958 Ms. TOENSING. Yes, I was.

3959 Mr. CUMMINGS. One of the things that she said--she said
3960 two things that I know will be embedded in the DNA of every
3961 cell of my body until I die. She said, I did not--I expected

3962 other countries to try to reveal my identity, but never did I
3963 expect my own government to do it. And then she said
3964 something else that was very interesting. She said that, as
3965 a result of the disclosure, whole networks of agents have
3966 been placed in jeopardy.

3967 The reason why I say that is because it seems like to me
3968 all of us, as Americans, would want to make sure that we did
3969 every single thing in our power to protect those people who
3970 are going out there trying to protect us.

3971 Going back to the--you know, we have a situation here,
3972 too, where, you know, it wasn't just the law, it was the
3973 order, 12958, the President's order. And unlike the criminal
3974 statute which requires an intentional disclosure of
3975 classified information, the administrative rules prohibit not
3976 just intentional disclosures but reckless and negligent ones
3977 as well, isn't that correct?

3978 Ms. TOENSING. You are reading from it. I assume that
3979 you read it appropriately.

3980 Can I say a word in reaction to that? I have no
3981 problem. I have no problem with Ms. Plame. I respect the
3982 service that she contributed to this country.

3983 My complaint is two-fold, one against the CIA for not
3984 taking the proper precautions, as they had promised to do so
3985 when this Act was passed in the 1980s; and, secondly, with
3986 the application. Because I am a criminal defense lawyer, but

3987 I was also a prosecutor, and I don't like to see the law
3988 abused. I don't like the application of the criminal law to
3989 a situation that does not have the elements of it. I think
3990 that is an abuse of prosecutorial power.

3991 Mr. CUMMINGS. I was a criminal lawyer, too. And, you
3992 know, I am sure that, consistent with what you just said, you
3993 believed the testimony should be accurate, did you not? That
3994 seems consistent with what you just said, that you would want
3995 anybody's testimony to be accurate. Wouldn't that be
3996 correct?

3997 Ms. TOENSING. That is correct.

3998 Mr. CUMMINGS. I think you said a little earlier that
3999 she had not been out of the country for 5 years. Didn't you
4000 say that?

4001 Ms. TOENSING. No, the statute doesn't say that. It
4002 says for an assignment.

4003 Mr. CUMMINGS. No, what did you say?

4004 Ms. TOENSING. I said for an assignment. I didn't
4005 testify about that here today, here yet.

4006 Mr. CUMMINGS. I thought I read it in something that you
4007 said to the press at some point. You didn't say that?

4008 Ms. TOENSING. I have always used the term "under the
4009 statute."

4010 Mr. CUMMINGS. It says here, Washington Post, February
4011 18th, just prior to the start of deliberations of the jury in

4012 the Scooter Libby trial, and you said this as follows--it may
4013 be wrong. The Washington Post can check it out--but it says,
4014 quote, Plame was not covert, and you said that, today, going
4015 on with the quote, this is your quote: She worked at the CIA
4016 headquarters and had not been stationed abroad within 5 years
4017 of the date of Novak's column.

4018 Ms. TOENSING. Right. That's the same concept as
4019 serving outside the United States. That was the whole
4020 concept that we had when we passed the law.

4021 The first draft of the law--and I have it in my
4022 statement--was we only applied it to persons who are outside
4023 of the United States. We never applied it to anybody inside
4024 the United States. And then people wanted rotation people
4025 covered. The CIA said, you got to cover rotation people. So
4026 we said, how long is that? They said, 2 to 3 years. We
4027 said, okay, we'll change it.

4028 "or within 3 years of coming back to the United States."

4029 And then somebody said, oh, but people retire; and so we
4030 said, okay, CIA, how long do you need to protect those
4031 sources that the person had while serving abroad? And they
4032 told us 5 years. So that's why we have the 5-year
4033 requirement. But it was always intended, because of the
4034 assassinations abroad, to protect our personnel serving
4035 abroad.

4036 Mr. CUMMINGS. I see my time is up. Thank you very

4037 much.

4038 Ms. TOENSING. Inside the United States.

4039 Chairman WAXMAN. I wanted to be very clear for the
4040 record. I said earlier General Hayden and the CIA have
4041 cleared the following comments: During her employment at the
4042 CIA, Ms. Wilson was undercover. Her employment status with
4043 the CIA was classified information prohibited from disclosure
4044 under the Executive order 12958. And at the time of the
4045 publication of Robert Novak's column on July 14th, 2003, Ms.
4046 Wilson's CIA employment status was covert. This was
4047 classified information.

4048 So I wanted to repeat it. I don't know if I misstated
4049 it or not. But let no one misunderstand it, and I would just
4050 use those words so we can clarify it for the record.

4051 Ms. Watson.

4052 Ms. WATSON. Thank you, Mr. Chairman.

4053 I want to kind of pursue this line of questioning, Ms.
4054 Toensing, as well.

4055 It is reported, again, by the Washington Post on
4056 February 18, 2007, that you said, and this is your quote, I
4057 am going to read it. It was just read. "Plame was not
4058 covert. She worked at CIA headquarters and had not been
4059 stationed abroad within 5 years of the date of Novak's
4060 column."

4061 You said you were here, and you heard Ms. Wilson's

4062 testimony. I took notes on her testimony, and I quoted her.
4063 She said she was a covert agent, and that was her statement.

4064 Now it seems to me that your remarks are contrary to
4065 that statement. So do you still maintain that on February
4066 18, 2007, Ms. Wilson was not a covert CIA agent?

4067 Ms. TOENSING. Not under the law. She didn't say she
4068 was under the law. In fact, she said several times that she
4069 was not a lawyer. I know what the law requires--

4070 Ms. WATSON. Reclaiming my time.

4071 You said--this is your statement from that date: "Plame
4072 was not covert." and my question directly is, do you still
4073 maintain that on that date she was not a covert CIA officer?

4074 Ms. TOENSING. I was trying to answer. Yes, I still
4075 maintain that.

4076 Ms. WATSON. Yes or no.

4077 Ms. TOENSING. I still maintain it, yes.

4078 Ms. WATSON. That she was not a covert agent.

4079 Ms. TOENSING. Under the law. Completely.

4080 Ms. WATSON. Ms. Plame was sworn.

4081 Ms. TOENSING. And I am sworn. I am giving you my legal
4082 interpretation under the law as I know the law, and I helped
4083 draft the law. The person is supposed to reside outside of
4084 the United States.

4085 And let me make one other comment--

4086 Ms. WATSON. No. Reclaiming my time--because this is

4087 | being timed and members do have to leave--did you receive any
4088 | information directly from the CIA or Ms. Wilson that supports
4089 | your assertion that Ms. Wilson was not a covert officer?

4090 | Ms. TOENSING. I didn't talk to Ms. Wilson or the CIA.

4091 | Ms. WATSON. And do you have any information about the
4092 | nature of Ms. Wilson's employment status that Director Hayden
4093 | and Ms. Wilson don't have?

4094 | Ms. TOENSING. I have no idea--I don't know what he has
4095 | that I don't have. You know, vice versa. I can just tell
4096 | you what is required under the law. They can call anybody
4097 | anything they want to do in the halls, but, under this
4098 | statute, a criminal statute which is interpreted very
4099 | strictly, all of these elements have to be proven beyond a
4100 | reasonable doubt. That has been my concern.

4101 | Ms. WATSON. Your testimony is focusing on the criminal
4102 | prohibition in the Intelligence Identities Protection Act.
4103 | But I don't see any mention whatsoever of the administrative
4104 | restrictions contained in Executive order 12958, which is
4105 | what the invitation letter asks you to address.

4106 | As you note in your written statement--and we have
4107 | copies of it--there are numerous elements that must be proven
4108 | beyond a reasonable doubt in order to establish a crime under
4109 | the IIPA.

4110 | In contrast, the administrative rules simply prohibit
4111 | the disclosure of classified information to anyone not

4112 authorized to receive it. Unlike the criminal statute, which
4113 requires an intentional disclosure of classified information,
4114 the administrative rules prohibit not just intentional
4115 disclosures but reckless and negligent ones as well. Is that
4116 right?

4117 Ms. TOENSING. Of course.

4118 Ms. WATSON. Okay. Therefore, an improper disclosure of
4119 classified information violates the Executive order, even
4120 though it does not violate the criminal statute; is that
4121 right?

4122 Ms. TOENSING. I am just--

4123 Ms. WATSON. Is that right?

4124 Ms. TOENSING. I wasn't invited here to talk about--

4125 Ms. WATSON. Excuse me. Reclaiming my time. Reclaiming
4126 my time. Is that right? Yes or no.

4127 Ms. TOENSING. Would you repeat it, please?

4128 Ms. WATSON. I will. Therefore, an improper disclosure
4129 of classified information violates the Executive order, even
4130 though it does not violate the criminal statute. Yes or no.

4131 Ms. TOENSING. I take no issue with that. Yeah, that is
4132 right.

4133 Chairman WAXMAN. Thank you, Ms. Watson. Your time has
4134 expired.

4135 Mr. Van Hollen.

4136 Mr. VAN HOLLEN. Thank you, Mr. Chairman. Let me thank

4137 | both of our witnesses here today.

4138 | Ms. Toensing, let me ask you, getting back to the
4139 | overall context in which this all happened, wouldn't you
4140 | agree that the reason the White House official disclosed this
4141 | information, leaked it quietly to the press, was in an effort
4142 | to discredit somehow Ambassador Wilson as a result of the
4143 | article he wrote in the New York Times?

4144 | Ms. TOENSING. I have no idea why they gave out that
4145 | information. I do know that there was this allusion by Joe
4146 | Wilson that he was sent on the trip by the Vice President's
4147 | office. So it made sense to me, if you are sitting in the
4148 | Vice President's office, to say, "We didn't send him. We
4149 | didn't know what this is all about." and in the inquiry, as
4150 | I understand it, and you may have different facts, the
4151 | response was his wife sent him. And guess who did that? The
4152 | INR statement at the State Department.

4153 | Mr. VAN HOLLEN. Do you know why Mr. Rove, after
4154 | disclosing some of this information to Mr. Cooper at Time
4155 | Magazine, would have concluded by saying I have already said
4156 | too much?

4157 | Ms. TOENSING. I have no idea.

4158 | Mr. VAN HOLLEN. It seems to me that that kind of
4159 | statement--of course, we can't all read Mr. Rove's mind, but
4160 | an ordinary interpretation of that may be to conclude that he
4161 | already provided him information that he knew he shouldn't be

4162 providing.

4163 Let me just go back to the other statements made by the
4164 White House. We saw the clip here of their spokesman, Scott
4165 McClellan, stating that the White House had not been involved
4166 in the disclosure of Valerie Plame as somebody who worked at
4167 the CIA. Now you agree she worked at the CIA, right?

4168 Ms. TOENSING. Yeah. I didn't hear that statement, but
4169 that's okay. If you are going to say he said those words--I
4170 thought he said in giving off classified information, but--

4171 Mr. VAN HOLLEN. My understanding is what they were
4172 essentially saying, they were not involved in the disclosures
4173 that had been made and, clearly, the testimonies that were
4174 involved in the disclosures that had been made.

4175 Let me get back to, as I said, the purpose of the
4176 hearing. Part of the purpose of the hearing was to look at
4177 how the White House safeguards security information. That is
4178 the reason we had the second panel. And did you know before
4179 the testimony today that the White House itself had not
4180 undertaken any kind of investigation internally from the
4181 security office?

4182 Ms. TOENSING. I didn't know that, but I would have
4183 concurred with that with a massive criminal investigation
4184 going on. If I was a lawyer to the President, I would say
4185 don't you dare do a thing until this criminal investigation
4186 and prosecution is over.

4187 Mr. VAN HOLLEN. It was more than 2 months after this
4188 initially broke that Scott McClellan in another statement
4189 said, we have no information in the White House about any of
4190 these disclosures. Before you made that kind of statement,
4191 wouldn't you undertake some kind of investigation?

4192 Ms. TOENSING. Well, I am not here to answer for Scott
4193 McClellan.

4194 Mr. VAN HOLLEN. There is one issue that has to do with
4195 once the criminal investigation was started, but a long
4196 period of time went by when no administrative action was
4197 taken, and, as I understand your response to the question by
4198 Ms. Watson, you would agree that that kind of sort of
4199 investigation goes on routinely when there has been a
4200 disclosure of classified information, does it not?

4201 Ms. TOENSING. It can, and it cannot. I mean, I
4202 certainly wouldn't have done it in the brouhaha that occurred
4203 within a week of Bob Novak's publication.

4204 By the way, Bob Novak was not the first person to say
4205 she was covert. That was David Corn who printed that she was
4206 covert. Bob Novak called her an operative.

4207 Mr. VAN HOLLEN. This is a period of 2 months when there
4208 was lots of questions, everyone was trying to find out what
4209 was going on. The CIA had said that this was an unauthorized
4210 disclosure. The President of the United States said, and I
4211 quote, this is a very serious matter, and our administration

4212 takes it seriously.

4213 Do you agree this was a serious matter?

4214 Ms. TOENSING. Well, I think an outing, if somebody's
4215 career is being affected, is, of course, a serious matter.
4216 The issue is whether it was--the outing was done
4217 intentionally under the criminal law. That is what I have
4218 written about always.

4219 Mr. VAN HOLLEN. I understand. I understand your point
4220 under the criminal law.

4221 The other question, though, is why people didn't take
4222 action under the non-criminal law as part of safeguarding
4223 secrets at the White House. And I understand your focus is
4224 on the other issue, but I have got to say it is stunning that
4225 the White House would tell us they had no information about
4226 this 2 months after the first disclosures and we hear today
4227 that they never conducted any investigation. I mean--

4228 Ms. TOENSING. I would agree with you that it was a bad
4229 situation that happened. But I say shame on the CIA, that
4230 the briefer did not tell anybody at the White House that--

4231 Chairman WAXMAN. How do you know that? How do you
4232 know?

4233 Ms. TOENSING. He testified to that at the Scooter Libby
4234 trial.

4235 Chairman WAXMAN. Who was that briefer?

4236 Ms. TOENSING. Grenier. Robert Grenier.

4237 Chairman WAXMAN. And he was the briefer from the CIA?

4238 Ms. TOENSING. He said, I talked about Valerie Plame. I
4239 talked about the wife with Scooter Libby and the Vice
4240 President, but I didn't tell them that--this was on
4241 cross-examination. He admitted that he had not said that her
4242 status was either classified or covert.

4243 Mr. VAN HOLLEN. If I could, Mr. Chairman. Do you think
4244 White House officials have any obligation at all to put aside
4245 the legal obligation as stewards of our national security
4246 when they find out that someone works for the Central
4247 Intelligence Agency? Do you think they have any obligation
4248 to citizens of this country to find out, before telling the
4249 President about it, whether that disclosure would compromise
4250 sensitive information? Do you think--as just citizens of
4251 this country, wouldn't you want that to be the standard?

4252 Ms. TOENSING. I think the Press Secretary should always
4253 tell what is accurate. The Press Secretary should always
4254 tell what is accurate. I have no problem with that.

4255 Mr. VAN HOLLEN. Before somebody goes around saying this
4256 person works for the CIA in a cavalier manner--obviously,
4257 intentional manner to try to spread this information, don't
4258 you think they have an obligation to the citizens of this
4259 country to make--we are talking about the Iraq war, decisions
4260 for going to war, whether or not Saddam Hussein was trying to
4261 get nuclear weapons material. Before they disclosed the

4262 identity of somebody who works in the nuclear
4263 nonproliferation area of the CIA, don't you think they have
4264 some obligation for--and to demonstrate the good judgment to
4265 find out if that would disclose sensitive information? That
4266 is my question.

4267 Ms. TOENSING. Well, it could be, but I don't
4268 particularly think that a red flag would go off. Because
4269 those of us who work in government all the time know people
4270 who work at the CIA and talk with people who are at the CIA,
4271 so you wouldn't necessarily say--

4272 Mr. VAN HOLLEN. We don't all of us go around trying to
4273 use that information with reporters for the purpose of
4274 discrediting somebody.

4275 Ms. TOENSING. Let me say--do you want me to tell you my
4276 experience? Because, as Mark has represented, people who are
4277 covert--and I have asked them since all of this occurred,
4278 well, would you ever have a desk job at being covert at
4279 Langley? And they laugh at me. You know--I don't know. I
4280 have never been covert. I have represented people, and this
4281 is what they tell me.

4282 Chairman WAXMAN. The gentleman's time has expired.

4283 I want to thank both of you.

4284 Mr. Zaid, I had other questions for you. Let me ask you
4285 one quick one.

4286 If you had clients like Fleischer and Martin and Libby

4287 and Cheney and Rove, let s say they were worried because they
4288 disclosed information that they shouldn't have disclosed,
4289 wouldn't you tell them that they were treated a lot better
4290 than most people who disclosed classified information?

4291 Mr. ZAID. They are treated a lot better than many of my
4292 clients, some of whom who have testified before you like
4293 Lieutenant Colonel Anthony Shaffer, who did lose his security
4294 clearance and his job at the Defense Intelligence Agency for
4295 incurring \$67 in cellular phone bills and a couple of other
4296 petty issues like stealing pens from the U.S. Embassy when he
4297 was 14 years old 30 years ago. So, yes, I would say there is
4298 quite a number of people who have fared a great deal better
4299 than many of my clients. But if they want to hire me--I
4300 represent Republicans and Democrats--I don't have any
4301 problem.

4302 Chairman WAXMAN. As you should.

4303 Ms. TOENSING. Me, too.

4304 Chairman WAXMAN. Their double standard doesn't make any
4305 difference. You are counsel, and everything is entitled to
4306 representation.

4307 I want to thank you both for being here. Ms. Toensing,
4308 I have the pleasure to say we are pleased to accommodate the
4309 request of the minority to have you as a witness. Some of
4310 the statements you have made, without any doubt with great
4311 authority, I understand may not be accurate, so we are going

4312 | to check the information and we are going to hold the record
4313 | open to put in other things that might contradict some of
4314 | what you had to say.

4315 | The only thing I will say is that when we heard from
4316 | Mrs. Wilson and we have heard from Fitzgerald and I talked
4317 | personally to General Hayden, they have a different view as
4318 | to what is a protected agent than you do; and your knowledge
4319 | is knowledge is based on writing the law 30 years ago.

4320 | Ms. TOENSING. Don't date me that far. It was 25.

4321 | Chairman WAXMAN. Well, we will check that fact out,
4322 | also. But if I am incorrect, my apologies.

4323 | The committee stands adjourned.

4324 | [Whereupon, at 2:30 p.m., the committee was adjourned.]