

18 September 1944

MEMORANDUM for Mr. William F. Friedman:

1. The following comments are submitted on the enclosed memorandum.

2. It is concluded that all but one of the problems raised have received adequate attention and will be solved as far as possible if present efforts to procure legislation are successful.

3. The problem of litigating prosecution under the Espionage Act or under the proposed law mentioned above not having received attention hitherto, an informal investigation of this subject was made and the following information obtained.

4. Sources of information in the Department of Justice disclosed that the problem has been met by government prosecuting attorneys in two ways:

(a) The first is to limit as closely as possible the number of persons connected in any way with the trial of a case involving classified information, to investigate these persons as far as possible in the time available and to procure a court order safeguarding the records containing references to such information. This, however, is only partially effective since there are limited controls available to the prosecutor in selecting personnel to be connected with the trial. These controls include challenges to the jury, change of venue, and persuasive action upon the attorneys representing the defense to limit the number of persons having access to the classified information.

(b) The second and more successful method of safeguarding classified information in a case enforcing a law against its disclosure is to use tactics which avoid placing the information in the record or before the court. This may be done in several ways. In case of an offense involving disclosure of information contained in documents which are removed from their official files, for example, a prosecution under Section 88 of the United States Criminal Code for unauthorized possession of government documents, involving proof only of the fact that the document was an official government document, and not of its

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contents, may be used. It is suggested, however, that any method involving the prosecution for a related offense would not have the deterrent effect obtained from a prosecution for disclosure.

5. However, in a prosecution for disclosure of classified information, the nature of the information need not necessarily be revealed. Securing indictments from a grand jury on generalized charges and with a minimum of evidence is another practice which a good district attorney can handle easily. Depending on the case, classified information in question may remain undisclosed during the actual trial or be disclosed only to the court or only to the court and a cooperative defense attorney. Cooperation of a defense attorney may be more readily obtained since he is acting in a capacity which might seem to compromise his patriotism, and which thus makes him more ready to emphasize his capacity as an official of the court owing a special duty to it and to the Federal Government.

6. The question of whether the information is probably related to national defense can be settled by the testimony of the official custodian of the information. A case is cited which involved disclosure of plans for the recent invasion. The testimony of an army officer that the information concerned invasion plans satisfied the statutory requirements. Evidence necessary for the success of the prosecution which contains classified information can be submitted with the classified items excised with or without the consent of the defendant upon showing proper cause to the court.

*if approved  
by  
the  
court*

7. It should be mentioned in closing that an attempt to secure legislation similar to the British Official Secrets Acts, providing for trial of criminal prosecutions involving national defense secrets before a three-judge court, was made some time ago by the Department of Justice, and a bill to that effect passed the House, but was stopped in the Senate.

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1 Enc.:  
Memo