



1299 PENNSYLVANIA AVE., NW
WASHINGTON, DC 20004-2402
PHONE 202.783.0800
FAX 202.383.6610
A LIMITED LIABILITY PARTNERSHIP

JOSEPH A. OSTOYICH
PARTNER
202.383.7241
ostoyichj@howrey.com

April 29, 2004

VIA HAND DELIVERY

The Honorable Jeff Bingaman
703 Hart Senate Office Building
United States Senate
Washington, DC 20510

Re: *Richard M. Barlow v. United States, Congressional Ref. No. 98-887X*

Dear Senator Bingaman:

My December 6, 2002 and October 28, 2002 letters to you set out the facts underlying my strong belief that my former *pro bono* client, your constituent Richard Barlow, was improperly terminated from his job as an intelligence analyst in the summer of 1989 by the Office of Secretary of Defense Richard Cheney for blowing the whistle on Executive Branch efforts to conceal intelligence related to the scope of Pakistan's nuclear program and its illegal and covert nuclear procurement activities from the Congress. At the urgings of your office, Mr. Barlow spent nine years fighting his termination, through six separate DOD, CIA, State Department, and GAO investigations, all of which found certain facts and law in his favor. In 1998, your office sponsored a private relief bill for Mr. Barlow, but rather than reward him after these inquiries, required him to undergo an additional investigation by the Court of Federal Claims in a Congressional Reference proceeding that ultimately lasted an additional four and a half years.

As chronicled in my earlier letters to you, we unearthed significant evidence during the course of the Congressional Reference proceeding which supported Mr. Barlow's charges, including hard evidence that crimes may have been committed by Executive Branch officials who apparently concealed intelligence from Congress. We were blocked from proving his case at trial, however, by the Government's overbroad and improper assertions of the "state secrets privilege" over "virtually all" of the classified documents and testimony produced in the case. I re-attach copies of my earlier letters for your convenience.

Events of the past few years also firmly establish that Mr. Barlow's conclusions regarding Pakistan's nuclear procurement and proliferation efforts and its possession of a nuclear explosive device were, in fact, correct, and that his efforts to enforce our laws regarding Pakistan's nuclear agents were wise. Those facts reinforce the conclusion that Department of Defense and CIA reprisals against him were damaging not only to Mr. Barlow, but, potentially,

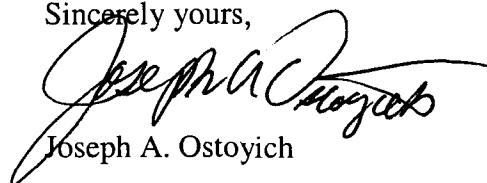
to our national security as well, a concern that you and your colleagues on both sides of the aisle recognized years ago. The Congress also clearly recognized that this case raised broad issues about the politicization of proliferation intelligence and reprisals against intelligence officers for doing their jobs. Congressional failure to address this type of Executive Branch misconduct at the time it occurred may even have contributed to more recent problems with intelligence oversight.

Mr. Barlow has had a number of recent conversations with Virginia White and Trudy Vincent of your staff and has proposed what I believe is a reasonable means of resolving his claims against the government. Even putting aside all the other losses that Mr. Barlow has experienced, I think that Mr. Barlow is truly in a very difficult position as a result of the unwarranted actions taken against him as regards his retirement. I believe that Mr. Barlow's request that a Congressional delegation approach the White House with a determined request to settle this case by providing Mr. Barlow with his federal retirement is more than reasonable.

Specifically, Mr. Barlow is seeking retirement in the Civil Service Retirement System (CSRS) for Law Enforcement. Mr. Barlow has spent almost 24 years serving his country, the last 13 as a consultant to the federal government. But for OSD's actions, Mr. Barlow's employment during these years would have been as a government employee. He has spent most of his career working for law enforcement. He requests that all his 20 plus years of service, including the last 13 years as a consultant to the federal government on security issues be counted towards his retirement and that his "high three" under this system be as a GS-15. I believe this grade level is warranted given his grade level in 1989 and his sensitive and major responsibilities for the last 7 years as a counterproliferation consultant. Under the law enforcement retirement system Mr. Barlow would be eligible for full benefits at age 50 which he will attain in October. This represents a substantially more limited form of compensation than the civil damages Mr. Barlow sought in his Congressional Reference proceeding and is in line with a proposal signed for Mr. Barlow's benefit by then-Secretary of Defense Cheney and attached hereto.

We would, of course, expect your office to not only support Mr. Barlow's request, but to assist us in furthering it and ensuring that Mr. Barlow can at last put this entire matter behind him. Thank you in advance for your assistance.

Sincerely yours,



Joseph A. Ostoyich



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FAX 202.383.6610
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JOSEPH A. OSTOYICH
PARTNER
202.383.7241
ostoyichj@howrey.com

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December 11, 2002

HAND DELIVERY

The Honorable Jeff Bingaman
703 Hart Senate Office Building
United States Senate
Washington, DC 20510

Re: Richard M. Barlow v. United States,
Congressional Ref. No. 98-887 X

Dear Senator Bingaman:

Enclosed are copies of two letters I recently delivered to Senators Grassley and Leahy regarding my *pro bono* whistleblower client, Richard Barlow, whose case raises a number of issues that should be of concern to the Armed Services Committee and to you personally as sponsor of Mr. Barlow's private relief bill. I would appreciate an opportunity to discuss this case further with you and the Armed Services Committee.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Joseph A. Ostoyich'. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Joseph A. Ostoyich

cc: Jonathan Epstein



1299 PENNSYLVANIA AVE., NW
WASHINGTON, DC 20004-2402
PHONE 202.783.0800
FAX 202.383.6610
A LIMITED LIABILITY PARTNERSHIP

JOSEPH A. OSTOYICH
PARTNER
202.383.7241
ostoyichj@howrey.com

FILE 08085.0061.000000

December 6, 2002

HAND DELIVERY

The Honorable Charles E. Grassley
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick J. Leahy
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: *Richard M. Barlow v. United States,*
Congressional Ref. No. 98-887 X

Dear Senators Grassley and Leahy:

In follow-up to my October 28, 2002 letter to you, and Mr. Barlow's November 7th letter, let me pin down more precisely the reasons why I believe Mr. Barlow's Congressional Reference case should be of particular concern to the Judiciary Committee and subcommittee on Administrative Oversight and the Courts, and to the Intelligence, Foreign Affairs, and Governmental Affairs committees, among others, and why Judiciary should act on his Private Relief Bill. I apologize for the length of this letter, but Mr. Barlow's case is extraordinarily complex and I believe assessing it requires a detailed understanding of the facts established during the course of this proceeding -- facts that the Court's Report often fails to address.

**Mr. Barlow Correctly Disclosed A Pattern Of
Apparently Significant Governmental Wrongdoing**

The trial record established that Mr. Barlow was correct when he disclosed to his DOD supervisors (Acting Director of the Office of Non-Proliferation Policy, Gerald Brubaker, and Principal Director, Victor Rostow) and to other DOD officials on numerous occasions in 1989 that Executive Branch officials were concealing intelligence about Pakistan's nuclear program from Congress and obstructing pending criminal investigations in an effort to avoid triggering the Pressler and Solarz Amendments and obtain approval for a proposed \$1.4 billion sale of F-16 jets to Pakistan.

1. The False Pressler Amendment Certifications and Solarz Amendment Updates.

Former Deputy Director of the CIA Richard Kerr, former National Intelligence Officer Gordon Oehler, Charles Burke, the former head of the pertinent CIA division, and others submitted testimony corroborating Mr. Barlow's charges that the Pressler certification was "inaccurate" and "not truthful" for several years in the late 1980s and that NIO David Einsel "had not been fully informing the Congress" on facts that would likely have triggered the Solarz Amendment. This "shaping" of the intelligence, which also involved DOD and State officials, was "not accidental." Undersecretary of Defense Wolfowitz testified that he, too, was concerned that "people thought we could construct a policy on a house of cards that the Congress wouldn't know what the Pakistanis were doing." After investigating Mr. Barlow's claims, State Department Inspector General Sherman Funk concluded that officials were "I phrase this diplomatically - - trying not to see what was happening."

2. The False F-16 Testimony. Mr. Oehler also corroborated Mr. Barlow's charge that Deputy Assistant Secretary of Defense Arthur Hughes falsely testified in August 1989 when he told Congress that modifying F-16s to deliver nuclear weapons "far exceeded the state of the art in Pakistan and could only be accomplished with a major release of data and industrial equipment from the U.S." Instead, Mr. Oehler testified that within the intelligence community there was "general agreement at the time that Pakistan's F-16 jets, which had been delivered in the early 1980s had the technical ability to deliver nuclear weapons[.]" The only classified intelligence document allowed in Mr. Barlow's Congressional Reference, a SECRET Air Force report assessing the capabilities of Pakistan's F-16s, confirmed Mr. Barlow's charge. See Plaintiff's Trial Exhibit 26. Plaintiff also submitted CIA Director Gates' later testimony before Congress acknowledging that Mr. Hughes' statement was inaccurate: the F-16s could deliver nuclear weapons without any release of data from the U.S. The "F-16s don't require those changes, I don't think, to deliver a weapon." The Defense Department made no effort at trial to defend Mr. Hughes' testimony.

Mr. Rostow acknowledged that DOD officials knew that the intelligence posed "problems" for the F-16 sale. As a result, it was apparently ignored in briefing Congress. The principal author of the Hughes testimony, Michael MacMurray, testified that he did not reflect the intelligence in the testimony because he was tasked with supporting the administration's stated policy of securing Congressional approval of the proposed F-16 sale.

3. State Department Obstruction Of Justice. State Department Inspector General Funk testified that Mr. Barlow was also correct in disclosing that high-ranking State officials had tipped off a former Pakistani General, who was the target of an undercover operation into an illegal plot to export nuclear components from the U.S., to the existence of a sealed arrest warrant. According to Inspector General Funk's testimony, the State Department officials were "eminently convictable" for obstructing justice: "it was proven beyond a doubt." The officials were not prosecuted, however, because of concerns that classified information would be made public. No punitive actions were taken against them.

The Honorable Charles E. Grassley
The Honorable Patrick J. Leahy
December 6, 2002
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In the face of this evidence, the Court found that Mr. Barlow was not reasonable in believing that Congress was misled - - although his disclosures were based on the same intelligence as the testimony of Mr. Kerr, Mr. Oehler, and the other witnesses listed above. I respectfully submit that the Court's failure to address these facts in its opinion makes it incumbent upon the legislative branch to get to the truth of this matter and see that justice is served. Senate involvement is necessary not only to protect future whistleblowers, but also to hold the Executive Branch accountable for intentionally misleading Congress.

The quotes above are facts taken directly from the trial and discovery record and they cannot be ignored. This case concerned Executive Branch efforts to conceal intelligence from Congress and that is what the facts proved. Moreover, these generalized facts are likely only the tip of the iceberg: virtually all classified information relating to Pakistan's nuclear program was entirely withheld from me and the other lawyers on Mr. Barlow's team on state secrets grounds. *See infra*. It was also withheld from the Court. In support of his private relief bill, Mr. Barlow would like an opportunity to discuss with your Committee (or, if necessary, the Intelligence Committee) additional, extensive facts contained in the classified intelligence which corroborate his charge that Congress was misled.

**Mr. Barlow's DOD Supervisors Terminated Him
Because He Threatened A Pending Billion Dollar F-16 Sale To Pakistan**

The Office of Secretary of Defense terminated Mr. Barlow in August 1989 because his chain of command (and key personnel in NIO Einsel's office and the CIA Directorate of Operations) were concerned that by blowing the whistle on these illegalities to Congress he would have exposed criminal wrongdoing which would have stopped the planned F-16 sale to Pakistan.

Mr. Barlow was one of the government's top experts on Pakistan's nuclear program long before he joined the OSD in January 1989, as a number of witnesses testified at trial. Charles Burke, his second-line supervisor at the CIA in the mid-1980s, testified that his performance as a scientific intelligence officer specializing in Pakistan's nuclear program was "exceptional." Mr. Oehler confirmed that Mr. Barlow "was a thorough analyst who went the extra mile to get the information he needed to do his job." He was "very focused on and knowledgeable about the Pakistani nuclear issue."

Mr. Barlow was regularly promoted while at the CIA and he received multiple commendations for his central role in engineering the arrest of Pakistani nuclear agents in undercover operations, including citations from CIA Director William Webster, State Department Legal Advisor Abraham Sofaer, Deputy Assistant Secretary for Intelligence Richard Clarke, and Deputy Assistant Secretary of Commerce for Export Enforcement Theodore Wu. He proposed and helped form the inaugural interagency Nuclear Export Violations Working Group with Deputy Assistant Secretary of State for Nuclear Affairs Fred McGoldrick and served as the CIA's and later DOD's sole representative to the group. Mr. McGoldrick later told State

Department investigators that he had the utmost confidence in Mr. Barlow's judgment: "If Barlow said it, I would believe him."

In July 1987, Deputy Director of Intelligence Kerr and the CIA General Counsel's office specifically sent Mr. Barlow to represent the CIA at a Congressional hearing by NIO Einsel on Pakistan's illegal nuclear procurement efforts because of his expertise on the topic and their concern that the NIO was not telling Congress the truth about Pakistan's efforts. During the hearing, NIO Einsel made several false statements to Congressman Solarz's House Foreign Affairs subcommittee and it became evident to Mr. Barlow that NIO Einsel had been misleading the subcommittee for some time. Mr. Barlow corrected him and told the subcommittee the truth. NIO Einsel, his deputy, and personnel in the CIA Directorate of Operations were angered by Mr. Barlow's disclosure and "soon the word came down to fire Barlow and get him out of the Pakistan nuclear program." Their efforts failed, but created a hostile environment that caused Mr. Barlow to leave the Agency.

Mr. Barlow joined the Office of the Secretary of Defense in January 1989. Shortly afterward, NIO Einsel's deputy and certain CIA DO officers who worked on Pakistan matters denied him access to materials on Pakistan's nuclear program that were critical to the Pressler Amendment analysis - materials he had previously accessed while at the Agency. They had no legitimate reason for doing so, according to a CIA witness at trial, they "just didn't want him to be in a position to where he could be in a strong analytical position within the DOD." They "were afraid he [Barlow] might say more than he should" about Pakistan's possession of a nuclear explosive device and that his disclosures might lead to enforcement of the Pressler Amendment. They "didn't want him [Barlow] to have to be in a strong position to analyze some of the things he had previously done." These same CIA officials talked to Mr. Barlow's OSD supervisors and Defense Intelligence Agency officers, told them that Mr. Barlow was a "security and counterintelligence concern" to them, and engaged in fraudulent efforts to paint Mr. Barlow as a security risk. They told Mr. Rostow that Mr. Barlow was "a problem and he's your problem now." Mr. Brubaker subsequently warned Mr. Barlow that these CIA Directorate of Operations and NIO personnel had threatened "consequences" if he continued to work with federal agents on Pakistani nuclear cases. In early April, Mr. Brubaker told DOD higher-ups his concern that Mr. Barlow's "agenda = enforcement."

Mr. Barlow's supervisors confronted him about the CIA's refusal to provide him with access to the materials and the CIA's seeming security concerns. Mr. Barlow told them details about Executive Branch efforts to conceal evidence on Pakistan's nuclear program from Congress and intentionally mislead it, and about State Department obstruction of justice. Mr. Barlow eventually gained access to the materials when Deputy Director Kerr intervened and put an end to their unauthorized activities. Mr. Barlow then reviewed the intelligence acquired since he had left the CIA and determined that these same CIA and NIO officers had been manipulating intelligence collection to support the Pressler certification and continue misleading Congress. He also learned that they were withholding critical reporting from the FBI and he attempted to

get them to correct their actions. He informed his supervisors and other DOD officials of his findings.

The concern that Mr. Barlow might prompt the triggering of the Pressler and Solarz Amendments was heightened in the Spring, when Mr. Barlow wrote an extensive factual and technical intelligence assessment for incoming Secretary of Defense Cheney analyzing the status of Pakistan's nuclear program. Administration officials were internally discussing a proposal to sell 60 F-16 jets to Pakistan. This sale (like all military sales and assistance to Pakistan) was contingent on certification under the Pressler Amendment that Pakistan did not possess a nuclear explosive device and that such military sales would significantly reduce the likelihood that it would possess such a device. It was also contingent on compliance with the Solarz Amendment which prohibited illegal export of U.S. equipment in support of nuclear weapons development.

Mr. Barlow's analysis for the Secretary of Defense, which was fully coordinated, concluded that Pressler Amendment certification was impossible because Pakistan possessed all the components of a nuclear explosive device. It also concluded that "the Solarz Amendment was continuing to be violated" and it discussed Pakistan's ability, intentions, and activities to deliver nuclear weapons using F-16s that the U.S. had earlier sold to Pakistan. The DOD desk officer for Pakistan, Michael MacMurray, pressured Mr. Barlow "very, very, very heavily to soften that [Pressler Amendment] language." Mr. Barlow refused to soften his conclusion in any significant way: "I changed it to - - under pressure from him - - to 'extremely difficult or impossible.'"

Mr. Barlow's chain of command reviewed his report in early May and rewrote it without his knowledge. Its content was changed and its conclusion "superseded" so that it supported the F-16 sale. Secretary of Defense Cheney received only the rewritten report. Shortly afterward, Mr. Brubaker contacted DOD security and questioned whether an employee could be trusted with classified information if he was obtaining psychiatric treatment - - although Mr. Barlow was not receiving any psychiatric treatment.

On July 11, 1989, the administration formally proposed the F-16 sale to Congress with the goal of securing Congressional approval by Labor Day. In mid-July, Mr. Barlow told DOD officials that the cover-up continued: that a CIA witness had "created a misleading picture of Pakistan's activities" during a recent briefing to a House Foreign Affairs subcommittee chaired by Congressman Solarz.

In early August, Mr. Barlow sent corrections to the false CIA testimony through official channels to the CIA after showing them to Mr. Brubaker. He also told his DOD supervisors that testimony by Deputy Assistant Secretary of Defense Arthur Hughes to Congress falsely stated that modifying F-16s to deliver nuclear weapons "far exceeded the state of the art in Pakistan and could only be accomplished with a major release of data and industrial equipment from the U.S." "Mr. Barlow believed this was false, and on August 2 or 3, told Mr. Brubaker, Mr. Rostow, and

the individual who had prepared the testimony, Mr. MacMurray, his concerns about the truthfulness of the Hughes testimony.”

On August 3rd, Mr. Brubaker, with the support of Mr. Rostow, told his entire chain of command up to the office of Undersecretary Wolfowitz that Mr. Barlow was going to Congress to blow the whistle on the scheme to mislead Congress. Joint Trial Exhibit 6 (copying Mr. Rostow, Deputy Assistant James Hinds, and Mervyn Hampton). The next day, August 4, Mr. Brubaker told Mr. Barlow he was being terminated. Mr. Brubaker immediately removed his accesses to the intelligence on Pakistan. He also reported Mr. Barlow to DIA and OSD security and told them that he was concerned Mr. Barlow was going to the Hill to correct misleading testimony given to Congress and “give them the other side of the slant.” He informed OSD security that his concern was heightened because Mr. Barlow was under psychiatric care - - again, a falsehood. Mr. Barlow’s TOP SECRET security clearance was immediately suspended. Plaintiff’s Trial Exhibits 13-17.

An investigation was launched into Mr. Barlow’s personal life, his finances, and his marriage. He was not given any information about the investigation, only that it was based on a classified allegation by a “senior level DOD official” with the support of “a lot” of others that they were concerned about Mr. Barlow’s ability to protect classified information. He was told that he was not entitled to know the identities of the officials or any further details because the investigation was classified and he no longer held any security clearances. Mr. Barlow and his wife feared he had been accused of being a Soviet spy. As it turned out, Mr. Brubaker was the “senior” official who accused Mr. Barlow, which was a gross exaggeration of his role in DOD: he had been at the DOD for three years, but had only joined management, as Acting Director, three months earlier.

At trial, Mr. Rostow admitted that he and Mr. Brubaker discussed Mr. Barlow’s disclosures about false CIA and DOD testimony and that they were particularly concerned by Mr. Barlow’s disclosure about the false F-16 testimony because their Undersecretary of Defense had made it clear that he expected full support for the administration’s proposed sale. *See, e.g.,* Trial Transcript, at 861-62. Mr. Rostow also acknowledged that he and Mr. Brubaker had a “problem” with Mr. Barlow’s Pressler Amendment conclusion because although it relied on technical data that appeared to be conclusive that Pakistan had all of the elements necessary to assemble a nuclear device, it ignored the policy ramifications that would ensue if Congress and the President were told the truth and assistance to Pakistan was cut off:

That, I don’t believe, entered into Richard Barlow’s interpretation of the data, nor did he want them to. And that, I think, was the essence of the problem Brubaker had with his analysis. That is, there was more to it simply looking at the evidence and saying, ‘Pakistan has a bomb; we must cut off aid. The President must be informed. The Congress must be informed.’

**The Court Ruled That Mr. Barlow Had No Legal Or Equitable Recourse
For His Termination And The Suspension Of His Security Clearances**

Despite evidence of significant wrongdoing, the Court ruled that Mr. Barlow had no legal or equitable recourse under the Whistleblower Protection Act or any common law theory for his termination (or the loss of his security clearance) because his supervisor accused him of being on his way to Congress to blow the whistle on classified criminal activity - - even though the evidence at trial established that this accusation was false. The Court effectively ruled that a fabricated allegation that a whistleblower might discuss classified efforts to mislead Congress with members of Congress and cleared staff constitutes a reasonable ground for terminating the whistleblower and revoking his security clearance.

The evidence established that the accusation against Mr. Barlow was false. Indeed, as explained below, a Joint Investigation by the Inspectors General of the DOD, State Department, and CIA concluded that the security actions and resulting investigation were based on "false premises" and should not have occurred.

Mr. Brubaker wrote two secret memoranda in early August 1989 documenting his reasons for recommending Mr. Barlow's termination. Both memoranda admitted that, among other disclosures of wrongdoing, in mid-July 1989 Mr. Barlow told Mr. Brubaker that during the CIA briefing to the HFAC subcommittee "Congressman Solarz and Congressional staff had been given a misleading and incomplete picture regarding Pakistan's illicit procurement activities in the U.S. He noted in particular that his former supervisor at the CIA, [REDACTED], had made misstatements." Joint Trial Exhibit 8; *see also* Joint Trial Exhibit 6.

The memoranda - - which were, obviously, unsworn - - then further alleged that Mr. Barlow "told me that he (Barlow) intended to talk with two staff members to 'straighten them out' and identified them as Arch Roberts and Robert Hathaway." *Id.* Mr. Barlow's second-line supervisor, Victor Rostow, had ample reason to suspect Mr. Brubaker's accusation. He testified that he was "concerned over Brubaker's overall performance" as Acting Director, considered him an "inexperienced supervisor" with "difficulties," and knew at the time that Mr. Brubaker was likely to be replaced in his job as Acting Director, which he was shortly after when his next superior found him "prone to overreact." He also testified, more pointedly, that he knew Mr. Brubaker considered Barlow a "problem" because he was unwilling to ignore the technical data establishing that the Pressler Amendment was being violated, and he conceded at trial that he knew Mr. Barlow was not on his way to the Hill. *See* Trial Transcript, at 86 ("I would say I probably had contrary evidence from Mr. Barlow that he would not do it"). Nonetheless, Mr. Rostow stood by while Mr. Brubaker reported Mr. Barlow to OSD security personnel and told some of the highest-level OSD officials that Mr. Barlow was on his way to the Hill "with all the secrets." When Mr. Barlow finally learned of the "classified" accusation several months later, he flatly denied making any such threat.

Mr. Brubaker's story was a fabrication and he recanted it when cross-examined under oath:

Q. Just so we're clear, then, I take it that your recommendation that Barlow be terminated had nothing to do with a perceived risk that he would go to Congress?

A. That's absolutely correct.

Plaintiff's Trial Exhibit 52 (Brubaker December 21, 2000 Deposition Transcript, at 217). He also tried to distance himself from the suspension of Mr. Barlow's security clearance, testifying that "I played no part in that, and I was surprised to learn of it." The facts showed otherwise. Mr. Brubaker copied OSD security personnel on his August memoranda charging Mr. Barlow with being on his way to the Hill to "straighten them out," and a Fact Sheet prepared by OSD security personnel reported that "Mr. Brubaker made verbal allegations to Steve O'Toole, Security Division, in meetings during the week of August 7, 1989 that Mr. Barlow had been receiving psychiatric counseling and that he intended to brief, without authorization, Congressional staffers regarding what he considered to be inaccurate information provided during Congressional hearings."

The Defense Investigative Service then launched a nine-month long investigation into Mr. Brubaker's charges - - even though Leon Kniaz, the Director of Personnel and Security for the Office of the Secretary of Defense, had "real concerns" about the credibility of Mr. Brubaker's accusation and believed that OSD officials were motivated by "partisan politics" against Mr. Barlow. The DIS not only looked into Mr. Brubaker's accusation that Mr. Barlow had made a threat to disclose the truth to Congress, but also probed into new allegations about his finances and his personal life, ranging from an alleged failure to pay taxes to alcoholism to adultery to Mr. Brubaker's allegation that he was delusional and under psychiatric care.

The OSD ultimately exonerated Mr. Barlow, finding "no information" to support Mr. Brubaker's accusations and "a significant amount of detail in the investigative reports which refutes the allegations made against him." Plaintiff's Trial Exhibit 22. That finding was ratified by the Joint Report issued by the Inspectors General of the CIA, DOD, and State, and also by the G. A. O. report. As noted above, the Joint Report found that the suspension of Mr. Barlow's security clearances was based on "false premises" and that the Defense Investigative Service's invasive investigation into Mr. Barlow's personal life should not have occurred. The Report concluded that the suspension of Mr. Barlow's security clearances might "have devastating and long-lasting implications" to his career because "[e]ven after a clearance has been restored, the very fact that it had once been suspended often raises lingering questions within the security community." In fact, this was the case: State Department Inspector General Funk noted that three years later "whispers" about Mr. Barlow's alleged security problems persisted, "crippling his employability," and he remained "*de facto*, if not *de jure*, a security problem."

The Court's ruling in the face of this evidence sets a dangerous precedent that will likely chill would-be whistleblowers from telling Congress about potential illegalities, including lying to Congress, committed by members of the national security community. Moreover, it would provide supervisors of employees working with any type of classified information with a ready-made excuse for terminating a whistleblower and stripping his security clearances, an excuse that would be extraordinarily difficult to disprove. They could simply accuse the whistleblower - - without any proof and, as with Mr. Brubaker's accusation, even in the face of the evidence - - of being a threat to disseminate anything they deem classified outside the Executive Branch. The Court's ruling makes that a defense to a whistleblower claim, justifying the whistleblower's termination.

The Court also ruled that the whistleblower has no claim for the suspension of his security clearances - - even when the suspension is carried out under "false pretenses" - - because the judiciary has no jurisdiction to second-guess Executive Branch security decisions under any circumstance. The Court relied upon *Dep't. of Navy v. Egan*, 484 U.S. 518 (1988), but that case should not have governed. The *Egan* decision was well-known to the Senate in 1998 and the Senate expressly directed the Court to address the facts surrounding the suspension of Mr. Barlow's security clearance. The Court should have done so. Its failure to do so in the face of the Senate mandate effectively turned Mr. Barlow's four-year Congressional Reference into a wild goose chase that was futile from the start because the Court held, on separation of powers grounds, that it never had jurisdiction to investigate OSD's decisions or remedy Mr. Barlow's wrongs.

The only recourse a whistleblower has under the Court's rulings is to raise his concerns with his supervisors - - exactly what Mr. Barlow did. The likely result of such an action is obvious: rather than investigate Mr. Barlow's charges or report them to their higher-ups, his supervisors terminated him, falsely labeled him a security risk, stripped his Top Secret clearance and his accesses, instigated an intrusive investigation of him as a security risk, and ruined his federal government career.

The Alleged Performance Reasons For Terminating Mr. Barlow Were A Sham

The only "performance" reasons Mr. Brubaker and Mr. Rostow provided for terminating Mr. Barlow were either inconsequential or fabricated. Indeed, Mr. Barlow's performance at the OSD was objectively outstanding. In April, his then-supervisor Gerald Oplinger rated Mr. Barlow's performance "Exceeds Fully Successful" and noted that he "exceeded the general standards of performance of his present grade level, in some areas by a substantial margin." He praised Mr. Barlow's "solid understanding" and "thorough knowledge" of non-proliferation policy and intelligence, and noted that he was a "highly articulate and effective advocate of DOD positions" who had "improved the Directorate's ability to produce timely and complete analyses." Mr. Rostow approved the evaluation with the comment "Mr. Barlow is a bright, aggressive, and intelligent action officer." With Mr. Rostow's concurrence and that of the

Deputy Assistant Secretary of Defense James Hinds, the OSD promoted Mr. Barlow on June 4, 1989.

Mr. Brubaker became Acting Director on May 1 when Mr. Oplinger retired. He did not document a single complaint about Mr. Barlow's performance or discuss terminating him in May, June, or the first three weeks of July. It was not until late July 1989 - - *after* Mr. Barlow's disclosure that a CIA witness had continued to mislead Congress on the scope of Pakistan's Solarz Amendment activities - - that Mr. Brubaker mentioned terminating Mr. Barlow. He did not finalize his recommendation until August 3rd -- *after* Mr. Barlow told him and others that DASD Hughes' testimony to Congress on the F-16s was false. His August 3rd memorandum documenting the reasons for his termination expressly discusses Mr. Barlow's disclosure about the CIA as contributing to his decision. The performance issues he noted in the memorandum, however, occurred back in the Spring, *prior* to Mr. Barlow's evaluation and promotion. Thus, on their face they did not merit any adverse action. The Joint Inspectors General investigation itself concluded that Mr. Brubaker's termination memorandum "does not make a strong case."

Mr. Brubaker provided one other reason for terminating Mr. Barlow in his memorandum. He claimed that Mr. Barlow had failed to read certain classified documents housed in the National Foreign Intelligence Board reading room, but that was false. Several witnesses testified to Mr. Barlow's frequent and full review of the documents, including State IG Funk. The Court agreed, finding that Mr. Barlow's review of the documents in the NFIB was "undisputed." Mr. Brubaker conceded during cross-examination that Mr. Barlow had read "all" of the reports and that he had never had any reason to question Mr. Barlow's knowledge of the documents. In fact, many of these very documents contained the information being withheld from Congress.

The Government Abused The State Secrets Privilege And Denied Mr. Barlow His Day In Court

The Government grossly abused the "state secrets privilege" in this case. The privilege is distinct from Executive Order security classifications. It is a common law privilege designed to protect specific "sources and methods" of intelligence gathering from being jeopardized by public disclosure. It is not designed to permit Executive Branch agencies to cover-up evidence of potential crimes. No privilege, not even the President's Executive privilege, is that broad.

In the face of hard evidence that crimes may have been committed- - including testimony from three high-ranking CIA witnesses, Messrs. Kerr, Oehler, and Burke, that critical facts were withheld from Congress - - the Court permitted the Government to assert the state secrets privilege over (in its own words) "virtually all" of the classified documents and testimony in the case. The Court relied, in large part, upon a declaration submitted by CIA Director George Tenet. Director Tenet's declaration was highly unusual because it went beyond what was required to assert the privilege and volunteered that his review of Mr. Barlow's allegations led him to conclude that they were "groundless." Even the limited facts introduced at trial proved otherwise.

The Government also abused the state secrets privilege by wielding it as both a sword and a shield. Myriad documents were withheld from plaintiff and his counsel in their entirety: not one word was released from hundreds of requested documents. In contrast, the Government allowed one of its trial witnesses, a key CIA official, to review the complete transcript of his briefing to Congressman Solarz's subcommittee. Obviously, plaintiff's ability to conduct a full and fair cross-examination of the witness was hampered because the witness had access to materials that plaintiff's counsel did not.

The Government did produce a heavily-redacted report by the CIA Inspector General's office of its investigation into Mr. Barlow's allegations. Much of the report was expressly disavowed by the CIA Inspector General at the time, Fred Hitz, in his testimony in this case, and he did not transmit it to the SSCI because a significant amount of its content was used to bash Mr. Barlow's reputation, rather than get at the truth. The report concluded that CIA personnel did not engage in "significant wrongdoing." The testimony of Mr. Kerr, Mr. Oehler, Mr. Burke and others heavily suggests that the conclusion was, at best, a whitewash. Indeed, the investigation does not appear to have elicited any of the testimony that these men voluntarily provided to corroborate Mr. Barlow's charges. One key witness testified that he did not remember making many of the statements the report attributed to him, and he did not endorse them in his testimony.

As noted in my prior letter, the Government used the state secrets privilege to block witnesses from testifying to even their broad conclusions about Pakistan's nuclear program - - although their conclusions were not classified at all, were so generic that they could not have jeopardized a source or method of intelligence gathering, and were already in the public realm via Congressional testimony and magazine interviews in any event. Instead, it appears the privilege was used for the illegitimate purpose of keeping even broad facts shrouded in secrecy.

Finally, although the Government blocked Mr. Barlow from "virtually all" classified written and testimonial evidence corroborating his charges, it then argued to the Court that Mr. Barlow was unreasonable because he did not proffer sufficient facts to corroborate his charges. The Court erroneously agreed with this Kafkaesque logic -- even though it recognized that its ruling would severely hamper Mr. Barlow's case:

The Government is hypersensitive [redacted]. Unfortunately, that unavoidably conflicts with the level of detail you can go into on the reasonableness issue.

Trial Transcript, at 185.

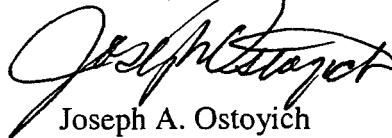
The Honorable Charles E. Grassley
The Honorable Patrick J. Leahy
December 6, 2002
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* * *

Mr. Barlow has been seeking relief for his termination and the suspension of his security clearance non-stop for thirteen years. He sought relief through multiple internal DOD, CIA, and State Department investigations that invaded his personal life, his marriage and his finances. He sought relief through a GAO investigation and four years of his Congressional Reference. The actions OSD took against him, and its lengthy battle to prevent him from clearing his name, not only derailed his promising intelligence career, they took and continue to take a terrible personal and financial toll on him, contributed to the dissolution of his marriage and resulted in his diagnosis with post-traumatic stress disorder. I believe that a fair Senate review of the full facts of his case will confirm that his injuries resulted from retaliation for his whistleblowing activities.

I urge you to have Committee staff read the full, unredacted trial record and to request that the Intelligence Committee review the documents withheld on state secrets privilege grounds. I look forward to further discussions on these matters and on the prospect of re-authorizing Mr. Barlow's private relief bill.

Sincerely yours,



Joseph A. Ostoyich

cc: Chad Groover
Steven Dettelbach



1299 PENNSYLVANIA AVE., NW
WASHINGTON, DC 20004-2402
PHONE 202.783.0800
FAX 202.383.6610
A LIMITED LIABILITY PARTNERSHIP

JOSEPH A. OSTOYICH
PARTNER
202.383.7241
ostoyichj@howrey.com

FILE 08085.0061.000000

October 28, 2002

The Honorable Patrick J. Leahy
U.S. Senate Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Charles E. Grassley
U.S. Senate Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts
224 Dirksen Senate Office Building
Washington, DC 20510

Re: *Richard M. Barlow v. United States*,
Congressional Ref. No. 98-887 X

Dear Senators Leahy and Grassley:

I read Friday's *Washington Post* article about your concerns with the Labor Department's interpretation of the whistleblower laws in the *Sasse* and *Edmonds* cases with great interest. For the past two years, I have represented Richard Barlow *pro bono* in a Congressional Reference sent from the Senate to the Court of Federal Claims in 1998. *See* S. 2274, 105th Cong. 1 (1998); S. Res. 256, 105th Cong. (1998). I took this case over from my former partner, Paul Warnke, after he passed away.

Mr. Barlow was an intelligence analyst with the CIA and the Department of Defense in the late 1980s. While at the DOD in 1989, he told his supervisors on numerous occasions that Executive Branch officials were concealing intelligence on Pakistan's nuclear program from Congress in an effort to avoid triggering the Pressler and Solarz Amendments to the Foreign Assistance Act, and that State Department officials had tipped off a Pakistani citizen who was the target of a U.S. sting investigation into Pakistan's illegal nuclear procurement efforts.

Rather than investigate Mr. Barlow's charges or report them to higher-ups, Mr. Barlow's supervisors terminated him -- only weeks after he had been promoted -- and reported that he was a security risk because he might go to Congress to blow the whistle on the wrongdoers.

From 1989-1996, Mr. Barlow fought these charges through multiple internal investigations by the DOD, CIA, and State Department. In 1997, a report by the G.A.O. found the agencies' investigations flawed. In 1998, Senator Bingaman sponsored a private relief bill for Mr. Barlow and his case was referred to the Court of Federal Claims.

Mr. Barlow's Congressional Reference will be forwarded by the Court to your subcommittee shortly. Let me highlight three issues up front that should be of interest to you:

1. The Court held that Mr. Barlow was not entitled to protection under the whistleblower laws because his supervisor at the DOD believed he *might* discuss classified information with *cleared* congressional staffers. *See, e.g.*, August 19, 2002 Opinion, at 34-35 ("the potential that Mr. Barlow would contact Hill staffers [] would not be an improper ground for discharge"), 36 ("Mr. Barlow had no right to make the threatened disclosure, even if the staffers were cleared").

2. The Government asserted the state secrets privilege over -- in its own words -- "virtually all of the classified information that could be relevant in this case[.]" As a result, we were substantially impaired in presenting documentary and testimonial evidence in support of Mr. Barlow's case. The Court allowed the government to invoke a state secrets privilege that was unprecedented in its breadth. Hundreds of documents were withheld from Mr. Barlow (and counsel) in their entirety. In addition, witnesses were blocked from testifying to even the most generic, publicly-available facts. For example, the Court allowed the Government to assert the privilege over a statement by former CIA Deputy Director of Intelligence Richard Kerr. Mr. Kerr informed us that the substance of his statement was not classified at all, in his view, and certainly did not compromise sources and methods of intelligence gathering. Moreover, no source or method could have been jeopardized by his sworn statement: he had already been widely quoted in the *New Yorker* magazine ten years earlier making the same point. Nonetheless, the government fully redacted the substance of his testimony.

To highlight another problematic example, the government asserted the state secrets privilege -- an Executive Branch privilege -- over the lack of knowledge of a staffer on Congressman Solarz's House Foreign Affairs subcommittee about certain facts related to Pakistan's nuclear program, even though it released to us as unclassified State Department documents containing the facts which he did not know (because they were, apparently, never disclosed to the subcommittee).

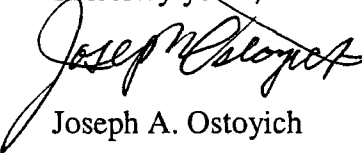
3. The trial record contains substantial evidence that Mr. Barlow was correct in his charges: the testimony of high-ranking CIA, DOD, and State Department officials corroborated his conclusion that critical intelligence on Pakistan's nuclear program was, in fact, withheld from Congress for political reasons, and that State Department officials had obstructed justice. For

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The Honorable Charles E. Grassley
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example, Gordon Oehler, a CIA official, testified that “as a result of such shaping [of the intelligence], there were times when the picture most consistent with the intelligence community’s positions as a whole were not presented.” Another CIA official, Charles Burke, testified that the Pressler certification to Congress was not truthful in 1987, 1988, or 1989. Paul Wolfowitz, Undersecretary of Defense at the time, testified that he, too, “specifically sensed that people thought we could somehow construct a policy on a house of cards that the Congress wouldn’t know what the Pakistanis were doing.”

We recently filed a more detailed summary of factual and legal errors that we believe were committed during Mr. Barlow’s Congressional Reference and which prevented him from obtaining his day in court. I would appreciate an opportunity to discuss these issues further with your subcommittee.

Sincerely yours,



Joseph A. Ostoyich

cc: Steven Dettelbach
Chad Groover



1299 PENNSYLVANIA AVE., NW
WASHINGTON, DC 20004-2402
PHONE 202.783.0800
FAX 202.383.6610
A LIMITED LIABILITY PARTNERSHIP

JOSEPH A. OSTOYICH
PARTNER
202.383.7241
ostoyichj@howrey.com

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December 6, 2002

HAND DELIVERY

The Honorable Charles E. Grassley
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick J. Leahy
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Richard M. Barlow v. United States,
Congressional Ref. No. 98-887 X

Dear Senators Grassley and Leahy:

In follow-up to my October 28, 2002 letter to you, and Mr. Barlow's November 7th letter, let me pin down more precisely the reasons why I believe Mr. Barlow's Congressional Reference case should be of particular concern to the Judiciary Committee and subcommittee on Administrative Oversight and the Courts, and to the Intelligence, Foreign Affairs, and Governmental Affairs committees, among others, and why Judiciary should act on his Private Relief Bill. I apologize for the length of this letter, but Mr. Barlow's case is extraordinarily complex and I believe assessing it requires a detailed understanding of the facts established during the course of this proceeding -- facts that the Court's Report often fails to address.

**Mr. Barlow Correctly Disclosed A Pattern Of
Apparently Significant Governmental Wrongdoing**

The trial record established that Mr. Barlow was correct when he disclosed to his DOD supervisors (Acting Director of the Office of Non-Proliferation Policy, Gerald Brubaker, and Principal Director, Victor Rostow) and to other DOD officials on numerous occasions in 1989 that Executive Branch officials were concealing intelligence about Pakistan's nuclear program from Congress and obstructing pending criminal investigations in an effort to avoid triggering the Pressler and Solarz Amendments and obtain approval for a proposed \$1.4 billion sale of F-16 jets to Pakistan.

1. The False Pressler Amendment Certifications and Solarz Amendment Updates.

Former Deputy Director of the CIA Richard Kerr, former National Intelligence Officer Gordon Oehler, Charles Burke, the former head of the pertinent CIA division, and others submitted testimony corroborating Mr. Barlow's charges that the Pressler certification was "inaccurate" and "not truthful" for several years in the late 1980s and that NIO David Einsel "had not been fully informing the Congress" on facts that would likely have triggered the Solarz Amendment. This "shaping" of the intelligence, which also involved DOD and State officials, was "not accidental." Undersecretary of Defense Wolfowitz testified that he, too, was concerned that "people thought we could construct a policy on a house of cards that the Congress wouldn't know what the Pakistanis were doing." After investigating Mr. Barlow's claims, State Department Inspector General Sherman Funk concluded that officials were "I phrase this diplomatically - - trying not to see what was happening."

2. The False F-16 Testimony. Mr. Oehler also corroborated Mr. Barlow's charge that Deputy Assistant Secretary of Defense Arthur Hughes falsely testified in August 1989 when he told Congress that modifying F-16s to deliver nuclear weapons "far exceeded the state of the art in Pakistan and could only be accomplished with a major release of data and industrial equipment from the U.S." Instead, Mr. Oehler testified that within the intelligence community there was "general agreement at the time that Pakistan's F-16 jets, which had been delivered in the early 1980s had the technical ability to deliver nuclear weapons[.]" The only classified intelligence document allowed in Mr. Barlow's Congressional Reference, a SECRET Air Force report assessing the capabilities of Pakistan's F-16s, confirmed Mr. Barlow's charge. See Plaintiff's Trial Exhibit 26. Plaintiff also submitted CIA Director Gates' later testimony before Congress acknowledging that Mr. Hughes' statement was inaccurate: the F-16s could deliver nuclear weapons without any release of data from the U.S. The "F-16s don't require those changes, I don't think, to deliver a weapon." The Defense Department made no effort at trial to defend Mr. Hughes' testimony.

Mr. Rostow acknowledged that DOD officials knew that the intelligence posed "problems" for the F-16 sale. As a result, it was apparently ignored in briefing Congress. The principal author of the Hughes testimony, Michael MacMurray, testified that he did not reflect the intelligence in the testimony because he was tasked with supporting the administration's stated policy of securing Congressional approval of the proposed F-16 sale.

3. State Department Obstruction Of Justice. State Department Inspector General Funk testified that Mr. Barlow was also correct in disclosing that high-ranking State officials had tipped off a former Pakistani General, who was the target of an undercover operation into an illegal plot to export nuclear components from the U.S., to the existence of a sealed arrest warrant. According to Inspector General Funk's testimony, the State Department officials were "eminently convictable" for obstructing justice: "it was proven beyond a doubt." The officials were not prosecuted, however, because of concerns that classified information would be made public. No punitive actions were taken against them.

In the face of this evidence, the Court found that Mr. Barlow was not reasonable in believing that Congress was misled - - although his disclosures were based on the same intelligence as the testimony of Mr. Kerr, Mr. Oehler, and the other witnesses listed above. I respectfully submit that the Court's failure to address these facts in its opinion makes it incumbent upon the legislative branch to get to the truth of this matter and see that justice is served. Senate involvement is necessary not only to protect future whistleblowers, but also to hold the Executive Branch accountable for intentionally misleading Congress.

The quotes above are facts taken directly from the trial and discovery record and they cannot be ignored. This case concerned Executive Branch efforts to conceal intelligence from Congress and that is what the facts proved. Moreover, these generalized facts are likely only the tip of the iceberg: virtually all classified information relating to Pakistan's nuclear program was entirely withheld from me and the other lawyers on Mr. Barlow's team on state secrets grounds. *See infra*. It was also withheld from the Court. In support of his private relief bill, Mr. Barlow would like an opportunity to discuss with your Committee (or, if necessary, the Intelligence Committee) additional, extensive facts contained in the classified intelligence which corroborate his charge that Congress was misled.

**Mr. Barlow's DOD Supervisors Terminated Him
Because He Threatened A Pending Billion Dollar F-16 Sale To Pakistan**

The Office of Secretary of Defense terminated Mr. Barlow in August 1989 because his chain of command (and key personnel in NIO Einsel's office and the CIA Directorate of Operations) were concerned that by blowing the whistle on these illegalities to Congress he would have exposed criminal wrongdoing which would have stopped the planned F-16 sale to Pakistan.

Mr. Barlow was one of the government's top experts on Pakistan's nuclear program long before he joined the OSD in January 1989, as a number of witnesses testified at trial. Charles Burke, his second-line supervisor at the CIA in the mid-1980s, testified that his performance as a scientific intelligence officer specializing in Pakistan's nuclear program was "exceptional." Mr. Oehler confirmed that Mr. Barlow "was a thorough analyst who went the extra mile to get the information he needed to do his job." He was "very focused on and knowledgeable about the Pakistani nuclear issue."

Mr. Barlow was regularly promoted while at the CIA and he received multiple commendations for his central role in engineering the arrest of Pakistani nuclear agents in undercover operations, including citations from CIA Director William Webster, State Department Legal Advisor Abraham Sofaer, Deputy Assistant Secretary for Intelligence Richard Clarke, and Deputy Assistant Secretary of Commerce for Export Enforcement Theodore Wu. He proposed and helped form the inaugural interagency Nuclear Export Violations Working Group with Deputy Assistant Secretary of State for Nuclear Affairs Fred McGoldrick and served as the CIA's and later DOD's sole representative to the group. Mr. McGoldrick later told State

Department investigators that he had the utmost confidence in Mr. Barlow's judgment: "If Barlow said it, I would believe him."

In July 1987, Deputy Director of Intelligence Kerr and the CIA General Counsel's office specifically sent Mr. Barlow to represent the CIA at a Congressional hearing by NIO Einsel on Pakistan's illegal nuclear procurement efforts because of his expertise on the topic and their concern that the NIO was not telling Congress the truth about Pakistan's efforts. During the hearing, NIO Einsel made several false statements to Congressman Solarz's House Foreign Affairs subcommittee and it became evident to Mr. Barlow that NIO Einsel had been misleading the subcommittee for some time. Mr. Barlow corrected him and told the subcommittee the truth. NIO Einsel, his deputy, and personnel in the CIA Directorate of Operations were angered by Mr. Barlow's disclosure and "soon the word came down to fire Barlow and get him out of the Pakistan nuclear program." Their efforts failed, but created a hostile environment that caused Mr. Barlow to leave the Agency.

Mr. Barlow joined the Office of the Secretary of Defense in January 1989. Shortly afterward, NIO Einsel's deputy and certain CIA DO officers who worked on Pakistan matters denied him access to materials on Pakistan's nuclear program that were critical to the Pressler Amendment analysis - materials he had previously accessed while at the Agency. They had no legitimate reason for doing so, according to a CIA witness at trial, they "just didn't want him to be in a position to where he could be in a strong analytical position within the DOD." They "were afraid he [Barlow] might say more than he should" about Pakistan's possession of a nuclear explosive device and that his disclosures might lead to enforcement of the Pressler Amendment. They "didn't want him [Barlow] to have to be in a strong position to analyze some of the things he had previously done." These same CIA officials talked to Mr. Barlow's OSD supervisors and Defense Intelligence Agency officers, told them that Mr. Barlow was a "security and counterintelligence concern" to them, and engaged in fraudulent efforts to paint Mr. Barlow as a security risk. They told Mr. Rostow that Mr. Barlow was "a problem and he's your problem now." Mr. Brubaker subsequently warned Mr. Barlow that these CIA Directorate of Operations and NIO personnel had threatened "consequences" if he continued to work with federal agents on Pakistani nuclear cases. In early April, Mr. Brubaker told DOD higher-ups his concern that Mr. Barlow's "agenda = enforcement."

Mr. Barlow's supervisors confronted him about the CIA's refusal to provide him with access to the materials and the CIA's seeming security concerns. Mr. Barlow told them details about Executive Branch efforts to conceal evidence on Pakistan's nuclear program from Congress and intentionally mislead it, and about State Department obstruction of justice. Mr. Barlow eventually gained access to the materials when Deputy Director Kerr intervened and put an end to their unauthorized activities. Mr. Barlow then reviewed the intelligence acquired since he had left the CIA and determined that these same CIA and NIO officers had been manipulating intelligence collection to support the Pressler certification and continue misleading Congress. He also learned that they were withholding critical reporting from the FBI and he attempted to

get them to correct their actions. He informed his supervisors and other DOD officials of his findings.

The concern that Mr. Barlow might prompt the triggering of the Pressler and Solarz Amendments was heightened in the Spring, when Mr. Barlow wrote an extensive factual and technical intelligence assessment for incoming Secretary of Defense Cheney analyzing the status of Pakistan's nuclear program. Administration officials were internally discussing a proposal to sell 60 F-16 jets to Pakistan. This sale (like all military sales and assistance to Pakistan) was contingent on certification under the Pressler Amendment that Pakistan did not possess a nuclear explosive device and that such military sales would significantly reduce the likelihood that it would possess such a device. It was also contingent on compliance with the Solarz Amendment which prohibited illegal export of U.S. equipment in support of nuclear weapons development.

Mr. Barlow's analysis for the Secretary of Defense, which was fully coordinated, concluded that Pressler Amendment certification was impossible because Pakistan possessed all the components of a nuclear explosive device. It also concluded that "the Solarz Amendment was continuing to be violated" and it discussed Pakistan's ability, intentions, and activities to deliver nuclear weapons using F-16s that the U.S. had earlier sold to Pakistan. The DOD desk officer for Pakistan, Michael MacMurray, pressured Mr. Barlow "very, very, very heavily to soften that [Pressler Amendment] language." Mr. Barlow refused to soften his conclusion in any significant way: "I changed it to - - under pressure from him - - to 'extremely difficult or impossible.'"

Mr. Barlow's chain of command reviewed his report in early May and rewrote it without his knowledge. Its content was changed and its conclusion "superseded" so that it supported the F-16 sale. Secretary of Defense Cheney received only the rewritten report. Shortly afterward, Mr. Brubaker contacted DOD security and questioned whether an employee could be trusted with classified information if he was obtaining psychiatric treatment - - although Mr. Barlow was not receiving any psychiatric treatment.

On July 11, 1989, the administration formally proposed the F-16 sale to Congress with the goal of securing Congressional approval by Labor Day. In mid-July, Mr. Barlow told DOD officials that the cover-up continued: that a CIA witness had "created a misleading picture of Pakistan's activities" during a recent briefing to a House Foreign Affairs subcommittee chaired by Congressman Solarz.

In early August, Mr. Barlow sent corrections to the false CIA testimony through official channels to the CIA after showing them to Mr. Brubaker. He also told his DOD supervisors that testimony by Deputy Assistant Secretary of Defense Arthur Hughes to Congress falsely stated that modifying F-16s to deliver nuclear weapons "far exceeded the state of the art in Pakistan and could only be accomplished with a major release of data and industrial equipment from the U.S." "Mr. Barlow believed this was false, and on August 2 or 3, told Mr. Brubaker, Mr. Rostow, and

the individual who had prepared the testimony, Mr. MacMurray, his concerns about the truthfulness of the Hughes testimony.”

On August 3rd, Mr. Brubaker, with the support of Mr. Rostow, told his entire chain of command up to the office of Undersecretary Wolfowitz that Mr. Barlow was going to Congress to blow the whistle on the scheme to mislead Congress. Joint Trial Exhibit 6 (copying Mr. Rostow, Deputy Assistant James Hinds, and Mervyn Hampton). The next day, August 4, Mr. Brubaker told Mr. Barlow he was being terminated. Mr. Brubaker immediately removed his accesses to the intelligence on Pakistan. He also reported Mr. Barlow to DIA and OSD security and told them that he was concerned Mr. Barlow was going to the Hill to correct misleading testimony given to Congress and “give them the other side of the slant.” He informed OSD security that his concern was heightened because Mr. Barlow was under psychiatric care - - again, a falsehood. Mr. Barlow’s TOP SECRET security clearance was immediately suspended. Plaintiff’s Trial Exhibits 13-17.

An investigation was launched into Mr. Barlow’s personal life, his finances, and his marriage. He was not given any information about the investigation, only that it was based on a classified allegation by a “senior level DOD official” with the support of “a lot” of others that they were concerned about Mr. Barlow’s ability to protect classified information. He was told that he was not entitled to know the identities of the officials or any further details because the investigation was classified and he no longer held any security clearances. Mr. Barlow and his wife feared he had been accused of being a Soviet spy. As it turned out, Mr. Brubaker was the “senior” official who accused Mr. Barlow, which was a gross exaggeration of his role in DOD: he had been at the DOD for three years, but had only joined management, as Acting Director, three months earlier.

At trial, Mr. Rostow admitted that he and Mr. Brubaker discussed Mr. Barlow’s disclosures about false CIA and DOD testimony and that they were particularly concerned by Mr. Barlow’s disclosure about the false F-16 testimony because their Undersecretary of Defense had made it clear that he expected full support for the administration’s proposed sale. *See, e.g.*, Trial Transcript, at 861-62. Mr. Rostow also acknowledged that he and Mr. Brubaker had a “problem” with Mr. Barlow’s Pressler Amendment conclusion because although it relied on technical data that appeared to be conclusive that Pakistan had all of the elements necessary to assemble a nuclear device, it ignored the policy ramifications that would ensue if Congress and the President were told the truth and assistance to Pakistan was cut off:

That, I don’t believe, entered into Richard Barlow’s interpretation of the data, nor did he want them to. And that, I think, was the essence of the problem Brubaker had with his analysis. *That is, there was more to it simply looking at the evidence and saying, ‘Pakistan has a bomb; we must cut off aid. The President must be informed. The Congress must be informed.’*

The Court Ruled That Mr. Barlow Had No Legal Or Equitable Recourse For His Termination And The Suspension Of His Security Clearances

Despite evidence of significant wrongdoing, the Court ruled that Mr. Barlow had no legal or equitable recourse under the Whistleblower Protection Act or any common law theory for his termination (or the loss of his security clearance) because his supervisor accused him of being on his way to Congress to blow the whistle on classified criminal activity - - even though the evidence at trial established that this accusation was false. The Court effectively ruled that a fabricated allegation that a whistleblower might discuss classified efforts to mislead Congress with members of Congress and cleared staff constitutes a reasonable ground for terminating the whistleblower and revoking his security clearance.

The evidence established that the accusation against Mr. Barlow was false. Indeed, as explained below, a Joint Investigation by the Inspectors General of the DOD, State Department, and CIA concluded that the security actions and resulting investigation were based on "false premises" and should not have occurred.

Mr. Brubaker wrote two secret memoranda in early August 1989 documenting his reasons for recommending Mr. Barlow's termination. Both memoranda admitted that, among other disclosures of wrongdoing, in mid-July 1989 Mr. Barlow told Mr. Brubaker that during the CIA briefing to the HFAC subcommittee "Congressman Solarz and Congressional staff had been given a misleading and incomplete picture regarding Pakistan's illicit procurement activities in the U.S. He noted in particular that his former supervisor at the CIA, [REDACTED], had made misstatements." Joint Trial Exhibit 8; *see also* Joint Trial Exhibit 6.

The memoranda - - which were, obviously, unsworn - - then further alleged that Mr. Barlow "told me that he (Barlow) intended to talk with two staff members to 'straighten them out' and identified them as Arch Roberts and Robert Hathaway." *Id.* Mr. Barlow's second-line supervisor, Victor Rostow, had ample reason to suspect Mr. Brubaker's accusation. He testified that he was "concerned over Brubaker's overall performance" as Acting Director, considered him an "inexperienced supervisor" with "difficulties," and knew at the time that Mr. Brubaker was likely to be replaced in his job as Acting Director, which he was shortly after when his next superior found him "prone to overreact." He also testified, more pointedly, that he knew Mr. Brubaker considered Barlow a "problem" because he was unwilling to ignore the technical data establishing that the Pressler Amendment was being violated, and he conceded at trial that he knew Mr. Barlow was not on his way to the Hill. *See* Trial Transcript, at 86 ("I would say I probably had contrary evidence from Mr. Barlow that he would not do it"). Nonetheless, Mr. Rostow stood by while Mr. Brubaker reported Mr. Barlow to OSD security personnel and told some of the highest-level OSD officials that Mr. Barlow was on his way to the Hill "with all the secrets." When Mr. Barlow finally learned of the "classified" accusation several months later, he flatly denied making any such threat.

Mr. Brubaker's story was a fabrication and he recanted it when cross-examined under oath:

Q. Just so we're clear, then, I take it that your recommendation that Barlow be terminated had nothing to do with a perceived risk that he would go to Congress?

A. That's absolutely correct.

Plaintiff's Trial Exhibit 52 (Brubaker December 21, 2000 Deposition Transcript, at 217). He also tried to distance himself from the suspension of Mr. Barlow's security clearance, testifying that "I played no part in that, and I was surprised to learn of it." The facts showed otherwise. Mr. Brubaker copied OSD security personnel on his August memoranda charging Mr. Barlow with being on his way to the Hill to "straighten them out," and a Fact Sheet prepared by OSD security personnel reported that "Mr. Brubaker made verbal allegations to Steve O'Toole, Security Division, in meetings during the week of August 7, 1989 that Mr. Barlow had been receiving psychiatric counseling and that he intended to brief, without authorization, Congressional staffers regarding what he considered to be inaccurate information provided during Congressional hearings."

The Defense Investigative Service then launched a nine-month long investigation into Mr. Brubaker's charges - - even though Leon Kniaz, the Director of Personnel and Security for the Office of the Secretary of Defense, had "real concerns" about the credibility of Mr. Brubaker's accusation and believed that OSD officials were motivated by "partisan politics" against Mr. Barlow. The DIS not only looked into Mr. Brubaker's accusation that Mr. Barlow had made a threat to disclose the truth to Congress, but also probed into new allegations about his finances and his personal life, ranging from an alleged failure to pay taxes to alcoholism to adultery to Mr. Brubaker's allegation that he was delusional and under psychiatric care.

The OSD ultimately exonerated Mr. Barlow, finding "no information" to support Mr. Brubaker's accusations and "a significant amount of detail in the investigative reports which refutes the allegations made against him." Plaintiff's Trial Exhibit 22. That finding was ratified by the Joint Report issued by the Inspectors General of the CIA, DOD, and State, and also by the G. A. O. report. As noted above, the Joint Report found that the suspension of Mr. Barlow's security clearances was based on "false premises" and that the Defense Investigative Service's invasive investigation into Mr. Barlow's personal life should not have occurred. The Report concluded that the suspension of Mr. Barlow's security clearances might "have devastating and long-lasting implications" to his career because "[e]ven after a clearance has been restored, the very fact that it had once been suspended often raises lingering questions within the security community." In fact, this was the case: State Department Inspector General Funk noted that three years later "whispers" about Mr. Barlow's alleged security problems persisted, "crippling his employability," and he remained "*de facto*, if not *de jure*, a security problem."

The Court's ruling in the face of this evidence sets a dangerous precedent that will likely chill would-be whistleblowers from telling Congress about potential illegalities, including lying to Congress, committed by members of the national security community. Moreover, it would provide supervisors of employees working with any type of classified information with a ready-made excuse for terminating a whistleblower and stripping his security clearances, an excuse that would be extraordinarily difficult to disprove. They could simply accuse the whistleblower - - without any proof and, as with Mr. Brubaker's accusation, even in the face of the evidence - - of being a threat to disseminate anything they deem classified outside the Executive Branch. The Court's ruling makes that a defense to a whistleblower claim, justifying the whistleblower's termination.

The Court also ruled that the whistleblower has no claim for the suspension of his security clearances - - even when the suspension is carried out under "false pretenses" - - because the judiciary has no jurisdiction to second-guess Executive Branch security decisions under any circumstance. The Court relied upon *Dep't. of Navy v. Egan*, 484 U.S. 518 (1988), but that case should not have governed. The *Egan* decision was well-known to the Senate in 1998 and the Senate expressly directed the Court to address the facts surrounding the suspension of Mr. Barlow's security clearance. The Court should have done so. Its failure to do so in the face of the Senate mandate effectively turned Mr. Barlow's four-year Congressional Reference into a wild goose chase that was futile from the start because the Court held, on separation of powers grounds, that it never had jurisdiction to investigate OSD's decisions or remedy Mr. Barlow's wrongs.

The only recourse a whistleblower has under the Court's rulings is to raise his concerns with his supervisors - - exactly what Mr. Barlow did. The likely result of such an action is obvious: rather than investigate Mr. Barlow's charges or report them to their higher-ups, his supervisors terminated him, falsely labeled him a security risk, stripped his Top Secret clearance and his accesses, instigated an intrusive investigation of him as a security risk, and ruined his federal government career.

The Alleged Performance Reasons For Terminating Mr. Barlow Were A Sham

The only "performance" reasons Mr. Brubaker and Mr. Rostow provided for terminating Mr. Barlow were either inconsequential or fabricated. Indeed, Mr. Barlow's performance at the OSD was objectively outstanding. In April, his then-supervisor Gerald Oplinger rated Mr. Barlow's performance "Exceeds Fully Successful" and noted that he "exceeded the general standards of performance of his present grade level, in some areas by a substantial margin." He praised Mr. Barlow's "solid understanding" and "thorough knowledge" of non-proliferation policy and intelligence, and noted that he was a "highly articulate and effective advocate of DOD positions" who had "improved the Directorate's ability to produce timely and complete analyses." Mr. Rostow approved the evaluation with the comment "Mr. Barlow is a bright, aggressive, and intelligent action officer." With Mr. Rostow's concurrence and that of the

Deputy Assistant Secretary of Defense James Hinds, the OSD promoted Mr. Barlow on June 4, 1989.

Mr. Brubaker became Acting Director on May 1 when Mr. Oplinger retired. He did not document a single complaint about Mr. Barlow's performance or discuss terminating him in May, June, or the first three weeks of July. It was not until late July 1989 - - *after* Mr. Barlow's disclosure that a CIA witness had continued to mislead Congress on the scope of Pakistan's Solarz Amendment activities - - that Mr. Brubaker mentioned terminating Mr. Barlow. He did not finalize his recommendation until August 3rd -- *after* Mr. Barlow told him and others that DASD Hughes' testimony to Congress on the F-16s was false. His August 3rd memorandum documenting the reasons for his termination expressly discusses Mr. Barlow's disclosure about the CIA as contributing to his decision. The performance issues he noted in the memorandum, however, occurred back in the Spring, *prior* to Mr. Barlow's evaluation and promotion. Thus, on their face they did not merit any adverse action. The Joint Inspectors General investigation itself concluded that Mr. Brubaker's termination memorandum "does not make a strong case."

Mr. Brubaker provided one other reason for terminating Mr. Barlow in his memorandum. He claimed that Mr. Barlow had failed to read certain classified documents housed in the National Foreign Intelligence Board reading room, but that was false. Several witnesses testified to Mr. Barlow's frequent and full review of the documents, including State IG Funk. The Court agreed, finding that Mr. Barlow's review of the documents in the NFIB was "undisputed." Mr. Brubaker conceded during cross-examination that Mr. Barlow had read "all" of the reports and that he had never had any reason to question Mr. Barlow's knowledge of the documents. In fact, many of these very documents contained the information being withheld from Congress.

The Government Abused The State Secrets Privilege And Denied Mr. Barlow His Day In Court

The Government grossly abused the "state secrets privilege" in this case. The privilege is distinct from Executive Order security classifications. It is a common law privilege designed to protect specific "sources and methods" of intelligence gathering from being jeopardized by public disclosure. It is not designed to permit Executive Branch agencies to cover-up evidence of potential crimes. No privilege, not even the President's Executive privilege, is that broad.

In the face of hard evidence that crimes may have been committed- - including testimony from three high-ranking CIA witnesses, Messrs. Kerr, Oehler, and Burke, that critical facts were withheld from Congress - - the Court permitted the Government to assert the state secrets privilege over (in its own words) "virtually all" of the classified documents and testimony in the case. The Court relied, in large part, upon a declaration submitted by CIA Director George Tenet. Director Tenet's declaration was highly unusual because it went beyond what was required to assert the privilege and volunteered that his review of Mr. Barlow's allegations led him to conclude that they were "groundless." Even the limited facts introduced at trial proved otherwise.

The Government also abused the state secrets privilege by wielding it as both a sword and a shield. Myriad documents were withheld from plaintiff and his counsel in their entirety: not one word was released from hundreds of requested documents. In contrast, the Government allowed one of its trial witnesses, a key CIA official, to review the complete transcript of his briefing to Congressman Solarz's subcommittee. Obviously, plaintiff's ability to conduct a full and fair cross-examination of the witness was hampered because the witness had access to materials that plaintiff's counsel did not.

The Government did produce a heavily-redacted report by the CIA Inspector General's office of its investigation into Mr. Barlow's allegations. Much of the report was expressly disavowed by the CIA Inspector General at the time, Fred Hitz, in his testimony in this case, and he did not transmit it to the SSCI because a significant amount of its content was used to bash Mr. Barlow's reputation, rather than get at the truth. The report concluded that CIA personnel did not engage in "significant wrongdoing." The testimony of Mr. Kerr, Mr. Oehler, Mr. Burke and others heavily suggests that the conclusion was, at best, a whitewash. Indeed, the investigation does not appear to have elicited any of the testimony that these men voluntarily provided to corroborate Mr. Barlow's charges. One key witness testified that he did not remember making many of the statements the report attributed to him, and he did not endorse them in his testimony.

As noted in my prior letter, the Government used the state secrets privilege to block witnesses from testifying to even their broad conclusions about Pakistan's nuclear program - - although their conclusions were not classified at all, were so generic that they could not have jeopardized a source or method of intelligence gathering, and were already in the public realm via Congressional testimony and magazine interviews in any event. Instead, it appears the privilege was used for the illegitimate purpose of keeping even broad facts shrouded in secrecy.

Finally, although the Government blocked Mr. Barlow from "virtually all" classified written and testimonial evidence corroborating his charges, it then argued to the Court that Mr. Barlow was unreasonable because he did not proffer sufficient facts to corroborate his charges. The Court erroneously agreed with this Kafkaesque logic -- even though it recognized that its ruling would severely hamper Mr. Barlow's case:

The Government is hypersensitive [redacted]. Unfortunately, that unavoidably conflicts with the level of detail you can go into on the reasonableness issue.

Trial Transcript, at 185.

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Mr. Barlow has been seeking relief for his termination and the suspension of his security clearance non-stop for thirteen years. He sought relief through multiple internal DOD, CIA, and State Department investigations that invaded his personal life, his marriage and his finances. He sought relief through a GAO investigation and four years of his Congressional Reference. The actions OSD took against him, and its lengthy battle to prevent him from clearing his name, not only derailed his promising intelligence career, they took and continue to take a terrible personal and financial toll on him, contributed to the dissolution of his marriage and resulted in his diagnosis with post-traumatic stress disorder. I believe that a fair Senate review of the full facts of his case will confirm that his injuries resulted from retaliation for his whistleblowing activities.

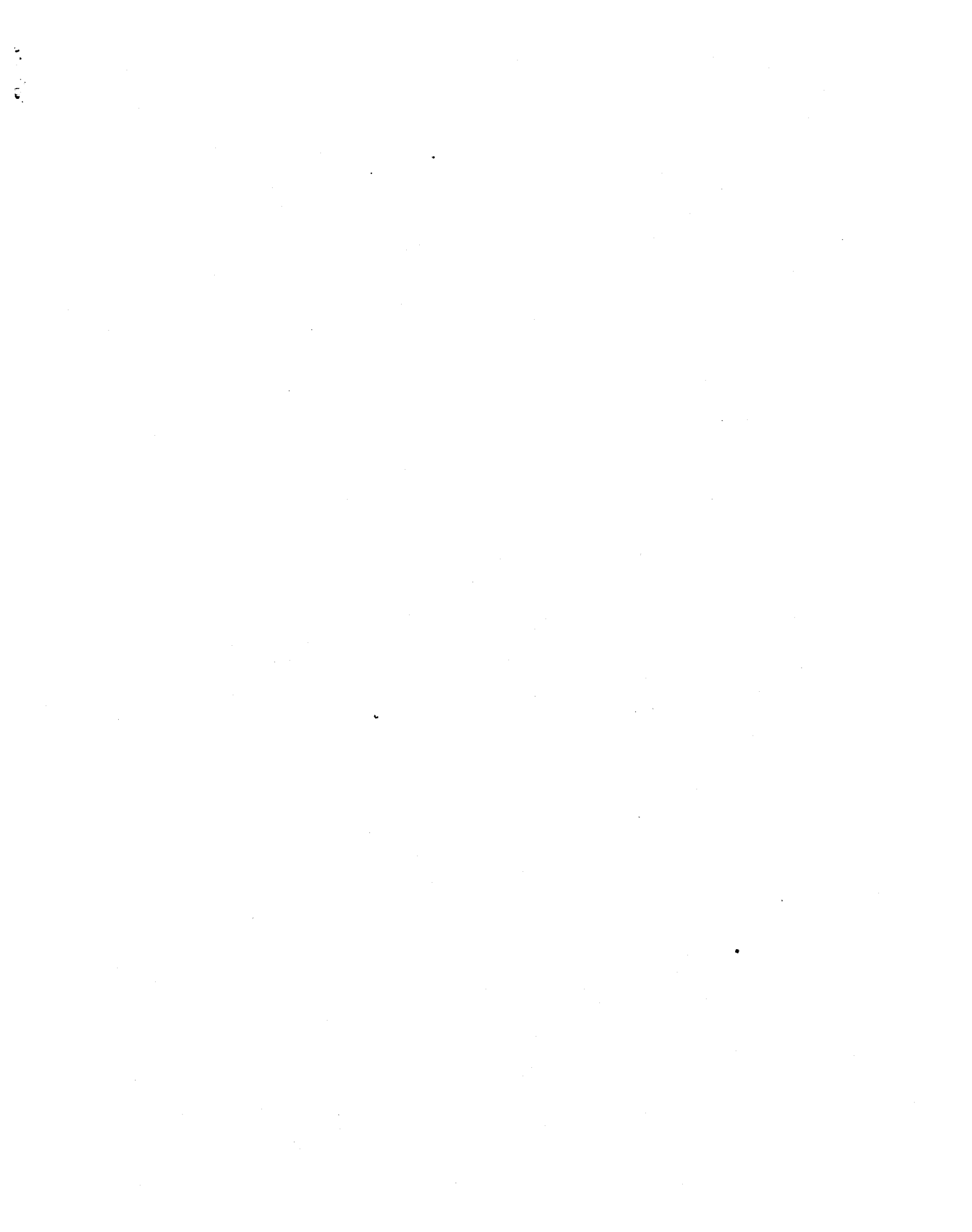
I urge you to have Committee staff read the full, unredacted trial record and to request that the Intelligence Committee review the documents withheld on state secrets privilege grounds. I look forward to further discussions on these matters and on the prospect of re-authorizing Mr. Barlow's private relief bill.

Sincerely yours,



Joseph A. Ostoyich

cc: Chad Groover
Steven Dettelbach





THE SECRETARY OF DEFENSE
WASHINGTON, THE DISTRICT OF COLUMBIA



MEMORANDUM OF CERTIFICATION

Pursuant to the authority provided me in Title 5, Code of Federal Regulations (CFR), §842.803, I certify that the position of Criminal Investigator, GS-1811-11/12, Position Number 6422/6423, is appropriate for coverage under the special retirement system for law enforcement officers, firefighters and air traffic controllers employed under the Federal Employees Retirement System.

Dick Cheney

