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GOVERNMENT SECRECY AND THE RIGHT OF CONFRONTATION

I

THE PROBLEM

Shortly after the end of World War II a certain soldier who had been stationed at Los Alamos was given his discharge. Like most G.I.s, he had a propensity for collecting souvenirs, and he brought some official photographs back to civilian life with him. These pictures contained highly secret data relative to the atomic project.

His dereliction was discovered and a prosecution was brought under the Criminal Code for the theft of government property and the unlawful removal of documents. Before the case went to trial, the defense moved for a production of the subjects of the larceny, the photographs. The motion was granted and the secret data in the photographs was masked, leaving the identifying objects mentioned in the criminal information, visible.

At a meeting in the judge's chambers, representatives of the Atomic Energy Commission unmasked the pictures and, upon instruction of the court, offered to exhibit them to the defendant and his counsel. The attorney thereupon asked the court for assurance that he would not be prosecuted under the Atomic Energy Act, in the event this secret data subsequently leaked out. On being advised that he would have to construe the law for himself, counsel declined to examine the photographs. The trial proceeded and the defendant was convicted of the misdemeanor.¹

In this article we will prescind from the propriety of

¹ The case does not seem to have been reported, but its details, as set forth above, were made known to this writer by Mr. Adrian Fisher, former General Counsel of the AEC. The case was also discussed by Mr. Fisher in a speech before the American Law Institute at Washington, D.C., May 18, 1949.
counsel's decision. Although he has done only what many criminal lawyers do in the course of a career, that is, waived his client's right of confrontation, \(^2\) whether his motive and reason for so doing were proper is an ethical and moral point beyond the realm of the present discussion.

We are not concerned with defense strategy. The problem to be considered is the constitutional limitations on secrecy that hamper the prosecution in securing convictions for crimes relating to the national security. We are trying to answer this question — what can the government do to get a conviction when evidence that is essential to the government's case must not be disclosed for reasons of national security?

In the course of gathering material on this subject it was hoped that the Justice Department would be of some assistance in pointing up the problem. Certain questions were put to various men in the Subversive Activities Section of the Department. Basically, these three queries were made:

\(^2\) For cases in which the right of confrontation has been waived, see: Salinger v. United States, 272 U.S. 542 (1926), where there was a waiver of the right to exclude letters by permitting defendant to testify in respect to them; Diaz v. United States, 223 U.S. 442 (1912), right waived by submitting record of former trial; Motes v. United States, 178 U.S. 458 (1900), where one of multiple defendants waived right by admitting crime, conviction reversed as to others because deposition let in; Cruzado v. Puerto Rico, 210 F.2d 789 (1st Cir. 1954), waiver by stipulation submitting transcript of testimony from former trial; Kanner v. United States, 34 F.2d 863 (7th Cir. 1929), where questionable right to be in jury's view was waived; Fukunaga v. Hawaii, 33 F.2d 396 (9th Cir.), cert. denied, 280 U.S. 593 (1929) (dictum), attorney can waive minor's right of confrontation; Sullivan v. United States, 7 F.2d 355 (8th Cir. 1925), cert. denied, 270 U.S. 648 (1926), waiver by stipulating corpus delicti; Grove v. United States, 3 F.2d 965 (4th Cir.), cert. denied, 268 U.S. 691 (1925), waiver by approving stenographic notes from former trial in lieu of repeating testimony; Winters v. United States, 201 Fed. 845 (8th Cir. 1912), cert. denied, 229 U.S. 614 (1913), waiver by failing to object to jury's reading letter after retiring, which letter had not been read at trial; Hedderly v. United States, 193 Fed. 561 (9th Cir. 1912), express waiver by counsel; United States v. Barracota, 45 F. Supp. 38 (S.D.N.Y. 1942), defendant expressly waived right by his voluntary absence. It should also be noted that counsel's failure to object to inadmissible hearsay is always a waiver of the right of confrontation. See p. 616 infra.
(1) Can you say how many cases there are in your files that are not being prosecuted because a trial would necessitate the disclosure of some secret data?

(2) Can you say if there are some such cases?

(3) Can you say there are none?

To all three questions, the same "no comment" reply was made.

Such a state of affairs leaves the writer in somewhat of a quandary. Is there such a problem? The conclusion reached, and the presumption upon which this article is based is that if the problem were non-existent, there would be no need for a complete "no comment" reply. And if the problem exists because of only a very few cases, it would still seem advisable, because of the possible magnitude of any single case, to explore the problem in the hope of determining precisely what prevents the use of secret evidence and to seek out legitimate circumventions, if any exist.

It is the purpose here to expose the problem, to analyze the legal principles involved, and to consider whatever avenues of relief seem possible, proper and reasonable. The law relating to non-criminal actions concerning classified data is clearly established and is not considered beyond treatment accorded it in the footnote.³

The first question that arises is: how do these cases

³ In the case of United States v. Reynolds, 345 U.S. 1 (1953), the Supreme Court held that the federal government, the defendant in an action brought under the Tort Claims Act, 28 U.S.C. § 2674 (1952), could properly claim as secret and therefore privileged, certain accident reports and investigations of the plane crash which was the subject of that action. The Court was clear and concise, stating, 345 U.S. at 7-8:

"The privilege belongs to the Government and must be asserted by it; it can be neither claimed nor waived by a private party ... The [trial] court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."
come up in reality? In the absence of direct information, reason tells us that there are probably but three types of factual situations that present the problem.

First: prosecution for illegal taking of government property. Suppose Richard Roe, an unauthorized person, removed papers from a classified file, read them, and returned them. There are several statutes under which a prosecution may be brought. But his counsel, in cross-examination relative to the corpus delecti, will be within his rights to inquire into the contents of the papers in issue.

Second: prosecution for the illegal transmission of classified information. Suppose that the Government can prove that Richard Roe transmitted certain classified information with intent either to injure the United States or to aid a foreign country. The designation of the information as "classified" gives the government only a prima facie case, open to rebuttal by a cross-examination which discloses the contents and shows them to be so categorized without basis. This is a legitimate method of defense because it is no crime to pass on non-secret information under our present statutes.

Third: prosecution for any crime related to national de-
fense or security in which the testimony of a secret in-
former is essential to a successful prosecution. Suppose
that John Doe, a janitor, is a secret informer for the FBI
and saw Richard Roe unauthorizedly remove classified
documents. Under the present law, there is no way in
which Doe's testimony can be used without revealing his
identity. Such a disclosure would wreck Doe's value as a
secret informer.

These three hypotheticals spotlight the problem. The
widely publicized case of Judith Coplon also is in point. 8
Judge Learned Hand, in reversing her conviction, said that
although the guilt might be obvious 9 the prosecutor would
be required either to divulge certain secret information
or drop the prosecution. 10 In that case secret matter had
been discussed by the defendant over her phone which had
been tapped. She claimed that information leading to her
arrest, and vital to the government's case, had come di-
rectly or indirectly from the tapped messages. On appeal
of her conviction the circuit court, in effect, told the Gov-
ernment that it must either divulge the contents of the tap-
ped messages or give up the prosecution of the case. Why?
Because under the Sixth Amendment the defendant had
the "right to confront" witnesses brought against her. 11
Since the defendant had proved the taps, the burden of go-
ing forward shifted to the Government—to prove that the
taps furnished no direct or indirect leads. 12 This proof

8 United States v. Coplon, 185 F.2d 629 (2d Cir. 1950).
9 Id. at 638.
10 Ibid.
11 U.S. CONST. amend. VI provides:
"In all criminal prosecutions, the accused shall enjoy the right to
a speedy and public trial, by an impartial jury . . . and to be in-
formed of the nature and cause of the accusation; to be con-
fronted with the witnesses against him; to have compulsory process
for obtaining witnesses in his favor, and to have the Assistance of
Counsel for his defence."

12 This differs both from concealment, a due process violation in which
the prosecution conceals evidence favorable to the defendant, Curtis v.
could not be made in the absence of defendant and her counsel, because of the right of confrontation. It could not be made in secret proceedings because of the right to a public trial by jury. And it could not be made in open court because such a disclosure would have run afoul of our security requirements.

There is the problem. A case was presented in which guilt was so obvious that an appellate court conceded it, yet guilt could not be proved without divulging secret information which actually may never have passed on to unfriendly countries.

It immediately is apparent that the presence of a jury and the public imposes a difficult burden for a prosecutor who is trying to prove guilt with secret information. If that information is vital to the prosecution, as in the Coplon case, the choice facing the government attorney is a most difficult one—disclose and prosecute or preserve the secret and withdraw. As long as the jury and the public can hear what takes place at the trial, secrets cannot remain secret.

We long ago demanded the right to be tried in open court because we feared, with good reason, that "... a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal." Then the second half of the twentieth century ushered in the age of atoms, guided missiles and the cold war. The strate-

Rives, 123 F.2d 936 (D.C. Cir. 1941); and from the situation whereby the right of defendant, fishing for favorable evidence, to have access to secret information is determined by the judge in camera, United States v. Schneiderman, 106 F. Supp. 731 (S.D. Cal. 1952); United States v. Burr, 25 Fed. Cas. 30, No. 14,692d (C.C.D. Va. 1808). The Coplon case, note 8 supra, held that the prosecution cannot prove its case in camera. The Schneiderman and Burr cases indicate that the trial judge can, upon an in camera inspection, decide whether the requested papers will have any bearing on the case. If they will, or may, the prosecution cannot prevent their introduction except by discontinuing the case. See United States v. Schneiderman, supra.

13 U.S. Const. amend. VI.

14 3 BLACKSTONE, COMMENTARIES *373. See also the extensive discussion of public trials in In re Oliver; 333 U.S. 257, 266-278 & nn. 12-32 (1947).
gy in the competitive race toward peace is "secrecy." The scientific, logistical and counterespionage gains of today are worth their toil, sweat and salt only as long as the Marx-Lenin Camp remains ignorant of them.

A fundamental analysis of the problem is here necessary. What is the Government trying to do by means of its security regulations? Why does it require that information be classified? The obvious answer is that, in the gigantic poker game of the cold war, the United States does not want to tip its hand. Therefore we have legislated a poker face for ourselves by sealing lips and documents that might give the slightest inkling of what we hold.

We can accomplish this end in either of two ways — by keeping the communists away from the information or by keeping the information away from the communists. Who sympathizes with their cause we do not know in every instance. As a result, when some secret matter is necessary to a conviction, we find ourselves in a position of being forced to drop the prosecution if we wish to keep the matter secret. Any one member of the jury, or of the public attending the trial, or even defense counsel, might be just the person before whom we do not want to disclose the secret information. We certainly do not want it in the press. Likewise, we do not want to take a nolle prosequi respecting a defendant who may have imminently endangered our security. What then can be done?

Concerning the trial, our answer does not lie in the presently existing law. The Coplon case says that. So we must look to see if an answer lies anywhere. If there is a solution it will be based on either of the two aforementioned principles — keeping the communists away from the evidence or the evidence away from the communists. We will consider them in order.

How can we keep communists out of the range of disclosure when we do not know who they are? The simple,
obvious answer is to hold the trial without permitting any spectators. This, of course, would probably be contrary to the right of public trial as guaranteed by the Sixth Amendment. But, in cases involving moral turpitude, it has been held that the public was properly excluded from that part of the trial during which the offensive testimony was presented. Possibly the public could be excluded during the secret testimony under those holdings. Or the cases which excluded certain groups from criminal trials might be relied on as precedent for requiring spectators to be admitted only after passing a security clearance.

That these devices would be successful is doubtful, however, due to the reasons for the exclusion. One of the most important reasons behind the requirement of a public trial is that it tends to prevent abuses of the judicial safeguards to which the defendant is entitled. In all the cases which have permitted exclusion of all spectators, or groups of them, the reason for the exclusion was the protection of the excluded group itself. In security cases, the exclusion is to favor the Government, which is the prosecutor. This would seem to fly in the face of the reason for public trials; it benefits not the defendant but the adverse party.

For still another reason, the proposal is not sound. Recently, the New York Court of Appeals held that the newspapers could not be excluded from a sordid trial. If the reasoning in that case is adopted by the federal courts, as

15See Radin, The Right to a Public Trial, 6 Temp. L.Q. 381 (1932).
18In re Oliver, 333 U.S. 257, 270 (1947).
191 Cooley, Constitutional Limitations 647 & n.2 (8th ed. 1927). See also Jeremy Bentham's thoughts on this in the year 1827, 1 Bentham, Rationales of Judicial Evidence 524 (1827).
does not seem unlikely,\textsuperscript{21} then the newspaper publicity would wreck the security involved. If the defendant does have the right to have the public and press present during the entire trial, the only available solution then would be to permit the presence of reporters and the public only after they have passed a security check and have taken an oath to treat all security matters as off the record confidences not for publication.\textsuperscript{22} Naturally, if the reporters can be made to take such an oath, the other spectators also should be subjected to it.

Most of these suggested ameliorations appeared in an article by Robert Haydock, Jr., in the Harvard Law Review.\textsuperscript{23} Some have been added by the present writer. Neither Mr. Haydock nor this writer sees the suggested changes as entirely free from doubt as to their legality. In addition, there are many persons who, ever watchful over civil rights and liberties, would seriously question their desirability. As a purely personal evaluation, this type of political-judicial thinking is probably sufficiently widespread to block any development along the lines suggested.

Lastly, the extreme cumbersomeness of the procedure, considering the necessary money and man-hours required for repeated security checks, raises grave doubt as to whether it is worth all the effort—even if it is legally permissible.

But let us presume that the changes are legal and feasible. There are still more holes to plug to prevent security leaks. The jury members would need security clearances, resulting in a group in the nature of a blue ribbon jury.\textsuperscript{24}

\textsuperscript{21} See United States v. Kobli, 172 F.2d 919 (3d Cir. 1949); Tanksley v. United States, 145 F.2d 58 (9th Cir. 1944).

\textsuperscript{22} Haydock, Some Evidentiary Problems Posed by Atomic Energy Security Requirements, 61 Harv. L. Rev. 468 (1948).

\textsuperscript{23} Id. at 486.

\textsuperscript{24} Fay v. New York, 332 U.S. 261 (1947), upheld the state blue ribbon jury statute. Haydock, note 22 supra, at 484-85; sees some possibility that such a device could be attacked as a panel of specialists when used in security matters.
Defense counsel also would need a clearance. Defendant has the right to select as counsel any member of the bar in good standing. If defendant chose counsel who could not pass a security clearance, the only move left for the prosecution would be a motion to disqualify him. This is a little known and little used device which can sometimes be employed to keep a particular attorney from representing a particular client in a particular hearing.\textsuperscript{25} It is usually based on counsel's prior professional relation to the moving party regarding the matter in issue in the present case.\textsuperscript{26} The motion, in the form of an injunction, has been successfully employed in a case where opposing counsel has been guilty of unethical conduct.\textsuperscript{27} (However, emphasis should be made that the motion is expeditiously remedial in character, rather than disciplinary.)\textsuperscript{28} Whether the motion would be available when premised solely on security is questionable. Again we have an undesirable, cumbersome procedure that would require an auxiliary hearing— it would be a case by itself. Another difficulty is that the counsel least objectionable to the prosecution ordinarily will be the one least in sympathy with defendant's plight. Such a situation imposes an added burden since it is always more difficult to defend a man who is accused of that type of crime which one particularly abhors.

We have left for consideration only two people in our attempts to discover what we conceivably might do to keep the communists away from the secret evidence. They are the defendant and the judge. If the defendant is acquitted, the material is out. But little risk is involved in such disclosure since defendant probably knows the secrets involved whether he is tried or not. If he is convicted, the

\textsuperscript{25} See writer's Note, 38 Cornell L.Q. 215 (1953) and cases cited therein.
\textsuperscript{26} Ibid.
\textsuperscript{28} Ibid.
secrets are safe if our other protective devices hold. The judge, presumably, would not be a security risk. But when "top secret" information is involved, the security agency probably would want that presumption made a certainty by running a security check on the judge. The immediate outcry that arises when such a suggestion is made — the reader's shock that the prosecution is brazenly handpicking the judge — is indicative of its undesirability. But what else can be done? When information of significant import is to be disclosed there must be no possible leaks at all.

This again points up a practical objection to this security clearance process. If even the judge must be cleared, how can we be sure that the jury and public, though loyal, will keep quiet after the trial is over. The judge is a professional at keeping secrets. If even he must be double checked, can we be sure that the non-professionals will keep the secrets safe?

The individual suggestions, taken one by one, may sound feasible. But considered together they are not efficacious. If there is but one chink in the protective armor, then the national security is risked. When these suggestions are considered together, there are two extra-legal objections to their desirability. The first is that the setting-up process is bulky and expensive with only a problematical degree of secrecy achieved. Secondly, the atmosphere is more hostile to the defendant than in the ordinary case. For the people who most easily pass a security check under current standards are the ones who normally are less concerned with scrupulous adherence to constitutional safeguards in regard to a defendant who is accused of having attempted to aid in the overthrow of that very Constitution. This is not to intimate that the defendant will not receive a fair trial. Rather it is to say that, depending on the security clearances granted, it might result in the presence of only those who are somewhat predisposed to convict on a lesser
quantum of proof than would ordinarily be required. Whether such a situation is desirable is questionable.

II

BASIS FOR SOLUTION

The answer, then, must be sought in a different area. Possibly the secrets could be kept out of the public trial altogether as opposed to letting the secrets in but forcing the public out. This seems to be enjoined by the Sixth Amendment under the right of confrontation. But confrontation poses a different problem. With the exception of Professor Wigmore, no one has ever given an analytical presentation of, "What is confrontation?" For hundreds of years the courts have said,—"Confrontation prohibits this (or that) practice." But, until Wigmore, no one ever said what confrontation means, what it really is. In such a situation then the next query seems to be—what is this thing, and what does it prohibit? Does it really affect the point at hand?

The words normally used to confer a right of confrontation are that the accused has a right either "to be confronted with the witnesses against him" or "to meet the witnesses face to face." Most state constitutions contain such a provision. Historically this right can be traced back to Roman law. The reported case in point is contained in the New Testament, where it is said by Festus, procurator of Judea, "It

29 5 Wigmore, Evidence §§ 1365, 1395-1418 (3d ed. 1940).
31 E.g., U.S. Const. amend. VI; N.M. Const. art. I § 8.
32 E.g., Tenn. Const. art. I § 9; Ky. Const. § 11.
33 See compilation in 5 Wigmore, Evidence § 1397 n.1 (3d ed. 1940).
Forty-seven states have statutory or constitutional provisions. Only Idaho is lacking.
is not the manner of the Romans to deliver any man to die before that he which is accused have the accusers face to face.\textsuperscript{34}

The right then seemed to drop from sight and is unknown at the beginning of the common law. The practice of the early common law, which tested truth by oath helpers, battle, or compurgation, brought the accused and his accusers face to face. At that time truth was not tested by cross-examination.\textsuperscript{35}

As trial practice began to develop into our present day method the right of confrontation was still unheard of.\textsuperscript{36} Sir Walter Raleigh was condemned to death solely on the strength of an affidavit of a witness he was not permitted to cross-examine. Raleigh was subsequently executed even though this witness had first withdrawn his affidavit, claiming it to be false.\textsuperscript{37}

As a result of popular condemnation of this practice whereby convictions were based on affidavits and depositions, the law began to require the personal presence of the accusers and extended the right of cross-examination to the defendant.\textsuperscript{38} Significantly, this development occurred simultaneously with that of the hearsay rule in point of time.\textsuperscript{39}

Here lies a clue to the possible solution of the security-secrecy dilemma. The rule against hearsay and the right of confrontation developed together. If they are one and the same thing, if confrontation is merely another term for the rule against hearsay, then we have something to work with. The hearsay rule is subject to exceptions;\textsuperscript{40}

\textsuperscript{34} Acts of the Apostles, c. 25, v. 16; see also, Acts, c. 23, vv. 30, 35.
\textsuperscript{35} 5 Wigmore, Evidence § 1364 (3d ed. 1940).
\textsuperscript{36} 5 id. at § 1395.
\textsuperscript{38} 5 Wigmore, Evidence §§ 1364, 1365 (3d ed. 1940).
\textsuperscript{39} Ibid.
\textsuperscript{40} 5 id. at § 1420.
perhaps confrontation is too. If so, it may be possible to create new exceptions or utilize the old ones in their present or an expanded form, in solving the security-secrecy problem. But this is getting ahead of the facts. Let us first determine if the two rules are the same.

The basis for the hearsay rule has long been a point in issue among legal scholars. At various times they have set forth different reasons for its existence. Boiled down, these reasons are three: (1) the oath; (2) demeanor evidence; (3) the right of cross-examination. The utilization of the right of confrontation has the same three effects — no more, no less. If a witness must take the stand to testify in order to satisfy the ordinary definition of confrontation (i.e., face to face) then he must take the oath, he is seen by the judge and jury, and his testimony is subject to cross-examination. Indeed, Blackstone, in his Commentaries, gives these three elements as the reasons for the rule requiring confrontation.

But the hearsay rule is subject to exceptions (e.g., res gestae, official reports, entries in the regular course of business), and these exceptions act as positive denials of the ordinary meaning of “face to face” confrontation. The statement of a homicide victim in respect to the identity of his slayer is permitted in evidence under the dying declarations exception to the hearsay rule. Yet this statement is not subject to cross examination; there is no oath or demeanor evidence because the man who said it is dead. The constitutional right of confrontation does not prohibit evidence which can come in under the exceptions to the hearsay rule. The Supreme Court has so ruled. In the five-four decision in Snyder v. Massachusetts Justice Cardozo wrote for the

\[\text{\textsuperscript{41} 5 id. at } \S\S 1361-63.\]
\[\text{\textsuperscript{42} 5 id. at } \S 1365.\]
\[\text{\textsuperscript{43} 3 BLACKSTONE, COMMENTARIES } \*373-75.\]
\[\text{\textsuperscript{44} 5 WIGMORE, EVIDENCE } \S 1430 \text{ (3d ed. 1940).}\]
\[\text{\textsuperscript{45} See Salinger v. United States, 272 U.S. 542 (1926).}\]
\[\text{\textsuperscript{46} 291 U.S. 97 (1934).}\]
majority:

[T]he privilege of confrontation . . . is limited to the stages of the trial when there are witnesses to be questioned. "It was intended to prevent the conviction of the accused upon depositions or ex parte affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross examination." Dowdell v. United States, 221 U.S. 325, 330. See also Wigmore, Evidence, vol. 3, §§ 1395, 1397, collating the decisions. Nor has the privilege of confrontation at any time been without recognized exceptions, as for instance dying declarations or documentary evidence. Dowdell v. United States, supra. Cf. Robertson v. Baldwin, 165 U.S. 275, 282; Motes v. United States, 178 U.S. 458, 472, 473. The exceptions are not even static, but may be enlarged from time to time if there is no material departure from the reason of the general rule. Commonwealth v. Slavski, 245 Mass. 405, 415; 140 N.E. 465; cf. West v. Louisiana, supra.47

A second rationale is available to indicate that the hearsay rule and the right of confrontation can be equated. The reason for the hearsay rule is the right of cross-examination.48 And confrontation is the right to the opportunity to cross-examine.49 Our jurisprudential system tests truth by cross-examination, oath, and demeanor, as before stated.50 Whether it be by the method called confrontation or by the hearsay rule, the same results normally are reached—a witness under oath and subject to cross-examination testifying in the view of a jury.51

In addition to this analytical similarity, judicial precedent is likewise a foundation for a comparison. It has been stated that confrontation is a common law doctrine with recognized exceptions,52 that hearsay evidence is constitu-

47 Id. at 106.
48 5 WIGMORE, EVIDENCE § 1364 (3d ed. 1940).
49 5 id. at § 1365.
50 See note 41 supra, and the text.
51 But demeanor evidence is as dispensable under confrontation as under hearsay. See Mattox v. United States, 156 U.S. 237 (1895).
tionally prohibited by the right, and that, "it is not necessary to say [now] what limits the Sixth Amendment may set to the extension of exceptions to the rule against hearsay. Probably the permissible extension is a question of degree."  

Note too how confrontation in a normal sense is denied each time evidence comes in under a hearsay rule exception. Res gestae furnishes an excellent example. Suppose the decedent declared, as the knife entered his chest, "My God, Roe, you've stabbed me!" If this statement is not received in evidence under the res gestae exception, it is certainly admissible as a dying declaration. The person on the stand testifying to the declaration can be cross-examined. But what of the true accuser, the deceased? Obviously, confrontation is impossible — yet the evidence is constitutionally admissible. The exceptions to the hearsay rule are exceptions to the right of confrontation. In different words, the right of actually confronting the true witness is limited by the application of the exceptions to the hearsay rule. Of course, the defendant still has the right to confront (i.e., to cross-examine) the witness on the stand.

It may be concluded, therefore, that the right of confrontation is the right to an opportunity to cross-examine a witness. This is what Wigmore says. But special emphasis should be placed on the word witness. As used, it pertains to a witness on the stand and not necessarily to the actual witness. The importance of this qualification should be readily apparent. If witness A may properly give hearsay testimony, then the defendant's right of con-

54 United States v. Leathers, 135 F.2d 507, 511 (2d Cir. 1943).
55 As it probably should be. See 6 Wigmore, Evidence §§ 1745-1747 (3d ed. 1940).
56 See cases collected 5 Wigmore, Evidence § 1398 n.7 (3d ed. 1940).
57 5 id. at § 1397.
58 See note 49 supra.
59 See note 57 supra.
frontation extends only to the point that he may cross-examine witness A. When witness A gives permissible hearsay evidence, the defendant's right of cross-examination is limited to the extent that the full knowledge possessed by the true witness is lacking in the one testifying in court.60

Possibly such limitation holds the horn-turning device for the prosecutor's dilemma. Only possibly, because it has been said that the legitimate encroachment on the right of confrontation probably will be a "question of degree."61 What the ultimate degree will be, however, is difficult to establish in advance.

The exceptions to the hearsay rule are premised on two elements — necessity and the probability of trustworthiness.62 In the usual case, necessity is caused by the inability to produce the witness or by the exigencies of the situation. Dying declarations,63 official reports,64 and entries in the regular course of business65 are examples of necessity based upon inability to produce. In res gestae,66 the situation itself provides the necessity. Man's state of mind, his thought processes, are always secret when he is silent, and his consciously considered words may be intentionally misleading. Yet his reflex-action statements are invaluable indicia of his state of mind.

The probability of trustworthiness is the second element for an exception to the hearsay rule and must coexist with necessity. Dying declarations have as their basis the fear of lying by one about to die and to be judged.67 Res gestae

60 Ibid.
61 United States v. Leathers, 135 F.2d 507, 511 (2d Cir. 1943) (conviction, based on hearsay exception of regular entries, sustained).
62 5 Wigmore, Evidence § 1420 (3d ed. 1940).
63 5 id. at § 1431.
64 5 id. at § 1631.
65 5 id. at § 1521.
66 5 id. at § 1421.
67 5 id. at § 1438.
has the reflex action which negates opportunity for a deliberate distortion of the truth. Official reports have the presumption of regularity, and regular entries have habit. Both of these last exceptions also have, as a basis for trustworthiness, the fact that any errors would probably have been discovered.

Without too exhaustive an analysis (because Wigmore is so complete), the two elements of necessity and trustworthiness are thus established as requisites. It would seem that the creation of a new exception to the rule against hearsay would circumvent the present difficulties in security cases posed by the right of confrontation. But can a new exception be established? Will the requisites of necessity and trustworthiness be present?

III

APPLICATION TO SECURITY

The element of necessity will derive from the policy of security. It is necessary to keep certain information secret. This is decided by the executive-legislative policy in regard to security. The policy's desirability is not in issue, for we only are concerned with the fact that such a policy exists, and as a matter of law is necessary. In order more fully to protect this secrecy, it is imperative that persons with knowledge of classified matter not be put in a position where they might disclose it. Thus they are necessarily unavailable to either prosecution or defense as a matter of public policy. This complies with the necessity

68 5 id. at § 1422.
69 5 id. at § 1632.
70 5 id. at § 1547.
71 5 id. at §§ 1546, 1632.
73 5 WIGMORE, EVIDENCE § 1421 (3d ed. 1940).
principal of unavailability as established by Wigmore.\textsuperscript{74} The unavailability here is predicated on expediency rather than impossibility.\textsuperscript{75}

As for the trustworthiness element, however, an entirely different situation obtains. As previously indicated, in the present exceptions to the hearsay rule trustworthiness exists because of the inherent nature of the evidence covered by the exception. The probability of truth is established because the evidence came into existence ante litam motam.\textsuperscript{76} Cicero, in his speech in defense of Milo, measured probabilities by the cui bono yardstick. And it appears that the present exceptions to the hearsay rule use the same measure.\textsuperscript{77}

Now in the case of security matters there will always be a basically different factual situation. From the first moment that classified matter becomes connected with a possible defendant, a status is reached. After that point, any attempt at selective production of evidence through the utilization of a hearsay exception necessitates the manufacture of evidence. That is, a procedure would then be necessary to determine the scope of permissibility under security regulations, some device to determine the extent of disclosability. Whatever device or procedure was adopted, it would have to be a per se guarantee of trustworthiness of the evidence resulting from its use.

There are three reasons which can explain a probability of trustworthiness.\textsuperscript{78} Of these, only one could supply a

\textsuperscript{74} As in the official reports exception. See 5 Wigmore, Evidence § 1631 (3d ed. 1940).

\textsuperscript{75} Ibid.

\textsuperscript{76} Except, of course, in the declarations against interest exception which is a positive denial of benefit. See 5 id. at § 1455.

\textsuperscript{77} That is to say that exceptions normally exist only in those situations in which the extra-testimonial assertion could not, at the time made, inure to the maker’s benefit according to the common experience of mankind. 5 id. at § 1422.

\textsuperscript{78} 5 id. at § 1422: (1) truth is naturally uttered in such circumstances; (2) fear of easy detection and/or punishment naturally induces truth; (3) magnitude of publicity decreases possibility of error remaining undetected.
foundation for a security exception—the fear of detection and punishment for a false utterance. But, due to the necessarily secret nature of the evidence, detection of error would be difficult. The persons in a position to detect the error would comprise a limited group of those cleared for that information. Even if error could be detected, punishment would be difficult. To secure a conviction, the evidence necessary would again involve the secret matter. An unending chain of mystery too easily could result.

Another method by which the secret evidence might be kept out is by the use of an expert witness. The expert, cleared for all classified material, would report that the matter in question was, in his opinion, correctly designated as classified. Upon cross-examination he would not be permitted to disclose the contents of the information.

Such a proposal has a sound basis in that, ordinarily, the technical nature of the secret might be beyond the understanding of the jury. The expert witness exists to aid the jury's comprehension.

But the drawback is great. Since the expert must be cleared for access to the information, he must be approved by the Government, which is a party in interest. And in order to be a true expert, he must have had extensive previous dealings with the evidence. That would probably mean he was in the government employ. Because the evidence is secret and the jury would never see it, the conclusions of the expert would be the conclusions of the jury, for all practical purposes. The defendant would not have a legally adequate opportunity to cross-examine the expert. He could not see the evidence and could not test the expert's judgment by examining him on it. Even if he were allowed to select his own expert, such a witness would have to fulfill the same qualifications as the government's ex-

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79 For expert witness' qualification, see 2 Wigmore, EVIDENCE §§ 555-561 (3d ed. 1940).
80 Ibid.
pert and as a result would not be defendant's witness in reality.81

The over-all difficulty involved in any selective production is, simply, that it is selective. It does not "just grow" out of the circumstances of the case as do the regular exceptions; it is a forced breeding. The production takes place after a conviction is desired, and the producers are either the same persons who seek the conviction or are on their side, in the government employ. There is, then, no answer in the hearsay-confrontation comparison.

This conclusion practically completes a full circle. We began by seeking an answer to the secrecy-security dilemma and seem to have found none. At least it does not lie in the hearsay-confrontation rule. That rule (or those rules, as you wish) is premised on truth through cross-examination, the big gun in the arsenal of adversary proceedings. There is no way humanly possible to consider a situation secretly and at the same time produce trustworthiness of the degree required by law. Our jurisprudence wisely has determined truth through adversary proceedings. In its wisdom, it constitutionally requires adversity. Of course, the present judicial system is not a perfect guarantee of truth, but the requirement of conflicting parties goes a long way toward reaching the goal. So long as fallible human nature exists, all its creations will bear the mark of its imperfections.

There is then no answer in this area. But two possible solutions remain. They are not panaceas. Frankly, they are stopgap measures. They do have certain advantages, however. First, they are constitutionally permissible, and, secondly, they will be relatively effective within their spheres of legitimate, though limited, operation.

The first part of the solution is the enactment of a statute which would provide for a method and means of classify-

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81 Which defeats the purpose of the expert witness. 9 id. at § 555.
ing information, and an accompanying criminal statute which would make it an offense for an unauthorized person to acquire, transmit, and/or divulge such information. Its designation as classified would be irrebuttable. Under such a statute, the unlawful possession of even a blank sheet of paper would be a crime if that paper were marked classified and a notice printed thereon that unauthorized personnel subjected themselves to criminal prosecution if they intentionally took possession of it. This would be sound law, because there already exists a statute which designates as criminal the unlawful removal of government property from its proper custody.\(^2\) That statute, however, determines the gravamen of the offense on the basis of the dollar value of the property. The proposed enactment would posit gravity on the category of classification.\(^3\) Now we are doing what was impossible before, because in a sense, this is what was sought in the selective production of evidence—the designation is made irrebuttable and the contents irrelevant. But now the evidence is manufactured for all times and not merely for one trial. Secrecy is maintained in such a manner that no one's liberty is jeopardized without his knowledge.

In passing, it should be noted that there is an answer to the possible objection that the contents, in some cases, would be rather harmless and that, resultanty, the punishment would not "fit the crime." In the case of Williams v. New York,\(^4\) the Supreme Court held that the right of confrontation extends only to the trial and not to the sentencing. Under such a decision, the court could be permitted to confer secretly with the prosecutor as to the gravity of

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\(^3\) A statute can make the stealing of a specific article or type of article a felony irrespective of its monetary value. See Adams v. State, 60 Fla. 1, 53 So. 451 (1910) (dictum); State v. McDonald, 10 Mont. 21, 24 Pac. 628 (1890); State v. Jenkins, 213 S.W. 796 (Mo. 1919); People v. Mills, 178 N.Y. 274, 70 N.E. 785 (1904).

\(^4\) 337 U.S. 241 (1949).
the offense. The court would be limited on the strict side by the limits of the statute and on the lenient side by his own conscience and common sense.

That is the first proposal. It does not dispose of the *Coplon* case, however, for the categorization appears only on the document and not on or in the spoken word. In the case of the spoken word, different relief is required. It would seem to exist in a longer statute of limitations. At some point in time the information will lose its secret nature and at that time a prosecution should still be available to the Government. The extension necessary is a question to be answered by the men who know how long it is before the average secret loses its security significance. It is not a matter of common knowledge. It is properly the province of a congressional committee to ask of the enforcement and security officers how great an extension is necessary.

Admittedly, the scope of these suggestions is limited. They do not dispose of all cases, and the second recommendation does not solve immediately present cases of subversion. But they have some benefit. The first, by making the categorization irrebuttable, makes an inquiry into the contents of the document irrelevant and immaterial. It covers only those cases which relate to an unauthorized removal of papers, photographs, plans and models. It does not affect the present law in regard to transmission of information. But if our security program is generally in

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85 Nor can the suggestion which follows affect Miss Coplon. When a limitation is extended, it extends the bar, Commonwealth v. Duffy, 96 Pa. 506 (1880), but never removes it once it has fallen, Moore v. State, 43 N.J.L. 203 (1881).

86 For varying limitations in respect to felonies compare Mass. Ann. Law c. 277 § 63 (1933) (murder, no limitation, all other felonies six years) with Mass. Ann. Laws c.272 § 11 (1933) (prostitution, one year). Most states similarly vary the limitations on the different crimes. As was pointed out in Commonwealth v. Duffy, note 85 supra, limitations are extensions of legislative grace. There is no reason, therefore, why they cannot be lengthened in the proper case. If murder prosecutions are to be without limitation, why not security cases?
good working order there will be no leaks from persons who have authorized access. Therefore, the only way in which a leak can be sprung is by an unauthorized person getting at the documents. The proposal does not cover every situation, but it should cover many of them.

The extension of the statute of limitations has even a less direct effect than the first suggestion. It will not bring about prosecutions immediately. It demands a stand and wait policy. However, it does have much to recommend it. Under our present law, an act of subversion is a gamble. Will it be discovered? If discovered, will the government be willing to disclose the information necessarily involved? A negative answer to the first question alone is all that a prospective criminal can hopefully hang his hat on in a non-security crime. But a subversive has a second peg. The suggested extension does not eliminate this secondary hope, it limits it.

Evaluating this recommended extension is difficult. Its purpose is to deter crime by the threat of eventual punishment. A subversive may or may not be hopeful that a non-disclosure policy will bar a prosecution. Whether this hope forms part of the basis for his resolution to commit a certain act, we cannot say. If we consider it from a negative point of view, however, we can say this—he no longer can pin as great a hope of escaping prosecution on the second point. No matter what past motives have been, in the future there will be more reason not to commit a security crime.

Realistically, individual subversives must be considered expendable from the point of view of the Communist Party. Prescinding from the individual's hopes for an impossibility of prosecution, we must consider party policy. This we can only surmise. It is probable that any device which lays the party open to increased criminal notoriety will tend to diminish its activity. Its dealings in subversion are neces-
sarily secret. The less that public notice is directed to criminal acts performed by its members so much the less does communism appear to be a threat in the public's eyes. However this notoriety is increased, its increase will hurt the party.

This rationale is not based on, and prescinds from, the "hysteria" that so-called witch-hunts have allegedly produced. It is based on the simple axiom that knowledge of acute danger causes the reasonable man to take precautions against that danger. It is premised on the publicity value of prosecutions for a criminal act, not epithets of impropriety. If the communist danger is acute, its existence will be indicated by the success of various prosecutions. While the proposal does nothing to increase our awareness of imminent danger (since it provides for prosecutions based on less recent acts), it will effect a demonstration of former danger. As long as the Communist Party is dedicated to an annihilation of capitalism, the avowed and only reason for its existence, the status quo of danger to our constitutional system never changes from one decade to the next. As long as we utilize factual demonstrations of that danger, in the form of successful criminal prosecutions, it seems to make little difference whether the anti-constitutional act was committed ten days or ten years ago.

One last objection to an extension of the limitations period might be that it is an infringement of our constitutional, traditional notions of justice and fair play, since we are making it less easy for a man to defend himself, considering the time lapse, with little resultant benefit to the community.\footnote{But compare to this objection the now seldom heard argument that we should not meekly submit to those who boldly attempt to wrest the Constitution and our heritage in aid of crime.}

First, the greatest deterrent to crime is the certainty of punishment. As we increase that certainty we correspond-
ingly increase the deterrent. This is, in itself, of great value to the community.

Secondly, the statute could be framed in such a way as to provide prospective defendants with notice of intent to prosecute when and if the secrets become stale. This notice would be required within a reasonable time, say, within the present five year limiting period. Thus we would be according the defendant our traditional "bending over backwards" leniency and advising him to begin the collection and preservation of evidence and witnesses in his favor.

This last suggestion does not spring from a personal desire of protection for those accused of crime. It is proposed, purely and simply, to assuage those who might find the recommendation a too bitter pill to swallow without it. It is not a legally necessary element, as there are presently in existence many discriminatory (i.e., different limitations for different types of felonies) statutes of limitation. For example, the atomic energy criminal limitation is ten years, while that for most federal felonies is five.

In conclusion, there seems no direct all-embracing answer to the three hypothetical situations posed at the outset. The secret informer is an adverse witness and must appear in court to be confronted in accordance with the normal confrontation rules. The transmittal of secret information will necessarily involve its disclosure in a criminal prosecution due to defendant's cross-examination rights of confrontation. The same is true under the present law in respect to illegal possession of classified documents.

89 See note 86 supra.
91 See note 88 supra.
92 Pages 605-06 supra.
The proposed extension of the statute of limitations will be applicable to all three situations and will have a limited beneficial effect, if enacted. The suggested change in respect to irrebuttable classification will relate only to the illegal possession of documents. Such a case can be proved by evidence to the effect that defendant had in his possession, which was not proper statutory custody, certain documents clearly stamped classified. The proposal cannot affect the present law respecting transmittal of information when no stamped documents are involved. In such a case, the establishment of the information as classified must be effected through usual evidentiary channels. The statement by the government's witness that he knew the information to be classified would be a conclusion and objectionable on the ground that the witness was not an expert.

The suggestions made are not cure-alls. They are not perfect. However, if enacted, they would ease considerably the burden which, in all probability, presently renders the prosecution impotent in a most important area of its activities.

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