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Via email: rk-1@wash.auswaertiges-amt.de

The Honorable Knut Abraham
Legal Advisor and Consul General
Embassy of the Federal Republic of Germany
2300 M Street, N.W.
Washington, D.C. 20037

Re: Your inquiry regarding potential criminal exposure to U.S. criminal investigation

Dear Mr. Abraham:

We are pleased to provide you and your government our opinions concerning the questions you have raised. Please do not hesitate to contact me if you have questions concerning the content set out below or if you require any further assistance.

Executive Summary:

1. The United States has jurisdiction to prosecute crimes committed in Germany, Russia, or elsewhere through which classified information from the U.S. has been disclosed.

2. The immunity afforded by Germany to members of the Bundestag may be honored by the United States, but the United States is not required to do so.

3. It is a criminal offense in the United States to induce the repeat of previously released classified information; however the United States has never prosecuted such an act.

4. It is a criminal offense in the U.S. if the main perpetrator is induced to disclose U.S. classified information. Such release constitutes aiding and abetting, and may, depending on the facts, constitute "accessory after the fact," conspiracy and theft of government property.

5. An arrangement of a date to reveal classified information can be regarded as an criminal agreement to release classified information and any overt act (which itself is non-criminal such as a phone call in furtherance of the agreement) completes the conspiracy.

6. The act of asking the perpetrator a question which he does not answer is not punishable as a violation of U.S. criminal law.

7. There is no legal distinction between release of classified information in a closed

committee hearing and public release, as U.S. law protects classified information from being released to foreign governments in addition to release to the public.

8. A member of the Bundestag who makes public U.S. classified information that was disclosed in a closed session is liable under U.S. criminal law.

9. See the answer to #2 above.

I. Introduction

You have asked us to give you our opinion on several issues relating to the potential interaction by members of the German Bundestag and/or diplomatic personnel of the Federal Republic of Germany with Edward Snowden. To date, as far as is publically known, a criminal complaint has been filed against Snowden in the United States District Court for the Eastern District of Virginia alleging that Snowden has violated 18 United States Code (hereinafter USC) 641, theft of government property; 18 USC 793(d), unauthorized communication of national defense information; and 18 USC 798(a)(3), willful communication of classified communications intelligence to an unauthorized person.[1] While you have asked us to base our opinions on these charges, if the U.S. Government were to indict Snowden, the list of charges would undoubtedly be far more expansive that those contained in the criminal complaint.

To the extent that we find that the potential actions that may be undertaken by legislative

[1] Although it is beyond the scope of this opinion, it is worth noting that the criminal complaint alleges that venue is proper in the Eastern District of Virginia pursuant to 18 USC 3238 which applies to offenses "begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district." As Snowden was last working in Hawaii and that was the place that he "began" his offense, there is a real issue of whether venue in the Eastern District of Virginia is proper. The Eastern District of Virginia has a reputation for very aggressive prosecutors and pro-government judges so it is not surprising that the Government would try to obtain venue for the case in the Eastern District of Virginia.

and diplomatic personnel of the Federal Republic of Germany violate United States criminal law, we do not express an opinion of whether the United States would exercise its prosecutorial discretion by bringing charges. In a high profile matter, such as the Snowden affair, suffice it to say that stated outrage by executive and legislative branch members of the United States government are often directed to public relations damage control and have little to do with decisions to actually pursue charges. Finally, given the substantial embarrassment of the United States with regard to the already public revelations regarding NSA's actions directed at Chancellor Merkel, the United States would undoubtedly act with extreme caution in any contemplated action against members of the government of the Federal Republic of Germany.

II. Does the United States have jurisdiction to prosecute crimes committed in Germany, Russia or elsewhere through which classified information is disclosed?

United States criminal law applies beyond the geographical confines of the United States under certain circumstances. The source of the authority to apply criminal law extraterritorially is grounded in the United States Constitution. Several Constitution passages contemplate the application of Unites States law beyond the geographical confines of the United States. The Constitution speaks, for example, of "felonies committed on the high seas," "offences against the law of nations," "commerce with foreign nations," and of the impact of treaties. More specifically, it grants Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;" the power "[t]o regulate commerce with foreign Nations;" and "[t]o make all Laws which shall be necessary and properly for carrying into Execution the foregoing Powers, and all other Powers vested by this

Constitution in the Government of the United States, or in any Department or Officer thereof."[2]

Given the broad Constitutional basis permitting Congress to enact criminal statutes that have extra territorial application, the issue in a given case has generally been considered a matter of statutory, rather than constitutional, construction.[3] The rules of statutory construction can be broadly categorized as:

1. Generally, where a statute is silent it will only be construed to have extra territorial application where there is a clear indication of some broader intent.[4]

2. The nature and purpose of a statute may indicate whether Congress intended broader application.[5]

3. Unless contrary intent is clear, Congress is presumed to act in such a way as to not violate international law.[6]

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[2] U.S. Const. Art. I, §8, cls. 10, 3; Art. VI, cl. 2; U.S. Const. Art. I, §8, cl. 10; U.S. Const. Art. I, §8, cl.3; U.S. Const. Art. I, §8, cl.18.

[3] *EEC v. Arabian American Oil Co .,* 499 U.S. 244, 248 (1991); *Foley Brothers v. Filar do*, 336 U.S. 281, 284-85 (1949) ("The question before us is not the power of Congress to extend the eight hour law to work performed in foreign countries. . . . The question is rather whether Congress intended to make the law applicable to such work"); *United States v. ACEF*, 327 F.3d 56, 86 (2d. Cir. 2003) ("It is beyond doubt that, as a general proposition, Congress has the authority to enforce its laws beyond the territorial boundaries of the United States").

[4] "It is a 'long-standing principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,'" *Morrison v. National Australia*, 130 S.Ct. 2869, 2877 (2010), *quoting, EEOC. v. Arabian American Oil Co.*, 499 U.S. at 248 (1991).

[5] *United States v. Belfast*, 611 F.3d 783, 811, 813-14 (11th Cir. 2010).

[6] *Weinberger v. Rossi,* 456 U.S. 25, 32 (1982) ("an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains").

With regard to the last of these principles, an oft cited 1935 Harvard Law study[7] attempted to answer the question: To what extent does international law permit a nation to exercise extraterritorial criminal jurisdiction? The study found five categories or principles corresponding to the circumstances under which the nations of the world had declared their criminal laws applicable: (1) the territorial principle which involves crimes occurring or having an impact within the territory of a country; (2) the nationality principle which involves crimes committed by its nationals; (3) the passive personality principle which involves crimes committed against its nationals; (4) **the protection principle which involves the crimes which have an impact on its interests as a nation**; [8]and (5) the universal principle which involves crimes which are universally condemned. (emphasis added).

Current application of the exercise of extra territorial criminal jurisdiction is either express or implied. The express category includes misconduct when it occurs within the special maritime and territorial jurisdiction of the United States. This has been expanded to encompass air travel, customs matters, spaceflight, evasive submersible stateless underwater vessels, overseas federal facilities and federal employee residences, members of the armed forces and those accompanying them, and overseas human trafficking and sex offenses by federal employees and U.S. Military personnel and those accompanying them.

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[7] Harvard Research in International Law, 29 AMERICAN JOURNAL OF INTERNATIONAL LAW (Supp.)(Harvard Study) 439, 445 (1935).

[8] Under the "protective" principle, jurisdiction is based on whether the national interest or national security is threatened or injured by the conduct in question. *United States v. Felix-Gutierrez,* 940 F.2d 1200, 1206 (9th Cir. Cal. 1991).

A second category is extra territorial application based upon treaty. The range of these treaty-based federal crimes differs. Some have extraterritorial application only when the offender is an American. Some address misconduct so universally condemned that they fall within federal jurisdiction regardless of any other jurisdictional considerations as long as the offender flees to the United States, is brought here for prosecution, or is otherwise "found in the United States" after the commission of the offense. Some enjoy extraterritorial application under any of a number of these and other explicit jurisdictional circumstances.

A third category are those criminal statutes which expressly state that they have extra territorial application.

A fourth category are those crimes prosecuted under the Maritime Drug Law Enforcement Act (46 U.S.C. 70501-70507) which expressly authorizes extraterritorial coverage of federal criminal law predicated on nothing more than the consent of the nation with primary criminal jurisdiction.

A great number of statutes have extra territorial application where Congressional intent to permit extra territorial application is implied. These include statutes designed to protect federal officers, employees and property, to prevent smuggling and to deter the obstruction or corruption of the overseas activities of federal departments and agencies. Courts have routinely inferred congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm. *United States v. MacAllister*, 160 F.3d 1304, 1308 n.8 (11th Cir. 1998) (extra territorial jurisdiction applies "where the defendant's actions either produced some effect in the

United States, or where he was part of a conspiracy in which any conspirator's overt acts were committed within the United States' territory.")

Included in the statutes where extra territorial jurisdiction is implied are the so-called piggyback statutes whose provisions are necessarily related to some other crime. An individual may be guilty of conspiracy to violate a federal law within the United States notwithstanding the fact he never enters the United States. It is sufficient that he is a member of a conspiracy to violate the American law. The rationale should apply with equal force to the case of any accessory to the violation of any federal crime. *United States v. Felix-Gutierrez*, 940 F.2d at 1204-207 (accessory after the fact violation committed overseas). Likewise one who aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. 18 U.S. C. 2.

III. Do members of the Bundestag enjoy immunity in the United States?

The Constitution of the Federal Republic of Germany grants Members of the Bundestag immunity and indemnification for acts done in their capacity as Members of the Bundestag.[9] This grant of immunity is similar to that granted to members of the U.S. Congress. The United States Constitution, (Article I, Section 6, Clause 1) states that members of both Houses of

[9] Articles 46 and 47 of the German Constitution; Paragraph107 of the Internal Rules of Procedure of the German Bundestag; The Parliamentary Resolution of March 16,1973 on the cancellation of parliamentary immunity (reprinted in Annex 6 of the Internal Rules of Procedure of the German Bundestag); The Principles pertaining to parliamentary immunity enacted by the Parliamentary Committee on Votes, Immunity and By-laws on April 24, 1970 (reprinted in Annex 6 of the Internal Rules of Procedure of the German Bundestag).

Congress ". . . shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their Respective Houses, and in going to and from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." This clause has been interpreted to provide absolute immunity for "legislative acts" which include conducting legislative hearings.[10]

The question then is, if during a legislative hearing in the Bundestag, U.S. classified information is revealed which would constitute a violation of U.S. criminal law, will immunity granted by the German Constitution be recognized by the United States so as to act as a bar to prosecution of the Bundestag member in the United States? The legal doctrine that determines the answer to that question is the doctrine of comity between nations. Courts, according to this doctrine, should apply foreign law or limit domestic jurisdiction out of respect for foreign sovereignty. This evolved into the "Act of State Doctrine" which "precludes any review whatever of the acts of the government of one sovereign State done within its own territory by the courts of another sovereign State." *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (U.S. 1972). However, the Supreme Court after describing the Act of State Doctrine limited its application holding that:

> The act of state doctrine is grounded on judicial concern that application of customary principles of law to judge the acts of a foreign sovereign might frustrate the conduct of foreign relations

[10] See, *Gravel v. United States*, 408 U.S. 606, 626 (1972) (Member's conduct at legislative committee hearings, although subject to judicial review in various circumstances, as is legislation itself, may not be made the basis for a civil or criminal judgment against a Member because that conduct is within the "sphere of legitimate legislative activity." *citing Tenney* v. *Brandhove*, 341 U.S. 367, 377-378 (1951)).

> by the political branches of the government. We conclude that where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts.

Id. at 767-768.

This Supreme Court decision makes it quite clear that if the Executive Branch of the United States Government advised a court that honoring the immunity granted to members of the Bundestag by the German Constitution would not advance the interests of U.S. foreign policy, the court so advised would not honor that immunity under comity principles.[11]

IV. Criminal Offenses[12]

A. Aiding and Abetting

It is a crime in the United States to aid, abet, counsel, command, induce or procure the commission of a crime and one who does so is punishable as a principal. 18 U.S.C. 2. Since it is beyond argument that Snowden stole U.S. classified information and since it also is beyond argument that both the theft of that information and the revelation of classified information are crimes, anyone who induces or procures Snowden to reveal that stolen classified information is guilty as a principal.

B. Accessory After the Fact

While 18 U.S.C. 2 is most directly on point, 18 U.S.C. 3, which makes being an

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[11] The same result would obtain if the legislators are acting through a parliamentary mandate.

[12] Of the crimes discussed below the only one that could be considered a crime if Snowden was asked questions that he refused to answer is the crime of conspiracy.

accessory after the fact a crime, also arguably could be charged in circumstances in which one provides a platform or forum for Snowden to reveal stolen classified information. However, in order to be an accessory after the fact one has to receive, relieve, comfort or assist the offender **in order to hinder or prevent his apprehension, trial or punishment.** It seems unlikely that the questioning of Snowden would be regarded as hindering or preventing his apprehension, trial or punishment.

C. Conspiracy

Conspiracy is defined in U.S. law as an agreement to engage in criminal activity which is completed when an overt act in furtherance of the agreement occurs. 18 U.S.C. 371. The overt act does not have to be criminal in and of itself. A phone call, for example, will suffice. If German legislators or diplomats enter into an agreement with Snowden to testify which testimony is contemplated to involve the disclosure of classified information, and an overt act in furtherance thereof takes place, the crime of conspiracy is complete and that conduct could be charged as conspiracy to violate the espionage law (18 U.S.C. 798).

D. Theft of Government Property

Title 18 U.S.C. 641 makes theft of government property a crime. This section also includes anyone who "receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted." Hence, this formulation would include German legislators or diplomats who "receive or retain" classified information and/or documents provided by Snowden.

V. Republishing classified information previously revealed

Classified information does not lose its character as "classified information" because it has been revealed in violation of law. Hence, as a technical matter any republication violates the U.S. espionage law (the one charged in Snowden's criminal complaint) to the same extent as the original publication. However having stated that, there has been only one case brought against a re-publisher and the government eventually dropped that case before it went to trial.

VI. Closed Session Hearings

Closed session hearings which remain non-public arguably would be a factor that the United States would take into account in deciding how to exercise its prosecutorial discretion. However, the Espionage Act makes it a crime to disclose classified information "for the benefit of any foreign government to the detriment of the United States." 18 U.S.C. 798. The act is clearly violated by disclosure of classified information to the Federal Republic of Germany, even if done so in closed legislative session.

VII. Conclusion

We are of the opinion that if Snowden provides classified information or documents to the Bundestag or to German diplomats who interview Snowden, such acts give rise to criminal exposure under the laws of the United States. The United States would have jurisdiction to prosecute these acts regardless of where they occur. The fact that German legislators have immunity under German law would not shield them from prosecution in the United States. German diplomats (in Russia, for example) not accredited to the United States enjoy no

privileges and immunities in the United States. These opinions are not intended to opine on whether the United States would actually choose to prosecute, rather only that the United States has the legal authority to do so.

Very truly yours,

s/ *Jeffrey Harris*
Jeffrey Harris
Managing Partner