OLD DRAFT

Draft letter to Radiation Experiment Contractors/grantees

Dear ________ :

The purpose of this letter is to notify you of the Federal Government's ongoing investigation into the nature and scope of human radiation experiments conducted by or on behalf of the federal government since 1944 and to enlist your assistance in locating and preserving any records of such experiments. We are contacting you because our records reflect that, pursuant to **[select one:** contract[s] with.../...grant[s] from] this department **[or** ____, a predecessor of this department,] your institution participated in human radiation experiments that fall within the scope of the investigation.

Information previously made public reflects a diversity of purposes for human radiation experiments conducted during the past fifty years. Many experiments advanced the state of medical and scientific understanding of radiation and resulted in enhanced use of radiation as a diagnostic and therapeutic tool. However, some experiments raise questions concerning the nature and purpose for the experiments, selection of test subjects, and whether test subjects gave informed consent to participate in the experiments.

The Clinton Administration has authorized its agencies, through the Human Radiation Interagency Working Group and an independent Advisory Committee on Human Radiation Experiments, to conduct a full and open investigation to obtain answers to these important questions. The results of the investigation will be considered in formulating an appropriate response to the subjects of such experiments.

This Department has been an active participant in the proceedings of the Working Group and is assisting the Advisory Committee. In this role, we will need to examine any existing records that were generated in performance of the experiments. Any documents or records pertaining to human radiation experiments that you possess or the existence of which you know should be identified and preserved in order that they may be considered in the proceedings of the Human Radiation Interagency Working Group and the Advisory Committee on Human Radiation Experiments. At a later date, we will make arrangements to obtain access to any records you may possess.

If you have any questions concerning this matter, please don't hesitate to contact ______.

Thank you for your continued cooperation in this matter.

Cordially yours,

Draft letter to Radiation Experiment Contractors/grantees

Dear __________ :

The purpose of this letter is to notify you of the Federal Government's ongoing investigation into the nature and scope of human radiation experiments conducted by or on behalf of the Federal Government since 1944, and to request formally that you locate and preserve any records of such experiments. We are contacting you because our records reflect that, pursuant to **[select one:** contract[s] with.../...grant[s] from] this department **[or** ____, a predecessor of this department,**]** your institution participated in human radiation experiments that fall within the scope of the investigation.

"Human radiation experiments" within the scope of the investigation includes experiments on individuals involving intentional exposure to ionizing radiation, excluding common and routine clinical practices, and experiments involving intentional environmental releases of radiation that were designed either to test human health effects or to test the extent of human exposure to ionizing radiation.

Information previously made public reflects a diversity of purposes for human radiation experiments conducted during the past fifty years. Many experiments advanced the state of medical and scientific understanding of radiation and resulted in enhanced use of radiation as a diagnostic and therapeutic tool. However, some experiments raise questions concerning the nature and purpose for the experiments, selection of test subjects, and whether test subjects gave informed consent to participate in the experiments.

The Clinton Administration has directed **[this department]**, as a member of the Human Radiation Interagency Working Group, and in cooperation with an independent Advisory Committee on Human Radiation Experiments, to conduct a full and open investigation to obtain answers to these important questions. The results of the investigation will be considered in formulating an appropriate response to the subjects of such experiments.

Under Executive Order No. 12891 (January 15, 1994), the President directed all government agencies to provide the Advisory Committee on Human Radiation Experiments with information on such experiments. **[This Department]** has been an active participant in the proceedings of the Working Group and is assisting the Advisory Committee. In this role, we will need to examine any existing records that were generated in performance of the experiments. Any documents or records pertaining to human radiation experiments that you possess or the existence of which you know should be identified and preserved in order that they may be considered in the proceedings of the Human Radiation

Interagency Working Group and the Advisory Committee on Human Radiation Experiments. At a later date, we will make arrangements to obtain access to any such records in your custody or under your control.

If you have any questions concerning this matter, please do not hesitate to contact ______.

Thank you for your continued cooperation in this matter.

Sincerely yours,

FAX TRANSMITTAL SHEET

OFFICE OF THE ASSISTANT SECRETARY FOR HEALTH

PUBLIC HEALTH SERVICE

DATE: April 14, 1994

FROM: Kathy Hudson, Ph.D.

PHONE: 202/690-6811

FAX: 202/690-7360

TO: Phil Kaplan

ADDRESS: White House Cabinet Affairs

PHONE: _

FAX: _456-6704

Number of pages (including cover): _2_

* *

Message
As per your request

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Office of the Assistant Secreta
for Health
Washington DC 20201

MEMORANDUM TO RESEARCH INSTITUTIONS

FROM: Co-Chairs of the Public Health Service Radiation Studies Working Group

SUBJECT: Human Radiation Experiments: Records for the Period 1944 through May 30, 1974--ACTION

It has recently become widely known that the Federal Government conducted and/or supported experiments in which human subjects were intentionally exposed to ionizing radiation, sometimes without their consent. Although most, if not all, such experiments occurred twenty or more years ago, this is nevertheless a matter of the utmost concern to the Administration and to the public. Accordingly, the President established the Human Radiation Interagency Working Group to identify and report on such experiments conducted between 1944 and May 30, 1974. This Department and others have been asked to establish procedures for locating, and subsequently retrieving and inventorying records of human radiation experiments conducted either directly by HHS or through an HHS contract or grant. HHS agencies are now engaged in the first step of this process; namely, identifying relevant records in our possession or custody.

Based on the long-term relationship between HHS and your institution, you may have received an HHS grant or contract to conduct or participate in human radiation experiments during the period in question. We anticipate that further review of our records will enable us to identify which institution in fact received HHS funds for such experiments. When this information becomes available we will be in touch with relevant institutions to discuss what additional steps should be taken.

In the interim, we are asking that all addressees take steps to preserve and retain any records they may have that pertain to human radiation experimentation. We are concerned that no files or records related to this subject be destroyed or otherwise disposed of, even if these files would normally be destroyed under an existing records disposition schedule.

We urge your cooperation to ensure that your organization preserves all pertinent records in your custody or possession. When we have better information on which institutions may have been involved, we will issue further guidance.

We appreciate your assistance in this important task. Please contact either of us if you have any questions.

DA Henderson
D.A. Henderson, M.D., M.P.H.
Deputy Assistant Secretary
for Health-Science
U.S. Public Health Service
(202) 690-6811

Wendy Baldwin
Wendy Baldwin, Ph.D.
Deputy Director
for Extramural Research
National Institutes of Health
(301) 496-1096

U.S. Department of Justice

Washington, D.C. 20530

April 7, 1994

MEMORANDUM

To: Phil Caplan
The White House

From: J. Patrick Glynn
Torts Branch
Civil Division

Subject: Indemnification Issues, Interagency Working Group

You have asked me to respond to questions that have arisen concerning the scope of potential indemnification by the government for researchers and institutions that may have sponsored human radiation experiments.

In consulting with other components of the Department of Justice concerning your questions, I was cautioned that my comments cannot be construed as an official opinion on behalf of the Department of Justice. If you need such an opinion, the most appropriate course would be to ask the White House Counsel's office to submit a request to the Office of Legal Counsel for the Department. However, I understand that, in connection with the ongoing activities of the Interagency Working Group, you are looking for some immediate practical guidance concerning how to deal with questions concerning the potential recourse that researchers may have against the government. In that context, and subject to the disclaimer above, I have outlined the fundamental issues that would arise in connection with a claim that the United States owes an indemnity obligation to human radiation experiment researchers. In the interest of time, I am enclosing several internal memoranda from Department attorneys that illuminate the issues presented. These memoranda are intended for your understanding of the issue and were not prepared for external distribution.

The initial, short answer to your question is that we are unaware of any general statutory provision affording indemnification from the government to private researchers or their sponsoring institutions. Thus, any claim of such protection likely would arise only under a contract between the researcher and the government. Even if a researcher produced a clause purporting to extend indemnification, there remain impediments to enforcement of such a clause, and it would be subject to interpretation concerning its intended scope.

One generalization that can be stated is that the Anti-Deficiency Act, 31 U.S.C. §1341, would render unenforceable an open-ended indemnification provision not authorized by statute. Beyond this general statement, however, each purported claim of a right to contractual indemnification would have to be analyzed under the specific terms of the contract in question, which would present potentially complex issues of interpretation in light of the allegations against the researcher seeking indemnification. For this reason, I cannot suggest a simple, uniform answer to the question of whether researchers may be entitled to indemnification. I can suggest that, since the category of persons about whom you are inquiring excludes employees of the United States, it is highly unlikely that any researcher would be entitled to blanket indemnification for the researcher's own conduct. Moreover, to the extent that independent research was being funded pursuant to government grant, rather than contract, any claim for indemnification would be even less feasible.

You also have asked me to comment on the issue of government access to records from a researcher who is not entitled to indemnification from the United States. This is an issue that we have discussed within the Working Group for some time. As I've previously indicated, since neither the Working Group nor the Advisory Committee has subpoena power, the government's right of access to records in the possession of researchers appears to depend upon the relationship between the sponsoring agency and the researcher. In connection with work done pursuant to contract, one would have to look to the contract and the agency's procurement regulations applicable to the contract to determine whether the government retained a right of access to records. I have previously urged that each of the agencies in the Working Group review its own contracts and regulations to make this determination and that they consult with their offices of inspectors general concerning the authority of those offices to conduct audits and reviews of such contracts.

I have noted that most of the agencies in the Working Group have stated their understanding that requirements for record retention under contracts generally have been limited to a specified term of years, but also noted the regulation cited by the Department of Health and Human Services relative to research conducted pursuant to grants, 45 C.F.R. §74.24 (d), which extends the right of access to retained records beyond the required retention period. Similar provisions may govern the rights of other agencies. Again, questions as to the method and manner of obtaining access to researchers' records seem best addressed by the specific sponsoring agency relative to each research project.

As with other issues presented by the activities of the Working Group, complex questions are not susceptible to quick and easy answers. To ensure the continued preservation of the records relative to the experiments, we have suggested that the agencies notify the researchers whom they sponsored to put them on notice that the research is within the scope of the current proceedings of the Working Group and the Advisory Committee.

U.S. Department of Justice

Washington, D.C. 20530

April 7, 1994

MEMORANDUM

TO: J. Patrick Glynn, Director

FROM: DFF David S. Fishback, Assistant Director
Torts Branch, Civil Division

RE: Contractual Remedies For Radiation Researchers/ Institutions

QUESTION: What remedy, if any, is available to researchers or the institutions in which they worked, flowing from their research contracts with the United States? In other words, if such contracts contained indemnification clauses, would they be enforceable in light of the Anti-Deficiency Act?

ANSWER: Unless private researchers or institutions are able to demonstrate that their contracts with the United States contained indemnification clauses placed in the contracts pursuant to specific procedures authorizing such clauses, they have no contractual remedy against the government to recoup any losses arising out of tort suits against them.

The Anti-Deficiency Act, 31 U.S.C. §1341, provides that government agencies may not obligate funds not appropriated by Congress. It is settled that this means that the United States may not enter into agreements to indemnify government contractors for future tort liability, because such agreements subject the United States to potentially open-ended liability. Thus, absent some limit to liability and concommitant appropriation to cover such liability, an express agreement by the United States to indemnify a government contractor is unenforceable. See discussion in Johns-Manville v. United States, 12 Cl.Ct. 1, 21-25 (1987); In re All Asbestos Cases, 603 F. Supp. 599, 611-12 (D. Hawaii 1984).[1]

[1] As the court in In re All Asbestos Cases stated, "[t]he Comptroller General consistently has taken the position that a government agent may not make any oral or written agreements to indemnify or 'hold harmless' a contractor for future losses under a contract, absent specific authorization or appropriation. . . .
(continued...)

There is a potentially-applicable exception to the rule in the Anti-Deficiency Act, Public Law 84-805 (codified as 50 U.S.C. §1431), but it is narrow and must be specifically invoked at the time a contract is entered into. Under P.L. 84-805 -- which permits the President to enter into indemnification agreements in certain national security situations -- there are a number of procurement regulations which must be complied with before the President's designee could validly agree to such indemnification. See 32 C.F.R. §17-206(ii)(iii) (1984); FAR 50.403. A specific, written request must be made, and it must be supported by explanations of why such an indemnification provision is necessary. It is important to note that P.L. 84-805 was enacted to permit contractual indemnity provisions for the building of nuclear submarines in circumstances where contractors feared they could not purchase insurance to cover the then-feared risks involved in such activity. See S. Rep. No. 2281, 85th Cong., 2d Sess. (1958), reprinted in 1958 U.S. CODE CONG. & AD. NEWS 4043-45. We do not know whether the private researchers and institutions involved here had such concerns, but unless they made them known and secured specific authorization for indemnification provisions in accordance with applicable procurement regulations, any express agreement by the government to indemnify would be unenforceable.[2]

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[1](...continued)
[Even if a contractor] could show representations on the part of government agents that the government would indemnify [it] for prospective tort losses, those representations would not be binding upon the government." 603 F. Supp. at 611-12. See Matter of: Assumption by Government of Contractor Liability to Third Persons -- Reconsideration, May 12, 1983, 62 Comp. Gen. 361 (1983).

[2] This discussion applies with even greater force to any argument that the government contracts contained an implied agreement to indemnify. Indeed, in the cases cited above, there were no express indemnification provisions. Finally, it must be remembered, with respect to allegations of implied agreements, that only implied-in-fact obligations are enforceable against the United States. "The Tucker Act does not grant . . . jurisdiction to enforce contracts implied-in-law." GAF Corp. v. United States, 932 F.2d 947, 951 (Fed. Cir. 1991), cert. denied, 112 S.Ct. 965, and cases cited therein. As the court in In re All Asbestos Cases observed, contract claims against the United States "require an agreement founded upon a meeting of the minds, which, although not necessarily embodied in an express contract, must be inferable as a fact from the conduct of the parties showing, in light of surrounding circumstances, their tacit understanding." 603 F. Supp. at 610. A claimant would have a heavy, if not impossible, burden to show that it went through the extensive procedures required to secure an enforceable indemnification agreement and then failed to have the agreement written into its contract.

If an indemnity clause is present in a contract, but has not gone through the P.L. 85-804 process, the government's liability is limited to the available appropriated funds covering that contract. See FAR 52.228-7. With respect to a contract which has long-since been completed, it is highly unlikely that any funds would still remain to make proper payments on a claim.

Moreover, there is a process for closing out government contracts upon "final payment" by the United States. See Mingus Constructors v. United States, 10 Cl.Ct. 173, 176-78 (1986); J.G. Watts Construction v. United States, 161 Ct.Cl. 801 (1963). Unless the release given by a contractor upon final payment reserves rights to future claims, the release may be construed to bar future claims, including those arising out of personal injuries not manifest at the time the contract is closed out. For example, in American Employers Insurance v. United States, 812 F.2d 700, 703-05 (Fed. Cir. 1987), the Federal Circuit rejected an attempt by a private shipyard's insurance company to collect additional money for workers' compensation benefits paid to shipyard workers who had manifested asbestos-related diseases many years after final settlement. The court rejected the claim of "mutual mistake," noting that insurance companies were aware, at the time of final settlement, "of the possibilities of silicosis and asbestos claims surfacing in the future." 812 F.2d at 705 n.5.[3]

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[3] In American Employers Insurance, the court applied the Contract Settlement Act of 1944, 41 U.S.C. §§101 et seq, under which the government's final settlement of a "war contract" precludes subsequent claims unless the settlement provides otherwise or there is fraud or mutual mistake.

Tony Thornton

6-26-04

EVA M. PLAZA
DEPUTY ASSISTANT
ATTORNEY GENERAL
CIVIL DIVISION
(202) 514-3309 (OFFICE)
(202) 514-8071 (FAX)

DATE: 3/21/94

TO: Phil Caplan

FAX #: 456-2983 PHONE #: 456-2572

OF PAGES: 8

COMMENTS: Phil:

This is a draft of the memo we promised you weeks ago. Also included is a draft of a letter you may wish to distribute to agencies interested in contacting their contractors/grantees. The final version will follow tomorrow. Thanks!

Eva

U.S. Department of Justice

Civil Division

Deputy Assistant Attorney General

Washington, D.C. 20530

March 21, 1994

MEMORANDUM

TO: Eva M. Plaza
Deputy Assistant Attorney General
Torts Branch, Civil Division

FROM: J. Patrick Glynn
Direcator
Torts Branch, Civil Division

SUBJECT: Applicability of Statutes to Destruction of Radiation Experiment Documents by Government Contractors

The issue presented is whether pursuant to criminal statute, a contractor can be compelled to preserve records generated in connection with government contracts based upon agency request. This memo assumes that those records will be subsequently sought by the agency in a policy making proceeding. This memo also assumes that no criminal investigation or criminal or administrative subpoena is contemplated. The second half of this memo presumes that the records are government property, pursuant to contractual provisions so specifying.

1. 18 U.S.C. Section 1505

Section 1505 is titled "Obstruction of Proceedings Before . . . Agencies." It provides criminal penalties for "whoever corruptly . . . obstructs or impedes . . . the due and proper administration of the law under which any pending proceeding is being had before any . . . agency of the United States."[1]

[1] Under 18 U.S.C. Section 6, "The term 'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest . . . ."

There is ample authority for the proposition that concealment, destruction, or alteration of documents sought by an agency violates Section 1505. See e.g., United States v. Laurins, 857 F.2d 529, 536 (9th Cir. 1988)(concealing documents and submitting false documents in response to an Internal Revenue Service subpoena violates prohibition against obstructing administration of law in proceeding before an agency); United States v. Sutton, 732 F.2d 1483 (10th Cir. 1984)(directing destruction of documents sought by Department of Energy's administrative subpoena).

Nor is the proscription on such conduct confined to those situations where the agency issues a subpoena. See e.g., United States v. Leo, 941 F.2d 181 (3d Cir. 1991)(altering records submitted to a government contract auditor constitutes obstruction); United States v. Fruchtman, 421 F.2d 1019 (6th Cir. 1970)(furnishing false invoices pursuant to request by Federal Trade Commission attorney).

The problem presented is whether the ongoing policy activities contemplated in connection with the radiation experiments would constitute a "proceeding" under Section 1505. All the decided cases arise in connection with investigatory or adjudicatory proceedings by an agency focusing on criminal or civil wrongdoing committed by an individual or corporation. Although the cases generally comment that Section 1505 concerns "adjudicative or investigative" proceedings," Rice v. United States, 356 F.2d 709, 712 (8th Cir. 1966), other cases go on to state in dicta that Section 1505 reaches agency rule-making proceedings. See United States v. Wright, 704 F.Supp. 613, 614 (D. Md. 1989); United States v. Higgins, 511 F.Supp. 453 (W. Dist. Ky. 1981). When an agency performs rule-making, it is engaged in a type of policy-making proceeding. In both a rule-making proceeding and the instant policy-making proceeding, obstruction would endanger the agency's ability to perform its fact finding and policy-making functions properly. However, none of the decided cases address whether the statute reaches policy-making proceedings.

In construing statutes, the courts will give the words of a statute their plain meaning, "unless to do so produces an absurd result or one which defeats the purpose for which the act was passed." Rice v. United States, 356 F.2d 712 (citation omitted). Nothing in the wording of the statute suggests that policy-making proceedings are excluded.

The courts have "broadly construed" the term "proceeding" in Section 1505. See United States v. Leo, 941 F.2d 198(discussing broad construction of term in 6th, 10th, 2nd, 4th, and 8th Circuits). As the 8th Circuit stated, "Proceedings before a governmental department or agency simply mean proceeding in the manner and form prescribed for conducting business before the department or agency, including all steps and stages in such an action from its inception to its conclusion." Rice v. United States, 356 F.2d 712(filing charges before National Labor Relations Board held to be a proceeding despite absence of formal complaint). The cases under Section 1505 have characterized a variety of relatively informal agency activities as proceedings, including an informal request by an FTC attorney for documents, United States v. Fruchtman, an interview by a Customs Service agent, United States v. Schwartz, 924 F.2d 410 (2nd Cir. 1991) and submission of routine customs forms reviewed by customs agents, United States v. Browning, 572 F.2d 720,723 (10th Cir. 1978).

As the 10th Circuit commented, "the term 'proceeding' is not . . . limited to something in the nature of a trial. The growth and expansion of agency activities have resulted in a meaning being given to 'proceeding' which is much more inclusive and which no longer limits itself to formal activities . . . [R]ather, the investigation or search for the true facts . . . is not to be ruled as a non-proceeding simply because it is preliminary to indictment and trial." Id.

In sum, the courts have never addressed whether Section 1505 extends to prohibit obstruction of a policy-making proceeding of an agency. Certainly the broad scope given the term "proceeding," its plain meaning, and policy considerations support the application of the statute in this context. In light of the uncertainty concerning the interpretation of Section 1505, however, the wording of any letter to a contractor should not go further than to suggest that destruction of any relevant documents might subject the individual to sanctions pursuant to 18 U.S.C. Section 1505.[2]

2. 44 U.S.C. Section 3106

Section 3106 provides a structured procedure to redress the actual or threatened unlawful removal or destruction of records "in the custody of the agency."[3] The records at issue do not appear to be in the custody of an agency, and nothing in the

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[2] The tentative wording proposed is based on two factors: First, if presented with the question, a court might find Section 1505 applicable. Second, while not contemplated at this point, we cannot say for certain that more formalized agency proceedings might not eventuate at a future time.

[3] Civil actions have been brought under this section See e.g., Armstrong v. Executive Office of the President, 1 F.3rd 1274 (D.C. Cir. 1993) (researchers and nonprofit organizations successfully challenged proposed destruction of National Security Counsel electronic mail communications system).

legislative history or decided cases would support relying upon this statute to recover records not previously unlawfully removed from the custody of the United States. [4]

3. 18 U.S.C. Section 641

The present theft and malicious mischief statutes, 18 U.S.C. Sections 641 and 1361, date back to criminal statutes originating in 1909 and subsequently amended in 1947. While the literal terms of selected portions of these statutes arguably could apply to the conduct contemplated in this case, none of the decided cases even remotely involved parallel facts. Moreover, the legislative history does not address the kind of circumstances presented in this case. The dearth of relevant legislative history and judicial cases involving our fact situation creates considerable uncertainty concerning the statutes' applicability.

Section 641 is contained within a chapter entitled "Embezzlement and Theft." It provides, in pertinent part, that "Whoever . . . without authority . . . disposes of any record . . . or thing of value of the United States" shall be subject to criminal penalties.[5]

The classic fact pattern embraced by this section occurs where a contractor's employee takes classified documents and conveys the information to others. See United States v. Fowler, 932 F.2d 306 (4th Cir. 1991); United States v. Zettl, 889 F.2d 51 (4th Cir. 1989). Under the second clause of Section 641 quoted above, the government need not prove an intent to convert the document. Instead, it must demonstrate only an "intent to . . . dispose of . . . [government property] without authorization." Id. at 53.

The statute reaches documents, as well as the information contained within the documents. Fowler, 932 F.2d 310. See also

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[4]The statute requires the head of each Federal agency to "notify the Archivist of any...threatened unlawful destruction of records in the custody of the agency" and to initiate actions through the Attorney General to recover records which have been unlawfully removed from a Federal agency. Section 3106 is not a criminal statute and does not set forth penalties for persons destroying agency records.

[5] The legislative history of Section 641 is briefly discussed in Morisette v. United States, 342 U.S.246, 266-69 n.28. ("The history of S. 641 demonstrates that it was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions...")

United States v. Jeter, 775 F.2d 670, 680-82 (6th Cir. (conveyance of governmental information contained in grand jury information can violate Section 641); United States v. Girard, 601 F.2d 69, 70-71 (2d Cir. 1979)(information contained in a DEA computer). The information contained in the record is a "thing of value"; its unauthorized conveyance is proscribed even if the government does not lose the possession of any informational property due to the defendant's activities. Jeter, 775 F.2d at 680-681.

By its terms, the statute requires that the property at issue be property "of the United States." The cases do not require that the government hold formal title to the property at issue if the government retains significant control over the property. See United States v Barreda, 607 F. Supp. 419,420 (N.D. Ind. 1985) (revenue-sharing funds were property of the United States since even after distribution to state or local government, government exercised significant supervision and control). C.f. United States v. Tana, 618 F.Supp. 1393 (S.D.N.Y.1985) (statute inapplicable where the government merely holds general security interest). The cases discovered in research have not dealt with prosecutions based upon property in which both the United States and the defendant may have a property interest.[6]

The cases have not had occasion to resolve whether destruction of government property qualifies as a disposal. The plain meaning of the term "disposal" would seemingly encompass destruction, particularly since other means of disposal, such as sale and conveyance, are already separately enumerated by the statute.

Plainly, the decided cases do not address the question presented here, i.e., whether Section 641 extends to disposal of a record by a contractor in defiance of a contrary request by the government years after the record was generated. Certainly, by applicable regulations or by contract, the government may have a property interest in the records of the radiation experiments, particularly if the government has retained the right to exercise control over these records. Moreover, the government may have a property interest in the information contained in those records which it could lose if the record were destroyed. Such disposal

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[6] In connection with both sections 641 and 1361, the discussion assumes that the government has an ownership interest in the documents by contract or regulation. However, the ensuing discussion does not assume that the contractor lacks any ownership interest in the documents. The precise contour of the property interests at issue should be illuminated by an examination of available contracts and applicable regulations.

could certainly result in destruction of the information contained in the record, information which can be reasonably characterized as "a thing of value of the United States". 18 U.S.C. s 641.

Whether such destruction is criminally proscribed by this section would depend upon the court's interpretation of the statutory clause "without authority." Destruction after letter notice might be prosecutable under section 641 particularly if the documents are characterized by the contract as government property, or if the documents are classified. Similarly, the government's hand would be strengthened if the regulations of the contracting agency or the contract require document retention or prohibit unauthorized document disposal, or require the contractor to make the documents available to the government upon request.[7]

4. 18 U.S.C. Section 1361.

Section 1361 is contained in a chapter labeled "Malicious Mischief," and it provides criminal penalties for "whoever willfully injures . . . any property of the United States . . . ."

There can be no dispute that the prohibition includes injury to documents. Indeed, the classic case arising under Section 1361 involves destruction of documents in connection with a political protest. See e.g., United States v. Eberhardt, 417 F.2d 1009 (9th Cir. 1969) cert. den., 397 U.S. 909 (1969)(Selective Service documents). None of the decided cases have determined if section 1361 proscribes injury to intangible property. However by analogy to cases decided under section 641, the information contained in the documents should be similarly protected.

Government ownership of the property is a necessary element. See United States v. Fine, 413 F.Supp. 728,733 (W.D. Wis. 1976). None of the decided cases address whether the statute prohibits destruction of property in a dual ownership situation. The legislative history is also silent on this issue. However, when a contractor destroys records, there is a clear destruction of government property (the information) entirely apart from the physical documents.

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[7] For example, defense contractors are required to keep extensive records pertaining to their contracts, which must be made available to the Department of Defense upon request. See generally, United States v. A Building House Business, 139 F.R.D. 111, 113 (W.D. Wisc. 1990).

Prosecution of a contractor for destroying radiation experiment records under this section as well as section 641 will surely face interesting challenges in the courts. We can anticipate arguments that this activity falls outside the prohibitions of these statutes and that the statutes are unconstitutionally vague as applied.

5. Government's Ownership Interest/Access Rights.

As was noted above, the second portion of this memorandum assumes a governmental ownership interest in the records. The validity of such an assumption is, however, not without question. The primary agencies involved in human radiation experiment record searches, DOD, DOE, and HHS, cannot confirm an agency ownership interest in data or records generated pursuant to contract without examining the individual contracts.

Some support for an ownership claim may be found in a clause establishing "Rights in Technical Data," but no definitive statement in this regard can be made without recourse to the actual contracts involved in the experiments. Since virtually all contracts and grants that may be at issue in the human radiation context will be more than twenty years old, the prospect of finding any is slim.

Thus, we may be overreaching to suggest to contractors or grantees that they should retain records on the basis of a claim of government ownership of those records.

With respect to the issue of a right of access to contractor records in general, independently of a claim of government ownership, the agencies could only cite standard procurement clauses that required retention of records for a period of three years after completion of the contract. However, a clause in the HHS regulations governing work performed pursuant to **grant** (as contrasted with contract) may support continued access to at least a subset of radiation records. That regulation, 45 CFR 24(d) provides that the rights of access to records pertinent to an HHS grant "are not limited to the required retention period but shall last as long as the records are retained." This particular provision appears to date back to 1980 and relates only to grant work. If there was a predecessor provision and/or a similar provision in the regulations of other agencies, a strong case could be made for a right of access to a substantial body of records.

Conclusion.

This memorandum has examined potential alternative theories whereby the United States could compel the retention and production of records of human radiation experiments. No single alternative was found to be without doubt. However, a reasonable interpretation of the provisions of 18 U.S.C. Section 1505 is that willful destruction or alteration of human radiation records could give rise to criminal penalties.

Application of section 1505 in this manner appears consistent with the spirit of the prohibition against obstruction of agency proceedings, broadly construed.[8]

All of the other enforcement alternatives considered, each of which assumes a government ownership interest in the records, seems less well founded. Thus, in the absence of clear authority, it is recommended that a conservative statement of the government's interest in preservation of, and access to, human radiation experiment records is warranted.

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[8] An additional danger in urging that any criminal statute be broadly construed rests in the potential unconstituionality of such an interpretation. In United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991), the court found that the statute could not be applied to lying or misleading Congress. However, that conduct is plainly different from "concealing documents," specifically mentioned by the Poindexter Court as within the reach of Section 1505 under reported decisions. Since the prior judicial interpretation of Section 1505 supplies the constitutionally-required notice that the statute on its face might lack, the vagueness argument should be unpersuasive in the context of concealing or altering documents.

EVA M. PLAZA
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
(202) 514-3309 (OFFICE)
(202) 514-8071 (FAX)

DATE: 3/24/94

TO: Phil Caplan

FAX #: 456-2983 **PHONE #:** 456-2572

 # OF PAGES: 2

COMMENTS:

New Draft

Draft letter to Radiation Experiment Contractors/grantees

Dear ________ :

The purpose of this letter is to notify you of the Federal Government's ongoing investigation into the nature and scope of human radiation experiments conducted by or on behalf of the Federal Government since 1944, and to request formally that you locate and preserve any records of such experiments. We are contacting you because our records reflect that, pursuant to **[select one:** contract[s] with.../...grant[s] from] this department **[or** ____, a predecessor of this department,] your institution participated in human radiation experiments that fall within the scope of the investigation.

Information previously made public reflects a diversity of purposes for human radiation experiments conducted during the past fifty years. Many experiments advanced the state of medical and scientific understanding of radiation and resulted in enhanced use of radiation as a diagnostic and therapeutic tool. However, some experiments raise questions concerning the nature and purpose for the experiments, selection of test subjects, and whether test subjects gave informed consent to participate in the experiments.

The Clinton Administration has directed **[this department]**, as a member of the Human Radiation Interagency Working Group, and in cooperation with an independent Advisory Committee on Human Radiation Experiments, to conduct a full and open investigation to obtain answers to these important questions. The results of the investigation will be considered in formulating an appropriate response to the subjects of such experiments.

Under Executive Order No. 12891 (January 15, 1994), the President directed all government agencies to provide the Advisory Committee on Human Radiation Experiments with information on such experiments to carry out its functions. **[This Department]** has been an active participant in the proceedings of the Working Group and is assisting the Advisory Committee. In this role, we will need to examine any existing records that were generated in performance of the experiments. Any documents or records pertaining to human radiation experiments that you possess or the existence of which you know should be identified and preserved in order that they may be considered in the proceedings of the Human Radiation Interagency Working Group and the Advisory Committee on Human Radiation Experiments. At a later date, we will make arrangements to obtain access to any such records in your custody or under your control.

If you have any questions concerning this matter, please do not hesitate to contact ________.

Thank you for your continued cooperation in this matter.

Sincerely yours,