

Congressional Review of “Anti-Leaks” Legislation

by Sunshine in Government Initiative (www.sunshineingovernment.org)

Background:

The national debate over the benefits and harm of intelligence leaks has escalated. We are aware that the House and Senate Intelligence Committees remain concerned about the unauthorized disclosure of classified information. The House Intelligence Committee held a series of closed hearings on leaks in the fall, and we understand a third public hearing on the media’s responsibilities regarding leaks may be held in May. In the committee report accompanying H.R. 5020, “The Intelligence Authorization Act,” the House Intelligence Committee stated that it was continuing its legislative review of the issue to determine if changes in the law are necessary. We also understand the Senate Intelligence Committee is examining specific cases of unauthorized leaks. Thus far, Congress has resisted requests for a broad “official secrets act” that would criminalize the unauthorized disclosure of any classified information.

Discussion Points:

- As you know, the Department of Justice, in the AIPAC case, has raised the possibility of prosecuting journalists. We understand the Administration’s concerns about leaks, but we are not aware of any instance in our nation’s history in which a legitimate journalist has been prosecuted for publishing government information. Such a prosecution would fundamentally alter our democracy and we are deeply troubled by the threat.
- Reporters and editors are mindful that they are also citizens and talk to government representatives before publishing anything that could be harmful. In our experience, the media listens to concerns of government officials and make responsible journalistic judgments to withhold truly harmful information.
- The media recognizes that certain “leaks” of classified information can cause genuine harm and the government has a duty to protect classified national security information. However, over the course of our nation’s history, past Administrations and Congresses have understood there is a delicate balance between the public’s right to know and the need of the government to protect secrets. That balance is difficult to maintain particularly in time of war.
- The problem of leaks of classified information does not lend itself easily to a legislative fix, and previous attempts to legislate would have created an “Official Secrets Act” in this country. Such a broad approach would have chilled the daily communications between government officials and the public, particularly between government officials and Congress and reporters.
- Overly broad legislation would also close down avenues for government “whistleblowers” to come forward to Congress or the media and expose wrongdoing, abuse and mismanagement.

- We all understand that far too much information is classified. The executive branch should be encouraged to classify less. Historically, when increased amounts of information are shielded from the public, government officials have a tendency to leak more information to Congress and the press.
- We also know that senior executive branch officials use “backgrounders” to inform the public. Typically, these are authorized “leaks” of classified information and play a vital role in informing the public - and Congress. If new laws were passed to criminalize this practice, it would shut off a vital source of information for the public and change the nature of our democracy.
- We believe representatives of the media would be interested in sitting down to talk with you and your colleagues to see if there is a narrow way to approach this issue that would provide value in protecting “sources and methods” and vital military secrets. In addition, we believe there are positive steps that Congress can take without legislation to address this complex issue. These steps were outlined in a letter that was recently sent to you and your colleagues on the committee.
- We would also like to explore with you whether education of government officials and the media will help reduce leaks of truly harmful secrets. Both the executive and legislative branch officials need to understand how to talk to the press about sensitive information without improperly disclosing highly classified information. The media needs to understand how to proceed when they learn of highly sensitive information that could be potentially harmful if disclosed.
- Representatives of the media have engaged in a constructive dialogue with the intelligence community on these important issues in a series of candid, off-the-record discussions over the last four years. Congressional representatives also participated in some of these sessions. One hurdle is that the dialogue has never been formalized and has an intermittent existence because of changing players within the intelligence community. We believe one concrete step your committee could take would be to endorse further support for this dialogue and to participate in this forum.
- We would be happy to work with you to explore the specifics of how this approach can be formalized.