

Sunshine in Government Initiative

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September 14, 2006

The Honorable Christopher Bond
Russell Senate Office Building 274
United States Senate
Washington, DC 20515
Sent via facsimile: 202-224-8149

Dear Senator Bond:

Our organizations are writing to express our strong opposition to S. 3774, overly broad legislation that would, for the first time in our nation's history, criminalize disclosures of classified information. Instead of pursuing new legislation, we urge you to endorse and participate in an ongoing dialogue hosted by the Aspen Institute and involving active journalists, publishers and very senior level government officials.

We recognize that the government has a duty to protect national security and that some unauthorized disclosures of classified information may cause serious damage. The media clearly have an obligation to act carefully and responsibly and to avoid harm to national security as they make their decisions whether to publish.

As part of the media's responsibility, we also acknowledge that our founders understood that there is the delicate balance between the public's right to know and the government's need to protect national security secrets.

In lieu of new legislation, we urge you to pursue congressional endorsement of and participation in a renewed dialogue between government and the media. Since the 9/11 attacks, senior representatives of government and the media have engaged in several off-the-record discussions designed to avoid the disclosure of truly harmful secrets. Congressional representatives also participated in some of these sessions. Executive and legislative branch officials need to understand how to talk to the press about sensitive information without improperly disclosing highly classified information. Journalists need to understand what to do when learning of highly sensitive information that may cause harm if disclosed. When these discussions occurred, those attending found them extremely helpful. Due in part to turnover within intelligence agencies, these discussions have not occurred in some time.

We are committed to renewing the dialogue. The Aspen Institute and its Communications and Society Program has agreed to sponsor the "dialogue" and the first session is scheduled in early October.

American Society of Newspaper Editors · The Associated Press · The Association of Alternative Newsweeklies ·
Coalition of Journalists for Open Government · National Newspaper Association ·
Newspaper Association of America · Radio-Television News Directors Association ·
The Reporters Committee for Freedom of the Press · Society of Professional Journalists

Over the years, Congress has passed a variety of laws to punish disclosure of specific types of classified information (such as information relating to communications intelligence, atomic weapons and covert agents). However, through two world wars and the Cold War, Congress resisted requests for a broad “Official Secrets Act” that would criminalize the unauthorized disclosure of any classified information. In 2001, Congress again rejected “Official Secrets Act” legislation, and instead mandated a comprehensive review by the Justice Department of protections against the unauthorized disclosure of classified information. On October 15, 2002, then-Attorney General John Ashcroft submitted a report to Congress in which he stated, “Accordingly I am not recommending that the Executive Branch focus its attention on pursuing new legislation at this time. “

S. 3774 would have a chilling effect on legitimate interactions between government officials and the public. With the threat of criminal prosecution looming, it would alter the way in which government officials — including members of Congress — deal with the press, the way in which the press gathers and reports the news and the way in which the public learns about its government. The bill would also expose journalists to greater pressure to reveal confidential sources.

Beyond the news media, it would affect the legitimate interaction of many others with the government, including historians and public policy think tanks. Such legislation would discourage government “whistleblowers” from coming forward with information that may shed light on inappropriate or unlawful activities. While such disclosures often cause discomfort within the institutions involved, they have often informed Congress in its constitutional responsibility to govern the nation.

Consider the following matters that came to light when classified information was disclosed to journalists: The Pentagon Papers; lapses in security creating vulnerability to espionage, such as the case of former CIA agent Edward Lee Howard; government radiation and biological warfare experiments on unwitting Americans; and waste, fraud and abuse in the defense industry. Leaks to the media, even of classified information, have served as a vital source of information about public issues and the operation of government.

Thank you for considering our views on this important matter. We look forward to a dialogue with you on remedies to the problems and challenges of protecting national security while preserving open discussion of important public issues. To follow up, please contact Rick Blum, coordinator of the Sunshine in Government Initiative, at 703-807-2100.

Sincerely,

American Society of Newspaper Editors
The Associated Press
Association of Alternative Newsweeklies
Coalition of Journalists for Open Government
National Newspaper Association
Newspaper Association of America
Radio-Television News Directors Association
Reporters Committee for Freedom of the Press
Society of Professional Journalists

Bond Legislation Would Create an “Official Secrets Act” and Shield Information from the Public about Its Government

September 14, 2006

Early in August 2006, Senator Christopher Bond introduced legislation that would criminalize any unauthorized disclosure of classified information. The bill is overbroad and would likely undermine daily communications between government officials and the public, particularly between government officials and Congress and reporters. The nine organizations comprising the Sunshine in Government Initiative believe that an ongoing dialogue between active journalists, publishers and senior government officials would better protect national security while fulfilling the media’s obligation to inform the public of government activities.

The media recognize that some disclosures of classified information can cause genuine harm and the government has a duty to protect such highly sensitive classified national security information. But S. 3774 as written fails to balance this duty against other crucial duties and values. Over the course of our nation’s history, past Administrations and Congresses have understood the need to safeguard both the public’s right to know and the government’s legitimate need to protect true national security secrets. Even in times of war, Congress has never taken the step of creating such sweeping law.

Reporters and editors often perform this kind of balancing. Mindful that they are also citizens, they consult with government officials before publication on stories containing what could be harmful information. In our experience, the media listen to concerns of government officials and make responsible journalistic judgments to withhold or delay stories where they are persuaded the risk of harm is credible.

In response to the escalating debate about unauthorized disclosures, we believe the following points should be considered:

First, the Congress should not write new, overly broad laws outlawing unauthorized disclosures of classified information.

Second, current law already criminalizes the release of national security secrets. Protections are already in place for information such as the identities of covert agents, intelligence on communications capabilities, and data concerning nuclear weapons. Before creating new, overly broad laws, Congress should communicate exactly why existing laws are inadequate. If legislation is pursued, Congress should craft a narrow approach that would protect “sources and methods” and vital military secrets without a wholesale clampdown on all forms of classified information, including information that should never have been classified at all.

Third, government officials and the media should engage in the “Dialogue.” Leaders from relevant committees in Congress and senior government officials could endorse and participate in an on-going dialogue designed to educate government officials and the media on what should be treated as truly harmful secrets. Since 9/11, such discussions have taken place, but for a variety of reasons, including turnover among intelligence officials, these discussions have not occurred regularly. The Aspen Institute has agreed to host a renewed “dialogue” in early October. Executive and legislative branch officials need to understand how to talk to the press about sensitive information without improperly disclosing highly classified information. Journalists need to understand what to do when learning of highly sensitive information that may cause harm if disclosed.

Fourth, Congress should encourage the Executive Branch to classify less. Too much information is classified. Historically, when increased amounts of information are shielded from the public, government officials have a tendency to leak more information to the Congress and the press.

Background on Bond “Official Secrets Act”

On August 2, 2006, Senator Christopher Bond (R-MO) introduced a bill that would criminalize the unauthorized disclosure of classified information.

The bill, S. 3774, has 11 original co-sponsors: Senators Alexander (R-TN), Bennett (R-UT), Burns (R-MT), Chambliss (R-GA), Cochran (MS), Cornyn (R-TX), Domenici (R-NM), Hatch (R-UT), Lott (R-MS), Santorum (R-PA) and Stevens (R-AK). On September 8, supporters added 3 additional co-sponsors: Senators Sessions (R-AL), Allen (R-VA) and Dole (R-NC).

The language is identical to previous legislation passed by Congress and ultimately vetoed by President Clinton. In 2001, the legislation reappeared. After public outcry, Congress scuttled a hearing at the last minute and agreed to have the Justice Department study the issue. What ensued became known as the Dialogue consisting of a series of informal discussions between high-level intelligence officials and media representatives to discuss government concerns regarding leaks and improve mutual understanding of government and media interests. Then-Attorney General John Ashcroft concluded more could be done short of writing new laws to protect information whose disclosure would harm national security. “Accordingly,” he wrote to Congress on October 15, 2002, “I am not recommending that the Executive Branch focus its attention on pursuing new legislation at this time.”

Summary of S. 3774

S. 3774 would criminalize the disclosures of classified information by any person authorized to receive the information. The legislation adds a new subsection to Section 798 of Title 18 of the U.S. Code titled, “Unauthorized Disclosure of Classified Information.” The language, in part, reads:

Whoever, being an officer or employee of the United States, a former or retired officer or employee of the United States, any other person with authorized access to classified information, or any other person formerly with authorized access to classified information, knowingly and willfully discloses, or attempts to disclose, any classified information to a person (other than an officer or employee of the United States with authorized access to classified information) who is not authorized access to such classified information, knowing that the person is not authorized access to such classified information, shall be fined under this title, imprisoned not more than 3 years, or both.

The bill would affect current as well as former government employees who have or had the authority to receive classified information.

The bill lowers thresholds for prosecuting those who make unauthorized disclosures in two important ways. First, the legislation would criminalize disclosures of unclassified, unmarked documents. The government need not stamp a document “classified” or otherwise notify employees which documents are classified. The government would only need to show there was “reason to believe” the information could be classified.

Second, to obtain a conviction, prosecutors no longer would need to show that disclosure actually harmed or will harm national security.

The bill specifically exempts from its restrictions any disclosures of classified information to the courts and Congress. It also would not affect authorized disclosures of classified information to foreign governments.

The bill affects individuals in a broad range of categories. Any current employee, former employee or anyone who has signed a nondisclosure agreement would be subject to criminal penalties including fines and up to three years in jail.

Impact on Informing the Public

While it is accurate that the bill does not directly target those who receive classified information, this understates the bill's impact on journalists. It is true that the bill criminalizes only the act of disclosing information without authorization. It does not criminalize publication or receipt of classified information. But the bill would likely lead to additional subpoenas served on journalists to reveal their sources of information, thus it hurts the media. It can also be expected to discourage many sources from disclosing information that is important for the public to know but has no impact whatsoever on national security.

Journalists and the public should be concerned by several aspects of the bill.

The bill will cut down the flow of information to the public on important issues of the day. The legislation is overly broad and will chill the daily communications between government officials and the public, particularly between government officials and Congress and reporters. It would leave the public dependent upon information only provided by government press releases and "authorized leaks" that might be designed to bolster certain public policy viewpoints.

The bill's vagueness raises questions whether it punishes disclosure of unmarked, unclassified information. A disclosure violates the bill's prohibition against disclosure if the person has "reason to believe" a document is classified. Determining whether an unmarked document had been classified elsewhere in the federal government would be nearly impossible. Since disclosure of unmarked documents could constitute a crime under this bill, government employees are likely to "err on the side of caution" and withhold documents when in doubt. In the end, this bill further exacerbates obstacles to information sharing, an objective the 9/11 Commission reported was crucial in antiterrorism efforts.

The bill criminalizes disclosures regardless of whether they create actual damage to either national security or specific intelligence capabilities. Current law already criminalizes the release of national security secrets such as identities of covert agents, intelligence on communications capabilities, and data concerning nuclear weapons. The legislation would expose individuals who have done no harm to potential prosecution.

A person disclosing information with no intent to cause harm would be guilty of a crime. The bill does not require proof that the discloser intends to cause harm or that the person receiving the information intended to harm national security or public safety, or even – the lowest state-of-mind requirement in current law – that the discloser has any reason to believe that the disclosed information could be used to cause harm.

The bill erodes "whistleblower" protections. The legislation would discourage government "whistleblowers" from coming forward to Congress or the media and expose wrongdoing, abuse and mismanagement. Without information that is exposed by "whistleblowers" the American people will not be able to provide a check on the actions of its government.

By directly going after news sources, the bill likely exposes journalists to pressure and more frequent subpoenas to reveal confidential sources. Although most states and the District of Columbia have shield laws protecting journalists from revealing sources, no such law exists at the federal level.

The overbroad language means even government officials working in their official capacity could be exposed to criminal prosecution. During a press briefing on Nov. 7, 2000, then-Defense Department

spokesperson Kenneth Bacon described his concern that the language – identical to S. 3774 – could “prevent reference to classified information in answering everyday questions.” Others at the Pentagon, according to Bacon, thought the provision “too clumsy, too sweeping.”¹

The bill creates incentives to overclassify and harms information sharing efforts. Fany government employees uncertain of the laws and policies as they apply to their agencies, the bill creates a strong negative incentive – jail – to overclassify information and wrongly decline requests for documents that the public has a right to see.

The bill would do nothing to educate government officials and the media to help reduce leaks of truly harmful secrets. 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 need to understand how to proceed when they learn of highly sensitive information that could be potentially harmful if disclosed.

A Note on the “Dialogue”

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. Unfortunately, the dialogue was not formalized and has an intermittent existence because of changing players within the intelligence community. Recently, the Aspen Instituted agreed to host a renewed “Dialogue” bringing together very senior government officials and active journalists and publishers to share perspectives and concerns. One concrete step to constructively address these challenges would be for intelligence leaders in the executive branch and Congress to endorse further support for this dialogue and to participate.

Conclusion

Our organizations believe S. 3774 is unnecessary. Even if it were, the legislation as drafted is overbroad and would prevent disclosure of vastly greater quantities of information than the highly sensitive items at which it is supposedly targeted. We strongly recommend that Congress refrain from enacting any new legislation governing unauthorized disclosures. We take seriously the media’s responsibility to avoid disclosing true national security secrets while informing the public of government activities. We welcome further dialogue between the media and government to advance our mutual understanding of specific concerns.

¹ Department of Defense News Briefing, Nov. 7, 2000. Available at <http://www.fas.org/sgp/news/2000/11/dod110700.html>; last accessed 8/9/06.