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**U.S. Government Secrecy and  
the Current Crackdown on Leaks**

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## INTRODUCTION

In the never-ending sparring match between the government and the news media, no subject produces more friction than the practice of leaking classified information. Government officials—at least those who don't leak—denounce the practice. They say it can damage intelligence operations and reduce the government's ability to detect and deter terrorists or other enemies.

Journalists, on the other hand, say they couldn't do their jobs without the leaks. Almost all leaks come from government officials, they point out. And, in an era of managed news and wholesale classification of government documents, such back-channel information is often the only way the public can gain an understanding of what its government is thinking and doing.

Not surprisingly, the debate over leaks has become increasingly heated since the 9/11 terrorist attacks and the showdown with Iraq over giving up any chemical and biological weapons and abandoning its quest to develop weapons of mass destruction. Defense Secretary Donald Rumsfeld called for jail terms for leakers and President Bush joined him in denouncing them. An intelligence official even suggested sending “swat teams into journalists' homes” if necessary to root out reporters' sources.

Ironically, government officials and military officers, from the President on down, routinely authorize leaks for policy or political purposes. On October 20, 2002, Senator Bob Graham of Florida, then Senate Intelligence Committee Chairman, accused the Bush Administration of selectively disclosing classified information that corresponds more closely to its political agenda than to national security concerns. In a November 17, 2002 article, for example, the New York Times reported the reason government officials confirmed a secret report about monitoring Iraqis in the United States to identify potential terrorist threats was “an apparent attempt to rebut critics in Congress and elsewhere who have complained in recent days that American intelligence agencies are failing in their war on terrorism.”

There are many motives for disclosing secrets, of course. Some leaks come from so-called whistleblowers who want to expose what they see as government wrongdoing or inefficiency or mistakes. Some are designed to stir opposition to a pending action. Leaks are also used to launch trial balloons; that is, to float planned policies or decisions in the news

media as a way of testing public or political reaction. Leaks are frequently used to shape or spin news coverage. And some officials use leaks to settle political scores or even to curry favor with reporters they think may prove useful.

Today, the basis for taking any legal action against leakers of classified secrets dates back to the Espionage Act of 1917. The statute provides that any person who has information “relating to the national defense and has reason to believe it could be used to harm the United States and willfully transmits the information to an unauthorized recipient” could be subject to prosecution and a 10-year prison sentence. In addition, the government must show an intent to harm the United States or benefit a foreign power—no easy thing to prove. As a result, the ongoing debate centers on attempts to enact a much more sweeping law that would provide for prosecution of anyone who leaks any classified information regardless of intent or damage to national security .

Even before 9/11, proponents of tougher anti-leak laws were on the verge of victory. In fact, in 2000, for the first time in history Congress passed a bill covering the unauthorized disclosure of all forms of classified information. So sweeping was the legislation that leaking patently harmless information could draw up to three years in prison whether or not there was an intent to help a foreign government. The press was caught napping while Congress debated the issue, mostly in secret. Only an unprecedented, last-minute lobbying campaign by media executives and a late flood of editorial columns and news articles persuaded President Clinton to veto the measure, which his Administration had supported.

Over the years, the sparring between the press and the government has sprung from what former Senator Daniel Patrick Moynihan has called “a culture of secrecy.” Its roots go back to World War I and World War II, and grew tremendously during the Cold War—when the real and imagined dangers of communist subversion combined with the threat of nuclear war raised concern over national security to previously unimagined levels.

Now, despite the end of the cold war, the number of documents being stamped secret by the government has soared .The total classification actions during the George W. Bush Administration’s first fiscal year set an all time record, according to a November 18, 2002 report by the Information Security Oversight Office—the agency charged with overseeing the classification system. In part, the huge surge in classified documents may be

attributed to increased national security concerns in the wake of 9/11. However, the Bush Administration had a predisposition to secrecy before the terrorist attacks that suggests greater secrecy has become part of the government mind-set regardless of the actual sensitivity of the material being classified.

The huge trove of secret information actually encourages leaking. As Justice Potter Stewart said in the Pentagon Papers case, “When everything is stamped secret, nothing is secret.” As a result, leaking has been such a routine way of doing business in Washington for so many years that even some government officials say the government would have trouble functioning without some classified information being disclosed to the press.

This discussion paper looks at the long and continuing struggle over the scope of laws to punish leakers and discusses as well the mushrooming of secrets over the years. It also examines efforts to speed up the job of declassifying hundreds of millions of pages of classified material. Finally, it examines the work of an unprecedented group of government and press representatives who meet periodically in off-the-record sessions to discuss ways to protect the most sensitive national security secrets without abridging the public’s right to know what its government is doing.

The work of the group—known simply as the “Dialogue”—is the one bright spot for the public’s right to know in an Administration steeped in secrecy. Working quietly with no public notice, the group contributed to a decision by Attorney General John Ashcroft not to seek a more sweeping anti-leaks law in 2002. The threat of future legislation has not receded, however. In his October 22, 2002 letter to Congress announcing his decision, Ashcroft declared the Administration would work with Congress if it should choose to pursue the more sweeping statute.

Even more troubling, the Patriot Act, the Homeland Security Information Act, and the Homeland Security Act, all passed in the aftermath of 9/11, will create a whole new category of secrets and officials empowered to classify information. The new system will encompass virtually all agencies of the federal government and will require huge numbers of state and local government officials, as well as corporate officials who do business with the government, to sign sworn statements they won’t disclose classified information.

## **HISTORICAL OVERVIEW**

Openness in government, as opposed to secrecy, was seen as a democratic value when President Woodrow Wilson was inaugurated in 1913. Beginning in the 1880s, for example, the State Department began publishing an annual review called “Foreign Relations,” that was known for its candor. In his book, “Secrecy,” Moynihan quoted State Department historian William Z. Slany: “The question of secrecy appears rarely to have risen in the editing of the published documents.”

But World War I changed government attitudes about secrecy and press access to defense information. Much of today’s structure of secrecy took shape in about 11 weeks in the spring of 1917 while the Espionage Act was being debated by Congress and war hysteria was at a fever pitch. No one fanned the fear of war more than Woodrow Wilson.

In his 1915 State of the Union address, with war clouds on the horizon, Wilson warned of some U.S. citizens of foreign origin “who have poured the poison of disloyalty into the very arteries of our national life...” The government, he said, needed more laws to address the problem and should enact them quickly because “such creatures of passion, disloyalty, and anarchy must be crushed out.”

Never before or since has a president spoken in such harsh, vitriolic terms about some of the country’s own foreign-born citizens. As the Commission on Protecting and Reducing Government Secrecy, chaired by Moynihan, reported in 1997: “Even during the Cold War; when there were indeed persons of foreign birth living in the United States and actively involved in seditious activities on behalf of the Soviet Union, no president spoke like that.... But the telling fact is that the intensity of fear and yes, loathing of those years was never equaled later.”

Wilson called specifically for legislation that would make it a crime to disclose all national defense secrets to unauthorized persons. Even though the Senate passed an espionage law in 1916 that included that provision, opposition to it quickly mounted. The debate continued even after war was declared on April 4, 1917. Opponents declared the provisions would amount to prior restraint censoring newspapers on what they could publish and would delegate unlimited power to the President to decide what defense information could be published.

The debate was especially heated in the Senate where William E. Borah, Republican of Idaho, referred to the Sedition Act of 1798—an antecedent of the Espionage Act—as he attacked the pending bill: “Once before in the history of the government we undertook to establish something in the nature of an abridgement of speech and of the press. It was a complete and ignominious failure. It did not serve the objects and purposes of those who fathered it. It accomplished nothing in the way of that which they desired it to accomplish.”

Despite heavy lobbying, by President Wilson, Congress dropped the anti-leaks provision before passing the Espionage Act, which became law on June 15, 1917. Though less sweeping than Wilson desired, it banned the unlawful obtaining of national defense information and the unlawful disclosure of such information to a foreign government or its agents. It also included a provision punishing certain “seditious or disloyal acts in time of war.”

The Espionage Act has been amended several times over the years to cover disclosure of secret codes or disseminating unauthorized photographs of military installations and equipment. Since 1950, penalties have been added at various times for those who violate the statute, also to update the list of protected information, such as adding spacecraft, satellite systems, and other advanced technologies. Yet, the government has caught few leakers.

### **THE CASE OF SAMUEL LORING MORISON**

The legislative history of the Espionage Act clearly shows that Congress’ original intent was to punish spies, not those who disclose information to inform the public. However, in two exceptional cases, the government has used the act to prosecute civilian employees for unauthorized disclosure of classified information that clearly had no connection with espionage.

The first case involved the 1971 “Pentagon Papers” when former Defense Department official Daniel Ellsberg and Rand Corporation analyst Anthony Russo were charged with leaking classified information on the Vietnam War to the New York Times. That case never established a legal precedent for the prosecution of leakers because a federal judge dismissed it on grounds of prosecutorial misconduct. He based his decision on the

disclosure that the “plumbers,” a secret intelligence group connected to the Richard Nixon White House, had subjected the defendants to break-ins and wiretaps.

The second exception involved Samuel Loring Morison, a civilian analyst with the Office of Naval Intelligence in Suitland, Maryland—the only person ever convicted under the Espionage Act for leaking secrets to the press. A Navy veteran who served in Vietnam, Morrison was convicted in federal court in Baltimore in October, 1985, for violating the act by giving three classified photographs of a Soviet ship under construction to Jane’s Defense Weekly, a private British publication. The jury also found him guilty of “unauthorized possession” of military information for keeping secret documents in his home and two counts of theft of government property for removing the photographs and documents from the naval center in Suitland.

The fact that Morison had been working at Jane’s part time with the approval of his superiors in Naval intelligence complicated the case. The government argued that he was trying to improve his chances of getting a full-time job by providing the photographs and that the quality and resolution of the photographs showed a reconnaissance capability previously unknown to the Soviets. Morison’s defense was that the photographs did not reveal anything the Russians didn’t already know.

The conviction of Morison, grandson of the distinguished naval historian and author Samuel Eliot Morison, alarmed the press and many of its advocates. They argued that if the conviction were upheld on appeal, the press would be stifled in reporting many government matters it covered routinely and reporters would be subjected to subpoenas in search of their sources and might even be prosecuted as a party to an illegal act. Justice Department prosecutors countered that while they hoped the verdict would send a clear signal that classified material should not be leaked, they respected First Amendment concerns and had no plan to hamper the media in its coverage of government.

The press was not mollified. Major print and broadcast media, as well as numerous news organizations and First Amendment groups, filed a lengthy brief supporting an appeal by Morison, arguing that “whatever one might think of government officials who release confidential or secret information to the press, it seems clear that leaking is not the same as espionage, and it is not the same as theft....Congress has been sensitive to the valuable informative role of press leaks, and has repeatedly rejected proposals to criminalize the mere

public disclosure of classified or defense-related information. Samuel Morison's conviction, if upheld, will overrule these careful judgments of Congress. It will restrict an important source of public information...and it will expose journalists and government officials alike to the threat of criminal prosecution for activity, which, no matter how offensive to those in power, has never been viewed as criminal.”

However, a three-judge panel of the U.S. Fourth Circuit Court of Appeals, in a unanimous decision, upheld Morison's conviction and two-year prison sentence. In its opinion, the panel stressed that while its decision did not mean that news organizations could be prosecuted for publishing government secrets, it did not rule out that possibility.

Despite First Amendment issues and the concerns expressed by Morrison and the media, the Supreme Court refused to hear the case on appeal. Nevertheless, so far the government has not used the Morison case as a legal precedent to subpoena or prosecute reporters or even to prosecute government employees for unauthorized disclosures. Nor has the case slowed the torrent of leaks to reporters, which includes not only the daily disclosures regarding policies, but more sensitive matters concerning sources and methods and other national security information.

Morrison applied for a pardon in 1998 and Moynihan, writing in his former capacity as chairman of the Commission on Protecting and Reducing Government Secrecy, sent a passionate letter to President Clinton supporting the application. He observed that the commission had stressed that in the eighty-one years since the Espionage Act had passed, Morison was the only person ever convicted of passing on classified information. Singling out Morison for prosecution appeared “capricious at best,” declared Moynihan, who argued that what was remarkable was not the crime, but that Morrison was the only one convicted of something that had become a routine aspect of government life: leaking information to the press in order to bring pressure to bear on a policy question.

Although the CIA strongly objected, President Clinton pardoned Morison on January 20, 2001, his last day in the Oval Office. The pardon outraged Senator Richard Shelby, an Alabama Republican and leading proponent of clamping down on leaks. He said it would do nothing to curb a torrent of leaks and only underscored the need for new legislation that would make unauthorized leaks a crime. But First Amendment advocates hailed the decision and accused the Reagan Administration of having inappropriately turned

the Morison matter into a test case of whether the Espionage Act applied to all unauthorized disclosures of classified material to the media.

### **MUSHROOMING GOVERNMENT SECRECY**

In many respects, the United States Government remains remarkably open, particularly when compared to foreign governments. It is not unusual, for example, for foreign academics or journalists to be denied access to government records in their own countries, only to find what they are looking for in the United States archives. In a 1987 20<sup>th</sup> Century Fund report, “Leaking: Who Does It? Who Benefits? At What Cost,” Elie Abel noted that few governments in Europe or elsewhere “allow reporters to forage for news in the corridors and offices of sensitive governments, as the United States does every day.”

At the same time, acting in the name of national security, federal officials increasingly are curbing reporters’ physical freedom to “forage for news in the corridors and offices” of government buildings, even though they carry government-issued press credentials. And each year the mountains of documents fenced off from reporters by secrecy classifications grow larger.

There are no laws on the books establishing procedures for classifying or declassifying documents. For most of the government’s history, individual agencies developed their own ad hoc policies. Beginning with President Truman, however, uniform policies have been established through presidential orders for all agencies except the Atomic Energy Commission, which has its own legal procedures. But it wasn’t until the Nixon Administration that a serious attempt to deal with declassifying documents was made.

Surprising as it may seem for a president obsessed with secrecy, Nixon issued the first executive order requiring a systematic review of records for possible declassification. His order required the review after records had been classified for 30 years or more. The declassification became a monumental task, according to Steven Garfinkel, who was a 26-year-old attorney with the General Services Administration when the new policy was issued.

His superiors instructed Garfinkel to review a huge supply of World War II documents stored in the National Archives in Suitland, Maryland, and see if they could be declassified. “I walked into this stadium size room,” he recalled in an interview, “and it was a mess, lined with shelves and shelves and boxes and boxes and it was all junk. It was

declared to have permanent historic value, but it would have been better to throw it away. It was all the basic procurement that had been done during the war to buy for the military. I went through a couple of boxes and I said, ‘this is nuts, I’ll be here the rest of my life if I look at all these boxes.’ So I said, ‘this room is declassified’ and went back to my job.”

Garfinkel, who probably knows more about government secrets than anybody, later served for 20 years as director of the Information Security Oversight Office (ISOO), a small, little-known agency established during the Carter Administration to oversee classification and to promote declassification as soon as possible consistent with national security concerns. He cites his first declassification experience as an example of how government often classifies huge amounts of documents and leaves them in storage long after they could possibly be sensitive. Such over-classification, he said, “becomes a big deal in time because sensitivity decreases over time, information becomes known, events change and yet stuff could lay around for decades and decades that should be declassified.”

Under a 1978 executive order by President Jimmy Carter, government officials for the first time were ordered to consider the public’s right to know in classifying information and were instructed to use the lowest level of clearance when in doubt. Even that did little to slow the build-up of documents. And the build-up even got much worse when President Ronald Reagan signed a 1982 executive order rescinding those provisions and essentially encouraging more classification of materials.

A significant change came only after President Clinton issued an executive order in 1995 aimed at holding classification to the minimum necessary and promoting as much declassification as possible consistent with national security. Garfinkel worked out the policy change with the help of two Clinton aides—John Podesta, who would later become Clinton’s chief of staff, and George Tenet, a national security official who would become CIA director.

Clinton’s Executive Order 12958, which became effective Oct. 14, 1995, and remains in effect, resulted in the declassifying of more than 900 million pages of documents through fiscal 2001—more declassification than occurred under all previous presidents combined, according to Garfinkel.

Among the order's provisions aimed at keeping secrecy to a minimum is one that states when there is doubt about the need to classify information, it should not be classified, contrary to the previous presumption in favor of classification. The order also limits the duration of classification of most information to 10 years, except for documents that might reasonably be expected to reveal sources or methods or that deal with the development of weapons of mass destruction. It also provides for automatic declassification of all information more than 25 years old with exemptions for a series of specific national security concerns.

Each of the major classifying agencies—including Defense, State and Justice departments—now has in place an infrastructure for declassifying records, something almost none of the agencies had prior to Clinton's order. And they have continued to declassify unprecedented numbers of records with permanent historic value. In fiscal 2001, for example, 100,104,990 pages were declassified, compared to 11,452,930 in fiscal 1994 before the Clinton order was issued. In fact, J. William Leonard, who succeeded Garfinkel as ISOO director after Garfinkel retired in January, 2002, reports that the declassification system continues to churn out so many millions of documents that it exceeds the ability of agency systems and resources to process the records for public access.

At the same time, the pace of classifying records continues to accelerate dramatically. The total of all classification actions reported for fiscal 2001 increased by 44 per cent to 33,020,997, with the Defense, State, and Justice departments accounting for 96 per cent of the actions. As Leonard noted in a letter to President Bush accompanying the ISOO annual report, the agency does not expect the upward trend in classification to change “particularly in light of the current global war on terrorism.”

Looking ahead, the ISOO reported it is “reasonably clear” that the automatic declassification program will be affected by the September 11 terrorist attacks “if only in the number of resources dedicated to it.” The agency urged that staffs assigned to handle declassification be maintained because each year huge amounts of classified information becomes subject to automatic declassification.

If staff capabilities are not maintained, the ISOO reported, “another mountain” of older secrets will arise to choke the system. In fact, organizations that monitor government

secrecy report that there already has been a significant slow-down in the pace of documents being declassified under the automatic declassification system.

### **CLINTON PRESSED TO VETO A BILL HE SUPPORTED**

Surprisingly little attention was paid when Senator Shelby introduced his anti-leaks legislation in the form of an amendment to the 2000 intelligence reauthorization bill. Except for a debate on public television's News Hour with Jim Lehrer on June 29, 2000, the measure attracted little news coverage, largely because the Congressional debates were taking place behind closed doors. And although the media had repeatedly won battles over similar legislation in the past, that summer the issue was not on the radar screens of the Newspaper Association of America and other major media groups.

The Lehrer show featured a debate between Senator Shelby and Scott Armstrong, an investigative journalist and strong advocate of openness in government. Armstrong argued that the bill would do nothing to stop authorized leaks by top government officials to influence policy, but that it would intimidate whistleblowers and others in government who want to expose inefficiency and wrongdoing. Shelby declared that the bill was designed to ban disclosures of classified information that damages national security, not to protect the wrongdoings of politicians. And he pointed out the Senate Intelligence Committee, which he then chaired, had unanimously endorsed the bill and said he was working with the Clinton Administration to get its support.

Armstrong, who would emerge as a leader of a campaign against the anti-leaks amendment, asked Shelby why his legislation was necessary. The senator replied the information was classified, but he would tell Armstrong if he would come by his office. Armstrong asked him if the law he was advocating wouldn't make that illegal—a suggestion that seemed to stun Shelby. Later, he thought Shelby was uncomfortable defending his measure against arguments it could lead to investigations and wiretaps of journalists. Armstrong says he left Washington for a summer-long business trip thinking Clinton would never support the measure and Congress would not pass it .

While Armstrong was away from Washington, Shelby was adroitly pushing his legislation. The CIA was working hard to get it passed, too. In particular, the agency was upset over repeated leaks of national security secrets, especially to Bill Gertz of the right-

wing Washington Times. He had infuriated intelligence agencies for years with articles citing secrets, many based on intercepted communications. Jeffrey H. Smith, a Washington lawyer and former general counsel of the CIA, said in an interview that Gertz's stories "drove people at the CIA absolutely nuts because he was just writing things and never asking if his stories can do any harm. And they did do harm."

Gertz had cited numerous classified documents in a book, "Betrayal," as well as in the Washington Times, in criticizing Clinton's foreign policies toward China, North Korea, and Russia. In the book, published in 1999, Gertz wrote that "dissidents and patriots" in the intelligence community were so angry at Clinton's "betrayal of American security" that they "responded in the only way they knew how: by disclosing some of the nation's most secret intelligence."

CIA Director George Tenet had expressed anger at Gertz's reporting and had publicly complained that the executive branch "leaks like a sieve." It was Tenet who had encouraged Shelby to introduce his anti-leaks amendment in the first place. And now Tenet was enlisting support from other Administration officials. Attorney General Janet Reno had opposed an early version of the measure, but joined Tenet in supporting it after some minor changes.

In October, Armstrong returned to Washington, where he is executive director of the Information Trust, a non-profit group that promotes openness in government. He was casually thumbing through the Washington Post of October 13 when a headline on page A5 jumped out at him: "Congress Passes Bill to Punish Leaks." It was a perfunctory, 236-word story with no by-line, no doubt based on an Associated Press story. It quoted Representative Nancy Pelosi, California Democrat and member of the House Intelligence Committee, as calling Congress "foolish" for giving the executive branch a blank check for prosecuting leaks cases. Buried inside the New York Times was a short Associated Press story that included the same Pelosi quote. Neither the Post nor the Times had even bothered to staff the story.

The intelligence bill, including the Shelby amendment, had passed Congress by voice vote while the press had paid little attention either to the legislative process or the outcome. "I couldn't believe it at first," Armstrong said in an interview. "Never any hearings in the House, never any real hearings in the Senate, and the whole bill passed by voice vote!"

Armstrong, who called the Shelby amendment “the most draconian thing to happen to the First Amendment in our lifetime,” started working the phones. First, he telephoned First Amendment advocate groups, such as the American Society of Newspaper Editors and the Society for Professional Journalists, seeking an explanation for why the bill had passed. They told him they had lobbied against the Shelby amendment, but the major media had done little to oppose it.

Next, hoping to spur a drive to get President Clinton to veto the intelligence bill, he telephoned Jeffrey Smith, the former CIA general counsel, who had represented Armstrong when he headed the National Security Archives, and Boisfeuillet Jones Jr., publisher of the Washington Post, where Armstrong had been an investigative reporter. Jones acknowledged in an interview that he and the National Newspaper Association had been caught off guard by the legislation’s passage and needed to go into “high gear” to drum up support for a campaign if they were going to have any chance of persuading Clinton to veto a bill he had supported.

Jeffrey Smith thought the Shelby amendment was less threatening than Armstrong did but said he thought it could be “chilling” nonetheless. He noted that Kenneth Bacon, the Assistant Secretary of Defense for Public Affairs, was especially upset about the measure and feared that if it became law, information he might pass on to journalists on background could subject him to prosecution. Bacon, who made his views known to the White House, also told the Washington Post the measure was “disastrous for journalists...disastrous for any official who deals with the press in national security, whether at State, the NSC or the Pentagon.”

Smith said he agreed with Bacon’s sentiments because when he was in the State Department during the Nixon Administration, he had seen Secretary of State Henry Kissinger instruct a senior official to do a backgrounder with reporters and when the story came out and was criticized for including classified information, Kissinger wrote the official a letter admonishing him for leaking the information and made the letter a part of his file. “That was disgraceful,” Smith said.

Opponents of the amendment found an ally in John Podesta, the White House Chief of Staff. Like Reno, he had objected to an earlier version, which he criticized as being overly broad. In an interview, he said he thought after he raised his objections, the issue had been

put on the back burner, but in any case he lost track of it. Following his objections, the proposal had been narrowed, but the Justice Department, Office of Management and Budget and White House had all signed off on it and then sent it to Congress, confirming the President would sign it if Congress passed it.

“We just didn’t do our homework,” Podesta, now a Georgetown University law school professor, acknowledged. “All of a sudden, the bill passed with the negotiated amendment in there, slightly narrower than the original, but well on the way to an official secrets act.”

Since the bill, as passed by Congress, bore the Administration’s imprimatur, Podesta found it awkward to be lining up support for a veto. And he thought persuading Clinton to veto a bill he had earlier endorsed and was supported by the CIA and Justice Department, was a long shot. But Podesta had a history of supporting First Amendment causes and felt bad about letting the intelligence bill slip through with the Shelby Amendment attached. So he began seeking support for a veto from senior officials. He ultimately found allies in Sandy Berger, Clinton’s national security advisor, Secretary of State Madeline Albright, and Defense Secretary William Cohen.

Meanwhile, Jones, the Post publisher, had been joined in the lobbying campaign by Arthur O. Sulzberger Jr., publisher of the New York Times; Tom Johnson, then Chairman and CEO, CNN; and John F. Strum, President and CEO, NAA. They sent a letter to President Clinton arguing that the Shelby Amendment would, in effect, create an official secrets act of the kind that had always been rejected by this country, and they urged the President to veto the intelligence bill.

Their letter pointed out that Congress had enacted a variety of laws to punish disclosure of specific types of classified information, such as communications intelligence, atomic weapons, and covert agents, but added: “Congress has resisted demands for a broad officials secrets act even in the face of serious threats to the nation’s security—including the outbreak of World War I, the attack on Pearl Harbor in World War II, and the Cold War that followed. In 1985 and thereafter, the CIA has proposed substantially similar legislation through Intelligence Authorization acts, but the proposals have been rejected each and every time.” (See Appendix I for the text of the letter.)

Podesta said while the press was especially sensitive about weighing in on the government it covered, in this case it was not journalists, but media executives who were doing the lobbying. “It was a different level,” said Podesta, “and it was clear to the President that this was no third tier issue. He knew he needed to understand the law, the substance of the bill, and agency viewpoints. When I discussed it with him, he said he could get back to me later.”

Opponents of the measure felt strongly they should also try to persuade the Justice Department to change its position on the legislation or to at least soften its support for it. Since it would be inappropriate for working journalists to be involved in the lobbying, Armstrong sought media executives for that mission, too, but executives with a strong editorial background who would have credibility with Justice Department lawyers when laying out the bill’s likely impact.

The clock was ticking when Armstrong, Bill Kovach, former editor of *The Atlanta Constitution* and a long-time *New York Times* reporter and editor, and Ben Bradlee, a senior news executive and former editor of the *Washington Post*, met with about 15 Justice Department lawyers in the Attorney General’s Conference Room on Friday afternoon, Nov. 3. If Clinton failed to veto the bill by the end of the following day, it would automatically become law.

Kovach, who also had served as curator of the Nieman Foundation, felt uncomfortable lobbying the government on a piece of legislation. “It’s not the kind of thing I would want to do,” he said in an interview, “and I didn’t want to get involved. I recommended other folks for it but there wasn’t much time and it was a really serious issue so I agreed to do it.” Bradlee wasn’t thrilled to be involved either and said in an interview he didn’t see how their arguments could be of much help since most of the time “things just don’t work like that.” But for two hours the trio made their case to the Justice Department lawyers that the anti-leaks legislation was bad for the press and bad for the government.

The Justice attorneys conceded that passage of the legislation could mean reporters would be drawn into leaks investigations, but suggested they could write regulations that would protect reporters. They conceded little else, however, and the journalists felt that most of the attorneys didn’t understand the way leaks had become so commonplace in the way the government operated. The attorneys, it seemed clear to them, didn’t realize that when a

Secretary of Defense speaks for the record, a reporter might interview 10 other officials on what he said and those officials, to help explain or verify or amplify the Secretary's statements, might well use classified information.

The journalists left the session feeling certain Reno would continue supporting the legislation. And they felt sure Clinton would sign it the next day. That would mean any official who leaked any classified information, no matter what the motive or intent, could be subject to prosecution.

That had been Kenneth Bacon's concern at the Defense Department. And it was a concern of Strobe Talbot at the State Department. Talbot, Deputy Secretary of State and former Time Magazine editor and correspondent, thought the Shelby Amendment was "unbelievably pernicious for all kinds of reasons." In an interview, he recalled attending an interagency meeting in the White House's Roosevelt Room where the issue was discussed shortly before Clinton's veto decision. Bob McNamara, the CIA the general counsel, made what Talbot thought was a "pro forma" argument for the bill, but Attorney General Reno strongly advocated it.

Talbot, who is now President of the Brookings Institution, told the other officials that he was constantly in the position of using classified information to provide background for reporters on foreign trips by the Secretary of State. If Clinton signed the intelligence bill, he said, whether the Shelby Amendment could be used to prosecute him for such activities "would have to depend on the good sense and good will of the people enforcing the law. And there would certainly be the potential you could have more than a letter of reprimand in your file. You could be prosecuted."

On Saturday morning, November 4, the last day the bill could be vetoed or would become law, Talbot went to the White House and delivered the same message to President Clinton, a long-time friend. Talbot told the president the State Department would have trouble functioning if the measure became law and urged him to veto it. Talbot recalls Clinton saying he was listening to both sides and would fully understand the issue before making a decision.

Later that day Armstrong, dejected about prospects the intelligence bill would be signed, tried without success to reach Podesta by telephone at the White House. A short

while later Podesta telephoned him with the news: Clinton had vetoed the bill and sent Congress a message saying the anti-leaks provision was overbroad “and may unnecessarily chill legitimate activities that are at the heart of our democracy.”

“I agree that unauthorized disclosures can be extraordinarily harmful to the United States national security interests and that far too many such disclosures occur,” Clinton said. “Unauthorized disclosures damage our intelligence relationships abroad, compromise intelligence gathering, jeopardize lives and increase the threat of terrorism.” But he went on to say the Shelby amendment posed dangers to liberty that outweighed security concerns. And, in an unusual admission for a President, he noted that his own administration’s deliberations that led to congressional approval of the intelligence bill “lacked the thoroughness this provision warranted, which in turn led to a failure to apprise Congress of the concerns I am expressing today.” (See Appendix II for the text of the veto message.)

Talking to Jones, the Washington Post publisher, after vetoing the bill, Clinton also made an unusually candid admission: “We let that one slip by us.”

Clinton’s veto infuriated Shelby. The Senator angrily told the Senate: “After 8 years of subordinating national security to political concerns, the Clinton-Gore administration now exits on a similar note. Three days before the election, in the face of hysterical, largely inaccurate, but extremely well-timed media lobbying blitz, the President overruled his national security experts and vetoed this bill over a provision to reduce damaging leaks of classified national security information.”

Shelby accused media organizations and others of having “conjured up a parade of dire consequences that would ensue” if his amendment had become law. But he contended it would not have eroded First Amendment rights and “would not have silenced whistle blowers who would continue to enjoy current statutory protections, including those governing the disclosure of classified information to appropriate congressional oversight committees.”

### **SHELBY PLOWS AHEAD**

Still upset that the measure he had fought for so hard had been killed by Clinton, Shelby brought up the amendment again in 2001. Now the new Bush Administration was in place, and both President George W. Bush and Attorney General John Ashcroft routinely

employed and defended secrecy and vehemently criticized unauthorized disclosure of classified documents. At the same time they were also aware of the controversial nature of the proposed legislation. Moreover, they knew that news media executives had campaigned heavily the year before in persuading Clinton to veto the measure and that media interests were now fully mobilized for the new challenge.

Executives of local print and broadcast media from around the country bombarded their members of Congress and Administration officials with calls opposing the amendment and newspapers published editorials denouncing the legislation. And they used Republican intermediaries to quietly lobby top White House and Justice Department officials.

Shelby sought the support of Bush and Vice President Cheney but got no commitment. An intelligence committee aide, according to the Washington Post, said Shelby was told the Administration's position was being worked on. Some sources said Administration officials discouraged Shelby from going forward. And the Post quoted John Martin, former Internal Security Chief of the Justice Department, as saying current law was sufficient to cover people who provide classified information to unauthorized persons, including the press.

Martin, who had handled the leaks prosecution of Samuel Loring Morison, said the problem with leaks had not been the lack of statutory sanctions but the lack of will on the part of agency heads and Cabinet secretaries to enforce security regulations. He reckoned that if the amendment became law and was enforced "you could relocate the capital from Washington to Lewisburg, Pa. (site of a federal prison)" because "the biggest leakers are White House aides, Cabinet secretaries, generals and admirals, and members of Congress."

On Sept. 5, 2001 the Senate Intelligence Committee again took up the Shelby amendment. Tenet and Ashcroft were scheduled to testify, but so were several well-prepared opponents: Floyd Abrams, a lawyer representing the New York Times; Don Oberdorfer, former long-time national security reporter for The Washington Post; Blaine Harden, a lawyer representing Jones, the Post publisher; and Philip B. Heymann, a Harvard law school professor and former Deputy Attorney General, who had supervised a number of investigations of leaks while at the Justice Department.

The Bush Administration, however, had been unable to reach a firm consensus on the measure. A senior intelligence official told reporters the Administration just didn't want to take on any additional political problems at the time. Moreover, Justice Department attorneys were divided on how to proceed. Ashcroft told the committee the Department needed more time to study the issue. The committee dropped the anti-leaks amendment, then approved the intelligence bill without hearing testimony from the witnesses. And it instructed the Justice Department to study the issue of leaks and report back to the committee in six months.

If the anti-leaks measure had come up a week or so later—in the aftermath of the 9/11 terrorist attacks when national security concerns dominated Washington's political agenda—the committee undoubtedly would have endorsed it. And Armstrong and other leading opponents say that under those circumstances they have no doubt the full Congress would have passed the restrictions too.

The intelligence appropriations bill Congress ultimately passed called for Ashcroft to appoint an inter-agency task force to analyze protection against leaks, including criminal and civil penalties, and to determine whether additional laws were needed. The task force included officials of the Justice, Defense, State, and Energy departments, as well as officials from other agencies that handle classified information.

## **MEDIA AND GOVERNMENT DIALOGUE**

With that formal review underway, Armstrong and Smith, the former CIA general counsel, embarked upon an extraordinary venture that they had been planning for several months and that they hoped would head off any additional anti-leaks legislation. They enlisted media executives and government officials to engage in an informal, ongoing dialogue about the issue of protecting Government secrets without infringing on the right to report on the Government.

The discussions of this unofficial body, called simply "Dialogue," generally are off the record, but several of the participants, including Armstrong and Smith, who function as facilitators, agreed to discuss its sessions and its aims with the author of this paper.

The Dialogue sessions have been held over dinner at Washington's Metropolitan Club periodically—usually once every several weeks—for the past year. They have received

virtually no publicity, but have attracted some of Washington's top journalists, as well as some of the government's senior intelligence officials. Officials from the Central Intelligence Agency, National Security Council, National Security Agency, and Defense Department, as well as several congressional aides, have taken part in the sessions. (For a list of those attending, see Appendix III.)

From all accounts, both sides have considered the meetings constructive, although some are more enthusiastic than others in assessing the Dialogue's impact. The best evidence of positive impact is that members of Attorney General Ashcroft's task force on leaks consulted with Dialogue participants before drafting his report to Congress of October 30, 2002, which concluded new anti-leaks legislation was not needed at that time, although it recommended the Administration take steps to crack down on unauthorized disclosures of classified information.

Several participants said one of the most significant achievements of the Dialogue meetings, aside from weighing in on Ashcroft's decision not to seek anti-leaks legislation, has been a recognition on both sides of the need for the media and the government to be educated about both the dangers and the values of leaks. "National security leaders need to understand that some leaks are good for democracy and the country even though others are bad," says Jeffrey Smith. "The press needs to understand more about the sensitivity of national security leaks. Everybody understands you don't publish that the 82<sup>nd</sup> Airborne is planning to land somewhere, but not everyone understands that it's a national security problem to report that Osama bin Laden's cell phone calls have been intercepted."

Bill Harlow, CIA public affairs officer, agrees the dialogue meetings could be educational for both sides. He points out there are times when a news article about sensitive issues can be written without changing its thrust or doing any national security damage if journalists are willing to check with intelligence officials. Often, agreeing to change just a few words is all it takes, he said. "There is value in sensitizing editors to those facts," he said, "but I'm not overly convinced how much good it does because there are too many players, too many editors involved."

In fact, although Harlow thinks the dialogue has been of some value, he is not as sold on it as some of the other participants. Unfortunately, he said, there is too much of government representatives waving their hands and complaining about leaks and press representatives

waiving their hands and complaining about the over-classification of records. “And they’re both right,” he said. “They’re all reasonable people, but coming to common ground on the issue is difficult.”

That’s true because both sides approach the issue from such different perspectives. There are instances where the media is irresponsible in using classified information that might endanger national security while the government keeps far too many secrets that have little or nothing to do with national security. Media representatives at the Dialogue meetings insist that responsible journalists have no interest in disclosing secrets that might compromise national security or in some way endanger lives.

Nobody wants the intelligence agencies to know less or to be prevented from getting information valuable for their analysis, they say, and responsible journalists will negotiate with the agencies to try to find a way to write articles based on leaks without disclosing information that might be damaging. On the other hand, intelligence officials insist that too often the press will publish articles based on government secrets either without checking with them or without agreeing to withhold information the government considers damaging to national security.

A senior government official, who has taken part in the Dialogue sessions, found them “extraordinarily constructive,” But the official, who declined to be further identified, wondered whether the meetings would have been so constructive had it not been that they have taken place since the 9/11 terrorist attacks. “To the degree that journalists participated,” he said, “they were talking about the need to protect sources and methods, understanding we had just been attacked by terrorists and journalists had lost one of their own in Daniel Pearl (the Wall Street Journal reporter killed by terrorists in Pakistan). They felt personally they needed to engage in how they can still get information out to the public so the public can understand what the government is doing, but at the same time not give away the government’s ability to continue collecting intelligence.”

Individual cases of tension between the press and intelligence agencies sometimes are discussed in detail at the Dialogue sessions. At one meeting, a case was discussed that Harlow found especially disturbing. It showed how failing to find common ground can inflict hard-to-heal bruises on news organizations and intelligence agencies. He cited a Los Angeles Times story of January 15, 2002, that reported the CIA was recruiting

Iranian/American businessmen in Los Angeles to act as informants after returning from trips to Iran.

CIA Director George Tenet telephoned Dean Baquet, the Times managing editor, and urged that the story be withheld on national security grounds. “It’s rare for a director to do that,” Harlow said, “but they decided to publish it anyway. The plan to use the Iranian Americans to bring back intelligence had worked quite well, but not since the Times story. It was a one-day story in the Times, but got much bigger play in Iran. The press can’t have it both ways, criticizing us for not knowing things and then making it harder for us to find out things and do our job. Now, an Iranian ex-patriot going to Iran is going to find he is under much greater scrutiny.”

For its part, the Los Angeles Times contends Tenet did not make a compelling case to withhold publication. In an interview, Baquet said that after receiving a message from the CIA that the story was harmful to an ongoing investigation, he did withhold the story a day to give Tenet a chance to make his case. But Baquet said that when Tenet called him, he was vague and argued in principle that the Times shouldn’t write about ongoing operations and investigations because it would hurt them “And it struck me that what they were doing in the community was well known and they were kidding themselves if they thought it wouldn’t get out,” Baquet said.” He made the decision to publish, he said, after consulting with other editors who agreed Tenet had failed to make a compelling case.

In spite of such clashes, journalists generally agree that since 9/11, they have become more sensitive to national security concerns about leaks. Two journalists who attend the Dialogue sessions—Doyle McManus, Washington Bureau Chief of the Los Angeles Times, and Don Oberdorfer, the Washington Post’s former national security correspondent, said those concerns are stressed at the Dialogue sessions. McManus said, “things have changed, but not as radically as some portray it. We still apply largely the standards about what to publish that we did prior to 9/11, we’re just more sensitive now because it’s like the difference between peacetime and war.”

Oberdorfer, now journalist in residence at Johns Hopkins University School of Advanced International Studies, took a somewhat different point of view. He said there was an assumption by journalists going into the Dialogue meetings that there was a serious

problem of some leaks causing damage to national security. “I’m not sure that same assumption would have been there two years ago, but after 9/11 journalists felt that way.”

One of the major concerns about leaks cited often at the meetings involves Bill Gertz, the national security correspondent of the Washington Times, an arch-conservative newspaper that vehemently opposed the Clinton Administration. Gertz has used over 200 highly classified documents in articles and books since 1996, according to a tabulation this year by the CIA. And much of his reporting has been severely critical of the Clinton Administration.

Jacob Heilbrunn, writing in the June 21, 1999 New Republic, said Gertz gets his stories—usually buttressed by classified documents—from “disgruntled conservative military and intelligence officers within the bowels of the Pentagon and the CIA.” Gertz has said he’s not concerned about his sources’ motives when they give him classified information. It’s not unusual for reporters to take that view of sources, of course, since many officials have reasons of their own to talk to the media.

Gertz’s use of classified records based on intercepted satellite communications has been especially galling to intelligence agencies because they say it alerts foreign interests to the fact the United States can monitor their communications and perhaps read their codes, giving them the chance to alter both. For example, in 1999, Gertz reported that national security intercepts indicated that Chinese secret agents had notified China that the American bombing of the Chinese embassy in Belgrade during the NATO war on Yugoslavia had not been accidental, as the United States claimed, but had been deliberate.

Those are the kind of stories, intelligence officials say, that make it possible for foreign agents to figure out how the United States gets its information and to deny it the capability of doing it in the future. In Afghanistan, once al Qaeda and Taliban leaders discovered how easily their cell phone conversations could be intercepted, they became much more circumspect in using those phones, according to intelligence officials.

In an interview, Gertz acknowledged that his articles based on leaks “usually drive them crazy, especially issues related to communications intercepts.” “I’m not in the secrecy business,” he said, “I’m in the news business. It’s not our job to keep secrets, it’s their job. I don’t clear my stories with the government.” At the same time, he insisted that he tries to be

responsible and normally goes to the CIA when dealing with sensitive classified information “and if they have security issues, I tell them, have your boss call my boss, and sometimes they do, sometimes they don’t.”

He said the intelligence agencies were trying to demonize him and that the focus on him was political. “Clearly there are official leaks all over the place,” he said, “and officials who talk to the New York Times and Washington Post are rewarded,”

Intelligence officials, however, also cited cases where they criticized the Washington Post and New York Times for using stories based on leaks that they said caused national security damage. One involved a Post story based on a satellite communications intercept of a message from Osama bin Laden. Another was a New York Times story in the mid-1990s dealing with how the CIA was using unsavory characters as “assets” or informers overseas to help fight terrorism. The CIA’s Harlow recalls that the agency was able to persuade the Times to delete the name of an asset, but that the Times’ story described him in some detail. “The asset disappeared shortly thereafter and his family believed terrorists killed him,” Harlow said. “We lost a good asset.”

Despite such cases, government representatives at the Dialogue sessions have generally indicated that they have no big problem with the way most of the press handles national security issues most of the time. And with the exception of some Defense Department representatives who take a harder line about leaks, government representatives have indicated they support the system of negotiating with the press over national security concerns so that the press can write its stories and the government can protect its most sensitive secrets.

Ashcroft’s interagency task force on secrets thought enough of the Dialogue that when the task force was still in existence more than half its members participated in some of the sessions. In fact, the task force’s chairman, Patrick Murray, Associate Deputy Attorney General for National Security, described the nature of the final report at a Dialogue meeting long before Ashcroft sent it to Congress on Oct. 22, 2002. The report had been scheduled to be sent to Congress much earlier—on May 1 after six months of study and deliberations. But a Government official said it was delayed by two factors: The report was slow to work its way through the task force’s various agencies and there was no demand from Congress to speed up the process.

Task force members who have attended the Dialogue meetings view them as constructive for the most part and suggest they should be continued, especially since press/national security issues are likely to increase as the government presses its war on terrorism. An earlier draft of the Ashcroft report called the Dialogue a “positive development toward achieving a change in the cultural attitude about the need to continue to safeguard classified information, and the media’s desire to inform the public of the workings of its government without doing damage to the public’s security.” But the comment was deleted from the final report.

The Ashcroft report recommended a series of administrative measures designed to tighten controls on classified information and to identify and hold accountable any persons who engage in unauthorized leaks, if they can be found. It also would provide that individuals being investigated for unauthorized disclosures be required to execute affidavits swearing under penalty of perjury they have not engaged in such acts.

The report concluded that current statutes provide a legal basis for prosecuting those who engage in unauthorized disclosures, but left open the possibility of pursuing a broader statute in the future. Should Congress choose to pursue a criminal statute that covers in one place all unauthorized disclosure of classified information, it said, “the Administration would, of course, be prepared to work with Congress.”

Armstrong, although disappointed that the final report was less definitive in dismissing any new anti-leak legislation, said that in the context of Shelby’s sweeping legislation on unauthorized disclosure, he considered the report a victory. “In the context of the media’s ongoing dialogue with the government over unauthorized disclosures and secrecy,” he wrote in an e-mail to colleagues, “I consider it just a beginning. We will have to remain engaged on these issues for the foreseeable future.”

Media and First Amendment watchdogs are even more alarmed by the passage of several bills since 9/11, the Patriot Act, the Homeland Security Information Act, and the Homeland Security Act, all of which expand government secrecy. Armstrong says the Dialogue sessions have become more relevant than ever since the new system under these acts, “would effectively become an official secrets act that could be used to intimidate and punish leakers much as had been intended with the original secrets act proposed by Senator Shelby.”

## CONCLUSION

The war on terrorism and the showdown with Iraq clearly have given a greater sense of urgency to the issue of unauthorized disclosure of sensitive national security secrets. Journalists such as those attending the Dialogue sessions say they clearly are more concerned now about the dangers of such disclosures.

Those who monitor government secrecy have been rethinking the issue as well. Steven Aftergood, executive director of the Federation of American Scientists' Secrecy Project, says that before 9/11 he viewed the secrecy policy as part of a game in which the government kept secrets indiscriminately and he responded by disclosing them indiscriminately. "But 9/11 made it clear there are people out there looking for creative ways to kill Americans," he said. "That made me and a lot of other people see secrecy in a new light. Before, I believed I should vacuum up all the secrets I could and make them available on the internet. Now I have to first determine whether the material disclosed can be used by terrorists."

9/11 also has brought about a greater willingness by both the media and the government to discuss the issues. The Dialogue sessions are the best example of that. But Doyle McManus of the Los Angeles Times is perhaps correct when he suggests the degree of change could be exaggerated. For one thing, people and institutions find it hard to give up old habits and attitudes. Also, the fundamental reason the problem persists is that both sides have good and compelling reasons for holding fast to their positions.

The situation is more clear-cut when it comes to military secrets or information that could endanger lives. Since 9/11, a fairly strong consensus seems to have developed within the news media that such information usually should not be disclosed. Yet recent reporting on battle plans for a war in Iraq illustrates the complexity of the problem.

The reports may in fact have given Iraq's Saddam Hussein insight into United States military thinking and capabilities. But to the news media, it seemed necessary to reveal these plans to a public which had not focused on how seriously the Bush Administration was preparing for war or what the scale and price of such a conflict might be. Moreover, even though the Pentagon denounced the stories as a serious breach of national security, they clearly were based on "plants" or "controlled leaks" by the Bush Administration, according to both Brent Scowcroft, who served as President George H. W. Bush's national security

advisor, and former Senator Warren Rudman, a New Hampshire Republican and ex-chairman of the President's Advisory Board on National Security.

Another nettlesome problem is that neither side always acts in a disinterested manner. News organizations are highly competitive and sometimes their drive to be first to disclose major news can outweigh concern for disclosing sensitive secrets. As for the government, it's obvious that political leaders frequently use secrets to serve them, not the public.

In today's climate, leaks undoubtedly will become an even more burning issue. With the war on terrorism raising serious concerns about violations of press freedom and other civil liberties, the news media and the government should continue the Dialogue sessions to broaden understanding on both sides. Dialogue meetings make it easier for both sides to avoid knee-jerk reactions. Also, the more sophisticated the news media's understanding of the problems, especially when dealing with sensitive intelligence, the greater the media's ability to avoid needless damage.

All this requires a greater willingness on the part of government agencies to deal with reporters and editors in more sophisticated, forthright ways, however. Officials who hold the media at arm's length and exploit secrecy for political purposes should not expect the media to just roll over when they make demands to withhold classified information.

Senator Shelby's anti-leak legislation undoubtedly will surface again. He has vowed to press for it until it becomes law and several Bush Administration officials have said they would actively pursue such legislation. It's up to the news media to be ready for the challenge. Reporters and editors need to pay much more attention to the whole issue of leaks and classified information than they have in the recent past. Never again should the news media be caught napping when Congress is considering legislation that threatens the public's right to know about its government's operations.

The need for vigilance by the press is even greater today because of the Bush Administration's excessive reliance on secrecy. Even before 9/11, it was predisposed to secrecy. To cite but a few examples, Bush refused to disclose the names of those who consulted with his energy task force, and he issued an executive order to prevent access to

records of previous Presidents. He also has denied congressional access to routine government information and fostered restrictions on the Freedom of Information Act. Since 9/11, the Administration has greatly expanded its secrecy policies, restricting the media's ability to cover war, military tribunals and proceedings involving terrorism and immigration. (Details of Bush's myriad secrecy policies are included in a 60-page report the Reporters Committee for Freedom of the Press issued on the first anniversary of 9/11.) Today's atmosphere of fear over war and terrorism, as Lucy A. Dalglish, the Reporters Committee's executive director, says, "induced public officials to abandon this country's culture of openness and opt for secrecy as a way of ensuring safety and security."

## **APPENDIX I**

The text of media executives' letter to President Bill Clinton.

October 31, 2000

BY HAND

The President

The White House

Washington, DC 20500

Dear Mr. President:

As leaders of major news organizations, we take the unusual step of writing to express our concern—in fact, alarm—over a provision in the Intelligence Authorization bill recently passed by Congress. For the first time in our nation's history, a law would criminalize all unauthorized disclosures of classified information—in effect creating an “official secrets act” of the sort that exists elsewhere but that has always been rejected in this country. This provision shatters the delicate balance that has been achieved in this country between the public's right to know and the legitimate demands of national security. We therefore urge you to veto it.

The specific provision at issue, Section 304, would make it a felony for a government employee to reveal any properly classified information to any unauthorized person, regardless of whether any harm to the national security results. Even individuals who do not actually know they are revealing classified information could be prosecuted if they had “reason to believe” the information was classified.

Of course, the government has a duty to preserve national security secrets. And over the years, Congress has enacted a variety of laws to punish disclosure of specific types of classified information (e.g., communications intelligence, atomic weapons, covert agents). But Congress has resisted demands for a broad official secrets act even in the face of serious threats to the nation's security—including the outbreak of World War I, the attack on Pearl Harbor in World War II, and the Cold War that followed. In 1985 and thereafter, the CIA

has proposed substantially similar legislation through Intelligence Authorization acts, but the proposals have been rejected each and every time.

The legislation now before you would change the kind of society that we have become. It would alter the way in which government officials 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. On a daily basis, government officials—variously described as whistleblowers, “senior State Department officials,” or even “sources close to the President”—disclose government “secrets,” which sometimes are classified.

The motives of those who disclose what has been classified may be honorable or dishonorable, and the immediate effect of publication may be harmful or beneficial—or these matters may be fairly open to debate. But the overall effect of disclosures concerning the affairs of government is to enhance the people’s ability to understand what the government is doing and to hold the government accountable. Any effort to impose criminal sanctions for disclosing classified information must confront the reality that the “leak” is an important instrument of communication that is employed on a routine basis by officials at every level of government.

The laws on the books strike a balance—imperfect, to be sure—between the public interests in preventing harm to the national security, on the one hand, and preserving free discussion of governmental affairs, on the other. This legislation simply goes too far. The mere fact that a document is classified, even properly classified, does not mean that its disclosure is harmful to national security. Over 7 million documents (not pages) are classified each year, and billions of pages remain classified from past years. As the bipartisan Commission on Protecting and Reducing Government Secrecy noted in 1997, the ordinary rule for those in a position to classify is to “stamp, stamp, stamp.” That Commission, which was tasked with proposing ways to strengthen the protection of legitimately classified information, never endorsed criminalizing the leaking of classified information.

Section 304 would empower the government effectively to silence a broad range of important news reporting. Consider these subjects that came to light when classified information was disclosed to journalists:

- The Pentagon Papers;
- Details of the Iran-Contra affair;
- Government radiation and biological warfare experiments on unwitting Americans;
- Safety violations in nuclear weapons manufacturing processes and nuclear power plants;
- Lapses in security creating vulnerability to espionage, such as the case of CIA agent Edward Lee Howard;
- Waste, fraud, and abuse in the defense industry;
- The efficacy of particular weapons systems, such as Star Wars;
- Human rights abuses in Latin America, Asia, and Africa.

As these examples illustrate, press leaks, even of classified information, can serve as a vital source of information about public issues and the operation of government. Yet each of these stories could have resulted in criminal prosecution under Section 304. And despite the assurances from the legislation's sponsors, journalists themselves may fear the possibility of prosecution by overzealous authorities for aiding and abetting the release of classified information. Certainly, journalists could face subpoenas, search warrants, telephone taps, and review of their phone records to identify the culprit. The net effect would be censorship and self-censorship among journalists, sources, and whistleblowers alike.

There is no warrant for legislation of this kind. The government has ample power to deal with those who engage in the unauthorized disclosure of confidential information. It can remove security clearances and fire employees for unauthorized disclosures. It can bring criminal prosecutions under existing criminal statutes that cover particular concerns. If needed, Congress can enact further, specific legislation after appropriate hearings—legislation that focuses on particular types of grave concerns rather than all classified information.

At bottom, legislation that criminalizes all disclosures of classified information is anathema to a system that places sovereignty in the hands of the people. That, at least, has been the prevailing view for the first two and one-quarter centuries of our nation's existence. If we are about to embark on a new era of criminalizing all leaks, let there be public hearings and a full review by the House and Senate Judiciary Committees, and let a well-informed

consensus emerge. An addition to an authorization bill is not the proper vehicle for so fundamental a change in the public's right to know.

We urge you to veto this bill, and we thank you for considering our views on this matter.

Sincerely,

(The letter was signed by Tom Johnson, Chairman and CEO, CNN; Boisfeuillet Jones Jr., Publisher and CEO, The Washington Post; John F. Sturm, President and CEO, Newspaper Association of America; and Arthur O. Sulzberger Jr., Publisher, The New York Times and Chairman, The New York Times Company. It was copied to John Podesta, White House Chief of Staff, who delivered the letter to President Clinton.)

## **APPENDIX II**

Clinton's message vetoing the Intelligence re-authorization bill.

November 4, 2000

STATEMENT BY THE PRESIDENT

TO THE HOUSE OF REPRESENTATIVES:

Today, I am disapproving H.R. 4392, the "Intelligence Authorization Act for Fiscal Year 2001," because of one badly flawed provision that would have made a felony of unauthorized disclosures of classified information. Although well intentioned, that provision is overbroad and may unnecessarily chill legitimate activities that are at the heart of a democracy.

I agree that unauthorized disclosures can be extraordinarily harmful to United States national security interests and that far too many such disclosures occur. I have been particularly concerned about their potential effects on the sometimes irreplaceable intelligence sources and methods on which we rely to acquire accurate and timely information I need in order to make the most appropriate decisions on matters of national security. Unauthorized disclosures damage our intelligence relationships abroad, compromise intelligence gathering, jeopardize lives, and increase the threat of terrorism. As Justice Stewart stated in the Pentagon Papers case, "it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept . . . and the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely." Those who disclose classified information inappropriately thus commit a gross breach of the public trust and may recklessly put our national security at risk. To the extent that existing sanctions have proven insufficient to address and deter unauthorized disclosures, they should be strengthened. What is in dispute is not the gravity of the problem, but the best way to respond to it.

In addressing this issue, we must never forget that the free flow of information is essential to a democratic society. Justice Stewart also wrote in the Pentagon Papers case that "the only

effective restraint upon executive policy in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.”

Justice Brandeis reminded us “those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.” His words caution that we must always tread carefully when considering measures that may limit public discussion—even when those measures are intended to achieve laudable, indeed necessary, goals.

As President, therefore, it is my obligation to protect not only our government’s vital information from improper disclosure, but also to protect the rights of citizens to receive the information necessary for democracy to work. Furthering these two goals requires a careful balancing, which must be assessed in light of our system of classifying information over a range of categories. This legislation does not achieve the proper balance. For example, there is a serious risk that this legislation would tend to have a chilling effect on those who engage in legitimate activities. A desire to avoid the risk that their good faith choice of words—their exercise of judgment—could become the subject of a criminal referral for prosecution might discourage Government officials from engaging even in appropriate public discussion, press briefings, or other legitimate official activities. Similarly, the legislation may unduly restrain the ability of former Government officials to teach, write, or engage in any activity aimed at building public understanding of complex issues. Incurring such risks is unnecessary and inappropriate in a society built on freedom of expression and the consent of the governed and is particularly inadvisable in a context in which the range of classified materials is so extensive. In such circumstances, this criminal provision would, in my view, create an undue chilling effect.

The problem is compounded because this provision was passed without benefit of public hearings—a particular concern given that it is the public that this law seeks ultimately to protect. The Administration shares the process burden since its deliberations lacked the thoroughness this provision warranted, which in turn led to a failure to apprise the Congress of the concerns I am expressing today.

I deeply appreciate the sincere efforts of Members of Congress to address the problem of unauthorized disclosures and I fully share their commitment. When the Congress returns, I encourage it to send me this bill with this provision deleted and I encourage the Congress as soon as possible to pursue a more narrowly drawn provision tested in public hearings so that those they represent can also be heard on this important issue.

Since the adjournment of the Congress has prevented my return of H.R. 4392 within the meaning of Article I, section 7, clause 2 of the Constitution, my withholding of approval from the bill precludes its becoming law. *The Pocket Veto Case*, 279 U.S. 655 (1929). In addition to withholding my signature and thereby invoking my constitutional power to “pocket veto” bills during an adjournment of the Congress, to avoid litigation, I am also sending H.R. 4392 to the House of Representatives with my objections, to leave no possible doubt that I have vetoed the measure.

WILLIAM J. CLINTON

### **APPENDIX III**

The following are the names of those who have attended Dialogue meetings in 2001 and 2002.

Government officials—John Bellinger, general counsel of the National Security Council; Robert Dietz, general counsel, National Security Agency; Judy Emmel, Public Affairs Officer, National Security Agency; Bill Harlow, CIA Public Affairs; Richard Haver, Assistant to the Defense Secretary for Intelligence; Fred Manget, Deputy General Counsel, CIA; Mark Mansfield, CIA Public Affairs Office; Bob McNamara, CIA General Counsel; Stanley Moskowitz, CIA Congressional Liaison; Patrick Murray, Associate Deputy Attorney General for National Security; Powell Moore, Assistant Secretary of State for Legislative Affairs; Anna Perez, National Security Affairs; Richard Schiffrin, deputy general counsel, Department of Defense, and Paula Sweeney, CIA General Counsel's office.

Former Government officials—Hodding Carter, head of the Knight Foundation and former Secretary of State for Public Affairs; Boyden Gray, Washington lawyer and former counsel to President George H. W. Bush; John Martin, Washington lawyer and former head of the Justice Department's internal security, and John Podesta, Georgetown University law professor and former White House chief of staff in the Clinton Administration.

Congressional observers—Vicki Divoll, general counsel of the Senate Intelligence Committee; Chris Healey, senior counsel of the House Permanent Select Committee on Intelligence; and Tim Sample, staff director of the House Intelligence Committee.

Media representatives—Tom Bettag, Executive Producer, ABC's Nightline; Patrick Butler, vice president, Washington Post; David Cloud, National Security Correspondent, Wall Street Journal; Peter Copeland, Washington Bureau Chief, Scripps-Howard News Service; Daniel Klaidman, Newsweek Washington Bureau Chief; Bill Kovach, former editor, The Atlanta Constitution and former curator, Nieman Foundation; Doyle McManus, Los Angeles Times Washington Bureau Chief; Greg Miller, Los Angeles Times National Security Correspondent; Paul McMasters, ombudsman, Freedom Forum, and former associate editor, USA Today; Don Oberdorfer, former Washington Post national security correspondent; Frank Sesno, former CNN Washington Bureau Chief; and George Wilson, National Journal national security correspondent.

Co-conveners and facilitators—Jeff Smith, Washington lawyer and former general counsel, CIA, and Scott Armstrong, former Washington Post reporter, director of Information Trust, and founder of National Security Archive.