

✓ National Secrets, Too Frequently Told

By William S. Cohen

WASHINGTON
Few things were more frustrating to me as secretary of defense than reading in the morning papers about memos addressed to me that had yet to reach my desk. Few were more disturbing than leaks that jeopardized our sources and methods of gathering intelligence or even the conduct of military operations.

A Senate Intelligence Committee hearing scheduled today will examine legislation to create a new criminal offense applying to any government official who intentionally discloses any classified information to a person not authorized to receive it. On its face, the legislation makes perfect sense. Public officials entrusted with secrets should be subject to penalty when they deliberately violate that trust.

Closer examination, however, suggests that the legislation would probably do little to prevent damaging leaks. Contrary to the claims of some in the press, it probably poses no risk to journalists' ability to do their job or to public discussion of policy issues. But since there was not a single hearing last year, when the same legislation was rushed through Congress, it has been difficult to judge its likely effects, both intended and unintended. For that reason, it was vetoed by President Bill Clinton.

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I reject the claim by some in the press that leaks seldom harm national security and typically are justified to ensure informed public debate.

The romantic notion that most leakers are earnest civil servants driven by conscience is touchingly naïve. Most, in fact, are midlevel career or political appointees seeking bureaucratic advantage in the daily battles over making and implementing government decisions. Most other leaks come from a small number of

A new law to stop leakers must be carefully drawn.

career staff people seeking to undermine the policies of their political superiors, who have been duly elected or appointed but whom the leakers view as temporary interlopers in government. So much for leakers upholding the temple of democracy.

As for whistleblowing, over the last quarter-century numerous mechanisms for revealing waste, fraud and abuse have been created, like the proliferation of strengthened inspectors general and anonymous hot lines and the greatly enhanced roles of Congressional investigatory subcommittees and the General Accounting Office. And whistleblowers now have numerous legal protections from retribution for exposing problems.

Concerns that reporters will suddenly move from a sanctuary to be-

ing compelled in court to reveal sources overlooks the fact that under current law they could be, but almost never are, put under such pressure.

Today, leakers can be subject to both administrative and criminal penalties. They can be fired, have their security clearances removed and be disciplined in other ways. Existing federal criminal law states that whoever has "information relating to the national defense" and has "reason to believe [it] could be used to the injury of the United States or to the advantage of any foreign nation" and "willfully" transmits that information to "any person not entitled to receive it" shall be fined or imprisoned for up to 10 years. The term "national defense" has been broadly defined by the courts, and "advantage" to a foreign nation need not be disadvantageous to the United States. The courts have ruled that this provision does not apply narrowly to "spying" but to disclosure to anyone not entitled to receive the information — including reporters.

Indeed, past leaks usually cited as justification for the proposed legislation could have been prosecuted under existing law — if the leaker could have been found.

Still, I believe that stricter laws may be necessary. Some types of classified information, like United States trade negotiating positions, might not be considered "information relating to the national defense" but also need to be strongly protected.

Blanket criminalization might inspire additional caution in individuals considering leaking. But it also could chill legitimate dialogue between government officials (including

members of Congress and their staffs) and the public, journalists and foreign officials for fear of crossing a line that is often hard to define.

Information can be classified in one context and not be (or appear not to be) in another. For example, various unclassified bits of information can, when assembled together, be deemed classified under the so-called "mosaic theory." Also, it is not uncommon for different agencies to assign different classification levels to essentially the same information, and in some cases information that one agency might determine to be unclassified might be considered classified by another agency.

The legislation might make punishment of leakers less likely. A manager may hesitate to put a letter of reprimand in a subordinate's file or revoke a security clearance for a relatively inconsequential leak if he believed doing so required him to make a criminal referral to the Justice Department.

"First do no harm" is as applicable to legislators as it is to physicians. Before this legislation is adopted, there should be much more careful review of the strengths and weaknesses of existing law and the administrative and legal changes that are needed. Congress should ask the president to submit a report next spring addressing these questions. The answers are far from clear, and no one now can say how this legislation would better protect national secrets. □