"The Espionage Act: A Look Back and a Look Forward"

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SUBCOMMITTEE ON TERRORISM AND HOMELAND SECURITY
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Senator Jon Kyl

Introduction

At the outset, I would like to thank Chairman Cardin for holding this hearing to examine the effectiveness of the espionage laws.

Throughout my years on this Subcommittee, I have worked to ensure that the law keeps pace with changes in technology and national security needs. At this hearing, we have the opportunity to examine statutes reaching back to the early 1900s to ensure that they are appropriate to the challenges of today.

Leaks of Classified Information

Leaks of classified information are a grave matter and a serious problem. This might seem like an obvious point, but many people seem to think that leaking classified information is justified in some circumstances, such as when leaking it to a reporter rather than to a spy. There are two rationales that are sometimes advanced to distinguish a media leak from traditional espionage behavior. As I will explain, neither of these rationales is compelling.

First, some have suggested that leaking information, especially to the press, is a legitimate form of "whistle-blowing" by government employees. To be sure, there

are situations where whistle-blowing is appropriate. It is important, for example, that government employees have the ability to bring illegal activity to the light of day. But there is a right way, and a wrong way, for government employees to raise concerns that misconduct or illegal activity has occurred. Congress has passed whistle-blower statutes that provide mechanisms for employees to report activities without compromising sensitive or classified information, and employees should take full advantage of the protections that those statutes provide. When an employee decides instead to go outside those approved channels by leaking classified information to the press, he or she should be prosecuted.

Second, some argue that a person's motives for disclosing classified information should play a role in determining whether the individual can be prosecuted. Again, this is not a compelling argument. Whether one discloses classified information to intentionally harm the United States or for some other reason, such as fame, the deleterious effect on national security remains the same. Indeed, "well intentioned" leaks to the press can be more harmful than a traditional espionage leak—instead of exposing U.S. secrets to a single country, they make them available to the entire world. The fact is that all government employees with access to classified information agree not to disclose or share it with unauthorized persons. An individual who intentionally does so anyway should be held accountable, no matter whether his "motive" is to harm the United States or not.

A prime example in the classic espionage context is Jonathan Pollard, the Israeli spy who received a life sentence in 1987. According to reports, Pollard never revealed the names of U.S. agents or military plans. And in a memorandum to his sentencing judge he said, "I never thought for a second that Israel's gain would necessarily result in America's loss. How could it?" Notwithstanding these seemingly innocent motives, Pollard was—rightfully, in my opinion—punished severely for

abusing the trust placed in him by the American people. Those who leak classified information to the press are similarly abusing their positions of trust.

Past Attempts at Reform

Although it appears that the espionage statutes generally work well at permitting the prosecution of government employees and others who are accused of spying (such as Jonathan Pollard), the statutes might not work as well in a leak context where the accused is not a foreign agents and/or did not intend specifically harm to the United States.

In 2000, in an attempt to update the statutes, Congress passed a measure to criminalize all unauthorized leaks of classified information.[1] It would have made it easier for the government to prosecute unauthorized disclosures of classified information by eliminating the need to *prove* that damage to national security has resulted or would result from the unauthorized disclosure, requiring instead only that the unauthorized disclosure was of information properly classified under a statute or executive order. President Clinton vetoed the measure, asserting that it was too broad and posed a risk of "unnecessarily chill[ing] legitimate activities that are at the heart of a democracy."[2]

Courts have continued to struggle with the existing statutory framework in attempting to adapt it to the cases at hand. The espionage statutes have been criticized as being "unwieldy and imprecise instruments."[3] In a recent case[4] involving access to classified information, after noting that that "the basic terms and

[1] H.R. 4392 § 303, 106th Congress.
[2] Statement by the President to the House of Representatives, 36 WEEKLY COMP. PRES. DOC. 278 (Nov. 4, 2000).
[3] *United States v. Morison*, 844 F.2d 1057, 1086 (4th Cir. 1988) (Phillips, J., concurring).

[4] *United States v. Rosen*, 445 F.Supp. 2d 602 (E.D. Va. 2006).

structure of this statute have remained largely unchanged since the administration of William Howard Taft" and that "[t]he intervening years have witnessed dramatic changes in the position of the United States in world affairs and the nature of threats to our national security," the court stated that Congress should engage in a "thorough review" of these statutes.[5] I am pleased that we are doing that today.

More Modest Reforms

Separate from past attempts to make major reforms in this areas, several of our witnesses have suggested some relatively straight-forward changes that could help modernize the espionage statutes. For example, one could clarify that electronic information is protected by the statutes. And the statute could be amended to protect information relating to "national security" (currently, the statute protects information relating to the "national defense"). I look forward to hearing what our witnesses have to say about these potential changes.

I also look forward to hearing our witnesses testify about the role of Classified Information Procedures Act in prosecuting espionage and leak cases. One of the reasons that we don't see more leak prosecutions is because these cases often require the government to reveal additional classified information during the course of the trial. Thus, the government is often forced to choose between bringing leakers to justice and protecting national security information. CIPA is supposed to help protect this information, but unfortunately it has a relatively mixed record of effectiveness.

Last year, I introduced legislation that would implement some common-sense fixes to CIPA. I believe that these fixes would make CIPA more effective at

[5] *Rosen*, 445 F. Supp. 2d at 646.

protecting information and might allow prosecutors to bring cases that they otherwise would not. I am interested in getting the panel's views on these proposals.

Conclusion

I hope that today's hearing will serve as a springboard for a continuing dialogue about how Congress can best help to protect classified information.

I look forward to hearing from the witnesses.

Thank you, Mr. Chairman.