On Leaks of National Security Secrets: A Response to Michael Hurt

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CONTROVERSY HAS SURROUNDED LEGISLATIVE PROPOSALS TO criminalize the unauthorized disclosure of classified information for the past two years, culminating in an unexpected presidential veto in 2000, followed by reconsideration and subsequent deferral of the legislation in 2001. Despite all of this activity, there exists little attempt to publicly justify the need for such legislation, and no effort as extensive as Michael Hurt's recent article ("Leaking National Security Secrets: Effects on Security and Measures to Mitigate," *NSSQ*, Autumn 2001). His work has enriched the public record on this important topic. The proposed legislation to combat leaks endorsed by Mr. Hurt, however, is fundamentally misconceived, rife with unintended consequences, and neither necessary nor sufficient to achieve its goal.

Obviously, there are national security secrets that are worth keeping and their continued protection serves the national interest. The unauthorized disclosure of such secrets does not serve the national interest. Their disclosure should be deterred and punished. The key question is what type of information should be subject to such strictures. Mr. Hurt presumes that if information is "classified"—or "properly classified"—it deserves legal protection against disclosure, and he tends to equate the word "classified" with "sensitive." Anyone acquainted with the application of the classification system in the real world could contend that the situation is not so clear-cut. A considerable quantity of information that is not sensitive is nevertheless formally classified. Conversely, there is a good deal of sensitive information that is not classified. To cite one ex-

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treme but illustrative example, the Central Intelligence Agency (CIA) continues to classify the intelligence budget total from 1947. Although the 1997 and 1998 intelligence budget figures were declassified some time ago, the CIA maintains that similar budget data from 50 years earlier is "currently and properly classified."[1]

One may doubt that this kind of capriciousness should be backed up by a felony statute. This example points to a profound defect in the anti-leak proposal introduced by Senator Richard Shelby and favored by Mr. Hurt: it would endow the executive branch with the authority both to define a crime as it sees fit and then to punish it. Because the classification system is governed by executive order, not by statute, the executive branch can classify, declassify, and reclassify national security information at its discretion. Under the Shelby proposal, this would mean that it also could create or dissolve at will the conditions for a felony prosecution. This would be an invitation to abuse and reflects a surprising lapse in legislative judgment. It also may be an abdication of Congress' constitutional responsibility to "make all laws."

The point may be further clarified by contrasting the current proposal with an earlier measure to criminalize an unauthorized disclosure of classified information. In the Intelligence Identities Protection Act of 1982 (50 U.S.C. sec. 421), the statute mandated with great specificity what information was to be protected, namely the identities of "covert agents," and under what circumstances its disclosure would be a crime. There is no doubt about the scope or definition of the proscribed offense and little room for misinterpretation. This explains, incidentally, why the American Civil Liberties Union and other civil liberties organizations did not oppose enactment of the 1982 law, though they fiercely have resisted its poorly crafted successor. Even if it were not intolerably vague, the proposed anti-leak legislation would have serious unintended effects on journalists and others who seek to exercise their First Amendment rights. Mr. Hurt dismisses this possibility, citing Senator Shelby's insistence that the proposal is targeted only at the leaker.

To suggest that journalists who are recipients of leaks would be unaffected is disingenuous or ill-considered. In most cases of unauthorized disclosures, reporters will be the best or only "witnesses" to the crime. Are they really to be exempt from questioning? Will they

be excused from testifying at trial about their sources? If such exemptions were incorporated into the proposed law, how would that affect the "enforceability" that Mr. Hurt sensibly argues is needed for any new law to succeed? The problem goes even deeper. Any proposal to make unauthorized disclosures of classified information a felony could ensnare journalists as well as many ordinary citizens in a web of criminality. Specifically, they could be liable for inciting a felony if they knowingly solicited disclosure of classified information from anyone who was not officially authorized to disclose it. Those who contend that the anti-leak statute would only apply to the leaker, not the recipient of the leak, seem to have forgotten that journalists are not just passive conduits of information. In the normal course of business, a reporter actively elicits information.

If the act of disclosure is a felony, then "incitement" to disclose also may be a crime. Yet every good national security reporter, and many a concerned citizen, is engaged in such "incitement" practically every day. The legal term is "accessory before the fact" defined as "one whose counsel or instigation leads another to commit a crime."[2] Thus, despite Senator Shelby's assurance, criminalizing disclosure of classified information inevitably would have legal ramifications that go far beyond the leaker. Remarkably, even the passive recipient of a leak could be in trouble if he immediately did not alert the authorities. The legal concept known as "misprision of felony" requires that:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.[3]

Congress did not begin to consider such unintended consequences before adopting its anti-leak statute in 2000. One can be grateful that President Clinton vetoed the measure at the last minute. Otherwise, many reporters and citizen activists concerned with national security policy might now be actual or potential criminals.

Having excluded the public from official deliberations on the subject, other fundamental questions—in-

cluding the efficacy of legislation—have been evaded. Members of Congress, as legislators, naturally may be inclined to favor legislative solutions. There are reasons to doubt that new legislation would be the proper tool for dealing with unauthorized disclosures of sensitive national security information. Existing law notably has not been effective. Mr. Hurt observes that there has been only one successful prosecution, that of Samuel Loring Morison, for unauthorized disclosures to the media. There also has been only one unsuccessful prosecution of any significance, that of Daniel Ellsberg. For a variety of reasons, particularly a frequent inability to identify the leaker, it appears that the question of prosecution simply does not arise very often.

Contrary to the premise of the Shelby bill, legal "gaps" in the prohibitions on disclosing classified information simply are not the root of the problem. This is clear from the fact that there is already a specific prohibition against disclosures of communications intelligence, which imposes even stricter penalties than those in the Shelby legislation. Yet, as Mr. Hurt notes, there were dozens of leaks of such information in 1998 and 1999, all of which probably violated this statute. Although there was no "gap" in the law, no prosecutions ensued. A new law would not make these disclosures any more illegal than they already are. If law is not sufficient to stem the flow of unauthorized disclosures, it may not be necessary.

Remarkably, "The leaking of classified information . . . has dropped considerably" in recent months, according to Assistant Secretary of Defense for Public Affairs Victoria Clarke. "Because Secretary Rumsfeld has made it a personal campaign that he would reduce the amount of leaking of classified information by people in government and he would reduce the amount of inappropriate backgrounding of classified information," Ms. Clarke said last January.[4] This indicates that where law has proved to be of limited utility, or utterly irrelevant, personal leadership and exhortation can make a real, measurable difference. As Christopher Barton of the House Intelligence Committee told Mr. Hurt: "If the culture at the top communicates early on that leaking is intolerable and unacceptable, then this is a way of shutting off the spigot."[5] This is correct, but leaking has not stopped completely. One continues to find some stories which gratuitously disclose the

source of sensitive intelligence. Thus, a 5 March 2002 *New York Times* story reporting that intercepted email messages were used to track Al Qaeda terrorists near the Afghanistan border arguably tends to diminish the utility of such intercepts.[6]

Other leaks of classified information, however, are innocuous or actually beneficial. Recent news reports concerning the classified Nuclear Posture Review served to compensate for the failure of the Pentagon to deliver an unclassified report on the subject, as required by law, and helped to revive an entirely appropriate public debate over U.S. nuclear weapons policy.[7] Other leaks identified by Mr. Hurt are not leaks at all. In particular, Mr. Hurt perpetuates an injustice against former Energy Secretary Hazel O'Leary when he repeats the false assertion that she gave a classified diagram of the W-87 thermonuclear warhead to a reporter from *U.S. News and World Report.* This did not happen.[8]

Behind all of the daily churning, a new degree of self-restraint is evident in the mainstream media. For example, in a widely publicized 1 March 2002 news story about deployment of executive branch personnel outside of Washington to ensure continuity of government in the event of a terrorist attack, "*The Washington Post* agreed to a White House request not to . . . identify the two principal locations of the shadow government."[9] In my opinion, secrecy is not an essential attribute of these "shadow government" sites; what they provide, rather, is redundancy. Nevertheless, other media outlets have followed the *Post's* lead in respecting these "undisclosed locations." As this case shows, Mr. Hurt is quite right to suggest that "Reporters . . . could be part of the solution." The interested public has a role to play in communicating an expectation that journalists will consider the requirements of our common security, even as they labor to expose incompetence or malfeasance in national security agencies. Instead of new laws, leadership from within and a judicious sense of responsibility from without are what is needed to clarify the shifting boundaries of secrecy and disclosure. This is the terrain on which the battle against damaging leaks can and should be fought.

ENDNOTES

1. See letter to the author from Gregory L. Moulton, executive secretary, CIA Agency Release Panel, 14 December 2000.

2. Allen Thomson brought this point to my attention. See also 18 USC sec. 2 which dictates that: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." This means that both the leaker and the one who elicited the leak could wind up in jail.
3. 18 USC sec. 4.
4. Clarke spoke at a Brookings Institution forum on Press Coverage and the War on Terrorism on 9 January 2002. Her remarks on classified information are excerpted online at www.fas.org/sgp/news/2002/01/press.html.
5. Michael Hurt, "Leaking National Security Secrets: Effects on Security and Measures to Mitigate," *National Security Studies Quarterly*, volume VII, issue 4 (Autumn 2001): 20.
6. James Risen and David Johnston, "Al Qaeda May Be Rebuilding In Pakistan, E-Mails Indicate," *New York Times*, 5 March 2002.
7. William M. Arkin, "Secret Plan Outlines the Unthinkable," *Los Angeles Times*, 10 March 2002. According to the *Times*, "Administration officials did not seem especially perturbed by the leak of the Nuclear Posture Review, even though the report was officially classified. Some said privately that a national debate on nuclear strategy might be healthy." Doyle McManus, "Nuclear Use as 'Option' Clouds Issue," *Los Angeles Times*, 12 March 2002.
8. For background on the evolution of this falsehood, see "Rep. Weldon Fans the Flames" in *Secrecy & Government Bulletin*, Issue No. 80 (August 1999) posted at www.fas.org/sgp/bulletin/sec80.html.
9. Barton Gellman and Susan Schmidt, "Shadow Government is at Work in Secret," *Washington Post*, 1 March 2002. It also might be noted that even Bill Gertz of the Washington Times, who is perhaps the most prolific reporter of classified information, has on numerous occasions withheld classified documents from publication at the request of U.S. intelligence agencies.