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SECRECY & GOVERNMENT BULLETIN

To Challenge Excessive Government Secrecy and
To Promote Public Oversight and Free Exchange
In Science, Technology, Defense, and Intelligence

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FOIA Amendments Proposed

In two exciting and potentially important bills, Senator Patrick Leahy has proposed some substantial amendments to the Freedom of Information Act.

S. 1939 aims to improve public access to government records by significantly narrowing the current exemptions to the FOIA, and restricting the fees that agencies may charge for responding to FOIA requests.

Notably, S. 1939 would amend the often-invoked "national defense" exemption by requiring not only that withheld documents must be properly classified, but also that their disclosure "could reasonably be expected to cause identifiable damage to national defense or foreign policy." Additionally, the revised exemption would require a determination that the need to protect such information outweighs the public interest in disclosure.

In a somewhat less compelling (in our view) provision, the bill would extend the FOIA to the offices of the President and the Vice President, the Congress, and the Administrative Office of the U.S. Courts.

Senator Leahy's bill S.1940, co-sponsored by Sen. Hank Brown, would expand the FOIA to improve public access to information that is in an electronic format. (See Sen. Leahy's statement in the Congressional Record, 11/7/91, p. S16244)

Congress Surrenders to the Pentagon

After much sound and fury about the "essential" need to rein in super-secret special access programs which are "now adversely affecting the national security," the Conference Committee on the Defense Authorization Bill reached agreement-- to do nothing. (H. Rep. 102-311, p. 594)

The Senate and House Armed Services Committees each came in with different proposals for Congressional notification, public disclosure, Pentagon management, etc. In the end they compromised and deleted both sets of proposals.

As justification for not acting, the Conferees noted that the Deputy Secretary of Defense had "assured" them that he will improve the situation.

To add insult to injury, the Conferees deleted the House provision (sec. 218) that would have required the Timberwind nuclear rocket program to come out of the special access category (p. 500). As a result, public information on the secret program will continue to be dominated by leaks from within the program, to the growing discredit of the classification system.

In the Conference Report on the Defense Appropriations Bill (H.Rep. 102-328, p. 198), the Conferees make pleasant noises and claim to be "concerned about the adequacy of management of special access programs in the Department of Defense," about which they "intend to initiate a comprehensive review."

But there are already many cubic feet of "comprehensive reviews" of special access programs and related problems. Congress has been complaining about DOD classification practices since the great Rep. John E. Moss chaired the Subcommittee on Government Information in the 1950s. Isn't it perhaps time to act?

Instead, the Appropriations conferees demand that the Defense Department... write a report. Specifically, by April 1992, DOD is to address the feasibility, desirability, advantages and disadvantages of various measures to improve management of special access programs. Faced with such a challenge, DOD typically alternates between its two favorite responses: (1) deny there is a problem, and (2) promise to fix it. That is usually sufficient to calm Congressional tempers until the next scandal, when yet another report may have to be written.

Congress Surrenders to the CIA

The Senate had determined in its 1992 Intelligence Authorization Bill that the total intelligence budget could be disclosed without damage to national security and therefore ought to be disclosed.

However, former CIA Director George Bush issued a "firm threat" that he "would veto the bill if this provision were included" in the final version.

Consequently, the Intelligence Authorization conferees decided it was "preferable" to present the call for budget disclosure as a non-binding "sense of the Congress" provision rather than requiring it by law.

"It is the conferees' hope that the [Intelligence] Committees, working with the President, will, in 1993, be able to make such information available to the American people, whose tax dollars fund these activities, in a manner that does not jeopardize U.S. national security interests." (H.Report 102-327, p. 29) Actually, it is hard to imagine releasing the information in a manner that would jeopardize national security interests.

See the September 1991 Secrecy & Government Bulletin for an unofficial estimated breakdown of the roughly $30 billion intelligence budget.

Reductio ad Absurdum

For an interesting review of the emergence of the F-117A stealth fighter from the secret budget, see Jim Cunningham, "Cracks in the Black Dike: Secrecy, the Media, and the F-117A," Airpower Journal (the professional journal of the U.S. Air Force), Fall 1991, pp. 16-34. In one noteworthy passage, the author writes:

"In 1986 the United States executed an air strike on Libya, a mission for which the F-117A would have been ideal. The reason the airplane was not used in that operation, reports indicate, was concern by the Joint Chiefs that the classified aspects of the aircraft might have been revealed whether or not any were shot down. Furthermore, using them in the raid would have made denial of their existence more difficult. Similar concerns canceled their use in a planned but unexecuted strike on Syria in 1983 and perhaps other missions." (emphasis added)

What's Behind Secrecy's Thirty Year Lifetime?

Why do so many documents remain classified for decades, rather than months or centuries? The FY 1983 Annual Report to the President on Information Security offers a remarkably candid explanation. In discussing why President Reagan extended the period for systematic declassification review to thirty years (fifty years for "sensitive" intelligence), the report notes (p. 16):

"Experience revealed that the national security sensitivity of a significant percentage of information lingers after 20 years, but often dissipates around 30 years. Speculation ties this phenomenon to the fact that the 30-year period more accurately reflects the span of political or public careers."

Thus, what is called "national security" has rather more to do with "job security."

This insight dictates that, if elected officials are to be held accountable for their secret actions, declassification should follow within a short period of time-- say, three years. This would allow sufficient freedom of action in genuinely sensitive circumstances, along with the enhanced sense of responsibility that comes from knowing one's actions will become public knowledge in the not too distant future.

"National Security" in the Fourth Dimension

How old is the oldest currently classified document? Pretty damn old.

In response to our inquiry, the National Archives reported that "the earliest military document that has been reviewed and still held as classified" is dated April 15, 1917. The document comes from the records of the "War Department General and Special Staffs, War College Division."

It is intriguing to consider what kind of information from 1917 could cause sufficient damage to national security that it should still be classified today. In all probability, no such damage would result, and this case is just one more indication of the dimensions of reflexive government secrecy.

We have requested that the National Archives return the document to the Army for another classification review.

Free-Lance Declassification

May a person properly choose to disclose classified information? In 1971 testimony before Congress, former Supreme Court Justice Arthur J. Goldberg made an interesting distinction:

"I answered a question, does an individual have a right to declassify? And I have been thinking, I said no, [but] I should have added provided the classification system is legal.... What I really meant to say is, if there was a proper classification system then we would all, as law-abiding citizens, have to abide by it."

If, on the other hand, the current classification system is "adversely affecting the national security," as the House Armed Services Committee declared last summer, then a different conclusion might follow. Overclassification, indefinite classification, and politicized classification all generate contempt for, and will ultimately erode, the information security system.

Nuclear Weapon Secrecy

A bill (H.R. 3961) to declassify the number of nuclear weapons in the US arsenal and the amount of nuclear weapons material in the stockpile was introduced by Reps. Lane Evans and John Conyers, Jr.

"There are still aspects of our defense policy that remain untouched by the death of the Cold War," Evans stated. "One of these is the veil of secrecy we keep around the data on our nuclear weapons stockpile and materials production....

"While we implore [other] countries to abandon their nuclear aspirations and reveal the extent of their nuclear capabilities, we still keep much of the data on our own nuclear stockpiles shrouded in secrecy. We cannot become a leader of the free world in making this call if we cannot disclose the same information about our own arsenal." (Congressional Record, 11/26/91, p. E4191)

The bill would also seek to promote similar openness by officials of the (former) Soviet Union.

"Stupid" Secrecy

An article by Jeffrey Richelson entitled "The Spies in Space" appeared in the December/January issue of Air & Space magazine and was inserted in the Congressional Record (11/26/91, p. E4120) by Rep. George E. Brown.

Mr. Brown points out that much of the information in the article is, strictly speaking, considered classified and cannot be openly discussed or debated in Congress.

"What is totally stupid is that we have a classification system which persists in perpetuating the fiction that this material is secret and that such a fiction contributes to our national security....

"Neither the executive branch nor the leadership of the House has been willing to confront the issue, even though they recognize the irrationality of the system....

"The excessive and unnecessary system of secrecy which surrounds this program will fall of its own weight in the near future...."

Don't count on it.

Very Special Access

How many hyper-classified special access programs are there? Nobody really knows, in part because the definition of what constitutes special access is somewhat vague, and in part because the definition is often ignored.

But in a 1985 hearing before the Senate Governmental Affairs Committee (S. Hrg. 99-166, page 23), the General Accounting Office indicated that at that time, there were "about 5,000 or 6,000" special access contracts active.

Now More Than Ever

When President Nixon signed an Executive Order on March 8, 1972, that established a "new, more progressive" classification scheme, he issued a statement that included the following observations:

"Unfortunately, the system of classification which has evolved in the United States has failed to meet the standards of an open and democratic society, allowing too many papers to be classified for too long a time....

"The many abuses of the security system can no longer be tolerated. Fundamental to our way of life is the belief that when information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and-- eventually-- incapable of determining their own destinies."