

# Heritage Lectures

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## Containing Sensitive Information in a Free Society

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A recent *U.S. News & World Report* cover framed one of the most significant security challenges America faces today very well. It enticed potential readers with a headline promising “secret” Pentagon plans for the global war on terrorism.

Of course, what was in the magazine was no longer secret, and it was unclear whether its publication helped or hurt the war. But beyond that, the idea that some secret is on the cover of a national magazine is utterly unremarkable. Hardly a month goes by without the publication of some purportedly secret government information. What does this mean for American security, and how can the nation balance the people’s right to know what their government is doing in an open and transparent manner with the legitimate need to safeguard sensitive information whose compromise might jeopardize lives or put the nation at risk?

### Taking on a Complex and Sensitive Issue

On July 25, 2005, The Heritage Foundation hosted a panel discussion entitled “Secrets and Leaks: The Costs and Consequences for National Security,” analyzing the challenge of maintaining the security of classified information in an age of intense global media scrutiny, whistleblowers, and bitter political partisanship and a global war against terrorism. The panel agreed that leaks of classified material greatly harm national security and that current laws both inadequately define “leaks” and fail to provide adequate remedies after their occurrence.

### Talking Points

- Leaks of classified material harm national security. Current laws both inadequately define “leaks” and fail to provide adequate remedies after their occurrence.
- The problem with unauthorized disclosure must be fixed, but in a way that does not prevent the public from getting useful information from the government.
- Keeping secrets and preventing leaks requires both legislation and the national will to follow through on that legislation.
- Classifiable information must be strictly defined, and government employees must be trained in the rules of handling classified information.
- Congress, the courts, and the executive branch must have the means and the will to police themselves. When leaks occur, punishment should follow.

This paper, in its entirety, can be found at:  
[www.heritage.org/research/nationalsecurity/hl903.cfm](http://www.heritage.org/research/nationalsecurity/hl903.cfm)

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Fixing these problems will be no easy task. Any activity in this area will have to balance the competing interests of national security and long-standing traditions of openness in government. It is, however, a challenge that the Congress needs to address. The speakers agreed that new legislation will likely be necessary to solve this growing problem.

### Framing the Challenge

The keynote speaker, Representative Pete Hoekstra (R-MI), chairman of the House Permanent Select Committee on Intelligence, highlighted the real difficulties of containing sensitive information in a free society.<sup>1</sup> He argued that openness in government is important in the United States and that the committee is working to make the discussion of intelligence matters more transparent, including holding more hearings that would be open to the public.

The chairman maintained, however, that certain classes of information must be kept secret to protect the security of the country. In these cases, using insider information to advance policy goals or personal agendas—something that has always taken place in Washington—is simply unacceptable. Revealing this information is very harmful, but it also is virtually never punished. In the past 50 years, only one person has been convicted of leaking classified material, and he was pardoned by President Bill Clinton.<sup>2</sup> Lawrence Franklin, recently arrested for delivering classified data to foreign agents, had previously mishandled classified items and was never punished. There has been a general reluctance to prosecute.

Congressman Hoekstra also argued that the U.S. penchant for allowing violators to go unpunished damages our relationship with foreign security services, all of which operate in a political climate that protects secrecy far more than the United States does. American laws guaranteeing open government are unique in the world, and this creates fear of disclosure of information shared by foreign governments. It also, the chairman contends, damages

the ability of U.S. intelligence to recruit agents, who fear their identities will be exposed. In addition, lack of security over America's secrets gives our adversaries information about our intentions, which they can then use to thwart our efforts.

The chairman supports zero tolerance for disclosure of classified information after more narrowly defining what needs to be classified and educating government employees on the risks of disclosure. It is time for Congress to address the issue through legislation.

### Four Perspectives on the Problem

**The Past Is Prologue: How We Got Here from There.** Ronald Marks, former CIA employee and counsel to the Senate Intelligence Committee, discussed the significant growth in the number of persons receiving classified briefings on Capitol Hill. The role of Congress in intelligence oversight has changed over the years. It has moved from a very informal oversight after World War II to special select committees in each house of Congress. The emphasis was on “select” since members were chosen, and remained on the committee, based on their circumspection.

The end of the Cold war changed this again. In the early 1990s, many more Members of Congress received briefings from intelligence agencies, based upon the view that intelligence was evolving away from being primarily for national security. Agencies perceive testifying on the Hill more often as positive public relations and therefore do not resist revealing classified information. This has created obvious difficulties in controlling the information and creates an impression that being classified is not really that important.

**Why We Have a Problem.** Shannen Coffin, former Deputy Assistant Attorney General in the Department of Justice, focused on the impact of leaks on civil litigation. Often, a person who reveals classified information has pending disciplinary issues with

1. Hon. Pete Hoekstra, “Secrets and Leaks: The Costs and Consequences for National Security,” Heritage Foundation *Lecture* No. 897 at [www.heritage.org/Research/NationalSecurity/hl897.cfm](http://www.heritage.org/Research/NationalSecurity/hl897.cfm).
2. Samuel Loring Morison, a civilian analyst with the Office of Naval Intelligence, was convicted in 1984 of providing classified satellite photos of an under-construction Soviet nuclear-powered aircraft carrier to Britain's *Jane's Defence Weekly*.

the agency and seeks status as a whistleblower as protection. This underscores the problem that one person's leak is another's revelation of government wrongdoing. The problem arises that the government cannot rebut or respond publicly to published information because it would further damage national security. As a result, the media have a huge advantage in publishing leaks. Coffin called for stronger and more vigorously enforced criminal penalties.

#### **Leaks Undermine Intelligence Operations.**

Richard Russell, a former CIA employee and currently a professor at the National Defense University, expanded upon Congressman Hoekstra's concern that disclosures have severely damaged intelligence-gathering ability. Russell supported the point that human sources will not cooperate when there are leaks since their lives could be at stake. Liaison with foreign services is also jeopardized by publicity because they want to avoid embarrassment.

It has become more difficult to get truly secret information in this environment, so intelligence analysts more often rely on open source material. This, coupled with a disinclination to horizontally share information within agencies, has resulted in much poorer analyses. Information is classified to protect sources and methods. If agencies rely on public sources rather than insider intelligence, their value is diminished.

In addition, Russell noted, the danger of leaks and whistleblowers makes security operatives more risk-averse. The 9/11 Commission chastised the intelligence community for a "lack of imagination" in addressing the challenge. In part, the fear of exposure through leaks and other forms of intelligence compromise contributed to the reluctance of operatives to think and act "outside the box."

**How to Safeguard an Open Society.** Paul Rosenzweig, Senior Legal Research Fellow at The Heritage Foundation, addressed the issue of protecting the public's right to know while also recognizing the government's legitimate need to keep secrets. Since World War II, 150 people have been prosecuted for espionage, giving secrets to a foreign government, and only one has been prosecuted for giving information to the press. Since revealing secrets is a problem in either event, this disparity is wrong. It

reveals a belief that government secrecy must be selective and justified. A new legal approach to information leaks must take into account the competing interests of national security and a free society with access to government information.

This can occur if classification rules are tightened to cover only vital information and if clear prohibitions, including clear penalties, are instituted by law. These currently do not exist, despite widespread belief to the contrary. People have lost trust in traditional government oversight as it has become more political. It cannot work if intelligence policy differences are worked out in the pages of a newspaper. A new law would help to revive nonpartisan oversight of intelligence and curtail uninhibited leaking.

Also, any new law that protects the press from having to reveal sources would damage the cause of national security. There is no First Amendment privilege protecting journalists' sources. This is a matter of custom rather than law. Journalists should have no greater right to secrecy in vital matters of security than any other members of society, Rosenzweig said.

Above all, Rosenzweig argued, is the principle of transparency in the operations of the government. We cannot have a system where secrets are used to hide failures or illegal acts. Transparency, however, can be fulfilled in ways other than blasting America's secrets on the six o'clock news. Departmental inspectors general and congressional and judicial oversight can perform this function just as well without compromising national security.

#### **Moving Forward**

The patchwork of laws and regulations that currently covers protecting classified information is inadequate. The problem with unauthorized disclosure must be fixed, but in a way that does not prevent the public from getting useful information from the government.

In any new legislative approach, classifiable information must be strictly defined. Government employees must be trained in the rules for handling classified information. Congress and the courts, as well as the executive branch, must have the means

and the will to police themselves. When leaks occur, punishment should follow. The problem of secrets and leaks requires both legislation and the national will to follow through on that legislation.

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