Center for American Progress

OpenTheGovernment.org
Americans for Less Secrecy, More Democracy

CNSS Center for National Security Studies
Protecting Civil Liberties and Human Rights

Congressional Access to Classified National Security Information

Kate Martin

Center for American Progress

OpenTheGovernment.org
Americans for Less Secrecy, More Democracy

Center for National Security Studies
Protecting Civil Liberties and Human Rights

Congressional Access to Classified National Security Information

By Kate Martin
Center for National Security Studies

March 2007

Center for American Progress
1333 H St., NW, 10th Floor
Washington, DC 20005
202-682-1611
www.americanprogress.org

Center for National Security Studies
1120 19th St., NW, 8th Floor
Washington, DC 20036
202-721-5650
www.cnss.org

OpenTheGovernment.org
1742 Connecticut Ave., NW, 3rd Floor
Washington, DC 20009
202-332-OPEN (6736)
www.OpenTheGovernment.org

OpenTheGovernment.org
Americans for Less Secrecy, More Democracy

Center for National Security Studies
Protecting Civil Liberties and Human Rights

Center for American Progress

Congress must have access to information about executive branch activities if it is to carry out its constitutional responsibilities to make laws, appropriate funds, conduct oversight, and confirm agency officials. While few would question the need to safeguard national security information from improper public disclosures that would damage the national interest, the executive branch has repeatedly claimed the authority to withhold such information from Congress as well.

Proponents of expansive presidential power claim that classified national security information "belongs" to the executive branch and is shared with Congress only as a matter of grace. The executive branch has regularly resisted congressional requests for classified information. But such resistance has intensified since 2001 with the Bush administration's claim of unprecedented presidential powers to act alone or in contravention of congressional enactments.

Congress has both a constitutional and statutory right to access information within the executive branch, including classified information.

Congress has been left in the dark on many matters. The following is a brief outline of Congress' powers to obtain information required to conduct the vigorous oversight and wise lawmaking necessary to assure the efficient and lawful functioning of the government.

Principles of Congressional Access

The Bush administration claims that Congress is not entitled to access to certain classified information. While the matter has not been definitively addressed by the Supreme Court, it is well settled that Congress has both a constitutional and statutory right to access information within the executive branch, including classified information.

Congress' authority to obtain information from the executive branch stems from the explicit constitutional grants of authority to Congress, such as the power to legislate, to appropriate all funds, and to confirm presidential appointments. All of these explicit powers require information in the possession of the executive branch and knowledge of executive branch activities.

In addition, general principles of oversight and accountability underlying the separation of powers also require that Congress be fully informed concerning such information. (Executive privilege protects only certain information regarding internal presidential communications and deliberations. Accordingly, only a small subcategory of national security information *may* be exempt from disclosure on the grounds of executive privilege.)

Nevertheless, those who take an expansive view of presidential power rely upon statements about the commander-in-chief powers to argue that the president has ultimate control over such information. The Congress has objected to this view on numerous occasions, not only when demanding information, but in enacting statutes and writing its own rules.

Congress codified its right to classified information in the Intelligence Oversight Act of 1980, which directs the president to keep Congress fully informed of all intelligence activities.

For example, in 1974, Congress overrode President Ford's veto of amendments to the Freedom of Information Act, which provided that courts shall determine whether information is properly classified and thus may be withheld from the public. The amendments evidence Congress' understanding that the constitutional arrangement of shared powers between the branches precludes government information from being the sole property of the executive.

In addition, Congress codified its right to classified information in the Intelligence Oversight Act of 1980, which explicitly requires that the president keep congressional intelligence committees fully and currently informed of all intelligence activities, including significant anticipated intelligence activities (see National Security Act of 1947, Title V).

The rules of Congress expressly recognize Congress' constitutional authority to declassify information.

The Oversight Act also specifically requires the director of National Intelligence to provide any information requested by the committees; in the case of covert actions, the president is *required* to inform members of the committees. (Covert actions do not include classic espionage; rather, they are secret operations designed to influence events overseas without the role of the United States becoming known.)

While the Act refers to the executive's obligation to inform Congress consistent with the protection of sources and methods, this phrase refers to the necessary security arrangements and clearances for staff members to obtain classified information, *not* to the right of members of Congress to the information.

The Oversight Act incorporates Congress' understanding that it has equal right to classified national security information because the Constitution vests shared responsibilities in the Congress and the president for making decisions about national security and foreign policy matters. While the Oversight Act requires the executive to keep congressional intelligence committees informed, the committees in turn serve as the repository and conduit for any member of Congress wishing to inform himself or herself about the classified information.

Congress' Authority to Declassify

The Bush administration claims that only those in the executive branch with proper authority can declassify national security information in order to make it public. This claim is a corollary of the claim that classified information belongs exclusively to the executive.

The rules of the Congress, however, expressly recognize Congress' concurrent constitutional authority to declassify information. Those rules specify a procedure for Congress to publicly disclose classified information when it determines that it is in the public interest to do so, even over the objection of the president, after giving due consideration to that objection.*

* Senate Resolution 400, section 8, agreed to May 19, 1976 (94th Congress, 2nd Session); Rules of the 109th Congress, U.S. House of Representatives, Rule X, sec. 11. Available at http://www.rules.house.gov/ruleprec/RX.htm.

Information from Whistleblowers

Members of Congress may receive classified information from a whistleblower, but the whistleblower may be subject to retaliation by the executive branch.

The Bush administration has warned whistleblowers not to present classified information to members of Congress or relevant committees, even in closed session. There is a long history of controversy about how Congress may protect its right to know classified information. See, for example, the Lloyd-LaFollette Act of 1912, which is intended to protect the right of any government employee to furnish executive-branch information to Congress.

While it is clear that members are entitled to receive classified information from a whistleblower, it is not clear they can do so in a manner that protects the whistleblower from retaliation.

Whistleblowers may not be adequately protected, as they are often required to notify their agency before informing Congress, even through secure channels. And there are no adequate statutory remedies for such whistleblowers if they are then retaliated against. When the executive branch uses such means to keep information from Congress, it impedes Congress' ability to carry out its oversight responsibilities, especially in investigating improper or illegal activities.

Access to Non-Classified 'Sensitive' Information and Improperly Classified Information

The Bush administration has improperly classified information and stamped other non-classified information "sensitive." This makes it more difficult for members of Congress to learn about and use the information, but they retain their right to it.

In recent years, federal agencies have adopted various labels and markings to limit access to unclassified information, including "sensitive but unclassified" (SBU); "sensitive security information" (SSI); and "sensitive homeland security information."

These and other agency control markings have caused considerable confusion, and it is sometimes incorrectly claimed that they carry the same weight as classified information labels. This misconception can result in access to such unclassified information being limited to congressional staff with security clearances, making it more difficult for many members of Congress to learn about and use the information.

In fact, such markings do not affect Congress' right to access such information. Only properly classified information is restricted to staff members with the requisite security clearance.

Information may be classified when it meets the requirements set forth in E.O. 12958, which generally provides that information may be classified if its disclosure is reasonably likely to cause damage to the national security. But federal agencies have frequently classified large quantities of information that should not be classified.

When it appears that information has been improperly classified, Congress may request the executive to declassify it and, as outlined above, may do so itself if necessary. The other information safeguarding labels currently in use by federal agencies are not part of the classification system and are thus not a legitimate basis for restricting access to staff with security clearances.

Access for Congressional Committees

The Bush administration claims that only certain committees are entitled to classified information. In order to protect the security of such information, Congress has set up physical security procedures and required clearances for staff to receive such information.

The executive branch may not dictate how Congress chooses to arrange for the sharing of classified information among Committees.

In addition, Congress has organized itself into committees with separate responsibilities, including the responsibility to receive and protect classified information concerning certain subjects. These arrangements are the prerogative of Congress. All members by virtue of their legislative responsibilities are entitled to classified information; the executive may not dictate how Congress chooses to arrange for the secure sharing of such information.

Congress and the News Media

Members of the press have been threatened with felony charges when they made public classified information that had been withheld from Congress. Such reporting is essential, however, to effective congressional oversight and public debate. Congress learned about the secret CIA prisons and the warrantless NSA surveillance programs from public press accounts. Such accounts generated intense congressional interest in matters that were previously unknown to most members of Congress. At the same time, administration supporters called for criminal prosecution of the reporters.

Criminal prosecution of reporters or government officials would chill public debate and congressional oversight. Congress, for example, learned about the secret CIA prisons and NSA warrantless surveillance programs from press accounts.

The executive branch has long taken the position that espionage laws criminalized the publication of classified information, but has brought few such prosecutions. In fact, such prosecutions are legally dubious and raise serious First Amendment concerns. Moreover, such broad interpretation of the espionage laws is belied by Congress' enactment of the narrow Protection of the Identities of Intelligence Officers Act, which would have been unnecessary if the espionage laws already covered public disclosure of classified information.

While many leaks of classified information are rightly deplored, the proper remedy is for government employees who disclose such information to be stripped of their security clearances, not the criminal prosecution of those who publish it.

This paper is a joint product of OpenTheGovernment.org, the Center for National Security Studies (CNSS), and the Center for American Progress. CNSS and the Center for American Progress are partners in the OpenTheGovernment.org coalition. Kate Martin, author of this paper, is director of CNSS.