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THE DISCLOSURE TO CONGRESS ACT OF 1998

FEBRUARY 23, 1998.—Ordered to be printed

Mr. SHELBY, from the Select Committee on Intelligence, submitted the following

REPORT

[To accompany S. 1668]

The Select Committee on Intelligence, having considered original bill (S. 1668), which directs the President to inform employees within the Intelligence Community that it is not prohibited by law, executive order, or regulation or otherwise contrary to public policy to disclose certain information, including classified information, to an appropriate committee of Congress, reports favorably thereon and recommends that the bill pass.

PURPOSE OF THE BILL

The Disclosure to Congress Act (S. 1668) will ensure that employees within the Intelligence Community are made aware that they may, without prior authorization, disclose certain information to Congress, including classified information, that they reasonably believe is specific and direct evidence of: a violation of law, rule or regulation; a false statement to Congress on an issue of material fact; or gross mismanagement, a gross waste of funds, a flagrant abuse of authority, or a substantial and specific danger to public health or safety. The Committee is hopeful that the legislation will encourage employees within the Intelligence Community to bring such information to an appropriate committee of Congress rather than unlawfully disclosing such information to the media. It is imperative that individuals with sensitive or classified information about misconduct within the Executive Branch have a "safe harbor" for disclosure where they know the information will be properly safeguarded and thoroughly investigated.

COMMITTEE ACTION

On February 11, 1998, on a vote on the motion to order the bill reported favorably with a recommendation that the bill do pass, nineteen Members of the Committee voted in favor and no Members voted against.

BACKGROUND AND NEED FOR LEGISLATION

It is not generally known that the "Whistle Blower Protection Act" does not cover employees of the agencies within the Intelligence Community. See 5 U.S.C. §§ 2301 et seq. The "whistle blower" statute also expressly proscribes the disclosure of information that is specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs. Therefore, employees within the Intelligence Community are not protected from adverse personnel actions if they choose to disclose such information, irrespective of its classification, to Congress. In fact, an employee who discloses classified information to Congress without prior approval is specifically subject to sanctions which may include reprimand, termination of security clearance, suspension without pay, or removal. See Exec. Order No. 12,958, 60 Fed. Reg. 19825 (1995). Some types of unauthorized disclosures are also subject to criminal sanctions. See 18 U.S.C. §§ 641, 793, 794, 798, 952 (1996); 50 U.S.C. § 783(b) (1996).

In accordance with Executive Order No. 12,958, classified information must remain under the control of the originating agency and it may not be disseminated without proper authorization. Consequently, an Executive Branch employee may not disclose classified information to Congress without prior approval. In fact, employees are advised that the agency will provide "access as is necessary for Congress to perform its legislative functions * * *." Information Security Oversight Office, General Services Administration, Classified Information Nondisclosure Agreement (SF–312) Briefing Booklet, at 66. In other words, the executive agency will decide what Members of Congress may "need to know" to perform their constitutional oversight functions. The President, in effect, asserts that he has exclusive or plenary authority to oversee the regulation of national security information.

In response to the Administration's position, the Select Committee on Intelligence of the United States Senate reported the Intelligence Authorization Act for Fiscal Year 1998 which included a provision that specifically addressed this issue. See S. 858, 105th Cong., 1st Sess. § 306 (1997). The Senate passed the bill by a vote of ninety-eight to one. Shortly after the Senate vote, the Administration issued a Statement of Administration Policy stating that section 306 was unconstitutional and that if it remained in the bill, in its present form, senior advisers would recommend that the President veto the bill.

Section 306 directed the President to inform all Executive Branch employees that disclosing classified information to an appropriate oversight committee or to their Congressional representative is not prohibited by any law, executive order, or regulation or otherwise contrary to public policy if the employee reasonably believes that the classified information evidences a violation of any

law, rule, or regulation; a false statement to Congress on an issue of material fact; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. This provision was intended to ensure that Congress received information necessary to fulfill its constitutional oversight responsibilities. It was also intended to protect employees from adverse actions based on what was heretofore considered an unauthorized disclosure to Congress.

The Committee intended disclosure to an appropriate oversight committee to mean disclosure to cleared staff or a member of the committee with jurisdiction over the agency involved in the wrongdoing. Members or committee staff who receive such information from an employee were to be presumed to have received it in their capacity as members or staff of the appropriate oversight committee. The Committee believed that this presumption was necessary because Members and staff are responsible for ensuring that the information is protected in accordance with committee rules and that it is brought to the attention of the leadership of the committee. The President, by informing Executive Branch employees as directed in section 306, would have authorized disclosure to the appropriate oversight committee or member thereby recognizing that these committees and members have a "need to know" the information as required by current Executive Branch restrictions on disclosure of classified information.

In conference, members of the House Permanent Select Committee on Intelligence (HPSCI) and the Senate Select Committee on Intelligence (SSCI) did not agree to include section 306 as passed by the Senate. The Senate offered to amend section 306, thereby significantly narrowing the scope of the provision to cover only employees of agencies within the Intelligence Community (the Senate passed version covered all executive employees). The Senate amendment further narrowed the provision by allowing disclosure only to committees with primary jurisdiction over the agency involved (the original language also allowed disclosure to a Member of Congress who represented the employee).

The Chairman and Ranking Member of the House Permanent Select Committee on Intelligence expressed concern over the significant constitutional implications of such language. They were also mindful of the Administration's veto threat as expressed in the Statement of Administration Policy. The Chairman and Vice Chairman of the Senate Select Committee on Intelligence, in deference to their House colleague's concerns, agreed to amend the provision to express a sense of the Congress that Members of Congress have equal standing with officials of the Executive Branch to receive classified information so that Congress may carry out is oversight responsibilities.

The managers decision not to include section 306 of the Senate bill in the conference report, however, was not intended by either body to be interpreted as agreement with the Administration's position on whether it is constitutional for Congress to legislate on this subject matter. The managers actions were also not to be interpreted as expressing agreement with the opinion of the Justice Department's Office of Legal Counsel, which explicitly stated that only the President may determine when Executive Branch employ-

ees may disclose classified information to Members of Congress. The managers asserted in their Conference Report that members of congressional committees have a need to know information, classified or otherwise, that directly relates to their responsibility to conduct vigorous and thorough oversight of the activities of the executive departments and agencies within their committees' jurisdiction. Therefore, the President may not assert an unimpeded authority to determine otherwise.

While the managers recognized the Chief Executive's derived constitutional authority to protect sensitive national security information, they did not agree with the Administration that the authority is exclusive. Members of both committees also agreed that whatever the scope of the President's authority, it may not be asserted against Congress to withhold evidence of misconduct or wrongdoing and thereby impede Congress in exercising its constitutional legislative and oversight authority. Therefore, the managers committed to hold hearings on this issue and develop appropriate legislative solutions in the second session of the 105th Congress.

The Senate Select Committee held public hearings on 4 & 11 February 1998 to examine the constitutional implications of legislation such as section 306. The Committee heard from constitutional scholars and legal experts on both sides of the issue. Mr. Randolph D. Moss, Deputy Assistant Attorney General from the Department of Justice Office of Legal Counsel testified in support of the Administration's position that section 306 and any similar language represents an unconstitutional infringement on the President's authority as Commander in Chief and Chief Executive. Mr. Moss asserted the following:

> (A) The President as Commander in Chief, Chief Executive, and sole organ of the Nation in its external relations has ultimate and unimpeded authority over the collection, retention, and dissemination of intelligence and other national security information.
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> (B) Any congressional enactment that may be interpreted to divest the President of his ultimate control over national security information is an unconstitutional usurpation of the exclusive authority of the Executive.
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> (C) The Senate's language vests lower-ranking personnel in the Executive Branch with a "right" to furnish such information to a Member of Congress without prior official authorization from the President or his delagee. Therefore, section 306 and any similar provision is unconstitutional.

The Committee also heard Professor Peter Raven-Hansen, Glen Earl Weston Research Professor of Law from the George Washington University Law School and Dr. Louis Fisher, Senior Specialist (Separation of Powers) from the Congressional Research Service testify that the President's authority in this area is not exclusive. Hence, these experts believed that Congress already has authority to regulate the collection, retention, and dissemination of national security information. Professor Raven-Hansen and Dr. Fisher asserted the following:

> (A) A claim of exclusive authority must be substantiated by an explicit textual grant of such authority by the Constitution.

(B) There is no express constitutional language regarding the regulation of national security information as it pertains to the President.

(C) The President's authority to regulate national security information is an implied authority flowing from his responsibilities as Commander in Chief and Chief Executive.

(D) As the regulation of national security information is implicit in the command authority of the President, it is equally implicit in the broad array of national security and foreign affairs authorities vested in the Congress by the Constitution. In fact, Congress has legislated extensively over a long period of time to require the President to provide information to Congress.

(E) Congress may legislate in this area because the Executive and Legislative Branches share constitutional authority to regulate national security information.

(F) The Supreme Court has never decided a case that specifically addressed this issue.

(G) The provision is constitutional because it does not prevent the President from accomplishing his constitutionally assigned functions and any intrusion upon his authority is justified by an overriding need to promote objectives within the constitutional authority of Congress.

The Committee found the latter argument to be persuasive and determined that the Administration's intransigence on this issue compelled the Committee to act.

Following the public hearing on February 11th, the Committee met to markup a modified version of section 306. One amendment was offered by a member of the Committee and was adopted unanimously. The bill as amended is explained in the following section.

SECTION EXPLANATION

The bill has one section divided into subsections (a) through (d). Subsection (a)(1) directs the President to take appropriate actions to inform the employees of agencies covered in subsection (d) and employees of contractors of such agencies that the disclosure of information described in paragraph (2) to individuals referred to in paragraph (3) is not prohibited by law, executive order, or regulation or otherwise contrary to public policy. In other words, the President is directed to inform "covered employees" that it will not be considered an "unauthorized disclosure" if they provide certain information to Congress, if that information is provided to the appropriate member and the information falls within the specified categories.

Subsection (a)(1) does not, however, define the means by which the President must implement this direction. The Committee refrained from expressly stating the types of actions that the President should take as we have in previous measures. See, e.g., Counterintelligence and Security Enhancements Act of 1994, Pub. L. No. 103–359, Title VIII, § 802(a), 108 Stat. 3435 (1994). The Committee has intentionally allowed the President a great deal of latitude to implement this legislation. The Committee does not, however, intend this permissive approach to be interpreted as license to frustrate its purpose by promulgating procedures that would in any

way impede an employee's ability or desire to bring this type of information to Congress. Any procedures should be clearly stated to eliminate any uncertainty for employees who wish to disclose such information.

Paragraph (1)(B) further directs the President to inform such employees that the individuals referred to in paragraph (3) have a need to know and are authorized to receive such information. This language is consistent with the argument propounded by the Administration in a brief that it filed in the Supreme Court in 1989. See Brief for Appellees, *American Foreign Service Association* v. *Garfinkel,* 488 U.S. 923 (1988) (No. 87–2127). In the *Garfinkel* brief the Department of Justice stated that "the President has uniformly limited access to classified information to persons who have a need to know the particular information, such as a *congressional committee having specific jurisdiction over the subject matter.*" Id at 16 (emphasis added).

Paragraph (1)(C) is intended to ensure that members receive information only in their capacity as a member of the committee concerned. The Committee is adamant that any information received by a member of one of the appropriate committees be protected in accordance with that committee's rules for safeguarding classified material and be reported to the committee's leadership. Accordingly, a member is not free to accept covered information as a member of a committee unrestrained by such rules or to withhold knowledge of the information from the committee's leadership. The various national security committees enjoy a long history of trust with the Executive Branch and that record will be continued.

Paragraph (2) defines the type of information that an employee may bring to Congress. It is intended to cover all information in the covered categories, including classified information. Paragraphs (2)(A) and (C) are taken nearly verbatim from the text of the "Whistle Blower Protection Act" and are intended to have the same meaning. See 5 U.S.C. § 2302(b)(8)(A)(i)–(ii) (1994 & Supp. II 1996). The Committee did slightly narrow the language, however, to cover only flagrant abuses of authority. The Committee intended to address only those abuses that are so objectionable as to warrant the attention of Congress.

Paragraph (2)(B) is not found in the "whistle blower" statute and was added to ensure that information pertaining to a false statement to Congress is brought to our attention. In the interest of legislative efficiency, however, the Committee is most concerned with those false statements that pertain to an issue of material fact. The material facts of an issue are those facts that a reasonable person would consider important in reviewing that particular issue. Congress depends on the accuracy of the information provided to it and when our oversight is based on false information, we must be made aware of it even if the President would prefer to withhold it.

Paragraph (3) refers to the individuals to whom information described in paragraph (2) may be disclosed. Although the Senate Select Committee on Intelligence is composed, inter alia, of members from the Committees on Appropriations, Armed Services, and the Judiciary, we recognize that those committees share jurisdiction with this Committee and each has as its primary responsibility the oversight of some of the departments, agencies or elements of the

Federal Government to which such information relates. As noted earlier, the individuals to whom information may be disclosed was narrowed significantly from section 306 to further ensure the protection of the information.

Paragraph (4) recognizes the inviolability of the rule of secrecy in grand jury proceedings. The Committee does not intend this legislation to circumvent the obligation of secrecy imposed by Rule 6(e) of the Federal Rules of Criminal Procedure and therefore paragraph (1)(A) does not apply to such information. The Committee does not believe, however, that disclosures to Congress fall under the rubric of other statutes that prohibit the disclosure of certain information. The Congress is an entity of the federal government and is capable of protecting such information in the same manner as an executive agency or department. Accordingly, the Committee does not view a disclosure to Congress as a disclosure outside of the government.

Subsection (b) directs the President to submit a report to Congress on the actions taken under subsection (a). The Committee expects to see a report that describes any procedures established or guidance given to the various agencies, departments, or elements. If the President gives wide discretion to agency heads, the Committee would also like the report to address how each agency or department has implemented this legislation.

Subsection (c) is intended to protect the integrity of other reporting requirements enacted into relevant law.

Subsection (d) defines the covered agencies. These are the agencies specifically exempted from the "whistle blower" statute. See 5 U.S.C. § 2302(a)(2)(C)(ii) (1994 & Supp. II 1996).

ESTIMATE OF COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate, the Committee attempted to estimate the costs which would be incurred in carrying out the provisions of this bill in fiscal year 1998 and in each of the five years thereafter. The Committee determined that it would be impracticable to estimate the exact costs because the method by which the President will implement this bill is unknown. While some of the provisions of the bill may increase the administrative costs associated with promulgating guidance for its implementation, the Committee believes that whatever course the President chooses these costs will be minimal and can be absorbed within existing levels of appropriations.

EVALUATION OF REGULATORY IMPACT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee finds no substantial regulatory impact will be incurred by implementing the provisions of this legislation.

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