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May 24, 2006

The Honorable Peter Hoekstra
Chairman
Permanent Select Committee on
Intelligence
H-405, The Capitol
Washington, DC 20515

The Honorable Jane Harman
Ranking Member
Permanent Select Committee on
Intelligence
H-405, The Capitol
Washington, DC 20515

Dear Chairman Hoekstra and Ranking Member Harman:

I am writing on behalf of the Media Law Resource Center ("MLRC"), a non-profit information clearinghouse organized by the media to monitor and report on developments in First Amendment law. Our membership includes the leading publishers and broadcasters in the U.S., all of whom have a deep interest in and commitment to the publication of news and information to the American public.*

MLRC appreciates the consideration this Committee is giving to the issue of national security and the publication of classified information. Because protecting the public's ability to receive information from a free press is an MLRC core concern, we welcome the opportunity to set forth our understanding of the media's role and responsibilities in this area and respectfully request that this letter be included in the record.

To begin, MLRC is very concerned with suggestions that Congress create a new statute akin to an "official secrets act" that would criminalize the press's publication of classified information. We believe that history and experience show that such a law is unnecessary and is fundamentally antithetical to the principle of a federal government that is by and for the citizenry.

* Membership in the MLRC is made up of corporations, associations and other entities that publish, broadcast or otherwise disseminate news, information or other data to the public, and various related entities that support freedom of speech and press. MLRC also has a Defense Counsel Section made up of over 230 law firms in the United States and around the world that defend free press issues.

As Professor Geoffrey R. Stone has written to the Committee, "in the entire history of the United States the federal government has never criminally prosecuted the press for publishing government secrets." Efforts to enact an official secrets law have been rejected as unnecessary and harmful to First Amendment rights and the public interest even in the midst of war and other serious threats to our national security. Even in the current war against terrorism, then-Attorney General John Ashcroft in his report to Congress dated October 15, 2002 saw no need for new criminal legislation.

Our country's longstanding rejection of an official secrets law is based on the danger that such a law will inevitably be used against the press and public to stifle legitimate criticism and discussion of government policies and actions. Notwithstanding the current political debate over leaks of classified information, nothing that has happened justifies departing from this historical wisdom.

As good citizens, though, the press recognizes that national security does entail keeping some information secret. The press has a professional and civic obligation to respect that principle. It does so by acting with great caution before publishing leaked information relating to national security, including listening to the concerns of appropriate government officials prior to publication and sometimes delaying publication. For example, the *New York Times* waited at least one year before publishing its report on the NSA surveillance program. Indeed, there are countless instances in which the press has held stories, has edited stories, and has worked cooperatively with government officials so that reporting would not jeopardize highly sensitive national security matters. This reflects the relationship between two institutions of democratic society that routinely cooperate, notwithstanding the tensions that arise as both seek to serve the public.

Reporters and press organizations are committed to this cooperative approach and are ready to strengthen the ongoing dialogue with government officials and agencies on this subject. This approach is not only consistent with the government's interest in national security, but it ultimately serves the press's interest in preserving the public trust that newspapers and broadcasters have with their readers and viewers.

Of course, the border between national security and the public's right to know is not always clear. Government employees unremarkably may regard more information as secret than is actually critical. There is little if any penalty for exercising undo caution in stamping information as secret and placing it outside of public view. Over-classification – in addition to the creation of pseudo-classification categories such as "sensitive but unclassified" – undermines the basics of a democratic society by depriving citizens of information about how their government is operating. It can be used as a pretext to prevent the public from learning about embarrassing or controversial information. It prevents legitimate oversight. It also leads, inevitably, to "leaks" as the counterweight.

The broad threat of criminal punishment for publishing classified information would

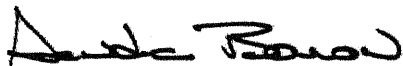
Hon. Peter Hoekstra and Hon. Jane Harman
May 24, 2006
Page 3

severely chill routine communications between government officials and the press and public. It would limit historical and investigative research into government. And it would deter whistleblowers from exposing government mismanagement and corruption. These sorts of disclosures all serve the public interest and have been and should continue to be left to the political forces that govern a democratic republic. Certainly nothing warrants making reporters and citizens criminals for receiving or publishing such information.

Instead, secret information that goes to the heart of national security can and should be guarded at the source. This means the government should judiciously designate what information is secret. The government should exercise appropriate oversight and control over officials who can designate information as classified and those who can access such information. And the government can enforce the existing criminal laws against officials who violate their obligations to preserve secrecy.

Finally, as a matter of law any sweeping criminalization of newsgathering and publishing is fundamentally incompatible with the First Amendment. Protecting national security is no doubt a compelling government interest. But a statute that broadly criminalizes the publication of information on matters of public interest and concern is certainly not the least restrictive means of accomplishing the government's purpose – the standard the statute would have to meet to pass constitutional muster.

Sincerely,



Sandra S. Baron
Executive Director
Media Law Resource Center