

111TH CONGRESS
2^D SESSION

S. 4051

To improve, modernize, and clarify the espionage statutes contained in chapter 37 of title 18, United States Code, to promote Federal whistleblower protection statutes and regulations, to deter unauthorized disclosures of classified information, and for other purposes.

IN THE SENATE OF THE UNITED STATES

DECEMBER 21, 2010

Mr. CARDIN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To improve, modernize, and clarify the espionage statutes contained in chapter 37 of title 18, United States Code, to promote Federal whistleblower protection statutes and regulations, to deter unauthorized disclosures of classified information, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “The Espionage Stat-
5 utes Modernization Act of 2010”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

1 (1) As of 2010, the statutory framework with
2 respect to the espionage statutes is a compilation of
3 statutes that began with Act of June 15, 1917 (40
4 Stat. 217, chapter 30) (commonly known as the
5 “Espionage Act of 1917”), which targeted classic es-
6 pionage cases involving persons working on behalf of
7 foreign nations.

8 (2) The statutory framework was formed at a
9 time when intelligence and national security infor-
10 mation existed primarily in a tangible form, such as
11 blueprints, photographs, maps, and other docu-
12 ments.

13 (3) Since 1917, the United States has wit-
14 nessed dramatic changes in intelligence and national
15 security information, including technological ad-
16 vances that have revolutionized information gath-
17 ering abilities as well as the mediums used to com-
18 municate such information.

19 (4) Some of the terms used in the espionage
20 statutes are obsolete and the statutes do not fully
21 take into account the classification levels that apply
22 to national security information in the 21st century.

23 (5) In addition, the statutory framework was
24 originally designed to address classic espionage cases
25 involving persons working on behalf of foreign na-

1 tions. However, the national security of the United
2 States could be harmed, and lives may be put at
3 risk, when a Government officer, employee, con-
4 tractor, or consultant with access to classified infor-
5 mation makes an unauthorized disclosure of the
6 classified information, irrespective of whether the
7 Government officer, employee, contractor, or consult-
8 ant intended to aid a foreign nation or harm the
9 United States.

10 (6) Federal whistleblower protection statutes
11 and regulations that enable Government officers,
12 employees, contractors, and consultants to report
13 unlawful and improper conduct are appropriate
14 mechanisms for reporting such conduct.

15 (7) Congress can deter unauthorized disclosures
16 of classified information and thereby protect the na-
17 tional security by—

18 (A) enacting laws that improve, modernize,
19 and clarify the espionage statutes and make the
20 espionage statutes more relevant and effective
21 in the 21st century in the prosecution of per-
22 sons working on behalf of foreign powers;

23 (B) promoting Federal whistleblower pro-
24 tection statutes and regulations to enable Gov-
25 ernment officers, employees, contractors, or

1 consultants to report unlawful and improper
2 conduct; and

3 (C) enacting laws that separately punish
4 the unauthorized disclosure of classified infor-
5 mation by Government officers, employees, con-
6 tractors, or consultants who knowingly and in-
7 tentionally violate a classified information non-
8 disclosure agreement, irrespective of whether
9 the officers, employees, contractors, or consult-
10 ants intend to aid a foreign power or harm the
11 United States.

12 **SEC. 3. CRIMES.**

13 (a) IN GENERAL.—Chapter 37 of title 18, United
14 States Code, is amended—

15 (1) in section 793—

16 (A) in the section heading, by striking “**or**
17 **losing defense information**” and insert-
18 ing “**or, losing national security infor-**
19 **mation**”;

20 (B) by striking “the national defense”
21 each place it appears and inserting “national
22 security”;

23 (C) by striking “foreign nation” each place
24 it appears and inserting “foreign power”;

1 (D) in subsection (b), by inserting “classi-
2 fied information, or other” before “sketch”;

3 (E) in subsection (c), by inserting “classi-
4 fied information, or other” before “document”;

5 (F) in subsection (d), by inserting “classi-
6 fied information, or other” before “document”;

7 (G) in subsection (e), by inserting “classi-
8 fied information, or other” before “document”;

9 (H) in subsection (f), by inserting “classi-
10 fied information,” before “document”; and

11 (I) in subsection (h)(1), by striking “for-
12 eign government” and inserting “foreign
13 power”;

14 (2) in section 794—

15 (A) in the section heading, by striking
16 “**Gathering**” and all that follows and insert-
17 ing “**Gathering or delivering national**
18 **security information to aid foreign**
19 **powers**”; and

20 (B) in subsection (a)—

21 (i) by striking “foreign nation” and
22 inserting “foreign power”;

23 (ii) by striking “foreign government”
24 and inserting “foreign power”;

1 (iii) by inserting “classified informa-
2 tion,” before “document”;

3 (iv) by striking “the national defense”
4 and inserting “national security”; and

5 (v) by striking “(as defined in section
6 101(a) of the Foreign Intelligence Surveil-
7 lance Act of 1978)”;

8 (3) in section 795(a), by striking “national de-
9 fense” and inserting “national security”;

10 (4) in section 798—

11 (A) in subsection (a), by striking “foreign
12 government” each place it appears and insert-
13 ing “foreign power”; and

14 (B) in subsection (b)—

15 (i) by striking the first undesignated
16 paragraph (relating to the term “classified
17 information”); and

18 (ii) by striking the third undesignated
19 paragraph (relating to the term “foreign
20 government”); and

21 (5) by adding at the end the following:

22 **“§ 800. Definitions**

23 “In this chapter—

1 “(1) the term ‘classified information’ has the
2 meaning given the term in section 1 of the Classified
3 Information Procedures Act (18 U.S.C. App.);

4 “(2) the term ‘foreign power’ has the meaning
5 given the term in section 101 of the Foreign Intel-
6 ligence Surveillance Act of 1978 (50 U.S.C. 1801);
7 and

8 “(3) the term ‘national security’ has the mean-
9 ing given the term in section 1 of the Classified In-
10 formation Procedures Act (18 U.S.C. App.).”.

11 (b) TECHNICAL AND CONFORMING AMENDMENT.—
12 The table of section for chapter 37 of title 18, United
13 States Code, is amended—

14 (1) by striking the item relating to section 793
15 and inserting the following:

“793. Gathering, transmitting, or losing national security information.”;

16 (2) by striking the item relating to section 794
17 and inserting the following:

“794. Gathering or delivering national security information to aid foreign pow-
ers.”;

18 and

19 (3) by adding at the end the following:

“800. Definitions.”.

1 **SEC. 4. VIOLATION OF CLASSIFIED INFORMATION NON-**
 2 **DISCLOSURE AGREEMENT.**

3 (a) IN GENERAL.—Chapter 93 of title 18, United
 4 States Code, is amended by adding at the end the fol-
 5 lowing:

6 **“§ 1925. Violation of classified information nondisclo-**
 7 **sure agreement**

8 “(a) DEFINITIONS.—In this section—

9 “(1) the term ‘classified information’ has the
 10 meaning given the term in section 1 of the Classified
 11 Information Procedures Act (18 U.S.C. App.); and

12 “(2) the term ‘covered individual’ means an of-
 13 ficer, employee, contractor, or consultant of an agen-
 14 cy of the Federal Government who, by virtue of the
 15 office, employment, position, or contract held by the
 16 individual, knowingly and intentionally agrees to be
 17 legally bound by the terms of a classified informa-
 18 tion nondisclosure agreement.

19 “(b) OFFENSE.—

20 “(1) IN GENERAL.—Except as otherwise pro-
 21 vided in this section, it shall be unlawful for a cov-
 22 ered individual to intentionally disclose, deliver, com-
 23 municate, or transmit classified information, without
 24 the authorization of the head of the Federal agency,
 25 or an authorized designee, knowing or having reason
 26 to know that the disclosure, delivery, communica-

1 tion, or transmission of the classified information is
2 a violation of the terms of the classified information
3 nondisclosure agreement entered by the covered indi-
4 vidual.

5 “(2) PENALTY.—A covered individual who vio-
6 lates paragraph (1) shall be fined under this title,
7 imprisoned for not more than 5 years, or both.

8 “(c) WHISTLEBLOWER PROTECTION.—The disclo-
9 sure, delivery, communication, or transmission of classi-
10 fied information by a covered individual in accordance
11 with a Federal whistleblower protection statute or regula-
12 tion applicable to the Federal agency of which the covered
13 individual is an officer, employee, contractor, or consultant
14 shall not be a violation of subsection (b)(1).

15 “(d) REBUTTABLE PRESUMPTION.—For purposes of
16 this section, there shall be a rebuttable presumption that
17 information has been properly classified if the information
18 has been marked as classified information in accordance
19 with Executive Order 12958 (60 Fed. Reg. 19825) or a
20 successor or predecessor to the order.

21 “(e) DEFENSE OF IMPROPER CLASSIFICATION.—The
22 disclosure, delivery, communication, or transmission of
23 classified information by a covered individual shall not vio-
24 late subsection (b)(1) if the covered individual proves by
25 clear and convincing evidence that at the time the infor-

1 mation was originally classified, no reasonable person with
2 original classification authority under Executive Order
3 13292 (68 Fed. Reg. 15315), or any successor order,
4 could have identified or described any damage to national
5 security that reasonably could be expected to be caused
6 by the unauthorized disclosure of the information.

7 “(f) EXTRATERRITORIAL JURISDICTION.—There is
8 jurisdiction over an offense under this section if—

9 “(1) the offense occurs in whole or in part with-
10 in the United States;

11 “(2) regardless of where the offense is com-
12 mitted, the alleged offender is—

13 “(A) a national of the United States (as
14 defined in section 101(a) of the Immigration
15 and Nationality Act (8 U.S.C. 1101(a)));

16 “(B) an alien lawfully admitted for perma-
17 nent residence in the United States (as defined
18 in section 101(a) of the Immigration and Na-
19 tionality Act (8 U.S.C. 1101(a))); or

20 “(C) a stateless person whose habitual res-
21 idence is in the United States;

22 “(3) after the offense occurs, the offender is
23 brought into or found in the United States, even if
24 the conduct required for the offense occurs outside
25 the United States; or

1 “(4) an offender aids or abets or conspires with
2 any person over whom jurisdiction exists under this
3 paragraph in committing an offense under sub-
4 section (b)(1).”.

5 (b) **TECHNICAL AND CONFORMING AMENDMENT.**—
6 The table of sections for chapter 93 of title 18, United
7 States Code, is amended by adding at the end the fol-
8 lowing:

 “1925. Violation of classified information nondisclosure agreement.”.

9 **SEC. 5. DIRECTIVE TO SENTENCING COMMISSION.**

10 (a) **IN GENERAL.**—Pursuant to its authority under
11 section 994 of title 28, United States Code, and in accord-
12 ance with this section, the United States Sentencing Com-
13 mission, shall review and, if appropriate, amend the Fed-
14 eral Sentencing Guidelines and policy statements applica-
15 ble to a person convicted of an offense under section 1925
16 of title 18, United States Code, as added by this Act.

17 (b) **CONSIDERATIONS.**—In carrying out this section,
18 the Sentencing Commission shall ensure that the sen-
19 tencing guidelines account for all relevant conduct, includ-
20 ing—

21 (1) multiple instances of unauthorized disclo-
22 sure, delivery, communication, or transmission of the
23 classified information;

1 (2) the volume of the classified information that
2 was disclosed, delivered, communicated, or trans-
3 mitted;

4 (3) the classification level of the classified infor-
5 mation;

6 (4) the harm to the national security of the
7 United States that reasonably could be expected to
8 be caused by the disclosure, delivery, communication,
9 or transmission of the classified information; and

10 (5) the nature and manner in which the classi-
11 fied information was disclosed, delivered, commu-
12 nicated, or transmitted.

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