

112TH CONGRESS  
1ST SESSION

# S. 355

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.

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## IN THE SENATE OF THE UNITED STATES

FEBRUARY 15, 2011

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

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## 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 2011”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

1           (1) As of 2011, the statutory framework with  
2           respect to the espionage statutes is a compilation of  
3           statutes that began with the Act of June 15, 1917  
4           (40 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 extraterritorial jurisdiction over an offense under this sec-  
9 tion.”.

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

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

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

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

22 (b) **CONSIDERATIONS.**—In carrying out this section,  
23 the Sentencing Commission shall ensure that the sen-  
24 tencing guidelines account for all relevant conduct, includ-  
25 ing—

1           (1) multiple instances of unauthorized disclo-  
2           sure, delivery, communication, or transmission of the  
3           classified information;

4           (2) the volume of the classified information that  
5           was disclosed, delivered, communicated, or trans-  
6           mitted;

7           (3) the classification level of the classified infor-  
8           mation;

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

13          (5) the nature and manner in which the classi-  
14          fied information was disclosed, delivered, commu-  
15          nicated, or transmitted.

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