

Justice Department Bill Asking New Code for

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The Justice Department is asking Congress to approve a new system for prosecuting persons who leak classified information, a system designed to avoid the disclosure of that information during the trial.

To solve the security problem posed by leaks, the department wrote into the Nixon Administration's proposed new criminal code a provision involving disclosure of classified documents that has since provoked a barrage of criticism from freedom of information advocates.

As submitted to Congress under the White House imprimatur, the legislation prohibits anyone accused of disclosing secret, confidential or restricted information from defending himself by proving that the in-



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Senator Edmund S. Muskie

formation "was improperly classified at the time of its classification or at the time of the offense."

Senator Edmund S. Muskie, Democrat of Maine, who has taken the lead in attacking the code, says this provision "would enforce public ignorance by making criminals out of honest men and women who put the public interest above bureaucratic secrecy" by fur-

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Prosecuting Classified-Data Leaks

nishing improperly classified documents to the press.

Law Held Necessary

But the Justice Department insists that such a law is necessary. Without it, Government attorneys contend, any defendant can argue that the document he disclosed was improperly classified, and the court will then be forced to examine its contents in public to decide the question.

"We have had to decline to prosecute a significant number of cases involving classified documents because we could be forced to disclose secret information in the process," said Robert Keuch, a Justice attorney who helped draft the information code.

"Bringing such defendants to trial under circumstances that permit them to open up whatever documents are at issue would jeopardize the national security," he added.

Under the proposed new provision, all the Government would have to prove in such a security case was that the document involved had been classified by an authorized official. No further inquiry into its contents would be required for the prosecution or permitted for the defense.

Surprise at Criticism

A rising storm of criticism against two other controversial parts of the proposed communications section—those limiting circulation of "national defense information"—has surprised the Justice Department attorneys who drafted them largely because they maintain that the provisions are only a restatement of present statutes and Court-made case law.

"We knew that the classified information section was touchy, and we expected to be grilled on that," said Ronald L. Gainer, head of the department's Crimi-

Stirs Wide Attack

nal Code Revision Unit. "But we were caught flat-footed by attacks on the defense information sections, which are within the exact parameters of existing law."

In describing the drafting of the information section and the rest of the 366-page code, the Justice attorneys made the following points:

¶The drafters, all career department employees, were given only one advance political instruction by the Nixon Administration: To incorporate in the over-all code a provision reviving the death penalty that would be designed to survive scrutiny by the Supreme Court. The Court abolished capital punishment last year.

The death penalty section was included in the revised code, all of which was cleared by the White House before the legislation was introduced in Congress.

¶The defense information sec-

<p>tion bears no relationship to the British Official Secrets Act, to which some critics have compared it. Under the British law, it is a crime to publish any Government document that has not been officially released. Easing of these restrictions is now under study by Parliament.</p> <p>¶The classified information section was not influenced by the prosecution of Dr. Daniel Ellsberg and Anthony J. Russo Jr. for disclosing the Pentagon papers. Revision of the law in this area had been under study in the Justice Department for a</p>	<p>dozen years before that case broke.</p> <p>The information sections of the code were drafted by Mr. Gainer, as head of the code revision unit; Mr. Keuch, an attorney with the department's Internal Security Division on loan to the unit, and Ezra Friedman, one of eight Justice attorneys attached to the special study.</p> <p>These authors acknowledge that there are some differences between sections of the present criminal code and the new "defense information" provisions, but they maintain the changes</p>	<p>do not materially affect existing law.</p> <p>The proposed code provides that "a person is guilty of an offense if he knowingly communicates information relating to the national defense to a person not authorized to receive it." Penalties for a violation are a \$100,000 fine and 15 years in jail in time of war or national emergency, \$50,000 and seven years in all other times.</p> <p>Present law sets a \$10,000 fine and a 10-year jail sentence or both for anyone who "willfully" communicates any of a long list of types of defense in-</p>	<p>formation — "code book, signal book, sketch, photograph . . ." — to anyone "not entitled to receive it" or who refuses to deliver it to an authorized Federal employee.</p> <p>The present code specifies, however, that it must be information "relating to the national defense, which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation." This language is dropped in the new code.</p> <p>The new code defines "national defense information" as</p>
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<p>material relating to the military capability, planning, communications, installations, weaponry, intelligence and communications of the country, restricted atomic energy data and information on "the conduct of foreign relations affecting the national defense."</p> <p>The Justice Department attorneys say that existing law, as subsequently interpreted by the courts, would cover all these sources of information, including those relating to foreign relations.</p> <p>This section would punish a Government employe for leaking "national defense informa-</p>	<p>tion" to a newsman, who would become subject to its sanctions in turn if he passed on the information to anyone else, either privately or through a newspaper article or a broadcast report.</p> <p>But, the drafters of the code emphasize, reporters are subject to essentially the same criminal law penalties under present law.</p> <p>In a speech on April 1, Senator Muskie said, "No law gives the Government such power to prosecute newsmen, not only for revealing what they determine the public should know but just for possessing informa-</p>	<p>tion the Government says they should not have."</p> <p>A memorandum circulated by the Senator's staff in support of his position and published in The Congressional Record says, "Attaching criminal penalties to the use of information by the press is unprecedented in American history except for the Alien and Sedition Acts."</p> <p>The Senate, faced with such a long and complicated bill, including several other controversial sections, appears unlikely to complete action before next fall, with consideration by the House coming some time in 1974 at the earliest.</p>
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