

## VOICES

# Only in America? The Kiriakou Affair and the Public's Right to Know

 January 8, 2013 | by Sandra Coliver | Open Society Justice Initiative | [Add your voice](#)

What sorts of sentences do public servants in Europe and elsewhere receive for disclosing classified information to the media? And are penalties in the US disproportionately severe?

Those questions are relevant now as Americans concerned about the costs of excessive secrecy ponder the implications of a 30-month prison sentence agreed to by former CIA officer John Kiriakou as part of a plea agreement for having disclosed classified information to two journalists.

Kiriakou pled guilty on October 23 to having disclosed the name of a covert CIA officer and also information revealing the role of another CIA employee in classified activities. He will be sentenced on January 25.

No government representative has claimed, and no evidence has surfaced, that the disclosures were intended to cause, or in fact caused, any concrete harm. Indeed, the covert agent apparently remains undercover, presumably under a different identity. The other CIA employee was never covert, retired from the CIA, and has posted his home address, personal e-mail address, job as an intelligence officer and other personal details on a public Web site. The operations to which Kiriakou linked him took place in 2002 and 2003 and were extensively publicized.

Rather, the chief government prosecutor on the case, Neil McBride, stated simply that "leaks of highly sensitive, closely held, and classified information compromise national security and can put individual lives in danger."

Kiriakou pled guilty even though he had a solid defense, because he faced a sentence of up to 15 years and fines of up to \$250,000, and his attorneys' fees had virtually bankrupted him.

Now aged 48, Kiriakou had earned numerous commendations in nearly 15 years at the CIA, and he has already paid a heavy price: his wife was pressured to resign from her CIA job; he lost several consultancy jobs; they and their three young children had to move from their home into a small apartment; and they had to live on food stamps for several months.

But the price to the free flow of information about matters of high public interest is at least as great: journalists say that the zeal with which the Obama administration pursued this and similar cases has substantially deterred government employees, especially those handling classified information, from talking to the press about anything.

This is in a context where the government authorizes leaks of information it wants the public to get, pardons those leakers when they get caught (such as Scooter Libby, Cheney's hatchet man), and, as of recently, passed a law that allows the military to pay for stories intended for the US public without having to disclose the payments.

How does this compare with how classified information is handled in other democracies?



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In 14 European countries Kiriakou could not, or would be highly unlikely to, be found guilty based on the facts set forth in the indictment.

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To answer this question, and to uncover best practices, the Justice Initiative together with an academic at the University of Copenhagen recently undertook a survey of the laws and practices of 20 European countries.

All of the surveyed states proscribe criminal penalties for the disclosure of classified national security information. However, where there is no espionage, treason or disclosure to a foreign state, the penalties are far less than in the US: up to two years in Denmark and Great Britain; four years in Spain and Sweden; five years in Belgium, Germany, Poland and Slovenia; and seven years in France.

Moreover, prosecutions are rare. In seven countries—Albania, Belgium, Norway, Romania, Spain and Turkey— there has not been a single conviction in the past 10 years.

In eleven countries, there have been just a handful of prosecutions, and even fewer convictions.

Russia is the only country surveyed in which significant numbers of prosecutions have been conducted. In the past decade, 10 public servants were convicted and sentenced for terms ranging from 4 to 15 years for the public disclosure of information. The cases illustrate the serious consequences for individuals as well as the public's right to know of excessive prosecutions for public disclosure of classified information.

Significantly, ten states—Albania, Czech Republic, Germany, Italy, Moldova, the Netherlands, Norway, Romania, Spain, and Sweden—require the government to prove either actual or probable harm resulting from the disclosure in order for any penalty to be imposed. An additional three countries—Hungary, Denmark, and France—allow the lack of harm to be raised as a defence or mitigating circumstance.

In Britain, while Kiriakou could be found guilty pursuant to law, he most likely would not be, and in any event, would face a far lighter penalty: a maximum of two years, compared to the 15 years under US law. Since Britain's Official Secrets Act (OSA) of 1989 entered into force, ten public servants with authorized access to confidential information have been prosecuted under the Act. In three of these cases, charges were eventually dropped; in a fourth case, a jury found the public servant not guilty. In a fifth case, a public servant was required to pay a small fine. In the five cases (in 23 years) that resulted in custodial penalties, the maximum sentence was one year. Other defendants, including a former MI6 agent, served sentences of between two and eight months.

The case of Derek Pasquill, a Foreign Office employee, demonstrates the likelihood that a public servant who disclosed information that caused no serious harm would not be convicted. Pasquill was arrested and suspended with pay from his job in January 2006 for having leaked to a journalist Whitehall documents pertaining to the US practice of extraordinary rendition and UK government policy towards Muslim groups. He was charged with six counts of violating the OSA. The case against him collapsed after internal papers revealed that Pasquill's leaking of the information had actually been helpful in starting a constructive debate, and that one senior official had written that disclosure had not caused any harm, including to national security and international relations. In January 2008, charges were dropped against him.

Thus, in these 14 countries, which include all of the US's main allies, Kiriakou could not, or would be highly unlikely to, be found guilty based on the facts set forth in the indictment.

*In order to provide guidance to those engaged in drafting, revising or implementing laws or provisions relating to the state's authority to withhold information on national security grounds or to penalize the publication of such information, the Justice Initiative has embarked on a project to draft [Global Principles on National Security and the Right to Information](#). We have consulted more than 400 experts from 73 countries at 11 meetings around the world, have commissioned papers and prompted research studies, and have obtained endorsements from inter-governmental and national experts.*

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