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House Republicans consider prosecuting reporters over leaks

By Jamie Goldberg
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WASHINGTON — Expressing outrage over national security leaks, Republicans on a House Judiciary subcommittee pressed legal experts Wednesday on whether it was possible to prosecute reporters for publishing classified information.

The response was a qualified yes.

"Under certain circumstances, you can see that if someone acting with impunity and knowledge of the consequences goes ahead and publishes it, that is something that I think would be worthy of prosecution and punishment," said Kenneth Wainstein, a partner at Cadwalader, Wickersham & Taft who specializes in national security.

The hearing of the crime, terrorism and homeland security subcommittee follows publication in recent weeks in the New York Times and other outlets of detailed accounts about cyber warfare, the slaying of Osama bin Laden and alleged "kill lists" maintained for targeting foreign terrorists.

Most of the congressional uproar has been focused on the sources of the leaks. Atty. Gen. Eric H. Holder Jr. has appointed two federal prosecutors to lead criminal investigations into whether administration officials violated the Espionage Act by revealing classified information.

Most recently, former CIA officer John Kiriakou was indicted by a federal grand jury in April after being charged under the Espionage Act with leaking classified information to journalists.

Rep. Trey Gowdy (R-S.C.) suggested that the U.S. attorneys subpoena journalists to determine the names of sources who provide classified information.

"Put them in front of the grand jury," Gowdy said. "You either answer the question or you're going to be held in contempt and go to jail, which is what I thought all reporters aspire to do anyway. I thought that was the crown jewel of the reporter's resume to actually go to jail protecting a source."

Prosecutors have subpoenaed journalists in recent years and even held them in contempt of court for refusing to give up their sources. In 2005, New York Times reporter Judith Miller was jailed for 85 days for refusing to disclose conversations with confidential sources connected to the leaked identity of CIA operative Valerie Plame.

No journalist has been prosecuted for publishing leaked information under the Espionage Act.

"The distinction between punishing and prosecuting the newspaper reporter, that's a very different issue from prosecuting and punishing the leaker," Wainstein told the committee. "And you know, to your question as to whether you should put the reporter in jail, that's a bigger step."

Rep. Hank Johnson (D-Ga.) said that some leaks revealed abuses, such as the Abu Ghraib prison scandal. He questioned why Congress should be so concerned about the current leaks when leaks had occurred in every administration.

Instead of looking for ways to go after journalists, the government should be focused on updating outdated laws like the Espionage Act in a way that will protect journalists and government interests, said Bruce Brown, a partner at Baker & Hostetler law firm.

"What's unfortunate is that rather than grappling with this question in a measured, rationale way, whenever disclosures are in the headlines then lawmakers have a tendency to latch on to this area," Brown said.