

AIPAC Resolution/5

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As an organization that advocates before all levels of federal, state, and local government, the Jewish Community Relations Council of Greater Washington adopts this resolution to express its concern that the federal government’s prosecution of two AIPAC employees on charges of violating the Espionage Act of 1917 will chill constitutionally legitimate government advocacy.

The indictment charges Steven Rosen and Keith Weissman with passing on to agents of a foreign government (apparently Israel) allegedly classified national defense information disclosed to them by federal employees. The government employee charged with illegally providing the information to Rosen and Weissman has pleaded guilty to related charges. Other government employees who apparently also passed on allegedly classified information were not charged.

The Rosen/Weissman case is the first case ever brought under the 90 year-old Espionage Act against private individuals for disclosure of secret national defense information illegally furnished to them by a government official. The statute prohibits provision of such information to agents of foreign governments.

Although the federal government has previously brought criminal charges against federal employees who have given classified information to reporters and others, the Justice Department has in the past refrained from bringing criminal charges against reporters and other recipients of illegally disclosed national defense information who have published or otherwise passed on the information to others.

Reporters and lobbyists have long assumed that the Justice Department has refrained from prosecuting private citizen recipients of illegally disclosed government secrets out of concern for

1 the important Constitutional concerns such prosecutions would implicate. The applicable
2 Constitutional rights include both the right of free speech and, in the case of lobbyists such as
3 Rosen and Weissman, the additional First Amendment right to petition the government on issues
4 of public concern.

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7 The JCRC's concerns about the Rosen/Weissman prosecution are several:

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9 First, those involved in advocacy before the Congress or the Executive Branch know that
10 government officials, acting with apparent authority, may disclose classified information to
11 reporters or advocacy groups as a trial balloon, a back channel, or a means of testing the
12 accuracy of government information or the public's view of a government policy. Under the
13 new government policy reflected in the Rosen/Weissman prosecution, the recipients of classified
14 information, whether they are reporters, lobbyists or citizen activists, face the threat of criminal
15 prosecution for revealing information they in fact believe the government itself wanted to release
16 and have passed on. The chilling effect of this prosecution on the press and on advocacy and
17 public dialogue would significantly inhibit exercise of First Amendment rights.

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19 Second, the press and the public usually lack access to much of the information in issue in
20 espionage prosecutions. While the presiding judge verbally denied a government motion to close
21 large portions of the trial, the court room may yet be closed to the public during much of the trial
22 of such a case or other procedures may be used to maintain the secrecy of the information the
23 government claims was illegally passed on. As a consequence, citizens are unable to assess the
24 fairness of the prosecution or to receive from the case fair notice of the actions that could lead to
25 criminal charges.

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2 Third, even if the government’s case results in an acquittal, the burden of defending against an
3 unfounded prosecution, in terms of expense, public approbation, and time will be enough to
4 discourage people from speaking out.

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6 Fourth, the prosecutors of the Rosen/Weissman case rely on legal contentions that lack support
7 in the Espionage Act and threaten criminal prosecution regardless of whether the private
8 individuals knew that the information is classified. The United States Attorneys’ Manual, by
9 which the U.S. Department of Justice directs and coordinates local criminal prosecutions,
10 recognizes the need for special approval of Espionage Act investigations and prosecutions. That
11 Manual, however, currently does not provide any specific guidance or limitation respecting the
12 particular facts and circumstances that must be present before any person is prosecuted under the
13 subsection of the Espionage Act that forms the basis for the prosecution of Rosen and Weissman.

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15 The prosecution’s remarkable legal contentions have in fact been rejected by the highly-
16 respected federal judge who is presiding over the Rosen/Weissman case. In overruling the
17 prosecutors’ basic legal theories, the judge has held that merely sharing information with a
18 foreign nation, even if the information is classified, is not enough to sustain prosecution under
19 the Espionage Act. Rather, he has required the Justice Department to prove that the defendants
20 acted with knowledge of the unlawfulness of their conduct, with knowledge that the information
21 was classified, and with knowledge that the information was potentially damaging to the national
22 security.

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24 If, as has been reported in the press, at least part of the allegedly classified information was
25 passed to the defendants as part of a “sting” operation designed by the Federal Bureau of

1 Investigation, it makes the prosecution even more troublesome. Are we to believe that the FBI
2 would have intentionally disseminated information that, if disclosed to a foreign nation, would
3 be harmful to our national interest?
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5 Accordingly, the Jewish Community Relations Council of Greater Washington resolves:

6 1. The federal government should not change its nine-decade old policy of not bringing
7 Espionage Act prosecutions against private citizens for publishing or otherwise passing on
8 disclosed classified information illegally disclosed by government employees unless it first
9 issues a public statement explaining in detail the reasons for the change in policy and the
10 circumstances in which such prosecutions will be brought.

11 2. The detailed public statement should in addition explicitly commit the federal government to
12 adherence to the legal interpretation of the Espionage Act rendered by the federal judge presiding
13 over the Rosen/Weissman case.

14 3. The detailed public statement should in addition explain why the federal government believes
15 that prosecutions of private individuals may be undertaken under the described facts and
16 circumstances without inhibiting the exercise of the rights of free speech and advocacy enshrined
17 in the First Amendment to the Constitution.

18 4. The Executive Branch should—whether by Executive Order of the President, amendment or
19 modification of the United States Attorneys’ Manual, or other appropriate means—also establish
20 procedures that safeguard against prosecutions that are not in strict compliance with the criteria

1 established in the detailed public statement called for in the first three paragraphs of this
2 resolution.

3 For these reasons, the Jewish Community Relations Council is deeply troubled by this
4 prosecution because of our concern that the government policies articulated in this case will,
5 whether so intended or not, chill Constitutionally protected advocacy by inhibiting contact
6 between advocacy groups and regulators and government officials. These concerns should
7 trouble all groups and persons who report or advocate on matters of national defense or foreign
8 policy.

9 Accordingly, the JCRC concludes that on the facts now publicly available, the Rosen/Weissman
10 prosecution does not meet the standards described above and, absent the government conforming
11 to these standards, calls upon the government to dismiss these prosecutions.

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This resolution was passed by the JCRC board on April 18, 2007

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