Center for National Security Studies
protecting civil liberties and human rights

Director
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Memorandum to Interested Persons July 30, 2012

From: Kate Martin, Center for National Security Studies

Civil liberties/constitutional concerns re "leak provisions" in the FY 2013 Intelligence Authorization bill reported out by the Senate Intelligence Committee.

We commend the Senate Intelligence Committee for focusing on administrative measures to deal with the perennial problem of unauthorized public disclosures of classified information, rather than amending the Espionage Acts in order to cover leaks of information to the public. At the same time we are disappointed that the Committee's approach is not focused more on the perennial and pervasive problem of over-classification of information, which substantially contributes to leaks of such information.

We are also very concerned that certain provisions raise serious First Amendment, due process and separation of powers concerns; many of these provisions are not focused on leaks of classified information, but would impose barriers on disclosure of unclassified information. We are very concerned that if enacted these provisions would have the effect of depriving the public of information essential to debate on vital national security issues. No hearings have been held on these provisions and they were offered and marked up in secret. Public examination and debate are crucial before Congress considers these provisions.

1. First, section 505 " Prohibition on certain individuals serving as consultants," would unconstitutionally prohibit former government officials from providing public commentary through the media if they are paid for doing so. Such government officials are already prohibited by both law and contract from disclosing classified information. But this provision would go much further and prohibit paid public commentary on "matters concerning the classified intelligence activities of any element of the intelligence community or intelligence related to national security." The provision would prohibit paid public commentary, including op eds, on matters vital to democratic public debate, including for example, the use of enhanced interrogation techniques, government surveillance powers, targeted killings, procurement scandals, etc. It would apply for one year after leaving government employment – the time period when the former official's analysis may be most useful to the general public. The over-breadth of this provision in prohibiting commentary and analysis even when no classified information is disclosed would violate the First Amendment. Indeed the provision seems drafted in order to chill public discussion of information that is not classified, rather than being narrowly tailored to simply target disclosures of classified information.

2. Second, section 511" Surrender of certain benefits" would provide penalties for disclosure of classified information without providing adequate due process for imposing such penalties. We should note that we have always urged that deprivation of one's security clearance and job may be an appropriate penalty for violating one's oath not to disclose classified information and that such penalties already exist. Moreover, the Supreme Court has approved forfeiture of the proceeds of publications published in violation of pre-publication review requirements even if no classified information is in fact published. *SNEPP v. UNITED STATES*, 444 U.S. 507 (1980). Finally, persons convicted of certain serious crimes including espionage and violations of the Intelligence Identities' Protection Act may forfeit their pensions.

   But section 511 would establish a draconian penalty – forfeiture of compensation earned for government service over many years -- without regard to the seriousness of the offense involved, e.g., disclosure of even improperly classified information would be covered. And it would do so without providing adequate due process: a civil trial where the government would have the burden of proof and the employee would be afforded an adequate defense before an impartial judge or jury.

3. Provisions micro-managing the Executive Branch's disclosure of information to the public.

   A number of provisions, including sections 501, 502, 506, 507(a)(1) and (4), would provide onerous and potentially unconstitutional burdens on the Executive Branch's public disclosure of information vital to the electorate, all with the apparent intent of making public disclosure of even *unclassified* information more difficult rather than easier. Congress and the Intelligence Committees in particular, as stewards of the public's right to know, have a responsibility to protect the public's right to information. Instead these provisions would chill authorized disclosures of any information concerning national security and intelligence matters, and are not focused on stopping individuals from taking unauthorized actions to disclose properly classified information.

   To the extent that these provisions are likely to interfere with the functioning of the Executive Branch, they raise separation of process concerns. Even more fundamentally, they also raise First Amendment concerns as the required procedures and conditions for public disclosure are likely to interfere with public access to even unclassified information.

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