WASHINGTON
LEGISLATIVE OFFICE

August 15, 2012

United States Senate
Washington, DC 20510

Re: Remove Title V from FY2013 Intelligence Authorization Bill; "Anti-Leak" Measure Threatens Freedom of Speech and the Press, Would Also Violate Due Process and Separation of Powers

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Dear Senator:

On behalf of the ACLU, we urge you to strip Title V from S. 3454, the Intelligence Authorization Act of 2013.[1] Title V—ostensibly targeting the unauthorized disclosure of national security information—poses constitutional problems of the highest order, and would:

- Unconstitutionally limit the free speech rights of government workers and contactors in the intelligence and defense communities (§§ 505 and 506);
- Unconstitutionally limit the ability of the press[2] to report on matters of public interest involving intelligence activities, thus denying the public access to information necessary for voters to make informed decisions on national security, and deny Congress information that may form the basis for Congressional oversight (§§ 505 and 506);
- Unconstitutionally discriminate against the media (full Title);
- Unconstitutionally deny vulnerable government employees basic due process rights in leak investigations, including protections against the unfair denial of retirement benefits (§ 511);

[1] 112th Cong. (2012).

[2] Please note we use the terms "press" and "media" interchangeably. Further, as discussed below, modern technology has rendered the exact definition of the "media" a moving target. The ACLU urges an expansive view of the press to include the modern day equivalent of the "lonely pamphleteer," including any individual who is engaged in the gathering of information with the purpose of disclosing that information to the public. *See Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) ("[L]iberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.").

- Unconstitutionally violate both the First Amendment and separation of powers by possibly prohibiting even members of Congress (and definitely their staff) from talking to the press about intelligence activities, which could include ***advocacy for or against this very legislation*** (§ 505);

- Unconstitutionally deny Congress and the public access to information about government waste, mismanagement, abuse or fraud by outlawing leaks in the public interest (§§ 505 and 506);

- Violate open government principles to the extent that, were this regime in place, the American public would never have found out about the Pentagon Papers and the policy miscalculations that led to escalation in Vietnam; the Watergate scandal; the crime of torture, extraordinary rendition and secret prisons post 9/11; or the targeted killing program under President Obama, to name just a few important revelations disclosed through "leaks";

- Introduce significant confusion in the application of the law due to the numerous undefined terms in the statute, including "media," "background" and "off-the-record."

While we recognize the government's interest in protecting narrow categories of properly classified national security information from disclosure, these interests are not served by Title V.

I. Title V Would Be An Unconstitutional Violation of Freedom of Speech and Press

The Senate Select Committee on Intelligence conducted its markup of the 2013 intelligence authorization bill in closed session on July 24, 2012. In it, the committee included a new Title V, which purports to tighten up classification procedures to prevent leaks. In reality, these provisions have very little to do with legitimately harmful unauthorized disclosures of national security information. They amount to a comprehensive system whereby Congress would block both itself and the media—and, of course, the public—from obtaining information about the government's policies and conduct in the areas of national security and foreign affairs, in direct violation of the First Amendment's guarantees of freedom of speech and the press.

Title V should be rejected as wrong-headed, unnecessary and ineffective. Discussions of the specific problems in the legislation follow, in rough order of severity.

a. Section 506 Would Eliminate Background and Off-the-Record Conversations Between the Media and Rank-and-File Members of the Intelligence Community, Violating Both Freedom of Speech and of the Press

Section 506 severely limits who in the intelligence agencies can talk to the press. Under the legislation, only the director and deputy director, and designated public affairs officials, of any element of the intelligence community as defined under 50 U.S.C. § 401a (2006), would be permitted to talk on "background" or "off-the-record" about intelligence issues with the media "or any person affiliated with the media."

From a constitutional perspective, § 506 is both a frontal attack on freedom of the press and a potentially radical limitation on the public's ability and right to access information about government affairs—and especially national security matters. As explained in the numerous articles outlining the role of background interviews with members of the intelligence community, such conversations are commonplace and harmless, and are rarely (if ever) the source of leaks that are intended to harm U.S. national security.[3] Indeed, they often serve the important purpose of allowing journalists who are already privy to sensitive classified information to gauge the accuracy of the information and whether there is any risk in disclosure.[4]

Further, much of the media attention on § 506 has focused on the fact that it would practically also cover *un*classified media briefings by specialists in the intelligence community. While that is certainly true—and a serious First Amendment concern in and of itself—the fact that this would prohibit conversations that involve the transfer of classified information to the press is likewise a First Amendment issue.

First, and most obvious, there is no carve out in the legislation for whistleblowers. Those seeking to disclose information in the public interest of government fraud, waste, abuse or malfeasance would run afoul of § 506.

But, second, § 506 will serve to bias the information being disclosed toward ***self-serving leaks*** by senior officials in elements of the intelligence community. That is, the director, deputy director and designated public affairs official in an element of the intelligence community—as well as completely uncovered members of Congress and White House officials—will still be leaking, but the leaks will almost certainly be politically expedient and the information disclosed favorable to the leaker. Selective leaking is, in many ways, worse than shutting off leaks altogether, because it misleads the electorate and results in poor political and policy decisions.

For instance, in the lead up to the second Iraq War, the New York Times published a number of stories based on leaked classified information about Saddam Hussein's efforts to revitalize his program to develop and stockpile chemical, biological and nuclear weapons of mass destruction ("WMDs").[5] Those leaks reportedly came from high level officials in the White House, who sought to promote evidence of Iraq's revitalization of a WMD program and to downplay contrary intelligence assessments. Reporters with Knight Ridder, however, spoke to lower-level officials,

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[3] Bill Keller, *The Leak Police*, N.Y. Times, Aug. 5, 2012; Editorial, *A Pernicious Drive Toward Secrecy*, N.Y. Times, Aug. 2, 2012, at A20; Scott Shane, *Inquiry Into U.S. Leaks Is Casting Chill Over Coverage*, N.Y. Times, Aug. 1, 2012, at A1; David Ignatius, *Senate's Anti-Leaking Bill Doesn't Address the Real Sources of Information*, Wash. Post, July 31, 2012; Editorial, *A Bill to Stop Security Leaks Puts a Plug on Democracy*, Wash. Post., July 30, 2012.

[4] *See* Ignatius, *supra* note 3.

[5] *See* Daniel Okrent, *The Public Editor; Weapons of Mass Destruction? Or Mass Distraction?* N.Y. Times, May 30, 2004; Editors, *The Times and Iraq*, N.Y. Times, May 26, 2004, http://www.nytimes.com/2004/05/26/international/middleeast/26FTE_NOTE.html.

who challenged the administration's claims.[6] The Times's uncritical reliance on top-level administration and intelligence agency officials was criticized by the paper (and many others), especially in light of numerous contradictory reports that were known to rank-and-file intelligence officials and employees.[7]

Section 506 is deeply flawed for another reason. It limits the "gag" on non-senior officials to the intelligence community, sparing, among others:

1. the White House;

2. the non-intelligence elements of the Departments of Energy, Treasury and Homeland Security (repositories for some of the most sensitive national security information in government);

3. the entire Department of Justice (save the intelligence elements of the Federal Bureau of Investigation and the Drug Enforcement Administration);

4. the non-intelligence defense elements[8] (including certain component units under the USD(I), which are likely to be indistinguishable from the intelligence community proper in terms of access to national security information); and,

5. Congress.

The effect of doing so will be to further skew the accuracy of the information that makes its way to the public via the press. The intelligence community is often competitive with other elements of the government in terms of the policy debate. Indeed, in the WMD example above, it was dissenters within the intelligence community that questioned the administration's reliance on reports from self-interested Iraqi dissidents that, in many cases, turned out to be blatantly false. Under § 506, these officials and employees will be prohibited from attempting to "set the record straight" by talking to the media on background.

All of these considerations demonstrate that § 506 would violate the constitutional guarantees of freedom of speech and the press in several distinct and specific ways:

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[6] *See* Jonathan S. Landay, *Lack of Hard Evidence of Iraqi Weapons Worries Top Officials*, Knight Ridder, Sept. 6, 2002, http://www.mcclatchydc.com/2002/09/06/8546/lack-of-hard-evidence-of-iraqi.html.

[7] *See The Times and Iraq*, *supra* note 5; Douglas Jehl, *U.S., Certain That Iraq Had Illicit Arms, Reportedly Ignored Contrary Reports*, N.Y. Times, Mar. 6, 2004. *See also* Michael Gordon, et al., *'Iraq: Now They Tell Us': An Exchange*, N.Y. Times Rev. of Books, Apr. 8, 2004, http://www.nybooks.com/articles/archives/2004/apr/08/iraq-now-they-tell-us-an-exchange/?page=1.

[8] With respect to the military, the "intelligence community," and therefore § 506, covers only the Defense Intelligence Agency, the service branch intelligence agencies, the National Security Agency and the Department of Defense ("DOD") reconnaissance agencies. *See* 50 U.S.C. § 401a (2006) (listing components of the intelligence community). Based on our reading of the legislation, it would not cover all of the officials, offices or agencies reporting to the Undersecretary of Defense for Intelligence ("USD(I)").

- It literally censors conversations because of the identity of the speakers, which is an unconstitutional content-based restriction on speech. The non-disclosure agreements ("NDAs") that already bar disclosure of classified information do not operate to censor speech per se. By their nature, they permit the disclosure, but subject the speaker to sanction after the fact.[9] Section 506 directly censors speech based on the identity of the speakers, which is clearly unconstitutional unless the restriction can survive strict scrutiny.[10]

- It violates the public's right to free and unfettered access to information about government affairs. As the ACLU wrote in its amicus brief in the Pentagon Papers case, "if the Government can suppress information critical to the informed exercise of political judgment merely by invoking the shibboleth of national security, the basic commitment of this nation to free trade in ideas will be severely weakened."[11] The "right to know" is a necessary corollary to the right of expression guaranteed by the First Amendment, and would be dramatically curtailed by § 506.[12]

- Though not a prior restraint in the sense of, for instance, an injunction against the publication of information that is already in the hands of the media, it would act effectively as a prior restraint by preventing the media from even receiving information in the first place, and would do so without any specific compelling reason

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[9] They are, after all, creatures of contract law. The most significant remedies provided for in the standard NDA (Form SF-312) primarily seek to divest from a violator any monetary gain from the disclosure. So, for instance, the agreement provides for administrative action against the violator, including loss of pay or clearance; termination; a possible civil action by the government to recover compensatory damages or other relief; and a waiver by the employee of any claim to royalties or any other financial benefit resulting from the unauthorized disclosure. The agreement also notes the available criminal remedies. While there is mention of possible injunctive relief to prevent disclosure in violation of the agreement, any such injunction would run into First Amendment considerations. *See* Info. Sec. Oversight Office, Classified Information Nondisclosure Agreement (Standard Form 312) Briefing Booklet, http://www.archives.gov/isoo/training/standard-form-312.html.

[10] *See Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 889 (2010) ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content."); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."). Just because these conversations are not taking place directly in the public square does not mean they are not discussions of crucial issues in the public interest. Individuals' employment as intelligence officials does not rob them of their First Amendment right to be free of direct government censorship. Section 506 is direct censorship of particular types of speech—namely, certain conversations with the media.

[11] Brief for Am. Civil Liberties Union as Amicus Curiae at *19, *New York Times Co. v. United States*, 403 U.S. 713 (1971) (Nos. 1873, 1885).

[12] Although the Supreme Court has never directly recognized an independent "right to know" under the First Amendment (as opposed to a "right to report" or a right of the public to access media), to the Framers it was clearly necessary for the First Amendment to effect its purposes. For instance, as James Madison wrote in 1822, "[k]nowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power Knowledge gives. A popular government without popular information ***or the means for acquiring it***, is but a prologue to a farce or a tragedy, or perhaps both." James Madison, The Complete Madison: His Basic Writings 8 (Saul Kussiel Padover ed., 1953) (emphasis added).

(let alone one that could meet the enormously high bar for prior restraints in the national security context).[13]

- It discriminates against the media. Academics, other government employees and, indeed, even members of the general public are permitted to have conversations with officials or employees in the intelligence community that are identical to the conversations that would be prohibited under § 506.[14] Such differential treatment of the media is a clear violation of the press clause of the First Amendment.[15]

Finally, the section is seriously flawed in its lack of specificity. It is both broad and vague enough that it could conceivably cover interactions between intelligence community officials and their spouses or friends who work in or with the media, which is surely not the intent of the legislation. Also, as discussed in a separate subsection below, the provision suffers from the use of undefined terms of art, including "background" and "off-the-record," which would likewise result in serious vagueness and overbreadth concerns.

Section 506 is perhaps the clearest indication that this is not an "anti-leaks" bill. The provision has absolutely nothing to do with the types of leaks that ***are intended and likely to cause harm to the national security***, which—to the extent they occur (and they are rare)—usually originate outside the intelligence community or involve the surreptitious disclosure of information to a foreign power, not the media.[16] This bill would outlaw talking to the media in certain instances while not addressing at all disclosures to hostile foreign powers (though these are, of course, already illegal and may be punished, and punished severely, under existing law).

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[13] There should be no prior restraint where there is even a scintilla of public interest in the material to be disclosed. *See* ACLU *New York Times* Amicus, *supra* note 11, at *12-*13. The *Near* exception allowing for prior restraint must be construed very narrowly (and the "decency" exception ignored). *See Near v. Minnesota*, 283 U.S. 697, 716 (1931) ("[T]he limitation has been recognized only in exceptional cases.").

[14] The plain language of the legislation (i.e., "information regarding intelligence activities") covers far more speech than the narrow categories that are currently illegal under existing law.

[15] *See, e.g.*, *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (holding strict scrutiny warranted when restriction expressly "single[s] out the press"); *Ark. Writers' Project v. Ragland*, 481 U.S. 221 (1987) (taxation exemption for religious, professional, trade and sports journals unconstitutional)*; Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983) (differential taxation unconstitutional). The *Minneapolis Star & Tribune Co.* analysis is not limited to differential taxation. *See, e.g.*, *Legi-Tech, Inc. v. Keiper*, 766 F.2d 728, 734 (2d Cir. 1985) ("We do not think that the rationale of *Minneapolis Star* is limited to taxation."). Additionally, prior to *Leathers*, courts echoed the case's holding that a law that expressly singles out the press is automatically subject to strict scrutiny, even when a non-discriminatory ban on access could be constitutionally acceptable. *See id.* ("We do not agree that the discriminatory denial of access to an organ of the press can never affect First Amendment rights where access generally is not constitutionally mandated. The Supreme Court has squarely held that the government may not single out the press to bear special burdens, even if evenhanded imposition of the identical burdens would be constitutionally permissible.").

[16] *Ignatius*, *supra* note 3 ("[A]fter 35 years of writing about intelligence matters, I want to confide a journalistic secret: Most damaging leaks don't come from U.S. intelligence agencies. They come from overseas, or they come from the executive branch, or they come, ahem, from Congress.").

Section 506 has one target and one target alone: the media. It treats the act of news gathering as the main source of the unauthorized disclosure of national security information, when journalism is really incidental to the problem of "leaking" (to the extent such a problem exists). Further, it treats the media as an annoyance or, worse, a threat. This is fundamentally averse to basic constitutional principles and this particular provision should be abandoned, and with haste.

b. Section 505 Would Unconstitutionally Bar Current or Former Government Officials With Security Clearances, Including Congressional Staff and Possibly Even Members of Congress, From Providing Commentary on Intelligence Issues

Section 505 bars three categories of cleared current or former government workers and contractors,[17] covering literally millions of Americans,[18] from "enter[ing] into a contract or other binding agreement with the media in order to provide, or otherwise assist in providing, analysis or commentary on matters concerning the classified intelligence activities of any element of the intelligence community or intelligence related to national security."[19] As discussed in a separate section below, the provision fails to define "binding agreement," the "media," "analysis," "commentary" or "active security clearance."

This provision has no reasonable connection with "leaks." We can safely say that most leaks of sensitive national security information happen outside formal contracts between intelligence employees and the media, particularly those leaks that are intended to do harm to the United States. What this provision would do is entirely insulate the American people—***and Congress***—from informed commentary on crucial matters of keen public interest. Additionally, this provision fundamentally violates the First Amendment rights of both current and former employees. Although federal employees are subject to limited restrictions reflecting the unique forum of the workplace, speech that has no effect on the workplace, or the ability of the employee to perform her job, cannot be restricted.[20] This provision, by contrast, would dramatically chill the ability of current and former intelligence community officials and employees from engaging in public discussions about their employment that have no harmful effects on their employment or employer, and are essential for an informed electorate.

Additionally, the provision would deny the American public a key avenue of information about national security matters that significantly implicate the public interest. Intelligence officials and contractors, and especially former intelligence officials and employees who have held top secret

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[17] That is, any government officer, employee or contractor with an active security clearance; any member of an intelligence community advisory board with a security clearance; and any former officer, employee or contractor who has left government service in the past year, and who has had a clearance permitting access to top secret, sensitive compartmented information within the three years prior to departure. *See id.* § 505(b)(3)(B).

[18] Office of the Director of National Intelligence, 2011 Report on Security Clearance Determinations 3 (2011) (reporting 4.8 million Americans cleared at a secret level or higher).

[19] *See id.* § 505(a).

[20] Again, although the government may require the employee to agree to an NDA, the creation of a contractual obligation is different than a federal law that would directly prohibit the act of speaking.

clearances, are likely to be the most informed segment of society on an area of government that is cloaked in secrecy and totally opaque to the average American.

This provision would, for instance, block commentary by former Special Forces officers on the killing of Osama bin Laden, even by an officer who had no role in the hunt for bin Laden. It would bar former intelligence officials from providing informed commentary on the targeted killing program, Iran's nuclear intentions or the current state of dissent in Russia. It could even bar production and release of the recent feature length Navy recruiting film Act of Valor, which almost certainly involved "binding agreements" between the Navy, the SEALs featured in the film and the filmmakers, and it arguably involved "analysis or commentary" about classified intelligence matters.[21]

Further, the provision would bar officials who have not had a security clearance in almost four years from providing commentary to the media (that is, if their top secret clearance had expired or had been revoked in less than three years before their departure, and including the one-year gag). Additionally, former officials would be prohibited from providing analysis or commentary to the media even with respect to issues on which they have never worked (and which may not have even existed at the time of their employment).

The effect of the provision on Congressional speech is also unclear. First, Congressional staff with active clearances will be barred from talking to the media pursuant to a contract or "binding agreement" with the media.[22] Although staffers would be subject to the law only if they entered into a contract or agreement "with the media," they may still run afoul of the law if they help prepare their representative or senator to discuss "matters concerning the classified intelligence activities" of the intelligence community.[23] This will be particularly true if, as discussed below, "binding agreement" is interpreted to mean something other than a legal contract.

There is even a colorable argument that the section would apply directly to members of Congress, even though they do not have a "personnel security clearance," as provided for in the relevant executive orders and regulations.[24] Although "security clearance" is conventionally understood to refer to the actual clearance process undertaken by the executive branch, it is, in fact, a term of art that could be read on its face to mean an individual who is able to access classified information legally. Members of Congress fall into that camp. Although they do not have "security clearances," they are "cleared" to access classified information. To the extent this

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[21] *See* Anna Mulrine, *'Act of Valor': Does Navy SEAL Film Reveal Too Many Secrets?*, C.S. Monitor, Feb. 24, 2012, http://www.csmonitor.com/USA/Society/2012/0224/Act-of-Valor-Does-Navy-SEAL-film-reveal-too-many-secrets ("Pentagon officials say they have been fielding calls from concerned congressional staffers, wondering whether the movie might reveal sensitive tactics.").

[22] *See* S. 3454, 112th Cong. § 505(a) (2012).

[23] Consider, for instance, a staffer who sits in with a member of Congress during a background interview on targeted killing legislation. Assuming a broad reading of "binding agreement" that covers all of the parties to the conversation, the staffer would arguably come under the ambit of the legislation. To this extent this hinders members of Congress from commenting publicly in an informed fashion on national security matters, it is of constitutional concern.

[24] *See, e.g.*, 32 C.F.R. § 154.16 (2012); Exec. Order No. 13,467, 3 C.F.R. 2008 Comp., p. 196.

argument would serve to even chill members of Congress from speaking to the press as part of their oversight responsibilities, it raises civil liberties concerns.

Finally, the ambiguity in the term "binding agreement" could lead to even more confusion. While presumably intended to bar individuals with access to classified information from appearing as paid consultants on news programs, the current language would likely sweep much further. Although the plain language reading of "binding agreement" would be synonymous with contract, the fact the legislation reads "contract or other binding agreement" would lead an interpreting court to avoid redundancy and assume that Congress intended the two terms to mean different things. Accordingly, a court could conceivably find that a "binding agreement" includes a non-legal agreement that is still meant to control the obligations of the agreeing parties. For instance, an agreement with a reporter to give the reporter an "exclusive" could be seen as "binding," in the sense that giving the story to another reporter would void any assurances the reporter made to the source in terms of how he or she would be treated in the story in exchange for the exclusive.

In sum, § 506, as with § 505, is concerned more about denying the media access to potential sources than it is with addressing truly damaging leaks.

c. Sections 504(a)(1) (Expanding Polygraph Use), 507(a)(1) (Reporting All Contacts With Media), 507(a)(4) (Requiring Prepublication Review for Oral Comments) and Section 508(a)(2) (Modification of Media Subpoena Policies) All Pose Significant First Amendment Risks

i. Expanding the Use of Lie-Detector Tests in Leak Hunts

Section 504(a)(1) of the markup requires the Director of National Intelligence ("DNI") to assess the feasibility of expanding the use of lie-detector tests in leak investigations. Polygraph testing, especially in the context of security screening, has a relatively high level of both false positives and false negatives. On the latter, an individual who actually seeks to harm the United States through the disclosure of classified information will be highly motivated to learn and employ polygraph counter-measures, thus further *increasing* the risk to national security by reliance on lie-detector tests.[25]

Accordingly, the widespread deployment of polygraphs in search of "leakers" will undoubtedly cast inappropriate suspicion on scores of innocent employees, and will likely fail to detect real threats (to the extent they exist). Their widespread use would also chill intelligence community officials and employees from exercising their First Amendment rights, for fear of being subject to polygraph testing that could engender unwarranted suspicion.

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[25] The National Research Council of the National Academies, under contract with the Department of Energy, concluded that polygraphs should not be used in security screenings. The Academy wrote, "[p]olygraph testing yields an unacceptable choice for DOE employee security screening between too many loyal employees falsely judged deceptive and too many major security threats left undetected. Its accuracy in distinguishing actual or potential security violators from innocent test takers is insufficient to justify reliance on its use in employee security screening in federal agencies." Nat'l Research Council, The Polygraph & Lie Detection (2003), *available at* http://www.nap.edu/openbook.php?record_id=10420&page=R1.

ii. Recording Every "Oral and Written" Contact With the Media

Section 507(a)(1) would require the Office of the Director of National Intelligence ("ODNI") to craft regulations governing the reporting of every contact between the media and any current intelligence community employee or contractor, or member of an advisory board, with an active security clearance. In addition to the administrative burden this would pose (without any benefit in terms of deterring harmful leaks), tracking all oral and written communications with the (undefined) "media" would further chill the background conversations that happen every day between members of the media and rank-and-file officials and employees in the intelligence community, which provide information crucial for an informed electorate.

iii. Expanding Prepublication Review to "Anticipated Oral Comments"

Section 507(a)(4) would expand the existing prepublication review process to "anticipated oral comments." The lack of definition of "anticipated oral comments" could lead to impermissible (and absurd) results, where even informal comments at a dinner party could be covered by the requirement. Additionally, by introducing this uncertainty into the prepublication review process, and in conjunction with § 511 (moving authority to determine when a breach of the prepublication review process has occurred to the ODNI), the provision would further facilitate the selective censorship of information unfavorable to the government.[26]

iv. Potentially Expanding Subpoena Authority to Force Members of the Media to Disclose Their Sources

Finally, Section 508(a)(2) would require the attorney general, in coordination with the DNI, to submit a report on the "effectiveness of and potential improvements" to leak investigations, which must include "potential modifications" to the Department of Justice ("DOJ") guidance on subpoenas to the news media.[27]

This section could be of enormous First Amendment import, depending on the proposed modifications. While we would urge the attorney general to further limit the guidance on when DOJ may subpoena a member of the media, it is likely that this section will be taken by DOJ as an invitation to further expand federal authority to issue subpoenas in the context of leak investigations. Members of the media should be protected from compelled disclosure of their sources, except when the information cannot be disclosed in any other way and it would be material to a criminal defense and/or would prevent imminent harm to life or limb. To the extent the proposed modifications grant DOJ further authority to issue subpoenas, they open the door to significant civil liberties violations.

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[26] *See* note 29, *infra*, for further discussion of the existing threat of selective censorship by the prepublication review board.

[27] Currently set out in 28 C.F.R. § 50.10 (2012). The draft actually says that the policies are described in § 50.10(b), which, as discussed above, is only part of the guidance (and requires investigators to make all reasonable attempts to uncover the relevant information without subpoenaing a member of the press).

Further, the actual language in S. 3454 says that DOJ guidance is limited to a particular subsection, § 50.10(b), of the Code of Federal Regulations. The guidance is actually contained in the whole § 50.10, and subsection (b) only covers the exhaustion requirement.[28] To the extent the draft requires DOJ to issue guidance on revisiting the exhaustion requirement, this could potentially raise even more serious civil liberties implications. The exhaustion requirement is one of the most important safeguards—along with requiring express approval of the attorney general before issuing a subpoena—to prevent the overuse of the government's subpoena authority to force members of the media to disclose their sources.

II. The Pension Forfeiture Provision Lacks Appropriate Due Process Protections

Section 511 is exceedingly punitive, contains no clear protections against unconstitutional due process violations and would do little to deter truly dangerous disclosures of sensitive national security information. It would require each employee of an element of the intelligence community to sign a new written agreement that prohibits the disclosure of classified information without authorization and mandates compliance with the prepublication review requirements contained in the relevant employee's NDA.

Although the law already requires the imposition of an NDA as a condition of employment, punishment for a violation is pursuant to contract law and subject to judicial due process. Title V would effectively move the process for adjudicating whether a violation occurred to the ODNI and would give the DNI or the relevant head of the intelligence community element the authority to single-handedly determine if an employee committed a violation of the new agreement.[29] On such a determination, the employee could be punished by the ***forfeiture of federal pension benefits*** with the vague caveat "in a manner that is consistent with the due process and appeal rights otherwise available to an individual who is subject to the same or similar disciplinary action under other law."[30] This caveat is insufficient to appropriately define the level of due

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[28] It requires an investigator to exhaust all "reasonable" alternative investigative means or alternative sources for securing the relevant information before a subpoena may issue. *See id.* § 50.10(b).

[29] Moving the adjudication of NDA violations to the sole discretion of the DNI risks further politicizing the process. The Washington Post reported in May that the CIA has undertaken an internal investigation to determine if the prepublication review process there has been hijacked to protect agency boosters and silence agency critics. While a book by former head of the National Clandestine Service, Jose A. Rodriguez, received approval to use copious amounts of selectively disclosed national security information to defend the use of illegal interrogation methods, a former FBI agent and whistleblower, Ali Soufan, was forced to redact so much text that he left the redactions in the published book and changed the title to "The Black Banners." Though the FBI had approved his book, the CIA imposed the changes, redacting information critical of the agency. Giving the DNI authority to determine at his discretion whether an employee or official has violated his or her NDA raises identical concerns. *See* Greg Miller & Julie Tate, *CIA Probes Publication Review Board Over Allegations of Selective Censorship*, Wash. Post, May 31, 2012, http://www.washingtonpost.com/ world/national-security/cia-probes-publication-review-board-over-allegations-of-selective-censorship/2012/05/ 31/gJQAhfPT5U_story.html.

[30] S. 3454, 112th Cong. § 511(b)(3) (2012). This would drastically expand the remedies provided for a breach of existing NDAs. The legislation would effectively include liquidated damages in the new written agreement, which would have to include possible forfeiture of government benefits.

process protection due the employee, and is thus a clear violation of constitutional due process protections for intelligence community officials and employees.[31]

III. Title V Raises Separation of Powers Concerns By Limiting Congressional Oversight

It bears emphasizing the (admittedly self-inflicted) harm this legislation would visit on Congress. The legislation would seriously impair Congress's ability to act as a check on the intelligence community. First, § 505's potentially broad ban on current and former government employees and contractors acting as consultants and advisors to the media could conceivably extend to members of Congress and would certainly extend to cleared staff.[32] Part of a member's responsibility is to criticize abuses by the executive branch, and often to do so in the media. To the extent this would deny members of Congress access to the media soapbox, it would significantly diminish Congress's ability to exercise its oversight function.

Additionally, § 505 will also close off an essential conduit of information to Congress. Although the vast majority of truly damaging disclosures of national security information (read: espionage) are not to the media, the media's coverage of intelligence issues provides crucial information to Congress in its role as a check against the executive branch.

Indeed, many controversial classified programs have only received thorough investigation by the legislature as a result of news reporting. Perhaps the most obvious example is the classified warrantless surveillance programs launched by the National Security Agency following the attacks of September 11. When briefed on the program, then ranking member of the Senate Select Committee on Intelligence, Sen. John D. Rockefeller IV (D-W.V.), wrote a two page handwritten letter to Vice President Cheney outlining the "profound oversight issues" and "concerns" with the program.[33] He further noted his inability to fully assess the program without access to legal and technical expertise, and warned that without this information, he "simply cannot satisfy lingering concerns raised by the briefing we received."[34]

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[31] Indeed, it is a violation of due process protections against the forfeiture of property without appropriate neutral review. *See Goldberg v. Kelly*, 397 U.S. 254, 263 n.8 (1970). At the very least, *Goldberg* requires pre-termination notice and a pre-termination evidentiary hearing presided over by a neutral arbiter before federal pension benefits can be denied. Aside from the vague disclaimer noted above, there is no such guarantee. (*Matthews v. Eldridge* is not to the contrary; there, an evidentiary hearing would have been of little use given that the bulk of the evidence was medical and could not be controverted. *See* 424 U.S. 319, 326 (1976). Here, an intelligence employee will need to engage in a full airing of the facts in order to mount an effective defense.)

[32] As discussed above, although members of Congress do not go through the formal clearance process as applied to both their staffs and other federal employees, it remains to be seen whether a court could conceivably treat them as having an "active security clearance" for the purposes of this section. They are, after all, "cleared" under the relevant executive orders, regulations and custom to receive classified information.

[33] Letter from Senator John D. Rockefeller IV to Vice President Richard Cheney (July 17, 2003), http://www.fas.org/irp/news/2005/12/rock121905.pdf.

[34] *Id.*

Senator Rockefeller then locked a copy of the letter in a sealed envelope in a secure location in the committee's offices. More than two years passed before the program, and the severe concerns it raised in both Congress and in the federal agencies, were disclosed to the public—through "leaks" to the New York Times. Indeed, in a move highlighting the extent to which the media will take national security considerations into account in newsgathering and reporting, the Times agreed to hold publication of the story *for more than a year*, and omitted information that "administration officials argued could be useful to terrorists . . . ."[35]

This episode—one of the most historic national security leaks in recent memory—highlights the legislative branch's need for a free press in the execution of its oversight obligation. This reality was top-of-mind to this country's Framers when they enshrined freedom of the press in the First Amendment. The concern with press licensing and the law of seditious libel, which, in part, prompted the inclusion of the press clause is precisely about the government being able to block the reporting of information that is embarrassing or that discloses official wrongdoing. Too often such information is shielded through spurious invocations of national security. These problems will be severely exacerbated under Title V, and the "shibboleth" of national security will almost certainly be used to deny Congress the kind of information that it needs to do its job.

IV. The Lack of Definitions For Terms Like "Media" and "Background" Will Cause Considerable Uncertainty and Possible Constitutional Concerns

Title V fails to define several central terms, which would cause considerable confusion in the application of the law.

First, multiple sections refer to the "media," but fail to provide any guidance on what constitutes a member of the media. The lack of a definition will require the courts to engage in the extremely dangerous exercise of trying to determine who qualifies as the "media" such that they receive the protection of the First Amendment's freedom of the press clause. Conversely, however, the inclusion of a definition also raises serious constitutional considerations because then it is Congress drawing the constitutional line.[36] The only possible solution is to include an extremely broad definition of the "media" (covering, for instance, bloggers and members of Twitter), which will chill a correspondingly more expansive amount of speech.[37] All told, these

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[35] James Risen & Eric Licthblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, *available at* http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all.

[36] This exact consideration was one of the reasons the Supreme Court failed to recognize a reporter's privilege not to testify in front of a grand jury about the identity of confidential sources. If the Supreme Court was frightened to answer the question in that easy case (the ACLU strongly supports the creation of a federal reporter "shield" law that would legislatively impose the privilege), Congress should be terrified to do so here. *See Branzburg v. Hayes*, 408 U.S. 665, 703-04 (1972) ("The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.").

[37] Again, *Branzburg*—though a questionable decision in its failure to recognize the privilege—held that the freedom is an expansive one, and an undefined "media" in S. 3454 will be construed by the courts broadly. *See id.* at 704 ("Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and

considerations illustrate the unconstitutionality of any legislation targeting the media, and counsel in favor of abandoning Title V wholesale.

Second, § 506 prohibits "background" and "off-the-record" communications with the media (presumably the other typical ground rule, "deep background," is covered by "background," even though they differ in common understanding). These terms of art are undefined in the legislation and mean different things to different reporters, outlets and sources.[38] Indeed, they mean different things within the government to different components of a single cabinet department.[39]

In practice, such lack of definition will either force intelligence officials and employees to create new "categories" of interviews to avoid the gag, or will—and this seems more likely—cut off these conversations completely. Additionally, the ban on "off-the-record" communications, which is generally understood as meaning that nothing in the interview can be used at all, would be ineffective in addressing leaks in that, by definition, an off-the-record interview cannot result in disclosure of the information to the public.

Finally, as previously discussed, the term "binding agreement" in § 505 will likewise create confusion and could be read to cover more media activity than is intended or appropriate under the First Amendment.

V. Conclusion

In sum, the committee here has offered less an "anti-leaks" bill than an "anti-media" bill. The legislation would build a Berlin Wall between the press and the intelligence community, surmountable only by select "safe" officials. The ultimate victims of such a system would of course be the public, but it will also be you—the legislative body that approved it. Congress simply cannot perform its oversight function without access to national security information that is disclosed without authorization.[40] By approving this legislation, Congress will effectively be

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periodicals. It necessarily embraces pamphlets and leaflets . . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' . . . Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury.") (citations omitted).

[38] *See, e.g.*, Timothy Noah, *What Does "Off the Record" Mean?*, Slate, Oct. 20, 2009, http://www.slate.com/articles/news_and_politics/recycled/2009/10/what_does_off_the_record_mean.html ("[J]ournalists deliberately keep the applied meaning of terms like 'off the record' and 'background' fluid to maximize their latitude to impart information.").

[39] Compare State Dep't, Ground Rules for Interviewing State Department Employees, http://www.state.gov/r/pa/prs/17191.htm ("No information provided [on 'deep background'] may be used in the story."), with State Dep't Bur. of Int'l Info. Programs, Speaking On and Off the Record, http://iipdigital.usembassy.gov/st/english/publication/2012/01/20120103162705yelhsa0.3310205.html#axzz22zTTO5mQ ("When you establish before an interview that you are speaking only on deep background, a reporter may use the information but without giving any attribution.").

[40] Mike German & Jay Stanley, Drastic Measures Required: Congress Needs to Overhaul U.S. Secrecy Laws and Increase Oversight of the Secret Security Establishment 21-23 (2011).

cutting out its eyes and off its ears, and Title V of the marked up authorization measure should be opposed in its entirety.

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