

July 30, 2012

An Open Letter to United States Senate: Oppose the Anti-Speech Policy in the Intelligence Authorization Bill

Dear Senator:

Our undersigned groups are writing to oppose a troubling provision in the Intelligence Authorization for Fiscal Year 2013, which makes the unauthorized disclosure of any classified information a punishable offense, regardless of its public policy significance, and threatens free speech rights and due process of current and former federal employees. We urge you to oppose this misguided attempt to prevent disclosures of classified information. We agree that leaks that endanger our national security must be punished and prevented—but there are better ways to do this.

Section 511 grants the Director of National Intelligence (DNI) and intelligence agency heads extraordinary authority to penalize federal employees in the intelligence community, including depriving them their pensions. They can do so without a criminal conviction, based on their “determination” that an employee knowingly violated a non-disclosure agreement by disclosing classified information to “unauthorized persons or entities.”

Unauthorized disclosures are already barred by non-disclosure agreements that personnel with security clearances must sign. In addition, current law allows the government to strip pension benefits from employees or former employees convicted of illegally disclosing classified information (Section 8312(c) of title 5). Revocation of a pension earned through decades of loyal service to this nation is an extraordinary penalty that should not be imposed unless the government proves guilt beyond a reasonable doubt in a court of law. Under this legislation, the DNI is provided far too much discretion to take pension benefits away from employees in secret with no oversight or judicial review.

Section 511 gives the DNI the power to establish the procedures for fact finding, appeal, or review of agency determinations. Though the section states that the agreements must “describe procedures for making and reviewing determinations” that are “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,” it is unclear what these rights are. The legislation itself lacks any framework for independent due process: there are no definitions of who is “authorized” to receive classified information or other terms, or legal burdens of proof for an agency head’s authority to “determine” an improper disclosure has occurred.

As a result, a finding could be based on suspicion, speculation, or in retaliation for the exercise of employee rights. Thus, Section 511 would give intelligence agency heads nearly unrestrained discretion to suppress speech critical of the intelligence community—even after an employee has resigned or retired from an intelligence agency—and to retaliate against disfavored employees or pensioners, including whistleblowers.

This policy does not protect our nation's legitimate secrets, but instead opens the door to abuse and chills critical disclosures of wrongdoing.

Section 511's extreme approach would imperil the few existing safe channels for those in the intelligence community who seek to expose waste, fraud, abuse, and illegality. Conscientious employees or former employees considering reporting wrongdoing to Congress and agency Inspectors General, for example, would risk losing their pensions without adequate due process.

We absolutely agree that those who intend to harm our national security must not be allowed to leak without penalty. Some secrets must be kept, but protecting our most important secrets is made more difficult by the overwhelming amount of information that is illegitimately marked secret.

Section 511 is not an anti-leaks policy, it's an anti-speech policy.

An informed public depends on many sources of information, not only those that are "authorized" by the government. A free press is only free to the extent that it can report all newsworthy information, including information that the government would prefer to withhold. It is the responsibility of Congress to hold our constitutional rights and responsibilities to the national defense carefully in balance. This bill fails to do so.

The Intelligence Authorization bill also fails to provide meaningful anti-leaks measures needed to strengthen our national security: strengthening protections for whistleblowers and reforming the classification system that marks massive amounts of information illegitimately as secret. Instead, this bill makes it easier to punish whistleblowers and those who may disclose inappropriately marked information.

We urge you to oppose the Intelligence Authorization Bill so long as the proposed policy in Section 511 remains. We welcome an opportunity to discuss this further with you and your staff. You may reach us by contacting Angela Canterbury at the Project On Government Oversight at 202-347-1122 or acanterbury@pogo.org

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American Library Association
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