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

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:

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- 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 ***d oc cy for or g nst th s ery eg s t on*** (§ 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 th

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

- 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

(let alone one that could meet the enormously high

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.

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 ave

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

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]

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

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" cand

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

Please do not hesitate to contact Legislative Counsel/Policy Advisor Gabe Rottman (at 202-675-2325 or grottman@dcaclu.org) with any questions or comments.

Sincerely,

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