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August 8, 2019

Dear Member of Congress:

The undersigned thirty-eight representatives of the news media write in strong opposition to the dramatic expansion of the Intelligence Identities Protection Act of 1982 (the “IIPA”), one of the few laws that *criminalizes* the publication of truthful information about government activities. The bill expanding the IIPA was recently rushed through Congress with no meaningful debate.

This expansion of the law is currently pending as part of the intelligence authorization bills that have passed both the House, as section 305 of H.R. 3494, and Senate, as section 9305 of S. 1790. We urge you to strip the provision and, barring that, to support future amendments to the law to better protect First Amendment press rights. This objective can be accomplished without compromising national security.

Whenever a law criminalizes the publication of true information, it raises core First Amendment issues. In a series of cases culminating in the 2001 decision *Bartnicki v. Vopper*, the Supreme Court has repeatedly affirmed that “if a newspaper obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information absent a need . . . of the highest order.” 532 U.S. 514, 528 (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979)). Only if the law is narrowly tailored to serve a compelling governmental interest can it survive constitutional review. The proposed amendment falls short of that legal standard.

The drafters of the original provision understood the need for narrow tailoring and crafted the law to make sure that responsible reporting by journalists covering national security did not trigger the possibility of criminal charges. While press organizations understand that clandestine officers should not be put at risk, there are cases where anonymity can shield the intelligence agencies from public accountability, which heightens the risk that intelligence officers or agents will act recklessly or cross ethical or legal lines. The law as it stands now attempts to balance those competing interests.

It is telling that the original IIPA took *six years* of deliberation, debate and compromise before it passed. This sweeping expansion went from introduction to passage in both chambers in about *two months*.

The law, as passed in 1982, sought to criminalize disclosures that put officers and agents in physical or legal danger overseas. Congress agreed in 1982 that a key way to limit the law to those egregious cases would be to require that covered intelligence officers and employees either be posted overseas or have served overseas in the last five years. U.S. citizen agents or informants must be active overseas at the time of disclosure.

The legislative history is clear that the intent was to limit the scope of the law to cases where it was reasonable to believe that personal safety would be at issue. The expansion in the current measure would remove that overseas nexus completely. This means that the intelligence agencies would be able to criminalize the disclosure of the identity of any officer, employee, informant or agent in perpetuity—after retirement and even after death—simply by keeping that identity classified.

Such an expansion of the IIPA could increase the risk that journalists will be chilled in their ability to provide valuable information to the public.

In 2011, for instance, the CIA successfully used the threat of an IIPA prosecution to persuade two independent journalists to censor the name of Alfreda Bikowsky in an audio documentary series about pre-9/11 intelligence activity. Then, in 2014, a Senate report identified her, without using her name, as a major player in the interrogation and detention program. Bikowsky did not fall into the window of foreign service contained in the statute, and there was obvious public interest in knowing who the decision-makers were behind the controversial program in the same way that the public knows those in the military and law enforcement who are responsible for actions that implicate America's critical foreign policy interests.

Likewise, in 2015, journalists reported that officials involved in the post-9/11 interrogation and detention program were also involved in the expansion of the CIA's paramilitary drone operation. Their identities were widely known, they were based in the United States, and the connection of the same personnel to the two programs was newsworthy. If those empowered to be decision-makers about critical government initiatives are allowed to stay shielded in perpetuity by anonymity, they never face the public accountability that is an essential check in our system of government.

Importantly, the IIPA expansion also applies to U.S. citizen agents and informants, meaning non-intelligence officers or employees, with a classified relationship to the intelligence agencies. Congress expressly cited the then-recent illegal use of informants on U.S. soil by the intelligence agencies against civil rights and anti-war activists when it included the requirement that, to be covered under the IIPA, U.S. citizen agents and informants be active overseas at the time of the disclosure. Congress stated that the identities of domestic U.S. citizen informants at "colleges, churches, the media, or political organizations" are "a legitimate subject of national debate."

This legislation would now criminalize the disclosure of the classified identity of any U.S. citizen agent or informant active in the United States.

It is true that the law would retain a heightened intent requirement for non-government employees. Those without authorized access to classified information must engage in a "pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States." 50 U.S.C. § 3121(c). That standard would require proof that a non-government third party, like a journalist, had the specific intent to "name names," and that the identification of an

unacknowledged intelligence officer or agent was not the “side effect” of other activity, such as reporting on “intelligence failures and abuses.” *See* H.R. Conf. Rep. 97-580 at 8-9 (1982).

That said, the expansion of the IIPA will extend the law’s scope to a larger universe of unacknowledged intelligence officers and to U.S. citizen agents and informants in the United States, where the public interest in disclosure could be heightened and the risk of disclosure would be markedly lower than for an officer or agent working overseas.

In the relatively rare news reporting that has the goal of identifying such officers or agents—such as that around Bikowsky—an aggressive prosecutor could argue that the intent standard is met because the main focus of the newsgathering and reporting is the identification of a covert agent. Even if that argument is specious, the threat of prosecution could chill reporting in the public interest, and the investigation could result in efforts to force journalists to disclose their sources.

Please let us know how we can work with the relevant committees and Congress to maintain or restore the law’s original balance. For any questions or comments, please contact Gabe Rottman at the Reporters Committee for Freedom of the Press at grottman@rcfp.org.

Sincerely,

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