

2014

"The culture of leaks has to change", but at what expense to congressional oversight of the Executive Branch? An examination of Title V of the Intelligence Authorization Act for Fiscal Year 2013.

Roseanne Sessa  
*Seton Hall Law*

Follow this and additional works at: [https://scholarship.shu.edu/student\\_scholarship](https://scholarship.shu.edu/student_scholarship)

---

#### Recommended Citation

Sessa, Roseanne, ""The culture of leaks has to change", but at what expense to congressional oversight of the Executive Branch? An examination of Title V of the Intelligence Authorization Act for Fiscal Year 2013." (2014). *Law School Student Scholarship*. 617.  
[https://scholarship.shu.edu/student\\_scholarship/617](https://scholarship.shu.edu/student_scholarship/617)

### *Introduction*

Government officials, including members of Congress, communicate with members of the media regarding sensitive material on a daily basis.<sup>1</sup> Subsequently, this information often reaches the public through various media channels.<sup>2</sup> This information helps the public sort out critical issues, which is a core feature of our democracy.<sup>3</sup>

A recent example demonstrates just how important this system is: in April 2012, intelligence officials briefed journalists about their assessment of al-Qaeda and the future threats the terrorist regime posed to the United States a year after the killing of Osama bin Laden.<sup>4</sup> Armed with this knowledge, the public was able to stay informed in the event they needed to make a decision about related governmental policies. However, due to a recent rise in unauthorized leaks, the Senate Intelligence Committee proposed and approved an amendment to the Intelligence Authorization Act for Fiscal Year 2013<sup>5</sup> with provisions that, if adopted, would severely infringe upon the media's relationship with the government, and in turn, the people. If provisions of this magnitude are enacted, information such as the recent assessment of al-Qaeda would never reach the public realm, leading to a wealth of unintended consequences.

This note will argue that legislation such as Title V of the Intelligence Authorization Act for Fiscal Year 2013 will negatively impact the system of congressional oversight by prohibiting members of Congress from talking to media outlets about intelligence activities. Congress uses the media as a way to exercise its constitutionally implied duty of oversight of the Executive

---

<sup>1</sup> Editorial Board, Editorial, *A Bill to Stop Security Leaks Puts a Plug on Democracy*, WASHINGTON POST, Jul. 30, 2012, [http://www.washingtonpost.com/opinions/squelching-public-interest-in-national-security/2012/07/30/gJQAF0pHLX\\_story.html](http://www.washingtonpost.com/opinions/squelching-public-interest-in-national-security/2012/07/30/gJQAF0pHLX_story.html).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Press Release, U.S. Senate Select Committee on Intelligence, Feinstein, Chambliss Announce Committee Approval of Fiscal Year 2013 Intelligence Authorization (Jul. 25, 2012), *available at* <http://www.intelligence.senate.gov/press/record.cfm?id=337333>.

Branch. Legislation like Title V would therefore limit Congress's ability to monitor the conduct of intelligence agencies and would ultimately pose a great risk to the checks and balances of government and the national security of the United States.

Part I will discuss intelligence leaks and congressional oversight with respect to the media. Part II will provide an overview of the Intelligence Authorization Act for Fiscal Year 2013 and its relevant provisions. Part III will discuss the recent backlash that has occurred from various groups and media outlets concerning the Act. Part IV will outline the legal and policy implications of an Act like this for Congress, the media, and the public. Finally, Part V will discuss why Congress should not adopt such a bill as well as potential solutions that should be pursued in lieu of the provisions attached to the Intelligence Authorization Act for Fiscal Year 2013.

### ***Part I: Intelligence Leaks and Congressional Oversight With Respect to the Media***

#### ***A. Unauthorized and Authorized Disclosures***

Most discussions about intelligence leaks revolve around the government regulating the flow of national security information.<sup>6</sup> This is because the government has a substantial interest in protecting the national security of the country.<sup>7</sup> As such, the “executive and legislative branches of government have elaborate machinery for protecting the confidentiality of information used in policymaking and administration.”<sup>8</sup>

A leak by a government employee is considered “the release, of outside official public information channels, of previously undisclosed information.”<sup>9</sup> Leaks can either be classified as

---

<sup>6</sup> Alan Katz, *Government Information Leaks and the First Amendment*, 64 CAL. L. REV. 1 108, 109 (1976), available at <https://www.law.upenn.edu/institutes/cerl/conferences/ethicsofsecrecy/papers/reading/Katz.pdf>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 108

<sup>9</sup> *Id.*

authorized or unauthorized.<sup>10</sup> An authorized leak is defined as “an established part of government policy”<sup>11</sup> while an unauthorized leak is said to “[occur] when a government employee makes public information that her superiors and the government information machinery have chosen not to disclose.”<sup>12</sup> Whether a leak is authorized or unauthorized, those that are disseminated to the public by the media are an important source of political news and are likewise an effective means of influencing government policy.<sup>13</sup> This note will focus in particular on the consequences of unauthorized leaks.

In 2009, Former Director of National Intelligence, Dennis Blair, wrote a memorandum to the directors of the sixteen United States Intelligence Community Agencies.<sup>14</sup> In this memorandum, Blair discussed the severe consequences posed by the unauthorized disclosure of classified information.<sup>15</sup> He noted that “disclosures of classified information, including ‘leaks’ to the media can compromise sensitive sources and methods...and may allow our adversaries to learn about, deny, counteract, and deceive our intelligence collection methods, leading to the loss of critical capabilities, resources, and even lives.”<sup>16</sup> Blair further noted that over recent years, unauthorized disclosures have impaired the ability of the Intelligence Community to accomplish its mission and support its national security objectives.<sup>17</sup> While these unauthorized disclosures have the potential to jeopardize national security, Congress also utilizes the media as a way to exercise oversight of the Executive Branch, which will be discussed in the following section.

*B. Congressional Oversight of the Executive Branch*

---

<sup>10</sup> Alan Katz, *Government Information Leaks and the First Amendment*, 64 CAL. L. REV. 1 108, 108 (1976).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> GARY ROSS, WHO WATCHES THE WATCHMEN? THE CONFLICT BETWEEN NATIONAL SECURITY AND FREEDOM OF THE PRESS 5 (NI Press ed., 2011), available at <http://www.fas.org/sgp/eprint/ross.pdf>.

<sup>15</sup> *Id.* at 5-6.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

Among Congress's duties are creating legislation, appropriating funds for Executive Branch operations, and monitoring whether the Executive Branch carries out its responsibilities effectively and in accordance with the law.<sup>18</sup> This type of monitoring of the Executive Branch is also referred to as congressional oversight.<sup>19</sup> The Congressional Research Service defines congressional oversight as "the review, monitoring, and supervision of the implementation of public policy – of the Executive Branch,"<sup>20</sup> and this duty of oversight is embodied in Congress's implied powers under the Constitution.<sup>21</sup> Congress oversees the Executive Branch through a wide variety of channels, organizations, and structures.<sup>22</sup> Oversight techniques range from investigation and reporting requirements to more contemporary means<sup>23</sup> – such as utilizing media outlets.<sup>24</sup> Thus, "members of Congress, as the elected representatives of the American people, [have] the obligation to be the eyes and ears of the citizenry by closely watching over the policies of the President and executive officials."<sup>25</sup> This further holds true for policies dealing with intelligence and national security where the President is the "sole organ for the Nation in foreign affairs... carrying with it preeminent authority in [these two policy areas]."<sup>26</sup>

---

<sup>18</sup> Kathleen Clark, *Congress's Right to Counsel in Intelligence Oversight*, 11 U. ILL. L. REV. 915 (2011).

<sup>19</sup> FREDERICK M. KAISER, WALTER J. OLESZEK & TODD B. TATELMAN, CONG. RESEARCH SERV., RL 30240, CONGRESSIONAL OVERSIGHT MANUAL 1 (2011), available at <http://www.fas.org/sgp/crs/misc/RL30240.pdf>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See discussion *infra* p. 5. See also Letter from ACLU to U.S. Senate (Aug. 15, 2012), available at [http://www.aclu.org/files/assets/8-15-12\\_-\\_aclu\\_on\\_s\\_3454\\_title\\_v\\_-\\_final.pdf](http://www.aclu.org/files/assets/8-15-12_-_aclu_on_s_3454_title_v_-_final.pdf).

<sup>25</sup> Vicki Divoll, *President Obama's First Two Years: A Legal Reflection: The "Full Access Doctrine": Congress's Constitutional Entitlement to National Security Information from the Executive*, 34 HARV. J.L. & PUB. POL'Y 493, 500.

<sup>26</sup> Office of Legal Counsel, U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, 2006, 2, available at <http://www.justice.gov/opa/whitepaperonnsalegalauthorities.pdf>. See also Frederick A. O. Schwartz, Jr. et al. UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR (2007), 1.

Because the Executive Branch is traditionally responsible for handling matters of intelligence and national security,<sup>27</sup> it often uses its authority to limit the distribution of such information to the other branches of government.<sup>28</sup> Some information, however, must be delivered to the Legislative Branch not only to help protect national security, but so that Congress can monitor the Executive Branch as a part of the government's system of separation of powers.<sup>29</sup> Since the Executive Branch is able to select what intelligence and national security information makes its way to the Legislative Branch, Congress often utilizes other means, such as the media, to exercise its oversight function.<sup>30</sup>

Congress empowers the media with information it receives to help it moderate Executive Branch policies and activities that require close scrutiny.<sup>31</sup> With this information, the media attempts to influence executive behavior.<sup>32</sup> This relationship, however, is not one sided. The media also equips Congress with information it may need in order to perform its own job, creating a symbiotic relationship whereby<sup>33</sup> Congress has a chief ally in the mass media.<sup>34</sup> If Congress is deprived of access to this information from the Executive Branch, the public is in turn disposed of their absolute entitlement under the Constitution to ensure that the Executive Branch is not abusing its powers or using those powers poorly,<sup>35</sup> and the system of checks and

---

<sup>27</sup> Louis Fisher, *Presidential Power in National Security: A Guide to the President-Elect*, THE WHITE HOUSE TRANSITION PROJECT (2007), <http://loc.gov/law/help/usconlaw/pdf/presidential-power-national-security.pdf>.

<sup>28</sup> Kathleen Clark, *Congress's Right to Counsel in Intelligence Oversight*, 11 U. ILL. L. REV. 915, 930-931 (2011).

<sup>29</sup> *Id.*

<sup>30</sup> See discussion *supra* p. 4.

<sup>31</sup> Kathleen Clark, *Congress's Right to Counsel in Intelligence Oversight*, 11 U. ILL. L. REV. 915 (2011).

<sup>32</sup> *Id.*

<sup>33</sup> Murrey Marder, *The Press and the Presidency: Silencing the Watchdog*, NIEMAN WATCHDOG (Apr. 16, 2008), <http://www.niemanwatchdog.org/index.cfm?fuseaction=background.view&backgroundid=240>. See also Mary-Rose Papandrea, Article, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 256 (2008).

<sup>34</sup> Kathleen Clark, *Congress's Right to Counsel in Intelligence Oversight*, 11 U. ILL. L. REV. 915 (2011).

<sup>35</sup> Vicki Divoll, *President Obama's First Two Years: A Legal Reflection: The "Full Access Doctrine": Congress's Constitutional Entitlement to National Security Information from the Executive* 34 HARV. J.L. & PUB. POL'Y 493.

balances is then disrupted.<sup>36</sup> What has further set this balance out of kilter has been the increase in executive power and privilege since the September 11<sup>th</sup> attacks.

*C. Increase in Executive Power and Privilege Since September 11<sup>th</sup>*

There has been a steadily increasing trend in executive power and the September 11<sup>th</sup> terrorist attacks have only accelerated this growth.<sup>37</sup> For over a decade, the Executive Branch has operated on a “need to know” basis where certain information is safely protected and sparingly distributed.<sup>38</sup> Congress has gradually found it more difficult to obtain information about how the Executive Branch exercises their power in various policymaking areas, specifically that of national security.<sup>39</sup>

Executive privilege represents the President’s ability to withhold certain information sought out by Congress.<sup>40</sup> Operating in a perfect system, this privilege would allow the President to seek candid advice from his advisors while still permitting Congress to obtain just enough information for it to perform its oversight function.<sup>41</sup> However, no system is perfect; in fact, executive privilege has recently harmed Congress’s oversight function by promoting secrecy.<sup>42</sup> The President typically acts with little deference to or collaboration with Congress on matters relevant to national security.<sup>43</sup> History shows that executive power is not necessarily benign,<sup>44</sup>

---

<sup>36</sup> *Id.*

<sup>37</sup> EMILY BERMAN, EXECUTIVE PRIVILEGE: A LEGISLATIVE REMEDY I (2009), available at <http://www.brennancenter.org/sites/default/files/legacy/publications/Executive.Privilege.pdf>.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 2.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Frederick A. O. Schwartz, Jr. et al. UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR (2007), 1.

<sup>44</sup> EMILY BERMAN, EXECUTIVE PRIVILEGE: A LEGISLATIVE REMEDY I (2009), available at <http://www.brennancenter.org/sites/default/files/legacy/publications/Executive.Privilege.pdf>. (“When presidents are allowed to implement policies that have not been subject to scrutiny, the results have included justifying abusive interrogation and detention policies through flawed legal analysis; manipulating prosecutorial decision-making for partisan ends; engaging in unlawful conspiracies to influence the outcome of elections; unlawfully funding foreign paramilitary groups; and conducting unlawful surveillance of Americans.”).

and that this newly acquired executive privilege has actually aided in tipping the constitutional balance of power.<sup>45</sup>

The Framers of the Constitution created a system of checks and balances to act as “a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”<sup>46</sup> This system of checks and balances relies on transparency<sup>47</sup> and “when secrecy thwarts the efforts of the people and their elected representatives to obtain information, it undermines Congress’s core functions, its ability to enact legislation and exercise oversight.”<sup>48</sup>

The main problem, therefore, with the rise of executive power and privilege, is that it serves to limit Congress’s oversight of the Executive Branch. To begin with, Congress has limited tools available to it to perform its oversight function.<sup>49</sup> Even when Congress does succeed in obtaining the information it seeks, it is often the case that too much time has passed in order for it to actually serve a useful purpose.<sup>50</sup> To take away one of Congress’s primary means of oversight – the media – would extremely exacerbate this function even more.

More importantly, Congress’s need for information on national security issues is greater than its need for information in other policymaking areas.<sup>51</sup> Because this information is well guarded, the public depends on Congress to scrutinize national security policies to ensure that the government is not infringing on any of their rights.<sup>52</sup> The history of leaks, as discussed in the following section, shows just how vulnerable this area of policymaking is.<sup>53</sup>

#### *D. Historical National Security Leaks in the Media*

---

<sup>45</sup> *Id.*

<sup>46</sup> THE FEDERALIST No. 47 (James Madison).

<sup>47</sup> EMILY BERMAN, EXECUTIVE PRIVILEGE: A LEGISLATIVE REMEDY I (2009), available at <http://www.brennancenter.org/sites/default/files/legacy/publications/Executive.Privilege.pdf>.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 3.

<sup>50</sup> *Id.* at 9.

<sup>51</sup> *Id.* at 15.

<sup>52</sup> *Id.*

<sup>53</sup> See discussion *infra* p. 8.

Since the founding of the United States, leaks have played an important role in the country's governance.<sup>54</sup> Nearly every administration is linked to leaking some type of national security information,<sup>55</sup> beginning with the first President of the United States, George Washington.<sup>56</sup> One of the first significant leaks that occurred during Washington's administration was when John Jay returned from Great Britain in 1795 with a treaty aimed at ending ongoing hostilities from the American Revolution.<sup>57</sup> Washington, however, did not want the contents of the treaty disclosed to the public until it was first reviewed by the Federalist Senate.<sup>58</sup> Despite Washington's wishes, an Anti-Federalist newspaper got hold of the entire text of the treaty and decided to publish it.<sup>59</sup>

Other leaks of classified information throughout following administrations have included the details of the Iran-Contra Affair;<sup>60</sup> the government's radiation and biological weapon experiments on unwitting Americans;<sup>61</sup> the effectiveness of weapons systems;<sup>62</sup> human rights abuses in Latin America, Asia, and Africa;<sup>63</sup> and many other illegally or morally reprehensive

---

<sup>54</sup> Micha Zenko, *A Brief History of National Security Leaks*, POLITICS, POWER, AND PREVENTATIVE ACTION, (Jun. 8, 2012), <http://blogs.cfr.org/zenko/2012/06/08/a-brief-history-of-national-security-leaks/>.

<sup>55</sup> *Id.*

<sup>56</sup> Mary-Rose Papandrea, Article, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 Ind. L.J. 233, 249 (2008).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> John R. McGeehan, THE IRAN-CONTRA AFFAIR, <http://www.netplaces.com/american-history/new-conservatism/the-iran-contra-affair.htm> (Word leaked to newspapers in November 1986 that the United States had secretly sold weapons to Iran.).

<sup>61</sup> U.S. Promises to Release Data on Plutonium Test, N.Y. TIMES (Nov. 21, 1993), <http://www.nytimes.com/1993/11/21/us/us-promises-to-release-data-on-plutonium-test.html> (In the 1940s, 18 patients were injected with plutonium during secret experiments.).

<sup>62</sup> Eric Schmitt, Israel Plays Down Effectiveness of Patriot Missile, N.Y. TIMES (Oct. 31, 1991), <http://www.nytimes.com/1991/10/31/world/israel-plays-down-effectiveness-of-patriot-missile.html> (Senior Israel scientists and military officers disclosed new information that the American Patriot missiles used in Israel during the Persian Gulf war destroyed fewer Scud missile warheads that previously thought.).

<sup>63</sup> See Raymond Bonner, News Organizations Ask White House to Veto Secrecy Measure, N.Y. TIMES (Nov. 1, 2000), <http://www.nytimes.com/2000/11/01/us/news-organizations-ask-white-house-to-veto-secrecy-measure.html>.

government practices.<sup>64</sup> Moreover, some leaks have dealt with the exposure of questionable and potentially illegal practices, including the treatment of prisoners in Abu Ghraib<sup>65</sup> and Guantanamo Bay;<sup>66</sup> wiretapping outside of the provisions of the Foreign Intelligence Surveillance Act (FISA); and extraordinary rendition.<sup>67</sup> The nature and content of leaks has varied greatly since the founding of the United States, which will further be demonstrated in the following section's discussion of the country's most recent national security leaks.

#### E. Recent National Security Leaks in the Media

Some media reports claim that the leaks of the Obama administration are “greater in magnitude and sensitivity than those of previous administrations.”<sup>68</sup> President Obama, addressing the alleged leaks that occurred during his administration, stated in his remarks at a press conference in June 2012:

We're dealing with issues that can touch on the safety and security of the American people, our families, or our military personnel, or our allies. And so we don't play with that. And it is a source of consistent frustration, not just for my administration but for previous administrations, when this stuff happens.<sup>69</sup>

Of the recent leaks in the United States, the more pertinent ones have been Stuxnet;<sup>70</sup> a classified cyber-attack program aimed at Iran's nuclear facilities;<sup>71</sup> the Obama administration's

---

<sup>64</sup> Mary-Rose Papandrea, Article, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 Ind. L.J. 233, 254-255 (2008).

<sup>65</sup> James Risen, G.I.'s Are Accused of Abusing Iraqi Captives, N.Y. TIMES (Apr. 29, 2004), <http://www.nytimes.com/2004/04/29/politics/29ABUS.html> (Near Baghdad, American soldiers were accused of forcing Iraqi prisoners into acts of sexual humiliation and other abuses in order to make them talk.).

<sup>66</sup> See Dana Priest and Joe Stephens, Pentagon Approved Tougher Interrogations, WASHINGTON POST (May 9, 2004), <http://www.washingtonpost.com/wp-dyn/content/article/2004/05/09/AR2005040206867.html>.

<sup>67</sup> Erwin Chemerinsky, Leaks Show Secrecy Overused, NEWS OBSERVER (Jul. 30, 2010), <http://www.newsobserver.com/2010/07/30/603536/leak-shows-secrecy-overused.html>.

<sup>68</sup> Elise Cooper, *Political Leaks*, AMERICAN THINKER BLOG (Oct. 5, 2012), [http://www.americanthinker.com/2012/10/political\\_leaks.html](http://www.americanthinker.com/2012/10/political_leaks.html).

<sup>69</sup> President Obama, Remarks (Jun. 8, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/06/08/remarks-president>.

<sup>70</sup> *Id.* See also Kim Zetter, *Sen. Feinstein Calls for Hearing on Stuxnet Leaks as FBI Begins Probe*, WIRED (Jun. 6, 2012), <http://www.wired.com/threatlevel/2012/06/stuxnet-leak-investigation/> (Stuxnet was a cyber-attack created as a joint project of the United States and Israel that escaped its prescribed target after the Israelis made unspecified alterations to it. The spread of the worm led to its discovery by a computer security firm in Belarus in June 2010. Though denied by the Obama administration, it is alleged that they are behind the leak.).

classified “kill list,”<sup>72</sup> a double-agent in Yemen;<sup>73</sup> and information relating to the bin Laden raid.<sup>74</sup> These latest leaks have sparked government official’s attention with a focus on reform.<sup>75</sup> Specifically, Senator Dianne Feinstein (D-California), Chairman of the Senate Select Committee on Intelligence, declared, “the culture of leaks has to change.”<sup>76</sup>

## ***Part II: The Intelligence Authorization Act for Fiscal Year 2013***

### ***A. History and Purpose of the Intelligence Authorization Act for Fiscal Year 2013***

A Congressional oversight committee enacted the first Intelligence Authorization Act in 1978 to give Congress the “ultimate oversight hammer – control over the Intelligence Community’s purse strings.”<sup>77</sup> By contrast, Senator Feinstein in the Senate Select Committee on Intelligence proposed the Senate’s version of the Intelligence Authorization Act for Fiscal Year 2013 after being fueled by frustrations over recent media reports that disclosed key details of the nation’s counterterrorism operations.<sup>78</sup> Members of the Committee opined that each unauthorized disclosure puts American lives at risk, makes it more difficult to recruit assets, strains the trust of partners, and threatens imminent and irreparable damage to national security,

---

<sup>71</sup> Evan Perez & Adam Entous, *FBI Probes Leaks on Iran Cyberattack*, WALL ST. J., Jun. 5, 2012, <http://online.wsj.com/article/SB10001424052702303506404577448563517340188.html> (Information about a cyber-attack was aimed at Iran’s nuclear facilities was disclosed).

<sup>72</sup> Jeremy Herb, *Senate Democrats Blast National Security Leak About Cyberattack Against Iran*, HILL BLOG (Jun. 5, 2012), <http://thehill.com/blogs/defcon-hill/policy-and-strategy/230985-senate-dems-blast-leaks-about-iranian-cyberattacks>.

<sup>73</sup> *Id.*

<sup>74</sup> Elise Cooper, *Political Leaks*, AMERICAN THINKER BLOG (Oct. 5, 2012), [http://www.americanthinker.com/2012/10/political\\_leaks.html](http://www.americanthinker.com/2012/10/political_leaks.html).

<sup>75</sup> Press Release, U.S. Senate Select Committee on Intelligence, Feinstein, Chambliss Announce Committee Approval of Fiscal Year 2013 Intelligence Authorization (Jul. 25, 2012), *available at* <http://www.intelligence.senate.gov/press/record.cfm?id=337333>.

<sup>76</sup> *Id.*

<sup>77</sup> James S. Van Wagenen, *A Review of Congressional Oversight*, CENTRAL INTELLIGENCE AGENCY (Apr. 14, 2007, 04:51 PM), <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/97unclass/wagenen.html>.

<sup>78</sup> Press Release, U.S. House of Representatives Permanent Select Committee on Intelligence, Feinstein, Chambliss, Rogers, Ruppertsberger Deplore Leaks of Classified National Security Information (Jun. 6, 2012), *available at* <http://intelligence.house.gov/press-release/feinstein-chambliss-rogers-ruppertsberger-deplore-leaks-classified-national-security>.

especially at a time where there are constant, rapidly emerging threats.<sup>79</sup> George Little, Pentagon Press Secretary, confirmed the purpose of the bill at a July 24, 2012 Department of Defense News Briefing, asserting that the provisions the Senate added to the bill were not an attempt to go after the media, but rather to protect classified information.<sup>80</sup> Because government officials have an obligation to protect classified information and national security, supporters argued the bill aimed to do just that.<sup>81</sup>

Proponents of the bill claimed that it was essential to safeguard the nation and to protect its citizens.<sup>82</sup> “Leaks of classified information regarding intelligence sources and methods can disrupt intelligence operations, threaten the lives of intelligence officers and assets, and make foreign partners less likely to work with [the United States].”<sup>83</sup> The two provisions at issue in this note, §§ 505 and 506, were said to give the intelligence community the resources it needs in order to do its job of protecting the public and the country.<sup>84</sup> In light of the recent surge of national security leaks that have occurred during the Obama administration, these changes are ones that are demanded by those who support some type of leak reform.<sup>85</sup>

The controversial provisions at the core of this note lie under the Senate Select Committee on Intelligence’s version of the bill, encompassing Title V: Preventing Unauthorized Disclosures of Classified Information. The bill was introduced by Senator Feinstein and passed the Senate

---

<sup>79</sup> *Id.*

<sup>80</sup> Transcript of DOD News Briefing with George Little from the Pentagon, Jul. 24, 2012, *available at* <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5085>.

<sup>81</sup> *Id.*

<sup>82</sup> Press Release, Senator Dianne Feinstein, Feinstein Announces Committee Approval of Fiscal Year 2013 Intelligence Authorization (Jul 25, 2012), *available at* <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=d330ad36-865a-47b2-81e6-7e60e5ef3c5d>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *See discussion supra* p. 7.

Select Committee on Intelligence on July 24, 2012 by a vote of 14-1 with bipartisan support.<sup>86</sup> The sole dissenter, Senator Ron Wyden (D-Oregon), stated in his minority view that the issue of unauthorized disclosures, according to studies, is sometimes considered a problem that cannot be resolved by legislation.<sup>87</sup> Senator Wyden contended, however, that the problem could be cured by legislation, so long as Congress does not do more harm than good.<sup>88</sup>

*B. Intelligence Authorization Act for Fiscal Year 2013*

Title V: Preventing Unauthorized Disclosures of Classified Information contained twelve provisions,<sup>89</sup> several of which aimed to disrupt the flow of classified information to the press and public.<sup>90</sup> The pertinent provisions, for purposes of this note, were §§ 505 and 506, which will be discussed further below. § 505 dealt with the prohibition on certain individuals serving as consultants and § 506 dealt with limitations on persons authorized to communicate with the media.

*C. § 505: Prohibition on Certain Individuals Serving as Consultants*

Section 505 “prohibit[ed] certain persons possessing an active security clearance from entering into contracts or binding agreements with the media in order to provide analysis or commentary on matters concerning classified intelligence activities or intelligence related to national security.”<sup>91</sup> This section further prohibited those persons who previously possessed an active security clearance for access to top secret, sensitive compartmented information from entering into said contracts or agreements for a period of one year after their government

---

<sup>86</sup> *Id.*; H.R. 5743, 112th Cong. (2012), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr5743rfs/pdf/BILLS-112hr5743rfs.pdf> (By contrast, the House of Representatives’ version did not include any amendments dealing with unauthorized disclosures).

<sup>87</sup> S. REP. NO. 112-192 (2012), 23 available at <http://www.intelligence.senate.gov/pdfs/112th/112192.pdf>.

<sup>88</sup> *Id.*

<sup>89</sup> S. 3454, 112th Cong. (2012).

<sup>90</sup> S. REP. NO. 112-192 (2012), available at <http://www.intelligence.senate.gov/pdfs/112th/112192.pdf>.

<sup>91</sup> S. 3454, 112th Cong. (2012).

service.<sup>92</sup> The purpose of this particular provision, as outlined by the Senate Select Committee on Intelligence, was to prohibit the practice of current and former employees who have or had an active security clearance from appearing in media broadcasts to discuss matters concerning classified intelligence activities.<sup>93</sup>

*D. § 506: Limitation on Persons Authorized to Communicate With the Media*

Section 506 provided that “for each element of the Intelligence Community, only the Director and Deputy Director of such element and individuals in the offices of public affairs who are specifically designated by the Director may provide background or off-the-record information regarding intelligence activities to the media.”<sup>94</sup> Subsection 506(b) made clear that it did not prohibit an officer or employee of an element of the Intelligence Community from providing authorized, unclassified, on-the-record briefings to the media or to any person affiliated with the media.<sup>95</sup> This provision did not prohibit an Intelligence Community official from providing necessary threat or other unclassified information to the public so long as the official was acting in their official capacity and was authorized to speak to the media on-the-record.<sup>96</sup>

***Part III: Criticism and Response***

Title V instantly created a surge of backlash from journalists and other organizations across the country within days of passing the Senate Select Committee on Intelligence.<sup>97</sup> The bill was criticized on numerous grounds, some of which will be discussed in the following subsections.

---

<sup>92</sup> *Id.*

<sup>93</sup> S. REP. NO. 112-192 (2012), available at <http://www.intelligence.senate.gov/pdfs/112th/112192.pdf>.

<sup>94</sup> S. 3454, 112th Cong. (2012).

<sup>95</sup> S. REP. NO. 112-192 (2012), available at <http://www.intelligence.senate.gov/pdfs/112th/112192.pdf>.

<sup>96</sup> *Id.*

<sup>97</sup> Mark Hosenball, *Senate Intelligence Panel to Reconsider Anti-Leak Plan*, REUTERS, Aug. 3, 2012, <http://www.reuters.com/assets/print?aid=USBRE8721DU20120803>.

### A. Journalists

Journalists had nothing positive to say about Title V of the bill and instead, many called for its immediate non-passage. *The Washington Post* took a harsh view on the proposed legislation, using such words to describe it as “crude and dangerous,” “poorly drafted,” and “hastily conceived.”<sup>98</sup> The main problem journalists had with the bill is that it could end present dialogues that take place between journalists and intelligence officials.<sup>99</sup> If provisions like this pass, these dialogues will have to be logged and reported, and as *The Washington Post* asserts, the result will be fewer such conversations.<sup>100</sup> Overall, it was claimed that the bill’s provisions were a “draconian attempt at anti-leaking legislation,”<sup>101</sup> that would do the complete opposite of what it was intended to do by instead creating a counter-intelligence problem.<sup>102</sup> By interfering with the daily give-and-take between the media and intelligence agencies, the “lifeblood of a democratic society while trying to solve a leak problem [would be impacted]... without making the nation in any way more secure.”<sup>103</sup>

Likewise, *Reuters* called Title V’s provisions “strict new measures” which would stop the commonplace practice of journalists occasionally being briefed by intelligence officials who were directly involved in news events under discussion.<sup>104</sup> Section 505, the provision which *Reuters* believed to be the most threatening, would ban any intelligence official besides press officers and agency directors or deputy directors from giving non-attributable background

---

<sup>98</sup> Editorial Board, Editorial, *A Bill to Stop Security Leaks Puts a Plug on Democracy*, WASHINGTON POST, Jul. 30, 2012, [http://www.washingtonpost.com/opinions/squelching-public-interest-in-national-security/2012/07/30/gJQAF0pHLX\\_story.html](http://www.washingtonpost.com/opinions/squelching-public-interest-in-national-security/2012/07/30/gJQAF0pHLX_story.html).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> David Ignatius, Editorial, *Senate’s Anti-Leaking Bill Doesn’t Address the Real Sources of Information*, WASHINGTON POST, Jul. 31, 2012, [http://www.washingtonpost.com/opinions/david-ignatius-senates-anti-leaking-bill-doesnt-address-the-real-sources-of-information/2012/07/31/gJQAPBE1NX\\_story.html](http://www.washingtonpost.com/opinions/david-ignatius-senates-anti-leaking-bill-doesnt-address-the-real-sources-of-information/2012/07/31/gJQAPBE1NX_story.html).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

briefings to journalists.<sup>105</sup> To end this practice would be to go against a practice that was followed by nearly all recent United States administrations.<sup>106</sup>

Bill Keller, former executive editor and current columnist of *The New York Times*, commented on the bill's provisions, stating that although the government "has [the] right and responsibility to protect secrets whose disclosure could undermine American security," it also has "a responsibility to explain and justify what it is doing in our name."<sup>107</sup> Keller, like his fellow journalists at *The Washington Post*, also agreed that the added provisions were draconian and asserted that as a result, the public and Congress will know less about how well the intelligence agencies are doing their jobs.<sup>108</sup> Likewise, an editorial in *The New York Times* called the legislation "misguided," claiming that the provisions would cease news coverage of national security issues.<sup>109</sup> The bill, drafted in secret without public hearings, was claimed to be dangerous.<sup>110</sup>

#### *The Sunshine in Government Initiative*

The Sunshine in Government Initiative (hereafter "SGI") "is a coalition of media groups committed to promoting policies that ensure government is accessible, accountable, and open."<sup>111</sup> In other words, their mission is primarily dedicated to oversight of the government to safeguard democracy.<sup>112</sup> They claim that citizens have a right to this information and that it is best served when news media act on behalf of the public to gain access to information.<sup>113</sup>

---

<sup>105</sup> *Id.*

<sup>106</sup> Mark Hosenball, *Senate Intelligence Panel to Reconsider Anti-Leak Plan*, REUTERS, Aug. 3, 2012, <http://www.reuters.com/assets/print?aid=USBRE8721DU20120803>.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Editorial Board, Editorial, *A Pernicious Drive Toward Secrecy*, NEW YORK TIMES, Aug. 2, 2012, [http://www.nytimes.com/2012/08/03/opinion/a-pernicious-drive-toward-secrecy.html?\\_r=4&smid=tw-share&](http://www.nytimes.com/2012/08/03/opinion/a-pernicious-drive-toward-secrecy.html?_r=4&smid=tw-share&).

<sup>110</sup> *Id.*

<sup>111</sup> Sunshine in Government Initiative, SUNSHINE IN GOVERNMENT INITIATIVE <http://www.sunshineingovernment.org/index.php?cat=38>.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

On August 10, 2012, the SGI wrote a letter to the Senate Select Committee on Intelligence about their concerns with Title V of the Intelligence Authorization Act for Fiscal Year 2013.<sup>114</sup> In this letter, the SGI analyzed certain provisions which they found to be troubling and which they believed would curtail what the public learns about news events and what the government is doing in the public's name.<sup>115</sup> These provisions in particular, which the SGI claimed threaten the basic relationship between the government and the public via the press, are §§ 505, 506, and 508.<sup>116</sup> They claimed that these provisions "significantly undermine[d] common practice in reporting on national security issues of vital public interest and appear to be unconstitutionally vague and overbroad."<sup>117</sup>

Section 505, SGI argued, prevented the news media, and consequently, the public's, ability to benefit from present and former government official's expertise.<sup>118</sup> These former officials assist journalists and the public through their analysis and commentary to understand issues and ensure that the details of the stories are accurate.<sup>119</sup> These officials likewise allay fears during major national crises, such as the September 11<sup>th</sup> terrorist attacks.<sup>120</sup>

Even more threatening to the basic relationship was § 506, which would significantly constrain the flow of information from the government to the press and public on important national security and other issues.<sup>121</sup> It is claimed that this provision would change a practice

---

<sup>114</sup> Sunshine in Government Initiative, *SGI Letter to Senate Intelligence Committee Regarding S. 3454 (Intelligence Authorization Act for FY 2013)*, THE SUNSHINE IN GOVERNMENT BLOG (Aug. 31, 2012), <http://sunshineingov.wordpress.com/2012/08/31/sgi-letter-to-ssci-on-intelauthfy13/>.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* For purposes of this note, the discussion about § 508 will be omitted.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Sunshine in Government Initiative, *SGI Letter to Senate Intelligence Committee Regarding S. 3454 (Intelligence Authorization Act for FY 2013)*, THE SUNSHINE IN GOVERNMENT BLOG (Aug. 31, 2012), <http://sunshineingov.wordpress.com/2012/08/31/sgi-letter-to-ssci-on-intelauthfy13/>.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

that has been a part of our democracy from the beginning.<sup>122</sup> Government officials and journalists have used background briefings and off-the-record briefings to their mutual benefit since the founding of our country.<sup>123</sup> Background briefings and off-the-record communications are vital because they help journalists understand the full context of the story, get key details right, and ensure that individuals or the United States as a whole will not be harmed by the publication of incorrect or sensitive information. Furthermore, these officials can share information with the press without fearing for their security if their names are published.<sup>124</sup>

The SGI argued that careful and thoughtful deliberation should be given before provisions like these, which impact the delicate balance between the government's right to keep certain information secret to protect national security and the press's right to gather news and inform citizens about what the government is doing in their name, are enacted.<sup>125</sup> Journalists handle leaks responsibly and follow procedures which mitigate any potential harm when reporting stories based on unauthorized disclosures.<sup>126</sup>

#### *B. American Civil Liberties Union*

The American Civil Liberties Union ("ACLU") "is a national organization advocating individual rights, by litigating, legislating, and educating the public on a broad array of issues affecting individual freedom in the United States."<sup>127</sup> On August 15, 2012, the ACLU wrote a letter urging the United States Senate to strip Title V from the Intelligence Authorization Act for Fiscal Year 2013, claiming that the anti-leak measures would threaten freedom of speech and the

---

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Sunshine in Government Initiative, *SGI Letter to Senate Intelligence Committee Regarding S. 3454 (Intelligence Authorization Act for FY 2013)*, THE SUNSHINE IN GOVERNMENT BLOG (Aug. 31, 2012), <http://sunshineingov.wordpress.com/2012/08/31/sgi-letter-to-ssci-on-intelauthfy13/>.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> AMERICAN CIVIL LIBERTIES UNION, <http://www.aclu.org/>.

press and would also violate due process and separation of powers.<sup>128</sup> Most of their arguments focus on §§ 505 and 506 of the bill.<sup>129</sup>

The ACLU outlined various arguments against the bill. First is their contention that §§ 505 and 506 unconstitutionally limit the free speech rights of government workers and contractors in the intelligence and defense communities.<sup>130</sup> Second, the ACLU maintained that these sections unconstitutionally limit the ability of the press to report on matters of public interest involving intelligence activities and thus deny the public access to information necessary for voters to make informed decisions on national security, and deny Congress information they may form the basis for Congressional oversight.<sup>131</sup> Third, they argued that these sections unconstitutionally discriminate against the media.<sup>132</sup> Fourth, §§ 505 and 506 unconstitutionally violate both the First Amendment and separation of powers by prohibiting members of Congress from talking to the press about intelligence activities.<sup>133</sup> Fifth, the ACLU argued these sections unconstitutionally deny Congress and the public access to information about government waste, mismanagement, abuse or fraud by outlawing leaks in the public interest. Finally, these sections were said to overall violate open government principles.<sup>134</sup>

Overall, the crux of the ACLU's argument was that the proposed bill was an anti-media bill disguised as an anti-leaks bill which would "place a Berlin Wall between the press and the intelligence community" and should be opposed in its entirety.<sup>135</sup> The two greatest victims would be Congress and the public. Congress would no longer be able to perform its oversight

---

<sup>128</sup> Letter from ACLU to U.S. Senate 1 (Aug. 15, 2012), available at [http://www.aclu.org/files/assets/8-15-12\\_-\\_aclu\\_on\\_s\\_3454\\_title\\_v\\_-\\_final.pdf](http://www.aclu.org/files/assets/8-15-12_-_aclu_on_s_3454_title_v_-_final.pdf).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Letter from ACLU to U.S. Senate 1 (Aug. 15, 2012), available at [http://www.aclu.org/files/assets/8-15-12\\_-\\_aclu\\_on\\_s\\_3454\\_title\\_v\\_-\\_final.pdf](http://www.aclu.org/files/assets/8-15-12_-_aclu_on_s_3454_title_v_-_final.pdf).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 14.

function without access to national security information that is disclosed without organization, and as such, would be “cutting out its eyes and off its ears.”<sup>136</sup>

### C. *Response to the Criticism*

Only a week after the Senate Select Committee on Intelligence approved Title V and the overwhelming criticism the bill faced from members of the media, a Senate panel was established to reevaluate its provisions.<sup>137</sup> The Senate panel, chaired by Senator Dianne Feinstein, reviewed comments and criticism and considered alternative ideas and modifications to the bill as it moved forward.<sup>138</sup>

On November 14, 2012, however, a public hold was placed on the bill by Senator Wyden to prevent it from passing without both considerable debate and amendments.<sup>139</sup> In placing the bill on hold, Senator Wyden cited significant concerns over the bill’s anti-leak provisions in a floor statement.<sup>140</sup> Senator Wyden objected to these provisions because it “would [have] harmed first amendment rights... led to less-informed public debate about national security issues, and also undermined the due process rights of intelligence agency employees, without actually enhancing national security.”<sup>141</sup>

The changes made to the bill removed many of the anti-leak provisions that were meant to lessen the amount of unauthorized disclosures of classified information.<sup>142</sup> On December 21,

<sup>136</sup> Letter from ACLU to U.S. Senate 14-15 (Aug. 15, 2012), available at [http://www.aclu.org/files/assets/8-15-12\\_-\\_aclu\\_on\\_s\\_3454\\_title\\_v\\_-\\_final.pdf](http://www.aclu.org/files/assets/8-15-12_-_aclu_on_s_3454_title_v_-_final.pdf).

<sup>137</sup> Mark Hosenball, *Senate Intelligence Panel to Reconsider Anti-Leak Plan*, REUTERS, Aug. 3, 2012, <http://www.reuters.com/article/2012/08/03/us-usa-congress-newsleaks-idUSBRE8721DU20120803>.

<sup>138</sup> *Id.*

<sup>139</sup> Communications Office, *What to Know About Wyden Hold on Intelligence Authorization Bill*, SENATOR RON WYDEN BLOG (Dec. 18, 2012), <http://www.wyden.senate.gov/news/blog/post/what-to-know-about-wyden-hold-on-intelligence-authorization-bill>.

<sup>140</sup> *Id.*

<sup>141</sup> Press Release, Senator Ron Wyden, *Wyden Floor Statement on the Removal of Controversial Leaks Provisions from Intelligence Authorization Bill* (Dec. 21, 2012), available at <http://www.wyden.senate.gov/news/press-releases/wyden-floor-statement-on-the-removal-of-controversial-leaks-provisions-from-intelligence-authorization-bill>.

<sup>142</sup> *Id.*

2012, the only provision that remained was one that would mandate the Executive Branch to alert Congress when it “declassif[ies] information to disclose it to the press.”<sup>143</sup> With a majority of the anti-leak provisions removed, the bill moved forward and was approved with unanimous consent.<sup>144</sup> However, there is a concern that such provisions may be proposed again in the future,<sup>145</sup> as the problem of leaks does not appear to be diminishing any time soon.<sup>146</sup>

#### ***Part IV: Legal and Policy Based Implications***

Congressional oversight is often seen as inadequate.<sup>147</sup> It is frequently said that the press is the one entity that is the most capable of providing oversight of government activity.<sup>148</sup> Senator Wyden confirmed in a recent floor statement that members of Congress do in fact use the media as a way to exercise oversight of the Executive Branch, stating:

While members of Congress do not like to admit it, members often rely on the press to inform them about problems that congressional overseers have not discovered on their own. I have been on the Senate Intelligence Committee for twelve years now, and I can recall numerous specific instances where I have found out about serious government wrongdoings – such as the NSA’s warrantless wiretapping program, or the CIA’s coercive interrogation program – only as a result of disclosures by the press.<sup>149</sup>

Senator Wyden’s account makes clear that members of Congress are dependent on the information they receive from the press to make informed decisions. Provisions like those included in Title V would severely impair Congress’s ability to act as a check on the intelligence

---

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Josh Gerstein, *Senate Panel Nixes Anti-Leak Measures*, POLITICO (Dec. 22, 2012), <http://www.politico.com/blogs/under-the-radar/2012/12/senate-panel-nixes-antileak-measures-152684.html>.

<sup>146</sup> Elise Cooper, *Political Leaks*, AMERICAN THINKER BLOG (Oct. 5, 2012), [http://www.americanthinker.com/2012/10/political\\_leaks.html](http://www.americanthinker.com/2012/10/political_leaks.html).

<sup>147</sup> GARY ROSS, WHO WATCHES THE WATCHMEN? THE CONFLICT BETWEEN NATIONAL SECURITY AND FREEDOM OF THE PRESS 56 (NI Press ed., 2011), available at <http://www.fas.org/sgp/eprint/ross.pdf>.

<sup>148</sup> *Id.*

<sup>149</sup> Press Release, Senator Ron Wyden, Wyden Floor Statement on the Removal of Controversial Leaks Provisions from Intelligence Authorization Bill (Dec. 21, 2012), available at <http://www.wyden.senate.gov/news/press-releases/wyden-floor-statement-on-the-removal-of-controversial-leaks-provisions-from-intelligence-authorization-bill>.

community.<sup>150</sup> In light of the threat of ongoing terrorism, this limitation is especially troubling.<sup>151</sup> Congress, however, is not the only body that stands to be affected; the media and the public will also be impacted by legislation curtailing such valuable oversight.

Recognizing the media for the important function they perform, former CIA Director Michael Hayden stated, “I have a deep respect for journalists and their profession. Many of them – especially in the years since September 11<sup>th</sup> – have given their lives in the act of keeping citizens informed. They are smart, dedicated, and courageous men and women.”<sup>152</sup> The media, as Hayden acknowledged, are important to a free society and a key to an informed electorate.<sup>153</sup> To a certain extent, unauthorized disclosures are viewed as both justified and essential to preserve democracy.<sup>154</sup> Thus, any harm to national security is generally outweighed by the benefits of an independent and informed press.<sup>155</sup> The reason that is most often named by advocates of the media’s right to publish classified information is to increase public knowledge and promote informed debate.<sup>156</sup>

Epitomizing this point is Justice Potter Stewart’s dissent in *Branzburg v. Hayes*.<sup>157</sup> Justice Stewart averred, “enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society.”<sup>158</sup> The new trend of anti-leaks legislation has the potential to completely change the way that the media can interact with government officials, mainly by limiting Congress’s ability to talk to

---

<sup>150</sup> Letter from ACLU to U.S. Senate 1 (Aug. 15, 2012), available at [http://www.aclu.org/files/assets/8-15-12\\_-\\_aclu\\_on\\_s\\_3454\\_title\\_v\\_-\\_final.pdf](http://www.aclu.org/files/assets/8-15-12_-_aclu_on_s_3454_title_v_-_final.pdf).

<sup>151</sup> Frederick A. O. Schwartz, Jr. et al. UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR (2007), 202.

<sup>152</sup> GARY ROSS, WHO WATCHES THE WATCHMEN? THE CONFLICT BETWEEN NATIONAL SECURITY AND FREEDOM OF THE PRESS 29 (NI Press ed., 2011), available at <http://www.fas.org/sgp/eprint/ross.pdf>.

<sup>153</sup> *Id.*

<sup>154</sup> GARY ROSS, WHO WATCHES THE WATCHMEN? THE CONFLICT BETWEEN NATIONAL SECURITY AND FREEDOM OF THE PRESS 29 (NI Press ed., 2011), available at <http://www.fas.org/sgp/eprint/ross.pdf>.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Branzburg v. Hayes*, 408 U.S. 665, 726 (1972).

<sup>158</sup> *Id.*

members of the press about issues of national security and intelligence.<sup>159</sup> Such legislation seems to threaten the very purpose of the media's existence, and to leave the media unable to report on such matters. This would undermine democracy by denying Americans access to this information that is essential to national debate on these critical issues.<sup>160</sup>

“At the beginning of the chain of democratic responsibility stand the people. It is the people who are entitled to decide the course of the Republic based on a clear view of the facts.”<sup>161</sup> Thus, in a democratic society, the national security interest must be balanced against the public's right to know.<sup>162</sup> The term, “right to know,” refers to a variety of concepts: the public's general right to be informed about governmental activities and performance; the right to compel the government to produce specific information within its control; and the right of access to particular government proceedings.<sup>163</sup> Provisions like Title V “limit a government employee's dissemination of information about the government,”<sup>164</sup> restrict the public's right to know, and forge a barrier between the government and the people.<sup>165</sup> In essence, the public will no longer have information about how the government is managing national security issues aside from authorized disclosures.<sup>166</sup>

Because the public will lack access to this information, this will in turn impact the public's ability to make informed decisions about who they choose to elect into office and

---

<sup>159</sup> Jennifer Lynch & Trevor Timm, *Senate Anti-Leaks Bill Threatens the Rights of the Press and the Public*, ELECTRONIC FRONTIER FOUNDATION, Aug. 6, 2012, <https://www.eff.org/deeplinks/2012/08/senates-anti-leaks-bill-threatens-rights-press-and-public>.

<sup>160</sup> *Id.*

<sup>161</sup> Frederick A. O. Schwartz, Jr. et al. UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 161 (2007).

<sup>162</sup> Jennifer Lynch & Trevor Timm, *Senate Anti-Leaks Bill Threatens the Rights of the Press and the Public*, ELECTRONIC FRONTIER FOUNDATION, Aug. 6, 2012, <https://www.eff.org/deeplinks/2012/08/senates-anti-leaks-bill-threatens-rights-press-and-public>.

<sup>163</sup> E.E.B. & K.E.M., Note, *Plugging the Leak: The Case for a Legislative Resolution of the Conflict Between the Demands of Secrecy and the Need for an Open Government*, 71 VA L. REV. 801, 830 (1985).

<sup>164</sup> *Id.* at 823.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

subsequently heighten skepticism of government, “for without an informed and free press there cannot be an enlightened people.”<sup>167</sup> To imagine a world in which these provisions were to exist would be to envision one where the Pentagon Papers, the Watergate Scandal, crimes of torture, extraordinary rendition, or the targeted killing program under President Obama, would have never been disclosed to the American public.<sup>168</sup> Of all of these leaks, the one most frequently cited over the years where the value of an enlightened citizenry was perceived to overcome the harm to national security has been the incident of the Pentagon Papers.<sup>169</sup>

In 1971, *The New York Times* began to publish the Pentagon Papers, a document that outlined the involvement of the United States in the Vietnam War.<sup>170</sup> This document revealed to the public that the Johnson administration had lied to both them and Congress about vital issues of national security.<sup>171</sup> The Nixon administration took action, obtaining court orders to enjoin *The New York Times* and *The Washington Post* from publishing any articles containing information regarding the Pentagon Papers as both newspapers had published articles containing classified information prior to the injunction.<sup>172</sup> The Court in *New York Times Co. v. United States* ultimately ruled that the newspapers could resume publication.<sup>173</sup> Three concurring opinions discuss the media’s incentive to maintain an enlightened citizenry.<sup>174</sup>

Justice Potter Stewart, writing one of the concurrences, discussed the importance of enlightenment, stating, “the only effective restraint upon executive policy and power in the areas

---

<sup>167</sup> *New York Times Co. v. U.S.*, 403 U.S. 713, 728 (1971).

<sup>168</sup> Letter from ACLU to U.S. Senate 2 (Aug. 15, 2012), available at [http://www.aclu.org/files/assets/8-15-12\\_-\\_aclu\\_on\\_s\\_3454\\_title\\_v\\_-\\_final.pdf](http://www.aclu.org/files/assets/8-15-12_-_aclu_on_s_3454_title_v_-_final.pdf).

<sup>169</sup> GARY ROSS, WHO WATCHES THE WATCHMEN? THE CONFLICT BETWEEN NATIONAL SECURITY AND FREEDOM OF THE PRESS 37 (NI Press ed., 2011), available at <http://www.fas.org/sgp/eprint/ross.pdf>.

<sup>170</sup> Pentagon Papers, NEW YORK TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/p/pentagon\\_papers/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/p/pentagon_papers/index.html).

<sup>171</sup> *Id.*

<sup>172</sup> GARY ROSS, WHO WATCHES THE WATCHMEN? THE CONFLICT BETWEEN NATIONAL SECURITY AND FREEDOM OF THE PRESS 32 (NI Press ed., 2011), available at <http://www.fas.org/sgp/eprint/ross.pdf>.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

of national defense may lie in an enlightened citizenry – in an informed and critical public opinion which alone can here protect the values of a democratic government.”<sup>175</sup> As previously discussed, restraints on executive power are important to preserve Congress’s ability to exercise oversight due to the rise in executive power.<sup>176</sup> This rise shows that the country is at its strongest when policies are formulated by deliberative, open, and democratic processes.<sup>177</sup> Without the clarity that informed criticism brings and without candid public debate about goals and means, our security policy all becomes too elicited, foolish, and harmful.<sup>178</sup>

Thus, a provision like Title V’s § 505 would block off an important source of information to Congress.<sup>179</sup> The media’s coverage of intelligence matters provides vital information to Congress in its role as a check against the Executive Branch.<sup>180</sup> The fact that executive power is on the rise means that Congress needs to be even more diligent in its oversight of the Executive Branch.<sup>181</sup> Past executive unilateralism has brought torture, extraordinary rendition, and domestic surveillance.<sup>182</sup> This unilateralism not only undermines the delicate balance of our Constitution, but also lessens our human liberties and hurts vital counterterrorism campaigns.<sup>183</sup> Questions about what can properly be kept from the public are entirely in the hands of the presidents, leaving them free to declassify selectively for narrow partisan or protective ends.<sup>184</sup> Congress needs to ensure that there is a continuous flow of accurate information about the

---

<sup>175</sup> *New York Times Co. v. U.S.*, 403 U.S. at 728 (1971).

<sup>176</sup> *See supra* p. 6.

<sup>177</sup> Frederick A. O. Schwartz, Jr. et al. UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 8 (2007).

<sup>178</sup> Letter from ACLU to U.S. Senate 1 12 (Aug. 15, 2012), available at [http://www.aclu.org/files/assets/8-15-12\\_-\\_aclu\\_on\\_s\\_3454\\_title\\_v\\_-\\_final.pdf](http://www.aclu.org/files/assets/8-15-12_-_aclu_on_s_3454_title_v_-_final.pdf).

<sup>179</sup> *Id.*

<sup>180</sup> Letter from ACLU to U.S. Senate 1 12 (Aug. 15, 2012), available at [http://www.aclu.org/files/assets/8-15-12\\_-\\_aclu\\_on\\_s\\_3454\\_title\\_v\\_-\\_final.pdf](http://www.aclu.org/files/assets/8-15-12_-_aclu_on_s_3454_title_v_-_final.pdf).

<sup>181</sup> Frederick A. O. Schwartz, Jr. et al. UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 1 (2007).

<sup>182</sup> *Id.* at 8-9.

<sup>183</sup> *Id.* at 201.

<sup>184</sup> *Id.* at 207.

functioning and malfunctioning of the Executive Branch, and the one way it is able to do this is by its oversight through the media.<sup>185</sup> Congress can do this by using the tools available to them: investigations and crafting careful legislation.<sup>186</sup>

Furthermore, § 505's prohibition on former and current government employees acting as consultants and advisors to the media could also extend to members of Congress and to members of their staff.<sup>187</sup> Congressmen's responsibilities include criticizing abuses by the Executive Branch, and this is frequently done through the media.<sup>188</sup> Section 505's provisions would thus deny members of Congress access to the media and would greatly lessen their ability to exercise their oversight over the Executive Branch.<sup>189</sup>

Overall, to put forward provisions of this nature, Congress will be denied the information it needs about national security and intelligence to effectively perform its job.<sup>190</sup> To inhibit Congress from its constitutionally granted oversight function is to diminish its balance among the other branches, and to impact two key allies along the way: the media and the public.

### ***Part V: Proposed Solution***

Since September 11<sup>th</sup>, there has been a near decade-long war against terror.<sup>191</sup> The War on Terror has subsequently produced an increase in the campaign to stop leaks of classified information from being reported to the media.<sup>192</sup> Leaks of classified information have risen over

---

<sup>185</sup> Frederick A. O. Schwartz, Jr. et al. UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 205 (2007).

<sup>186</sup> *Id.* at 207. See also *supra* p. 3.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Letter from ACLU to U.S. Senate 1 12 (Aug. 15, 2012), available at [http://www.aclu.org/files/assets/8-15-12\\_-\\_aclu\\_on\\_s\\_3454\\_title\\_v\\_-\\_final.pdf](http://www.aclu.org/files/assets/8-15-12_-_aclu_on_s_3454_title_v_-_final.pdf).

<sup>191</sup> Press Release, Senator Ron Wyden, Wyden Floor Statement on the Removal of Controversial Leaks Provisions from Intelligence Authorization Bill (Dec. 21, 2012), available at <http://www.wyden.senate.gov/news/press-releases/wyden-floor-statement-on-the-removal-of-controversial-leaks-provisions-from-intelligence-authorization-bill>.

<sup>192</sup> *Id.*

the course of recent administrations, particularly during Obama's term over the last four years.<sup>193</sup> Based on this recent rise in leaks to the media and in light of historical leaks that have impacted the country's national security, it is clearly a problem that will not be going away at any time in the near future. As the character and nature of leaks change throughout the course of history, adaptive measures need to be taken to protect the national security of our country while still protecting the free press and an informed public.<sup>194</sup> Adaptive measures, like those that were proposed in Title V, were ill-conceived, hastily drafted, and should not be proposed to eliminate the current leak epidemic. "[Legislation of this kind] could tip the balance dangerously"<sup>195</sup> and the tension between the need for secrecy and the democratic requirements of openness and transparency will only be exacerbated. As Yale Law scholar Charles Black stated in 1975, "Congress has abundantly passed the buck."<sup>196</sup>

As succinctly stated by Harvard law professor Jack Goldsmith, "there is no perfect solution to the problem."<sup>197</sup> The leak problem is not one that can be solved with one piece of legislation quickly passed through Congress. The tension that exists requires that there be more informed debate involving members of the public regarding any legislation that potentially affects their right to know.

Congress must therefore look for ways to help the Executive Branch safeguard information that intelligence agencies wish to keep secret. Legislation that threatens to encroach

---

<sup>193</sup> See discussion *supra* p. 9.

<sup>194</sup> Press Release, Senator Ron Wyden, Wyden Floor Statement on the Removal of Controversial Leaks Provisions from Intelligence Authorization Bill (Dec. 21, 2012), available at <http://www.wyden.senate.gov/news/press-releases/wyden-floor-statement-on-the-removal-of-controversial-leaks-provisions-from-intelligence-authorization-bill>.

<sup>195</sup> *Id.*

<sup>196</sup> Frederick A. O. Schwartz, Jr. et al. UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 203 (2007).

<sup>197</sup> Leonard Downie Jr., Editorial, *Why We Don't Need Another Law Against Intelligence Leaks*, WASHINGTON POST, Dec. 6, 2012, [http://articles.washingtonpost.com/2012-12-06/opinions/35673556\\_\\_1\\_intelligence-authorization-act-director-of-national-intelligence-news-media](http://articles.washingtonpost.com/2012-12-06/opinions/35673556__1_intelligence-authorization-act-director-of-national-intelligence-news-media).

upon the rights of the media or that would lessen the public's access to information for which they have a right to know should be critically examined and thought about before an attempt is made to attach it onto a piece of legislation last minute. The Director of National Intelligence has even stated that provisions such as these would not significantly deter leaks nor would it help protect sensitive national security information.<sup>198</sup> Furthermore, Robert Litt, the General Counsel for the Director of National Intelligence, recently informed the American Bar Association that the proposals "really would not have any deterrent impact or punitive impact on leaks, and might in fact have an adverse impact on the free flow of information to the American people."<sup>199</sup> Based on this information alone, it is apparent that the very purpose for which the bill has set out to achieve has failed.

Additionally, in crafting new legislation, Congress must be careful not to limit its oversight function of the Executive Branch. If members of Congress fail to have access to media reports on national security issues, they would be ineffective in their oversight duties, resulting in the Executive Branch wielding more power – an undesirable consequence that would tip the balance of powers among the three branches. "It [ultimately] comes down to striking a balance."<sup>200</sup>

### ***Conclusion***

The history of national security leaks in the United States is something that has occurred on a regular basis since the founding of the country and has only increased in volume in recent years. Title V of the Intelligence Authorization Act for Fiscal Year 2013 includes provisions

---

<sup>198</sup> Press Release, Senator Ron Wyden, Wyden Floor Statement on the Removal of Controversial Leaks Provisions from Intelligence Authorization Bill (Dec. 21, 2012), *available at* <http://www.wyden.senate.gov/news/press-releases/wyden-floor-statement-on-the-removal-of-controversial-leaks-provisions-from-intelligence-authorization-bill>.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

that, if adopted, will negatively impact the system of congressional oversight by prohibiting members of Congress from speaking to the media regarding intelligence activities. Congress regularly interacts with the media to ensure that the Executive Branch does not wield too much authority and does not tip the balance of powers among the three branches. Based on the rise in number of unauthorized disclosures, legislation must be carefully debated and crafted among members of Congress and revealed to the media and members of the public as it may potentially affect their individual rights. “It is important for Congress to remember that not everything that is done in the name of stopping leaks is necessarily wise policy.”<sup>201</sup> Thus, Congress must look for a cautious, long-term solution to a recurring, long-standing problem.

---

<sup>201</sup> *Id.*