

ANOTHER TWO-TIER JUSTICE SYSTEM: FOR “UNAUTHORIZED” LEAKS

I’m traveling to Boston today for the National Conference on Media Reform (if you’re in Boston, come see my panel on “Independent Journalism and International Crisis” on Saturday!). So blogging will be light today.

But I wanted to point to one more aspect of the Senate Intelligence Committee’s Intelligence Authorization—one also highlighted by Steven Aftergood. Someone—someone not in the intelligence community, apparently—has decided that intelligence community leakers (but not leakers from other parts of government) should lose their pension if the executive branch unilaterally decides they’ve leaked classified information.

The committee’s explanation for needing the bill is cute, among other reasons, because its concerns about “unauthorized” leaks seem to admit their lack of concern about “authorized” leaks of classified information.

The Committee has had long-standing concerns about unauthorized disclosures of classified information.

Which by itself points to the arbitrariness of our classification system.

But it’s in Ron Wyden’s extensive opposition to the measure where the true arbitrary potential for this becomes clear.

Given these challenges, my concern is that giving intelligence agency heads the authority to take away the pensions of individuals who haven’t been formally convicted of any wrongdoing could pose serious problems for the due process

rights of intelligence professionals, and particularly the rights of whistleblowers who report waste, fraud and abuse to Congress or Inspectors General.

Section 403 – as approved by the Select Committee on Intelligence – gives the intelligence agency heads the power to take pension benefits away from any employee that an agency head –determines|| has knowingly violated their nondisclosure agreement. But as I noted in the committee markup of this bill, neither the DNI nor any of the intelligence agency heads have asked Congress for this authority. Moreover, as of this writing none of the intelligence agencies have officially told Congress how they would interpret this language.

It is entirely unclear to me which standard agency heads would use to –determine|| that a particular employee was guilty of disclosing information. It seems clear that section 403 gives agency heads the power to make this determination themselves, without going to a court of law, but the language of the provision provides virtually no guidance about what standard should be used, or even whether this standard could vary from one agency to the next.

In other words, agency heads will get to decide, unilaterally and in secret, whether they think a former employee has leaked classified information and therefore should lose their pension.

Serving in the intelligence community is already prone to abuse. Since there is almost no transparency, agencies can and have fired people for being unwilling to participate in propaganda or illegal ops. And this would just give intelligence agencies one more tool to retaliate against people if they're perceived as doing

something wrong.

I can't help but think of Jeff Sterling and this measure. He had a gripe about discrimination. But he also appears to have had a gripe about a really asinine plot to deal nukes to Iran. His case will be tried in court (though the agency already has a huge advantage over him, starting with the fact that they have already invoked state secrets in his case). But now Congress (or someone whispering on Congress' ear?) wants one more tool to punish people like Sterling, this time with no due process. Moreover, in his case, the government has claimed that leaks to the American public are worse than leaks to our enemies.

The defendant's unauthorized disclosures, however, may be viewed as more pernicious than the typical espionage case where a spy sells classified information for money. Unlike the typical espionage case where a single foreign country or intelligence agency may be the beneficiary of the unauthorized disclosure of classified information, this defendant elected to disclose the classified information publicly through the mass media. Thus, every foreign adversary stood to benefit from the defendant's unauthorized disclosure of classified information, thus posing an even greater threat to society.

This measure, which would allow the government to use a two-tier justice system to secretly retaliate against those it claims leaked, seems to reinforce this growing claim to that leaks to American citizens are more dangerous than leaks to our enemies.

It seems the government believes the most dangerous spies are those who tell Americans what its government does in their name.