USING PENSIONS TO "PUNISH" "LEAKS" WILL SUBJECT CLEARANCE HOLDERS TO ARBITRARY POWER

The Senate Intelligence Committee's new anti-leak laws are the part of the Intelligence Authorization that will generate the most attention. Greg Miller already got Dianne Feinstein to admit there's no reason to think one of the new provisions—permitting only the most senior intelligence officials to do background briefings—will limit leaks.

> Feinstein acknowledged that she knew of no evidence tying those leaks or others to background sessions, which generally deal broadly with analysts' interpretations of developments overseas and avoid discussions of the operations of the CIA or other spy services.

Another of the provisions—requiring intelligence committee heads to ensure that every sanctioned leak be recorded—ought to be named the Judy Miller and Bob Woodward Insta-Leak Recording Act.

> (a) RECORD REQUIREMENT.—The head of each element of the intelligence community shall ensure that such element creates and maintains a record of all authorized disclosures of classified information to media personnel, including any person or entity under contract or other binding agreement with the media to provide analysis or commentary, or to any person or entity if the disclosure is made with the intent or knowledge that such information will be made publicly available.

I'm sure someone can think of some downside to this provision, but I can't think of it at the moment (which is why Obama will probably find some way to eliminate it). It will end some of the asymmetry and abuse of classification as it currently exists.

In addition, there are a bunch of provisions that are just dumb bureaucracy.

But it's this one that is deeply troubling. Among the other provisions making nondisclosure agreements more rigorous is a provision that would allow an intelligence community head to take away a person's pension if they "determine" that an individual violated her nondisclosure agreement.

> (3) specifies appropriate disciplinary actions, including the surrender of any current or future Federal Government pension benefit, to be taken against the individual if the Director of National Intelligence or the head of the appropriate element of the intelligence community determines that the individual has knowingly violated the prepublication review requirements contained in a nondisclosure agreement between the individual and an element of the intelligence community in a manner that disclosed classified information to an unauthorized person or entity;

Ron Wyden objects to this on the obvious due process grounds (and notes a big disparity between the treatment of intelligence agency employees and those in, say, the White House). He also describes a scenario in which a whistleblower might be targeted that gets awfully close to the plight of Thomas Drake, who was prosecuted for the documents he had—upon the instruction of the NSA Inspector General—kept in his basement to make a whistleblower complaint.

> It is unfortunately entirely plausible to me that a given intelligence agency

> could conclude that a written submission to the congressional intelligence committees or an agency Inspector General is an “unauthorized publication,” and that the whistleblower who submitted it is thereby subject to punishment under section 511, especially since there is no explicit language in the bill that contradicts this conclusion.

But there’s one thing Wyden left out: the proven arbitrariness of the existing prepublication review process. A slew of people have well-founded gripes with the prepublication review process: Valerie Plame, for CIA’s unwillingness to let her publish things that Dick Cheney already exposed; Peter Van Buren for State’s stupid policy on WikiLeaks; Glenn Carle for the delay and arbitrariness. That list alone ought to make it clear how a provision giving agencies even more power to use the prepublication review process as a means to exact revenge for critics would be abused.

Now consider the most egregious case: the disparate treatment of Jose Rodriguez and Ali Soufan’s books on torture. Rodriguez was able to make false claims, both about what intelligence torture produced and about legal facts of his destruction of the torture tapes. Yet Soufan was not permitted to publish the counterpart to those false claims. Thus, not only did prepublication review prevent Soufan from expressing legitimate criticism. But the process facilitated the production of propaganda about CIA actions.

What’s truly bizarre is that the same people who want to leverage the already arbitrary power prepublication review exacts over government employees have also expressed concern about how arbitrary the prepublication review process is.

> U.S. officials familiar with the inquiry, who spoke on condition of anonymity, said that it reflects growing

> concern in the intelligence community that the review process is biased toward agency loyalists, particularly those from the executive ranks.
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> Members of the Senate Intelligence Committee expressed such concerns in a recent letter to CIA Director David H. Petraeus, a document that has not been publicly released.

As it is, intelligence community officials will be subject to unreliable polygraph questions focusing on unauthorized (but not authorized) leaks. Those expanded polygraphs come at a time when at least one agency has already been accused of using them for fishing expeditions.

And now the Senate Intelligence Community want to allow agency heads to use a prepublication review process that they themselves have worried is politicized to punish alleged leakers?