

JAMES CLAPPER'S ANTI-LEAK EFFORTS WILL INCREASE INFORMATION ASYMMETRY

As Charlie Savage and others report, Director of National Security James Clapper has instituted new efforts to crack down on leaks. The plan has two aspects. First, those agencies within the IC that have mandatory lie detector tests will add an unspecified question about “unauthorized disclosure of classified information.”

(1) mandating that a question related to unauthorized disclosure of classified information be added to the counterintelligence polygraph used by all intelligence agencies that administer the examination (CIA, DIA, DOE, FBI, NGA, NRO, and NSA).

Not only does this cover just some who might have access to classified information, leaving some agencies, contractors, Congressional employees, and White House employees, not to mention our international intelligence partners, in the clear. But it also brackets off the “authorized” disclosure of classified information. Heck, it might not even cover any of the leaks currently under investigation.

Then there's the authorization of IC Inspectors General to investigate leaks that DOJ declines to pursue.

(2) requesting the Intelligence Community Inspector General lead independent investigations of selected unauthorized disclosure cases when prosecution is declined by the Department of Justice. The IC IG will establish and lead a task force of IC inspectors general to conduct independent investigations, pursuant to his

statutory authority and in coordination with the Office of the National Counterintelligence Executive. This will ensure that selected unauthorized disclosure cases suitable for administrative investigations are not closed prematurely.

As Savage has noted (and this report he links makes clear) the vast majority of leaks are not prosecuted. That's partly because information is so widely distributed that identifying a sole leaker becomes legally problematic if not impossible more generally. In addition, many leak prosecutions would risk disclosing more classified information than simply letting the alleged leaker go free (this is probably why the Bush and Obama Administrations tried to trump up a charge against Thomas Drake rather than charge known leakers who exposed the illegal wiretap program).

Clapper's solution will instead have Inspectors General pursue suspected leakers instead. Not only would this free investigative methods from evidentiary rules (so for example, IGs might use wiretaps and other intrusive investigative techniques because they would never need to be disclosed or not in court). The secrecy of such investigations would also make the exposure of selective prosecution impossible. And given the impunity with which the government can give or withdraw clearances, it would mean those unfairly targeted would have no recourse.

All this might be less problematic if the IC IG hadn't already proven himself to serve government cover-ups rather than the citizens of this country. But as it is, this scheme is ripe for abuse.

Which won't end leaking. Instead, it'll make whistleblowing even riskier, as compared with sanctioned leaks, than it already is. Which, so long as Congressional oversight committees refuse to exercise any oversight, will mean the intelligence committee will operate with further

unchecked power.