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Trying to Spook the Press

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By Tom Gibson

It is February 1973. Reporters for The Washington Post covering the Watergate story are tracking down evidence that the burglars have CIA connections. The day before a front-page article is scheduled to appear identifying one of the burglars as a CIA agent, The Post's managing editor receives a call from the White House urging him to kill the story because it would impair "an intelligence source of operational assistance." The editor and the reporters consider the request, but decide that the information is too important to withhold. Two days after the story is published they are charged with violating a new law that makes it a crime to publish the identity of an intelligence source or agent, and they face the possibility of 10 years in prison and a $50,000 fine.

Farfetched? Not if you have read drafts of the Intelligence Identities Protection Act of 1980. This bill flies in the face of the First Amendment, which broadly states that "Congress shall make no law . . . abridging freedom of speech or of the press." Today this prohibition is in danger of being disregarded by a Congress obsessed with national security secrecy. Six years after a president was forced to resign or face impeachment because of abuses of power under the cover of national security, and four years after a Senate select committee reached the "fundamental conclusion that intelligence activities have undermined the constitutional rights of citizens," Congress in the name of national security and intelligence protection is on the verge of enacting the most severe abridgment of freedom of the press since the Alien and Sedition Laws of the late 18th century.

The Intelligence Identities Protection Act would make it a crime to publish "any information that identifies an individual as a covert agent" of the CIA or the FBI. Part of the bill would prohibit CIA or FBI employees from disclosing classified information about secret agents, but another section sweeps far more broadly. In the candid words of Rep. Edward Boland (D-Mass.), chief sponsor of the bill in the House of Representatives, this provision "could subject a private citizen to criminal prosecution for disclosing unclassified information obtained from unclassified sources."

It is aimed at the editors of Covert Action Information Bulletin, a journal that opposes CIA clandestine interference in the affairs of other countries and that has been widely condemned for using public information to identify CIA agents. Another sponsor of the legislation has stated that he wants "to put away" the Bulletin editors. That would also mean putting away the New York Times reporter who writes a series of articles about CIA agents who secretly work to "destabilize" the democratically elected government of Chile, or any other journalist or editor who makes a difficult decision to publish lawfully obtained information about intelligence agencies.

Three of the four congressional committees that have approved the agent identities bill have failed to limit the scope of the new crime. The House version reported by the Judiciary and Intelligence committees requires an "intent to impair or impede the intelligence activities of the United States." This standard would authorize inquiries into the political purposes of CIA critics and would do little to protect those whose writing expresses sharp opposition to particular CIA activities. The House committee report blandly asserts that "critics of U.S. intelligence would stand beyond the reach of the law if they made their disclosures for purposes other than impairment of U.S. intelligence activities."

A bill approved by the Senate Intelligence Committee offers even less assurance to investigative reporters covering the CIA by providing that they need not "intend" to impair foreign intelligence activities, but only have "reason to believe" that a "pattern of activities intended to identify agents" will do so. A series of articles or a week of investigation would presumably be enough to establish a "pattern of activities." A pre-publication warning to a journalist by the CIA—or even general knowledge of the CIA's sensitivity about the subject of an article—would constitute "reason to believe." Only the Senate Judiciary Committee has attempted to narrow the scope of the proposed crime by adopting an amendment sponsored by Sen. Edward Kennedy, but strong efforts are expected to be made on the Senate floor to remove the Kennedy amendment and restore the original bill.

In the face of these sweeping provisions, it is not surprising that many First Amendment scholars have reached the conclusion that the Intelligence Identities Protection Act is unconstitutional. For the first time in our history it would penalize the publication of information that is already public and thus strike a blow at the heart of a free press.

More surprising is the fact that congressional authors of the broadest bill apparently do not disagree with this assessment but are determined to plow ahead because, according to Sen. Richard Lugar (R-Ind), "we are [not] going to be able to have both an ongoing intelligence capability and a totality of civil rights protection." Nearly two centuries ago, James Madison, one of the authors of the Bill of Rights, warned against this kind of assertion when he observed that "it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad." It is not too late for Congress to heed Madison's warning. If it does not, the courts will have to do so.

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