Expansion of "covert agent" definition would weaken oversight and accountability

Section 305 (Division A) of S. 1589, the Intelligence Authorization Act for FY 2018, 2019, and 2020, would expand the definition of "covert agent" for purposes of prosecution under the Intelligence Identities Protection Act, in what appears to be a clear attempt to subvert transparency, oversight, and accountability. The House should act to ensure that this provision does not become law.

Under current law, "covert agent" is defined as an individual: (1) whose relationship with the intelligence community is classified, and (2) (for U.S. citizens) either resides or serves outside the United States, or has done so within the past five years.

Section 305 would remove the second requirement, and define all U.S. citizens with a classified relationship with the U.S. intelligence community as "covert agents" regardless of when (if ever) they last served overseas. In doing so, it makes the definition apply indefinitely, even after retirement.

Delegating authority to the executive branch

Without any congressionally imposed limits, whether an individual qualified as a "covert agent" would depend entirely on classification decisions by the executive branch. This provision could be used to prosecute or threaten not only government whistleblowers, but also journalists and civil society organizations. It would harm congressional oversight of the intelligence community, making it much more difficult to obtain information about almost any individual's relationship to intelligence agencies and allowing the executive branch to avoid oversight through arbitrary classification.

Weakening accountability

In a statement found on page 56 of the SSCI report on S. 1589, Senator Ron Wyden (D-OR) noted that the CIA justified its request for expansion of the Intelligence Identities Protection Act based on what the agency described as "incidents related to past Agency programs, such as the RDI [Rendition, Detention and Interrogation] investigation.'' He stated his concern that the inclusion of the CIA torture program as justification, combined with the indefinite timeline, means that the provision could be used to shield officials from accountability, even those who have "become senior management or have retired." The provision would likely make it even more difficult to obtain information about an individual's role in CIA torture and other past programs.

Additionally, the provision would have implications for disclosure under the Freedom of Information Act, by significantly expanding both the number of intelligence identities currently allowed to be withheld under FOIA exemptions and by increasing the duration those identities are protected. It would also delay declassification of historical information and potentially censor information currently available to the public.

Chilling effect

Because of the potentially widespread legal ramifications for working with individuals who have retired or otherwise left their work with the intelligence community, this provision would likely have a profound chilling effect on journalists' and public interest organizations' work.

This provision is an extremely broad expansion of felony criminal penalties, and delegates authority as to when those penalties apply to the executive branch. It would be significantly damaging to transparency, oversight, and accountability, and should be removed from the Intelligence Authorization Act. Please contact Emily Manna (Open the Government) at emanna@openthegovernment.org or Katherine Hawkins (Project On Government Oversight) at khawkins@pogo.org for more information.