

THE RUTHERFORD INSTITUTE

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May 21, 2014

Via Email, Facsimile, and U.S. Mail

The Honorable Barack Obama
1600 Pennsylvania Ave.
Washington, DC 20006

Re: *ODNI Pre-Publication Rule Changes Run Afoul of First Amendment*

Dear Mr. President:

As an organization dedicated to the defense of Americans' constitutional rights, The Rutherford Institute¹ is extremely concerned by your administration's recent policy changes prohibiting current and former employees and contractors from citing "news reports based on leaks in their speeches, opinion articles, books, term papers or other unofficial writings."²

This prohibition, coupled with a promise that those who violate this policy may find themselves faced with the "imposition of civil and administrative penalties, and may result in the loss of security clearances and accesses,"³ demonstrates a broad violation of the First Amendment rights of current and former intelligence officials. Such a policy runs afoul of First Amendment principles, by unnecessarily inhibiting current and former intelligence officials from engaging in discussions of public concern by imposing an unlawful prior restraint on their speech.

¹ The Rutherford Institute is a non-profit civil liberties organization that provides free legal representation to individuals whose civil rights are threatened and/or infringed.

² Charlie Savage, "Intelligence Policy Bans Citation of Leaked Material," *New York Times* (May 8, 2014), http://www.nytimes.com/2014/05/09/us/politics/obama-policy-bans-employee-use-of-leaked-material.html?_r=0.

³ Charlie Savage, "Intelligence Policy Bans Citation of Leaked Material," *New York Times* (May 8, 2014), http://www.nytimes.com/2014/05/09/us/politics/obama-policy-bans-employee-use-of-leaked-material.html?_r=0.

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Coming as it does in the wake of disclosures made by former NSA contractor Edward Snowden confirming the government's ongoing domestic spying and surveillance of its own citizens, this policy change, issued by James Clapper, Director of National Intelligence, appear to be little more than a thinly veiled attempt to suppress public discussion of government wrongdoing.

Indeed, when considered in conjunction with your administration's tireless pursuit and prosecution of government leakers (you have pursued more whistleblowers in your first 26 months in office than all other previous administrations combined⁴), this policy change sends a clear and troubling message about your lack of commitment and concern for government transparency. Your disregard for the legitimacy of the violations exposed by the leaks, and for the arguable whistleblower status of the individuals leaking the information indicates that in your legal and moral calculus protecting the crimes of government officials takes precedence over the basic rights of American citizens.

A careful review of the revisions to your administration's pre-publication review policies, issued by the Office of the Director of National Intelligence ("ODNI") on April 8, 2014, only adds to growing concerns about your pursuit of whistleblowers who reveal damaging information about the wrongdoings of the government – classified or not.

Unclassified speech restrictions

The new policy broadens the purpose of the pre-publication review process, expanding it from "prevent[ing] the disclosure of classified information,"⁵ to preventing the "unauthorized disclosure of information."⁶ This subtle change in language broadens the scope of speech requiring ODNI approval to include speech that is unclassified but still determined to be sensitive in some way. It is an unmistakable message to would-be speakers that the focus of ODNI is not on keeping sensitive and classified information secret, but instead on broadly allowing the office to suppress speech which is embarrassing to government officials, or which exposes the crimes and errors of those in power, without any real guiding standard.

Sourcing restrictions

More damningly, paragraph 6 of the "Policy" section contains a new provision on "sourcing," which states that ODNI personnel "must not use sourcing that comes from

⁴ "Obama Takes a Hard Line Against Leaks to Press," *The New York Times*, June 11, 2010, <http://www.nytimes.com/2010/06/12/us/politics/12leak.html?pagewanted=all>

⁵ *Supra* note 6 at 2.B.; *Supra* note 7 at 3.

⁶ *Supra* note 5 at 3.

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known leaks, or unauthorized disclosures of sensitive information.”⁷ The revision further states that ODNI personnel are “not authorized to use anonymous sourcing.”⁸

This language is a blatant attack on any intelligence official who would care to respond to or discuss the material leaked by government whistleblower Edward Snowden, which is not only a matter of public concern, but indicates that the federal government is not abiding by its commitments to the citizens it claims to protect.

In response to the public outcry over this change, ODNI attempted to clarify the purpose of this section as limited to preventing current and former intelligence agency employees from unintentionally verifying the factual accuracy of certain information that has been publicly disclosed, but nonetheless still remains technically “classified.”⁹

Unfortunately, Mr. President, in instances like the Edward Snowden disclosures, the cat is already out of the bag. When such disclosures make the public aware of rampant privacy violations and unconstitutional government overreach, the response by an intelligence community that is actually accountable to the public should be to acknowledge the failures exposed by the leaks and work toward reforming them.

Instead, these revisions serve no goal other than to squelch debate and prevent current and former government employees from speaking about information already clearly in the public domain. Instead of allowing for productive avenues for discussing reform, these revisions serve only to create a wall of silence, bullying anyone in any position of authority into a forced quiet.

Prior Restraint

In addition to severely curtailing the speech rights of current intelligence community employees, preventing them from disclosing important governmental abuses by requiring them to go through an office that is certain to suppress and censor them, these new restrictions also restrain the speech rights of private citizens. Under the ODNI’s new rules, even former employees who are no longer employed by intelligence agencies are restricted in their right to speak freely.

Indeed, former employees, contractors, and any other individuals with a previous relationship with intelligence agencies are subject to the same restrictions as current ODNI staff, even after they have completely separated from any intelligence agency.

⁷ *Supra* note 5 at 6.

⁸ *Id.*

⁹ From the PAO: Updates to ODNI Pre-Publication Review Policy, May 9, 2014, <https://www.documentcloud.org/documents/1157341-odni-workforce-email-re-pre-public-review-may-9.html>

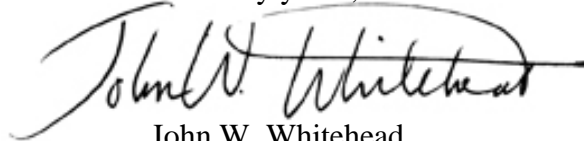
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These private citizens are unconstitutionally restricted from speaking on subjects that everyone else in the public is able to discuss, just because of their previous relationship with the intelligence community. Such restrictions represent a flagrant prior restraint on First Amendment protected speech that cannot remain in place.

As a constitutional lawyer who works diligently to ensure that the Constitution's restrictions on government overreach are adhered to, to a former constitutional law professor who should know better than to allow such overtly unconstitutional incursions to take place, I urge you to call on James Clapper to rescind the unconstitutionally restrictive revisions to ODNI's pre-publication policy.

Sincerely yours,

A handwritten signature in black ink that reads "John W. Whitehead". The signature is written in a cursive style with a long horizontal stroke extending to the right.

John W. Whitehead
President

cc: James Clapper, Director of National Intelligence
U.S. Senate Select Committee on Intelligence