

July 19, 2023

Dear Senators:

The undersigned 53 civil society organizations and press freedom associations write in strong opposition to Senate Amendment 218, offered by Senators Klobuchar and Cruz as a floor amendment to the Senate's Fiscal Year 2024 National Defense Authorization Act (S. 2226). **We urge you to vote "no" on this amendment should it come up for a floor vote and to oppose its inclusion in the national defense bill or any other package.**

This amendment contains serious constitutional, prudential, and implementation problems that undercut its apparent intention of addressing security and privacy issues regarding elected leaders and those closely associated with them. We are deeply concerned this proposal will enable corruption to flourish undetected and severely chill press reporting on congressional affairs generally, while providing a mirage of security to lawmakers and their loved ones. These flaws also directly conflict with the cherished values and freedoms that are vital to our democracy, including government transparency, accountability, free expression, and freedom of the press.

That is because as drafted, **Amendment 218 would allow Members of Congress to compel the censorship of a broad range of information whose publication is protected by the First Amendment—including the types of information routinely reported by journalists, government watchdogs, and ordinary citizens. This is precisely the information necessary for the American public to evaluate lawmakers' adherence to our laws and ethical standards, as well as their policy promises to their constituents.**

Specifically, the amendment would empower a range of individuals connected to Members of Congress to order websites and data brokers to delete information from the digital public domain and from databases, backed by court order. The sweepingly broad categories of information subject to coerced deletion would include information about the lawmakers or their spouses, siblings, parents, or anyone else living in their household, including information that is already publicly available or easily observed by anyone out in public. This includes their home address, addresses of other residences, vehicle license plate number, and whereabouts.

It is disturbingly easy to envision the resulting scenarios in which this legislation could be wielded as a censorship cudgel, such as:

- An anti-corruption organization checking the new property or vehicle purchases of a lawmaker under allegations of taking financial bribes;

- A journalist reporting on the travel plans and thus the whereabouts of lawmakers who are facing criticism in their home state or district;
- A citizen activist blogging about the fact of a lawmaker having money stashed in a Wall Street bank while the lawmaker pushes for a bailout for that bank;
- A voter complaining on social media about the school that certain lawmakers chose for their children while voting against education, child care, or paid leave for other families.

The amendment purports to remedy First Amendment and anti-corruption concerns through a series of carve-outs, but the exemptions are wholly inadequate. **Not only is the language of the carve-outs, such as the exception for matters of "public concern," subject to different interpretations that would need to be litigated in court, the amendment effectively states that ambiguity "shall" be "broadly construed" in favor of censorship.** Furthermore, as explained in an ACLU analysis about a very similar bill,¹ the U.S. Constitution protects the publication of truthful information lawfully obtained, even where there are significant privacy concerns posed by the information. Similarly, Amendment 218 will also likely fail the requisite legal standard that the government must satisfy before it is permitted to censor.

Should this legislation be enacted nonetheless, the predictable result will be that virtually anybody who participates in congressional oversight or related public debates will face enormous incentives to sideline themselves. For individuals, community newspapers, and non-profit organizations, even the threat of a lawsuit, let alone the penalties or sanctions potentially imposed during litigation and the attorneys' fees, could be ruinous and enough for them to simply disengage. Their attorneys will advise self-censorship to avoid legal liability and the public square will be poorer for it. These damaging outcomes must also be weighed against the fact that Members of Congress, like all Americans, are already protected by a variety of criminal statutes and civil remedies against conduct such as stalking and assault, which make much of the legislation superfluous.

Indeed, **the amendment also fails to protect Members of Congress and those closely associated with them from having their information sold by data brokers. A flaw in the legislative language would make almost all data brokers exempt from the rules that are ostensibly meant to limit data broker sales of protected personal information.** The bill as written exempts any "consumer reporting agency

¹ ACLU, Letter to U.S. Senate on S. 2340, The Daniel Aderl Judicial Security and Privacy Act of 2021 (Nov. 17, 2021), https://s3.amazonaws.com/demandprogress/documents/ACLU_Letter_2021.11.17_S._2340_Judicial_Security_and_Privacy_Act.pdf.

subject to the Fair Credit Reporting Act" and any "financial institution subject to the Graham-Leach-Bliley Act." But these are precisely the types of data brokers that buy and sell people's personal information in ways that could put the subjects of this bill at risk. As an analysis by the Electronic Privacy Information Center (EPIC) concludes in its July 14th statement on this topic, the legislation does not accomplish its intended purpose.²

In effect, Amendment 218 would weaponize the privacy concerns of powerful government leaders into a potent and arguably unconstitutional new tool for suppressing public discussion and press reporting that they dislike while failing on its face to accomplish its claimed goals. We expect the American people will react negatively when they learn that Congress is seeking to give itself enormous new censorship powers while failing to extend appropriate, comprehensive privacy rules for all.

For all these reasons, we urge you to reject this censorship amendment. We ask you to instead work with us to truly improve the privacy and security protections available to all Americans while making good on our shared ideals of an open and honest Congress that is accountable to the American people. Should you have any questions, we stand ready to assist you.

Sincerely,

Demand Progress
Freedom of the Press Foundation
Action Corps
Advocacy for Principled Action in Government
American Civil Liberties Union
American Society of Journalists and Authors (ASJA)
Americans For Prosperity
Better Government Association
Center for Media and Democracy
Center for Progressive Reform
Center for Public Integrity
Defending Rights & Dissent
D.C. Open Government Coalition
Due Process Institute
Fight for the Future
First Amendment Clinic at the University of Illinois College of Law
First Amendment Coalition

² EPIC, Statement on NDAA Senate Amendment 218 regarding privacy for Members of Congress and their families (July 14, 2023), <https://epic.org/epic-statement-on-ndaa-senate-amendment-218-regarding-privacy-for-members-of-congress-and-their-families/>.

First Amendment Foundation
Fix the Court
Foundation for Individual Rights and Expression
Free Government Information (FGI)
Free Press Action
Freedom of Information Oklahoma
FreedomWorks
Government Information Watch
GovTrack.us
Greenpeace USA
Institute for Nonprofit News
Kentucky Open Government Coalition
League of Women Voters of the United States
Ms. Magazine
MuckRock
Muslims for Just Futures
National Coalition Against Censorship
National Freedom of Information Coalition
National Newspaper Association
NETWORK Lobby for Catholic Social Justice
New Mexico Foundation for Open Government
Nexstar Media Group, Inc.
Organization for Identity & Cultural Development (OICD.net)
Pay Our Interns
PEN America
Project On Government Oversight
Radio Television Digital News Association
RepresentUs
Texas Press Association
The Authors Guild
The Center for Investigative Reporting (d/b/a Reveal)
The Indiana Coalition for Open Government
The Workers Circle
Tucson Sentinel
Virginia Coalition for Open Government
Woodhull Freedom Foundation
X-Lab