27

NATIONAL INTELLIGENCE REORGANIZATION AND REFORM ACT OF 1978

HEARINGS

BEFORE THE

SELECT COMMITTEE ON INTELLIGENCE

OF THE

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

S. 2525

NATIONAL INTELLIGENCE REORGANIZATION
AND REFORM ACT OF 1978

APRIL 4, 5, 19, 25; MAY 3, 4, 16; JUNE 15, 21; JULY 11, 18, 20
AND AUGUST 3, 1978

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(Established by S. Res. 400, 94th Cong., 2d Sess.)

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FOREWORD

The hearings on S. 2525, the National Intelligence Reorganization and Reform Act of 1978, which make up the contents of this volume, are part of a long process of building a new national consensus concerning the intelligence activities of the United States. While there is no question that due to its position in world affairs the United States needs a strong and capable intelligence system, the challenge we must now meet is how to place necessary intelligence activities under constitutional governance. The unfortunate lack of proper guidelines in the past led some of the intelligence agencies into improper areas of activity. This chapter in our history must not be repeated.

Secret activities can and do create great strains in our democratic system. Despite their inevitable secret nature, we have, however, come to recognize that intelligence activities are a legitimate and essential function of government. Their basic purpose is to protect our freedom and to better inform our Government about the wisest course for our foreign policy and defense preparations. It is clear that intelligence activities can take place without adversely affecting the cherished constitutional rights of American citizens. This task of setting forth duties and authorities for the intelligence agencies, as well as writing firm measures which protect the rights of Americans, is at the heart of S. 2525.

These hearings, conducted under the able direction of Senator Walter D. Huddleston of Kentucky and Senator Charles McC. Mathias of Maryland, are an important contribution toward achieving the goals of assuring that the United States has an intelligence service second to none and that its activities are compatible with our democratic system.

BIRCH BAYH,
Chairman, Senate Select Committee on Intelligence.
BARRY GOLDWATER,
Vice Chairman, Senate Select Committee on Intelligence.

INTRODUCTION

The laws relating to intelligence activities in the statute books today take up no more than a page or two and clearly do not provide adequate governance for the vital and powerful secret organizations charged with the task of intelligence. The Senate Select Committee on Intelligence is now in the process of formulating a comprehensive statute clearly mandating certain intelligence activities necessary for the security of the United States and the manner in which they must be carried out.

The current laws are not comprehensive because they were written when we were neophytes in the world of intelligence. Now, the nation has had thirty years of experience that have proven the need for intelligence of the highest quality. We all know that without good intelligence, our foreign policy would be less coherent and our national defense efforts less certain. The Committee recognizes the necessity for intelligence in today's world, but we also recognize that intelligence activities must be subject to the rule of law.

S. 2525 builds a structure that provides both for the finest intelligence system possible and for the protection of the rights of Americans. It does so by establishing: an intelligence structure headed by a Director of National Intelligence; charters for the individual intelligence agencies setting forth their missions; a requirement that intelligence activities not adversely affect the constitutional rights of Americans; and Congressional and other oversight mechanisms to insure the efficient and proper use of the powers granted the intelligence community.

In the hearings on S. 2525, we have been fortunate to hear from many experts on the field of intelligence and other persons concerned that the powers of the intelligence community be kept within proper bounds. These hearings are another step in the long process of bringing the rule of law to the world of intelligence. The Church Committee, on which we both served, took the first step in defining the boundaries that any comprehensive legislation, such as S. 2525, should take. The Senate Select Committee on Intelligence has taken the work of the Church Committee a step farther by formulating a draft bill to be acted upon by the Congress in the next session. These hearings explore some of the basic premises underlying S. 2525, and after considerable study we think the testimony of the witnesses demonstrates the basic validity of the bill's approach although many changes in the bill remain to be made.

During World War II, Winston Churchill once said that Britain was not at the end of its struggles, nor was it at the beginning of the end, but instead it was at "the end of the beginning." The Intelligence Committee has reached that point with the conclusion of these hearings. We are continuing our discussion with the Administration and other interested parties; we will hold hearings at the beginning of the next session in which the Administration will put forward its position; and finally, we will put before the Senate a final version of S. 2525 for action in the first months of the 96th Congress.

WALTER D. HUDDLESTON,
Chairman, Subcommittee on Charters and Guidelines.
CHARLES MCC. MATHIAS, JR.,
Vice Chairman, Subcommittee on Charters and Guidelines.

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S. 2525

NATIONAL INTELLIGENCE REORGANIZATION AND REFORM ACT OF 1978

TUESDAY, APRIL 4, 1978

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The committee met, pursuant to notice, at 11:05 a.m., in room 5110, Dirksen Senate Office Building, Senator Birch Bayh (chairman of the committee) presiding.

Present: Senators Bayh (presiding), Huddleston, Stevenson, Morgan, Goldwater, Mathias, and Chafee.

Also present: William G. Miller, staff director; Audrey Hatry, clerk of the committee.

The CHAIRMAN. Let us call our committee to order.

I might say to the reporters, to those present and to our distinguished witness, Mr. Clifford, one of our colleagues who has played a key role in our whole purpose of being here to launch these hearings on the need for charters is our distinguished colleague from Kentucky, Senator Huddleston. He is en route at this particular moment from the airport.

I would suggest that we proceed now and let me as the chairman make some opening remarks that will not, I am sure, be missed by our distinguished colleague from Kentucky, and by the time I finish with those, we will hope that he is here. If he is not, we would ask our other colleagues, Senator Stevenson and Senator Morgan if they have comments, and by then I am certain he will be here.

I know how busy you are, Mr. Clifford, and I don't want to keep you waiting unnecessarily.

I also might make one note of concern, that Mr. Clifford is experiencing some rather critical speech problems. He is in the process of recovering, we hope, from a bout with laryngitis, and we will try to be as conserving as we possibly can of his limited speech capacity at this moment.

The Senate Select Committee on Intelligence opens its hearings today, the purposes for which are to establish the need for intelligence activities and to establish how these intelligence activities are to be placed within our constitutional framework. Intelligence activities have functioned since the end of World War II without the benefit of clear legislative authorities or limitations, and without an effective oversight system. It is the intention of the committee to hold most, if not all, of these hearings in public. We shall

make every effort to discuss the major missions and duties of intelligence fully so that all of our citizens can understand just why intelligence is required, and so we all can agree that carefully drawn lines are needed to govern those vital activities.

It is somewhat of a paradox that most intelligence activities are secret, and yet we must write in some detail public laws to govern these activities and fit them into the normal processes of our open and democratic society. During the progress of these hearings, we will seek to establish what must be kept secret by our Government, and what intelligence matters can and should be shared by all of our citizens. Most importantly, we ask and we seek to determine how intelligence activities are to be governed. In the past the executive branch alone assumed the responsibility for the setting of policy, direction, management and oversight of intelligence activities. This province of one branch alone led to an imbalance in our constitutional system and the use of such pernicious doctrines as plausible denial and such unwise activities as the ill-fated Bay of Pigs fiasco, as well as the violation of the rights and privacy of American citizens through programs such as CHOAS and the harassment of Dr. Martin Luther King.

The investigation of intelligence wrongdoing by congressional committees, executive commissions, and by the press has given the public a full picture of what has gone wrong. When the Senate created the Select Committee on Intelligence, one of its first duties was to learn what intelligence activities are, which of those activities are necessary for the security of the country at the present time, and which intelligence activities might be necessary for the future. These hearings which begin today will bring before the public many of our country's most distinguished citizens who will give their advice on the basis of long experience. They will tell us, in their judgment, what activities are necessary and what means, laws and support are needed to carry out these activities.

Today, contrary to past tradition and practice, a premise is shared by both the committee and the executive branch: that is, whatever intelligence activities are to be carried out shall be a shared responsibility. Only through shared responsibility by both the executive and legislative branches can the rights of Americans be protected, and a sense of common purpose for intelligence activities be achieved.

Last summer, President Carter met with members of this committee, and we discussed the need for an interim executive order to govern the intelligence activities of the United States. That executive order was drafted by the executive branch agencies, by the President, Vice President, and I must say also, with close cooperation and consultation with this committee, for which we are deeply appreciative. When the Executive Order No. 12036 was issued on January 26 of this year, the committee again met with the President and the Vice President and the chief officials of the intelligence community, and we agreed to work together jointly on a legislative charter.

Over the past year the committee has worked with the executive branch and many former officials on various aspects of a comprehensive legislative charter for intelligence activities. A draft bill, S. 2525, was introduced on February 9 of this year, and it was

agreed by both the committee and the executive branch that this draft bill would serve as a starting point and as an agenda for work over the coming months. The draft is based on some 31 years of experience by many people, following the creation of the CIA in 1947. It is based on the fruits of several investigations and advice and counsel of literally hundreds of experienced and dedicated public servants.

We intend, over the coming months, to continue to work with the President and his chief advisers on that draft until we have come to what we believe is the best possible charter, not a charter which we all agree with every dot and every title, but a charter which is worked out recognizing the concerns and interest which exist in this very important area. At that point the committee will mark up the bill and bring it to the floor for action.

These hearings, formulated by our distinguished colleague from Kentucky, Senator Huddleston, chairman of the Subcommittee on Charters and Guidelines, are intended to serve an important purpose in the charter effort. We seek advice and suggestions and we want the public to share in that process of seeking advice. The pattern of the hearings will be as follows: We will begin by hearing from former high officials of the intelligence community, the Department of State, the Department of Defense, the National Security Council advisers—I think our witness today wears three or four of those hats, which will be an interesting combination for a witness. Very few, if any, living citizens that I know of have this kind of rare insight. We are going to hear from former ambassadors and others who have advised presidents on intelligence matters or who have been involved in intelligence activities.

We will turn to experts on particular issues, for example, the constitutional problems that intelligence activities create for first and fourth amendment guarantees. We will seek advice from the press, from the academic community, from the clergy, asking them to what extent limitations are required to protect the integrity of their professions. We will turn to public interest groups to hear their views on this important public question. The committee seeks legislation that will be the result of national consensus. The committee wants to hear and learn from the considered judgment of all those who have contended with the knotty dilemmas created by intelligence activities. We need the wisdom that has been gained by the painful lessons of the past 31 years.

Both the executive and legislative branches have been feeling their way, trying to find the proper balance between the restraint caused by vigorous oversight and the flexibility necessary to carry out the necessary intelligence activities. We have been trying to find the proper balance between what must be kept secret and what, for valid reasons, should be protected in confidentiality. The process in the coming months must give us an answer to what that proper balance should be.

We are fully aware of the power that intelligence gives. The United States is the most powerful nation on Earth and we know that intelligence is a great and powerful means to maintain power and protect our people. Yet intelligence must be used with understanding, careful guidance and proper restraint. Intelligence should be, above all, a rational process, and there is therefore

every reason to seek to place it under our national constitutional order, so that it can serve our country's larger purposes of maintaining the peace, furthering our well-being and prosperity, or, in the awful event of war, to assist in that grim task.

I suppose in the period of time this committee has existed, and I have had the good fortune to serve on it, no other area of legislation that I have been involved in in most of my lifetime, has presented such a complex contradiction of reasonable goals. I think it is fair that the United States of America, more than any nation in the history of our civilization, possesses a rare combination of raw military and economic power that is based on a firm constitutional foundation which guarantees the individual freedoms and liberties of all of our citizens. No other nation before or today contains this combination.

There are those today, however, in the world who do not wish our Nation well. We must recognize this realistically, but unfortunately the fact exists. We must have an intelligence system which provides our President, our Congress, and all of our policymakers with the vital information necessary to protect our country and our people. But I think it is critical that we also ensure that those agencies which are designed to protect our people and guarantee our freedoms do not become the vehicles to diminish or destroy the very individual freedoms they are designed to protect.

Now, I would like to turn to our distinguished ranking member if he has any comments that he would like to make. I would like to turn to him and then I would like to turn to Senator Huddleston.

Senator GOLDWATER. No; I am listening to you with great interest. It is a pleasure to be here with this distinguished American.

The CHAIRMAN. I am pleased that you are here, and I want to say again that I am pleased with the cooperation we have had between the two of us and the staff.

I would like to turn now to our distinguished subcommittee chairman who has had primary responsibility for getting us to where we are right now. It has been a privilege working with him. I think it has been a cooperative effort. I would like to compliment him as well as the members of his staff, and I might say to Mr. Elliff, a member of the subcommittee staff on Intelligence and the Rights of Americans. We have had the responsibility of dealing with the rights of Americans as part of this charter, and it has been an interesting effort with a lot of work involved. But Senator Huddleston has been the focal point of pulling all these ingredients together and creating all he has done, and the charters have been in good hands because of his diligence and foresight.

Senator Huddleston?

Senator HUDDLESTON. Thank you, Mr. Chairman. I commend you for the thorough statement you have made. It pretty well sets the tone, I believe, for the effort that we are beginning here today.

I do believe this is a significant and historic occasion. The Select Committee on Intelligence and its predecessor, the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, have now been examining the intelligence activities of the United States for over 3 years. The bill before us is in many respects the culmination of these 3 years of work. But just as it respresents the 3 years of work, it also signifies the intent of the

committee to move ahead on the enactment of charters and guidelines for the intelligence community.

Before considering the specific provisions of S. 2525, I, too, would like to reflect a moment on the purposes which this legislation is to serve and the manner in which we intend to proceed.

The recent attention directed at intelligence activities has often focused on alleged abuses. I for one believe that we have had enough of investigations and revelations. I think we know where problems have arisen in the past, even if we have not identified or publicized every possible misconduct which might have occurred. The effect of certain of these revelations has, undoubtedly, been healthy. But the time has come to discontinue our self-flagellation. Continuing on that course would help only marginally in deterring future abuses, but could have serious detrimental effects on our intelligence capabilities and, hence, on our national security.

The responsibility now before us is a very different one, a much less exciting one, perhaps, but much more important. We must now commit to law subjects which have hitherto only been dealt with in secret and of which many governments, including democratic ones, do not even speak publicly. The ramifications of any decisions we make will affect not only the intelligence community, but also our defense and foreign policy interests and ultimately the security of our society.

Perhaps the first of the tasks before us is to reaffirm the importance of intelligence activities. The revelations of recent years have called into question the legitimacy of many of these activities. In some instances, I believe our intelligence agencies are currently refraining from conducting activities which most people would agree to be reasonable and necessary, because the boundaries of their authority have become so uncertain. One task, then, is to authorize the activities in the field of intelligence which are essential to our national security. The bill before us authorizes a wide range of intelligence activities; we must ask of our witnesses now: Is this enough?

Our experiences of recent years have taught us that intelligence activities which are inadequately controlled or improperly conducted may impinge upon our individual rights and in some cases jeopardize the fabric of our society as a whole. Our second task, therefore, is to determine how we may best ensure that legitimate intelligence authority is not abused. The bill attempts to do this in several ways. In some cases, there are outright prohibitions on activities; in others, particular procedures and oversight mechanisms are provided. We must now ask, are these prohibitions reasonable? Are these procedures viable? What consequences will these restrictions have on the performance of intelligence activities? Is it reasonable to incorporate them into statute? Have we done too much or too little?

We must keep in mind, too, that the intelligence community serves many functions and many masters. Our third task, then, is to try to organize the intelligence apparatus of our Government in a way which will maximize its efficiency and ensure that the proper priorities are followed. At the heart of this issue, perhaps, is the relationship between the benefits which may result from increased centralized authority and coordination and those benefits

which result from a healthy competition among different components of the intelligence community.

By increasing centralization and coordination, we can better insure the efficient performance of intelligence activities, a reduction in redundant activities, and a proper orientation of those activities toward national needs. In doing this, however, we must ensure that we do not stifle dissent or rigidify a structure whose very fluidity is one of our greatest assets. We need now to determine whether maintaining the existing entities of the intelligence apparatus and providing the Director of National Intelligence with enhanced budgeting and tasking authority will satisfy those objectives.

S. 2525 has attempted to deal with these issues and more. As I remarked at the time of its introduction, few if any of the cosponsors of the legislation are wedded to each and every provision. Instead, we have put forth a draft which admittedly has flaws and over whose particular provisions even the sponsors may differ. We have done this in the hope that we could lay before the public and before Members of the Congress a bill which would generate a constructive public debate.

I wish to emphasize, too, the process by which we have arrived at this draft and the process which we hope to follow from this point on. This bill represents numerous drafts and redrafts. Actually, literally thousands of hours of consultations with the executive branch and with interested private parties have been conducted. The bill reflects many helpful suggestions from both within and without the Government. We have consulted with persons from all parts of the political spectrum with various and diverse views and philosophies. Thus, in many ways, S. 2525 already represents a synthesis of the views of those within the intelligence community, the rest of the Government, the academic community, and many other interested observers.

We hope that this general process will continue, and that the hearings will be but one facet of it. The topic is one of sufficient gravity and importance that it deserves the most thorough public consideration and debate.

The chairman has already outlined to you the hearing process and the individuals from whom we will be hearing in the next days. Tomorrow we have former Directors of Central Intelligence William Colby and George Bush, and former Deputy Director E. Henry Knoche. Former Director of Central Intelligence Richard Helms will be testifying early next month, and we hope to have in the interim a wide range of former Government officials and other experts on intelligence matters.

Today, as has been pointed out, we are very fortunate in having an individual who has been one of the shipwrights of the intelligence vessel in the past, and one of its chief mates as well, and who has for many years stood at the right hand of the ship's captain. I speak, of course, of the Honorable Clark Clifford, who as an aide to President Truman, helped to fashion the National Security Act of 1947, which established the CIA. Subsequently, Mr. Clifford served as first a member, and then the Chairman of the President's Foreign Intelligence Advisory Board under President Kennedy. Later still he served as Secretary of Defense, an office with direct respon-

sibility for many of our Nation's intelligence activities. But most importantly, perhaps, Mr. Clifford has served as a foreign affairs and defense adviser to Presidents for over a generation. No other individual has such a breadth of experience in this area. We are therefore very pleased to have Mr. Clifford as our leadoff witness in this series of hearings.

The CHAIRMAN. Does the Senator from Rhode Island have any comment at this time?

Senator Stevenson?

Senator STEVENSON. Thank you, Mr. Chairman. No statement.

Senator HUDDLESTON. Senator Morgan?

Senator MORGAN. No statement, Mr. Chairman, except to thank Mr. Clifford for coming before us. I remember very well his testimony in the first days of the Church committee hearings, and I think you gave us a good perspective in which to set the entire hearings, and we certainly appreciate your coming back.

Mr. CLIFFORD. Certainly.

Senator HUDDLESTON. Mr. Clifford, you may proceed with your statement as you desire.

STATEMENT OF HON. CLARK CLIFFORD, FORMER CHAIRMAN OF THE PRESIDENT'S FOREIGN INTELLIGENCE ADVISORY BOARD AND FORMER SECRETARY OF DEFENSE

Mr. CLIFFORD. I welcome your invitation to appear here today to discuss the new legislation which has been created to govern our intelligence activities. Your staff has asked me to present in some detail my experience in the field of intelligence so that this committee will have knowledge of my background which forms the basis of the opinions which I will express.

I served as counsel in the White House in the Truman administration. By the time the Second World War ended in August 1945, President Truman had become convinced that it was absolutely necessary that our country have a peacetime intelligence service. Such an operation had never existed before. It was clear to President Truman that we needed a central depository for intelligence information that was scattered throughout the various departments and agencies of our Government. I recall his stating on one occasion that if we had had such an agency in 1941, we could have foreseen Pearl Harbor. Our problem was that bits and pieces of information existed throughout our Government, but the impact of such information was so diffused as to be practically useless.

I was given the assignment, toward the end of 1945, to start a study which would encompass the unification of the services and the creation of a central intelligence agency. Ultimately, the National Security Act of 1947 was passed in the fall of that year and the CIA came into existence.

In 1949, legislation was passed which strengthened the CIA and also gave it power to use unvouchered funds.

I had an experience in the spring of 1961 which I think is worth repeating. A few days after the Bay of Pigs debacle, President Kennedy called me to the White House. The comment he made at that time was a significant one. He said, and I quote:

I have made a tragic mistake. I have analyzed the events of these past few days and it is now clear to me what happened. First, I received bad advice. Second, the

advice was bad because it was based upon erroneous information. Third, the information was erroneous because it was based upon faulty intelligence.

He further stated that he doubted he could survive another catastrophe of this kind, so he intended to take whatever steps were necessary to improve the quality of our intelligence.

Shortly thereafter, he created the President's Foreign Intelligence Advisory Board and asked that I serve as a member of the Board, Dr. James Killian of MIT was named Chairman. He served for about 2 years and then resigned because of illness. President Kennedy named me Chairman of the Board and I served in that capacity until 1968 when I went to the Department of Defense.

At the Defense Department, the subject of intelligence was a matter of daily concern because of the conduct of the war in Vietnam. Many and varied intelligence activities were being conducted in Southeast Asia and one had to try to keep abreast of their manifold ramifications.

During these last few years while the study and review of our intelligence operations have been under way, I have testified at length before the Rockefeller Commission, the Church committee, the Ribicoff committee, and other governmental bodies.

Let me briefly retrace my steps and go back to the 1947 Act. A reading of this act will indicate that the Central Intelligence Agency was to be mainly a depository of information. The act provided that the CIA was to advise the National Security Council on intelligence matters; it was to make recommendations to the NSC for the coordination of intelligence activities; it was to correlate and evaluate intelligence relating to the national security; and it was to disseminate such information to appropriate departments.

Because we were blazing new trails and had no precedents to follow, we decided to place in the act a catchall clause that would permit the CIA to perform functions under the direction of the NSC which we, at the time, could not foresee. This section reads as follows, and I quote:

> To perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct.

It is interesting to note that the original language did not concern itself with the obtaining or collecting of intelligence. Neither was there any language which could be construed to have authorized the CIA to engage in covert activities.

However, the general utility clause we had put in the act quickly became the basis for a rapidly expanding CIA. Within a year after the act was passed, the National Security Council issued an order which became known as "ten slant two" which authorized covert operations.

Year by year, the CIA increased in size and in the operations it performed. It reached the point where it had thousands of employees, and it is my belief that it had literally hundreds of covert operations going at any one time.

I believe it is generally agreed that the operations of our intelligence agencies expanded to the point where they clearly got out of hand. In many instances, these actions have been unproductive, undemocratic and un-American. The knowledge regarding such operations has become so widespread, that is, throughout the world,

our country has been accused of being responsible for practically every internal difficulty that has occurred in every country in the world. Our reputation has been damaged and our capacity for ethical and moral world leadership has been grossly impaired.

As the size and power of our intelligence operations increased, the basic rights of our citizens began to be violated. Stories began to appear involving wiretappings, buggings, mail openings and similar activities. It is clear that in order to prevent such abuses in the future, there must be a tighter and more effective method of control.

It is my opinion that the National Security Council is not equipped to perform an effective oversight function. The NSC is composed of men who are extremely busy meeting the responsibilities in their respective positions and they simply do not have the time to police our intelligence activities.

In order to demonstrate and illustrate this, it is my belief that on a number of occasions, the CIA would present to the NSC a plan for covert action and authority would be requested for the CIA to preceed from point A to point B. The authority would be given and the action would be launched. When point B is reached, the persons in charge feel it is necessary to go to point C, and they assume that the original authorization gave them such right. From point C they would go on to D and possibly E, and even farther. This has led to some bizarre results, and when an investigation is started, the excuse is blandly presented that authority was obtained from the NSC before the project was launched.

In addition to the failure of the NSC to control intelligence activities, there is the concurrent failure of the Congress to exercise its oversight function. It is quite startling to note that since the National Security Act of 1947, Congress has time and time again affirmatively refused to meet its responsibilities in this area.

Since 1947, some 200 bills have been introduced in the Congress in pursuit of the goal to provide meaningful oversight of the intelligence community; 150 of these bills have specifically dealt with strengthening congressional oversight; 147 of these bills provided for the establishing of a joint committee on intelligence modeled to some extent after the Joint Committee on Atomic Energy. Out of these 147 proposals, only 2 bills ever reached the floor where they were promptly and soundly defeated.

I have, for some years now, advocated new legislation to govern our intelligence activities. The 1947 Act was largely experimental in nature for we had no precedents and very little experience to guide us. I think it has served us reasonably well for over three decades. But the times have changed and our intelligence institutions have changed with them. With three decades of experience, we know better what we want from our intelligence operations and what to guard against. We should now draw on that experience to fashion an intelligence capability for our government which will serve us in the decades to come.

The legislation that members of the select committee have recently introduced to that end is lengthy and complicated. I obviously cannot offer a detailed critique of it in the brief time allotted me here today. I would, however, like to offer my opinions on certain key features of that legislation.

It appears to me that the legislation properly attempts to accomplish three basic objectives. First, it authorizes certain intelligence activities that are believed to be important to our national security. Second, it attempts to prevent the recurrence of abuses of the past. Finally, the bill provides an organizational and institutional framework to facilitate the proper and effective conduct of U.S. intelligence activities. I shall address each of these areas in turn.

The 1947 Act was at best ambivalent about the conduct of those activities we have come to identify as most quintessentially "intelligence", namely, the clandestine collection of information and the more aggressive activities which have come to be known as covert action, or in the terminology of your bill and recent executive orders, "special activities." I believe that there was at the time of enactment of the 1947 legislation a general expectation within the executive and legislative branches alike that clandestine collection would occur. I am more skeptical about covert action. I seriously doubt that the legislative branch contemplated such activities in passing the legislation, and it is my belief that President Truman did not have them in mind at the time he signed the bill.

The most important goal for the present draft legislation in this regard is that whatever position is chosen, the ambivalence must be ended. The men and women of the clandestine service perform duties that are not only difficult, but often perilous. Their personal courage demands our respect all the more because it is anonymous. The revelations of recent years, the questioning of the fundamental legitimacy of clandestine intelligence activities, cannot but have had a detrimental effect on their morale and effectiveness. We owe it to the members of our clandestine service to specify what our society expects of them. We must also anticipate that unless we give this guidance and the proper assurances, the activities of this nature will be performed inadequately, if at all. Finally, in this regard, we must establish a consensus between the executive and legislative branches as to what the national interest requires in the way of clandestine intelligence activities.

The bill expressly authorizes the clandestine collection of intelligence. This is right. Intelligence so obtained is often useful, sometimes critical to the conduct of our foreign policy and the formulation of our defense plans. Overly zealous operations in this field, however, may turn out to be unfortunate. This is a flaw, however, which over time is self-correcting and which is not, in any event, amenable to statutory control.

In the area of collection, much has been made recently of the distinction between human sources, that is, spies, in the conventional sense, and sophisticated means of technological collection. I can offer no definitive prognostications on the likely mix of these different sources for the future, however, for each provides useful information when used properly, and ideally, one supplements the other. I would, however, offer one word of caution. It would be a mistake, I believe, to expect technological collection wholly to supply human sources. Technology is, in a sense, more objective than information ferreted out by individuals. It is also rather more antiseptic in that it is less likely to involve betrayal or exposure. But information derived from human sources often provides unique perspectives, and the reasoned judgment of a skilled intelligence

officer intimately familiar with the society in which he or she is functioning can never be replaced by machine-generated detail.

The area of covert action is a more difficult one. I certainly believe that many of the activities carried out under this rubric in the past—Chile, perhaps, being a good example—were not only unwise, but clearly contrary to our genuine national interest. I think, too, that the sheer scale on which such activities were conducted was, in retrospect, injurious to our best interests.

I would not, however, leap from these observations to the conclusion that the United States should never engage in covert action, that is to say, international activities in which the role of the U.S. Government is not discernible. Whatever collective psychological gratification we might derive from disavowing recourse to such activities, it cannot, I believe, be denied that some desirable, and indeed, commendable activities can best be carried out when the role of the U.S. Government is not immediately apparent.

But how, it will justifiably be asked, may we ensure that in the future covert action will be confined to situations that genuinely warrant it? It appears to me that your draft legislation employs three devices to this end. First, it requires a Presidential finding that the activity be "essential to the defense or the conduct of the foreign policy of the United States." Second, it prohibits certain activities outright. And third, it provides for a system of congressional notification and review.

I believe that there should be a very high standard for the initiation of such special activities. Whether "essential" is the proper standard, I am not entirely sure.

Read strictly, it might be questioned whether any activity could really be considered "essential." The precise standard is not, in my view, of the greatest consequence so long as it unambiguously conveys the intention that such activities should not be entered into lightly.

The second device that is used to limit activities in this field is to prohibit outright certain covert activities. In my opinion, this is most unfortunate.

I am unalterably opposed to the enumeration of prohibited activities, and this includes assassinations. In the first place, I think it is demeaning. Of course, the United States will not engage in such activities but is it necessary, whatever the historical record, to enshrine this principle in legislation? Conversely, I doubt that any among us is sufficiently prescient to anticipate with any degree of accuracy what the future may demand in this area. Certainly those of us who drafted the 1947 legislation did not anticipate what the 1950's held in store for intelligence activities, much less the 1970's. Most importantly, however, I am concerned with the negative implications of such an enumeration. Must we assume that all activities not expressly prohibited are authorized? This could possibly be a reasonable interpretation, and I think it makes us look silly.

I would note, moreover, that some of the specific prohibitions in the draft legislation are extraordinarily vague. No. 6, for example, would prohibit any covert action which was likely to result in "the violent overthrow of a democratic government of any country." Which governments are to be considered democratic? Who would make the decision? Why is the limitation only on violent over-

throw? Would we not in some circumstances, for example, Chile, wish to eschew even nonviolent interference in the electoral processes? I cite these examples not as a critique of the draft itself, but rather to illustrate the general problem. Such prohibitions are inevitably either too specific to ensure that they cover everything intended, or too vague to provide guidance in concrete situations. And as such they can only be expected to give rise to future conflict between the executive and legislative branches over whether a contemplated action did or did not comport with the law.

Far better, in my opinion, is the general procedure adopted in the legislation of structuring the decisionmaking process in such a way that any serious activity of this nature must be reviewed and approved by the appropriate authorities. I concur fully with the bill in requiring that the President personally approve all special activities. The President should be not only aware of each such activity, but he should bear responsibility for determining whether to conduct it or not.

I am more skeptical about the role which the bill provides for the National Security Council in this respect. As I have said, the members of the National Security Council are extraordinarily busy individuals. You will recall that is the President, Vice President, Secretary of State, Secretary of Defense, and so forth. It may be doubted whether they would have the time and the opportunity to consider fully all the factors which go into determining whether to initiate covert action or not.

Review and approval procedures within the executive branch alone will now, however, suffice to prevent unwise and unjustified decisions on covert action. All officials in the executive branch are in one way or another the President's men; even the occasional dissenter will be circumvented one way or another in the end. The answer, therefore, lies in a full reliance on the checks and balances of our constitutional system; that is to say, on an effective congressional oversight. This is provided in the bill by the requirement that all covert action and indeed, all significant changes in covert action be reported to the oversight committees of the Congress in advance of initiation, barring, of course, emergency situations.

Such a notification procedure will, I think, have the following salutary practical effects. If the oversight committees concurred with the proposed action of the President, I think it could be fairly said that there was a reasonable consensus among the appropriate officials of our Government that the action was in the interest of the United States. Responsibility for any adverse consequences from the action could moreover be said to rest with both branches of Government. This is where it should rest, and this responsibility should serve as a caution to the Congress before concurring with such activities.

If, on the other hand, the oversight committees, or indeed, any members thereof, disagreed with the President's decision, they would have adquate opportunity to make their views known to the President. It must be anticipated that a President would be extremely cautious about proceeding with such an activity in the face of determined congressional opposition. Ultimately, however, the President has the right, he must have the right, if he chooses, to proceed with the action in question. Congress, too, has its ultimate

recourse, in the introduction of legislation, perhaps appropriate cutoffs, which could terminate the activity in question. Angola has, I believe, already served as an example of what Congress may do in this area. Reliance on these ultimate constitutional authorities is likely to be infrequent, but the very possibility will serve as an effective constraint on both branches. This is, I think, a workable system which relies more on the political process than on inflexible rules and definitions.

While still on the sensitive subject of covert action, let me advance one organizational idea which the bill does not encompass. I have for some time advocated separation of the Government's covert action capability from the CIA, locating it rather in a small, independent organization whose sole function would be covert action. This is the way it was originally.

There are, of course, problems with this approach. The organization in order to justify its own existence, might be tempted to generate more covert action than is now the case. In practice, it would in any event require the extensive facilities and assets of the CIA in order to make any given operation effective. Nevertheless, I believe that the merits of such a separate, smaller organization at least deserve the serious consideration of the committee. The oversight function of Congress with respect to covert action would be greatly enhanced by severely delimiting the institution which would be authorized to conduct it. Budgetary restraint in particular might be more readily applied. And, too, if the organization and its personnel were as a regular matter stationed entirely within the United States, relying on the CIA abroad only in the actual conduct of an operation, it might well be that covert action would not so readily grow out of clandestine collection as has been the case in the past.

Finally, I wish to address one major organizational issue and to differ from the approach taken by the draft legislation with respect to it. I consider this the most important recommendation that I have.

In my opinion, the Office of the Director of National Intelligence should be separated entirely from the Central Intelligence Agency. The bill provides the President with the authority to do this if he chooses, but I feel that the choice should be made in the legislation itself. The President should have as his chief intelligence advisor an individual who is not personally connected with and thus psychologically committed to the details of particular intelligence programs. Such an individual should, moreover, be able to exert general supervision over the intelligence community. He cannot perform either of these functions effectively if he is tied to a particular agency as its administrative director. Partly because I am skeptical about the effectiveness of the NSC in advising the President on covert action, I have in the past advocated that there be a separate intelligence advisor on the White House staff. I think now that perhaps the same result could be achieved simply by severing the position of Director of National Intelligence as established in the bill, from the directorship of the CIA. This approach would, moreover, have the advantage of clarifying the lines of authority from all different parts of the intelligence community to a central figure with direct ties to the President.

In the drafting of previous legislation, we specified that the Director of the CIA should be the chief intelligence officer of the United States. This has never worked. Instead of being the chief intelligence officer, he has merely been one among equals.

We need an official who is responsible to the President and to the Congress for the efficient and effective operation of the entire intelligence community.

Specifying precisely what should be the role of such an independent Director of National Intelligence with respect to the components of the intelligence community which are located in other departments or agencies is difficult. I am acutely sensitive to this issue myself because of the time I spent in the Department of Defense. Whatever the formal ties, moreover, many of the key decisions in this regard will inevitably be determined by personalities and by bureaucratic politics and bureaucratic decisionmaking.

I do believe it important in this regard that the Director be given a strong hand in coordinating the activities of all intelligence components of the Government. Whenever there is a conflict between the Director's perceptions of national intelligence needs and the needs of a particular department, there should at least be a presumption in favor of the national perspective. Ultimately, of course, the President may always step in and resolve any disputes. But the President's time is limited, and I think the Director's authority should accordingly be clear enough that he can resolve all but the most significant disputes. I note that the draft legislation leans in this direction in giving the Director extensive budgetary authority over intelligence activities and complete access to all relevant information. If anything, I would suggest that further means be considered to enhance his coordinating role.

Allow me to close with a few general observations. One can effect by legislation governmental activities in general, and intelligence activities in particular, only up to a point. After that point, the proper and effective functioning of the government is dependent on other more subtle factors. One is the morale of the officials themselves. As I have indicated before, I believe we must make clear to those officials what we expect of them and equally importantly, that we attach great weight to their achievements. Another factor is the vigilance of Congress. In the draft legislation much depends, and rightly so, on a vigilant congressional oversight. Legislation cannot guarantee this. Only the individuals concerned can ensure that the degree of vigilance remains constant.

But fundamental to all these factors is public trust. Such trust is basic to intelligence activities which, by their very nature, must be conducted by a few chosen officials in secret. Once dissipated, however, such trust is the most difficult of public attitudes to reestablish. We have been through a period which has gravely shaken public confidence in our Government in many respects. Now we must seek to justify a renewal of that confidence. I believe this new legislation is an important first step in that process.

Thank you.

The CHAIRMAN. Thank you, Mr. Clifford, for your very perceptive and educational presentation.

If there are no objections, we shall proceed with a general 10-minute limitation so equity will prevail before our witness' voice completely leaves.

It is seldom we have an opportunity to ask broad ranging questions that may go beyond the dotting the titles, sections and paragraphs of the bill of someone who has been in on the inception of something that has now become such a vast, complicated part of our Government.

Let me ask you a philosphical question, and indeed, after you have answered it, ask you to give us some insight as to how we accomplish the goal.

I suppose it is rather easy, but I would ask you generally if you would, Mr. Clifford, to tell us in talking about foreign intelligence or the purpose of an intelligence system, what is that intelligence really for? Before you answer the obvious, it seems, if one reflects on some instances in the past, particularly if you look at some of the intelligence that now we have had a chance to look at in the period of the 1950's and 1960's as it relates to Vietnam, that not infrequently intelligence appears to have been used more to sustain a position of a President or administration, to support a policy, almost to excuse it rather than as information to determine what the policy ought to be in the first place.

How do we accomplish the goal that we feel could be the acceptable goal? How do we, without being able to perform any miracles, how do we increase the chances of being able to reach the goal that you feel should be the major purpose of the foreign intelligence gathering mechanism?

Mr. CLIFFORD. Your question, Senator, is really in two parts. First, if I understand it, it is why we need foreign intelligence, and the second part has to do with either the proper or improper use we make of it.

I would hope perhaps above all other aspirations that I might have, that we might live in a world in which we did not need intelligence. If all other countries had the same concept of the world and their place in it that this Nation has, then we would not need intelligence. But that doesn't happen to be so. There are nations in this world that wish us ill, and we must constantly be on our guard so that we can have all the facts that we possibly can obtain in the formation of our foreign policy and in the formation of our defense policy.

If we fly blindly in this regard, then we become extraordinarily vulnerable. As a quick illustration, we have no alternative but to do everything in our power to keep up with the progress in weapons that is made by other nations in the globe. If we did not do that and just assumed that they made no progress, we might very well lose that asset that we have struggled so for the last 200 years, and that is our liberty.

Now, after we get the intelligence, what use is made of it by the executive branch of the Government? I would say that in the great majority of the cases, it is used properly. I believe that it enters into the deliberations that lead to important and basic decisions in the field of national security. I think that a close relationship between a President and his Secretary of State, Secretary of Defense, and the Director of National Intelligence could help keep the

President fully informed as to what was going on in the world, and I think that most of his decisions would be made in support of the policymaking responsibility that he has.

There have been instances, as you have mentioned—I was conscious of them—in the Vietnam war where it would be hoped by an adminstration that the intelligence product would support a position already taken by an administration. That will occur occasionally. I am sure it has occurred in the past, in instances in which I do not know. A President will have made a decision. It will be very important. He will be vulnerable. How the issue turns out is a matter of considerable import to him. So there is a very real temptation to get a product from the intelligence community that will support his position. It is the exception rather than the rule.

In the first place, I have confidence in the majority of our Presidents that they play the game fair, and I think the great majority of them do. But just for those instances in which maybe the temptation is too great, this bill, I think, recognizes that, and as I suggested in my statement, the new bill does not depend upon oversight within the executive branch. Any type of information that the Oversight Committee desires, that is, the Oversight Committee of Congress, it can receive. If the committee wonders about a certain position that the President is taking, it has the right to summon the Director of National Intelligence and any other persons before it, so that I think the opportunity for it to get the facts is much improved.

I might say from a practical standpoint, for many years, the Congress did not properly perform its oversight function. It chose not to. For a great many years—and I don't know exactly when they were, but names don't add anything to it—we had a very prominent Democratic Senator and a very prominent Republican Senator. They both knew this area very well. Their attitude was that they really preferred not to know what was going on. They wanted to leave that to the Chief Executive, and they didn't want to know things where they might make a slip of some kind, and they really felt that it belonged entirely to the Executive.

That has changed now. The concept has changed. It is incorporated in the new legislation. It is up to the Congress, Senator, the ultimate answer to your question is to see to it that the kind of situation you have described, the improper use of intelligence to support a policy already made is not followed in the executive branch, and you have the right under this bill to do it.

The CHAIRMAN. Thank you.

Let me ask another general kind of a question.

And you touched on this, but I would like you to be a bit more specific. One of the things we are proud of as members of this body and as citizens of this country is that we would like to believe that the United States of America stands for more than dollar signs and missile counts and GNP's, and that there is still a certain kind of moral fervor based on principles that have lasted 200 years. There has been a good deal of discussion, and I think there is a recent article by Drexell Godfrey who was a former Director of Current Intelligence at CIA, and also a television program just this last week which basically raised the same question, about moral compromises which result from having clandestine intelligence ser-

vices. Basically the problem is that when you are talking about this kind of service, you are talking about manipulating people, using them, often deceiving, and in some instances violating the laws of the foreign country, and the concern has been expressed that this kind of activity is contrary to the basic principles of how we conduct our government, yet we are participating in it and intelligence gathering mechanisms that foster this kind of activity in other countries.

You mentioned the real world in which we live. We are all painfully aware that we don't live in a Sunday school, tea-and-crumpets kind of world. How can we increase the chances of drawing the line at the right place to minimize this kind of activity where it is not truly essential or absolutely necessary, as we might finally decide to use the words, to protect our country, and yet minimize the necessity or the instances of resorting to tactics that are really contrary to what the average schoolchild feels our country ought to stand for.

Mr. CLIFFORD. I am familiar with the article to which you referred. I think it appeared in "Foreign Affairs" and I considered it a well-written article. It addressed itself to a problem that is fundamental and has concerned all of us. At the same time, our country has had to make any number of adjustments throughout its history. We have had instances in which, because of certain emergencies, we have had to take a different position. For instance, in time of war, the Congress will pass a war powers act that will give unusual powers to the President of the United States. There are times when the basic rights of our people will not receive the same protections as they would ordinarily because of the exigencies of the period and the problems that confront us. I might say that I believe as a Nation we have adjusted ourselves really quite well to this problem. There is no ready answer, there is no panacea. What we do, however, is, I think we give 95 percent of our attention to preserving the principles upon which our country was created, and to which we adhere, and which we honor day after day, but at the same time, maybe we give 5 percent of our attention to the realistic problems that confront our country, and then we try to adjust that 5 percent within the 95. So I might say, whereas it is a philosophical discussion that will go on indefinitely, I believe that we need it better than perhaps any other country does. I think we have preserved the rights of our people better.

We have some glaring exceptions, but we have overcome those, and I think we do preserve our principles well and still meet the problems of the world. We do it so much better than almost all of the other countries of the world, so that I might just say in conclusion to that, our Government does recognize that the problem exists. As a matter of basic fact, in a true democracy, a 100-percent democracy, I suppose that we couldn't have an intelligence service because it engages in undemocratic conduct, and it must if it is to perform its function.

It wasn't too long ago when a very prominent Secretary of War, when asked about practices that went on in his administration, said gentlemen do not read other people's mail. Well, fine, that was great then, but we are in a very different world now. We do what

we have to do, which possibly is contrary to some of our democratic principles because it is the price of survival of our country.

The CHAIRMAN. Just one quick question to follow up there.

Is it fair to say in light of the response you gave to the earlier question that the possibility of the right balance between morality and principle on the one hand, and pragmatism on the other, the fact that that line can be drawn at the right place can be enhanced by the provisions in this bill which give a strong oversight function to the Congress?

Mr. CLIFFORD. Yes. And the reason why it enhances that and helps guarantee it is because it prevents excesses that have taken place in the past. The CIA got out of hand. Many of their activities were, I think, inimical to the interests of our country, and they were permitted too much freedom.

This bill now places machinery in operation which watches much more closely how it conducts its affairs. I will tell you one of the problems that we have had and we encountered it in the President's Intelligence Advisory Board. I didn't know it existed for a while. It takes maybe years to find them. It is this: Our intelligence apparatus has a great many individuals in it who believe very deeply in what they are doing. They believe it is absolutely necessary. They do not believe that a President's Intelligence Board, or possibly even a Director of the CIA, or a President really understands what has to be done, and so they go ahead and do what they think has to be done. They feel they are serving some higher principle, some higher master, maybe, than even the President of the United States, because Presidents come and go but their job goes on forever. And that exists, down deep in our intelligence operations. It must be understood and it must be prevented.

So congressional oversight will go a long way toward disclosing what is going on and in preventing abuses that have taken place in the past.

The CHAIRMAN. Thank you.

Senator Goldwater?

Senator GOLDWATER. Thank you, Mr. Chairman.

I want to thank you, Mr. Clifford, for a very fine paper that will give all of us a good basis on which to work. I only have one question.

As we all know, the President's major responsibility to our country is the formulation of foreign policy, the overseeing of that foreign policy to the end that would keep this country at peace.

Now, I have served on these oversight committees that never did anything, and you said that precisely right, we didn't want to know. I served on the Church committee and this committee, and I will say that I can't lay all the troubles of the CIA and other intelligence gathering organizations to their own doing. When the President of the United States who is Commander in Chief, not just of the armed forces, but I would assume of all the agencies that come under his administration decides that he wants something done in a covert way, by some intelligence agency, that is directed at some foreign government—and I must say that practically every case we have gone through in both the Church committee and this committee that has laid a lot of criticism on the CIA—stem from decisions that I am talking about. It was the President who decided

that a particular person or a particular government is an anathema to the United States and we can't live with it.

Now, what do we do as an oversight committee when that action, which we presumably will not know about, takes place and taking place turns out to be disastrous rather than helpful? Is there a place that you see where this committee can fit in? Is there a way that we can know of the President's decisions that might come from discussions with the Joint Chiefs or the NSC? What do we do about those cases?

Mr. CLIFFORD. The situation you describe, Senator, is the situation that has existed in the past, and a President exercised considerable discretion as to the amount of information that he might choose to give to the Congress. The fact is that many covert activities have been taking place, some of them with the President's knowledge and some of them without the President's knowledge. But let's get to your illustration. The President chooses today to engage in a covert action and he just proceeds. He just directs the CIA today to engage in a covert action. Under this bill, that is all changed, and I think properly so. The President has the responsibility, under this bill, to inform this committee in writing before he launches a covert action, and if he violates that law, he violates it at his peril, in my opinion. It is very clear. When he has talked the matter out and he concludes that he should proceed with his covert action, he is under the responsibility of informing this committee in writing. The committee meets. Then one of two results occurs. The committee decides that it wishes to support that action on the part of the President. It so informs him. And the President then goes ahead and there is a joint responsibility which I think is proper under our form of government.

If, on the other hand, let's suppose the committee unanimously opposes the project. It then informs the President that it unanimously opposes the project. My experience would lead me to believe that very few Presidents would proceed then with the knowledge that they were engaging in an activity which had been directly criticized by Congress.

Now, it might be that the whole committee didn't agree—it might be a split committee, and then the President should be informed in that regard so that he would know that there are members of the committee who did not choose that he proceed.

Now, in the final analysis, he must have that authority because he has it under the Constitution, in my opinion, and he can go ahead, if he chooses to, but he goes ahead under the circumstances that I have described. And it is my belief that if this committee should disagree definitely with him, that I think he wouldn't do it because he would know that down the road, in the event this project turned out to be a disaster, it would be very clear to the American people that it was his decision, and his alone, and that he did it despite a contrary wish on the part of the Congress.

Senator GOLDWATER. Well, I appreciate that and I think it is a sound answer.

I have two things that bother me. A covert action such as the President might decide on usually is a matter of very, very extreme sensitivity. A knowledge of it to an enemy or even a friendly country would be disastrous. As you know, exposing anything to

any committee of Congress, or any Member of it, is usually a rather easy way to let go of a secret.

Now, I am not arguing with you. I am agreeing with you, but I am trying to point out some of the difficulties I see in this procedure. This doesn't apply to CIA, but you were close to this decision, when President Truman decided to use the then little known atomic bomb, had he been required to submit this decision to the Congress, with their limited knowledge of the bomb, I have grave questions that the Congress would have approved it. On the other hand, he made the decision and did it, and I have always been in complete accord with that decision, and I think it represents a kind of decision that I have been talking about, a decision that only one man can live with. And I agree with you that that one man has to live with it for the rest of his life. So I don't think we can settle the question here, but I think it is one that requires a lot of thought. I am a firm believer in the Commander-in-Chief concept of the President. I am also a firm believer that in many cases the commission of this country is better with that one man making the decision than having to go to a committee.

Mr. CLIFFORD. You're aware, of course, Senator, that I know why you used that illustration, but there is a basic distinction between the illustration you used, and that is we were at war at the time, and he merely decided upon a certain instrument of war. Under this bill, he would have no responsibility to come to the Congress. It didn't involve intelligence, it didn't involve covert action. It was probably the most overt acton that our country ever took under the circumstances. So there is that major distinction.

The reason why I come down in favor of this present procedure is that there are not many covert projects in my opinion that are very important to the welfare of our country so that the limitation of those, I think, is a step in the right direction. We have been much too deeply involved in that field. A number of people have made the decisions at lower levels, and we have gotten in lots of difficulty, so that if we moved away from the covert projects, I would feel that we had not lost anything very important. So that I am willing to take the risk of disclosure, which sure, would be unfortunate, but I think not fatal, rather than leave this field up to the sole determination of the executive branch, because our experience of the past has proved that there is much more likely to be damage to our country than benefit.

Senator GOLDWATER. Thank you very much, and thank you, Mr. Chairman.

The CHAIRMAN. Senator Huddleston.

Senator HUDDLESTON. Just pursuing that same area, I think we have fairly well exhausted it except to indicate the concern of the committee in drafting the legislation. With covert action, just as you have indicated, you can justify it at times, but it is an area in which justification ought to be very clear. Our approach was the two-pronged attack of congressional oversight plus a mechanism within the executive branch that sets up review and the requirement that the President make a determination. I also want to mention that this determination has to be in writing; it has to be done in such a way that there is a trail, an accountability, if you please, that can be determined.

One thing that we learned in the Church committee investigation was that intelligence people sitting in the same room and speaking the same language frequently came out of that room with very different interpretations of what was said. Actions were started on the basis of conflicting interpretations that allowed one echelon of that group to deny entirely any responsibility for it, and yet the other echelon to say with at least an equal surety in their own mind that they were acting in strict accordance with what had been authorized. That is an intolerable situation if you are trying to find some way to put a restraint or a control or an operational procedure on our intelligence operations, it seems to me, and that is essentially what we are attempting to do here by the executive mechanism and by congressional oversight.

Our committee has been operating, incidentally, for nearly 2 years with this very sensitive information. As far as I know, we have not at this point divulged any security information. I think we have to accept that responsibility and Congress has to accept that responsibility.

Mr. CLIFFORD. Senator, there is an observation to make here. I have taken the position, consistent with the bill. There is one part that is going to require a good deal of attention. I am in accord with the machinery for the President having the request in writing, and so forth. It is possible that later on there might be a situation develop in which it might be important under all the circumstances for a President to take the position that the particular act or the way it was carried out was not known to him or understood by him to be conducted in that manner. If we could possibly leave some narrow out for the President, it would be desirable.

In the spring of 1960, President Eisenhower was to go to Paris to have a summit conference with Khrushchev, and I think maybe it was the day before or the day of the summit meeting, and it was an important summit meeting, a U-2 was shot down in the course of an overflight over the Soviet Union.

Now, it placed Khrushchev in an unenviable position, and I believe he did everything in his power to try to persuade President Eisenhower to take the position that he didn't know that that overflight was occurring. But President Eisenhower at the time was under some criticism—for not knowing everything that was going on. So he firmly maintained that he knew all about it, and it left Khrushchev no out whatsoever. So he had to declare the whole meeting was off, and I might say, it had far-reaching implications because it was that spring that President Eisenhower was to make his visit to the Soviet Union, which I think would perhaps have been the most triumphant visit by any American to any foreign country. He was the outstanding foreign hero in the Soviet Union, and it blew all of that also, which was really quite unfortunate.

So we have a problem there, and as the work goes on I might hope to have an opportunity of working with Mr. Miller in seeing if there is some possible type of protection that, under unusual circumstances, might be given.

Senator HUDDLESTON. Are you suggesting a form of plausible deniability?

Mr. CLIFFORD. I don't know yet what it is. I know that it is possible that a man might approve a certain operation, maybe President Eisenhower might have said yes, I did at one time approve overflights, but I did not approve this specific overflight, and I think that would have gotten him out of the box, and I think that would have been enough for Khrushchev, but he felt he couldn't even do that. So it is somewhere in that area we have got to think about.

Senator HUDDLESTON. Well, we certainly would welcome your continued interest and assistance, and I assure you you will have an opportunity to help us in that regard. It is certainly not inconceivable that there will be operations going on within a country that the leaders of that country themselves wouldn't find as objectionable if it were not made public, and to which the citizens of that country might object to such an extent that the leaders would have to take a position such as Mr. Khrushchev did at the time.

Mr. CLIFFORD. Yes.

Senator HUDDLESTON. That would bring about consequences far greater or more severe than the act itself would justify.

Mr. CLIFFORD. Yes.

Senator HUDDLESTON. Maybe it is something we do have to study a little more closely.

On page 4 of your testimony, Mr. Clifford, you note that the utility clause of the 1947 Act quickly became the basis for rapidly expanding CIA.

Do you believe this was necessary, for the CIA to expand in this manner, in order to fulfill the functions it was established for, or was it just a natural progression of an agency, somewhat aggressive, that did not have constraints and controls in its legislation?

Mr. CLIFFORD. As is so oftentimes the case, it is some of both. We had to provide, we felt, a broad range of authority because we had no previous experience, and then after we once had the agency, it was very soon thereafter that opportunities came to the agency and to the Administration to perform a very real service. A quick illustration: As we went from 1947, when this act was passed, into 1948, the Soviets were engaged in a very active period of aggressive expansionism. You remember they had taken all of the nations on their western periphery, Latvia, Lithuania, Estonia, Bulgaria, Romania, later Hungary, Czechoslovakia, Yugoslavia, and then they had spread out into Western Europe, and there was pressure on every important country in Western Europe.

There was an election in Italy in the spring of 1948 that was exceedingly critical to the future of Western Europe. The nations of Europe were prostrate, and we used this catch-all clause—it has since become public—to engage in every conceivable means that we had to prevent a Communist victory in that election. I think had we not, I think the Communists would have won that election, and the map of Europe would have been very, very different for the last 30 years.

So once you have the organization, once you have the opportunity, the needs and the requirements become obvious and you use them, and that is what occurred.

Senator HUDDLESTON. In your reference to the Bay of Pigs, you noted that President Kennedy thought that the information he received was erroneous and the intelligence was faulty.

From your review, were you able to determine why the information was erroneous, why the intelligence was faulty?

Mr. CLIFFORD. I was not engaged in that particular review. Later on the Intelligence Board went into it, and we found that a great deal of the information was coming from those persons who were involved in the operation and who had a real stake in the operation, and that was most unfortunate because all of their interpretations favored the project, and it was our belief at the time that we wrote a report on it, that the information was one-sided, was given an interpretation that would fit in with the desires of the party. It was almost a perfect illustration of the kind of situation that Senator Goldwater referred to, where a previous policy is made, and then you select out that intelligence which supports the decision that you have already made, and that was the basic problem.

Senator HUDDLESTON. Did you find a situation similar to that during the Vietnam war, relating to the intelligence information?

Mr. CLIFFORD. Yes, it existed. Policies would be made and on occasion I had the feeling that there was possibly a leaning on the part of intelligence estimates that might be supportive to the policy that our country was following, and I might say that it caused some of us concern.

Senator HUDDLESTON. I think my time has expired.

The CHAIRMAN. I hate to interrupt, but if we all are going to have a crack here, we can come back.

Senator Mathias, do you have any questions?

Senator MATHIAS. Mr. Chairman, I have some questions, but I would like to defer to Senator Chafee at this moment.

Senator CHAFEE. Thank you, Mr. Chairman.

First, Mr. Clifford, I would like to say that your statement here was extremely helpful. You took the specific points, and it just seems to me, have given us a lot of good guidance. As we proceed, I would like to get back to a question that Senator Goldwater touched on before. Although I guess I know your answer, what bothers me is the ability of a group of people to keep any kind of confidence, and when you are dealing with a congressional committee, you are really dealing with a lot of people. Furthermore, under congressional practices, our information is available to anybody, any Senator, not just the members of the committee, and I presume the House is the same. We frequently say that no secret has ever come out of this committee, at least no secret has ever come back to us that has come out. Thus I am not so sure and I hope we are accurate, but I just wonder when you are dealing with a group this size, which is the oversight group that you recommend have oversight, if we could keep a secret, which it seems to me is a pertinent one in the past, and that is the fact we broke the Japanese code. I can think of no other secret that was as well kept and that was as important to this Nation as that one. And what we did—well, really, led to our success in the Battle of Midway.

Now, that, I assume, would be the kind of intelligence that comes under the purview of this committee.

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Would it or wouldn't it?

Mr. CLIFFORD. No, I think it would not.

Senator CHAFEE. You don't think so because that doesn't involve any covert type of action?

Mr. CLIFFORD. That's right, and Senator, that took place during war.

Senator CHAFEE. I appreciate that.

Mr. CLIFFORD. And that type of intelligence would be within departmental intelligence of Army, Navy, or Air Force, and it seems to me that that would be protected in every way possible. There would be no decision to be made by this committee in that regard as to whether our cryptographic services would attempt to break all codes. That would not be brought to the attention of the committee.

Curiously enough, you bring up a situation in which an incident occurred that I thought was maybe the one most damaging news story that has ever occurred in my lifetime. It took us a year to break the Japanese code. We broke it. We were reading everything they had out in the Pacific, and one day one newspaper ran——

Senator CHAFEE. The Chicago paper, was it?

Mr. CLIFFORD. It was. Ran a story that the United States had broken the Japanese code.

Now, what they ever got in their mind or what was ever behind it, I have not understood. Why there wasn't a prosecution for treason I have never understood. It took us another year to break that code. If somebody could figure out, I know that tens of thousands of lives of American men, the billions of dollars of our Treasury that were lost by that story. But there again, that wasn't anything that would have been brought to this committee.

Senator CHAFEE. I see.

Well, how about the breaking of a code in peacetime? Do you think that would not be within the purview of the committee?

Mr. CLIFFORD. I would think not. It is not a covert project that I think the Administration would need approval on. We have a very effective organization with which you are familiar who devotes itself 24 hours a day to trying to understand the mass of electric signals that go through the ether, and they try to read as much of that as they can, and everybody understands it, and we do it, and every other nation in the world that has any competence in that regard does it, too. It is life today in this world.

So there again, I don't see that there is anything there to bring to you.

Senator CHAFEE. I am not sure the committee would agree with that. I suspect that if, in our regular sessions with the Director of Central Intelligence, everything must be an open book now, and so he does reveal the most extraordinary things to us.

Mr. CLIFFORD. There is a difference there. Under this law, there is no information that you can't have if you ask for it. That is the way I read this law. And if you have the Director of National Intelligence in before you, he has to answer your questions, so that if you want to find out about the codes, you can find out about the codes. I know of no way that the intelligence operation can keep secrets from this committee. It is just that I think there are any

number of areas in which the committee will assume that the Government is doing its job, and I think that you would be more likely to be interested in what we call covert activities, that is, political activities that have to do with possibly the dislodging of a government in another country. There has been a good deal of that, as you know.

Senator CHAFEE. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Stevenson.

Senator STEVENSON. Mr. Clifford, there have been some marked changes since you were Secretary of Defense, or for that matter, since Senator Chafee was Secretary of the Navy.

The position that you are enunciating now would represent a step back to Presidential powers. We don't get access, nor do we claim access to sources, but because methods can be very intrusive, this committee does receive a great deal of information about such methods, as you have mentioned and so far as I know, without any breach of confidence, and with some benefit to this committee. It helps, for example, in putting together the budget for the community, including that organization. It is not my intention to get off on that subject. I was about to thank you for giving us the benefit of your wisdom and experience, and also some courage.

To paraphrase Mark Twain, you have helped to murder some beautiful myths with some ugly facts. Most of what you said would elicit little disagreement up here, with one exception already mentioned. Your support for the organizational and procedural reforms in the main is welcome and you made some suggestions for improvement which I think will receive support as well as respect from within the committee.

You reserved—and by that I mean in particular your suggestion about the independence of the authority of the new DNI, which I think is a very important suggestion—you reserved most of your criticism, as I see it, for the prohibitions, and there lies the beautiful myth that somehow we can foresee all the necessities of national security in a turbulent nuclear world, and without impairing national security, legislate our security.

I agree with the thrust of your remarks and would like, if I could, to try to determine where you would draw the line, whether you would rule out all prohibitions, and if not, which? Some prohibitions strike me as sensible. The prohibition, for example, against recruiting of members of the U.S. media for intelligence purposes. How do you feel about that one?

Mr. CLIFFORD. I would place that in a different category. If the Congress chooses to designate the types of persons who shall not engage in intelligence activities, that doesn't disturb me particularly. The main point—perhaps there are two main points, Senator. (1), is no person in the world versed in intelligence will attach any significance whatsoever to the prohibitions that you put in the law. I guarantee that to you.

Now, for years on the intelligence board we watched a Soviet operator, and he came to our attention early because he apparently was enormously effective, and they raised him up and up and up, and they finally brought him back to Moscow and gave him a job. Now, the best description of his job is they made him Director of

the Bureau of Misinformation, and it was his task to misinform all the other nations of the world about what the Soviets were doing, and he has done a superb job. We watched him after that and it was very difficult because the reports coming out were false for any number of reasons, and everybody in the intelligence field knows that. And because we say this, it doesn't mean a thing. It may just increase suspicions.

The second point is that I don't like to see my country say we are now going to have a law, that as a government we are not going to assassinate heads of other states. We are not going to spread disease. We are not going to engage in activities that would overthrow governments. I don't want us to go on record that way. I don't think it is right. It offends my regard for my country and it doesn't do any good. And then it leads to this curious result that all those actions that you do not prohibit, at least by inference are permitted. Well, I tell you, I could draw up a lot longer list, and all those things would be prohibited.

I would feel more comfortable if we just took it all out. I think it is meaningless.

Now, I think it had a domestic purpose at the time. We were going through a period when there was great criticism of abuses of our intelligence activities. I would hope to some extent we are over that emotional period and we might look at it more logically.

Senator STEVENSON. I think it was McCaulay who said of the British, once, that they were suffering from a periodic fit of righteousness.

Let me not belabor the point, because it is a controversial one and far from resolved. You also gave us the benefit of some experience as a lawyer, that what is not prohibited can, by implication, be permitted.

One of the prohibitions is against the violent overthrow of democratic governments. By implication, then, that would suggest that the nonviolent overthrow of the democratic governments is approved?

Did you suggest that?

Mr. CLIFFORD. Sure.

Senator STEVENSON. And what about the violent overthrow of nondemocratic governments?

Mr. CLIFFORD. Sure. All you have got to do is read the words.

Senator STEVENSON. That would be approved, and that would also require some determinations as to which is democratic or nondemocratic.

Mr. CLIFFORD. Sure.

Senator STEVENSON. How about the Queen of England. Is she the head of a democratic form of government?

Mr. CLIFFORD. You might have a little trouble convincing the Queen of that fact. [General laughter.]

Senator STEVENSON. Well, let me just wind up with that example, and I do this illustratively.

Senator HUDDLESTON. If you would yield, just as a suggestion, about the nonviolent overthrow of the U.S. Government is permitted.

Senator STEVENSON. The nonviolent——

Senator HUDDLESTON. Yes.

Senator STEVENSON. Well, I was going to ask you if that was behind Mr. Eisenhower's exercise in truthfulness concerning the U–2 incident. Perhaps he was engaged in the nonviolent overthrow of Mr. Khrushchev. There are those who trace Khrushchev's downfall to that incident.

The bill also prohibits support of any action which violates human rights if the action is conducted by police, internal security forces, or intelligence forces in the foreign country, as if to suggest that support of repressive action by other agencies is all right, and that raises some rather large questions about what is meant by human rights, does it not?

What would, for example, the effect of such statement of policy be on support through the intelligence services of the United States for those of Israel?

Mr. CLIFFORD. Well, I doubt that there is any answer which could be given that could reach that particular question. The fact that you ask the question would indicate that a study must be conducted to ascertain whether in any country human rights are being violated. They are, I assume, and then, if they are, according to some of the language, you might choose to overthrow the government, but you can't do it with the CIA or other elements of the community, but you could organize a group of private citizens and send them over to overthrow the government. That is not prevented by the act. And as I said in there in the end, I think it makes us look silly, and I think we do a lot better to try to avoid those instances in which people believe that we are reaching for the absurd.

Senator STEVENSON. Well, I don't want to prolong this. There is another prohibition which is against assassination of foreign officials abroad, as if to suggest that if you are not one of the protected species of abroad, you are vulnerable.

Would you draw the line nowhere, eliminate all of these prohibitions and rely alternatively on the procedural safeguards?

Mr. CLIFFORD. If it were left to me, I would elminate the prohibitions.

Senator STEVENSON. All of them?

Mr. CLIFFORD. I would eliminate all of them. I really think that they are meaningless because nobody is going to believe them, and the fact is they create problems, and in the last analysis, these decisions have got to be made by the President of the United States and his major advisers and a committee of the Congress such as this, and that is where the decisions are going to be made. It would be entirely possible under some circumstances that with all of this language an emergency might arise in which a President would say I have but one duty, the duty to my country is to take a particular action, and it might be inconsistent with the language of this particular prohibition. I suppose he would have to take it.

Senator STEVENSON. And the procedural safeguards would, in this legislation and unlike in the past, include timely notice to the Congress or to the agencies of the Congress.

Mr. CLIFFORD. I believe in that. I think that is wise.

Senator STEVENSON. But you would draw the line short of notice to the committees of the Congress of information about methods? This gets back to the first, the opening point about the breaking of

the codes and interception of the electronic transmitted messages. Would you give us no access to methods?

Mr. CLIFFORD. Oh, no, no. The Government, our Government is engaged for 24 hours out of every day in obtaining intelligence. It has gone on year after year. We work on it, we have many people engaged in research so as to improve the ability to get information all over the world. Now, we have that information. I don't believe that we should take up the time of the committee by coming to you and telling you the means by which we do it. If you wish to know the means, then it is my concept under this act that you are entitled to it, and all you have to do is ask for it and you will be told what the information is.

What the President comes to you about for your judgment is the beginning of some covert project that, as an illustration, is directed toward unseating an unfriendly government in another country, something like that, and he comes to get your judgment on that. I don't think he comes to get your judgment on routine matters that we have been engaged in for the last 25 years, however long we have had the act.

Senator STEVENSON. But we are kept informed on a timely basis with respect to covert and clandestine actions, plus on request, methods.

Mr. CLIFFORD. I think that is so.

Senator STEVENSON. You would draw the line at sources, everything up to sources.

Mr. CLIFFORD. No; I wouldn't even draw the line on that. If we are going to have this partnership, I think the partnership has to go the whole way, and if you require of the President that you wanted sources, I don't think you could limit the partnership.

From a practical standpoint he is going to leave it up to you a good deal to ask the questions as to the information you want. In some instances—now, it has happened in the past—in some instances the reply might be let us tell you what producing this answer would imply and entail, and after we have told you, do you still want the answer. In some instances you might say, under those circumstances we don't want the answer.

Senator STEVENSON. You recognized earlier in your statement that notwithstanding the extraordinary advances in technology, many important methods and sources remain human.

Would you not be concerned about the effects of congressional access to methods and sources on the availability of human sources throughout the world? Are we not already in danger of losing valuable assets because of their concern that they themselves will be compromised, perhaps lose their lives, their concern about the integrity of the process?

Mr. CLIFFORD. I would depend upon the judgment and discretion of this committee in that regard. It is a little difficult for me to believe that at some point this committee would say to the Director of National Intelligence, we want you to submit a list of all your secret agents throughout the world. I can't believe that you would do that. But I am going to say that if we are going to have the kind of partnership that this bill contemplates, then you would have the right to ask it, and then it would be up to the President, I think, to explain to you why it would be really very unfortunate.

You know, we had a situation, we had one come up some time ago. We talk about this and it sounds almost academic, but it is the toughest game that goes on in the world, and we will be in touch with our people and keep in close touch with them and then every so often they disappear, and we never know what happened.

Senator STEVENSON. Well, I am aware of that, and I must conclude, but the argument is that the mere fact of access, not the abuse of access—there has been no abuse of which I am aware—the mere fact of access damages our ability to recruit human sources throughout the world, and in fact that has happened.

Mr. CLIFFORD. I cannot agree with that. No. The mere fact of access, if it is never used and is purely academic, hasn't led to anything, does not disturb me.

Senator STEVENSON. Thank you, Mr. Clifford.

The CHAIRMAN. Senator Mathias?

Senator MATHIAS. Thank you, Mr. Chairman.

I am aware that we are in overtime. I am more importantly aware that we are not only detaining Secretary Clifford, but we are detaining Mrs. Clifford, which I don't want to do. We are very grateful to them for the time that they are giving us here today. I just want to say that, when we introduced the bill we had what might be described as a covert hope that it would evoke the very kind of thoughtful and wise comment that the committee has had today from Secretary Clifford. We hoped that men and women who had not only the intellectual capacity but the experience to deal with this very difficult subject would come forward and give us their views in a candid and helpful way.

As I have read the statement today, I think it does exactly that, and I am very grateful.

Mr. CLIFFORD. Thank you.

Senator MATHIAS. Now, let me challenge the premise, really, on which we are meeting here today.

You said in your statement that you had for some years advocated new legislation to govern our intelligence activities. By that do I understand you to mean that you feel there are some areas in the field of intelligence which are really not adequately controlled by Executive order, areas in which there needs to be a statutory mechanism by which oversight can be provided?

Mr. CLIFFORD. Yes, Senator, and from two sources. One, the old act has been in effect 31 years, and it set very broad principles. We all know, and I think we are likely to agree that abuses occurred under the old act. It has given out. It has worn out, and we have learned a great deal in the last 31 years, both about what the opportunities are for intelligence, the assets that exist there, and what the abuses have been, so that it is very clear to me that we need a new law at this time that does exactly what this act does. It set out what the functions of our intelligence operations are to be, and it sets out how we can prevent the abuses of the past, and third, it sets up a new organizational framework which is more likely to attain those results than the one we have under the old act.

Senator MATHIAS. Now, so that we are guilty of as few abuses as possible, in the process of correcting old abuses, can you think of any areas that we have covered here which would be better left to

regulation, rather than to statutory control? And I am mindful, of course, of the statements you have already made about specific acts and covert activity.

Mr. CLIFFORD. Well that will come out in the process of winnowing through the act. It is 267 pages long. I think it will want to be shortened a good deal, and I believe that there are areas that can be tightened up. That is only natural. I think it was wise to put everything in the act. I believe that is the way first drafts of acts should be drawn so every alternative is there. If anybody had a good thought, it went in the act. I favor that so that instead of going through an act and having to add, the big job is to look and then decide what you need to discard.

I think a good deal of tigbtening up can be done in the process. I think that it is possible that decisions will be reached that maybe there is too much detail in the act, that there are requirements of this report by tbat date, 90 days later; write some report of that date, all that, I think, has to be cleaned up as we get into them. I think the act cannot provide for every contingency any more than a lawyer can draw a will that provides for any contingency. Those are the wills that lead to the litigation that goes on through the years.

I think that we will want to make some of it less detailed than it is now.

Senator MATHIAS. You served for a number of years as Chairman of the President's Foreign Intelligence Advisory Board and have a deep personal knowledge not only of what the board did, but of what its value was. That board, of course, has now been abolished.

Do you feel, in light of your experience, that it would be desirable to establish some new agency which would perform the functions that you performed on the board?

Mr. CLIFFORD. That board performed an important function the first 3 years of its existence. Because it was created by President Kennedy, he met each time with the board when the board met. He took a great interest in it, and that was generally known throughout the intelligence community. There has not been any board like that for a great many years, so we did perform, I think, a valuable service. I have a recollection that we made something like 203 recommendations for improvements in foreign intelligence, and he adopted 194 of them, and they were all—but many of them very minor. We settled a number of jurisdictional disputes.

But after that early period of about 2½ or 3 years, the board went rapidly downhill. It didn't amount to very much under President Johnson. It amounted, I think, to less as time went on. And I noted with some concern later on that it looked as though it had become the repository place for political appointments to maybe pay off political debts of some kind, which I thought was unfortunate because at one time it did a real job.

I doubt that a board of that size, 9 or 11 men who meet once a month, penetrate the situation enough to render much of a service. I am opposed to the reincarnation of that board. I do like the three-man intelligence supervisory board or oversight board. I like it. I think they have an interesting function to perform. The three men can give more time to it; carefully selected, I would hope tbey

would be experienced men, and I rather like that concept. I think that there will be something there that is valuable.

Also, the major function of the three-man oversight board is to see to it that the intelligence community is not exceeding the responsibilities that it has under the law, whereas the other board had an across-the-field responsibility, and it became too diffused.

Senator MATHIAS. Turning our attention to counterintelligence for a minute, I think the world has been very much shocked by the very tragic events in Italy in which Aldo Moro has been kidnapped by terrorists. I think there is a clear understanding that no nation, or no individual in the world is immune from the misguided danger. Everybody is exposed, everybody is susceptible. The presence and activities of hostile intelligence and international terrorist representatives and agents in the United States has probably been growing as everywhere else in the world.

So the question arises whether provisions in the bill are wise and are adequate in providing for U.S. counterintelligence capabilities? I wonder if you have any recommendations for us for counterintelligence, particularly in response to the increasing threats that we see all over the world?

Mr. CLIFFORD. I am delighted that the bill gives attention to that, and it may be that its provisions are adequate at this time, or on further study, the committee may wish to strengthen those provisions, for you have touched upon the deepest concern that I have in this whole area today. It will not be long before it will be possible for some group in the world to manufacture a nuclear device, and——

Senator MATHIAS. Nearly 50 private corporations have the capacity to do it today.

Mr. CLIFFORD. What is our posture in the event that a nuclear device is smuggled into the country in some manner, by air, by boat, by submarine, and placed in a strategic location, and then our Government is informed that unless a certain action takes place on the part of our Government within 24 hours or 48 hours, the nuclear device will be exploded? I don't know.

I think we will see it happen. I expect that it will occur some time. The terrorist activities are on the increase. We see it with international planes, we see it with individuals who are kidnapped and the ransom is to produce other terrorists who are in prison in that country. It is the weapon of the era in which we live, and the most formidable and the most powerful I have ever seen, so that we can expect that the danger will increase, and with it, we must increase our protection. So I would hope the committee would watch with great care that part of the bill and do everything in its power to see that our protections are built up in that regard.

Senator MATHIAS. Mr. Chairman, I have about 100 further questions, but in view of the hour I will content myself with just one final one, which I think is important.

When the Senate was considering the confirmation of the Director of CIA, I was discussing it, and a friend said to me, you know, there is only one important qualification. I naturally was very eager to know what that one qualification was, and he said it is that the President would enjoy having a cup of coffee in the morning with the Director.

And there was, I think, a good deal of wisdom in that. Because you could have the most magnificent intelligence organization in the world, produce the most accurate information, you could subject it to the most sound analysis and come up with the ultimate in the intelligence product, and yet if the policymakers for whom it is intended don't use it, it doesn't mean very much.

You have been on the receiving end of the intelligence product. You must know that with decisions of great importance awaiting you seriatim, day by day, keeping up witb intelligence is just one more thing that has to be done. So my question is this. What would you recommend to improve the relevance of the intelligence product to the needs of the policymakers, so that we can improve the acceptance of the intelligence product, both in competition for time and attention, and particularly, as you already have suggested with some of the examples you have given earlier, when it is at variance with the established policy or a preconceived notion that is strongly held by the policymaker?

Mr. CLIFFORD. I think your question is a broad one, Senator. I would have two or three observations about it.

You increase the importance of intelligence, you increase the value of intelligence if you increase the quality of intelligence, and if a President finds after a while that the quality of the intelligence he is getting is high, then he will use it more, so that there should be the constant effort to improve the quality.

Second, you touch on another point that is interesting. Even in the early days of the Truman administration when we were just getting into the creation of an intelligence agency, and the President named as the chief intelligence officer a man whom he liked and admired very much in Admiral Sauers, who was a reserve naval officer, and the President started his day off every day at 8 o'clock with a visit with Admiral Sauers, and that relationship was very, very valuable. Other Presidents have not been nearly that close. President Kennedy was not that close to the Director; President Johnson was nowhere near that close to the Director, so that what they did was read the daily intelligence report which the Director prepares for the President. But that loses quite a lot which you get from an intimate relationship. So that you touch on a subject that I referred to briefly in the statement. We can pass the best law, provide the most effective machinery, but unless the men who govern our country and are in charge of it are able to find a relationship in working together, it will not be effective, and that holds particularly true between the President and the Director of National Intelligence, and this committee, because I would expect that this committee would want to develop a relationship with the Director of National Intelligence that could be infinitely valuable if it turned out to be a personal one, and a sense of mutual confidence developed.

I think that would be the best answer I could give.

Senator MATHIAS. Mr. Secretary, I thank you very much for your responses, and I thank Mrs. Clifford for her patience.

Mr. CLIFFORD. Thank you

Senator HUDDLESTON. Thank you.

Mr. Clifford, you have been very generous with your time before the committee today, as you have on a number of occasions in the

past, and we have appreciated it very much. All of us have a lot of questions that we would like to discuss with you because of your experience and knowledge, and forthright manner in which you answer them. We appreciate that very much and we will accept your invitation to call on you again as these hearings progress, and to seek your advice and counsel as we proceed.

And we thank you very much for being with us today.

The committee will adjourn until 10 a.m. tomorrow.

[Whereupon, at 1:32 p.m., the committee recessed, to reconvene at 10 a.m., Wednesday, April 5, 1978.]

WEDNESDAY, APRIL 5, 1978

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The committee met, pursuant to notice, at 10:15 a.m., in room 318, Russell Senate Office Building, Senator Birch Bayh (chairman of the committee) presiding.

Present: Senators Bayh (presiding), Huddleston, Goldwater, Chafee, and Garn.

Also present: William G. Miller, staff director and Audrey Hatry, clerk of the committee.

The CHAIRMAN. Senator Huddleston, why don't you get us started here this morning.

Senator HUDDLESTON. The Committee will come to order.

Yesterday morning we commenced hearings on S. 2525, the National Intelligence Reorganization and Reform Act of 1978 with testimony by Mr. Clark Clifford. It was an instructive beginning, I think, for a complex subject from an individual with an almost unique range of experience in intelligence matters.

As I noted yesterday, we do not consider S. 2525 perfect. It has been put forth in order to generate a constructive public debate over the issues which we have identified as needing resolution.

S. 2525 is based on a number of premises, including the following:

The United States does need a strong and effective intelligence community.

The entities within the intelligence community each serve a particular function and should be retained, not only to continue their individual functions but also to provide competing centers of analysis which will allow for diverse interpretations and evaluations.

With the continuation of the various entities, greater coordination is required, especially in the budgeting and tasking areas.

The increased coordination should be undertaken by the Director of National Intelligence who perhaps should be separated from the head of the Central Intelligence Agency.

Covert activities, and especially sensitive human collection of intelligence, should be more carefully considered before being initiated than they have been in the past.

Certain types of covert actions will not be undertaken. Certain classes of individuals will not be used for paid intelligence collection or operations, although they may be used on a voluntary basis.

Greater oversight and accountability is needed both within the executive branch and by the Congress in order to protect against abuses in the future.

The identity of agents working under cover must be protected.

Intelligence agencies must not disregard the individual rights and liberties of Americans.

As I noted yesterday, I think our task now is to examine these premises in some detail, to evaluate them and to determine if S. 2525 approaches them in the proper manner.

I am pleased this morning to continue the hearings with testimony from three individuals who have borne directly the responsibility for the intelligence activities of the United States. William Colby, after a distinguished career in intelligence dating back to World War II, became the Director of Central Intelligence in 1973 and headed the Central Intelligence Agency during a very difficult period. George Bush has had several distinguished careers: in private industry, as a Congressman, as a diplomat, and finally, as Director of Central Intelligence from 1975 to 1977. And Henry Knoche, like Mr. Colby, spent his entire career in the intelligence business, culminating in his service as Deputy Director of Central Intelligence, which he ended only last summer. These three individuals, then, have a wealth of intelligence knowledge among them, and all three have served their Government very recently. I welcome them here and I look forward to hearing from them.

Senator Bayh, do you have any comment at this time?

The CHAIRMAN. No, Senator Huddleston. I think I made my comments yesterday. I appreciate very much the fact that these three distinguished gentlemen are here with us this morning. You very accurately categorized their service, and we are very fortunate in having the opportunity to get the expert testimony from people who have been on the scene.

The charters that are before us for consideration are a product of rather extensive give and take between the members of this committee and the executive, and I think everybody is moving forward in a good faith effort to try to reconcile all of our differences, and I think it is important to hear from those of you who have been in the hot seat as to just how far we can go to meet the dual responsibilities, one of which is to protect the country and the other of which is to protect the individual citizen.

This is a delicate balance we have in our society that exists really not to the extent it exists anyplace else in the world, and I would hope that we had the wisdom—and certainly your experience can help add to that wisdom—to be able to have the best intelligence system in the world, as I think we do have, make it even stronger, to do a better job of analysis and oversight and all the kinds of things that I know you gentlemen have given your lives to accomplish, and yet at the same time we are doing this to see that our intelligence agencies, as other agencies of our Government, are required to operate under the rule of law and protect the individual rights of American citizens.

Now, that is what we are trying to accomplish. I think we can accomplish it. It is not an easy goal, but nothing really worthwhile is accomplished very easily.

So that is why we are here, and we appreciate very much your being here.

Senator HUDDLESTON. Senator Goldwater, do you have any comment before we hear from the witnesses?

Senator GOLDWATER. No; I haven't.

Senator CHAFEE. I just wanted to say three distinguished gentlemen, not two, inadvertently.

Mr. KNOCHE. Thanks for welcoming me to the club.

The CHAIRMAN. I tell you, it is not what I say, it is what I mean, John. They are big enough to be six.

Senator CHAFEE. Well, certainly. I just want to join in the welcoming of these gentlemen, taking the trouble to come bere because yesterday we had some excellent testimony from Clark Clifford, and I found it extremely helpful, as I believe the others did, and so therefore we look forward to your views and also your—we will be asking you about your reflections on some of the points that he made in his testimony.

So thanks for coming, and welcome.

Senator HUDDLESTON. I think the best way to proceed would be to have each of the witnesses present his statement in turn, and then if they would all remain as a panel, we could just ask our questions in that manner.

So we will start in chronological order, and Mr. Colby, we ask you to proceed first.

STATEMENT OF HON. WILLIAM E. COLBY, FORMER DIRECTOR OF CENTRAL INTELLIGENCE

Mr. COLBY. Thank you, Mr. Chairman. I appreciate the chance to be here.

Mr. Chairman, S. 2525 can be a landmark in the history of intelligence. Throughout the centuries, intelligence was believed to be, as President Eisenhower once characterized it, a "necessary evil" in the world of nation states, outside the normal constraints of law and serving only the practical interests of national sovereignty. Our own country fully accepted this concept, from Nathan Hale's sincere belief, for which he gave his life, that "every kind of service, necessary to the public good, becomes honorable by being necessary," to the guidance given to our intelligence establishment in the immediate postwar era, that it be "more effective, more unique, and if necessary, more ruthless, than that employed by the enemy." For many years our political leadership, executive, legislative, and even judicial, viewed intelligence as a special world somewhere outside the law, necessary to preserve our Nation in an unfriendly world. The fundamental contradiction between this approach and the principles of tbe American Constitution was not ignored, it was accepted, with national consensus.

S. 2525 represents a new concept that American intelligence must operate under the confines of the Constitution we Americans have established as the framework to govern our affairs. Far from decrying this new situation, I welcome it, because I believe that it will produce a stronger American intelligence. American people who understand American intelligence, who participate in setting the proper guidelines for its behavior, and who look to it for assistance in meeting the problems of the world around us, will support intelligence, will insist upon excellence in its product, and will help protect its necessary secrecy.

Thus, Mr. Chairman, I urge that S. 2525 proceed through the legislative process and be incorporated into our statutes. The internal regulations issued within CIA over the years and the Executive orders issued by two Presidents may have been precursors to this statutory charter, but they cannot substitute for its function as an

expression of our new national consensus with respect to American intelligence operating under American law. The American public, our political leadership and the dedicated personnel of American intelligence all will benefit by a plain, open expression of the function of American intelligence and the limits we Americans insist on its exercise. A clear charter for the work of intelligence will end the ambiguities and euphemisms which have characterized this field and which are the root cause of the fascination and sensationalism which have so badly harassed and discredited the honorable men and women who have devoted their lives to their country in this "peculiar service", as Nathan Hale called it. While we all might have wished a quieter and less damaging transition from the old concept of totally secret intelligence as a world apart to a new concept of constitutional intelligence for America, a new meaning for the initials CIA, we must accept S. 2525 for its real function as the milestone of a new era in our country and as a model for others.

But since, Mr. Chairman, this is indeed such an important milestone, we must treat it as such and not as a mere reflection of the climate of excitement and sensationalism which marked the first full exposure of American intelligence to our public. This exposure did reveal activities which we Americans today repudiate, even though they might have been accepted in years gone by and even been a response to encouragement from the highest levels of our political leadership at that time. We must lift our eyes from recriminations about those events of the past to a delineation of the best possible way to approach the future.

In writing a new charter for American intelligence to replace the vague and amorphous language of the National Security Act of 1947, I believe we must clearly outline its major objectives. As we look to the years ahead, it is plain that the most important role of American intelligence will be to give us accurate information and wise assessments about the complex problems that our country will face in a still unsettled world. This must be held as a first priority and not be subordinated in our considerations. The second and equal objective must be to assure that American intelligence operate under the limits that we Americans insist upon for actions undertaken in our name by our elected and appointed representatives.

Viewed against this standard, S. 2525 can be said to meet the requirement. While its stress is on the organization and coordination of American intelligence and on a detailed outline of the permissible limits for American intelligence, and the control machinery to insure that the limits are respected, by implication it does appear that the standard is one of excellence of information and assessment. In my view, it should go further, however, and make explicit that the purpose of American intelligence is not only to inform the American executive and legislature to enable them to make wise decisions about foreign affairs in these years ahead, but also to develop techniques to pass its information and assessments to the American people to enable them to play their full constitutional role in the determination of foreign and defense policy for this Nation. This also can be implied from a few incidental phrases in the bill, but in my view, the kind of fundamental revision of the

charter of American intelligence that S. 2525 represents should confront much more directly this difficult challenge of how to provide intelligence in the modern sense to our citizens as well as our Government. Much of the valuable information and assessments of American intelligence today does reach our public through intermediaries such as the State and Defense Departments and statements from the White House, in most cases protecting the source while disseminating the substance. But I believe that a new order of magnitude of transmission of such material might be achieved through intermediaries in the Congress, academia, and the media through whom the substance of our information and assessments could be passed while protecting their sources, in the way our journalists do. This technique also would obviate the difficult diplomatic reactions apt to follow official expression by the Executive of facts or views unflattering to a foreign power. I do not say this is an easy chore, but I do believe it must be recognized as an unfinished obligation in the process of making American intelligence serve our American people, and it should be set out as an objective in S. 2525. To the extent that it can be achieved, it will replace the blind support of intelligence in the past with an informed comprehension of the excellence and the importance of intelligence for our country in the world of today and tomorrow.

Short of this future dimension of an American concept of intelligence, S. 2525 in my view generally meets the need for matching today's intelligence with the constitutional process. The stress on the rights of American citizens and resident aliens, including the requirement of a judicial warrant for electronic surveillance in the United States and abroad, the clear emphasis on the role of Congress through its select committees, and the definitions of proscribed behavior for American intelligence all clearly reflect the attitude of those of the intelligence profession as well as the American people as a whole following the exposure of those missteps and misdeeds, albeit few and far between, which occurred during the quarter century during which American intelligence operated under a charter of total secrecy and exhortations to meet deadly challenges seen threatening our Nation. While the final reports of the investigations into American intelligence make clear that the sensational headlines and great TV theater which accompanied the initial exposures were grossly exaggerated, intelligence professionals will welcome a clear charter and precise limits within which future intelligence efforts will be conducted. The care for the constitutional rights of Americans and the plain statement that certain forms of abhorrent behavior will not be conducted in the name of the American people are welcome reassurances against a recurrence of even a small degree of activity outside proper limits.

The degree of congressional supervision called for in S. 2525 will, of course, add to the burdens of those conducting intelligence operations, as they will be required to testify and report and on some occasions may be overruled. But this is an accepted burden for all elements of the U.S. Government. The particular danger of exposure of intelligence secrets is not, in my mind, a bar to proper constitutional supervision. This committee, in its 2 years of history, has given evidence that it can keep the secrets it has been given, and I am sure that the House Select Committee has an equal

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resolution. It is true, as a committee of the Continental Congress said in 1776, that "there are too many Members of Congress to keep secrets" but the limited membership of these two select committees is in my mind a reasonable compromise between the need for supervision and the need to keep secrets. Many of these secrets already must be spread substantially within the executive branch in order that the operations function. The additional exposure to specified Members of Congress and selected staff operating under strict secrecy agreements, including exposure to the legislation I have recommended, would, in my mind, not spread the secrets any further than is necessary to conform with the constitutional process. I believe this will give an American intelligence greater, rather than less, strength in the long run and avoid the kind of sensational hindsighting that has characterized too much of the last several years.

Mr. Chairman, within this overall posture of support for S. 2525, I do have a few points on which I believe it is mistaken. I am appreciative of the changes which were made in the original draft which led up to this bill, on which I was very kindly afforded the opportunity to comment, and I believe that S. 2525 is a much improved version of an essential charter for American intelligence. I will outline a few points of recommended improvement for your consideration, but I would not like these points to be interpreted as anything other than improvements on a fundamentally positive proposal.

A major gap in S. 2525 I have already commented on in my testimony before the Subcommittee on Secrecy and Disclosure on March 6. I offer that statement for your record here today.

[Statement of Mr. William E. Colby before the Subcommittee on Secrecy and Disclosure follows:]

STATEMENT OF MR. WILLIAM E. COLBY BEFORE THE SUBCOMMITTEE ON SECRECY AND DISCLOSURE, MARCH 6, 1978

Mr. COLBY. Thank you, Mr. Chairman. I appreciate the chance to be here and it is an honor to be invited.

Mr. Chairman, we must resolve how to keep the necessary secrets of intelligence. I stress the word "necessary"—some secrets are literally essential if we are to have an effective intelligence system. But we all know that the total secrecy which characterized intelligence in the past included many unnecessary secrets and that some of these covered activity improper at the time or not meeting the higher standards we insist on today.

The revision of our intelligence structure incorporated in the Presidential Executive Orders recently and in the proposed S. 2525 will in my view prevent such abuse or wrongdoing in the future. But we would be irresponsible if our revision of our intelligence structure did not recognize the need to protect the necessary secrets of intelligence better than we do today.

This is not just a theoretical problem. Foreigners abroad wonder if the Americans can keep any secrets, and this has led to individual foreigners deciding that they will not work with us in a secret relationship, depriving us of the information they could have given us.

It has affected foreign intelligence services from which we had obtained important material in the past but which reduced their sharing of similar material. Our sensitive technological sources are today vulnerable to leaks about their access and techniques which can make it easy for the countries about which they are reporting to frustrate their continued acquisition of information.

An exhaustive study of our present legal system for the protection of our intelligence secrets has summarized the situation starkly: "The basic espionage statutes

are totally inadequate."[1] We must give a signal to our intelligence personnel, to our citizenry disturbed by this situation, and to our foreign friends that America will not try to keep unnecessary secrets but that it does have the will and the machinery to keep the necessary ones.

But this must be done within the concepts of our Constitution and the policies which mark our free society. We must have a dignified and serious legal structure through which to act and not turn frantically to attempts to enforce contracts or obtain damages for disclosure, resulting in stimulating publishers into covert techniques to avoid injunction. We must have a system which would work effectively in the few cases in which it would be required and not be frustrated by the danger of greater exposure in the course of legal proceedings.

Mr. Chairman, I submit that a very simple approach would answer this problem. It would be characterized by several features:

Criminal penalties for the unauthorized disclosure of secret intelligence sources and techniques by individuals who have consciously undertaken the obligation to protect the secrecy of such sources and techniques.

Sources and techniques defined narrowly only to include those matters which would be vulnerable to termination or frustration by a foreign power if disclosed, not substantive information and conclusions whose source it could not be expected to identify.

Penalties applicable only to individuals who assumed the obligation and not to other individuals who receive such material—e.g., journalists—even if they never undertook an obligation to protect such secrecy.

A shield law protecting journalists or other third parties repeating such information in the course of the exercise of their constitutional rights from subpoena or other requirement to testify and reveal the individual from whom they obtained such information, if they themselves had not undertaken to respect the secrecy of the sources and techniques.

A special procedure for any prosecution under the statute, by which a question of law would be decided whether the specific material which had been disclosed without authorization met the legal definition of a "secret intelligence source or technique." This procedure would provide for an adversary—and not an *ex parte*—proceeding before a Federal judge *in camera* for this purpose, and provide that any material obtained by discovery in the course of such a proceeding would remain under judicial seal and not be exposed beyond the parties and their counsel, and further require that they undertake the obligation to protect the continued secrecy of such material and thereby subject themselves to the application of the statute.

The judge's finding that the specific material met the legal standard would be deemed a question of law preliminary to the actual trial which would take place in open court with full right of jury to decide the guilt or innocence of the individuals prosecuted on the basis of the material actually disclosed publicly, the material having been disclosed in the *in camera* hearing thus not being made public in the course of the trial.

The criminal penalties of this statute would be exclusive. It would clearly bar any other legal proceeding, such as injunction or civil suit, against the individual who undertook the obligation and thus eliminate any prior restraint on publication other than the general law, as outlined in "The New York Times" 403 U.S. 713 (1971) and subsequent cases. It would also eliminate any obligation of individuals undertaking to respect the secrecy to submit writings, speeches, et cetera, for prior clearance by any agency of the Government, although the voluntary submission of such material and its clearance would constitute a bar to protection.

Material circulated within the Government would be divided into that material containing information as to secret sources and techniques and that substantive material which would not reveal such sources and techniques. Access to the former category should be limited to those who signed the undertaking to respect the continued secrecy of such sources and techniques subject to this statute.

Mr. Chairman, I believe this proposal would solve most of the problems involved in the very unsatisfactory situation we have today. It would provide a mechanism for prosecuting the exposure of material which could truly damage our intelligence system, but it would protect the rights of the individual and reflect the interest of our nation that this category of secrecy be restricted as much as possible.

It would apply only to those who undertake to protect intelligence sources and techniques and protect individuals such as journalists or other third parties against harassment. It would reduce the chances of this statute being used as a bar to "whistle blowing" against abuse or wrongdoing by eliminating prior restraint or

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[1] Harold Edgar and Benno C. Schmidt, Jr., The Basic Espionage Statutes and Publication of Defense Information, 73 Columbia Law Review 929, 1076 (1973).

contract theories and by requiring a Federal judge to decide the question of whether the secret meets its standards.

It would provide a procedure to reduce the danger that prosecution produces greater exposure through the discovery process. It would not try to solve the problem of all classified material, but merely limit its objective to reenforcing our intelligence system. And to ensure against arbitrary decision not to prosecute a case in which additional exposure only to the parties and their counsel was believed too dangerous, the statute could include a provision that any such decision be made by the Attorney General personally and be reported to this Select Committee and that of the House of Representatives.

Mr. Chairman, we need a signal to the world that we can keep the real secrets of American intelligence. I urge you to give it.

I must say that any overall revision of the charter of American intelligence today would be irresponsibly deficient if it did not recognize the urgent necessity to improve the legal structure for the protection of the secret sources and techniques which are vital to American intelligence. I have recommended a narrow approach toward this subject which is in my view fully compatible with the Constitution. It merely extends to the secret sources and techniques of American intelligence the same protection that we currently provide for a large number of specific subjects which we deem important enough to protect with special legislation, to include crop statistics, income tax returns, and trade secrets confided to Government officers. The secret sources and techniques which can contribute to the protection of our Nation are at least as important as these and deserve the same protection through criminal sanctions against those who are given authorized access to such information and then unconscionably reveal them. We—and I include myself—have endeavored to protect these secrets through tortured constructions of contract law and prior restraint, none of which have been either very effective or very dignified for such important matters for our Nation. I urgently recommend the addition of language to S. 2525 which will provide this kind of narrow protection of our secret intelligence sources and techniques, leaving to other forums debate about the degree of protection appropriate for our broader national defense and foreign policy secrets and confidentiality.

Another subject which I believe needs serious attention in this charter is that of cover for our intelligence officers who serve overseas. In my testimony to the Permanent Select Committee on Intelligence of the House of Representatives on December 27, a copy of which I also offer you, I pointed out the serious problem that our intelligence officers have of protecting the secrecy of their identification as intelligence officers.

[Testimony of Mr. William E. Colby before the Permanent Select Committee on Intelligence follows:]

TESTIMONY OF WILLIAM E. COLBY BEFORE THE PERMANENT SELECT COMMITTEE ON INTELLIGENCE, DECEMBER 27, 1977

Mr. CHAIRMAN. Thank you for this opportunity to contribute to what I hope will be a clarification of past relationships between CIA and the press, and the identification of appropriate guidelines for the future.

I speak as one who swore to support and defend the Constitution, including its First Amendment protecting our free press, through the contribution which an effective foreign intelligence service can provide.

First, I think that a number of concepts and distinctions need to be clarified, as some of the basic elements of the subject have unfortunately been confused and jumbled in the diffuse debates on this topic. Fundamental to any discussion must be

an understanding of the nature of modern intelligence as the gathering and analysis of all relevant information on the international problems affecting our country. The central features of this process are the most advanced disciplines of scholarship and technology, not merely the old techniques of the clandestine trade.

Thus, it is essential to recognize the important CIA responsibility to collect what is known as "overt" information. This includes such non-controversial activities as subscribing to journals and news services, gathering technical publications and encyclopedias, and recording and analyzing the public radio broadcasts and statements of the other nations in the world. It also includes CIA offices in some forty cities of the United States to request our fellow citizens to share with their government information they may have about foreign matters.

In this "overt" information capacity, the CIA is merely a subscriber to the product of our journalists and the recipient of whatever information the citizen wishes to give his government. To the extent that newsmen have contact with CIA in informal exchanges with CIA station chiefs abroad or analysts at home, no interference with the independence of our press takes place and both sides benefit from the exchange of knowledge.

Of course, some relationships have, in the past, gone beyond these and have included CIA employees on intelligence missions abroad who served as real or pretended journalists. I myself have handled such individuals in my service abroad. But here, again, some distinctions need to be drawn. For example, my agents and I had a clear understanding that they did their intelligence work for me, but that the news reports they wrote were a matter between themselves and their editors, and not given prior clearance or direction by me.

The reason for such an understanding is simple: The function of the CIA is to work abroad, not to determine the content of American media. The many discussions on the subject of CIA's relationships with the press have not brought forth cases of CIA operating covertly to control what should appear in the American press. While this may have been only an understanding in the past, not a clearly articulated regulation, and while this may not have been followed in some isolated instances, a serious examination should recognize the existence of this restraint to put to rest any myth that CIA dominated our media output in America.

Indeed, the recent New York Times review of this subject essentially confirms that CIA's efforts to affect public opinion were aimed abroad, conforming to its mission assigned by a series of American presidents and supported by a series of American Congresses.

A third important distinction is between CIA's connections with the press, American and foreign, to collect intelligence and the more aggressive mission which CIA had in the past, and parenthetically has in far less degree today, of influencing political developments in foreign nations. Obvious means for exerting such influence have been foreign journals and other media affecting political opinion, attitudes and actions in those countries. For many years clear doctrinal differences have governed such work, differentiating between so-called "white propaganda," acknowledged openly by its source, i.e. the United States Government, in which case it would not be a CIA task; "gray" propaganda, unattributed or attributed to some ostensible third source; and so-called "black" propaganda which pretended to be the output or even an internal document of the target group. For example, this last category was a particular favorite of the Soviet intelligence services with their own department of "disinformation," such as the bogus American documents distributed in Africa and described in Congressional hearings in 1961.

While some "black" propaganda was indeed produced by CIA and circulated abroad, by far the largest part of its efforts fell in the so-called "gray" area. This included the support of journalists and other media circulating material beneficial to the United States, and such larger operations as Radio Free Europe, which was formed under ostensibly private sponsorship to avoid the diplomatic constraints applicable to governmental emanations.

It is fashionable today to denounce these efforts as products of the cold war, and to condemn individual instances which were failures or even reckless. But a larger view of the cultural and intellectual battle which raged in Europe and the less developed world in the 1950's and 1960's would recognize that CIA's support of the voices of freedom in the face of the massive propaganda campaigns of the Communist world contributed effectively to the cohesion of free men during that period.

And I say that the recent New York Times disclosures of the tactical maneuvers and stratagems of that conflict should not dismay us today, but should rather give us pride that our nation met those challenges with the weapons of ideas, and in fact won that ideological battle without recourse to bloodier weapons.

It has been suggested by some critics, especially some members of the press, that CIA should have absolutely no contact with any element of the news media, that CIA be treated as some sort of pariah which would contaminate by its shadow. Since the journalists' product within the United States has been and remains free of influence by CIA, the major reason advanced for such a prohibition is that the revelation of one American journalist as an intelligence agent or contact would cast suspicion on all other American journalists and adversely affect their ability to perform their true functions.

With all due deference to this thesis, the facts do not bear it out. Foreign nations, and especially hostile foreign nations, are not apt to believe protestations that our journalists have no intelligence relationships, however firmly we declare them. Indeed, false charges of being intelligence agents are periodically made against American journalists, either because another nation does not believe our claims of restraint or more often because it opposes unwelcome inquiries by anyone including journalists. The close relationships between journalists and intelligence services in almost all other nations, including some impeccably democratic ones, will continue to be regarded as the norm and will not be changed by our forebearance.

Even in those cases in which we have absolutely set a bar against intelligence connections with American programs, such as the Peace Corps, we regularly see individuals of those services expelled from other nations for pressing their inquiries or their work too far. The fact that they have no contact whatever with CIA has not protected them nor would a similar prohibition protect our journalists in the future. Indeed, this ostrich-like tendency to pretend that journalism can be "purified" by a total separation from CIA bears a strong similarity to Secretary of State Stimson's closing of a code-breaking unit in the Department of State in the 1920's with the comment that, "Gentlemen do not read each other's mail." Secretary Stimson presumably believed that he lived in a world of gentlemen. But when he became Secretary of War a few years later, Mr. Stimson was reading as much Japanese mail as he could obtain, having learned that the real world is not populated solely by gentlemen.

I believe certain principles should and can be identified to ensure both that the independence of our press under the Constitution is respected and that our intelligence service can accomplish its mission to help preserve that independence. This should include a regulation reaffirming the long understanding that our intelligence services in no way control the content of information or opinion in American media. To enforce this rule, the House and Senate have established these permanent committees on intelligence, and they can ensure that our intelligence services adhere to such regulation and carry out only those activities directed by the President and acceptable to these committees.

Given such arrangements, I strongly recommend that we not establish any blanket prohibition against any relationship whatsoever between American journalists and intelligence services. I would particularly hope that we would not be so foolish as to forbid any relationship between American intelligence services and the journalists of foreign and even hostile powers. We do not need, for example, the self-inflicted wound of being barred from intelligence operations targeted against TASS.

But I recognize the concern of our press over its independence, and thus I agree fully with some restrictions on the CIA's relationships with the American press. Some of those in existence date from the early 1960's; I instituted others in 1973, Mr. George Bush established more stringent ones in 1976, and Admiral Stansfield Turner further clarified and limited this relationship earlier this month. I believe the subject fully covered at this point, and suggest no further steps are needed, beyond adopting Admiral Turner's directive as a formal regulation.

But having said this, I call upon this committee to discharge the other side of its responsibilities. You must control our intelligence services and ensure that they follow the policies of our country. But, you are equally obliged to ensure that our intelligence services can function so as to protect our country. One of the greatest areas of frustration and difficulty in our clandestine intelligence work abroad is the subject of cover. Intelligence officers cannot be effective in hostile areas of the world if they wear the initials CIA on their hatbands. It is essential that we give these officers other explanations for their presence, and for their contacts with the secret intelligence sources that they meet in other nations. They must be allowed to live and work without exposure to hostile counter-intelligence services, to disaffected ex-employees or to vicious terrorists. If you accept that intelligence work is important to the protection or our country, and both our laws and presidential executive orders say that it is, as does the very existence of this committee and its Senate counterpart, then you must also give CIA the essential tools with which to do its work.

The last ten years have seen a critical erosion of the cover under which American intelligence officers must work. The Peace Corps, the Fulbright Scholars, the U.S. Information Agency, the U.S. Agency for International Development and now journalists are off limits, and additional groups clamor to be included in this charmed circle. But if one examines the resident American community in many countries, it is obvious that the remaining areas of cover are few and that many CIA officers are all too easy to identify. And earnest investigators and even hostile groups are today busily engaged in programs to expose them.

Thus, I ask this committee to compensate for barring our intelligence from the use of American journalist credentials by reversing the tide of prohibition with respect to official cover. This committee should insist that the agencies of the United States Government incorporate in their ranks small numbers of intelligence officers under proper administrative arrangements so that they are not revealed. This will no more discredit the work of those agencies than the proper performance of intelligence work under the firm guidelines and supervision now established will discredit the United States as a whole.

With this change, our journalists can be kept immune, and intelligence can be improved. The melting ice floe of adequate cover has already led to the tragic death of one of our officers and the frustration of the work of a number of others. We must halt this trend and decide sensibly and seriously which parts of the American scene should, indeed, be kept free of connection with intelligence, and which can help discover the dangers and problems abroad about which our country needs to know in the years ahead.

This charter for the work of American intelligence should include a clear statement not only that intelligence is barred from certain areas of American life such as religion, official humanitarian and cultural affairs and the media, but an equal statutory requirement that other agencies of the U.S. Government assist the necessary work of American intelligence, with the exception of the Peace Corps pursuant to an arrangement which has existed since its origin. The elimination of the use of various American agencies for cover has exposed our officers to easy identification, surveillance, and frustration of their mission, aside from physical danger. The criminal provision of this statute against disclosure of the identity of CIA officers is not an adequate solution to this problem if the government does not use its own capabilities to conceal them better.

S. 2525 insists that any special activity must meet the standard of being "essential to the national defense or the conduct of foreign policy of the United States," substituting the word "essential" for the word "important" included in the present Hughes-Ryan amendment to the Foreign Assistance Act. I believe that the word "important" should certainly solve the desired objective of limiting the use of special activity to those areas in which indeed it is important. Either the real meaning of the word "essential" would be downgraded, or we might deprive ourselves of this technique in cases we would later regret. The real limit on the use of this technique will be in the procedure for review and approval through the executive branch and the select committees of the Congress. We do not need a debate about whether a particular activity is "essential"to the preservation of the Republic so long as we can decide through our constitutional process whether or not it is wise.

The prohibition against particular forms of special activity includes one which would raise similar problems of definition: "The violent overthrow of the democratic government of any country". With the number of countries who cynically name themselves as "democratic republics" prevalent in the world today, I fear that this language could lead to legalistic challenges rather than discus-

sion in the review procedure of how to meet a danger to the United States. I certainly do not envisage the violent overthrow of any government in the near future, and indeed, would be most sparing of any such action, but I would want to hold within the American arsenal the possibility of doing this through the less clamorous means of a special activity than through sending the U.S. Marines into a situation important to our country. To find ourselves more limited in the use of special activities than in the use of our armed forces would be an anomaly. I respectfully suggest that this issue be left to the machinery of review through the executive branch and the Congress through its select committees rather than enshrined in statute.

Mr. Chairman, I have a few other suggestions for improvement in this bill, but in general I would like to express my full support for what it represents, an effort to produce a clear statutory charter for American intelligence and a procedure through which its complicated and delicate operations can be reviewed and controlled according to the constitutional procedures we Americans have established for our Government. I believe it is a landmark in the development of the discipline and profession of intelligence. It will indeed require our intelligence establishment to comply with the standards we Americans believe important and with the separation of powers we have established in our constitutional structure. But it will extend to a new dimension the statement that we can confidently state about American intelligence, that it is and must continue to be the best in the world.

Thank you very much, Mr. Chairman.

Senator HUDDLESTON. Thank you, Mr. Colby.

Mr. Bush?

STATEMENT OF HON. GEORGE BUSH, FORMER DIRECTOR OF CENTRAL INTELLIGENCE

Mr. BUSH. Thank you, Senator Huddleston.

I appreciate the chance to appear before the committee.

It is my view, based on my own experience, that the Select Committee has done an excellent job of congressional oversight. I still feel that consolidated oversight is needed, however. This would result in more thorough oversight, and frankly, fewer leaks, better security.

I wish S. 2525 addressed itself to the question of consolidated oversight, but perhaps that is a subject for other legislation.

Let me make some comments on S. 2525. It is markedly improved over the first draft which was so restrictive it would seriously have tied the hands of the intelligence community.

I have problems with parts of this bill. I feel that the Director of National Intelligence (DNI), as he is called in S. 2525, should run the CIA, and I don't believe any loophole should be built into the law. The CIA Director in my view should be the DNI. And I think that a Director of National Intelligence separated from the CIA staff with more emphasis on civilian arm of intelligence, somewhere officing down in the Executive Office Building, would be virtually isolated. In theory he could draw on all the community elements, but he needs CIA as his principal source of support to be most effective. And, frankly, the CIA needs its head to be the chief

foreign intelligence adviser to the President. So I would not leave in that option for the President to determine. The bill creates slots for five new assistant DNIs. I think this is unnecessary. Five more "advise and consent" appointees are required. I don't know the motivation behind this and could be persuaded. But as one who was indirectly accused in rather emotional times that my very appointment would politicize the intelligence community, I have stronger views on this than others might have. I don't think the intelligence community should have that many political appointees. I don't know what the assignments would be but when I see five new Assistant Secretaries, I think of five new fiefdoms growing up somewhere.

I like giving the Director more control over the community budget, and the bill does this effectively.

On another front, I think there is far too much reporting. I talked to some friends in the retired intelligence officers association, and they told me there were more than 50 references on reporting to committees. That is excessive.

The Congress should be informed, fully informed, but I don't believe Congress ought to micromanage the intelligence business. An example of overreporting and/or micromanaging is found on page 31 of the bill where the Director must advise two committees "of any proposed agreement governing the relationship between any entity of the intelligence community and any foreign intelligence or internal security service of a foreign government before such agreement takes effect."

That language is far too broad. I don't believe that kind of intimate disclosure is essential to do what this committee is properly trying to do, to be sure that our intelligence community is responsive to the rights of Americans and stays strong.

Though it is difficult to quantify information that one doesn't get, I know that some U.S. sources are drying up because foreign services don't believe that the U.S. Congress can keep secrets, in spite of the good record of this committee. They are concerned, believing, rightly or wrongly, that if journalists get their hands today on classified information, that those journalists are going to be free to print it.

They are also concerned about some of our counterintelligence legislation. We go to capture a guy who has tried to sell secrets and the law requires that you have got to make public the very information the man was trying to sell to get a conviction. Liaison services are understandably concerned about cooperating with the intelligence community in the United States.

This section requiring Congress to micromanage the sensitive relationships we have with foreign intelligence cannot help but heighten concern.

Nothing in the bill addresses itself to imposing proper security oaths or security procedures on the staffs of Members of Congress. I know this is sensitive, but I feel strongly about it. During special hearings in 19—, it was my understanding the investigatory committees required clearances, or at least went through the clearance procedures. Now, to make balance in this legislation, I think some consideration should be given to this. Fairly or unfairly, people abroad whose cooperation we need will be very wary and not fully

cooperate if they feel that every detail of a sensitive relationship is to be aired outside the intelligence community.

A few other concerns, if I might.

The bill put into law a clarion call for the so-called whistleblower to come forward. Is this concept only to apply to intelligence or is it going to go into all legislation in the future? If not, why not? The intelligence community doesn't need to be singled out. Do we say to some guy, look if you see something wrong in the bowels of whatever bureau it might be the law says you're to go around the management?

And finally the bill, still presents too grim a picture of where our intelligence community is at, however improved this draft of S. 2525 is.

For example page 93, section 202(2),

> Illegal or improper activities have undermined due process of law, inhibited the exercise of freedom of speech, press, assembly, and association, invaded the privacy of individuals and impaired the integrity of free institutions.

Things were wrong, but they've long since been corrected. This kind of condemnatory language exacerbates the problem of gaining support from the American people for the proper functions of the intelligence community. Why is it required as we legislate for the future?

Mistakes were made. In my view, they have long since been corrected, and I would say that great credit for this goes to my predecessor as Director, Bill Colby.

But the bill connotes to me, that the Congress feels many problems still exist. I know many Senators don't feel this way, and I just hope that this committee can take a look at some of this language that will continue to throw a cloud over intelligence at a time in our history when, God knows, we need an intelligence capability second to none.

If we are going to have the condemnatory statements, I would like to see a little more rhetoric in there emphasizing the need for intelligence. We are living in troubled times. The Soviet Union is in a position to pass us in military might. Strategic parity is a very different situation than we had a few years ago. We need foreign intelligence now more than ever, and yet we appear to be tying the hands of our intelligence community, and our counterintelligence people beyond what is required.

I hoped the legislation would find ways to strengthen intelligence. I submitted a letter to the Senate urging legislation to provide better cover for those who continue to risk their lives serving abroad and better security provisions. I think this committee has done a fantastic job on security other committees have not. Who knows when the country will return to a very emotional climate? We would all concede that when that climate was very emotional, there was a lack of security. Not just on the Hill, but in the CIA and across the community. I am concerned about the restriction on Presidential authority.

A couple of references: inspectors to inspect the inspectors; the National Security Council to report to Congress. That seems to me to be a major imposition on Presidential power.

Advance notice of special activities: I find some of the definitions too confining, and what of the question of defining a "democratic" government. Every government that I dealt with at the U.N. was a Democratic Peoples Republic but most have yet to have a first election or a first sign of respect for any of the fundamental human rights. I am afraid that these definitions can indeed be confining in the future.

I am concerned, about overrestriction on who can be used as an asset. What prostitution of academia is there if a teacher feels strongly about his country and wants to cooperate and needs expense money if he is going on some visit to some outlying place in some country from which the intelligence community needs information? What is so sacrosanct about academia that a teacher should be denied his rights to cooperate, if he wants to? These restrictions shouldn't be as tight as they are.

President Ford promulgated a good, strong, Executive order. I think President Carter followed in the same vein. The orders took care of most of the problems. Obviously the committee has felt all along that it needs legislation, and I don't blindly oppose any legislation at all. I think maybe some is required, although I do think the problem that motivated this in the beginning is taken care of.

But I am opposed to too much regulation, too much reporting, too much restriction. I feel confident that the intelligence business is under control, respecting the rights of American citizens. Let's keep it that way, but let's not unduly tie the hands of the President, and let's not further handicap our intelligence agencies.

And last, let's understand that we are living in a world where we can protect and guarantee the freedom of our open society only by keeping secret some relationships and some information.

Thank you, Mr. Chairman.

Senator HUDDLESTON. Let me, for the record, thank you very much, Mr. Bush, for your very sincere statement based on a great deal of experience.

Let me state for the record, however, that on the matter of staff clearances, the staff of the committee does have clearances.

Mr. BUSH. Is it in this legislation?

Senator HUDDLESTON. It is in the rules, in Senate Resolution 400.

Mr. BUSH. Maybe that would obviate the need for it to be in the legislation, Senator, but what I was addressing myself to is that there are restrictions and controls, but nothing in legislation that codifies the need for security through proper clearances.

Senator HUDDLESTON. I think it is a very good point to which we will give further consideration.

Mr. BUSH. Thank you, sir.

Senator HUDDLESTON. Mr. Knoche.

STATEMENT OF HON. E. HENRY KNOCHE, FORMER DEPUTY DIRECTOR OF CENTRAL INTELLIGENCE

Mr. KNOCHE. Thank you, Senator Huddleston. I appreciate the opportunity to appear before this committee today to discuss matters relating to American intelligence activities and their future.

I believe the Senate Select Committee on Intelligence since its inception in 1976 has been constructive and perceptive in develop-

ing a framework for responsible congressional oversight of our intelligence activities.

I know also that our intelligence officials have been equally constructive and responsible in helping you to develop that framework.

And I know, too, that the dedicated men and women of the intelligence profession can be counted on to follow the guidelines and standards that are set for them in the conduct of their work.

I commend the committee for its plans to make as subjects for public discussion the crucial questions relating to the future of our country's intelligence efforts. There are many concerns in need of popular debate and understanding.

The purpose of intelligence is to acquire information and render assessments of foreign situations and prospects so that wise foreign policy and defense plans can be developed by our Government.

To the extent that the intelligence job is done well, American policies will be informed and effective. To the extent that the intelligence job is done well, the greater the chances the peace will be kept.

This is not a perfect world. And in such a world, to acquire the necessary information and exert American influence in the interests of stability abroad, American intelligence, primarily the CIA, must be capable of making the difference, always by using bold and imaginative methods.

Responsible Americans recognize the importance of the intelligence function. They know we cannot afford to be blind and deaf in a complex, potentially hostile world.

The question for all of us is not whether we should have an intelligence arm as part of our society. Granted the essential nature of intelligence, the basic questions are: How do we keep intelligence under control in an open, democratic society; and how do we insure that our intelligence arm is kept effective, not unduly impaired by the controls?

To deal with the first question concerning control, two Executive orders, one by President Ford in 1976, and another by President Carter earlier this year, have set new guidelines. This committee, with its proposed bill S. 2525 would codify in law a host of principles and standards. And internally within the intelligence community, new strictures and controls in keeping with modern standards and values have been part of the scene since 1973 when CIA Director Bill Colby personally authored and issued new directives to insure the propriety of various intelligence activities. Under George Bush, the process continued. Much progress has been made, and it continues, still.

On the second question about the effectiveness of intelligence, much remains to be done, and I frankly see little in the proposed bill which deals with the question of effectiveness.

I have four areas of concern that relate to this question of effectiveness. I think they are worthy of attention by this committee, by the intelligence community, and by the public.

First is in the area of the balancing of rights, as mentioned by Chairman Bayh at the outset. No one wants intelligence activities that harm the rights of our citizens. But the threats of foreign

intelligence efforts in espionage, subversion and sabotage endanger our society as a whole.

For almost 30 years after the end of World War II, American intelligence had a virtual carte blanche to decide on steps to protect Americans from foreign intelligence threats. In our system of checks and balances, there were few checks or balances that operated in this field. Some abuses ensued. The pendulum has now swung to concern about individual rights.

Finding the middle ground in guarding individual rights without sacrificing tbe safety of our society is not an easy task. I believe titles II and III of S. 2525 carry safeguards on both counts and should prove generally wise for the future.

Nevertheless, I see opportunity in extended public discussion of this crucial topic of how to balance the rights. The goal is to preserve individual freedom while using our intelligence function prudently and effectively to preserve the national well-being.

The second area has to do with compliance versus effectiveness. In the past year or two, emphasis in the intelligence community and in oversight bodies such as your own has been on seeing to it that our intelligence activities are in compliance with the newly established guidelines and rules. Little study has been made of the impact of the guidelines and restraints. Are we more vulnerable as a society now than before to the threat of foreign intelligence operations? Has it been made less likely that we can acquire some of the kinds of foreign information so essential to the country's needs? I would like to see improved machinery established to keep these matters under a continuing review.

I have a major concern about the future of intelligence effectiveness because of the extent of explicit reporting requirements and detail in title I of S. 2525. The detail comes in the procedural requirements to inform various congressional and executive authorities about sensitive intelligence matters, particularly about sensitive intelligence collection. I recognize a need to insure that the overseers of our intelligence have a sufficiency of information to weigh competing sensitivities. But, as the committee knows, successful intelligence collection and counterintelligence depend on the willingness of foreigners to impart secret information to us. Often, their lives depend upon our ability to insure that their names and cooperation are fully protected from disclosure. I am concerned that these detailed reporting requirements of S. 2525 will, in the long run, discourage foreign sources and organizations from cooperating with American intelligence, the same point made by Mr. Bush. In their view, the risks of disclosure and personal safety are apt to loom large and their cooperation not felt to be worth the candle. Experience has shown that there are ways to mitigate a result that could be disastrous to the future of intelligence.

The third area has to do with protection of intelligence sources and methods. Our intelligence sources and methods are part of the national treasure. They are valuable and they are fragile. Once disclosed, our sources can be denied to us and our methods thwarted by relatively simple actions by foreign authorities. The law currently lacks teeth in seeing to it that these sources and methods are adequately protected from unauthorized disclosure. This is a

complex area and I know that a subcommittee of this committee is examining the complexities and their pros and cons. I would merely point out that in the effort to compile a new statute governing intelligence, S. 2525 does not do much to redress the current weakness in this area.

The need to protect intelligence sources and methods from disclosure has complicated our country's judicial processes from time to time. Title III of S. 2525 establishes principles that will better relate intelligence and the courts, including the provision that there be a judicial security system to safeguard the confidentiality of sensitive intelligence matters. The latest Executive order and S. 2525 both call for greater participation by the Attorney General in deliberations concerning sensitive intelligence matters. These are healthy first steps in addressing judicial and intelligence concerns.

The fourth and concluding area of concern about effectiveness has to do with the viability of CIA as an institution and intelligence as a profession. I am concerned about the future of CIA as an institution. I think most Americans agree on the importance of having a skilled and objective information clearinghouse and analytical center to illuminate the making of foreign policy. The importance and priority of this work have long attracted some of the best of young Americans who have dedicated themselves to the intelligence profession as a career, convinced of its importance to the national well being. With the details of S. 2525 regarding restraints, oversight reporting procedures and legal liabilities, I am concerned that many bright young Americans will recoil from employment in the profession. The overall effect, I fear, is to create an image of intelligence work as unseemly, unworthy.

I am also concerned about the ability of CIA to retain its organizational integrity and spirit as we look to the future. I believe it to be in the public interest to concentrate more effort on ways to shore up and enchance CIA as an essential element of our Government. America needs a competent intelligence agency capable of taking the lead within the intelligence community in producing sound and objective analysis, free of departmental influences, in developing new and advanced technology for intelligence purposes, and in carrying out clandestine intelligence activities as required and approved by our Government. These are fundamental CIA responsibilities. I believe they have been carried out well in the main, and America should not be deprived of this capability by organizational change or fragmentation.

Recent executive and congressional studies have tended to center on the question of how to enhance the powers of the Director of Central Intelligence. To the extent that he is expected to concentrate on communitywide issues, his ties to CIA could lessen, and his attention to its needs could suffer. Institutional luster and effectiveness could be lost in this process. CIA needs the most effective possible control at the top; oversight within and without; encouragement of creativity and ingenuity; and to improve itself as the authoritative objective reporter and assessor of the foreign scene. To meet these goals, CIA requires the support and direction of a leader whose time and energy are not spread thin by the competing demands of interagency issues.

Thank you, Mr. Chairman.

Senator HUDDLESTON. Thank you, Mr. Knoche, and again, thanks to all three of you for very well prepared presentations that reflect the experience that each of you has had in the actual operations of our intelligence agencies.

I think you all have put your finger on what is a major objective of this committee and of this legislation and one that we want to continue to emphasize, and that is our desire to strengthen and improve our intelligence operations, make them more effective, more efficient. That has been as I say, one of the major objectives of our legislation. It is through comment that we get from individuals who are confronted with the problems that will enable us, I think, to refine that effort and make it successful. That is our hope.

We are anticipating a vote at 11 o'clock, which is just now past, and the bells have not sounded as yet. We will proceed on the questioning on a 10-minute basis, if that is satisfactory with the other members of the panel.

I think all of you have expressed some very serious concerns about the legislation and about what it will in fact accomplish. I think, Mr. Colby, you have stated again your advocacy of greater dissemination of intelligence information to the American public. Today you seem to suggest that such information should be filtered through the Congress or through the universities and the media in order that foreign governments would not necessarily react too negatively. Could you be more specific as to just how that might work, how we might protect our sources and methods while at the same time disseminating information?

Mr. COLBY. Right. I think, Mr. Chairman, that we could protect the sources without too much trouble in most cases, not all cases. There are some cases where you really just couldn't reveal the substance without clearly——

Senator HUDDLESTON. Sometimes the information itself reveals the source.

Mr. COLBY. But I think we are talking about a fairly small percentage, quite frankly. I think you could do it by gradually developing a reputation for integrity and accuracy in the statement without accompanying the statement with the source, that when you first started people might not believe it, but after a little while it would become clear that this is pretty solid stuff, and the details of how we learned it, how we came to that conclusion would not necessarily have to be revealed.

That is only half the problem, though, obviously, because it clearly is impossible for the official U.S. Government to give an assessment of a foreign political leader that says very negative things about him, even though that might be a common belief and a well-founded belief in terms of information and assessment. Therefore that kind of diplomatic reaction has normally restrained us from letting that kind of thing loose. Sometimes it has come out in the press as a leak, and particularly because of its sensational quality sometimes, this has added to its significance.

I think in this situation if we had a clearly defined set of intermediaries who would take the information, again without the source, and would not attribute it to an official source, an official U.S. individual but be content to use their usual source protection

techniques of referring to a reliable source, that quite a lot of this material again could be released. Again, not all of it, obviously, but we are talking about degrees and a basic direction.

One reason I am particularly interested in this, aside from the positive value it can give our people in understanding the nature of the world, is that gradually the people would become impressed and aware that there is a new level of knowledge of the events of the world that is coming out of this intelligence machine in some indirect way. It would reinforce the importance of knowledge as we face the problems of the future, and knowing that the work of the intelligence machinery is to produce knowledge, the increased knowledge would reflect to the benefit of the intelligence business.

I think the increased knowledge of our citizens, the debates about the projections of future Soviet forces, the fact that we don't debate about present Soviet forces at all, those are well established and understood. These kinds of information I think have helped us to debate and have helped improve the reputation of intelligence as a means to help us understand better what is happening.

I don't say this is an easy one.

Senator HUDDLESTON. The press does an excellent job of protecting its own sources.

Mr. COLBY. Right.

Senator HUDDLESTON. Sometimes I think your sources, or the intelligence community sources, may become part of the story, and they may not have the same diligence in attempting to protect those sources.

Mr. COLBY. Well, unfortunately that is the case, that they are apt to focus on the still hidden fact and work on identifying that, but I think that would be just part of the procedure that it would be necessary to work out.

Senator HUDDLESTON. Let me approach one area on which there is some disagreement at the table and some disagreement within our committee, and some disagreement within the intelligence community—which make it about par for the course—and that is the role of the Director of National Intelligence.

As you know, we have provided a mechanism whereby he could be separated from the CIA, be established as a separate entity over all intelligence operations. Mr. Bush, you are very strong in your opinion that he should continue to be the operating head of the CIA, that he needs those troops or that backup to give him the proper force that he ought to have.

Is there any problem throughout the community, though, feeling that maybe in that position he would favor reports from the CIA or favor operations of the CIA over operations of the other intelligence agencies?

Do you see that as a problem?

Mr. BUSH. Yes, sir. I don't think it is a substantive problem. I think it is a cosmetic problem. I do believe that that exists in the military, some feeling that the Director, being that close to the Agency, will favor CIA.

But, Senator Huddleston, my concept is that the largely civilian intelligence component, the CIA, really should be the bulwark of support for the Director.

And I think if he is down there, orbiting around the Executive Office Building with DIA, CIA, NSA, and all the intelligence services, service intelligence agencies reporting in to him, all having other bosses, I see him as kind of naked there, just a figurehead with no real support. From the Director's standpoint, no one element of the community is going to be directly responsive to him. And I think a person that can delegate effectively could still handle the inordinate time demands.

There is something to be said from the CIA's standpoint that if their Director is the top foreign intelligence officer for the President, that gives the Agency a certain esprit, a certain career approach that I think is a very valuable thing. If the Director is just the Director of CIA, and is reporting, just as many other intelligence people are reporting, to the DNI, you diminish the very important and should remain the key role in the foreign intelligence business that CIA has.

Senator HUDDLESTON. Go ahead, Hank.

Mr. KNOCHE. Well, let me elaborate my own concern. I didn't bring it out in the statement, but I don't think there is a disagreement between George Bush and myself on this at all. I proceed from the assumption that you need talented, highly competent, capable people to inhabit a place like CIA, which is the continuity center of the intelligence profession. Careers are spent there, and special expertise and skills are developed. To keep those people, to attract them in the first place and keep them, requires a sense of organizational integrity, a sense of order, of future, and not one of fragmentation.

Now, my problem is that when you heap new responsibilities on a DNI, like, for instance, coordinating the production of national intelligence, he thereupon has to set up machinery to produce it, and he will take from the CIA the intelligence analysis machinery of the CIA to do that job. That leaves CIA bereft, and in a sense of organizational confusion as to where they fit.

I would much prefer to see the powers of the Director enhanced by enhancing the powers of the CIA. Fasten upon the Agency the responsibility to coordinate production, to coordinate R. & D., to coordinate S. & T., to provide services of common concern, to set sources and methods guidance and criteria, to set standards for these things, and let him take his powers from the powers that accrue to the Agency. If you put the power solely in the hands of one man, always heaping more and more upon him, I think that you do damage to the institution of CIA as the heart and center of the intelligence profession, and you run the risk of creating a man who may in the long run be a bit too powerful in a very delicate area. That is my concern.

Mr. BUSH. May I add one thing, sir?

Senator HUDDLESTON. Yes.

Mr. BUSH. I think your legislation takes care of some of the question you raise because it locks in the diversity of assessment that hasn't been there.

So the possibility of abuse has been eliminated in the event a Director said to the NFIB, "all right, every military component or civilian component on this board feels one way, but I am the

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Director. I will now submit this assessment, leaving out your opinion."

Today that's taken care of, so that is one reason less to have the DNI separated from the CIA in my view.

Senator HUDDLESTON. We will have to recess now for about 10 minutes to vote, and then we will continue with the questioning.

Thank you.

[A brief recess was taken.]

The CHAIRMAN. Shall we reconvene, please.

I understand a question has been asked that was very much on my mind when I left, and I understand at least that Mr. Bush has directed himself to that issue, I don't know whether you other gentlemen have or not, and that was the very strong feeling expressed yesterday by Clark Clifford that if we are going to reorganize the intelligence community, the Director of National Intelligence should be apart from any of the specific agencies so that he could play a coordinating role. He pointed out that that was the way the original National Security Act that was passed back in 1947, but it just never worked that way.

Now, I understand, Mr. Bush, you feel that that should not be the case.

Mr. BUSH. Strongly.

The CHAIRMAN. Mr. Knoche, do you feel that same way?

Mr. KNOCHE. What I feel, sir, is that the additional powers and responsibilities that the committee is interested in seeing to it become part of the statute should accrue to the CIA as an institution, and that the Director of CIA should draw those powers from his agency. He should be, as the head of CIA, the principal adviser to the President. He can undertake certain coordination responsibilities in that role, he can be responsible for tasking, but he can be relieved of some of the responsibilities of, I think, in what he is confronted. I think the OMB, for example, could play a greater role in helping in the budgetary process. The problem, Senator Bayh, if I can just repeat what I said earlier while you were out, the problem is that when you put these responsibilities as worded in the bill on a DNI, somehow or other divorced from CIA to some extent, he must take some of the machinery of CIA with him to accomplish certain tasks like the production of national intelligence, the coordination of national intelligence. That begins to disturb the warp and woof of the organization of CIA, which is the heart and soul of the intelligence profession, the intelligence effort, provides the continuity. It is free of departmental influences and so on.

So, in the interest of maintaining the integrity and a feeling of future on behalf of the people that work in CIA, I would be more interested in seeing this man's powers enhanced by enhancing the powers of the agency that he heads.

The CHAIRMAN. Mr. Colby, do you have thoughts on that?

Mr. COLBY. I think it is important, Mr. Chairman, that the Director of National Intelligence be the Director of CIA. I recognize the statute's attempt to cut the baby in half and leave the question a little bit open, but I think it is very important, for the reasons that Mr. Bush has outlined, that the Director have the substantive base on which to operate, that he be able to call directly the

analyst on "East Zamboangan" affairs and not have to go through a hierarchical chain to find out what happened there yesterday or last night or in the middle of the morning or whatever—that he can use the organization as his.

I think the very name of the Agency, Central Intelligence Agency, was designed to provide that kind of a service, not for the different departments, but for the President and the National Security Council. It was supposed to be above the other departmental intelligence centers. It wasn't a co-equal. It is a central intelligence agency and not something off by itself.

I think the danger of separating him is not that you reduce CIA to one among the others, but mainly, that you isolate the Director, you put him into, I think, without that kind of a base, you put him into the White House orbit. He begins to think of intelligence as a support to policy rather than a way of trying to decide which policy should be adopted, and I think that you could adversely affect his objectivity in the use of the independent intelligence machinery of the Government.

As Mr. Bush says, I think your provisions for requiring the views of the other agencies to be reported protects the diversity that you are interested in, and the issue of whether he will favor CIA, I don't think he will favor it if it doesn't do good service for him. He won't favor it just because he is there. And therefore I think I would leave him very much as the Director of CIA.

The CHAIRMAN. You are aware, of course, that other intelligence agencies or parts of the broader community are concerned about objectivity in their product, how it is assessed, when you have the person who is the Director of National Intelligence as head of CIA.

How do you talk about giving him more power? What role does NSA play? What do we do with our Defense Intelligence Agency? All those people feel that they play—and I think we all admit they play—a very fundamental role in the overall intelligence picture.

Could you not say the same thing about the importance of those agencies being over a part of CIA to follow your logic?

Mr. COLBY. I think each of them has its function, each of them has its particular chief to report to. There is an arrangement where they all sit around the table and argue about the different things that have to be argued about, be they substantive or be they program decisions, and in your bill and in the present Executive order, if one of the agencies feels he is not getting a fair shake, he has another very clear line of authority to go up to complain. He can go to his Secretary of Defense, or his Secretary of State, or whatever, and he can go right into the President's office. He can't be kept out of the President's office on an issue like that, and I really think that this favoritism business is kind of a false issue. I think you have got to accept the fact that there will be differences of opinion on decisions made, but that dissents have a way of getting to the top, and they are incorporated in the machinery, and therefore there is no problem of favoritism. If you get arrant favoritism by one particular Director, I am sure the opposition will build up and begin to sit and fester on the President's desk until he does something about it. So I really don't see it as a major issue.

The CHAIRMAN. Would any of the others of you want to comment?

I think the inference that you gave which went to a question I raised yesterday was how we could ensure a greater degree of certainty that intelligence information was used to make policy, not support policy. In hindsight one wonders in some instances. Do you feel that by divorcing the DNI from the CIA you increase the possibility of this intelligence product being used as a rationalization for an administration's policy rather than the formulation of it?

Mr. COLBY. Very much so. I think that the tradition of CIA—and it is a very strong tradition among its officer and analysts—is that they are supposed to call the shots as they see them, and frankly, the physical location of CIA that Allen Dulles chose, just far enough away from the center of Washington to be separate from some of its political cockfighting, I think encourages that. A director who has his main base out there knows that he has to go out there and look at the world and then go into town as an outsider when he goes into the National Security Council, to the congressional committees or whatever. He is not located in, as Mr. Bush says, the Executive Office Building, pulsating with the current political dynamics of that office, which properly does respond to the political problems that they face every day. And I think the comment that you get in the corridors in the two places is quite different and would lead in placing him totally in the Executive Office Building, to an identification with the national security structure and the policy structure rather than an independent position of being on the outside, called in to give his assessment, contribute what he can but then return to his base of information and knowledge outside of the political stream.

The CHAIRMAN. Do you other gentlemen have any thoughts on that?

Mr. KNOCHE. Just one, Mr. Chairman, and that is that I sense a spirit in reading this draft statute that there is a great concern as to how one preserves dissent and differing points of view in the intelligence product, and I understand that. But in practical terms, in real life, over the last several years we have all grown used to ensuring that differing points of view are put forward.

Most of the questions that get asked these days by Presidents and National Security Advisers and Secretaries of State and Defense are so complicated and sophisticated that they run beyond factual intelligence data in responding to them. You have to put together assessments and evaluations, rather deep and complex, and there is a premium on serving up ranges of alternatives and points of view when you respond to questions like that.

A Director has to insure that he votes his stock and that he tells the President or the asker of the question where he stands on that range. But the procedures now are such that differing points of view are well preserved and presented, I think.

The CHAIRMAN. Could I ask one other question that I think is closely related to what you said about the complexity of some of these questions, and I tried to pick up where you had started because that was a question I had in my mind that was raised yesterday, about the complexity of the questions. I have had this in mind in some of the discussions I have had since becoming the chairman—the seat is still not warm. I am not yet fully recovered.

I wonder if anyone gets recovered from the enormity of the job. It is quite a challenge, and I think reading your testimony one gets the idea that you share the beliefs addressed by several of us yesterday, that we hope that these charters can provide a new chapter in the development of the intelligence community, that the misdeeds of yesterday are over. We can learn from them, to keep from making the same mistakes again, to provide ways to be better in our oversight functions and to try to draw the guidelines more carefully. We are also looking for ways to be positive, and I must say I have found nothing but cooperation from the intelligence people I have talked to since I have been on this committee and as chairman of it. We haven't always agreed as we have tried to put the electronic surveillance bill together or the charters bill that we are just starting now as to where you should draw the line, but there has been a good faith effort to try to reconcile differences, and I think there has been a good reporting as far as our oversight function is concerned.

But the problems are complex and one of the concerns I have sort of sensed, without naming anybody, is that we have a tremendous emphasis on technological collection, that if the President of the United States says how many tanks are within how many miles of the border, bang, you can get that information to him instantaneously. But we are weak, or at least we do not have the same resources, human resources, as the result of long-term planning, that somebody can say not only how many tanks are there, but the following discussion took place in the Politburo, and it appears that the intention is to do this and that with those tanks. I mean, that is not a two plus two equals four problem, but it does require long-range planning. Could you just give me your impression, those of you who have sat right there and had a chance to weigh this, should we be doing more now to prepare for the next generation of DNIs and the next generation of Presidents, to be able to have human resources that we can count on to a greater degree than is now the case? Do you feel that that weakness is not a weakness, that it doesn't exist, that we have adequate human resources out there, assets?

Could you just give us your general appraisal of that?

Mr. BUSH. I would be glad to start, Senator Bayh. The scientific and technological capabilities of the intelligence community, communitywide are fantastic. They can do many of the things you have just mentioned, and many, many more, mindboggling, highly sensitive, important efforts. Adversaries do not know how good some of it is, frankly.

But when you go to measure the intent of foreign leaders, science and technology alone can't give you what you need to advise the policymakers in this Government. They can't give the best judgment on intent. So it concerns me, then, that human sources abroad are uncertain their identity will be protected. The totality of our human intelligence depends on full cooperation with whatever liaison services exist. The services are now concerned we can't fully protect the relationship with them. These concerns result in the fact that the human input is diminished.

One of the big debates today is about what is the intention of the Soviet Union? Are they seeking superiority? Are they seeking

parity? What are they doing in Africa with their Cuban surrogates? What is this intent? Are they really trying to rectify a right in the Ogaden, or are they seeking permanent hegemony?

This can't be measured by some machine. The thrust of my testimony is that the committee ought to be very careful that it doesn't, while trying to correct a wrong done in the 1950's, tie the hands in this human intelligence collection for the 1970's and 1980's.

In addressing yourself to this problem, you are dealing with a very fundamental issue because human intelligence is terribly important. That is why some of the thrust of my remarks might have seemed negative to the staff who have worked for months on this legislation. But some of my comments come from the fact that I am afraid human sources are drying up. Admittedly it is hard to document what you don't get. How do you measure what you don't get? How do you quantify it?

But I think if we were in some executive session that not only myself but Bill Colby and Hank Knoche and others could give you quite an agenda of where there is worry about input from other services.

So my view is that as you fully shape this legislation, you ought to preserve the secrecy that is required in order to have human cooperation.

Mr. COLBY. Mr. Chairman, I agree fully with Mr. Bush's points. We have frightened an awful lot of people in the world into believing that Americans can't keep secrets, and we do need to give a signal to those people in the world that we can keep some secrets, the important ones. That is why I recommend this secrecy legislation. I think it could be used to rebuild a certain amount of confidence that has been lost. I think we can actually go back to a lot of those people today and say look, you were scared and we were scared, but let's look at what actually came out, because there are very few names that came out. There is very little discussion of the role of foreign intelligence services that came out.

We have had 2 years of a very close supervision by this committee, and nothing untoward has come out. So we can rebuild that confidence. But we need to have a handle, a signal to go back to these people around the world with that message.

Now, second, let's talk about the growth of technological intelligence. The kind of information that you can give a president about how many tanks are where, we could not have given 15 years ago, a mere 15 years ago. We wouldn't have been able to give him anything like that kind of knowledge. We were scrambling with vague estimates as to whether there were 1,000 or 5,000 or what, and we would have rumors and stories and all the rest of it.

Today we have that kind of information precisely. Now, that is a triumph of the development of intelligence, and a triumph in the development of technology. There is no question about it. It does leave some questions open.

Out of this, that triumph, we do know that certain other countries have options, and we know those very firmly, thanks to what we can see and hear and feel and listen to and all the rest of it through technology. So we do have an additional input into the

intention area because we can see what options other countries have that we really would not have been aware of at that time.

But, in the future, I think that we will need human source intelligence. Obviously we are going to need to penetrate societies that insist on keeping secrets and conducting their political affairs in secret, their military planning in secret, which might be dangerous to us. We are going to have to reach for brave people of that country who will tell us those secrets. We have got to make the guarantees that we will protect them.

And so human source intelligence, with the training in the languages and the cultures and all the techniques of understanding these people is going to be essential.

I do say, however, that there is another area that we bave to prosecute, and that in my mind will be the exciting development of intelligence in the next 10 and 20 years, and that is in the analytical area, the matching together not just of raw facts, of what was said in the Politburo yesterday, but putting that against an appreciation of the political structure, the economic limitations, the sociological attitudes, the geographic features, putting them all together and making a reasoned judgment that whatever that Politburo member may have said, he either can or can't actually carry it out. Then we begin to get not what is his intention, but what is he likely to do, which is a different dimension beyond the raw intelligence input of what he said he wanted to do. And that is going to depend upon psychology and all tbe other sciences. This is the area that I think we are going to develop enormously, our handling and understanding of information. We are going to have to rejigger the machinery to produce better understanding of foreign cultures. The language training in this country is a disaster at the moment, as we all know. The cultural understanding of different kinds of peoples and dynamics of other societies, we have really got to work on very hard.

And those two areas, the growth of the analytical discipline, the improvement of the human source collection I think are the two major areas we are going to have to move toward.

Mr. KNOCHE. Mr. Chairman, I agree with all the points that both George Bush and Bill Colby have just made, and let me just elaborate one additional point. You mentioned the need for long-term planning in the human collection field.

I think we have had the benefits of long-term planning, but I just wanted to make sure the committee is aware of the extreme difficulty in this area. If the world was all made of chocolate syrup, we would be able to hire as agents of penetration cabinet members in the societies where secrets are kept and protected so well. It doesn't happen that way. And so we have to search out in backwater areas all over the world potential agents and sources who are perhaps on a career path in the foreign ministry, a low level official in a foreign embassy in a place like Timbuktu, to fictionalize it the best I can, and then bope that that person will stay loyal to us, convinced of the importance of his work, that he will stay on a career path that takes him ever upward in his profession so that at some point in the future he is in position to give us the kind of information we need.

Senator HUDDLESTON. I might interject here, Mr. Chairman, it is our intention that we will have some executive sessions on some of these specific points to find out just how they apply to actual operations, and I hope that you gentleman would be available to us and other members of the community. Our concern is that proper balance, and as I have said before, our concern is that whatever we do is workable. We won't accomplish anything if we write into law things that just simply don't work.

So I think we can best address some of those problems in closed session.

The CHAIRMAN. The questions and specifics of this area are very sensitive, but I gather that all of you gentlemen feel very strongly that this, the human area, is an area that we ignore at our peril.

Mr. COLBY. Well, and I think each of us can say without identification, I can say up until the time I left that I am specifically aware of a certain number of cases of people who have said, I cannot work with you any longer or for you any longer, foreigners. I cannot take the risk. There is so much excitement back there in Washington and there is so much leakage. You know, it is my life and it is my family. I don't know what your politics is, but I just can't take that risk any longer. And we—I am aware of people who said that, and so we lost that potential.

I am also aware of certain, obviously, foreign intelligence services who crimped down on what they gave us. They used to give us very sensitive stuff, and they weren't giving us quite such sensitive stuff, and that—without identification, and I would have a hard time remembering the specific identification today, but I know that that did exist.

The CHAIRMAN. This committee has been very sensitive about the security question, and I think you are accurate, in the 2 years we have been in operation there haven't been any leaks in this committee. There has been information that has been public.

Senator HUDDLESTON. Senator—I have nothing else.

Senator Chafee?

Senator CHAFEE. I would ask each of you to comment on a point Mr. Clifford made yesterday that he felt that the act went too far in prohibiting certain activities, that it is forbidden to murder foreign leaders, and Mr. Colby said on page 6 of his testimony, that he approved the definitions of proscribed behavior. However, I am not sure that that puts you at odds with Mr. Clifford, who said that he just didn't think that we should list all the things you are prohibited from doing because first of all he felt that was demeaning to our Nation, that we have a law that you can't murder foreign leaders, and also he felt that by listing the things you can't do, that by implication that left approval for the balance. You could murder a semileader, apparently.

Bill, do you want to comment on that?

Mr. COLBY. Right. I agree in a way with Mr. Clifford on that, but I think there has been so much noise created about these subjects that the simplest way to solve it is to write it, very clearly, write it right down and get it over with.

Senator CHAFEE. But then it gets into the problem that you and Mr. Bush raised, that you can't overthrow a democratic government.

Mr. COLBY. That one I don't agree with, of course, is that I can't find out what he is really talking about, but simple things like torture and support of human rights violations, assassination, just put them off the edge of the limit, make it clear what the limits are.

There is a benefit in that, to not only the public feeling about intelligence. There is a benefit in getting the word actually down to that last intelligence officer out at the end of the line someplace. If in his training this has been made very clear to him and not just generally understood that those things are off limits, but very specifically stated, when he goes out to the end of the world and is all by himself and somebody comes up to him, he just rejects it out of hand. He doesn't even send in a message to Washington saying well, do you want to do this? No, he just says no, and it helps in the running of the Agency.

Senator CHAFEE. Mr. Bush?

Mr. BUSH. I agree with concerns of Hon. Clark Clifford. In an understandable effort to spell out "thou shalt nots," particularly in covert action, if you follow through, you may run into some things that you just simply can't foresee. Mr. Clifford put his finger on this, one of my main concerns about this legislation. In an effort to prohibit certain things, you run into enormous complications.

Senator CHAFEE. You are talking about the point you made about teachers?

Mr. BUSH. Mr. Clifford put his finger on a very, very important point.

Senator CHAFEE. Mr. Knoche?

Mr. KNOCHE. Well, Senator, I think the values and standards and circumstances change, and I think—I have my problem in seeing this embodied in statute. I think Bill Colby has a good point in the value of writing it down, as he puts it, but I wonder if in this area and others that the bill addresses, whether there might not be a way to establish an expression of congressional oversight principles emanating from the two committees, standards, values, statements of concern, and then use your oversight responsibilities to hold the intelligence community to account on the basis of those principles that you establish and reexamine from time to time.

But in trying to codify these matters in law, I think there are some straightjackets that ensue, and I would add one other word that gets to this point and others in the bill. Bear in mind that the bill already itself is a pretty hefty document, extremely detailed, page after page. This will be translated over time into a whole series of rules and regulations within each agency and department of the intelligence community, and you will have a web, woven so tight around the average intelligence officer that I am afraid you are going to deaden his ability to think creatively and with ingenuity in getting the job done. He will be much more apt to keep his head down than to put forth ideas, suggestions, proposals that might be of value to the Congress and the executive to consider.

Senator CHAFEE. Well, thank you.

I just want to say I think the reflections you have given us on this act have been extremely helpful.

I would like to go back to Mr. Bush a minute. One of the points you made was, I got it that you would like to see one committee, in other words, a joint committee handle the oversight.

Mr. BUSH. I expressed the fact, sir, on that that I felt that a joint committee, something along the lines of the old Atomic Energy Committee, but barring that, one committee in each bouse. You have come a long way, sir, it seems to me, on that, but I still think consolidated oversight is the answer. You still have the appropriations process, as I understand it. I don't know what you do now on briefing the Foreign Relations Committee on special activities, but why shouldn't this committee have full responsibility for tbat kind of thing.

Senator CHAFEE. The other point I would like to make, that I hope we will get into in more detail, is the point that Bill Colby made about the failure of the balance of the U.S. Government to help in cover. I think we have all been stunned by that failure, and while I am not sure that would come up under this legislation, I think that would have to come up in another activity.

Mr. COLBY. I think a sentence is needed along the lines that the Agency can turn to the other agencies of the U.S. Government. We have the prohibitions in here about people they can't use. I would like the other side of the coin.

Senator CHAFEE. Yes.

Mr. COLBY. That they can get reasonable support from the other agencies of Government.

Mr. BUSH. Senator, could I respond, just by way of example?

Senator CHAFEE. Yes.

Mr. BUSH. I know anytime you suggest that you are not against torture or against mass destruction of property or against the support of international terrorists, it is a very, very delicate thing. Let me just hypothecate.

Senator CHAFEE. That doesn't mean you are for it.

Mr. BUSH. That's right.

Suppose a U.S. plane was hijacked, sitting in Cyprus. The way to free those American citizens was through a third party that was willing to go in and make a raid to free these citizens. Part of that plan was the destruction of the airplane, the tower that controlled the field, and let's also suppose that if any of these hijackers were captured this third party country was likely to use torture that was uncivilized. This was against international law. But suppose the President found it was in the interest of the United States to go in on the plan to free American citizens.

I worry whether this bill in an effort to bring civility to covert action, isn't going to—too tightly tie the hands of our Presidents. We are dealing more and more in the world with a new element, and that is terror. We must not render ourselves impotent in countering such terror.

I have reservations about these definitions. I would support what I think was the thrust of Mr. Clifford's testimony.

Senator CHAFEE. Is my time up? I have one more question.

Senator HUDDLESTON. Go ahead.

Senator CHAFEE. One more.

Mr. Clifford's general thrust yesterday was that instead of having a mass of specific prohibitions, that we have got to rely on

the oversight from the congressional committee, plus the administration, the President, and those working with him to provide or to operate in the best interests of the United States as reflected in our obtaining intelligence, and as reflected in protecting the individual rights of our citizens.

Now if both of those fail us, then the country is in pretty tough shape anyway. It was his thrust yesterday to look to these two groups to do the job rather than having it all written out in every detail within the legislation.

Do you agree with that?

I guess you do, Mr. Bush.

Mr. BUSH. Yes, sir.

Mr. KNOCHE. And I do too, sir.

Mr. COLBY. I think it is useful to write out some of it in legislation because I think that the people are going to insist on it, after all the excitement we have had about the investigations of the past, and I think that there is a public interest involved in outlining a new charter for the future and not just saying trust us, we will take care of it. I think it is, at this stage, a part of the business of reassuring our country that we do have a good intelligence service in both senses of the word good.

Senator CHAFEE. Thank you.

Thank you, Mr. Chairman.

Senator HUDDLESTON. Along the same line: One thing Mr. Clifford did say yesterday was that it is an important purpose of this legislation to eliminate some of the ambivalence under which our operations are now conducted, that they need some specificity, so those that are in the field as well as those who are directing them can know what the limitations are and within what parameters they are operating. That was one of our objectives in trying to have some specific prohibitions. We recognized the tension from the beginning between those who are charged with having to operate wanting some flexibility—and we recognize they need some flexibility—and also the need, as Bill Colby points out, to reassure the American people about the type of operation we are having.

Mr. COLBY. Mr. Chairman, I would just like to make one remark that I suspect that in the additional testimony you are going to get, you are going to get a long list of criticisms on exactly the opposite side of this argument, that you are going to be attacked with why do you let the Agency do this? This provision could allow them to do that, and all the rest of it. And frankly, I would like to, in some way, reserve a chance to come back on some of those things because I would hate to see this then be kicked around so broadly, so vigorously by the groups who are opposed to really almost any kind of activity of this nature, and then have a whole lot of additional restrictions set in. I think the committee in this, with a few exceptions that I have pointed out, has come to a remarkably good balance in its answer to this problem, and so I don't want to sort of say well, this is too tight, and then have it attacked as being much too loose, and then have it tightened up a lot. I think it is very well balanced right now, and it does indeed do what Mr. Clifford said, puts the main thrust on the continuing supervision, oversight by these committees, and on the executive branch review. That is just right on through it.

Senator HUDDLESTON. Well, I haven't made up my own mind, that going through this kind of procedure, without any prohibitions at all, we would have eliminated many of the so-called abuses that have occurred. Time passes, and different characters come onto the scene. It seems to me that the one thing lacking, maybe, in our previous operations was this very thing, that there were not clear definitions and responsibilities and parameters. That is partly what we are trying to do here.

I am very interested in how the suggestion of Bill Colby on cover would work. What would be the implications for other agencies if in fact they were required in some way to provide cover? How sensitive would that be to their particular operations if it were known that their personnel were in fact operatives for the CIA or other intelligence operations?

Is this a major problem?

Mr. COLBY. Well, if you phrase it in terms of the U.S. Government, which is what I am talking about, I don't think you are pinpointing anybody. I think you are taking away from some of them the ability to stand up and say in a pristine manner that they have nothing to do with that terrible business of intelligence, but the foreigners don't believe them anyway, and I really don't think you are losing anything by——

Senator HUDDLESTON. You think there is nothing wrong with an assumption on the part of foreign countries that all American employees, with whatever agency, potentially are there to gather information?

Mr. COLBY. You look at the record of the Peace Corps, which of course has not been touched by intelligence for 17 years or so, and how many of their people have been thrown out of countries as "intelligence agents"? I mean, that allegation is going to be around all through the world. Mrs. Gandhi, I noticed, is saying that we helped to overthrow—led to her defeat in the election. I haven't been involved, but I am almost certain that we had absolutely nothing to do with it. But she is going to use the name anyway. You are going to have that around. Just ignore it. Go do your business.

Senator CHAFEE. She managed to lose the election all by herself.

Mr. COLBY. She lost it all by herself, I am convinced.

Mr. BUSH. Mr. Bhutto parlayed into a massive plurality the claim that the CIA was involved against him in his election, now has other difficulties, but there was no truth the CIA was trying to manipulate his election. (Bhutto's argument). No truth in it at all. But the longer we have a sensational climate where myth replaces fact, as long as the climate is such where every little tidbit about CIA is voraciously devoured in the news, we are going to have these problems around the world. There is no complete remedy for this. Time takes care of some of it.

Senator HUDDLESTON. Are there not countries of which we assume that any representatives of their government or any government employee might be part of their intelligence?

Mr. COLBY. A lot of countries we are sure that they are.

Senator HUDDLESTON. So that wouldn't be unheard of.

Mr. KNOCHE. Senator Huddleston, I have a slightly different point of view on this cover business. I think the reference to cover

in the bill is good, describes it as a phenomenon of the business, and it legitimizes the concept of cover, but it—I think it is essentially an executive problem, to make these other agencies, departments face up, give us a hand with it, and I, aside from legitimizing the concept, am not sure that a bill more specifically stated would help much.

Senator HUDDLESTON. I think we are running into some time constraints here, John.

Senator CHAFEE. I don't have any more questions.

Senator HUDDLESTON. Hopefully we don't impose on the time of you gentlemen too unduly as we continue this process, but I know there are other questions I would like to pose myself, and we have a time problem here.

We would like the opportunity to call on you again before we finalize this for further information and questioning, particularly in the closed sessions, when they are set.

We appreciate very much all three of you coming and giving us this testimony this morning, and we will be adjourned until further call of the Chair.

[Whereupon, at 12:09 p.m., the committee recessed subject to the call of the Chair.]

WEDNESDAY, APRIL 19, 1978

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The committee met, pursuant to notice, at 11:07 a.m., in room 357, Russell Senate Office Building, Senator Joseph R. Biden (presiding).

Present: Senators Biden (presiding), Garn, Mathias, and Chafee.

Also present: William G. Miller, staff director and Audrey Hatry, clerk of the committee.

Senator BIDEN. The hearing will come to order. Today we have the third in our series of hearings on S. 2525, the National Intelligence Reorganization and Reform Act of 1978. On the first day of hearings we heard testimony from Clark Clifford, one of the principal authors of the 1947 National Security Act, former Secretary of Defense, and longtime adviser to many Presidents of the United States. We then heard from three gentlemen who have directly borne the responsibility for U.S. intelligence activities: William Colby and George Bush, both former Directors of Central Intelligence; and E. Henry Knoche, former Deputy Director of Central Intelligence.

Today our focus changes somewhat. The ultimate purpose of all U.S. Intelligence activities is to facilitate the furtherance of our country's foreign policy and defense role. We turn now to individuals who have borne the responsibility for formulating and carrying out our foreign policy. We hope to hear from them in what ways the intelligence activities can indeed further American foreign policy interests, and the ways in which those activities might be improved.

We are pleased to have with us today McGeorge Bundy who served as Special Assistant to President Kennedy for National Security Affairs, and also has since served as president of the Ford Foundation.

During Mr. Bundy's tenure at the White House, he had, among other duties, responsibilities for coordinating with the CIA. We hope that Mr. Bundy can afford us some insight into how intelligence activities are perceived from the White House, what kinds of intelligence are most useful at that level of decisionmaking, what kinds of activities should be received and approved by the President, how the President can insure, as a general matter, that intelligence activities comport fully with his foreign policy aims.

Mr. Bundy, I welcome you, and I apologize for being late, and we are anxious to hear from you today.

Senator Mathias, do you have any comments?

Senator MATHIAS. Mr. Chairman, just to extend a word of welcome to Mr. Bundy, and to say how much we anticipate his advice and counsel. I think no one could come before us who brings more diverse and useful experience. We appreciate his taking the time

and his willingness to join us in this pursuit of a better way in which to obtain the intelligence that we need, the restructuring of the intelligence system.

Senator BIDEN. Mr. Bundy, you can proceed in any way you are most comfortable.

STATEMENT OF HON. McGEORGE BUNDY, FORMER SPECIAL ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS

Mr. BUNDY. Mr. Chairman, I have no written prepared statement because it seemed to me, in consultation with your staff advisers, that it would be more helpful if I were to try, in the main, to respond to the questions that you and your colleagues may have. I do very much welcome the emphasis which you placed in your opening remarks on the uses of intelligence, and in particular, their uses in the executive branch and by the President himself, because I think it is not an accident that the whole of the structure which has been developed, which we call the intelligence community, does face in the end, within the executive branch, toward the White House. I think that a confident and effective process between the President and that community is the right final objective of both intelligence collection and what I hope will in the future be the much smaller although much more discussed area of special activities.

So I welcome this emphasis. I can perhaps say that I found in your earlier testimony, some of which has been made available to me, a number of points with which I strongly agree. It was Mr. Clifford who made the point, I think, that while legislation is clearly needed, it is the way the law works, the process by which it is carried out that will really make the difference. Therefore I rather shared his judgment that a large number of specific prohibitions was not likely to be the most effective way of exercising the fundamental responsibilities of congressional oversight. I shared his judgment that in operational terms the National Security Council as such is not equipped for oversight of the intelligence community. The Council by definition is its members. They are Cabinet officers. The Assistant for National Security Affairs has too much to do to be an effective overseer of anything as large and varied as the intelligence community.

I agreed with Mr. Colby that intelligence as a product should be available not only to the President, but to the Congress and to the public, and that this can be done better than we have done it in the past.

I agreed with Mr. Bush that in my experience, at least, it works better to have the overall responsibility for intelligence coordination, and the direct responsibility for the CIA in the same hands. There are difficulties with that, but I think the difficulties in any other system are greater.

And finally, I agreed with Mr. Knoche that when you come to review this bill and frame it for the floor and for a decision, one of the questions you will need to ask after all the necessary protections have been written in and the right processes described is whether young men and women will want to work in the intelligence community of the United States under this statute, because

if you cannot recruit first class people into the intelligence service, there is no way in the world that you can have the kind of intelligence that the people and the Congress and the President, all of them need.

I think that may be enough to start with, Mr. Chairman. I think I may be more helpful if I respond to questions.

Senator BIDEN. Thank you, Mr. Bundy. I would like to—I have several prepared questions, but I would like to begin by picking up on your last comment about the statutes that we draft having a potential of inhibiting qualified and dedicated young women and men from wanting to work in the intelligence community.

Do you have an opinion as to whether or not what we have done thus far has had an effect on that question?

Mr. BUNDY. I don't believe it is anything that the committee has done that has had an effect, nor do I have direct evidence as to what the problems and opportunities of recruitment are in the intelligence community today. I do think that the draft bill lays more emphasis on the risk of abuse, quite understandably because of the history out of which it emerges, than it does upon the importance of and the need for the effective collection, analysis and dissemination of intelligence and it could be read—and this I don't think is necessary to your objectives—as a bill which expresses in statutory form a kind of wariness and suspicion of the intelligence community which certainly has considerable historic roots, but is hardly a sound basis for the long-term relationship between Congress, the intelligence community, and the rest of the executive branch that I am sure your are aiming for.

That is a matter of not so much whether you get the safeguards as to how many times you have to write them into how many different paragraphs, I think.

Senator BIDEN. Do you have any examples of how the proposed draft has done that, or is it just the overall draft?

Mr. BUNDY. Well, let me get—if you look at the number of times that you require reports, for example, it seems to me the draft tends to try to write in a requirement of a report in every section where it is at least possible—and I am neither a lawyer nor a statutory draftsman—that a general requirement of forthcomingness and a general authorization to this committee and its counterpart in the House to get any information that those committees felt they needed, would be better.

You have, for example, a detailed elaboration of specific activities in I think it is section 135 that are not allowed in the category of special activities. If you ask yourself the kinds of things that might still go on, they would include arson, kidnaping, mayhem, because what you prohibited is assassination and torture. There are all kinds of offenses against normal standards of human behavior that you have not listed, and it seems to me that you would do better to have a general requirement that people be informed and that affirmative control be exercised.

Senator BIDEN. Mr. Bundy, the term "intelligence," even in its limited governmental sense, is used to cover, as you well know, a broad range of activities from the collection of raw data to complex judgmental analysis of foreign events and situations and politics in foreign countries.

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Now, you were for a time one of the ultimate recipients for whom the final product of these activities was destined.

Perhaps we could for a few moments focus initially on your perceptions of how this process works, how it could be improved, and how it relates to other information collections and analysis processes of the Government. And to begin with, analysis of foreign events and situations by intelligence agencies, most notably the CIA, would seem clearly to overlap the analysis by the Foreign Service, the Department of Defense, the NSC staff, and other agencies within the Government.

In what respect do you think intelligence analysis differs from that by other agencies concerned with foreign policy of defense questions?

Mr. BUNDY. Are you asking specifically about CIA?

Senator BIDEN. Yes.

Mr. BUNDY. At its best, I think, the estimating process in the Central Intelligence Agency has been marked by independence from the special interests of other departments in the national security field, and I would include there, independence from the operating wing of the Agency itself, so that it has been a very powerful source of estimation and of comment, not marked by the natural preference that you would expect from the Assistant Chief of Staff of one of the military services in estimating a particular threat where the magnitude of the threat has a direct relation to the role of his service.

I think that the estimators in the Agency played that role with considerable skill, in the years in which I was one direct consumer—I would certainly not say a final consumer, because the job of the White House staff in this connection is fundamentally to serve the President rather than themselves to be independent consumers, estimators, and actors, or at least that is my opinion.

The fact that the Agency's estimates and the Agency's role in coordinating Government estimates have this importance and this kind of independence, doesn't in my view mean that we should downgrade the importance of intelligence that does have a service connection or a State Department connection. Very valuable intelligence was supplied through the Office of Intelligence and Research—INR—at the State Department in the years that I was familiar with it, and it is very helpful to have estimates given on Soviet strategic strength, for example, by the people who have direct knowledge of the way that threat is perceived and countered by American military strength.

So, in praising the estimating process and the role of the Agency, I do not mean to downgrade the role of others.

There is another part of your question, Mr. Chairman, that I think is extremely important. You are quite right, I think, when you say that the intelligence process is not that different in kind from the reporting process of the Foreign Service or of other agencies that have knowledge of the situation abroad, the Treasury, for example, and the Commerce Department and a number of others, and I think it is a mistake to set up a rigid classification that would separate intelligence from other parts of the broad flow of information that comes into the Government. Indeed, I myself think that there is great importance in connecting the intelligence

community to these other channels, and indeed, also to the action channels of American international behavior.

Senator BIDEN. When you say connect them, you mean connect them differently?

Mr. BUNDY. I think it is important for the Director of the Central Intelligence Agency and an appropriate, if limited, necessarily limited, number of his senior associates to be well on track with negotiations upon which they are likely to be asked for advice or comment.

Now, that is a sensitive matter because the State Department, other officials from time to time, and Presidents quite often, wish to preserve the privacy of their diplomatic negotiations and you can get a situation in which it is a very important question of intelligence analysis whether this or that faction in an African country is of this or that basic persuasion, and the most reliable information on that available to the U.S. Government may well be in the hands of those who have talked as diplomats with representatives of those factions.

If someone in the intelligence community does not have access to that perception, then necessarily the intelligence estimate lacks an element of information that will limit its value.

Now, that is hard business and it involves trust, and when you don't have trust, it is very difficult to manage. In our time in the early 1960's we had a working arrangement with Mr. McCone, who was then the Director of the Central Intelligence Agency, that the President's private diplomatic communications to figures as different as Khrushchev, Nasser, the head of Government of Israel, would be made available to an appropriate senior colleague of Mr. McCone so that the estimators would not be flying blind on important information available through other processes to the U.S. Government.

Senator BIDEN. Do you believe there is any need for that to be institutionalized, or is that just a matter of a working out, or a working relationship based upon the players?

Mr. BUNDY. I think it almost surely falls under the heading for which I use the general word process. I don't see how you can legislate a requirement on the Commander in Chief as to just how he will share information he obtains by his interviews or discussions with heads of state, and if it is difficult in that case, it is even more difficult, in a sense, with the wide ramifications of the discussions of ambassadors with their opposite numbers. A well-placed and well-informed ambassador is bound to pick up the kind of information that is not available to others with less rank and access than he may have. And whether that is shared and used in the Government as a whole is a matter of the ways and habits of particular secretaries, ambassadors, and Presidents.

Senator BIDEN. I have numerous additional questions but in the interest of making sure my colleagues also have an opportunity of asking questions, I would just like to ask one followup question, then yield to the Senator from Maryland.

You discussed in the first part of your answer to my last question, Mr. Bundy, what I perceive to be your perception of the unique character of the CIA in presenting information, its independence, its institutional independence, and I wonder whether or not

you can share with us your experience in your years as to whether or not it really did fill that role as an independent source, or was it co-opted by the Defense Department in Vietnam, or really how independent were the analyses you received from Defense and from the CIA?

Mr. BUNDY. Well, the short answer would be that I do not think the CIA estimators were co-opted by the Department of Defense. But when you talk about Vietnam, as indeed about Cuba and other areas where the operational role of the Agency has been large, you do have to be careful because the very senior officers of the Agency may be coming in with a role which is affected by their own operational responsibilities in the field rather than the estimators' view of the situation.

I am afraid I am not equipped with particular instances of CIA estimating, but I think it is fair to say that I do remember very well that there were senior officers in the Defense Department who placed great reliance on the Agency's analyses in Southeast Asia precisely because they were separate from the interests of the respective services that were heavily engaged there.

So, in general, yes, I would say that the Agency did display independence in its estimating in Southeast Asia and elsewhere.

Senator BIDEN. Are you suggesting, though, even where the Agency itself has a large operational role, that you have to be wary of the estimating advice that you are getting?

Mr. BUNDY. Absolutely, absolutely, and that, of course, is particularly true when the role is large.

Senator BIDEN. Now, how do we preserve that independence, that separation of responsibility?

Is there a need for us to do anything in the charters or guidelines that we are preparing to be sure or help maintain that independence at the Agency from the operational responsibilities for foreign affairs, or political pressure?

Mr. BUNDY. Well, you would be much better equipped than I to know whether this is something that you put in statutory language or in committee report language, or whether, as I would guess, maintain it most effectively by insisting upon it in your year-by-year discbarge of the oversight function.

One can always ask senior estimators whether they really are prepared to stand behind their estimates in terms of their own independent judgment. There are or have been different processes at different times by which Directors of Central Intelligence have themselves tried to insure the independence and fairness of the estimating process. Some I think have worked better than others, but I don't have the direct experience that would allow me to make sharp comparative judgments on that.

I certainly think it is to the point, however, for this committee to ask itself how it can help to signal the importance of such independent intelligence estimating.

Senator BIDEN. One last question. I promised I would yield, but a follow-on.

How do we assure the independence, and I know we can't be sure of anything, but how do we enhance the prospect that the independent estimates that are prepared actually are filtered through to the leaders to whom—who need the information? How do we

enhance the possibility that we are sure that the President gets access to this estimate? What do we do?

Mr. BUNDY. You can't be sure, of course. The President is perfectly free to shut the door, and a President can be surrounded by people who have what I would regard as the ineffable presumption to shut the door for him. The object, it seems to me, of any sensible and wary President, should be to multiply the opportunities that he has to get analysis that is informed and fair and careful from as many different sources as possible, and the object for his staff should be to help to that end, but I don't think you can assure it.

It was a tradition in the early 1960's that the President's door was open to the Director of Central Intelligence, but I think it is a fact that during the Johnson administration in some measure that access went down, and nobody can change the right of a President to see who he wants to see and to tell other people to put it in writing or show it to Joe or somehow discharge what they perceive as their responsibility some other way.

I think myself that it does help—and this is one of the reasons for my agreement with Mr. Bush on the point—it does help for the Director of the Central Intelligence Agency to be the senior intelligence officer of the U.S. Government because that creates a presumption that he reports to the President, even if not face-to-face every day.

Senator BIDEN. Senator Mathias. I am sorry I took longer than I should have.

Senator MATHIAS. Thank you, Mr. Chairman.

As a matter of fact, I was interested in pursuing this same line of questioning. This is really where the whole purpose of the intelligence community finally culminates, I think, on the desk of the President, and I think there are very few people who are better qualified than Mr. Bundy to pursue this with us.

Seeing you here takes my mind back a dozen years or more to the time when I had joined perhaps Ogden Reid and Morris—I have forgotten exactly who were my coconspirators, addressing a series of impertinent questions to President Johnson. Mr. Bundy very patiently received us in his office in the West Wing of the White House and spent about an hour thoroughly answering all the questions. We thought we had really gotten better treatment than we deserved. And then you said, "Now the President wants to see you." So we went up to the Cabinet Room and sat with the President for another hour and discussed the question. But I——

Mr. BUNDY. I'll bet you said more to me than you did to him.

Senator MATHIAS. Well, I recount that story not so much as a matter of nostalgia, but I would like to put your mind, as much as I can, back into that period of your own history, so that you can think in terms of being a consumer of the intelligence product. Exactly what were the shortcomings, not in a theoretical way, not in an academic way, but as somebody who sat there day by day and had to use this product?

I pursued this same sort of questioning with Clark Clifford, because, after all, what this committee has a responsibility to do is to help produce better intelligence, more accurate intelligence, and to get it to the President, to get it to the Secretary of Defense and the Secretary of State.

Now, Mr. Clifford said that he thought the best way of getting access to the President was to have a better product.

Would you agree with that?

Mr. BUNDY. Yes, I would. I think that the quality of the product enormously affects the President's interest in it, and I can give you a dramatic example in point, I think. One of the great achievements of the intelligence community in the 1950's and early 1960's was photographic reconnaissance, and the product there got better and better. President Kennedy had great personal curiosity about it, became acquainted with some of the senior officers who were concerned with that process, and was, therefore, ready when it became necessary to go or not go in a very critical situation on photo reconnaissance information, namely, the information that missiles were being installed in Cuba.

The pictures upon which the photo interpreters drew that conclusion would not have suggested to the ordinary collector of Kodak snapshots that anything remarkable was going on, and without a relation of confidence built up through time between photo interpreters relatively far in the bowels of the Agency, their seniors, and the President himself, I do not think that it would have been possible for the President on the first day of that crisis, the 14th of October, to have been persuaded that he was dealing with a reality. It would have been a much slower and more difficult matter.

Now, the quality of the product, I must go on to say, is very uneven. One of the difficulties is inherent in the fact that you have a diversified community. I have recently had some marginal exposure to that problem, to this problem, and to this day you can read National Intelligence estimates, and what they will say to you is that you had better get into the same room with the people who are in that process and ask them just what this sentence means, because the sentence is obviously designed to hold in place six or eight different agencies. And as a result, there is a certain murkiness to the language.

And I believe myself that it is important to break those propositions apart, that differences need to be stated openly and sharply, and that conclusions should be written in the clearest and least ambiguous language. And this does not always happen. And that is a matter of insistence from the consumer.

I will say that in my experience—and I suspect this has been true in most administrations—people do not wind up in the Oval Office without a considerable capacity for cross-examination, and if they exercise it, they will, I think, usually find the intelligence spokesmen very responsive.

Senator MATHIAS. What do you see is the duty of the Director, assuming he is going to be the person with principal access to the President, to convey not only what is his ultimate judgment, but perhaps the dissenting views within the intelligence community?

Mr. BUNDY. I think he has both responsibilities, and that it is extremely important that he carry them out to the point of including in appropriate fashion opportunities for direct expression of opinion by dissenters.

Now, that will very often happen in another way. If the overall intelligence estimate is that the level of production of a new Soviet

missile is 100 a year and the Air Force estimate is that it is 150 or 200 a year, there are, of course, channels available to the Defense Department and to those estimators through the Joint Chiefs and through the Secretary, each of whom independently has a right of direct access to the President which the President is very wise to honor, in my opinion.

And the risk is that you will get people saying well, we will keep on arguing about it. There is quite a temptation to keep quarrels out of the President's office. That temptation should be resisted on hard issues.

Senator MATHIAS. That leads me to the next point. You and I both remember that President Johnson had very great qualities for which I am grateful and for which the country ought to be grateful, but he was not an easy man when you were swimming against the tide with him. If you had an idea that was unpopular in his mind, you had trouble pursuing that thought, and he had 1,000 different ways of chopping that off.

What do you do when you have a piece of unpopular intelligence that the policymaker simply has to know? How does the community get that across?

Mr. BUNDY. Well, I had the kind of experience that you are describing more than once with that great man.

Senator MATHIAS. It broadened one's vocabulary.

Mr. BUNDY. It is a very instructive experience, and I finally discovered that his basic method was simply to grab the microphone, you know. He did the talking. So I took the cowardly course and phrased all my disagreeable advice or unwelcome reporting on paper and sent it up with a carrier who didn't know what kind of a bomb he had in his hand. [General laughter.]

Senator MATHIAS. Did they come back alive?

Mr. BUNDY. He never shot the messenger. He sometimes—he had another technique, though, which was daunting, which was that if you had been giving him unwelcome advice, you might suddenly find that he didn't talk to you for a while. That was the alternative of grabbing the mike.

But the fact is that he would read it, and joking aside, I do not recall a case where after the initial sort of annoyance had gone past, he was not willing to read and to take account of opinions that were not initially welcome. The manner here was his own and was a disservice to himself, I think, but not the real attitude of the man toward evidence.

Senator MATHIAS. So that, historically, what is one of the most unpopular duties in the world, bringing bad news to the steps of the throne, is really one of the most important things that the community has to do.

Mr. BUNDY. Absolutely true.

Senator MATHIAS. One further question, Mr. Chairman, before I yield to my colleagues.

Under a number of proposals that have been advanced in recent days, the Attorney General would have increasing responsibility for the approval of planned intelligence or counterintelligence activities, if they involve U.S. citizens. This raises an interesting jurisdictional question, how far should we involve the Attorney General in foreign intelligence activities?

Is there any prudent point at which we might want to cut off? Should there be some attempt to draw guidelines and to obtain legal opinions from the Department of Justice, and thereby avoid the specific involvement of the Attorney General into foreign and counterintelligence projects?

Mr. BUNDY. I don't feel that I am qualified to give you a very well-informed comment on that. I take it you are talking now not about the Attorney General's responsibilities as the cabinet officer responsible for the Federal Bureau of Investigation, but rather for what he might or might not do with respect to other elements of the intelligence community.

Senator MATHIAS. That's right. Well, of course, it could involve the FBI. It is——

Mr. BUNDY. Well, there I would feel strongly that the supervision of the Attorney General is critical.

Senator MATHIAS. And that is clearly within his jurisdiction.

Mr. BUNDY. Exactly.

Senator MATHIAS. No problem about that.

Mr. BUNDY. That's right.

Senator MATHIAS. But where we are really reaching beyond the normal activities of the FBI——

Mr. BUNDY. I think there is advantage in the process of management of the intelligence community as a whole, advantage in having what in the nongovernmental world you would call outside counsel. I think there have been difficulties in the degree to which counsel inside the CIA or indeed, inside other agencies that work on intelligence matters, were able to take a detached and determined view as to what the legal responsibilities of management were. Whether that outside counsel needs to be the Attorney General is a harder question.

Senator MATHIAS. This is almost an operational responsibility, and I think the concern is how many chiefs you can get in under this tent.

Mr. BUNDY. Well, I do not think that an operational responsibility—I can't claim to have read the draft statute with that kind of precision, so I can only say that I think that it is probably not wise to try to build in too many protections against the danger that the responsible operating chiefs—and here we are now talking about the Director of Central Intelligence, the Director of National Intelligence, that that person won't do the job, because really the only way to get the job done is for that person and his associates to do it.

Senator MATHIAS. And if you say, well, the Attorney General has to agree to this or that or the other specific act, you are in effect diluting responsibility for that act, even though in name the Attorney General is merely giving the legal opinion.

Mr. BUNDY. Well, you run that risk, I would agree. I again should beg off from trying to be too definite about it.

Mr. MATHIAS. Thank you, Mr. Chairman.

Senator BIDEN. Senator Garn?

Senator GARN. Thank you, Mr. Chairman.

Mr. Bundy, I would like to pursue a couple of organizational areas, and first of all, as I have traveled as a member of this committee to various countries and talked to CIA station chiefs,

one of their big problems has been the matter of cover for their agents. This is particularly so with the State Department. This troubles me a great deal. We are talking about gathering needed intelligence, and yet within our own Government we cannot get the cooperation of one department, the State Department, to provide better cover for our agents.

Would you comment on this problem, or did you have any experience with that when you were there?

Mr. BUNDY. I don't have much operational experience with it, Senator Garn. I am familiar with the problem and with the old joke that all you had to do was to look in the Foreign Service Directory and find the right extra letter behind somebody's name, and you had a one in three chance of finding a CIA person. I think that ought to be resolvable, I have to say, but as to who has to hit whom over the head or what prerogatives have to be waived, I really don't know enough about it to say precisely.

I should add that I think there is another kind of a problem that the chiefs of station could help with, which is that insofar as in many ways their people are reporting officers not that different from reporting officers of the Foreign Service, it might be to the point not to try for too much cover on everybody, but only for cover for the people who need it.

Now, again I don't have the direct knowledge of numbers of players and what their particular functions are to be able to go beyond making that general point, but there are kinds of people in the Agency who aren't that different from the political officers of the embassy, and to pretend that they are may be misleading.

Senator GARN. I would agree with you completely, and none of them has argued to me that they needed deep cover for everyone, but what they are complaining is that they are not able to get it for the people that really do need it. It would seem to me that it ought to be solvable too, and here I have been talking about it and I can't seem to get the attention of State Department that they ought to be more cooperative.

Mr. BUNDY. It is a sensitive issue for them because it does involve their belief that a Foreign Service Officer is a Foreign Service Officer, and there is no one else that is quite like that, and I am familiar with your problem.

Senator GARN. I understand that point too, but when it comes to national security, then I cease to understand that kind of parochialism within an agency.

You have already testified, mentioned a couple of times that you agreed with George Bush on the need to keep the Director of National Intelligence also as head of the CIA.

Do you think that having this dual responsibility, or responsibility of daily details of the operation of CIA would detract from his ability as DNI to carry out the overall functions of his communitywide duties?

Mr. BUNDY. Well, I think I said I didn't think it was a perfect solution, but better than any other. I think that the regular operation of the CIA, if that is not a contradiction in terms, because it is a complex agency with a constantly changing set of problems and responsibilities, even on the side of estimation alone, and analysis, that managing that is nonetheless something which, with

effective deputies—more often than not professional, in my judgment—and I think I agree with George Bush on that point, too, as I recall his testimony—a Director of the CIA would have time and should make time for the double duty of being informed of and responsible to the President for the general contours of responsibility and activity in the intelligence community as a whole, and for representing that community as a whole to the President and the senior officers of the cabinet.

Senator GARN. Well, I guess you would feel, then, that the way it has operated in the past, having a chief deputy with responsibility for the day-to-day operations would be a good solution and would allow him to address himself communitywide but yet have responsibility to the President and to others directly for the operation of the CIA.

Mr. BUNDY. I think in principle that is the right way of doing it. Let me talk historically now, because I am not familiar with the current organization of the Agency. You should count in as very important instruments for the Director himself, not just his alter ego, the Deputy, but the Deputy Directors with particular responsibilities. The Deputy Director for Intelligence and the Deputy Director for Plans, as it then was—this is now nearly 15 years ago—each in his own way, if he did his job, could very much lighten the task of the Director of Central Intelligence.

Where the Agency has had internal management problems I think it has been in part the consequence of the kind of running with the ball and going beyond what the initial mandate may have seemed to the outsiders to be when they approved it, partly that and partly the compartmentalization which, when it gets excessive, can be destructive of control.

Senator GARN. I happen to agree with both you and Mr. Bush. I think it would be better to keep him in both positions, but there are some who make the argument that he would not be able to be fair or to judge fairly among the different entities within the community; that he would show bias toward the CIA in terms of possible conflicting intelligence analysis, budget decisions, research and development priorities, and things of this nature.

Do you feel that is a problem?

Mr. BUNDY. There is a risk, but there are at least two other forces involved here before we get to the President, who himself, is going to make final rulings upon budget as upon other responsibilities.

There is the Office of Management and Budget, which I think is a very important instrument here, and one that was not used as well as it should have been in the time that I was in the Government, through no fault, I hasten to add, of the Director or his assistants, but simply because the habit of probing deeply into intelligence budget was not then strongly encouraged—as I think it would be now—either by the Executive, or to be fair, by the Congress 15 years ago. But OMB can have a high capability here, and is, of course, there to be used by the President and by persons to whom he turns.

So I grant you that there would be a risk here, but you know, these other forces, the people in the National Security Agency, or the people in the Defense Intelligence Agency or in the service

intelligence staffs are not exactly without their own bureaucratic weapons in this context. I have never found them to be either powerless or to suffer silently.

Senator GARN. Let me ask you this.

If it is set up so that we have a separate director not tied to the CIA, do you feel that this would create a necessity for rather a large staff under the DNI, that the DNI would then become rather bureaucratic in its own right?

Mr. BUNDY. I think you can't operate in this city alone, so I think there would be a staff there pretty soon. The only people who have managed to control that process, Senator, are the Justices of the Supreme Court, so far as I know. And they have more staff than they used to have.

Senator GARN. So you would agree with me, then, that going this direction, separation, would probably create another level of bureaucracy.

Mr. BUNDY. I think you bring nearer the day in which there will be a new EOB.

Senator GARN. We have also had some discussion about the people who would like to require the DNI to be a civilian.

How do you feel about military officers being——

Mr. BUNDY. Well, I think require is the wrong word. I think that I know of no reason to drop Bedell Smith, or Admiral Turner, for that matter, from the list of distinguished directors. I think that it is very important for the man at that job to understand that his loyalty is not to where he came from but to where he is, to the intelligence process and to his responsibilites of the present, but I wouldn't make a sweeping judgment that no military man should be the Director of the Agency.

Senator GARN. Thank you.

Now, what other ramifications do you see if we separate it and have a single DNI, for the CIA to be no more than one entity among equals of other intelligence gathering agencies?

Mr. BUNDY. What I hear of the thinking of the professionals over there is that if they can have the kind of standing in the intelligence community that comes from the general recognition that the senior intelligence officer in the Government is also the Director of CIA, that they are not going to be too worried about whether they get neglected in the process. I am not sure whether I am responding to your question.

I think that from the point of view of the morale of the Agency, keeping the two jobs in one person is an advantage.

Senator GARN. Well, yes, you responded.

What I was trying to get at was concern, my concern that if we do separate, I think that CIA does need to be the dominant agency, as we are looking at the broad general picture, where some of the other agencies, the Army, the Navy, Defense Intelligence Agency, are more narrowly directed. I would not like to see the Central Intelligence Agency put into that kind of a category. So my own opinion is that by keeping the jobs together it not only helps the problems you are talking about, but it keeps the CIA in an important position to see the broad general context of the intelligence tbat they have together.

Thank you, Mr. Chairman.

Senator BIDEN. If I could follow up on that point for just a moment, the way the statute, the proposed statute is drafted, as I understand it, the key function of the Director will be to keep the President informed of all the intelligence activities, and if that is what we are keying on, won't it become a necessity for that person to be freed up of the managerial responsibilities that go along with the day-to-day operation of the CIA or will it?

I don't see how you could focus on that, how any one person could do it all.

Mr. BUNDY. Well, Mr. Chairman, I think that if you—if a director who is also the Director of the Central Intelligence Agency, put the latter job ahead of the former, the Presidential job or the analytic and reporting job at the top of the Government, as you have described it, if he doesn't put that first, then he is making a great mistake. But this is a disciplined agency, with all allowances for extremely unfortunate things that have happened, and it is especially disciplined near the top, and it is possible to have an operating deputy and special assignment deputies who will carry on the day-to-day work and at the same time keep the Director informed.

It is, I think, not too different, if you want to think about it that way, from the responsibility of the Chairman of the Joint Chiefs—well, let's go further back—of the Joint Chiefs of Staff as they were in the Second World War, where you would have to say that the most important responsibility that General Marshall had was as counselor, chief military counselor to the President.

Now, he was also, in the shorthand phrase, running a war, but he had an enormous amount of help in that second job, and he was the only one who could do that first job.

Senator Chafee.

Senator CHAFEE. Thank you, Mr. Chairman.

You made some specific points about this statute regarding the listing of abuses, and you suggested that you didn't think that was a very good idea—thou shalt not assassinate. In that testimony, I think you are echoing or you are confirming the judgment that we had from Mr. Clifford and really from everybody, except Mr. Colby. But I would like to take you a little bit further. This proposed statute prohibits paid relationships between the intelligence community and certain categories of individuals like journalists, clergymen, students on scholarships, grants, or grants from the U.S. Government.

What do you think of that?

Mr. BUNDY. I have a lot of sympathy for the position of professional journalists that feel that their trade has been besmirched by a very limited number of people who were engaged in intelligence assignments. On the other hand, I have a lot of respect for the right of any individual in any position to decide to work for his country if he thinks that that is what he ought to do. So it is not that easy for me.

I can give you an example that is important as to how institutions—important to me as to how institutions react to this. Because a number of the activities of the Agency in the field of covert operations in the past have taken place through foundations, it has been suggested from time to time in countries, especially in the

developing world, that some of the large private foundations, and particularly the Ford Foundation for which I have responsibility, might be somehow related to the Agency. And it was always very important to me in the time when that was being said, and in countries where we were at work, that I had taken the trouble the moment I got to New York to make absolutely sure that that was not the case, and had a working understanding with appropriate officials here that they would not try to place their people under our cover.

So I can understand very sympathetically why a particular institution or profession could feel that it was very, very important to keep separate from the intelligence activities of the U.S. Government, valuable and important as many of those activities are. So I am afraid I have to give you the answer that I think it is a very hard question.

I am not quite sure I understand why there should be statutory prohibition for one of the sensitive categories and not for others, and I think the same problem of definition therefore does arise. I suspect as a practical matter that given the level of attention to this matter in the media, and the emotional reaction that one gets to the thought of placing Father Brown under cover, although he was a very distinguished detective as I recall it, it may be necessary, but I am not sure the logic is that clear.

Senator CHAFEE. Well, I agree completely with you. I am not sure why the draft has that.

Senator MATHIAS. Would the Senator yield for a moment?

Senator CHAFEE. Yes.

Senator MATHIAS. A question on that point.

Harvard has issued guidelines which are probably going to be widely copied in the academic world.

Do you have any views on those?

Mr. BUNDY. I haven't read them line for line, Senator Mathias. I can tell you how it was in the 1950's. There were a considerable number of members of the faculty who were consultants to the Government, Defense Department, State Department, and indeed, for the Central Intelligence Agency. One has to remember that the CIA emerged from the OSS, and that the OSS in its analytic and estimating side, was essentially a bunch of college professors, brought to Washington under the leadership of men like William Langer who died just this winter, and was one of the great historians of his generation.

So that connection was well understood, and on the estimating side, I think it is entirely appropriate and desirable. That doesn't necessarily mean people have to be on the payroll. Most of this consultation took place for nominal fees and with a serious drain on professorial time.

When you get to foreign agents, I must say I feel differently. People recruiting foreign agents, especially among non-Americans on a university campus in a manner that is not known to their colleagues, I think that raises very grave questions. I wasn't aware that that was going on in the 1950's. It may have been but we were simply uninformed about it.

So the notion of guidelines from the university's point of view seems to me highly desirable, and I am inclined to think that it is

the responsibility of an institution to safeguard its own integrity, and that you can only go so far by statutory regulation.

Senator CHAFEE. Well, it seems to me that is the point. It is an institutional point between the correspondent and his newspaper rather than a statutory point that no journalist shall ever be hired by the Federal Government or even paid their expenses, never mind being on some kind of a salary.

One of the points you made was that in your experience you have noted that where the Agency is involved in operations, then it can affect its estimating capacity and maybe color it. If the Agency is to be an intelligence gathering and an estimating agency to come up with predictions, as it were, should they be engaged in covert activity at all?

Mr. BUNDY. Ideally not, but the trouble with that proposition is that it is very hard to figure out where else to put it.

Senator CHAFEE. Where else to put covert action?

Mr. BUNDY. Yes.

I don't believe that you can solve that problem by a separate institution, presumably reporting directly to the President through some Mr. X that was never discussed, whose identity was never known, and this is the picture that one gets from processes in the United Kingdom, with which I am not closely familiar.

I think on the whole it is better to watch for this danger. I think in the immediate future it is much less serious than it may have been at the height of heavy operational involvement in Southeast Asia or against Cuba, and I think it can be coped with by being aware of it.

Senator BIDEN. Will the Senator yield on that point?

Is that accomplished in any way, Mr. Bundy, by separating the Director from the operational activities of the Agency, which is at least a trend or direction that we go in this draft?

Mr. BUNDY. It probably would have some impact. I think it certainly is a reasonable supposition that a Director of National Intelligence located near the White House and not in McLean with a staff of his own would have less of a direct engagement in commitments that were the consequence of an assignment to conduct this or that special activity. I think one would have to say that that might be an advantage. I don't myself, as I suggested, regard it as an overriding one.

Senator BIDEN. Thank you, Senator.

Senator CHAFEE. Those are all the questions.

I would just like to join in the expression of appreciation for your coming down here and sharing your views with us.

Senator BIDEN. Mr. Bundy, I don't want to detain you unnecessarily, but I would like to pursue briefly, if I can, two more lines of questioning, if I may.

Senator MATHIAS. Mr. Chairman, before you do that, I have one very narrow, specific question and I have to leave in just a minute, and I should like to propound that. It may be in an area of experience that you have never been involved in, but we do have one intelligence related question that could possibly have arisen in your White House days.

When foreign intelligence personnel, perhaps hostile, have sought admission to the United States, in the past that has been a

matter which the State Department has handled and it has been decided within the State Department, but there may be other interests involved there.

Do you think that ought to be a responsibility shared in the intelligence community, perhaps resolved in the National Security Council, rather than narrowly in the State Department?.

Mr. BUNDY. You mean the Department of State has been able to make its own decision as to whether——

Senator MATHIAS. It is my understanding that they pretty well control that.

Mr. BUNDY. By controlling the visa process?

Senator MATHIAS. By controlling the visa process.

Mr. BUNDY. I would regard that as a matter that ought to be shared with those having the more general responsibilities for counterintelligence.

Senator MATHIAS. Thank you.

Senator BIDEN. Mr. Bundy, since becoming a member of this committee, and simultaneously the Foreign Relations Committee, I have been struck by certain fundamental facts about the sensitivity of our intelligence activities which I didn't really feel or share prior to being put on these two committees.

Mr. BUNDY. You may have been right the first time, Mr. Chairman.

Senator BIDEN. I may have been. That is what I would like to pursue.

Most public attention, and especially the attention of the Congress, has been focused in the last several years on what is generally known as covert action, covert activities, which in the new statute we call special activities. I don't know what the distinction is, but I guess we want to get away from the word "covert." As Senator Garn has indicated, all of us in this committee traveled. I guess I have visited 10 or 12 countries. I have visited, met with the station chiefs and had extensive discussions with them. Through those visits and the witnesses we have heard relating to the covert activities, and the conferences we have had, I have come to the tentative conclusion that there is an entire area that quite frankly is much more sensitive to our foreign policy formulation, and our relationships with other countries, than covert activities, that is clandestine collection activities. Yet somehow we have assumed, as a Congress, as a country, as a policy, that the real concern is covert activity.

I know you know the distinction, but for the purpose of this question and for the public, I define a covert activity as that activity of the intelligence community designed to influence events abroad, for example, covert actions in Chile designed to overthrow the Allende regime. And I find clandestine collection as being in effect spying against foreign power, or in the words of intelligence professionals, clandestine collection of intelligence designed not to influence foreign affairs.

Now, as I indicated, as I and other members of this committee have reviewed various CIA operations, I have come to the conclusion that covert actions around the world have been severely reduced over the last several years. I mean, I think people would be astounded if they knew what was not being done.

And I think this is in large part a result of the times, the public scrutiny, pressure, congressional oversight, and a general introspective reassessment by the community itself as to what it should and shouldn't be doing.

However, the process by which we collect intelligence, especially through human sources, via spying on foreign powers, hasn't changed appreciably over the same period. As I have come to understand these various clandestine collection operations, especially as a member of the Foreign Relations Commitee, they could really affect our relationships with some of our friends and not so friendly nations around the world.

Now, our oversight of the clandestine activities and operations I think leaves a good deal to be desired. I think we are equipped, but I am not sure we have gotten a handle on how to do it, or an agreement between us and the administration as to what degree that should take place. I think when we write these charters—that this is one of the most important areas that we should focus on, and one of the most important contributions that the charter can make.

And with that little background, I would like to explore with you some issues that have been raised by the approach that we have taken in the legislation.

There are two basic approaches taken by the charters and the existing law regarding the matter of clandestine collection. The first is section 16 of the State Department Authorization Act, which I must take some blame for as a member of the Foreign Relations Committee when it came before it, required all Government representatives in a particular country—and I emphasize all—in a particular country, to report their activities and be subject to the oversight of U.S. Ambassadors.

Now, this is an outgrowth of a number of things which we won't get into, as you are more familiar with than I, but this provision has been on the books since we drafted it in the 94th Congress, and it is intended to be preserved in the charter, the draft charter that we have before us. In effect it requires a station chief to report all activities in his country to the Ambassador.

Now, Mr. Bundy, do you believe this is an effective mechanism for the oversight by the State Department and the executive branch generally of CIA operations abroad?

Or maybe I should ask first, do you believe clandestine collection should fall under the umbrella of oversight on the part of an ambassador?

Mr. BUNDY. Broadly speaking, I do believe in oversight of clandestine collection. I can remember cases where it was very clear when the subject came up to the level of the Secretary of State, that he, as senior political adviser to the President, was not prepared to take the risk, political risk involved in what seemed to him an unduly sensitive and chancy form of clandestine intelligence collection. It would be inappropriate even at this distance in time to go into individual cases, I think.

Senator BIDEN. I agree.

Mr. BUNDY. But there is no doubt that that can happen, and I believe that there needs to be a process, again, by which particularly sensitive operations, if, for example, you are entering into a

relationship with an agent, seen to you as an agent, seen to you by some other government as a very senior and trusted person, then obviously the rewards are very great. But so are the risks. And someone other than the collector has to measure those.

I don't myself think that that is a job that one would always wish to leave to the Ambassador, because it isn't always true that ambassadors are better judges than chiefs of station. I think the really tough ones ought to come back to Washington.

Senator BIDEN. Even more fundamental, do you agree that the committee designated with the responsibility of overseeing the intelligence community, that is, this committee in the U.S. Senate, should be aware of those operations?

Mr. BUNDY. That is a very difficult question, Mr. Chairman. I think you should be aware of kinds of operations. I think I would be very unenthusiastic, if I were a member of the committee, about knowing the identities of particular individuals in particular situations.

Senator CHAFEE. Well, I think, Mr. Chairman, that is pretty clear, that we have never gotten into that, so I think that would be understood.

Senator BIDEN. For example, in the very vague, I think it must be vague, hypothetical you raised, the senior offical in another government being tapped by our intelligence community, we in the past would, and I expect in the future would not seek the specific identity of who that official was, but I do think that it is essential that this committee, because of foreign policy implications that would be significant, that this committee be aware of the country in question and the level at which we are discussing.

Mr. BUNDY. Well, you have got a very tricky problem, haven't you, because if you say that a member of the Cabinet of "Cosmopolitania" is working for the CIA, and you know the country, if some knowledgeable outsider gets to know that country and the level, and knows that six out of seven of the possible people are really inconceivable, you begin to narrow things down——

Senator BIDEN. What do you mean by knowledgeable outsider?

Mr. BUNDY. Well, I mean that if the word is through 20 or 30 people up here that we have got a major penetration in thus and such a country, I think that the half-life of that piece of information as a really private one is a little uncertain. I have never been an intelligence operator, but if I were one, and I had that penetration, I have to say it would scare me.

Senator BIDEN. Well, what scares the heck out of me is that that could occur and we could find that the fallout of that penetration would drastically alter our relationship with a country that might have some serious consequences with us, including the potential of armed hostilities with that country.

Mr. BUNDY. Well, I am not sure I think the risks are that great, Mr. Chairman, on a particular intelligence penetration. The noise level sometimes goes up, but I think that is a rather different proposition.

Senator CHAFEE. Mr. Chairman, could I just ask——

Senator BIDEN. Please.

Senator CHAFEE. In other words, there is a world of difference between covert action, which we are undertaking, and us achieving some kind of a penetration through what we could well call a spy.

Mr. BUNDY. Yes.

Senator CHAFEE. Is that not correct?

Mr. BUNDY. I think there is a big difference.

Senator CHAFEE. I think there is a big difference, too.

I would be extremely nervous in having the Ambassador know all of this although he should know covert action because it could be extremely embarrassing for him, but I am not so sure it would be so embarrassing that it was a spy because no one would think he put it there.

Mr. BUNDY. You can put the Ambassador's interest, I think, if you try to think like an ambassador for a minute, he may well take the view, and I think he would take the view, that he didn't want the chief of station engaged in activities that could cut down his own words. Let's suppose he has a good and effective relationship with the Prime Minister. I would think he might very well want to put the Prime Minister's office just plain out of bounds—the Prime Minister and all his people—just don't let's louse that up by something that might come out, and I think an ambassador should have the right to have that assurance where he needs it, that there is not a covert intelligence operation in a particular area.

Senator BIDEN. If I can continue to pursue this, I would think that back in—well, the U-2 incident, in what was it, 1959, that we did much more, that our relationship to the Soviet Union was much more likely to be affected as a consequence of a U-2 operation being uncovered in the way in which it was than we would if we had had a covert activity of placing articles in Pravda, or that we were even, you know, engaged in espionage of, you know, a dam or a dike, or a railroad, or whatever somewhere in the Soviet Union.

The alteration of the course of events in foreign policy, it seems to me, have been and can be more drastically affected by clandestine collection activities than they can be by covert activities.

Mr. BUNDY. I would think of the U-2 as falling clearly under the heading of "Special Activities" and not just clandestine collection. It illustrates the difficulty of interpretation. That is a very large operation. I would compare it for its impact against the case which I really am more a reader of now than I was a student of at the time of, was it Colonel Penkovsky, where there was a relatively senior penetration and where I think its denouncement was not gravely damaging to relations.

Senator CHAFEE. Well, Mr. Chairman, one question.

The specific point of the U-2 was raised with Mr. Clifford, and Mr. Clifford made the point—I just wondered what your thoughts are—that that wouldn't have caused any problem except the President acknowledged that he knew about it.

Mr. BUNDY. Well, the President who doesn't acknowledge something of that magnitude has other embarrassments.

Senator CHAFEE. well, Mr. Clifford's testimony, as best I recall it, in the minuet of diplomacy, the President should have indicated that—maybe the staff members remember exactly what Mr. Clifford said, but basically it was that the President should, if not

flatly denied it, have somehow disavowed it, certainly not acknowledged it, and that is the problem. And Mr. Clifford further indicated——

Mr. BUNDY. Mr. Clifford was talking about a President for whom he did not have the duty of being an adviser. [General laughter.]

Senator CHAFEE. Maybe so, but he was speaking from his experience, and I just wondered if you can cover this. And I am not trying to get you in juxtaposition, but Mr. Clifford indicated that Mr. Khrushchev would have gone right ahead and received President Eisenhower in that visit, knowing full well that Eisenhower knew about it, but that once Eisenhower acknowledged it, then it put Khrushchev in an impossible position.

Do you agree with that analysis?

Mr. BUNDY. I think it put Khrushchev in a very difficult position, I will agree with that. I honestly don't think that I can imagine in our political system an operation of that magnitude being exposed and the President being able to say this is a most unfortunate matter on which some of my subordinates seem to have gotten out of hand.

That particular President was subject to occasional charges, largely in my view unjustified, tbat he was not minding the store and was out playing golf while Foster Dulles ran the country. Just to move to an administration I know more about, one of the fundamental errors that we made in the case of the Bay of Pigs was to suppose tbat the level of American participation could in some serious sense remain a secret and not be a Presidential responsibility.

Senator BIDEN. I would really like to pursue this even more, but the time is running and I would like to move to one other subject very rapidly, if I may.

DCI's Colby and Turner both have been particularly keen on the value of making more U.S. intelligence data available to the public, and that sounds good, and is very much in vogue today, and they talk about making this information available, but is there a need for any safeguards or checks to insure that the Government or the CIA does not in the name of disclosure become tempted to tell the American people how to think about this or that problem, or to use that intelligence information to sell particular foreign or domestic policies.

Do you have any thoughts on that?

Mr. BUNDY. I think that is a real danger. I think that is something you just have to be aware of, that even on the estimating side, the Agency is the child of the OSS which was a child of war, and it grew to maturity in a time of cold war, and its business is to think about the possible adversaries of the United States, and it would be asking a lot of it to see the world always and totally in the round or to be absolutely evenhanded in its view of what the American people need to know. And therefore I think it is important that we think about this process of making information available in a much wider sense than simply figuring out how to sanitize CIA documents and put them out without a classification stamp on them, although that in its own way can be a useful and helpful exercise in some specific subjects. I think it is very important, for example, in the general question of the strategic balance, that

there be more sharing of the Government's estimates with the public as a whole.

But as Mr. Colby I think pointed out, you can make available the information that is available to the U.S. Government in lots of other ways than by having the information put out directly by the collecting agency. The President himself, after all, is the great spokesman of the executive branch, and a great deal of the information that the Agency presents has in fact been put out by presidents over the years, and should be.

And the same thing is true about testimony about particular countries before committees of the Congress, and about the economic information which is one of the large and unsufficiently tapped storehouses of Government information, I think—it certainly used to be. But I think the warning you make is a proper one, that there is in any group of people a cast of mind, a set of priorities, and nobody has the right to use the publication of information—or nobody should have a monopoly over information that may be affected by their state of mind.

I think that is a hazard.

Senator BIDEN. Mr. Bundy thank you very much for your time. I appreciate it. You have been very helpful to us.

Mr. BUNDY. Thank you, Mr. Chairman.

Senator BIDEN. The committee is adjourned.

[Whereupon, at 12:34 p.m., the committee recessed subject to the call of the Chair.]

TUESDAY, APRIL 25, 1978

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The committee met, pursuant to notice, at 10:14 a.m., in room 318, Russell Senate Office Building, Senator Walter D. Huddleston (presiding).

Present: Senators Huddleston (presiding) and Mathias.

Also present: William G. Miller, staff director; and Audrey Hatry, clerk of the committee.

Senator HUDDLESTON. The committee will come to order.

This is the fourth in our series of hearings on S. 2525, the National Intelligence Reorganization and Reform Act of 1978. We are continuing to focus on the broadest possible questions with respect to this legislation: What activities should intelligence agencies be conducting? In what manner should the intelligence community be organized so as to conduct those activities most efficiently and effectively? What role should the Congress play? How can we insure that our intelligence activities do not violate the rights of our citizens?

We are exceptionally fortunate today in having with us three gentlemen who have extensive experience with different aspects of the intelligence activities of the U.S. Government.

Drexel Godfrey was formerly the head of the CIA's Office of Current Intelligence, an intelligence analysis function. Thomas Karamessines was the Deputy Director of the Central Intelligence Agency for what was then called plans and is now known as operations, that is to say, the clandestine intelligence service. Pete Scoville was Deputy Director of the CIA for Research, the Agency's scientific side.

Gentlemen, we welcome you here today before the committee. If it is agreeable, we will proceed with whatever statements or comments you have at the beginning and then pose questions to the panel as a group.

Senator Mathias, do you have any comment at this particular time?

Senator MATHIAS. Not at this point, Mr. Chairman.

Senator HUDDLESTON. Mr. Karamessines, then, would you lead off with your statement?

Mr. KARAMESSINES. Senator Huddleston, Senator Mathias, and gentlemen, do you wish me to read my statement, or do you wish to accept the statement for the record, so to speak?

Senator HUDDLESTON. We would be happy for you to read your statement, if that is agreeable to you.

STATEMENT OF THOMAS H. KARAMESSINES, FORMER DEPUTY DIRECTOR OF PLANS, CENTRAL INTELLIGENCE AGENCY

Mr. KARAMESSINES. Thank you.

Thank you for inviting me to express my views on proposed bill S. 2525. My comments represent my personal judgments only.

It may be useful to place in perspective this highly laudable effort of the Select Committee on Intelligence to provide the intelligence community with a legislative framework within which it can function, and beyond which it may not. This perspective is best and most succinctly summarized in the "Report to the Senate" of the Congressional Record, December 15, 1977, on the work of this committee, by Senator Daniel Inouye, its first chairman. In this report, Senator Inouye said, and I quote:

> In recent years the intelligence community, particularly the CIA and the FBI, have been the targets of suspicion and abuse. There is no question that a number of abuses of power, mistakes in judgment, and failures by the intelligence agencies, have harmed the United States. We, of course, hope that these abuses are behind us and will not occur again. These events did not happen in a vacuum. In almost every instance, the abuses that have been revealed were a result of direction from above, including Presidents and Secretaries of State. Further, in almost every instance, some Members of both Houses of Congress assigned the duty of oversight were knowledgeable about these activities.
>
> The recent *Helms* case illustrates this pattern. If Mr. Helms should be subject to public blame, as some contend, then others in higher authority in both the executive branch and the Congress should also share the blame.

The men and women who pioneered in the field of modern intelligence for the United States, and who literally built the Central Intelligence Agency from scratch, had scanty precedent in our history for such an organization, relying almost entirely on their experience in the Office of Strategic Services, and on a wholly ambiguous and inadequate legislative mandate. Considering this background, they built extraordinarily well. The mistakes, taken over a period of 30 years of hard work in the most sensitive area of our Government's activities, were few indeed; and none was attributed to personal self-interest.

These pioneers created what was possibly the world's finest intelligence organization, dedicated to the best interests of our country, and with a high esprit de corps. Yet, when the Church investigating committee of the Senate addressed itself to the admitted errors, some of its members did so in an injudicious manner and with an unparalleled display of vehemence. Its chairman took advantage of the TV cameras at every opportunity to belabor the CIA. We were called a rogue elephant. When the dust settled, it turned out that we were not a rogue elephant; but by then this was poor consolation to the thousands of devoted men and women of the CIA who had shamefully been depicted in the most lurid terms and implications, and who were indeed totally innocent of any wrongdoing whatsoever.

The Central Intelligence Agency and our general intelligence capability will be paying for some years for this inexcusable exercise in political sensationalism. But if, out of this turmoil, we can look forward to a strengthened legislative underpinning to the difficult work of the intelligence community, it will not have been an unmitigated disaster. It is in this sense that I welcome this

legislative effort, and the opportunity respectfully to offer my views.

First and foremost it is my strong conviction that the draft calls for an excruciatingly extensive series of procedures and reports which may be designed to keep everyone informed of all that is going on, and which will probably result in doing just that; so that before long, not much will be going on. Surely it must be possible to provide for approval and notification procedures without the chilling effect of the ones proposed. Over 52 different sets of requirements, certifications and reports, most of them going to a number of addresses are called for in title I alone. If we adhere to this bureaucratic avalanche of paper, we will smother initiative, imagination and energy. The Congress by this legislature is setting up various oversight and investigative machinery, and providing guidelines and prohibitions. It should not also seek to place itself in the position of being able to anticipate and check every single move of the intelligence community. The excessively stringent procedural and notification requirements called for will have an inhibiting effect on intelligence operations, and will convert what has until now been our least bureaucratically constipated agency into a timid and faltering second-rate service.

A second objection to the myriad steps and reports called for in title I, I must respectfully submit, arises from my belief that it is simply not possible, given human nature and the often conflicting, partisan views and interests of legislators, to keep some secrets secret. There will be no difficulty with the politically or economically sterile secret that will be kept intact. But an operation of great political sensitivity, be it in the special activity field, or clandestine intelligence or counterintelligence, will be at the mercy of any legislator who dislikes the thrust of it.

The answer, it seems to me, is to confine knowledge of such operations to the smallest feasible number of legislators. I do not believe we can have a truly effective intelligence service if secret information of a sensitive nature can be available to over 500 legislators, as is made possible under section 153.

Would it not be wise, in the case of any special activity or clandestine collection activity, to retain the procedures involving the President and the National Security Council, with their attendant requirements for establishing criteria of sensitivity, and including the provisions relative to notification of the two congressional committees, but restricting such operational information to those committees alone and excepting it from the provisions of section 153, paragraphs (c) (1) and (2)? If this were not feasible, I should urge a revision of section 131 so that it referred to special activity programs and clandestine collection programs. These programs would describe objectives in general terms, and would include comprehensive statements as to the nature, scope, costs, and other relevant factors, but it would not provide the operational details whose accidental leaking could destroy the operations encompassed in the program. Such details, if of interest to either of the congressional committees, could be provided orally by the Director on request, but with the understanding that they would not be available to other Members of the Congress.

Unless we can so order and define these requirements as to reassure current and prospective foreign agents that their association with us will be protected from undue disclosure, we cannot look forward to adequately effective clandestine intelligence and counterintelligence; and we will be discouraging potentially important defectors from trying to reach us.

I am troubled by the chapter, at page 58, on the assassination of foreign officials, and the following material, at section 135(a) on prohibitions against particular forms of special activities. If we must have an explicit prohibition against assassination in this legislation, why confine it to assassination of foreign officials? And why confine the cause of action to cases involving a foreign official's office, position, political views, action, or statements? I do not condone assassination, but I believe that to attempt to deal with it in this legislation creates more problems than it solves.

Section 135(a) on prohibitions against particular forms of special activities has a peculiar statement prohibiting activity designed to, or which could result in, "the support of international terrorist activities." I do not know what could have occasioned this prohibition. Our effort has always been to detect and counter terrorist activity, not support it; and the legislation specifically calls for the conduct of counterterrorist operations. In another subparagraph there is an injunction against the violent overthrow of a democratic government. I am not sure that we could all agree on what constitutes a democratic government. This subparagraph in particular exemplifies the difficulty in attempting to legislate for every possible contingency. I believe such matters should be dealt with as individual cases, as they arise, since each situation will always have its own special circumstances and peculiarities.

In section 114 at page 32, the Director is made responsible for the protection of sources and methods. This is a welcome change from an earlier draft. I must submit, however, that experience has shown that this is a hollow mandate unless it can be reinforced with language providing appropriate sanctions and giving the Director not alone the responsibility for protecting sources and methods, but also the authority to investigate and take appropriate action in cases involving such protection.

A critical need of any successful intelligence service, and one that is not touched upon in this otherwise comprehensive bill, is cover support for the representatives of the CIA. Unless these men and women have viable and secure cover, they cannot pursue their intelligence functions effectively. This has become a particularly sensitive problem since the flamboyant hearings of 1975. Securing good cover support from the Department of State particularly has always presented problems. The Department has understandably been reluctant, over the years, to meet fully the cover requirements of the CIA. I believe that this legislation could make a significant contribution to strengthening the cover position of the CIA, by requiring appropriate other departments and agencies to provide comprehensive and effective cover for the officers and other ranks of the CIA.

At page 203, title IV, fines and/or prison terms are prescribed for officers or employees of the U.S. Government who reveal the identity of undercover officers or employees of the CIA in a manner

resulting in injury or jeopardizing the safety of such CIA personnel. This is a much-needed provision for obvious reasons. It should, by every logical consideration, be changed to include "any person" who willfully jeopardizes the lives of, or injures CIA personnel, by exposing their cover. As it is, it does encompass a part of the problem, but it does not go far enough. It should further be broadened to protect not only officers and employees of the CIA, but also individuals acting in a formal agent capacity, since it is their lives and careers that are most in jeopardy in such cases. Furthermore, if we are to penalize the misuse of the name, initials, or seal of the CIA, as we do in section 716, at page 202, where a fine of up to $20,000 and imprisonment of up to 1 year, or both, are provided for such misuse, should we not also provide appropriate penalties for a far more important offense, the unauthorized revelation or compromise of the classified sources and methods and the classified intelligence information of the entities of the intelligence community, including the CIA? This is a necessary, proper, and reasonable projection of the section as now written, and should be given urgent attention.

I was intrigued by section 132(a) which is titled "Restrictions on the Use of Certain Categories of Individuals for Certain Intelligence Activities." It would allow, as now written, voluntary contacts and exchanges of information between CIA officers and representatives of the Peace Corps, for example. This is far more permissive than the strict injunction we functioned under for many years, when there was an absolute prohibition against any contact, voluntary or otherwise, with Peace Corps representatives. I would further submit that the phrase "pay or provide other valuable consideration" leaves open the voluntary use of persons in the restricted categories, in an intelligence capacity. Nevertheless, I would plug the loopholes I have indicated, in the case of Peace Corps representatives and persons following a full-time religious vocation, while leaving members of all other categories free to engage in voluntary contacts, as the bill now provides.

Another intriguing paragraph occurs at page 53 of section 132, in which a permanent resident alien who has applied for U.S. citizenship may not be used in a foreign country as a source of operational assistance. I cannot find a reason for this prohibition, which is made even more intriguing by the fact that an exception requires the head of the intelligence entity to make a written finding that this is necessary to an authorized intelligence activity; or the President of the United States to authorize a waiver. I believe this is an entirely needless prohibition.

At page 84, section 151, officers and employees are enjoined to report possible violations and improprieties. This should be amended to require that such reporting be made directly and confidentially, and not openly or publicly, since the reporting employee may not be in a position to know that a particular activity, which appears to him illegal or improper, has indeed received appropriate consideration and approval under the provisions of this bill.

Section 154, on page 92, would seem to be more cosmetic than substantive. No such report can be really meaningful, certainly after the first one is issued, without progressively revealing too much.

Paragraph (b) of section 233 on page 120 allows any member of Congress to have access to any information of a private nature on any individual. The possibilities for mischief, created by this little paragraph, would seem to have special relevance in these particular days. I would limit that right to members of the two oversight committees.

Section 2528 at page 160 requires the Attorney General to report, "fully and completely", four times a year to the two congressional oversight commttees concerning all electronic surveillance within the United States for foreign intelligence purposes. Earlier sections establish an exquisitely refined procedure for protecting security in such operations, including the establishment of special courts, and a special court of appeals, by appointment of the Chief Justice of the United States; transmission of court documents under seal; special security measures, et cetera, to protect from unauthorized disclosure. If the Attorney General complies literally with the requirement to report "fully and completely" four times a year to the two congressional committees, and if any member of the Congress can have access to such sensitive information, there is an inconsistency here. I recommend a modification of the term "fully and completely" to provide a threshold of security consistent with the level of protection provided by the courts as specified in the bill.

Under section 245, page 124, any entity of the intelligence community may, with certain prior approval, provide specialized equipment, technical knowledge, or pursuant to special prior approval, expert personnel assistance to support local law enforcement agencies "when lives are threatened". It is regrettable that such assistance has to be conditioned on lives being threatened. We have daily shocking evidence of the need for more effective local law enforcement. The CIA should be encouraged to provide information on special equipment and techniques and methods to local and State law enforcement agencies on request.

With respect to section 114(j) at page 31, our formal agreements with foreign intelligence and security services have been, almost exclusively, in the fields of communications intelligence and stay-behind operations. We have not had, with a few notable exceptions, formal agreements in the general field of intelligence and security cooperation, although we do enjoy a mutual collaboration and assistance with a large number of such foreign services. The events of the last few years have already alienated a number of foreign services whose help we have valued; and provisions in the law for advising the congressional committees of the specifics of such working arrangements will undoubtedly alienate more of them, or at least make them wary of working with us. This will, without question, impede our ability to operate effectively in a number of countries. I am sure that any director would not need a provision in the law in order to respond to an inquiry from either congressional committee as to our working arrangements with any foreign service. By spelling it out in the law, we simply, and unnecessarily, put cooperating foreign services on notice that they may be reading all about themselves in the daily papers; at least that will be their reaction.

If we must have a Director of National Intelligence apart from the Central Intelligence Agency, which I consider a mistake, let us

at least have a Director of the Central Intelligence Agency, also, and let us not demean the Agency by having it led by an assistant or deputy director. It deserves better.

Conspicuously absent from this welter of restrictions, prohibitions and reporting requirements is a section which could usefully read as follows:

Neither the Director of National Intelligence; nor the Director of the Central Intelligence Agency nor any member of that Agency shall be required to testify concerning any special activity or any clandestine collection activity; or concerning any classified matter related to the organization, funding, administration or personnel of the CIA before any Congressional Committee, other than the Select Committee on Intelligence in the Senate, and the Permanent Select Committee on Intelligence in the House, unless these Committees have specifically designated in writing one or more other Congressional Committees to be entitled to such testimony in view of their substantive responsibilities. Such designations will include the reasons supporting the designation, and will be consistent with the overall need to restrict exposure of sensitive national security information to the minimum necessary. The Select Committee and the Permanent Select Committee shall, once a year, advise the President of the United States, the Director of National Intelligence, and the Director of the CIA of such designations, and the effective dates thereof.

I make this recommendation having in mind the wholly senseless miscarriage of justice in the case of Richard Helms.

The intelligence community and particularly the CIA have been the target of unprecedented attack for the past 3 years. During this time, no comparable energy has been devoted to identifying and publicizing the threat to the United States posed by the activities of certain foreign intelligence services, notably the KGB and its satellite services, which together maintain hundreds of intelligence officers in this country alone; nor has there been much of an effort to illuminate for the public the role of intelligence in our efforts to gain a more durable peace while at the same time providing the timely information needed to help keep us strong in case of war. Nor has the role of intelligence in the normal, routine, day-to-day functioning of our foreign political and economic policy been talked about. If we expect excellence in our intelligence personnel, we must display our confidence in the agencies they work for, and our appreciation of the important and difficult task they confront. The time has come to discontinue our self-flagellation.

The proposed bill, while giving intelligence and security a new and highly welcome legal underpinning, is festooned with pejorative implications. It is not a bill designed to enhance the profession of intelligence in the eyes of young men and women of excellent mind and character, who might be attracted to it.

Under these circumstances, I respectfully urge the committee to consider this proposed legislation with a fresh mind; to inform its thinking with a keen regard for the practical effect each provision of the new legislation will have on the spirit and work of the intelligence and security agencies; and to place in the path of the devoted men and women of these agencies no more psychological or other obstacles that are absolutely necessary to give the American people a renewed confidence in their true first line of defense.

Thank you.

Senator HUDDLESTON. Thank you very much, Mr. Karamessines.

Mr. Godfrey, you may proceed at this time, please.

STATEMENT OF E. DREXEL GODFREY, JR., FORMER HEAD, OFFICE OF CURRENT INTELLIGENCE, CENTRAL INTELLIGENCE AGENCY

Mr. GODFREY. Thank you, Mr. Huddleston, Mr. Mathias.

It is a pleasure to appear before the committee and comment on the legislative proposals for chartering the activities of the intelligence community.

I hope you will indulge me by permitting a few personal observations before I make some specific comments on the draft before the committee.

First, let me say that my views on intelligence are not popular with all my ex-colleagues. I have made it abundantly clear in print that I believe major changes in the intelligence function are necessary.[1] These are changes that are coming anyway; what is at issue is the speed with which they are implemented. I personally would move fast to reduce clandestine collection and to eliminate covert political action altogether.

My reasons for doing so, or urging it be done, are largely pragmatic. Emphasis on these activities, an emphasis which has dominated the Agency for years with enthusiastic support from the media, has meant that the real purpose of intelligence is undercut if not lost. The real purpose is to tell the truth about conditions around the world, or when the truth is unattainable, to be in a position to offer the Government the best possible judgment on the state of affairs in question.

Telling the truth, or reaching a purely objective judgment about a complex matter, is a heavy responsibility; it is not an easy job. It has not been the central focus of the CIA because clandestine activities have been on center stage for so long. Furthermore, the Agency's credibility as a truth teller has been diminished because it has been associated in the public mind with activities that were often the antithesis of truthfulness. The Agency's truth-telling capability has, in other words, been damaged. Refurbishing that capability will require a sharp reorientation toward the analytic and judgmental functions of the Agency. Collection of material for analysis will of course have to continue, but as Admiral Turner has said, it should be primarily by technological means, or by diplomatic intercourse.

Some of my ex-colleagues from the clandestine service seem to feel that my views demean their patriotic efforts over the years. Nothing could be further from the truth. I have a warm respect for professionals of what Nathan Hale called "That Peculiar Institution." However, I have an even deeper respect for the prime intelligence mission. That mission is jeopardized if it is compromised by public and official skepticism, brought on by operational excesses. So I say to my ex-colleagues, you were mismanaged. Your bosses did not serve you well; they set no limits on operational activities; they failed to consider the consequences for the Agency as a whole. I know they, too, honor the basic mission of intelligence. If that mission is to be fulfilled, severe limits, both personal and institutional, will have to be accepted. That, as I understand it, is the business of this committee. I welcome attempts to impose limits. I

[1] See appendix page 711.

would welcome even more signs of a massive redirection of the Agency's purpose, away from special activities and toward the truth-telling function.

Now, if I may, a few specific comments about particular aspects of the legislation before the committee. Overall I think the proposed legislation is impressive and comprehensive. It represents an enormous step forward in chartering the institutions of the intelligence community.

My first observation—and here I am very close to Mr. Karamessines—is that if anything, the legislation is too comprehensive. It is, I believe, impossible to predict and therefore impossible to prohibit the whole range of activities that intelligence officers could conceivably get involved with. One of the problems of professional codes of conduct of other professions is that they become a playground for the sharp attorney. That which is not specifically prohibited is inferentially permissible. It is far better, I think, to provide the newly created General Counsels with the authority to blow the whistle when constitutional safeguards or legal safeguards are being weakened. Such authority, of course, requires that the counsel have a degree of independence, and that is what the committee's bill provides by designating this post a Presidential appointment. There are some other aspects of overkill in the bill before the committee, but this, in my mind, is the most important.

Second, I would not separate or permit the separation of the DNI from the CIA. The DNI should become a formidable force in Washington. He will, if I read the bill correctly, have access to the President, a cabinet level position and considerable clout in dealing with the other intelligence elements. He cannot fill these roles successfully without a large, skilled support base. As the only intelligence element without a departmental ax to grind, the CIA clearly should be that base.

As an old bureaucrat and as a new professor of bureaucracies, I feel strongly that the DNI would soon become ineffective if he were separated from a departmental base. Too much of the DNI's authority will depend on his grasp of the substance of a problem, on his budgetary muscle, and on his ability to counsel effectively. None of these things are possible without organizational backup and depth. Let him wear both hats, DNI and CIA director, but give him the strength to do the DNI job with excellence.

A small point concerns the Assistant Directors. Their function is unclear in the legislation. They would appear to represent an unnecessary bureaucratic layer in the new intelligence community. I feel, furthermore, that whatever their specific assignments, they would be laboring under the same disadvantages as the DNI and his Deputy without a departmental home. Only in their cases the disadvantage would be much greater, since they would not enjoy the prestige of the DNI.

Finally, and this is a general observation, where again I agree with Mr. Karamessines, but I have not taken the time to work it out in the detail that he has, I feel that the bill enumerates too many occasions where it is obligatory for various officials to report to the President and/or to the various committees of Congress. In the past, this sort of injunction, where it has existed, has led to pro forma reporting, not necessarily in the intelligence community, I

don't mean, but in other agencies, reporting that is too generalized and too often unread. On the other hand, I see great merit in the extensive authority given the Oversight Board. This body could become a significant conveyor of concerns to the President and the NSC. It goes without saying that the Board should include some very tough and outspoken characters with a small, tight professional staff. It can only be hoped that at least one member of the Board would not be an intelligence apologist but rather an intelligence critic.

I will not burden the committee with a reiteration of my views expressed elsewhere that operational activities and clandestine human collection should by and large be diminished, if not eliminated. Those steps are critical for the future of the Agency, but I have made myself clear on that point elsewhere.

Thank you very much for the opportunity to put my views on the record.

Senator HUDDLESTON. Thank you, Mr. Godfrey.

Mr. Scoville?

STATEMENT OF HERBERT SCOVILLE, JR., FORMER DEPUTY DIRECTOR FOR RESEARCH, CENTRAL INTELLIGENCE AGENCY

Mr. SCOVILLE. Thank you.

Mr. Chairman, I am very pleased to be able to accept the invitation of this committee to discuss national intelligence and certain aspects of the legislation related to it, because I believe that national intelligence more than perhaps any other item, is vital to our security. The proposed Senate bill S. 2525, in section 103, paragraph (4) states as a purpose of the Act,

> * * * to insure that the executive and legislative branches are provided, in the most efficient manner, with such accurate, relevant, and timely information and analysis as those branches need to make sound and informed decisions regarding the security and vital interests of the United States, and to protect the United States against foreign intelligence activities, international terrorist activities, and other forms of hostile action directed against the United States.

I believe that this contains an excellent statement of what should be the primary objectives of the U.S. intelligence community. It is absolutely essential that the President, the NSC, and other senior officials responsible for critical national security decisions have the best information and the most objective analyses that can possible be made available. This is more important than any nuclear weapon, and guided missile, or any tank, plane, or naval vessel.

But objective intelligence analysis is not always easy to come by despite the major improvements in the basic factual information now available from a variety of technical collection sources. Often early evidence is fragmentary and subject to a number of interpretations. In other cases, particularly where human sources are a factor, the reliability of the information is suspect. Estimates of future intentions often depend on the eye of the beholder. An individual who has a vested interest in the results can, even with the best of motives, often bias conclusions to support his own interests. Even if the analysis is completely objective, conclusions from them can be suspect if some program depends on it. There-

fore, it is absolutely essential that the U.S. intelligence apparatus be organized in such a way that objectivity can be assured.

Thus, I strongly support the establishment of a Director of National Intelligence supported by a Central Intelligence Agency. If the Director were separated from the CIA and had no way of assuring that its assets were available to supply him with the information he seeks and needs, then the position of the Director of National Intelligence would soon become that of a figurehead and subject to pressures from all parts of the intelligence community. Therefore, I support the concept in S. 2525 that the Director of National Intelligence also be the Director of CIA. While I recognize that the Director cannot be overloaded with too many duties, I believe that section 117(a) which authorizes the transfer of duties and authorities of CIA to other individuals should be used very sparingly. It certainly should not be used to delegate the directorship of CIA to some other individual. The direct authority to be able to obtain from all parts of CIA the support he needs as Director of National Intelligence should not in any way be compromised.

And I might just digress here for a moment because I think this is very important, but going back to personal experiences at a slightly lower level, when I was in the intelligence community, one of my jobs was to be chairman of the Joint Atomic Energy Intelligence Committee, which was the community group that looked at atomic energy intelligence. I am absolutely certain from the experience I had in chairing that committee, that I could not have done the job I had to do if I had not had the support of CIA analytical group working on atomic energy intelligence. It wasn't that they supplied all the information, but they supplied parts of the information and were at my beck and call in order to make sure that the holes were filled in, that one had ways of checking the material that was obtained from other sources, and I think this principle applies even more strongly when you are raising it to the higher level of the Director of Central Intelligence.

If the CIA is to be the objective arm of the Director of National Intelligence, then it is essential that it not have any vested interest in the intelligence information and analysis that it prepares for the Director and through him to other senior Government officials. For this and other reasons I am not in favor of the CIA having responsibility for what S. 2525 in section 104, paragraph 27 defines as special activity in support of national foreign policy objectives, or for what I believe was formerly known as covert action.

In the first place, I do not believe that such special activity is in the broad U.S. security interest, and in this I fully agree with Mr. Godfrey. Perhaps one can cite instances where a specific operation provided some security gain, but I believe that the program as a whole clearly hurts our foreign and security policy objectives. Such operations are inevitably disclosed, and the backlash can be very damaging. As long as the United States is known to be conducting any such activities, it is subject to being blamed for everything bad that happens around the world. Therefore, I believe there should be a clean break with the past, and it should be a stated national policy that the United States will no longer carry out any special activities. The legislation to give specific permission for even limit-

ed operations under stringent safeguards and restrictions does not overcome these drawbacks and is in my view unsatisfactory.

Furthermore, the responsibility for carrying out covert action operations can seriously interfere with CIA's primary function of collecting and providing objective intelligence analysis to serve the Government's needs. In many instances, CIA would have a vested interest in the intelligence and lose its aura of objectivity. A classic example of this was the failure of CIA to provide sound intelligence on the possible success and consequences of the Bay of Pigs operation.

It has been argued that covert action operations are an important source of intelligence information. I have personally strong doubts on this score. If a source has an interest in an operation, then the information he supplies can be very suspect. Furthermore, the high level security normally associated with such special activities often prevents information from being made available to those analysts and senior officials who need it. I believe that the quality of our intelligence would on the whole be far superior if the CIA were not involved in any special activities.

By proscribing special activities I in no way wish to halt the collection of intelligence information by agents or what is often known as espionage. I believe that such activities should be continued even though it must be recognized that their usefulness in the most critical important national security, particularly military areas, is quite limited. I have analyzed the usefulness of such sources as compared with technological and open ones in an article published in Foreign Affairs in April 1976, and have appended copies of that article to this statement.[1] I believe the analysis made then is essentially valid today, and therefore I will not repeat it now, other than to summarize my conclusions.

Without question in most areas related to national security, technical means of collection provide by far and wide the most valuable intelligence. Foremost in this category are observations from satellites, particularly photography, now recognized as legitimate by the Soviet Union in the ABM treaty of 1972. Next would come communications and other electronic intelligence collected outside the borders of the target country. While espionage would have limited value, it is probably most critical for counterintelligence and perhaps could occasionally by good fortune provide Soviet political and intentions information. It can be more useful in Third World nations where the knowledge or attitudes or persons inside as well as outside the Government is essential for a sound foreign policy, and yet security is not so tight.

I bave obviously not addressed many parts of the proposed bill on which I have no particular expertise. However, I do wish to say in conclusion that I do support a strong Director of National Intelligence and a strong independent CIA. The CIA will only have the necessary prestige and authority in this Nation if the abuses and illegalities that were allowed to creep into the system are clearly proscribed, and the persons involved, particularly the leaders of the intelligence community, are made personally responsible under the law.

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[1] See appendix page 731.

Senator HUDDLESTON. Thank you very much, gentlemen. I think our anticipations have been realized, that we have heard very well-thought-out testimony based on the experience of each of you gentlemen, and that it has not always been in agreement, which I think points out some of the difficulties that the committee has had in trying to develop legislation that balances various needs and various points of views of individuals who have been involved in our intelligence operations.

I would like first just to jump into this question of covert action and clandestine collection. This is a major area in which the committee has spent a great deal of time trying to come down on the proper provisions. Obviously we haven't satisfied anybody, which was pretty much our expectation when we began.

Mr. Scoville and Mr. Godfrey would eliminate covert actions altogether, and I think you have indicated that you think generally that there is more potential for harm than there is for good. In your experience, looking over the past and even thinking about the future, you don't see any possibility that this kind of covert action or special activities, would be necessary or would be to the benefit of the Government?

Either one of you might proceed first.

Mr. GODFREY. Mr. Chairman, I feel that it is quite possible that there might be an occasion where some sort of nonlegal covert action or nonopen, I should say, covert action might indeed be useful in a particular foreign policy setting. However, I don't think that would be very often, and I think that when it happens Presidents might well consider other private ways of doing this. That has happened in the past in our history. Presidents have had unofficial emissaries abroad. My own feeling is that if that were necessary, that it would put the button right on the President's desk, and it would certainly make his choice of such a means of carrying out a particular policy a much more cautious and much more restrained choice.

I don't think we need the apparatus in place in order to fulfill that kind of action if it suddenly became necessary somewhere.

Senator HUDDLESTON. Mr. Scoville?

Mr. SCOVILLE. I basically agree. Of course, there undoubtedly will be occasions where if you had such a capability you might be able to use it to our advantage but I think in most cases that would not be the case, and I think that the net loss to our national security, by continuing such operations and having a mechanism for doing is clear.

Senator HUDDLESTON. And you don't think the provisions in the bill that require the President to certify that such action would be essential to the foreign policy and security of the country are warranted?

Mr. SCOVILLE. I think we have to make a clean break. I think this is the kind of area where you just can't be a little bit pregnant. If you once are involved in legalizing such operations under even any kind of restrictions, you are going to take the knocks for everything that goes on around the world, and I am sure we will be doing also a lot of things that we shouldn't be doing.

Senator HUDDLESTON. Do you think such a law or such a prohibition would be believed around the world?

Mr. SCOVILLE. Well, it probably is not going to be easily believable at the very beginning, but I think if the Congress and the President made firm statements that this was our national policy, and if all operations were actually called off, in time I think we would gradually establish some, reestablish some credibility.

Senator HUDDLESTON. Mr. Karamessines, now, you have a different view, and as you stated in your statement, you feel that the bill as it is written is too restrictive in permitting covert action?

Mr. KARAMESSINES. Yes. I think, sir, that it is too restrictive mostly in the procedures and the reports it calls for. I agree with the bill in that the bill does provide for the conduct of special activity operations or covert action operations, and I think that covert action operations should continue to be another arrow in the President's quiver, if he chooses to use it in a given situation.

I do not believe that we should, as has been suggested, have the President go to private enterprise. I don't think we need more ITT, Lockheed, and Gulf Oil cases, and I would much prefer to see a regulated, controlled, congressionally aware operation conducted under responsible Government auspices than I would to have this type of activity thrown into the private sector.

Senator HUDDLESTON. Do you think the requirement that covert actions be essential is appropriate? We have had suggestions that——

Mr. KARAMESSINES. It should be important.

Senator HUDDLESTON. It should be important instead of essential?

Mr. KARAMESSINES. Yes. I think that is a proper observation. I have noted the fact that others have picked that up. I do believe that it should read important or it could read highly important but I think to call it essential places it in that category of action that one doesn't take unless war impends within minutes, and——

Senator HUDDLESTON. Well, I would just say that the committee's objective was to make it almost that strict.

Mr. KARAMESSINES. I understand that.

Senator HUDDLESTON. We recognize——

Mr. KARAMESSINES. And I think it begs the purpose of it, it defeats the purpose of it to do it that way. Situations have arisen many times in the last 20 or 25 years, calling for covert action in which a President has asked that a certain covert action activity be conducted, and excellent results have been obtained in such operations.

Now, we are constantly faced with the disaster that the Bay of Pigs operation resulted in, and I recognize that; but we have had other disasters in other fields of Government activity, and we didn't throw the baby out with the bath water. I do believe that situations, especially in this very uncertain world of ours—and it gets more and more uncertain by the minute—I do believe that covert operations should continue to be available, under very strict controls, if you will, but I think we will be doing ourselves a disservice if we strip ourselves of the ability, legally and properly and under the proper controls, to conduct such operations. It is as simple as that. And I am not speaking about going out and killing people. I am speaking about a political or an economic covert action operation.

Senator HUDDLESTON. Which might be nothing more than inserting news stories in a——

Mr. KARAMESSINES. Inserting a news story, helping a political party——

Senator HUDDLESTON. A friendly party——

Mr. KARAMESSINES. Democratically inclined political party that is fighting for its life against overwhelming Communist supported odds, this type of thing.

Senator HUDDLESTON. But even that, of course, represents interference within the other country by the U.S. Government, and it is not the same thing as collecting intelligence, collecting information.

Mr. KARAMESSINES. That's true.

Senator HUDDLESTON. You still see that there is no inconsistency here, that there is nothing illogical in primarily an intelligence-gathering organization also becoming involved in exerting influence on the outcome of an election in a country or interfering with the operation of that country's government?

Mr. KARAMESSINES. I do not see anything illogical about an organization devoted to the conduct of intelligence activities also being charged with carrying out the type of operation you have been describing, largely because the assets to be used in a covert operation are pretty much the same ones that are involved in the collection of intelligence and it would be senseless, it seems to me, to try to set up a separate organization to conduct this activity. There was a time when there was such a separate organization for covert action activity way back in the late 1940's and early 1950's, and experience quickly showed that this was bad, that lines kept getting crossed overseas, that there was an unhealthy competition between those conducting intelligence and counterintelligence operations and those charged with conducting covert actions, and by the mid-1950's we had come away from that concept as a result of this unfortunate experience, and we had brought these two together.

And while we have maintained—I don't know what the situation is now—but while we have maintained for years, up until the time I left, certainly, a separate staff devoted to covert actions, that staff's activities and that staff's influence was made felt through the instrumentalities in the field which conducted both intelligence and counterintelligence on the one hand, and covert action activities on the other.

Senator HUDDLESTON. Now, is your objection to the procedures established in the bill, including the word "essential," as they relate to special activities primarily based on the restrictions that they might apply to the initiation of special activities, or to the fact that there is so much reporting that the information might go beyond where it ought to go?

Mr. KARAMESSINES. I could summarize my comments, and I would not call them objections—I don't have strong objections, really, to almost any part of this bill—but my comments would be threefold.

No. 1. There are too many reporting requirements. There is too much paper being called for, too often, going to too many addresses.

No. 2. There is, in view of the other provisions of the bill relating to the accessibility of this information to all Members of the Congress, and to both committees, Senate Resolution 400 and the rest of it, there is too much possibility of compromise of covert action activities that have been proposed.

No. 3. That portion of the bill which specifically prohibits certain types of covert action activities I believe goes too far and should be trimmed back so that the functions of the committees working with the executive can have full play, so that we don't eliminate the occasional operation which arises, and which might on the face of it be a violation of the law as proposed in S. 2525, but which at the time might seem to be the one way of avoiding a highly undesirable military confrontation in some distant part of the world.

So I would say that we should not do ourselves the disservice of divesting ourselves of this possibility if we can avoid it.

Senator HUDDLESTON. Now, of course, the question of the handling of information has been a major concern to us here in the Senate. Senate Resolution 400, which is encompassed in this legislation, set up procedures whereby other Members of the Senate could receive information that came to the select committee, but only under certain conditions prescribed by the committee on how they use that information. So far, apparently, it has been fairly successful. We haven't had any serious breaches of security information in the 2 years that we have handled the most sensitive security information that our agencies have.

How far we can go in restricting other committees is a jurisdictional question, as you know, with which we are confronted. We have tried to address that in the bill, but I think everybody recognizes that the fewer committees to which the agencies have to report, generally the better; we have tried to move in that direction.

Mr. Godfrey, you suggest that we shouldn't have clandestine collection either. The two are very similar, of course, or can be very similar.

Do you think that the agencies could continue to be assured that they are getting all of the information they need in order to provide objective analysis to our policy makers without some kind of clandestine collection of intelligence?

Mr. GODFREY. I believe so, on the basis of my experience in the past. Clandestine data which we did use very often served a role of sometimes verifying material that one had gotten from technological means or other means. I think at times it opened up some perspectives that we wouldn't necessarily have thought of. I think this was its greatest usefulness, but I believe that in terms of what Mr. Scoville calls turning over a complete new page, that we can stand that loss.

That is perhaps going out on the far end, but I think perhaps we are in a situation where we have to take that kind of a risk.

Senator HUDDLESTON. In your experience and judgment, could our Foreign Service information collection replace clandestine collection or substitute for it?

Mr. GODFREY. I think a different kind can, Senator, and I have a suggestion or I have made a suggestion in the past that perhaps is regarded with some skepticism, but I feel that one of the problems

with Foreign Service reporting is that it is always connected with, related to the official policy position of the United States, and that is not necessarily always where the most meaningful insights can be obtained.

I would like to see intelligence officials abroad who were open figures, who did not have to grind a State Department axe, if you want, what have you; instead were open to and cultivated all elements of the society to which they were posted. I think this would be very effective if the right kind of officials were chosen, and that is the kind of reporting, thoughtful, analytic, interpretive reporting which such a senior person could do with access to, hopefully access to all parts of the society. That would be very useful. And I don't think it needs to be done clandestinely. I don't think it needs to be done covertly.

Senator HUDDLESTON. Mr. Scoville, while you oppose special activities, you accept the idea of clandestine collection.

Mr. SCOVILLE. Yes.

Senator HUDDLESTON. Where do you see the need there?

Mr. SCOVILLE. Well, I would agree that clandestine, agent kind of collection of information, is rarely of any great value in most national security areas, in terms of getting military information or weapons information or that type of thing. My experience has been that it rarely was of great value. And I am sure that since I left the intelligence community that that value has decreased, relatively at least, because the capabilities of our technological methods have increased by leaps and bounds since that time.

But I think there are still some areas where I am not prepared to forego giving up that altogether. I think when one talks about counterterrorist activities, that information at the moment doesn't seem to be highly susceptible to technical methods, and I think perhaps that one area I would pinpoint as the most important area where you would still like to have it.

Senator HUDDLESTON. Well, the statement is often made that with sophisticated electronic information gathering and all the other statistics, you still don't get at the intentions of various countries.

Is this a major problem you see?

Mr. SCOVILLE. I don't think that you can count on agents to give you intentions either. I think actually technical information provides a very good base for getting at intentions because the best way to get at intentions is to see what they are doing, and particularly what they have been doing over a period of time, or changes in what they have been doing. These are the kind of things you get from technical information.

I would say the second major source is open, essentially relatively open information, information from public statements, from just the normal diplomatic exchanges that exist without requiring agents. I think agents—I can't think—well, I can't, I am not really an expert in that political intelligence, but I would doubt whether there were many cases where they were effective.

Senator HUDDLESTON. Senator Mathias, I know you have some questions. We have been dealing primarily while you were gone with clandestine collection and covert action. I think we have fairly well exhausted that at this point.

Senator MATHIAS. Thank you, Mr. Cbairman.

Mr. Karamessines, when I was in the Navy we used to hope that we could have a happy ship, which was the best organized, the most effective, the most successful. We are concerned that the CIA be, if not a happy ship, at least well organized and effecient and successful.

I am wondering if you would feel able to comment on the morale and the long-term-career prospects for personnel in the Operations Directorate of CIA, in the light of the personnel reductions that were effected by Mr. Schlesinger and by Admiral Turner?

Mr. KARAMESSINES. I would be happy to.

Personnel reductions under Mr. Schlesinger and the directors who succeeded him for the first several months, maybe the first year, year and a half after I retired from the clandestine service in early 1973, were largely reductions that had been set in motion, a large number of them had been set in motion in the immediate and preceding years as a result of a complicated but highly equitable and systematic evaluation procedure that we had established, so that the reductions for which credit was taken by others were actually accomplished largely by those who had been there up to early 1973.

In the years in which these reductions were taking place, I can't recall a single instance in which I read about one of them in the newspapers, although there were several appeals filed within the system.

Tbe reductions which were announced rather clamorously not too long ago, and which caused much concern, particularly in the clandestine service, are reductions which may or may not be needed, and I am not really qualified to say. I don't know what the strength figures are now, and I don't know what the overseas deployment is now, nor am I sufficiently familiar with the headquarters organization in support of that deployment; but I would say this—that the manner in which the reductions, the most recently announced ones, have been gone about has been unfortunate, and it has created anything but a happy ship. I think we have prided ourselves in running an organization which, while it may not always have been all that happy, was certainly one that worked hard, kept its nose to the grindstone, did the best it could, and felt quite comfortable in what it was about, and was not distracted overly much by this kind of administrative aberration.

I don't think the clandestine service today can be described as a happy ship.

Senator MATHIAS. Of course, in the old Navy there were a lot of definitions of what was a happy ship, and I suppose tbe prevailing view was that a tight ship was a happy ship.

Mr. KARAMESSINES. Correct.

Senator MATHIAS. But I am wondering really whether we are now in a situation where life has become sufficiently uncertain, so that the possibility of further arbitrary reductions, not decisions on merit, not decisions on an evaluation of performance, but arbitrary reductions, mean that there really is no job protection—that people are day to day uncertain about the future?

Mr. KARAMESSINES. My understanding is that while many of these reductions were heralded as designed to eliminate the fellows

that had been in grade or in particular positions overly long, and were therefore presumably designed to appeal to the younger officers as promising many openings and so forth, the fact remained that with the abolition of the individual, so to speak, there was the abolition of the position, and it has now been coming home to some of the younger officers that this could happen to them in due course so that uncertainty does exist, and I think that anything that can be done to correct this would be welcome.

It is because of this that I did include in my statement some material urging that the committee do all it can to reestablish confidence in the CIA and in the intelligence community generally, because I think this is sorely needed just now in view of the history of the past couple of years.

Senator MATHIAS. So what you are saying is that these reductions haven't worked as, for instance, forced attrition does in the armed services, which is a rather impartial, mechanical process, albeit somewhat a cruel process, but nonetheless it is viewed as objective and impartial.

Mr. KARAMESSINES. That is exactly right.

One of the things that is of interest is that it may well turn out—and I believe it is so turning out—that while hundreds of reductions were announced, thus frightening everybody, the actual number of reductions that will apparently be needed to achieve the figures that the management seems to have in mind, are going to be far, far fewer than the heralded hundreds of reductions.

Now, I am not in a position to say exactly what these figures are because I don't know, but I understand it to be the case that there will not be the many hundreds of reductions because they are not needed. When we, back 7 or 8 years ago, 9 years ago, were planning the reductions that were necessary then, they were many hundreds. As a matter of fact, they were well over a thousand; we were trying to deal with a bulge that existed in the grade structure following the acquisition of large numbers of personnel during the Korean war, personnel for whom we had no place in later years.

But this was managed through attrition and through an outplacement program. It was managed quietly and equitably, and as I said earlier, no one read about it in the newspaper, so that there wasn't any great and terrible letdown in morale.

I would hope that ways can be found to handle these matters at the Agency along those lines rather than along the lines that we have been witnessing in the last few months.

Could I, Senator Huddleston, Senator Mathias, may I make a comment on the observations of Mr. Drex Godfrey and Mr. Scoville with respect to clandestine intelligence?

Senator HUDDLESTON. Certainly, certainly.

Senator MATHIAS. But would you hold that just a moment? I think Mr. Scoville would like to comment on your last response.

Mr. SCOVILLE. Well, not really comment on it. I would just like to add another point which I think is directly related because I fully agree with Mr. Karamessines that it is terribly important now to restore the morale and the authority of the people in CIA so that they can do the functions that they need to do, and I don't think this is entirely related to reductions. I think CIA has been going through a traumatic experience in recent years, and I think par-

ticularly in the area of the analysis of intelligence, which is a difficult job at best, and you have to stand up and argue against vested interests. If your morale has been undercut and your authority has been undercut, this gets increasingly difficult to do, and I think one of the probably more disastrous things as far as the morale of the Agency was an operation like the so-called team B operation of a couple of years ago which brought in a group of outside people and then just undercut the authority of the professional intelligence people. I think that kind of thing needs to be avoided in the future if you are going to get the kind of objective intelligence for the senior policymaking people.

Senator MATHIAS. I suppose it goes without saying that when you recommend that morale be restored, that you feel that today it is at a low point.

Mr. SCOVILLE. That's right. I am seriously—I don't have any firsthand information, but I am worried about the ability of the people in CIA to continue to provide the kind of good, sound, objective intelligence that this country needs.

Senator HUDDLESTON. I might point out that the committee came to the same conclusion you did on team B.

Mr. Karamessines?

Mr. KARAMESSINES. Well, I simply wanted to add a comment, if I might.

Senator HUDDLESTON. Certainly.

Mr. KARAMESSINES. To the observations of Mr. Godfrey and Mr. Scoville on the usefulness of and the proper place, if there is such a place, for clandestine intelligence collection.

First of all, you have got to maintain overseas, I think no one would challenge this, an organization, a clandestine intelligence organization devoted to counterintelligence work. That is truly defensive, it seems to me.

But it is absolutely essential, and it is becoming more so every day.

Second, many of the activities which are devoted to counterintelligence work are activities which fit right in with the collection of clandestine intelligence, positive clandestine collection.

Third, I understand the preoccupation of those, particularly in the technical intelligence field, of whom Dr. Scoville is one of our experts, with what I like to call survivor intelligence. Now, we need—and it is essential that we have the best possible survivor intelligence. This is intelligence designed to tell us if we are going to make it in case the balloon goes up, or not going to make it, and what we need to do to make sure that we do make it. So that survivor intelligence has to take priority over all else.

Now, survivor intelligence is being accommodated very well by our newer and more improved technical collection means and it is a great and welcome addition to the armamentarium of this country in the intelligence field.

But once we have gotten past that—and after all, there is a limit to how much survivor intelligence you are going to collect and be able to assimilate and use, there comes the business of the day to day operation of this country among the family of nations. How do we get along with our neighbors, with our allies, witb the third world area, the developing countries? How do we deal with certain

situations in the Middle East which do not lend themselves to survivor intelligence collection, because that is not what you need there. You need something a little different.

And it is in this area that I consider clandestine collection of the utmost importance, because unless you are successful in providing the policymakers with the intelligence, the day to day political, economic, military, sociological intelligence that is required so that they can make informed judgments on these day to day matters, you are going to be resorting to the survivor intelligence quicker than you expected.

So if we are going to be able to avoid the small brushfires that can lead to the bigger war, then we have got to have good intelligence in these other areas.

Therefore, I would not lightly dismiss what I consider the considerable usefulness of clandestine collection in these areas that I have just been mentioning.

I could throw in the fact that we have had, not enough, but we have had on occasion clandestine agents properly placed to provide even the survivor intelligence we are interested in having. We have got to maintain a good clandestine collection posture overseas if we are going to be able to take advantage of the opportunities that present themselves from time to time for a defector like Penkovsky. If we don't have the mechanism in place, we are not going to be able to do it.

So that for all these reasons, I would urge that we continue to maintain a strong clandestine collection posture overseas, and needless to say, that we continue to maintain a strong counterintelligence posture overseas.

That was what I wanted to say, sir.

Senator HUDDLESTON. Thank you.

Senator MATHIAS. Now, you have raised in your last words a subject that is of interest to me.

You may have noticed, and I would address all members of the panel with this question, you may have noticed in Sunday's New York Times an article by David Binder, the headline for which is "Antiterrorist Policy of U.S. Called Weak." Mr. Chairman, I offer this article for the record, simply because it points out an area in which I think the charters have got to provide adequate authority, because I am concerned by the efforts being made or not made at the present time with respect to counterterrorism capabilities.

[The document referred to follows:]

[From the New York Times, Apr. 23, 1978]

ANTITERRORIST POLICY OF U.S. CALLED WEAK

(By David Binder)

WASHINGTON, April 22—Repeated assertions by Carter Administration officials that the United States is prepared to deal effectively with terrorist incidents around the world are dismissed by specialists in the field as exaggerated.

In a report to Congress early this month, the Defense Department asserted that the United States had 6,072 specialized troops in 18 units capable of responding to terrorism.

But high-ranking officers familiar with the activities of these units said that in fact only one detachment had received what could honestly be called antiterrorist training and that it would not be ready for operation until summer.

Similarly, while William H. Webster, the new Director of the Federal Bureau of Investigation, said he was elevating counterterrorist preparations to a high priority, specialists familiar with the FBI say its record in this field is spotty and that its collection is at best uneven.

Furthermore, these specialists in both the military and civilian aspects of combating terrorism contend that, despite a reshuffling of the policy-making bureaucracy in the counterterrorism field last autumn, the United States still lacks a clear-cut operational command structure for dealing with terrorist incidents at home and abroad.

Citing a recent example, the October hijacking of a Japan Airlines plane with several American citizens aboard, the specialists recalled that when the question came up no one in Washington was able to say which American rescue units could or should be alerted.

In past incidents of terrorism, operational authority has been maintained by different Federal and local agencies, depending on the nature of the event, and this is still largely the practice.

Thus, the District of Columbia Metropolitan Police had overall authority in the Hanafi Muslim barricade incident of March 1977, although the FBI and the State Department supplied essential support and assistance. In the hijacking of a Trans World Airlines plane by Croatian extremists in September 1976, however, it was the Federal Aviation Administration that exercised operational authority, with assistance from the State Department and the FBI

As a rule, domestic incidents are the province of the FBI, while the State Department takes charge of international incidents involving American citizens and property.

CITE LACK OF EXPERIENCE

The specialists also contend that the aides of the Joint Chiefs of Staff who are nominally responsible for responding to international incidents have had no experience in the terrorism field.

They pointed out that Lieut. Gen. C. J. LeVan, director of operations for the Joint Chiefs, was a specialist in antiaircraft defense while the deputy for current operations, Brig. Gen. A. W. Atkinson, is a former pilot.

When asked recently by another Administration official with responsibility in the field what operational capacity the military had for dealing with terrorism, General LeVan was quoted as replying, "All who need to know are me and the President of the United States—you'll be briefed at a proper time."

General Atkinson, when asked whether the Joint Chiefs had drawn up plans for dealing with various types of terrorist incidents, responded that this was "not feasible" because it would require possible use of "tanks and armored personnel carriers," and this could not be planned.

PANEL TOLD OF PREPARATIONS

The Pentagon's description of the military's preparations to fight terrorism was presented by David E. McGiffert, Assistant Secretary of Defense for international security affairs, to Senator Abraham A. Ribicoff, Democrat of Connecticut, who is chairman of the Governmental Affairs Committee.

The Ribicoff panel is drafting an omnibus antiterrorism bill that is due to go to the full Senate at the end of the month.

While some of the elite combat units named in the McGiffert report have undergone sporadic training in dealing with terrorist situations, only one has been designated to develop an ability to handle a wide variety of terrorist incidents.

This is the "D" detachment of the Army Special Forces, which began its terrorism program, Project Delta, five months ago at Fort Bragg, N.C., under Col. Charlie A. Beckwith. It consists of about 180 men, none lower in rank than sergeant. It is scheduled to complete the program in June.

Even Colonel Beckwith's credentials were questioned by military specialists, who noted that he had begun the training cycle with 36-mile marches in full gear, telling his men, "You've got to prove yourselves again."

GOT BRITON'S ADVICE

However, D detachment has recently had the benefit of special instruction from a member of Britain's antiterror unit, the Special Air Service 22d Regiment.

The FBI's counterterrorism courses are presented at its training academy in Quantico, Va., under Conrad Hassel, who conducts weeklong seminars on the subject. Mr. Hassel has also traveled widely in this country and to military bases

overseas with what a Congressional aide called "his dog and pony show on terrorism"—a presentation that includes a training film.

The show is popular in official circles because it satisfies some curiosity about a contemporary phenomenon that is two-faced, both glamorous and obscure.

"It is like the weather," one operational specialist said of the Administration's attitude toward terrorism and measures to deal with it. "Everybody talks about it, but nobody does anything about it."

A colleague said that "there is a lot of money being made in counterterrorism by self-styled experts" on the Administration lecture circuit and in the press.

DEALING WITH THEORIST

One military specialist described with amusement how his unit dealt with a Middle Western professor who arrived at his base with a proposal to enact a terrorist-hostage incident. The officer went along with the proposal, even providing mock hostages, including women and children, in an unused airfield control tower.

Then the officer deployed his own handpicked squad to infiltrate the control tower through air vents and free the "hostages." They seized the head "terrorist" and fired a blank round at his head. The frightened actor became confused while the professor screamed, "you all failed the scenario—you lied, your credibility is gone."

The officer described the incident as an example of the gap between the theorists and the practitioners on the subject of terrorism.

Civilian specialists gave the FBI mixed reviews on its antiterror capabilities. While praising some crisis negotiators and bureau experts, they said the FBI's performance in gathering intelligence on various domestic terrorist groups—among them, Croation emigres, Puerto Rican nationalists, the Weather Underground and Cuban exile groups—had been inadequate.

INTELLIGENCE REPORTED VARYING

"Their intelligence is inconsistent," an Administration official said. "It varies from incident to incident." A colleague added that there appeared to be "two FBI's—the old and the young." He asserted that the older agents were on the whole "surprisingly inept" in the terrorism field, while younger ones were "very sharp."

Curiously, the FBI is not represented on the interagency executive committee created last autumn to develop antiterror policy. The bureau is represented instead by a Justice Department lawyer, Larry S. Gibson, an Associate Deputy Attorney General with no background in terrorism.

Since its formation, according to one civilian member, the committee, established under the National Security Council, has devoted virtually all of its sessions to strategy and tactics for dealing with the Ribicoff ponel.

NOT ABLE TO CONVENE

In fact, neither the Working Group on Terrorism nor its executive body is operational in the sense that either would convene to deal with a terrorist incident. That authority lies solely with Col. William Odom of the National Security Council, who is a specialist in Soviet strategic affairs.

Experts experienced in dealing with terrorists question whether only one official should be assigned operational authority. They question why the military structure has so far failed to establish lines of command and communication to deal with potential terrorist incidents. "At present, it is a maze," said one officer with operational experience.

There is apparently confusion also in the State Department's office for combating terrorism. Ambassador Heywood Isham, who heads the office and is chairman of the interagency working group on terrorism, is about to be replaced at the request of Secretary of State Cyrus R. Vance.

Mr. Isham is to be succeeded by Anthony Quainton, who has been Ambassador to the Central African Republic. He will become the third head of the office in the last three years.

Senator MATHIAS. I am wondering if you would tell us what you would suggest to improve collection and analysis of intelligence on international terrorism.

Mr. KARAMESSINES. Well, I have to go back to the years when I was at the Agency, and I cannot speak to what has taken place since then because I am not privy to the operational situation at

the Agency since February of 1973, therefore my information is dated.

It was my feeling at the time, and it certainly was reflected in the manner in which our operations were conducted that you couldn't make a very special category of the antiterrorist field when you were dealing with the collection of intelligence clandestinely. Your operations were not too different from the ones that were required in the fields of clandestine collection of intelligence.

We did have to establish, where we could, highly confidential contacts with individuals within some of the terrorist movements. We did acquire penetration agents of some of the terrorist movements. We did give the FBI some years back direct information on plans of one particular terrorist organization to assassinate Golda Meir in New York.

We did establish, as a matter of fact, direct contact, through remote control, so to speak, with a prominent individual within one of the terrorist organizations of the Middle East. I don't know that one approaches counterterrorism operations in any manner substantially different from tbe ones I have been describing, but it is essentially the conduct of clandestine operations in the more or less classical manner that would get you at these terrorist organizations.

Now, where it begins to deviate from the pattern I have been describing is when you have worked with the local liaison service, the local security or intelligence service, because it is true that in the different countries abroad, responsibility for counterterrorism operations does not always vest in the intelligence organization that we happen to be in liaison with, or indeed, with the internal security organization we may happen to be working with; so that in those cases we have to seek out, I suppose, some other group, possibly in the military, which is charged with counterterrorist activity.

Senator MATHIAS. Which means that there has to be authority for adequate liaison.

Mr. KARAMESSINES. No question about that, sir, and I would suppose that there will be, if there is not now. There must be.

The other point that occurs to me in response to your question is one I believe raised in the list of questions that you were kind enough to send us, and that is, to what extent we can and should work as individual agencies in the counterterrorist field, or whether there should be created another agency to handle counterterrorist matters.

I instinctively recoil from any suggestion coming from any quarter addressed to the creation of another agency in any form, shape, or manner in any part of the Government, legislative, executive, or judicial. I don't think we need it in this instance. I think it would be wrong to set up a Director of Central Intelligence separate from anything else and give him an entire new level of bureaucracy through which to funnel and sieve all the information going to the President and the National Security Council. I think the more you can simplify these matters, the better off we will be, and I see no need for a new central organization for counterterrorism.

I do believe there should be, if there is not already—and I am quite sure there is—an interagency counterterrorist committee. I

further believe that the chairmanship of that committee should rest in whatever agency seems to have the laboring oar in the counterterrorist field. I would assume that in the general, international counterterrorist picture that would be the CIA.

Senator MATHIAS. Gentlemen, do you have comments on the question, on what we should do about an antiterrorist capability, or on the further comments of Mr. Karamessines?

Mr. SCOVILLE. I agree it is a very important problem, but I don't have any expertise.

Mr. GODFREY. I would only clarify one thing about this, and that is I in no sense would feel that this country could abolish its counterintelligence activities, nor indeed, the intelligence collected in the process thereof.

As far as counterterrorism goes, and terrorist intelligence, intelligence on terrorism, that seems to me a perfectly legitimate liaison function. The best material can be obtained—probably the best material can be obtained by official liaison with police bodies, intelligence bodies overseas, what have you. I would expect that the degree of cooperation is somewhat spotty there, and the nature of material that one gets would be very different, depending on which service one is dealing with. Those are, it seems to me, to be perfectly legitimate and official responsibilities of the CIA and perhaps even in some cases of the military.

Senator HUDDLESTON. I was just going to ask, in the area of terrorism, who should be in control or command of whatever military or paramilitary unit that might be necessary to respond to a terrorist situation?

Mr. KARAMESSINES. Not the CIA.

Senator HUDDLESTON. You think this should be outside the CIA?

Mr. KARAMESSINES. When It comes to taking military, paramilitary or police action, that should be outside of the CIA. The CIA should be responsible for collecting the intelligence required to keep us informed of what is going on to the best of its ability, but when it comes time to organize paracommandos and what have you, the CIA should not be a part.

Senator HUDDLESTON. Thank you.

Senator MATHIAS. You may have covered this when I was called out of the room a few moments ago, but if you didn't I should be interested in knowing whether you feel that there is a difference between sensitive, clandestine collection projects and run of the mill collection projects, and whether there ought to be a differentiation in the way that they are reviewed and approved?

Mr. KARAMESSINES. The proposed bill provides for such a differentiation and, rests with the President I believe.

Senator MATHIAS. Let me further elaborate on my question by saying should there be statutory criteria?

Mr. KARAMESSINES. No, sir. I don't believe it is feasible. It may be possible, but I really don't think it is practical to write that kind of thing in the law.

I have difficulty in my own mind—and I have been familiar with many, many operations—I have difficulty in my own mind in deciding how that particular pie should be cut.

I would opt, if it were up to me, for placing in the sensitive category that you mentioned, Senator Mathias, those operations

which do not involve, directly involve, and do not rely upon the individual human agent or agents, as distinguished from those clandestine collection operations which do call for the use of, let's say, massive instrumentalities, a submarine, airplanes, that type of thing. I would place the latter activities in the sensitive collection category largely because when they blow in one way or another, they do create a very considerable fuss.

Senator MATHIAS. When the U-2 falls, you have got a lot of wreckage, which is clearly identifiable.

Mr. KARAMESSINES. And if a submarine goes down, you have got the same problem, or is captured or what have you.

But if you are going to have a clandestine operation calling for an agent or two agents or three agents to do a certain piece of work somewhere abroad, I really do not believe that that type of activity should come within the category of sensitive clandestine collection operations. And therefore, I would exclude it from the requirements for reporting to the committee.

Senator MATHIAS. Gentlemen, do you have any comments?

Mr. SCOVILLE. I can comment so much on the agent side of it, but there was, when I was involved—I don't know what the situation is now—a special committee that did look at some of these larger collection operations which did involve sensitive international political matters, such as the U-2 flights, and my experience was that that committee oversight worked reasonably well. In some cases it seemed to me there was an undue willingness to go along with something, and then in other cases it seemed to me on occasion they were unduly reluctant to go along with things which were comparable. So it wasn't a perfect mechanism, but I think that it probably served, got the attention of the top people, and I think that was probably what was needed.

Senator MATHIAS. Mr. Godfrey, to what extent do you think we are threatened by pressures to produce popular intelligence products, in other words, intelligence which will conform to decisions that already have been determined by policymakers?

Mr. GODFREY. Well, I can't say what the pressures may be now. I will say, however, speaking from experience just on that one, if I may, that during—for the last 6 years I was in Washington, I prepared each night the President's intelligence brief, and this was a very small document which spoke directly to the President each night. I was the final office responsible for its submission the next morning, and keeping it up to date until 15 minutes before it was delivered. In those 5 years, I got exactly one element of pressure to change something, and that was from the Director who told me that the President was feeling very poorly and couldn't a particular item wait until Monday and give him at least one pleasant weekend.

Senator MATHIAS. That would affect his morale.

Mr. GODFREY. Sure, that's right. And that is the only time that I can recall any kind of pressure on me, and that seemed to me perfectly legitimate pressure.

I am not saying, obviously, that human bias does not get into the picture. Of course it does. And I know of no way to eliminate that. It certainly does.

I will say this, however, that I think the CIA has one advantage in this field, and that is that it does not have a particular departmental position that it wishes to put forward, or it is less bound up with positions than let's say the military or the State Department and what have you, and therefore I think it can achieve, if it works very hard at it, a more objective product.

Mr. KARAMESSINES. May I make a brief comment, because Mr. Godfrey in reminding us that he did indeed prepare the President's brief for a considerable period of time, reminded me also of that fact that in speaking of clandestine collection, the material that was included in the daily bulletin—what did we call the bulletin, not the brief——

Mr. GODFREY. The Central Intelligence Bulletin.

Mr. KARAMESSINES. The Central Intelligence Bulletin, which is a very highly classified publication, was published once a day, and contained the more salient items of intelligence, some running for a page or two, some just 2 or 3 paragraphs, but listing anywhere from 8 or 10 to 15 or 20 different pieces of information that were thought by the analysts under Mr. Godfrey proper for inclusion. The Deputy Director for Intelligence made a practice of indicating percentages of items included, where, let's say, the clandestine service had contributed either the whole item, or its contribution made the item possible. I think it is interesting to note that as of the time I left in 1973, that percentage was running slightly over 30. In other words, slightly over 30 percent of the items in that publication did not come from open sources, did not come from State Department reports or the Pentagon, did not come from Foreign Service reports, from Ambassadors or Foreign Service officers, but came from the clandestine service. And I think it is interesting to bear that in mind when deciding on whether or not we need the clandestine service.

Senator MATHIAS. If I could pursue this with Mr. Godfrey just a minute, now you obviously were the last step in moving from the Agency to the Presidential mind, the Presidential awareness.

Did you ever have a sense, notwithstanding the safeguards that Mr. Karamessines just mentioned, that the information that you had to work with, the raw materials that you had to edit and prepare finally for the President, were filtered in any way, in a way that challenged their objectivity?

Mr. GODFREY. I have to be very careful of how I answer that.

I don't think so. I will say this. There were times and I believe that at the time I understood those reasons, when I did not know the exact nature of the source, so that in a sense, the person, the analyst at the other end, the receiving end of the clandestine information, had to take it on faith that this was a reliable and legitimate source. I think that was done in the name of the security of the source and probably is defensible.

After all, one works together pretty much as a team in this kind of a context, and you get to trust your colleagues who tell you, you know, whatever you may have thought of other things I have given you, this one is really——

Senator MATHIAS. Well, that is what I am asking you, for your sense of the objectivity of the information that came to you to be transmitted?

Mr. GODFREY. No; I don't have a feeling of anything being skewed or—nor do I have the feeling that people were attempting to overload, let's say, on a particular question.

Senator MATHIAS. Mr. Scoville, you expressed an interest in the subject of human collection. What do you see as to the future of human collection, both as to filling gaps in technological means, and perhaps in replacing technological means as hostile powers may develop technological countermeasures and other means of frustrating current technological capabilities?

Mr. SCOVILLE. I guess I don't visualize that situation occurring where the human means are likely to suddenly jump in and fill the gap where technical means have collapsed for one reason or another. It seems to me the tendency is all in the other direction, that you will be filling—in fact, technical means have been filling gaps due to the fact that, because of the high security, it is becoming increasingly difficult to get information by the normal standard, old time espionage techniques.

And if a given technical means collapsed, and this does happen on occasion, the remedy is generally probably another technical means. And of course, you will always want to have many arrows in your quiver, so that you don't want to rely only on a single source

One of the most important things in that respect in terms of maintaining the viability of these technical means is their increased legality. I think one should not underestimate the importance of the fact that the Soviet Union now has formally recognized that satellite collection is legal. This is a major step forward toward solidifying for the indefinite future the ability to collect good, factual, technical information. I think that moves in that direction are very important.

In that respect, I also might just make an aside comment. I find it inexcusable that we still maintain the very high security on that source of information, and that if you really want to make it legal, then you don't want to imply that it has some particularly vulnerability reason. It is not a vulnerable system, and I think there is a basic fault there which, somehow or another, the bureaucracy has not seen fit to clarify.

Senator MATHIAS. Mr. Chairman, I have two very brief questions, if you don't mind.

Senator HUDDLESTON. Go right ahead.

Senator MATHIAS. I don't want to preempt your time, but I might throw this out for any one of the members of the panel.

Persons who are designated, beyond the Peace Corps as being "off limits" to the intelligence community and therefore their occupations are certified as 100-percent pure, by Act of Congress—are we creating with this certification an attractive target for hostile intelligence services?

Mr. KARAMESSINES. Do you mean by that, sir, that by listing Peace Corps, or religious vocations, government grantees abroad on cultural missions, by creating these——

Senator MATHIAS. No. 1, are we going to convince anybody else that it is a fact? And No. 2, if they are convinced, are they going to look on these groups as: If we are not there, perhaps they ought to be?

Mr. KARAMESSINES. I don't think that we are going to convince anybody, No. 1. We couldn't convince Senator Fulbright that we were not recruiting his Fulbright scholars for intelligence purposes. I don't believe to this day that Senator Fulbright is persuaded that we did not use his people for intelligence purposes. Now, that is our own Senator Fulbright.

I am less sanguine about convincing Idi Amin that a Peace Corps fellow in his country, if Mr. Amin chooses to believe so, is not a CIA operative, if it suits his purposes to say that he is.

Therefore, I agree with your suggestion, if indeed it was a suggestion, that we are not going to convince very many people.

Senator MATHIAS. It was a question.

Mr. KARAMESSINES. Pardon, sir?

Senator MATHIAS. It was a question.

Mr. KARAMESSINES. It was a question loaded with a pregnant suggestion.

But I would say that these people will not necessarily be targets for other services. I really don't believe they will be. Just because we are not doing it won't make any difference to other services. I think that the Soviets particularly, and their satellite services, the Czechs, especially Cubans, will go after just about any American overseas who may happen to be in a position that might serve their interests. I don't think our legislation will affect this one way or the other.

Senator MATHIAS. In another committee I have been reviewing section 1983, which is one of the reconstruction acts which subjects Government agents to civil liability for their violations of other people's civil rights.

Do you think sanctions of this sort ought to be applied against the intelligence community?

Mr. KARAMESSINES. Yes, I think when there is a clear violation in contravention of law applying to such cases, and unless the agent, because he is an agent of the Government, unless the agent was acting in good faith and at the specific, apparently legal orders of a duly constituted superior, unless those conditions are present, then I would say that such an individual should be subject to the appropriate sanctions.

Mr. SCOVILLE. I guess I would go even further. It seems to me that nobody can order somebody else to break the law. Therefore it seems to me that if you break the law you must be held responsible. I think, however, it is very important to also hold responsible the person who ordered you to break it.

Senator HUDDLESTON. Well, that makes it necessary, does it not, to have some specific law, such as these charters, so that all those from the top to the bottom, the field operators, will have some way of knowing what the parameters are within which they should be operating?

Senator MATHIAS. Mr. Chairman, I am just intrigued by Mr. Godfrey's experience, to trespass on your patience one more time.

You prepared the President's brief for 5 years. Did you ever find out in that period of time what got a rise out of him, when you had hit the target, or when he just put it aside and read Reston's column or something else ahead of that?

What really got to the President?

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Mr. GODFREY. Well, every once in a while we would know whether he had read it because you would get an angry call from Walt Rostow or Kissinger or someone jumping up and down all over you.

Senator MATHIAS. Didn't that please you?

Mr. GODFREY. Sure.

Senator MATHIAS. I should think so.

Mr. SCOVILLE. You said you didn't get any pressure. Isn't that pressure?

Mr. GODFREY. Oh, but that's—well, in a sense it is pressure, but it is not pressure that I ever felt the obligation to respond to. The business of intelligence is to bring the king bad news, after all.

Senator MATHIAS. Could you or did you ever, out of these experiences, find it possible to sharpen the briefs so that you were more nearly likely to attract Presidential attention, notwithstanding the many distractions and fatigue of office, and all of the other things with which you had to compete?

Mr. GODFREY. Well, I think, you know, it is true that anybody in our position was concerned with what would interest the President, to be sure. If you are suggesting that that, in a sense, led us to include some things in the brief which weren't really necessary, I am sure we were guilty of that.

However, the main——

Senator MATHIAS. Presidents, I suppose, have a certain amount of personal curiosity that they like to have titillated along with everybody else.

Mr. GODFREY. If on the other hand, you are suggesting that we deferred important subjects, no. We couldn't.

Senator MATHIAS. No; I am not suggesting that because I think that would be a dereliction of duty of a very grave nature.

What I am suggesting is that certainly one of the problems that this committee faces, and I think the chairman would agree with me, is trying to be sure that a product is developed which is going to command the President's attention, or the Secretary of Defense's attention, or whoever the relevant policymaker is. I don't think we can totally confine our activities here to constructing a vast structure of thousands of people, in which we invest billions of dollars, without considering this last, vital link: How are you going to get the policymaker really to use the product, after you have gone through all of the agony of making it the best, most efficient, and most effective intelligence apparatus in the world?

Mr. GODFREY. I think there are two aspects to answering that. One is of course that the brief itself is only one element of what the President gets. The President asks for a great number of things, and so does his National Security Council Adviser, which are independent of the daily production, and the Agency is responsible, of course, for producing that kind of material as well as the ordered and scheduled national intelligence estimates which are critical to making all sorts of policy judgments.

On the other hand, each Director, as Presidents change, would discuss with the President how he wanted his brief, and they were all quite different. One wanted—well, President Kennedy wanted very, very short ones, one liners almost. And President Johnson wanted to read at great length, but principally about Vietnam. And President Nixon was—would prefer a long document rather

than a short one. Those were the kinds of things they would tell the Director.

Senator MATHIAS. Well, I think it is clearly necessary to conform to the Presidential style, whatever that may be at any given moment, but I think it is—any general observations that you would have out of that experience which might occur to you later would be very valuable to us because that is, after all, the final crucial link upon which everything else depends.

Mr. Scoville?

Mr. SCOVILLE. I come in on the same thing because I think this is terribly important, and it isn't only that the intelligence has to be correct or the best that is available, but it has got to be presented in such a form that the proper policy decisions are made on it, because intelligence is not an end in itself. It is the only means toward good policy and good management. And I can think of a classic example of where intelligence was really extraordinarily good, particularly for the era in whicb it was, and that was in connection with the Soviet space program in the late 1950's. More than a year before the first Soviet Sputnik flight, we were predicting it accurately and putting information in such things as the bulletin and the estimates and that sort of thing, that within the next year the Soviets would have a tecbnical capability to do it.

Now, one didn't have much hard facts, but you had sort of general technical capabilities, status of programs, missile firings which showed you they were able to do something.

As the year went on, one began to refine this more and more and actually said it could occur within the next month, and then at the point Sputnik was launched the estimates were really very good. We almost pinpointed it, not to the day but almost to the day, and there were also studies telling the top leaders what would be the consequences, political and international consequences, of a Soviet first in this area, and they were all very prescient.

Yet they never were hoisted aboard by the President—by President Eisenhower and his top advisers. They frankly didn't want to listen to it, and also probably in retrospect, I have always tried to analyze it, but we probably didn't have enough actual facts, the kinds of things that people can't avoid facing up to.

The Cuban missile crisis was an ideal situation. Kennedy was prepared to move because he had some actual facts. He perhaps couldn't see the missiles on those photographs—they were pretty hard to see—but he knew they were there, and so he was able to act on it.

In the Soviet space program Eisenhower did not.

Senator MATHIAS. Why did Senator Keating get better intelligence——

Mr. SCOVILLE. He didn't have better intelligence. What Senator Keating had was the same kind of intelligence we were all getting—and Tom probably can report on this to a degree—I think in the aftermath it turned out that there were something like 180 reports by clandestine sources or that kind, agent, I mean personal reports, of Soviet missiles and——

Senator MATHIAS. Human collection.

Mr. SCOVILLE. Human collection, only six of which, in retrospect, turned out to be accurate. The problem there was that you had a

large amount of noise in the system because they were deploying surface-to-air missiles, defensive missiles, and the average human being doesn't know the difference between missiles to shoot an airplane down and an IRBM.

So it is a good example of the problems of human collection, that you get a lot of information and some of it is good, but it is not always very easy to use.

Senator MATHIAS. Why did Senator Keating get to the point?

Mr. SCOVILLE. He had those, and he was just—he wanted to believe that there were offensive missiles there, and he wouldn't believe they were all defensive.

I might say that Mr. McCone also got the same feeling sitting in on his honeymoon in southern France and raised hell with everybody back home.

Mr. KARAMESSINES. But it was an agent report which established the fact that the offensive missiles were going in place.

Mr. SCOVILLE. Oh, Tom, I'm sorry. I must disagree. Since I was running the planes.

It is true, we used all the agent reports good and bad to guide which precise paths to fly the planes, but we were basically trying to get a level free coverage of the entire island.

Senator HUDDLESTON. Following through on the analytic function, Mr. Godfrey, do you recall an instance where official policy was adopted subsequent to your presentation of an intelligence analysis that seemed to you to be contrary to what the analysis that you presented would appear to have dictated?

Mr. GODFREY. Well, I certainly can remember a number of occasions during the Vietnam war. At one point during the Vietnam war, we were producing as many as nine daily publications on Vietnam alone, and four more weeklies. The White House was insatiable about Vietnam. And most of the intelligence contained in the Vietnam, that is, that part of it which became analytic and interpretive, was saying in effect that there was a great deal of durability, sticking-withitness in the Viet Cong and the North Vietnamese, and it—well, I think it got ignored, or not ignored, but lived with perhaps.

Senator HUDDLESTON. After the Tet offensive, was it your analysis that it was in fact not a great victory for the Viet Cong as had been indicated in public reports?

Mr. GODFREY. Was our analysis that it was a great victory?

Senator HUDDLESTON. Was or was not?

Mr. GODFREY. No, sir. It was—no, it was—we certainly didn't regard it as a great victory. We regarded it as evidence of considerable muscle on the part of the Viet Cong, and you understand that we were not in the position of, nor can we in that business ever be in the business of second guessing our own policy. This was simply—we addressed ourselves to the question what does this tell us about the Viet Cong and the capabilities of the North Vietnamese.

Senator HUDDLESTON. I understand that, but I was wondering how many instances might have occurred when at least in your mind, in having the benefit of the intelligence information you did, it seemed that the Government took positions or took actions that

were contrary to what the intelligence suggested they ought to take?

Mr. GODFREY. Well——

Senator HUDDLESTON. Were there other cases besides the Vietnam war?

Mr. GODFREY. I think that was the most significant. I am sure there were, Senator, because after all, the President can ignore his intelligence. Well——

Senator HUDDLESTON. Well, I am sure he has got many other considerations to take into account other than just the raw intelligence, but I think our whole concern is whether or not, No. 1, we can properly process the raw intelligence that we collect in the field, and then whether or not it is properly used once it is properly processed. Some of us on the committee that preceded the permanent select committee got the impression that our analytical function hadn't been given proper attention so that we did have capability to utilize all of the intelligence that came in from the field, from the various different sources. The work of the analytic departments is not as glamorous as the special activity of Mr. Karamessines there and maybe other activities conducted by the intelligence community. There are also the related questions of the status of the individuals and the pay of the individuals concerned.

One of our efforts, and one of our intentions has been to try to put more emphasis on our analytical capability, give greater status, better conditions, better pay, and come out with a better final product.

Is that a legitimate concern on our part?

Mr. GODFREY. I think so. I believe personally that the better analysis we get, the better judgments we are going to be able to deliver to the White House and to the NSC, and indeed, to the Congress. I think what is critical there, and this is a kind of round about answer, but I think what is critical is that the integrity of the Agency itself, the Agency as a purveyor of excellent judgments, has to be strengthened.

I am a professor now, and I do not find my best students interested in going into CIA, certainly not into the analytic side.

On the other hand, I don't know what the recruiting successes of the Agency are because I am not in it. But my guess would be—and I think it is an informed guess—that the quality of the people who wish to spend their careers as analytic analysts is probably not what it should be. I am not saying——

Senator HUDDLESTON. You think this is because of the lack of attention given to that particular phase of intelligence?

Mr. GODFREY. No. I think it is because of the unfavorable publicity over the last several years.

Senator HUDDLESTON. Did you ever find a time when you felt that there was more raw intelligence information coming in than was being properly analyzed or could be cranked into the final decision?

Mr. GODFREY. Yes, I think there were bulges and gaps. By and large, those bulges and gaps did tend to get flattened out, you know, as the process caught up with the great flow. I know when satellite photography first became available, this was an enormous development, and other electronic intelligence at first, you know, it

was hard to realize what the flow would be, at first. But those gaps, I think, tended to get flattened out.

Senator HUDDLESTON. What was your impression of that, Mr. Scoville?

Mr. SCOVILLE. I agree with him absolutely, that there are these times when you just get more than you can handle, and there is a tendency to be more interested in the item which is hot right at the moment when you are looking at the raw material, and not looking in depth at things which are really in the long run more important because they affect longer term security.

Senator HUDDLESTON. That seems to me to be the great danger, really.

Mr. SCOVILLE. And the whole overhead photography is the classic area.

Probably the worst example that ever existed was the time of the Cuban missile crisis when there were so many overflights, practically every hour, that it was very hard to even look at the film, much less get anything out of it.

Senator HUDDLESTON. Mr. Karamessines, did you from the operational standpoint have a feeling at times that you were supplying more information than was being properly analyzed?

Mr. KARAMESSINES. Yes, I have felt that way on occassion, and whenever we went to the appropriate consumer of a particular type of information, in State, Defense, Treasury, whoever, and suggested that we were turning out too much and were to cut back, the suggestions were never received happily.

Now, you have got a built-in problem in the intelligence community, and with all due respect to the analysts and to the collectors, if the collectors are not turning the material out and sending it to the analysts, then you don't need all that many analysts, and if you cut back on your collection, you don't need that many collectors.

It was always the problem of balancing collection needs against the priorities that had been established for those collection needs, and trying desperately to keep the attention of our overseas collectors focused on the priority. It wasn't always easy to do this.

There is a tendency in intelligence, without any question, to collect and report what is reasonably easy to collect and report, and you have got to make a determined effort to keep the noses to the grindstone on the hard targets because you don't have all that much to show for your efforts when the year is done. You send an officer overseas and his job is to recruit some foreign intelligence personality, for example. He can spend several years at this and have nothing to show for it at the end of that time, and he is concerned that his promotion situation may be adversely affected by this.

Well, these are considerations that enter into the picture. But it is true that there have been times when we have had too much on certain topics and certainly not enough on a whole variety of things. And there has been a constant effort to keep focusing and refocusing attention on the more important topics.

Senator HUDDLESTON. Let me touch on one other area. I know our time is running out, and you have been very patient with us and generous in the time that you have given us this morning. I

would like to address the area of the restrictions and prohibitions that are specifically written into the bill.

The committee, of course, was trying to make sure that certain possible abuses not occur, and to do it in two ways, I guess, one by some specific prohibitions, the other by establishing a procedure that would make them much less likely to occur by the fact that so many people had to give approval and approval had to be based on certain standards.

We find that most of our witnesses have great concerns about first the specificity, and second, about the procedure itself being too cumbersome.

On the question of assassinations, I think most of our witnesses have indicated that a prohibition in statute might be demeaning, might be unnecessary. Yet we have seen in the past where assassinations have not only been considered, but have actually been attempted.

How do we deal with that problem? Assassination at the present time in a foreign country is not a crime by U.S. citizens. How do we deal with that, Mr. Karamessines?

Mr. KARAMESSINES. I would take all of the restrictions that are included in the section as now written and have a policy resolution of the committee which states that operations of this type and that type and that type, as representative examples, are not to be pursued, and then I would leave it to the rest of the machinery that has been set up to insure compliance because then you have got both committees of Congress in on it, not just the President. And if a situation presented itself in which there was conflict as to what constitutes, for example, a democratic government, there could be room for discussion, and there could be a resolution in favor of an operation without having everybody involved in it feel that he is violating a law, which is what you have now.

Senator HUDDLESTON. We are going to try to restore the confidence of the American people, which I think everybody recognizes is desirable and essential. At the same time, we want to reassure those who are involved in collection-gathering operations that their efforts are necessary and appreciated and desired, and supported by Congress, and by the American people. I think at least some of the committee members have thought that in order to achieve these objectives we had to be specific about some of the aberrations that had occurred in the past that were so distasteful to the American people.

Is it the opinion of all three of you that we should not have these specific prohibitions such as assassinations?

Mr. GODFREY. I have a feeling, sir, that—I have no objection to eliminating assassination, but I fear that once you start enumerating, then it could become an invitation to undertake other activities not listed. Now, that is my fear. It is not because I suspect that that necessarily would happen, but it has happened in other walks of life. That which isn't specifically prohibited is permissible. And I fear that.

Senator HUDDLESTON. Mr. Scoville.

Mr. SCOVILLE. I have the same fear. I am afraid, unfortunately, that Mr. Karamessines' alternative doesn't get around that. If you put the same things in a resolution, you are suffering from the

same difficulty. So I am kind of torn here because I agree with you, if you do nothing, you can be accused of having sanctioned some action. This has happened, not with assassination but in other areas—so I don't know. I am not quite so strongly against its being in the law perhaps as the others.

But I think it is a real problem.

Senator HUDDLESTON. Yes. I think as a practical matter under the procedures that are set up by the bill, it would be highly unlikely that one would be approved, but still the possibility exists, I suppose. We found so many times in our investigations that there seemed to be considerable differences in the perception that various individuals had of certain instructions or certain announced policies relating to individuals in foreign countries. Maybe a simple example would be that when it was suggested that we ought to get rid of an individual, apparently to some people that meant get rid of physically by any means possible, including elimination, assassination. To others it meant simply we ought to try to go through the political processes and neutralize an individual or take him out of a position of power.

How do we make sure that we don't have this ambiguity and misunderstanding if we don't get a little specific in places in the bill?

Mr. SCOVILLE. The real way is to stop all covert action.

Senator HUDDLESTON. That has sort of been suggested to the committee, and I guess the idea has some support in the committee and within the Senate.

Mr. GODFREY. Your items on the legal counsellors attached to the various agencies I think have some force in this regard.

Senator HUDDLESTON. Well, I think they would, and in my own mind I feel like that most, if not all, of the really bad types of operations that we have been concerned with would virtually be eliminated through the processes that are set up. Of course, there is some concern that it is too cumbersome, there is too much reporting, too much requirement for consideration and approval at the various levels. But we certainly have got to have some system if we are going to have this confidence on the part of Members of the Congress and members of the public, and if the operation managers down at all levels are to be confident that they are operating within the law and within their jurisdiction. It seems to me they have to have some assurance that whatever instructions they get have come through a process that assures them that they can go forward without fear that they are going to be called before a grand jury some time and have to explain their actions. That is the kind of thing we want to eliminate.

I think we have touched on recruiting pretty well, though this is a major concern, too, of the committee, that while imposing reasonable restrictions we do leave enough area available that we can recruit whatever personnel is needed.

I think Mr. Karamessines brought up the problem with the Peace Corps. As I read our bill, I know our intention was that the Peace Corps was off limits, period, whether paid or unpaid. I notice that there are other interpretations of that, and we will look at that.

Mr. KARAMESSINES. I don't believe that is the way it reads.

Senator HUDDLESTON. Well, that was our intention, those specific areas.

The matter of the press, do you have any concern that we have eliminated paid activities by American press but have permitted voluntary type cooperation?

Mr. KARAMESSINES. No, sir. I think that is perfectly appropriate in my view, although here again I think it is kind of unnecessary because I don't hold with those who feel that the Agency has tainted the American press. If anything, it may be the other way around.

Senator HUDDLESTON. I was going to say there are those who would suggest the other way.

Mr. KARAMESSINES. Some of our representatives overseas have spent a major portion of their incumbency in their stations feeding, I mean with information, feeding the American press because the American press has gone in and knocked on the door as soon as they arrive at a given place and said my editor told me to look you up, and you are the one that knows what is going on here. That has happened very, very often, and it happens far more often than the reverse, no question about it. And I think you know, Mr. Chairman, that the cases in which we have actually hired and paid representatives of the American press are few and far between. This doesn't go to foreign stringers. I am talking about bona fide representatives of established American press institutions.

But I don't have any great quarrel with the section as written now, and I think it is perfectly proper that between consenting adults it is quite permissible for a representative of the Agency to be in touch with, and vice versa, a representative of the American press. I think any other resolution of this would be unreasonable.

Senator HUDDLESTON. Do you other gentlemen have any problems with that?

Mr. GODFREY. Well, I tend to agree with Mr. Karamessines, and I think I would go a step further. I look forward to—I think intelligence has to be thought of as an honorable business, first of all, and contacts with honorable—between honorable people seem to me the objective that we ought to be aiming for in the future sometime, maybe not right now, but I would like to think that the intelligence business was sufficiently important to this country so that if a journalist or anybody else wanted to make contact, that he would feel free and anxious to do so.

We are not there at the moment, perhaps, but that is what I think we ought to aim at.

Senator HUDDLESTON. I think there is no question that there is a problem of perception here on the part of the American public. When we talk of intelligence, I think because of the attention that the secret intelligence, clandestine intelligence receives, that the perception almost is immediately, it is all a cloak and dagger operation looking for sensitive military secrets or political secrets, when in fact much of it relates to economic information or a whole variety of information that any citizen might pick up by just traveling through a country.

Gentlemen, we have passed 12:30 and I promised not to keep you here all day. We do appreciate the length of time you have stayed. There are a number of further areas that we would like to question

you about because of your knowledge and experience, and I would hope that the committee might have an opportunity to come back to you again, either with written questions or perhaps ask you to come again as this process continues.

We certainly appreciate your being here this morning.

Thank you.

The committee will be in adjournment subject to the call of the Chair.

[Whereupon, at 12:32 p.m., the committee recessed subject to the call of the Chair.]

WEDNESDAY, MAY 3, 1978

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The committee met, pursuant to notice, at 10:20 a.m., in room 6226, Dirksen Senate Office Building, Senator Birch Bayh (chairman of the committee) presiding.

Present: Senators Bayh (presiding), and Huddleston.

The CHAIRMAN. I apologize for keeping our distinguished witnesses waiting.

The key question before us today is the proper relationship between the press media and intelligence activities of the U.S. Government. This is, of course, a fundamental question that impacts upon basic constitutional rights of individual American citizens. It goes far beyond the normal perception of intelligence and press relationships.

We have witnesses who are unusually qualified to speak to this question. They have served as foreign correspondents. Through their work, they have had occasions to observe the activities of our intelligence agencies abroad. They have also been assigned investigative work by their media organizations.

We appreciate particularly your willingness to share your personal experience with the committee, so that we can better understand the scope of this problem.

I believe the distinguished subcommittee chairman, Senator Huddleston, has a few opening remarks.

Senator HUDDLESTON. I would just greet our witnesses. I appreciate the fact that they are here, and I think we ought to proceed with their testimony, and we will have questions when it is time.

The CHAIRMAN. Gentlemen, it is good to have you here. I do not know what the proper pecking order is. Shall we do it alphabetically? That is fine with me. I always find that that is a good way to proceed, unless you are someone whose name is Alfred or something like that.

Mr. Daniloff, why don't you start it off?

STATEMENT OF NICHOLAS DANILOFF, CONGRESSIONAL CORRESPONDENT, UNITED PRESS INTERNATIONAL

Mr. DANILOFF. Thank you, Mr. Chairman.

I am Nicholas Daniloff, a correspondent for United Press International. I understand I have been asked to testify before the committee as a single working journalist.

I would say first a word about my own background to give you a better appreciation of my own particular perspective.

I have been employed by United Press International almost continuously since 1959. One of my first assignments for UPI was as a Moscow correspondent from 1961 to 1965. That span included such

events as the Berlin wall, the Cuban missile crisis, the overthrow of Nikita Khrushchev, and the installation of the current Soviet leadership.

Since 1965, I have worked in Washington, covering at one time or another the State Department, the White House, the Congress, and traveling abroad on occasions with the Secretary of State or other officials.

I should add, perhaps, that my interest in the journalistic community at large, beyond my immediate professional cares, is illustrated by my service as president of the State Department Correspondents Association, and as president of the Overseas Writers Club. Since 1975, I have also been teaching a course at the American University on "The Press and Foreign Policy." For the purpose of this testimony, I have consulted several respected colleagues and my wife Ruth who shared the many difficulties and rewards of a Moscow assignment, but the views I am about to express I consider to be solely my own.

As I contemplate S. 2525, I am struck by the vast scope of the legislation you are proposing. Considering the complexities of the international scene, and the ruthlessness of potential adversaries, I instinctively wonder how wise it may be to attempt to legislate in overly great detail. Valuing the artfulness and brevity of the first amendment, I approach legislation relating to journalists with some trepidation.

Nevertheless, on balance, I believe it would be useful for the proposed charter to include a prohibition on paid, regular, or contractual relationships between intelligence agencies and journalists.

I come to this conclusion out of a concern for the integrity of the press as an institution, as well as a concern for the integrity of individual journalists.

The major purpose of the press, as I understand it and as I try to practice it, is to convey to the public an accurate and timely description of significant and interesting events.

The press, admittedly, is not a perfect institution, and its news gathering and news distributing processes are not without fault, but on the whole, the press tends to be self-correcting. I do not believe it would help the press in its essential purpose to be charged, in some covert manner, with ferreting out secrets for the benefit of intelligence agencies. Indeed, the notion of a secret assignment is quite antithetical to the openness and the truthfulness for which, I believe, the American press strives.

Furthermore, the investigations of the Senate Select Committee on Intelligence in 1976 and 1977 disclosed how, in the past, intelligence agencies manipulated the daily and weekly press, as well as respected publishing houses, through which they succeeded in disseminating biased, propagandistic, or inaccurate information. Some of this information, or misinformation, was intended for consumption abroad, but it was picked up by American news agencies and transmitted back to the American public in what is sometimes called the "flowback phenomenon". Such flowback and such manipulation, when it eventually becomes known, cannot enhance the credibility or the integrity of the press.

Much of what can be said about the assault of intelligence agencies on the integrity of the press as a whole can be said, too, about the integrity of the individual journalist. To carry on a covert intelligence assignment as a journalist, or to masquerade as a journalist when one is actually a spy, can only promote the impression that journalists are not what they say they are.

Furthermore, a paid relationship between an intelligence agency and an individual journalist will inevitably create a powerful incentive in the newsman's life, and this incentive can serve as a lever of manipulation.

There is another consideration, too, which past and present Moscow correspondents will appreciate. If a journalist is perceived by a foreign government to be a possible spy, all sorts of obstacles will be placed in his way. In countries hostile to the United States, the foreign correspondent always treads a perilous path in which he may suddenly find himself faced with charges of espionage and criminal activity.

In recent years, authorities in Moscow have scurrilously denounced several American reporters as agents of the CIA, a charge I fear Soviet officials may actually begin to believe if they repeat it to themselves too often.

As a Moscow correspondent I was occasionally arrested by vigilant citizens or authorities for such activities which I consider to be relatively innocuous, such as investigating a train wreck, photographing the Kremlin Hospital, or taking notes of an evening rehearsal of the November 7 military parade. The next time this happens, I will take some slight comfort if I can immediately argue that it is well known the United States does not hire journalists to be spies.

I do not wish my remarks to be interpreted to mean that I am calling for the abandonment of all contact between journalists and intelligence officers, however.

There are two categories of activities which, I believe, are permissible. I shall call these "public information exchange" and "extraordinary service."

As to the first: It is typical of journalists that they believe tbey may talk to whomever they wish, whenever they wish, and about whatever they wish. I believe, therefore, journalists may benefit by seeking out intelligence officials for the purpose of eliciting information which is to be made public through newspaper articles, magazine dispatches, and broadcasts.

As to the category of "extraordinary service": In the past crises journalists have occasionally played the role of intermediary, passing on messages from one hostile side to the other. This is usually not a function, the function of being an intermediary is usually not a function which either side considers essential, but it can be useful insofar as it confirms the validity and sincerity of messages coming through other channels. I see no reason why the United States should deprive itself of this type of extraordinary conduit in times of crisis.

I would like to close with two additional remarks relating to the integrity of tbe press as a whole, and to the integrity of the individual.

It is my deep conviction that the integrity of the press is fundamentally the responsibility of the press. I further believe the past associations of some journalists and some news organizations with the CIA and other intelligence agencies have tarnished the reputation of the press generally.

I believe that the American journalistic community should take note of the rumors about itself, should look into its own past, and publish an authoritative study of its findings. To this end, I think the press should assemble a working committee to review this particular aspect of its operations.

With regard to the integrity of the individual, I would like to call to your attention the case of Sam Jaffe, a former Moscow and Asian correspondent for ABC. Mr. Jaffe and I arrived in Moscow on the same day in November 1961, and we worked closely together for the next 4 years. As I did, he occasionally engaged in public information exchanges with Soviet officials and with persons whom I have every reason today to believe were associates of the Soviet intelligence agency, the KGB.

In 1963, an official of the Soviet disarmament delegation in Geneva defected to the United States, and I am reliably told, he announced to his interlocutors at the CIA: "We considered Mr. Jaffe a collaborator of ours." More recently, new information has come to light which suggests that the CIA itself deliberately manipulated Mr. Jaffe with its own ends in mind. Partial reports of these allegations have drifted toward the press community for some time to the very great detriment of Mr. Jaffe's reputation and to his own personal hardship.

I wish to state, as a longtime acquaintance of Mr. Jaffe's, and as a friend, that I believe the Soviet defector's description of Mr. Jaffe was totally unfounded so far as I can determine. Mr. Jaffe stands for me as a living warning of the dangers of a too-free-and-easy relationship between intelligence and journalism in years gone by.

Thank you.

The CHAIRMAN. Thank you very much, Mr. Daniloff. I appreciate your thoughtful comments. They are typical of you and your experience to be concerned about the impact that this kind of policy would have on a colleague. I would like to ask, if there is no objection, that we place into the record the three witnesses' biographical descriptions. They are pertinent but well known to most of us here. We will just forego taking the time to do that.

[The material referred to follows:]

DANIEL LOUIS SCHORR

August 31, 1916—Born New York City.
1939—Graduated City College of New York, B.S.
1939–41—Editor, Jewish Telegraphic Agency.
1941–48—News editor, ANETA, Netherlands News Agency, New York.
1948–53—Free-lance correspondent, New York Times, Christian Science Monitor, Time, Newsweek, in Netherlands, Belgium, Luxembourg.
1953–55—Washington correspondent, CBS, Special assignments Latin America, Europe.
1955—Reopened CBS Moscow bureau.
1956—Overseas Press Club citation for radio-TV reporting from Soviet Union.
1958–60—Roving assignments (CBS) U.S. and Europe.
1963—Award for best TV interpretation of foreign news.
1960–66—Chief CBS news bureau, Germany, Central Europe, stationed in Bonn.
1966–76—CBS Washington bureau.

1971—Author, "Don't Get Sick in America!"
1972, 1973, 1974—Recipient Emmy awards for Watergate coverage.
1977—Author, "Clearing the Air."
1976—Regents' Professor of Journalism, University of California, Berkeley.
1976-on—Snydicated columnist, Des Moines Register and Tribune Service, Lecturer, Free-lance correspondent.

JOHN HOWARD NELSON

October 11, 1929—Born Talladega, Alabama.
1947-51—Reporter, Biloxi (Mississippi) Daily Herald.
1951-52—U.S. Army.
1952-65—Atlanta Constitution.
1953-57—Studied economics at Georgia State College.
1960—Recipient Pultizer prize.
1961-62—Nieman fellow, Harvard University.
1963—Coauthored, "The Censors and the Schools", with Gene Roberts, Jr.
1965-70—Southern bureau chief, Los Angeles Times.
1970—Coauthored, "The Orangeburg Massacre", with Jack Bass.
1970 on—Washington bureau, Los Angeles Times.
1972—Coauthored, "The FBI and the Berrigans", with R. J. Ostrow.
1974—Drew Pearson award for investigative reporting.
1975 on—Washington bureau chief, Los Angeles Times.

NICHOLAS DANILOFF

December 30, 1934—Born Paris, France.
1956—Graduated Harvard University, A.B.
1959—Oxford University B.A.
1961-65—Moscow correspondent, United Press International.
1965—Oxford University, M.A.
1965 on—UPI congressional and diplomatic correspondent.
1972—Author, "The Kremlin and the Cosmos", Adjunct professor of journalism, American University, Washington, D.C.

The CHAIRMAN. Mr. Nelson, you are batter No. 2, and Mr. Schorr is in the box waiting to be cleanup batter.

Mr. NELSON. Thank you, Mr. Chairman.

STATEMENT OF JOHN H. NELSON, CHIEF, WASHINGTON BUREAU, LOS ANGELES TIMES

Mr. NELSON. Mr. Chairman, I do not envy the committee members their job of trying to work out a legal relationship between journalists and intelligence officers without hobbling either the work of journalists or legitimate intelligence activities.

From my own experience, although I agree with practically everything that Nicholas Danlioff said, I know there are wide disagreements that exist among journalists as to exactly what the proper relationship should be. However, I think there are a few things concerning what that relationship should not be, and they seem fairly obvious to me, and, I think, to most journalists.

Any paid relationship is especially odious, regardless of whether the member of the media is a free-lancer or an employee of a media organization. In my own opinion, S. 2525 should prohibit the intelligence community from employing any employee of a media organization, regardless of whether that employee is directly involved in the news operations.

Intelligence agencies should not be permitted to use a journalistic cover for their own officers or employees, no matter how useful such a cover might be in covert activities, and while the use of a foreign media as a cover is a more complex matter, I would suggest that such use in any country with a free press would be a corrup-

tion of that press, and there are differing degrees of press freedom in different countries.

If we are to protect our own press from such corruption, by what right do we undermine the free press of another country? The only basis I can see for journalists and intelligence officers to cooperate is in the voluntary exchange of information, and in this regard, I believe journalists as well as intelligence agents should be in the position of treating each other as confidential sources, and either party should be free to initiate the contact.

I strongly disagree with my colleague on the Reporters Committee for Freedom of the Press, Jack Landau, on that particular point. Writing in the committee's April 1978, publication of The News Media and the Law, Landau suggested passage of a law prohibiting the CIA from initiating such a contact, and he added, and I quote, "Perhaps more useful would be a law simply requiring the CIA to publicly report every year on those newspersons who have supplied it with information under any arrangements."

Landau wrote that "this would not stop the newsperson from volunteering information to the CIA, but it would put his coworkers and his news sources on notice for the future that the newsperson is in fact a Government agent."

I do not believe the exchange of information in any way makes a journalist a Government agent. It is a time-honored way of journalists going about the business of finding out and reporting what is going on in Government. This is not to suggest that a journalist should spy for an intelligence agency, even on a voluntary basis, but I see nothing wrong with the reporter sharing the information he gathers with an intelligence agent, as long as it is voluntary, on his terms, and he is not compromising his own sources of information.

It is done every day in American journalism, and there is no question in my mind but that a law requiring an intelligence agency to publicly report such sharing of information would adversely affect a journalist's first amendment rights to collect and report the news without prior restraint.

My opposition to any paid relationship, including the payment of expenses, is based on the fact this would constitute a situation where a journalist would in fact be an arm of the Government. In my opinion, this would not only compromise his own journalistic integrity, but the disclosure of such a relationship would pose a wider danger that other journalists would be impeded in their work by unfairly being suspect of being intelligence agents.

To understand the danger of such disclosures, one only has to talk to U.S. correspondents abroad, such as Nicholas Daniloff or Daniel Schorr, whose work in recent years has been impeded by foreign governments which have cited publicity about journalists being employed by the CIA. Such disclosures have been used as evidence that all foreign correspondents are suspect, and therefore should be treated as foreign agents.

The most notable recent case of a correspondent in such a situation involved Robert Toth, who is now in the Washington bureau of the Los Angeles Times. You will recall that last June, Toth was winding up a stint as Moscow bureau chief for the Times. He was arrested and detained for a week by the KGB before he was finally

released. The Soviet Union accused Toth of being a CIA agent. Despite denials from Toth and his newspaper as well as denials from Government officials, from President Carter on down, the Soviets have continued to depict Toth as an intelligence agent. Through broadcasts and print media, the Soviets have repeated this baseless charge at least a dozen times.

So, before coming here to testify, I asked Toth about the impact of such repeated accusations. He said,

> Despite all the denials of any connection whatever with the CIA, the accusation inevitably gets some credence from the disclosures that some journalists were used by the CIA. It does limit in a real way the access journalists have to news sources in unfriendly countries, and it may even give some suspicious Americans pause about the credentials of a correspondent despite the fact there is absolutely no truth to the allegations.

Whatever restraints are imposed on the relationship between the media and the intelligence community should be imposed on the latter and not the former, of course, and frankly, I see no reason why the intelligence community should not be a fountain of information for the media, consistent with national security goals and the necessity of protecting sources and methods.

In conclusion, I would like to not only associate myself with the testimony of Nicholas Daniloff, but to say I especially agree with him on the case of Sam Jaffe, whose case I looked into some time ago, and whom I believe has suffered greatly because of having been manipulated by intelligence agencies.

Thank you very much.

The CHAIRMAN. Thank you, Mr. Nelson.

Mr. Schorr, it is good to have you with us here this morning to clean up. You have had more than a interest in the governmental process, and certainly it has affected your life.

STATEMENT OF DANIEL L. SCHORR, FORMER CBS CORRESPONDENT, AUTHOR AND COLUMNIST

Mr. SCHORR. I thank you, Mr. Chairman.

For purposes of identification, I forgot to put in my prepared statement the most specific thing I do now. I am a syndicated newspaper columnist for the Des Moines Register and Tribune Syndicate. This is undoubtedly the most pleasant of three appearances I have made before Committees of the Congress, all of which were involved with intelligence matters in one way or another.

On the first of February 1972, I testified at the invitation of Senator Sam Ervin before the Judiciary Subcommittee on Constitutional Rights about the experience of being investigated by the FBI for a nonexistent Presidential appointment.

On September 15, 1976, I testified under subpena of the House Committee on Standards of Official Conduct, better known as the House Ethics Committee, and apparently not responsive entirely to their satisfaction. The committee was inquiring into the unauthorized disclosure of the draft final report of the House Select Committee on Intelligence.

That I have survived these episodes of intelligence agencies' concern with me to be sitting here today advising on future guidelines for the intelligence agencies is something that strikes me as an exhiliarating tribute to democracy in action.

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To get down to S. 2525, I believe it represents an impressively thoughtful and balanced approach to applying the lessons of the past to the future direction of American intelligence. I think you have a most extraordinary task, because you really have to overcome the fundamental contradiction between secret intelligence and responsive government.

Intelligence activities are clandestine precisely because they do not conform to accepted modes. Communication between the covert world and the overt world is simply not easy. How do you write a code for professionals whose real code has been to operate outside the code? In the past, the intelligence people have shown an institutional tendency to ignore publicly stated national policies, and they have shown a tendency to be, almost by reflex, less than candid when asked to reconcile their actions with public policies.

So, building a bridge between the Constitution and the clandestine is a most delicate task. I guess eternal vigilance will be the price of maintaining it.

Turning now to section 132, which I guess I would be expected to focus on because it involves the use of journalists in intelligence activities, let me say I fully agree with the positions expressed by Mr. Daniloff and Mr. Nelson, and that what I have to say, I think, will be very much along the same lines, although seen from a slightly different perspective.

For purpose of analysis, it may be useful to view relations between intelligence and the press from two viewpoints: the ways in which intelligence agencies utilize the press, and the ways in which the press utilizes intelligence agencies. At both ends of the spectrum, you can make some fairly clear distinctions. At the center, it tends to become fuzzy, and that is where the problem arises.

A clear issue is the use of the press for purposes of intelligence cover. Typically, the agency infiltrates an agent into a news organization, most often by arrangement with management, sometimes not. The agency generally does not seek to influence the reporting of the correspondent, because that might detract from the effectiveness of his cover. In fact, it encourages him to live a life of controlled schizophrenia, meaning, when you are working for the news organizations, you do what they say, except when you are working for us, and then you perform your intelligence missions.

Under current CIA regulations, this practice is banned as regards journalists employed by American news media on a full-time or part-time basis, but it is not banned for nonjournalistic personnel, that is to say, administrative and technical, when that is approved by management of the news organizations.

In S. 2525, your proposed paragraph 6 would flatly prohibit intelligence agencies from using a "U.S. media organization" for the purpose of "maintaining cover" for an intelligence agent. However, when you look at paragraph 3, which defines those news media personnel whom intelligence agencies would not be permitted to use for paid intelligence work, your definition there is somewhat less sweeping.

There, you would apply it only to journalists, editors, and policymaking executives. I believe in practice it would be difficult to distinguish the news person who is paid as an intelligence agent from an agent who is under cover. In fact, I am inclined to believe

that once you abandon the use of cover formally, the tendency to want to use the other category of persons who are employed at least pro forma by news media organizations but serving the intelligence agencies, that may very well increase.

So I would urge you to expand your restriction in paragraph 3 to be more like the one in your paragraph 6, that is to say, to apply to all personnel employed by American news organizations, including administrative and technical. Otherwise, I fear you will open the back door to cover arrangements that you would try to close in paragraph 6.

I am aware of the CIA's concern that, as various occupations and activities are removed from its purview, that it is being subjected to an involuntary striptease, one cover after another being torn away, until it feels that its agents will become quite naked, and I understand that. Part of my difficulty with this is, I can look at it from their point of view as well, but I would submit to you that there is such a special fragility about the gathering of news for the American public that it warrants special protection in spite of the burden that it would place upon the intelligence agencies as their means of cover become reduced.

It is not foreign reaction that concerns me. Here may be the one point on which I do not fully agree with Mr. Daniloff or Bob Toth. I am not impressed with the argument that categoric legislation is needed to keep the Soviets from making propaganda hay by labeling American journalists as CIA agents. They will in any case not believe American legislation. They will in any case make their accusations whenever it suits their purposes. What concerns me is not credibility with the Russians, but credibility with the Americans, and even credibility within American news organizations.

The unresolved question of what media executives made what secret agreements with what intelligence agencies way back in the 1950's, however patriotically they were motivated, the unresolved questions of what media executive made those agreements to penetrate their own organizations have left a cloud of suspicion both outside and inside those organizations, and there I agree with Mr. Daniloff that it would be a good idea for the press itself to try to uncover that past, not in terms of those reporters or quasi-reporters who served the Agency, because the Agency will never reveal the names of their agents, but to simply expose the type of arrangements that were made with news executives, and what those arrangements were. If they were made patriotically, why not say so now, so that at least we have some understanding of how they worked?

I can tell you it is unsettling to look back on those tbat one was associated with in a news organization over many years and wonder which of them were operating with other, if not ulterior motives than newsgathering. Today a typical television network bureau in a large foreign capital employs more administrators and technicians than it employs correspondents and editors, and the distinctions between and among them are not always very easy to draw.

So, I think it would be a great service to the free press if it were required, as far as legislation can accomplish this, that American

news organizations be completely free of deliberate intelligence penetration.

Let me turn now to the other end of the spectrum, the press utilization of intelligence agencies as opposed to their utilization of us. While I am in favor of the strongest provisions to keep intelligence agencies from utilizing the press, I would oppose anything that hindered press access to the intelligence agencies for information-gathering purposes. There is an ambiguous area between the two, but I would caution you against allowing your zeal to protect us from going so far as unwittingly to infringe on our first amendment rights and responsibilities.

That is to say, I would advise you to steer clear of seeking to regulate the voluntary and unpaid relationships between news people and intelligence agencies. These are properly matters between journalists and their own organizations.

Before becoming involved with covering the investigation of improprieties in intelligence agencies, I dealt with the CIA over a period of many years as a foreign correspondent. For many of those years, I was a CBS news correspondent, and before that I was a stringer for papers like the New York Times and the Christian Science Monitor. It was hardly possible to seek information without imparting information, nor, to be frank, did I try very hard. I had no compunction about telling a CIA station chief what I would tell an Ambassador, and what I would tell the American public.

Did the CIA sometime try to sell me its line? Undoubtedly. Does the CIA favor cooperative reporters? Undoubtedly. Why should the CIA be different from the State Department, the Department of Agriculture, or the White House, for that matter?

To illustrate the variety of ways in which a journalist deals with the CIA, I take the liberty of furnishing you a copy of an article I wrote recently for the Op-Ed page of the New York Times. I will not take your time, as I am running too long anyway, to read that, but we will ask that that be put into the record.

[The material referred to follows:]

I'VE GOT A SECRET

(By Daniel Schorr)

WASHINGTON.—Whether the journalists who served the C.I.A. should be numbered in the dozens or in the hundreds hinges, it has become clear, on how one reads the files. Groping through the thicket of C.I.A.-media relations, the House Intelligence Committee has come up with a distinction between "contacts" (voluntary) and "assets" (paid). Not so, say veteran intelligence officers. An "asset" could be anyone enlisted, even unwittingly, to provide assistance, or sometimes merely claimed as an asset by a self-aggrandizing field officer.

Various episodes in my career must, in that case, have qualified me for an "asset" listing, and I offer these as a cautionary tale:

1. In the late 1950's I was one of the group of CBS foreign correspondents who would dine, during year-end visits home, with high C.I.A. officials. My current amnesia about what was discussed may attest to their intelligence skills or to the quality and the quantity of the wine consumed.

2. Stationed in Moscow from 1955 through 1957, I met Americans on voluntary or assigned intelligence missions. For example, a visiting television executive took me to inspect a jamming transmitter, whose location he obviously knew. In May, 1957 I spent many late nights with C.I.A.-financed American students who had been sent to the Moscow Youth Festival as an antidote to the predominantly left-wing delegation.

3. Barred from the Soviet Union after being briefly arrested by the K.G.B., I was invited to lunch, in 1958, in the office of C.I.A. Director Allen Dulles. Afterwards,

without asking my consent, he led me into a room for what turned out to be a debriefing by agency specialists. I had some qualms, and I rejected some questions, but generally I cooperated. Shortly thereafter, as I learned on obtaining parts of my C.I.A. file two decades later, some consideration was given to recruiting me into the C.I.A.'s ranks, although no offer was ever made.

4. In East European capitals, as a matter of practice, I sought out C.I.A. officers in American embassies as generally more knowledgeable and objective than their diplomat counterparts. Before leaving these countries I would share my observations—to check my findings and to maintain contacts useful for the future.

5. In West Germany, an important C.I.A. terrain in the 1960's, the West Berlin station chief, at whose home I dined, was invaluable in casing the Communists, and I discussed with him my impressions of visits to East Germany. In Bonn, Henry Pleasants, a station chief under very light cover, mixed easily with American correspondents at his sumptuous hilltop mansion. He seemed mainly to be trying to recruit us for discussions of music and for his wife's harpsichord recitals. Once I confronted him with the charge of using the C.I.A. as cover for a massive music operation.

6. With less overt C.I.A. officers in West Germany I entered occasionally into operational cooperation. For example, I accepted the offer of a filmed interview, in an obscure country retreat, with African students who had quit East European universities, bitter about Communist racism. It made an interesting story for CBS and undoubtedly an interesting propaganda point on American television for the C.I.A.

The C.I.A. also agreed to cooperate in the making of a televison documentary about Communist espionage penetration of West Germany. West German counterintelligence officials to whom I was referred provided me with vivid case studies. In a secret C.I.A. installation near Frankfurt, I was able to film an interview with a recently-defected East German espionage officer, who recounted the running of spies in West Germany—one of them targeted at American Embassy secretaries. CBS gained a successful half-hour documentary; undoubtedly the C.I.A. gained in its aim of jarring the West Germans from their complacency about espionage.

7. As late as 1976, working on a television program for children called "What's the C.I.A. All About" I arranged with the agency to obtain U-2 spy plane equipment and photographs of missile sites in Cuba. I was aware that the C.I.A. was anxious to have its prouder moments recalled. The gadgetry was perfect for television however.

Was I a C.I.A. asset? Perhaps. Certainly the C.I.A. was an asset in *my* work. Journalism—particularly television journalism—requires various kinds of active cooperation. As long as *my* sole purpose was getting a story and my employers were aware of what I was doing, I felt ethically secure.

Daniel Schorr, a former CBS news correspondent, is the author of "Clearing the Air" which discusses Government security.

Mr. SCHORR. You will find there some examples of what happens in what I call the middle of the spectrum, where the press is both the beneficiary and benefactor of intelligence agencies.

Let me in that connection raise a specific problem with paragraph 5 of your section 132. This paragraph would seek to remedy the phenomenon of flowback or feedback to the United States of the intelligence agencies' propaganda activities abroad. In one case the CIA made available to me while I served in Germany a defected East German intelligence officer, and his filmed interview, which was for a CBS documentary, appeared on television in the United States.

In another case, the agency gave me access to African students who had left an East European university bitter and disillusioned over the racism they had encountered there. For the U.S. Government, this had an obvious propaganda purpose. It was also, as my employers recognized, news for us.

It is not clear to me, because I have not examined this with a lawyer's eyes, whether that assistance, rendered in a foreign country, resulting in distribution of what was CIA information on American television, would have been precluded if paragraph 5 as

now written had been in force. In that case, there is a question whether such a provision would violate the spirit, if not the letter, of the first amendment by interfering with my news-gathering activities.

You see what a tricky area you are in when the best intended protection for the press can turn out to have implications of abridgement. I am not even sure whether constitutionally you can prevent a journalist who works part-time for an American news organization from writing a piece of analysis commissioned by the intelligence agency. What would surely be infinitely more desirable is that news organizations rather than Congress or the Government police the relationships of their full- and part-time employees with intelligence agencies.

As to what you do about free-lance journalists, a term that defies precise definition, I simply throw up my hands. I am not always sure what a free-lance journalist is.

In conclusion, I believe you are on the right road in seeking to make your basic premise the difference between the paid and the voluntary relationships between journalists and intelligence agencies. This, even though we know that there can be forms of compensation more valuable than money, by scoops and even occasionally helping to get a Pulitzer prize. I hope you will strengthen the provisions aimed at preventing penetration of news organizations, and at the same time you will reconsider language that could have the effect of limiting news gathering.

Thank you.

The CHAIRMAN. Thank you, Mr. Schorr.

Gentlemen, I think you have all in your own way, with your own experience, really focused in on the delicacy of the problem the reporter faces. I am sure Senator Huddleston will want to deal with some of the specific bits and pieces of this problem. Resolving a contradictory responsibility between a free press and a secure intelligence system will not result in a picture that has broad sweep with clearly definable features, but rather as a mosaic or even a "Monetic" kind of thing where we hope to get all the pieces to make sense.

Could you help give us a bit more information? There seems to be general recognition that there should be no contractual paid relationship, nothing, not even expenses. Could you help give us a little more information about how a citizen of the United States who happens to be working with the press can, if he or she is so disposed, exercise his or her rights to voluntarily make information available without falling into the same pitfalls here? Can we distinguish between information that comes to your attention as members of the press that you feel is vital and critical, that someone in the Government needs to know from the standpoint of national security on the one hand, and an operational function on another, whereas one of you might say, well, I would like to help out voluntarily, so instead of reporting information, instead of having any contractual relationship, you are used to pass on information purely voluntarily, or to make what the community calls a drop?

This kind of thing would be totally voluntary in nature. Could you make a distinction there, or should a press citizen be free to do whatever he or she chooses?

Mr. DANILOFF. I must say I would certainly oppose an employee of a media organization making a drop. That enters into an operational role which I take to be in the nature of a regular relationship, an intelligence relationship. I would oppose that. I do think that the legislation should be written in such a way that there is the possibility for volunteering information if an individual feels that it is really of great importance to the national security.

Frankly, I think that kind of situation hardly ever arises, except possibly in wartime.

Mr. NELSON. I would agree with that, Mr. Chairman. I would be opposed to a drop or anything that would look like you had an arrangement, a covert arrangement, but on the other hand, reporters do all of the time talk to intelligence agents. They do share information with them. I do not think that is a particular problem. It is just a matter of the course of journalism in this country.

Mr. SCHORR. I think it is the word "drop" that has colored the answers. Obviously, no reporter wants to be accused of making a drop, but if you, instead of using drop, say giving information at various times, Nick Daniloff opposes it and I oppose it, but your question has to be, coming from a committee of the Senate, as to what kind of legislation there should be. I am constantly concerned that in the course of trying to protect the pristine quality of the press, that you will impose a restriction. I do not think under the first amendment that you can interfere with the right of an American to talk to anybody he or she wants to talk to.

You can make rules for the intelligence agencies. I do not suggest that you can make rules with regard to individuals. If a reporter cooperates with an intelligence agency beyond the bounds of propriety, it is a problem for his news organization. It is not a problem for you, and I see no reason to try to write legislation that would say that if you happen to work for a newspaper or a network as opposed to being a businessman or some other kind of citizen, that you would be barred from a right to talk to anybody you want to talk to, including the CIA or the FBI.

I think the problem is for the employer and not for you.

Mr. NELSON. One of the questions I think the committee staff suggested might be answered is whether or not a journalist should seek briefings from, say, the CIA or some intelligence agency before going to a foreign country, for example. I not only do not see anything wrong with that, I think it is very helpful, and I see nothing wrong with a reporter coming back from a foreign country with whatever information he is able to pick up, if it is not published information, as long as he is not compromising a source or anything—it is normally public information anyway—sharing that type of information.

The CHAIRMAN. Mr. Schorr, I do not know whether you would care to be more specific or whether Mr. Nelson or Mr. Daniloff care to respond to the problem you raised there where, by making certain individuals available, an agency might indeed violate paragraph 5? Where do you go between that and first amendment rights on the other? After you presented the quandary, do you have any more definitive answers? Is that the kind of thing we just stay away from?

Mr. DANILOFF. Senator, if I may interject, I would like to say that in talking with some of my colleagues, I was surprised to find that a number of them actively oppose any prohibition being written into the law. They seem to oppose it because they feel that the press really should regulate itself, and that it sets a poor precedent to begin discussing the relationships of journalists in law.

The CHAIRMAN. Do they oppose the paid contractual prohibition as well?

Mr. DANILOFF. They oppose two things. They oppose any relationship between the media and the intelligence agencies. They also oppose the sort of prohibition that you wish to write into this legislation, because they feel that it is unwise to set a precedent of writing into the law restrictions on how journalists should operate, and I must say, if you look at my testimony, that I approached the question of regulating the relationship very gingerly, because I think it is best not to be too specific.

Once you start becoming too specific, you will begin to run into all sorts of problems.

The CHAIRMAN. Mr. Schorr, you were going to say something?

Mr. SCHORR. Yes. What I was going to say may over-simplify things a little bit, but the basic standard, as I see it, is that your job is to regulate Government agencies and not to regulate the press in this country. You can write rules for the CIA and for the FBI. You can say that we do not want you to penetrate news organizations. We do not want you to make arrangements with news organizations which in fact turn news organizations partly to purposes which are not news gathering. That is a perfectly legitimate purpose for you to serve.

In addition, you can say that you do not want the CIA to employ journalists as long as they are journalists as agents in any form. When you go further, and then say, we do not want you talking to journalists, then you are also saying you do not want journalists talking to them. The line that comes in is, you can regulate the proper activities of the agency, but you cannot undertake in any way—I believe you cannot undertake in any way to regulate what the press does under the freedom of the press or indeed what a citizen does under the individual freedoms, right of free speech.

The line sometimes is unclear, because if the agency is not permitted to listen to you, you may in effect be preventing somebody from talking to the agency, but I think that line has to be found and has to be drawn. You are in the business of making sure agencies behave properly and do not do clandestine things against public policy as you see it, and that can be defined as, do not make arrangements with news media, as has happened in the past, in which you run people under cover.

Furthermore, we do not want you engaging people without public knowledge who work in news organizations because of the fragile quality of the product they turn out, and having done that, you will just have to stop. You cannot regulate every form of communication and expression that goes on between news people, citizens, and any Government agency, of which the CIA and FBI are two.

The CHAIRMAN. I apologize. I just have a report that I must be on the floor. I will get back as quickly as I can. I am sure Senator

Huddleston will have some questions. It is a delicate line there. I think you have put it very well.

Senator HUDDLESTON [presiding]. Thank you, Mr. Chairman.

Gentlemen, I am pleased to see all three of you indicate that the press itself has an important role to play. I guess the best of all possible worlds would be to have a canon of ethics or whatever within the press, enforceable to the extent possible, to the effect that these kinds of things could not happen no matter what the objective of the intelligence agencies might be.

If part of the objective of writing this kind of law is to restore confidence in the people both in the intelligence operations and in the press, I have some concern that the press in fact is not being corrupted in any way by the intelligence agencies, that they are all free to, and are, operating freely without the kind of bias that might occur if they were paid by the agencies.

It seems to me we do have to have it written in specifically. As Mr. Schorr has pointed out, no matter how strong we write the law, I think there will be those who do not believe it, certainly when it suits their purpose not to believe it. On the other hand, it seems to me that you must have some specific prohibitions in the law in order to achieve that part of the purpose of this provision in the bill in the first place.

I recall back when we were investigating the connection between the press and the intelligence agencies, I was involved very much in that specific part of our investigation, and was under a considerable amount of pressure from a good part of the press to reveal the names of those who were involved. My response was that that really was not what we were concerned about. We were more concerned about the mechanics, the processes, and the extent of it, and what the results might have been, rather than individuals.

I said further that after all, the press knows—using "the press" in the sense of botb collectively and individually. That was one issue where the knowledge was within the press. The press did nibble at it, and provide some information about it. I think the suggestion that has been made by Mr. Daniloff that the press itself should investigate and make a total disclosure of whatever they can find might be very beneficial.

It has also been expressed by all of you that there is a role that the press as an institution can play. Does the mechanism exist within the press? Is there a canon of ethics that can be enforced to the extent that the press can or could play a decisive role in setting the standards and setting the kinds of activities tbat they can and cannot participate in?

Mr. DANILOFF. I am not an expert in the history of this area, but my impression is, the American press is marvelously disorganized, and that it instinctively resists any type of banding together for a collective purpose. Actually, I think this is a strength in some regards, because it really prevents any kind of domination of any part of the press by any other, or even any domination from the outside.

I do feel strongly that the press ought somehow to look at itself, but it is not clear to me quite how one might go about this. One could say that perhaps some of the leading press organizations, such as the New York Times, the Washington Post, or television

networks, or the wire services, could take the lead here. One might also say that a group of concerned reporters ought to take the lead.

Frankly, I am doubtful that this will ever happen. Nevertheless, I wanted to raise the possibility.

Senator HUDDLESTON. Do you have any ideas on that, Mr. Nelson?

Mr. NELSON. Senator, there are certain codes that are sort of halfway looked at in the field of journalism. Sigma Delta Chi, for example, the journalism fraternity, has some, but Mr. Daniloff is exactly right. The press is generally so disorganized that it does not have a central code. I doubt seriously that it would do any great amount of good to have a code. I think the word is really out among members of the news media now that it is considered odious to have any sort of connection with intelligence agencies, and I would think all of the news organizations would be totally against that.

Senator HUDDLESTON. As it is now, each news organization whether it is a major newspaper, a network, or wire service, has its own code. Is that correct?

Mr. NELSON. I think that is substantially correct.

Mr. DANILOFF. I guess I would have to differ there. I have never been presented, ever in my experience, with any formalized code by anyone.

Mr. NELSON. I do not mean to say that there is a formalized code, but we have certain written policies. We have a policy on the Los Angeles Times, for example, that no one could be a member of an intelligence agency, paid expenses or anything else, and that is a firm policy.

Incidentally, we have tried to find out from the CIA the names of anybody from the Los Angeles Times who has ever been employed. The CIA has refused to give us that information.

Senator HUDDLESTON. Mr. Schorr, do you have any comments?

Mr. SCHORR. I am in general agreement. The press is not very big on canons, because we are always afraid they will explode in our own faces. The rules, such as they are, are rules within individual organizations. I am not sure what kind of a code of ethics you could write that would prevent a publisher or a head of a large organization from making an agreement with the CIA that would provide for cover for the CIA of one of his nominal employees. That is the problem. No code of ethics works if there are secret arrangements made between the employers.

I think the whole question of the CIA's relationship with the press has focused too much on individuals and demands for names, such as I know you were subjected to back in 1975. The names are not really all that important. They may satisfy the curiosity of people to know who it was, but I think the arrangement that was made and its nature, between large organizations and their executives and intelligence agencies, are probably more important than the names of those who did, all of them presumably for patriotic reasons.

As my colleague has suggested, I doubt whether much of that would happen again today, partly because we are not in the age of that kind of cold war. The rationale for that kind of action is missing in a period of detente, and a lot of people have been

burned by it, and having been burned, they would not be likely to repeat the experience anyway.

I think it may seem fruitless to try to fight the last war, to try to go over and close all of the holes opened up in the 1950's, and if you overdo it, and write the rules too specifically, you verge off in the other direction.

At the very least, one thing that is very sure is, it would be very useful, and I think we could all agree on it, that at the very least the intelligence agencies are estopped from entering into arrangements with news organizations which will provide, sometimes without the knowledge of most of those employees in the news organization, use of the organizations as tools of the intelligence agencies. One could begin there. From there on, it gets rather gray.

Senator HUDDLESTON. When you start talking about any kind of control on the press, you get beyond the first amendment, and you have about said it all.

Mr. NELSON. When you talk about a regular relationship, I would hate to see any legislation that might say you could not have a regular relationship if it is not paid and is a voluntary relationship because any number of journalists do have regular contacts in the intelligence agencies.

Senator HUDDLESTON. We provide that, of course. I am wondering, if a person has a relationship, or if he just on a one-time basis, say, were going to Europe on a special assignment to interview a leader of a foreign country, perhaps even an "iron curtain" country, and went to the CIA for a briefing before he went; and if the CIA should suggest to him that there are a couple of areas they would like to have some information on about this individual, maybe nothing more than his health, or what his plans might be for seeking reelection, would that be considered an improper suggestion to ask the reporter, with the understanding that whatever he found might be a part of a public story?

Mr. NELSON. I would not see anything wrong with that, as long as the reporter saw it as a news question to ask, a question which might have some news value. I see nothing wrong with that at all. That is part of the reason for the briefing, to find out what sort of background they might have to help you with your interview.

Senator HUDDLESTON. But this would be specific information that the agency itself wanted as part of its intelligence gathering.

Mr. NELSON. I understand that, but the reporter would not be curtailed from using it in his story, so I cannot see where there would be anything wrong with it.

Senator HUDDLESTON. Is there any problem with that?

Mr. DANILOFF. I do see a problem with that. I think that is the thin end of the wedge right there, when an intelligence official says, when you go to country X, could you not try to find out about the health of the minister of petroleum? That is a poor example. Let us say minister of mining, because that is not necessarily a big newsstory, but it could be terribly important to somebody in the CIA.

Mr. NELSON. Excuse me.

Mr. DANILOFF. If I may just give you what my response would be, my response would be, OK, I hear what you say. Then I would go off and find out what I could find out. If the man then came back

to me and asked to get together with me, took the initiative, and then wanted to come and exchange information, and in the course of that conversation said, "Oh, by the way, did you find out about the health of so and so," and if I had, then I probably would pass it on, but I really do consider that kind of suggestion from an intelligence agent to be the beginning of espionage, and that is where I draw the line.

Mr. NELSON. That does show you real disagreements among the journalists, because I see absolutely nothing wrong with him suggesting 100 questions. Now, I might see 2 out of the 100 that I would think were newsworthy, and I might ask those 2, but I would ask all 100 if I thought they were newsworthy.

Senator HUDDLESTON. You think as long as the reporter sees it on the basis of whether it complies with what his news objective is——

Mr. NELSON. Certainly.

Senator HUDDLESTON [continuing]. That there would be no problem, Mr. Schorr?

Mr. DANILOFF. I was trying to draw the distinction here that the question he was suggesting was not a news question, and I was not going to use the answer in a news fashion. It was a question of interest only to the intelligence agency in which I could possibly help them, but I consider that to be the beginning of espionage right there.

Mr. NELSON. I have to agree with that. I would not ask the question if it were not newsworthy.

Mr. SCHORR. It is a difficult area. In practice, once you are engaged in friendly intercourse with intelligence agents, you very soon lose the boundaries. It does not tend to work in terms of tell me only things that I want for news, and I would only do what I want. You discuss the general situation. A discussion with an intelligence—or for that matter a State Department officer—in essence the kind of prebriefings and postdiscussions we have are not terribly different, whether they be Pentagon officers, military affairs, CIA officers in certain areas, or State Department, or Foreign Service people. You go over the whole ground.

I know for example when I was stationed in Moscow in 1955, I was given a tip by an intelligence officer that when the name of the cabinet member described as the Minister for Heavy Machine Building dropped out because he was supposed to be ill, it was something very important to watch, because that was the cover name in the Soviet Cabinet for the one in charge of nuclear development. It was very important. He was really in charge of making nuclear weapons. He ended up in the hospital, and then it was required that he be sent abroad for treatment, and I was quite fascinated. It made a fascinating story, which I never got past the Soviet censors, but I tried.

So you see how intricate the relationship is? It was very important for the CIA to know what I could find. It was important for the whole American Government, the AEC, to know what I could find out about this minister. I found it fascinating to have the background that made him become a newsstory.

Essentially, I agree that the line you can draw, to the extent you can draw it, is that if it is actually or potentially something that

would end up in something you do in a newsstory, then it is OK. If there is a fringe benefit for the CIA in having put the question to use, that you know enough to make something of it, and they get some benefit out of it, that is OK.

The point is, when someone says, you do not care to know about this, it would serve no purpose for you, but we would sure appreciate it if you would find this out and report it to us, and please do not put it in any newsstory, because that would blow the whole thing, that is where you would stop.

Mr. DANILOFF. I would give you another example which illustrates this problem. On one occasion an FBI agent came to me and said, when you next see Soviet diplomat Ivanoff, see if you could ask him this sort of question, and find out what his answer is. I refused, because I thought that was being an agent of the FBI.

Senator HUDDLESTON. Of course, that is an area where I think it would be very difficult to draw legislation. We would have to make a determination whether it was in the scope of his newsgathering responsibilities, and I think it would be clear if he went beyond that he would in fact be an agent of whoever asked him to do it.

In the area of influence on publication, where has the responsibility been discharged when an agency of the Government—CIA, FBI, or a security agency—makes an effort and a strong case that the release of a certain story that you may have in your possession would in fact be damaging to the security of the United States? How do you handle that?

Mr. NELSON. I am a first amendment absolutist on that. I think any news we get that is news should be published. I have a perfect example, the *Glomar Explorer* case, where the CIA managed to lock up the Los Angeles Times, the New York Times, the Washington Post, Newsweek, Time, all of the networks, until finally Jack Anderson broke the story on radio one night. I have never heard of any real damage to our national security from that particular story. I can imagine barring some story like a troop move during a war. I can imagine nothing that would be so devastating to national security that it would not be in the interest of the public to go ahead and report it if it were real news.

Senator HUDDLESTON. Did you say including troop movements?

Mr. NELSON. No; I said I would see that as an exception, but hardly anything short of that.

Senator HUDDLESTON. Do you recognize there is a legitimacy to the idea that some things ought to remain secret?

Mr. NELSON. Very few things.

Senator HUDDLESTON. My impression is that much of the press agrees with that, that there ought to be national secrets, but they also follow the idea that it is the responsibility of the Government to keep them secret, and if they become nonsecret, it is the responsibility of the press to print them.

Mr. NELSON. That is close to my feelings.

Mr. SCHORR. Unlike Jack Nelson, I am really not an absolutist. I am not an absolutist about practically anything, and it is interesting that the *Glomar Explorer,* which he cites as an example of a mistake made by newspapers, including his own, in withholding that story, is cited by the CIA and stressed in the forthcoming book of Bill Colby as an example of a legitimate request by an intelli-

gence agency to withhold information. After all, his point was that they had not completed the job of lifting the Soviet nuclear submarine off of Hawaii, somewhere in the Pacific, and that they planned to go back, and they were not permitted to do it again.

The story could have at least been withheld until they finished doing their work, which was the argument that apparently prevailed with the various news organizations to whom it was presented.

I luckily, most of the time, at least, am not in the position of having to make that decision. Normally, those decisions are made by my superiors. It is they who basically have to live with them. The New York Times has to live with the fact that having consented to hold up Tad Szulc's material on the Bay of Pigs, they lived not very long to have President Kennedy say he wished they had not listened to him. It would have been a great thing for this Nation if they had blown the whole Bay of Pigs thing and prevented it from happening.

Those are some of the things you later hear when you do assent to requests, but it is an ad hoc thing. The troop shipment is not really a real problem. It happens in war time, and you will be subjected to emergency regulations anyway, and you do not have the problem of making those decisions by yourself, because there are laws then that have to be enforced, and emergency proclamations. It is in peace time that the problem arises.

I for one would never say that there is no circumstance under which I would withhold publication of information if I were convinced personally or if my superiors were that it would do harm, but having said all of that, let me say respectfully that it is none of your business. It is a thing that happens in a voluntary relationship between editors and the Government when a Government official appeals to the editor. If you are asking for information about how it works, we would be delighted to discuss it, but if you are asking because you want to write regulations to enforce such things, then it really is outside the purview of anyone in the Government.

Senator HUDDLESTON. I recognize that, but I do not think the concern for the interests and the security of the United States is outside of our purview. We at least ought to have an opportunity to explore the possibility of that.

Mr. NELSON. Senator, I would like to add something in connection with what Dan Schorr said. The editor of the Los Angeles Times obviously thought it was in the interest of national security to withhold the story. He was the editor. He made the decision, and I just happened to disagree with it.

Senator HUDDLESTON. I think he was probably correct in that instance. Of course, we do not know what interests might have been served had we been able to complete the task.

Mr. NELSON. I do not think you would have found any working journalist in that story who would have agreed with the decision, but it was made by the superiors of all of those organizations, which is, I guess, the reason they are the heads of all of those organizations.

Senator HUDDLESTON. What about the case of having a code broken in an enemy country?

Mr. SCHORR. That is the famous Chicago Tribune Iron Cross from President Roosevelt. I am not sure what your question is. For one thing, codes do not work these days the way they used to work. You do not work these days the way they used to work. You do not compromise codes any more. The allegation was made, for example, in connection with the Pentagon Papers, that one of the damaging effects of the publication of the Pentagon Papers is that it would compromise the codes. That is nonsensical. We have computerized codes, changed on a random basis, and you do not compromise codes. If you are talking about in wartime——

Senator HUDDLESTON. That is not entirely true, Mr. Schorr.

Mr. SCHORR. Well, I would love to receive any further information you care to impart. [General laughter.]

But if you are talking about the knowledge in wartime that we, our side have broken an enemy code—the odd thing about it is, in tbe very case you apparently allude to, the famous breaking of the Japanese naval code, in spite of the fact that the Chicago Tribune inferentially revealed that information, the Japanese did not react. They either did not know about it or did not believe it. It is strange that in many of these cases when we think enormous damage will be done it turns out not to be, probably because the other side suspects the motive of the publication of it and gets itself all confused. They are all very intricate relationships which most foreigners do not understand working in the American press, and are likely to believe if something is in the American press it is for some purpose other than simply disclosing the information.

When you say, how about the code, if your question is——

Senator HUDDLESTON. It was used as an illustration of something——

Mr. SCHORR. If I were an editor of a newspaper and I had some information of that sort, which would not be likely to get to me anyway, but if I had information of tbat sort, and in the normal course of duties I would assign a reporter and say, get the Government's reaction as part of the story, then they would find out we had the information. Then, soon enough, there would be a call from someone saying, "Hey, that is very damaging." Well, clearly, the next question would be, show me how, and then you sit down, usually with a publisher, a lawyer, and a few other people, and you say, should we or shouldn't we, and you make an ad hoc decision. That is how things work in a free society.

Senator HUDDLESTON. I think we are right back where we started, that the Government has secrets it needs to keep, and when leaks are made available, the press has a responsibility perhaps to print them.

Mr. NELSON. The other side of the story on the *Glomar Explorer*, inasmuch as you seem to think it was the right decision to withhold that story from publication, was, here was a multimillion dollar project, many millions of dollars, involving the very mysterious figure of Howard Hughes, and the Government was withholding the information.

We saw it as a legitimate news story, in spite of the fact that they said they had not completed——

Senator HUDDLESTON. It was a great news story and a great intelligence effort, in my judgment. It was imaginative. It succeed-

ed where the Soviets had been unable to succeed, and we gathered probably a tremendous amount of very valuable information.

Mr. NELSON. Before it was ever published, the story was spread to a number of these news organizations by the CIA briefing various people for fear they might find out about it, so by the time it finally did run, it was the CIA who had briefed about a dozen media organizations.

Senator HUDDLESTON. We have found out that that is where a lot of leaks occur.

Mr. DANILOFF. I think that example does show an interesting problem with the press, and that is that the CIA managed to button up the major news organizations for reasons that they considered to be legitimate national security, and then a single link exploded, and the whole dam broke. That is the sort of problem that you have with the American press, and if you study the British experience in this area, the system of "D" notices which go out to newspapers precisely to keep them buttoned up, there might be some interesting conclusions to be drawn from that.

We have no Official Secrets Act in this country yet, and this is certainly an area which is worthy of deep reflection, and I guess I would agree with Dan Schorr that I would not be a total absolutist.

Senator HUDDLESTON. I can see there could be a number of factors. It might be a question of whether you hold it up for 2 hours, 2 days, or 30 days. I think you would approach the problem maybe differently on that basis.

Mr. NELSON. Dan Schorr is not an absolutist, of course. On the legal end of it, he is. Where he and I disagree is, I cannot think of a circumstance under which we would not run the story. There may be one, but the fact is, I think all three of us agree that we do not want to see a law which would prevent us from running it. I do not think Nick does, unless he is talking about an Official Secrets Act.

Mr. DANILOFF. I am not in favor of an Official Secrects Act. I am in favor of letting the chips fall where they may.

Senator HUDDLESTON. I am not, either, but I think there may be times when the responsible position of the news organization would be to make some accommodation, whether it is total restraint, or whether it is restraint for a period of time, or whether there is a question of exploring it further, to make sure what a situation is. I am sure you would all have more inclination or more confidence if we had a better system of actually classifying information, and a better way of determining what in fact really is a national security problem.

You cannot always accept what is presented to you as some thing that is set out to be a national security secret.

Mr. NELSON. It is common practice for newspapers to withhold information on kidnapping when a life may be endangered. They do withhold it, but they are not required to by law.

Senator HUDDLESTON. Changing back again to another area, I think it was Mr. Nelson who expressed some concern about the loophole that I guess the bill contains that permits a relationship with the foreign press, the concern being that we should not corrupt the foreign press either. It is our understanding that of course press conditions in many countries are vastly different from those

in this country, and perhaps some countries actually themselves use their journalists as agents for other purposes.

Would you make any distinction between a press operation in various countries that might be vastly different from ours?

Mr. NELSON. I certainly would. If the press in that country was an arm of the Government, I would consider that penetration of the Government.

Senator HUDDLESTON. That would be fair game?

Mr. NELSON. I think so.

Senator HUDDLESTON. But if they had a free press similar to ours, we should not?

Mr. NELSON. Yes, but again, there are degrees of free press. Look at Brazil, for example. I think that is a very gray area.

Senator HUDDLESTON. Did you wish to resume, Mr. Chairman?

The CHAIRMAN [presiding]. While you are on that, could we expand on that a little bit? Because this whole business of when to use and when not to use foreign journalists, it seems to me, is more complicated than trying to determine who has a free press and who does not, because realistically we just sort of have to recognize that we are competing in a world where ideas are being sold to third countries, and we can all think of examples of issues that are very important to the free world.

The lines are very clearly drawn where the Russians are spending large amounts of money to try to sell their propaganda.

What do you as journalists feel? Is there anything we can do there to compete against that? How do we protect—if we can get over this hurdle, which perhaps you do not feel we can—how do we prevent the feedback in this situation? We deal with that in two places, but I have some concern about whether we really deal with it sufficiently.

Mr. SCHORR. Senator Bayh, you have accurately identified some loose thinking, some gray areas, and I think it is legitimate that you raise that question. As I listen to this colloquy, I say, oh, come on, if the CIA could get a subeditor of Pravda as an agent, would I mind? Hell, no, I would not mind. I would love it if they could do it. Unfortunately, they seem to do less well with Pravda than they do with newspapers in the Third World or in weaker countries, but is it a legitimate objective of an intelligence agency to penetrate a newspaper in a communist country? Absolutely. Then the question is, in countries which are not yet under Communist control, or not entirely under Communist control, can we put ourselves in the business of determining on some scale the degree of freedom of the free press in various countries? That is manifestly very difficult.

Let us face the fact that the first amendment of our Constitution applies to the citizens of this country, that for a long time, for example, this committee or its predecessor committee found when it did its first investigation of the subject of assassination conspiracies, it found, perhaps somewhat to its surprise, there is no American law against killing people in a foreign country. We do not extend the rule of our law beyond our territorial limits.

You are now proposing a ban on assassination conspiracies. There was no legal ban on murder in foreign countries. That may be surpirsing to us, but it was true. We cannot extend our constitution either to provide the liberties for the foreign press that we

hope to be able to provide for our own press. In a real world, however much we desire that the press be left free in other countries, I doubt if it is possible to write legislation that would say clearly that the CIA cannot intervene. If it does manage to penetrate a newspaper in Moscow, Warsaw, Prague—Rome for the moment we are not sure about; let's see how things go—Brazil, well, I do not think legislation can be written that way, and I simply suggest that if you can find a way to make those distinctions, then you have some rather brilliant lawyers.

The CHAIRMAN. Well, are you saying, then, no?

Mr. SCHORR. Yes, I am saying no. I am saying it is unfeasible. I am saying it is unfeasible to write rules which equate the press of other countries with our press, and extend the protection of our Constitution by way of limitations on intelligence agencies to what they do with the foreign press. I know there are those who argue that position as an emotional and sentimental thing, and I have heard arguments made by people whom I respect, but I have never been able to see the feasibility of writing rules like that for the foreign press.

The CHAIRMAN. So you would impose no limitations on the foreign press. Do you think restricting the substantial redistribution in the United States, is that a reasonable safeguard for us to try to make?

Mr. SCHORR. It is reasonable if you can manage it. Again, it happens frequently by accident, and the way you have to do it would be by a series of alerts given to the American press that if you see this story in La Stampa, do not pay attention to it, because that is one we put in there. If I could figure out the practical way to do it, I would be all for it, but I do not see a practical way to do it.

If I may add to that, I heard some testimony by Bill Colby on that before a House committee. He was asked if it would be feasible to warn editors of American newspapers from Washington that the story which is running in Europe, quoting this or that Italian newspaper, to warn American editors not to pay attention to it because it represents a plant by the CIA.

Colby's reply to it properly was, that that would be a story in tomorrow's paper, the warning.

Mr. DANILOFF. I think you are focusing here on whether it is feasible to create a system for communicating between the Central Intelligence Agency and the various elements of the American press, such as exists in England, the D notice system. I do not know whether it is feasible to create that, but if it is feasible, that might provide a solution to some of these problems, being able to warn editors of the La Stampa type story which is going to result in flowback, also being able to communicate with editors about the national intelligence security value of a certain development, like the *Glomar Explorer*.

If you asked me today whether I think such a system of communicate is feasible, my answer is, probably not, and I suspect that it would probably depend very much on the journalistic community as a whole seeing this as a real and important problem in the life of this Nation, and being willing to sit down and put their heads together, and among themselves develop such a system, and as I

have said before, we are so disorganized I am not sure we would have the public spirit enough to sit down and do that.

Mr. NELSON. Senator, I do not know whether you could write a law that would prohibit the CIA from having someone working on a foreign paper and so forth, but I would like to think that my argument in favor of the principle of respecting the free press of another country is based upon respect for that principle and not emotion. I feel very strongly that if the CIA or any other American intelligence agency penetrates the free press of another country, that that does damage to us as well as to them.

The CHAIRMAN. Yes, there are degrees, I suppose. No, there really are. How you define those in statute I do not know. Without going into too much detail, as you can understand, in discussing this with people who represent our intelligence communities abroad, the problem is not so much one of intentional misinformation, where we try to mislead the people of a third country, but of actually getting the facts as we see them on a given issue told in another country, a position that the United States feels very strongly on, in a technical journal.

Unless you are a technical journalist, you do not even have access to that particular kind of communication. It is that kind of problem. I am sure you have the misinformation, too, but that is not the one that has really been articulated to me.

Mr. NELSON. I saw an interesting statistic the other day, though, Senator Bayh. I cannot cite you the source of it now, but three-fourths of all of the international news, both for broadcast and for print, in the entire world emanates from New York-based media organizations.

I think that the U.S. viewpoint ought to have a pretty good chance of getting through with that sort of monopoly on media.

Senator HUDDLESTON. There seems to be a trend now for more information coming from particularly the CIA. Mr. Colby suggested that it could be done, and Admiral Turner, I believe, is attempting to develop policies that would give a greater amount of information to the American public. Presumably that would mean additional briefings or press conferences or whatever manner is used to disseminate.

Do you see any danger there that this will develop a system whereby the CIA or the agency might attempt to use the media? Would that be any different than any other?

Mr. NELSON. I think that would be a perfectly legitimate using of the media, if they put the information out, evaluate, and decide whether to run it. They put a lot of information out now that we pay little attention to, because it is not newsworthy, but when they put out information that is newsworthy, we publish it.

Senator HUDDLESTON. There have been—I guess you would call them problems in the past where some news people have a greater affinity for our intelligence operations and sincerely are more inclined to write favorably toward them. That, of course, causes the agencies, I suppose, to have a greater affinity for that news individual. Do you see this as a problem?

Mr. SCHORR. How does that differ in kind from the fact that some reporters have good contacts in the State Department and write favorably about the Secretary of State, and others do not, or

the White House, or any department? If the purpose of this charter that you are trying to write for the intelligence agencies is to bring them, as Bill Colby wants to put it, under the Constitution, to make them as far as possible more like other normal agencies, then you will have to accept that they will act like other agencies. They will try to make their news known. They will try to have friends. They will try to get support. They will try to get people to write favorable articles about them as they come up for appropriations, and to the extent that they act like other departments or Government agencies, I have no problem with that.

Mr. DANILOFF. I think also there is a very beneficial aspect to demystifying the CIA. I have always viewed this increase in public acknowledgement of its own existence to be part of the demystification process, and I think that the publication of specialized studies on the whole is very beneficial. I would in fact think it would be worthwhile some day for certain parts of the CIA to be open to scholars so that people could go there and consult some of the valuable information that has been collected at taxpayer expense.

Obviously, you must draw a line somewhere, but I think the resources within the CIA in part belong to each individual citizen, and there should be some access to that, and that will have a beneficial effect in terms of demystifying the intelligence process.

Senator HUDDLESTON. By not opposing the idea of using foreign journalists, you are supporting, of course, covert or clandestine collection. Is that an accurate statement?

Mr. DANILOFF. It seems to me that you have to have clandestine and covert operations. I do not think there is any question about that. Perhaps my colleagues do not agree but I would certainly acknowledge that you have to have those two categories.

Mr. NELSON. I do not agree. Again, in a country with a free press.

Mr. SCHORR. There may be an impression of disagreement on the subject between Jack Nelson and myself, but I think we both agree it is desirable that we leave the press alone. I am only saying I do not quite see how feasible legislation can be written to accomplish it. If there were a way to do it, for reasons that I feel about the free press, depending on what countries the press is free in, I wish it would happen. I only stop short in saying, I do not know what language to propose to you, and if I cannot think of a way of doing it—I do not want to urge you to do things which I myself cannot figure out how to do.

Senator HUDDLESTON. As a practical matter, in a country that has a press as free as ours, the chances are scant indeed for trying to corrupt it.

Mr. NELSON. I would hate, for example, to see us have the CIA penetrating the British press. They may do it, but if they do it, I think it reflects adversely on us.

Mr. SCHORR. There is a distinction that has not been made here. There was a reference earlier to getting our side of the story across. It is not primarily the function of the CIA to get our side of the story across. It has been the function of our embassies, of the USIA and its now successor agency. Typically, when the CIA deals with information, it is for a purpose other than merely getting our side of the story across. It is in order to accomplish a certain

specific objective, to get a reaction, to get some people excited about something or angry at each other, to create a certain impression which may include correct information, but manipulated in a certain way, and occasionally information which is not quite correct.

So, let us not confuse the job of the Voice of America on getting our story told abroad with the typical way in which an intelligence agency uses information for a certain other kind of purpose.

Senator HUDDLESTON. Well, we have discovered a variety of purposes and methods which have been used in the past to get our story across, and of course a great part of it is simply telling what we at least believe to be the truth, so that both sides can be understood by some group of people somewhere. There are thousands of ingenious ways to accomplish that. In one case, they had to buy a newspaper.

Do you have any further questions?

The CHAIRMAN. Let me pass the buck here a little. One of the real, challenges before this committee—and this goes much beyond your specific mission here, but I think it is probably even more important, if you can help us deal with this mystery—one of the important roles of this committee is to restore the confidence of the American people in the legislative branch of the Government to assure them that it has not defaulted and abandoned its responsibility to determine where to draw the line in the very difficult and contradictory responsibilities of our Government, on the one hand to protect individual liberties of individual citizens; and on the other hand to protect the whole, part of which is getting good intelligence information.

We have a responsibility in the oversight function of the committee which is indispensable. You in the media have every reason to be cynical about our ability to do that. If we learn about what is going on today by looking at tomorrow, we know what the story would be. It is awfully difficult for me to convince reporters I talk to that there has been much of a change, although I perceive there has been. How long it will last, I do not know, but one of the fundamental parts of our ability to succeed is our ability to get information that is very critical and very sensitive, and maintain its security, which is absolutely inconsistent with the role that you have, really, and it is very contrary to the nature of the average Member of Congress.

We are public beings. We thrive and survive on being able to announce things, and to discuss what we are doing. The role of this Committee is not really a public role. What can we do to cooperate with members of the press in carrying out your responsibility to report what we are doing in a way that helps to restore confidence, but on the other hand does not destroy the very ability to get information necessary for oversight?

I am sort of like Dan Schorr. I do not know the answer to that question, so perhaps I should not ask you, but you are looking at it from a different perspective than ours. Where do we go? How do we resolve this?

Mr. SCHORR. I do not have a whole answer to that, because what you are really talking about is the dilemma, the whole large dilemma of democracies, which function on the basis of an open society

where they must be involved at times in keeping certain secrets. It is a state of tension between the system and the things that we sometimes have to do. So, I have only a short and partial answer to your question.

I think, and if I am wrong, someone will correct me, I think one could go further than one goes now in giving retrospective reports on the covert operations about which you were informed. I think one could—The whole point about covert operations in the past is not that the CIA has been engaged in covert operations, but because they have been in large part engaged in the wrong covert operations, at the wrong time, at the wrong place, against the wrong governments and the wrong people, and the reasons they have had to be kept so secret is, when they come out, Americans are shocked, be it Angola or be it Chile, because they say, why were you doing all of this? Why were you engaged with the ITT? Why were you dealing with that?

Generally speaking, a covert operation would be supported by the American people if it were something which if they knew, they would be inclined to favor. It is not possible to make a rule, since most covert operations are basically secret only during the period they are being conducted and for a certain time, that it be a regular reporting system retrospectively about covert operations, leaving out certain classified details if necessary, in which, after a period of time, 3 years later, your committee and the sister House committee make reports to the American people about covert operations of which you have been informed whicb are now completed and the American people can now know about, so that the general pattern of those operations becomes known.

Mr. NELSON. Senator, I would say one way you could help restore some confidence, both that you are doing the job and that the agencies are now somewhat cleaner, is by just releasing all of the information that you can possibly release concerning all of the past abuses. I think one of the real reasons the CIA and the FBI are in such terrible shape today with the American public is that it has been almost like Chinese water torture. It has been a drop, a drop, a drop for the past several years.

I will never forget Clarence Kelly, after he became FBI director, he said, what do you think I should do about restoring confidence of tbe American people in the FBI? I said, what you ought to do is, you ought to have an in-house investigation. You ought to find everything they have done that has been wrong, and you ought to put it out for the American people to see, for the press to report.

He said, yes, that is interesting, and as you will notice, he never did it. It has been going on ever since, and is still going on.

Mr. DANILOFF. Senator, if I may, I have a counterquestion. I have the general impression that the abuses of the CIA have been pretty well exposed, and I was not really under the impression that your committee felt that it was under fire for not doing an adequate job. I like Dan Schorr's suggestion very much, although 3 years may be too short a period. You may want to make that longer. I would like to ask you, what feedback do you get which leads you to the belief that the American public is dissatisfied with the job this committee is doing in overseeing the intelligence agencies?

The CHAIRMAN. This assessment is not designed to be critical, certainly not of any of you here, or some who I think do possess this feeling, because there is every good reason to believe it. How do you prove a negative? How do you know you are getting everything? There is no way of proving that. It is all well and good to say, well, there must be something mighty good back there, because we are being told things which appear to fulfill the new relationship. I have no way of judging what the people generally feel. I think people generally probably do not even know we are in existence, and maybe that is just as well, but I think there are some reporters for whom this is their beat, and they have been misled so often, and they continue to find these disclosures of things that happened 10, 15, 20 years ago, that they ferret out, that have not been released to them, and I can understand that cynicism.

I just wonder how I deal with it, how we deal with it. I think perhaps the idea—and we have been discussing this—is to pick some things we can disclose.

What did you gentlemen feel about the way in which the Panama intelligence executive session was handled, as far as making information available?

Mr. DANILOFF. I am interested you ask that question, because as you know, I authored a series that came out shortly before that which disclosed many of the points you disclosed. My reaction was that you probably disclosed more than you had to, and that I was delighted you did, because it made that a much better story for me, but I thought you could have released slightly less and still have discharged your duties.

Senator HUDDLESTON. There were two constituencies we were concerned with: One within the Chamber, and one without.

Mr. DANILOFF. I understand that.

The CHAIRMAN. This was not an easy process, as I am sure you can imagine. It took some long—I will not say acrimonious, at least the ones I was involved in were not acrimonious. It was a very steady flow of differing opinions, give and take, but our thoughts were, if we are going to be credible, let's appear credible.

Mr. DANILOFF. I think you bent over backwards to make as much available there as possible, and I think you did very, very well, but with regard to the problem of your own sense that perhaps you have not convinced the American people that you are overseeing the intelligence community well enough, it would be my opinion that you are conceivably exaggerating that fear.

You may have trouble with one or two reporters, and in that case I would think your best tack would be to take them in, discuss with them as frankly as you can, answer as many of their questions as you can, make a very conscientious effort to disclose everything that you can, make periodic reports of past operations. After certain intervals, hold public hearings, release information which is not compromising from time to time.

I think these are the things to do. Basically, I think one will find that one is going to live through a period of discomfort for some years, maybe 10 years, but I would not at this stage be overly concerned that you have a big problem in that area. I could be wrong, but that is my perception.

Senator HUDDLESTON. Mr. Chairman, there is a sizeable body of the public which thinks we are overseeing to too great an extent the intelligence operation.

The CHAIRMAN. Yes; and I think to the extent that these past abuses keep coming out, that that is attributed to what we are trying to do now. As far as candor goes, I suppose it is, but it belies the kind of positive relationship that I think we have right now, and I think the community is very candid with us.

Senator HUDDLESTON. Just looking back at the so-called Church committee, we made a rather exhaustive study. We had a concern all the time that as soon as we closed shop, further relevations would be presented to us, but time being what it was, we finally had to close up and issue the report, as we did. I do not know if there were too many major things that we did not get into to some degree.

Mr. NELSON. Would it be permissible for me to ask you a question, Senator?

Senator HUDDLESTON. Yes, sir.

Mr. NELSON. Can you tell us whether the fact that you did not get complete cooperation from some of the intelligence agencies had quite a bit to do with the fact that disclosures did continue to come out even after you completed the investigation and so forth?

Senator HUDDLESTON. We generally had the impression that we had pretty good cooperation, at least toward the end of our study. I am sure there was at certain levels down the line a reluctance, and things might have been withheld from us. It took a long time for us to get the point across that we were expecting not just that they answer questions, but that they make sure that we asked all of the questions. That was a major problem when we started out. We did not have a very great knowledge of operations, and we did not know what questions to ask for some period of time. They were forthcoming generally when we asked the questions, but sometimes it took us a long time for us to figure out what we ought to be asking.

Mr. NELSON. I gather what you were saying was, they were not volunteering a lot.

Senator HUDDLESTON. Certainly at the beginning we had some problems along that line.

Mr. SCHORR. As I recall, you were not completely satisfied toward the end. Let me see. You and Senator Mathias were running a subcommittee specifically on the problem being discussed today, which was relations with the CIA and the press, and I happened to be waiting on the doorstep of the CIA when you came out. There were a couple of days in which you indicated you had some very painful negotiations with them about what they would and would not give you, but I did not have the impression then that you got all that you have.

Senator HUDDLESTON. It was generally actual identities that were withheld. We finally did get to the point of seeing files which presented a situation, a case, and I think it gave us a fairly good picture of the kind of activities going on and the extent of them. In some of the cases, the identification could be deduced. I think generally for our purposes we finally got pretty close to what we needed, enough that we have these provisions in this bill.

Mr. SCHORR. Enough to end up in a big Carl Bernstein article.
Senator HUDDLESTON. I beg your pardon?
Mr. SCHORR. Enough to end up in a big article by Carl Bernstein.
Senator HUDDLESTON. Well.
The CHAIRMAN. Gentlemen, you have been very kind in giving us your thoughts. All of you have been intimately involved in this, and such credibility is not available from very many places. We appreciate not only your cooperating with us, but the contribution you have made to the continued existence of the first amendment, which takes more than writing. It takes a good deal of individual courage, and I for one want to compliment you on that.
Senator HUDDLESTON. Thank you very much.
[Whereupon, at 12:05 p.m., the committee was adjourned, subject to the call of the Chair.]

THURSDAY, MAY 4, 1978

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The committee met, pursuant to notice, at 10:14 a.m., in room 5110, Dirksen Senate Office Building, Senator Birch Bayh (chairman of the committee) presiding.

Present: Senators Bayh (presiding), Huddleston, Hathaway, Mathias, and Chafee.

Also Present: William G. Miller, staff director; and Audrey Hatry, clerk of the committee.

The CHAIRMAN. We will reconvene our hearing this morning.

We are privileged to have with us a distinguished group of journalists, managers, editors, interested citizens, who are working in a managerial role in the part of the first amendment area that concerns us as we continue our effort to make it possible for our country to have good intelligence systems without infringing on the rights of Americans.

I think the best way to approach this morning would be to let us have your thoughts, your testimony, and then let us follow up with questions.

We have Edwin Keith Fuller, the general manager of the Associated Press; Phil Geyelin of the Post; Richard Leonard of the Milwaukee Journal; and Mike Wallace of CBS, and I would ask unanimous consent that the appropriate complete biographical data of these distinguished men be put in the record.

Why don't we just throw the ball to you and you can run with it as you see fit.

We can have a good free and easy period of discussing this whole problem in any form that you would care to make it.

Mr. FULLER. It is your hearing, Senator, but may I suggest that since I am the only one without a prepared statement, that to begin, why don't we start at the other end of the table.

Mr. WALLACE. I am in the same spot, no prepared statement.

Senator MATHIAS. What happens when we ask you to sign the editorial?

Mr. LEONARD. Do you wish me to proceed.

[The biographical statements of Mr. Edwin Keith Fuller, Mr. Richard Leonard, Mr. Mike Wallace, and Mr. Philip Geyelin follow:]

EDWIN KEITH FULLER

January 10, 1923—Born Arlington, Kans.
1940–41—Lamar College, Beaumont, Tex.
World War II—Captain USAAF, prisoner of war in Germany.
1945–47—Southern Methodist University.
1947–49—Reporter, Dallas Morning News.
1949 on—Associated Press.
1959–64—AP Chief of Bureau, Denver.

1964—Supervisory Editor, *"The Torch is Passed."*
1974-76—Executive vice president, deputy general manager, AP.
1976 on—AP general manager.

RICHARD LEONARD

May 23, 1921—Born, New York City.
1942-46—U.S. Army.
1947—B.A. University of Wisconsin.
1948—Picture editor, Milwaukee Journal.
1949-50—Madison Bureau, Milwaukee Journal.
1951-52—State Desk.
1953-62—State Editor.
1962-66—Managing Editor.
1965—President, Milwaukee Press Club.
1967-present—Editor, vice president, Milwaukee Journal Co.

MIKE WALLACE

May 9, 1918—Born in Brookline, Mass.
1939—Graduated University of Michigan, A.B.
1939—Began work in radio.
1946—Began work in TV.
1951-54—Commentator CBS-TV
1951 on—TV interviewer.
1958—Author "Mike Wallace Asks."
1963 on—CBS news correspondent.
1963-71—George Foster Peabody awards.
1971—Robert Sherwood award.
1972—Dupont Columbia journalism award, Boston Press Club Headliner award.
1973—ATVAS Emmy award.
Currently anchorman on "60 Minutes."

PHILIP L. GEYELIN

February 27, 1923—Born Devon, Pa.
1940—Graduated Episcopal Academy, Overbrook, Pa.
1944—B.A. Yale University.
1946-47—Associated Press.
1947-66—Wall Street Journal.
1960-67—Diplomatic Correspondent, Wall Street Journal.
1964-present—Board of Trustees, Alliance Francaise.
1966—Published "Lyndon B. Johnson and the World."
1967—Fellow, Institute of Politics, Harvard School of Government.
1956-present—Member of editorial staff, Washington Post.
19-present—Editor of editorial page, Washington Post.
1969—Pulitzer Prize for editorial writing.

[The prepared statement of Mr. Leonard follows:]

PREPARED STATEMENT OF RICHARD H. LEONARD BEFORE THE SENATE SELECT COMMITTEE ON INTELLIGENCE MAY 4, 1978

I appear here this morning as the Editor of the Milwaukee Journal, a newspaper which sends ten or more journalists overseas each year to seek information that will benefit our readers.

I am also Chairman of the American Committee of the International Press Institute and was Chairman of the conference which laid the foundation for the World Press Freedom Committee.

I spent almost four years in the Army in World War II, serving in both the European and Pacific Theaters.

Putting all this together, I find that I am a citizen who recognizes the need for comptetent CIA activity; an editor who wants his paper to carry reliable, firsthand information from abroad; and a leader of an international press organization that is seeking to win the trust of journalists in other parts of the world and to export the American concept of a free press unfettered by government control.

The straight truth, and there is no way around it, is that any relationship with the CIA will either impair or destroy the credibility of a journalist if that relation-

ship is discovered. Further, the knowledge that the CIA has a relationship with any journalist, American or foreign, casts suspicion upon all journalists.

In the last year representatives of the World Press Freedom Committee have been actively opposing a UNESCO resolution, supported by the Soviet Union, which could bring stronger government participation in the news flow to and from third world nations. Last year at Nairobi and last week in Stockholm, free world journalists told UNESCO that the flow of news must be free of government interference and that developing nations could have confidence in the integrity of the United States press and press agencies because they are free of government influence.

What do we tell them if they learn that the CIA has press connections, whether they are American of foreign?

Representatives of western nations expressed the fear in Stockholm that such revelations might result in excluding their foreign correspondents from developing nations.

The final report of the UNESCO seminar included the comment: "There is a general agreement that the media should not engage in war propaganda or promote racism and apartheid, should not disseminate false information, and should be truthful, honest, unbiased, without political or special interest designs."

Would CIA press connections be in keeping with these objectives? Of course not.

In the recent election activity in the Philippines, President Marcos openly accused the foreign press and the U.S. Government of involvement in the protest march through Manila.

The Soviet news agency Tass declared after the recent Cairo Confernece on International Mass Media that the western mass media were the "propaganda organs of the imperialist states, above all the U.S.A." (Tass itself has little credibility because it is goverment controlled.)

Wild allegations? Of course. But not so easy to deny if there is knowledge of CIA press connections. And, wild or not, they could have an effect in developing nations.

Sean Macbride, Chairman of the UNESCO International Commission for the Study of Communications Problems, recently called attention to "covert outside interference in communication processes" and urged "a high sense of moral and ethical responsibility in all those involved in the education and information of public opinion."

George Reedy, former press secretary to President Lyndon Johnson, returned last month from a tour of Asia. In Korea, he reported, people wanted to know why the U.S. Government was attacking Korea through the press. He said it was inconceivable to the Koreans that an attack on Korea could appear in the paper without the approval of the government. This is the type of belief we are fighting throughout the world as we seek a freer flow of news.

Let us look at the National Intelligence Reorganization and Reform Act in the light of the above events.

The policy of prohibiting paid relationships between the CIA and the U.S. media deserves praise, but we must go further: The CIA should also be prohibited from having paid relationships with foreign journalists. Failure to do so would make a mockery of our efforts to steer developing nations away from a press with strong government influence. Failure to do so could lead to expulsion of United States correspondents from foreign nations. Most certainly, CIA activity involving foreign newsmen would have a chilling effect on news sources overseas.

Payment of expense money should be forbidden. It would have the same negative effect as payment for services.

Journalists should be wary of all contacts with the CIA.

Certainly, they should not swap information. Certainly briefings before travel to a foreign area should be done by a less sensitive agency. Nor should the CIA take the initiative in seeking information from a returning journalist. I believe it unwise for a newsman to participate in such a debriefing, but I don't think this is a matter for statutory control. Here we are dealing with a matter of individual conscience.

I am not worried about the possibility that the CIA would tend to favor cooperating reporters at the expense of others. I don't think the nation's respected newsmen would cooperate with the CIA today.

The only assistance that journalists should give the CIA is honest, accurate reporting in the public interest. Help in recruiting agents, providing safe houses and courier service should be given by members of less sensitive professions.

Above all, the CIA should never use journalistic cover for its own officers anywhere. The adverse effect to our integrity would be enormous throughout the world. Loss of integrity means loss of our ability to communicate.

Any statutory provisions on relations between the CIA and the media should be broad and cover news executives, editors, photographers and reporters. They should

also cover freelancers who represent themselves as representatives of established publications.

There should be concern about the flowback problem of stories planted in foreign publications by the CIA, but that concern should be far less than the fear of reaction to the discovery that the U.S. is tampering with the press of other nations.

The opinions stated above are widely shared by my colleagues. However, I find differences of opinion on how control should be exercised. I believe that there should be statutes covering such specific areas as payment of money to media people and use of journalistic cover by CIA personnel. More general areas, such as planting of stories and dissemination of false information could be covered by executive order.

With regard to secrecy, I believe that there should never be prior restraint in our nation. However, the CIA would be acting properly in attempting to convince the press of the importance of maintaining secrecy on an issue vital to the national security.

I do not believe there will ever be, or should ever be a smooth working relationship between the CIA and the media. Journalists are assigned the mission of looking behind the scenes in government and telling the American public what is happening. Often this involves information that public officials do not want to have made public.

Journalists have great confidence in the power of truth, openness and accuracy. This feeling was refected in a resolution adopted last Friday by the Board of Directors of the Society of Professional Journalists, Sigma Delta Chi, at their meeting in St. Louis. The resolution said:

"We now call on Congress and the President to state positively that the CIA will not employ foreign journalists.

"We believe that such a declaration is essential to advise the world that the United States Government is not interfering with the free flow of accurate and objective information.

"We believe that the need for the uncompromised truth is more essential to this nation and the world than any gain made from using journalists as agents of government."

I think that says it all.

STATEMENT OF RICHARD LEONARD, EDITOR, MILWAUKEE JOURNAL

Mr. LEONARD. Thank you, Senator. You have a statement from me that is rather lengthy. I don't want to read it all, but I would like to read the more important parts, and I would like to start right out by saying the straight truth, and there is no way around it, is that any relationship with the CIA will either impair or destroy the credibility of a journalist if that relationship is discovered. Further, the knowledge that the CIA has a relationship with any journalist, American or foreign, is going to cast suspicion upon all journalists.

Now, in the last year, representatives of the World Press Freedom Committee—and this is a committee that is comprised of 30 organizations, journalists on five continents—has been actively opposing a UNESCO resolution—the resolution is supported by the Soviet Union—which could bring stronger government participation in the news flow to and from Third World nations. Last year at Nairobi, and last week in Stockholm, the free world journalists told UNESCO that the flow of news must be free of government interference and that developing nations could have confidence in the integrity of the U.S. press and press agencies because they are free of government influence. We told that to the third world in attempting to get their support to oppose this UNESCO resolution.

Now, what do we tell them if they learn that the CIA has press connections, whether they are American or foreign? This would hurt our purpose.

George Reedy, former press secretary to President Johnson, returned last month from a tour of Asia. In Korea, he reported, the people wanted to know why the U.S. Government was attacking Korea through the press. He said it was inconceivable to the Koreans that an attack on Korea could appear in the U.S. papers without the approval of the Government. They are suspicious of this. This is the type of belief we are fighting throughout the world as we seek a freer flow of news.

Any knowledge of Government participation defeats our purpose, which is to improve world communication and understanding that will lead to peace.

Now, let's look at the National Intelligence Reorganization and Reform Act, a good bill in many ways. I was much impressed by it. It puts intelligence activity on a statutory basis, has an excellent section on covert action and surveillance.

Now, the policy of prohibiting paid relationships between the CIA and the U.S. media deserves praise, but here we must go further. The CIA should also be prohibited from having paid relationships with foreign journalists. Failure to do so would make a mockery of our efforts to steer developing nations away from a press with strong government influence. Failure to do so could lead to expulsion of U.S. correspondents from foreign nations. Most certainly, CIA activity involving foreign newsmen would have a chilling effect on news sources overseas, and I have seen this happen myself. I have seen our news sources behind the Iron Curtain dry up because the sources suspected U.S. reporters had Government connections.

Journalists should be wary of all contacts with the CIA, and certainly they should not swap information. Certainly briefings before travel to a foreign area should be done by a less sensitive agency. Nor should the CIA take the initiative in seeking information from a returning journalist. I believe it unwise for a newsman to participate in a debriefing by the CIA, but I don't think this is a matter for statutory control. Here we are dealing with a matter of individual conscience and journalism ethics—not law, ethics. I think that the bill draws a good line, a good line between paid and voluntary activity.

Journalists don't want the Government telling them what to do, and they also don't want to be told what they should not do. If a journalist wants to have a voluntary relationship, I would say that is a matter for his own conscience and I would support that.

And above all, the CIA should never use journalistic cover for its own officers anywhere. The adverse effect to our integrity would be enormous throughout the world. Loss of integrity means loss of our ability to communicate.

When Tass, the Soviet agency, makes a statement, hardly anyone in the world believes it today because they know that there is government participation in Tass, that is, government control. We don't want that to happen to our free world news agencies.

Journalists have a great confidence in the power of truth, openness and accuracy, and this feeling was reflected in a resolution that was adopted last Friday by the board of directors of the Society of Professional Journalists, Sigma Delta Chi, at their meet-

ing in St. Louis. This organization, by the way, represents 27,000 active, working journalists in the country.

I would like to read the resolution. It is brief.

We now call on Congress and the President to state positively that the CIA will not employ foreign journalists.

We believe that such a declaration is essential to advise the world that the United States Government is not interfering with the free flow of accurate and objective information.

We believe that the need for the uncompromised truth is more essential to this Nation and the world than any gain made from using journalists as agents of government.

That is the end of the resolution. I would like to respectfully urge that the words "or foreign" and "or abroad" be added at the appropriate places in section 132 of the bill, pages 51, 52, and 53.

Thank you.

The CHAIRMAN. Thank you, Mr. Leonard.

Mr. Geyelin?

STATEMENT OF PHILIP L. GEYELIN, EDITORIAL PAGE EDITOR, WASHINGTON POST, ON BEHALF OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS

Mr. GEYELIN. Mr. Chairman, I have a rather long statement. I don't know whether you want me to read it all, but I will start, and you can stop me when you want to.

Mr. CHAIRMAN. Proceed as you see fit.

Senator HUDDLESTON. Sure, read it all.

Mr. GEYELIN. I am here in response to your invitation to the American Society of Newspaper Editors to delegate a member of the society to testify on S. 2525, or that part of it that deals with the CIA and the media, and I would like to clarify my credentials. Not being a member of the board of the ASNE, I cannot speak for it. Still less can I speak for its full membership. And I am not here either as a spokesman for the Washington Post or its editorial page, which speaks for itself. My views are those of an ASNE member and a newspaperman who has worked as both an editor and a reporter and as a foreign correspondent overseas. Finally, I should note that 28 years ago at the time of the Korean War, I also worked for 1 year on a leave of absence from my newspaper, which was then the Wall Street Journal, for the CIA here in Washington. I have had no connection with the CIA since then, other than that of a reporter dealing with news sources. But that experience has obviously had some influence on my thinking about the Agency and its relation with the media.

I think there are two separate ways to approach this problem. We could approach it as if we were writing on a clean slate, as a matter of pure principle—and editorial writers like to deal in pure principle—and the other way would be to approach it as a practical matter in the light all the abuses and excesses and conflicts of interest that have been brought to public attention in recent years.

A powerful case has been made that the press has been seriously compromised, even subverted, that it has been so weakened in the eyes of the world at the hands of a hyperactive and insensitive CIA that it now requires some sort of good housekeeping seal of approval, something, some kind of strict, statutory regulations guiding the press/CIA relations for the future.

This view is reflected in the provisions of S. 2525 and it was forcefully set forth by the board of directors of ASNE late in 1976, and I would like to, I am, I guess, duty bound to briefly summarize it.

In that statement the ASNE board demanded that the Central Intelligence Agency terminate:

> CIA employment of all correspondents of United States news media and called on the President and Congress to require the CIA to extend this hands-off rule worldwide so as to prohibit CIA employment of journalists working for foreign news media as well as for American media.

The ASNE board noted that the CIA had refused to give assurance that it will not employ foreign newsmen, and I see that the bill before you also omits any statutory control over CIA use of news media of foreign countries. The ASNE board "urged a reversal of that policy, by law if necessary, because it subverts American's advocacy of a free flow of news for all people and damages the ideals that Americans profess."

I thoroughly endorse the purposes underlying that position and I have considerable sympathy with the inclination reflected in S. 2525, and in the congressional testimony of a number of distinguished American editors and reporters, to seek to impose, by law if necessary, a hands-off rule with respect to foreign as well as American news media.

A good case can be made that nothing less than that can repair the damage that has been done, the damage that has been done to the credibility and integrity of all American news media as they are perceived from abroad and even at home, that it is not enough to be able to argue that the record of CIA abuses in past years was itself exposed by a freely functioning American press. Our critics and adversaries around the world are not much impressed by that. And this is not, in any case, just a matter of a convenient talking point for propaganda purposes. The effectiveness of all American correspondents is seriously compromised when there is not just suspicion, but hard evidence that even some relatively small number of them have served the intelligence branch of their government.

So it is understandable that many now believe that it will not do simply to disavow past practices. Even though it is also not at all certain that the passage of legislation actually forbidding these practices would repair all the damage or impress those who do not wish to be impressed, it is at least arguable that the American news business now requires something more than mere statements of good intentions.

But that argument, however highly principled, seems to me to be at war with even higher prinicples. Let me put the matter in blunt terms. We are not talking here about the journalistic equivalent of rape. We are talking, if I might say so, about transactions between consenting adults. It is tempting, and not entirely unjustified, to think of the Central Intelligence Agency as some kind of wild, uncontrollable beast. But when we do that, we are, in a sense, fighting the last war. By failing to acknowledge that the times, the circumstances and the CIA itself have all undergone considerable and self-evident changes, we are in danger of missing some larger points. While the CIA may be nearly unique in its clandestine

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nature, it is still only a part of a larger intelligence community scattered through the Government; a community which in turn is only a piece of the Government. And thus, a lot of the things that you might want to circumscribe by law with respect to the relationship between the press and the intelligence community are not all that different in kind from conflicts of interest that apply with equal force to the relationship between the press and the government in general.

The simple point is that newspaper organizations and those who work for them under the special protection of the first amendment, ought to have no working relationships of any kind with any part of the Government that are not openly acknowledged as a part of the business of professional journalism. Just as news people should not be in the business of furnishing intelligence to the Government, in a conscious, calculated way, so they should not perform services for any agency of Government.

But for this, do we need laws? Surely when news orgainzations are compromised or corrupted there has to be some willingness on somebody's part, to be compromised or corrupted. And if this is so, it would seem to me to follow tbat when the press asks for legislation to protect itself from exploitation in one way or another by the CIA, what it is asking, really, is for the Government to save it from itself.

This is a favor that the press should not ask of Government, along with just about any other conceivable favor. For once the Government begins to legislate favors for the press, it establishes a precedent which clearly begins to run counter, or so it would seem to me, to the whole concept of the first amendment's protection, that the Congress shall make no law abridging the freedom of the press. A press that becomes dependent on special favors or protections or shields or other benefits from Government becomes exeedingly vulnerable, and the power to retain or withdraw a favor can then become a potent instrument for Government manipulation of the press. Today's favor may be tomorrow's abridgment, once the habit of legislating the workings of a free press takes hold.

That is why, with certain exceptions over which the American press can exercise no direct control—CIA propaganda activities within the United States, for example, the use of journalistic cover for intelligence agents, the exploitation of foreign newsmen abroad—I am troubled by the resort to a statutory remedy. The problem is nicely illustrated, I think, in a passage from a statement entitled "Questions for Media Hearings" which your committee staff, I guess, has prepared. It notes that a line was drawn in S. 2525 between paid relationships between the CIA and members of the press and voluntary relationships. But it goes on to ask, and I quote, "whether this in fact is the proper place to draw the line, and whether the line is itself sufficiently distinct."

Now, there is no question in my mind about the impropriety of paid relationships, or even unpaid relationships, born of some patriotic impulse on the part of news organizations or their representatives, on a regular, sustained basis. But when you begin to move into the area of voluntary relationships you begin to open up some extremely difficult questions of definition and intent, questions which I believe could not easily be resolved by law or regulation,

and must necessarily be left to the discipline, integrity, and ethical standards of news organizations and those who work for them.

Just consider the next questions raised in your staff memorandum:

> Should journalists be permitted to swap information with the CIA? Should they be permitted to get briefings before visiting a particular foreign area? Should they be permitted to report voluntarily information they derive from such visits?

Permitted by whom? When the memorandum asks whether these voluntary exchanges of information are amenable to statutory control, my answer is "No." But if you ask whether journalists should be permitted to do all these things by their news organizations, my answer would be "Yes," insofar as the swapping of information and the briefings are part of normal news gathering.

And they are. Reporting is not a game of fish. You do not ask your sources to give you all their kings or 10's or aces. More often than not, you are checking something you have heard or seen, and presenting a piece of information you have received for comment and response. From your standpoint, you are reporting. But, of course, from the standpoint of your source, whether it is an agricultural attaché or a White House spokesman or a CIA official, you are also imparting information. And when CIA officials report that information, as they tend to do faithfully with whatever scrap of information they acquire from any source, the resulting cable or memorandum to headquarters, complete with cryptonyms and intelligence jargon, inevitably acquires the cast of an intelligence report.

I can speak to this point, if I may elaborate on it for a moment, out of a curious experience several years ago when a colleague confronted me with an allegation that I had worked for the CIA while serving as a foreign correspondent for the Wall Street Journal in West Germany in the early 1950's. As it happens, the report was not only contrary to the record from the time I left the Agency in 1950, or 1951, but also false on its face; I was working in Washington at the time and the allegation was easy to deal with. But it prompted me to demand a review of every reference to me in the CIA's files, in an effort to determine what might have given rise to such a report. The experience was illuminating. There were many mentions of numerous contacts I had had with CIA representatives in the field, as a reporter, in Europe, the Middle East and Latin America. There were notes of several briefings I had been given in advance of foreign assignments and of several briefings after foreign assignments in which I reported some of the things I had learned in the interest of extracting reaction. All this was dutifully recorded in the files. I have no doubt the same would be the case for almost every foreign correspondent I have ever worked with. And it seems to me self-evident that these exchanges of information are not only well within the bounds of professional journalistic performance, but also well beyond the bounds of statutory regulation.

The staff memorandum goes on to ask whether there is a danger that if voluntary relations with the media are permitted by statute, the CIA will somehow tend to favor cooperative reporters with the information and "thereby exert pressure on reporters to be cooperative?" Probably so. But this is one more example of why it is

unwise to consider the CIA in isolation from every other part of Government, for every other part of Government from Presidents on down spends a great deal of time and energy trying to "exert pressure on reporters to be cooperative."

Good reporters resist, and no law can save bad reporters.

So I would agree with what the Washington Post's ombudsman Charles B. Seib had to say in a recent column:

> The CIA's stock-in-trade includes deception and covert manipulation. It does the Nation's undercover dirty work. The press, on the other hand, has only one justification for its special status in this country: its ability to inform the public fully and without bias or restraint.

But I don't accept his conclusion that "the twain can never meet." Nor do I accept the view attributed to Ward Just, a former foreign correspondent, an old friend, and an editorial writer for the Washington Post at one time, that reporters should have little or nothing to do with intelligence agents because "they live in a different temperamental world than the rest of us, and you have to be Goddamned careful when you get around them."

Journalists have to be Goddamned careful when they get around a lot of news sources who live in a "different temperamental world," Soviet diplomats for example, or the military, or members of the White House national security staff, politicians, perhaps, maybe even fellow journalists.

Similarly, I would agree with Ray S. Cline, a former high official of the CIA who told a House committee recently that journalists working abroad and CIA agents:

> All are searching for nuggets of truth about the outside world. They all try to acquire reliable sources, whose identities they often feel it necessary to protect, and in every case their credibility depends on a record for objectivity and accuracy.

But I don't accept Mr. Cline's description of these parallel efforts and interests as a "natural affinity." On the contrary, the press ought to have with the CIA the same natural adversary relationship that it ought to have with all the institutions with which it must deal.

Is there, then, any room for statutory regulation? And if so, where do you draw the line?

I think it comes down in the end to this question of consent. News organizations and their representatives can control their direct relationships with the intelligence community. But they cannot, for instance, control the use by intelligence agencies of journalistic cover for their own agents. That's one problem, I think, that lends itself certainly to the strictest kind of executive regulation, at least, if not actual regulation by law. The same may be said for CIA propaganda activities within the United States, the use of one sort of cover or another for the covert distribution of information designed to advance CIA interests.

The problem of CIA employment or other use of foreign newsmen is more difficult because it goes to the wider question of CIA employment or exploitation of foreigners of all kinds, the payment of money to politicians, efforts to recruit local government officials as agents in foreign countries, clandestine relations with business or labor and all the rest. A good case can be made with respect to foreign journalists that the U.S. Government should lead by its example, that the CIA should treat foreigners no differently than it

does American news organizations and news people, if American values are to have any meaning. But this raises a difficult question of definition: Certainly the CIA should not subvert a free press in that minority of countries around the world where a free press exists. I am less sure about whether the CIA should be forbidden by law, or even by executive regulation, from having anything to do with representatives of "news media" in foreign countries where the "media" are demonstrably an arm of the government.

One last point: Considerable concern has been expressed in the news business and elsewhere about CIA propaganda activities abroad which have the effect of promulgating false information or promoting the publication of spurious material that could find its way back into the American communications stream. This is nothing that an agency of the U.S. Government can proudly engage in. The same may be said for many other activities of the CIA. But the promulgation of misleading, deceptive, or even downright false information is also something that American Government officials do from time to time, and sometimes openly, at home. It seems to me that enforcement of such a provision abroad would be difficult. In any case, the best protection for the American media and the American public against bad information is still good reporting.

In other words, this would seem to me to come under the category of those things over which a professional and responsible press can exercise control. I think that's where I would draw the line on statutory rules and restraints, with those matters that are subject to the control of consent of the American media. At best, what we are talking about most of the time, in connection with past abuses, excesses and conflicts of interest in the relationship between the press and the CIA is seduction. A better way to put it might be prostitution, and if that is what we are talking about, it seems to me that we in the press are obliged to remember who it is, in these transactions, that is playing the part of the prostitute.

Thank you.

The CHAIRMAN. Thank you very much, Mr. Geyelin.

Mr. Fuller.

STATEMENT OF EDWIN KEITH FULLER, GENERAL MANAGER, ASSOCIATED PRESS

Mr. FULLER. Mr. Chairman, as I said at the beginning, I have not, I am not qualified, nor have I even given thought to the question of this legislation in the abstract. I could be persuaded by the arguments of either of the colleagues who spoke before.

I am a bit more cynical than Mr. Leonard, that legislation itself will dispel the real or imagined concern of foreign sources and governments that newspaper persons of the United States have CIA connections. In other words, it is not going to stop the accusations that are made for self-serving purposes by governments and sources abroad.

I don't think legislation will solve the problem at all, but I do find that I am much less concerned about the window dressing than the substance: If the CIA in fact will forego the use of active journalists in its work, we will all be substantially aided. But in my case, in the case of a news agency that operates abroad as well as domestically, we have a very real problem that is not abstract at

all. It is the concern for the safety of 500 people on our staff who must work in areas where any suggestion of collusion, not only with the CIA but with the American Government in general, could be quite dangerous, and has been quite dangerous.

I think that even when they suspect, have no knowledge of, but only suspect, that we would be collusive with any arm of the American Government, not only is our job made impossible but in today's world, the likelihood of retribution is great, and it has happened in 1977 and 1978, and will happen in 1979.

What can we do then is to—for my part, it is not a question of legislation or administrative edict. It is a question of not really having any contact with the CIA in its work. Our product, our news will reflect the lack of news manipulation if it is absent. I find that in many countries I could name where we have to deal with sources that are on both sides, the legitimate government and the terrorists and dissidents and so forth, any suggestion that we are not there strictly as objective reporters of the news is itself a total danger, not only to the people on that story, but could reverberate around the world where these situations are duplicated.

So as we discuss this matter today, I will listen and learn with great interest because when you are working in 89 countries of the world where you are already suspect just by being from the Western press, the so-called Western press, it is the substance rather than the theory that I am concerned with.

The CHAIRMAN. Thank you.

Gentlemen, do you all concur—excuse me, I'm sorry. I didn't know whether you wanted to make any statement.

STATEMENT OF MIKE WALLACE, CBS, "60 MINUTES" NEWS REPORTER

Mr. WALLACE. Thank you, Senator.

My colleagues, Senator Bayh, are involved to a greater degree in management than am I. First of all, I speak not in any sense for CBS news. I speak only for myself, and I would add only one thing to what has been said here. We are talking about journalists generally. The one thing, it seems to me, in the bill as drawn, that is probably not sufficiently gone into, is the fact that the electronic press, as I believe was suggested by Daniel Schorr, involves more than a man with a pencil and a piece of paper, or a pencil and a notebook. Television journalism as you know, is a collaborative venture which involves not just the reporter, but frequently a producer, a cameraman, a sound man, a light man, and frequently in foreign countries, involves foreign nationals. It may be a U.S. reporter, a U.S. producer, an Egyptian cameraman or light man, or sound man.

Therefore, it seems to me that as the bill is drawn, it should pay very serious attention to the fact that there are on a television crew, or a radio crew, three, four, five men or women who are involved in the story. And we have found from time to time that whereas the individual reporters and producer have one kind of relationship with the management of the journalistic enterprise, the technicians involved do not. They operate on different standards, and conceivably they are more vulnerable to suggestions from people who want to employ them.

The CHAIRMAN. Mr. Wallace, would you include the same prohibitions as far as the contractual and monetary relationships with all members of the crew?

Mr. WALLACE. Yes.

The CHAIRMAN. Anyone associated in anyway with the news media would be prohibited from such relationships.

Mr. WALLACE. If the bill, as drawn—Yes, indeed, I would. With respect to anybody on a television crew involved in gathering news, because they are just as much involved in the gathering of news as is the reporter. Their functions may be different, but they have access to the same kind of information that the reporter and the producer have in putting together a story in backgrounding a story.

The CHAIRMAN. Do all four of you concur in the assessment that was made by at least a couple of you that the skepticism that exists traditionally in the Communist world, that everybody is suspect, that the skepticism and the blame that might occasionally be directed at Americans, would not be removed by statute? I think we need to assess rather what we can reasonably accomplish and not think we are dealing with some sort of utopian effort here.

Mr. LEONARD. Senator, if I could speak on that point, I agree with the cynical Mr. Fuller here that this is not going to remove such suspicion immediately, but it is a step in that direction. It is an assurance that carries the full faith and the weight of the U.S. Congress, and I think that is important, to serve notice to people that we are not going to be meddling in their internal news and the news that comes from those countries.

It is not just Communist countries. It is countries that are on the border of freedom that we are trying to make a part of the world's communication network. It is the Third World countries in Africa and Latin America. We are saying look at the free press of the United States. We are a great example of how people can communicate. We don't want to do anything in those countries that is going to make them suspicious or destroy their faith.

So I don't think it is going to clear it up right away, but it is going to be a step toward it.

The CHAIRMAN. It certainly puts us on the record.

Yes, Mr. Geyelin.

Mr. GEYELIN. Well, I agree. I don't think it is going to clear it up except for those people who are favorably inclined to think generously.

I am also a little disturbed, and I guess I have indicated it, by the passage of a law in this country in order to send a message someplace. It seems to me that a law should stand on its own merits.

This is a—this situation of the press is an unpleasant one in which the reporters are suspect and are openly being accused of CIA connections. Obviously it is easy to make that accusation in the light of the past history, but I am still a little bit dubious about passing a law for the sake of trying to convey a message unless those provisions of law stand on their own merits.

The CHAIRMAN. Well, as far as the committee is concerned, we are not in the message sending business, and you are absolutely right in your assessment of what our primary goal should be, that

it should stand on its own legs, regarding the wording and the extent to which we ultimately go. We are dealing with a very sensitive area. You have pointed out if we have too many prohibitions, we could get ourselves unconstitutionally in an area where there has to be freedom under the Constitution.

Let me ask you gentlemen to deal with this very perplexing area of the correspondent who is a foreign national. This is compounded by the fact that we are not living in the kind of world that we would like to live in, but we are living in a world where in some countries there is a rather gross competition for the minds of other people, and we are confronted with the Soviets' and others' constant barrage of propaganda.

Should that be taken into consideration as far as the use of foreign journalists, not to sell misinformation, but at least try to combat the misinformation from the Communists?

One particular case that was pointed out to me by one of our people in a foreign country was the need to have journalists who could get stories into technical journals and similar publications.

Do we have a different need there, or do we still have the same problem?

Mr. LEONARD. Senator, are we talking about false stories or true stories?

The CHAIRMAN. We are talking about true stories.

Mr. LEONARD. True stories? Isn't that a function of the U.S. Information Service, the U.S. Information Agency?

The CHAIRMAN. That is the function, but sometimes the fact that it is the U.S. Information Agency makes it suspect in itself as its credibility in the eyes of the people that are reading it.

I don't know what the answer is, but we are talking about someone who has recognized expertise in a technical area, for example.

Mr. GEYELIN. Well, I don't think I quite—well, let me put it this way. If you can get that kind of information into the press of that country, you don't need the CIA to do it, it seems to me. The real problem is the countries that do not have a free press, and I don't think that the CIA can be very effective in getting into the controlled press of a totalitarian country with the American viewpoint with any regularity. I mean, we do that with the Voice of America. It is a lot easier to do electronically than it is to do in the print media. I think the use of foreign journalists is probably marginal except in countries where they might be—in really totalitarian countries where they are in effect government officials and they might be useful intelligence sources if you could turn them around, I suppose.

I don't really think that is a very big deal for the CIA, and I think the USIA can deal openly as best it can with its efforts to influence the press, the local press in a foreign country.

Mr. WALLACE. At the risk of belaboring this issue unnecessarily, take the case of a Middle Eastern country, a Far Eastern country. This is why I do not find it difficult to envision the passage of a law governing CIA relationships with journalists. Let us say that you have a camera crew, and that you have a correspondent who works with a cameraman and an electrician, or a cameraman and a sound man, on a regular basis. And let us say that the reporter and

the cameraman are Americans, but for reasons of economy and for reasons of mobility, for reasons of language and so forth, the third man on the crew, the sound man, or the electrician, is a foreign national. Let us say that he is paid, or he gets involved voluntarily, with the Agency.

What you have is a man who is working for the Central Intelligence Agency, either under pay or voluntarily, who is acting as an agent of our Government, who is privy to most of the information that is involved, as far as the work of that journalist and the work of that cameraman are concerned. He knows everything that is going on, and yet he is serving, if you will, two masters.

I see nothing wrong under those circumstances with drawing a law which would forbid the Agency to engage in that kind of a relationship.

The CHAIRMAN. Senator Huddleston?

Senator HUDDLESTON. Well, just following through on that aspect, the legislation as it is written is intended to include any employee of American news media, whether that employee were foreign or not. The question is, would you make any distinction between a country with a reasonable amount of free press, and a country where obviously the press was just an arm of the government? Would you suggest that the latter kind of a country ought to be free game for our CIA or for other intelligence agencies to develop contacts, even agents?

What would be your judgment on that?

Mr. WALLACE. Well, obviously that is the sticky business, one part of the sticky business in this legislation. I get the sense that if you have seen one, you have seen them all. In other words, obviously it would be very useful, for instance, for the Agency to have a man working on a camera crew, if you will, in the Soviet Union or wherever, who is in the pay of the Agency, useful to the Agency. But once he is discovered, it immediately tags that whole team. And therefore it is sensible to draw the inference that all American journalists can be had, or all foreign journalists employed by American organizations can be had.

Senator HUDDLESTON. We want to prevent that. A foreign journalist who is employed by American media is not available to the CIA under this legislation, but a foreign journalist working for a foreign journalistic organization, perhaps even for his government, is fair game the way the bill is structured at the present time. The question is, is there a legitimate distinction? Are we in fact protecting our own press, protecting the Agency from being involved in so-called corruption of the American press, and at the same time permitting them to corrupt—to the extent that such a press may have some area that is left to be corrupted—a foreign country's press that is already operating principally as a propaganda vehicle for its country?

Mr. WALLACE. I find myself in agreement with Mr. Leonard. That it is probably a pretty good idea—what I understand him to say, anyway—that it is a good idea to stay out of it totally.

Senator HUDDLESTON. All of it totally, regardless of the system.

Do you have further comment, Mr. Leonard?

Mr. LEONARD. Yes, Senator. I worry when somebody gets caught, and the big problem is when you get caught. If you are an Indone-

sian journalist working for the CIA and all of a sudden throughout Indonesia it becomes known that the CIA is involved in the news that is either being distributed there or reported from there, is the effect any different whether the journalist is a national of the United States or a citizen of Indonesia?

I have here a copy of the publication of the U.S. National Commission for UNESCO which has been working around the world trying to combat the Soviet influence on the press. All of their efforts have been aimed at assuring the world that we are not doing exactly what we are talking about here right now, and if we are going to have any credibility I think you have got to steer clear of foreign journalists whether they are citizens of the United States, of Indonesia, Africa, whatever they may be.

Senator HUDDLESTON. Mr. Geyelin, you have seen some of it from both sides, at least.

Mr. GEYELIN. Well, not really.

Senator HUDDLESTON. OK.

Mr. GEYELIN. But I think I have said what I think about it. I think we have encountered so many varieties of the foreign press, we tend to think of it as being like ours and it isn't. Obviously there is no purpose and nothing to be said for the CIA trying to subvert a member of the British press or the French press or a lot of the Japanese or whatever, any country where there is a free press.

I think that probably the results are so marginal that it would be—that that is one place where you can legislate. It doesn't trouble me because it doesn't have anything much to do with our own. I mean, we are not talking about legislating for the American press. We are talking about the rules of engagement for the CIA around the world.

And that is a wider, wider question. Obviously it would be better if we don't do it, and if we foreswear it because we are then saying, if we foreswear it by law, because we are then saying that we will do unto others as we will do unto ourselves, and we are true to our values and all the rest.

I still have a little bit of a problem with the definition of what is a foreign journalist, because it is self-evident that these delegations, say People's Republic of China journalists that come here, or Soviet journalists that come here who may or may not be themselves working for the KGB, I think to tell the CIA that that is off limits when what you are dealing with is demonstrably not a journalist but a government official who may in fact be working in the intelligence business against this country, I think you might have trouble with definitions.

Senator HUDDLESTON. Mr. Fuller.

Mr. FULLER. Well, Senator, if you believe as we do, and I am sure you do, that in the function of the press, the free press of the United States, in just achieving our goals, doing our own thing our own way, that we are as much a support for what we believe in this country and in many other Western countries as would be the CIA or any other arm of the Government, then I can assure you that we can best achieve this by acting on our own and without alliances of any sort with any Government arm. And it is so difficult even under the best of circumstances to maintain a pos-

ture of independence and objectivity throughout the world that I come back to my statement that in substance we need to be totally separated.

I get mixed feelings about legislation on such, but I am just saying that if the Agency leaves hands off and lets us produce our news, that will be believed around the world because it is true and because we have sought out the truth to deliver it, I think that is the best of all circumstances that we can wish for. Whether it can be done by legislation I am not sure, but it strikes me that as we discuss the subject this morning, what would we be deriving—I mean, what would be denied the Agency by a strict hands off policy? When people ask any of us about a story we may have covered and say what is the real story, well, the real story is what we put on the wire or on the tube, because that is the business we are in, and we don't save the good ones to tell at cocktail parties. We would rather see them on the front page of the newspapers or on the evening news.

So on the whole, we must separate our job from that of any other Government agency, USIA or any other, and establish that while we are Americans seeing the world through our own heritage, through the prism of our own heritage, still we are doing it to the benefit of all, even those in the Socialist countries. And one of the proofs of this, on our recent visit to China, I walked down to Sinh Hua's wire room where they had teletype machines clacking away from every agency in the world, Tass, all of them, and I couldn't find the AP machine, and that was—I was just about to ask the interpreter where the hell it was, when I saw one over in the corner clacking away, and it was the only machine in the place with carbon rolls on it, disappearing through a wall, and it was clipped up to the last story.

And I think it is that kind of credence that we are looking for, and that we can do more with than any alliances or any—actually and legislation, as long as we are left alone, and the governments of the world realize this.

Senator HUDDLESTON. I think all the members of this committee—and everybody else probably—realizes that to legislate directly against the press, to put any restraint on the press, would be inappropriate and inconsistent with the first amendment. The legislation, of course, is directed toward a Federal agency and imposing certain restraints on how it operates, not only in this area, but in a number of other areas that the legislation covers. Certainly if the press adhered to certain standards, one of which happened to be that there would be no contact or official connections with intelligence agencies, that would eliminate the problem that we are trying to address.

Is there a mechanism within the press in America that can establish and enforce standards, or is that, too, something that is too loosely drawn?

Mr. LEONARD. Senator, if I may, the codes of ethics of journalism have proliferated in the United States since, I would say, about 1970. I think the American Society of Newspaper Editors has its own, I know it does, and the Society of Professional Journalists and the Editorial Writers have all come out with strong statements of ethics, and that, I do believe they have some effect in setting

standards, and where it is measurable, you can see that this has happened.

Now, the main point to me, though, is not the ethical conduct of the U.S. press. It is the conduct of the U.S. Government, and I think S. 2525 does place the burden on the CIA. It doesn't legislate against the press. It tells the CIA what it can and cannot do, and there I believe we do have an area for statutory control.

Mr. WALLACE. I must say that I fully agree with it. I like Mr. Geyelin's phrase. It seems to me that we of the press are obliged to remember who it is in these transactions who is playing the part of the prostitute. It is the kind of phrase that I have come to appreciate and understand in the editorial columns of the Washington Post. But my understanding is that the legislation is aimed not at the prostitute, but at the whoremaster, if I may. And under those circumstances, I find it very difficult, Phil, and I am curious to understand. I take it that you are against legislation?

Mr. GEYELIN. Yes.

Mr. WALLACE. I do not see why this impinges upon the freedom of the press, and I would like this explained to me, if legislation is aimed at keeping the Agency from doing things that apparently have been done in the past. The fact is that we only have to read the history of the last 15 or 20 years. We know those news organizations which have used——

Senator HUDDLESTON. The legislation may not work, but it certainly wouldn't work without the legislation. In fact, when we were involved in those investigations and discovering that there had, in fact, been paid relationships between some of the American press and the CIA, and were under some pressure to reveal all the names of the press involved, our response was well, the press knows who is involved. The press was involved, and really, however you look at it, somewhere within the press community, there was total knowledge of all the involvement. So if there was a story there, it was their story.

Mr. GEYELIN. Well, Senator, all I am really saying in answer to Mike Wallace is that it takes two to tango, and if the press doesn't want to play this game, it won't be played and, therefore, for all the reasons I have set forth, I am leery of legislation because once you get into the business of legislating any rules, I think there is a danger of getting into the business of legislating all, and I think your memorandum of questions for this hearing suggests at least a slight instinct to worry about whether paid relationships are enough, and should we not get into the area of voluntary relationships, and I think—I tried to make the point that if you start down that road with voluntary relationships, you are getting in the way of perfectly ethical conduct of newsgathering.

So I think we are all grownups and we ought to be able to deal with it. Furthermore, times have changed, circumstances have changed, the CIA has changed, but I think much more important, the quality and extent of congressional oversight has changed. There was a mechanism during those dark days for the Congress to know about this, and if it did, it apparently didn't object. And there is a lot to be said for oversight, and if it is good oversight, I think—and the rules are clear and publicly proclaimed, I think that is a pretty powerful deterrent. I don't know how much further

you would have to go on this question of direct relationships between the CIA and the American press.

Senator HUDDLESTON. You would prefer the executive order that is now in effect?

Mr. GEYELIN. I am not sure I would prefer all parts of it, but I think there is a way of dealing with it, plus your committee, the oversight that you provide, plus the oversight that the executive branch is supposed to provide, I think that part of the process.

Senator HUDDLESTON. I think my time must be up.

The CHAIRMAN. Senator Mathias?

Senator MATHIAS. Thank you, Mr. Chairman.

I share Mr. Geyelin's concern about whether we ought to be legislating in this area at all. I think that is the bedrock question that we have before us which doesn't mean that some action ought not to be taken.

Now, I would suggest to you the example of the academic community, led by Derek Bok, the president of Harvard, which has proposed a rather formal set of guidelines for the very similar problem that the academic community faces. I think it is a very similar problem, because it involves a communication of information, which should be only in its purest form on the campuses of America, but which can be tainted because of connection with the CIA.

Do you think any sort of self-discipline of that sort is possible or in order?

Mr. GEYELIN. Well, I think it is possible, and I think it is in order, and I think the analogy is a good one as far as it goes, Senator.

There is a difference in the academic community: It does have a relationship with Government already. It doesn't have the same kind of first amendment——

Senator MATHIAS. That is an overt relationship with the Government. They come down here and they bang on the table and say "we want our money."

Mr. GEYELIN. That's right.

Senator MATHIAS. So that is all out in the open.

Mr. GEYELIN. But we do legislate in that field and there isn't the complication of the first amendment, I think, or the precedent that is set by legislating at all, I think self-discipline is the answer. Some of it comes through trade associations, like ASNE, but basically it has to be in the newsrooms and publishers' offices and the network offices and so forth. I think it is really the individual news organization who have the first responsibility to police this.

Mr. WALLACE. But Phil, isn't one man's self-discipline another man's patriotism? I confess, I am still at a loss to see what it can do to the freedom of the press to have some guidelines laid down in law which say to the CIA: "Stay away, stay away!"

You mentioned academics. Frank Snepp, who used to work at CBS news and then went back to school at Columbia, the School of International Studies, was, according to him, recruited for the Agency by one of his professors at Columbia University. Maybe I was naive about it, but I was astonished to hear that Snepp had been recruited by a professor at school. If there is one, there are more.

Senator MATHIAS. That is specifically one of the areas covered by the new guidelines.

Mr. LEONARD. Senator, I would like to agree with what Mr. Wallace has just said and go a step further, that an executive order can change with executives. Something written in the statutes of the United States becomes a very firm statement of the will of the people for everyone to see.

I think that there ought to be a strong statute, and it ought to be stated forthrightly and pertain to both domestic and foreign journalists, and I think we will all feel better when we get it.

Senator MATHIAS. Should it apply to both paid and voluntary relationships?

Mr. LEONARD. No, sir, it should be paid relationships because I think that is the only binding thing that you can put upon the CIA. If a newsman should come to the CIA's door and knock and say I have got to tell you this, he has got to tell. I mean, that is his conscience. That is a personal matter. Paid relationships with the law affecting the CIA, that is where I think we have to go.

Senator MATHIAS. And if we got into voluntary relationships then you really would be in trouble.

Mr. LEONARD. To get into voluntary relationships would be bad.

Senator MATHIAS. Now, I assume that the rationale for this legislation, this proposed legislation, is that mixing journalism and intelligence would possibly contaminate the American press. I don't assume that the opposite might happen, that it would contaminate the intelligence community. Is that correct?

Mr. LEONARD. I am not worried about that at all. I am worried about the effect on our credibility in the United States and throughout the world, if there is Government tampering, you might say, with the flow of news.

Senator MATHIAS. So that our concern, the motivation for this legislation is the possible contamination of the press?

Mr. LEONARD. [Nods in the affirmative.]

Senator MATHIAS. Given the world today, is this a valid concern? Is this really something that the Congress of the United States ought to be worried about and legislating about?

Do you really think that the American media are in danger and require this special protection for this occupational hazard? I mean just stand back a moment and look at the years in which the alleged practices reached their highwater marks, the last 10, 15, 20 years, the years in which this practice was conceived and was carried out probably more than in any other time, at least that we know of in the entire history of the country. Yet that was the same period of time in which, I would submit, the American press reached the heights of success and world recognition.

Mr. LEONARD. Senator, in this country I am not worried about it. Overseas, in Nairobi at the UNESCO meeting, with the State Department and the American press working together—and they were, Clayton Kirkpatrick of the Chicago Tribune was part of the U.S. delegation—it was a very close call to head off a resolution which would have called for setting up national news agencies in Third World countries which would have controlled the flow of news to those countries and from them, and that is where I am worried. That is where I am worried, overseas. Keith Fuller's corre-

spondents in, I don't know, let's take a country. Let's take Ghana just offhand, whether they would still be able to have the effect, the freedom that they now have in reporting. The Third World has ideas that the Western agencies are biased against them, not presenting balanced pictures or a balanced picture of their development. They want to have news agencies within their country that disseminate what they call balanced news, which would really be propaganda to the detriment of the West, and I am afraid that if we have——

Senator MATHIAS. We as politicians seek "balanced news" sometimes.

Mr. LEONARD. I hope so, but that is where it comes into play mainly now, and I think the world is looking for some assurance that the United States is not going to be tampering with their news, either coming in or going out.

Mr. GEYELIN. Could I respond to that, Senator? I am not sure that I grasp the tremendous difference between an Executive order, a firmly stated executive policy, subject to congressional oversight, faithfully carried out, and a law. We are talking about people who are not inclined to think well of us to begin with. I am just not quite sure what the law adds in terms of our image, leaving quite aside the question of whether it is right to pass laws to do something about the image of the American press. I don't think that is the function of legislation, to make us look good in Nairobi. I think the way we look good is the way we look good on the story. As I said, tbe American press broke this story. It has broken quite a lot of other stories.

I can't believe that reasonable people abroad would have the sense that the American press has gone in the tank for the American Government. There must be a few past presidents who have questioned that, maybe even an incumbent. I don't think that our image is that bad. Where it is bad, I don't think a law will make it better. I think that is where I have to come down.

Senator MATHIAS. Senator Chafee has a question on that.

Senator CHAFEE. As I understand it from your comments, it is the motivation for this law as it is concerned with contamination of the press—I was quoting what you said before, and so therefore, why don't we go a bit further and have a statute in our books that covers the entire U.S. Government which stipulates that the Government can't contaminate the press in any way or do anything that we are striving for in this statute.

I mean, if that is your concern, why just restrict it to the CIA?

Mr. LEONARD. This legislation is concerned with intelligence. I think if you wanted to pass some type of law which said the U.S. Government will not have a paid relationship with journalists to influence the flow of news, I don't know what would be so bad about this. What I am mainly concerned about is the intelligence activities because they affect our overseas relationships with other nations.

Senator CHAFEE. But, you know, this thing can go a long ways. If you get a free meal in the White House, you are being contaminated.

Senator MATHIAS. You are being courted.

Senator CHAFEE. Yeah, you are being courted all the time in the Government anyway.

Mr. GEYELIN. Sure, I agree with you, Senator Chafee. I don't want to see a law saying it is against the law for a reporter to write speeches for a Senator, or to participate in any other way in advising or counseling people in the U.S. Government. I don't know where you draw the line when you single out one agency. The reason we are singling out this one agency is because we are confronted with gross abuses, but I don't think we ought to underestimate the healing effect of the simple ventilation of all this. I think it has raised everybody's consciousness on this question in a way which would make it extremely difficult under any conditions for the CIA to return to the same kind of relationships.

Now, it is true that executives change and directors of Central Intelligence change, and, therefore, it could be argued that we have got to have a law. But laws can also be changed. They are not immutable. They are maybe a little bit more concrete but not necessarily. I don't think that there is magic in passing a law. It is not written in stone, a law. It can be amended again, and the circumstances under which the CIA would reverse its stated policy of the moment not to have paid relationships with news organizations, American news organizations, I can't envisage the circumstances under which that would publicly be reversed, and I would suggest that in any climate in which it would be publicly reversed, I suspect the Congress would be equally susceptible to that climate and would change the law.

So I don't see that a law protects us any more than a strong position on the part of the executive branch and diligent oversight.

Senator MATHIAS. Mr. Chairman, I just have one final question while we have this distinguished panel here. I would like to look at the other side of this coin and see if any one of you has any apprehension that there are any dangers at present of secret propaganda, of covert political action by columnists, by commentators, who may be agents of influence of any foreign country. Do you think that what we are talking about doing to ourselves is being done to us by anybody else?

Mr. GEYELIN. Well, I don't think so.

Does anybody else want to answer that?

Mr. FULLER. I certainly have no evidence before us that any prominent journalists have been subverted. One of the Senators remarked a moment ago, early in the hearing, that a portion of the press certainly had to know what was going on in the past contacts with the CIA, and appropos of nothing, I just wanted to comment that neither I nor my predecessor have yet to confirm any relationship between our staff and the CIA, not to say that it didn't happen, not to say that it didn't happen often, but I am not so certain—there have been allegations that people at the top in news organizations knew and condoned work with the CIA, but as far as the international news agencies such as I represent, it was not true then and it is not true now.

Senator MATHIAS. It is like they used to say in the Navy, in the old days: "It didn't happen on my watch."

Do either of you have any comment on it?

Mr. LEONARD. No. I have clippings here from the various newspapers about various people alleged to have been associated with the CIA, but I wouldn't take it to court. These are allegations that have been made.

Senator MATHIAS. But nothing on the KGB?

Mr. LEONARD. No, no. I might say that certain Russian journalists have come to the United States to visit us, and we were kept under quite strong surveillance during that period. There seemed to be some apprehension about the purpose that Soviet journalists serve when they come to the United States, what they have in mind. So I think there is an awareness that they could be attempting something.

Senator MATHIAS. Acting as agents of influence.

Mr. WALLACE. But their circulation in the United States is rather skimpy.

Mr. LEONARD. Very small.

Senator MATHIAS. Thank you, Mr. Chairman.

Senator HATHAWAY. Thank you.

I would like to carry Senator Chafee's question one step further.

If there is concern here that this one agency might in some way erode the independence of the press, why not extend it to all Government agencies, and also all individuals and corporations? In many cases, the independence is thwarted more, I suppose, by the influence of some company or individual on a reporter, whether he pays him or doesn't pay him, than by what the CIA might be doing. For instance, if you take the example that Mr. Wallace gave of the technician in the foreign country, his mission from the CIA might simply be to count the number of airplanes on a certain field and come back and report, and that certainly wouldn't warp the independence of the newspaper in any way.

In other words, why don't we just have a complete disclosure law so that the general public knows all the influences, that is, all the significant influences, and that, of course, would solve the problem with respect to CIA because they wouldn't want to reveal that someone was on the payroll.

Mr. GEYELIN. Well, strictly speaking, the example you cite, if that is all the technician did is count airplanes, it wouldn't affect, I suppose, the product of CBS or whoever. But if it became known, and it might or might not, it would surely affect access, and that is the thing that one, I think a lot of us are worried about.

Senator HATHAWAY. If it became known that that same technician were on the payroll of McDonnell-Douglas, I suppose that might affect access, too.

Mr. GEYELIN. Well, I suppose it would.

Senator HATHAWAY. I mean, in the case of the Middle East, with F-15's in Saudi Arabia and Israel and so forth.

Mr. GEYELIN. Well, I haven't thought—I think it would affect access, and it would certainly taint him. It would taint the organization and in the process of tainting the organization, it would taint all news organizations because, you know, where there is any conflict of interest there are questions about the practices of everybody.

So I think it would be compromising in that manner, and it would also be extremely compromising if the word got around—to

give only one example, if the people who were working for the Washington Post or CBS were also counting airplanes, I think they would have trouble getting visas. They would have trouble getting access to the news sources, and it would be a very crippling thing.

Senator HATHAWAY. But it wouldn't destroy the independence of the news agency.

Mr. GEYELIN. Well, I don't know what you mean by independence. It would certainly destroy its effectiveness.

Senator HATHAWAY. To the same extent as if it were known that one of the employees was working for McDonnell-Douglas, also?

Mr. GEYELIN. I think that would be very bad.

Senator HATHAWAY. Do you think we should have a law that would prohibit that, too?

Mr. GEYELIN. No, I am antilaw.

Senator HATHAWAY. Except, I think you say in your statement here, that we ought to have a law with respect to using journalists as cover.

Mr. GEYELIN. No, I think what I said was we ought to have a law preventing the use of journalistic cover for Central Intelligence Agency agents because that is something over which publishers or network executives, bureau chiefs or whatever, can excercise no control, with which they do not necessarily give consent. That is something the Agency does, using a journalistic cover, which I think is extemely damaging.

The other question you talk about, whether actual practicing, accredited journalists ought to be CIA agents on the side is a different question. I am obviously against that, too, but I think that can be controlled by the fact that the journalist or his bosses would have to give their consent, and obviously I think that consent should be denied, but I think that is something that the media can control for themselves. They cannot control the clandestine use of journalistic cover for regular CIA agents or any other intelligence agents.

So I think that——

Senator HATHAWAY. Well, they could have limited control. The control could be limited by saying no one can be employed who has any connection, and if they find it out, fire him.

Mr. GEYELIN. Well, I suppose you could do it with free lance writers. You could send somebody abroad as a free lance writer, as a stringer. I suppose you could set up a dummy newspaper, magazine, or something that had the look of a news organization, and which is in fact totally controlled by CIA.

Senator HATHAWAY. Any of the others of you have any comments?

I guess three out of four of you do support the prohibition in the bill, but would you also extend it and make it a broad prohibition against any journalist being paid by any organization outside of the newspaper itself?

Mr. LEONARD. Senator Hathaway, I would like to clarify a point here with Mr. Geyelin. Would he accept an extension of the ban on payment to foreign journalists if it were under executive order rather than statute?

Mr. GEYELIN. I don't think we ought to be doing it, but I am still talking about the law and the problems of definition and what is a

foreign journalist. That is my point. I don't think that is easy to define.

Senator HATHAWAY. Mr. Wallace, do you have any comment?

Mr. WALLACE. We are talking about an intelligence bill. I would like to come down on Phil Geyelin's side and say we don't need a law. But it is apparent that I have thought about it and I think that we may just need a law. But it is different when you get into the Agriculture Department or the Commerce Department or whatever. A reporter shouldn't be writing speeches for a Senator and a reporter should not be on the payroll of the Agriculture Department. It is going to be darned difficult, however for him to mask that, if he is indeed working for two masters.

It would be conceivably much easier for him to mask the fact that he is working for the CIA and for a news organization simultaneously, and that is why I come down on the side of the law as far as the intelligence community is concerned.

Senator HATHAWAY. But it would be fairly easy for him to negotiate with General Motors or some company, to writo articles for pay from them, as far as anybody really finding out about it.

Mr. WALLACE. If he was consistently plugging their new product—and now you get into a totally different area in which, for instance, Sigma Delta Chi has been very much involved, and that is the business of press junkets and lunches and things of that nature. That is something, it seems to me, that the press can pretty well monitor for itself. We have vigilant management in the American press, and a growing sense of conscience in the American press.

I would like, for purposes of this morning, to say that as far as legislation is concerned, I would like to confine myself only to the bill that we are talking about.

Senator HATHAWAY. Well, all right. Just confining ourselves to that, would you make any differentiation between what the activity was that the CIA wanted done, like the example I gave before of the technician who was simply to count the number of airplanes on the field, and differentiate that from the case of the person who goes in to write an article, a propaganda article in regard to——

Mr. WALLACE. If he works for the Agency, Senator Hathaway, he works for the Agency as well as for whomever in the press. And once that becomes apparent, or if that becomes apparent, he tarnishes it all.

Senator HATHAWAY. He tarnishes what, the Agency?

Mr. WALLACE. No, no. He doesn't tarnish the Agency. He tarnishes the organization for which he works and by implication, all of the rest of us.

Senator HATHAWAY. Well, I don't know if he tarnishes it any more than some other private source that had him in his pocket.

Mr. GEYELIN. Senator, if I could speak——

Senator HATHAWAY. Depending on the mission he is trying to do.

Mr. GEYELIN. I think you have raised a question. You are talking about private industry, but this raises a question about how far you go with statutory regulations of any kind. After all, the CIA is not gathering intelligence just for the fun of it. It is gathering intelligence for the rest of the Government, so that the Government can presumably act in a more informed way.

You could count airplanes for the Pentagon. You don't have to count them for the CIA. The Pentagon is very interested—in fact that's where the basic interest is—if you are talking about counting airplanes. Again, that is an example, it seems to me, of where you could wind up when you start down this road. I am not saying it is even conceivable at the moment. But the Government has a need for information. It happens to use the CIA primarily to get it, but—and I recognize this applies to the whole intelligence community—but it is getting it for somebody else who wants it, so that when you lock this door, you are not sure you have locked all doors, and therefore I am wondering whether you even ought to try to lock the door in this way.

Mr. LEONARD. Senator——

Senator HATHAWAY. Yes, Mr. Leonard.

Mr. LEONARD [continuing]. The most precious thing the American press has going for it is integrity, independence, and objectivity, and they fight for this in many ways. And what we are talking about today is the attempts of the U.S. Government, through its intelligence agency, to interfere with this, to hurt this, and it does hurt it when it becomes known that anyone related with the press is in any way related with the Central Intelligence Agency.

So all we are saying, all I am saying here today is that if the CIA can keep its hands off the press, the press will retain its credibility in that respect, and it will have a message that can be believed throughout the world. As soon as it becomes known that anyone from the CIA is having any input or anyone with CIA connection is having input in the press, then our message to the world won't have any more validity than Tass.

Senator HATHAWAY. Yes. That is a good point. The question I have is whether it shouldn't be broadened. I think I agree with Mr. Geyelin who said we should throw it all out, or it should be modified considerably, and make this a matter of principle for the press itself, because there are so many other areas you can get into once you pass this. Then the question comes up, well, as Senator Chafee said, shouldn't we extend it to all Government agencies, and then shouldn't we extend it to all private individuals and corporations because that can also hurt your credibility in the world if they thought that some of your reporters were on the payroll of General Motors or whatever.

Mr. LEONARD. Well, it certainly could, Senator, but the main thing we are talking about here today is the influence of the U.S. Government and an agency which does operate covertly most of the time.

Senator HATHAWAY. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Chafee?

Senator CHAFEE. Yes, I just have a couple of questions.

Mr. Geyelin has referred to the real world, and in this committee not only do we have some responsibility to see that there aren't abuses done by the CIA, but we also have some responsibility to see that the CIA can function in the best possible manner. This act before us provides that no entity of the intelligence community may pay or provide other valuable consideration to any individual engaged in any intelligence activities who is a journalist or colum-

nist accredited to or regularly contributes material relating to politics, economics, so forth, to any U.S. media organization.

Now, that is going pretty far. Let's just take the case of some columnist who, say, is going to China, and has access to an area to which for some peculiar reason other people don't have access, and let's say it is an area where there is a drydock that has some gates in it in which the CIA, and the U.S. Government are very interested.

Now, I would take it that if he wandered around there and saw something, from what you gentlemen agreed upon, he could come home and knock on the door of the CIA and say, boy, I just want to tell you what I have seen over there in China. Now, does everybody agree that that is all right—or that it's wrong?

Mr. LEONARD. [Nods in the affirmative.]

Senator CHAFEE. Mike, you seem——

Mr. WALLACE. Yes, I do. But if he comes across something of that nature, Senator Chafee, why wouldn't he put it in a piece of his own film or in his paper? If it is that interesting a story, what is going to keep him from publishing it?

Senator CHAFEE [continuing]. Well, let's say it is not a topic of general interest. Let me take it one step further. Let's say that he is a close friend of somebody who is in the CIA. The CIA knows he is going. He is a columnist, he is not a high paid journalist, or media man. [General laughter.]

Now, for him to spend some time really looking over this area is going a little beyond his normal schedule. The CIA says we will cover your expense, say $200 a day. He says all right, and he goes, and he wanders around and sees this thing that really isn't a topic of general news. It is a very esoteric piece of equipment. And he comes home and tells the CIA about it.

Now, is that wrong?

Mr. WALLACE. [Nods in the affirmative.]

Senator CHAFEE. It is good for the Nation. It is a very needy, helpful piece of information. This is the patriotism to which we are referring, Mr. Wallace, but that is wrong?

Mr. GEYELIN. I think it is wrong if it does not have a legitimate journalistic purpose. It seems to me that is the test.

I see what you are getting at. I know there are things that the CIA is interested in all the time, and they can't even tell, they won't even tell a newspaper reporter why they are interested, and if they won't tell you why they are interested, and you are just going around picking up a small piece of a big thing that concerns them, then, you are working for them, you are not working for your organization.

On the other hand, if you can find out why they are interested, you have probably got a news story. Most of the time—and this doesn't just apply to the CIA, it applies to a lot of people who are interested other—there is the classic story, I think of some reporter who was asked by CIA, who was going to see Nasser, I think, to report something about his appearance or his health or something else, and did to a CIA friend who was interested, without really knowing why this was a terribly important thing.

I think that is very questionable. I think there is a very simple test. You go and look at anything that looks newsworthy. That is

the only business you are in. And if the agency in question won't tell you why it is newsworthy, then they will have to find it out in another way.

Senator CHAFEE. But on military bases, if I knew you were going or Mr. X were going to China and I said, hey, keep your eye out for this thing, will you, and I wasn't taking a dime from the CIA, that would be all right.

Mr. GEYELIN. No; my next question would be why, and if I can't get an answer that suggests to me that there is an interesting line of inquiry as a reporter, then I am not interested. I am intensely interested if I can find out why this is a matter of urgent concern to tbe U.S. Government, because if it is of urgent concern to the U.S. Government, it is almost inevitably going to be a news story.

Mr. FULLER. For any short gain that the CIA or even our country might make with such a venture, over the long run, our credibility abroad would be destroyed. Our access to news which in essence gives the world a balance of what is good and bad in the world, and I think we would lose much more than we would gain.

Senator CHAFEE. Who is we?

Mr. FULLER. We the American people, who are trying to preserve, I think, the freedoms in this country, and they are being attacked on all sides. The world that we cover is shrinking every year.

In 1947 the Associated Press correspondents could go virtually anyplace except Russia with their passports. Today, three-quarters of the people of the world, we have no direct access to on a free basis, to go in and cover the news.

So I am saying only that while it would seem that we would all say, "Yes, of course, we would do that," I think that this country would be the loser because once we are associated as working hand in glove with the intelligence community of this country, the purpose we serve is destroyed.

Senator CHAFEE. Well, it seems to me that you are setting a pretty hard standard. Another thing that was mentioned was that this is the real world and we have concerns that, as you gentlemen obviously do, of keeping it strong and competitive.

What about the British? How do they handle this? Is our press looked on as so much purer than the British, our stories considered so much more credible? I can't believe the British have a law in this area.

Mr. FULLER. Well, the British, of course, operate under the Official Secrets Act, which is another——

Senator CHAFEE. But that is a different side of the coin, I think.

Mr. FULLER. Yes.

Let me use an outsider to answer the question. A newly adopted colleague in New York from Australia was making a speech at the IPI not long ago, in his own country, Rupert Murdock, and he said he published newspapers only three times, and by any standard that one would care to use, any yardstick, that the American press was by far the freest and the most responsible, and I think he is right.

Senator CHAFEE. Well, somehow I think that you gentlemen are arguing, debating, not necessarily Mr. Geyelin, but the others are arguing in favor of us policing your affairs for you, and if I get Mr.

Geyelin's argument, it is up to the newspaper to have those kinds of codes and enforcement that would cover these methods instead of having Big Brother step in with the law.

Mr. FULLER. I said I was cynical from the outset about legislation in this area. I would much prefer that the Director of the CIA told me in a private conversation that they were not using news persons for covert activities, that would mean as much to me as your law, or actually more.

Mr. LEONARD. On the subject of standards, Senator, Henry Kissinger once told me that in international intelligence, that our CIA acted like choirboys compared to the British. That has always stuck in my mind, as American standards of intelligence——

Senator CHAFEE. Excuse me. Like what boys?

Mr. LEONARD. Like choirboys. Now, this stuck in my mind. And I like it. I rather hope that American journalism has higher standards than other parts of the world.

There is the recurring idea that somehow this committee or this legislation is trying to help out the press, but it is trying to help out the country, really. It is not trying to help out the press so much.

Now, for instance, the Associated Press, the Washington Post, the Milwaukee Journal and CBS I am sure would abide by high standards, but someplace, somewhere in the United States there is somebody I am sure that is going to take money from the CIA, somebody in journalism, to perform some activity, and when they get caught it is going to be just as bad for the press as if someone in this group were doing it.

So the burden really has to be put, as bill S. 2525 puts it, on the U.S. Government, to say that you will not pay, period. That is a pretty final, definite statement.

Mr. WALLACE. You are talking about the real world, Senator Chafee. And there is an AP report about testimony by Stansfield Turner, testifying before a House intelligence subcommittee, and he says "I am reluctant to keep drawing finer and finer lines." He also argued in favor of retaining a provision authorizing him to waive the restrictions and to enlist the U.S.-accredited reporter if he feels it necessary. And in the real world, it seems to me that the Agency probably would like to do it. But if they are specifically told they cannot do it under S. 2525, then it seems to me that it is protecting us. But that is only a corollary. What you are really saying to the CIA is: "Don't do it!" And a byproduct of that, it seems to me, is that it helps the U.S. press to remain free and independent, and most important of all, above the suspicion under which it currently labors.

Senator CHAFEE. I guess what worries me, as we read about successes in the past with ULTRA, and with Midway, the Japanese code, whatever it was, these things came about because of a whole variety of circumstances, that we were lucky, we had things worked out.

Now, somehow to enjoin things by law makes me nervous. Now, I can see that everybody can say there have been abuses, and indeed there have been abuses, and that perhaps was the responsibility of the Congress for not conducting adequate oversight, but to enjoin things where the precious opportunity might come up, a once in a

lifetime thing, Stansfield Turner can't go to anybody and say here is a chance to get something significant through this reporter if we can only pay his expenses. The law says no, and so there is no doing it. I just worry about what the alternative might be.

Mr. FULLER. Senator Chafee, I don't think any of us are saying don't gather intelligence.

Senator CHAFEE. I appreciate that.

Mr. FULLER. We are just saying that we think we are making a contribution, that whatever small, covert contribution might be made is miniscule compared to what we could do if we are putting out a believable news product that countries all over the world read and believe.

Senator CHAFEE. Well, that is in the balance——

Mr. WALLACE. The other part of it is this. You mentioned China before, and reading Jack Nelson's remarks from yesterday, which I found quite persuasive and very interesting, let's say that a reporter is going to North Korea, where not many American reporters go in. Ahead of time he goes to the Agency, he goes to a friend of his in the Agency and says: "Look, there is so little in the press about this, I would like to know a little bit about the background of what goes on in North Korea." And he gets a briefing from the Agency. And he comes back and he writes his pieces. And then let's say the fellow, his friend from the Agency says, "Listen, I would like to have lunch with you and just shoot the breeze about what you saw there."

First of all, if he is a good reporter and he has been in there I would imagine that most of his material is going to be in the pieces that he has done.

But then, Nelson says, I see nothing wrong with a reporter sharing the information he gathers with an intelligence agent as long as it is voluntary. And that is where I find it difficult to go along with you. Whether it is expenses, or a couple of hundred bucks or a couple of thousand bucks, it is wrong. As long as it is voluntary and on his terms, and he is not compromising his own sources of information, it is done every day in American journalism—that's the real world—and there is no question in my mind but that—that is OK.

And you know as well as I that that is the way you operate from time to time with reporters. And I daresay that reporters have been operating traditionally with people from the Agency in that way on a voluntary basis from time immemorial.

The CHAIRMAN. John, would you pardon me just to extend here just a tad, because we have gone all around this area, and we have tended to lean on the strong word of "voluntary" as the right of the reporter and as minimizing the risk to the great American news media.

Are you limiting that voluntary relationship to the transmittal of ideas and news and observations, or would you draw a line at which the reporter is asked: "Would you mind, when you go back, to find out this or that or to deliver this or that." So then it is still voluntary, there is no contractual relationship, but it becomes an operational kind of thing—I think we are going to have to go vote, aren't we?

We are going to have to go vote. Knowing what happens when we get over there, I don't think it really would be good to ask you gentlemen to stay on here.

You might give a little thought to that, but I would like to just toss in another thing for you to think about, and that is not directly related to the subject of our hearings. But inasmuch as the whole purpose of this legislation is to do our job and convey the idea that we are doing our job, for those of you who are out there looking and have the responsibility to test us and see that we are providing oversight, I wish you would give some thought about how you can do your job, get the information you need, and we can convey to you the fact that we really are doing our job. At the same time, you understand and we understand there are just some things that we know we can't discuss. And that is a narrow line, particularly for those of us who normally like to say everything. Now we are in a much different role.

Let me just say thank you, gentlemen. This has been very perceptive and valuable to us because you realize the issues.

[Whereupon, at 12:06 p.m., the committee recessed subject to the call of the Chair.]

TUESDAY, MAY 16, 1978

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The committee met, pursuant to notice, at 10:06 a.m., in room 1114, Dirksen Senate Office Building, Senator Birch Bayh (chairman of the committee) presiding.

Present: Senators Bayh (presiding), Moynihan, Goldwater, Garn, and Chafee.

Also present: William G. Miller, staff director; Earl Eisenhower, minority staff director; David Bushong, minority counsel; and Audrey Hatry, clerk of the committee.

The CHAIRMAN. We are very fortunate this morning in having the man who has served our Government for most of his adult life, if not all of it, a man who is very well qualified to discuss the question of intelligence organizations.

I appreciate the fact that as busy as he is, he has taken time to be with us.

Mr. Ambassador, it is good to have you with us this morning.

Mr. HELMS. Thank you.

The CHAIRMAN. We will ask that an appropriate abbreviated biographical sketch of your varied career be placed in the record at this time.

[The biographical sketch of Mr. Richard Helms follows:]

RICHARD MCGARRHAH HELMS

1913—Born, St. Davids, Pa.
1935—Graduated Phi Beta Kappa from Williams College. Worked for United Press in London.
1943—Assigned to OSS. Held desk jobs in Washington and New York before going to England and France, and after the war to Germany.
1945—Strategic Services Unit of the War Department and later the Central Intelligence Group.
1951—Deputy Assistant Director for Special Operations.
1952—Acting Chief of Operations, Office of Deputy. Director for Plans. (DDP).
1958—Deputy to DDP (Richard Bissell) and Chief of Operations.
1962—Deputy Director for Plans.
1963—Acting Director of Central Intelligence.
1965—Deputy Director of Central Intelligence.
1966—Director of Central Intelligence.
1973—Confirmed as Ambassador to Iran.
1977-Present—SAFEER—consulting firm.

The CHAIRMAN. Why don't you proceed?

Do you have any statement that you would like to make this morning?

STATEMENT OF HON. RICHARD HELMS, FORMER DIRECTOR OF CENTRAL INTELLIGENCE

Mr. HELMS. Mr. Chairman, thank you for your kind words. I don't have any formal statement this morning, but I do have a couple of observations I would like to make before we get started.

I recognize that I am swimming against a strong current when I have the temerity to suggest that in writing the voluminous language of S. 2525, the committee is attacking the problem of dealing with the intelligence community in a way which would seem to raise more difficulties than it resolves.

May I say here and now that the only part of the intelligence community which would appear to be at serious issue is that part of it which deals with espionage, counterintelligence, and covert action. These activities are understood to be incorporated in what Americans have called the clandestine service, what the British refer to as the secret service.

The secret service, as a tool of government, must of necessity belong in the United States to the Presidency. Under the constitutional powers of the President as Commander in Chief of the Armed Forces and the formulator of American foreign policy, it should be the President who establishes the guidelines and the restrictions on what a secret service should attempt to do and how it handles its various activities. Congress has an oversight role to contribute, a continuing and consistent oversight role.

As the months turn into years, the Executive and the Congress will obviously confront differing perceptions according to the mood of the American people and changing circumstances in the world at large. This flexibility is essential. In other words, in formulating laws and prescribing criminal penalties for violation thereof, the Congress is in effect attempting to build a legal structure which reduces this flexibility and makes it more difficult to shift quickly in the face of new conditions.

Would it not be preferable to encourage collaboration between the executive and the legislative, rather than requiring what S. 2525 would seem to demand, namely, at least 67 separate conditions under which written reports would be made to the Congress. This blizzard of paper would be so heavy as to turn the examination of it over to the committee staffs, which in turn would be running the intelligence community, or, as former Director George Bush put it, "micromanaging the intelligence business."

In my experience, what a Director requires from the Congress as much as anything else are the thoughts and perceptions of Congressmen on the need for, or desirability of, certain activities and operations in the context of the times. These matters are of such importance that they should be subject to discussion between oversight Senators and oversight Representatives personally, and the Director, not committed to impersonal treatment such as would be the inevitable result of exchanging written documents.

There is one other general point that I would like to make, Mr. Chairman, and that has to do with this passage on the protection of sources and methods. This happens to be something about which I feel very strongly indeed, because I have been a victim of this part of the statute as it exists today. If there is going to be the

same kind of a proposal in any new legislation, I think it has got to go far farther than the one that is in the existing draft.

When the Rockefeller Commission made its report, they made this observation, and I quote:

> The Statute does not provide the Director of Central Intelligence with guidance on the scope of this responsibility and on how it is to be performed, nor does it grant him additional authority to discharge this responsibility.

Later on, the same Rockefeller Commission report says:

> The Director's responsibility to protect intelligence sources and methods, however, cannot be read so broadly as to permit investigations of persons having no relationship whatever with the Agency. The CIA has no authority to investigate newsmen simply because they have published leaked, classified information. Investigations by the CIA should be limited to persons presently or formerly affiliated with the Agency, directly or indirectly.

Mr. Karamessines when he testified here recently said in his statement:

> I must admit, however, that experience has shown that this is a hollow mandate unless it can be reinforced with language providing appropriate sanctions and giving the Director not alone the responsibility for protecting sources and methods, but also the authority to investigate and take appropriate action in cases involving such protection.

In short, gentlemen, it is simply not enough to give the Director this responsibility. You either define this responsibility, give him the right to take certain actions and recourses in the context of enforcing the responsibility, or I would recommend you leave it out of the legislation entirely. I promise you that it is grossly unfair to give him the responsibility without any authority whatever to enforce it.

I would also like to suggest in connection with the bill, gentlemen, that it would seem to me that you have too many definitions, and that they are rather confusing. There are 12 pages of them, and yet in those 12 pages no one has seen fit to define that much used term "national security." It appears throughout the act. It was not defined in the National Security Act of 1947, and to the best of my knowledge, I have never seen it defined since.

And the word "coordination," although used throughout the bill, is not defined. The intelligence community has never formally agreed on its meaning, which would range from mere notification of an activity to approval or disapproval of an entity. Without some clearer definition, the bill insures the continuation of disagreements within the community on what coordination actually means or what it entails.

Also, we have the term in S. 2525 "United States person" in quotations. It would seem to me that it is defined very broadly. Almost any group of people can incorporate themselves or be an incorporated association and therefore be protected from intelligence community activity, which is what I interpret the sense of the bill to mean. But how does one find out if an association is controlled by a foreign power without investigating it to start with? So I think that that language ought to be tidied up, including the definition of international terrorist activity, which I think gives real problems in terms of, do we really mean what we say? In other words, are we really in favor of the status quo in all so-called democratic countries, be they rightist or leftist?

Thank you, Mr. Chairman.

Mr. CHAIRMAN. Thank you, Ambassador Helms.

Is it not possible for us to establish general guidelines enunciating the rules, the regulations and defining the width and breadth of authority without getting into micro-management?

The whole purpose of hearings, of course, is to take something and let some of you who have had practical experience look at it—67 separate reports. It would be better to have two or three good ones as well as the kind of personal, ongoing relationship you referred to.

Is it not possible to have one goal to reach without so tying ourselves up with minutia, day-to-day details that we have difficulty?

Mr. HELMS. Well, I would have thought so, Mr. Chairman. You know, I realize that there are very wise men who disagree with me, but the National Security Act of 1947, as it applies to the intelligence community, is not such a bad document, and if we had had the proper kind of oversight in Congress throughout these years, I think that that document could probably still remain on the books without too much trouble.

But the issue that I raised at the outset, of the proper kind of give and take between Senators and the Director on what he might do at a given time, what he might be permitted to do, what is going too far, and then assuring him the kind of security which one committee in the House and one committee in the Senate could give him, would seem to be adequate. And the difficulty with legislation is that no matter how many words you write, it never covers all the contingencies. It tends to put things in a straitjacket, and it tends to require so many reports that you have fellows writing reports and doing no work. And as a matter of fact, believe it or not, one of the principal complaints of most of the employees of the clandestine service of the CIA in the past has been the number of reports required of them from the field so we could keep track of what they were doing. They felt this cut into their productive work.

Well, now we not only will have those reports, but we will have all kinds of reports from headquarters on top of that. I do honestly plead that you make the legislation simpler.

Mr. CHAIRMAN. Let me read that portion of the bill that deals with the oversight function and ask you to comment on it.

> Keep the Permanent Select Committee on Intelligence of the House of Representatives, and the Select Committee on Intelligence of the Senate fully and currently informed of all National Intelligence activities and all intelligence activities which are the responsibility of or are engaged in by or are carried out for or on behalf of any entity of the Intelligence Community, including any significant anticipated intelligence activity; but the foregoing condition shall not constitute a condition precedent to the initiation of any such anticipated intelligence activity; and furnish any information or material in the possession, custody or control of the Director of the relevant entity of the Intelligence Community or in the possession, custody or control of any person paid by the Director or by any such entity whenever requested by the Committees.

That is basically the mandate of the proposed oversight authority there. We really have that oversight authority now.

Would you care to comment on whether it is adequate, or too extensive, or not extensive enough?

Mr. HELMS. I think that the main problem with oversight is the security of all the material that you are going to require. I think it ought to be a lot more specific that these two committees, one in the House and one in the Senate, are going to be the ones to get this material, and that any other committee chairman who wants it doesn't have any right to call the Director and simply extract it from him. You will have to recognize that after what happened to me legally, it is quite clear that nobody dare come near the Senate anymore and be sworn without being prepared to take his pants down, in other words, confess all.

So, I think that you ought to protect the Director in this respect by saying that his sensitive testimony is limited to these two committees. Whether you can get that through the Senate or not, I don't know, but it would be a good test of how interested they are in security.

The CHAIRMAN. You have no objection to what I just read you that does tie into tbe two committees, one in the House and one in the Senate.

Mr. HELMS. No objection to that.

The CHAIRMAN. I call your attention particularly to the broad scope of the information which is made available here to those committees. You have no objection to that.

Mr. HELMS. I have no way of objecting to that. I think the Senate has got to decide what it wants to know and this committee has got to decide what is best to know, and I think it starts at 100 percent. If it then over a period of time wants to contract that down because it is too much of a workload or whatever the case may be, fine.

But I certainly don't want to sit here and say that the Senate and the House should not have, at least the committees should not have, full access to this information. I don't think we ever in the history of this country want to go through again what we did in 1975 over intelligence, and anything that would stop that, I would be in favor of.

The CHAIRMAN. That is one of the reasons for the bill, I think, to provide strong guidelines, and perhaps we have gone too far, and we will have to look at that, but by drawing some guidelines, we have sent some rather clear signals that this should not happen again. Hopefully we would be wise enough to draw the line in such a way that we can stop the abuse without unnecessarily burdening people in the intelligence community with the trivia.

That is what you are concerned about, is it not?

Mr. HELMS. That is exactly what I am concerned about. I am also concerned about a constant traffic in paper, because papers in this town have a way of turning up in the strangest places. If you look back at the history during the last 5 years, odd little pieces of paper show up in the newspapers, or show up in the hands of private citizens. It is this paper traffic which, the heavier you make it and the more documents you have, the more you erode the security of these operations.

And maybe there isn't going to be much covert action in the future. That would depend on Presidential desires and the position of our country and so forth. But it is not possible, Mr. Chairman, to run an adequate and successful covert operation if it is leaking

around the edges all the time, and no sensible man will embark on one if this is what he is going to be confronted with.

The CHAIRMAN. Well, how do you suggest we protect the country from this kind of leak? What kind of governmental response should there be when we read all these books and people that are publishing lists and this kind of thing. How do you see the necessity and the ability to restrict the leaking of security information on one hand, and the first amendment rights on the other?

Mr. HELMS. It doesn't seem that the first amendment rights come into this as long as the legislators and the members of the executive branch both keep their mouths shut. It doesn't get to the newspapers in that case, so the first amendment doesn't arise. I mean, I never had any difficulty with the Senate Armed Services Committee about security. I don't know a single thing that was leaked over a period of 20 years. And I never had any difficulty with the House Appropriations Committee. I don't know a single thing that was leaked out of there in 20 years. So there isn't any question the House and Senate can do it if they want to.

The CHAIRMAN. I will hasten to add, I think you will find there is no evidence of any leaking out of this committee. Where this information is coming from is a good question, but through talking to the agency heads, they are convinced—there was some concern, understandably, at the initiation of the committee—that we are secure.

What would you have, penalties, or how would you deal with those who actually release information?

Mr. HELMS. I don't know. All of us have thought a good deal about the desirability of having an Official Secrets Act in this country of the kind that the British have. I frankly don't think it is a useful option, because I don't think it could ever be put through the Senate and the House, and even to introduce it and debate it would lead to a murderous dialog. I don't see that there would be any particular useful purpose served by that.

Therefore, I suppose that if you pass an act which makes the criminal penalties do something after the fact, I mean, that you are punished after you have done the leaking, I am not sure that is very much of a constraint. I have never noticed that it was, and besides, suppose you leak it to a newspaper. Then what is going to happen? Do you punish the fellow? I doubt it. Then you do get the first amendment all snarled up in it, and I doubt very much that anything would happen.

So to come back to your question, Mr. Chairman, I would like to see us put emphasis right now on binding up the wounds of the intelligence community and trying to get the Congress and the executive collaborating and cooperating together, which I understand from the newspapers they are. I think this can be done in the proper fashion. Why don't we get on with the job of doing it and then worry about these criminal sanctions later.

It doesn't seem to me that in the middle of the effort to write a charter, it is going to help the process very much, and I would rather leave that to the end. Punishing people for doing things which in effect are treasonable or against their oath is such a complicated business under our system of laws, that I would rather trust to my Agency people and my Senators and my Congressmen

to do the right thing rather than saying, "Well, we will pass a law and we will send that fellow to jail for a couple of years for being naughty." I don't think that is going to be much of a deterrent.

The CHAIRMAN. We have had a good working relationship with the executive branch in the formulation process of this charter.

Could you give us some more detail about what you are talking about—and perhaps I don't quote you exactly, but something of the thrust of what you said about why the Director needs authority to protect sources and methods.

What exactly does he need in the way of authority that he doesn't now have?

Mr. HELMS. For example, he would need some sort of authority to investigate the leak. He puts in his regulations, security regulations, to guide and guard the papers and whom they go to and under what circumstances and so forth. But finally, a piece of paper shows up on the street or shows up in the hands of some unauthorized person. He doesn't at the present time have any right to even look into this matter. He can't investigate it. In days gone by efforts were made to get Mr. Hoover to investigate some of these leaks. Mr. Hoover had no stomach for it. He wasn't interested in it. And therefore he would seldom do it.

So how are you going to protect these sources and these methods if you don't have any ability to find out where the difficulty is in the first place?

Let me give you a concrete example of this. All the difficulty over the Anderson papers and the leak of communications on the tilt toward Pakistan and all the rest of it were an absolute hemorrhage in terms of intelligence community information. There was no question about it. We were attempting to find out where Anderson was getting all this material. That seemed a perfectly justifiable interpretation of the mandate that I had. But the Rockefeller Commission says I had no such mandate. That is their opinion. But this issue has never been judged in the courts, and so I don't know exactly whether it was proper or improper.

It wasn't until much later that it was found out that Yeoman Radford was handing all this material over to Jack Anderson.

So in the process of trying to investigate this, I got bitterly criticized by the Rockefeller Commission and everybody else, and why should the next Director be put in that position again? Does he drop the matter, or does he pursue it to find out if there is someone in his Agency who is passing this material directly to unauthorized individuals?

The CHAIRMAN. You might, when you have the time, look at the provisions in title II, which give the authority to the head of the agency in question to investigate the conduct of employees, pursuant to the improper conduct you are describing.

As I recall, we do limit the use of electronic surveillance to a procedure that must go through the Justice Department once we have reached that stage. It must still be that the case must be made.

Mr. HELMS. Well, you see, Mr. Chairman, if I may be responsive to this provision you were just talking about, certainly the Director can investigate his own employees, but these documents go to many people in Government, the Department of State, the White

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House, the Defense Department, and so forth. As soon as the document leaves the Agency, then it is totally out of the control of the Director, even though he is responsible for it. And this is my point. No Director, no Secretary of Defense, ever comes up and says the leak was in my department. That is one of the biggest jokes in town. If you speak to the Cabinet officer and say there has been a leak in your department, he comes around 48 hours later and says "I have got the best and most secure department in Washington. That can never have happened in my department."

This is a farce, and I would like to prevent it from being a farce in the future.

The CHAIRMAN. Well, should the thrust of this investigation, when you are talking about proceeding outside your own given agency, should that be in the hands of the CIA or the FBI?

Mr. HELMS. Well, this is the point I think the committee ought to clear up. If you are going to get into the problem and you are going to give the Director this authority, then I think, if I may say so, that you are obliged to come down to the end, which is how is he going to execute it? Does he pass this to the Director of the FBI? If he does, say so.

The CHAIRMAN. I guess one of the real balancing acts we are trying to perform here is how we can provide security on the one hand and still get the whole story so that we can perform the necessary oversight function on the other. In the past we have intentionally or unintentionally done both from time to time, and there has been a real effort, I think, to either not let Congress have the information or make Congress believe something is happening a little different than it actually is.

Now, we have not had that kind of effort up here lately, so whatever we do, we are trying to be certain that we can balance out the security of the country, the security of this information, quite rightly as a matter of concern to the Agency. It is a matter of concern to us. It ought to be. The question is how we handle this in a way which will provide a forum in which those who fulfill the kind of responsibility you fulfilled, let us have the information, let us provide the oversight. We can bring a different dimension into the decisionmaking process.

Mr. HELMS. I think you are going to be amazed, Mr. Chairman, at how forthcoming the intelligence community is going to be with your committee and with the committee in the House. I believe this illusion that Directors have been fiddle-faddling with their oversight committees over the years is a myth that has been created in the Congress. I don't know any Directors, at least up to my time, that fiddle-faddled with the Congress. If you could find the chairman of the committee so you could sit down and talk to him or have a meeting, he got the martini straight up. It wasn't on the rocks or anything like that.

We presented a budget every year that had all the details in it. There were no secret wars in Laos and all that nonsense. That is part of the mythology of Washington. It is not the truth.

The CHAIRMAN. Well, certainly it is, mythology or whatever it might be, the concept that a large number of the Members of Congress didn't know what was going on. That may have been the Agency's fault, it may have been the Members of Congress fault.

Mr. HELMS. Senator Bayh, on October 5, 1967, the full Armed Services, not the CIA part of the Armed Services Committee, the full Armed Services Committee heard a 2-hour briefing from Mr. Shackley, who at that time was the Chief of Station in Laos, on the entire problem, of how the war was being fought in Laos, where it was being fought, how much money was being spent, detail after detail after detail. At the end of the briefing the Armed Services Committee said this is a much better way to fight a war in Southeast Asia than the way we are doing it in Vietnam. You spend $1 million a year on Laos and we spend $1 million a day in Vietnam.

All I am trying to say is that all of those Senators were in on the takeoff. This was 1967.

Now, you ask some of those Senators who were there that day. They are your colleagues. Tbat isn't my problem, it is your problem.

The CHARIMAN. Yes, indeed, it is.

Senator Goldwater? [General laughter.]

Senator GOLDWATER. Mr. Ambassador, you left that on a very handy note to me because you have been referring to the Congress and our responsibilities. I wish I could sit here and say that I felt that every Member of Congress were interested in good intelligence. I tbink you have a rather sizable segment of the Congress that is completely opposed to the concept of intelligence, CIA, NSA, DIA, FBI, or whatever it is, and I am convinced that the media have members who are completely opposed to the continuation of any intelligence gathering such as we have known. You only need read any daily paper on the east coast or the west coast to make that rather sad discovery.

Now, the problems that we are going through relative to what I have been talking about, the problems that you are aware of, and every man who has ever been in intelligence is aware of, the leaks that just constantly go on up here. I have often, with all due respect, said there are more leaks around here than there is in the men's room at Anheuser-Busch. [General laughter.]

But the problem is with our allies and their confidence in our ability to keep a secret. Don't you find that more prevalent today than when you first went in the intelligence business?

Mr. HELMS. It is inevitable, Senator Goldwater. Any sane man who is interested in the sanctity of his information, in his sources from which he got it and all the rest, would not want to share it with a country where there was a possibility that he was going to read about it in the newspaper the next day. And it is all fine to say that we are getting along in good shape, and you know, our allies are being forthcoming and so forth, but obviously our allies are not being forthcoming. We don't even have to look at the pieces of paper to know that.

For example, a good agent, in the espionage business is so hard to come by that it takes a man who is literally irresponsible to want to jeopardize that asset once he has got it, and it doesn't make any difference whether it is French intelligence or Israeli intelligence or British intelligence or whatever intelligence. They are all the same on this point. And the hemorrhaging which has been going on recently all over Washington in connection with not only intelligence material and secrets, but state secrets, I suppose

is an aberration of the times, but if it continues, I think we will find that the country is going to be at a serious disadvantage. I don't think that anyone who looks at the world today and watches the maneuvers of Cubans and Soviets in Africa, a recent coup in Afghanistan, and all these other various operations, does not sense that the Russians are putting things into place. Maybe the exact pattern is not all that clear yet, but gradually they will fill it out, and we will wake up one morning and find that it is indeed in place.

This is a time when I think the intelligence can't possible be too good, and we can't possibly have too much of it. To coin a phrase, we are certainly fiddling while Rome burns.

Senator GOLDWATER. I agree.

Now, on this point that I am leading up to, which I would call subversion—and we have laws on our books concerning subversion, and we have had them ever since we have been a Republic. Yet I, not being a lawyer, can't remember when we have ever used those laws of subversion and I have recommended using them in a number of cases, like the *Ellsberg* case where material was leaked and where newspapers used this information without asking the authority of the agency from which it was leaked.

No. 1, in your opinion, are these laws adequate to cover the situation we are talking about?

Mr. HELMS. Senator Goldwater, as you know, I am not a lawyer either, and if you would forgive me, I would like to duck that because I haven't read these laws in recent years and I am not even sure exactly what is on the books at the present time.

I think my answer, though, as a lay person, would have to be that they are not adequate.

Senator GOLDWATER. Well, if you would care to consult with people on that, and if you feel that you would like to submit an answer, I think we would be very happy to get it because I have asked the legislative people connected with this committee, I have asked my own legal advisers to formulate legislation that would be directed at the misuse of information gathered through intelligence sources.

We are not at the point yet where that piece of legislation can be introduced, and as you have indicated, it probably would have trouble on the floor because of the first amendment rights which I think we are seeing abused all over this country without looking at intelligence. When I think of the first amendment rights of a man in uniform, I don't think that just because a man puts on the uniform of his country he has to shut up about the things he sees going on wrong, unless he is serving under direct orders of the Commander in Chief. But, that is beside the point.

But now we are seeing books, and articles written by former agents and former Directors. We are seeing articles appearing almost daily in newspapers and magazines, written by people who should know and people who have no reason to know. I am amazed at the number of times almost weekly I am called on the telephone by some news source to check on a certain situation that I thought, Lord, I was probably the only one around that knew about it. But I find it is pretty generally known throughout the whole TV-radio-press colony. Not just in a casual way but a very complete way, to

the point where they can argue with me when I say no and they know damned well I could say yes.

So those are the things I would like to see us attempt to correct in our charters, and anything that you can do to help us in that will be greatly appreciated.

Today it seems like anybody, however close to the intelligence gathering agencies of our country, can go out and write or talk or tell tales, and those tales not only lose us the cooperation of intelligence agencies around the world that we have had to depend on, it might even result in the loss of a life here and there.

Now, a question on covert action. Our new legislation would permit the United States, through its intelligence agencies, to continue to conduct covert action. It would, however, subject such covert action to strict review and approval procedures witbin the executive branch, to prior notification of the Congress, and to periodic review of ongoing activities. For any given activity, the President would have to certify that the activity was essential to the national security.

Now, is it fair to assume that you would be in favor of the United States continuing to conduct such activities?

Mr. HELMS. Yes, Senator Goldwater, I would be in favor of it. I am frank to admit that I see no substitute for it, that there are many situations in the world where we certainly don't want to send in conventional troops or conventional aircraft, or diplomatic maneuvers have failed, or economic pressures have done no good, and yet where our side, the U.S. side can be advantaged or helped by covert manipulation of one sort or another. I think to strike that weapon from the hands of a President in the modern context would be a great mistake.

Senator GOLDWATER. Well, I will go one step further.

Do you think it should be stricken, that weapon should be stricken from the hands of the directors of intelligence agencies?

Mr. HELMS. Sir, it has never been in the Director's hands. Ever since covert actions were begun under a document known as NSC 10/2 he in effect had to have the approval of the authorities of the executive branch. The committee that was established at that time and the membership of which changed slightly through the years, and the name changed with every administration, was nothing more nor less than an approval mechanism for the President. Since our President is elected for 4 years and sbouldn't have to be got out of office because some covert action goes wrong, this committee was a circuit breaker, but they always had access to the President if they wanted it, and vice versa. They consult with him, and I believe that most of the time he was kept adequately informed as to what was going on.

So in effect, the Director has never had this mandate.

Senator GOLDWATER. Well, what you are saying, then, if I understand you, is that all covert activities during the time that you were acquainted or associated with the CIA, came as an order or with the approval of the Commander in Chief, who is the President.

Mr. HELMS. Effectively, yes.

Senator GOLDWATER. I wish we could get the media and the American people to understand that, because I feel that that is at

the root of most of the problems of our intelligence agencies today, namely that the Directors do not have the ability to wake up in the morning and say: Oh, I've got a real cutie, and I am going to do it. That is not the truth and never has been the truth, and I don't think ever will be the truth. But it will be accepted as the truth by the American people if that is all they hear and read.

And I would hope that the media who are interested in the perpetuation of the freedom of this country would stop blaming it on the wrong people.

Now, I think you have already answered this question. Is the standard that any covert action be "essential to the national security" a reasonable one?

Mr. HELMS. I beg your pardon. Would you read that again, please, sir?

Senator GOLDWATER. Is the standard that any covert action be "essential to the national security" a reasonable one?

Mr. HELMS. Senator, one of the reasons that I asked for or suggested mildly that the term "national security" be defined if one is going to talk about it so much is that I would like to know what we really have in mind here, because the perceptions in public life these days of what is of interest to the national security and what is not vary very widely indeed. I would have no trouble if national security were defined a little bit more broadly than "the collapse of the Republic" or "the Pentagon in shambles."

Senator GOLDWATER. Well, I am glad you reiterated that point, and I can see that becoming one of the major problems of this committee.

It reminds me of a question I asked, I believe in this room, a little over a year ago, of the Chairman of the Joint Chiefs of Staff, if he would assist me in preparing legislation to prevent women from taking part in combat. Well, he said, Senator, I would be glad to but you will have to define combat to me because I have given over 100 Purple Hearts to women in Vietnam. So I can see your point.

I won't participate in any more questions now.

The Senator from New York.

Senator MOYNIHAN. Thank you, Senator Goldwater.

May I first state what an honor it is for this committee to have you before us, Ambassador Helms. You know with what respect you are held by this member of the committee, at the very least, and I think perhaps you have heard me suggest that this is a general view.

Under the guise of asking you a question or two, I am going to make a few statements, mostly to see if you want to confirm them, and first to say that it seems to me that it would be useful if it were better understood by everybody, perhaps even by members of this Senate committee, that we are not involved here with the question of how to conduct policy. What we are involved here with is the question of what policy to conduct. The fact is that under the pretense of reorganizing CIA, we are trying to make it impossible for it to carry forward the policies associated with it in its first three decades, and for which it was created, which is to say, a forward anti-Soviet position in the world.

The political consensus behind this position broke up in the late 1960's early 1970's, and that is when your security—that is that of CIA itself—broke up as well. You say that for years you briefed the Senate Armed Services Committee and had no problems. That is because there was a political consensus bebind what you were doing, and the effort to change that policy of being aggressively anti-Soviet in the world has taken the forms of declaring the CIA to be a danger to the American people. They were designed to be a danger to Soviet expansion.

It is now the case that on balance we indict more intelligence officers than we do spies. One of my concerns is that we are now carrying out the last action to make Vietnam retrospectively impossible—and perhaps retrospectively it never should have happened—but we now do so in the face of a clear Soviet expansion in the world.

Soviets are not routinely expansionists, but they probe. Suddenly they seem to be on the rampage, and the President of the United States seems to have discovered this, and each week we learn of a new discovery. The President discovers Cubans in Africa. The President discovers Cubans in Asia. The President learns of Soviet expansion. It is a rather striking form of discovery that has been taking place.

But I want to put this to you, and that is as an example of what I talked to you about, electronic surveillance is very much concerned, and counterintelligence is a particularly sensitive issue. Now, for some time we have known that the Soviet Union, the KGB, the Committee for Security of the Soviet Union, is actively spying on Americans in massive numbers through the interception of their telephone calls. This is not a very arcane bit of knowledge. The Columbia Broadcasting System, CBS Television, went up on the roof, I believe of the University Club here in Washington and looking down on the Soviet Embassy said "See that box? That is where the equipment is that listens to the telephone calls of everybody in Washington." As a matter of fact, the brilliant and relentless television journalist who did the job is in this room. So we know the Soviets are doing that, but there is nothing about that in this legislation.

There is a kind of equation, almost, about this matter. During the Spanish Civil War the British poet Stephen Spender who was recruited by the left, by the Communists, was taken down to Spain and shown the atrocities of the Fascists, and he came back to write a poem against them, and then he was taken down again. But then he began to notice that it wasn't only on one side that the atrocities occurred, and he wrote in a wonderful essay included in "The God That Failed," he said, it came to me that unless I cared about every murdered child indiscriminately, I really didn't care about children being murdered at all.

Now, we are showing in this Senate an enormous concern that the CIA not listen to anybody's telephone wires, but no concern at all if the Russian intelligence service is listening to our telephone calls.

Does that not suggest to you that we really don't care about telephone calls being intercepted, we care about the purposes for which the CIA might be doing this?

Now, that is a long question, Mr. Helms.

Mr. HELMS. On the latter part of it, Senator Moynihan, I would certainly agree that on this issue of counterintelligence there is a great deal of work to be done.

One of the difficulties with counterintelligence is that until one catches a spy, the assumption is that there are no spies really doing any spying. I think it has been observed by many that as far as the American public is concerned, if it is not in the newspaper and they don't know about it, it doesn't exist.

I recall, for example, a period during which something like 250,000 people were being killed in Indonesia, and since there were no American or British newspaper correspondents there this was an event which passed into history without the knowledge of the American public, and, therefore, there was no outcry, there were no complaints in the United Nations, there was no nothing.

Senator CHAFEE. Mr. Ambassador, I wonder if you could pull the mike a little bit closer.

Mr. HELMS. Excuse me. I'm sorry, Senator Chafee. I was talking in this direction. Maybe if I got this microphone over here.

Senator CHAFEE. They are rigged in a very difficult manner.

Mr. HELMS. As far as the counterintelligence itself is concerned, you are absolutely correct that the Russians are operating massively in their country.

Senator MOYNIHAN. The Russians are operating massively in this country.

Mr. HELMS. Second, I don't think that we are in very good shape to counter this these days, from what I read in the newspapers, and I hasten to add, I have no inside information of any kind whatsoever. But I did notice that Director Kelley of the FBI commented publicly to the effect the Bureau agents had lost their cutting edge for looking into espionage cases and similarly difficult ones because of the problems that they have had. I can't imagine that the Central Intelligence Agency is up on its tippy toes these days with respect to counterintelligence, particularly in light of the fact that there have been a number of leaks and articles that strike right at the heart of any counterintelligence operations they could possibly have had going against the Soviet Union.

And one of the great difficulties in defending counterintelligence and standing up for it is the difficulty I mentioned a moment ago. That is that if you don't catch somebody, the assumption is there is nobody tbere to catch. In World War II, the phrase "fifth column" became a word of art. It was known throughout the world. What was a fifth column? It was a device whereby through persuasion, subversion, influence, bribery and so forth, a foreign country went into another country, set up a group of people in favor of its causes. When the time came, they pulled the lanyard, and the government collapsed.

This is not a likely event in the United States of America. But whom these Russians are recruiting and whom they are using, whether they be on Capitol Hill or whether they be in the press, or whether they be in the Department of Defense or whether they be in the CIA, I would feel a lot more comfortable if we were working a lot harder on this issue.

Senator MOYNIHAN. Well, sir, I am afraid you are going to have to go through a period of discomfort because we are not going to do so. Our political cry at this moment is to make it as difficult as possible for the CIA, as difficult as possible for the FBI, and there is a political agenda to these procedural matters, and as you say, the Russians are in fact expanding around the world.

But why should the Russians not expand? They sit here in Washington reading about the incredible precautions we are going to take to see that the CIA does not listen to anybody for counterintelligence purposes on telephone while they actively listen to tens if not hundreds of thousands of Americans, and we do not presume even to ask them to stop spying on us.

The fourth amendment rights of an American not to have his telephone listened to do not extend to the KGB. The KGB is given the courtesy of the port, as it were, to do anything they want. As a liberal, I tell you that the day will come when it will be looked back and asked "For what purposes did the men of this political generation make it impossible to resist Soviet espionage in this country, and why did they do it?" And God, we will have a lot to explain. It will not be a happy occasion. But it will not be because of the men like you, sir, that this has come about.

And I wish we had a little more openness about the political purposes that are behind the present enterprise. You don't have to comment on that, but I want you to know that when the history of this period is written, you won't be around but your grandchildren will not be displeased, and I fear for the reputation—and, therefore, for the future—of American liberalism if it happens that American liberals, in the face of the fact of totalitarian expansion, nonetheless fail to identify the risk and fail to lead the resistance.

Thank you, Mr. Ambassador.

Senator GOLDWATER. I would just comment that Senator Moynihan is very, very consistent on this complaint, and why the administrations or the agencies have done nothing about it, I don't know.

As one who knows a little bit about communications, had I somebody that would give me about $50 and a strange suit of clothes, I could screw that Russian embassy up to where they wouldn't know what they were doing. [General laughter.]

Senator CHAFEE. Mr. Ambassador, one of the maybe myths that we are operating on around here is that despite all these disclosures of our operations, and the CIA, there is really no lasting harm that has been done, and that indeed our intelligence service is still the very best in the world that you want, and that we have survived all this and are going on to greater and greater heights.

From your experience, would you say that information from foreign sources, from foreign intelligence communities has indeed been refused because of the very fears of disclosure that we have discussed here today?

Mr. HELMS. Certainly, Senator Chafee. It has to have been reduced. I don't even have to go out to the Agency and inquire. I spent 25 years at this business and I know pretty well the way it works.

One of the problems that the Agency has right now and is going to have for many years is that it still doesn't know where all its paper is. The way secret operations are supposed to be run, you

surround the operation with as much security as you possible can, and keep to an irreducible minimum the number of people who know about it, and try to find out each time an additional person is brought into the circle.

When you start to lose your papers having to do with these operations, it is like the internal hemorrhaging in a human being. You don't see it and you may not feel it, but it isn't doing you any good, and you may die of it.

Now, so many papers were produced by the Agency in the context of the hearings in 1975 and in connection with the Freedom of Information Act, that I don't believe that Director Turner can come up here and tell you that he knows where every one of those pieces of paper is. When that happens to an intelligence organization, it has a serious problem.

The Freedom of Information Act, I am sure, was a great boom to all of those who wanted to find out more about the Department of Transportation and why the Department of Labor didn't do certain things, and so forth, and I assume that that is the reason it was passed in the Senate. It is a devastating act as far as the intelligence community is concerned, and since this may be my last occasion here, I would like to plead with the well-meaning Senators to think about the desirability of putting some exclusion into the Freedom of Information Act which would protect the intelligence community from these endless incursions and inquiries.

If we had known back in 1947 when the Agency was set up that such a thing was going to go on, you would have found the files of that Agency very different indeed. You would have found far fewer papers than you have found now.

Senator CHAFEE. Do you think this country is capable under the systems under which we are currently working to duplicate, for instance, the feat, a secret such as, say, the breaking the Japanese code in World War II, and keep it silent?

Mr. HELMS. I don't know, Senator.

Senator CHAFEE. Do you think we could do that? Do you think this hemorrhaging and the whole mood of the country today where everybody has got to tell everything to everybody, and if somebody had a secret and runs to tell the press, there is apparently no way we can do anything about it? Today, if one writes a book, one can make $1 million on it, and there seems to be no way we can punish the author. You even suggested that it is hopeless to do that, that really we have got to count on the type of people that we hire in the beginning.

But you don't hire the Senators and Representatives or whoever it is you have to go to or your successor does.

So is it possible for a secret like that to be kept?

Mr. HELMS. I don't know, Senator Chafee. I genuinely and honestly don't know, but I have thought about a point that you raised, and I have thought hard about it. If it had got into the newspapers on a continuing basis, not only about the Japanese codes in World War II, but the German codes in World War II, it would have prolonged the war I don't know how many years, and we might never have got ashore in Europe with an invasion short of blasting the place loose with atomic bombs.

I see General Quinn sitting behind me. I would like to ask him how he would have felt when he went in with the 7th Army in the south of France, if they hadn't had the protection which was given to them by knowing where the Germans were and what they were doing and how much force they could bring in there.

It is mindboggling, in short, what might have happened in World War II, if these things had leaked. And I would suggest that everyone, liberals and conservatives alike, ponder it.

Senator CHAFEE. One of the points we frequently state here, and the chairman stated earlier, is that there are no leaks out of this committee. I don't know whether there are, here, or from the House committee. But I don't suppose, as you mentioned earlier, that you ever go to anybody and they say there are all kinds of leaks out of my organization, and correct me if I am wrong.

Mr. HELMS. You are not.

Senator CHAFEE. Does it make sense? We are always trying to balance these things, and you are conscious, of course, of the balance, of the right of the elected officials to know versus the security aspects, and that is the tightrope we are trying to walk around here in this charter.

How would you suggest it be done? I mean, really, that is why we are here. As far as how many people you should disclose your information to as Director of the CIA, would you have it three, five from each branch? You say that it functioned satisfactorily when you were dealing with the Armed Services Committee, and the House Appropriations. How many did you talk to in those instances?

Mr. HELMS. Well, it was quite a few. Actually, I didn't want to go on at too great a length. I must point out that we also had meetings with the Senate Appropriations Committee and with the House Armed Services Committee. I had no problems with any of these committees.

Senator CHAFEE. How many people would you be dealing with, just the select few, say, from the Armed Services Committee, three, five, whatever it was?

Mr. HELMS. Well, at one time, in Senator Russell's day, it was five, and then it was expanded to eight, and then it varied around seven to nine, something of this kind. The Appropriations Committee, as I recall, was about five. The House Armed Services Committee was more, though, like 9, 10 or 11. The House Appropriations Committee in those days was five, as I recall.

Senator CHAFEE. And you found that that worked.

Mr. HELMS. Senator Chafee, there is absolutely no point in my sitting here and saying that I don't recognize the problem which the Congress has in and of itself about the numbers of people to which you can confine a committee. I understand that, and that varies from age to age. I can only say, the truthful answer to your question is that the smaller you can make the committees, and the smaller you can make the staffs, the better security you are going to have.

Senator CHAFEE. There has been a lot of discussion on the advances of technology, and there seems to be even inferences that clandestine human intelligence is passe.

Have you got any comments on that?

Mr. HELMS. Yes, sir, I have some comments on that.

To start with, back in the 1950's, before these technological breakthroughs were achieved, we had very little information on the Soviet Union. Those technological breakthroughs gave us a quantum jump and continued to give us quantum jumps in the amount of information we knew about the Soviet Union. But that is not to say that it tells us their intentions or tells us a great many other things that it is very important for this country to know. For example, if they are going to move in Angola, there is nothing about a photograph which tells us that unless there is a vast concentration of troops.

There is no question in my mind that human resources have got to be used alongside of technological developments, not only to interpret the pictures and tell what they mean, but to find out what the other man's intentions are and what he wants to do to you, what his policies are, and last but not least, what manipulations he is involved in.

One time I remember, before I ceased being Director, Senator Percy took out after me about what we knew on Soviet wheat production, and I told him that I thougbt we had a very good handle on Soviet wheat production. Well, our information had never got around to the right people, because the Soviets came over here and took us to the cleaners in the wheat market, and there was a great deal of unhappiness about it. It seems to me that wheat is an important issue these days and we ought to know more about it. Oil is an important issue.

For years this Government depended on what the oil companies told us about their reserves. It wasn't that the oil companies were necessarily being devious. They just didn't know what their reserves were very accurately.

But there are a whole series of things that only human beings can tell you and these are very important to our economic life as well as to our national security life. I believe that we have got to have a good intelligence service, and we have got to stick it back together again. We have got to be a little bit patient with it because they have been through a great deal. But there isn't any reason why we can't get on with this job if we really want to.

But listening to Senator Moynihan, I am not so sure we want to.

Senator CHAFEE. Well, I hope that we are in a more optimistic frame of mind than Senator Moynihan, though I must say your statement that we have indicted more security agents than we have spies is discouraging. We are certainly more enthusiastic about such an effort.

Well, fine. I just want to thank you, as the others have, for sharing your experience and visiting with us.

Thank you.

Mr. HELMS. Thank you, Senator Chafee.

Senator GOLDWATER. Senator Garn?

Senator GARN. Thank you, Mr. Chairman.

Mr. Helms, I would first say that I am sorry Mr. Moynihan, Senator Moyniban has left, because I certainly agree with what he has said, and he announced that he was a liberal and I don't think it is any secret that I am a conservative, and I wish he would go give that speech to his liberal colleagues. We conservatives, I don't

think we need it, Barry. I think we have agreed with this philosophy for a long time about what the liberals have been giving away in national security. So I hope he will—I'll tell him personally I hope he gives that speech to another audience.

Let me ask you just one question, an organizational question that I have asked each of our witnesses, and particularly those that have been former Directors of the CIA, and that is on this question of whether we separate or not the Director of Central Intelligence from the operating head of the CIA.

Most of the former witnesses have testified that they felt it was valuable to maintain that dual position rather than separating it, and I would appreciate your views on that issue.

Mr. HELMS. Senator Garn, I agree with those witnesses.

When the Central Intelligence Agency was established and the position of Director of Central Intelligence was written into law, he was designated Director of Central Intelligence because this was the job that they intended that man to have: To be a Director of National Intelligence, if you want to put it that way. The whole concept of central was to be national. So the words are almost synonymous in the technology of intelligence.

But it was found through the years that even though Presidents gave this Director increasing authority, there were certain practical problems in connection with exerting that authority which are going to exist whether you call him a Director of National Intelligence and put him in the White House, or whether you call him a Director of Central Intelligence and leave him in Langley. Those problems arise out of this kind of situation: NSA is in the Department of Defense, the FBI is in the Department of Justice, just to mention two and not make this too complicated.

Now, how does a Director of Central Intelligence, who has very few troops, tell a Secretary of Defense, who has many troops and an enormous budget and far more influence in the Congress than any Director of Central Intelligence is ever going to have, how to run his business? The President can give this man all the authority he likes, if I may say so, and I am not being rude. I am simply describing the facts of life: That when he clashes with the Secretary of Defense, he isn't a big enough fellow on tbe block. That is the real truth of the matter.

Now, as far as having a man down in the White House sitting there in solitary splendor as a Director of National Intelligence, he needs support, he needs analytic support, he needs what the Director of Central Intelligence already has in the Central Intelligence Agency to make him an effective adviser to the President, or an effective coordinator of these other activities. But you put him down there in isolation, and I want to ask you as a rational man, when you have assistants to the President of the personalities of McGeorge Bundy and Henry Kissinger, do you think that the Director of Central Intelligence is going to have a very good time trying to fend off that man and not go through him and compete for that private time with the President which, you know, he is really entitled to?

These are the practical considerations of life.

And besides, Presidents have different styles. Some of them like to talk to people, some of them don't like to talk to people. We are

not going to legislate Presidential style. If he wants to see the Director, all he does is push a button and the Director appears. If he doesn't want to see him, there is no way the Director can get in there.

So there is no point in setting up this kind of competition. The President has got to run his own show.

Our Constitution, in my opinion—and I recognize I am no lawyer, but at least I can read—means that we have got to have a strong President. He has got to run the executive branch and if he doesn't run the executive branch, you have chaos and infighting and all kinds of nonsense.

So why set up a Director of National Intelligence on top of all the other things you have? It is more bureaucracy. Now that I am a private citizen I can say clearly what we need in this country is less bureaucracy.

Senator GARN. Well, let me say that I agree with you and I am pleased that almost without exception former Directors take the same point of view. I think there is great validity in keeping the joint position, certainly in day-to-day operations, have a deputy handle the daily ins and outs, and I think it is important that the CIA director maintain that position as well.

Thank you very much. I have no further questions.

Senator GOLDWATER. Mr. Miller, the Chief of Staff?

Earl?

Mr. Ambassador, on behalf of the committee, I want to thank you for appearing here. Your testimony is most valuable. As you might well expect, we have, in our opinion, a good 2 years ahead of us before these charters become intelligible or are charters that we feel the country can operate with. There is no big hurry.

I will say again what I have said before, and I know the chairman has said, we welcome criticism or suggestions from any area, any academic or former member of the intelligence corps. We are neophytes in this business, and to write legislation which frankly, I am very happy to say, we are going to need help.

So thank you for coming here, and unless there are further comments, the meeting will be adjourned.

Mr. HELMS. Thank you, Senator Goldwater.

[Whereupon, at 11:19 a.m., the committee recessed subject to the call of the Chair.]

THURSDAY, JUNE 15, 1978

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The Committee met, pursuant to notice, at 10:13 a.m., in Room 1318, Dirksen Senate Office Building, Senator Birch Bayh (chairman of the committee) presiding.

Present: Senators Bayh (presiding), Huddleston, Biden and Goldwater.

Also present: William G. Miller, staff director; Earl Eisenhower, minority staff director; David Bushong, minority counsel; and Audrey Hatry, clerk of the committee.

The CHAIRMAN. We will come to order.

This morning we will try to fulfill the multifaceted challenge given us by the Senate, and one of the things we have been engaged in is an intensive effort to formulate the best possible charters legislation for the intelligence community. My colleague from Kentucky has been leading the way on that, and we have had a number of outstanding witnesses who have had significant expertise in this area.

We have General Stilwell and John Warner. John, what title do we use for you here?

Mr. WARNER. I am the legal adviser to AFIO at this stage, sir.

The CHAIRMAN. Fine. And Dr. Morton Halperin, three people who have extensive experience in the operation of the intelligence community and its impact on society generally.

I would ask, if I could, for our reporter and our committee staff to see that appropriate biographical data of all three of these gentlemen are placed in the record at this time.

[The information referred to follows:]

GENERAL RICHARD GILES STILWELL

February 24, 1917—Born Buffalo, N.Y.
1933-34—Student at Brown University.
1938—Graduated U.S. Military Academy, B.S. 2d lieutenant, U.S. Army.
1942-43—Commander 315th Combat Engineer Battalion.
1943-45—G-3, 90th Infantry Division.
1945—XXII Army Corps, 15th Army.
1946-47—Assigned to Paris.
1947-48—Assigned to Trieste.
1948-49—Assigned to Rome.
1952-53—Commander, 15th Infantry Regiment Korea.
1953—Senior Adviser, I Republic Korea Army Corps.
1953-56—Faculty of Army War College.
1955—Graduated Army War College.
1956-58—Chief Strategic Studies, SHAPE.
1958-59—Commander, Western Area Germany.
1959-61—Commander, 2d Regiment, USCC U.S. Military Academy.
June 1, 1961—Promoted to Brigadier General.
1961-63—Commandant of Cadets, Military Academy.
August 1, 1963—Promoted to Major General.

1963–64—Assistant Chief of Staff Operations, U.S. Military Assistance Command, Vietnam.
1964–65—Chief of Staff.
1965–67—Commander of U.S. Military Assistance Command, Thailand.
1967–68—1st Armored Division.
August 1, 1968—Promoted to Lieutenant General.
1968–69—XXIV Corps, Vietnam.
1969–72—Deputy Chief of Staff for Military Operations, U.S. Army, Washington.
1972–73—Commander, 6th Army.
1973—Commander-in-Chief, U.N. Command and Commander, 8th Army, Korea.
October 1977—President, Association of Former Intelligence Officers.
General Stilwell served several tours with the CIA.

MORTON HALPERIN

June 13, 1938—Born Brooklyn, N.Y.
1958—Graduated Columbia University, A.B.
1959—Yale University M.A.
1960—Authored "Nuclear Weapons and Limited War."
1960–66—Research Associate, Center for International Affairs, Harvard University.
1961—Yale University Ph. D. in International Relations. Authored "Strategy and Arms Control," and "A Proposal for a Ban on the Use of Nuclear Weapons."
1961–63—Instructor, Harvard University.
1962—Authored "Arms Control and Inadvertent General War."
1963—Authored "Limited War in the Nuclear Age."
1964–66—Assistant Professor of Government, Harvard.
1965—Authored "China and the Bomb."
1966–67—Special Assistant, Office of the Assistant Secretary of Defense.
1967—Authored "Contemporary Military Strategy."
1967–69—Deputy Assistant Secretary of Defense.
1969—Member of senior staff, National Security Council.
1969—Meritorious Civilian Service Award, DOD.
1969—Senior fellow, Brookings Institute.
1971—Authored "Defense Strategies for the Seventies."
1976—Authored "The Lawless State: Crimes of the U.S. Intelligence Agencies."
1977—Authored "Top Secret: National Security and the Right To Know."
Member of the Council on Foreign Relations, the Institute of Strategic Studies, the American Political Science Association, the Foreign Policy Association.

JOHN S. WARNER

February 12, 1919—Born Washington, D.C.
1941—LL.B from Southeastern University and admitted to D.C. Bar.
1942—LL.M from Columbus University.
1942—Enlisted as Aviation Cadet.
1944—Commissioned and received pilot's wings in U.S. Army Air Forces.
1944—Flew B–17 combat tours over Europe.
1945—Detailed to OSS.
1947—Civilian employee of CIA on date of establishment, September 18, 1947. Served in legal, operational, and support assignments.
1956–57—Resident course at National War College.
1957–68—Legislative Counsel, CIA.
1964—M.A. (International Affairs) from George Washington University.
1968–73—Deputy General Counsel, CIA.
1974–76—General Counsel, CIA.
Current: Board Member and Legal Adviser, Association of Former Intelligence Officers.
USAF reservist as Mobilization Assistant to Director, Legislative Liaison, USAF with rank of Major General.
Of Counsel, Bierbower and Rockefeller, Washington, D.C.
Mr. Warner's career in the CIA was generally in the area of legal affairs. He served over 10 years as Legislative Counsel for the Agency, and also served as the CIA's General Counsel.

The CHAIRMAN. General, why don't you start, since you are in the center there.

I am not certain whether it is by accident, whether Mr. Halperin is on your right or your left, depending upon your perspective here.

General STILWELL. It's pre-emptive, Mr. Chairman. I don't know whether we have power here or not.

The CHAIRMAN. We have a couple working that you can't see. [General laughter.]

[The prepared statement of General Richard G. Stilwell follows:]

STATEMENT

OF

RICHARD G. STILWELL, Gen. USA (Ret.), President

ASSOCIATION OF FORMER INTELLIGENCE OFFICERS

BEFORE

SELECT COMMITTEE ON INTELLIGENCE

UNITED STATES SENATE

ON S. 2525

The "National Intelligence Reorganization and Reform Act of 1978"

15 June 1978

Prepared in collaboration with:

John S. Warner
Lawrence R. Houston
John M. Maury
Walter L. Pforzheimer

INTRODUCTION

Mr. Chairman, thank you for the opportunity to appear before this Committee to present the views of the Association of Former Intelligence Officers (AFIO) on S. 2525, entitled the "National Intelligence Reorganization and Reform Act of 1978." We are especially grateful because we are convinced that our country's ability to cope effectively with the threats to national and Free World security that we are certain to confront over the remainder of this century will depend, in substantial degree, on the professionalism and elan of the intelligence community and the quality of its output.

A clarified charter for the intelligence agencies of this government and clear-cut guidelines to govern their activities are needed. We, therefore, support legislation to that end. But in our considered view, S. 2525 does not fill the bill. It is long on restrictions, short on flexibility to adjust to changing situations and lacking incentives for greater excellence in intelligence. Many of its provisions are ambiguous and would require almost as many lawyers as case officers. It goes far beyond legitimate and necessary Congressional oversight. A 263-page draft -- incidentally, ten times the length of the entire National Security Act of 1947 -- can fairly be labeled over-management. It is out of balance. While designed to empower and guide the entire range of national intelligence activities, it concentrates excessively on a miniscule -- albeit vital -- segment of the total effort. Overall, the drafting of S. 2525

appears not to have been preceded by a detailed appraisal of the extant and projected international and domestic environment, and the role that intelligence must play in meeting the resultant challenge to the security of this nation.

I realize this is a strong statement, but I am sure that this Committee desires nothing less than complete candor. Before addressing the various provisions of the Bill which are of major concern, let me outline AFIO's perception of the role and responsibilities of our intelligence agencies in the years ahead. In our judgment, our intelligence resources will shoulder burdens far in excess of any experienced to date in support of foreign policy and protection of national security.

I am confident that the members of this Committee are under no illusions regarding the ultimate designs of the Soviet Union. The last decade has been witness to prodigious efforts to achieve dominance in every dimension of military power; and the results of this drive have been well documented by intelligence. The Soviet Union is prepared for the eventuality of war at any level but its leadership aspires to advance toward world hegemony step by step, by means short of war. Thus, the principal role of its Armed Forces is to undergird political and economic initiatives intended to disrupt our alliances, sap the vitality of the free enterprise system, isolate the United States and extend Soviet influence into every quarter of the globe. But awareness of the Soviet grand strategy is not a sufficient basis for effective countermoves. The indispensable condition precedent for U.S. and/or Allied actions to checkmate the Soviet Union is

advance knowledge of the substance and timing of specific actions to further its expansionist policy. Our intelligence capabilities must coalesce to meet this requirement. Like the strategic nuclear TRIAD, our various intelligence capabilities -- conspicuously including human intelligence -- are interdependent and mutually reinforcing. Yet S. 2525, in its present form, imposes troublesome -- approaching prohibitive -- operational restraints on the conduct of clandestine collection, i.e. old-fashioned espionage.

The Soviet challenge is not the only threat to our vital interests abroad. Indeed, there is hardly an area on the globe where one can safely assume that peace and stability will endure. Never before has the security and well-being of the United States been more susceptible to disturbance by events abroad. Our dependence on foreign energy sources is the most dramatic case in point. Our economic life is heavily dependent on foreign trade and resources, and our national defense relies on foreign alliances and overseas bases. Thus situations continue to arise in which we will find it necessary to try to influence the course of events in furtherance of our legitimate national interests. Sometimes these situations may be most prudently and effectively dealt with through means short of direct U.S. involvement. But again, S. 2525 imposes significant obstacles, inhibiting the flexibility which is essential to the success of such operations.

These introductory comments would be out-of-balance without a word on counterintelligence. Without effective counterintelligence, neither intelligence operations nor covert actions can be pursued with confidence. The examples of audacious and aggressive KGB operations in the United States and abroad, , including the "bugging" of our Embassy in Moscow, which have recently surfaced, are but the tip of the iceberg. Senator Moynihan aptly described the counterintelligence threat as "massive." He is so right. Moreover, that threat is growing. Identification of the specifics of that threat and the countering of penetrations of our security necessitates a major effort, sophisticated means and a high degree of operational resourcefulness. Some of the provisions of S. 2525 are not in consonance with the magnitude of that vital and difficult task.

Now, we turn to a detailed analysis of S. 2525 and those specific provisions which we believe require thorough review and modification.

TITLE I -- NATIONAL INTELLIGENCE

We are in complete agreement with those stated purposes of Title I of the Act, which are: (1) to authorize the intelligence activities necessary for the national security of the United States; (2) to ensure that intelligence activities are effectively directed and coordinated and conducted in a manner consistent with the Constitution and the law; and (3) to provide accurate, relevant and timely intelligence regarding the security and vital interests of the United States. In short, we agree that authorities should be clarified and statutory guidelines should be clear. But there is also a need to assure the effectiveness of the intelligence process.

Certain provisions of Title I raise a number of fundamental issues which are of most serious concern to us. Included are such issues as: (1) the DNI concept, (2) counterterrorism activities, (3) the plethora of reporting requirements to Committees of Congress, (4) authorization and GAO audit, (5) exclusive Congressional Committee jurisdiction, (6) procedures and reporting of special activities and sensitive clandestine collection activities, and (7) disclosure of information. This is not an all-inclusive list of the issues; it is merely representative of matters which need further airing and discussion. We append for consideration at Tab A a section-by-section commentary on the entire range of issues.

1. The DNI Concept. A first and crucial point which must be determined is whether the position of Director of Central Intelligence (who is called Director of National Intelligence throughout this Title, but who will be referred to in this Statement under his current title of DCI) should be separated from the Agency and established with a separate Office.

In theory, a DCI divorced from any institutional allegiance has seeming virtue, particularly objectivity. Understandably, support for a separate DCI has, over the years, come from the Department of Defense and senior military intelligence officers who, in retirement, constitute a significant portion of AFIO's membership. But theory is one thing and practicality another. No one has ever devised a better formula than the existing statutory DCI concept that would work to the greater benefit of the United States. Thus, AFIO continues to believe the concept of a DCI exercising his responsibilities in a separate "office" as set forth in Title I separate and apart from the CIA is a serious mistake. We are not alone in opposing it. We feel that the proposed responsibilities are too broad (e.g., Section 114(c)); and that to place such responsibilities in one person -- in effect a "czar" -- will result in unwarranted intrusions into the command responsibilities of other departments and agencies. The major point is the question of complete separation of the DCI from CIA by creating by law a separate "Office of the Director," whether he ultimately remains head of CIA or not. Former DCI's Helms, Colby and Bush have strongly

opposed such "separation out" in their testimony before this Committee. Opposition to such separation was also voiced to the Committee on 19 April by Mr. McGeorge Bundy, former Assistant to Presidents Kennedy and Johnson for National Security Affairs. In subscribing to Mr. Bush's position, Mr. Bundy noted that, if the DCI were "separated out," he would find it necessary to build a considerable new and separate bureaucracy for himself and probably a new building in which to house it.

Mr. Colby, in his letter to the Committee dated January 6, 1978, states:

> "I continue my belief that the Director of National Intelligence should not be a separate individual from the Director of the CIA. . . . Separating these two functions would downgrade the effectiveness of the CIA, tend to bring the DNI into a political orbit, and reduce the very concept of central intelligence, which has been valued by all of our Presidents since Truman."

It is our firm position that the role of DCI should remain as it is, serving concurrently as head of CIA. This was the original concept, approved by the Congress in the National Security Act of 1947. It is still valid. The floor debate in the House in July 1947 rather clearly indicates not only the Agency's coordinating role but its function as a central point for the coordination, collection, evaluation and dissemination of national intelligence. Precisely because of this centralizing role, both in concept and in fact, we recommend that the Director continue to bear the title of Director of Central Intelligence rather than the proposed new title of Director of National Intelligence. There are those who argue that the name should be

changed, both as to DCI and CIA, for cosmetic reasons; this appears to us an argument without virtue.]

Other responsibilities placed on the DCI by S. 2525 to coordinate (1) national intelligence activities, (2) U.S. counter-intelligence activities abroad, (3) all clandestine collection outside the United States, and further, to produce national intelligence and to approve the national intelligence budget for presentation to the President and the Congress, cannot be accomplished by an individual. Adequate staff, an organization, and trained personnel are required. The establishment by statute of an "Office of the DNI" in itself accomplishes nothing but offering a choice of two evils -- one is to raid CIA which today is his tool for exercising those responsibilities or, two, to insert new and untrained people between him and CIA. The result in either case is an undesirable stripping of people and functions from CIA and a layering which can but promote duplication and inefficiency.

It would seem quite clear that a Director separate from CIA and charged by law with the final responsibility for National Intelligence Estimates will want under his immediate authority the staff capability to support him in this responsibility. This alone could require thousands of trained analysts and specialists. As to coordination of the intelligence community, its activities and budgeting by the DCI, we note the continuing evolution and growth of the Intelligence Community Staff as reflected in E.O. 12036 and the current authorization

bill, S. 2939. This appears to be a better path; that is, evolution and growth to meet new needs rather than the drastic surgery of removing the DCI from CIA by statute.

As presently set forth in the National Security Act of 1947, the authorities "For the purpose of coordinating the intelligence activities of the several government departments and agencies in the interest of national security . . ." and the specific functions allocated thereunder by Sec. 102(d) of that Act, are assigned as functions of the Agency and not of the DCI. Virtually all of these functions are now proposed to be assigned to the new "Office of the DCI" rather than to CIA, although, of course, there is some overlapping in S. 2525.

Responsibilities of the awesome magnitude noted above should rest within an institution and not in the personal hands of a "czar." The intelligence disaster of Pearl Harbor, which was the principal rationale behind the passage of the intelligence provisions of the National Security Act of 1947, taught the American people the necessity for a central organization for intelligence -- that concept is as basically sound today as when President Roosevelt was considering it a week before his death. An institution with no policy or parochial bias, and access to all foreign intelligence in government, serving a Director of Central Intelligence as the principal foreign intelligence advisor to the President --that was the concept, and that is CIA. While CIA and the intelligence community have had some growing pains, no wave of a magic legislative wand will create perfection. Certainly an intelligence "czar" is not the answer.

Thus, we recommend that Section 114 of this Title relating to the duties of the DCI be placed in Title IV, with most of those functions assigned to CIA as at present, and with additional changes noted under Section 114 in Tab A. Throughout S. 2525, all references to a DNI should be to the DCI. There should be no statutory "Office of the DNI."

2. Counterterrorism Activities. We believe it is not wise to authorize entities of the intelligence community to conduct counterterrorism activities as defined to include "activity undertaken . . . to protect against an international terrorist activity" (Sec. 104(7)(c)). Collection and analysis of intelligence concerning international terrorist activity is one thing. Protecting against such activity is another. The former is an inherent part of intelligence and counterintelligence collection and analysis and need not be singled out in legislation, despite its current importance in world affairs. The latter involves aspects of law enforcement, internal security and physical security of the public. As in the narcotics area, entities of the intelligence community should collect and analyze intelligence, but their roles end there. The action to be taken, be it apprehension of terrorists or physical security measures, is for other than intelligence collection and analysis entities. Counter action against international terrorism in the U.S. would be a proper role for the non-intelligence elements of the FBI, the local police, and the military as appropriate; and abroad the responsibility rests with the authorities of the nation involved. All references in S. 2525 should be adjusted accordingly.

3. Reporting Requirements. The more than sixty references to types of reports required to be sent to the Congress on various intelligence matters certainly raise a genuine issue. Aside from the sheer burden itself is the question of whether this is Congressional oversight or micro-management by the Congress. In Title I, which consists of 86 pages of text in S. 2525, there are 44 reporting requirements to the Congress -- more than one for every two pages of text. This seems to be out of balance. The Constitutional concept was for Congress to pass a law, and for the Executive Branch to execute and administer it. Oversight and review are certainly appropriate, but micro-management is not.

For example, at Sec. 114(j), the Director is required to advise the two Select Committees of proposed agreements between any intelligence community entity and any intelligence or security service of a foreign government before such agreement takes effect. It should surprise no one that many foreign governments are concerned about the security and confidentiality of their relationships with U.S. intelligence. In many cases, such concerns result in establishing as a condition precedent to any such relations that assurances be given that knowledge thereof will remain within the U.S. intelligence entity concerned, and even there to be restricted to only those persons who have a "need to know." Is it a good tradeoff that, if the two Committees must know the specifics of all such relationships, there will be no such relations? There are a great many such relationships with foreign intelligence services around the world, many in countries

where our diplomatic relations are less than cordial. These are an extremely productive source of intelligence which our country cannot secure in any other way.

The multiple reporting requirements of S. 2525 should be dropped in favor of the general reporting requirement in Sec. 152(a). Many of the specific reporting requirements ultimately may not be desired by, or useful to, the two Committees in the future. Why put such specificity in a statute when the purposes can be served with one provision of law rather than more than sixty such requirements?

4. Authorization and GAO Audit. The literal meaning of the words in Sec. 122 and repeated in Sec. 425 that no funds may be appropriated unless previously authorized by legislation within the prior two fiscal years brings up the issue of an overt budget as against a classified budget. We continue to believe there should not be an unclassified, public budget or appropriation figure for all intelligence activities, whether a "one-line" item or in greater detail. We shall not go into the detailed reasoning supporting this position since extensive hearings have already been held on this aspect of the issue. Suffice it to say that we think such disclosure would assist our potential enemies and open the door for an even greater breakdown of the figures into individual agencies, programs and projects. We contend that authorization can be handled effectively by procedures similar to those Congress has utilized for almost 30 years in making appropriations for CIA which establishes on a classified basis a sum certain for the total with a reasonable breakdown of programs and

major activities. This position has the approval of the House Permanent Select Committee, as shown by its Report No. 95-1075 on H.R. 12240, dated April 20, 1978 and is presently being followed in your Committee as expressed in S. Report No. 95-744 on S. 2979, dated April 19, 1978.

Provision is then made in Secs. 122(b) and 425(b) for certain expenditures solely on the certificate of the Director. The similar provisions existing in law today are what provide CIA and other intelligence entities with confidential or unvouchered funds. These are at the heart of the ability of intelligence, and particularly CIA, to mount and conduct secret operations, including espionage, counterintelligence, covert action and other sophisticated technical collection operations. It should be noted that, beginning with the first term of George Washington, almost every President has been given confidential funds by the Congress to expend on foreign secret operations. Thus, it was the President's decision on the purposes, and his signature or certificate was a sufficient voucher -- that last meaning that no one else could judge, second guess, disapprove or alter his judgment.

In Sec. 122(b) and in Sec. 425 at (a) and (b) as well as in (c)(1)(c), there are provisions that expenditures shall be made only for activities authorized by law. This creates a serious problem of interpretation. Sec. 425(a) starts by providing "Notwithstanding any other provision of law" sums may be expended, but in the next sentence, funds may not "be

expended for activities which have not been authorized by legislation . . . ." Which sentence is controlling? While programs or projects may be authorized by law, an attempt to authorize specific expenditures in the intelligence and covert action field quickly runs into security problems. There is no way to legislate publicly on specific secret activities. A re-drafting of Sec. 425(a) and (b) could result in permanent authorization language which is a technique used in other laws. In fact, such a re-draft would be similar to Sections 8(a) and (b) of the CIA Act of 1949 which were intended to serve, and are still serving after three decades, as permanent authorization.

Even if the present statutory language, "Nothwithstanding any other provisions of law," were to be added to Sec. 122(b), the left hand of S. 2525 would still take away the tool placed in the right hand. We are referring to the provision that the General Accounting Office would have, under the authority of Sec. 123 of S. 2525, the power to conduct financial and program management audits and reviews of all national intelligence activities upon request of either of the two Select Committees. The question of Comptroller General audit of CIA funds has a long history. In the early days of the Agency, specially-cleared Comptroller General personnel did audit CIA expenditures of vouchered funds. After a few years, however, the Comptroller General, in attempting to accomplish subsequently required comprehensive audits, determined that he could not make such audits of CIA expenditures without access to the records of expenditures of unvouchered funds. This was properly denied him

by the DCI, and shortly thereafter the Comptroller General withdrew from auditing any CIA expenditures with the approval of existing "oversight" Congressional Committees.

Then, Sec. 123(b) provides that over and beyond any request for audit and review by either Intelligence Committee of the Congress, nothing in subsection (a) shall be construed as a limitation on the existing authority of any other committee of the Congress to request financial and program management audits and reviews by the Comptroller General of any national intelligence activities over which such committee has legislative jurisdiction. An attempt to soften Sec. 123(b) is the provision that the results of any audit or review conducted by the Comptroller General at the request of any committee other than the Select Intelligence Committees shall be submitted to either the House or Senate Intelligence Committee as appropriate, and the Intelligence Committee will then make such report available to the requesting committee, presumably under appropriate security safeguards as required by Sec. 153. Also, Sec. 123(d) would authorize the Comptroller General to conduct audits or reviews of national intelligence activities even though not requested by a congressional committee. This section provides that the Comptroller General shall notify the Intelligence Committees whenever he conducts such self-starters and provide them with a copy of the results.

It is our opinion that all of the provisions for GAO audit have been found wanting by previous experience. They would erode the very foundation for secret and clandestine

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operations which has been preserved by the Congress for almost 200 years. We recommend that Sec. 123 be completely deleted from S. 2525.

5. Exclusive Committee Jurisdiction. We applaud the fact of Select Committees on Intelligence in the House and the Senate, although our strong preference for security reasons would be a single Joint Committee. It would be desirable if these committees had exclusive oversight and investigatory jurisdiction over intelligence matters.

We realize that such a proposal is fraught with difficulties, since other Committees can rightfully assert jurisdiction in several situations. The Armed Services Committees have legislative jurisdiction over the Department of Defense which contains several important entities of the intelligence community and expends a major part of intelligence funds. The Judiciary Committees have jurisdiction over the Department of Justice which includes the FBI, although the intelligence functions of the latter would represent only a small part of the Department's functions. But let us not create or continue oversight and investigatory jurisdiction over intelligence in other than the Select Committees of the Congress. It is hoped that any investigations would be referred to the appropriate Intelligence Committee. Of course, nothing said above should be considered as contravening the jurisdiction of the Appropriations Committees.

We particularly note the language requiring reporting of covert action operations under the so-called Hughes-Ryan amendment to the Foreign Assistance Act of 1974. In the interests of

security and in accord with our concept of exclusive jurisdiction, we recommend that the Hughes-Ryan amendment be repealed. The security problems with this type of legislation have been amply demonstrated.

We urge that the number of people with access be minimized by amendment of the proposed subsections of Sec. 153 of S. 2525, particularly with respect to budgetary details, intelligence sources and methods, and operational details. Security is a prime issue here -- the more people exposed to highly sensitive information, the greater the risk of unauthorized, inadvertent, or even deliberate disclosure. Furthermore, the two Select Committees have, and will develop even more, knowledge and expertise to comprehend fully the complexities of intelligence. This is not to say that other committees should be not be given substantive intelligence reports and briefings in their area of concern. But surely, the Congress can delegate to and trust the two Select Committees with the principal investigatory and oversight jurisdiction over intelligence operations and activities.

6. Approval and Reporting of Special Activities and Sensitive Clandestine Collection Activities. Detailed and elaborate procedures are provided for in Sec. 131 with respect to consideration and approval of special activities and sensitive clandestine collection. The President is required to establish standards, procedures and criteria for identifying which cases of clandestine collection of foreign intelligence require his personal approval. As to special activities, all must be reviewed and personally approved by the President. The bill enumerates the

factors to be considered in both categories and the individuals who must participate in these considerations. Annual NSC reviews are mandated, and annual reaffirmation by the President is needed in certain cases. Where Presidential approval is required, the two Select Committees normally must be notified in advance of initiation of such operation, although Committee approval is not required. Significant changes must be processed through all of the above steps. On top of all this, the standards and procedures established by the President, and any changes thereto must be submitted to the two Select Committees 60 days prior to the date they become effective. Procedures similar to those applicable to collection activities are prescribed in Sec. 141 for counterintelligence activities.

We submit that this mountain of red tape required by law is an intolerable burden on the highest levels of government, is an unwarranted intrusion on the functioning of the Executive branch, and is destructive of the flexibility of the President to meet emergency and crisis threats to our national security. It is no way to run a railroad. As Mr. McGeorge Bundy so cogently testified from the great depth of his experience, the President and key members of the National Security Council are very busy people; and never more so than in periods of crisis. The 60-day lay-over requirement for the President's procedures, and equally so with respect to changes, creates a most serious situation. It defies reason that the security of our country might depend upon the completion of a waiting period during which, by this title, a President could not lawfully take steps

to meet unforeseen situations. Not to be able to seize upon or exploit a clandestine collection or special activity opportunity when it arises may be an opportunity lost forever -- or may even cost lives. The 60-day lay-over provision in these sensitive areas which are peculiarly within the President's responsibilities is, in our view, unconstitutional. We recommend dropping these provisions, retaining the requirements for Presidential approval of "special activities" by program or major activity, with reporting only to the two Select Committees but not prior to initiation.

7. Disclosure of Information. The wording in Sec. 152(a) provides that the two Committees shall be fully and currently informed of all intelligence activities. Does this mean that when an agent is to be recruited, there shall be a report? We don't think that is what is intended, but the word "all" is there. Let's not put into law what is not intended -- refer to programs and major activities, but drop the word "all."

Additionally, Sec. 152(a) provides that the intelligence entities upon request will furnish "any information or material" in the possession or control of intelligence or of any person paid by intelligence. The mere fact of payment to a person doesn't mean that an intelligence entity necessarily can mandate turn over by that person to the two Committees. Why, in this proposed law, put on intelligence a requirement it manifestly can't meet? Furthermore, let us look for a minute at the requirement to furnish "any information or material." A committee could request a list of all agents, a list of employees under cover and

the specifics of that cover, a list of all American corporations cooperating with intelligence, or a compilation of drawings and specifications of all technical equipment used to collect intelligence. Some will say no committee would ever ask for such things -- but if a request were made, the law requires compliance. We believe that in all likelihood no such unreasonable requests would be made -- but why cast in statutory concrete a requirement that would force a violation of law in response to an unreasonable request? We recommend that Sec. 152 be redrafted accordingly.

We now turn to Sec. 153 which provides that the two Select Committees have the authority first, to give any such information to any other Member under certain security safeguards; and, second, to disclose such information publicly, subject to existing Senate and House Resolutions which require a vote by the Senate or House, as the case may be, on the issue of disclosure by the Senate or House Committee. This law in effect says to intelligence: report everything and furnish whatever is requested and the Select Committees may publicly disclose it (subject to their governing Charter resolutions) or allow any other Member or Committee to see it. There is a United States Constitution and, as the Supreme Court has interpreted its provisions (see Tab C for citations), there are reserved to the President certain prerogatives and responsibilities -- and one of these is that matters which he determines must remain secret in the interest of national security may not lawfully be disclosed by the Congress; nor does the Supreme Court assert the authority to override such a Presidential determination. Sec. 153 is both unconstitutional and unwise.

It may be said that the two Committees will not be unreasonable in asserting their proposed rights to "all" and "any," and that they will act cautiously and wisely in exercising their proposed right to pass on sensitive information or to disclose it publicly. But there comes to mind most vividly the incident of the House Select Committee on Intelligence in September 1975, asserting the right unilaterally under the House Rules to publish certain classified information, and over the vigorous objection of the Director of Central Intelligence and the President -- in fact publishing some of it. What happened? The President personally directed that no more classified information be passed to the Committee until some understanding was reached. An agreement was reached which, in effect, provided that any item which the Committee wished to release over the security objections of intelligence would go to the President for his personal approval to publish, or certification that it was not in the public interest to publish. Later, using the specious argument that such agreement applied only to Executive branch documents, the House Committee sought full House approval to publish its Report which contained substantial quantities of classified information. The full House rejected this ploy, saying that it would honor its understanding with the President.

Today, as we understand it, the two Select Committees are getting the information from intelligence they need to accomplish their oversight responsibilities. Why attempt to put into law what is not needed, and that which is unconstitutional?

8. Other Issues. There are other matters in Title I which deserve fuller consideration than time permits in this Statement. They are commented upon in Tab A.[1] However, two deserve passing mention here.

a. The purpose of legislating criminal sanctions is to deter. To make assassinations a crime does not meet any need; CIA has not assassinated any foreign official. If the Committee wishes to prohibit such assassinations in peace time, prohibit them flatly, without cluttering the statute books with verbiage which raises as many questions as it answers.

b. While it may seem desirable to prohibit certain forms of special activities, difficulties immediately arise in attempting to interpret the language of Sec. 135. What is "mass" destruction of property? What is a democratic government? What are "human rights" in certain foreign countries? We concur with Mr. Bundy's recent testimony here recommending that Sec. 135 be stricken. It is his view that, in effect, by enumerating prohibitions against some eight forms of special activity, Sec. 135 gives an apparent license for certain other forms of special activity not mentioned. Mayhem and arson are two that he noted.

[1] See p. 263.

TITLE II -- INTELLIGENCE ACTIVITIES
AND CONSTITUTIONAL RIGHTS

Title II in its present form deals primarily with collection, retention and dissemination of information about certain individuals and entities. With regard to collection concerning U.S. persons it generally prescribes when information may be collected. These rather detailed requirements concerning the when and how of collection are designed to meet specific abuses of the past collection of information for political or other inappropriate reasons, continuation of collection for long periods after the reasons for initial collection were not confirmed, and collection by intrusive techniques regardless of the narrow purpose behind collection.

While there is arguably a need for restriction and guidance on the when and how of collection concerning U.S. persons, that is not readily apparent with respect to foreign persons. The past has not demonstrated any abuses concerning collection about foreign persons. Sec. 225 is thus entirely gratuitous. It places limitations on collection about foreign persons within the U.S. which adds enormously to the administrative burden intelligence officials will have to face. More importantly, it is inimical to the national security of the United States.

a. When does a foreign person's presence in the U.S. "make it reasonably likely that such person may engage in espionage or any other clandestine intelligence activity"? Sec. 225(2).

b. Why should the "head of the collecting entity" have to determine that information about the person is significant foreign intelligence? Sec. 225(3). He has more important duties. Why such a high standard?

c. What if an intelligence official's judgment were that further collection of information about the person might produce foreign intelligence, counterintelligence, or counter-terrorism intelligence, and the standards of Secs. 225(1) - (4) are not met? Since a foreign person is involved, why shouldn't further collection be permitted?

Sec. 225 is a clear example of how the bill goes too far. The section should be deleted.

Title II emphasizes that collection of information about U.S. persons should be undertaken only for purposes that are directly related to the responsibilities of intelligence. Clearly, the collection effort should focus on foreign intelligence and counterintelligence, as well as information concerning applicants, employees and those who do business or are otherwise associated with intelligence. Collection of foreign intelligence and counterintelligence is a major intelligence mission, while collection concerning persons working for or associated with intelligence is a necessary security precaution. Some other specialized types of collection are treated separately, even if they might be viewed as a part of foreign intelligence, counter-intelligence or personnel security collection, e.g. Sec. 219 -- collection of foreign intelligence in possession of U.S. persons; Sec. 220 -- collection concerning U.S. persons in contact with

suspected intelligence agents; Sec. 221 -- collection concerning potential sources of assistance.

The primary problem in Title II exists in the sections dealing with collection for foreign intelligence, counterintelligence and counterterrorism intelligence purposes (Secs. 213 - 214). While those sections do a respectable job of defining the activities for which collection may be undertaken, the threshold for collection in each instance is "reasonably believed to be engaged in." This standard is too high and poses serious problems. This is so because intelligence is acquired in bits and pieces. Rarely would the official required to make a written approval under Sec. 216 for the initiation of collection have enough information to form a "reasonable belief" that the U.S. person to be targeted is engaged in an activity specified in Secs. 213 and 214. For example, the Agency might receive information (volunteered) that Abdul X in Paris (a known U.S. person temporarily outside the U.S.) received a phone call from Mohammed Y in Tripoli, Libya, a known member of a "proterrorist" organization (these are the only facts available and the substance of the conversation is unknown). Could collection be initiated on Abdul X under Sec. 213 on the basis of the information provided? Not if "reasonably believed to be engaged in . . . any international terrorist activity" is given its commonly understood meaning. Should he be targeted for further collection, however minimal? Probably, but only if further relevant information is obtained. Meanwhile, however, under Sec. 213, it is questionable whether the information could be retained in the Agency's files.

This example shows how Title II as written may prevent collection by making it impossible to follow up on leads and fragmentary pieces of information. One solution would be to lower the threshold standard of "reasonably believed to be engaged in" to one that provides for the collection of information if an intelligence official "has reason to believe" that the U.S. person is or may be involved in "the kinds of activities outlined in Secs. 213 and 214." Those sections as written already provide for a partially lowered standard with respect to a person "reasonably believed to be engaged in espionage or any other clandestine intelligence activity which involves or may involve a violation of the criminal laws of the United States" (Sec. 213(1), emphasis added; see Sec. 214(1) also). However, that concession is of minimal help because it is so limited. It still requires a reasonable belief that the person is involved in the specified activities as opposed to conduct for which there is just as likely to be some innocent explanation. The standard is lowered only in that it does not require certainty that the activities presently involve criminal offenses. In most other situations covered by Secs. 213 and 214 the higher standard prevails -- e.g., international terrorist activities and certain activities outside the United States.

Any lowering of the threshold for collection of information on U.S. persons would naturally raise concerns about infringement of their rights. On the other hand, many activities of U.S. persons who travel abroad or who have extensive foreign connections raise questions or suspicions from an intel-

ligence standpoint which do not amount to "reasonable belief" that such persons are involved in improper activity. The question this poses, of course, is where to strike the balance between individual rights and the need to protect the nation and the public from certain activities. One alternative to the standard in Secs. 213 and 214 which would strike it more in favor of collection would be to lower the standard for collection as previously suggested ("reason to believe the person is or may be engaged in"), but to provide for the higher standard for retention and dissemination of information. If after a reasonable period, say one year, the information collected did not provide a basis for reasonable belief of participation in the specified activities, then its retention and dissemination would be prohibited or strictly limited. Furthermore, the lower standard for initiation of collection would have no bearing on the use of the most intrusive techniques -- mail opening and electronic surveillance and other searches -- since they would continue to be available only under a higher standard and in accordance with applicable law.

While the threshold for collection of information on U.S. persons is an important issue, Sec. 215 raises another which may have an adverse impact on the effectiveness and management of collection. It would normally require the personal approval of the Attorney General or his designee for the use of certain specified techniques. The techniques in Sec. 215 are simply not so intrusive as to warrant the Attorney General's or his designee's personal review every time they are used. Such a requirement, with its attendant bureaucratic delay and risk to

security, will simply result in diminished use of those techniques and thus diminished collection. Use of those techniques should be subject to approval by designated Agency and other intelligence officials.

Sec. 214, "Authority to Collect Foreign Intelligence Concerning U.S. Persons," as written does not provide authority for any collection of information about such persons who may be engaged in "foreign aspects of narcotics production and trafficking." While that information is part of the term "foreign intelligence" (Sec. 104(13)), the phrase in Sec. 214(1), "reasonably believed to be engaged in . . . any other clandestine intelligence activity which involves or may involve a violation of the laws of the United States" would not cover narcotics information unless such information were part of an "intelligence activity on behalf of a foreign power . . . ." (See the definition of "clandestine intelligence activity" in Sec. 204(b)(1).) Thus, the words "foreign aspects of narcotics production and trafficking" should be included in Sec. 214(1).

Sec. 243, entitled "Participation in Illegal Activity" is not an accurate label. Activity undertaken at or pursuant to the direction of the Attorney General which is a legitimate law enforcement and intelligence activity should not be labeled as an excused "violation of the criminal statutes of the United States." This section should carefully be redrafted.

Sec. 244 as written does not allow for undisclosed participation in "United States organizations" (as that term is broadly defined in Section 204(b)(13)) by intelligence entities

to accomplish legitimate intelligence collection and support functions. This technique is so basic for the protection of internal security that the draft provisions should be broadened to permit such participation under procedures approved by the Attorney General.

In Sec. 253 a new basis is created for civil suits for money damages against intelligence employees. Such remedy is declared in Sec. 257 to be the exclusive remedy for money damages. Provision is then made in Sec. 258 that the Attorney General, upon recommendation of the head of an intelligence entity, may pay reasonable attorney's fees and litigation costs incurred in defending against such civil suits. We bitterly protest this discrimination and denigration of intelligence employees. Elsewhere in the government an employee who is named in a civil suit has the Department of Justice, normally as a matter of right, either represent him or counsel is retained at Government expense. The presumption is that he acted within the scope of his employment. This provision seems to say to an intelligence employee that we, the Congress, find you guilty of violating the law before the trial begins, because Sec. 258 provides only that the Attorney General <u>may</u> pay legal fees, and then only upon recommendation of the head of the entity concerned. Where is the employee if there is no such recommendation, or if the Attorney General decides not to act?

Many frivolous cases are filed naming government employees as defendants. They should have legal assistance as a matter of right, and not be left to the whims and caprices of

agency heads and the Attorney General. It will be urged that this would never happen. Well, gentlemen, it can, and it did within the last five years. Hundreds of employees were confronted with this very problem in suits involving multiple charges about which many of the employees knew nothing personally and of their own knowledge. The bill should be changed to provide that the Attorney General shall provide the defense or funds for retained private counsel so long as the employee has not been finally adjudged by a court to have violated the law in question or been found guilty on criminal charges arising out of the factual circumstances involved. We must not make second-class citizens of our intelligence officers. This bill seeks to protect the rights of American citizens as well as foreigners, but this provision decreases the rights of citizens, i.e., our intelligence officers who are on the firing line.

We have additional and more detailed suggestions on this Title in the attached Tab B.[1]

[1] See p. 276.

TITLE III -- FOREIGN INTELLIGENCE SURVEILLANCE

This is an extremely important subject. It is unfortunate that the substance of this title is, for all practical purposes, moving through the Congressional processes not in context with the overall impact and thrust of S. 2525.

We, too, are aware of some past abuses in the area of electronic surveillance, and agree that the authority for such activity needs clarification. The laudable efforts to protect the privacy and rights of American citizens are seriously marred, however, by the misguided extension of requirements for warrants in cases involving "foreign powers" and known "agents of foreign powers."

Some would urge, and we would prefer, that sweeping new laws in this general area await definitive Supreme Court rulings on the basic issue of the Constitutionality of electronic surveillance to collect foreign intelligence from American citizens in the interests of national security. Various subordinate courts have distinguished foreign targets from domestic targets. If the Supreme Court were to hold that warrantless electronic surveillance of Americans offends the Fourth Amendment, we would have no problem and no comments on this Title insofar as it applies to United States persons as defined. However, we strongly oppose the provisions of this Title insofar as they apply to a "foreign power" or "agent of a foreign power" as those terms are defined. Our grounds for this position are that such application:

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- Is unnecessary.
- Corrects no known abuse.
- Renders foreign intelligence activities less effective.
- Creates substantial new security hazards.
- Does not create new safeguards for the rights of Americans.
- Is inconsistent with repeated views of the Judiciary.
- Is unconstitutional.

What sensible American would object to U.S. intelligence wiretapping the Soviet Embassy or the hundreds of officers of foreign intelligence services conducting espionage within the United States? What abuses can be pointed to in this area? None! It will be urged that there will be inadvertent overhearing of Americans, and that the use of information derived therefrom can be abused. But a warrant does not eliminate the inadvertent overhearing, and it is to the "minimization procedures" of this Title that we look for proper handling of such derived information. These procedures can be applicable regardless of whether or not there is a warrant. Imposition of statutorily mandated procedures inserting the Judiciary into the heart of sensitive operations not only renders intelligence less effective and less flexible, but creates most serious additional security hazards. The rights of Americans are not safeguarded by a judge issuing a warrant to tap a known KGB officer in the U.S. The Courts have repeatedly held that foreign intelligence activities are within the realm of the President and for which the Judiciary has no

experience, training or expertise. (See cases referred to in Tab C attached.) To give to a judge the power to tell the President that "it's all right to tap Embassy X, but your request to tap Embassy Y is denied" is ludicrous. If there is a response that, of course, a judge really can't do this, then the whole exercise is feckless and a sham. To assert that the President cannot take action without a judicial warrant in this area of sensitive foreign intelligence activities is to close one's eyes to the words of the Constitution as passed upon over the years by the Supreme Court.

In lieu of more detailed discussions of these issues, we have attached as Tab C[1] the following:

1. A statement by the Legal Advisor to the Association of Former Intelligence Officers, John S. Warner, before the House Permanent Select Committee on Intelligence on January 17, 1978 concerning H.R. 7308 which is substantially similar to the language of Title III.

2. The views of Mr. Robert McClory appearing in The Washington Post on April 19, 1978 concerning this issue. Mr. McClory is the ranking Republican on the House Judiciary Committee and the House Intelligence Committee's legislation subcommittee.

3. The views of Mr. Robert H. Bork on H.R. 7308 appearing in The Wall Street Journal of March 9, 1978. Mr. Bork, former Solicitor General of the U.S., is Chancellor Kent professor of law at Yale University.

4. Editorial from The Washington Star of June 5, 1978 entitled "Control of foreign intelligence."

As written, this Title is an over-reaction to a few abuses of the past and a genuine need for clarification of the law. It is incredible that the Congress and the Executive should

[1]See p. 279.

be joining hands to strip the President of certain of his Constitutional prerogatives in the pursuit of no known constructive purpose and at the price of major reduction of effectiveness of intelligence. To us, this Title should be known as "An Act to Convey Fourth Amendment Rights on the Soviet Embassy and All KGB Officers in the United States and All Other Foreigners." This Title is a most serious mistake, and we adamantly oppose its enactment in its present form.

TITLE IV -- CENTRAL INTELLIGENCE AGENCY

There are many excellent provisions in Title IV of S. 2525 which are not in law today. We support the "purposes" of the bill as set forth in Sec. 402. There are, however, certain basic issues to be discussed. These include:

1. A DNI separate from the CIA.
2. CIA responsibility for counterterrorism;
3. Authorization for expenditures;
4. Exclusive jurisdiction of two Select Committees;
5. Multiple requirements for reports to Congressional Committees;
6. Repeal of Section 102 of the National Security Act of 1947 and the Central Intelligence Agency Act of 1949;
7. Criminal sanctions for unauthorized disclosure of intelligence sources and methods.

Our views on the first five of these issues are set forth in the discussion of Title I and need not be repeated here. We might add that proposed provisions on these matters should be included only at one point in S. 2525.

Repeal of Sec. 102 of NSA of 1947 and the CIA Act of 1949. Title IV starts by establishing the Central Intelligence Agency. We all know that CIA has been in existence for over 30 years and has functioned well under the two statutes which are proposed for repeal. A considerable body of case-law has developed based on the language of those statutes. We understand that certain changes are desirable as are some new provisions. Analysis shows, however, that over one-third of the provisions of

Title IV are identical with those in existing law. We urge that these not be re-enacted with possible minor variations simply because of a drafting style. In other words, "if it ain't broke, don't fix it." The entire bill is extremely lengthy, and where it can be shortened without doing violence to principles knowingly changed or added, such effort should be made. This general view is applicable to other titles and is covered in appropriate comments at the appended Tabs. Numerous examples exist of apparent unintended changes -- some of them serious. E.g., in bringing forward into Sec. 425(a) and (b) the language of Sec. 8(a) and (b) of the CIA Act of 1949, the draftsman missed the point that the important preamble of 8(a) also applied to 8(b). As a result, Sec. 425(a) has the preamble and it is missing on Sec. 425(b), rendering the latter meaningless.

Criminal Sanctions. Title IV provides assistance in the area of security by providing criminal sanctions with respect to misuse of the name or initials of CIA and for the unauthorized disclosure of the identity of staff personnel under cover. As you know, however, there is no law on the books which effectively provides criminal sanctions for the unauthorized disclosure of intelligence sources and methods. It is ironic that there are at least 30 provisions of law which provide criminal penalties for the unauthorized disclosure of information in the hands of the government. Some examples are: insecticide formulas, agricultural marketing agreements, crop information, confidential business information, bank loan information, income tax information, shipping information, selective service information and

numerous others. In the absence of such a law as to sources and methods, current employees and former employees and others in a position of trust can reveal such information with impunity. After many years of research and drafting, such a proposed law was sent to the Congress by the President on February 18, 1976. That law would apply only to persons who have had access to information concerning intelligence sources and methods as a result of their being in a position of trust by virtue of being a government employee or an employee of a contractor with the government. All media personnel would be excluded. A copy of that proposal is attached as Tab D-1.[1] We believe your responsibility to protect intelligence and make it more effective is just as great as your responsibility to assure that intelligence is properly accountable.

Appended to this prepared statement as Tab D[2] is a section by section review of Title IV which includes specific suggestions and additional details which could not be covered in this general statement.

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[1] See p. 297.
[2] See p. 291.

TITLE V -- FEDERAL BUREAU OF INVESTIGATION

We believe it worthwhile and appropriate to clarify in law the authority and responsibility of the FBI in the field of intelligence. Title V of the bill seems appropriate to this purpose. By its wording it appears to cover only foreign intelligence, counterintelligence and counterterrorism intelligence, the latter two of which by definition in the bill deal with foreign or international aspects. Purely domestic intelligence seems to be excluded, and we shall leave this aspect for others to comment upon.

The FBI is authorized in Sec. 507(a) to collect foreign intelligence within the U.S. from publicly available information and also clandestinely, and further to analyze, produce and disseminate such material. In view of the broad and overall responsibility of the Director of Central Intelligence in the foreign intelligence field, it is recommended that FBI action in this instance be authorized "only in coordination with the Director of Central Intelligence or his designee." It should be made clear that this needed and welcome charter for the FBI in the field of positive foreign intelligence within the U.S. is to be orchestrated within the context of the overall foreign intelligence effort by the President's principal foreign intelligence officer, namely, the Director of Central Intelligence.

In order to avoid the creation of yet another analysis entity in the intelligence community, the FBI should be limited to the collection and dissemination of positive foreign intelligence. This will obviate the necessity for the FBI to develop the entire panoply of expertise, capability and bureaucratic, machinery to compete in the field of positive intelligence analysis and production. Such changes would therefore authorize the FBI to collect and disseminate positive foreign intelligence, not only as a by-product of its counterintelligence activities, but also as a direct collector.

As you know, the Director of Central Intelligence is today charged by law with "the responsibility for protecting intelligence sources and methods from uauthorized disclosure." S. 2525 would continue that statutory charge -- but neither existing law nor S. 2525 grants any authority to fulfill that responsibility. The other heads of intelligence entities have a similar inherent responsibility. As a partial step to help protect such secrets we have elsewhere in this statement recommended that criminal sanctions be enacted for unauthorized disclosure of intelligence sources and methods. Under existing law and under S. 2525, the Director of Central Intelligence has extremely limited authority to investigate an unauthorized disclosure. The appropriate investigative arm of the U.S. Government, the FBI, in practice will rarely undertake such an investigation unless they are presented with reasonable evidence that a known individual has committed a crime. This is the Catch-22 for the DCI -- he knows there has been an unauthorized disclosure, but he doesn't know

who is the culprit. The DCI can only go so far under law in investigating, and the FBI won't investigate until there is substantial evidence of the crime.

Here is a "disclosure of secrets gap" that we urge the Committee to examine. Executive Order 12036 of January 24, 1978 touches on this dilemma at Section 1-707 by providing, "In any case involving serious or continuing breaches of security [senior officials of the Intelligence Community shall] recommend to the Attorney General that the case be referred to the FBI for further investigation." This does not go far enough and we recommend that consideration be given to statutory language requiring FBI investigation of those cases of unauthorized disclosure of intelligence sources and methods so certified to the Attorney General by the Director of Central Intelligence.

Additional points and suggestions are included in the Sectional Analysis at Tab E.[1]

[1]See p. 305.

TITLE VI -- NATIONAL SECURITY AGENCY

We strongly endorse the concept of the establishment of the National Security Agency by statute and a statement of its functions in law. Equally, we endorse the effort to give it the statutory tools to accomplish its missions. We have attached additional comments at Tab F[1] which we hope will be of assistance in considering the final draft of this Title.

Several general comments are appropriate:

1. The definitions appearing at Section 603 should be most carefully reviewed by all departments and agencies to assure that they are fully adequate. Since we do not have access to the classified manuals and reference materials, we cannot conduct such a review.

2. We do have some difficulty with various sections of Part C and Part F. These deal essentially with administrative matters, including funds, expenditures, leases, procurement, appropriations, travel expenses and commissary facilities. Since NSA is a part of the Department of Defense, many basic authorities necessary for any government agency to function are available to NSA by appropriate delegation. It is our belief that the special mission of NSA requires certain special authorities, but it appears that some of the provisions of this Bill are superfluous. A careful review of existing authorities in DOD and available to NSA should be conducted.

[1]See p. 306.

TITLE VII -- MISCELLANEOUS AMENDMENTS

We have no substantive comments on this Title.

CONCLUSION

S. 2525 as a whole is to be cited as the "National Intelligence Reorganization and Reform Act of 1978." We recommend to this Committee that "Reform" be dropped from the title, and that the Act be cited as the "National Intelligence Reorganization Act of 1978," or simply, the "National Intelligence Act of 1978." The word "reform" has an unfortunate connotation which is an affront to the thousands of dedicated employees of the intelligence community, present and future, who were never aware of, or participated in, the very few transgressions which led to the many sensational charges of the past few years.

Titles I through VI of S. 2525 are each cited as separately entitled Acts. This makes for very complicated drafting and usage problems. This is further complicated by the "Definitions" section in each title, which add some new definitions to those already set out in Title I. This would be workable if S. 2525 were a single Act, with several Titles, and not six separate Acts within one.

On a matter which is not touched upon in S. 2525, we suggest the Committee examine with the intelligence community the serious and continuing impact of the Freedom of Information Act. It was reported in the June 12, 1978 issue of U.S. News & World Report that "One out of every 15 FBI agents now works full time answering queries . . . ." Last year the CIA received 16,000 queries requiring the expenditure of over 200,000 man-hours to handle. To make the careful review of documents necessary to

determine if they can be declassified is a complex task requiring mid-level and senior level people. The cumulative effect of the information released in separate unclassified pieces is of assistance to our adversaries. Further, human errors will occur, and inevitably information which is not declassified will be found in released documents. While we do not at this time offer a specific solution, this is an area which well merits examination and study by this Committee.

We have pointed to many specific provisions of S. 2525 explaining why, in our view, some are unworkable, some are seriously troublesome, some need slight modification, some are burdensome, some add needless red tape and some are unconstitutional. The cumulative effect of all these is to undermine initiative and flexibility severely. Certainly, security of intelligence is woefully weakened. The accumulation of most sensitive information and documents called for by this bill to be held on Capitol Hill makes a very tempting target for our adversaries. Physical security and personnel security standards should be of the highest, and neither are covered in S. 2525. These should be addressed in the bill. So, too, should a requirement that all staff persons sign an appropriate secrecy agreement.

The effort to prevent the abuses of the past has led to a bill which seriously shackles intelligence. The record shows that most of the abuses of the past were directly traceable to direction from the highest levels of the Executive branch and inadequate oversight by the Congress. We do not believe the

solution to these problems is to encase the national intelligence machinery in a legislative straight-jacket and micro-manage complex and sensitive clandestine operations from Capitol Hill. In fact, we agree with the comment of the most experienced former Director of Central Intelligence, Richard Helms, who said he "would profoundly distrust any director who contended he could operate an effective Secret Service" under the present version of S. 2525.

We believe the answer lies in Executive leadership which has learned from the mistakes of its predecessors and Congressional oversight by Committees which, unburdened by other responsibilities, can give their full attention to seeing that these lessons from the past are not overlooked. If we have not learned the appropriate lessons from the past, Mr. Chairman, it is doubtful that any amount of legislative red tape can prevent future mischief or mistakes. But to all appearances the appropriate lessons have been learned. Indeed, there is concern among some of us that they may have been over-learned. We believe it was Mark Twain who said that a cat who sits on a hot stove will never sit on a hot stove again, but then he probably won't sit on a cold stove either. There is, we believe, a very real risk that, in trying to foreclose the danger of repeating past mistakes, we may also foreclose the possibility of achieving future successes. And future intelligence successes are essential if we are to avoid surprises and setbacks, indeed if our nation and our way of life are to survive and prosper.

In our considered opinion, this bill as now written will seriously impair the future effectiveness of U.S. intelligence. Beyond that, it will be a disincentive to the recruitment and retention of men and women of outstanding talent and promise, whose dedication, initiative and capacity for innovation are the real determinants of the caliber of an intelligence community. Further, approval of this bill as written is virtually a decision to stop all clandestine operations, not only positive collection and counterintelligence, but also covert action. What is needed is a sincere cooperative effort to produce a bill designed to serve its commendable objectives. As we see it, Mr. Chairman, this is a task we should all share. The Association of Former Intelligence Officers, many of whose members have lived under and administered the existing laws, is ready to work with your Committee and staff in any manner you might suggest in the hope that we can contribute to its solution. Thank you.

Tab A

TITLE I -- NATIONAL INTELLIGENCE

Sectional Analysis

Part A

Sec. 102 (2) The finding of "Waste and unnecessary duplication" in the last sentence should be deleted.

Sec. 103 (2) The word "replace" in line 18 should be deleted, and in lieu thereof insert "clarify."

(3) The word "national" in line 20 should be deleted, as it has been dropped elsewhere in this draft. Change "insure" to "ensure" in line 20.

(4) The word "insure" in line 4 should be "ensure" throughout S. 2525 by normal definition. In line 5 the word "all" should be inserted before the word "other" and the word "foreign" after the word "hostile."

(6) We recommend the deletion of the phrase "and the people of the United States" at lines 13-14 as these entities are responsible to "the people" through the President and the Congress. Also we recommend deletion, as redundant, of all after the word "States" in line 17.

Sec. 104 This Section sets forth "Definitions" of the terms utilized in most of S. 2525. These definitions need careful reconsideration and sharpening. In many instances, they differ from the more professional definitions of E.O. 12036. This is particularly important because Sec. 13(a)(9) of S. Res. 400, which established the Senate Select Committee, charges the Committee with developing a uniform set of definitions which may be adopted by the executive and legislative branches in connection with intelligence activities.

(9)(B) We recommend the insertion of the word "informant," after the word "employee" in line 4.

(10) We recommend the deletion of all after the word "agency" at line 17.

(12) The phrase "or wholly owned corporation" in line 24 should be deleted.

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(13) We recommend the deletion of lines 6 and 7. As we have said in our Statement, the collection and analysis of foreign narcotics (and counter-terrorism) intelligence is inherent in such work and need not be singled out in the statute any more than political, economic, military or scientific intelligence.

(17) We recommend that this definition be broadened by inserting the words "and analysis techniques," after the word "operation," in line 21.

(18)(C) The words "recruiting or" should be inserted after the word "of" at line 10. Lines 14-17 are not clear and could cause difficulty. They probably should be deleted.

(22)(23) In these definitions, and elsewhere in S. 2525, the phrase "foreign policy" is used, rather than "foreign relations." It would appear preferable to use the latter term wherever possible in order to eliminate from the public mind the thought that intelligence has any responsibility in the making of foreign policy. It is also suggested that the words "defense, security, and" should be inserted after the word "national" at line 16.

(28) As defined, this definition appears to be too broad.

The above comments, to which many more could be added regarding the definitions, present only several examples of why this whole section needs careful restudy and considerable sharpening so that proper definitions can thus be standardized.

Part B

Sec. 112 (a) We believe that this section (a) should be completely eliminated, because any new legal intelligence activity would almost certainly be able to be fitted into the present proposed statutory provisions.

(b) It is recommended that the phrase "of the National Security Council" at lines 9 and 10 be deleted. The NSC has no "President."

Sec. 113 We recommend that this Section be deleted in its entirety for the reasons set forth in our Statement.

Sec. 114 — We recommend that this Section be deleted in its entirety from Title I and be integrated, as appropriate, with Sec. 412 of Title IV. There is a full discussion of this matter in our Statement. Specific additional comments are listed below.

(b)(3) — This subsection should be deleted entirely, for the reasons already given above.

(c) — This is far too broad: To have Director ensure proper and efficient direction, regulation and administration is clear intrusion into command authority. To ensure all such activities are conducted in accordance with this Act and Constitution and laws of the United States is either meaningless or intrusion into command authority.

(d) — For the reasons set forth in our Statement, we recommend that this Section be deleted as unnecessary.

(f) — This Section provides that the DCI is responsible for the production of national intelligence, including estimates, and "other intelligence community-coordinated analyses." It gives the Director no responsibility for the large CIA intelligence production which is not "community-coordinated," and for which he is also responsible.

(f)(1) — This Section appears to be too broad in requiring the DCI to serve two masters. The DCI must respond to the specific requirements of the President, and he should be able to provide substantive intelligence briefings and reports to the Congress.

(g)(1) — Including the phrase "operational commanders of the Armed Forces" appears to us again to be instrusion into command lines.

(i) — Everything after the word "activities" at line 4 should be deleted.

(j) — This Section raises the important issue of foreign liaison. It is one of the major problems which we have discussed in our Statement. While there may be occasions when it is appropriate to consult with the Secretary of State on these matters, in a majority of cases this is not so in the absence of broad policy questions. Such consultation should not be included in the statute but left to the discretion of the DCI and the Secretary.

(j)(3) As set forth in our Statement, we believe this subsection should be deleted entirely.

(k) The word "Director" at line 21 should be deleted, and the words "National Security Council" inserted. This conforms to current practice.

(l) This Section raises another major problem. The provision here raises the same problems that have been with us since such a provision was originally included in Sec. 102(d)(3) of the National Security Act of 1947; namely, that the DCI has the responsibility but no authority in this field. We must again urge the inclusion of criminal sanctions against the unauthorized disclosure of intelligence sources and methods substantially as provided in the draft originally submitted to the Congress by President Ford. Nor should we in any way forego in such legislation the available civil procedures for violation of secrecy agreements by intelligence community personnel, or failure to submit manuscripts by such personnel to the appropriate intelligence entities for clearance prior to their being shown to those who have no such secrecy agreements. As further drafting points here, we suggest deleting the words following "for" at line 2 through "of" at line 3 and inserting in lieu the word "protecting"; and after the word "methods" at line 3 inserting the words "from unauthorized disclosure." After the word "standards" at line 4 the words "and procedures" should be added. Following the word "management" at line 5 insert a comma, deleting the following word "and"; after the word "of" at line 5 insert the words "and access to." The entire last sentence commencing with the word "The" should be deleted.

(m)-(o) We recommend that all these Sections be completely deleted and that existing language of Sec. 102(c) of the NSA Act be retained.

Sec. 116 (a) This Section provides that the President is authorized to appoint, by and with the advice and consent of the Senate, not more than five Assistant Directors of National Intelligence. In our opinion, the DCI should make these appointments, not the President, and should not require Senate confirmation. As written this is a big step toward politicization of intelligence. We recommend that this section be deleted.

(c)(2) We recommend the deletion of the last sentence beginning at line 16.

Sec. 117 — We recommend that this Section be deleted altogether.

Sec. 122 — In furtherance of the discussion of this Section regarding unvouchered funds in our Statement, attention is invited to the attempt made by the House Committee on Foreign Affairs (backed up by a Resolution of the full House) to see certain of these unvouchered funds certificates in 1846. This attempt was successfully resisted by President Polk in a letter to the House of Representatives, dated April 20, 1846, in which he clearly set forth the dangers to intelligence operations and agents of any such disclosure. In that letter to the House, President Polk stated:

> "The experience of every nation on earth has demonstrated that emergencies may arise in which it becomes absolutely necessary for the public safety or the public good to make expenditures the very object of which would be defeated by publicity. . . . In no nation is the application of such sums ever made public. In time of war or impending danger the situation of the country may make it necessary to employ individuals for the purpose of obtaining information or rendering other important services who could never be prevailed upon to act if they entertained the least apprehension that their names or their agency would in any contingency be divulged. So it may often become necessary to incur an expenditure for an object highly useful to the country; . . . But this object might be altogether defeated by the intrigues of other powers if our purposes were to be made known by the exhibition of the original papers and vouchers to the accounting officers of the Treasury. It should be easy to specify other cases which may occur in the history of a great nation, in its intercourse with other nations, wherein it might become absolutely necessary to incur expenditures for objects which could never be accomplished if it were suspected in advance that the items of expenditure and the agencies employed would be made public." (See IV Richardson: A Compilation of the Messages and Papers of the President, pp. 431-436.)

In denying the House Committee access to these vouchers, President Polk was supported by his predecessor, President Tyler, whose certificates were those the Committee wished to see.

We recommend, for the reasons set forth in our Statement, that Sec. 122 in its entirety be deleted.

Sec. 123 — For the reasons set forth in our Statement, we recommend that this Section be completely deleted.

Part D

Sec. 131 (a) — It is suggested that the words following the word "activity" at line 15 through the word "specifies" at line 16 be deleted.

(b) — For the reasons set forth in our Statement, we believe that this Section should be deleted in its entirety.

(d)(1) — The use of the word "essential" at line 18 is unrealistic if given its normal dictionary meaning of "indispensable." We suggest that the word "important" be substituted.

(e) — For the reasons set forth in our Statement, we recommend that this Section be deleted entirely.

(f) — We suggest deleting the phrase starting with the word "and" at line 17 and ending with the word "activity" at line 18, placing a period after the word "President" at line 19 and deleting the remainder of that sentence; and deleting all after the letter "(d)" at line 25.

(g) — We recommend the deletion of this section entirely.

(h) — We suggest the deletion of all the words following the word "activity" at line 22 and ending with the word "President" at line 25; also the words "review, approval, and" at line 1, p. 49.

(i) — We recommend deletion of all the words following the word "or" at line 5 and ending with the word "President" at line 9; also the words following the word "the" at line 9 through the word "Congress" at line 10.

(j) — This Section provides for presidential notification to the Intelligence Committees of "special activity" in war time. We believe this Section should be stricken because of the extreme sensitivity of many such special activitiee in war time, and because they would usually come under the President's authority as Commander-in-Chief. The restrictions on conduct of special activities are inappropriate and intrude on Presidential powers.

(k) — At line 5 delete "and (e)."

(k)(1) — We recommend that this entire Section be deleted.

Sec. 132 — The whole section seems poorly drafted, and we recommend that it be stricken at least in its present form. It should better be left to Presidential and internal regulation. Some recent testimony before this Committee, and articles by other journalists, tend to suggest that the media should police itself in regard to contacts with intelligence.

(b)(1) — The requirement for the head of an intelligence entity to make a written finding for the operational use of a permanent resident alien is unnecessary and undesirable; nor does it appear to serve a useful purpose. Should be deleted.

(c) — Informing a U.S. person of the nature of the desired assistance he might be asked to render to a clandestine intelligence activity and its possible risks to his physical safety needlessly puts more red tape in the law. As there is no apparent viable objective here, we recommend deletion.

(d) — We recommend that this Section be deleted.

Sec. 133 — The restrictions on U.S. persons as combatants is an additional pouring on of statutory red tape. The special activity involved will have been approved by the President, and the two Select Intelligence Committees will have been informed. For the reasons set forth in our Statement, this section should be deleted.

Sec. 134 — This Section contains the prohibitions on assassination. For the reasons expressed in our Statement, we recommend that this section should be deleted.

Sec. 135 — This Section is a further enumeration of prohibitions against eight forms of special activity. The reasons for our recommendation that this Section be deleted are contained in our Statement. Some additional comments in support of our recommendation follow.

(a)(1) — The first prohibition concerns the support of international terrorist activities. The definition of "international terrorist activity" (pp. 16-17 of S. 2525) is probably not what the drafters of this legislation had in mind when they included it in Sec. 135(a). One must bear in mind that

one man's terrorist is often another man's freedom fighter. Without specific definition, "many kinds of paramilitary and guerilla activity [in which the U.S. legitimately could be involved] would become the immediate basis for charges that they involve 'terrorist activity.'"

(a)(2) This is a prohibition against the "mass destruction" of property. What constitutes "mass"? After all, most paramilitary activity or guerilla warfare may well involve some destruction of property.

(a)(6) This prohibits the violent overthrow of the democratic government of any country. Again, this raises a problem of definition as to what is "democratic." Who is to judge whether any particular form of government is "democratic" in the terms of this law? Such a term as "freely elected" may well be meaningless in many countries.

(a)(8) This prohibits "the support of any action which violates human rights, conducted by the police, foreign intelligence, or internal security forces of any foreign country." Here again there is neither a standard nor a definition with regard to "human rights."

Sec. 136 This authorizes the President in war time to waive certain provisions of Sec. 132 regarding the restrictions on the use of certain categories of individuals for intelligence activities and of Sec. 135 regarding the prohibition against certain forms of covert action. If, as we recommend, Secs. 132 and 135 are stricken from S. 2525, Sec. 136 automatically will be stricken also. It is interesting to note that this section refers to notification to "appropriate committees of the Congress" rather than the Intelligence Committees. If the section remains, some further definition of which committees of the Congress are involved needs to be included. In any event, it is recommended that the word "and 135(a)(1), (2), (3), and (6)" at line 24 be stricken.

(2) It is recommended that all the material after the word "States" at line 14, p. 63 through the word "resolution" at line 5, p. 64 be stricken.

(3) It is recommended that all the material after the word "States" at line 13, p. 64 through the word "waiver" at line 2, p. 65 be stricken.

Sec. 137 — The prohibitions on indirect activity pose extremely difficult problems of applying the law. To say, as in this Section, that U.S. cooperation with a foreign intelligence service or government is, in effect, contingent upon the latter's action being consistent with U.S. law is to establish impossible standards. Subsections (a) and (b) are too broad and should be stricken or substantially revised.

Sec. 138 — To say that laws, etc., relating to conflicts of interest which apply to all government employees shall also apply to intelligence employees is redundant. Also special waivers of any kind for intelligence employees, even with the written approval of the Attorney General, are not appropriate. We recommend deletion of this entire section.

Sec. 139 — This Section should be opposed on at least two points, other than the fact that it is unreasonable and unworkable. The first is that entity sponsorship must be made known to appropriate officials of the company or institution. Such sponsorship might well be revealed to one senior official of such company or institution who may not wish to have further disclosure. While this section does not define "appropriate officials," who is informed should remain between the senior official approached and the intelligence entity involved. Secondly, the provision which would authorize procedures to be established by the Attorney General permitting concealment of the intelligence entity for security reasons should really not be within the province of the Attorney General at all. It is not a legal problem. On balance, we recommend that the entire section be stricken, for there must be some security maintained in such matters, and there have been no valid abuses which need correction.

Sec. 141 (a) — We suggest deleting, as redundant, all the material following the word "States" at line 17 through the word "States" at line 19; the word "Council" should be inserted after the word "Security" at line 21. The elimination of the Secretary of Defense from the committee's membership should be rectified in view of the large counterintelligence responsibilities of the Department of Defense.

(c) A reading of Sec. 141 in its entirety, however, reveals such poor draftsmanship in several of its provisions that, if it is retained, it must be carefully redrafted. On balance, for the reasons set forth in our Statement, we recommend that Sec. 141(c) should be deleted altogether.

Sec. 142 This Section deals with communications security. The whole Section should be reviewed to make certain that it does not conflict with the proposed NSA statute contained in Title VI of this Act or vice versa. The proposed membership of this NSC [communications security] committee needs some restructuring, as it appears to be very large to deal with so delicate a subject. We recommend that Sec. 142 be carefully restructured.

Sec. 151 To have the Congress establish by law the intelligence oversight function within the Executive including its specific functions goes too far. The flexibility of the President to modify as circumstances change should not be cast in statutory concrete. We believe it is up to the Congress to establish the Congressional oversight function and mechanism which it has done by Senate and House resolutions and not by statute. Direct by law that the President establish an oversight function within the Executive and then leave the matter in his hands to prescribe the precise procedures and functions in this most sensitive area. For example, the General Counsel of CIA is the counsel to the DCI and, through him, the entire Agency in the performance of its functions. If a CIA employee is involved in a possible illegal act, it is the responsibility of either or both the CIA Inspector General and General Counsel to make the initial investigations. If, in the course of such an investigation, it is requested that a suspected employee discuss the matter with the General Counsel, the latter can only serve one client, namely, in this case, the DCI. Therefore, in such an investigation a suspected employee must be advised of what, for want of a better term, must be called his Miranda rights, and the CIA General Counsel cannot function as his attorney in such an internal procedure. However, if such a suspected individual chooses to be frank and open with the CIA General Counsel, and if the latter's investigation shows that such employee may have committed an illegal act, the General Counsel, quite properly and on behalf of the DCI, must report such illegality to the Attorney General. However, if it becomes apparent that the Attorney General must

take some prosecutorial steps, it would seem to us that any further reporting of this illegal act, either as to its terms or the name of the person or persons involved, should not be made either to the IOB or a congressional committee under commonly accepted standards of the Canons of Ethics.

None of the above problems have really been addressed in Sec. 151 and must be carefully considered in the drafting of that Section.

(e)(1) We suggest that the word "quarterly" at lines 22-23 be amended to read "not less than annually."

(e)(2) and (3) We recommend that both of these subsections be deleted, as these functions are not those of the general counsel and inspectors general, but belong to the head of whichever intelligence entity is involved.

(h) We suggest the deletion of the words at line 2 starting with the first word "and" and ending with the word "thereof." This is a command function.

(i)(1) (B) We suggest that this subsection be deleted.

(i)(2) (C) In our view, this whole subsection should be deleted in its present form. It would tend to make policemen of all of the employees of the intelligence entities in the breadth of its current scope. In the case of reporting by CIA personnel, it might bring them into internal security or police functions from which they are barred by law. It well may be that such persons would report such violations of Federal law (if not relating to intelligence) as citizens, but they should not be mandated by law to do so as intelligence personnel.

(j)(1) While this provision obviously arises from certain aspects of the recent investigations of the intelligence community, it presents obvious difficulties. In the first place, most of the officers and employees of the intelligence community are not lawyers. In the second place, many of them are not privy at least to certain Presidential directives and memoranda. In the third place, this Section would be an open path to harassment and vendetta by disgruntled employees. In the fourth place, there are no provisions in S. 2525 for its enforcement. We recommend that it be carefully restudied and possibly eliminated. It can be handled by internal regulations. The use of the words "or policy" at line 25 is overly broad.

(k) This section appears to be repetitive of the requirements of many of the provisions already included in Sec. 151 and should be deleted.

Sec. 152 This Section mandates Congressional oversight of the various entities of the intelligence community. Included in the reporting requirements are operational details and implementing regulations, all adding up to a tremendous load of bureaucratic paper. If all these reporting requirements were to be fulfilled, the Intelligence Committees would require a vast amount of additional space for storage purposes. In addition, the security implications of this mass of detailed classified reporting reposing in the committee files, with access not only to the committee members but also to the changing membership of their staffs, is of great concern, as we have indicated in our Statement. However, the result has been a classic case of overkill.

We certainly do not oppose the theory of a more structured congressional oversight than has been in effect during the past thirty years. In fact, a majority of responsible intelligence officials, past and present, welcome it. What is at stake here is a question of degree and security.

We, therefore, strongly recommend that all of the reporting provisions of S. 2525 (with perhaps a few negotiable exceptions) be stricken from this legislation, leaving the oversight requirements in the broad language of Sec. 152.

(a)(1) We suggest the deletion of the word "all" in both lines 6 and 7.

(a)(2) We suggest the substitution of the word "appropriate" for the word "any" at line 14.

(c) The Section requires that "An index of each such record" shall be maintained in the Office of the Federal Register under security standards approved by the DCI. We are opposed to this latter provision on security grounds. While doubtless some of this material could be appropriately included on an unclassified basis, the basic question is, why? It also represents a further erosion of the security of intelligence operations, sources and methods. We therefore recommend the deletion of the last sentence in this section.

(e) We recommend deletion of the last sentence beginning with the word "No" on p. 88, line 24. This would appear to be amply covered by Federal statute on the destruction of records and what is record material.

(f) We recommend that this section be deleted on security grounds. This material can always be made available to the Intelligence Committees at their request, on an ad hoc basis, as the Committee's need arises, under the Committees' broad statutory powers.

(b) We note the use of the word "confidential" at line 18 and suggest the substitution of the word "classified" in lieu thereof. We recommend the deletion of the material commencing with the word "except" at line 20 through the word "members" at line 2, p. 91. This matter is discussed more fully in our Statement.

(c)(1) and (2) For the reasons set forth in our Statement, these subsections should be entirely deleted.

(d) We recommend the deletion of this Section.

Sec. 154 This Section requires that the DCI make publicly available an unclassified annual report on national intelligence activities. Appropriate security safeguards are included in this Section. Again, one questions the necessity of burdening the intelligence community with such a public report. It would appear that the Annual Reports of the Intelligence Committees of the Congress would suffice in this connection and carry more weight with the public. We recommend that Sec. 154 be stricken.

Tab B

TITLE II -- INTELLIGENCE ACTIVITIES AND CONSTITUTIONAL RIGHTS

Sectional Analysis

Part A

Sec. 202	(2)	Delete -- unnecessary and overblown.
Sec. 205	(a)	Delete all after "States" in line 11 to end of sentence -- redundant.

Part B -- Subpart 1

Sec. 211	(b)	Delete last sentence of (b) -- unnecessary red tape.

Part B -- Subpart 2

Sec. 213	(1)	Insert after "be" in line 18 the words "or who may be."
	(2)	Insert after "be" in line 1 the words "or who may be."
	(3)	Insert after "be" in line 6 the words "or which may be."
Sec. 214		Delete after "person" on line 13 through "intelligence" on line 16 -- unnecessary red tape.
	(1)	Insert after "be" in line 17 the words "or who may be."
	(2)	Insert after "be" in line 25 the words "or who may be."
	(4)	Insert after "have" in line 8 the words "or who may have" and at line 10 delete "significant."
Sec. 216	(a)	Delete last sentence -- time limits are not appropriate.
	(b)	Delete entirely.
	(c)	At line 9 delete "one hundred eighty days" and in lieu insert "one year."

Sec. 217		At line 16 delete all after "shall" and insert "take the following into consideration" -- too restrictive.
Sec. 218	(a)	At line 8 delete after "collected" to "by" on line 9.
	(a)(1)	Insert after "be" in line 11 the words "or who may be."
	(a)(2)	Insert after "be" in line 16 the words "or which may be" and insert after "be" in line 19 the words "or who may be."
	(b)	Don't object to thought but why put in law? Delete entirely.
Sec. 219	(1)	Delete "significant" at line 16. Insert "appropriately" in line 17 after "otherwise."
	(2)	Delete entirely -- unworkable.
	(3)	Delete entirely -- why limit to one means so long as all other means used are legal?
Sec. 220		Beginning at line 4 delete "not to exceed ninety days" -- unduly restrictive and after word "be in line 7 insert the words "or who may be."
Sec. 221		Beginning at line 16 delete "for up to ninety days" -- not realistic.
Sec. 222	(c)	Delete sentence beginning at line 24 and at line 1 on p. 114 after "entity" insert the words "or his designee."

Part B -- Subpart 4

Sec. 225		At line 2 delete all after "purposes." Why create this red tape as to foreigners?

Part C

Sec. 231	(a)(6)	Delete at line 22 all after "intelligence" -- why throw away intelligence?
Sec. 232	(a)	In Line 17; error in spelling word "consent."
	(e)(2)	At line 8 after "designee" insert "in coordination with the Director of Central Intelligence."
Sec. 233	(b)	Delete entirely -- unnecessary.

Part D

Sec. 241		Should be reworded. It is one thing to so target and another where proper collection incidentally picks up information on criminal activity.
Sec. 243		This is badly worded -- should be most carefully reworked, or better yet deleted.
Sec. 244	(a)	This must be reworked. As worded would prohibit the FBI from penetrating Tass or Amtorg. All a foreign service needs to do is incorporate in the United States.
Sec. 245	(a)	Beginning at line 4 delete all after "community" through "responsibilities" at line 6. Unnecessary.
Sec. 254		At line 20 delete beginning with "have" through "shall" on line 24.
Sec. 254		Entire section should be deleted. A blanket invitation for law suits and discovery.
Sec. 258		This section is entirely wrong. Until employee is finally convicted for crime which gives rise to civil cause of action the Department of Justice should be required to defend civil suit or provide private counsel at government expense. This should be a right and not dependent on recommendation of agency head.

Part D -- Subpart 3

Sec. 260	(c)	Delete as undesirable limitation on rights of employees.
Sec. 272		Delete all of second sentence.

Tab C

TITLE III -- FOREIGN INTELLIGENCE SURVEILLANCE

Enclosures to Statement

1. Statement by the Legal Advisor to the Association of Former Intelligence Officers, John S. Warner, given before the House Permanent Select Committee on Intelligence on January 17, 1978 concerning H.R. 7308 which is substantially similar to the language of Title III.

2. The views of Robert McClory appearing in The Washington Post on April 19, 1978 concerning this issue. Mr. McClory is the ranking Republican on the House Judiciary Committee and the House Intelligence Committee's legislation subcommittee.

3. The views of Mr. Robert H. Bork on H.R. 7308 appearing in The Wall Street Journal of March 9, 1978. Mr. Bork, former Solicitor General of the U.S., is Chancellor Kent professor of law at Yale University.

4. Editorial from The Washington Star of June 5, 1978 entitled "Control of foreign intelligence."

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STATEMENT OF THE LEGAL ADVISOR TO THE ASSOCIATION OF FORMER INTELLIGENCE OFFICERS, JOHN S. WARNER, BEFORE THE HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE ON PROPOSED LEGISLATION TO GOVERN ELECTRONIC SURVEILLANCE FOR FOREIGN INTELLIGENCE OPERATIONS.

January 17, 19

Mr. Chairman, the Association of Former Intelligence Officers welcomes the opportunity to express its views on this vital legislation, and I personally am pleased at this opportunity to appear before you.

The foreign intelligence obtained through electronic surveillance is of huge and inestimable value to the President, our senior policy makers, and ultimately to the Congress and the American public. At the same time, because of the sources and methods involved, this type of intelligence is one of the most sensitive within the intelligence community. Nothing should be done which would put this means of collection at risk or which would impair the ability of the United States to continue these programs.

I shall speak to H.R. 7308 which we basically support. It establishes workable statutory guidelines for the intelligence community and provides necessary and desired protection for the rights of Americans. There are several areas where we believe the Bill should be modified without in any way decreasing the protection afforded Americans. The first of these is the requirement for a judicial warrant to obtain foreign intelligence by electronic surveillance of foreign governments or foreign entities that are directed by foreign Intelligence services. Such a requirement meets no demonstrated need -- to my knowledge there have been no findings of abuse.

It is well settled that the President has the inherent constitutional power to conduct electronic surveillance for national security purposes. It is the stretching of the meaning

of the words "national security" involving Americans which is the abuse to be corrected, and the provisions of this Bill appear well suited to this purpose. In the area of collecting foreign intelligence from foreigners by electronic surveillance, placing restrictions on the President's constitutional power with no benefits to the rights of Americans is a disservice to the country and to some degree a weakening of the ability of the Executive Branch to carry out its defense and foreign affairs responsibilities. The clandestine collection of intelligence is a matter which the judiciary historically has held to be reserved solely to the Executive. In Totten v. United States, 92 U.S.R. 105, 1872, a former Union spy attempted to collect additional pay by filing suit. The Supreme Court held that no such suit could be maintained since secrecy in the clandestine procurement of information is of the essence, and therefore "public policy forbids the maintenance of any suit the trial of which will inevitably lead to the disclosure of matters which the law regards as confidential..." In other words, the Court said it had no jurisdiction over intelligence activities. Totten has been cited and relied upon repeatedly in court opinions (and in recent years).

In United States v. Brown, 484 F2d 418 (1973), the Fifth Circuit Court of Appeals stated, "Restrictions upon the President's power which are appropriate in cases of domestic security become artificial in the context of the international sphere." In that same case, the Court goes on to say that its holding "...is buttressed by a thread which runs through the Federalist Papers:

that the President must take care to safeguard the nation from possible foreign encroachment, whether in its existence as a nation or in its intercourse with other nations."

Furthermore, involving the courts in this process carries substantial risks of compromise of highly sensitive intelligence sources and methods. It is axiomatic that the more people who have access to sensitive information, the greater the risk of unauthorized disclosure. Speaking of disclosing classified documents, even though in an in-camera proceeding, the U.S. Court of Appeals for the Fourth Circuit said, "It is not to slight judges, lawyers or anyone else to suggest that any such disclosure carries with it serious risk that highly sensitive information may be compromised. In our own chambers, we are ill equipped to provide the kind of security highly sensitive information should have."--Knopf v. Colby, 509 F.2d 1362 (1975).

Contuing for the moment our review of the judiciary - attempting to rule on foreign intelligence activities involving only foreigners, one must ask, What expertise, body of experience and knowledge of intelligence requirements would judges rely on to approve or disapprove a request of the Executive Branch to conduct an electronic surveillance operation? There are extremely complex inter-agency relationships involving consumers, collectors and analysts of intelligence information which determine requirements for collection. The entire picture of this process and the substantive intelligence information involved simply cannot be capsuled in an application for a judicial warrant. In many cases, the need for information is prgmised on ongoing political

negotiations with other nations which are not the province of the judiciary. The U.S. Supreme Court spoke to such issues in the well-known Chicago and Southern Air Lines and Waterman Steamship Corporation case, 333 U.S. 103 (1948). "But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial.... They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." In short, can the courts make worthwhile value judgments? The answer is that they can't. A court approval in this sensitive area would merely be window dressing and a disapproval would be an improper intrusion into the sole province of the Executive. The same court said, "It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

My next point concerns the definition of electronic surveillance contained in the proposed new section 2521 (b)(6)(D). This could cover monitoring devices of all types such as cameras, television and even binoculars. By definition, the words "other than from a wire or radio communication" renders this type of acquisition non-germane to an electronic surveillance bill and the legal issues are quite different. This subsection should be dropped and if there is a problem it should be studied elsewhere.

We also have trouble with the use of the word "essential" in the proposed section 2521 (b)(5)(B) insofar as it is applicable to foreign targets. We see no reason to apply so rigid a standard as opposed to, for example, "relevant" when dealing with foreigners. There is, in our opinion, no logical reason to so restrict foreign intelligence collection. What is merely "relevant" when seeking information can be extremely important when collected and analyzed.

In order not to prolong this presentation with a number of other suggestions, I would like to say that we have other suggestions for changes that coincide with the detailed recommendations made by Deputy Under Secretary of Defense for Policy, Daniel J. Murphy before this Committee on January 10, 1978. We endorse those recommendations.

In summary, we urge that non-existent problems not be solved by inhibiting the collection of foreign intelligence and creating serious risks of compromise of intelligence sources and methods with grave harm to the national effort.

Thank you. I shall be glad to attempt to answer any questions.

[Views of Hon. Robert McClory appearing in the Washington Post on Apr. 19, 1978]

An Unreasonable Bill On Reasonable Searches

The writer, a representative from Illinois, is the ranking Republican on the Judiciary Committee and the Intelligence Committee's legislation subcommittee.

I read with interest The Post's April 14 editorial regarding a bill to regulate national security electronic surveillance. However, the editorial confused a number of key issues, and by that confusion came to a less than proper conclusion.

It is true that past administrations have "insisted that there is a constitutional difference between searches for intelligence data and for evidence of a crime," and therefore no warrant is required to authorize the former. But one must go on to note that three U.S. courts of appeals—the only ones to have directly ruled on this issue—have confirmed that a warrant is not a prerequisite to the gathering of foreign intelligence. The fourth amendment does not itself require a warrant in all cases. rather, it insures "the right of the people to be secure * * * against unreasonable searches and seizures." The issue then becomes what is reasonable in the foreign-intelligence arena.

When the executive branch is truly acting to gather foreign intelligence, even without a warrant it is acting within fourth amendment proscriptions because it is doing something that is constitutionally reasonable. The fourth amendment was adopted as a reaction to the wide-open, general searches allowed under the British writs of assistance and general warrants. Those writs, which were first issued to enforce import restrictions, were ultimately used by the British government to repress political dissent of Englishmen in the colonies.

The fourth amendment, adopted soon after our Constitution was ratified, was framed to prevent the new central government from acting in an overbearing fashion to quell domestic political activities. It was never contemplated that that restriction would be used to inhibit executive branch actions in the international sphere. As Judge Albert V. Bryan Jr. stated in his recent opinion in the Humphrey/Truong espionage case, to require a warrant for foreign-intelligence electronic surveillance "would frustrate the president's ability to conduct affairs in a manner that best protects the security of our Government."

Because our Government needs accurate information to protect our country from the hostile acts of foreign powers, it is necessary to engage in electronic surveillance of the agents of such powers. That is true if the agents are foreigners, as well as in the rare situation that an American citizen is working clandestinely for a foreign power. It would be inappropriate to go beyond the fourth amendment mandate by requiring a judicial role in such matters, for the issues involved are not susceptible to right-or-wrong, judicial-type reasoning.

Decisions in this area demand complex trade-offs and difficult balancing of priorities. Again quoting Judge Bryan, "It is not at all certain that a judicial officer, even an extremely well-informed one, would be in a position to evaluate the threat posed by certain actions undertaken on behalf of or in collaboration with a foreign state."

As envisioned by the Framers of our Constitution, the legislative and executive were to be the political branches, subject to the electorate from time to time. On the other hand, the Framers insulated the judicial branch from political considerations by granting judges life tenure. The former two are to formulate policies, while the courts are assigned the task of resolving cases and controversies by making reference to those policies. That structure should be abided by—and with particular good reason—in the area of national security. As Justice Jackson wrote for the Supreme Court in *Chicago Southern* v. *Waterman Steamship Company*, the issues involved "are delicate [and] complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil."

TAKING EXCEPTION

Finally, it should be seen that by shifting from the president to the judiciary the responsibility to authorize foreign-intelligence electronic surveillance, the courts become a buffer to executive accountability. If an intelligence agency wants to use electronic surveillance for an improper purpose, an application can be made to a court for authorization. The worst that can happen during the secret proceding is that the application will be denied. But, it appears inevitable that some judges—perhaps by granting too much deference to the intelligence community—might give approval to abusive actions. No matter how clear the mistake might appear upon a more detailed analysis, no executive branch official could be called to task for the abuse. Anyone questioned need only make use of the court order as a shield.

The legislative branch is the proper arm of government to serve as a check on executive discretion in this area. Indeed, President Carter endorsed the concept of strong congressional oversight when he backed the creation in both the House and Senate of the intelligence committees. Adequate privacy protection can be provided without resort to the courts by a law that would explicitly regulate when the Government could engage in foreign-intelligence electronic surveillance. Compliance with those statutory provisions would be monitored by the congressional intelligence committees, and anyone found to have committed a violation would be subject to civil and criminal liability. That approach, embodied in an alternative measure that I have sponsored (H.R. 9745), would better balance the right of Americans to be protected from overreaching activities of their own government and from the activities of any foreign governments that could be inimical to the very existence of the United States.

[Views of Mr. Robert H. Bork on H.R. 7308 appearing in the Wall Street Journal of Mar. 9, 1978]

REFORMING FOREIGN INTELLIGENCE

The proposed Foreign Intelligence Surveillance Act reflects a certain lightheadedness about the damage the reform will do to indispensable constitutional institutions.

Periods of sin and excess are commonly followed by spasms of remorse and moralistic overreaction. That is harmless enough; indeed, the repentance of the hungover reveller is standard comic fare. In Washington, however, politicians are apt to repent only the sins of others, and matters become rather less humorous when the moral hangover is written into laws that promise permanent damage to constitutional procedures and institutions.

As expiation for Vietnam, we have the War Powers Resolution, an attempt by Congress to share in detailed decisions about the deployment of U.S. armed forces in the world. It is probably unconstitutional and certainly unworkable. But politically the resolution severely handicaps the President in responding to rapidly developing threats to our national interest abroad. We have, as atonement for illegalities in fund raising for the 1972 campaign, the Federal Election Campaign Act, which limits political expression and deforms the political process. The Supreme Court held that parts of this act violate the first amendment and probably should have held that all of it does.

Now, in response to past excesses by our intelligence agencies, we have H.R. 7308, the proposed Foreign Intelligence Surveillance Act. (A similar bill is out of committee in the Senate.) Like the other two "reforms" it reflects an unwillingness to recognize that existing processes worked and do not require reform, as well as a certain lightheadedness about the damage the reform will do to indispensable constitutional institutions.

The purpose of H.R. 7308 is to lodge in the federal courts the final power to decide when electronic surveillance of American citizens and lawfully admitted aliens may be done to gather foreign intelligence information important to national security.

Since Franklin Roosevelt at least, every President has claimed the constitutional authority to order such surveillances without a court order. That power has been derived from the President's role under article II of the Constitution as Commander-in-Chief and officer primarily responsible for the conduct of foreign affairs. The judicial warrant requirement of the fourth amendment, never an absolute in any case, was thought inapplicable because of the fundamental dissimilarity of intelligence gathering and criminal investigation with prosecution in mind.

A LOT OF SECRECY

H.R. 7308 provides that the Chief Justice of the United States will publicly designate at least one judge from each of the 11 federal circuits to sit on a special court. Two judges at a time will come to Washington. Warrant applications may be made to either. The Chief Justice will publicly designate six other judges to sit in panels of three to hear government appeals from warrant denials. The Government may petition for review by the Supreme Court if turned down by the special court of appeals. All hearings, including presentations to the Supreme Court, will be secret; the rulings will be secret; and the Government will be the only party represented.

Each application requires the approval of the Attorney General or his designee and a certification by a high presidential appointee working in the area of national security or defense. Persons to be targeted for surveillance, the means to be used, minimization of the surveillance and close control of the information obtained are provided for.

The most stringent protections are provided for targeting American citizens and aliens lawfully admitted for permanent residence. There must be probable cause to believe they are agents of a foreign power. The bill may also require reason to believe that a crime may be committed.

Much of this tracks existing executive branch practice. The political appeal of the bill lies in the introduction of judges and warrants. That is also its major flaw. Procedures appropriate to criminal contexts, where, say, a wiretap is sought to gather evidence to prosecute narcotics smugglers, are not easily transferred to foreign intelligence, where, for example, radio transmissions from hostile powers' establishments in the country are to be monitored with no thought of prosecution.

The difference in context may mean, for one thing, that the law would be unconstitutional. If warrantless surveillance for foreign intelligence is a presidential power under article II (the only two courts of appeals required to decide the issue held that it is, but the point is unsettled), Congress probably has no authority to require warrants.

Moreover, the attempt to give the Supreme Court an essentially administrative role in intelligence gathering may run afoul of article III of the Constitution. It is somewhat as if Judge Webster was empowered to run the FBI while remaining on the bench. The job is managerial, not judicial, and the two should not be mixed.

There are and can be no judicial criteria for making decisions about the needs of foreign intelligence, and judges cannot become adequately informed about intelligence to make the sophisticated judgments required. To do an adequate job, they would have to be drawn fully into intelligence work, which is not the point of this enterprise. To suppose that they would defer to the superior expertise of the agencies is either to confess the safeguards will not work or to underestimate the strength of the tendency displayed by the judiciary in recent years to take over both legislative and executive functions.

The requirement that a crime be in the offing would eliminate our ability to learn of foreign intelligence activities vital to our national interests but which violate no federal criminal law.

The law would almost certainly increase unauthorized disclosures of sensitive information simply by greatly widening the circle of people with access to it. In some cases as many as 13 judges, their clerks, and secretaries would share knowledge. If opinions—required only when warrants are denied—are circulated, or if the judges consult one another, a minimum of 26 judges will have top-secret information. Disclosures are not merely intelligence calamities; they may lead to foreign relations debacles as well. Electronic surveillance is known by everyone to exist, but its public disclosure may be hard to ignore, just as Khrushchev could ignore the U-2, until it was shot down.

The element of judicial secrecy is particularly troubling. Because it reverses our entire tradition, it is difficult to think of secret decisions as "law." The assertion that this bill would ensure that foreign intelligence electronic surveillance was conducted according to "the rule of law" is, therefore, misleading. The bill pretends to create a real set of courts that will bring "law" to an area of discretion. In reality, it would set apart a group of judges who must operate largely in the dark and create rules known only to themselves. Whatever that may be called, it debases an important idea to term it the rule of law; it is more like the uninformed, unknown and uncontrolled exercise of discretion.

The statute would, moreover, present some judges with an impossible dilemma. Suppose that the Supreme Court splits, say five-to-four, in granting a warrant. If the dissenting Justices felt that the decision and others it presages deny basic constitutional rights of Americans, what are those Justices to do? Must they remain stoically silent about what they believe to be the secret destruction of rights they are sworn to uphold? Should they publish a full opinion and damage national security? Or should they perhaps state publicly that constitutional freedoms are being destroyed but they are not at the moment at liberty to explain how? They appear to have a choice between behavior that is dishonorable or fatuous. That is an intolerable moral and constitutional position in which to place judges.

DIMINISHING EXECUTIVE RESPONSIBILITY

The law seems certain as well to diminish substantially the responsibility and accountability of the executive branch. To take the extreme but not improbable case, if even one judge proves excessively lenient, the government can go to him in all doubtful, or even improper, cases. Since there is no adverse party to appeal, the "rule of law" will be the temper of one district judge, unknown to the other judges and the Supreme Court.

Whether or not there is such a judge, what can the Congress do if it comes to think the surveillance power granted has been abused? Can a congressional committee summon before it for explanation the judges, perhaps including some members of the Supreme Court, who approved the warrants? I should think certainly not. Can we expect successful criminal or civil actions against the officials who, following statutory procedures, obtained warrants from the judges? That seems hardly likely.

When an attorney general must decide for himself, without the shield of a warrant, whether to authorize surveillance, and must accept the consequences if things go wrong, there is likely to be more care taken. The statute, however, has the effect of immunizing everyone, and sooner or later the fact will be taken advantage of. It would not be the first time a regulatory scheme turned out to benefit the regulated rather than the public.

The intelligence abuses of the past were uncovered through existing processes of investigation. One response was the detailed regulations governing electronic surveillance promulgated by then Attorney General Edward Levi. These are fully as sensitive to fourth amendment protections against unreasonable searches and seizures of communications as this bill is, and likely to be as effective. The intelligence officer reckless enough to ignore those regulations and subject himself to criminal liability would be reckless enough to bypass the warrant requirement of the proposed statute as well.

[Editorial From Washington Star of June 5, 1978]

Control of Foreign Intelligence

We suggested, not long ago, that in its quest for ways to prevent future abuse of the "foreign intelligence" surveillance function, Congress is in the grip of a fixed idea. The fixed idea is that judges and warrants are the right answer.

That notion completely controlled the Senate deliberations, which ended in near-unanimous passage of a bill replacing traditional presidential discretion with a warrant-issuing procedure by specially designated Federal judges. It has also controlled House deliberations, for the most part.

It is our hope, however, that the House will take a deeper look. Basic issues, not only of national security itself but of constitutional checks and balances, are involved. The House Select Committee on Intelligence has now examined its own Foreign Intelligence Surveillance Act (H.R. 7308), contenting itself with the conventional wisdom that judges are the answer.

But there is a chance, albeit a shaky one that the House Judiciary Committee might also get into the act. The Senate's bill has been referred to it.

The Judiciary Committee may not exercise jurisdiction, since it has already examined the bill formally before; and even if it does so, it may not examine alternatives to judicial control of foreign intelligence wiretapping. Yet, as we understand the situation, some senior members of the Judiciary Committee are making the case to Chairman Peter Rodino that it should do both things.

The main issue here is easily stated. It is readily agreed—and the view has Supreme Court sanction now—that any electronic surveillance for domestic intelligence (surveillance likely to involve American citizens and suspected criminal acts almost exclusively) should be undertaken only with court-issued warrants.

The question is whether that rule should also properly apply to foreign-intelligence surveillance. The conventional view on Capitol Hill is that it should. But several knowledgeable students of the issue—including former Solicitor General Robert Bork, Rep. Robert McClory of Illinois and former Deputy Attorney General Laurence Silberman—have made a persuasive case that the rule need not and should not apply.

Their argument, complex as it is, can briefly be summarized: Judicial control of foreign intelligence surveillance, especially if it adheres to a "criminal standard," might give us the worst of both worlds. On the one hand it would severely limit the intelligence-gathering capacity of the president when suspected criminal acts were not at issue: that is, when information rather than evidence for possible indictment is sought. On the other hand, it would involve Federal Judges in a matter as to which their knowledge, experience and perspective—and traditional constitutional role—are incomplete or irrelevant. "The task of the judiciary under this legislation," as Mr. Silberman told the House Intelligence Committee last winter, "seems much closer to rendering the traditionally prohibited advisory opinion than to the constitutionally sound adjudication of cases and controversies."

And this is not to mention the entirely arguable proposition that the discretionary control of foreign-intelligence gathering is within the implied constitutional powers of the Commander-in-Chief, hence not subject to abridgment by Congress.

What then, one might ask, of past and future abuses of the surveillance power? Have they not been serious, and might they not be serious again? Certainly.

But no system for monitoring this executive function, whether by judges or otherwise, is likely to be fool-proof. The American electorate unavoidably confides vast discretion to any president, including discretion over the nuclear arsenal, relying on his basic character and integrity as a safety device. And if a bomb, why not a wiretap? For that matter, a president faced with a legal technicality that precludes some form of secret intelligence-gathering that seems to him essential to national security will probably prefer the lesser evil of winking at the legal technicality; and should.

But the public is not without protection. Two powerful new deterrents have entered the picture. Both Houses of Congress have established permanent intelligence committees, whose duty and mandate it is to check abuses and excesses. Additionally, we have learned in recent years the power of exposure as a check on mischievous abuse of the executive power. It is, as Mr. Silberman says, "the single most important deterrent to executive branch malfeasance." Would a few designated judges, acting in areas they are given but dimly and partially to understand, improve on that deterrent?

The issue seems to us of sufficient gravity to prompt the House to pause from any headlong plunge into judicial control and weigh the alternatives anew—weigh them with both the integrity of the judiciary and the larger aims of foreign intelligence in mind. Perhaps such a consideration, for which the House Judiciary Committee is best equipped, would not result in a turning away from the conventional wisdom. But at least deeper, and largely unexplored, issues will have been fully aired for the first time.

Tab D

TITLE IV -- CENTRAL INTELLIGENCE AGENCY

Sectional Analysis

Part A

Sec. 402 (2) At line 24 insert after intelligence the words "and special".

(3) Insert the word "and" after "intelligence" at line 3 and delete "and counterterrorism" at line 4 after the word "intelligence."

(4) Delete the comma after the word "President" at line 9 and insert the word "and" in lieu. Delete the comma and the words "and the people of the United States" after the word "Congress" at line 10. Delete the comma after the word "intelligence" at line 11 and insert the word "and" in lieu; delete the comma and the words "and counterterrorism" at line 11. Delete all after "States" in line 14.

Part B

Sec. 411 It is inappropriate to establish in S. 2525 the CIA which has been established in law since September 18, 1947. Delete.

Sec. 412 (a) The head of the agency is already provided for by law [102(a) NSA]. Disagree with words to establish DNI, DDNI, or Assistant DNI. Delete.

(b) Delete all after word "States" in line 23 to end of subsection.

Sec. 413 (b)(2) "foreign persons" not defined -- why not other than "United States person" as defined at Sec. 104(31).

(c) Delete "the Congress" in line 5 and delete all after the word "agencies" in line 6.

(e) Delete "and counterterrorism" in line 13, line 17 and line 21.

(f) Delete "act as the Director of National Intelligence's agent in the coordination of" and substitute "coordinate." Delete counterterrorism" in line 24 and the word "of" in line 24.

(g)(2) At line 8 substitute "National Security Council" for "Director of National Intelligence."

	(g)(3)	At line 11, delete "in coordination with the Director National Intelligence."
	(g)(4)	At line 16, delete "or counterterrorism intelligence" and insert "or" at line 15 after the word "intelligence."
	(g)(5)	Delete entirely.
	(h)(1)	Insert "clandestine" in line 21 before "collection."
	(h)(2)	At line 11, delete references to the two select committees. Also delete "and the Attorney General" at line 3.
Part C Sec. 421	(a)(1)	Delete entirely; retain Sec. 5(a) of CIA Act of 1949.
	(a)(2)	Delete entirely; retain Sec. 5(b) of CIA Act of 1949.
	(a)(3)	Delete entirely; retain Sec. 5(c) of CIA Act of 1949.
	(a)(4)	Delete entirely; retain Sec. 5(c) of CIA Act of 1949.
	(a)(5)	Delete entirely; retain appropriate parts of Sec. 5(e) and 8(a) of CIA Act of 1949.
	(a)(6)	Expand to include employees, consultants, employees of contractors and others who will receive classified CIA information.
	(a)(8)	At line 11 insert after "perform" the words "for the Agency."
	(a)(9)	Delete after "maintain" in line 13 through "Intelligence" in line 14.
	(a)(11)	Delete as being redundant.
	(a)(13) - (14)	Delete; retain appropriate parts of Sec. 8(a) of CIA Act of 1949.
	(a)(16)	Delete entirely; retain appropriate language of Sec. 8(a) of CIA Act of 1949.
	(b)	Delete; unnecessary; see (a)(1) above.
	(c)	Delete; see (a)(3) and (4) above.
	(d)(1)	Delete; not necessary, existing law covers.
	(d)(2)	Delete; unnecessary red tape.

(e) This could be good, as extended to other subsections depending upon final structuring of Title IV.

(f) Delete; retain Sec. 2 of CIA Act of 1949.

(g) Delete; retain Sec. 6 of CIA Act of 1949.

(i) At line 18 after "States" insert "or elsewhere, for guard purposes, for protection of classified information,". At line 20 delete beginning with "National" through "National" at the end of line 20 and insert "Central Intelligence and the Deputy Director of Central."

(j)(1) The figure V in line 14 should be III.

(j)(2) Addition of "or the security clearance of any contractor of the Agency or any employee of any such contractor" is good. Delete "of the natural security." Reporting requirement to two Committees should be deleted. Why not just keep Sec. 102(c) of the NSA of 1947 with the addition?

(j)(3) Delete.

(j)(4) Delete and why not retain Sec. 102(c) of the NSA of 1947?

Sec. 422 (a) Substantially same as 8(a)(1) and (2) of CIA Act of 1949 which could be retained and delete in proposed bill.

(b) Re-write of Sec. 3(a)(b)(c)(d) of CIA Act of 1949. Delete reporting requirement to two committees.

(c) This is new and probably helpful, but exercise of such authority only in accord with "Sec. 139 of this Act" (making contactor witting) should be deleted.

[All of Sec. 422 should be reviewed in detail with procurement experts.]

Sec. 423 (1) Should be broadened to cover others such as people to whom CIA classified information will be imparted or having relationships with the Agency.

(6) Delete as unnecessary.

Sec. 424 Exists as Sec. 7 of CIA Act of 1949. Why repeat? Delete and retain existing law.

Sec. 425 (a) This should be considered in conjunction with Sec. 422(a) as both relate to Sec. 8 of CIA Act of 1949. Probably could be deleted. This would appear to be best handled by the permanent "authorizing" language presently set forth in Sec. 8 of the CIA Act of 1949. This does not mean that the Intelligence Committees should not set the annual budget ceiling and personnel strength limits. Nor does it means that these Committees not be apprised, for review, acceptance or rejection, of major intelligence activities. This is a key factor in valid Congressional oversight. But when this Committee speaks of giving "strong legislative guidance and direction" (S. Rept. No. 95-744, p. 3) it tends to intrude on the Constitutional powers of the Executive, and engages in management rather than oversight -- again a Constitutional question. The security aspects of "authorizing" language are great, even when contained in a classified Committee Report. That is one reason why the present permanent general "authorization" language was adopted in the 1949 Act. To quote the language of S. Rept. No. 106 (10 March 1949) in regard to the "authorizing" language of (now) Sec. 8 of the CIA Act of 1949:

> "[This] establishes a point of reference to which the administration and fiscal officers of the Agency and other appropriate officers of the Government may look to determine what expenditures are authorized for the activities of the Agency. It permits sums made available to the Agency to be expended for the purposes set forth in the section. The section is necessary in view of the requirements of existing law or Comptroller General's decisions, which specify that such expenditures are not permissible unless authorized by laws."

We recommend that "authorizing" language be handled with informal procedures similar to those presently existing.

(b) This is 8(b) of CIA Act of 1949 -- why re-enact? Again, the question of authorization. The very purpose of confidential funds is, under security safeguards, to facilitate clandestine activities in situations as diverse as there are human beings. No authorization law could anticipate all the myriad situations calling for expenditure of funds in conducting espionage.

	(c)(1)	Delete line 21 and insert "lawfully made available to the Central Intelligence Agency."
		(B) Delete as unnecessary; although in accord with existing procedure, why not have it remain as such.
		(C) Delete "and the activities to be funded are authorized by law."
Sec. 426	(a)	General Counsel should not be appointed by President, by and with the advice and consent of the Senate.
	(a)(1)	Should not require General Counsel to review "all activities." He then would be duplicating the IG.
	(a)(3)	See comments of Sec. 151.
	(b)(2)	"General Council" should be "General Counsel."

Part D

Sec. 431	(a)	Entire section should be deleted -- is covered by general law -- Director should not be able to waive. No known abuse to correct.
	(b)	$20,000.00 is a bit steep and not consistent with similar laws.
	(c)(1)	Title is inconsistent with text, which should be broadened to include agents. Insert at line 15 after "Agency," the words "or other person." Also, delete lines 19 through the word "Agency" at line 23. The elements of the crime should be revealing identity of a person under cover, not that such revelation resulted in injury or jeopardized the safety of such person, or could have been expected to do so.
Sec. 432	(b)	At line 16, delete all after "functions." Otherwise language is verbatim from Sec. 102(d)(3) of NSA Act of 1947 -- why not keep?

Part E

Sec. 441		Will not comment in detail on these provisions, but will leave to the technical experts.
	(c)	This is excellent provision and will assist materially. Do question sub-section (3) requiring proposed Executive order to lay-over with the Congressional committees having jurisdiction over subject matter for 60 days. Issues are the principle of 60 day lay-over and exclusive jurisdiction of two Select Committees.

27-462 O - 78 -- 20

(d) Don't believe language accomplishes objective and reports to two committees should be deleted. Why not "similar" for equivalent in line 1, p. 208?

Sec. 442 See no reason why this is included. Delete.

Part F

Sec. 451 If our comment on Sec. 411 is valid, then none of Sec. 451 is necessary.

Sec. 452 Comments on this Section are dependent upon structuring of this bill. Strong view that neither Sec. 102 of NSA Act of 1947 nor the CIA Act of 1949 should be repealed in their entirety.

Tab D-1

TITLE IV -- CENTRAL INTELLIGENCE AGENCY

Enclosure to Statement

Copy of

Message

from

The President of the United States

to the Congress of the United States

on February 18, 1976

containing a proposed Bill to establish criminal sanctions for the unauthorized disclosure of intelligence sources and methods and authorizing the Attorney General to seek an injunction from the courts to prevent such unauthorized disclosure.

94th Congress, 2d Session . . . . . House Document No. 94-374

ORGANIZATION AND CONTROL OF THE FOREIGN INTELLIGENCE COMMUNITY

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

PROPOSALS FOR IMPROVING THE ORGANIZATION AND CONTROL OF THE FOREIGN INTELLIGENCE COMMUNITY, TOGETHER WITH A REPORT ON ACTIONS ALREADY TAKEN BY EXECUTIVE ORDER

FEBRUARY 18, 1976.—Message and accompanying papers referred to the Committee of the Whole House on the State of the Union and ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

87-011 WASHINGTON : 1976

To the Congress of the United States:

By virtue of the authority vested in me by Article II, Sections 2 and 3 of the Constitution, and other provisions of law, I have today issued an Executive Order pertaining to the organization and control of the United States foreign intelligence community. This order establishes clear lines of accountability for the Nation's foreign intelligence agencies. It sets forth strict guidelines to control the activities of these agencies and specifies as well those activities in which they shall not engage.

In carrying out my Constitutional responsibilities to manage and conduct foreign policy and provide for the Nation's defense, I believe it essential to have the best possible intelligence about the capabilities, intentions and activities of governments and other entities and individuals abroad. To this end, the foreign intelligence agencies of the United States play a vital role in collecting and analyzing information related to the national defense and foreign policy.

It is equally as important that the methods these agencies employ to collect such information for the legitimate needs of the government conform to the standards set out in the Constitution to preserve and respect the privacy and civil liberties of American citizens.

The Executive Order I have issued today will insure a proper balancing of these interests. It establishes government-wide direction for the foreign intelligence agencies and places responsibility and accountability on individuals, not institutions.

I believe it will eliminate abuses and questionable activities on the part of the foreign intelligence agencies while at the same time permitting them to get on with their vital work of gathering and assessing information. It is also my hope that these steps will help to restore public confidence in these agencies and encourage our citizens to appreciate the valuable contribution they make to our national security.

Beyond the steps I have taken in the Executive Order, I also believe there is a clear need for some specific legislative actions. I am today submitting to the Congress of the United States proposals which will go far toward enhancing the protection of true intelligence secrets as well as regularizing procedures for intelligence collection in the United States.

My first proposal deals with the protection of intelligence sources and methods. The Director of Central Intelligence is charged, under the National Security Act of 1947, as amended, with protecting intelligence sources and methods. The Act, however, gives the Director no authorities commensurate with this responsibility.

Therefore, I am proposing legislation to impose criminal and civil sanctions on those who are authorized access to intelligence secrets and who willfully and wrongfully reveal this information. This legislation is not an "Official Secrets Act", since it would affect only those who improperly disclose secrets, not those to whom secrets are disclosed. Moreover, this legislation could not be used to cover up abuses and

improprieties. It would in no way prevent people from reporting questionable activities to appropriate authorities in the Executive and Legislative Branches of the government.

It is essential, however, that the irresponsible and dangerous exposure of our Nation's intelligence secrets be stopped. The American people have long accepted the principles of confidentiality and secrecy in many dealings—such as with doctors, lawyers and the clergy. It makes absolutely no sense to deny this same protection to our intelligence secrets. Openness is a hallmark of our democratic society, but the American people have never believed that it was necessary to reveal the secret war plans of the Department of Defense, and I do not think they wish to have true intelligence secrets revealed either.

I urge the adoption of this legislation with all possible speed.

Second, I support proposals that would clarify and set statutory limits, where necessary, on the activities of the foreign intelligence agencies. In particular, I will support legislation making it a crime to assassinate or attempt or conspire to assassinate a foreign official in peacetime. Since it defines a crime, legislation is necessary.

Third, I will meet with the appropriate leaders of Congress to try to develop sound legislation to deal with a critical problem involving personal privacy—electronic surveillance. Working with Congressional leaders and the Justice Department and other Executive agencies, we will seek to develop a procedure for undertaking electronic surveillance for foreign intelligence purposes. It should create a special procedure for seeking a judicial warrant authorizing the use of electronic surveillance in the United States for foreign intelligence purposes.

I will also seek Congressional support for sound legislation to expand judicial supervision of mail openings. The law now permits the opening of United States mail, under proper judicial safeguards, in the conduct of criminal investigations. We need authority to open mail under the limitations and safeguards that now apply in order to obtain vitally needed foreign intelligence information.

This would require a showing that there is probable cause to believe that the sender or recipient is an agent of a foreign power who is engaged in spying, sabotage or terrorism. As is now the case in criminal investigations, those seeking authority to examine mail for foreign intelligence purposes will have to convince a federal judge of the necessity to do so and accept the limitations upon their authorization to examine the mail provided in the order of the court.

Fourth, I would like to share my views regarding appropriate Congressional oversight of the foreign intelligence agencies. It is clearly the business of the Congress to organize itself to deal with these matters. Certain principles, however, should be recognized by both the Executive and Legislative Branches if this oversight is to be effective. I believe good Congressional oversight is essential so that the Congress and the American people whom you represent can be assured that the foreign intelligence agencies are adhering to the law in all of their activities.

Congress should seek to centralize the responsibility for oversight of the foreign intelligence community. The more committees and sub-

committees dealing with highly sensitive secrets, the greater the risks of disclosure. I recommend that Congress establish a Joint Foreign Intelligence Oversight Committee. Consolidating Congressional oversight in one committee will facilitate the efforts of the Administration to keep the Congress fully informed of foreign intelligence activities.

It is essential that both the House and the Senate establish firm rules to insure that foreign intelligence secrets will not be improperly disclosed. There must be established clear process to safeguard these secrets and effective measures to deal with unauthorized disclosures.

Any foreign intelligence information transmitted by the Executive Branch to the Oversight Committee, under an injunction of secrecy, should not be unilaterally disclosed without my agreement. Respect for the integrity of the Constitution requires adherence to the principle that no individual member, nor committee, nor single House of Congress can overrule an act of the Executive. Unilateral publication of classified information over the objection of the President, by one committee or one House of Congress, not only violates the doctrine of separation of powers, but also effectively overrules the actions of the other House of Congress, and perhaps even the majority of both Houses.

Finally, successful and effective Congressional oversight of the foreign intelligence agencies depends on mutual trust between the Congress and Executive. Each branch must recognize and respect the rights and prerogatives of the other if anything is to be achieved.

In this context, a Congressional requirement to keep the Oversight Committee "fully" informed is more desirable and workable as a practical matter than formal requirements for notification of specific activities to a large number of committees. Specifically, Section 662 of the Foreign Assistance Act, which has resulted in over six separate committee briefings, should be modified as recommended by the Commission on the Organization of the Government for the Conduct of Foreign Policy, and reporting should be limited to the new Oversight Committee.

Both the Congress and the Executive Branch recognize the importance to this Nation of a strong intelligence service. I believe it urgent that we take the steps I have outlined above to insure that America not only has the best foreign intelligence service in the world, but also the most unique—one which operates in a manner fully consistent with the Constitutional rights of our citizens.

GERALD R. FORD.

THE WHITE HOUSE, *February 18, 1976.*

A BILL To amend the National Security Act of 1947, as amended, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 102 of the National Security Act of 1947, as amended, (50 U.S.C.A. 403) is further amended by adding the following new subsection (g):

(g) In the interests of the security of the foreign intelligence activities of the United States, and in order further to implement the proviso of section 102(d)(3) of the Act that the Director of Central

Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure—

(1) Whoever, being or having been in duly authorized possession or control of information relating to intelligence sources and methods, or whoever, being or having been an officer or employee of the United States, or member of the Armed Services of the United States, or a contractor of the United States Government, or an employee of a contractor of the United States Government, and in the course of such relationship becomes possessed of such information imparts or communicates it by any means to a person not authorized to receive it or to the general public shall be fined not more than $5,000 or imprisoned not more than five years, or both;

(2) For the purposes of this subsection, the term "information relating to intelligence sources and methods" means any information, regardless of its origin, that is classified pursuant to the provisions of a statute or Executive order, or a regulation or a rule issues pursuant thereto as information requiring a specific degree of protection against unauthorized disclosure for reasons of national security and which, in the interest of the foreign intelligence activities of the United States, has been specifically designated by a department or agency of the United States Government which is authorized by law or by the President to engage in foreign intelligence activities for the United States as information concerning—

(A) methods of collecting foreign intelligence;

(B) sources of foreign intelligence, whether human, technical, or other; or

(C) methods and techniques of analysis and evaluation of foreign intelligence.

(3) A person who is not authorized to receive information relating to intelligence sources and methods is not subject to prosecution for conspiracy to commit an offense under this subsection, or as an accomplice, within the meaning of sections 2 and 3 of Title 18, United States Code, in the commission of an offense under this subsection, unless he became possessed of such information in the course of a relationship with the United States Government as described in paragraph (1): *Provided, however,* That the bar created by this paragraph does not preclude the indictment or conviction for conspiracy of any person who is subject to prosecution under paragraph (1) of this subsection.

(4) It is a bar to prosecution under this subsection that:

(A) at the time of the offense there did not exist a review procedure within the Government agency described in paragraph (2) of this subsection through which the defendant could obtain review of the continuing necessity for the classification and designation;

(B) prior to the return of the indictment or the filing of the information, the Attorney General and the Director of Central Intelligence did not jointly certify to the court that the information was lawfully classified and lawfully designated pursuant to paragraph (2) at the time of the offense;

(C) the information has been placed in the public domain by the United States Government; or

(D) the information was not lawfully classified and lawfully designated pursuant to paragraph (2) at the time of the offense.

(5) It is a defense to a prosecution under this subsection that the information was communicated only to a regularly constituted subcommittee, committee or joint committee of Congress, pursuant to lawful demand.

(6) Any hearing by the court for the purpose of making a determination whether the information was lawfully classified and lawfully designated, shall be *in camera;*

(A) at the close of any *in camera* review, the court shall enter into the record an order pursuant to its findings and determinations;

(B) any determination by the court under this paragraph shall be a question of law.

(7) Whenever in the judgment of the Director of Central Intelligence any person is about to engage in any acts or practices which will constitute a violation of this subsection, the Attorney General, on behalf of the United States, may make application to the appropriate court for an order enjoining such acts or practices, and upon a showing that such person is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order may be granted. In the case of and application for an order under this paragraph:

(A) the court shall not hold an *in camera* hearing for the purpose of making a determination as to the lawfulness of the classification and designation of the information unless it has determined after giving due consideration to all attending evidence that such evidence does not indicate that the matter has been lawfully classified and designated;

(B) the court shall not invalidate the classification or designation unless it finds that the judgment of the department or agency, pursuant to paragraph (2), as to the lawfulness of the classification and designation was arbitrary, capricious and without a reasonable basis in fact.

SECTIONAL ANALYSIS AND EXPLANATION

The draft bill by adding a new subsection (g) to the National Security Act of 1947 further implements a proviso of that Act imposing a duty upon the Director of Central Intelligence to protect intelligence sources and methods from unauthorized disclosure. The new subsection draws upon existing concepts of law found within 18 U.S.C. 798 (relating to communication intelligence) and 42 U.S.C. 2204 *et seq.* (relating to atomic energy Restricted Data).

Paragraph (1) of the new subsection identifies the special and limited class of individuals having privity of access to the sensitive information defined in paragraph (2) below and proscribes their culpable communication of such information to an unauthorized recipient.

Paragraph (2) of the new subsection defines the special category of information relating to intelligence sources and methods which is sub-

ject to the new provisions. It also recognizes the authority of the Director and heads of other agencies expressly authorized by law or by the President to engage in intelligence activities for the United States, to provide for the appropriate designation of such information.

Paragraph (3) of the new subsection assures that only the special and limited class of individuals identified under paragraph (1) above will be subject to prosecution as a result of the violation of the new subsection. This is in keeping with the intent that the new provision penalizes as unlawful the conduct of those whose access to the designated information is dependent upon understandings arising out of a relationship involving trust and confidence. Collateral prosecution related to the violation of any other provision of law, however, is not vitiated by this paragraph.

Paragraph (4) of the new subsection provides that no prosecution may be instituted unless the Attorney General and the Director of Central Intelligence first jointly certify to the court that the information was lawfully classified and lawfully designated for limited dissemination; the information was not placed in the public domain by the Government; an agency review procedure existed whereby the defendant could have secured a review of the information in question for a determination on public releasability; and the information was lawfully classified and lawfully designated pursuant to paragraph (2) at the time of the offense.

Paragraph (5) of the new subsection provides a defense to prosecution if the information was only provided to a regularly constituted committee, joint committee or joint committee of Congress, pursuant to lawful demand.

Paragraph (6) of the new subsection provides that any hearing by the court to determine whether the information was lawfully classified and lawfully designated shall be *in camera* and such determination shall be a question of law.

Paragraph (7) of the new subsection permits the Attorney General to petition a court to enjoin injunction any act which the Director believes will violate any provision of the new subsection. This authority is intended to provide prompt judicial action to avoid damage to the U.S. foreign intelligence effort in circumstances where punitive criminal action alone, being necessarily ex post facto, may be inadequate in achieving the underlying objective of the legislation which is to protect intelligence sources, methods and techniques from unauthorized disclosure. This paragraph also provides that in any hearing for such an order the court shall not hold an *in camera* hearing to determine the lawfulness of the classification and designation of the information unless it has first considered all attending evidence and determined that the evidence does not indicate that the matter has been lawfully classified and lawfully designated. The paragraph further provides that the court may invalidate a classification or designation if it finds the judgment of the department or agency head was arbitrary, capricious and without a reasonable basis in fact.

Tab E

TITLE V -- FEDERAL BUREAU OF INVESTIGATION

Sectional Analysis

Sec. 502	(2)	At line 5, delete all after "Congress" to end of subsection;
Sec. 504	(a)	Not certain what is intended but could be clarified by inserting "intelligence" after "All" in line 18, and after "all" in line 21.
Sec. 505	(a)(1)	Delete all after "States" in line 22 -- rest is redundant.
	(a)(8)	Cannot perform same duties as heads of other intelligence entities -- can do so as to FBI. This should be re-worded.
Sec. 506	(a)(2)	Why limit to international terrorist activities? What about domestic terrorist activities? Also, in some cases it is difficult to distinguish. Recommend deletion of "international" in line 2, p. 216.
	(c)(2)	Delete entirely as unnecessary -- see Sec. 505(a)(3).
Sec. 507	(a)	Insert after "authorized" in line 7 "after coordination with the Central Intelligence Agency." See discussion in text of Statement.
	(b)(1)	The word "President" at line 21 should be deleted and in lieu insert the words "Director of Central Intelligence."
	(b)(2)	Delete as unnecessary after "shall" in line 7 to "conduct" in line 9 -- see Sec. 505(a)(3).
Sec. 508	(b)	Insert "intelligence" at line 3 before "investigation."
	(c)	Delete entirely an unnecessary -- see Sec. 505(a)(3).

Tab F

TITLE VI -- NATIONAL SECURITY AGENCY

Sectional Analysis

Part A

Sec. 601		No comment.
Sec. 602	(1)	No comment.
	(2)	No comment.
	(3)	No comment.
	(4)	Strike all after "States" in line 25. Redundant.
Sec. 603		The definitions should be most carefully reviewed to assure they are fully adequate.

Part B

Sec. 611		No comment.
Sec. 612		No comment.
Sec. 613	(a)(2)	Strike all after "States" in line 24. Redundant.
	(a)(7)	Strike all after "States" in line 21. Redundant.
	(a)(13)	Insert after "budgets" in line 8 the word "programs." Insert after "intelligence" in line 11 the words "program and." Insert after "proposed" in line 14 the words "program and."
Sec. 614	(a)	Delete all after "by" in line 12 to end of sentence and insert "the Secretary of Defense."
	(a)(1)	Delete word "all" in line 16. Would duplicate the IG function.
	(a)(c)	Strike -- is not necessary.

Part C

Sec. 621	(a)(4)	Strike all after "title" in line 1, p. 238. Not necessary.

Delete entire last sentence beginning on line 2.

(1) In line 8 insert after "Agency" the words, "of the "Department of Defense." In line 11 make the same addition after "Agency." In line 14 delete all after "function" -- not needed.

Delete all of subsection (a) -- not necessary.

(2) On page 248, at line 3, delete all beginning with "but" to end of sentence.

Delete the second sentence entirely.

Leave detailed review to techicians. Query whether any of this is necessary since NSA is a part of DOD.

Same comment as for Sec. 651.

Delete -- unnecessary..

Same comment as for Sec. 651.

STATEMENT OF GEN. RICHARD GILES STILWELL, PRESIDENT, ASSOCIATION OF FORMER INTELLIGENCE OFFICERS, ACCOMPANIED BY MR. JOHN WARNER, LEGAL ADVISER TO ASSOCIATION OF FORMER INTELLIGENCE OFFICERS

General STILWELL. Mr. Chairman, thank you for the opportunity to appear before this committee to present the views of the Association of Former Intelligence Officers on the Senate bill 2525, because we are convinced that our country's ability to cope effectively with the threats to national and free world security that we are certain to confront in the remainder of this century will depend in substantial degree on the professionalism and elan of the intelligence community and the quality of its output.

A clarified charter for the intelligence agencies of this Government and clearcut guidelines to govern their activities are needed. We therefore support legislation to that end. But in our considered view, S. 2525 does not fill the bill. It is long on restrictions, short on flexibility to adjust to changing situations, and lacking incentives for greater excellence in intelligence. Many of its provisions are ambiguous and would require almost as many lawyers as case officers.

It goes far beyond legitimate and necessary congressional oversight. A 263-page draft—incidentally, 10 times the length of the entire National Security Act of 1947—can fairly be labeled overmanagement. And it is out of balance. While designed to empower and guide the entire range of national intelligence activities, it concentrates excessively on a miniscule, albeit vital segment of the total effort.

Overall, the drafting of S. 2525 appears not to have been preceded by a detailed appraisal of the extent and projected international domestic environment and the role that intelligence must play in meeting the resultant challenges to the security of this Nation.

I realize, sir, that tbat is a strong statement, but I am sure that this committee desires nothing less than complete candor.

The CHAIRMAN. I must say that that is a strong statement, and I must say on behalf of the staff and the members who introduced it, I don't think it is accurate, but I am anxious to hear how you support it because we would like to get specific criticisms and maybe a little help from you, General. We want frankness and candor, you are absolutely right, here.

General STILWELL. Thank you, Mr. Chairman. We will try to justify that statement, sir.

The CHAIRMAN. Excuse me for interrupting.

General STILWELL. Before addressing the various portions of the bill which are of major concern, let me outline my organization's perception of the role and responsibilities of our intelligence agencies in the years ahead.

I am confident that the members of the committee are under no illusions regarding the grand designs of the Soviet Union. The last decade has been witness to prodigious Soviet efforts to achieve dominance in every dimension of military power. But the Russians have studied Clausewitz with great care and while prepared for the eventually of war, Soviet leadership aspires to advance toward world hegemony step by step, by means short thereof. The principal role of their armed forces will be to undergird political and

economic initiatives intended to disrupt our alliances, sap the vitality of the free enterprise system, isolate the United States and extend Soviet influence into every quarter of the globe. But awareness of the Soviet grand strategy is not a sufficient basis for effective countermoves. The indispensable condition precedent for United States and Allied actions to checkmate the Soviet Union is advance knowledge of the substance and timing of specific actions to further their expansionist policy. Our intelligence capabilities must coalesce to meet this requirement. Like the strategic nuclear TRIAD, our various intelligence capabilities, conspicuously including human intelligence, are interdependent and mutually reinforcing. Yet, S. 2525 in its present form imposes troublesome, approaching prohibitive, operational restraints on the conduct of clandestine collection.

Nor is the Soviet challenge the only threat to our interests abroad. There is hardly an area on the globe where one can safely assume that peace and stability will endure. We are at the head of a maritime alliance, one most susceptible to disturbance by events abroad, and dependent on foreign trade and access to resources. Indeed, our national defense relies on foreign alliances and overseas bases.

Consequently, situations will continue to arise in which we will find it necessary to try to influence the course of events in furtherance of our legitimate national interests. Sometimes these situations may be most prudently and effectively dealt with through means short of direct involvement or even the showing of our hand. But again, S. 2525 imposes significant obstacles, inhibiting the flexibility which is essential to the success of such operations.

These introductory comments would be out of balance without a word on counterintelligence. Without effective counterintelligence, neither intelligence operations nor covert actions can be pursued with confidence. The examples of audacious and agressive KGB operations in the United States and abroad, including the bugging of our embassy in Moscow, which have recently surfaced, are but the tip of the iceberg. Senator Moynihan aptly described the counterintelligence target as massive. He is so right. And moreover, that threat is growing. Identification of the specifics of that threat and the countering of penetrations of our security necessitate a major effort, sophisticated means and a high degree of operational resourcefulness. Some of the provisions of S. 2525 are simply not in consonance with the magnitude of that vital and difficult task.

One further word by the way of preamble, Mr. Chairman. It is something of an anomaly that I am here representing the Association of Former Intelligence Officers. I am not an ex-professional in that trade. Aside from one tour of duty in the CIA nearly 30 years ago, and then on the covert action side, I have always been a soldier of the line.

But for that reason, by virtue of experiences in three wars, innumerable tensions and crises, I probably have a better appreciation of the inordinate value of intelligence and the dangers explicit in its absence than anybody in this hearing.

And so I approach this subject with considerable concern.

We have appended to my statement, Mr. Chairman, a title by title, section by section commentary on the entire bill. We believe

it is a very professional bit of analysis from a legal, from an operational, and from a policy standpoint, and whether or not our comments are accepted, we believe they will be a real contribution, sir, to your staff and the ongoing work of this committee.

Now if I may turn to the several titles. As to title I, we are in complete agreement with its stated purposes, and agree that the authorities should be clarified and statutory guidelines made clear. But there is also a companion need to assure the effectiveness of the intelligence process.

Certain provisions of title I raise a number of fundamental issues which are of most serious concern to us. My statement singles out seven as representative of matters which need further airing and discussion.

I begin with the proposed role and functions of the Director of National Intelligence, who will be referred to in my comment by his current title of DCI. We would make four points.

The first and major one has to do with the proposal to create an Office of the Director, separate and distinct from the Central Intelligence Agency. A DCI divorced from any institutional allegiance has seeming virtue, particularly objectivity. Support for a separate DCI, albeit with much circumscribed responsibilities and authorities, has been repeatedly voiced by Department of Defense and senior military intelligence officers who, in retirement, constitute a major portion of our organization's membership. But since no one has yet devised a formula that would function to the greater benefit of the United States than the existing statutory concept of the DCI, AFIO continues to believe that the concept of a DCI exercising his responsibilities in an office separate and apart from CIA is a serious mistake.

In testimony before this committee, Mr. McGeorge Bundy noted that if the DCI were separated out, he would find it necessary to build a considerable new bureaucracy for bimself either by raiding the several intelligence agencies—and mostly CIA—or inserting untrained people as another layer.

Second, we feel that the Director's proposed functions and responsibilities are all too encompassing. They would in effect make him a czar and would constitute unwarranted intrusions into the command responsibilities of other departments and agencies. For example, a Director separate from the CIA and charged with the full responsibility for NIEs would want under his authority the requisite capability to support them. This alone could add up to thousands of trained analysts and specialists.

Third, it is our firm position that the DCI should serve concurrently as the head of the Central Intelligence Agency. This was the original concept approved by the Congress in 1947. It is still valid. The floor debate in the House in July 1947 rather clearly indicates not only the Agency's coordinating role but its function as a central point for the coordination, collection, evaluation, and dissemination of national intelligence.

Precisely because of the centralizing role, both in concept and in fact, we recommend that the Director continue to bear tbe title of Director of Central Intelligence rather than the proposed new title.

The fourth point has to do with the assignment of authorities and functions. The National Security Act of 1947 made the assign-

ments to the CIA. Virtually all are now proposed to be assigned to the new office of the Director. Even as we would delimit them, the responsibilities are of such awesome magnitude that they should be vested in an institution and not an individual.

To be sure, sir, CIA and the rest of the intelligence community have had some growing pains, but legislation cannot create perfection. Certainly an intelligence czar is not the answer.

We note the continuing evolution and growth of the intelligence community staff for coordination, tasking, and budgeting by the DCI, as reflected in Executive Order 12036 and the current authorization bill. This appears to be the right and the better path to meet changing needs in an uncertain future.

Thus, we recommend that there be no statutory office of the Director; and that section 114 of title I relating to the duties of the Director be placed in title IV with most of those functions assigned to CIA as at present, and with the additional changes we note in our tabs.

My second subject has to do with counterterrorism. Collection and analysis of intelligence concerning international terrorist activities is one thing. Protecting against such activity is another. The former is an inherent part of intelligence and counterintelligence collection and analysis and need not be singled out in legislation, despite its current importance. The latter involves aspects of law enforcement, internal security, and physical security of the public.

Counteraction against international terrorism in the United States would be a proper role for the nonintelligence elements of the FBI, the local police, and tbe military as appropriate; and abroad the responsibility rests with the authorities of the particular nation involved.

Our third subject sir, has to do with reporting. The more than 60 references to types of reports required to be sent to Congress on various intelligence matters raises not only the matter of burden but the question of whether this is congressional oversight or congressional management. For example, in title I there are 44 reporting requirements, more than one for every two pages of text. Also, in section 114, the Director is required to advise the two select committees of proposed agreements between any U.S intelligence community entity and any intelligence or security service of a foreign government before such agreement takes effect. Many foreign governments are concerned about the security and confidentiality of their relationships with U.S. intelligence. Such concerns often result in establishing as a condition precedent to any such relationships that assurances be given that the knowledge thereof will remain within the U.S. intelligence entity concerned, and even there be restricted to persons who have a need to know.

Is it a good tradeoff that, if the two committees must know the specifics of all such relationships that there will be no such relationships? There are a great many such relationships with foreign intelligence services around the world, many in countries where our diplomatic relationships are less than cordial. These are an extremely productive source of intelligence which our country cannot secure in any other way.

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The multiple reporting requirements should be dropped in favor of the general reporting requirement in section 152(a).

The next point, sir, has to do with authorization, expenditure and audit. We continue to believe that there should not be an unclassified public budget or appropriation figure for all intelligence activities, whether a one-line item or in greater detail.

This has been the subject of extensive hearings, and suffice it here to say that we think that such disclosure would assist our potential enemies and open the door for an even greater breakdown of the figures into individual agencies, programs and projects. We believe that authorization can be handled effectively by procedures similar to those Congress has utilized for almost 30 years in making appropriations to the Central Intelligence Agency and which establishes on a classified basis a sum certain for the total with a reasonable breakdown of programs and major activities.

We understand that this position also has the approval of the two Select Committees on Intelligence as reflected in their respective reports of mid-April.

The title then makes provision for expenditures solely on the certificate of tbe Director. Similar provisions existing in law are what provide the Central Intelligence Agency and other intelligence entities with confidential or unvouchered funds, which are at the heart of the ability of intelligence to mount and conduct secret operations, including espionage, counterintelligence, covert action and sophisticated technical collection operations.

Beginning with George Washington, almost every President has been given confidential funds by the Congress to expend on foreign secret operations. It was the President who decided on the purposes. His signature or certificate was a sufficient voucher, meaning that no one else could second-guess, disapprove, or alter his judgment.

However, there are also provisions in the bill that expenditures shall be made only for activities authorized by law. This creates a serious problem of interpretation. Section 425(a) starts by providing that "Notwithstanding any other provision of law" sums may be expended, but in the next sentence it says that funds may not "be expended for activities which have not been authorized by legislation."

The problem is which sentence controls?

While programs or projects may be authorized by law, an attempt to authorize specific expenditures in the intelligence and covert action field quickly runs into security problems. There is no way to legislate publicly on specific secret activities. So we recommend redrafting to accord with the extant sections of the CIA Act of 1949 which were intended to serve and are still serving after three decades, as permanent authorization.

Now, the bill contains another threat to tbe confidentiality of expenditures. Under the provisions of section 123, the General Accounting Office would have the power to conduct financial and program management audits and reviews of all national intelligence activities upon request of either of the two select committees, or upon request of other committees having legislative jurisdiction over some aspect of national intelligence activities, subject to the

proviso that the audit results would be funneled through the select committees.

And finally, the Comptroller General could undertake audits on his own initiative.

The question, sir, of Comptroller General audit of the CIA funds has a long history. In the early days of the Agency, specially cleared Comptroller General personnel did audit CIA expenditures of vouchered funds. After a few years, the Comptroller General, in attempting to accomplish subsequently required comprehensive audits, determined that he could not make audits of CIA expenditures without access to the records of expenditures of unvouchered funds. This was denied him by the DCI, and, shortly thereafter, the Comptroller General withdrew from auditing any CIA expenditures with the concurrence of the existing oversight congressional committees.

It is our view that all the provisions for GAO audit have been found wanting by previous experience. They would erode the very foundation for secret and clandestine operations which has been preserved by the Congress for almost two centuries. And so we recommend that section be completely deleted.

As to committee jurisdiction, we applaud the establishment of Select Committees on Intelligence in the House and the Senate, although our preference would be for a single joint committee. It would be desirable if these committees had exclusive oversight and investigatory jurisdiction on intelligence matters.

We realize that such a proposal is fraught with difficulties, since other committees can rightfully assert jurisdiction in several situations. The Armed Services Committees have jurisdiction over DOD, which contains several important entities of the intelligence community and expends a major portion of intelligence funds. Likewise, the Judiciary Committees have jurisdiction over the Department of Justice, which includes the FBI.

But let us not create or continue oversight and investigatory jurisdiction on intelligence in other than the Select Committees of the Congress, recognizing that one cannot contravene the special jurisdiction of the Appropriations Committees.

And in this context, we note language requiring reporting of covert operations under the so-called Hughes-Ryan amendment to the Foreign Assistance Act of 1974. In the interests of security and in accord with our concept of exclusive jurisdiction we recommend that that amendment be repealed. We urge, sir, that the number of people with access be minimized by amendment of the proposed subsections of section 153, particularly with respect to budgetary details, intelligence sources and methods, and operational details. Security is a prime issue. The more people exposed to highly sensitive information, the greater the risk of disclosure. Beyond that, the two select committees have now and will develop even more knowledge and expertise to comprehend fully the complexities of intelligence. This is not to say that other committees should not be given substantive intelligence reports and briefings in their area of concern, but surely the Congress can delegate to and trust the two select committees with the principal investigatory and oversight jurisdiction.

My next point has to do with special activities and sensitive clandestine collection activities. Elaborate procedures are provided for in section 131 with respect to consideration and approval of special activities and sensitive clandestine collection. The President is required to establish standards, procedures, and criteria for identifying which cases of clandestine collection of foreign intelligence require his personal approval. All special activities must be reviewed and personally approved by the President.

The bill enumerates the factors to be considered in both categories and the individuals who must participate in these considerations. Annual NSC reviews are mandated and annual reaffirmation by the President is needed in certain cases. Where Presidential approval is required, the two select committees normally must be notified in advance of the initiation of such operation, although committee approval is not required. Significant changes must be processed through all of the above steps, and any changes must be submitted to the two committees 60 days prior to their effective date. Procedures similar to all those applicable to collection activities are prescribed in section 141 for counterintelligence activities.

Sir, we submit that this mountain of redtape is an intolerable burden on the highest levels of government; is an unwarranted intrusion on the functioning of the executive branch; and is destructive of the flexibility of the President to meet emergency and crisis threats to our national security. As Mr. McGeorge Bundy so cogently testified from the great depth of his experience, the President and key members of the National Security Council are very busy people, and never more so than in periods of crisis. It defies logic that the security of our country might depend on a waiting period during which, by this title, a President could not lawfully take steps to meet unforeseen situations. Not to be able to seize upon or exploit a clandestine collection or special activity opportunity when it arises may be an opportunity lost forever. The layover provision in these sensitive areas which are peculiarly within the President's responsibilities is in our view unconstitutional. We recommend dropping these provisions, retaining the requirements for Presidential approval of special activities by program or major activity, with reporting only to the two select committees but not necessarily prior to initiation.

And the final point on title I has to do with disclosure. The wording of section 152(a) provides that the two committees shall be fully and currently informed of all intelligence activities. We do not think that this is what is intended. Can we not, then, refer to programs and major activities and drop the word "all?"

Additionally, that section provides that the intelligence entities, upon request will furnish any information or material in the possession or control of intelligence or of any person paid by intelligence. Thus, a committee could request a list of all agents, a list of all employees under cover, and the specifics of that cover, a list of all American corporations cooperating with intelligence, or a compilation of drawings and specifications of all technical equipment used for collection. We believe that in all likelihood no such unreasonable request would ever be made, but why cast in concrete a requirement that would force a violation of law in response to an

unreasonable request? And so we recommend a redrafting of that section.

Section 153 provides that the two select committees have the authority first, to give such information to any other Member of Congress under certain security safeguards, and second, to disclose such information publicly, subject to existing Senate and House resolutions which require a vote by those chambers, as the case may be, on the issue of disclosure by the committees.

As the Supreme Court has interpreted the pertinent constitutional provisions, one of the prerogatives reserved for the President is that matters which he determines must remain secret in the interest of national security may not be lawfully disclosed by the Congress; nor does the Supreme Court assert the authority to override such a Presidential determination.

Today, Mr. Chairman, as we understand it, the two select committees are getting the information from intelligence they need to accomplish their oversight responsibilities. Why attempt, sir, to put into law what is not needed and that which is unconstitutional?

Turning, now, sir, to title II. In its present form it deals primarily with collection, retention and dissemination of information about certain individuals and entities. These rather detailed requirements concerning the when and how of collection are designed to meet specific abuses of the past collection of information for political or other inappropriate reasons, continuation of collection for long periods after the reasons for initial collection were not confirmed, and collection by intrusive techniques regardless of the narrow purpose behind collection.

While there is clearly a need for restrictions and guidance on the when and how of collection concerning U.S. persons, that is not readily apparent with respect to foreign persons. The past has not demonstrated any abuses concerning collection about foreign persons. Thus section 225 is gratuitous. It places limitations on collection about foreign persons within the United States which adds enormously to the administrative burden intelligence officials will have to face. More importantly, it is inimical to the national security of our country.

When does a foreign person's presence in the United States make it reasonably likely that such person may engage in espionage or any other clandestine intelligence activity?

Why should the head of the collecting entity have to determine that the information about the person is significant foreign intelligence?

What if an intelligence official's judgment were that further collection of information about the person might produce foreign intelligence, counterintelligence, or counterterrorism intelligence, but the standards of sections 225 (1) through (4) were not met? Since a foreign person is involved, why shouldn't a further collection period be permitted?

The primary problem in title II exists in the sections dealing with the collection for foreign intelligence, counterintelligence and counterterrorism intelligence purposes. They do a respectable job of defining the activities for which collection may be undertaken. However, the threshold for collection in each instance is "reasonably believed" to be engaged in.

We submit that this standard is too high and poses serious problems. This is so because intelligence is acquired in bits and pieces. Rarely would the official required to make a written approval under that section for the initiation of collection have enough information to form a reasonable belief that the U.S. person to be targeted is engaged in an activity specified in sections 213 and 214.

Thus, as written, those provisions may greatly restrict collection by making it impossible to follow up on leads and fragmentary pieces of information. One solution would be to lower the threshold standard of "reasonably believed to be engaged in" to one that provides for the collection of information if an intelligence official has "reason to believe"—words that appear from time to time in your committee's release of February 9 this year, in describing the bill.

Those sections as written already provide for a partially lowered standard with respect to a person reasonably believed to be engaged in espionage or any other clandestine intelligence activity which involves or may involve a violation of the criminal laws of the United States. But that concession is of minimal help because it is so limited. The standard is lowered only in that it does not require certainty that the activities presently involve criminal offenses.

We appreciate that any lowering of the threshold for collection of information on U.S. persons would naturally raise concerns about infringement of their rights. On the other hand, many activities of U.S. persons who travel abroad or who have extensive foreign connections raise questions from an intelligence standpoint which do not amount to reasonable belief that such persons are involved in improper activity. The question this poses, of course, is where to strike the balance between individual rights and the need to protect the Nation and the public from certain activities. One alternative would be to strike it more in favor of collection by lowering the standard, as previously suggested, but to provide for the higher standard for retention and dissemination of information.

Thus, if after a reasonable period, the information collected did not provide a basis for reasonable belief of participation in the specified activities, then its retention and dissemination would be prohibited or very strictly limited. The lower standard for initiation of collection would have no bearing on the use of the most intrusive techniques since they would continue to be available only under a higher standard and in accordance with applicable law.

Section 244, as written does not allow for undisclosed participation in U.S. organizations by intelligence entities to accomplish legitimate intelligence collection and support functions. This technique, Mr. Chairman, is so basic to the protection of internal security that the draft provisions should be broadened to permit such participation under procedures approved by the Attorney General.

In section 253, a new basis is created for civil suits for monetary damages against intelligence employees. Such remedy is declared in a subsequent section to be the exclusive remedy for monetary damages. Provision is then made in section 258 that the Attorney General, upon recommendation of the head of an Intelligence

entity, may pay reasonable attorney's fees and litigation costs incurred in defending against such civil suits. We bitterly protect this discrimination against intelligence employees. Elsewhere in the Government an employee who is named in a civil suit has the Department of Justice, normally as a matter of right, either represent him or counsel is retained at Government expense. The presumption is that he acted within the scope of his employment. This provision seems to say to an intelligence employee that we, the Congress, find you guilty of violating the law before the trial begins because section 258 provides only that the Attorney General may pay, and then only upon recommendation of the head of the entity concerned. Where is the employee if there is no such recommendation or if the Attorney General decides not to act?

The bill should be changed to provide that the Attorney General shall provide the defense or funds for retained private counsel so long as the employee has not been finally adjudged by a court to have violated the law in question or been found guilty on criminal charges arising out of the factual circumstances involved. We must not make second-class citizens of our intelligence officers.

I turn now, sir, to title III, Foreign Intelligence Surveillance. It is unfortunate that the substance of this title is, for all practical purposes, moving through the congressional processes not in context with the overall impact and thrust of S. 2525.

We, too, are aware of some past abuses in the area of electronic surveillance, and agree that the authority for such activity needs clarification. The laudable efforts to protect the privacy and rights of American citizens are seriously marred, however, by the misguided extension of requirements for warrants in cases involving "foreign powers" and known "agents of foreign powers."

Some would urge, and we would prefer, that sweeping new laws in this general area await definitive Supreme Court rulings on the basic issue of the constitutionality of electronic surveillance to collect foreign intelligence from American citizens in the interests of national security. Various subordinate courts have distinguished foreign from domestic targets. If the Supreme Court were to hold the warrantless electronic surveillance of Americans offends the fourth amendment, we would have no comments on this title insofar as it applies to U.S. persons as defined. However, we strongly oppose the provisions of this title insofar as they apply to a "foreign power" or "agent of a foreign power" as those terms are defined. Our grounds for this position are that such application corrects no known abuse; renders foreign intelligence activities less effective; creates substantial new security hazards; does not create new safeguards for the rights of Americans; is inconsistent with repeated views of the judiciary; and is unconstitutional.

What American would object to U.S. intelligence wiretapping the Soviet Embassy or the hundreds of officers of foreign intelligence services conducting espionage within the United States? What abuses can be pointed to in this area? It may be urged that there will be inadvertent overhearing of Americans and that the use of information derived therefrom can be abused. But a warrant does not eliminate inadvertent overhearing, and it is to the minimization procedures of this title that we look for proper handling of such derived information. These procedures can be applicable re-

gardless of whether or not there is a warrant. Imposition of statutorily mandated procedures inserting the judiciary into the heart of sensitive operations not only renders intelligence less effective and less flexible, but it creates most serious additional security hazards.

The rights of Americans are not safeguarded by a judge issuing a warrant to tap a known KGB officer in the United States. The courts have repeatedly held that foreign intelligence activities are within the realm of the President and for which the judiciary has no experience, training or expertise.

To give a judge the power to tell the President that it is all right to tap embassy X but your request to tap embassy Y is denied is ludicrous. A judge really can't do this, and if he can't, then the whole exercise is feckless. To assert that the President cannot take action without a judicial warrant in this area of sensitive foreign intelligence activities is to close one's eyes to the words of the Constitution as passed upon over the years by the Supreme Court.

As written, this title is an overreaction to a few abuses of the past and to a genuine need for clarification of the law. It is simply incredible that the Congress and the Executive should be joining hands to strip the President of certain of his constitutional prerogatives in the pursuit of no known constructive purpose, and at the price of major reduction of effectiveness of intelligence.

This title is a most serious mistake and we adamantly oppose its enactment in its present form because it in fact confers fourth amendment rights on the Soviet embassy, all KGB officers in the United States, and all other kinds of foreign intelligence activities in our country.

As to title IV, it contains many excellent provisions which are not in law today. Our views on the most important issues in title IV have already been elaborated on by my presentation, and they need not be discussed further.

There are two worth mentioning, however. The first has to do with the provisions for repeal of elements of the National Security Act of 1947 and the CIA Act of 1949. The title starts by establishing the CIA, which we all know has been in existence for over 30 years and has functioned well under the two statutes which are proposed for repeal. A considerable body of case-law has developed based on the language of those statutes. We understand that certain changes are desirable as are some new provisions. Analysis shows, however, that over one-third of the provisions of title IV are identical with those in existing law.

The entire bill is extremely lengthy, and where it can be shortened without doing violence to principles knowingly changed or added, such effort should be made. This general view is applicable to other titles and is covered in appropriate comments at the appended tabs.

And the second point has to do with criminal sanctions. Title IV, Mr. Chairman, provides assistance in the area of security by providing criminal sanctions with respect to misuse of the name or initials of CIA and for the unauthorized disclosure of the identity of staff personnel under cover. As you know, however, there is no law on the books which effectively provides criminal sanctions for the unauthorized disclosure of intelligence sources and methods. It is ironic that there are at least 30 provisions of law which provide

criminal penalties for the unauthorized disclosure of information in the hands of the Government ranging from insecticide formulas to crop information to selective service information. In the absence of such a law as to sources and methods, current employees and former employees and others in a position of trust can reveal such information with impunity. After many years of research and drafting, a proposed law was sent to the Congress by the President in February of 1976. That law would apply only to persons who have had access to information concerning intelligence sources and methods as a result of their being in a position of trust by virtue of being a Government employee or employee of a contractor with the Government. All media personnel would be excluded. We believe that your responsibility to protect intelligence is just as great as your responsibility to assure that intelligence is properly accountable.

We append to this statement a proposed bill to that effect for your consideration.

Title V, the Federal Bureau of Investigation, appropriately clarifies in law the authority and responsibility of the FBI in the field of intelligence. By its wording it would appear to cover only foreign intelligence, counterintelligence, and counterterrorism intelligence, the latter two of which by definition in the bill deal with foreign or international aspects. Purely domestic intelligence seems to be excluded, and we shall leave this aspect for others to comment upon.

The FBI is authorized in section 507 to collect foreign intelligence within the United States from publicly available information and also clandestinely, and further, to analyze, produce, and disseminate such material. In view of the overall responsibility of the Director of Central Intelligence in the foreign intelligence field, the bill should make clear that this needed and welcome charter for the FBI is to be orchestrated within the context of the overall foreign intelligence effort by the President's principal foreign intelligence officer, that is, the DCI.

In order to avoid the creation of yet another analysis entity in the intelligence community, the FBI might well be limited to collection and dissemination of positive foreign intelligence. This will obviate the necessity for that organization to develop the entire panoply of expertise, capabiltiy and bureaucratic machinery in the field of positive intelligence analysis and production.

As a final point, and as you know, Mr. Chairman, the Director of Central Intelligence is today charged by law with the responsibility for protecting intelligence sources and methods from unauthorized disclosure. The proposed bill would continue that statutory charge, but neither existing law nor the bill grants any authority to fulfill that responsibility. The other heads of intelligence entities have a similar inherent responsibility. As a partial step to help protect such secrets we have elsewhere in this statement recommended that criminal sanctions be enacted for unauthorized disclosure of intelligence sources and methods. Under existing law and under the proposed bill, the Director of Central Intelligence has extremely limited authority to investigate. The appropriate investigative arm of the U.S. Government, the FBI, in practice, will rarely undertake such an investigation unless presented with reasonable evidence that a known individual has committed a crime. This is

Catch-22. The Director of Central Intelligence knows there has been an unauthorized disclosure but he doesn't know who is the culprit. He can only go so far under law in investigating, and the FBI won't investigate until there is substantial evidence of the crime.

Here is a disclosure of secrets gap that we urge the committee to examine. We recommend that consideration be given to statutory language requiring FBI investigation of those cases of unauthorized disclosure of intelligence sources and methods so certified to the Attorney General by the Director of Central Intelligence.

Other than endorsing the concept of the establishment of the National Security Agency by statute and a statement of its functions in law, and the effort to give it statutory tools to accomplish its mission, we have no substantive comments on title VI or title VII.

By way of conclusion, Mr. Chairman, we recommend to this committee that the word "reform" be dropped from the title of S. 2525 and that the act be cited as the National Intelligence Reorganization Act of 1978, or more simply, the National Intelligence Act. The word "reform" has an unfortunate connotation which is something of an affront to the thousands of dedicated employees of the intelligence community—present, past, and future—who were never aware of or participated in the very few transgressions which led to the many sensational charges of the past few years.

On a matter not touched upon in the bill, we suggest that the committee examine with the intelligence community the serious and continuing impact of the Freedom of Information Act. U.S. News and World Report reported this past week, that "one out of every 15 FBI agents now works full time answering queries." Last year the CIA received 16,000 queries, requiring the expenditure of over 200,000 man hours to handle. The careful review of documents necessary to determine if they can be declassified is a complex task requiring midlevel and senior level people. One certain effect of so many separate, unclassified releases is to provide comfort and assistance to our adversaries. Further, human errors do occur, and inevitably information which is not declassified will be found in released documents. While we do not at this time offer a specific solution, this is an area which well merits examination and study by this committee.

Mr. Chairman, we honestly believe the net effect of the many provisions that we have pointed to is to undermine initiative, restrict flexibility and weaken the security of intelligence. The accumulation on Capitol Hill of most sensitive information and documents called for by this bill makes a very tempting target for our adversaries. Physical security and personnel security standards must be of the highest but neither are covered in this bill. They should be addressed. So, too, should a requirement that all staff personnel sign an appropriate secrecy agreement.

The effort, Mr. Chairman, to prevent the abuses of the past has led to a bill which would seriously shackle intelligence. The record shows that most of the abuses of the past were directly traceable to direction from the highest levels of the Executive branch and to inadequate oversight by the Congress. We do not believe that the solution to these problems is to encase the national intelligence

machinery in a legislative straitjacket and micromanage complex and sensitive clandestine operations from Capitol Hill. We agree with Mr. Helms when he said he would profoundly distrust any director who contended he could operate an effective secret service under the present version of this bill.

We believe, sir, that the answer lies in executive leadership on the one hand, and congressional oversight on the other, exercised by committees which, unburdened by other responsibilities, can give their full attention to seeing that the lessons from the past are not overlooked. But to all appearances, the appropriate lessons have been learned. Indeed, there is concern among some of us that they may have been overlearned. There is, we believe, a very real risk that, in trying to foreclose the danger of repeating past mistakes, we may also foreclose the possibility of achieving future successes. And future intelligence successes are essential if we are to avoid surprises and setbacks, indeed, if our Nation and our value system are to remain extant and survive.

In our considered opinion, this bill, as now written, will seriously impair the future effectiveness of intelligence. Beyond that, it will act as a disincentive to the recruitment and retention of men and women of outstanding talent and promise, whose dedication, initiative and capacity for innovation are the real determinents of the caliber of any intelligence community. Further, approval of this bill as written is virtually a decision to stop all clandestine operations, not only positive collection and counterintelligence, but also covert action. What we believe is needed, Mr. Chairman, is a cooperative effort to produce a bill designed to serve its very commendable objectives. This is a task in which we all should share. The Association of Former Intelligence Officers, many of whose members have lived under and administered the existing laws, is ready to work with your committee and your staff in any manner you might suggest in the hope that we can contribute to the solution.

For your courteous attention, I thank you most sincerely.

The CHAIRMAN. Thank you, General.

If there is no objection from my colleagues, I assume that from the standpoint of time, we should give Mr. Halperin an opportunity to testify now, and then I assume some of us will have questions. Perhaps we will have point and counterpoint in dialog here.

STATEMENT OF MORTON H. HALPERIN, DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES

Mr. HALPERIN. Thank you, Mr. Chairman. I do have a prepared statement, and in the interest of moving to that dialog and the questions, I would like to ask that it be included in the record as written with attachments.

I should note that there is one attachment [1] that is not yet here, and I would like to submit it later. In addition, there is a document that I want to refer to this morning and have attached to my statement. I will do so.

The CHAIRMAN. Without objection.

[The prepared statement of Morton H. Halperin follows:]

[1] See p. 327.

Prepared Statement of Morton H. Halperin, Before the Senate Select Committee on Intelligence, June 15, 1978

Mr. Chairman: I very much appreciate the opportunity to appear before this Committee to testify on S. 2525. More generally, I want to express my appreciation for the opportunity that I and others of the Center for National Security Studies have had to comment on this legislation as it has developed. I look forward to such continued interchanges in the future.

It would seem more appropriate today not to provide detailed and specific comments on the current draft but rather to comment briefly on some of the major issues that are raised by this effort to draft legislative charters for the intelligence agencies.

Let me say first that I think this task is not only extremely important but essential if we are to bring the intelligence agencies under constitutional control and keep them there. Whatever one may think about the current activities of American intelligence agencies the one unmistakable lesson of the past is that we cannot permit that conduct to be left to internal directives or presidential orders. To do that would be to assume that never again in the future will those in charge of those agencies be tempted to conduct operations which violate constitutional rights.

At the same time, I would be less than candid if I did not say there was a danger (one which I think is in fact reflected in parts of S. 2525) that the efforts to legislate controls over the activities of the intelligence agencies may succeed merely in authorizing the activities which previously had been conducted without congressional authorization without putting meaningful limits and controls over those activities. I am thinking particularly of covert operations but I think the same is true of other intelligence agency operations.

CRITERIA FOR DEVELOPING AUTHORIZATIONS AND LIMITATIONS

In authorizing activities for the intelligence agencies and in seeking to put limitations on those activities, it is obviously not sufficient to try to determine what methods and techniques would, from the point of view of the intelligence agencies, be optimum. The most effective techniques—such as mass arrest and torture—in tracking down spies and terrorists are of course those that are only acceptable in a totalitarian society. It is the essence of a democratic society that we are prepared to run some risks in the most effective operation of the police and intelligence services in order to insure that the state does not become a far more dangerous threat to its own people, as police states have been.

Nor, in my view, is it enough for new charters to simply ensure that the operations of the intelligence agencies do not violate the constitutional rights of American citizens as they have been interpreted thus far by the courts. If the new charter merely restates constitutional restrictions, this would be far too narrow a response, given the extensive power of the clandestine intelligence agencies and the record of abuse which is before this Committee. Rather, I would submit that one must begin with the spirit embodied in the First, the Fourth and other amendments to the Constitution. The new interpretation of these provisions must match the intent of the Framers with the technology and resources now available to intelligence agencies, while finding effective ways of dealing with the threats to American society from counterintelligence and international terrorist operations.

In the attempt to draw the line, the first effort should be to ask the question of how, in the day to day operations of the intelligence agencies, we are still to strike a balance between what we want their functions to be and what limitations we want to put on them. The limitations, of course, derive from the problems of fitting them into a constitutional government—how do we go about authorizing certain activities and also putting controls on those activities? This is essentially the question which S. 2525 tries to answer. The balancing on which this bill relies implicitly assumes that the intelligence agencies and presidents and attorneys general will operate in good faith with an effort to comply with both the letter and the spirit of the legislation. My own view is that this is not sufficient—that looking at the record of the past requires that this Committee go beyond its initial analysis and give intelligence officials far clearer instructions about where to draw the line.

In doing this, there must first be a probing search into the value of various techniques in order to determine whether giving the intelligence agencies the power that they may ask for is, in fact, of sufficient use to them and to the nation that it is worth running risks of violations of the privacy and constitutional rights of American citizens. For example, while the intelligence agencies continue to assert that informants played a key role in preventing terror, this claim has not been borne out by outside investigations.

The record of the late 1960's, when there was extensive political violence in the United States and when the FBI and other agencies had free reign in the use of informants, suggests (and the GAO report confirms) that the value of such informants in such an enterprise is, in fact, extremely small. By contrast, the dangers informants and agents provocateur present are quite grave. I would urge this Committee not to accept statements that the restrictions in this bill interfere with the effective operations of the intelligence agencies. Indeed, I think the case has not yet been made for many of the intelligence activities that this bill would authorize—it has not yet been shown that they are sufficiently important to the proper goals of the intelligence agencies that they to should be authorized. There is, for example, no record at all on counterintelligence operations targeted on American citizens.

Beyond that, I think that the record of abuse by the intelligence agencies—abuses wherein they stretched their authorized functions to often illogical and illegal ends and undercut the constitutional rights of American citizens—cannot be ignored in the drafting of charter legislation. The record shows that not only have the intelligence agencies consistently chosen to ignore the law in the past and to do the things which they knew to be illegal, it also shows that they gave a broad interpretation to all of the authority which they did have. It is a record where the letter of the law, and the spirit behind the law, have been violated on a day to day basis by the intelligence agencies and by our presidents.

I recognize that this Committee feels that the investigative phase of the congressional inquiry into the intelligence agencies should be over. I would dissent from that view only to the extent of urging you to conduct some hearings on new material which has been released since the Church Committee filed its report. I think such hearings would show that on a number of subjects—including the CIA's Operation CHAOS program, the FBI surveillance of Martin Luther King, and the CIA's presence on university campuses—substantial and important material was withheld from the Church Committee and that the record is substantially worse than even that described in the Committee's Report.

This record of abuse cannot be simply swept under the rug with the assumption that such abuses will no longer occur. The recommendations of the Church Committee, from which S. 2525 substantially retreats in a number of areas, deserve serious consideration in light of the fact that it arose from the Church Committee which conducted extensive investigation of intelligence agency abuse. (The Center for National Security Studies has compiled a comparison of S. 2525 with the Church Committee recommendations in key areas. I would like to submit a copy of that analysis for inclusion in the record as an attachment to my statement.) [1]

There is no reason to think that the process of exaggerated interpretation of intelligence agency authority has not continued unchanged or will not broaden in the future. In such areas as the CIA's background investigations of unwitting American citizens, the CIA now appears to be stretching its authority and to be reluctant to conform to legislative restraints on its activities. The reasons are familiar; it contends restraints would impede the most effective operations of its organization.

To provide a concrete example of this problem: the FBI and the Justice Department have been found by the District Court in Northern Virginia to have violated congressional restrictions on FBI wiretapping programs by conducting a surveillance which was primarily for prosecutorial purposes. Instead of using the procedures of Title III and obtaining a search warrant, the government claimed inherent and presidential power and did not obtain a court order.

I have alluded to only a few examples which raise important questions, without offering at this point any systematic effort to explore the degree to which intelligence agencies are not now following both the spirit and the letter of those few restrictions which actually exist. But, it should be borne in mind that we are at a period during which we would expect them to adhere more closely to established regulations than they might in some future date, when scrutiny is less intense and the society as a whole perceives greater danger from espionage operations or international terrorism.

The task now, therefore, is to devise restrictions and regulations which cannot be abused and cannot be ignored. Restrictions must be written on the assumption that at some future time we will have a president, an attorney general, CIA or FBI director, or some other official who will seek to take advantage of every loophole, of every ambiguity in order to broaden the powers of the intelligence agency. The restrictions in the bill must be drawn tightly and there must not be the kind of

[1] See p. 327.

ambiguity which appears in many points in this legislation and which could easily be used to carry on kinds of activities which the Committee does not now anticipate.

COVERT OPERATIONS

The section of S. 2525 dealing with covert operations (or "special activities") ignores both the record that the Church Committee developed and the conclusion that the Church Committee reached—that covert operations over the past 25 years had not contributed to promoting American security. Moreover, the draft provisions contained in S. 2525 differ from those of the Church Committee in fundamental ways.

I do not think it is possible to put effective controls on covert operations by legislating reporting requirements to the Congress, or establishing procedural requirements within the executive branch, or imposing specific restrictions and prohibitions. On the first two issues I would refer this Committee to the exceedingly important exchange of views between the late Senator Phillip Hart and Clark Clifford in the public hearing on covert operations held by the Church Committee.

To summarize briefly: Senator Hart expressed doubt whether any congressional committee could effectively control covert operations; Mr. Clifford expressed doubt whether any executive branch committees could prevent such operations if the President were determined to carry them out. That specific kinds of prohibitions prove ineffective and that they probably prove dangerous has already been shown in hearings on S. 2525 before this Committee.

In short, I think there are three possible routes that Congress can take in dealing with covert operations. First, it can abolish them. Second, it can, as the Church Committee recommended, limit them to extraordinary situations when all would agree that the survival of the nation is at stake. Third, it can authorize past practice—it can recognize and authorize such operations, essentially leaving it to the discretion of the President to use the technique whenever he chose to do so, limited only by the fear of disclosure and the temper of the times.

My own view continues to be that we should abolish all such operations. Their utility is so small, the difficulty of controlling them is so great, the abuses that they create (both in our foreign policy and our domestic society) is so large, that I think the time has come to take the United States out of the covert operations business. On this subject, I have little to add to my previous testimony before the Church Committee and I request that my opening statement then be attached as an appendix to my statement today before this Committee.[2]

The second possibility and one I would urge this Committee to give most careful consideration to, is the recommendation of the Church Committee. Namely, that the authority to conduct covert operations should not be taken entirely from the President, the legislation should make it clear that such authority is to be used only in the most extreme situations. The critical question is whether covert operations are to be conducted regularly or whether they need to be limited to quite extraordinary events, the kind of event which, when the covert operation is finally revealed, a large proportion of the Congress and the public would agree that this was the kind of extraordinary circumstance that justified the use of this technique.

If one is not prepared to go that far, then I think efforts to regulate covert operation will be largely unsuccessful. We will have simply a situation in which the Congress, as a reform measure after the first intensive review of covert operations, would end up for the first time authorizing those activities. The provisions of S. 2525 would even end up being a step backward because it would limit the reporting of such operations to one committee in each house of the Congress. Again, I would urge the Committee to look at the record of abuses, to examine the claimed effectiveness of these operations, and to worry about the possibility that authority given will be stretched and abused in the present and the future. The application of these principles would, I believe, lead to a decision that covert operations should either be abolished or limited to the most extraordinary circumstances.

CIA ACTIVITIES IN THE UNITED STATES

In dealing with the possible activities of the CIA in the United States, S. 2525 would in effect repeal the absolute prohibition in the National Security Act of 1947 and would allow CIA activities within the United States. The legislative history of that act makes it clear that the prohibitions against domestic activities of the CIA stated in the legislation were intended, in fact, to prohibit any CIA investigations of Americans or even, apparently, of foreigners within the United States. We now know that right from the beginning the CIA acted within the United States, conducting surveillance of foreign emigre groups, of foreign intelligence activities, and

[2] See p. 408.

of American citizens. However, rather than tightening up the restrictions in order to be sure that they are now followed, S. 2525 moves in the other direction and authorizes the CIA to conduct a number of operations within the United States.

In taking this step the draft legislation ignores the very important differences between the FBI on the one hand and the CIA and other foreign intelligence agencies on the other. In setting up the CIA, Congress recognized that it would be granted greater secrecy than was necessary for the FBI and that its activities would necessarily come under less scrutiny. For that reason, among others, it directed that the CIA not conduct any operations within the United States. S. 2525 ignores that distinction and imposes its restrictions without regard to the fact that the CIA's activities, being super-secret, are inherently more difficult to control.

I would urge this Committee to return to the principles of the National Security Act of 1947 and to require that, whenever investigations are to be conducted within the United States for the purpose of gathering foreign intelligence information or for the purpose of interferring with the activities of foreign intelligence services in the United States, be conducted by the FBI. If investigations are to be made of individuals in order to consider approaching them for jobs or to determine whether they are the targets of counterintelligence, such investigations should be conducted by the FBI. If investigations are needed to determine whether individuals are threatening the physical facilities of the operations of intelligence agencies, those investigations should be conducted by the FBI within the context of an investigation of possible criminal activity. The CIA, if it is to operate at all, should be confined to operations abroad.

Certainly, before the Committee retreats from the principles of the 1947 Act it ought to conduct a searching examination to determine why these operations cannot be conducted effectively in the United States by the FBI. There are two specific areas in which S. 2525 appears literally to be dealing with the problem of past abuses by authorizing conduct which now appears to be in violation of the CIA charter. I refer to the CIA's activities on university campuses and to its background investigations on unwitting Americans with no connection with the CIA.

As this Committee knows, the Church Committee devoted considerable attention to the problem of the CIA on U.S. campuses and concluded it was a serious threat that needed to be dealt with. At the same time, it accepted the CIA's insistence that a full description of current CIA activities on campus could not be given. This Committee, it seems to me, has one of two choices. First, it can publish the secret portions of the Church Committee Report dealing with the CIA on university campuses and urge the universities to react to it and take appropriate steps to deal with what the Church Committee described as a serious threat to academic freedom.

Alternatively, it can legislate its own restrictions to deal with that problem taking guidance from university spokespersons who have now become generally aware of the content of the secret portions of the Church Committee Report. What it should not do is what S. 2525 appears to do—which is simply to authorize current CIA activity on campus without explaining to universities what they are, and without explaining why this Committee differs with its predecessor and does not see them as a threat to academic freedom.

One of the justifications for CIA investigations of Americans is that the CIA is thinking of approaching an individual to provide some operational service for the agency. The Court of Appeals for the District of Columbia Circuit in a case called *Weismann* v. *CIA*, 565 F. 2d 692 (D.C. Cir. 1977), as amended by unpublished memorandum April 4, 1977, held that such investigations violated the congressional intent in the National Security Act. However, the CIA apparently is continuing to conduct such investigations, either under the theory that the CIA need not obey the law or under the theory that the law as stated by one Circuit Court of Appeals is not definitive. In any case, Congress should make certain that the intentions of the 1947 Act are observed, rather than, as S. 2525 does, authorizing such investigations.

The CIA, like any other agency, should be required to approach an individual it is thinking of hiring and ask whether he or she wishes to be considered for employment without secretly gathering information about that individual.

The CIA has shown in the past that it can abuse the authority to collect information (anti-war activists, for example, were investigated under this pretext) and that it keeps its files long after it is no longer considering someone for employment. But even leaving aside the question of abuse, an American citizen should not be subjected to a secret investigation without his or her consent.

STANDARD OF INVESTIGATION AND OF INTRUSIVE TECHNIQUES

No legislation authorizing counterintelligence activities can meet the necessary standards of the Constitution unless it first prohibits investigations of American

citizens who are not suspected of criminal activity, and second, requires warrants according to the criminal standards of the Fourth Amendment. S. 2525 appears to accept both of these principles, but (particularly in the area of the criminal standard) it provides a number of different exceptions and possible loopholes so as to render the standard ineffective.

For example, I see no reason why American citizens traveling abroad should be subject to investigation by American intelligence agencies of a non-criminal standard. It is difficult to understand why the conduct of Americans abroad poses a sufficiently greater threat to American interests that citizens must be subjected to an investigation under a lesser standard. Moreover, the standards for gathering information about potential terrorist targets or potential intelligence sources leave much room for abuse, in that they permit investigations of these individuals without their permission. The authority to conduct investigations to protect physical facilities of the intelligence agencies is also subject to abuse in that it is not limited simply to active control of one of installations, but authorizes such techniques as interviews, even pretext interviews; this suggests strongly that there will be wide ranging investigations of individuals because of the speculation that someone may, at some unspecified future time, threaten physical facilities. Women Strike for Peace was an organization targeted under the pretext of protecting Langley.

Moreover, once an intelligence agency begins an investigation, S. 2525 would permit it to continue indefinitely simply by reiterating the same suspicion of criminal activity which initially triggered it. While there may be some justification for a lower standard of suspicion for beginning an investigation, an investigation should not continue unless it uncovers more proof of criminal activity over time than it had when it began.

Finally, there is one area where I believe it is extremely important for legislation to go beyond what the courts have suggested the Fourth Amendment requires. This is the area of informants. The courts have held that while a court order is needed for wiretaps, informers can be planted without any judicial review. Specifically, the cases thus far have ruled that if the government conducts its investigation through an informant, the Fourth Amendment provides no protection to someone's criminal enterprises. But the court has never squarely ruled on the question of whether informants raise First Amendment or Fourth Amendment problems when they gather information about lawful political activity. The abuse in the use of informants by the intelligence agencies which has occurred thus far makes it imperative that this extraordinarily intrusive technique be subjected to limitations similar to those put on wiretaps and buggings.

Mr. Chairman, let me say again how much I appreciate the opportunity to testify before this Committee, and to have the opportunity to discuss with the Committee and members of the staff S. 2525 as it has evolved and will evolve. I have this morning been critical of a number of elements of the bill, but I want to commend the Committee for moving forward with great seriousness in this enterprise. It may well be that S. 2525 is too complex to be enacted as a single piece of legislation. This Committee may want to consider moving pieces of it separately. In whatever form, we urgently need legislative controls over the intelligence agencies, particularly in light of the very serious problems created by the Carter Executive order.

REPORT

COMPARISON OF PROPOSALS FOR REFORMING THE INTELLIGENCE AGENCIES

AUGUST 1978

CENTER FOR NATIONAL SECURITY STUDIES

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COMPARISON OF PROPOSALS FOR REFORMING THE INTELLIGENCE AGENCIES

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INTRODUCTION

There is now broad agreement that legislation should be enacted to authorize and restrict the activities of intelligence agencies, but there is substantial and important disagreement about what these conditions should be. Several different comprehensive sets of recommendations have been put forward. This report compares five of these reports as they relate to eight major issues affecting foreign intelligence activities.*
The five official documents are:

Executive Order 12036 on U.S. Intelligence Activities (The Carter Order), issued by President Carter on January 26, 1978. This order currently governs the activities of the intelligence community;

S.2525, The National Intelligence Reorganization and Reform Act of 1978, charter legislation for the foreign intelligence related activities of the intelligence community. The bill was introduced by the Senate Select Committee on Intelligence on February 18, 1978 and is currently the subject of hearings before that committee. If and when enacted, it will supersede Executive guidelines then in effect;

Recommendations of the Final Report of the House Select Committee on Intelligence, 94th Congress, 2nd Session, (The Pike Committee Report);

Recommendations of the Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, 94th Congress, 2nd Session (The Church Committee Report);

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*Some of the guidelines also deal with domestic intelligence gathering where the targets are American citizens not believed to be agents of foreign powers. The issues involved in these activities are not discussed in this report. See: Testimony of Jerry J. Berman, John H.F. Shattuck and Morton H. Halperin on behalf of the American Civil Liberties Union on FBI Charter Legislation before the Committee on the Judiciary, United States Senate, April 25, 1978.

H.R.6051, The Federal Intelligence Activities Control Act of 1977, a bill designed to prevent abuses of power by the intelligence community and introduced with the support of a number of civil liberties groups including the American Civil Liberties Union.*

The major sets of activities compared in this report are:

I. Covert operations conducted abroad; (p.3)

II. Covert collection of intelligence abroad; (p.11)

III. The use of independent American institutions for intelligence purposes; (p. 15)

IV. Preventive action designed to frustrate hostile foreign intelligence and terrorist activities both abroad and in the U.S.; (p.18)

V. Foreign intelligence, counterintelligence, and counterterrorism investigations of Americans both abroad and in the U.S.; (p.20)

VI. Other intelligence investigation of U.S. persons; (p.39)

VII. The use of very intrusive techniques of investigation; (p.54)

VIII. Maintenance and dissemination of information obtained in intelligence investigations. (p.65)

Each section identifies the major policy questions and describes the recommendations contained in each document.

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*Underlined words are used to refer to these reports hereinafter. Executive Order 11905 (The Ford Order) and the recommendations included in the Report to the President by the Commission on CIA Activities Within the U.S. (The Rockefeller Commission Report) are also discussed, though less extensively. See the Appendix for more information on these documents.

I. COVERT OPERATIONS CONDUCTED ABROAD

Covert operations are activities conducted abroad which are designed to further U.S. policies and are carried on in a manner which is designed to conceal the role of the U.S. government. The tactics employed and the secrecy in which these missions are carried out are, according to the Church Committee, "in basic tension" with the demands of a democratic system and raise important civil liberties issues. All of the documents deal with covert operations.

A. AUTHORIZATION

1. Should the United States conduct covert operations?

The Carter Order authorizes the conduct of covert operations. 1/ S2525 would authorize covert operations subject to procedural requirements, Presidential findings and with specified limitations and prohibitions. 2/

The Church Committee, after "serious consideration of the option of proposing a total ban on all forms of covert activity," recommended authorizing covert operations only in "extraordinary circumstances involving grave threats to United States national security." 3/ The Pike Committee Report recommended prohibition of specific types of covert operations and authorization of all others. 4/ HR6051 would prohibit all covert operations in peacetime. 5/

B. IMPLEMENTATION OF COVERT OPERATIONS

1. Who should be allowed to conduct covert operations?

The Carter Order authorizes the CIA to conduct covert operations; any other intelligence agency may conduct an operation if that agency appears more likely

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1 Carter Order, §§1-302-303.

2 S2525 §§134-135.

3 Church Committee Report, Book I, p. 446; see also Church Committee Report, Book I, p. 448, Recommendation #35.

4 Pike Committee Report, p. 2.

5 HR6051 §§303(e)

than the CIA to achieve the objective of the operation. 6/ S2525 would authorize the CIA and, in wartime, the Armed Forces, to conduct covert operations. 7/ S2525 would permit any other intelligence agency to "provide support" for a covert operation. 8/ The term "provide support" is not defined.

The Church Committee Report recommended authorization of only the CIA to conduct covert operations. 9/ The Pike Committee Report did not specify which intelligence agencies should or should not conduct covert operations. HR6051 would prohibit covert operations in peacetime and does not specify who may conduct such operations during war.10/

2. What activities should be prohibited in the conduct of covert operations?

The Carter Order prohibits only assassination.11/ S2525 absolutely would prohibit the following:

1) assassination of foreign officials;12/

2) "the creation of epidemics;13/

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6 Carter Order, §2-306.

7 S2525 §131(j).

8 Id.

9 Church Committee Report, Book I, p.448, Recommendation #35.

10 HR6051 §303(e)(1).

11 Carter Order §2-305.

12 S2525 §134(5).

13 Id. §135(a)(4).

3) use of chemical, biological, or other weapons in violation of treaties or other international agreements to which the United States is a party;14/

4) the torture of individuals;15/ and

5) the support of any action, which violates human rights, conducted by the police, foreign intelligence, or internal security forces of any foreign country."16/

S2525 would prohibit the following but would provide for a Presidential waiver of this restriction in times of war or when the President determines that there is a "grave and immediate threat to the national security" and that such action is "vital" and is the only way to accomplish the objective: 17/

1) "the support of international terrorist activities;18/

2) the mass destruction of property;19/

3) the creation of food or water shortages or floods;20/ and

4) the violent overthrow of the democratic government of any country."21/

The Church Committee Report recommended prohibition of:

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14 Id. §135(a)(5).

15 Id. §135(a)(7).

16 Id. §135(a)(8).

17 Id. §136.

18 Id. §135(a)(1) Waiver at §136.

19 Id. §135(a)(2). Waiver at §136.

20 Id. §135(a)(3). Waiver at §136.

21 Id. §135(a)(6). Waiver at §136.

1) "political assassinations;

2) efforts to subvert democratic governments; and

3) support for police or other internal security forces which engage in the systematic violation of human rights."22/

The Pike Committee Report recommended prohibition of "direct and indirect attempts to assassinate any individual and all paramilitary activities...except in time of war."23/

C. STANDARDS

1. In what circumstances should covert operations be conducted?

The Carter Order authorizes covert operations whenever the President approves such activity.24/ S2525 would require, prior to initiation of a covert operation, Presidential findings that:

1) "such activity is essential to the national defense or the conduct of foreign policy of the United States;

2) the anticipated benefits of such activity justify the foreseeable risks and likely consequences of its disclosure to a foreign power;

3) overt or less sensitive alternatives would not be likely to achieve the intended objectives; and

4) the circumstances require the use of extraordinary means."25/

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22 Church Committee Report, Book I, p. 448, Recommendation #36.

23 Pike Committee Report, p. 2.

24 Carter Order §1-808.

25 S2525 §131(d).

The Church Committee Report recommended limitation of the conduct of covert operations to "extraordinary circumstances when no other means will suffice" and then, only when necessary "to deal with grave threats to American security."26/ The Pike Committee Report recommended authorization of covert operations only when the President certifies that such action "is required to protect the national security of the United States."27/ HR6051 would authorize covert operations only after a "congressional declaration of war."28/

2. What should be the standards of prior approval for covert operations?

The Carter Order does not prescribe standards for prior review of covert operations. Under S2525, the NSC would have to consider the following factors prior to initiation of covert operations:

1) "the justification for such proposed activity;

2) the nature, scope, probable duration, estimated costs, foreseeable risks, likely consequences of disclosure, and actions necessary in the event of the termination of such activity;

3) the relationship between the proposed activity and any previously approved activity;

4) the likelihood that the objectives of such activity would be achieved by overt or less sensitive alternatives; and

5) the legal implications of the proposed activity." 29/

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26 Church Committee Report, Book I, p. 446; see also Church Committee Report, Book I, p. 448, Recommendation #35.

27 Pike Committee Report, p. 2.

28 HR6051 §303(e).

29 S2525 §131(c).

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Prior to initiation of covert operations, S2525 also would require the Presidential findings listed above.30/ The Church Committee Report recommended inclusion of the same factors for consideration by the NSC as S2525 as well as "a careful and systematic analysis of the political premises underlying the recommended actions."31/ Review by the NSC, as recommended by the Pike Committee, would encompass the same factors as those listed above which S2525 would require for such review.32/ HR6051 would require a "congressional declaration of war" prior to initiation of covert operations.33/

3. Should there be a limitation on the duration of covert operations?

The Carter Order does not set a time limit on covert operations. S2525 would not limit the duration of covert operations and would establish annual review of such activities on the assumption that they may continue for periods longer than one year.34/

The Church Committee Report did not specify a cut-off period for covert operations. The Pike Committee Report mandated that no covert operation continue for more than one year past the "date of affirmative recommendation of its initiation."35/

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30 See note 25 & accompanying text supra.

31 Church Committee Report, Book I, p. 448, Recommendation #37.

32 Pike Committee Report, p. 5.

33 HR6051 §303(e).

34 S2525 §131(f).

35 Pike Committee Report, p. 3.

D. PROCEDURES

1. What procedures should be followed prior to initiation of covert operations?

The Carter Order establishes a committee of the NSC which must consider all proposals for covert operations and submit a policy recommendation to the President on all covert operations.36/ The President must approve all covert operations prior to their initiation under the Carter Order.37/ S2525 would require review of each covert operation by the NSC and Presidential approval prior to initiation of the activity.38/ Prior notification to the congressional committees on intelligence would be required by S2525 unless the President determined that such notification would result in harmful delay.39/

The Church Committee Report recommended prior review by a committee of the NSC and final approval by the President.40/ The Church Committee Report also called for specified and detailed budget requests for covert operations anticipated at the time of the annual intelligence budget submission.41/ The Pike Committee Report recommended establishment of a NSC committee

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36 Carter Order §1-302.

37 Carter Order §1-808.

38 S2525 §131(a),(d).

39 S2525 §131(g).

40 Church Committee Report, Book I, pp. 448-449, Recommendation #37.

41 Id. at p. 449, Recommendation #38.

whose members would review all covert operations and submit their proposal to the President.42/ The Pike Committee Report required notification to the House Select Committee on Intelligence accompanied by a Presidential certification of the necessity of the operation and recommendations from members of the NSC committee.43/ HR6051 would prohibit covert operations in peacetime and does not establish procedures for their authorization during war.44/

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42 Pike Committee Report, p. 5.

43 Id. at p. 2.

44 HR6051 §303(e).

II. COVERT COLLECTION OF INTELLIGENCE ABROAD

Covert or "sensitive" collection activities are clandestine efforts by the U.S. to gather foreign intelligence information. The exposure of such an operation, either because of the source of the information sought, the subject of the information, the manner of collection or other factors, can often have a significant effect on American interests. The U-2, KC-135 and Glomar Explorer are intelligence collection operations whose use would be covered by these rules along with the use of spies in some circumstances. The secrecy required by these operations insulates them from the sort of public debate normally associated with democratic decision-making; moreover, informed public debate on broader issues is hindered by the secrecy in which the fruits of sensitive collection activities are held.

A. AUTHORIZATION

1. Does covert collection differ from intelligence collection generally?

The Carter Order distinguishes between clandestine intelligence in general and "sensitive foreign intelligence collection operations" and establishes rules for the latter. 1/ S2525 would establish separate procedures for clandestine collection activities whose "importance or sensitivity" mandates additional safeguards or review. 2/

The Church Committee Report did not call for special rules for certain collection activities. 3/ The Pike Committee Report recommended a requirement of special review of "hazardous collection activities" although it did not indicate the precise scope of this term. 4/

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1 Carter Order §1-303.

2 S2525 §131.

3 Church Committee Report, Book I, p. 436-442.

4 Pike Committee Report, p. 5.

HR6051 would distinguish between human and technical intelligence collection and would prohibit human collection (espionage) in peacetime. 5/

2. Should there be special authorization for covert collection?

The Carter Order requires special authorization by the Special Coordination Committee of the NSC prior to initiation of all sensitive collection operations. 6/ S2525 would mandate review and approval of sensitive collection by the NSC prior to initiation of such activity. 7/

The Church Committee Report did not specify a need for special authorization of covert collection. The Pike Committee Report recommended that review of such activities by a Foreign Operations Subcommittee of the NSC be required. 8/ HR6051 would prohibit covert human collection. 9/

B. STANDARDS

1. What standards should trigger identification of covert collection?

The Carter Order requires the President to establish the standards which would trigger the special authorization procedures for sensitive collection.10/

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5 HR6051 §303.

6 Carter Order §1-303.

7 S2525 §131(a).

8 Pike Committee Report, p. 5.

9 HR6051 §303.

10 Carter Order §1-303.

S2525 also would require Presidential determination of such standards to identify those clandestine collection activities whose "importance or sensitivity requires review by the NSC."11/

The Church Committee Report, the Pike Committee Report, and HR6051 did not address this issue.

2. What standards of review should be required for covert collection?

Only S2525 would mandate specific standards for review of covert collection. They are:

1) "justification for such proposed activity;

2) the nature, scope, probable duration, estimated cost, foreseeable risks, likely consequences of disclosure, and actions necessary in the event of the termination of the activity;

3) the relationship between the proposed activity and any previously approved activity;

4) the likelihood that the objectives of such activity would be achieved by overt or less sensitive alternatives; and

5) the legal implications of the proposed activity."12/

C. PROCEDURES

1. What should be the procedures for approval of covert collection?

The Carter Order requires the DCI to report proposals for covert collection to the Chairman of a Committee of the NSC and mandates the Committee to review and approve all such proposals.13/ S2525 would require similar review by the NSC as well as prior notification to the President. S2525 also would establish a procedure for Presidential approval of activities

11 S2525 §131 (b) (1)

12 S2525 §131 (c)

13 Carter Order §1-303

"whose exceptional importance or sensitivity" requires this additional safeguard.14/

D. RESTRICTIONS

1. What restrictions should govern covert collection?

S2525 would establish limitations for covert collection but these would apply only to those activities whose "exceptional importance or sensitivity" would mandate Presidential approval. The President would have to establish standards for identification of those activities which fit this category.15/ S2525 would require that, with respect to this category of collection, the President determine that:

1) "the information to be obtained by such project must be essential to the national defense or the conduct of the foreign policy of the United States;

2) the importance of the information must justify the foreseeable risks of the likely consequences of disclosure to a foreign power; and

3) overt or less sensitive alternatives would not be likely to accomplish the intended objectives." 16/

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14 S2525 §131 (b) (1)

15 Id.

16 Id. at §131 (e)

III. USE OF INDEPENDENT AMERICAN INSTITUTIONS FOR INTELLIGENCE PURPOSES

The CIA has, in the past, used representatives of American institutions - clergy, academics, journalists - for operational assistance in espionage and covert activities. The use of these individuals raises issues with respect to the coopting of independent institutions to the detriment of both the institution and society at large.

A. AUTHORIZATION

1. Should the use of independent American institutions by the intelligence community be authorized?

The Carter Order does not regulate the use of independent institutions by the intelligence community at all, leaving this matter to agency regulations. S2525 would not restrict the voluntary use of representatives of institutions. The bill would partially prohibit the paid use of such people. 1/ The Church Committee Report permitted voluntary relationships. The Church Committee Report recommended prohibition of contractual relationships with the press, clergy and government grantees (exchange students). Paid relationships with representatives of American academic institutions would be authorized. 2/ The Pike Committee Report recommended prohibition of paid relationships. 3/ HR6051 would prohibit clandestine collection and covert operations in peacetime and would thus render this issue moot. 4/

B. RESTRICTIONS

The Carter Order contains no restrictions. S2525 would authorize limited use of certain persons under

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1 S2525 §132.

2 Church Committee Report, Book I, p. 455-456, Recommendations #42-48.

3 Pike Committee Report, p. 6, P(1).

4 HR6051 §303.

particular circumstances for certain purposes. The Church Committee Report proposed regulation of the use of academics.

1. How should the use of clergy be regulated?

S2525 would prohibit the paid use of anyone engaged in a full-time religious vocation for operational assistance. 5/ However, such persons could be contracted to aid in the recruitment of sources of information or assistance. 6/

2. How should the use of journalists be regulated?

S2525 would prohibit the paid use of accredited journalists, editors and policymakers of U.S. publications for operational assistance. 7/ However, their paid assistance in recruitment efforts would be authorized. 8/ The use of freelance journalists would not be regulated by S2525. 9/ The Church Committee Report recommended extension of this protection to all journalists who contribute materials regularly.10/

3. How should the use of government grantees be regulated?

Grantees could not be paid for operational assistance under S2525.11/ However, they could be contracted for assistance in recruitment efforts.12/

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5 S2525 §132(a)(1).

6 Id. at 132(f).

7 Id. at §132(a)(3).

8 See note 6 supra.

9 See note 7 supra.

10 See Church Committee Report, Book I, p. 456, Recommendation #46.

11 S2525 §132(a)(2).

12 Id. at §132(f).

4. How should the use of representatives of academic institutions be regulated?

S2525 would authorize the use of academics traveling abroad for operational assistance; a senior official at such person's institution would have to be notified of a paid relationship.13/ The use of academics to assist in recruitment efforts (at home as well as abroad) would not be restricted by the bill.14/ The Church Committee Report recommended that the use of academics be permitted and required that officials of the institution be notified in all cases. It suggested that universities adopt their own regulations.15/

5. Should the distribution of information within the U.S. be supported covertly by the intelligence community?

The Carter Order does not prohibit this activity. S2525 would prohibit covert distribution within the U.S.16/ and abroad where such distribution is "likely" to result in "substantial redistribution within the U.S.17/ The Church Committee Report recommended prohibition of both direct and indirect distribution within the U.S.18/ The Pike Committee Report also recommended prohibition of such activities.19/ HR6051 would also prohibit unacknowledged support for publications.20/

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13 Id. at §132(b)(2).

14 Id. at §132(f).

15 Church Committee Report, Book I, p. 456, Recommendation #42.

16 S2525 §132(a)(4).

17 Id. at §132(a)(5).

18 Church Committee Report, Book I, p. 456, Recommendation #45.

19 Pike Committee Report, p. 6, P(2).

20 HR6051 §303.

IV. PREVENTIVE ACTION DESIGNED TO FRUSTRATE HOSTILE FOREIGN INTELLIGENCE AND TERRORIST ACTIVITIES BOTH ABROAD AND IN THE UNITED STATES

Operations designed to frustrate the intelligence operations of foreign powers or the activities of international terrorists have also been a part of the intelligence mission. These activities may be conducted either abroad or in the United States and may be directed against Americans. Tactics can include but are not limited to the dissemination of misinformation, attempts to provoke violence and various forms of official harassment. Only S2525 deals specifically with this issue.

A. AUTHORIZATION

1. Should activities designed to frustrate and prevent anticipated foreign intelligence and terrorist activities be authorized?

The Carter Order does not prohibit and therefore implicitly authorizes without regulation such activities. S2525 would authorize counterterrorism and counterintelligence activities. 1/ The Church Committee Report recommended prohibition of COINTELPRO-type activities. 2/ HR6051 would prohibit preventive action except when such action might be authorized in traditional law enforcement related situations - e.g. arrest for attempted crimes, interviews of suspects. 3/

B. STANDARDS

1. If such activity is to be authorized, in what circumstances should it be permissible?

S2525 would not establish a standard for initiation of counterintelligence and-counterterrorism activities but would direct the President to establish standards. 4/

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1 S2525 §141.

2 Church Committee Report, Book II, p. 317, Recommendations #40-41.

3 HR6051 §102; See also HR6051 §§112-113.

4 S2525 §141(c)(2).

It would require that constitutional considerations be one but not the only factor in the decision. 5/

C. PROCEDURES

1. What procedures should be established to govern these activities?

S2525 would direct that the President establish procedures to govern the initiation of actions to prevent or counter terrorism and espionage. It would direct that the most sensitive activities be approved by the President but would leave the determination as to which activities require this special treatment to the President. 6/

D. RESTRICTIONS

1. What restrictions or duration of these activities should be established?

S2525 would not limit the duration of counterintelligence and counterterrorism activities. 7/

2. Should certain activities be prohibited?

S2525 explicitly would not prohibit any actions undertaken for counterintelligence or counterterrorist purposes; COINTELPRO-type activities would not be prohibited. S2525 does prohibit anonymous dissemination of information for the purpose of discrediting someone because of his exercise of constitutional rights. However, §243 authorizes violations of law other than acts of violence. 8/

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5 Id. at §141(c) (4).

6 Id.

7 See S2525 §141(c)(5) which mandates annual review indicating that long-term activities are contemplated.

8 The prohibitions on special activities (S2525 §135) do not apply to counterintelligence and counterterrorism (authorized by S2525 §141). §242 prohibits dissemination; §243 authorizes participation in illegal activities.

V. FOREIGN INTELLIGENCE, COUNTERINTELLIGENCE AND COUNTERTERRORISM INVESTIGATIONS BOTH ABROAD AND IN THE UNITED STATES

The foreign intelligence gathering activities of the United States intelligence agencies are designed to collect information for three primary purposes: (1) to learn about the activities of foreign governments and activities abroad, "foreign intelligence information"; (2) to uncover the plans of foreign intelligence services to gather information about the United States or its allies or to conduct covert operations in the United States, "counterintelligence"; and (3)to learn about the activities of international terrorist groups, "counterterrorism."

Such information is gathered not only by targeting foreigners but also by targeting American citizens and permanent resident aliens ("U.S. persons") both in the United States and abroad. A variety of techniques, some extremely intrusive, is used to gather this information.

A. INVESTIGATION OF U.S. PERSONS WITHIN THE U.S. CONDUCTED FOR THE PURPOSE OF LEARNING ABOUT THE ACTIVITIES OF FOREIGN GOVERNMENTS AND ACTIVITIES ABROAD (FOREIGN INTELLIGENCE INFORMATION)

1. In what circumstances should a U.S. person be targeted for a foreign intelligence investigation?

The Carter Order defines "foreign intelligence" broadly as "information relating to the capabilities, intentions and activities of foreign powers, organizations or persons." 1/ The Carter Order authorizes investigations for the collection of such information about U.S. persons but limits collection to the following types of non-publicly available information:

(a) "information about a person who is reasonably believed to be acting on behalf of a foreign power."

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1 Carter Order §4-205.

(b) "Information concerning corporations or other commercial organizations or activities that constitutes foreign intelligence."

(c) "Information constituting foreign intelligence... gathered...from cooperating sources in the United States."

(d) "Information acquired by overhead reconnaissance not directed at specific United States persons."

(e) "Information collected, received, disseminated or stored by the FBI and necessary to fulfill its lawful investigative responsibilities." 2/

These limitations can reasonably be interpreted to encompass more than criminal acts.

S2525 would authorize foreign intelligence investigations of U.S. persons within the U.S. whenever a designated official of the intelligence agency involved makes a determination that the information would be "significant foreign intelligence" and that the person targeted

(1) "is reasonably believed to be engaged in espionage or any other clandestine intelligence activity which involves or may involve a violation of the criminal laws of the United States, sabotage, any international terrorist activity, or any assasination, to be aiding and abetting any person in the conduct of any such activity, or to be conspiring with any person engaged in any such activity." 3 /

S2525 would define "foreign intelligence" more broadly than the Carter Order and include within the scope of that term "information pertaining to the capabilities, intentions, or activities of any foreign state, government, organization, association, or individual and also pertaining to the defense, national security, foreign policy or related policies of the United States, including information on the foreign aspects of narcotics production and trafficking." 4/

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2 Id. at §2-208.

3 S2525 §214(1).

4 Id. at §104(13).

This standard ties investigations within the United States to evidence of criminal conduct. However, the standard only requires that the "reasonably believed" activity "may involve" a violation of criminal statutes. This change is a significant retreat from the traditional criminal standard (Terry v. Ohio). As discussed below, the nexus to crime is weakened even further for investigations abroad.

The Church Committee Report explicitly recommended that the standard for initiation of a "full preventive intelligence investigation" should be tied to Terry v. Ohio. 5/ It recommended that such an investigation should proceed upon "reasonable suspicion" that the target "will soon engage in...hostile foreign intelligence activity." 6/ "Hostile foreign intelligence activity" is defined to include some non-criminal activities. 7/ However, the report stated that "certain activities engaged in by the conscious agents of foreign powers, such as forms of industrial, technological, or economic espionage, are not now prohibited by federal statutes. It would be preferable to amend the espionage laws to cover such activity...As a matter of principle, intelligence agencies should not investigate activities of Americans which are not federal criminal statutes."(sic) 8/ The Committee restricted investigations to the acts of conscious agents of a foreign power. 9/ The Church Committee Report also recommended that the FBI be permitted to conduct a less intrusive investigation--a "preliminary preventive intelligence investigation"--where "it has a specific allegation or specific or substantiated information that the American...will soon engage in...hostile foreign intelligence activity."10/

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5 Church Committee Report, Book II, p. 318.

6 Id. at Book II, p. 320, Recommendation #44.

7 Id. at Book II, p. 340, Definition(H).

8 Id. at Book II, p. 340, ftn. 74.

9 See notes 7 and 8 & accompanying text supra.

10 Church Committee Report, Book II, p. 320, Recommendation #44.

HR6051 would authorize only the investigation of "specific acts which violate Federal criminal statutes."11/ Provision is also made for a limited preliminary investigation "upon receipt of a specific allegation that a person has committed, is committing, or is about to commit a specific act which violates a Federal criminal statute."12/ Absent a violation of criminal statutes, HR5051 would prohibit the covert collection of foreign intelligence information in peacetime.13/

2. Should there be limitations on the techniques employed in such investigations?

All of the recommended guidelines except HR6051 envisage full scale investigations proceeding from the above standards including but not limited to the following techniques:

Overt Techniques (including pretext interviews)

Name checks/National Agency checks14/

Physical surveillance

Canvas of existing covert human sources

Examination of phone and credit records

Targeting of covert human sources

Mail cover

Examination of tax records

Examination of medical records, private institutions' records, "social history" records, federal, state and local agency records.

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11 HR6051 §112(a).

12 Id. at §113(a).

13 Id. at §303.

14 For definitions of these terms, see, respectively, Church Committee Report, Book II, p. 340, Definition (I) and S2525 §204(10). Note the difference between the terms: a "national agency check" is more extensive than a "name check."

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The Church Committee Report recommended limitation of "preliminary preventive intelligence investigations" to overt techniques, name checks, physical surveillance, canvassing of existing human sources and examination of phone and credit records.

HR6051 would establish a higher standard--that of probable cause of a criminal act--for the examination of private records and the use of mail covers.15/ The use of informants would be prohibited (by HR6051) with respect to groups engaged in First Amendment Activity.16/

All of the guidelines would establish different standards from those discussed above for the employment of very intrusive techniques--electronic surveillance, physical searches and mail opening. These techniques require a warrant when employed for traditional law enforcement purposes and will be discussed below in Section VII, "Very Intrusive Techniques."

3. What procedures should be established to govern these investigations?

The Carter Order authorizes investigations to be undertaken "by procedures established by the head of the agency concerned and approved by the Attorney General."17/ S2525 would authorize investigations upon the written approval of a designated agency official; annual review by the Attorney General of investigations which last more than 180 days would also be required.18/ S2525 would require the approval of the Attorney General for the employment of the following techniques:

1. examination of tax records
2. physical surveillance
3. direction of covert human sources
4. mail covers
5. examination of private records

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15 HR6051 §§203(b) and 206(a).

16 Id. at §202.

17 Carter Order §2-201(a).

18 S2525 §216.

6. See section VII on the use of "very intrusive techniques."19/

The Church Committee Report recommended requiring written approval of the Attorney General for the employment of any technique which would not be permissible as part of a preliminary preventive intelligence investigation.20/ (See page 24 for a list of these techniques.) HR6051 would require the written approval (including pertinent information) of the director of the investigating agency after thirty days. The approval of the Attorney General would be required in any investigation touching on the exercise of the target's First Amendment rights.21/

4. Should these investigations be restricted in duration?

The Carter Order does not limit the period of time for which an investigation may continue. S2525 would permit investigations for 90 days, renewable in writing for another 90 days. An investigation could be extended indefinitely beyond 180 days upon a written finding by an agency official that such an extension was "necessary and reasonable."22/ The standard for extension of an investigation would be no higher than the original standard.

The Church Committee Report recommended that a preliminary preventive intelligence investigation be limited to 30 days from the receipt of the information. An extension not to exceed 60 days could be obtained if the Attorney General or his designee determined that the information obtained warranted further investigation.23/ A full preventive intelligence investigation could last no longer than one year without a finding of compelling circumstances by the Attorney General or his designee.24/ The Church Committee Report recommended that the targeting of informants be limited to 90 days with a 60 day extension upon a finding by the Attorney General of "probable cause."25/

19 Id. at §215.

20 Church Committee Report, Book II, pp. 327-329, Recommendation #51-58.

21 HR6051 §114(a)-(b).

22 S2525 §216(a)-(b).

23 Church Committee Report, Book II, p. 320, Recommendation #44.

24 Id.

25 Id. at Book II, pp. 328-329, Recommendation #56

HR6051 would limit preliminary inquiries to 60 days. However, the director of the FBI could authorize, in writing, a thirty day extension if the facts obtained in the original inquiry were deemed to justify it. Such an authorization would have to set forth the particular acts on which the authorization was based.26/ A full-scale criminal investigation would have to be terminated after 6 months unless an extension was authorized in writing by the Attorney General upon a finding of probable cause.27/

5. What other restrictions should be applied to such investigations?

Both the Carter Order and S2525 require that the least intrusive means of investigation should be employed.28/ The Church Committee Report and HR6051 contain similar restrictions.29/

The Carter Order prohibits all intelligence agencies from requesting or otherwise encouraging "directly or indirectly, any person, organization, or government agency to undertake activities forbidden by this Order or by applicable law."30/ Similarly S2525 would mandate that "no entity of the intelligence community...shall knowingly pay, cause, request, or otherwise encourage, directly or indirectly, any individual, organization, or foreign government to engage in any activity in which such entity of the intelligence community is prohibited from engaging."31/

HR6051 would prohibit "all forms of political surveillance by intelligence agencies"32/ and "all forms of selective investigation or prosecution by the intelligence agencies."33/

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26 HR6051 §113(b).

27 Id. at §114(d).

28 See Carter Order §2-201(a) and S2525 §215 ("necessary and reasonable" requirement).

29 See, e.g. Church Committee Report, Book II, p. 328, Recommendation #55(2) and HR6051 §204(b)(3).

30 Carter Order §2-307.

31 S2525 §137 (a)

32 HR6051 § 2 (b) (1). See also HR6051 §101

33 Id. at §2(b)(3). See also, Id. at §103.

HR6051 also would prohibit intelligence agencies from cooperating with any federal, state, local or private agency to perform investigations or techniques prohibited by the act.34/

B. INVESTIGATION OF NON-U.S. PERSONS WITHIN THE U.S. CONDUCTED FOR THE PURPOSE OF LEARNING ABOUT THE ACTIVITIES OF FOREIGN GOVERNMENTS AND ACTIVITIES ABROAD (FOREIGN INTELLIGENCE INFORMATION)

1. In what circumstances should a non-U.S. person be targeted for a foreign intelligence investigation within the United States?

The Carter Order provides no protection for non-U.S. persons. S2525 would allow such investigations if:

"(1) such person is an officer or employee of any foreign power or organization;

(2) the circumstances of such person's presence in the United States make it reasonably likely that such person may engage in espionage or any other clandestine intelligence activity;

(3) information concerning such person is determined by the head of the collecting entity of the intelligence community to be significant foreign intelligence; or

(4) the collection of information concerning such person would be permitted under this part if such person were a United States person, but any limitation under this part on duration or techniques of collection that would be applicable to collection concerning a United States person shall not apply to collection under this section."35/

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34 Id. at §104.

35 S2525 §225.

This standard of investigation for foreign persons within the United States would not be tied to a criminal standard; foreign persons within the United States would be subject to investigation under S2525 for their employment status under (1) above and the information sought need not be "significant foreign intelligence."

The Church Committee Report recommended application of the same standard of investigation to foreigners within the United States as that which applied to Americans. The Report recommended that a "preliminary preventive intelligence imvestigation" follow "a specific allegation or specific or substantiated information that the American or foreigner will soon engage in...hostile foreign intelligence activity."36/ A "full preventive intelligence investigation" could be conducted upon " 'reasonable suspicion' that an American or foreigner will soon engage in...hostile foreign intelligence activity."37/ HR6051 would prohibit covert collection of foreign intelligence information in peacetime whether the target was a U.S. person or a foreigner.38/ HR6051 would require reasonable suspicion of "specific act which violates a Federal criminal statute" for initiation of a full investigation of a foreigner within the United States.39/

2. Should there be limits on the techniques employed in such investigations?

The Carter Order implicitly places no limitations on the techniques for such investigations. S2525 would limit only techniques used in the investigation of U.S. persons and "any limitation...on duration or techniques of collection that would be applicable to collection concerning a United States person shall not apply to collection" of information concerning foreign persons within the United States.40/ The Church Committee Report recommended that certain techniques be employed pursuant to each stage of investigation; this distinction between preliminary and full investigative techniques applies to investigations of foreigners as well as U.S. persons.41/

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36 Church Committee Report, Book II, p. 320, Recommendation #44.

37 Id.

38 HR6051 §303.

39 Id. at §112(b).

40 S2525 §225(4).

41 Church Committee Report, Book II, p. 320, Recommendation #44.

HR6051 would prohibit collection of foreign intelligence information in peacetime.42/

3. What procedures should be established to govern these investigations?

The Carter Order does not establish procedures for such investigations. S2525 would not require that the procedural safeguards required in the investigation of U.S. persons be applied to the investigation of foreign persons within the U.S. If the standard was met, S2525 would mandate no further requirements.43/

The Church Committee Report recommended different procedures for each covert technique authorized only for use in "full preventive intelligence investigations." These procedures apply only to investigation of Americans unless the technique is one which if used for law enforcement purposes would require a judicial warrant (for the procedures which govern the use of these techniques, see Section VII on "very intrusive techniques") HR6051 would require the same procedures in the investigation of foreign persons as it would for the investigation of U.S. persons.44/

4. Should these investigations be restricted in duration?

The Carter Order does not limit the period of time for which an investigation may continue. The duration limitations which S2525 would apply to investigations of U.S. persons would not apply to investigations of non-U.S. persons.45/ The Church Committee Report recommended that the limitations on the duration of investigations of U.S. persons apply to investigations of non-U.S. persons as well.46/ Similarly, HR6051 would limit the duration of the investigations of non-U.S. persons to the same time periods discussed above which apply to investigations of U.S. persons.47/

42 HR6051 §303.

43 See generally S2525 § 225.

44 HR6051 §112.

45 S2525 §225(4).

46 Church Committee Report, Book II, p. 320, Recommendation #44.

47 HR6051 §114.

5. What other restrictions should be applied to such investigations?

The restrictions discussed in Section A.(5) above apply to investigations of non-U.S. persons as well as to investigations of U.S. persons.

C. INVESTIGATION OF U.S. PERSONS WITHIN THE U.S. CONDUCTED TO UNCOVER PLANS OF FOREIGN INTELLIGENCE SERVICES TO GATHER INFORMATION ABOUT THE UNITED STATES OR ITS ALLIES OR TO CONDUCT COVERT OPERATIONS IN THE UNITED STATES (COUNTERINTELLIGENCE)

1. In what circumstances should a U.S. person be targeted for a counterintelligence investigation within the United States?

The Carter Order defines "counterintelligence" as "information gathered and activities conducted to protect against espionage and other clandestine intelligence activities, sabotage, international terrorist activities or assassinations conducted for or on behalf of foreign powers, organizations or persons, but not including personnel, physical, document, or communications security programs."48/ The Carter Order authorizes investigations for the collection of such information about U.S. persons but limits collection to the following types of nonpublicly available information:

(a) "information about a person who is reasonably believed to be acting on behalf of a foreign power, engaging in international terrorist activities or narcotics production or trafficking, or endangering the safety of a person protected by the United States Secret Service or the Department of State;"

(b) "information concerning corporations or other commercial organizations or activities that constitutes...counterintelligence;"

(c) "information arising out of a lawful counterintelligence...investigation;"

48 Carter Order #4-202.

(d) "information constituting...counterintelligence gathered...from cooperating sources in the United States;"

(e) "information collected, received, disseminated or stored by the FBI and necessary to fulfill its lawful investigative responsibilities; or"

(f) "information concerning persons or activities that pose a clear threat to any facility or personnel of an agency within the Intelligence Community. Such information may be retained only by the agency threatened and, if appropriate, by the United States Secret Service and the FBI."49/

S2525 would authorize counterintelligence investigations of U.S. persons within the United States if such person:

"(1) is reasonably believed to be engaged in espionage or any other clandestine intelligence activity which involves or may involve a violation of the criminal laws of the United States, sabotage, any international terrorist activity, or any assassination, to be aiding and abetting any person in the conduct of any such activity, or to be conspiring with any person engaged in any such activity."50/

This standard would tie such investigations loosely to a criminal standard in the same manner as the standard for investigations of U.S. persons for foreign intelligence information.

The Church Committee Report recommended that the FBI be permitted to conduct a preliminary preventive investigation "where it has specific allegation or specific or substantiated information that the American...will soon engage in...hostile foreign intelligence activity."51/ The Report recommended that a full investigation could be initiated upon " 'reasonable suspicion' that an American...will soon engage in... hostile foreign intelligence activity."52/

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49 Id. at 82-208.

50 S2525 §213(1).

51 Church Committee Report, Book II, p. 320, Recommendation #44.

52 Id.

The term "hostile foreign intelligence activity" includes "acts, or conspiracies, by Americans or foreigners, who are officer, employee, or conscious agents of a foreign power, or who, pursuant to the direction of a foreign power, engage in clandestine intelligence activity."53/ When the investigation targets a U.S. person for counterintelligence purposes, the above standard applies. HR6051 would require that, "Counterintelligence investigations inside the United States...focus on obtaining evidence of violations of the criminal laws of the United States for purposes of prosecution, deportation, or expulsion from the United States."54/

2. Should there be limitations on the techniques employed in such investigations?

The Carter Order applies the same limitations on techniques employed in counterintelligence investigations of U.S. persons within the United States as it applies to foreign intelligence investigations of U.S. persons within the United States. (See Section A.(2)supra). S2525 would apply the same limitations to counterintelligence investigations as it would to foreign intelligence investigations. (See Section A.(2) above)

The Church Committee Report and HR6051 also apply the same limitations as listed above in Section A.(2).

3. What other restrictions should govern such investigations?

See the restrictions on foreign intelligence investigations of U.S. persons listed under Section A.(3), (4), and (5) above for restrictions which limit the conduct of counterintelligence investigations of U.S. persons within the United States.

D. INVESTIGATIONS OF NON-U.S. PERSONS WITHIN THE UNITED STATES CONDUCTED TO UNCOVER PLANS OF FOREIGN INTELLIGENCE SERVICES TO GATHER INFORMATION ABOUT THE UNITED STATES OR ITS ALLIES OR TO CONDUCT COVERT OPERATIONS IN THE UNITED STATES (COUNTERINTELLIGENCE)

53 Id. at Book II, p. 340, Definition (H).

54 HR6051 §304(a).

1. In what circumstances should a non-U.S. person be targeted for a counterintelligence investigation within the United States?

The Carter Order does not explicitly address the issue of counterintelligence investigations of non-U.S. persons within the United States and the restrictions on investigations apply only to investigations of U.S. persons. S2525 would apply the same standard to trigger a counterintelligence investigation of a non-U.S. person as it applies to foreign intelligence investigations of such persons. (See Section B.(1)supra).

The Church Committee Report recommended application of the same standard of investigation of foreigners targeted in a counterintelligence investigation as that which it recommended for U.S. persons targeted in a foreign intelligence investigation. (See Section A.(1)supra). HR6051 would require the same standard of investigation of non-U.S. persons as that applied to U.S. persons in the conduct of counterintelligence investigations. (See Section C.(1) supra).

2. What restrictions should be applied to such investigations (e.g. limitation of techniques, restriction of duration, etc.)?

All of the guidelines mandate the same restrictions for application to counterintelligence investigations of non-U.S. persons as for foreign intelligence investigations of such persons. (See Section B.(2), (3), (4), and (5) supra).

E. INVESTIGATIONS OF U.S. PERSONS WITHIN THE UNITED STATES CONDUCTED FOR THE PURPOSE OF LEARNING ABOUT THE ACTIVITIES OF INTERNATIONAL TERRORIST GROUPS (COUNTERTERRORISM)

1. In what circumstances should a U.S. person be targeted for a counterterrorism investigation within the United States?

The Carter Order defines "international terrorist activity" as "any activity or activities which:

(a) involves killing, causing serious bodily harm, kidnapping, or violent destruction of property, or an attempt or credible threat to commit such acts; and

(b) appears intended to endanger a protectee of the Secret Service or the Department of State or to further political, social or economic goals by intimidating or coercing a civilian population or any segment thereof, influencing the policy of a government or international organization by intimidation or coercion, or obtaining widespread publicity for a group or its cause; and

(c) transcends national boundaries in terms of the means by which it is accomplished, the civilian population, government, or international organization it appears intended to coerce or intimidate, or the locale in which its perpetrators operate or seek asylum."55/

The Carter Order authorizes investigations for the collection of such information about U.S. persons but limits collection to the following types of non-publicly available information:

(a) "information about a person who is reasonably believed to be acting on behalf of a foreign power, engaging in international terrorist activities or narcotics production or trafficking, or endangering the safety of a person protected by the United States Secret Service or the Department of State;"

(b) "information collected, received, disseminated or stored by the FBI and necessary to fulfill its lawful investigative responsibilities; or"

(c) "information concerning persons or activities that pose a clear threat to any facility or personnel of an agency within the Intelligence Community. Such information may be retained only by the agency threatened and, if appropriate, by the United States Secret Service and the FBI."56/

S2525 would authorize counterterrorism investigations of U.S. persons within the United States pursuant to the same standard it would require for the targeting of such persons for counterintelligence investigations within the United States. (See Section C.(1) above)

The Church Committee Report recommended that the FBI be permitted to conduct a preliminary preventive intelligence investigation "where it has a specific allegation or specific

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55 Carter Order §4-209.

56 Id. at §2-208.

or substantiated information that the American...will soon engage in terrorist activity."57/ The Report also recommended that a full investigation could be initiated upon 'reasonable suspicion' that an American...will soon engage in terrorist activity."58/ The Church Committee Report defined "terrorist activities" as "acts or conspiracies which: (a) are violent or dangerous to human life; and (b) violate federal or state criminal statutes concerning assassination, murder, arson, bombing, hijacking, or kidnapping; and (c) appear intended to, or are likely to have the effect of:

(1) Substantially disrupting federal, state or local government; or

(2) Substantially disrupting interstate or foreign commerce between the United States and another country; or

(3) Directly interfering with the exercise by Americans, of Constitutional rights protected by the Civil Rights Act of 1968 or by foreigners, of their rights under the laws or treaties of the United States."59/

HR6051 would allow a preliminary investigation of a U.S. person within the United States only "(u)pon receipt of a specific allegation that a person has committed, is committing, or is about to commit a specific act which violates a Federal criminal statute."60/ Further investigation would be limited to investigation of "specific acts which violate Federal criminal statutes."61/

2. What restrictions should be applied to such investigations (e.g. limitation of techniques, restriction of duration, etc.)?

All of the guidelines mandate the same restrictions for application to counterterrorism investigations of U.S. persons as for foreign intelligence investigations of such persons. (See Section A.(2), (3), (4), and (5) supra).

57/ Church Committee Report, Book II, p. 320, Recommendation #44.

58 Id.

59 Id. at Book II, p. 341, Definition (N).

60 HR6051 §113(a).

61 HR6051 §112(a).

F. INVESTIGATIONS OF NON-U.S. PERSONS WITHIN THE UNITED STATES CONDUCTED FOR THE PURPOSE OF LEARNING ABOUT THE ACTIVITIES OF INTERNATIONAL TERRORIST GROUPS (COUNTER-TERRORISM)

1. In what circumstances should a non-U.S. person be targeted for a counterterrorism investigation within the United States?

All of the guidelines would require the same standard for investigation of non-U.S. persons for counterterrorism purposes as they would require for investigations of such persons for foreign intelligence purposes. (See Section B.(1) supra).

2. What restrictions should be applied to such investigations (e.g. limitation of techniques, restriction of duration, etc.)?

All of the guidelines mandate the same restrictions for application to counterterrorism investigations of non-U.S. persons as for foreign intelligence investigations of such persons. (See Section B.(2), (3), (4), and (5) supra).

G. INVESTIGATION OF U.S. CITIZENS ABROAD FOR FOREIGN INTELLIGENCE, COUNTERINTELLIGENCE OR COUNTERTERRORISM PURPOSES

1. In what circumstances should a U.S. person be targeted for foreign intelligence, counterintelligence or counterterrorism investigations abroad?

The Carter Order authorizes investigations for the collection of such information about U.S. persons but limits collection to the following types of non-publicly available information:

(a) "information about a person who is reasonably believed to be acting on behalf of a foreign power, engaging in international terrorist activities or narcotics production or trafficking, or endangering the safety of a person protected by the United States Secret Service or the Department of State;"

(b) "information constituting foreign intelligence or counterintelligence gathered abroad or from electronic surveillance conducted in compliance with Section 2-202."

(c) "information acquired by overhead reconnaissance not directed at specific United States persons;"

(d) "information concerning United States persons abroad that is obtained in response to requests from the Department of State for support of its consular responsibilities relating to the welfare of those persons."62/

S2525 would authorize such investigations of U.S. persons abroad whenever a designated official of the intelligence agency involved makes a determination that the information would be "significant foreign intelligence" and that the person targeted:

(1) "is reasonably believed to be engaged in any clandestine intelligence activity outside the United States;"

(2) "resides outside the United States and is acting in an official capacity for a foreign power and the information sought concerns such person's official duties or activities;" or

(3) "is a fugitive from United States justice abroad, reasonably believed to have relationships with foreign governments or organizations which would constitute significant foreign intelligence."63/

The standard for such investigations under S2525 would retreat even further from a criminal standard than that required for investigations of U.S. persons conducted within the United States.

The Church Committee Report recommended that such investigations could not be employed for collection of information concerning Americans abroad except:

"(a) Information concerning Americans which it is permitted to collect within the United States;

(b) At the request of the Justice Department as part of criminal investigations or an investigation of an American for suspected terrorist, or hostile foreign intelligence activities or security leak or security risk investigations which the FBI has opened pursuant to (these recommendations)

62 Carter Order §2-208.

63 S2525 §214

and which is conducted consistently with these recommendations."64/

HR6051 would allow counterintelligence investigations of U.S. persons abroad subject to "the prohibitions contained in subsections (b) and (e) of section 203 of the National Security Act of 1947 (50 U.S.C. 403)."65/

2. What restrictions should apply to such investigations of U.S. persons abroad?

The Carter Order does not limit the techniques which may be employed in such investigations. However, it requires Presidential authorization of the technique as well as an Attorney General finding of "probable cause to believe that the United States person is an agent of a foreign power" for utilization of techniques which require a warrant if undertaken for traditional law enforcement purposes.66/ Very intrusive techniques may be used without a finding of criminal activity. S2525 would require the same limitations on techniques, procedures and duration for investigations of U.S. persons abroad as for such investigations conducted within the United States. (See Section A.(2), (3), (4), and (5) supra).

The Church Committee Report also recommended that such investigations be conducted consistent with the recommendations which would govern investigations of U.S. persons within the United States. (See Section A. (2),(3), (4), and (5) supra).

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64 Church Committee Report, Book II, p. 306-307, Recommendation #9.

65 HR6051 §304(a)(2).

66 Carter Order §2-201(b).

VI. OTHER INTELLIGENCE INVESTIGATIONS OF U.S. PERSONS

In addition to foreign intelligence, counterintelligence and counterterrorism investigations initiated under the standards and procedures described in the previous section, some of the blueprints for intelligence activities authorize other investigations based on non-criminal standards for purposes such as investigating possible targets of foreign intelligence activity, possible recruits for U.S. intelligence, or those who pose a threat to intelligence agency security. In some cases, special procedures and restrictions are established to govern these investigations; in other cases, no special precautions are taken.

A. AUTHORIZATION OF INVESTIGATION OF TARGETS OF FOREIGN INTELLIGENCE SERVICES OR TERRORIST ORGANIZATIONS

1. Should the targeting of potential targets of foreign intelligence services or terrorist organizations be authorized?

The Carter Order authorizes such investigations. 1/ S2525 would authorize such investigations. 2/ The Church Committee Report 3/ and HR6051 4/ would not.

2. If so, under what circumstances should such investigations be permitted?

The Carter Order authorizes investigations "for the purpose of protecting foreign intelligence and counterintelligence sources and methods."5 / S2525 would authorize the investigation of any person "reasonably believed" to be the object of a recruitment effort by an intelligence service of a foreign power or the target of an international terrorist organization. The bill also would permit investigations of persons engaged in an activity or possessing information which is "reasonably believed" to be a target. The investigation of any person "reasonably believed" to be the target of an assassination attempt also would be authorized. 6/

1 Carter Order §2-206(c).

2 S2525 §218(a).

3 See Church Committee Report, Book II, pp. 320-323, Recommendation #44.

4 HR6051 §§112-113.

5 Carter Order §2-206(c).

6 S2525 §218(a).

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B. PROCEDURES FOR INVESTIGATION OF TARGETS OF FOREIGN INTELLIGENCE SERVICES OR TERRORIST ORGANIZATIONS

1. What special procedures should be established for such investigations?

Neither the Carter Order nor S2525 establish special procedures for such cases. 7/

2. Should the subject of such investigation be notified?

S2525 would require notice unless "(1) informing the person would jeopardize intelligence sources and methods; or (2) there is reasonable uncertainty as to whether such person may be cooperating with the foreign intelligence service or international terrorists." 8/

C. RESTRICTIONS ON INVESTIGATION OF TARGETS OF FOREIGN INTELLIGENCE SERVICES OR TERRORIST ORGANIZATIONS

1. Should there be limitations on the techniques employed in such investigations?

The Carter Order authorizes physical surveillance. 9/ S2525 would limit investigations to techniques which would not require Attorney General approval. See p. 24-25, supra for a list of the techniques which require such approval.10/ See also, p. 23.

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7 See Carter Order §2-206(c) and S2525 §218(a).

8 S2525 §218(b).

9 Carter Order §2-206.

10 S2525 §215 limits the techniques authorized therein (those which would require Attorney General approval) to investigations initiated "under this subpart," those initiated under the standards established in §213/§214; investigation of potential targets is authorized by a different subpart, S2525 §218.

2. What should be the purpose of such investigations?

S2525 would direct that investigations be designed to "protect against" such terrorist or intelligence activity or assassination.11/ Criminal prosecution need not necessarily be the goal.

3. Should there be limits on the duration of such investigations?

The Carter Order does not limit duration.12/ S2525 would permit these investigations to continue for up to 180 days.13/

4. Which entity of the intelligence community should carry out these investigations?

S2525 would authorize any entity of the intelligence community to carry them out.14/

D. AUTHORIZATION OF INVESTIGATION OF PERSONS IN CONTACT WITH SUSPECTED INTELLIGENCE AGENCIES

1. Should persons who come in contact with suspected intelligence agents be targeted?

The Carter Order15/ and S2525 16/ authorize such investigations. The Church Committee Report recommended prohibition of them except for a narrow exception concerning Americans abroad.17/ HR6051 would prohibit them. 18/

11 S2525 §218(a)(2).

12 Carter Order §2-206(c).

13 S2525 §218(a).

14 Id.

15 Carter Order §2-208(d).

16 S2525 §220.

17 For the rule, see Church Committee Report, Book II, pp. 321-325; for the exception, see id. at Book II, p. 307, Recommendation #11(c).

18 HR6051 §§112-113.

2. In what circumstances should such investigations be authorized?

The Carter Order authorizes the investigation of any person coming in contact with present and former employees and contractors or anyone who comes in contact with the subject of a lawful counterintelligence or foreign intelligence investigation.19/ S2525 would authorize the investigation of any person who has contact with any person "reasonably believed" to be engaged in "espionage or any other clandestine intelligence collection activity."20/

The Church Committee Report stated that the FBI should not investigate the allegation that a U.S. Senator attended a cocktail party at a foreign embassy where a foreign intelligence agent was present."21/ Recommendation 11, however, provided that "(t)he CIA may employ covert techniques abroad against Americans...(t)o the extent necessary to identify persons known or suspected to be Americans who come in contact with foreigners the CIA is investigating."22/

E. PROCEDURES FOR INVESTIGATION OF PERSONS IN CONTACT WITH SUSPECTED INTELLIGENCE AGENTS

1. What special procedures should be established for the initiation of such investigations?

Neither the Carter Order nor S2525 establishes special procedures.23/

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19 Carter Order §2-208(d).

20 S2525 §220.

21 Church Committee Report, Book II, p. 322.

22 Id. at Book II, p. 307, Recommendation #11(c). See also, Book II, p. 323, Recommendation #47 for limitation on FBI in conduct of background investigations of federal employees or contractors: "The authority to conduct such investigations should not, however, be used as the basis for conducting investigations of other persons."

23 See Carter Order §2-208 and S2525 §220.

2. Should the target of such an investigation be notified of his/her situation?

Neither the Carter Order nor S2525 provides for notification.

F. RESTRICTIONS ON INVESTIGATION OF PERSONS IN CONTACT WITH SUSPECTED INTELLIGENCE AGENTS

1. Should there be limitations on the techniques employed?

The Carter Order does not limit permissible techniques.24/ S2525 would permit all techniques which do not require Attorney General approval. See p. 24, supra, for a list of the techniques which require such approval.25/ See also p. 23, supra.

2. Should the duration of such an investigation be restricted?

The Carter Order does not restrict duration.26/ S2525 would allow up to 90 days.27/

3. What should be the purpose of such an investigation?

The Carter Order limits the scope of such investigations to "information needed solely to identify" the subject of the investigation.28/ S2525 would provide that the investigation may only extend to identifying the person and finding out if such person has, has had, or will have access to information the disclosure of which would be harmful to the U.S.29/

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24 See generally, Carter Order §2-201-208

25 S2525 §220.

26 See Carter Order §2-208.

27 S2525 §220.

28 Carter Order §2-208(d).

29 S2525 §220.

4. Which entity of the intelligence community should carry out these investigations?

Both the Carter Order and S2525 authorize any entity of the intelligence community to engage in these activities.30/

G. AUTHORIZATION OF INVESTIGATION OF POTENTIAL SOURCES OF ASSISTANCE

1. Should the unconsented investigation of potential sources of assistance be authorized?

The Carter Order31/ and S2525 authorize such investigations.32/ The Church Committee Report recommended that such activities be authorized.33/ HR6051 would not authorize such investigations.34/

2. If so, under what circumstances should such investigations be authorized?

The Carter Order35/ and S2525 require that a "reasonable belief" standard be met.36/ The Church Committee Report recommended that there should be a "bonafide expectation" that the subject might be of assistance.37/

H. PROCEDURES FOR INVESTIGATION OF POTENTIAL SOURCES OF ASSISTANCE

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30 Carter Order §2-208(d); S2525 §220.

31 Carter Order §2-208(e).

32 S2525 §221.

33 Church Committee Report, Book II, p. 303, Recommendation §8(b)-(c).

34 HR6051 §§112-113.

35 Carter Order §2-208(e).

36 S2525 §221.

37 Church Committee Report, Book II, p. 303.

1. What special procedures should be established for such investigations?

None of the guidelines establish special procedures to govern these investigations.

I. RESTRICTIONS ON INVESTIGATION OF POTENTIAL SOURCES OF ASSISTANCE

1. Should the nature of the information sought be restricted?

In all cases, the information sought would be limited to that which is necessary to determine the subject's suitability for employment or his/her credibility as a source of information.38/

2. Should the techniques employed be restricted?

The Carter Order does not restrict techniques.39/ S2525 would authorize all techniques which do not require Attorney General approval.40/ See p. 24 ,supra, for a list of techniques which require such approval. The Church Committee Report recommended authorization only of name checks and interviews with persons who know the subject.41/

3. Should the duration of such an investigation be restricted?

The Carter Order does not limit the duration of such investigations. 42/ S2525 would allow 90 days.43/

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38 See notes 35, 36, and 37 & accompanying text supra.

39 Carter Order §2-208.

40 S2525 §221.

41 Church Committee Report, Book II, p.. 303, Recommendation §8(b)-(c) and ftns. 23-24.

42 Carter Order §2-208

43 S2525 §221.

The Church Committee Report did not directly discuss the duration of such investigations. However, the Report implied that the investigations should be short, reflecting the limited goal of such activities.44/

4. Which entitites of the intelligence community should be authorized to carry out these investigations?

The Carter Order and S2525 authorize any entity of the intelligence community to investigate potential sources of assistance.45/ The Church Committee Report recommended that the CIA conduct these investigations with respect to possible sources for the CIA only and the FBI, with repect to potential employees of that agency.46/

J. AUTHORIZATION OF INVESTIGATION OF PERSONS IN POSSESSION OF FOREIGN INTELLIGENCE INFORMATION

1. Should U.S. persons in possession of foreign intelligence information be subject to investigation?

Only S2525 explicitly would authorize such investigations of U.S. persons.47/

2. In what circumstances should such investigations be authorized?

The information would have to constitute "significant" foreign intelligence.48/

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44 See generally, Church Committee Report, Book II, p. 303, Recommendation #8.

45 See Carter Order §2-208; S2525 §221.

46 See Church Committee Report, Book II, p. 303, Recommendation #8 and pp. 323-324, Recommendation #47.

47 S2525 §219.

48 Id. at §219(1).

K. PROCEDURES FOR INVESTIGATION OF PERSONS IN POSSESSION OF FOREIGN INTELLIGENCE INFORMATION

1. What special procedures should be established?

A properly designated agency official would have to determine that the above standard was met (i.e. circumstances exist).49/

L. RESTRICTIONS ON INVESTIGATION OF PERSONS IN POSSESSION OF FOREIGN INTELLIGENCE INFORMATION

1. Should the duration of such investigations be restricted?

S2525 would not limit the duration.50/

2. Should there be limitations on the techniques employed in such investigation?

S2525 would limit investigations to interviews (including pretext interviews) of persons to whom the information sought might have been disclosed.51/

3. Which entity of the intelligence community should perform these investigations?

S2525 would authorize any entity to conduct them.52/

M. AUTHORIZATION OF INVESTIGATIONS FOR THE PROTECTION OF SECURITY

49 Id.

50 See generally, S2525 §219.

51 S2525 §219(3).

52 Id. at §219.

1. Should persons in the vicinity of installations be subject to investigation?

The Carter Order does not explicitly authorize such investigations. S2525 would permit them.53/ The Church Committee recommended authorization of investigations while on the premises.54/ HR6051 would not authorize these activities.

2. What special procedures should be established for such investigations?

No special procedures are established by any of the regulatory schemes.

3. Should there be limitations on the techniques employed in such investigations?

S2525 would authorize physical surveillance, national agency checks and requests for records from federal, state, and local law enforcement agencies.55/ The Church Committee Report recommended only authorization of physical surveillance while the subject is on the grounds.56/

4. Should the investigation of persons suspected of posing a threat to installations or personnel be authorized?

The Carter Order authorizes the investigation of "persons or activities that pose a clear threat to any facility or personnel."57/ S2525 would authorize the collection of information concerning any person "who is reasonably believed to be engaging in any activity which poses a clear threat to the physical safety of any installation or of any personnel."58/ This standard would be less strict than the general standard discussed in the previous section (see p.20 , supra);

53 S2525 §222(a).

54 Church Committee Report, Book II, p. 302, Recommendation #7(a).

55 S2525 §222(a).

56 See note 54 supra.

57 Carter Order §2-208(k).

58 S2525 §222(b).

investigations are intended to determine whether that general standard has been met. The Church Committee Report did not recommend authorization of investigations of this nature outside of those which would be covered under the general counterintelligence/counterterrorism standard. See p.20 et. seq. supra. HR6051 would maintain the criminal standard in this area by not addressing such investigations directly.

5. What special procedures should be established for such investigations?

Neither the Carter Order nor S2525 establishes special procedural safeguards for these investigations.

6. Should there be limitations on the techniques employed in such investigations?

The Carter Order does not limit techniques.59/ S2525 would authorize physical surveillance on or near the installation, national agency checks, interviews, and requests for records from federal, state, and local law enforcement agencies.60/

7. Should the duration of such investigations be restricted?

Neither the Carter Order nor S2525 limits the duration of these investigations.

8. Should employees of intelligence agencies and persons in similar situations be subject to investigation?

The Carter Order authorizes the investigation of present and former employees, present and former contractors and applicants for employment or a contract in order to "protect foreign intelligence or counterintelligence sources or methods from unauthorized disclosure."61/ S2525 would permit investigations of employees, contractors and the employees of contractors for security reasons.62/

59 Carter Order §2-208(k).

60 S2525 §222(b)(1)-(4).

61 Carter Order §2-208(c).

62 S2525 §222(c).

The Rockefeller Commission Report recommended that investigations of persons presently or formerly affiliated with the CIA be authorized only if the Director of the CIA finds that "the investigation is necessary to protect intelligence sources or methods the disclosure of which might endanger the national security."63/ The Church Committee Report recommended provisions for investigations of employees, contractors and their employees, and applicants for such positions.64/

9. What special procedures should be established for such investigations?

No special procedures are established by any of the regulatory formats.

10. Should there be limitations on the techniques employed in such investigations?

The Carter Order does not restrict techniques. S2525 would permit all techniques which would not require Attorney General approval (see above p. 24, supra for a list of techniques which do) plus certain techniques which normally would require Attorney General approval but in this case would be permitted upon the written permission of the head of the investigating agency.65/

11. Should the duration of such investigations be restricted?

The Carter Order does not restrict duration. S2525 would permit 180 days after which the head of the agency could authorize continuation of the investigation.66/ The Church Committee Report did not discuss duration of such investigations.

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63 Rockefeller Commission Report, Recommendation (18)b.

64 Church Committee Report, Book II, p. 303, Recommendation #8(a).

65 S2525 §222(c).

66 Id.

12. Which agencies of the intelligence community should be permitted to conduct investigations relating to the protection of security?

The Carter Order and S2525 permit any entity of the intelligence community to conduct these investigations.67/ The Church Committee Report explicitly authorized the CIA and the FBI to take such actions.68/

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67 Carter Order §2-208, S2525 §222.

68 Church Committee Report, Book II, p. 303, Recommendation #8 (a) and pp. 323-324, Recommendations #47-49.

VII. THE USE OF VERY INTRUSIVE TECHNIQUES

"Very intrusive techniques" refers to three types of investigative activities - electronic surveillance both within the U.S. and abroad, mail opening and physical searches. These techniques have traditionally required a judicial warrant when employed for law enforcement purposes.

A. ELECTRONIC SURVEILLANCE WITHIN THE U.S.

Electronic surveillance within the U.S. refers generally to the intentional targeting of the domestic and international communications of U.S. persons located in the U.S., the intentional acquisition of the wire communications of any person in the U.S. where the acquisition occurs within the U.S., the intentional acquisition of totally domestic radio communication or any other monitoring of communications within the U.S. in which a party to the communication has a reasonable expectation of privacy.

1. Should electronic surveillance within the U.S. be authorized?

The Carter Order and S2525 authorize this technique. 1/ The Rockefeller Commission Report also authorized this technique. 2/ The Church Committee Report recommended authorization of such surveillance. 3/ HR6051 would prohibit the use of this technique. 4/

2. Under what procedures should electronic surveillance within the U.S. be employed?

The Carter Order does not require that a judicial warrant be obtained before electronic surveillance is initiated.

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1 Carter Order §2-202; S2525 §311 (18 U.S.C. §2522).

2 Rockefeller Commission Report, pp. 168-169.

3 Church Committee Report, Book II, p. 327, Recommendation #51.

4 HR6051 §201

Presidential approval of the use of such techniques is required. The determination that the standard has been met is left to the Attorney General. 5/

S2525 would provide that electronic surveillance within the U.S. could only be employed pursuant to a judicial warrant 6/ issued by a special court the members of which would be chosen by the Chief Justice from among nominees of the Chief Judges of the circuit courts. 7/ The President would have to authorize the Attorney General to approve applications for such warrants. 8/

The Church Committee Report recommended a warrant procedure for electronic surveillance within the U.S.; no special court was recommended. 9/ The Rockefeller Commission Report recommended either a warrant procedure or a requirement of written approval of the Attorney General. 10/

3. Against whom and in what circumstances should electronic surveillance within the U.S. be employed?

The Carter Order does not restrict the use of this technique against foreigners at all. Electronic surveillance may be employed against U.S. persons whenever there is "probable cause" to believe that such person is an "agent of a foreign power." 11/ "Foreign power" is not defined; "agent of a foreign power" is not defined. The Carter Order does not establish a criminal standard for the use of electronic surveillance within the U.S.

The standard for electronic surveillance which S2525 would establish was taken from the Foreign Intelligence Surveillance Act (S1566) as it was when S2525 was introduced and will presumably be amended to reflect the terms of the Act when passed by the Congress. As passed by the Senate S1566 would authorize electronic surveillance only when:

1) "the target of the electronic surveillance is a foreign power or an agent of a foreign power; and

5 Carter Order §2-201(b).

6 S2525 §311 (18 U.S.C. §2522).

7 Id. at §311 (18 U.S.C. §2523).

8 Id. at §311 (18 U.S.C. §2522).

9 Church Committee Report, Book II, pp. 327-328, Recommendations #51-52.

10 Rockefeller Commission Report, p. 168.

11 Carter Order §2-201(b).

2) the facilities or the place at which the electronic surveillance is directed are being used, or are about to be used, by a foreign power or an agent of a foreign power;

3) the purpose of the surveillance is to obtain foreign intelligence information; and

4) that such information cannot reasonably be obtained by normal investigative techniques."12/

The bill also would require a number of procedural safeguards.

The Church Committee Report recommended a requirement that all American citizens and resident aliens be targeted pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 - specific criminal activity must be suspected.13/ A limited exception is made for foreigners, for whom a warrant may issue if:

"(a) There is probable cause that the target is an officer, employee, or conscious agent of a foreign power.

(b) The Attorney General has certified that the surveillance is likely to reveal information necessary to the protection of the nation against actual or potential attack or other hostile acts of force of a foreign power; to obtain foreign intelligence information deemed essential to the security of the U.S.; or to protect national security information against hostile foreign intelligence activity."14/

The Church Committee Report recommended limitation of electronic surveillance of foreigners within the U.S. to situations in which the information sought was necessary to the security of the nation. The implication is that the Committee did not intend this to be common practice; rather, the non-criminal standard for foreigners was to be a narrow exception to the criminal standard. The Rockefeller Commission Report recommended that the minimum threshhold for approval of electronic surveillance should be a finding that the nation-

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12 S1566 §2 (18 U.S.C. §2524).

13 Church Committee Report, Book II, p. 327-328, Recommendation #52.

14 Id. at Recommendation #52(a)-(b).

al security was involved and the "circumstances included a significant connection with a foreign power."15/

4. What efforts should be made to reduce the gathering of information about individuals not targeted for investigation?

The Carter Order does not require that any attention be paid to minimization. S2525 would direct that minimization procedures be developed and that the court review these procedures to make sure they are reasonable.16/ The Church Committee Report also directs that attention be paid to minimization.17/

5. Which entities of the intelligence community should be authorized to engage in electronic surveillance within the U.S.?

The Carter Order authorizes any entity, except the CIA, to use this technique.18/ S2525 would authorize the FBI, CIA, and NSA.19/ The Church Committee Report recommended that only the FBI and NSA be permitted to use this technique.20/

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15 Rockefeller Commission Report, p. 168.

16 S2525 §311 (18 U.S.C. §§2521 (b)(8), 2524 (a) (5), and 2525(b)(2)(A)).

17 Church Committee Report, Book II, p. 327, Recommendation #52(c). Title III of the Omnibus Crime Control and Safe Streets Act of 1968 also requires minimization.

18 Carter Order §2-202.

19 See S2525 §§506(a) and 215(6) for FBI's authority to engage in electronic surveillance within the United States. See S2525 §413 (c) (2) for limited authorization for the CIA. The NSA was established for, among other purposes, monitoring communications. S2525 §§602(2) and 611(b).

20 For authorization for FBI use, see Church Committee Report, Book II, p. 327, Recommendation #52 and Book II, p. 320, Recommendation #44. For authorization for NSA, see Book II, p. 309, Recommendation #16.

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B. FOREIGN ELECTRONIC SURVEILLANCE

As defined in S2525 the term "foreign electronic or signals intelligence activities" means:

> "the acquisition of information by the interception of wire communications, nonpublic radio communications, or oral communications without the knowledge of all parties, or the installation or use of a device for monitoring to acquire information without the knowledge of the persons or activities monitored, but does not include 'electronic surveillance within the United States' as defined in Chapter 120 of Title 18, U.S. Code."21/

1. Should foreign electronic surveillance be authorized?

All of the proposed schemes to govern the intelligence community except HR6051 would authorize this technique.22/

2. Under what procedures should foreign electronic surveillance be employed?

The Carter Order establishes the same procedures for this technique as it does for electronic surveillance within the U.S. - i.e. there is no warrant requirement.23/ S2525 would require a warrant and the same procedures would apply to this technique as apply to electronic surveillance within the U.S.24/ The Church Committee Report also recommended that a warrant be required for such surveillance.25/

3. In what circumstances should foreign electronic surveillance be employed?

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21 S2525 §321 (18 U.S.C. §2531(b)).

22 See Carter Order §2-202; S2525 §321 (18 U.S.C. §2533); Church Committee Report, Book II, p. 327, Recommendation #51.

23 Carter Order §2-201(b).

24 S2525 §321 (18 U.S.C. §2534). See also, id. §311 (18 U.S.C. §2524).

25 Church Committee Report, Book II, p. 327, Recommendation #51.

The Carter Order applies the same standard abroad as it does for other electronic surveillance.26/ S2525 would broaden the standard it would establish for electronic surveillance within the U.S. by adding to it. The bill would provide that any U.S. person who is an "agent of a foreign power" or whose activities outside the U.S. would, if engaged in within the U.S., meet the definition of "agent of a foreign power" could be targeted.27/ In addition, another category related to criminal conduct would be added--- "a fugitive from U.S. justice abroad, information about whose relationships with foreign governments would constitute foreign intelligence information."28/ In addition, a U.S. person could be targeted abroad if engaged in non-criminal activities if "the U.S. person targeted is an officer or employee of a foreign power residing abroad, information about whose official duties or communications may constitute foreign intelligence information."29/ The Church Committee Report recommended application of the same standard abroad as it did within the U.S.30/

4. What efforts to reduce the gathering of information about individuals targeted for investigation should be made?

The Carter Order does not provide for minimization. S2525 would direct that procedures be developed, as did the Church Committee Report.31/

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26 Carter Order §§2-201 - 202.

27 S2525 §321 (18 U.S.C. §2534(b)(3)(A)-(B)).

28 Id. at §321 (18 U.S.C. §2534(b)(3)(D)).

29 Id. at §321 (18 U.S.C. §2534(b)(3)(C)).

30 Church Committee Report, Book II, p. 327, Recommendation #51.

31 See S2525 §321 (18 U.S.C. §§2532, 2534(a)(5), and 2534(b)(4)). See also Church Committee Report, Book II, p. 327, Recommendation #52 (Omnibus Crime Control and Safe Streets Act of 1968 referred to therein provides the necessary minimization procedures).

5. Which entities of the intelligence community should be authorized to conduct these surveillances?

The Carter Order authorizes any entity.32/ S2525 and the Church Committee Report would authorize the CIA and NSA to employ this technique.33/

C. PHYSICAL SEARCHES AND UNAUTHORIZED ENTRIES

1. Should physical searches for foreign intelligence, counterintelligence and counterterrorism purposes be authorized?

The Carter Order authorizes searches for intelligence purposes both within the U.S. and abroad.34/ S2525 would authorize searches within the U.S. and abroad.35/ The Church Committee Report also recommended authorization of physical searches.36/ HR6051 only would authorize physical searches pursuant to Title 18, that is, under a criminal warrant procedure.37/

2. What procedures should apply to the use of this technique?

The Carter Order does not require a warrant; the same procedures which apply for electronic surveillance apply to physical searches - i.e., the President must approve the use of the technique and the Attorney General must authorize the search and find that the target is an agent of a foreign power.38/

32 Carter Order §2-202.

33 Authorization for employment of this technique derives from the general scope of the entities' authority.

34 Carter Order §2-204.

35 S2525 §341.

36 Church Committee Report, Book II, p. 328, Recommendation #54.

37 This authorization is implicit by the omission of a prohibition within the provisions of the HR6051.

38 See Carter Order §2-201(b) and 2-204.

S2525 would require a warrant for searches abroad as well as within the U.S.39/ The Church Committee Report recommended requiring a warrant.40/

3. What standard should apply to the use of this technique?

The Carter Order applies the same non-criminal standard it uses to authorize electronic surveillance.41/ S2525 would apply the same standard for searches within the U.S. as it would apply to electronic surveillance within the U.S. (See p. 54, supra)42/ Searches conducted abroad would be governed by the same standard which would cover foreign electronic surveillance (see p. 58, supra) 43/ The Church Committee Report recommended application of the same standard it suggested for electronic surveillance both within the U.S. and abroad - a criminal standard with a narrow exception for foreigners.44/ HR6051 would require a criminal search warrant in all cases.45/

4. Should multiple searches be permitted?

The Carter Order authorizes multiple searches.46/

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39 S2525 §341(a).

40 Church Committee Report, Book II, p. 328, Recommendation #54.

41 Carter Order §2-201(b).

42 S2525 §341.

43 Id. at §341(b)(2).

44 Church Committee Report, Book II, p. 328, Recommendation #54.

45 This requirement is implicit since HR6051 does not exempt physical searches from existing law.

46 The plural "searches" is used throughout the applicable section; see Carter Order §2-204.

S2525 would authorize them abroad.47/ The Church Committee and HR6051 did not authorize multiple searches.48/

5. Which entities of the intelligence community should be authorized to conduct these searches?

The Carter Order authorizes the FBI at home and any entity abroad.49/ S2525 would not explicitly limit authorization to conduct physical searches to a particular entity. The Church Committee Report authorized only the FBI to conduct such searches within the U.S. and the CIA abroad.50/

D. MAIL OPENING

1. Should the opening of a U.S. person's mail be authorized and, if so, in what circumstances?

The Carter Order authorizes mail opening in U.S. postal channels under existing statutes and abroad under the same standard it applies to electronic surveillance.51/ S2525 would leave current law enforcement procedures to govern the opening of mail within U.S. postal channels 52/ and would authorize the opening of a U.S. person's mail outside the U.S. postal channels pursuant to the same standard adopted for electronic surveillance within the U.S. (See p. 54, supra)53/

With respect to mail passing between two persons, one of whom is an American, the Church Committee Report recommended restriction of mail opening to cases in which there is prob-

47 See S2525 §341; note the plural "searches".

48 Church Committee Report, Book II, p. 328, Recommendation #54 uses the singular form of the noun. Existing search and seizure law, in effect under JR 6051, requires a warrant for each search.

49 Carter Order §2-204.

50 Church Committee Report, Book II, p. 299, p. 306-307.

51 See Carter Order §§2-201(b) and 2-205.

52 S2525 §351(a)(1).

53 Id. at §351.

able cause to believe that the piece of mail contains evidence of a crime.54/ Concerning mail correspondence in which both parties are foreigners, the Report established the same standard as it established for electronic surveillance of foreigners. (See p. 58 , supra)55/ The Rockefeller Commission Report recommended "that the CIA is not to engage...in domestic mail openings except with statutory authority in time of war."56/ HR6051 would not authorize mail opening.

2. Under what procedures should this technique be conducted?

The Carter Order applies the same procedures to the mail of a U.S. person abroad which it establishes for electronic surveillance - no warrant requirement.57/ S2525 would require that a judicial warrant be obtained in all cases.58/ The Church Committee Report also required a warrant for mail opening.59/

3. Should multiple searches be permitted?

The Carter Order permits multiple searches, as would S2525.60/ The Church Committee Report was unclear on this question.61/

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54 Church Committee Report, Book II, p. 328, Recommendation #53 and p. 315, Recommendation #37(a).

55 Id. at p. 328, Recommendation #53 and pp. 315-316, Recommendation #37(b). See also p. 327-328, Recommendation #52.

56 Rockefeller Commission Report, Recommendation (13)a.

57 See Carter Order §§2-201(b) and 2-205.

58 S2525 §351.

59 Church Committee Report, Book II, p. 327, Recommendation #51.

60 Carter Order uses the term "open mail;" see Carter Order §2-205 S2525 uses the term "opening of mail;" see S2525 §351.

61 See Church Committee Report, Book II, p. 328, Recommendation #53 and pp. 315-316, Recommendation #37.

4. Which entities of the intelligence community should employ this technique?

The Carter Order authorizes any entity.62/ S2525 would authorize the FBI and, in some cases, the CIA to conduct mail openings. The Church Committee Report would authorize only the FBI to use this technique at home.63/

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62 Carter Order §2-205.

63 See S2525 at Title V and §413 (c) (2) and Church Committee Report, Book II, pp. 298-299.

VIII. MAINTENANCE AND DISSEMINATION OF INFORMATION OBTAINED IN INTELLIGENCE INVESTIGATIONS

Information gathered in intelligence investigations is subject to misuse. Because of the sensitive nature of the information, its maintenance and dissemination should be controlled. Release of information could be damaging to the subject; selective dissemination could be used, for example, to discredit political opponents of the Administration. However, important information must be made available to policy-makers.

A. MAINTENANCE

1. Should the period of time for which information may be retained be prescribed?

The Carter Order does not limit the period of retention, nor would S2525. 1/ The Church Committee Report required that information be sealed or purged upon completion of the investigation in which it was obtained. 2/ Improperly obtained information would be "sealed or purged as soon as practicable." 3/

B. DISSEMINATION

1. To whom, within a given agency, should private information which identifies a U.S. person be disseminated?

The Carter Order does not govern such dissemination. 4/ S2525 would restrict such dissemination to persons who require the information for the discharge of authorized governmental responsibilities. 5/

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1 Carter Order §2-310; S2525 §231.

2 Church Committee Report, Book II, p. 330, Recommendation #65.

3 Id. at Recommendation #66.

4 See generally Carter Order §2-310.

5 S2525 §232(b).

The Church Committee Report did not cover intra-agency dissemination. 6/

2. To which agencies and departments and in what circumstances should private foreign intelligence information which identifies a U.S. person be disseminated?

The Carter Order does not restrict interagency dissemination within the intelligence community. 7/ S2525 would authorize dissemination of such information when the recipient has lawful access to foreign intelligence information and the identity of the U.S. person is essential to an assessment of the information. 8/ The Church Committee Report did not authorize such dissemination outside the Department of Justice other than to the Department of State and the National Security Council. 9/

3. To which agencies and in what circumstances should private counterintelligence and counterterrorism information which identifies a U.S. person be disseminated?

The Carter Order does not restrict interagency dissemination of such information. 10/ S2525 would authorize dissemination to any agency having lawful counterintelligence or counterterrorism responsibilities and having a direct interest in the information. 11/ The Church Committee Report recommended authorization of dissemination of counterterrorism information to any law enforcement agency having jurisdiction over the criminal activity to which the information relates. 12/

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6 See generally, Church Committee Report, Book II, pp. 330-331.

7 See note 4 supra.

8 S2525 §232(c).

9 Church Committee Report, Book II, p. 331, Recommendation #67(b)(2).

10 See note 4 supra.

11 S2525 §232(d)(1).

12 Church Committee Report, Book II, pp. 330-331, Recommendation #67(a)(1).

4. In what circumstances should private foreign intelligence information which identifies a U.S. person be disseminated to a foreign government?

The Carter Order authorizes dissemination of foreign intelligence information to "entities of cooperating foreign governments" without restrictions.13/ S2525 would not authorize such dissemination.14/ The Church Committee Report recommended allowance of dissemination of such information to foreign governments if relevant to an activity permitted by the recommendations.15/

5. In what circumstances should private counterintelligence or counterterrorism which identifies a U.S. person be disseminated to a foreign government?

The Carter Order does not restrict such dissemination; information may be given to "cooperating foreign governments."16/ S2525 would permit dissemination if the information indicates that the U.S. person concerned could be engaged in international terrorist activities or in clandestine intelligence activities of direct interest to that foreign government if such dissemination is clearly in the interest of the U.S.17/ The Church Committee Report recommended authorization of dissemination of counterterrorism information to foreign law enforcement agencies having jurisdiction over the criminal activity to which the information relates and to foreign intelligence agencies if relevant to an authorized activity.18/

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13 Carter Order §2-310(c).

14 S2525 limits such dissemination to counterterrorism and counterintelligence information; see S2525 §232(d)(2).

15 Church Committee Report, Book II, p. 330-331, Recommendation #67(b)(3)-(4).

16 Carter Order §2-310(c).

17 S2525 §232(d)(2).

18 Church Committee Report, Book II, p. 330-331, Recommendation #67(a)(1),(4).

6. Should information relating to criminal activity be disseminated to law enforcement authorities?

All of the guidelines discussed provide for such dissemination.19/

7. Should the dissemination of "misinformation" about a U.S. person be authorized?

The Carter Order does not restrict such dissemination for purposes consistent with a legitimate intelligence activity.20/ S2525 would authorize the dissemination of "misinformation" under certain circumstances.21/ The Church Committee Report did not recommend authorization of such dissemination.

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19 See Carter Order §2-310(a), S2525 §232(d), Church Committee Report, Book II, pp. 330-331, Recommendation #67.

20 The issue is not directly addressed. The only possible safeguard appears in Carter Order, §2-102.

21 S2525 §242.

APPENDIX A: DETAILED INFORMATION ABOUT THE DOCUMENTS

CARTER ORDER

The Carter Order, Executive Order 12036, 1/ is currently in force "in order to provide for the organization and control of United States foreign intelligence activities." 2/ Under the definitions set forth in the Carter Order, "foreign intelligence means information relating to the capabilities, intentions and activities of foreign powers, organizations or persons, but not including counterintelligence except for information on international terrorist activities." 3/ Notwithstanding the exclusion of counterintelligence from the scope of the definition of "foreign intelligence," the Carter Order explicitly includes "counterintelligence" within its provisions. 4/

CHURCH COMMITTEE RECOMMENDATIONS

On January 27, 1975, the United States Senate, through Senate Resolution 21, established a Select Committee under the chairmanship of Senator Church "to conduct an investigation and study of governmental operations with respect to intelligence activities and of the extent, if any, to which illegal, improper, or unethical activities were engaged in by any agency of the Federal Government." The Church Committee, pursuant to the mandate of S.Res. 21, focused its inquiry on three broad questions:

1. Whether intelligence activities have functioned in accordance with the Constitution and the law of the U.S.; 2. Whether the structure, programs, past history, and present policies of the American intelligence system have served the national interests in a manner consistent with declared national policies and purposes; and 3. Whether the processes through which the intelligence agencies have been directed and controlled have been adequate to assure

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1 Carter Executive Order 12036, reprinted in Vol.43, No.18 Federal Register pp. 3674-3692 (Jan. 26, 1978).

2 Id. at p. 3674.

3 Id. 84-205.

4 See, e.g., id. at §1-304.

conformity with policy and the law. 5/

The Church Committee's Final Report, S.Rep.No. 94-755, was issued in six volumes on April 14, 1976. Most of the Committee's recommendations are contained in Book II, Intelligence Activities and the Rights of Americans. Recommendations concerning CIA activities abroad are in Book I, Foreign and Military Intelligence. Book III contains the Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans.

FORD ORDER

On February 19, 1976, President Ford issued Executive Order 11905 to govern "United States Foreign Intelligence Activities." 6/ The Ford Order was designed "to improve the quality of intelligence needed for national security, to clarify the authority and responsibilities of the intelligence departments and agencies, and to establish effective oversight to assure compliance with law in the management and direction of intelligence agencies and departments of the national government." 7/ The Carter Order, mentioned above, superseded the Ford Order.

HR6051

HR6051 was introduced in the House of Representatives on April 5, 1977. HR6051, the Federal Intelligence Activities Control Act of 1977, was established as a bill "(t)o prevent abuses of power by the intelligence agencies of the Federal Government, to limit the jurisdiction of the Federal Bureau of Investigation and the Central Intelligence Agency, to regulate dissemination of information by intelligence agencies, to amend the Freedom of Information Act to promote greater public access to the operation of intelligence agencies, to punish deception of Congress or the public by officials of the intelligence agencies, to establish procedures for assuring compliance with the foregoing measures, and for other purposes." 8/ HR6051 was referred jointly to the Committees on the Judiciary, Banking, Finance and Urban Affairs, Armed Services, and Government Operations.

5 Church Committee Report, S. Rep. No. 94-755, Book I, pp. 3-4.

6 Ford Executive Order 11905, reprinted in Vol. 41, No. 34 Federal Register pp. 7703-7738 (Feb. 18, 1976).

7 Id. at 81.

8 HR6051 at p. 1.

PIKE COMMITTEE RECOMMENDATIONS

The House Select Committee on Intelligence was established pursuant to House Resolution 591 (94th Congress, 2nd Session). It was directed to conduct an inquiry into the organization, operation, and oversight of the intelligence community. The Pike Committee Recommendations were published on February 11, 1976 as House Report No. 94-833, 94th Cong., 2nd Sess. (Wash. GPO 1976.) 9/

ROCKEFELLER COMMISSION REPORT

The Rockefeller Commission Report stemmed from Executive Order 11828. In that order, President Ford established the Commission and set forth tasks to be completed by the Commission; primarily, the Commission, under the chairmanship of Vice-President Rockefeller, was to "(d)etermine whether existing safeguards are adequate to prevent any activities which violate the provisions of 50 U.S.C. 403."10/ The Commission, established in January 1975, met in closed sessions and issued a report of their findings in June 1975.11/

S2525

Introduced on February 6, 1978, S2525, if and when enacted, will supersede the Carter Order and provide the "statutory basis for the national intelligence activities of the United States."12/ Title I of S2525 defines "national intelligence activity" as "any special activity in support of national foreign policy objectives, or, any foreign intelligence activity the primary purpose of which is to produce national intelligence."13/

S2525 is divided into seven titles. Titles IV, V and VI establish the statutory basis for the key agencies of the intelligence community. Title IV governs the CIA, establishes its functions, authority, appropriations and sets all other bureaucratic guidelines. Title V defines the authority of the FBI to engage in various activities and Title VI establishes the National Security Agency and defines its authority.

9 Pike Committee Text, published in the Village Voice, "Special Supplement" (36pages) (1976).

10 Executive Order 11828 §2(b).

11 Report to the President by the Commission on CIA Activities within the United States (the Rockefeller Commission-June 1975).

12 S2525 at p. 1.

13 S2525 §104(23).

Titles I, II and III are the heart of S2525. Title I defines the scope of allowable activities in which the intelligence community may engage. Title II, entitled "Intelligence Activities and Constitutional Rights," deals with the Constitutional rights of persons affected by intelligence activities. Title III deals with the employment of very intrusive techniques.

APPENDIX B: S. 2525 AND THE NATIONAL SECURITY ACT ON CIA OPERATIONS WITHIN THE U.S.

The National Security Act of 1947 (50 U.S.C. 403) barred the CIA from exercising "any police, subpeona, enforcement powers, or internal security functions within the United States." Because of excessive secrecy surrounding the CIA and its covert mission, and the consequent lack of public accountability, Congress determined that the agency's focus should be exclusively outward. Title IV of S. 2525 (Section 432 (b)) states that the agency "shall have no police, subpeona or law enforcement powers, nor perform any internal security or criminal investigation functions except to the extent expressly authorized by this Act." The exceptions are numerous.

First, the CIA is permitted to conduct foreign intelligence investigations in the United States directed against foreign persons, a category which includes resident aliens and some citizens. The CIA may also conduct counterintelligence and counterterrorism activities within the United States as are "integrally related" to its activities abroad. These activities may include investigations and preventive actions directed against United States persons as well as foreigners.

Second, the CIA is broadly authorized to conduct investigations in the United States to determine objects of recruitment, possible targets, foreign contacts, and "potential sources", activities now barred by law. See Weismann V. CIA, 565 F. 2d 692 (D.C. Cir. 1977).

Third, the CIA is authorized to conduct investigations to protect its installations and personnel in the United States from "physical threats" and to engage in activities to "counter" espionage or "prevent" terrorism in this country.

The domestic jurisdiction flowing from all of these authorizations is subject to expansion. Because jurisdictional disputes are to be settled independent of the charter's provisions (see § 141 (3) and § 113 (k)), CIA authority may be further expanded.

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STATEMENT OF MORTON H. HALPERIN, DIRECTOR, PROJECT ON NATIONAL SECURITY AND CIVIL LIBERTIES, BEFORE THE SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, DECEMBER 5, 1975

Mr. Chairman: I consider it an honor and a privilege to be invited to testify before this committee on the question of covert operations. From this committee's unprecedented review of the activities of our intelligence agencies must come a new definition of what the American people will permit to be done in their name abroad and allow to be done to them at home. No problem is more difficult and contentious than that of covert operations.

It appears that I have been cast in the role of the spokesman on the left on this issue. It is an unaccustomed position and one that I accept with some discomfort. It should be clear to the committee that there are a great many thoughtful and articulate Americans whose views on this question are considerably to the left of mine, at least as these terms are normally used. I would not presume to speak for them. Nor, Mr. Chairman, am I speaking for the organizations with which I am now affiliated. I appear as you requested as an individual to present my own views.

I believe that the United States should no longer maintain a career service for the purpose of conducting covert operations and covert intelligence collection by human means.

I believe also that the United States should eschew as a matter of national policy the conduct of covert operations. The prohibition should be embodied in a law with the same basic structure as the stature on assassinations which the committee has already recommended.

These proposals are not put forward because I believe that no covert operation could ever be in the American interest or because I could not conceive of circumstances where the capability to conduct a covert operation might seem to be important to the security of the United States. I can in fact envision such circumstances. However, I believe that the potential for covert operation has been greatly overrated and in my view the possible benefits of a few conceivable operations are far outweighed by the costs to our society of maintaining a capability for covert operations and permitting the executive branch to conduct such operations.

The revelations made by this committee in its report on assassinations are in themselves sufficient to make my case. I will rely on these illustrations not because there are not many others of which we are all aware but rather to avoid any dispute over facts.

The case against covert operations is really very simple. Such operations are incompatible with our democratic institutions, with Congressional and public control over foreign policy decisions, with our constitutional rights, and with the principles and ideals that this Republic stands for in the world.

Let me begin with the last point. The CIA operations described in this committee's assassination report are disturbing not only because murder was planned and attempted, but also because the operations went against the very principles we claim to stand for in the world. In Cuba, the Congo and Chile we intervened in the internal affairs of other countries on our own initiative and in the belief that we had the right to determine for others what kind of government their country needed and who posed a threat to their welfare. We acted not because we believed those that we opposed were the tools of foreign powers kept in office by outside intervention; rather we acted in the face of assertions by the intelligence community that the leaders we opposed were popular in their own lands.

In the Congo our efforts were directed at keeping Lumumba from speaking and keeping the parliament from meeting because we believed that allowing him to speak or allowing the parliament to meet would have meant that Lumumba would be back in office. In Chile we preached to the military the need to ignore the constitution and to over-throw a democratically elected government. We warned that the alternative was deprivation and poverty for the Chilean people.

All of these things were undertaken in the name of the United States but without the knowledge or consent of the Congress or the public. Nor could such consent have been obtained. Can you imagine a President asking the Congress to approve a program of seeking to reduce the people of Chile to poverty unless their military, in violation of the Constitution, seized power; or the President seeking funds to be used to keep the Congolese Parliament out of session so that it could not vote Lumumba back into office; or the authority to promise leniency to Mafia leaders if they would help to assassinate Castro. These programs were kept covert not only because we would be embarrassed abroad, but also because they would not be approved if they were subjected to the same congressional and public scrutiny as other programs. That is one major evil of having a covert capability and allowing our Presidents to

order such operations. The assassination themselves may have been an aberration; the means and purposes of our interventions were not.

Another inevitable consequence of conducting covert operations is that it distorts our democratic system in ways that we are only beginning to understand. Covert operations by their nature cannot be debated openly in ways required by our constitutional system. Moreover, they require efforts to avoid the structures that normally govern the conduct of our officials. One obvious area is lying to the public and the Congress.

We should not forget that the erosion of trust between the government and the people in this Republic began with the U-2 affair and has continued through a series of covert operations including Chile. Whether or not perjury was committed—and I see little doubt that it was—it is surely the case that the Congress and the public were systematically deceived about the American intervention in Chile. Such deception must stop if we are to regain the trust needed in this nation; it cannot stop as long as we are conducting covert operations. Given the current absence of consensus on foreign policy goals, such operations will not be accorded the deference they were given in the past. Critics will press as they do now on Angola and Portugal. And administrations will feel the need and the right to lie.

Surely at this point in time it is not necessary to remind ourselves of the certainty that the techniques that we apply to others will inevitably be turned on the American people by our own intelligence services. Whether that extends to assassination has sadly become an open question but little else is.

The existence of a capability for covert operations inevitably distorts the decision making process. Presidents confronted with hard choices in foreign policy have to face a variety of audiences in framing a policy. This in my view is all to the good. It keeps us from straying far from our principles, from what a majority of our citizens are prepared to support, from a policy out of touch with reality. The overt policies of the American government ultimately come under public scrutiny and Congressional debate. Long before that they have been subjected to bureaucratic struggles in which the opponents of the policy have their day in court.

Our intelligence analysts are free to explain why the policy will not work. With covert policies none of this happens. Intelligence community analysts were not told of the plans to assassinate Castro and so they did not do the careful analysis necessary to support their view that it would make no difference. The Assistant Secretary of State for Latin America was kept in the dark about Track II in Chile so he was not able to argue against it and inadvertently deceived the public.

In fact, I would argue that the route of covert operations is often chosen precisely to avoid the bureaucratic and public debate which our Presidents and their closest advisers come to despise. That is prescisely what is wrong with them. Our Presidents should not be able to conduct in secret operations which violate our principles, jeopordize our rights, and have not been subject to the checks and balances which normally keep policies in line.

You will hear, I am sure, various proposals to cure these evils by better forms of control. Such proposals are important, well-intentioned and certainly far better than the status quo, but I have come to believe that they cannot succeed in curing the evils inherent in having a covert capability. The only weapon that opponents of a Presidential policy, inside or outside the executive branch, have is public debate. If a policy can be debated openly, then Congress may be persuaded to constrain the President and public pressure may force a change in policy. But if secrecy is accepted as the norm and as legitimate, then the checks put on covert operations can easily be ignored.

Let me conclude by violating my self-imposed rule to draw only on cases in the assassination report and discuss some rumored current covert operations. I ask you to assume (since I assume that the committee is not prepared to confirm) that the United States now has underway a major program of intervention in Angola and a plan to create an independent Azores Republic should that prove necessary. I ask you to consider how the Congress and the public would treat these proposals if they were presented openly for public debate. Congress could, in principle, vote publicly to send aid to one side in the Angolan civil war as other nations are doing and we could publicly invite the people of the Azores to choose independence and gain our support. But because we maintain a covert operations capability and because such operations are permitted, the President can avoid debate in the bureaucracy and with the Congress and the public. We can be drawn deeply into commitments without our consent and have actions taken on our behalf that we have no opportunity to stop by public pressure or to punish at the polls.

Mr. Chairman, in response to the position I have outlined briefly this morning, one is confronted with a parade of hypothetical horribles—the terrorists with the

nuclear weapons, a permanent oil embargo and the like. To these I would reply in part that such scenarios seem implausible and should they occur the likelihood that covert capabilities could make an important difference also seems remote. As to the consequences of legislating a total prohibition in light of the possible unexpected catastrophe, I am content to call your attention back to the committee's excellent treatment of this issue in your assassination report.

This country is not, in my view, in such dangerous perils that it need continue to violate its own principles and ignore its own constitutional system to perpetuate a capability which has led to assassination attempts, to perjury, and to the subversion of all that we stand for at home and abroad. We are secure and we are free. Covert operations have no place in that world.

Mr. Chairman, let me say again how grateful I am for this opportunity to participate in this historic debate. I have published two articles on this subject which I have attached to this statement and which I request be made part of the record of your hearings.

I look forward to your questions.

Mr. HALPERIN. Mr. Chairman, I think that General Stilwell's statement has really raised the fundamental issue that this committee faces—I tried to deal with it in my statement in a somewhat different way—of how you should go about trying to design the limitations and the authorization of the intelligence agencies. What General Stilwell has done is to point out to you that there are restrictions and limitations put on the intelligence agencies by this bill, and he has suggested that the intelligence agencies would prefer to operate without them. For example, he says they would like to investigate Americans abroad when they have suspicion and questions about their activities.

Now, obviously from the point of view of the intelligence agencies, a free hand and an appeal to responsibility and dedication makes it easier for them to operate. In my view, the record of abuse that has occurred in the past, and the interest this country has in constitutional rights, makes it insufficient for the intelligence agencies and their supporters to say it is harder for us to operate without this; we would like to go after people and target them under these circumstances. What is necessary is a much more searching questioning of whether or not these restrictions will in fact interfere with the kind of intelligence operations that we would like to have.

It is not enough to say we would like to be able to do more. What is necessary is for past intelligence officers, out of their experience, or current intelligence officers, to come forward with specific, concrete cases, specific, concrete illustrations of what they would reasonably like to be permitted to do, and what they would not be able to do under the provisions of this bill, and to give some kind of an assessment of the cost to effective intelligence collection, to effective intelligence operation of the restrictions that are contained in the bill.

Now, I have not found in the statement, as I have read it and listened to it, any such analysis. What we have is simply the assertion that Mr. Helms would not want to be Director if these restrictions were in effect. We have the assertion that the intelligence agencies could not operate effectively if these restrictions were in effect. What we do not have are——

The CHAIRMAN. Dr. Halperin, just for your information and for others, the committee is presently engaged, with the cooperation, understanding and full participation on the part of the President, with the top people in the intelligence community across the board

in just this kind of point by point dialog, so that we know where there are specific problems, where inadvertently we might provide the kind of provisions that General Stilwell is talking about that would make it impossible to do the job. I should note that.

Mr. HALPERIN. Well, I welcome that, Mr. Chairman, and I would urge you to make as much of that public as you can. I would also urge that in trying to strike the balance in the bill, you recognize that abuses may hurt us in the future, and it is not simply enough to decide where the balance should be struck and then try to make legislation to suit it. One must ask the question also, are there possible loopholes here? Are there possible ways in which the authority in the bill has been abused in the past and might be abused in the future?

To say that we should rely in the future on the responsibility and dedication to the Constitution of our elected officials or officials of intelligence agencies seems to me to ignore the critical lesson of the past, that those people given the responsibilities will be tempted to abuse them.

We are told that that period is over, yet just in the last couple of months we have had a Federal district court judge rule that the current Attorney General and the current FBI conducted an electronic surveillance on an American and on a foreign national resident in the United States in violation of the Constitution and of the Safe Streets Act, in that a criminal wiretap, a wiretap was continued for the purpose of a criminal prosecution, was conducted without a warrant. Now, that occurred, given the existence of these committees. It occurred, given the dedication of the current Justice Department and the White House to protection of constitutional rights. We have had a judge rule that those wiretaps violated rights and that the evidence gathered in that should be suppressed.

So I think there is no reason to think that the simple dedication to the Constitution is enough.

Let me turn briefly to some of the specific items contained in my statement. First, on covert operations, it seems to me that the provision contained in S. 2525 does not reflect the conclusions drawn by the Church committee, the lessons of that analysis. As I read them, they simply say that covert operations should be conducted when it is important to the security of the United States to do so. It seems to me that the committee ought to look very carefully at going as far as the Church committee recommended, if not further, and that is to say that this is an extraordinary technique that we should only use when the survival of the Nation is in fact at stake.

What it comes down to is an alternative between a situation where we are always conducting some covert operations because there are always some clandestine activities that are important or will be judged to be important, or whether that technique raises sufficient problems for our constitutional democracy that if they should not be abolished, which is what my view is, they should at least be restricted, as the Church committee recommended, to very, very rare and very extreme situations.

If you look at the current world, covert operations are in fact prohibited in one country, and that is Angola, by the Clark amendment. The President has suggested that he is somewhat unhappy

about restrictions, apparently including that one. I think the question the committee needs to ask is whether it wants legislation which would enable the President to conduct covert operations again in Angola or not, or whether it wants to restrict that to circumstances where the survival of the Nation is at stake.

I think if you simply have the kind of restrictions that you have in this bill, we will go back, over time, to continuing to conduct covert operations as they were conducted in the past, and that is, whenever a President of the United States thinks that there is security need for the operation.

I think, as the testimony here has already shown, the effort to write specific restrictions into the bill about violently overthrowing democratic governments, mass destruction of crops, simply don't work. They open, I think, the committee up to ridicule. They create anomalies when by the negative they appear to authorize, for example, the peaceful overthrow of democratic governments. I doubt whether this committee wants to authorize the CIA to peacefully overthrow democratic governments.

And therefore I would urge the committee to move to the position recommended by the Church committee, namely, as I understand it, the prohibition on covert operations unless there is a much higher finding than the kind proposed in S. 2525.

Now, let me turn to the question of the CIA role in the United States. As I understand the overall impact of this legislation, it will abolish the distinction which is contained in the National Security Act of 1947 of what it is proper for the FBI to do in the United States as part of a law enforcement function from what it is proper for the CIA to do. And General Stilwell has in fact commented on that on a point in which I think we are in agreement, namely, that the bill seemed to get the CIA into the business of countering terror, countering narcotics activities within the United States, and does not draw a distinction between what is appropriate for the FBI to do as part of the law enforcement function, and what it is proper for the CIA to do.

I think that the prohibition which is contained in the National Security Act of 1947 ought to be continued, namely, a prohibition against CIA activities in the United States, particularly CIA activities in the United States directed at the activities of American citizens.

There is no record that suggests that the FBI could not properly perform these activities which should be done. Given the much more secretive nature of the structure of the CIA, the fact that it has secret employees, the fact that for its foreign operations it gets an added protection of various kinds, the principle which we started the CIA with, rather than being abandoned, ought to be reinforced by this legislation.

Let me refer to two specific areas. One of them has to do with the CIA presence on university campuses. General Stilwell objected to the Freedom of Information Act. In my view, that act is increasingly important because it provides a way to check the decisions that the Agency makes about what can and cannot be made public. As you know, when the Church committee made its report on the CIA role on campuses, it expressed the view that what the CIA was now doing on university campuses was a very serious problem and

it urged the universities to do something about it. But then it accepted the CIA's judgment that only something very general could be said about what those current activities were.

And Senator Mondale and Senators Phillip Hart and Gary Hart, in a concurring statement, said in their view that description of what the CIA was now doing on university campuses was insufficient to enable the university officials to understand what was going on and to reach their own judgment about whether that was acceptable.

Since then, the CIA has taken the position that nothing more could be said, until they were sued under the Freedom of Information Act, when they suddenly have discovered that a great deal more could be said. In an affidavit,[1] which I would like to ask be attached to my statement, of Mr. John Blake of the CIA, released in response to a lawsuit brought by the American Civil Liberties Union, Mr. Blake revealed on the 9th of June of this year that the CIA in fact, has programs involving confidential relations with American academics. He states that through the Foreign Resources Division the CIA maintains confidential contacts with personnel at American colleges and universities for assistance in the recruitment of foreign intelligence sources.

And he goes on to say that prior to 1968, a parallel program was maintained for the purpose of recruiting Americans who would serve in what he calls an undercover capacity with the CIA, and he suggested that this program was discontinued in 1968.

Now, my guess is that that information was also contained in the original version of the Church committee report, and that it could have been made public 3 years ago without any harm to the national security, just as I don't think the national security has in any way been harmed by the release of those facts, which are said to be generally known, by the CIA last week.

I think university officials and professors are entitled to know what the CIA does on their campuses.

I would therefore urge this committee to go back to the original version of the Church committee report and to see whether in light of what Mr. Blake has now made public, the full text of that report cannot be released now so that universities can in fact properly respond to the invitation of the Church committee, which this committee has now renewed, to decide how they feel about what the CIA is now doing on campuses based on the facts.

I had the opportunity to debate this subject with Admiral Turner a few days ago. I raised this question with him. He said that he did not have a copy of the original Church committee report and that he viewed it as the responsibility of this committee to decide whether or not that report should be made public.

I think it is very important that this committee permit university officials to make their own judgments and to report those judgments to the Congress and to the White House about the proper role of CIA on campus. I think that can only be done if they are informed about what the CIA is doing on campus.

I therefore welcomed Mr. Blake's affidavit. I regret that it took a lawsuit to get that information made public, and I would urge this

[1] See Appendix XI, p. 835.

committee to make as much additional information public as it can on that question.

One other issue on the CIA in the United States. The CIA has in the past conducted background investigations of unwitting Americans to decide whether or not they should be recruited. The court of appeals in this circuit in a case called *Weisman* has said that such investigations violate the National Security Act.

I have been trying for some months now to get the CIA to tell me whether or not they have stopped those investigations, and all they have finally been willing to say is that they are not doing anything that violates the *Weisman* decision, but what they think violates the decision remains a mystery.

I think again the public is entitled to know whether the CIA is in fact conducting investigations which the court of appeals in this circuit said violated the National Security Act of 1947, and I think this committee ought to amend S. 2525 to very precisely indicate what kinds of investigations on unwitting Americans are proper and are improper.

Now, finally, let me say something about two categories of investigative targets. One has to do with the question of American citizens abroad. S. 2525 seems to take the position that when an American travels abroad, the Government has the right to investigate him or her under a considerably lower standard than when he or she is in the United States. I think that as a constitutional matter, there is absolutely no basis for that, and as a practical matter, I find it hard to understand why the activities of Americans abroad is said to pose a greater threat to the security of the United States than the activities of Americans within the United States.

The fundamental principle which is reflected in this bill as to Americans in the United States should apply to Americans abroad as well, namely, that if the Government does not suspect the individual of illegal activity, he or she is entitled to be left alone. That fundamental right of Americans is not voided and should not be violated simply because an American citizen chooses to exercise what the Supreme Court has said many times is a constitutional right to travel abroad. We do not lose that right to be left alone simply because we travel abroad, and the intelligence agencies simply are not entitled, because they have, as General Stilwell put it, questions or suspicions about what an American may be doing, whether that American is in the United States or abroad, to start an investigation.

I would urge you to eliminate all of the distinctions in this bill which suggest a lower standard of investigation of an American citizen simply because that citizen is abroad.

Second, on the question of foreigners within the United States, General Stilwell has suggested that S. 2525 would confer fourth amendment rights on those persons. I would suggest that the Constitution is what confers fourth amendment rights on those persons, and I would have thought that that issue was settled in the *Abel* case in which the Supreme Court was clearly unanimous in believing that Mr. Abel, who was, after all, in the United States illegally as a secret Soviet agent, had fourth amendment rights.

Now, to be sure, when one is investigating illegal presence in the United States, the fourth amendment may be interpreted in a somewhat different way than when one is investigating criminal activity. To be sure, the courts have said that aliens may be treated differently where there is a strong constitutional reason to do so, but that does not mean that they do not have fourth amendment rights. It simply means that they may be applied differently under different circumstances.

And I would suggest that the way in which we view this country, the way we think about ourselves suggests that we do accord visitors to this country constitutional rights and constitutional protections, and that a person visiting the United States has a right to assume, and we want them to assume, that they have constitutional protections. There may be lower standards, there may be different standards, but to say that they can be wiretapped or surveilled or investigated at will or under a standard which turns out to be a meaningless restriction seems to me not only to ignore their constitutional rights, but to ignore sound policy.

I would just like to end with one final comment. The testimony that this committee has heard suggests to me that you want to begin to consider the question of whether this legislation ought to be moved forward in pieces rather than as a single act. There are many different and complex questions, for example, one that was touched on of whether the DCI should be separated from the CIA, which on the whole I personally agree with much of what General Stilwell has to say. A bill which deals with that issue, with the reorganization, with the rights of Americans, in a single piece of legislation, given the experience that we have had with the wiretap legislation, the complex problems just in that one bill, suggest to me that the committee ought to at least begin considering whether separate pieces of this legislation ought not to move forward on separate tracks.

Mr. Chairman, I appreciate the opportunity to testify here. I do not have the time to present a line-by-line analysis such as you have been given by General Stilwell, but I would like, with your permission, to submit in the future such an analysis, and to incorporate in it comments on the comments that you received from General Stilwell, and give you my reaction to those as well.[1]

Thank you very much.

The CHAIRMAN. Thank you, Mr. Halperin.

I ask unanimous consent that the document that you wanted appended to your statement, if there is no objection, be included in the record.

I understand that you received other documents in this same area that would be helpful to the committee?

Mr. HALPERN. I have received some documents relating to the background investigation. There are two letters from the Justice Department to the CIA on the meaning of the *Weisman* decision, and I would be happy to submit those to the committee as well.

The CHAIRMAN. If you could let us look at those, we would perhaps have a better idea of what is going on as well.[2]

[1] See p. 327.
[2] See Appendix X, p. 823.

General, I guess as much as I can, wearing a little different hat, I appreciate the concern you have over the security problem. Senator Goldwater and I have talked to Admiral Turner about that on a number of occasions, and most recently last evening. It is a difficult problem. You just make a plain, flatout statement that the physical security and personnel security of this committee is inadequate.

Why do you say that? Have you investigated us? Do you know the kind of investigations that we go through?

The reason I ask that question is because the President himself said that the security of this committee is better than any other agency of the Government, and yet I started with that question because I think the ability of this committee to do its job relies very heavily on our ability to have access to information that is top secret, and yet not have any situation where we have to worry about our people. That is why I started from that point.

Could you be any more specific about this?

General STILWELL. I didn't intend it to be in any way a commentary on the security of this committee as demonstrated today, Mr. Chairman, or indeed, of the House committee. My understanding is the record has, as you suggest, been impeccable. What I intended to convey was that if you take the totality of the reporting requirements laid down in this bill and the requisite assembly in this Congress of all the material that is specified, sir, by the current version of this bill, that you then have archives and records which are far in excess of those extant today, which will require considerable staff to process, and will require a physical security of premises that to my understanding does not now exist, although in the House premises, inherited from the Joint Atomic Energy Committee, there is a much larger and much more secure repository. That is what was implied.

Certainly this would then become a very prime target for penetration by our adversaries. I repeat, I did not mean to impugn in any way security consciousness of members of this committee.

The CHAIRMAN. I didn't ask the question out of personal reaction. None of us, I think, are in this very serious business going to be overly sensitive about toes being stepped on and certainly we are not going to suggest that the critique is any less than the most sincere, but I just raised that because we have established a security mechanism, a tecbnique that was structured by the interagency task force that does this for other agencies that have the most sensitive information. We have subjected our personnel to the most careful scrutiny and security checks, and if you have any specific concerns or recommendations on how to do better in this area, I would very much like to have them because I think that our ability to be able to handle this information, handle it securely, directly relates to whether we have an oversight function or not. If we are going to be a seive, then we are not going to get very much information.

And that is why we try, and if you do have a specific recommendation in that regard, we would like to have it.

General STILWELL. Might I just add, Mr. Chairman, that we strongly support the general reporting requirement.

The CHAIRMAN. Yes. I am glad you reminded me because as you were saying it I was going to mention there is probably a lot of merit in what you say, where we look on the total volume of reporting requirements that we have been very zealous in our effort. I think it is probably better for us to have less numerous reports that are good reports than to have so many different kinds of reports. I don't think the reporting should be such weight as provides a bureaucratic problem either for the intelligence community or for this committee to analyze it. What we want is to get the essential information at a meaningful interval. And I think there would be some reason for working on that problem.

If I just might say also, so you might have a little bit better understanding of why some of us feel the function of this committee is important, why we have pursued rather vigorously this enunciation of certain things in the charter. You have suggested and others have suggested that perhaps we don't need all these regulations or this kind of thing, and you used a phrase from Mark Twain that I use repeatedly about that cat on a hot stove. I think we are going through a hot-stove period right now, where we have sat down on some burners in the past few years, and I think it is important to be able to distinguish between hot and cold. That I accept.

I am a little less willing, well, in fact, let's say I am unwilling to accept your assessment that if we have not learned from our mistakes now, all the legislative redtape really can't prevent future commission. But we have never really put down specific guidelines so the people who risk their lives out there for us know how far they can go or when they should stop or when they should ask higher authority before proceeding, and we think that this might be helpful to them as well as cause a checking mechanism to be available so we won't repeat past mistakes.

I assume you are familiar with that period in our history when we had an Attorney General by the name of Palmer. We like to think that these abuses were all confined to the so-called Vietnam-Watergate era, whatever that means, but as we have seen in the investigations of the Church committee, some of these abuses occured early on in that period, and were not Watergate related. When you go back into the twenties and find out what happened, people were being thrown in jail without due process and this kind of thing, sort of a red scare period. I think it was Justice Jackson who eloquently spoke about the fact that Presidents and Congresses and administrative agencies can change, and he said it much better than I. And what today seems to me very acceptable guidelines, with one or two exceptions, may change and we are sensitive to this. And it is awfully easy to go about our normal business and let this experience leave us.

I would hope we can get some guidelines there and do it in a way that would avoid some of the administrative problems that you are concerned about.

Now, may I go to some of the specific concerns you raised, and I will ask one or two more questions and yield so other members can participate here.

You mentioned about the criminal sanctions and we now have on the books, as I understand it, certain statutes that make it a crime

to release certain information. One of the problems that we run into there, I assume that if we have somebody out here just meddling in what is security information I want to stop that, and if it takes new legislation, so be it, but talking to some of the folks down at the Defense Department, the question they raise is not one of lack of authority to prosecute some of these cases, but that when you make an assessment of what is necessary to prosecute the case, you have to disclose so much information in order to prove the case that you do more damage to the country and the intelligence system than you do good by prosecuting.

Do you have any suggestions as to how we get around that?

General STILWELL. May I ask Mr. John Warner?

Mr. WARNER. Yes, we would certainly agree with what you indicate the Department of Justice has said. Under existing espionage statutes, 793 and 794 of title 18, one has to prove to the satisfaction of a jury that it is information affecting the national defense, in the words of the statute. The prosecution, in presenting the case, No. 1, has to confirm the information, that it is true, and No. 2, has to show its relationship and why it is important to the national defense. So you do disclose, and balances must be struck in considering any particular case.

The statute that we have proposed or that has been proposed, avoids this possibility by establishing a category of information called intelligence sources and methods where you would not have to show to the satisfaction of a jury that relationship. It would be up to a judge to determine whether it was within the meaning of the statutory prohibitions or the statutory definitions of intelligence sources and methods, just as it is in some of these other disclosure cases. We believe, after a great deal of study, that this would avoid many of the problems that you find in prosecutions under 793 and 794.

This is a very carefully researched statute.

The CHAIRMAN. Would a defense lawyer have access to that colloquy or the disclosure of that information?

Mr. WARNER. The defense lawyer; yes.

The CHAIRMAN. That would not present any problems from a security standpoint?

Mr. WARNER. That is a burden we have to accept, sir. After all——

The CHAIRMAN. What burden then? Would this be a jury trial then?

Mr. WARNER. Yes, sir, it would be a jury trial, but the determination of whether or not it met the statutory definition would be a matter of law for the judge to decide.

The CHAIRMAN. What would be the burden of proof, then, on the Government?

Mr. WARNER. The burden of proof would be to show that the individual disclosed it in an unauthorized manner.

The CHAIRMAN. We will take a look at that one.

Mr. WARNER. I think it should be looked at, Mr. Chairman.

The CHAIRMAN. General, one question there and I will yield to my colleagues.

I want to make it clear what we are talking about when we are talking about electronic surveillance. The main thing you express

concern over is one thing we have negotiated out with the CIA and the Justice Department and the White House. It passed the Senate with only one dissenting vote. I don't know what is going to happen in the House, or how they are moving on it.

There is a much greater administrative problem, as you express concern over, or the burden is a much different one if you are asking to direct electronic surveillance at an American citizen than if, as you use an example, a KGB agent or the Russian Embassy. Now, that is a rather simple undertaking, to get that kind of thing done.

So the only major reason that we felt it was important is that we would have some mechanism there so that American citizens who inadvertently stumble into this kind of thing, in a nonconspiratorial manner, would have their rights protected, or even in a conspiratorial manner they would be given due process, through the minimization procedures on information gathered from these foreign sources, and it is the U.S. citizen we are concerned about. That is where you really have to go in and prove your case.

I don't know whether you are aware of that distinction or not.

General STILWELL. Yes, sir, we are aware of that distinction.

The CHAIRMAN. Are you afraid that we are not going to be able to find a Federal judge that we can trust? I mean, you stress that as a security problem, as I recall in your testimony here. If we pushed that very strongly, it is really sort of an indictment of the Federal judiciary to suggest that we can't find seven judges to sit on a panel, any one of whom might not be as trustworthy as one of us here.

General STILWELL. Well, we have several concerns, sir, and we are fully appreciative that at this stage of the game, that the administration is standing foursquare behind at least the House version of the bill, which has been modified, and it no longer tracks with 1566, as I understand it. We understand that. It shows a commendable unanimity in the administration, but we still disagree with that, sir.

And as our testimony shows, we fully support, subject, of course, to what the Supreme Court rules, the provisions that insofar as they apply to U.S. persons including permanent resident aliens. But we do not support extension to foreign powers or agents of foreign powers. We see nothing to be gained through the elaborate procedure of going to the judiciary every time one wants to use that type of intrusive technique.

I submit, sir, that if the Bureau were asked what was meant in terms of quantifying, the total impact of this on the general surveillance of this enormous counterintelligence target, where we have to deal with thousands and thousands——

The CHAIRMAN. Well, I won't pursue that but perhaps you might want to take a look at it, because it is relatively simple procedure where the Attorney General simply certifies that it is a foreign power. If he substantiates that, the judge can't look beyond that, if he has proof to substantiate that. But the judge does have, and it is for 1 year's duration. It can be renewed, of course. What the judge does require is that the collecting agency insure sufficient minimization procedures to protect American citizens.

You just might look at that.

I yield to my colleague.

Senator GOLDWATER. Well, thank you, Mr. Chairman.

First I want to thank the three of you gentlemen for testifying, and I might say that when we offered S. 2525 and all of us put our names on the legislation, every one of us agreed that we could disagree with any part of it or all of it at any time. But Senator Huddleston has done a magnificent job in putting together language, even though he himself knew that it would require changes and considerable changes before it could ever become law. And I think I wouldn't be wrong in saying that even if we could get this ready for this Congress, we are going to be fortunate.

It is my general feeling, gentlemen, that the American people have different concepts of intelligence information. I would say that unless a man or a woman has served in the armed services or served in the higher echelons of the corporate structure or union structure, that intelligence as we are talking about it today has no real meaning to most American people. I did not support too strongly the resolution that created this committee. I don't believe you can confide intelligence to 535 members of Congress and expect it to be bottled up. I will say that we have been very fortunate in this committee, on this side of the house, in keeping intelligence, classified intelligence where it should be kept, and that is quiet.

General Stilwell, do you think that the United States should be allowed to help in situations in other countries where terrorism is taking place, for example, the recent incident in Italy where the gentleman was murdered? And while I am not sure that the United States was asked for help, if that help was asked, do you think that we should be allowed to give, not in any other form than advice, psychiatric advice, police advice and so forth.

General STILWELL. Yes, of course, we should be authorized and should be enthusiastic to do so, sir, for a country that is an ally, that subscribes basically to the same value system that we do, the same type of civilization, a friend and ally in distress. That seems so basic.

Senator GOLDWATER. I believe we have a law that prevents that unless the act of terrorism can be called international terrorism. I am not a lawyer so, I am not certain of that, and I am not certain what our U.S. Attorney General ruled in the event that help was asked. But I agree with you. I think we should lend our intelligence sources to any ally to help them in their trouble, and I think during the course of our discussions on S. 2525, this undoubtedly will come up because there will be more acts and attempts.

Mr. HALPERIN. Senator, could I comment on that?

Senator GOLDWATER. Yes, please.

Mr. HALPERIN. There has of course been a press comment suggesting that such advice was asked for and could not be given under the law. That, in my view, is an example of efforts to suggest that the intelligence agencies are restricted in a way that nobody ever intended.

To read the Hughes-Ryan Act to prohibit the United States from aiding the Italian Government dealing with a terrorist attack simply defies the plain meaning of the language and the intent of the language.

And I find it absolutely astonishing to believe that anybody takes that amendment to have prohibited the kind of advice the column suggested was asked for.

I think this committee has an obligation, if there are such allegations being made, to advise the Congress, advise the administration that was not the intent of that bill. I don't think any American would object to giving that kind of advice, and I don't think the legislation prohibits it, and I think that is the kind of red herring that has been brought in in an attempt to suggest that the intelligence agencies' hands have been tied in ways that they have not.

Senator GOLDWATER. Well, I think the matter is highly sensitive, and I wouldn't want to get into it here, but I think the committee, with the knowledge that it has of the case, can well discuss it. I would agree with both you and the general that while you say the law has not been interpreted that way, it might have been. We don't know, and what the press says and has done is as big a problem with this committee as anything that we have to put up with in this country.

General, I wish that your group would give more thought to what we can do about the disclosure of intelligence sources and methods and the disclosure of classified material. I know of at least one death that occurred because of an unfortunate disclosure, and probably there will be more. I know of many sources that have been closed to us, what I call eyeball sources, because they are afraid of what might be said by Members of Congress and former members of the CIA or other intelligence agencies in this country or the press. I think if our intelligence agencies have suffered any really damaging blow, it has been in this area of sources, and naturally, because of fear for their lives, have refused further help to our country.

And I would ask not only your group but any group studying this to come up with ways that we can punish when an American or anybody else when they bandy about our intelligence to the detriment and the safety of our country. I think this is most important, and we are finding it truer every day. I dare say this is the most discussed problem that we have with Admiral Turner because he is concerned, and I will say the President is concerned.

Now, one statement I want to make—and I have made it time and again—the—I won't say the only, but the major problems that our intelligence agencies have run into have been as a result of decisions made by the executive branch.

Now, there is no way, for example, that the CIA could on its own decide to try to assassinate a foreign ruler.

There is no way that the CIA on its own initiative could decide to overthrow a government. I sat through the Church committee and I have sat through this committee, and every single case has been a decision of the President to use these agencies. Sometimes I honestly believe that they think it is in the best interests of our country, and at other times it was the best interests of themselves.

Now, I don't know how you can stop that because while the Constitution is not explicit, you and I know that the President is our Commander in Chief, and that doesn't mean just Commander in Chief of the men in uniform. It means Commander in Chief of the executive branch of Government. I want to make that state-

ment again. Maybe there is some way that we can prevent those decisions in the future. I don't know if that would be wise. I think again this is something that all the groups who are studying S. 2525 should pay attention to.

Now, Mr. Halperin, I might just call to your attention because I know of your great interest in maintaining the privacy of American citizens I would say that the FDA—I am not going to mention all of them, because I can't think of them all, but the FTC, the Internal Revenue Service, the EPA, the EEOC, all pry into our private lives daily, more than the CIA does. It is rather shocking to me to be able to relate the times that these agencies have demanded information from me that I figure is none of their damned business, and yet we have written into law by regulation the ability of these people to ask everything about your life that they want to. And now, of course, in some cases it is going to require a warrant or some such document regarding this secured in court. But I would hope that people who are worried about what goes on relative to our lives under the CIA or the FBI and so forth would begin worrying about these other agencies that clearly, if you ran a round of tapes on them, would shock you that they know that much.

I might say that starting with Franklin Roosevelt, maybe earlier, and under every President I have known—and Franklin Roosevelt started out with a woman sitting below what looked like a heater outlet behind his desk, taking shorthand notes of what went on—every President since has been doing more or less the same thing.

I'm not sure that's wrong, but I think the person talking to the President, should be told that he is being listened to.

So this problem that you see is nothing new. I don't like it any more than you do but as you get into these things, I hope that your groups would point out to the American people the danger that we live under daily.

Now, you are concerned with covert operations, and I know that many members of this committee are concerned with it, many members of the Church committee were concerned with it. I don't share that fear unless the intelligence agencies are allowed to make their own decisions. Again, while they can make some decisions, major decisions have to come from the Commander in Chief.

And I can tell you one covert operation that I can't get into detail on, that stopped the spreading of the war in southeast Asia into Burma and Pakistan and probably India. Nobody knew it, but they did a hell of a good job. I don't see how we can operate intelligence agencies or divisions of agencies without the ability to do a little Sneaky Pete footwork once in a while.

You mentioned covert operation and again, the President makes these decisions. The President made the decision relative to Angola, and we were within, I would say, 48 hours of a successful covert action that didn't involve any American men but it did involve American equipment, and had that action been allowed to be completed, without the Tunney amendment, I don't think we would have the trouble in Africa that we have today.

Pulling our action out allowed the Soviets to move in equipment and the Cubans to move in troops, and this would have been

prevented, without bloodshed, in my opinion, had we been allowed to continue the covert action.

Now, the Clark amendment, in my opinion, is just another example of foolishness like the so-called War Powers Act that literally ties the hands of the President in making decisions to keep the country out of this war. I believe that the Tunney amendment and the Clark amendment are going to result in more bloodshed on the continent of Africa than anything that we could imagine, because we have allowed the Cuban troops and the Soviet advisors and Soviet equipment to almost circle Africa.

We have a good chance of losing the Indian Ocean to the Soviets. These are the kinds of covert actions that I think we have to allow to continue.

Mr. HALPERIN. Senator, could I comment on that?

Senator GOLDWATER. Sure.

Mr. HALPERIN. The basic problem I have with the covert operations—and I agree that they basically come from the President—is that in a constitutional democracy, people have the right to decide whether, through elections, they want to keep a President in office and vote for him, or not, and they can do that only on the basis of knowing what he has done and whether they approve or disapprove of it.

The problem with covert operations is you then have a President of the United States doing things which the public cannot take account of in deciding how to vote. And that seems to me fundamental corruption of the democratic process. Therefore I would only do it under circumstances where it was vital to the survival of the Nation.

Now, if you take the intervention in Africa, I think there are very difficult and complicated arguments about whether what the Russians are doing and the Cubans are doing in Africa is a threat, and there are even arguments over what they are doing. The Russians and the Cubans all intervene in Africa openly. They say that is a corrupt government, we are going to support their opponents in this civil war or war of national liberation, that is a government we approve of, we are going to give them aid against their enemies.

I do not understand why we cannot do it the same way. If the survival of the Mobutu government is important to the security of the United States, we could give aid openly. If the overthrow of the Government of Angola is the objective of the Government of the United States, we should give aid to people fighting them in the civil war openly.

It is sometimes easier to do it covertly, but in almost every case it turns out people on the ground know we are involved anyway, and we can do it openly. I think we should do it openly so that we can have in this country the debate over what we should do which the Constitution requires.

Senator GOLDWATER. Well, I understand perfectly your feelings about this, but I also know that you cannot conduct operations on an open basis. No. 1, you have the Congress to figure with now, under the War Powers Act. The President could declare war, but 60 days later after Madison Avenue has spent millions of dollars convincing Congress that the enemy was right, the war could be

ended. I think it is one of the most dangerous pieces of legislation we ever passed.

And my answer to your suggestion that the overt approach would give the American people a better idea of how to vote is that I think the success of a covert action would give the American people a much better idea of how the President has succeeded in preserving peace for our country and protecting the interests of our allies.

And I feel, knowing what little I know about intelligence, that you can't tell the enemy what you are going to do. He is going to be there waiting for you. And that is the value of covert action even though it does probably violate some of the basic concepts of the democratic process.

So I would argue in favor of them, instead of arguing that they should be done in the open, this country being not a pure democracy but a democratic republic. We have seen in recent years what can happen when we have problems that should be solved or problems that we can solve. We are confronted with any number of groups who are willing to come to Washington, tear things down, be ugly about it or be nice about it and decent about it. I am thinking, for example, of the recommendation that the Armed Services Committee will make in the authorization legislation that we either return to the draft or some kind of universal training, not military training entirely. I can see the large groups of well-intentioned Americans marching on Washington protesting the draft. I don't say we do that secretly, but I don't think we move fast enough in this country, in this troubled world we are living in, when we have to sit here in Congress and debate and debate and argue and argue and listen and listen, and by the time it comes to a hope that some action can be taken, the battle is over.

I have only one other comment to make about your comments, and I know how you feel about these, and I know many people share your feelings. I know many people, believe it or not, that I am friendly with and they are friendly with me, people who were shocked that the CIA would ever ask a foreign pressman, an American in the foreign press to plant stories or to ask academics to suggest people in their fraternities, in their fraternities overseas who might be of value to them.

Personally, I look on this as the responsibility of an American citizen.

Now, he doesn't have to do it. That is the other responsibility he has. But I can't think of a trip I have ever made overseas, including overnight trips to Nogales, Ariz., that I don't call the CIA and tell them of anything I saw that might be of interest for a recruitment or things like that, and I think that the academics, instead of getting bristled about these things and the press, too, should be more aware of their responsibilities to their country. That is my personal view of that, and I would hope that in the final writing of S. 2525 we can make it clear, if we have to, that this is the freedom they have, either to do it or not to do it, but if they don't want to do it, don't raise such a stink about it that every country in the world knows that we are doing it.

Mr. Chairman, that is all I have, and I am sorry, but I have to leave.

I have my youngest grandson waiting for me in my office, and he raises hell when I'm not there.

The CHAIRMAN. He may be involved in covert activity in the office right now. [General laughter.]

[Whereupon, Senator Goldwater left the hearing room.]

The CHAIRMAN. Senator Huddleston?

Senator HUDDLESTON. Thank you very much, Mr. Chairman.

It is past noon hour. I don't want to delay the committee very much except to say that I appreciate very much the testimony that we have from these two witnesses today. I think they have been very thoughtful and presented the conflicting situation that the committee was aware of even before we began drafting the legislation that is before us. That is the question of how we establish reasonable restrictions and restraints on the operations of the intelligence community and at the same time provide the flexibility that is necessary for the intelligence community to carry out its responsibilities and be an efficient and effective intelligence operation.

Those who operate the intelligence elements naturally want all the flexibility they can get. They are in the front lines. They know what kind of situations might arise. They know what kind of reactions might be necessary, sometimes instantaneous in order to take advantage of an intelligence opportunity or maybe to prevent or to blunt some act that would adversely affect this country. So we recognize that. We recognize, too, the need for protecting the constitutional and legal rights of citizens of this country, and we recognize through the investigations that have been held that some activities, well intended, sometimes have adverse repercussions for the United States.

So our whole effort has been to try to develop some kind of mechanism or framework within which these two conflicting viewpoints can be accommodated, with the main objective, I think, of all of the members of this committee, being to provide the best intelligence operations in the world for the United States. The process that we are going through, the legislation that has been introduced as has already been amply indicated by the members of the committee, is designated as just a starting point. There was no way we could get the attention of you, gentlemen, or the executive or the present operators of our intelligence community on the problems until we had something out here to talk about. I think to that extent we are succeeding.

The process is continuing. We are working daily with the executive, with the branches of intelligence trying to resolve these problems, trying to develop charters that will be workable—I think that is kind of a key word as to what our objectives are.

There are a few points on which I think I would like to get further amplification. It seems to me that nearly everybody agrees that statutes are desirable, that operators of the intelligence agencies want to know what their legal responsibility is, what their missions are, and what the parameters of their operations ought to be. There is general agreement on that, and consequently that is why we are proceeding.

There have been a great many questions raised, I think, by both witnesses, as to the advisability of establishing a Director of Na-

tional Intelligence who might be separate from the CIA. We gave a lot of thought to that. The bill itself does not do that. It provides for a method by which the President should he determine it to be advisable, may recommend the separation of the two and seek the approval of Congress. This is the situation that exists now, under the Reorganization Act.

Some elements of the intelligence community have suggested in our hearings and in the Church committee considerations, that there might be some advantages in having a director of all intelligence operations who did not have any built-in bias toward one of the elements, did not have a direct responsibility with one of the elements that might color, to some extent, his administration of the others. It would also give him the authority to coordinate—the authority without the responsibility, I guess is the best way to say it, of coordinating all of the intelligence activities.

Do you believe there is any validity to the contention that a Director who is not encumbered by any kind of bias for any one of the elements might be more effective in the coordination and responsibility that he has, tasking responsibility, and budget responsibility?

General Stilwell, would you have any further comment on this?

General STILWELL. Senator Huddleston, as I indicated in my opening remarks, AFIO is about half ex-military and half ex-Central Intelligence Agency, Bureau of Investigation and others, and therefore does not have complete unanimity of view on this issue. Indeed, one of the directors of the Association of Former Intelligence Officers, General Graham, published an article last year in a well-known magazine in which he outlined a concept for the sort of separation to which you allude.

I would point out that he envisaged far more circumscribed functions and authorities for such an individual. Indeed, he called him the Coordinator of National Intelligence.

Now, we are also aware of the very thoughtful comments made to this committee by what I believe has been its first substantive witness, Mr. Clifford, on this subject. It is our view, however, sir, on balance, that the evolutionary approach that has characterized the community up to this point is the tack to stay on for the foreseeable future, one of evolution rather than a major reorganization which in effect this would constitute.

Senator HUDDLESTON. Mr. Halperin, I think you indicated you agreed with that.

Mr. HALPERIN. I agree with part of it, and let me say, let me emphasize this is my own personal view. This is not from any of the current institutional affiliations I have. My view is that the function of intelligence analysis and evaluation should be separated from the function of intelligence collection in any operations which may be conducted. As you know, the Director of Central Intelligence now does not operate the major technical collection systems of the United States. The division I would make would be to separate out the human collection and human operations part of the CIA, make that a separate entity, as NSA is, and the National Reconnaissance Office and so on, as a human collection agency, and leave with the Director of Central Intelligence the responsibilities that he has for budget advice and budget supervision of all of

the collection agencies, and vest him primarily with the responsibility for producing the best possible analytic intelligence for the President.

The reason for that is that I think the DCI still has a conflict between his responsibilities as the manager of one collection program, and his responsbility for the operation of covert operations, which I think are in conflict with what I view as his most important function which is giving advice to the President, the rest of the executive branch, and to the Congress as to what is going on in the world and what is likely to go on. In order to avoid that conflict, I would make a different split than the one that is sometimes suggested.

Senator HUDDLESTON. It was the analytical aspects that have given the committees a great deal of concern. I don't see how you can separate those totally from the collection part. It seems to me the analysts from time to time will have at least some suggestions of tasking.

Mr. HALPERIN. Sure, but they have that now for the NRO and for NSA and for the military attachés. You want a close connection.

Senator HUDDLESTON. But it has to be the person who has the authority to implement these suggestions that may come from any other element of the Agency.

Mr. HALPERIN. That should be the DCI, but he does that now with these other agencies by various kinds of informal techniques and in an evolving sense, the responsibility of the kind I think General Stilwell suggested, and I think it works reasonably well.

The problem is that when he runs it, which one of these should he run. I think that gives him maybe a bias that could conflict, but I think the analyst could deal with that the way he deals with all the other collections.

Senator HUDDLESTON. Well, in a way, I think it is a legitimate question to be considered. Admittedly, it hasn't been resolved, but there are open doors in S. 2525 to go a different route as it became desirable to do so.

Now, the reporting requirements we are all concerned about, General. Our main effort is to make sure that the committee that has the oversight responsibility is fully and currently informed to the extent that our colleagues in Congress, one, have confidence that we are on top of the situation, trying to avoid the situation that apparently existed in the past where at least some Members who had the responsibility didn't pursue it and even consciously didn't want to be fully and currently informed. And that I think was part of the reason that perhaps some Members of the Senate felt that it was time to get a greater hold, to get a clearer understanding that there was, in fact, congressional oversight to see that these things were being followed and that the Congress was given the information it needed. I am sure that in the evolution of this legislation we will find ways to reduce the burden. But I think it is still important and even essential that the fully and currently informed concept remain as far as the intelligence committees are concerned. We have drawn, I think, in Senate Resolution 400, and in the committee's own rules, procedures to try to protect the information while at the same time making it available on a need-to-know basis to other Members. We hope they can as a conse-

quence be confident that if there is something they need to know about or want to know about, under the provisions that we have established for protection and security they will have it available to them. And I think this was essential to the operation of our committee, that that confidence be held by the members. It is essential, too, that the intelligence community have the confidence that the information will not leak, and, as I have indicated, we have been trying to perform in such a way that they do have that confidence, and I believe they do generally up to this point.

Another issue you commented on, and one which we also have considered a great deal, is how much budget information ought to be made available. This, too, is a question that has not yet been fully resolved.

We have delved many times into the question of just how much useful information this would give our adversaries.

Do you believe that just a single, one-line item of the total budget would be detrimental from an intelligence standpoint? Would it provide anything that a skillful intelligence agent from another country could not now already discern from looking over budget documents that are public?

General STILWELL. I believe it was, sir, Mr. Bill Colby who testified at some length on how a one-line entry could well be and probably would be parlayed into its component parts by the reportorial or investigatorial machinery, but I would like, with your permission, to ask Mr. Warner if he has anything to add to that.

Mr. WARNER. Not basically. It is true that the one-line figure is of some assistance. That is not going to do serious damage in and of itself, but it is of assistance to our adversaries, but it is what to come that bothers many of us, let's break it down by program, let's break it down by this, that, and the other, and what does it lead to, and once you have taken that first step, you can't go back.

So we feel on balance it is not a wise move, and in and of itself, it does give some assistance, yes. We would pay a good price to get the actual Soviet figures, for example.

Senator HUDDLESTON. As an attorney, do you feel that the total exclusion of it still complies with constitutional requirements?

Mr. WARNER. Yes, sir, I do.

Senator HUDDLESTON. Do you have any comment on that, Mr. Halperin?

Mr. HALPERIN. I testified on that before this and other committees several times. I would just say that the question is not whether this conceivably could do any good to a foreign intelligence service; the question is whether the reasonable likelihood of damage outweighs the public right to know the information. The answer to that question is yes, the public right to know how much money is being spent clearly outweighs the possible damage that releasing that figure would make in terms of its value to foreign intelligence services.

Senator HUDDLESTON. Now, another question is whether the GAO ought to be permitted to audit the CIA as well as other Federal agencies of the community. In the committee I think that is one of our responsibilities, to be able to audit information on any operation. The suggestion of using the GAO was to avoid the committee's having to develop its own audit capability, and the GAO does

have a clearance mechanism. We felt, therefore, that the proper way to do it would be to have the GAO give us the information we need without having to actually provide our own auditors to do the work ourselves.

General Stilwell had a concern about so many requirements of various committees and busy people that are involved in redtape. One of the things we found troublesome in our investigations was that many decisions made relating to intelligence activities were very difficult to trace. The member of the various committees that had responsibilities were busy people and sometimes decisions were made when no meeting was actually held, and the committee members were simply contacted by telephone or whatever.

We felt it was essential that we have a mechanism whereby No. 1, the decision process could be traced. No. 2, by following certain mechanisms, many types of operations that might adversely affect or might be troublesome down in the future might be weeded out if we went through this process.

Do you see any validity to that approach?

General STILWELL. One of our problems, Mr. Chairman, is that there is no stratification at all of special activity in this bill, which is all special activity. In our discussion this morning we concentrated on a couple of instances at the extreme upper range, that is, Angola and one other involving Asia, very major projects which very properly involved the highest levels of the administration and one would hope also the congressional leadership, as represented by the two Select Committees on Intelligence, in this case. But below that level, sir, although covered by the bill, there is an entire range of activities which are of modest proportion but could be important, probable ongoing today, in which for one reason or another the hand of the United States should not be disclosed but which are designed to provide some assistance either in a political, psychological, or other area to elements of friendly nations. I mean, it might be as small as keeping an extra pair of shoes on a very fine champion of the democratic right in some country. Certainly that shouldn't be intended to go through this elaborate procedure.

Now, the first thing is stratification as we see it.

Senator HUDDLESTON. But you could get to the point where you just automatically exclude large segments of covert activities from the review procedures. I took the position that any covert action be referred to as a special activity. Any clandestine collection by its nature is also a serious matter, the revelation of which could cause serious damage. The instance you gave, the act of providing an extra pair of shoes certainly is not a very profound act, but if it were revealed, it certainly could have a very profound effect on the individual that you are talking about, or in the United States, on its standing in a particular country, in a particular place.

The bill takes a position that all covert, clandestine collection is indeed serious and important and should be protected, and should go through a particular process to insure that we don't go into those areas without full consideration as to its impact.

As a matter of fact, the argument has been made by some on the other side that the bill permits almost unlicensed and wholesale amounts of these covert operations. It does require that no other method would work, that the national security be at stake, and

that no overt action would be successful in accomplishing what is desired.

I think we have tried to address the issue in a responsible way, recognizing that some mechanism, even though it may be onerous at times, is necessary.

Mr. Halperin, you mentioned a phrase relating to this type of activity, that the survival of the Nation was at stake. Such a standard seems to me to be unduly restrictive. We had argued over the question of whether the Presidential finding ought to be that it is important to the national security or essential to the national security, and this is kind of a new dimension that you suggest, the survival of the Nation.

What kind of instance do you see occurring when the survival of the Nation would come into play?

Mr. HALPERIN. Well, I think some of the operations that were conducted during the second world war had to do with the survival of the Nation. I think the question is really whatever label you put on it, whether covert operations routinely occur, whether at any given moment you intend the language to lead to a situation in which the Government regularly and routinely is conducting three, four, half a dozen or a dozen covert operations, or whether you had to restrict that technique, restrict it to very unusual and rare situations so that most times there would be no covert operations and on certain occasions there might be one or two covert operations, and then you put whatever labels you want on those two different situations, survival of the Nation, necessary for the security, important to the security.

I think it is much more important that the committee——

Senator HUDDLESTON. You are not suggesting that we establish quotas?

Mr. HALPERIN. No, but if you look back over the past and you say which of the operations that we have conducted fit within the categories you have, I think that would give some indication of what you mean. As I read the language in this bill, it would in fact authorize all or virtually all of the operations we previously conducted. I think most Presidents have always said that is what they are always doing, the sort of thing we talk about here.

Important to the security where no other technique will work, and I think that is what the committee has to ask itself, is that what is intended. Is it intended that say over the next 25 years we will conduct covert operations under the same kind of circumstances we conducted them in the last 25 years, I mean, leaving aside assassinations and some other particular techniques? What it is intended to say, as I read the Church committee, it says we did this much too often. We did it in many circumstances where it was not appropriate, and that it wanted a much more restricted notion of when this should be done.

That is, I think, the real choice, and I think it is one the committee ought to explicitly make, regardless of what label it finally puts on the findings of the President.

Senator HUDDLESTON. Of course, the committee thought this was pretty restrictive, and those in the community think it is totally restrictive, and I think what the general is suggesting is that this approach means no.

General STILWELL. Yes, sir, because I am thinking in quite different terms than Mr. Halperin because I believe that our Government has the need to and should be conducting covert actions, special activities, which again, Mr. Chairman, go through the entire scale from support or guerrilla warfare to a very, very modest payment to somebody. We think in terms of hundreds of special activities at any one time, and sensitive clandestine collections operations in the thousands at any one time, and sensitive counterintelligence and counterterrorist intelligence operations in the same magnitude. That is quite different when one then looks at and interprets the provisions. And I think, therefore, one needs to have standards, and I would hope, sir, the next 2 years, which is the estimate of time it may take to perhaps have a final version of this very important legislation, that the executive and legislative branch would begin to develop the kind of mutual understanding, based on dealing with these important matters, as to be able to determine mutually what it is that you need and must have, and with what periodicity and in what depth.

Senator HUDDLESTON. You might say that the system is working now virtually as this bill contemplates as far as this committee being advised, the President making the findings on covert activities. I don't know that it has presented any major difficulties up to this point.

Mr. Halperin, you might want to make some comment about whether or not they ought to be allowed to participate in peaceful overthrow of governments. There is nothing to prevent the peaceful overthrow of our own Government in the Constitution. As a matter of fact, one of the major parties engages in that effort every 4 years and shouldn't be precluded, I think. I think the word "overthrow" has a bad connotation, but peacefully attempting to alter the government of a foreign power if that happened to be in the foreign interest of the United States?

Mr. HALPERIN. Yes, I think we probably should, and I think we should prohibit foreigners from peacefully deciding whether Republicans or Democrats should be elected. I think it would be a crime for them to do so, at least by providing funds.

I think it comes down really to the question of whether we want to impose a double standard on the world. Do we want to say it is illegal for foreigners to covertly interfere in our system but we have a right because of some values in this country that it is different to covertly interfere in foreign elections of other countries?

And I just don't think the security of the United States is so vitally threatened by what happens within democratic societies that we ought to contemplate what seems to me a very great departure from the kind of norms we want to establish.

Senator HUDDLESTON. The fact is foreign governments do participate in the peaceful overthrow of the United States. They influence, Israel, the Greeks influence us here.

Mr. HALPERIN. I think we should be free to do——

Senator HUDDLESTON. I don't think that that is——

Mr. HALPERIN. What we think is proper for the Israelis and Greeks to do in the United States, we should feel free to do in Israel and Greece.

Senator HUDDLESTON. Which is to help groups that happen to have the same——

Mr. HALPERIN. I don't have any problem with that. I think we would be very upset if we discovered that the Israeli Government was secretly giving money to candidates for offices. Indeed, as I understand, that is a crime.

Senator HUDDLESTON. Well, that itself doesn't, but those who agree, who are supporters of that do.

Mr. HALPERIN. Fine, and I think it would be perfectly fine if supporters of Israel in the United States would give money to Israel, and I don't think there is any problem with that. But I think there is an implication in our view about covert operations that we want to do things in other countries that we want to deny others the right to do even in foreign countries, but also particularly in the United States, and I don't think we ought to be in that position.

Senator HUDDLESTON. Just one final question. You suggested that many visitors to this country ought to assume that they have all the due protection of our Constitution.

Is there any right for our officials to assume that some people who come here who they may perhaps have knowledge about or who are coming under a program in which a pattern has been established by a country of using that program for the purposes of infiltrating or espionage or whatever, that we have a right to assume that when they come under those conditions, that they are here for purposes other than those publicly stated, that they could at least look at the situation?

Mr. HALPERIN. Yes, I think we do. There is, as you know, language in the Foreign Intelligence Surveillance Act that deals with that problem. I would like to add the word "systematically" to that language, but I think as a matter of principle, I agree, the standard can be different on a showing that something important to the Nation, I am sure it can be handled differently than the U.S. person.

Senator HUDDLESTON. But a terrorist or a person involved in terrorist activities who comes into the United States, you assume that he might be here for some kind of a unlawful act?

Mr. HALPERIN. I would even assume that about Americans.

Senator HUDDLESTON. I am going to read with great interest the information that both of you submitted with your statements, and I think they will be very helpful to us in reaching the balance that we are all looking for.

General, I appreciate the section-by-section comment that you made on the entire bill, and Mr. Halperin, his comments likewise, it will be helpful to us.

Senator Biden?

Senator BIDEN. Thank you, Mr. Chairman.

General, I realize you have been here a long time and I will not pursue the particular area of interest which I am going to raise with you now, but I would like to raise it at this point.

General Stilwell, I apologize to you and Mr. Halperin for not being here for your testimony, but I am told, General, that you raised a question of protection of sources and methods and a need for a piece of legislation——

Senator HUDDLESTON. Would the Senator yield for a moment? I have a gentleman waiting for 45 minutes and I am going to have to leave, and when you finish, the committee would be in recess.

Senator BIDEN. Fine, and I will not keep you more than 5 minutes.

So my first question is, General, do you have or could you submit for the record and for my subcommittee that is looking into this matter your proposed piece of legislation? [1]

General STILWELL. Mr. Senator, we have substantially that proposal appended as a tab to my statement which you may or may not have. The answer is yes.

Senator BIDEN. Fine.

As I was briefed by staff only a moment ago, the mechanism that you suggest is one which has been raised by others, and I would like to raise one question about it now and ask you both to comment on it. We will then recess this hearing, and I will be back to you, if I may, with questions after I have had an opportunity to read the text of your suggestions, of your legislation.

As I understand it, General, your suggestion is that a judge in an *in camera* proceeding make a determination of whether or not there would be damage to the national interest and once that was determined the hearing would commence to—that's not correct?

I missed the briefing. I was improperly briefed. I'm sorry.

Mr. WARNER. The proposition that we define in this bill is what is an intelligence source and method, just as other categories of information have been defined in other laws, and it would be up to the judge to determine whether the information concerned met that statutory standard, not whether it would be harmful to the national interest.

Senator BIDEN. Merely that it fell within that category? Once determined whether or not it fell within the category, then a judge would make that finding in an *in camera* proceeding, correct?

Mr. WARNER. Yes.

Senator BIDEN. And at that point, is the judge making a finding of law or a finding of fact?

Mr. WARNER. A finding of law.

Senator BIDEN. A finding of law.

Mr. WARNER. Yes, sir.

Senator BIDEN. Is he basing that finding on facts that relate to whether or not this fits the category?

Would you give me your rationale as to why that is a finding of law?

Mr. WARNER. Because we were attempting in drafting this original to meet the dilemma found in questions under existing law—19 U.S.C. 793–794—where it was required that the jury determine whether or not the information affected the national defense within the meaning of the statute, and the statute is pretty general.

We tried to devise a scheme, because within the intelligence community, what intelligence sources and methods is pretty meaningful and pretty clear. We tried to put this in statutory language so that it would be simply a matter for a judge to determine by looking at the information concerned, measuring it against the

[1] See p. 297.

statutory standard, and he would make a finding of law, that was within the meaning of the statutory criteria.

Senator BIDEN. I will not pursue that question.

Mr. Halperin, are you familiar with that?

Mr. HALPERIN. Yes.

Senator BIDEN. Would you comment on that?

Mr. HALPERIN. I must say it sounds a little bit like "Alice In Wonderland" to me. That is a finding of fact, and I don't think you can make a finding of fact a finding of law by labeling it a finding of law. I think there are ways, other ways around.

The Scarbeck Statute, you know, 50 U.S.C. 783,[1] simply makes irrelevant what the content of the information is and says that if it has been classified by an agency, it fits the category, and in that case, the judge ruled that the content of the information did not have to be made public. It simply had to be shown that the individual knew that the information was classified, and that he passed it to a person that he knew to be an agent of a foreign power, and it seems to me that some version of that rule is likely to be much less fraught with constitutional dangers than attempting to say that a finding of fact is a finding of law.

Senator BIDEN. Because there is the constitutional dilemma that we face on the issue of findings of fact and law, and what constitutes a finding of law and what can be denied a jury to determine whether or not a finding of fact——

Mr. WARNER. Indeed, it is a difficult problem.

Senator BIDEN. I didn't raise it at this point to be critical of it. I raised it to highlight it because one of the thorniest problems we faced in the hearings that we conducted, and the suggestions that Mr. Halperin and others of different points of view presented to us, was this question. My concern with the route that you suggest, Mr. Halperin, is that I am of the opinion, as I suspect most of—I would agree that much of it is classified and not much but a portion of what is classified doesn't warrant classification, so are we being more restrictive than warranted to protect the security or the United States?

Mr. HALPERIN. Could I just clarify my position?

I am not suggesting the statute make it a crime for a formal official to reveal anything which is classified. I think what you need to do is to have a very narrow definition of the category of information and I think the suggestion in that was too broad. Mr. Colby has suggested techniques and sources, which I think begins to get somewhat narrower, and to require a special finding by a senior official that information fits the much narrower category before it might be subjected to these differences.

Senator BIDEN. Well, as all three of you know better than I, we could pursue this for days at this point, but I will ask for permission so we may pursue it at least in writing and possibly verbally. I appreciate your time, and the hearing is recessed subject to the call of the Chair.

[Whereupon, at 12:52 p.m., the committee recessed subject to the call of the Chair.]

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[1] See hearing on The Use of Classified Information in Litigation, Appendix I—Court Cases, page 125.

WEDNESDAY, JUNE 21, 1978

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The committee met, pursuant to notice, at 10:05 a.m. in room 5110, Dirksen Senate Office Building, Senator Birch Bayh (chairman of the committee) presiding.

Present: Senators Bayh (presiding), Huddleston, Garn, Pearson, and Chafee.

Also present: William G. Miller, staff director; David Bushong, minority counsel; Audrey Hatry, clerk of the committee.

The CHAIRMAN. We will ask our hearings to come to order. Today the hearings on intelligence charter legislation takes up a different aspect of S. 2525 than has been considered in our previous hearings. One of the main reasons for the charter legislation is to protect constitutional rights, particularly the rights guaranteed by the first and fourth amendments. Fundamental principles of due process and equal protection of the laws are also at stake.

We have asked two outstanding constitutional scholars to discuss these issues with us this morning: Prof. Thomas Emerson is Lines Professor of Law Emeritus, Yale University and a leading authority on the first amendment. His book, "The System of Freedom of Expression," is probably the most comprehensive and widely read work on the subject.

Also with us today is the former Solicitor General of the United States, Mr. Robert Bork, who is Chancellor, Kent Professor of Law at Yale Law School. Professor Bork worked closely with the former Attorney General Edward Levi on some of the questions before us today. We understand that Professor Bork disagrees with Mr. Levi on the need for a court order for intelligence wiretapping in this country, and we are anxious to have him elaborate on his views, and have a chance to explore both his and Professor Emerson's views.

We appreciate you gentlemen, both of whom have many things to do, taking the time to be with us here. Neither one of you are foreigners to the congressional process. Both have made a significant contribution in your own separate ways to the governmental institutions of our country. So I don't know what the proper pecking order is here.

Is there any preference? Does one want to go first?

Well, Professor Emerson, why don't we go from left to right.

[The prepared statement of Mr. Thomas I. Emerson follows:]

PREPARED STATEMENT OF THOMAS I. EMERSON, LINES PROFESSOR OF LAW EMERITUS, YALE UNIVERSITY, BEFORE THE SENATE SELECT COMMITTEE ON INTELLIGENCE ON S. 2525, THE NATIONAL INTELLIGENCE REORGANIZATION AND REFORM ACT OF 1978

S. 2525 undertakes to provide the statutory basis for all intelligence activities concerned with the conduct of foreign relations and the protection of national

security against dangers from abroad. The intelligence activities covered by the bill include not only the collection, analysis and dissemination of information but actions by the intelligence agencies to counter the intelligence operations of other countries, to combat international terrorism, and to carry out covert operations in foreign countries. The bill establishes the administrative framework for the intelligence agencies, authorizes various intelligence activities, imposes certain limitations, and provides machinery for internal controls, external oversight, and judicial review.

The bill purports to deal only with "foreign intelligence" activities, not domestic intelligence matters. It should be emphasized, however, that this does not mean that the bill is concerned only with aliens. Quite the contrary, at most points United States citizens and resident noncitizens are directly affected. Certainly with respect to intelligence operations within the United States, it is virtually impossible to separate the impact on citizens and other residents from the impact on aliens having no permanent connection with this country. Consequently the bill must be judged in terms of its effect upon the rights of Americans. It is the standards for protection of the liberties of Americans, not inhabitants of foreign countries, that must govern.

S. 2525 is a lengthy and complicated bill, consisting of seven titles and 263 pages. I do not make any attempt here to deal with every phase of the legislation. My concern is primarily with the activities of the intelligence agencies within the borders of the United States and their impact upon the civil liberties of American residents. Even within this limited sphere, only a sketchy survey of the highlights of the bill is possible.

It is essential, first of all, to outline the basic constitutional framework in which S. 2525 must be considered. A number of important constitutional principles are involved.

The First Amendment guarantees freedom of political expression, including the right of political association. Clearly the collection, storage and dissemination of data about political beliefs, opinions, associations, and activities of American citizens can abridge First Amendment rights. The very process of investigating political activities, involving the questioning of friends, neighbors, employers and others by government agents, is intimidating. The compiling of dossiers, which may be the basis of internment in event of emergency or of other reprisals, is threatening. The very existence of an apparatus of agents, informers, and possibly agents provocateurs, is chilling. Opportunities of partisan abuse of intelligence powers become available and tempting. Freedom of expression cannot exist under these conditions.

The Supreme Court has never squarely addressed the First Amendment problems involved in intelligence gathering. The closest approach was in *Laird* v. *Tatum*, 408 U.S. 1 (1972), a case involving an attack upon the Army's intelligence program. The Court ruled that the plaintiffs in that case did not have standing to bring the suit since they had not shown a "direct injury." Thus the Court did not reach the underlying issues. Nevertheless, it can hardly be doubted that, at some point, surveillance of American citizens by intelligence agencies abridges freedom of expression. For example, the conduct of the Federal Bureau of Investigation in making prolonged and extensive investigations into the political activities of American citizens who were never alleged to have broken any law surely constituted a violation of the First Amendment.

The First Amendment issue here, then, is where to draw the line between collection of information for legitimate purposes and collection of information which violates constitutional rights. I believe the answer has to be that, where such operations relate to political expression and have a chilling effect, they must be confined to searching for data which has a direct and immediate relation to the violation of a criminal statute or to the administration of a regulatory statute. Since the operations of the intelligence agencies here involved are not concerned with regulatory legislation, the basic constitutional requirement is that their activities must be limited to investigations of violations of the criminal law.

Other operations of the intelligence agencies, in addition to the collection and dissemination of information, may impinge on First Amendment rights. Espionage, sabotage, terrorism and similar acts are, of course, not protected by the First Amendment. Nevertheless, in seeking to enforce laws against such conduct, and particulary in engaging in "preventive action", the intelligence agencies may intrude upon areas of legitimate political expression. Such action, again, would violate First Amendment rights unless it was confined to the traditional methods of law enforcement.

Additional limitations are imposed upon the intelligence agencies by the Fourth Amendment and by the constitutional right of privacy. These restrictions relate

principally to methods of gathering information. Under traditional law entrance onto premises without consent, opening mail, and intercepting communications by electronic means all require a court warrant issued only upon a showing of "probable cause" and "particularly describing the place to be searched, and the persons or things to be seized." The question is whether any of these requirements should be relaxed or abandoned because the government is engaged in a search for "foreign intelligence." In my opinion they should not. Clearly where United States citizens and permanent resident aliens are involved, directly or indirectly, there would appear to be no justification for changing the rules. The constitutional rights at stake are too precious to be sacrificed for the reason that external security, as distinct from internal security, is the object of concern. Security at the price of a police state is not an acceptable option.

The Supreme Court decision in *United States* v. *United States District Court*, discussed subsequently, supports this position. Although the requirement of "probable cause," and perhaps the requirement of particularity, may be somewhat different in "foreign intelligence" cases, the basic demands of the Fourth Amendment must be met.

I believe the same principles should apply to American citizens abroad and to non-resident aliens in the United States. As to the former, there seems no valid reason to deprive a United States citizen of constitutional rights at the hands of his own officials just because he is not physically present in the United States. As to the latter, it is unseemly to refuse the basic guarantees of personal liberty, which are the pride of the American system, to visitors from other lands.

The constitutional protections embodied in the due process and equal protection clauses of the Constitution are also applicable to the operations of the intelligence community. The due process clause, which assures that no person will be deprived of liberty without due process of law, clearly forbids action by government officials in deliberate violation of existing laws. Ever since the days of the Magna Carta it has been fundamental in our system of individual rights that the government in dealing with those subject to its power must follow the laws of the land. The equal protection clause would allow distinctions in treatment of United States citizens, permanent resident aliens, non-resident aliens, and aliens abroad, but only where there was a justifiable reason for the differentiation.

One overriding constitutional issue remains to be considered. Does the President or the Executive Branch, possess any inherent power to deviate from constitutional requirements because the intelligence agencies are dealing with "foreign intelligence activities"? The Supreme Court has several times considered the question whether the President can claim authority to ignore constitutional guarantees in national security matters affecting internal concerns. It has consistently held that no such power exists. In *United States* v. *United States District Court*, 407 U.S. 297 (1972), the President claimed the right to authorize electronic surveillance in internal security matters without adhering to the warrant requirements of the Fourth Amendment. The Supreme Court flatly rejected the President's position, saying:

"Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech. Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent. We recognize, as we have before, the constitutional basis of the President's domestic security role, but we think it must be exercised in a manner compatible with the Fourth Amendment." (407 U.S. at 320).

Similar claims based on the inherent powers of the President were rejected in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *New York Times* v. *United States*, 403 U.S. 713 (1971); and *United States* v. *Nixon*, 418 U.S. 683 (1974).

It is true that the Supreme Court, in the *United States District Court* case, expressly reserved decision on "the issues which may be involved with respect to activities of foreign powers or their agents" (407 U.S. at 322). But virtually all the operations of the intelligence agencies authorized by S. 2525, to the extent that they take place in the United States, involve at some point United States citizens or permanent resident aliens. Even a foreign embassy cannot be kept under surveillance without drawing into the intelligence net many activities of United States citizens. As to these operations of the intelligence agencies the reasons given by the Supreme Court for adhering to constitutional limitations are fully applicable. Only activities abroad not involving United States citizens might be considered as not infringing upon the rights of Americans and hence not subject to constitutional limits. This would seem to be the judgment of the Senate in enacting the Foreign Intelligence Surveillance Act of 1978.

Nothing could be more dangerous for a democratic society, or more subversive of the rule of law, than to permit the President or an Executive agency to override constitutional rights upon a broad claim to be promoting "national security." The deepest principles of our constitutional law forbid such a conclusion. S. 2525, like other legislation concerned with national security, must not include provisions which allow the President to disregard constitutional rights or ignore at will the established law of the land.

Apart from constitutional considerations, two other general propositions must be kept in mind in analyzing S. 2525. First, is the paradox that, in attempting to reform the intelligence agencies, it is easy for legislation to make matters worse. In the past the intelligence agencies have operated largely without statutory authority or guidance. Most of the abuses that ensued were of doubtful legality and might have eventually been found unauthorized or unconstitutional. In attempting to frame charters for the agencies, affirmatively setting forth their powers, great care has to be taken not to authorize and thereby legitimize practices which previously were beyond their legal authority. Only careful and precise drafting, and extensive discussion of the implications of the various provisions, can avoid this danger.

Second, it is essential to examine the provisions of S. 2525 with a most skeptical eye. Our past experience with the intelligence agencies sought to be regulated by this legislation demonstrates that they are not readily held within bounds. One is fully justified in assuming that the intelligence community will give the most expansive meaning to any provision that confers power and the most restrictive meaning to those provisions that impose limitation. Hence, again, great precision and full exploration of all possibilities are imperative.

Turning now to the specific provisions of S. 2525, consideration will be given to four major features of the bill. These are (1) the scope of the authority conferred upon the intelligence agencies to collect information; (2) the methods authorized for the collection of information; (3) the authority granted to the intelligence agencies to engage in preventive action; and (4) measures to control, oversee, and review the operations of the intelligence agencies.

I. THE SCOPE OF AUTHORITY TO COLLECT INFORMATION

Numerous provisions of S. 2525 deal with the collection of information by the intelligence agencies. The problems raised by these provisions may be grouped into the following categories: (A) The scope of the field of inquiry authorized; (B) the unlimited authority to collect "publically available information"; (C) the basic limitations imposed on the collection of other types of information; (D) the exceptions to the limitations; and (E) provisions for the protection of individual rights. Analysis of these provisions demonstrates that the authority conferred upon the intelligence agencies to collect information is not limited to investigation of violations of law, that it is so vague and extensive as to seriously endanger individual liberties, and that it infringes upon freedom of expression guaranteed by the First Amendment.

A. The field of inquiry

Section 111(a) of the bill gives blanket authority to the intelligence agencies to conduct (1) "national intelligence activities", (2) "counterintelligence activities," and (3) "counterterrorist activities". Section 211(a) reconfirms this authority. "National intelligence activity" is defined to include "foreign intelligence activity" (§ 104 (23)), which in turn is defined to mean the collection of "information pertaining to the capabilities, intentions, or activities of any foreign state, government, organization, association, or individual and also pertaining to the defense, national security, foreign policy or related policies of the United States." "Counterintelligence" is defined to mean "information pertaining to the capabilities, intentions, or activities of any foreign government in the fields of espionage, other clandestine intelligence collection, covert action, assassination, or sabotage, or pertaining to such government's own efforts to protect against the collection of information on its capabilities, intentions, or activities" (§ 104 (5)). And "counterterrorism intelligence" is defined to mean "information pertaining to the capabilities or intentions of any foreign government or of any organization, association, or individual to commit or otherwise participate in any international terrorist activity" (§ 104(8)).

It is clear from these definitions that the field of inquiry open to intelligence gathering is virtually without boundaries. Almost any political conduct, other than purely local activity, can be said to relate to the defense, national security, foreign policy or related policies of the United States and to bear upon the capabilities, intentions or activities of a foreign state, political party or individual. It will be remembered that the far-flung operations of the Federal Bureau of Investigation, in which information was compiled upon thousands of American citizens and hundreds

of organizations, was based upon a Presidential directive to investigate German Nazi and Russian Communist activity in the United States.

Similarly, information concerning the "capabilities, intentions or activities of a foreign government" in the field of espionage or other clandestine intelligence collection would cover the activities of nearly every organization having any ties to a foreign country or any member of such an organization. The collection of information relating to the "capabilities or intentions" of a foreign government or association to engage in terrorism is somewhat more limited, but even here the words "capabilities" and "intentions" could be stretched to cover the conduct of any organization connected in any way with an international movement regarded by the intelligence agencies as hostile to American interests.

Moreover, it should be noted that section 112(a) empowers the President to expand the coverage of "national intelligence activities" as defined in the bill to include additional activities about which information can be collected. Even if the original definition in the bill were construed to limit the authority of the intelligence agencies to gather information, this provision removes all such boundaries.

In short, the basic field of inquiry open to the intelligence agencies under S. 2525 would not substantially restrict their operations as they have been conducted in the past. We turn then to an examination of other provisions of the bill to discover what limits may be imposed upon this initial grant of virtually unconfined authority.

B. The gathering of publically available information

Section 211 (c) of S. 2525 provides that "[p]ublically available information concerning any United States person, or any foreign person within the United States, may be collected by any entity of the intelligence community when such information is relevant to an authorized function of that entity." (See also §§ 506 (a) and 507 (a)). This provision opens up to the intelligence agencies the entire field of inquiry outlined above. So long as the information can be said to be "publically available" there are no restrictions. A large proportion of the information gathered by the intelligence agencies in the past, and stored in dossiers on American citizens, was "publically available." My own F.B.I. file for example, reveals that over a period of 25 years the F.B.I. compiled reports on every book I wrote, every article I published, virtually every speech I made, almost every petition I signed for redress of grievances, almost every committee I served on, and almost every letterhead upon which my name appeared. All this information was "publically available." There is nothing in S. 2525 which would prevent the F.B.I. from continuing to maintain dossiers of this nature.

C. Basic limitations upon collection of information not publically available

Where information is not publically available, S. 2525 does impose some basic limitations upon the authority of the intelligence agencies to collect data. Section 214 provides that "foreign intelligence" may be collected with respect to any United States person (that is, a citizen or a permanent resident alien) when such person (1) is "reasonably believed" to be engaged in (2) "espionage" or (3) "any other clandestine activity" which (4) "involves or may involve a violation of the criminal laws of the United States", or (5) to be "aiding and abetting" any person in the conduct of any such activity, or (6) to be "conspiring with any person engaged in any such activity."

Section 214 is formulated as a grant of power, not as a limitation on power, and nowhere in S. 2525 is there an express statement that the intelligence agencies are limited in their field of inquiry by Section 214 or similar provisions discussed later. Section 111(b) does provide, however, that intelligence activities "may be undertaken only by entities of the intelligence community and only in accordance with the provisions of this Act." (See also § 211(a)). It will be assumed, therefore, that Section 214 was intended to preclude the intelligence agencies from collecting information (other than publically available information) unless the conditions set forth in that provision are met. On its face section 214 appears to be a substantial limitation. Analysis of its components, however, reveals that it is a far less restrictive than it appears.

(1) The term "reasonably believes" is wholly subjective and extremely vague. There is no requirement that the belief be based upon any concrete fact. Hence mere speculation will suffice to trigger an investigation, and control by any oversight machinery would be difficult.

(2) The term "espionage" is not defined. So far as it appears it is not confined to a violation of the espionage laws. Hence any communication with a foreign government, foreign official, or member of a foreign organization might be construed as grounds for opening a full investigation.

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(3) The term "clandestine intelligence activity" is defined in section 204 (b) (1) to mean "any intelligence activity" on behalf of a "foreign power" which is concealed, or "any activity carried out in support of such activity." "Foreign power" includes not only a foreign government but any foreign political party, unit, or group. (§ 204(b)(8)). Hence any connection with a foreign person, or any "supporting" activity for another person having such a connection, could bring one within its scope.

(4) The term "involves or may involve" a violation of the criminal laws of the United States limits the right to investigate "clandestine intelligence activity" (and possible "espionage"). But use of the phrase "may involve" almost nullifies the limitation. It is not difficult for an intelligence agency to argue that any connection with a foreign country which is not a close ally of the United States could potentially involve a violation of law, particularly so long as the Logan Act remains in effect. It is true that the term "may involve" has been accepted by the Senate in the Foreign Intelligence Surveillance Act. Apart from the fact that it is objectionable in that legislation also, there is less danger in using it where the involvement must be demonstrated to a court before the intelligence agency can act than where the intelligence agency makes the decision for itself.

(5) The term "aiding and abetting" does not require that the support given be "knowing" in any sense. Hence numerous persons on the periphery of targeted activity can themselves be targeted. For example, any member of a political organization could be the subject of investigation on the theory that he or she was aiding or abetting the conduct of the officers or even active members of the organization.

(6) The term "conspiring" is notorious as a dragnet device.

Two other provisions of section 214 confer additional authority upon the intelligence agencies. One empowers the agencies to collect "foreign intelligence" whenever they determine that a person "is reasonably believed to be engaged in any clandestine intelligence activity outside the United States," that is to be obtaining information with respect to any foreign organization or group that seeks to influence "political or public interest, policies, or relations" of a foreign government or unit. The other opens up investigation of any person who resides outside the United States and "is acting in an official capacity for a foreign power", defined as above to include any foreign political organization, and the information sought concerns such person's official activities. These provisions allow the collection of intelligence with respect to all Americans living abroad who have any contact with organizations or individuals who attempt to influence the public policy of a foreign country.

Taken as a whole, therefore, section 214 still leaves an extraordinarily wide range of targets available to the intelligence agencies. Section 213, which applies similar purported restrictions to the collection of counterintelligence and counterterrorism intelligence is subject to the same objections. In short, the reach of the authority to collect information under these provisions is unnecessarily and dangerously broad.

The basic flaw in this effort to impose limitations upon the initial vast grant of power conferred by section 111(a) is, not only that the limitations are couched in the vaguest of terms, but that they are themselves formulated as grants of power. This gives the intelligence agencies the opportunity to interpret them in their own way. If the drafters of the bill are serious about imposing limitations they should also incorporate provisions which affirmatively and specifically forbid the intelligence agencies to engage in the abuses which have characterized their operations in the past. This would call for concrete prohibitions against political surveillances, selective investigations, and similar conduct. No such provisions appear in the bill.

D. Exceptions to the limitations

S. 2525 contains a number of exceptions to the basic limitations imposed by sections 213 and 214. These have the effect of expanding even further the authority of the intelligence agencies to collect information. They can only be noted briefly.

(1) Section 218 authorizes the collection of information for up to 180 days concerning any person "who is reasonably believed to be the object of a recruitment effort by the intelligence service of a foreign power" (defined to include any foreign political party of group). This provision could allow investigation of any person in the United States who possesses any information or expertise with respect to any matter affecting the national security or defense of the United States. It would permit surveillance of numerous scientists and other members of the academic community.

Another provision of section 218 authorizes the intelligence agencies to compile data on any person "who is engaged in activity or possesses information or material which is reasonably believed to be . . . the target of any clandestine intelligence collection activity" (defined as above). Such information may be collected "only to the extent necessary to protect against such . . . intelligence activity", but it is not clear what this qualification means or how much it would restrain the agencies.

This provision could extend the powers of the intelligence agencies even further into the scientific community, with disastrous results for academic freedom. It would also authorize such investigations as the Federal Bureau of Investigation conducted of Rev. Martin Luther King, which was based upon the claim that members of his staff had Communist connections.

(2) Under section 219 "foreign intelligence" in the possession of a United States person may be collected by an intelligence agency, if the collection "is limited to interviewing any other person to whom the United States person may have voluntarily disclosed such foreign intelligence." This provision allows the investigation of anybody possessing any information relating to the defense or policies of any foreign government, organization or individual, provided the inquiry is confirmed to interviewing that person's colleagues, friends, acquaintances and other associates. The inhibiting effect of such activity is obvious.

(3) Section 220 provides that any intelligence agency may, for a period not to exceed 90 days, collect information with respect to any United States person "who has contact with any person who is reasonably believed to be engaged in espionage or other clandestine intelligence collection activity." Again, "espionage" is not defined, and is not limited to illegal activity; and "clandestine intelligence activity" includes the obtaining of information by any foreign government, organization or group, provided only it is done in a "concealed" manner. The investigation is limited to ascertaining the "identity" of the United States person involved and "whether such person concurrently has, has had, or will have access" to sensitive information. But, again, the power to investigate is opened up, as to numerous persons, and the point at which it will cease is speculative.

(4) Section 221 allows an investigation of any United States person "who is reasonably believed to be a potential source of information or operational assistance" to the intelligence agency, but only to the extent necessary to determine such person's "suitability" or "credibility" as a source. In this case the inquiry is limited to collection of publically available information, national agency checks, and interviews. Here also, although the manner of investigation is limited, the selection of a target is virtually unlimited.

(5) Section 222 authorizes investigation of persons within "or in the immediate vicinity" of an agency installation, or any person posing "a clear threat" to the safety of an installation or its personnel, and any contractor or employee of a contractor to determine whether security rules have been violated. Some provision for maintaining security is necessary, but these provisions go substantially beyond what is required. For example, the investigation of an employee of a contractor is allowed, even though such employee has no access to secret material, or indeed may not even know that the contractor has any relations with an intelligence agency. The effect, once more, is to multiply the number of available targets.

E. Provisions for protection of individual rights

The only provision in S. 2525 which undertakes to prohibit intelligence agency conduct that might violate the rights of the individual is section 241. That section provides:

"No intelligence activity may be directed against any United States person solely on the basis of such person's exercise of any right protected by the Constitution or laws of the United States, and no intelligence activity may be designed and conducted so as to limit, disrupt, or interfere with the exercise of any such right by any United States person."

For a number of reasons section 241 is wholly inadequate. In the first place the prohibition on directing intelligence activity against a person "solely" because such person has exercised a constitutional or legal right fails to afford any real protection. It would be almost impossible to prove in any case that the "sole" ground for agency action was to deny a lawful right. Moreover, no such proof should be required. Government action which abridges a constitutional or legal right should be prohibited whether or not there are other grounds which might have justified action.

Second, under this provision only intelligence activity that is both "designed and conducted" so as to interfere with constitutional or legal rights is forbidden. This requires proof that the agency intended to interfere not merely that it did interfere.

Third, a general provision that the government adhere to the mandate of the laws and the constitution is tautologous. The government owes that obligation anyway, regardless of any provision of statute.

Measures designed to protect constitutional and other legal right, as noted above, should be framed concretely and precisely to deal with specific abuses that have occurred. This S. 2525 does not do.

F. Conclusion

It is apparent from the foregoing analysis that the authority of the intelligence agencies to collect information is far too broad and goes substantially beyond inquiries into violation of the criminal law or the necessities of agency administration. Inasmuch as the kind of information to be collected deals with political beliefs, opinions, associations and other forms of expression these provisions both violate First Amendment rights on their face and inevitably result in First Amendment violations in practice. Even without regard to the constitutional implications of the bill the nature and scope of the powers conferred are contrary to sound public policy. Finally, the provisions of the bill do little to assure that the abuses characteristic of the intelligence agencies in the recent past will not occur again.

II. METHODS AUTHORIZED FOR THE COLLECTION OF INFORMATION

S. 2525 contains a number of provisions dealing with the methods which may be employed by the intelligence agencies in collecting information. Section 211(d) provides generally that "[a]ll collection of information concerning United States persons, or foreign persons within the United States, shall be conducted by the least intrusive means possible." This provision must be considered largely hortatory, however, as there is no way by which it can be enforced. Section 215 lists the basic methods available to the intelligence agencies in the ordinary gathering of intelligence. Section 243 authorizes illegal activities under certain circumstances, and section 244 contains special provisions dealing with agents or informers participating in targeted organizations.

Electronic surveillance within the United State is governed by the separate provisions of the Foreign Intelligence Surveillance Act, passed by the Senate on April 20, 1978, and will not be considered here. Likewise "physical search" (break-ins) and mail openings are made subject to the same rules as electronic surveillance and hence also will not be considered here. The remaining provisions raise a number of constitutional and policy issues. Discussion will be confined, however, to three major problems. They are (A) the use of intrusive methods of investigation where no violation of the law is involved; (B) the utilization of informers; and (C) authorization to engage in illegal methods of investigation.

A. Use of intrusive methods of investigation where no violation of law is involved

Section 215, as noted above, authorizes the use of various techniques for collection of data by the intelligence agencies. The section provides that these methods can be used "only under exigent circumstances" or when the Attorney General, or his designee, has made a written finding that "the use of such techniques is necessary and reasonable." It is hardly likely that these requirements will operate to confine the use of the listed techniques to extraordinary or unusual circumstances. On the contrary it is to be expected that the "necessary and reasonable" finding will be routinely made whenever the Federal Bureau of Investigation or other agency asks for it.

The techniques authorized by section 215 are as follows:

(1) "examination of the confidential tax records of any federal, state, or a local agency in accordance with any applicable law."

(2) "physical surveillance for purposes other than identification." The term "physical surveillance" is defined in section 204 (b)(7) as the "systematic and deliberate observation of a person without that person's consent by any means on a continuing basis;" or "unconsented acquisition of a nonpublic communication by a person not a party thereto or visibly present thereat." The first clause would, for example, authorize tailing a person, and the second clause would include, for example, the use of a radio transmitter by a party to a conversation in order to communicate the conversation to an intelligence agent.

(3) "the direction of covert human sources to collect information". The term "covert human sources" means informers, including persons who inform voluntarily and without compensation (§ 204 (b)(3)).

(4) "mail covers in accordance with applicable law of the United States."

(5) "requests for information . . . pertaining to employment, education, medical care, insurance, telecommunications services, credit status, or other financial matters from the confidential records of any private institution or any Federal, State, or local agency."

All of these techniques of investigation are objectionable when employed to collect information about a person who is not charged with or suspected of any violation of law. The intrusions and dangers involved in collecting data at all about such persons, as discussed previously, are compounded when the methods authorized by section 215 are employed. To subject a person to examination of his finances, tailing

of his movements, invasion of his privacy by informers, examination of his mail, tracking of his telephone calls, and the like is hardly to treat him as a free person. While the Supreme Court has never passed on the issue it would seem very doubtful that such activities by the intelligence agencies could be considered "reasonable" within the meaning of the Fourth Amendment. At the very least these intrusive techniques should be permitted only where a violation of law is involved or about to be involved.

B. Informers

As just noted, section 215 authorizes the intelligence agencies to use "covert human sources" (informers) in the collection of information. Section 244 deals with the use of informers to infiltrate an organization. It provides that in the case of a "United States organization" infiltration is permissible "when necessary to collect information concerning the organization or its members." The only limitation is that participation by informers "shall be confined to the collection of information as authorized" by the bill; shall be conducted "so as not to influence the lawful activities of the organization or its members;" and within the United States may be done only by the Federal Bureau of Investigation. Section 244 also authorizes "undisclosed participation in a United States organization" when "esssential for preparing the participants for assignment to an intelligence agency outside the United States."

The following points should be noted:

(1) Clearly S. 2525 contemplates the extensive use of informers in collecting information. Organizations are subject to infiltration, not only when the organization is itself under surveillance, but when any member is. Likewise, organizations can be infiltrated when necessary to train intelligence agents. Apart from the restrictions concerned with participation in organizations there are no limits placed on the use of informers.

(2) The use of informers is an exceptionally intrusive technique. It almost inevitably involves a gross and prolonged invasion of privacy.

(3) The use of informers to infiltrate organizations is especially objectionable. The persons recruited for such assignments are often unstable and unreliable. In order to maintain credibility an infiltrator must necessarily participate actively in the organization, and frequently assume a position of leadership. The admonition in section 244 that undercover participation in an organization shall be "confined to the collection of information" and shall not "influence the lawful activities of the organization or its members" is wholly unrealistic. Merely casting a vote influences policy. Indeed active participation is the name of the game. Nothing is likely to be more disruptive of an organization than infiltration by secret agents of an intelligence agency.

(4) It will be noted that the prohibition in section 244 against influencing activities is limited to "lawful" activities. This seems to invite participation by the infiltrator in illegal activities. In other words there is nothing to prevent the infiltrator from becoming an agent provacateur. Indeed, in certain cases, this is expressly authorized by section 243, discussed below.

(5) The use of informers, and especially infiltration of organizations, is as intrusive as wiretapping and bugging, break-ins, and opening mail. If allowed at all, it should only be permitted under procedures requiring a court warrant.

C. Authority to engage in illegal methods of collecting data

Section 243 provides:

"No person acting on behalf of an entity of the intelligence community may instigate or commit any violation of the criminal statues of the United States unless such activity is undertaken pursuant to procedures approved by the Attorney General and: (1) does not involve acts of violence; (2) does not involve a violation of any other provision of this Act; and (3) is necessary to protect against acts of espionage, sabotage, international terrorist activity, or assassination."

This extraordinary provision is discussed in more detail in connection with the sections of S. 2525 that authorize the intelligence agencies to engage in counterintelligence and counterterrorist activities. At this point it suffices to note its impact on the methods used in collection data.

Under section 243 whenever an intelligence agency deems it necessary to protect against acts of espionage, sabotage, terrorism or assassination it can collect information by any illegal method that does not involve acts of violence. "Espionage" is not defined and, as noted above, could include a wide area of conduct. The requirement that there be no violation of other provisions of S. 2525 would not seem to be a hindrance, except possibly as to electronic surveillance, physical search and mail openings, which are governed by Title III. Section 215, which lists certain approved

techniques for collecting information, is not exclusive; it does not forbid other methods. Hence, within the area specified, illegal methods of collection are permissible.

Rather than authorize illegal actions in gathering intelligence S. 2525 should specifically prohibit them. Otherwise abuses will continue to flourish.

III. AUTHORITY GRANTED TO INTELLIGENCE AGENCIES TO ENGAGE IN PREVENTIVE ACTION

S. 2525, in addition to providing for the collection, analysis and dissemination of information, also authorizes intelligence agencies to engage in preventive action. The powers conferred are vague and amorphous, and subject to few limitations. But their use by the intelligence agencies on a major scale is clearly contemplated. This feature of S. 2525 raises ominous questions.

Section 111(a), as noted previously, grants a blanket authority to the intelligence agencies to conduct "counterintelligence activities" and "counterterrorism activities." The term "counterintelligence activity" is defined to include "any activity undertaken by the United States to counter espionage, other clandestine intelligence collection, covert action, assassination, or sabotage, or similar activities of a foreign government or to counter such foreign government's efforts to protect against the collection of information on its capabilities, intentions, or activities" (§ 104(6)). "Counterterrorism activity" includes "any activity undertaken by an entity of the intelligence community intended to protect against an international terrorist activity" (§ 104(7)). See also § 506(a)(2).

The area of operation created by these provisions is extensive. It embraces (1) all espionage, clandestine intelligence collection and covert action of foreign governments; (2) sabotage and terrorist activities; and (3) the efforts of a foreign government to protect its intelligence system.

The nature of the preventive action authorized within this area is not spelled out. Some idea of its character, however, can be gained from an examination of the few restrictions imposed. Section 242 provides that no person acting on behalf of an intelligence agency "may disseminate anonymously or under a false identity information concerning any United States person" unless the dissemination poses no risk to the safety of such person, and is not done to discredit him because of his exercise of legal rights. Section 244, as noted above, confines infiltration of United States organizations by the intelligence agencies to the collection of information or the training of operatives. And section 246 requires that intelligence agencies may not "sponsor, contract for, or conduct research on any human subject" except in accordance with H.E.W. guidelines.

In addition, section 243, quoted previously, stipulates that no person acting for an intelligence agency "may instigate or commit any violation of the criminal statutes of the United States" unless such activity does not involve violence, does not violate other provisions of S. 2525, and is necessary for counterintelligence or counterterrorism purposes. It is not clear how section 243 squares with section 241, also mentioned previously, which provides that "no intelligence activity may be designed and conducted so as to limit, disrupt, or interfere with the exercise" by any person of a right protected by the Constitution or laws. Presumably section 241 prohibits only interference with the affirmative "exercise" of a right and does not protect against injury when a person is not "exercising" a right.

In any event section 243 is unprecedented in the annals of American law. At no time, so far as I am aware, has Congress or a state legislature ever passed a statute authorizing government agents, much less police officials, to break the laws. Surely this provision must be a clear violation of the due process clause of the United States Constitution. Even if it were not unconstitutional it stands in direct conflict to the rule of law.

Taken as a whole the preventive action provisions of S. 2525 would authorize such tactics on the part of the intelligence agencies and their agents as the conveying of false information, forging of documents, sending of poison pon letters, pressuring employers to discharge employees, use of agents provocateurs, and similar action. It would, in short, legalize the F.B.I.'s COINTELPRO and President Nixon's Huston Plan. It will be remembered that both these programs were designed, in part, to prevent leakage of information to foreign countries.

Such activities, insofar as they infringe upon the right to freedom of political expression and association, would violate the First Amendment to the extent they involve a deliberate pattern of law breaking they would violate the due process clause. At every point they would violate the principles of a democratic society.

IV. CONTROLS

The problem of controlling the agencies conducting foreign intelligence activities in the United States is a difficult one. It is not easy to draw clear-cut lines between authorized and unauthorized conduct. Supervision is greatly hampered by the requirements of secrecy. And intelligence agencies, based on prior experience, have a notorious tendency to press to the limits of the law, and beyond.

All these problems are accentuated in the case of S. 2525 because of the broad and vague grants of power contained in its substantive provisions. At many points it will be hard to say whether certain activity violates the law or not. Nor are the abuses of the past specifically forbidden.

Within these limitations, however, S. 2525 makes a substantial effort to establish effective controls. Accountability is secured through requirements that certain activities be authorized in writing and through a system of reporting. Oversight is provided within the agencies by creating the offices of general counsel and inspector general, and outside the agencies by the General Accounting Office, the Intelligence Oversight Board, and Congressional committees. Judicial review is available through criminal penalties and civil suits. Whistle blowing is given protection.

The following measures to improve the system of controls are suggested:

(1) The oversight provisions rely too heavily upon obtaining reports of failure to comply with the provisions of the bill, rather than upon routine inspection of the operations of the various agencies. At least as to the Federal Bureau of Investigation, the General Accounting Office should be directed to conduct an audit and evaluation at least once a year, which should include a random sampling of all Bureau files and investigations. The resulting report should be submitted to Congress and made public.

(2) The criminal sanctions provided in S. 2525 are inadequate. They deal only with illegal searches and human experimentation. While criminal proceedings are rarely brought against government officials, they serve a useful purpose in emphasizing the importance of protecting individual rights and provide an incentive for officials throughout the agency to refuse engagement in illegal action and to comply with the law. The bill should therefore make any intentional, substantial violation of its provisions a criminal offense.

(3) The civil sanctions available appear to be confined to the recovery of damages. The bill should also provide for injunctions and other equitable relief.

Again, it needs to be repeated, the control system will not function effectively so long as the substantive provisions are so far-reaching and prohibitions against specific abuses such as occured in the past are not provided.

STATEMENT OF THOMAS I. EMERSON, LINES PROFESSOR OF LAW EMERITUS, YALE UNIVERSITY

Mr. EMERSON. Thank you, Senator. I appreciate the opportunity to appear before the committee. I have filed a statement with the committee which elaborates my ideas, and I will not attempt to read that at this time, but more or less summarize what it says.

First, let me make two general remarks. S. 2525 ostensibly deals with foreign intelligence, counterintelligence, and terrorism, but the major impact of the bill falls on the rights of U.S. persons, that is, citizens of the United States, or permanent resident aliens. I therefore consider that the applicable constitutional standards are those which apply to American citizens and not those which may apply to foreigners or persons residing in another country.

Second, I will confine my consideration to the problem of intelligence activities in the United States, not abroad, except insofar as they involve American citizens abroad, and the impact on civil liberties of United States persons.

Now, first of all, generally, with respect to the constitutional issues, it is clear that the first amendment has a direct application in many aspects to the operations of the intelligence agencies. One of the main functions of the intelligence agencies, of course, is the collection of information, and the performance of that function has an immediate bearing on civil and political rights. The very process

of investigating political activities, which involves questioning of friends, neighbors, employers, and others by Government agencies, may be intimidating. The compiling of dossiers which may be the basis of internment in the event of emergency or other reprisals is threatening. The very existence of an apparatus of agents, informers, and possibly agents provocateurs is chilling. Opportunities for partisan abuse of intelligence powers become available and tempting. Freedom of expression cannot exist under those conditions.

The Supreme Court has consistently recognized that the collection of information with respect to political activities does involve and may infringe on first amendment rights. In *National Association for the Advancement of Colored People* v. *Alabama,* it held that the collection of the names of members of an organization in itself would be a violation of the right of association. In *Buckley* v. *Vallejo,* it reiterated the proposition that disclosure of information about political activities can invade first amendment rights.

Now, it is true that in *Laird* v. *Tatum* in 1972, the Supreme Court refused to interfere with the Army intelligence program which involved an enourmous collection of information about American citizens. However, in that case, the Court rested its decision not on the merits but on the ground that the plaintiffs did not have a standing to bring the action. Furthermore, the complaint in the case involved only the collection of information which was publicly available. It didn't involve collection of other types of information which might invade privacy or be more intrusive in their impact.

I think it is therefore clear that the operations of intelligence agencies, simply in gathering information, do impinge on first amendment rights. The question then is where do you draw the line.

In my statement I make the proposition that the applicable doctrine should be that where the operations of intelligence agencies involve expression or association and have a chilling effect on those rights, then the search for data must be confined to information having a direct and immediate relation to violation of a criminal statute or adminstration of a regulatory statute. I think that is the basic principle that should be applied in this situation.

In addition to the collection of information, other operations of intelligence agencies can effect first amendment rights. Espionage, sabotage, terrorism are of course activities not protected by the first amendment. Nobody argues that they are. But certain methods of seeking to protect against such conduct may invade first amendment rights. For instance, preventive action, the COINTEL program of the FBI, as it was directed against such organizations as the Socialist Workers Party or the National Lawyers Guild, clearly constituted an invasion of first amendment rights.

In my judgment, the use of informers can also constitute an invasion of the rights of association protected by the first amendment.

In other words, an intelligence apparatus can be an instrument and can be used as an instrument for political and social control. Insofar as it does that—and it frequently does that—it may invade first amendment rights.

With respect to the fourth amendment prohibiting unreasonable searches and seizures and requiring a warrant procedure, of course it has basic applications to the traditional areas requiring a warrant for a search of premises, for wiretapping, for opening mail and so forth. But in addition to that, the fourth amendment has broader implications with respect to intelligence activities because after all, intelligence activities do constitute a search for information, and frequently a search by the use of intrusive methods which invade privacy. So the collection of private records, such as bank records or employment records or educational records and so forth also seem to me to involve on a broad basis fourth amendment rights. And similarly, the use of informers to obtain information, a search for information with respect to political activities, involves not only first amendment but also fourth amendment rights.

I see no difference in the application of the fourth amendment to the question of domestic intelligence, so-called, and foreign intelligence, so-called, because as I have said, foreign intelligence actually has its main impact upon the rights of Americans. And I see no reason why such a precious inheritance of our system of individual rights, the right to be free from unreasonable searches by the Government, shouldn't apply even though the subject of the intelligence operations may be so-called foreign intelligence. A nation without the fourth amendment would certainly be a police state.

I think this position has been affirmed by the U.S. Supreme Court in *United States* v. *U.S. District Court* in 1972, which I will mention in a little more detail later.

The third major constitutional provision which has application here is the due process clause. It seems to me entirely clear that a pattern of lawless violation, of violation of law by any Government agency, including intelligence agencies, violates the due process clause. In other words, preventive action carried on in violation of existing laws is in itself a violation of the due process clause. The very origin of the due process clause in the Magna Carta was to protect against that kind of lawless activity on the part of the executive, and it seems to me it applies clearly in this case.

The equal protection clause might also apply, but it does not apply to the area to which I have limited myself.

The other major constitutional problem concerns the inherent powers of the President, that have been claimed, at least, for the President. It seems to me quite clear that so far as domestic security is concerned, the Supreme Court has held that the constitutional rights under the first amendment, the fourth amendment, the due process clause and so forth, are fully applicable.

I take it that is the meaning of *United States* v. *United States District Court,* which I mentioned previously, and let me just read a quotation from that case which I think summarizes the situation.

> Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech. Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillance to oversee political dissent. We recognize—

This is Justice Powell—

We recognize, as we have before, the constitutional basis of the President's domestic security role, but we think it must be exercised in a manner compatible with the fourth amendment.

Other cases, the *Youngstown Steel* case, the steel seizure case, the *Pentagon Papers* case and the *Nixon Tapes* case all rejected claims of inherent Presidential powers to take action contrary to constitutional principles in the case of domestic activities.

I think the same rules should apply to what is here called foreign intelligence, for the reason that I have given, that it has the same effect upon the rights of American citizens and permanent residents as do domestic security investigations. You will recall that in the steel seizure case, for instance, the basis of the President's action was a national security basis. He claimed that it was necessary in the conduct of the Korean police action to keep the steel mills running, and it was in the field of foreign affairs that he found justification for the action. The Supreme Court rejected that position, and obviously it affected domestic conduct as much as foreign. The same can be said of the *Pentagon Papers* case.

I would also add that the reasons for giving the President inherent power in the field of foreign affairs do not apply to the operation of intelligence agencies. The reason that the framers of the Constitution conferred upon the President the Executive power and the power as Commander in Chief was that in military or diplomatic affairs it was important to have a single person who would represent the interests of the United States and would be able to make decisions and carry on activities. But that is not true with respect to the collection of intelligence. The legislative branch has an equal need, with the executive branch, for information. As everyone knows, information is power, and the legislative branch, in performance of its duties, requires information just as much as the President does. There is nothing inherent about the position of the President that makes the application of constitutional principles any different in his case than in the case of the legislature.

Now, I don't want to take up too much time of the committee, but I would like to briefly analyze S. 2525 in terms of the constitutional principles which I have attempted to set forth.

There are four areas with which I am concerned and which in many respects it seems to me the bill fails to conform to constitutional principles or to sound policy.

The first area is the authority to collect information. The bill has a very elaborate structure with respect to the conferring of this power, and it is hard to compress into a few words. But essentially what the bill does is to open up in the first place a very broad field of inquiry. Section 111(a) gives blanket authorization to conduct national intelligence activities, counterintelligence activities, and counterterrorist activities. The definition of those three terms includes virtually anything that has a national impact: national defense, national security, foreign policy, related policies, almost anything of a national nature, which also can have of course international repercussions.

So the starting point is almost without limits in terms of the authority to collect information.

The CHAIRMAN. Would you limit it? I mean, do you have a definition that could help us there?

Mr. EMERSON. Yes. I think it should be limited in accordance with the principle I stated, that where it affects first amendment activities, it should be limited to the collection of information involving the violation of a criminal law or administration of a regulatory statute. Now, I haven't attempted to draft that language, but I think language to that effect can be found in the House bill introduced by Congressman Badillo, in which I did have some share of the drafting.

The CHAIRMAN. I would suggest that we really would like to have your thoughts on this, but if one looks further, there are certain limitations placed on how this information can be gathered. The standard is higher in the event intrusive techniques are being used. Whether that is the way to go about it or whether it should be a tighter definition, I don't know.

I call your attention to section 211.

Mr. EMERSON. Yes. Yes, Senator. I was going through this in logical order. It took me 2 days to really understand the structure of this bill, but I think I have it and I agree with you. I have just started. The starting point is almost unlimited.

Then the question is of limitations. Now, in the first place——

The CHAIRMAN. Excuse me. Just so that you will have a little idea where we were coming from on this, in the kind of world in which we are living today, with the quantity of information available having increased in geometric proportions in the last few years, and the sophisticated society in which we are living, some of the information which really would be vital to the national interest today we didn't even have 2 years, 5 years, 10 years ago. We wanted to have the broad fiat, and then where it is sensitive—in the areas that you are talking about—to try to say OK, in these areas we are going to increase the standard to try to do what I think you want to accomplish.

But if we are not doing it, we want your critique.

Excuse me.

Mr. EMERSON. Yes, I agree with that objective, and I agree with the need of information, including intelligence information. It is not that I am advocating the abolition of the intelligence agencies. But if I may continue point by point, as it were, I think where I would come out becomes clear in the end anyway. As I say, you start off with this almost unlimited area, and then the question is the limitations.

Now, in the first place, section 211(c) provides there are no limitations so far as the gathering of publicly available information is concerned. That is absolutely open, as I read it. Now, what that would mean is that the FBI's campaign to maintain dossiers on literally hundreds of thousands of Americans could continue almost in its present form. Most of that information—and I am going now on a personal experience, on my own file—most of the information in my file, which was 1,200 to 1,500 pages, was publicly available information. It consisted of the books that I had written, analyses of the books I had written, speeches I had made, meetings I had attended, letterheads on which I appeared, petitions I had signed, and so forth. I would say that 90 percent of the dossiers on me, without ever at any point alleging a charge of violation of law, was publicly available information. So that the intelligence agen-

cies could continue under 211(c) doing exactly, to a large extent anyway, what they have previously done.

The CHAIRMAN. Well, is there a threshold there, or should the FBI be denied the opportunity to collect any public information? I mean, how do you establish this?

Mr. EMERSON. Yes. The FBI should be confined to the collection of information involving violation of criminal laws, period. Well, with the exception, perhaps, of investigating candidates for employment or something of that sort. But the FBI is concerned with criminal law violations, and it should be limited to that. And I think a limitation to tbat would be the line at which you would draw the jurisdiction of the FBI.

Now, of course, Internal Revenue Service or some of the other agencies couldn't be limited to criminal violations, but the FBI can and should. They should not be investigating political activities where there is no suggestion of a violation of the criminal law, and that is exactly what they have been doing, and that is exactly what 211(c) would allow them to do. I think that is a violation of first amendment rights.

The CHAIRMAN. But do you think the other entity should be given a broader authority to collect information?

Mr. EMERSON. I think no agency should be allowed to investigate political activities unless it was at a direct and immediate relationship to a law. Now, in the case of the FBI, it is a criminal law. In the case of the Federal Trade Commission it would be a regulatory law. And insofar as it doesn't relate to that, they should not be allowed to collect political information.

There is another flaw, I think, in this bill. There is nothing in the bill which prohibits the intelligence agencies from invading first amendment activities, with the exception of section 241, which I think is inadequate. There should be a provision simply saying that the FBI and the other intelligence agencies cannot engage in political surveillance, which is what they have all done.

Now, you then get to the question of defining political surveillance. I agree that is not easy, but that is where the line has to be drawn. There can be a general statement prohibiting political surveillance, and the law on that can gradually develop over a period of time so that one gets a better understanding of what political surveillance is and is not. That seems to me the basis from which legislation should start. The first amendment demands the protection of political activity from the abuses that have been conducted by the intelligence agencies in the past.

Now, Senator, in addition to the open-ended gathering of so-called publicly available information, there are limitations on the initial authorization in section 111(a), as you pointed out. The main limitations are sections 213 and 214, which make a bow or pay lip service to the proposition that the gathering of data should be linked to violations. But if you analyze these sections and the exceptions to them, I think you will see that the power is virtually unlimited. The components of sections 213 and 214 are that a person has to be "reasonably believed"—that is quite broad; there is no requirement of a factual basis for the belief—to be engaged in "espionage," undefined, other "clandestine intelligence activity," undefined, "involving or may involve a violation of law." "Involv-

ing" itself is very hroad because it does not require that a violation of law is about to be committed. It is enough if there is some possible connection, such as being a member of an organization in which another person is thought to be violating the law, and so on. The term "may," of course, is virtually unlimited.

Now, it is true that the "may involve" language is used in the foreign wiretap bill, but notice that in the foreign wiretap bill you have a court that is going to supervise the operation in connection with issuing warrants. Here the intelligence agencies make the decision.

You add to that, then, the "aiding and abetting," persons who are aiding and abetting others, or engaged in "conspiracy," and you have it pretty wide.

In addition to that—I won't go into all of these—beginning with section 218, there is a whole series of exceptions, exceptions for persons who are "reasonably believed to be the object of a recruitment effort," and persons who "possess information" which may make them a target. That would apply to virtually every scientist in every university, for they would be a target for foreign intelligence activities. All countries are interested in those things. Almost any member of a university faculty engaged in the physical sciences, at least, and to some extent the social sciences, could be investigated.

Also "possession of foreign intelligence." Almost everybody has possession of foreign intelligence. "Contact with any person" reasonably believed to be engaged in clandestine intelligence activities. Any member of the Cbina-American Friendship Association, Soviet-American Friendship Association, any organization that has international connections, would be covered. Likewise a "potential source." Everybody is a potential source of information.

Those exceptions to the limitations simply wipe out the limitations. I think it is interesting that the draftsmen thought it necessary to make a bow toward confining data-gathering to violations of law, but they swept it away. Under this bill, the investigation of Martin Luther King could take place because the basis for that investigation was that there was a member of his staff, or two members, I forget which, who had some Communist connections. That would clearly be open to investigation. The investigation of the peace organizations against the Vietnam war would be possible. The bill goes far beyond a violation of law.

Now, section 241 attempts to introduce some limitations, but that section seems to me totally inadequate. It prevents investigations "solely" to interfere with first amendment activities. But no investigation can be proved to be "solely" for that reason. There is always some excuse. It is an impossible standard. The other standard is "designed and conducted," not conducted so as to interfere with constitutional rights but designed and conducted. You have to prove that the agencies intended to interfere with constitutional rights. You can't prove that. If they do interfere, then the burden should be on them to show that they were doing something legitimate. So the protections there are inadequate.

I don't know how long you want me to continue, Senator, but I will stop so far as the provisions relating to gathering information

are concerned. Let me say a few things briefly about three other areas.

First, the methods authorized for the collection of information. I am not considering the wiretapping provision because I take it that is separate legislation. I want to just say three things about methods. These apply where information is desired that is not publicly available, and there is a list in section 215 of the techniques available: examination of tax records, physical surveillance—which means tailing, eavesdropping, use of covert human sources—which means informers, mail covers, requests for educational, employment, telephone records, and so forth.

Now, where there is no violation of law involved or no need for the administration of a law it seems to me clear that those intrusive methods violate first amendment rights, and although the courts haven't gone this far, I would say fourth amendment rights. It is one thing where there is a violation of law or some legitimate reason, but where that cannot be shown, the use of those techniques, examining telephone records, tailing persons, and so forth, is simply an infringement of constitutional rights. This seems clear to me.

Next, informers, which are authorized by section 215. There are two limitations: that they can only collect information and that they can't influence policy. But those limitations are self-contradictory. You cannot have an informer who doesn't influence policy. An informer within an organization is a member and votes, and the very voting constitutes influence on policy. But most informers can't limit themselves to that. They have to produce. And so they become officers or top officials. And first thing you know, they are directing policy. It is impossible to have informers in organizations as a practical matter and not have them influence policy. It seems to me that if informers are to be used at all, they should be allowed only under a warrant procedure.

And, finally, and this I want to particularly stress, about methods. There is an authorization in section 243 to engage in illegal methods. I find that absolutely unparalleled in congressional legislation. I simply do not know of any Federal or State legislation which authorizes executive officials to engage in violation of the law. It is true, there are limitations. The illegality can't involve violence, you can't violate the provisions of this bill, which I assume means the wiretapping provisions, and it must be necessary to protect against espionage and so on. But the fact is that it is a violation of the rule of law, and it is a violation of the due process clause to authorize anyone to engage in activity that constitutes a violation of law.

Now, the next area I want to touch on briefly is preventive action. Section 111(a) authorizes any activity undertaken to counter espionage, other clandestine intelligence collection, and so forth, and to counter efforts of foreign governments to protect their own intelligence systems. Combine that with section 243 which allows violation of law.

Now, that is preventive action, and that authorizes the FBI and the other intelligence agencies to do a good deal of what they did, what the FBI did under the COINTEL program. You can convey false information, not about individuals, but false information

about organizations. You can engage in forgery. You can persuade employers to dismiss employees. You can discredit people. You can engage in all sorts of activities of that sort, which are not authorized by law. And I say that that would legalize a great deal of the COINTEL program and the Huston plan, and that it violates the first amendment and due process.

Finally, as to the area of controls, I find it difficult to think about controls until one has limited the substantive provisions somewhat more. I think the bill here is more effective than in the other respects that I have mentioned. But I do think it suffers from serious deficiencies. As I point out, in the oversight provisions, it authorizes mainly reports and so forth. It never says at any point that the oversight board or the Attorney General should make an inspection, should affirmatively go out and look to see what the agencies are doing, examine files at random, and so forth. It simply provides for the oversight agencies to wait and have information come to them, and then they can investigate. It seems to me much more than that is needed.

The criminal penalties are limited to the search-and-seizure and the human experimentation provisions. They should be broadened. And I think there should be added to the right of civil suits an injunction procedure.

So that is my conclusion. As to the data collection, I think the bill is far too broad. As to the methods, I think they both authorize intrusive methods and legalize illegal methods. Preventive action seems to me to violate the due process clause. There is nothing in the bill except a pale section 241 which prohibits abusive practices.

My feeling is that this bill, like S. 1 and S. 1437, the Reform of the Federal Criminal Code, was drafted in the Government, by the Government. There ought to be some way of bringing into the drafting process a citizen participation so that the rights of the citizen as well as the rights of the Government can be considered in this type of legislation.

Thank you.

The CHAIRMAN. Thank you, Professor Emerson. You are very familiar with the legislative process, and what you are doing now is a citizen participation in the process, and we are going to have a number of citizens that both agree and disagree with you, and with the draft, which is a point of departure.

I just—before yielding to Professor Bork here, are you satisfied with the law as it is now?

Mr. EMERSON. No, no, Senator. I think that the law, or rather the absence of law is a serious situation. I think there should be legislative policy expressed in legislation, and that the situation at present where there is no clearcut statutory authority and no clear limitations except as one can derive from the constitutional remedies in the courts, is an intolerable situation.

I agree that legislation is necessary.

The CHAIRMAN. Thank you.

Professor Bork?

[The prepared statement of Professor Bork follows:]

PREPARED STATEMENT OF ROBERT H. BORK, KENT PROFESSOR OF LAW, YALE LAW SCHOOL

Mr. Chairman, I am pleased to be here at the invitation of the Committee to discuss certain constitutional questions in connection with S. 2525, the National Intelligence Reorganization and Reform Act of 1978.

S. 2525 is an heroic effort to cope by law with certain problems that have arisen and much that it attempts seems to me a useful response. It is good that the bill authorizes important intelligence activities and good that it responds to certain abuses of the past and attempts to prevent their recurrence.

I should like to express doubts about three aspects of S. 2525, however. These doubts are partly of a policy nature, but they also rise to the magnitude of constitutional doubts. The three aspects in question are: first, the attempt to control the details of intelligence operations; second, the introduction of judges and a warrant procedure into the conduct of foreign intelligence surveillance, electronic and otherwise; and, third, the amount of reporting to groups outside the intelligence community.

The detailed control of intelligence activities seems to me both unwise and, in all probability, unconstitutional in that it invades presidential powers under Article II of the Constitution. Title I, for example, contains in Section 132 rather extensive restrictions on the categories of persons who may be used in intelligence activities, and, in Section 135, extensive prohibitions against particular forms of special activities. Similar attempts at detailed control of activities occur in Titles II and III. For example, Section 213 of Title II limits the collection of foreign intelligence concerning a United States person believed to be engaged in espionage or other clandestine intelligence activity to occasions when there is or may be a violation of the U.S. criminal code. That severely limits foreign intelligence. It may be important to know who is engaged in gathering information on behalf of a foreign power even though there is no indication that a violation of criminal law is likely to occur. It may be important that we know what foreign intelligence networks exist. The criminal law proviso sounds innocuous to some people but it is not and is an unjustifiable hindrance to sound intelligence practice.

Similarly, Section 241 (pp. 120-21) sounds attractive but is misguided. It provides that no intelligence activity may be directed against any United States person solely because of exercise of any right protected by the Constitution. But suppose the person is advocating the violent overthrow of the United States government or genocide, the extermination of Americans belonging to a particular racial or ethnic group, and, further, that the advocate is not a solitary crank but belongs to an organized group, one perhaps with links to a foreign power. Such advocacy is now his constitutional right, though it once was not. Does the fact that we must let such a person speak mean that we may not keep that person and his group under any form of surveillance, however mild?

These are well-intentioned but overly rigid attempts to safeguard First and Fourth Amendment rights. As we all know, the application of the First and Fourth Amendments, like all the great provisions of the Constitution, depends heavily upon particular circumstances and the weighing of particular facts and interests involved. Flat rules announced in advance are not sufficiently sensitive to these problems. Others have pointed out that detailed judgments made now may be wholly inappropriate in a world that changes rapidly and unpredictably. Mr. Clark Clifford, for one, testified before this Committee and gave objections to such an attempt to control specifics that seem to me absolutely correct on policy grounds. I will not repeat them here.

But there seems to me a constitutional issue that arises out of those policy considerations that may not have been canvassed in testimony before you. The issue arises under Article II of the Constitution and concerns the propriety or legality of Congress legislating in such detail about the conduct of American intelligence activities by the President. I am talking less about constitutional law in the hard and fast sense of known rules applied by courts—although some of the issues I am raising might well be litigated in suits under the provisions of the proposed statute—than I am speaking of constitutional values that ought to be respected in the framing of legislation.

The conduct of intelligence activities is basically a function of the executive branch of our government and comes within the constitutional powers of the President. It draws upon both the President's role as commander in chief and upon his role as leader in the conduct of foreign affairs. This is not to say that the Constitution excludes Congress from these areas. It has a role to play not only in intelligence operations but in the declaration and conduct of wars and in the conduct of foreign policy. I do mean to say that the constitutional roles of the President and

the Congress are very different, and that the difference flows largely from their differing institutional capabilities.

Congress was intentionally designed by the Framers of the Constitution as a deliberate assembly. Its very numbers and necessary methods of proceeding render it incapable of swift, decisive, and unanticipated response to the emergencies that the nation must face. The Framers, it must be remembered, acted against a history of legislative supremacy under the Articles of Confederation, and they found that experience extremely unsatisfactory. Their reaction was to create a strong presidency. The President was to lead in those areas that required managerial rather than legislative decisions.

I would like to offer an analogy which suggests the constitutional impropriety of some aspects of S. 2525. The analogy is to the respective roles of the President and the Congress in the declaration and conduct of war. Congress clearly has the constitutional power to declare war or refuse to declare war. It also clearly has the power to appropriate funds for armed conflict or to refuse to do so. Congress has, in fact, the raw constitutional power to disband the armed forces altogether and to leave the President as a Commander-in-Chief in name only, without a single platoon to manuever.

Yet—and this is the crucial point—Congress does not lawfully obtain tactical control of the armed forces because of its enormous legislative powers, including the power to say whether there shall be any armed forces.

Congress in 1941 declared war against Germany, Italy, and Japan, and it appropriated funds and conscripted men to fight the global conflict it contemplated. So much was it undoubted constitutional right. The war could not have been prosecuted by the President otherwise, no matter how important he might think entry into the war was to our national security. But let me take one step down from those overall decisions and ask how far Congress' power extends. Suppose that Congress, learning that President Roosevelt and General Marshall had decided to concentrate first on the European theater, had assumed the power by statutory enactment to direct that England and the Soviet Union be left unaided against Germany and Italy and that our entire force be directed against Japan. If Congress acted because it considered this course strategically sounder than that chosen by the President, can there be much doubt that this statute would have been an unconstitutional invasion of the President's prerogatives as Commander-in-Chief?

But I need not argue that case because S. 2525 is a much more detailed regulation of intelligence tactics. Let me, therefore, move the analogical case down a notch. Could Congress, within its constitutional powers, have ordered the Doolittle raid on Tokyo, directed that France be invaded from the south rather than through Normandy, or directed that the airborne troops at Bastogne surrender during the Battle of the Bulge? The answer, I believe, is plainly that Congress could not constitutionally have done those things. These are matters within the President's power as Commander-in-Chief and Congress' final say on the question of war or peace does not comprehend judgments on strategy or tactics.

These hypothetical cases are analogous to what is before us today because the conduct of intelligence in the modern age, given the close interdependence of nations and a technology that can bring war to any nation within a matter of minutes, presents many of the same requirements as the conduct of war—the need for central direction, rapid action, flexibility of judgment, secrecy, and the control of individual decisions according to a general strategic response to a hostile environment. But S. 2525 plunges Congress into tactical decisions about intelligence, decisions made in advance without knowledge of circumstances, and in this, I believe, the bill trenches impermissibly upon the role of the President.

This is a constitutional issue that ought to concern Congress and not be left for resolution by the courts. Some of these prohibitions and restrictions can hardly be litigated and yet may do permanent damage to our intelligence capabilities and to our national security. Even though the tactical controls may be unconstitutional, future presidents may have the greatest practical and political difficulty in making that point and repairing the damage.

There can be no dispute that constitutional rights must be preserved, and there can be no dispute that the intelligence agencies must not be allowed to slip out of control. But there are ways of doing that that are substantially less threatening to constitutional values and to national security than the enactment of complex and detailed legislation.

One way is the establishment of a strong tradition of the ways in which it is permissible or impermissible for an intelligence agency to behave. Such a tradition, a common understanding, leaves room for adjustment to all of the circumstances, needs, and crises of the future which rigid statutory rules cannot begin to antici-

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pate. We have made a strong start in establishing just such a tradition through the investigation, discussion, and public airing of past behavior of the intelligence agencies. No one, I think, can maintain that the agencies have not been greatly affected by what they have been through or that their behavior has not been greatly altered. Some would say that their behavior has been altered more than is required by the Constitution and more than is goed for our national security. It is not true that we need a statute for every instance of misconduct in the past. It must not be overlooked that past abuses were uncovered and rectified without the detailed controls this bill would provide. And now the internal controls in the executive branch are much stronger.

To reinforce the tradition we are establishing, the executive branch has been developing and enforcing guidelines of its own. I am familiar with some of these because I participated in their development under Attorney General Levi. These seemed to me, as they did to the Attorney General, fully responsive to First and Fourth Amendment concerns. My own work was primarily in connection with foreign intelligence electronic surveillance, but the point is a more general one.

The guidelines took the approach of stating the cause necessary to institute a surveillance or investigation, locating responsibility in identified officers for decisions about surveillance and investigations, requiring that decisions be reviewed by named officers at periodic intervals to see that the justifications remained in force, minimizing surveillances to what was actually required by the case, closely limiting the persons who could have access to the information developed and the use that could be made of the information. That approach seems to me both to preserve constitutional rights and to be about the best that can be done in this complex and changing field.

It would seem wise, before legislating detailed controls of dubious constitutionality, to determine how well American intelligence has been carried on under the guidelines already in place.

I will be quite brief about the warrant requirements introduced by Title III, partly because some of them have already been enacted by the Senate and partly because I have already made my argument in print about the idea of introducing judges into the intelligence process. The constitutional problem here arises both from Article II and Article III of the Constitution. The Article II problem exists because presidents have publicly claimed and exercised the power to engage in warrantless electronic surveillances in the foreign intelligence field as far back as Franklin Roosevelt. Congress has known of the practice and the Supreme Court has been informed of it. Two courts of appeals have held that the power exists. Congress may, therefore, have no power to require warrants in this area.

An Article III problem exists because there is no one to litigate with the government a warrant sought and issued in secrecy, and hence there would appear to be no case for controversy to give the federal courts jurisdiction. Warrants obtained for purposes of criminal prosecution do become known and subject to litigation if the prosecution goes forward, and, under current statutory law, the existence of electronic surveillance pursuant to warrant may be disclosed to the party targeted even if no prosecution occurs. That person may then litigate the warrant in a suit for damages. I think Title III of S. 2525 is void under Article III, and I would hope that the courts, though they would not be allowed adversary argument on the point under this bill, would agree.

It may be that the inclusion of the crime criterion in the definition of an "agent of a foreign power" (p. 137) is thought to mitigate the Article III problem. It could do so only by converting Title III primarily to a criminal investigation statute and that would severely limit the operation of foreign intelligence. I think future presidents should regard that as an unconstitutional abridgement of their Article II powers.

I will merely mention my other points rather than explain them at length. Title III would add little protection not already afforded by executive branch guidelines, but it would significantly increase the chances of leaks of important information and technologies, probably complicate intelligence gathering, either provide no protection because the judicial scrutiny was pro forma or draw the judges fully into the intelligence enterprise, and diminsh the accountability of everyone concerned with electronic surveillance.

The reporting requirements of the bill seem to spread American intelligence information so broadly as to ensure leaks and diplomatic complications. It would be better if Congress could establish a single joint oversight committee so that information could be more closely held.

These, as I have said, are points I have discussed in print and, for that reason, I forebear from trespassing further on your patience. I will, of course, be glad to discuss them further if any member of the Committee should desire.

Finally, simply as a matter of good taste, I would urge the deletion of Section 202(2) (p. 93) which is a finding of fact that smacks too much of self-flaggellation and which is highly dubious on the merits. I don't know that anybody's freedom of speech has been inhibited or that the integrity of our free institutions has been impaired. This goes far beyond the statement that there have been abuses and paints a picture of a democracy sliding into totalitarianism and that is simply not our situation by any stretch of the imagination.

The language of that section suggests an attitude that seems to underlie the philosophy of S. 2525 and which I think is wrong. It is the view that American intelligence is the primary threat to American liberties and hence must be closely confined so that not even the possibility of abuse exists. My own view is that the American intelligence community has already been severely chastised for past abuses, is well under control, and that the primary threat to American liberties is rapidly growing Soviet strength and agressiveness, which includes massive intelligence activity within the United States. Soviet intelligence is violating the law and the privacy of American citizens to a degree never dreamed of by our intelligence agencies.

The problem of abuses by our intelligence agencies has been very largely cured and that has been accomplished without a law such as the one S. 2525 contemplates. Both the experiences of the past few years and the executive branch guidelines now in place adequately guard us for the future. We ought not to hamper the effectiveness of American intelligence efforts further by drafting a complex code that by its nature cannot adequately address the unknowable problems and circumstances ahead. Perhaps the time has come to ask what can be done instead to strengthen and make more effective the American intelligence agencies.

STATEMENT OF ROBERT H. BORK, PROFESSOR OF LAW, YALE UNIVERSITY

Mr. BORK. Mr. Chairman, I am pleased to be here at the invitation of the committee to discuss certain constitutional questions in connection with S. 2525, the National Intelligence Reorganization and Reform Act of 1978.

I will make some changes and some interpolations in the prepared text that you have before you as I go along.

It seems to me that S. 2525 is a really heroic effort to cope by law with certain problems that have arisen, and much of it seems to me a useful response. I think it is good that the bill authorizes important intelligence activities, and good that it responds to certain abuses of the past and attempts to prevent their recurrence.

But I want to express some doubts about three aspects of S. 2525. These doubts are partly of a policy nature, but they rise to the magnitude of constitutional doubts. Perhaps, unlike Professor Emerson, I don't find the existing case law sheds a great deal of light on the problems we face here. Arguments, I think, from constitutional principles which have never been fully delineated by the courts are necessary. There will be other areas of disagreement as I go along.

Three aspects of S. 2525 that I have serious doubts about are: first, the attempt to control the details of intelligence operations; second, the introduction of judges and a warrant procedure into the conduct of foreign intelligence surveillance, electronic and otherwise; and third, the amount of reporting to be done to groups outside the intelligence community.

The detailed control of intelligence activities seems to me both unwise and in all probability unconstitutional in that it invades Presidential powers under article II of the Constitution. Title I of

the bill for example, contains in section 132 rather extensive restrictions on the categories of persons who may be used in intelligence activities, and in section 135, extensive prohibitions against particular forms of special activities.

Similar attempts at detailed control of activities occur in titles II and III. For example, section 213 of title II limits the collection of foreign intelligence concerning a U.S. person believed to be engaged in espionage or other clandestine intelligence activities to occasions when there is or may be a violation of the U.S. criminal code. That severely and unnecessarily limits foreign intelligence. It may be important to know who is engaged in gathering information on behalf of a foreign power, even though there is no indication that a violation of criminal law is imminent or likely. It may be important that we know what foreign intelligence networks exist. The criminal law proviso sounds innocuous to some people, but it is not, and is an unjustifiable hindrance to sound intelligence practice.

Similarly, section 219(3) which limits collection of foreign intelligence that a person may have, to interviews of any other person to whom he may have voluntarily disclosed such information strikes me as too limiting. Should that limitation apply under all circumstances whatever, I suppose that many circumstances might arise in which that would be not a principle we ought to adhere to.

Again, section 241 sounds attractive, but I think it is misguided. That section provides that no intelligence activity may be directed against any U.S. person solely because of his exercise of any right protected by the Constitution. Suppose the person is advocating the violent overthrow of the U.S. Government or he is advocating genocide, the extermination of Americans belonging to particular racial or ethnic groups. Suppose, further, that the advocate is not a solitary crank but belongs to an organized group, one perhaps with links to a foreign power. That advocacy, as long as he is not inciting to imminent violence, that advocacy is now his constitutional right though it once was not. The Supreme Court has changed the law of the First Amendment in this area. Does the fact that we must let him speak mean that we may not keep that person and his group under any form of surveillance, however mild? Persons or groups who advocate violence may be quite dangerous. In the past groups advocating violent overthrow of the government have been used to recruit people for illegal underground work. It is perverse to say that no intelligence agency may keep an eye on such persons and organization.

These are only examples of attempts at specific controls of activity that seem to me unwise, and do not take into account all the variations of circumstances that the world will throw up at us. They are well-intentioned but overly rigid attempts to safeguard first amendment and fourth amendment rights.

We all know the application of the first and the fourth amendments, like all the great provisions of the Constitution, depends heavily upon particular circumstances, the weighing of the particular facts and interests involved. Flat rules announced in advance are not sufficiently sensitive to these problems. Other witnesses have pointed out that detailed judgments made now may be wholly inappropriate in a world that changes rapidly and unpredictably.

Mr. Clark Clifford, for one, testified before this committee and gave objections to attempts to control specifics that seem to me to be absolutely correct on policy grounds. I won't repeat them here, but the policy grounds Mr. Clifford mentioned seem to me to shade into constitutional grounds.

The constitutional issue that arises out of these policy considerations may not have been canvassed in testimony before you. The issue arises under article II of the Constitution and concerns the propriety or legality of Congress legislating in such detail about the conduct of American intelligence activities by the President. I am talking, not about constitutional law in the hard-and-fast sense of rules already enunciated by the courts in particular fact situations, although some of these issues may be litigated eventually. I am speaking of constitutional values and principles that ought to be respected in the framing of legislation, and the point is essentially a separation of powers point.

The conduct of intelligence activities is basically a function of the executive branch of our Government and comes within the constitutional powers of the President. It draws upon both the President's role as Commander in Chief and upon his role as leader in the conduct of foreign affairs. This is not to say that the Constitution excludes Congress from these areas. It has a role to play, not only in intelligence operations, but in the declaration and conduct of wars and in the conduct of foreign policy. I do mean to say that the constitutional roles of the Congress and the President are very different, and that that difference flows from their differing institutional capabilities.

Congress was intentionally designed by the framers of the Constitution as a deliberative assembly. Its very numbers and necessary methods of proceeding render it incapable of swift, decisive, and unanticipated response to the emergencies the Nation must face. The framers, it must be remembered, acted against a history of legislative supremacy under the Articles of Confederation, and they found that experience extremely unsatisfactory. Their reaction was to create a strong Presidency. The President was to lead in those areas that required managerial rather than legislative decisions.

I would like to offer an analogy which suggests the constitutional impropriety of some aspects of S. 2525. The analogy is to the respective roles of the President and the Congress in the declaration and conduct of war. Congress clearly has the constitutional power to declare war or to refuse to declare war. It also has the power to appropriate funds for armed conflict or refuse to do so. Congress has, in fact, the raw constitutional power to disband the Armed Forces altogether and leave the President as a Commander in Chief in name only, without a single platoon to maneuver.

Yet—and this is the crucial point—Congress does not lawfully obtain tactical control of the Armed Forces because of its enormous legislative powers, including the power to say whether or not there shall be any Armed Forces.

Congress in 1941 declared war against Germany, Italy, and Japan and it appropriated funds and conscripted men to fight the global conflict it contemplated. That was its undoubted constitutional right. The war could not have been prosecuted by the Presi-

dent otherwise, no matter how important he might think entry into the war was to our national security. But let me take one step down from those overall decisions and ask how far Congress, power extends. Suppose that Congress, learning that President Roosevelt and General Marshall had decided to concentrate first on the European theater, had assumed the power by statutory enactment to direct that England and the Soviet Union be left unaided against Germany and Italy and that our entire force be directed against Japan. If Congress acted because it considered this course strategically sounder than that chosen by the President, can there be much doubt that this statute would have been unconstitutional as an invasion of the President's prerogatives as Commander in Chief.

But I don't really have to argue that case because S. 2525 is a much more detailed regulation of intelligence tactics. Let me therefore move the analogical case down a notch. Could Congress, within its constitutional powers, have ordered the Doolittle raid on Tokyo, directed that France be invaded from the south rather than through Normandy, or directed that the airborne troops at Bastogne surrender during the Battle of the Bulge? The answer, I believe, is plainly that Congress could not constitutionally have done these things. These are matters within the President's power as Commander in Chief, and Congress final say on the question of war or peace does not comprehend judgments on strategy or tactics.

These hypothetical cases are analogous to what is before us today because the conduct of intelligence in the modern age, given the close interdependence of nations and a technology that can bring war to any nation within a matter of minutes, presents many of the same requirements as the conduct of war: the need for central direction, rapid action, flexibility of judgment, secrecy, and the control of individual decisions according to a general strategic response to a hostile environment. But S. 2525 plunges Congress into tactical decisions about intelligence, decisions that are, moreover, made in advance without knowledge of the circumstances, and in this, I believe, the bill trenches impermissibly upon the role of the President.

This is a constitutional issue that ought to concern Congress and not be left for resolution by the courts. Some of these prohibitions and restrictions can hardly be litigated and may yet do permanent damage to our intelligence capabilities and to our national security. Even though the tactical controls may be unconstitutional, future Presidents may have the greatest practical and political difficulty in making that point and in repairing the damage.

There can be no dispute that constitutional rights must be preserved, and there can be no dispute that the intelligence agencies must not be allowed to slip out of control. But there are ways of doing that that are substantially less threatening to constitutional values and to national security than the enactment of complex and detailed legislation.

One way is the establishment of a strong tradition of the ways in which it is permissible or impermissible for an intelligence agency to behave. Such a tradition or a common understanding leaves room for adjustment to all of the circumstances, needs, and crises of the future which rigid statutory rules cannot begin to anticipate.

We ought to remember in this connection that what we now call the abuses of the intelligence agencies were in large measure, in many cases, actions of the sort that in that different era and climate we actually wanted the agencies to take. Many of those actions which we now regard as abuses, properly so, are said to have been known to members of Congress at the time. This suggests to me that the intelligence agencies, by and large, will behave as we expect them to.

We have made a strong start in establishing a new tradition, a new set of expectations communicated to the intelligence agencies though the investigation, discussion, and public airing of past behavior. No one, I think, can maintain that the agencies have not been greatly affected by what they have been through, or that their behavior has not been greatly altered. Some would say that their behavior has been altered more than is required by the Constitution and more than is good for our national security. But I think it is not true that we need a statute for every instance of misconduct in the past. We ought not to overlook that these past abuses were uncovered and rectified without the detailed controls this bill would provide. And now the internal controls in the executive branch are much stronger.

To reinforce the tradition we are establishing, the executive branch has been developing and enforcing guidelines of its own. I am familiar with some of these because I participated in their development under Attorney General Levi. They seemed to me, as they did to the Attorney General, fully responsive to first and fourth amendment concerns. My own work was primarily in connection with foreign intelligence electronic surveillance, but the point is a more general one.

The guidelines took the approach of stating the cause necessary to institute a surveillance or investigation, locating responsibility in identified officers for decisions about those surveillances and investigations, requiring that decisions be reviewed by specified officers at periodic intervals to see that the justifications remained in force, minimizing the surveillances to what was actually required by the case, closely limiting the persons who could have access to the information developed and to the use that could be made of the information. That approach seems to me both to preseve constitutional rights and to be about the best that can be done in this complex and changing field.

It would also be wise, I think, before legislating detailed controls of somewhat dubious constitutionality, to determine how well American intelligence has been carried on under the guidelines already in place. We do not really know whether those guidelines have damaged the American intelligence operation unnecessarily.

I will be quite brief abeut the warrant requirements introduced by title III, partly because some of them have already been enacted by the Senate, and partly because I have already made my argument in print about the idea of introducing judges into the intelligence process. And I understand that the article I wrote has been made a part of the record of the hearings of this committee.

The constitutional problem here arises both from article II and article III of the Constitution. The article II problem exists because presidents have publicly claimed and exercised the power to engage

in warrantless electronic surveillance in the foreign intelligence field as far back as Franklin Roosevelt. Congress has known of the practice, and the Supreme Court has been informed of it upon more than one occasion. Three courts of appeals, one sitting en banc, have held that that power exists. The Supreme Court has not passed upon the issue, although we attempted when I was in the Government to get the Court to do so. It is possible, therefore, that Congress may have no power to require warrants in this area.

An article III problem exists because there is no one to litigate with the Government a warrant sought and issued in secrecy, and hence there would appear to be no case or controversy as required by article III to give the Federal courts jurisdiction. Warrants obtained for purposes of criminal investigation and prosecution do become known and subject to litigation if the prosecution goes forward, and under current statutory law, the existence of electronic surveillance pursuant to warrant may be disclosed to the party targeted even if no prosecution occurs. That person may then litigate the warrant in a suit for damages. I think title III of S. 2525 is void under article III of the Constitution, and I would hope that the courts would agree with that, although they would not be allowed adversary argument on the point under this bill.

The CHAIRMAN. Professor Bork, is it fair to suggest at least as a constitutional proposition, that the court might look at executive authority under the Constitution absent any legislative action one way, and another way given legislative action?

All these court decisions have been operating in a vacuum as far as any legislative action is concerned.

Mr. BORK. Well, I think, Senator Bayh, that you may perhaps be referring to Justice Jackson's concurring opinion in the *Youngstown Sheet & Tube* case, and it is true that when the President takes an action with the support of Congress the constitutionality of his action is much stronger, but *Youngstown Sheet & Tube* does not address the question here where we have Congress moving into an area where certainly Presidential power has been asserted and exerted and acknowledged for many years. That does not mean Congress necessarily may not move in, but it seems to me we are getting close to the core of the President's power under article II, and it may well be that this is an impermissible violation of the separation of powers when we control the President in this kind of detail. That's all I'm suggesting.

I don't know, because we have not litigated this case.

The CHAIRMAN. But neither have we legislated.

Mr. BORK. I am hoping very much that you will not, sir.

The CHAIRMAN. Interestingly enough, I might say, before you continue, that we have a remarkable amount of agreement now between the executive and legislative branch that in certain areas there certainly should be legislation. Even with the Executive order, which is clearly within the confines of the President, the President has gone out of his way to converse with, and counsel, and seek advice from the legislative branch, to advise us. We haven't agreed with every dot and every tittle, but I might ask either one of you gentlemen to give us your thoughts about whether, if there is a general concurrence between executive and legislative branch, would that put us on a different constitutional

basis? I would assume that the President can't give away a constitutional power that is his and solely his, but in operating in a gray area, you have a President and a Congress working to try to deal with a very difficult problem. I mean, this is a very difficult thing, as all of our colleagues here can pronounce, certainly Senator Huddleston who has chaired the subcommittee on this charters business and Senator Garn and I who walked through the minefield of electronic surveillance. It is a kind of thing where you are damned if you do and damned if you don't, and you end up doing nothing.

Well, excuse me.

Mr. BORK. Well, Senator, in response to your remarks, I think it is entirely appropriate that the President and his representatives discuss executive branch guidelines with the Congress, but the problem remains of circumstances that are unforeseeable, and I have seen enough of this sort of thing to realize how rapidly unforeseen circumstances can arise. If such circumstances do arise, the President can then change the guidelines. If they arise under a statute, the President can do nothing, and much may be lost while one tries to amend the statute. It would be very difficult to do.

But on the title III point, it may be that the inclusion of a crime criterion in the definition of an agent of a foreign power, which appears on page 137 of the draft of the bill I have, is thought to mitigate this article III problem of there not being a case or controversy. It could do so only by converting title III primarily to a criminal investigation statute, and that would severely limit the operation of foreign intelligence. I think future presidents should regard that as an unconstitutional abridgement of their article II powers.

I will mention my other points about the requirement of a warrant very briefly because, as I say, I have written about them, but I would be glad to answer questions. I think title III here would add little protection not already afforded by executive branch guidelines, would significantly increase the chances of leaks of important information and technologies, probably complicate intelligence gathering, either provide no protection because the judicial scrutiny was pro forma, or else draw the judges fully into the intelligence enterprise, and it would furthermore diminish the accountability of everyone concerned with electronic surveillance.

Now, the reporting requirements of the bill I have objected to, and I will just mention those briefly. I notice, for example, that in section 133 there are to be reports to each of four different congressional committees. An intelligence oversight board is required, with a great deal of writing and reporting. Section 152 requires information be supplied to the House and Senate Select Intelligence Committees of all activities. Committees report to Congress under section 153.

Now, I think there has to be oversight and I think there has to be reporting, but I would urge that that function be consolidated so that there aren't so many reports and so much information going out to different groups of various sorts. I would urge that Congress, by this bill, establish a small, joint committee of Congress, one committee instead of the proliferation of committees and groups

who are to get the information as the bill now stands, and under which leaks, I think, are inevitable.

I will forebear from trespassing further on your patience. I will be glad to discuss this with you, but simply as a matter of good taste, I would urge the deletion of section 202(2) which appears on page 93. It is a finding of fact I think that smacks too much of self-flaggellation and which is highly dubious on the merits. I don't know that due to activities by our intelligence community that anybody's freedom of speech has been inhibited or that the freedom of the press has been inhibited, or that the integrity of our free institutions has been impaired. This section goes beyond the statement that there have been abuses that ought to be stopped, and instead paints a picture of a democracy sliding into totalitarianism, and that is simply not our situation by any stretch of the imagination.

The language of that section suggests an attitude that may underlie the philosophy of S. 2525 and which I think is wrong. It is the view that American intelligence is the primary threat to American liberties and hence must be closely confined so that not even the possibility of abuse exists. And let me add that I don't think there is any strong and vital institution of government which can remain strong and vital if even the possibility of the abuse of its powers is removed, because in doing that, you remove its powers.

My own view is that the American intelligence community has already been severely chastised for past abuses, is now well under control and that the primary threat to American liberties is rather rapidly growing Soviet strength and agressiveness, which includes massive intelligence activity within the United States by the Soviets. Soviet intelligence is violating the law and the privacy of American citizens through, among other things, the interception of enormous numbers of telephone calls to a degree never dreamed of by our own intelligence agencies.

And in doing so, they are violating the American statutory law, the American criminal code.

The problem of abuses by our intelligence agencies has been very largely cured and that has been accomplished without a law such as the one S. 2525 contemplates. Both the experiences of the past few years and the executive branch guidelines now in place adequately guard us for the future. We ought not to hamper the effectiveness of American intelligence efforts further by drafting a really complex code that by its nature cannot adequately address the unknowable problems and circumstances ahead. Perhaps the time has come to ask what can be done instead to strengthen and make more effective the American intelligence agencies.

Thank you.

The CHAIRMAN. Thank you, Professor Bork.

I think we have, shall we say, two rather significantly different positions well articulated here, and having those different perspectives so well articulated I think is helpful to the committee.

I would hope that we could, as we proceed on our path toward drafting legislation, ask for your continuing advice and counsel as we look at specific items. If we don't like one particular item and we recognize that there is a problem that needs to be dealt with, if

we don't agree with one particular section or subsection, what is a better approach to that particular problem?

Of course, I think from both your standpoints, you would totally do away with certain sections. I must say in listening to both of you articulate, I think that perhaps the accurate place ought to be about just to the right of Professor Emerson's elbow there as to where you draw the line. I don't know. There is so much give and take required here if we are going to get anything, that is the difficult thing.

We have tried to enunciate some principles; we struggled with this criminal law matter, and some of the people who had been the most vigorous critics of the earlier standard, as we tried it in wiretap legislation, seemed to feel that that went a long way, but Professor Emerson, you don't think it went far enough, that there are still significant loopholes there.

I should point out we do have, Professor Bork, emergency authority in there for the President to act. You might want to take another look at that and see whether that eases your concern. I doubt if it would eliminate it.

Mr. BORK. Well, Senator, when he has emergency authority to act, I take it that merely eliminates the reporting requirement for a period of 72 hours or something like that, but he would not have emergency authority, would he, to violate a specific prohibition of the statute?

The CHAIRMAN. We'll check.

Well, if it is the security of the country that were involved, and there were unforeseen circumstances, and the time exigencies were such, he could act, but then he would be required to report forthwith. I might say on the other hand, we have felt that, Professor Emerson, we have a significant amount of leeway to initiate our oversight, to ask questions, to ask for documents, and to conduct inquiries and investigations, not just sit there and sort of be paddled back and forth.

Mr. EMERSON. Well, I think that's true, Senator. There is no question that any government needs information on which to operate and determine policy. That is not my objection. My objection is that that has to be balanced against the right of citizens to participate in the Government process and to dissent from the Government, and when the agencies have done as they have in the past, in the CIA CHAOS program, the FBI COINTEL program, they are using the intelligence agencies as a method of controlling political expression, and that, I think, is wrong. That's not collecting information. That is an affirmative usurpation of power on the part of the intelligence agencies, and that is what they have to stop doing. They should collect information, that's what they should do, and that is perfectly permissible, within the limits that when the collection of information begins to interfere with First Amendment rights, they have to stop. But the fact is that under the guise of collecting information plus the guise of preventive action, they have become a power in themselves, totally unauthorized by any legislative statute.

The CHAIRMAN. Well, that's the kind of thing we are trying to stop.

Mr. EMERSON. Right.

The CHAIRMAN. And I must say whether section 202(2), that Professor Bork thought should be stricken for various reasons, whether it should be in there as part of the proper legislative process, I don't know, but certainly I must say I think it pretty well recites history. That is not looking in a crystal ball and anticipating. I think we can pretty well nail down all of those matters.

But let me ask you two gentlemen to deal with a couple of areas of constitutional concern that we have had. Could you attempt to distinguish for us, please, the constitutional rights of Americans relative to our intelligence agencies if they are not in the country, one, and two, could you give us your opinion of what the rights of foreigners and resident aliens are in this country, and what right do we have to establish one standard for American citizens and another for foreigners and resident aliens in this country?

Mr. BORK. I'll speak to that, if I may.

It seems to me that the rights of American citizens travel with them abroad, and that the fact that they are abroad, alone, does not change their constitutional rights against action by the American Government. It seems to me that the position with respect to resident aliens here is somewhat more complex. I think they have many of the same rights as citizens and the court has held, for example, that they have Fourth Amendment rights. I am sure however, that those rights are defined differently if there is reason, for example, to believe that the permanent resident alien is in fact an officer of the KGB engaged in penetration of American intelligence agencies or something of that sort. That is why I say that circumstances necessarily alter the application of constitutional principle.

The CHAIRMAN. Professor Emerson?

Mr. EMERSON. I would say, Senator, I agree with Professor Bork on the first proposition, that an American citizen traveling abroad, at least so far as his relations with American officials are concerned, doesn't waive any constitutional rights. I think the Supreme Court has in effect held that in *Reed* v. *Covert* and in the *Singleton* case involving the rights of non-military personnel attached to the Army and so on.

And I see no reason why just because a citizen is out of the country, when he is dealing with his own government servants, he shouldn't have all the rights he has if he is in the United States.

As to the resident aliens, I think I disagree somewhat. It is true, I agree, that it is a complicated question. I think that there is under some circumstances, as the Court has held, a basis for distinguishing between citizens and noncitizens, but I don't think those circumstances apply to the question of their rights vis-a-vis intelligence agencies. The Court has held that there are certain types of occupations, for instance, such as being a policemen, or obviously in the case of voting, where the factor of being a citizen or a noncitizen is decisive, and a resident alien docsn't have the same power, the same rights, privileges. But I don't think that applies to the question of whether he has First Amendment rights, Fourth Amendment rights, or due process rights. So when the intelligence agencies interfere with those rights, whether it is a citizen or a

resident alien, I see no real difference. I think they should be for that purpose considered on the same level.

Now, Mr. Bork says they may be agents of a foreign intelligence agency. Well, of course, that is true whether they are citizens or noncitizens. If they are agents of foreign intelligence agencies, they are subject to certain restrictions, but that isn't a differentiation on the basis of citizenship.

The CHAIRMAN. How about foreign visitors?

Mr. EMERSON. Well, I haven't really gone into that, Senator. I can't really give a considered opinion about that. I suppose there might be differences. In other words, my feeling is that the First Amendment guaranteeing the right to political expression, and the Fourth Amendment and so on, are traditions and principles of our society, and that the people who are part of the society are the ones that make those traditions, that have that educational background, that attitude and philosophy, and they are the ones that are part of the system, and I think that includes resident aliens. But it doesn't apply to persons just touring through. They are not part of our system. They have other loyalties, and therefore I think there is a basis for some distinction.

Now, I haven't worked out exactly in this connection where that distinction might be drawn, but possibly there could be some.

The CHARIMAN. Well, you might give a little thought to it, if you would, because that is one of the matters we are addressing; because historically certain kinds of visitors, certain types of groups, have been used as a cover for foreign intelligence, and we have established a different standard for that particular kind of group of foreign visitors generally.

But unfortunately, I have a Judiciary Committee meeting with a bill that I am interested in being discussed in about 2 minutes. Could I ask our distinguished colleague from Kentucky to take over, and I am sure you will have some questions.

I want to thank both of you gentlemen, and I hope we can keep in contact. It has been very enlightening to me to get the interplay there.

Senator HUDDLESTON [presiding]. Senator Garn, do you have a question?

Senator GARN. Thank you, Mr. Chairman.

Professor Emerson, I would like to ask you some specific examples, and I have big disagreements on whether or not criminal standards should be imposed. I would tend to agree much more with Professor Bork as far as the limitations we are placing on our intelligence gathering activities by going to a strict criminal standard. Senator Bayh and I spent 2 years on the wiretap bill hasseling to come up with this middle ground, so I plead guilty to insisting that "or may involve" be there, and I will continue to fight to see that it stays in there.

Nevertheless, despite the fact we have those disagreements on criminal standards, I and this committee very much want to limit information gathering as much as possible and to do so beyond the criminal standard only where we feel it is absolutely necessary, when people are not proven or suspected to be involved in criminal activities.

So if I could have you respond to some specific examples and how you feel about them.

It sometimes happens that intelligence agencies learn that a particular U.S. individual or corporation is the target of recruitment effort by a foreign intelligence service or international terrorists, or is the target of clandestine intelligence activities by foreign intelligence services of terrorists. That is a known fact.

What we don't know, it is not clear whether or not that individual is cooperating. He may just simply be a target, or trying to recruit him, but he is not cooperating or we don't know whether he is cooperating or not with them.

So S. 2525 would permit the intelligence agencies to collect information about that person for the sole purpose of determining, a preliminary investigation, whether or not he was cooperating or not, and at that point, having determined that, they would have to then inform the individual that they were collecting information on him. In any event, the law would allow this to take place for a maximum of 180 days.

Now, what is your feeling about this type of a situation? You simply don't know whether the man is doing anything or not, and the sole purpose of the gathering of information is to determine whether he is or not, to decide whether you want to go further or not.

Mr. EMERSON. Senator, I would apply the basic principle of the criminal standard. Now, as applied in that case, it would seem to me that it would depend on what information the intelligence agency had. If they had sufficient specific information to believe that there was a violation of law being committed under the espionage laws or sabotage laws or whatever it might be, then of course they should make an investigation.

But, to take the other extreme, to say that anyone who might be a target can be investigated is to leave the thing completely open ended. That would mean that the intelligence agencies could keep track, as I said, of every scientist on every university faculty, or in a corporation, any person who had information that another country might want.

Now, you can't extend it to that length without having a garrison state, a police state, and that is why you will have to draw the line at an earlier point. Therefore it would depend on what information the intelligence agency had that might indicate some violation of law was taking place.

Now, one further thing. I would certainly not object in any way to the general idea of having different levels of investigation, that is, preliminary inquiries which could go on for 30 days and then if nothing turned up would have to be dropped. The standard for them might be more relaxed than the standard for a full investigation with intrusive techniques and so forth. I would agree to measures of that sort, yes.

Senator GARN. Well, it certainly isn't open ended. As I said, it prohibits it after 180 days—allows it for 180 days maximum, so your statement that it is open ended I cannot accept. We may argue about the length of time. Maybe 180 days is too long to go ahead with that kind of an investigation, but if you have, let us

say, a double agent who absolutely says yes, this guy is a target, maybe 180 days is enough.

You see, one extreme is to go to the strict criminal standard that you want to. The other extreme is to have no warrant procedure at all and none of the safeguards we are trying to put in here. I don't like either extreme. That is what Senator Bayh and I worked so hard for, is to reach a middle ground so that we would allow at least some preventive action against a person who was not committing an obvious crime.

I think once before I gave you this example, when I was mayor of Salt Lake City, through intelligence gathering activities we learned there was a very serious threat to the Salt Lake Mormon Temple grounds, and as a result of that information I had a great number of policemen around, stationed at strategic places. Well, nothing happened, and so a lot of people said, well, you overreacted. Well, maybe I did. I don't know. But I know that nothing happened. I would hate to be on the other side of the coin where I discounted it and said well, we didn't really check into it, and 5,000 people were killed from a bomb blast in the tabernacle, and say, well, I didn't violate anybody's individual rights, but I let 5,000 people die. That is the type of balance I am trying to look for, and I do think it is important that we have some preventive measures.

If we wait until we have got a possible criminal violation, we are certainly going to overlook a great deal of espionage in this country.

Mr. EMERSON. Well, Senator, I certainly would have no objection to stationing police around the Capitol if there was any suspicion that something was going to take place. I mean, that is not what I am talking about, of course. I am talking about——

Senator GARN. Well, I am talking about is where we got that information. I understand you wouldn't object to doing that, but you would probably object to the way I got the information is my point.

Mr. EMERSON. Well, you didn't tell us the way you got the information.

Senator GARN. I don't intend to, either.

Mr. EMERSON. I would disagree with you when you say that my position is the extreme, in insisting on a criminal standard. I think that is the center position, really. I mean, I would certainly not think that in terms of American traditions it is an extreme position to insist that when the Government taps your phones, examines your bank records, tails you where you go and so on, that there be some violation of law involved. I mean, that doesn't seem to me an extreme position, and that is essentially my position.

Senator GARN. Well, and I would say that I don't think it is extreme to have some means for determining in a preventative way what is going on if there are limitations placed on it. Maybe 180 days in this case is too long.

Let me ask you another question. This bill would permit intelligence agencies to determine whether a U.S. person in contact with a foreign intelligence agent has had access to classified material or not.

Is that reasonable to find out? You know they have had contact. Is it reasonable to investigate, find out whether they have had access to classified material or not?

Mr. EMERSON. You mean an American citizen——

Senator GARN. An American citizen.

Mr. EMERSON [continuing]. Has been approached by a known espionage agent, and the question is whether the American citizen has had access.

Senator GARN. Whether we can investigate to find out whether he's——

Mr. EMERSON. Yes, I would say yes. Yes.

Senator GARN. Intelligence agencies often determine that a particular U.S. person might be useful as a source of information or as a source of assistance in intelligence operations. They might, for example, want the assistance of an owner of an apartment house in which a foreign intelligence agent was living. Before they decide whether to ask that individual's assistance, however, they most often will wish to determine whether the individual, for some reason, is unsuitable. For example, is there reason to believe that he himself is engaged in foreign intelligence? Is he an alcoholic or otherwise unreliable?

S. 2525 would permit the intelligence agencies to collect information about that individual unbeknownst to him to determine his suitable.

Now, I am well aware there have been a lot of allegations of abuse of this sort of collection authority in the past. I would assume that you would probably not feel that it is reasonable to do that without limitations, but would you feel there are some limitations we could place on that type of investigation to determine the suitability of that type of an individual that would be reasonable in your opinion?

Mr. EMERSON. I think if you had that concrete situation in which the intelligence agencies had information that a person was an intelligence agent for a foreign country and living in an apartment, a particular apartment, and you wanted to check with the manager of the apartment it would be reasonable to check into his background, yes.

On the other hand, as you say, to use that as, for instance, in the *Daniel Schorr* case or other instances in which it has been used as an excuse, obviously is impermissible. It would have to be quite narrowly confined to a specific factual situation where there were articulable facts that justified investigation of a violation of law.

Senator GARN. Thank you.

I will stop at this point so that others can question.

Senator HUDDLESTON. I am sorry I didn't get to hear all of the testimony presented by Professor Emerson, but I will, of course, read it with a great deal of interest.

We have tried, in the committee hearings, to get various viewpoints presented at the same time so that we have an opportunity to discuss the conflicting opinions about the need for legislation, about what it does and about what it ought to contain. It seems we have a situation here where Professor Bork contends that we ought to trust Government operations based on tradition and on execu-

tive guidelines that might be established. Professor Emerson says never trust them—put it into law.

Mr. EMERSON. Not quite that. Just never trust them too far. [General laughter.]

Mr. BORK. Gee, I agree with that, Tom.

Senator HUDDLESTON. I must say those are essentially the attitudes and the positions that we wrestled with so long in trying to strike some kind of reasonable balance. It doesn't seem that the tradition gave us a whole lot of comfort in trying to develop a system that would indeed protect the rights of individuals and citizens. Executive guidelines we took into account, also recognizing that they can be changed and sometimes become obscure by the time they reach down into the lower levels of operation. So that presented a problem for us, too.

Mr. Bork, I think you are correct. I think the revelations and investigations have had a profound effect on the current operation of our intelligence agencies. I don't believe they are engaged in any substantial abuses at this time, and probably will not be for some time with or without legislation. But those things seem to have a way of wearing off, and I am wondering if we are proposing a situation where we are going to have to have periodic investigations and self-flagellation at times to get back on track? Is that somewhere down the road, or would it be better to go ahead and put into statute some very specific prohibitions and specific guidelines that will give us some confidence that even though everybody is not checking every day, the operation is going forward in a way that is consistent with the constitution and law?

Mr. BORK. Well, Senator, I think that if you had a small, joint oversight committee plus the Attorney General and the President involved, you would have, plus the guidelines and the tradition that has been established, I think you have all the protection you can get, and I think it is adequate protection, consistent with a vital, effective American intelligence community.

I must confess that recent literature and revelations lead one to worry more about the effectiveness of American intelligence today than about its abuses.

Senator HUDDLESTON. Well, you made one point about the separation of powers, and while I am not a constitutional authority by any means, not even an attorney, we were concerned with this, too.

But would you agree that the activities that now are lumped into what we refer to as intelligence are of such a nature that there is a proper role for congressional oversight and authority—I am talking about overthrow of governments, paramilitary operations, even secret wars that have been conducted by intelligence operations, at least those that are still referred to as intelligence operations? This goes somewhat further than just collecting information. Do you see a difference there in the role that Congress ought to assume?

Mr. BORK. Well, I think, Senator, that Congress should have oversight when things of that nature are proposed or are done, and are learned about, and are disapproved of. Congress can then react to stop it, to punish, to do whatever it wants to do.

My basic objection is attempting to control what is necessarily a fluid, changing world in which dangers are unpredictable and in which the application of constitutional protections depends heavily

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upon particular circumstances. Trying to control all of those things by flat rules made in advance, I think cannot be done. If you want an analogy, the Federal Tax Code attempts in enormous detail to anticipate everything that might happen in the tax realm, and yet we have to have the IRS constantly making rulings, giving opinions, and so forth. The world is simply too fluid to write a complex code which purports to balance these values in every circumstance in the future.

Senator HUDDLESTON. Well, we understand that.

Mr. EMERSON. Senator, could I——

Senator HUDDLESTON. Yes, sir.

Mr. EMERSON. Could I say a word or two about what my colleague has said about the separation of powers and the article III.

Senator HUDDLESTON. Yes.

Mr. EMERSON. The argument seems to be that these regulations that are involved in S. 2525 are matters of tactics rather than policy. I would agree that the executive power certainly involves the power to administer or to decide the details and the legislative power is a power of establishing policy. But it seems to me that what is involved in S. 2525 are not simply questions of tactics, but are important questions of policy.

I would have no doubt, for instance, that Congress could pass a law prohibiting flogging in the armed services. The President, as Commander in Chief, could be prohibited by legislative policy from punishing soldiers by a flogging process. Similarly, if the Congress tried to say that the FBI should investigate X and not investigate Y, I think that would be an interference in the executive process. But the regulations, the protection against wiretapping, protection against use of informers except under certain circumstances, those are basic matters for policy, it seems to me, that are clearly within the legislative prerogative.

As to the article III question of whether there is a case or controversy involved in a warrant proceeding, it seems to me first of all that the Constitution contemplates in article IV that the issuance of a warrant is necessarily a case or controversy because it provides for a warrant issued obviously by a court proceeding, and therefore you don't have any question of whether there is a case or controversy. If there is any problem about it, however, it could easily be cured by putting in the bill a provision that a public defender be appointed in every case where there is a request for a warrant, to represent the interests of the person who was under surveillance, and then you have a case of controversy, so it can easily be fixed up.

In my mind, there is no question whatever that there is a real case of controversy. There is a real issue of legal and constitutional rights when these actions are taken, and it seems to me pure fiction to say there is no case or controversy.

Senator HUDDLESTON. Is there——

Mr. BORK. May I speak a word to that?

Senator HUDDLESTON. Yes, sir.

Mr. BORK. I must say that the constitutional provision providing for the issuance of a warrant assumes a criminal investigation and the warrant will be litigated so that—or it most probably will be litigated, so that there is a case or controversy there. I never heard

before the view that the mere fact that the court issues a warrant makes it a case or controversy, nor do I think the problem could be cured by appointing a public defender or a devil's advocate. Such a person would litigate against the Government, but would have no client he could speak to. He would not be under the control of a client, the person who was to be surveilled. He could not speak to the client. The client would never know he was being represented. So I think that would be a wholly fictitious form of dispute which would not provide that concrete case or controversy between Government and somebody adversely affected, which article III of the Constitution requires.

Senator HUDDLESTON. Well, doesn't the Supreme Court suggest in the *Keith* case that Congress could and should establish a special warrant procedure for intelligence surveillance?

Mr. BORK. I don't recall that it says should, Senator. I think it says——

Mr. EMERSON. Which case?

Mr. BORK. *United States* v. *United States District Court.*

Senator HUDDLESTON. The *Keith* case suggests at least an invitation to Congress to take some action in this regard.

Mr. BORK. Well, to consider it. It would be a peculiar warrant requirement because there might be no probable cause of the commission of a crime if you are dealing with foreign intelligence. And it is unclear what the standard for the issuance of a warrant would be, and furthermore it is unclear how the judge would know whether or not to issue it. The judge would either have to become fully involved with the intelligence process, so that he knew the need for this kind of information, or else he would have to defer to the intelligence officers who came before him so that the protection provided would be pro forma only.

Senator HUDDLESTON. We use several different phrases; and again, my lack of legal training I guess makes it even more complicated to me. In the bill we adopt a standard, "reasonably believed" that an individual is engaging in some kind of criminal activity. There is a standard in criminal law, I understand, of probable cause. There has been some suggestion of a term like "reasonable likelihood."

What is the difference among those terms?

Mr. EMERSON. Well, it is very hard to say. It is a continuum in which one is more strict, stricter standard than the other. I think that is about all you can say. Neither of those terms are very specific. But a lot of our law is that way and after a while the courts begin to bring some order into it and certain patterns develop and certain factual situations get established on one side of the line or the other. Eventually you come out with probably a fairly complicated but nevertheless a somewhat more specific understanding or interpretation of what those terms mean.

But it is true that they are very broad and it is hard to say in general terms what the difference is except that one is more strict than the other.

Senator HUDDLESTON. Would probable cause be the strictest of the three?

Mr. EMERSON. Yes.

Senator HUDDLESTON. Professor Emerson, you made some reference to prohibiting the proceeding with an investigation of an individual unless you had certain information. I am wondering how do you get that information if you haven't already violated some of his rights of privacy?

Mr. EMERSON. Well, that is a matter of various kinds of police methods. Most information, I suppose, comes to you on a voluntary basis from persons who inform the officials of something suspicious that is going on or of some violation of law. In other cases you get information from records that are made and are available publicly, or reports that have to be filed. There are many sources of obtaining information.

Now, of course, one source would be to have an informer or a whole set of informers in every organization. At one time the FBI had 5,000 informers in the city of Chicago, I think it was, operators of beauty parlors, candy stores, to report on what was going on in the black movement. You can carry it to incredible lengths because you can never be sure. And life isn't that certain.

The question is where you draw the line. I think you will have to draw the line at a point which is much closer to the protection of the system of individual rights.

Senator HUDDLESTON. I just wondered if we were developing some kind of a Catch 22 situation where you couldn't move unless you had certain information and you couldn't have had that information if you hadn't already conducted some kind of a surveillance or used a collection technique that might in itself have been contrary to the principle that you were enunciating in the first place.

Mr. EMERSON. No, Senator. I think the laws can be enforced without violating constitutional rights. The failure to enforce the laws, I think, is not because of the constitutional rights; it is because of either official corruption or unwillingness to really do it, or incompetence. I don't think there is anything in the history of our police systems that indicates that the police can't obtain information sufficient to enforce most laws if they want to without violating constitutional rights.

Senator HUDDLESTON. You discussed with Senator Garn a situation where a known KGB agent was under surveillance and it was determined that an American citizen had made or was making contact with that agent. It might be a contact of a very frivolous nature, maybe the American just happened to run into him on 3 successive nights, or 3 successive weeks or 3 successive months. Would that be sufficient reason for the agencies to begin a thorough check of that U.S. citizen?

Mr. EMERSON. I think so, yes. I think so. I——

Senator HUDDLESTON. Even though they have no previous knowledge about him at all.

Mr. EMERSON. No; I think that if you have found a foreign agent, that anyone who gets in contact with him, even though it is only every 3 months, there is reason to believe that there is a violation of law taking place, and that is a legitimate inquiry, I think, yes.

Senator HUDDLESTON. On the question of constitutional rights of individuals, is there any room in our Constitution to make allowances for the fact that all citizens have a right to believe their Government is doing whatever it can do to protect it from foreign

intervention, foreign difficulties? Does that in any way mitigate the rights of some specific individuals that the Government might find necessary to know something about in order to fulfill its larger obligation to the total society?

Mr. EMERSON. Well, the relationship between a democratic society and its police forces is a very difficult one, without question, because the police, inherently, by reason of various bureaucratic forces and otherwise, tend to get somewhat out of line, and that is something that has to be watched all the time.

I think, Senator, that I am inclined to accept the evidence that violations of constitutional rights by our police forces are counterproductive. One reason that the FBI could never find the Weathermen was that they had support in the community, and that support in the community derived from the fact that the citizens knew the kinds of things the FBI was doing and were simply not going to cooperate.

And I think that that is the secret of the problem of terrorism. If you bave a community that accepts the terrorists and protects them, you will never end terrorism, and a community that has an oppressive police force, that is unjust and unfair and abusive, will not have the support of the community, and in a democratic society, that is the relationship you have to have between the citizen and the police. I think that these abuses we are trying to prevent in the end make the society less secure rather tban more secure.

Mr. BORK. Senator, may I interject a thought there?

Senator HUDDLESTON. Yes.

Mr. BORK. It seems to me quite inaccurate to suggest tbat the success of terrorist groups arises from the oppressiveness of the police force. I bardly think the Red Brigade could be said to be responding to the oppressive tactics of the Italian police. The Bader-Meinhoff gang is not supported by a strong radical-intellectual movement in Germany because the German police are nasty to them. Terrorism and revolutionary political activity have deep roots we don't fully understand, but that the police are behaving unpleasantly is surely the least of the causes of those movements.

Senator HUDDLESTON. Well, I think, of course, the nature of the situation we are trying to deal with in intelligence, is esentially a secret type operation which is almost anathema to a free, open, democratic society to start with, but a case can be made, I think, that in order to protect what we have here, we have to have a certain amount of that kind of operation.

Now, how do we do it with the least infringement possible on individual rights and still protect our country?

Mr. EMERSON. Yes; you are quite right, that the secrecy which is necessarily involved at some points is a very serious added complication and makes control very difficult. I agree with that. But I, as I say, do not feel that, particularly with new techniques and so forth, the balance between curbing the police and allowing them to investigate crime has been turned in opposition to the police. I think that they have plenty of power, and if the society as a whole is operating on a healthy basis, the controls can be exercised in a democratic way without moving toward police state tactics.

Senator HUDDLESTON. As to our attempt to develop some control over the kind of operations we have, Mr. Bork, I might say we do

rely pretty strongly on a mechanism, a procedure that has to be followed in order to approve of various types of activities. In the special activity area—covert action—it is a declaration by the President that it is important to the national security. The reporting part of that is an attempt to keep it tight, to make sure the requirements are met. It is our firm belief that once a proposed project goes through that process most of, if not all of, the kind of abuses that might have occurred in the past would be weeded out.

But we felt, further, that in order to be responsive to the investigative committee and the recommendations they made, there probably also should be some specific prohibitions in statute, and we have tried to include some that we felt were in the area of most potential harm if they were abused.

Mr. BORK. Well, sir—I'm sorry.

Senator HUDDLESTON. Go ahead.

Mr. BORK. No; I was going to repeat two things. One is, I know of a political party in this country which has a wing which advocates—the political party is connected to a foreign organization and it has a wing which advocates terrorism in this country. Now, the general advocacy of terrorism is a constitutional right, it turns out, to my surprise, but it is, and it seems to me almost suicidal to say that since it is a constitutional right, the fact that terrorism is advocated is not sufficient to allow an intelligence agency to keep track of that group and what they are up to. That strikes me as very odd.

The other thing is the criminal standard might be met there, I am not so sure, but it is a constitutional right, so I suppose it isn't met. Suppose we have another political party whose political actions are directed from abroad. Now, there is no crime involved, nor, so far as one can tell, is there likely to be a crime. But if an American political party is directed by a foreign power, surveillance of that group is prohibited by this bill. I don't see why it ought to be. I would like to know what directions are coming from a foreign government to an American political group.

Senator HUDDLESTON. Well, I would agree with that. I think that Professor Emerson may have another viewpoint.

Mr. EMERSON. I think it should be said that under the present Supreme Court rulings, advocacy of terrorism would be a crime under certain circumstances. The formula is whether the advocacy is designed and intended and likely to produce imminent lawless action, and if it is done under those circumstances, it would be. If it was not, it would be constitutionally protected.

Mr. BORK. That's right, but if I have a political party which is saying that in the future we should engage in terrorism——

Senator HUDDLESTON. It would be hard to envision a terrorist act that wouldn't be in violation of a law.

Mr. EMERSON. Well, I don't understand how anyone can justify an investigation of an exercise of constitutional rights simply for the purpose of getting information, even, certainly not for the purpose of preventing the exercise of those constitutional rights. The gathering of information has a depressing effect and an inhibiting effect, and I don't think that the Government collection of information about legitimate exercise of rights is permissible under

the first amendment. I think the Court would undoubtedly uphold that position.

Senator HUDDLESTON. Gentlemen, I hope we do have the benefit of your further thinking as we proceed with this process, and we would like to have an opportunity to refer questions to you from time to time for your response, if that would be agreeable to you, as we try to explore all the possible facets of this really groundbreaking legislation that we are dealing with.

Mr. EMERSON. That is quite agreeable with me, Senator, yes.

Senator HUDDLESTON. We appreciate very much your appearance here today.

Mr. BORK. Thank you.

Senator HUDDLESTON. Thank you, both.

The subcommittee will be in recess subject to the call of the Chair.

[Whereupon, at 11:56 a.m., the committee recessed subject to the call of the Chair.]

TUESDAY, JULY 11, 1978

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The committee met, pursuant to notice, at 10:21 a.m., in room 5110, Dirksen Senate Office Building, Senator Birch Bayh (chairman of the committee) presiding.

Present: Senators Bayh (presiding) and Garn.

Also present: William G. Miller, staff director and David Bushong, minority counsel.

Senator GARN. Ladies and gentlemen, we will call the committee to order. I apologize for the chairman and vice chairman. They were called to a meeting at the White House this morning that had not been scheduled, and have not returned, and rather than continue to keep all of you waiting, we will start the committee hearing.

We are happy to have you here to testify. I understand that you requested that Ethel Taylor testify first, and so we will proceed with you and happy to hear your testimony.

STATEMENT OF MS. ETHEL TAYLOR, NATIONAL COORDINATOR, WOMEN STRIKE FOR PEACE, ACCOMPANIED BY BARBARA POLLACK

Ms. TAYLOR. Thank you, Senator Garn.

I am very grateful for this opportunity to speak for my organization, Women Strike for Peace, before this committee on Senate bill 2525. We feel that our credentials for testifying on this bill are impeccable. We have been spied upon by the CIA, the FBI, the DIA, the Army, the Navy, and the Air Force. Apparently the Marines were occupied elsewhere.

Women Strike for Peace is a movement which came into existence as a protest against the resumption of nuclear testing in the atmosphere by the Soviet Union and the United States. As women and mothers we were frightened by medical reports of the danger from radiation to the food our children ate and the milk they drank. We tried to alert women all over the country to work for a complete test ban treaty. Women were out on the street getting signatures to the President, distributing educational material, and urging the support of our elected representatives for such a test ban treaty. We saw a complete test ban treaty as the first important step to the ultimate goal of general and complete disarmament. It is toward disarmament that all of our energies are directed now.

Early in the U.S. involvement in Vietnam, we realized that we had to switch our main priority of disarmament to work toward ending the war and thus we came under the scrutiny of all the intelligence agencies I mentioned in the opening of my testimony.

At all times we worked in the open and sought, but did not always get, the maximum publicity. We did not know about this surveillance until we read about it in the Rockefeller Commission report on CIA activities within the United States.

I cringe with shame when I think that our Government's reaction to our lawful opposition to the war was to put spies in our midst and create dossiers on many, many women, some very involved but some as peripheral as the woman who allowed her garage to be used as a depot for a white elephant sale.

We have received our deleted CIA files, deleted in order to protect the rights of some nameless and faceless informants, for which the CIA asked $985. A great part of our dossier consists of their Xerox copies of our interorganizational memos, bulletins, letters, leaflets, et cetera. I have recently received my FBI files for $34 and discovered that I had been under surveillance since 1956 when I was involved, as I am now, in working for disarmament, which was, as it is now, the stated goal of the Government. It is obvious from my FBI files that agents, women of course, sat in on our small steering committee meetings as we planned actions against the Vietnam war, actions which we gave the fullest publicity possible.

The surveillance by the CIA took place despite the 1947 charter which explicitly limited their domestic role by prohibiting the Agency from excessive law enforcement or police powers or undertaking internal security functions. Nonetheless, they did it on the pretext that peace groups might be getting support from foreign sources. After involving all field services of the CIA clandestine service and every branch of the intelligence community over a period of a couple of years, and using the FBI as its main source of information, the CIA study showed no evidence of foreign involvement. They should have known this when they infiltrated our offices and saw that we could afford only part-time staff, if any, and our equipment was mostly second hand.

Since this hoax was not justified another tack was attempted to justify domestic surveillance. From our files, we learned that we were targeted to be infiltrated so that the Agency could get advance warning of demonstrations against their installations. The agents were instructed to "continue periodic monitoring of the following indicator organizations which are of interest to the parent organization." One such organization was Women Strike for Peace.

If the CIA can allege, as it did, that it believed that Women Strike for Peace represented a clear threat to its Langley installation, then we can truly be concerned about the reliability and value of the Agency's intelligence assessments. An intelligence agency that sees a clear threat in an organization such as Women Strike for Peace which legitimately exercises its constitutional rights should be a cause of grave concern to this committee.

We were therefore disturbed to read in section 222(b) of Senate bill 2525 the following:

> Each entity of the intelligence community may collect information concerning any United States person who is reasonably believed to be engaging in any activity that poses a clear threat to the physical safety of any installation.

Since the 1947 charter clearly prohibited domestic surveillance and since the charter was violated throughout the years, what we need is a tightening of the prohibition legislatively rather than creating loopholes which legitimize the violations. We see in this bill official sanction for abuses which the bill is supposed to eliminate.

We are also concerned that groups and individuals who have been under surveillance will continue to be on record since there is no mention in S. 2525 of destruction of files, merely, termination, of collection of information.

Section 213 raises more problems than it solves. In stating tbat counterintelligence or counterterrorism intelligence may be collected concerning a U.S. person who is "reasonably believed" to be engaged in any clandestine intelligence outside the United States raises a great many questions. What does "reasonably believed" mean? Reasonably believed by whom? Tbis is a vaguer standard for authorizing an investigation than the standard set up in the fourth amendment which requires "probable cause" to believe that a person has committed or is about to commit a crime.

We believe that there is no reason for surveillance of Americans abroad unless it is for criminal investigations and under the direction of the Justice Department. The excesses of the CIA in foreign countries does not inspire confidence in their judgment as to what is clandestine endeavor.

This bill requires the intelligence agencies to formulate many such judgmental decisions, often as they relate to domestic investigations. For example, section 218(a) authorizes investigation of objects of recruitment of foreign intelligence services. Women Strike for Peace since its inception has pursued a policy of friendship with foreign women of various ideologies in order to promote understanding of each other and to reduce international tensions as a way of promoting world peace. Since the CIA seems to operate on the assumption that foreign delegations often include foreign intelligence agents, would not this section authorize investigation of members of organizations such as ours when we meet with a foreign delegation?

Tbis certainly could have a chilling effect upon open and spontaneous exchange of ideas. Furthermore, section 220 authorizes investigations of persons in contact with foreign espionage agents. This could result in investigations based on guilt by association if a member of an organization such as ours unknowingly comes into contact with such an agent.

In light of past abuses, should we authorize investigations of Americans in such a broad manner requiring numerous judgments to be made? We believe in order to prevent investigations which involve such techniques as the placement of informants within political organizations, this bill should require reasonable belief of criminal activity for initiation of all investigations. To the contrary, this bill authorizes what was done illegally in the past.

Should not intelligence agencies be judged by the law as we all are? Are they above the law? For 23 years, according to the Rockefeller report, the CIA examined mail between U.S. citizens and foreign countries for the stated purpose of gathering intelligence. Three Postmasters General and one Attorney General were aware

of this project. The CIA, the record discloses, knew the operation was illegal but apparently considered the intelligence value of the mail operations to be paramount. Tampering with U.S. mail is a Federal offense for U.S. citizens, but intelligence agencies seem to trample on the law and get away with it in the name of national security.

The Rockefeller Commission conclusion re mail opening was as follows:

> While in operation the CIA's domestic mail opening programs were unlawful. United States statutes specifically forbid opening the mail. The mail openings also raise constitutional questions under the fourth amendment guarantees against unreasonable search, and the scope of the New York project poses possible difficulties with the first amendment rights of free speech and press.

In light of these conclusions, we question section 315 part F of the bill which seems to legitimatize mail openings.

Senate bill 2525 is so broadly written and in such vague general language that it readily lends itself to "national security" interpretation so as to permit an intelligence entity to conduct almost any kind of activity it wishes. Little comfort can be found in the statute's reliance on the Attorney General or his designees. We must remember that one former Attorney General is now in prison for his abuse of office in the name of national security.

We do not suggest that there be no intelligence activity in the United States. In many areas the FBI does splendid work in apprehending criminals. But unfortunately, the thrust of intelligence agencies too often is against people exercising their constitutional rights in a democratic society. When the exercise of these rights comes in conflict with the philosophy of the Government, then intelligence agencies have reacted without any regard for the Constitution or the democratic process.

Section 241 of the bill by the insertion of the word "solely" in its prohibition of political surveillance has so diluted the prohibition as to make it meaningless. It makes it much too easy for any intelligence agents or agency to conduct surveillance of an individual or organization engaging in constitutionally protected political activity by stating that such activity might pose a danger to a Federal installation. Thus, the surveillance was due to such allegation of potential danger and not solely because of political activity. On such a rationale, Women Strike for Peace was placed under surveillance by the CIA.

The use of informers is a particularly offensive practice and should be prohibited for use in political organizations. If information is required, it is essential that a warrant be procured.

If information about a U.S. citizen has been collected as a spinoff either intentionally or accidentally to another legitimate intelligence activity, we believe that file should be destroyed; not merely terminated.

We agree with S. 2525 that if citizens have been aggrieved by intelligence activities of the U.S. Government, they should institute suits for damages and attorney's fees. Women Strike for Peace is presently a plaintiff in such a suit.

In view of what recent history has shown as the way intelligence agencies can be manipulated and used as instruments of repression, we should make every effort to learn from this history rather

than repeat the mistakes. We fear that the broad and vague language of S. 2525 would enable anyone so inclined to reach self-serving interpretations of the statute to permit the erosion of the rights guaranteed to us by the Constitution.

I do not come before you as a legal expert or an authority on intelligence matters. That must be obvious to you. I come before you as a concerned American citizen and a representative of an organization which was and perhaps still is a victim of intelligence excesses. I speak only to the issues that relate directly to our experience. In this role I would urge this committee to create the kind of statute that will permit the legitimate collection of information while protecting our precious rights. We commend this committee for attempting to bring intelligence agencies under constitutional control but we believe that S. 2525 needs a major revision to attain this goal.

We are concerned that there are those who feel that sometimes it is necessary to suspend civil liberties in order to fight the enemies of civil liberties. There seems to be a trend in this direction. This is why this statute must not be the instrument for this kind of change but must take that delicate line between apprehending those who would harm us and our institutions while protecting those who exercise their constitutional rights. We fervently hope for a statute that will accomplish this.

I wish again to say how grateful I am for this opportunity to present the testimony of my organization.

Senator GARN. Thank you very much, and with your permission, we will hear all of your testimony before we get to any questions.

Mr. Schneider, if you would like to proceed.

STATEMENT OF LOUIS W. SCHNEIDER, EXECUTIVE SECRETARY, AMERICAN FRIENDS SERVICE COMMITTEE, ACCOMPANIED BY: MARGARET VAN HOUTEN, ASSOCIATE DIRECTOR, AMERICAN FRIENDS SERVICE COMMITTEE PROGRAM ON GOVERNMENT SURVEILLANCE AND CITIZEN'S RIGHTS; AND CATHERINE SHAW, FRIENDS COMMITTEE ON NATIONAL LEGISLATION

Mr. SCHNEIDER. Mr. Chairman, Mr. Miller, the American Friends Service Committee appreciates the invitation to give testimony on Senate bill 2525, the National Intelligence Reorganization and Reform Act of 1978. This statement is given on behalf of the American Friends Service Committee which does not purport to speak officially for the Religious Society of Friends, or Quakers, for no single body is authorized to do so. I am Louis W. Schneider, the executive secretary of the American Friends Service Committee, and I am accompanied by Margaret Van Houten, the associate director of the AFSC's program on Government surveillance and citizen's rights. Also present and sharing our concern in this matter is the Friends Committee on National Legislation, represented by Catherine Shaw.

With your permission, in the interests of time, I will not read my entire written testimony but refer to portions of it.

Senator GARN. That will be fine. The entire statement will be placed in the record.

Mr. SCHNEIDER. Thank you.

[The prepared statement of Mr. Louis W. Schneider follows:]

PREPARED STATEMENT OF LOUIS W. SCHNEIDER

Mr. Chairman and members of the Select Committee on Intelligence, the American Friends Service Committee (AFSC) appreciates the invitation to give testimony on S. 2525: The National Intelligence Reorganization and Reform Act of 1978.

This statement is given on behalf of the AFSC, which does not purport to speak officially for the Religious Society of Friends, or Quakers, for no single body is authorized to do so. I am Louis W. Schneider, the Executive Secretary of the American Friends Service Committee and I am accompanied by Margaret Van Houten, the Associate Director of the AFSC's Program on Government Surveillance and Citizen's Rights. Also present and sharing our concern in this matter is the Friends Committee on National Legislation (FCNL), represented by Catherine Shaw.

The AFSC was founded in 1917 to serve humanitarian purposes and to carry out programs opposed to war, repression and racism and geared towards the improvement of the conditions of life for those who suffer because of man's inhumanity to man. AFSC was awarded the Nobel Peace Prize in 1947.

An important aspect of Friends' contribution to religious and political freedom has been a commitment to complete openness in regard to the issues they were addressing, their thinking about it, and their way of proceeding either in public demonstrations or in actions through the courts. This tradition has continued from generation to generation. We support the letter and spirit of the First Amendment with regard to openness and freedom, and therefore oppose the continuation of either secret or overt local, State and Federal police activity which undermines and cancels the freedoms which under law they should logically protect.

In April 1976, after considerable study and discussion, AFSC issued a statement calling for the abolition of the CIA and the Internal Security Division of the FBI, stating:

The repeated violations of these agencies have so unmistakenly compromised these two bodies that it is certain that they are beyond salvage as agencies in which Americans can confidently place their trust. Unless strong action is taken, there will always be the fear that they will again, under the cover of secrecy, resort to the kind of improper and illegal methods that have indelibly tarnished their names at home and abroad.

Believing in the Quaker ideal of an open society in which we are all free to promote peace, equality and justice without fear, the American Friends Service Committee unhesitantly adds its voice to those which say that the CIA and the Internal Security Division of the FBI must be abolished. (A full copy of the text of this statement is enclosed.) [1]

It should be noted that the FCNL has called for careful review of the intelligence agencies with an eye toward drastic reforms so as to protect civil liberties.

While there may be some contradiction in an organization speaking to a proposal for reform of the intelligence agencies when it has specifically called for the abolition of at least two elements of that community, I feel that it is necessary to state for the public record the inherent pitfalls in reform attempts and to cite how specific provisions of the proposed charter, S. 2525, would make AFSC and organizations engaged in similar work the legitimate targets of government surveillance.

As my testimony will reflect, information that AFSC has received through the Federal Freedom of Information Act has served to reaffirm our position that these agencies are totally discredited, that their operations have done little if anything to further national security, and that legislative guidelines will be interpreted as to be virtually meaningless.

More than 10,000 pages of documents have been received from the FBI, CIA, State Departments, IRS, Secret Service, Army, Navy, Air Force, DIA and DOD. Our attorneys are currently working out the details of our appeal to the FBI for all deleted materials which will doubtless yield thousands more pages on the AFSC. Of the documents we have received under the Freedon of Information Act, many are headed "Internal Security" (often with subheadings "Subversive", "Racial Matters", etc.) and COMINFIL, the FBI word for Communist Infiltration . . . the catchall category in which the FBI justified many of its long term investigations including the surveillance of Dr. Martin Luther King. I will highlight some examples of the breadth and depth of this surveillance for you today and recommend that you read the enclosed article entitled "Even The Quakers Scare the FBI". [2]

[1] See p. 490.
[2] See p. 492.

In the 1920's, AFSC engaged in providing relief for Russians during their post-World War I famine and also provided assistance to Spanish Civil War refugees. It is noted in a House Un-American Activities Committee report, and repeated in several FBI and other files thereafter that AFSC's work with Spanish refugees in 1939 included aid to some communists due to the committee's "failure to apply any political tests to needy persons who asked assistance". It is a matter of principle with the AFSC not to apply any political tests to those asking assistance.

In World War II, AFSC aided European refugees, conscientious objectors and interned Japanese-Americans. During the war in Vietman, the Quakers became more actively involved in anti-draft and anti-war activities, while continuing to provide medical aid to all sides in the conflict. Throughout these decades, AFSC increasingly engaged in social action and social justice programs that attempted to expose and root out, rather than gloss over, the bases of conflicts. All of those activities were defined as radical and were extensively reported on in decades of government files.

In 1953, the Inspector General at Lowry Air Force Base reported his concern about a series of seminars at the Washington, D.C. Lenten School of Christian Living where "extremely controversial subjects" were discussed. One of these was "Segregation in Washington", at which an AFSC staff member expressed anti-racist views that shocked the Air Force Officer. He suggested that AFSC be further investigated, especially as any group with the word "committee" in it was "likely to be a Communist Front".

In the mid-1960's the Chicago office of AFSC joined with an interracial neighborhood group to present demands at real estate firms. The FBI kept close scrutiny on this activity and filed their reports under "Internal Security/Racial Matters". Even when the group failed to appear at one firm's office because it had decided to await a respone, the FBI reported this nonevent to Washington and to the District Attorney General, Secret Service and the 113th Army Intelligence Unit.

Special programs of AFSC have also been the target of government surveillance. In the 1960's the AFSC's "National Action/Research on the Military-Industrial Complex" (NARMIC) dug into the publicly available statistics of corporations with military contracts, describing the kind and extent of their "contributions" to the war effort—and their profits. NARMIC was largely responsible for bringing to public attention the nature of the automated air war and the electronic battlefield instigated by the U.S. Military in Vietnam—and also how this sophisticated, devastating and expensive form of warfare was sometimes thwarted by the Vietnamese guerrillas.

Also during the 60's, open, public actions against the war itself were undertaken by AFSC in cooperation with other organizations ranging from silent vigils at local libraries and post offices to massive ones at the White House. These activities were regularly and voluminously reported on by the FBI, Secret Service and other intelligence agencies. Any Communists or members of other "designated" groups who may have been present at any vigil throughout the country were noted by the FBI.

As the war escalated, so did the activities of the entire range of anti-war groups. AFSC itself eventually declared its readiness to commit civil disobedience in order to send medical supplies to all sides of the conflict in Vietnam if U.S. government permission to do so was not granted. The AFSC also organized non-violent training to blockade bombs destined for Vietnam. In a lengthy report on the "Peace Navy", the Navy held AFSC largely responsible for the fleets of canoes that confronted the huge war transport vessels at various ports on the East and West Coasts. When seven sailors jumped from the ship Nitro during the April 1972 People's Blockade, the Navy report noted "the incident was of priceless publicity value to blockade organizers". This report was sent to thirty-two military and government agencies. Meanwhile in Vietnam, the U.S. Ambassador received a cable from Secretary of State Kissinger suggesting that if the government of South Vietnam wanted to get rid of a Quaker-run prosthestics clinic at Quang-Ngai, it might be done in the name of "Vietnamization".

Many documents have been withheld from AFSC by the FBI, CIA and other agencies. Of the more than 10,000 documents sent (a large portion at a cost of 10¢ per page), many pages are duplicates or are blacked out or blank except for AFSC's name and address. Many hundreds of pages are copies of AFSC's (and sometimes other organizations') own publications, reports and public letters. Gradually, thousands of FBI files on AFSC have been received, but as usual whole paragraphs or pages are deleted, while hundreds of undeleted pages are copies of court proceedings in AFSC's 1971 suit against J. Edgar Hoover, Attorney General Mitchell, et al. Names appearing on AFSC letterheads, leaflets, etc. were checked off by the FBI,

apparently for cross-checking or further investigation. (One of these was George Fox, founding Quaker, who died in 1691.)

The participation in various peaceful and non-violent vigils or coalitions with AFSC was sufficient to land groups or even individual members in the FBI's files on AFSC. Appended to numerous reports are repeated descriptions of organizations such as Students for a Democratic Society (SDS), Progressive Labor Party (PLP), Socialist Workers Party (SWP), and many others with whom AFSC has no functional relationship or affiliation. Information of interest and relevance to AFSC that was collected and stored by FBI or other agencies has been denied, with the National Security Agency refusing to give any documents at all to AFSC, under the Freedom of Information Act—on the ground of "national security". CIA files reveal that official correspondence between AFSC personnel and foreign countries, especially the Soviet Union, was opened, but there is no clear indication that AFSC was directly subject either to the CIA's "Operation CHAOS", or to the FBI's COINTEL Program.

Despite its constant search for COMINFIL in the AFSC throughout nearly six decades of surveillance, FBI historians kept noting at the bottom of each new report that it is a "sincere pacifist group" of Quaker origin which has shown no evidence of Communist infiltration or domination, though its policies have "sometimes paralleled those of the Communist Party". During the war in Vietnam, it apparently began to dawn on Hoover that COMINFIL might never happen to AFSC, and that meanwhile new groups were burgeoning.

In the late 1960's, the CIA made secret training equipment loans to police departments across the country. CIA assistance included safecracking and other "clandestine collection methodology". In Chicago, collaboration of police with the right-wing Legion of Justice, and with Army Intelligence resulted in—among other things—the electronic "bugging" of the Chicago American Friends Service Committee office during the time of the conspiracy trial of the "Chicago 8".

In 1971, AFSC became involved in a confrontation with the bureau and a subsequent lawsuit against it, when dozens of agents swarmed over the liberal West Philadelphia area, Powelton Village. Investigating suspects in the burglary of the Media, Pa., FBI office, more than a dozen FBI agents broke through the door of an AFSC employee who had taken to a printer some copies of the Media FBI files which AFSC had anonymously received in the mail (these were to be incorporated into an AFSC booklet on police on which she was working at home). Together with members of the Philadelphia Resistance (a anti-draft group which FBI considered a prime suspect in Medburg), AFSC went to court, charging harassment, intimidation, etc. Five years later, with Attorney General John Mitchell deposed and FBI Director Hoover dead, the case was quietly settled by awarding the defendants costs but not damages, and promises of discontinuing such overt tactics in FBI's further pursuit of the still elusive Media file burglars.

This history of Quakerism and AFSC flies in the face of the intelligence agency rationale that we merit careful scrutiny because we might become violent, or "worse", succumb to "communist" influence causes one to question whether these agencies serve the public interest. The record of abuse by the FBI, CIA and others has often been blamed on particular individuals. I offer the caution that it is not the men but the institution and that we have witnessed not an aberration in our time but the organic and insidious growth of a bureaucratic mentality that has ultimately lost respect for the spirit and letter of the Constitution and is at war with the American public.

I will first make some general comments on the tenor of the charter and then address specific provisions of Titles I and II which graphically illustrate why, in my view, this legislative attempt to bring the intelligence community into check falls far short of the mark. Understandably, this is a monumental task to undertake. In view of the record of abuse and no matter how carefully devised, such controls may still be ignored by the intelligence agencies.

I am interested to find that I am in agreement with the statement that Clark Clifford made before this committee regarding the enumeration of specific prohibitions, in that one could safely assume that all activities not specifically prohibited are therefore authorized. As Mr. Clifford points out, the National Security Act of 1947 established CIA as a repository of information; to advise the National Security Agency on intelligence matters; to make recommendations for the coordination of intelligence activities; to correlate and evaluate intelligence relating to national security, and to disseminate such information to appropriate departments. Let me be clear that I do not share Mr. Clifford's further assessment that the intelligence agencies should have the flexibility for special, unenumerated, activities subject to their own determination; but I think that he does well in pointing us in the

direction of the initial act of 1947. Since that time the intelligence agencies have taken on a life of their own, ever increasing in size and scope, and the abysmal record shows that despite massive violations of rights and other illegal activities they have accomplished little that would argue for their continued existence.

As we look at S. 2525 we must be somewhat chastened by the difficult task of authorizing activities and establishing controls for the intelligence community at the same time. The lesson of the not too distant past is that intelligence functions have historically been stretched to illegal and illogical ends and there is no reason to assume that this will not continue or broaden in the future. It is offensive to say the least, that we are in effect shoring up law which already exists in the Constitution—and reaffirming for the intelligence community obligations that all government agencies and citizens must obey.

I submit that the intelligence charter assumes good faith on the part of the President, Attorney General and intelligence community and further, does not acknowledge the fact that future administrations might take advantage of loopholes. S. 2525 appears to be based on a formula of prohibitions coupled with broad grants of executive discretion which equals the legitimizing of past abuses and the wholesale violation of constitutional rights. While the intention of the bill may be to limit the authority to collect information, the fact that S. 2525 empowers the President to expand coverage of "national intelligence activities" opens the door to misuse of intelligence gathering capabilities. The bill grants authority that goes beyond inquiries into the violation of criminal law or necessities of agency administration. Also, the bill relies on an Intelligence Oversight Board which may likely be staffed by intelligence agency people. The broad conspiracy language could affect vast numbers of potential targets and does not address the pretext of the past wherein groups could be targets of surveillance because they might in future years develop into a group capable of engaging in a criminal violation. Perhaps the most remarkable aspect of the proposed charter is that the guidelines regarding actions that the intelligence agencies may engage in are remarkably vague and spread through the document in such a manner that it is not immediately evident that the grants of power would allow the COINTEL program to operate domestically and permit such activities as the overthrow of a Chilean government.

According to my reading of the proposed charter, the following provisions are among those which would affect the work of AFSC and make it a target of surveillance:

AFSC has programs and staff in Africa, Europe, Latin America and Asia with contacts with foreign governments, persons who are members of political parties, etc. Section 104(6)(c) could be interpreted in such a manner that any or all of our overseas staff as well as any domestic staff with international contacts could be the target of a counterintelligence operation and therefore subject to investigation.

Section 104(21)(b) contains an overbroad definition of what constitutes terrorist activity; e.g., past administrations viewed the civil rights and anti-war movements as a threat to national security. S. 2525 provides the rationale to state that an avowedly non-violent demonstration does in fact represent a threat to property and therefore can be prevented from happening. AFSC's continuing involvement in anti-nuclear demonstrations such as the April activity at Rocky Flats, Colorado and participation in disarmament protests similar to the recent demonstrations at the U.N., would make the organization a prime target of such a provision. Further, since both of the above mentioned demonstrations involved people from abroad, our involvement could be construed as possible participation in an international terrorist activity.

Section 204 includes the capability of investigating any connection with a foreign person or supporting activity for another person having such a connection. Certainly AFSC and virtually all Americans could be affected by this provision.

Section 211 again indicates that the power granted for conducting national intelligence activities, counterintelligence activities and counter terrorist activities is virtually without limit thus subjecting a vast number of organizations including AFSC to possible scrutiny based on the national security or international terrorist activity rationale. While this provision stipulates that investigations will be conducted with the least intrusive means possible, there is apparently no enforcement mechanism.

Section 213 has an overbroad definition allowing for counterintelligence/terrorism activity which could be interpreted to include the spectrum of AFSC activity; in addition, it incorporates a weak criminal standard which is subject to individual interpretation and there are no restrictions on targeting U.S. citizens abroad. Therefore, all AFSC staff and the organizations and individuals that they work with could be targeted without benefit of a criminal standard or First and Fourth Amendment restrictions.

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Section 214 further affirms that AFSC international staff would automatically be the subjects of intelligence collection in that we are in contact with individuals who are attempting to influence the public policy of foreign countries. The most appropriate example of this is our ongoing work against apartheid in South Africa.

Section 215 is dependent upon the discretion of the Attorney General to find that it is "necessary and reasonable" to conduct an investigation, and there is little reason to believe that if the FBI or other intelligence agency wants it that approval would not be given. Therefore, examination of tax records, physical surveillance for purposes other than identification, direction of covert human sources, and mail covers in accordance with U.S. laws would all be permissible. These are tactics that have been used against AFSC in the past and there is no reason to assume that this practice will change.

Section 218 provides that U.S. person can be targeted (without their knowledge or consent) if they are thought to be of interest as recruitment objects by foreign intelligence and further, this provision allows investigation of any person in the U.S. who possesses information or expertise on matters affecting national security or defense. As mentioned before, NARMIC and in fact, the entire Peace Education and International Divisions of AFSC would come under this provision.

The David Truong case is a current example of how AFSC would come within the purview of Section 220 in that staff had contact with both Truong and the Vietnamese Ambassador Dinh Ba Thi. This provision is sufficiently vague in that collection is not confined to illegal acts, purview power is granted to numerous persons, and whether or not such scrutiny will have ceased after 180 days is speculative.

Likewise, Section 221 allows for the targeting without their consent of anyone thought to be a potential source of assistance to an intelligence agency. This would include our staff having relationships with foreign leaders or possessing information themselves, thus making all AFSC program staff vulnerable to some extent.

AFSC's role in peaceful demonstrations in Washington and at various military installations, etc., would again be affected by Section 222(a) in that it authorizes investigations of persons "within or in the immediate vicinity" of agency installations or persons posing "a clear threat". Again subject to broad interpretation.

Regarding the protections that S. 2525 provides for citizens, I am sad to say that they are wholly inadequate. Section 241 places the burden of proof on the citizen to show that the particular intelligence agency intended to interfere with the exercise of citizen's constitutional and legal rights rather than that the interference was coincidental.

Section 244 is one of the most ominous provisions in the entire document in that informants are given a broad mandate to collect information concerning organizations and/or memberships and indicates that S. 2525 contemplates extensive use of this gross intrusive technique. The bill does not provide warrant requirements and/or specify the length of time such investigations may be carried out—nor does it accurately address the potential for influence that the very presence of an informant in an organization can have. Further, this provision authorizes undisclosed participation in U.S. organizations when essential for preparing agents for assignment to an intelligence agency outside the U.S.

Finally, Section 243 epitomizes the absolute necessity for concern in that it provides the grounds for intelligence collection by any illegal method to protect against espionage, sabotage, terrorism, or assassination—leaving the interpretation of the necessity of such investigations to particular intelligence agencies.

In my estimation, this provision nullifies all others in the charter and would appear to be in violation of the due process clause of the Constitution. Given the history of past abuses, it is shocking to contemplate a statute that would give government agents and police officials authority to break the law.

These are obviously only samples of the provisions of S. 2525 that AFSC finds wholly unacceptable. I must reiterate that the charters should in body and spirit reflect the Constitution, in particular, the First and Fourth amendments, while finding effective ways of dealing with real threats to American society from counterintelligence and international terrorism. I do not wish to minimize or discount these threats to modern democratic society, but the intelligence community has so grossly magnified threats to our society that have not materialized, so often, that it is difficult to give credence to their warnings. I think it bears repeating that the intelligence agencies have taken on a life of their own and have over the years succeeded somewhat disingenuously, I might add, in convincing Congress and the public that they should be able to operate secretly and with the broadest of mandates. I am confident that if we were to return to the original conception of the 1947 Act and allow a CIA independent of the President and the Pentagon to collect and analyze information and provided the FBI with a clearly defined criminal investiga-

tive mandate, we would not endanger the national security and would take a positive step toward insuring that America will not become a police state or a garrison state.

Realism compels us to recognize that the AFSC remedy for intelligence agency abuse is a goal that may not be fully reached. What we face today is the need to reverse a trend which threatens to destroy or undermine the rights of many if not all Americans. We must clearly state this: we deplore and oppose government actions of the sort described. We are concerned for their intimidating effects on American citizens working for peace and social change.

To a large extent, the progress that has been made and the efforts that still continue on matters of personal affirmation on the part of individuals reflect faith in an ideal. They are politically relevant acts, and as one can see, as one takes a long view of history, they open up new power, sometimes beyond our capacity to predict.

In front of AFSC Philadelphia headquarters is a serene statue of a seated, simply dressed woman named Mary Dyer—hanged in Boston Common in 1660 for refusing to give up her Quaker witness. The Quakers are determined that government shall not exercise arbitrary powers over the religious and political freedoms of Americans, even it if falls considerably short of hanging.

Finally, I'd be inclined to say that it's not that the citizen should be under surveillance by the government, but that the government should be under suveillance of its citizens.

Attachments.

STATEMENT ON THE CIA AND FBI

The scandalous and unlawful activities of the Central Intelligence Agency and the Internal Security Division of the Federal Bureau of Investigation have shocked Americans to the point that serious and responsible voices are calling for them to be abolished.

The repeated violations of these agencies have so unmistakably compromised these two bodies that it is certain that they are beyond salvage as agencies in which Americans can confidently place their trust. Unless strong action is taken, there will always be the fear that they will again, under the cover of secrecy, resort to the kind of improper and illegal methods that have indelibly tarnished their names at home and abroad.

Believing in the Quaker ideal of an open society in which all are free to promote peace, equality and justice without fear, the American Friends Service Committee unhesitatingly adds its voice to those which say that the CIA and the Internal Security Division of the FBI must be abolished.

The elimination of the CIA and the Internal Security Division of the FBI will serve as an unmistakable warning to any successor agencies. But even so clear a warning is not enough. The practices which brought these two bodies into disrepute must be unequivocally ended, for the same methods committed by any successor agencies would be as intolerable as if they were undertaken by the CIA or FBI.

We reject and call on all others to reject clandestine U.S. activities abroad such as subverting governments by bribery and corruption, secret military action, assassinations and conspiracy.

At home we reject and call on all others to reject illegal wiretapping, mail interception, burglaries, cover-ups, surveillance and infiltration of lawful groups, use of agents provocateurs, investigations of dissent and dissenters used by the party in power against its opponents or critics, and the maintenance of political dossiers on citizens and groups exercising legitimate rights.

We urge that such practices by the CIA, the Internal Security Division of the FBI, and by the numerous other federal, civil and military intelligence agencies be outlawed and that all government attempts to preserve these functions in any form or under any agencies be prevented.

We recognize that, sometimes in league with federal agencies and sometimes independently, state and local police forces are engaged in some of these practices. They, too, must be stopped. The development and use of computerized information systems must not provide tools to a

secretive and autocratic police. We urge the Congress to investigate rigorously the dissemination of information gathered under such systems and to enact strict detailed guidelines to prevent abuse of data systems.

We urge our government to end the practice of classifying information in its possession as a device to hide its own agents' mistakes or violations of law. We call for a system of accountability which will require all public officials to refrain from lying and deception of the American public.

We insist that those in government service who detect such transgressions and make them public shall be protected -- indeed honored -- rather than harassed or treated as criminals.

As for foreign intelligence activities, we do not believe that there should be one standard for American citizens and another standard for others justifying American government actions abroad which we would not tolerate at home. To those who say we must fight fire with fire by engaging in reprehensible actions at home and abroad, because others will commit such actions against us, we reply that we are not ready passively to give up our ideals ourselves out of fear of what others may do.

In this imperfect world the U.S. government will undoubtedly continue to gather foreign intelligence. Congress must fulfill its constitutional obligation to oversee this activity by prohibiting the kinds of acts which have brought the intelligence community into disrepute and by providing sanctions against those who overstep the bounds of law and decency.

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WATCHING FOR COMINFIL

Even the Quakers Scared the FBI

ANN MORRISSETT DAVIDON

As, drawer by drawer, the files of the Federal Bureau of Investigation are pried open by the Freedom of Information Act, the truly formidable capacity of the agency to sense subversion in the seemingly most honorable segments of American society is gradually unfolding. Paranoia on this scale has a certain grandeur: and if it were not that a number of good people were hurt and that we all paid for it in our taxes, J. Edgar Hoover's crusade of panic against treason might well be the jest of the century. Attend now to the proposition that the Quakers required vigilant surveillance. —The Editors

The American Friends Service Committee (AFSC), a Quaker service organization which was formed during World War I to do relief and rehabilitation work in war-torn countries and in 1947 received the Nobel Peace Prize, has been operating under the unblinking eye of the FBI for the past fifty-six years. Many thousands of pages of its FBI files, now emerging through the Freedom of Information Act (FOIA), are headed "Internal Security" (often with subheadings "Subversive," "Racial Matters," etc.)—and Cominfil, the FBI code word for Communist infiltration. This does not mean that AFSC has at any time been Communist-infiltrated; only that it has been *watched* for Cominfil.

The CIA and its predecessor the OSS, the State Department, IRS, Secret Service, Army, Navy, Air Force and the National Security Agency have also been keeping an eye on the Quakers for many years. And—as has become clear in these recent years of disclosures—the subject of this prolonged scrutiny is only one of hundreds of such groups, and some hundreds of thousands of individuals, spied on because of their dissenting views and/or their contacts with Communist or Socialist groups or countries. Like satellite pieces in Canada, the grim evidence of nefarious government surveillance keeps turning up.

Of course Americans are not spied upon without "cause," just as people in the Soviet Union are presumably not put under surveillance or into mental institutions for no reason. Every state apparatus or governing regime has a tendency to regard expressions of difference, or friendliness with the people or policies of competing powers, as "subversive." Advocating relations with China, for example, was sufficient to start your FBI and CIA dossiers in the 1950s or 1960s—a file which would still exist after an approach to China became official U.S. policy.

People with files are, after all, suspected of *something*. Since the early 1920s, AFSC has engaged not only in providing relief for the Russians during their post-World War I famine but also in such suspicious things as helping refugees during the Spanish Civil War. It is noted in a House Un-American Activities Committee report, and repeated in several FBI and other files thereafter, that AFSC's work with Spanish refugees in 1939 included aid to some Communists due to the committee's "failure to apply any political tests to needy persons who asked assistance."

In World War II, AFSC aided European refugees, conscientious objectors and interned Japanese-Americans. During the wars in Korea and Vietnam, the Quakers became more actively involved in anti-draft and anti-war activities, while continuing to provide medical aid to all sides in the conflicts. Throughout these decades, AFSC increasingly engaged in social action and social justice programs that attempted to expose and root out, rather than gloss over, the bases of conflicts. But anyone trying to get at roots is by definition "radical"—so all these activities were extensively reported in decades of governmental files.

In the 1950s it did not take much to make a group suspect. The Inspector General at Lowry Air Force Base, for example, reported his concern about a series of seminars in 1953 at the Washington, D.C. Lenten School of Christian Living, where "extremely controversial subjects" were discussed. One of these was "Segregation in Washington," at which an AFSC staff member expressed anti-racist views that shocked the Air Force officer. He suggested that AFSC be further investigated, especially as any group with the word "committee" in it was "likely to be a Communist Front."

In Oak Park, Ill., in the mid-1960s the Chicago AFSC joined with an interracial neighborhood group to present demands at real estate firms. This was watched closely (under "Internal Security/Racial Matters") by the FBI. Even when the little group failed to appear at one firm's office because it had decided to await a response, the FBI reported this nonevent to Washington and to the District Attorney General, Secret Service and the 113th Army Intelligence Unit.

Thus AFSC has had the effrontery to include in its work not only mopping-up programs after conflicts and disasters but efforts to prevent them. Through peace education, international seminars and work camps, community relations programs, etc., AFSC has increasingly stuck out its neck beyond simple relief work to probe basic causes. That's why, during the period of Vietnam, AFSC continued to try to root out racism, to expose

Ann Davidon, a writer in Haverford, Pa., has been active in peace and civil rights movements for many years.

poverty areas—and to initiate projects focused on such newly identified problems as sexism and the military-industrial complex.

These, too, became FBI targets. Started in the 1960s, AFSC's "National Action/Research on the Military-Industrial Complex" (NARMIC) dared to dig into the statistics of corporations with military contracts, describing the kind and extent of their "contributions" to the war effort—and their *profits*. NARMIC was largely responsible for bringing to public attention, through booklets, pamphlets and slide shows, the nature of the automated air war and the electronic battlefield instigated by the U.S. military in Vietnam—and also how this sophisticated, devastating and expensive form of warfare was sometimes thwarted by the simple and ingenious methods of Vietnamese guerrillas.

Meanwhile, actions against the war itself were undertaken by AFSC; they ranged from silent vigils at local libraries and post offices to massive ones at the White House. All these were regularly and voluminously reported on by the FBI, Secret Service and other intelligence agencies. Any Communists or members of other "designated" groups who may have been present at any vigil throughout the country were noted by the FBI.

As the war escalated, so did activities of the entire range of anti-war groups. AFSC itself finally supported civil disobedience in the form of sending "illegal" medical aid to North Vietnam (its programs in South Vietnam of course continuing), and organizing nonviolent training to blockade bombs destined for Vietnam. The Navy, in a lengthy report on the "Peace Navy," held AFSC largely responsible for the fleets of canoes that confronted the huge war transport vessels at various ports on the East and West Coasts. When seven sailors jumped from the ship *Nitro* during the April 1972 People's Blockade, the Navy report noted "the incident was of priceless publicity value to blockade organizers. . . . Usually any support by ship's companies is limited to peace signs and shouts of encouragement, or cheers for the 'Keystone Cops' type chases taking place in the water below them." This report was sent to thirty-two military and government agencies. (Meanwhile, in Vietnam, the U.S. Ambassador received a cable from Secretary of State Kissinger suggesting that if the government of South Vietnam wanted to get rid of the Quaker-run prosthenics clinic at Quang-Ngai, it might be done in the name of "Vietnamization.")

Of course you don't get away with such subversive shenanigans without Big Brother watching you. What in the case of the Quakers Big Brother did other than watch is not yet clear because so many documents have been withheld from AFSC by the FBI, CIA and other agencies. And of the nearly 10,000 sent (a large portion at a cost of 10¢ per page), many pages are duplicates or are blacked out or blank except for AFSC's name and address. Many hundreds of pages are copies of AFSC's (and sometimes other organizations') publications, reports and public letters. Gradually, thousands of FBI files on AFSC have been received, but as usual whole paragraphs or pages are deleted, while hundreds of undeleted pages are copies of court proceedings in AFSC's 1971 suit against J. Edgar Hoover, Attorney General Mitchell, et al. Names appearing on AFSC letterheads, leaflets, etc. were checked off by the FBI, apparently for cross-checking or further investigation. (One of these was George Fox, founding Quaker, who died in 1691.)

Appended to numerous reports, are repeated descriptions of organizations such as Students for a Democratic Society (SDS), Progressive Labor Party (PLP), Socialist Workers Party (SWP), and many others with whom AFSC has no functional relationship or affiliation. The participation in various vigils or coalitions with any of these groups or even individual members was sufficient to land them in the FBI's files on AFSC. Information of more interest and relevance to AFSC that was collected and stored by FBI or other agencies has been denied, with the National Security Agency refusing to give any documents at all to AFSC, under the Freedom of Information Act—on the ground of (what else?) "national security." CIA files reveal that official correspondence between AFSC personnel and foreign countries, especially the Soviet Union, was opened, but there is no clear indication that AFSC was directly subject to the CIA's "Operation Chaos," nor to the FBI's Cointelpro, the counterintelligence program intensified in 1968.

But the disruptive actions of the FBI and CIA against other groups have become increasingly revealed, and this exposure itself is partly due to the efforts of AFSC, whose policy is to act on behalf of others rather than wait until the noose is pulled on us all. (As Pastor Martin Niemöller, imprisoned by the Nazis, remarked: when they came for the Communists he did nothing, because he was not a Communist; when they came for the Jews, he did nothing, because he was not a Jew; when they came for him—it was too late.) In 1975 AFSC started its program of Government Surveillance and Citizens' Rights, and subsequently helped launch the coalition Campaign to Stop Government Spying. Now the campaign itself (and no doubt the AFSC's new program) is subject to government surveillance. (Who will spy on the spies who spy on the spies? And where will they all keep their files?)

Venomous attacks have been made on the campaign and its constituents by Rep. Larry McDonald [D., Ga.], a John Birch Society official. McDonald's research assistant is none other than private spy Sheila O'Conner/aka Louise Rees, who for two years had infiltrated the leftish National Lawyers Guild. With her husband John Rees she puts out the right-wing sheet called *Information Digest* which reports to subscribing police departments and government officials on all the activities of social change groups ranging from NAACP, AFSC and the National Council of Churches to leftist and black political groups.

Despite its constant search for Cominfil in the AFSC throughout nearly six decades of surveillance, FBI historians kept noting at the bottom of each new report that it is a "sincere pacifist group" of Quaker origin which has shown no evidence of Communist infiltration or domination, though its policies have "sometimes paralleled those of the Communist Party." During the war in Vietnam, it apparently began to dawn on Hoover that Cominfil might never happen to AFSC, and that meanwhile new groups were burgeoning. In fact, FBI infil-

tration into CPUSA (as FBI files denote the Communist Party) had been so thorough that there was hardly any Com left to infil.

So a new heading was added: New Left. Into this catchall fell groups of the late 1960s like SDS, Vietnam Veterans Against the War—and often AFSC, though one of the files from the Media FBI office stated AFSC was not to be "within the investigative purview of the 'New Left.'" Throughout 1968 to 1971 came expansion of Cointelpro, the aggressive counterintelligence program against a number of "New Left" and racial groups which went beyond the usual FBI spying and infiltration.

According to files obtained so far, AFSC and other peace groups were not in the direct "purview" of Cointelpro (as was the Socialist Workers Party, for example, whose court action against the FBI uncovered numerous break-ins and burglaries of their offices in various cities over many years). Yet some strange things happened to the peace groups during that period and later. The Jane Addams House on Walnut Street in Philadelphia, a fine old building owned by the Jane Addams Association and headquarters for the Women's International League for Peace and Freedom and several other anti-war groups, was burned out in early 1970. Documents were found to have been removed from file cabinets of some of the resident groups and arson was obvious, yet police found no suspects. In New York, in 1969, the War Resisters League office was heavily damaged, with files stolen: again police found no suspects. Women Strike for Peace and other offices throughout the country were burglarized, vandalized and burned. Again no suspects.

As to the Quakers, in the mid-1960s AFSC Philadelphia began missing files maintained on its contacts with Black Panthers and with Martin Luther King Jr. In 1973 the Washington, D.C. Peace Center, Quaker House, the Friends Meeting House and the home of a Peace Center worker were all broken into, with files stolen but valuables left untouched. The Miami, Fla. office of AFSC was firebombed. In 1974, the Cambridge office of AFSC reported three break-ins, with some files removed. As late as November 1975, shots were fired into AFSC's Des Moines, Iowa office and in December it was bombed.

In the late 1960s, the CIA made secret training equipment loans to police departments across the country. CIA assistance included safecracking and other "clandestine collection methodology." In Chicago, collaboration of police with the right-wing Legion of Justice, and with Army Intelligence resulted in—among other things—the electronic "bugging" of the Chicago American Friends Service Committee office during the time of the conspiracy trial of the "Chicago 8." In San Diego, where the CIA also channeled extensive assistance to police, the FBI's Cointelpro placed an informer-provocateur with a right-wing group called the Secret Army Organization (SAO, derived from the defunct Minutemen). This group engaged in armed attacks on anti-war activists as late as 1972. According to one ex-member of SAO, the FBI agent was "the man to see to get explosives, illegal arms. The FBI used us to do things it couldn't do."

In 1971, AFSC became involved in a confrontation with the bureau and a subsequent lawsuit against it, when dozens of zealous agents swarmed over the liberal West Philadelphia area, Powelton Village. Investigating suspects in the burglary of the Media, Pa. FBI office, more than a dozen FBI agents broke through the door of an AFSC employee who had taken to a printer some copies of the Media FBI files which AFSC had anonymously received in the mail (these were to be incorporated into an AFSC booklet on police on which she was working at home). Together with members of the Philadelphia Resistance (a resourceful anti-draft group which FBI considered a prime suspect in Medburg), AFSC went this time to court, charging harassment, intimidation, etc. Five years later, with Atty. Gen. John Mitchell deposed and FBI Director Hoover dead, the case was quietly settled by awarding the defendants costs but not damages, and promises of discontinuing such overt tactics in FBI's further pursuit of the still elusive Media file burglars—or liberators, as some regarded them. (It was in these Media files that the FBI agent's advice to make the New Left "think there was an agent behind every mailbox" was revealed, as well as the extent of FBI preoccupation with political and dissident groups—especially through the Cointelpro program.)

AFSC, though inclined to use mediating and conciliatory methods rather than resort to courts, has joined four major lawsuits with other plaintiffs: against CIA/NSA for interception of overseas communication; against the city of Chicago and its police, Mayor, and local and federal officials for bugging AFSC premises and planting informers, and against the Seattle Police Department to gain disclosure of intelligence files. The fourth case, a class action suit against the Honeywell Corporation and the FBI in which AFSC has recently become a co-plaintiff, is the only Cointelpro suit in the country linking a corporation and a federal intelligence agency.

The Government Surveillance and Citizen's Rights program, which began two years ago with a staff of one, when responses to AFSC's requests for FOIA files were beginning to trickle in, now has AFSC staff in nine cities involved in some aspect of its expanded concern about police abuse, "Red Squads," and other forms of official harassment or repression. It is a long way from feeding orphans and refugees, but AFSC workers came to believe that human life and dignity are threatened not only by wars and starvation but also by such things as political, racial and religious persecution. And the Quakers have a long history of contending with *that*. In front of its Philadelphia headquarters at the Friends Center (the block-long complex of red-brick buildings which also houses a Friends Meeting and local Friends' groups) is a serene statue of a seated, simply dressed woman named Mary Dyer—hanged on Boston Common in 1660 for refusing to give up her Quaker witness. The Quakers are determined not to let things get that bad again. □

Mr. SCHNEIDER. An important aspect of Friends' contribution to religious and political freedom has been a commitment to complete openness in regard to the issues they were addressing, their thinking about it, and their way of proceeding, either in public demonstrations or in actions through the courts. This tradition has continued from generation to generation. We support the letter and the spirit of the first amendment with regard to openness and freedom and therefore oppose the continuation of either secret or overt local, State and Federal police activity which undermines and cancels the freedoms which under law they should logically protect.

In April 1976 after considerable study and discussion, the American Friends Service Committee issued a statement calling for the abolition of the CIA and the Internal Security Division of the FBI.

It should be noted that the Friends Committee on National Legislation has called for careful review of the intelligence agencies with an eye toward drastic reforms so as to protect civil liberties.

While there may be some contradiction in an organization speaking to a proposal for reform of the intelligence agencies when it has specifically called for the abolition of at least two elements of that community, I feel that it is necessary to state for the public record the inherent pitfalls in reform attempts and to cite how specific provisions of the proposed charter, S. 2525, would make the American Friends Service Committee and organizations engaged in similar work the legitimate targets of Government surveillance.

I will highlight today, out of some dozen examples of surveillance to which the American Friends Service Committee has been subject, two examples of the breadth and depth of this surveillance and recommend that you read the enclosed article entitled "Even the Quakers Scare the FBI." [1] which was published in "The Nation" just a few months ago this last spring.

And now with your permission I will skip to page 6 of my written testimony. Incidentally, the experience of our being surveilled was not entirely unrelieved by a bit of humor. We learned from papers we derived under the Freedom of Information Act from the FBI that four or five names mentioned in the paper were listed by the FBI to be checked out since they were unknown to them at the time. One of these was George Fox, the Founding Quaker who died in 1691. [General laughter.]

Despite its constant search for Communist infiltration in the American Friends Service Committee throughout nearly six decades of surveillance, FBI historians kept noting at the bottom of each new report that it is "a sincere pacifist group" of Quaker origin which has shown no evidence of Communist infiltration or domination, though its policies have "sometimes paralleled those of the Communist Party." During the war in Vietnam, it apparently began to dawn on Mr. Hoover that Communist infiltration might never happen to the American Friends Service Committee and that meanwhile new groups were burgeoning.

In the late 1960's, the CIA made secret training equipment loans to police departments across the country. CIA assistance included safecracking and other clandestine collection methodology. In Chicago, collaboration of police with the rightwing Legion of Justice, and with Army Intelligence resulted in, among other things, the electronic bugging of the Chicago American Friends Service

[1] See p. 492.

Committee office during the time of the conspiracy trial of the Chicago 8.

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This history of Quakerism and AFSC flies in the face of the Intelligence agency rationale that we merit careful scrutiny because we might become violent, or worse, succumb to Communist influence, causes one to question whether these agencies serve the public interest. The record of abuse by the FBI, the CIA, and others has often been blamed on particular individuals. I offer the caution that it is not the men but the institution and that we have witnessed not an aberration in our time, but the organic and insidious growth of a bureaucratic mentality that has ultimately lost respect for the spirit and letter of the Constitution and is at war with the American public.

As we look at Senate bill 2525, we must be somewhat chastened by the difficult task of authorizing activities and establishing controls for the intelligence community at the same time. The lesson of the not too distant past is that intelligence functions have historically been stretched to illegal and illogical ends, and there is no reason to assume that this will not continue or broaden in the future. It is offensive, to say the least, that we are in effect shoring up laws which already exist in the Constitution, and reaffirming for the intelligence community obligations that all Government agencies and citizens must obey.

While the intention of the bill may be to limit the authority to collect information, the fact that Senate bill 2525 empowers the President to expand coverage of national intelligence activities opens the door to misuse of intelligence-gathering capabilities. The bill grants authority that goes beyond inquiries into the violation of criminal law or necessities of agency administration. Also, the bill relies on an intelligence oversight board which may likely be staffed by intelligence agency people. The broad conspiracy language could affect vast numbers of potential targets and does not address the pretext of the past wherein groups could be targets of surveillance because they might in future years develop into a group capable of engaging in a criminal violation. Perhaps the most remarkable aspect of the proposed charter is that the guidelines regarding actions that the intelligence agencies may engage

in are exceedingly vague and spread throughout the document in such a manner that it is not immediately evident that the grants of power would allow the COINTELPRO to operate domestically and permit such activities as the overthrow of a Chilean Government.

According to my reading of the proposed charter, the following provisions are among those which would affect the work of the American Friends Service Committee and make it a target of surveillance:

American Friends Service Committee has programs and staff in Africa, Europe, Latin America, and Asia with contacts with foreign governments and persons who are members of political parties. Section 104(6)(c) could be interpreted in such a manner that any or all of our overseas staff as well as any domestic staff with international contacts could be the target of a counterintelligence operation and therefore subject to investigation.

Section 104(21)(b) contains an overbroad definition of what constitutes terrorist activity. For instance, past administrations viewed the civil rights and antiwar movements as a threat to national security. Senate bill 2525 provides the rationale to state that an avowedly nonviolent demonstration does, in fact, represent a threat to property and therefore can be prevented from happening. The American Friends Service Committee's continuing involvement in antinuclear demonstrations such as the April 1978 activity at Rocky Flats, Colo., and participation in disarmament protests similar to the recent demonstrations at the United Nations would make the organization a prime target of such a provision. Further, since both the above-mentioned demonstrations involved people from abroad, our involvement could be construed as possible participation in an international terrorist activity.

Section 204 includes the capability of investigating any connection with a foreign person or supporting activity for another person having such a connection. Certainly the American Friends Service Committee and virtually all Americans could be affected by this provision.

Section 211 again indicates that the power granted for conducting national intelligence activities, counterintelligence activities, and counterterrorist activities is virtually without limit thus subjecting a vast number of organizations including the American Friends Service Committee to possible scrutiny based on the national security or international terrorist activity rationale. While this provision stipulates that investigations will be conducted with the least intrusive means possible, there is apparently no enforcement mechanism.

Section 213 has an overbroad definition allowing for counterintelligence/terrorism activity which could be interpreted to include the spectrum of American Friends Service Committee activity. In addition, it incorporates a weak criminal standard which is subject to individual interpretation and there are no restrictions on targeting U.S. citizens abroad. Therefore, all AFSC staff and the organizations and individuals that they work with could be targeted without benefit of a criminal standard or first and fourth amendment restrictions.

Section 214 further affirms that the American Friends Service Committee international staff would automatically be the subjects

of intelligence collection in that we are in contact with individuals who are attempting to influence the public policy of foreign countries. The most appropriate example of this is our ongoing work against apartheid in South Africa.

Section 215 is dependent upon the discretion of the Attorney General to find that it is necessary and reasonable to conduct an investigation. There is little reason to believe that if the FBI or other intelligence agency wants it, that approval would not be given. Therefore, examination of tax records, physical surveillance for purposes other than identification, direction of covert human sources, and mail covers in accordance with U.S. laws would all be permissible. These are tactics that have been used against the American Friends Service Committee in the past and there is no reason to assume that this practice will change.

Section 218 provides that U.S. persons can be targeted without their knowledge or consent if they are thought to be of interest as recruitment objects by foreign intelligence and further, this provision allows investigation of any person in the United States who possesses information or expertise on matters affecting national security or defense. As mentioned before, the entire Peace Education and International Divisions of the American Friends Service Committee would come under this provision.

The *David Truong* case is a current example of how the American Friends Service Committee would come within the purview of section 220, in that staff had contact with both Truong and the Vietnamese Ambassador Dinh Ba Thi. This provision is sufficiently vague in that collection is not confined to illegal acts, purview power is granted to numerous persons, and whether or not such scrutiny will have ceased after 180 days is speculative.

Likewise, section 221 allows for the targeting without their consent of anyone thought to be a potential source of assistance to an intelligence agency. This would include our staff having relationships with foreign leaders or possessing information themselves, thus making all American Friends Service Committee program staff vulnerable to some extent.

The American Friends Service Committee's role in peaceful demonstrations in Washington and at various military installations would again be affected by section 222(a) in that it authorizes investigations of persons within or in the immediate vicinity of agency installations or persons posing a clear threat. Again subject to broad interpretation.

Regarding the protections that Senate bill 2525 provides for citizens, I am sad to say that they are wholly inadequate. Section 241 places the burden of proof on the citizen to show that the particular intelligence agency intended to interfere with the exercise of a citizen's constitutional and legal rights rather than that the interference was coincidental.

Section 244 is one of the most ominous provisions in the entire document in that informants are given a broad mandate to collect information concerning organizations and/or memberships and indicates that Senate bill 2525 contemplates extensive use of this gross intrusive technique. The bill does not provide warrant requirements and/or specify the length of time such investigations may be carried out, nor does it accurately address the potential for

influence that the very presence of an informant in an organization can have. Further, this provision authorizes undisclosed participation in U.S. organizations when essential for preparing agents for assignment to an intelligence agency outside the United States.

Finally, section 243 epitomizes the absolute necessity for concern in that it provides the grounds for intelligence collection by any illegal method to protect against espionage, sabotage, terrorism, or assassination, leaving the interpretation of the necessity of such investigations to particular intelligence agencies.

In my estimation, this provision nullifies all others in the charter and would appear to be in violation of the due process clause of the Constitution. Given the history of past abuses, it is shocking to contemplate a statute that would give government agents and police officials authority to break the law.

These are obviously only samples of the provisions of Senate bill 2525 that the American Friends Service Committee finds wholly unacceptable. I must reiterate that the charters should in body and spirit reflect the Constitution, in particular the first and fourth amendments, while finding effective ways of dealing with real threats to American society from counterintelligence and international terrorism. I do not wish to minimize or discount these threats to modern democratic society, but the intelligence community has so grossly magnified threats to our society that have not materialized, so often, that it is difficult to give credence to their warnings. I think it bears repeating that the intelligence agencies have taken on a life of their own and have over the years succeeded somewhat disingenuously, I might add, in convincing Congress and the public that they should be able to operate secretly and with the broadest of mandates.

I am confident that if we were to return to the original conception of the 1947 act and allow a CIA independent of the President and the Pentagon to collect and analyze information and provided the FBI with a clearly defined criminal investigative mandate, we would not endanger the national security and would take a positive step toward insuring that America will not bocome a police state or a garrison state.

Realism compels us to recognize that the American Friends Service Committee remedy for intelligence agency abuse is a goal that may not be fully reached. What we face today is the need to reverse a trend which threatens to destroy or undermine the rights of many if not all Americans. We must clearly state this: We deplore and oppose Government actions of the sort described. We are concerned for their intimidating effects on American citizens working for peace and social change.

To a large extent, the progress that has been made and the efforts that still continue on matters of personal affirmation on the part of individuals reflect faith in an idea. They are politically relevant acts, and as one can see, as one takes a long view of history, they open up new power, sometimes beyond our capacity to predict.

In front of American Friends Service Committee Philadelphia headquarters is a serene statue of a seated, simply dressed woman named Mary Dyer, hanged in Boston Common in 1660 for refusing to give up her Quaker witness. The Quakers are determined that

Government shall not exercise arbitrary powers over the religious and political freedoms of Americans, even if it falls considerably short of hanging.

Finally, I'd be inclined to say that it's not that the citizen should be under surveillance by the Government, but that the Government should be under surveillance of its citizens.

Thank you.

Senator GARN. Mr. Gutman?

STATEMENT OF RICHARD M. GUTMAN, DIRECTOR, CHICAGO POLITICAL SURVEILLANCE LITIGATION AND EDUCATION PROJECT

Mr. GUTMAN. Thank you, Senator Garn.

I am an attorney representing plaintiffs in the Federal class action lawsuit in Chicago which involves allegations of unconstitutional activity by intelligence agencies including the FBI and the CIA.

I greatly appreciate this opportunity to speak to you about Senate bill 2525 because I believe that especially today it is of vital importance. We are all very familiar with the long list of abuses that have been exposed involving the intelligence agencies, including the CIA, in the last 20 years. I think Senate bill 2525 is a key because it aims at limiting the ability of those intelligence agencies to repeat those abuses. I also feel that the opportunity to do that is best today, and in a very real sense, this may be the last opportunity, when the abuses are fresh in our minds, to limit them.

And I also sincerely believe that if there are not concrete prohibitions passed by Congress now, that the intelligence agencies surely will continue the types of activities that have been exposed recently.

During our litigation we obtained a number of CIA documents and the CIA files on our named plaintiffs. We discovered a great deal of CIA domestic activity including technical assistance to the Chicago police department, widespread CIA intelligence gathering on lawful political activity in Chicago, illegal mail openings and extensive background investigation of a political activist that the CIA ostensibly was planning to recruit.

I would like to look at some of the provisions of the Senate bill as it is now written and try and analyze to what extent the bill does succeed in prohibiting those abuses that have recently been exposed.

One of the things that we discovered was a very broad pattern of CIA intelligence gathering on lawful political activity in Chicago, including the antiwar movement, the civil rights movement and even electoral politics, and some of those specifics are listed in my written statement on page 2.

We have since learned that that investigation was part of Operation CHAOS, the CIA's large domestic intelligence gathering program which was developed in the late sixties and early seventies. We now know that the original purpose of Operation CHAOS was in response to requests from the Presidents to determine to what extent or whether the militant protest activities of that period were controlled by hostile foreign powers.

Well, the CIA repeatedly issued reports during its investigation that there was no foreign control of these domestic movements, yet the investigation, this massive investigation of lawful political activity in the United States, continued and continued until it was finally abolished sometime after the Watergate incident was exposed.

I am afraid that my analysis of Senate bill 2525 indicates that that same kind of activity, another Operation CHAOS investigation, could occur under specific provisions which authorize it in the proposed Senate bill 2525. To be specific, section 213, paragraph (1), provides for investigations of—well, it is called counterintelligence, and I think that that paragraph is written so broadly and the terms defined in it, the terms used in that paragraph as defined in such a broad and vague way that the CIA, under this provision, could once again, based on really baseless fears by the President that the domestic movement was foreign controlled, engage in a very massive investigation of domestic activity. We believe that counterintelligence or foreign intelligence motivated investigations of American citizens or U.S. persons, as the bill would describe them, in the United States, should be limited to cases where there is a reasonable suspicion as defined in Supreme Court decisions, based on concrete evidence that criminal activity is occurring or may occur, and of course, that criminal activity could include violations of criminal espionage, sabotage, or treason statutes and, of course, a substantive charge of a conspiracy to violate those statutes would also constitute criminal activity.

Another aspect of the documents that we received in our case involved a rather extensive investigation of one of our plaintiffs, a political activist, by the CIA ostensibly because they were considering recruiting him to do some activities abroad.

They gathered—we received over 200 pages of materials on this named plaintiff during the CIA's background investigation of him. The CIA apparently decided that he was inappropriate to recruit and never approached him. All those materials which include information not only on his political life but also his personal life, including his sex life, are still in the files and still accessible to the CIA. They are still in CIA's files.

I think this is a very serious problem, the use of background investigations. It can very easily be used as a pretext to target someone for intelligence who the CIA considers really in a rather hostile manner, and we all remember that when the Nixon administration was discovered investigating Daniel Schorr, who was a major media critic of the Nixon administration, that the administration claimed that they were doing a background on him because he was being considered to be hired by a Federal environmental agency. I think that indicates how easily this kind of a pretext can be used.

Unfortunately, I think that under Senate bill 2525, as presently written, the CIA could still do a massive background on someone very easily without really sincerely intending to recruit them. And needless to say, this individual, when he saw the 200 pages that were developed on him by the CIA, ostensibly for recruitment purposes, he was very concerned and he, of course, had no intent ever to work for the CIA.

But under the current bill as written, no consent of the target is necessary in order to do a massive background on them, as long as the appropriate CIA official simply states in writing that, in his opinion, the CIA does intend to recruit this individual and, second, that the CIA official believes in his opinion that to try and obtain the consent of the individual would jeopardize the operation.

I think that is a very unrealistic—I think that as long as the specifics of the operation are not described to the individual, I don't think that getting their consent merely for a hackground would jeopardize an operation.

Another area is the retention of files. Now, all the materials that I mentioned, of course, are currently in the CIA files, even though they were gathered in the fifties, the sixties, or the seventies; although they involve nothing about foreign intelligence, and just lawful domestic activities, they are still in the files.

Now, Senate bill 2525 does have a provision which provides that materials gathered during investigations can be retained only if certain criteria are followed. However, I think that that section could very arguably be interpreted in merely a prospective way, that it only covers information which will be gathered in the future, and I think it can easily be claimed that that provision does not cover the materials currently in the files wbich were gathered under the former procedures.

So I think the bill should definitely state very clearly and explicitly that the materials that are currently in the file should be expunged if there is no concrete value in them or relationship to legitimate foreign intelligence or counterintelligence or related activities.

I would like to make a couple comments about what I feel are the possible effects of CIA covert activities abroad on political freedom here in the United States. Looking at all the materials we have seen about domestic activities of the CIA in the United States and reading the Church committee report, I have gotten an impression of a gradual but very relentless escalation of CIA involvement in the United States since 1947, and it raises in my mind very serious questions about whether or not such gradual escalation of the CIA in the United States may not be almost inevitable. I think we should attempt to limit foreign intelligence and counterintelligence activities in the United States to the FBI, but I wonder if it is really possible, in a practical sense.

Therefore, I am very concerned about CIA activities abroad because I really fear that if the CIA engages in undemocratic activities or immoral activities abroad, I fear that it is only a matter of time before those activities will be used in the United States against American citizens. I don't think that—I think it is very questionable whether you can keep an agency to a geographical limitation, and for that reason I am very concerned about the bill's, as it currently is written, failure to flatly ban covert operations abroad.

The bill, as written, seems to authorize even the overthrow of democratic governments if nonviolent means are used, for example, and I think there is, beyond the issue of morality and the way we treat foreign people, I think there is a real danger in this bill as

the covert operations are currently authorized, as to the actual security of the American people in the United States.

Thank you.

Senator GARN. I am sure you would like to have your entire statement included in the record.

Mr. GUTMAN. Could I, Senator?

Senator GARN. Yes; we'd be happy to include it where you did summarize it.

Thank you.

[The prepared statement of Mr. Richard Gutman follows:]

PREPARED STATEMENT OF RICHARD M. GUTMAN *

I would like to thank the Chairman and the members of the Committee for this opportunity to testify on a bill as vitally important as S. 2525. The widespread violations of human rights, both here and abroad, by our foreign intelligence agencies have been extensively documented by the Rockefeller Commission, the Church Committee, and the Pike Committee. S. 2525 will either prohibit or legitimize the recurrence of those abuses.

I appear before you as an attorney currently representing 14 named plaintiff organizations, 18 named plaintiff individuals, and a class similarly situated suing the Chicago Police Department Subversive Unit, the FBI, Military Intelligence, and the CIA for politically-motivated surveillance and harassment of lawful political activity in Chicago. See *Alliance To End Repression, et al.* v. *James Rochford, et al.*, 407 F. Supp. 115, 75 F.R.D. 428 et seq. (N.D.Ill. 1974).

During pretrial discovery in our lawsuit, we have obtained evidence of extensive CIA domestic activity including technical assistance to the Chicago Police Department, widespread intelligence gathering regarding lawful political activity, mail openings, and an extensive background investigation of a potential recruit. The CIA has attempted to justify much of this domestic activity as being relevant to the area of foreign intelligence or counterintelligence.

In the following pages we will describe some of the CIA activity revealed by our lawsuit and analyze whether S. 2525 forbids or legitimizes those activities. We will close with some comments on the dangers which CIA activities abroad pose to political freedom in the United States.

CIA DOMESTIC COUNTERINTELLIGENCE

CIA Activity In Chicago

The CIA files of our named plaintiffs reveal a broad pattern of CIA intelligence gathering regarding lawful political activity including the following:

(1) The CIA received Chicago Police Department Subversive Unit reports on groups planning to demonstrate at the 1968 Democratic Convention, as well as a 96-page report on the founding convention of the Young Workers Liberation League.

(2) The CIA prepared "Weekly Situation Reports" on domestic affairs. One Weekly Situation Report lists the major groups planning to demonstrate at the 1968 Democratic Convention and describes Black groups as "the most dangerous". The report emphasizes meetings planned in Chicago "by the National Committee of Inquiry, a broadly based all Negro group formed during the past spring to evaluate statements by political candidates and then make recommendations to the black community".

(3) The CIA had numerous files on individuals active in the "U.S. peace movement".

(4) The CIA has a list of the delegates, representatives and observers to the Chicago Convention of the National Conference for New Politics.

(5) The CIA gathered and retained information on former Chicago alderman A. A. Rayner, Jr.'s 1970 campaign for U.S. Representative.

(6) The CIA has reports entitled "Movement Activity in the USA".

(7) The CIA received reports on activities in Chicago from the House Un-American Activities Committee and from Information Digest, a private national spy organization.

* Richard Gutman is chief counsel for plaintiffs in the federal class action lawsuit. *Alliance To End Repression, et al.* v. *James Rochford, et al.*, 407 F. Supp. 115, 75 F.R.D. 428 et seq., and is Director of the Chicago Political Surveillance Litigation and Education Project.

Inadequacy of S. 2525

Although S. 2525 at Section 241 forbids targeting Americans solely because of their constitutional activities, it also provides loopholes to justify such surveillance.

The CIA's pretext for their massive domestic spying was inquiries from Presidents Johnson and Nixon as to whether the militant domestic dissent of the late sixties and early seventies was caused by hostile foreign powers.[1] Despite the fact that the CIA repeatedly concluded [2] that foreign governments did not control the U.S. anti-war movement, the civil rights movement, and the New Left, the CIA's domestic surveillance program, Operation CHAOS, continued from 1967 until 1974.

A similar justification for CIA domestic spying is established by S. 2525. Section 213(1) would authorize counterintelligence investigations of U.S. citizens within the U.S. if such persons:

(1) Is reasonably believed to be engaged in espionage or any other clandestine intelligence activity which involves or may involve a violation of the criminal laws of the United States, sabotage, any intentional terrorist activity, or any assassination, to be aiding and abetting any person in the conduct of any such activity, or to be conspiring with any person engaged in any such activity.

Although this provision may sound reasonable at first reading, a careful analysis reveals holes which would authorize extensive investigations of lawful domestic organizations based upon groundless allegations of foreign control as occurred during Operation CHAOS. First, the term "espionage" is not tied to criminal espionage statutes. Second, the term "clandestine intelligence activity", as defined at Section 204(b)(1), is even broader and does not even imply a criminal statute. Third, the phrase "may involve a violation of the criminal laws" does little to limit Section 213(1) since "may" is a very indefinite word, implying considerable speculation. Finally even the term "international terrorist activity" as defined at Section 104(21) is so broad as to arguably include a peaceful anti-war demonstration.[3]

Proposal

Domestic counterintelligence activities should not occur unless there is a reasonable suspicion, based upon concrete evidence, of a violation of the criminal statutes, including criminal espionage, criminal treason or criminal sabotage.

CIA BACKGROUND INVESTIGATIONS OF POTENTIAL OPERATIVES

CIA Activity in Chicago

The CIA carried out an extensive investigation of one of our named plaintiffs, ostensibly because they were considering recruiting him for CIA operations. More than two hundred pages were amassed on his political and personal activities. The CIA finally decided that he was inappropriate to recruit and never approached him.

Inadequacy of S. 2525

S. 2525 at Section 221 authorizes such broad background investigations that the consent of the targeted individual is unnecessary if the appropriate CIA official makes a written finding that the CIA is serious in recruiting the individual and that a request for his consent "would jeopardize the activity for which information or assistance is sought".

Proposal

The CIA could easily use Section 221 as a pretext to engage in domestic spying on a American citizen. One is reminded that when it was discovered that the Nixon Administration was gathering information on CBS-TV correspondent Daniel Schorr, the Administration used the pretext that Schorr was being considered for an appointment to the federal Council on Environmental Quality.

The CIA should not engage in a background investigation of a potential recruit without first acquiring the individual's permission. Such consent could easily be acquired without disclosing the details of the proposed operation.

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[1] Church Committee Report, Book III, p. 688.

[2] "International Connections of the U.S. Peace Movement" 11/15/67, "Student Dissent and Its Techniques in the U.S." 1/5/68, "Special Report on Foreign Communist Support to Revolutionary Protest Movements in the U.S." 6/30/69, "Definition and Assessment of Existing Internal Security Threat-Foreign" 1/15/71; Church Committee Report, Book III, pp. 691-700.

[3] During the Vietnam War, it was often argued by the authorities that anti-war demonstrations would lead to property destruction or prolongation of the War. A massive anti-war demonstration could thus be defined in the terms of Section 104(21) as involving a "credible threat to commit" "violent destruction of property" or "serious bodily harm" and "appears intended to further political, social or economic goals by" "obtaining widespread publicity for a group or its cause" and "transcends national boundaries" and thus constitutes "international terrorist activity".

RETENTION OF CIA FILES

CIA Activity Regarding Chicagoans

Having requested their CIA files, named plaintiffs in our lawsuit received hundreds of pages regarding their lawful political activity, all obviously retrieved by name of target. Although the information was gathered in the early 1970's, the 1960's, or even the 1950's, the files continue in existence even today.

Inadequacy of S. 2525

S. 2525 at Section 231(a) provides for the retention of information which is collected during investigations only if certain criteria are satisfied. Secton 231(a), however, could arguably be interpreted as being only prospective in effect and not pertaining to materials in the CIA files at the effective date of the legislation.

Proposal

A provision should expressly provide for the destruction of all information currently in the CIA files without foreign intelligence value. Information regarding possible criminal activity should be transmitted to the appropriate law enforcement agency.

CONCLUSION

Thus rather than prohibit the types of abuses made evident in our lawsuit, S. 2525 would legitimize them. We ask the Committee to engage in a major rewriting of S. 2525 in order to ensure that the CIA's systematic abuses of human rights not reoccur.

DANGERS OF EXPANSION OF CIA ACTIVITIES ABROAD TO U.S.A.

The history of the CIA's domestic activities raises grave questions as to the dangers to Americans of CIA activities abroad. Although strictly forbidden by the National Security Act of 1947 from engaging in police, law enforcement, or internal security matters, the CIA since its creation gradually increased its operational level in the United States. The CIA's domestic activity extended to include surveillance of foreign emigre groups, interviewing foreign travelers, investigating potential employees, assistance to local police departments, surveillance of threats to CIA's physical security (MERRIMAC and RESISTANCE), and, finally, the open-ended Operation CHAOS which gathered information on 300,000 [4] American individuals and organizations.

This history of gradual but relentless expansion of CIA activity at home poses a serious question as to whether the CIA can realisticly be limited to operating abroad. Although we favor statutorily forbidding the CIA from operating domestically, as long as the CIA is engaging in immoral or undemocratic activities abroad, the American people can have no real assurance that such CIA-type covert operations will not sooner or later be directed against U.S. citizens in the United States.

For that reason we view as grave threats to the future security of the American people S. 2525's failure to bar all covert operations including the planting of false information in the media, the non-violent overthrow of democratic governments, and the political assassination of non-officials. (Sections 134-135)

Senator GARN. Mr. Schneider, this committee obviously is concerned about constitutional rights of American citizens or we would not have been formed. It was in response to abuses that were turned up in the Church committee that this committee was formed to act as an oversight committee for the intelligence community and to come up with charters and guidelines. In fact, that was the specific mandate that we had in Senate Resolution 400. Senator Bayh and I worked for 2½ years on the question of electronic surveillance for foreign intelligence which has now passed the Senate. So I want all of you to understand, for certain, that we do share your concerns and are attempting to correct the abuses of the past. There is no doubt that they have existed.

There is obviously some disagreement as to what extent they existed, what part of the operations have been involved in illegal activities by various agencies, at what time period they were in-

[4] Rockefeller Commission Report, p. 130.

volved and whether they still continue, which I don't happen to think that they do.

One thing really puzzles me about your testimony. I find it rather incredible that, rather than trying to address ourselves to the abuses and to correct them so that individual constitutional right of American citizens are not violated, it is your recommendation of a couple of years ago that CIA absolutely be abolished.

The first question I want to ask you is a general one, are you aware—I would think that you must be, but it puzzles me, this kind of a recommendation—are you aware of the unbelievably massive spying effort by the Soviet Union in this country?

Mr. SCHNEIDER. How could I be aware of that?

Senator GARN. Well, there certainly are newspapers and news media. Senator Moynihan has made speeches. If he were here, he could certainly tell you about massive, just unbelievably massive electronic surveillance of American citizens out of the Soviet Embasssy here in Washington, of tapping telephone lines, the microwaves and all of that, and of the KGB activities in this country. It is easy for them, to begin with, because we are an open society, and I am glad that we are and that we can read things in U.S. News & World Report, Aviation Week, Space Technology, New York Times. I get some of my best information out of the press. That doesn't happen in the Soviet Union.

But you must be aware that there is an incredible—I can't even describe to you the massive spying effort of the Soviet Union in this country.

Mr. SCHNEIDER. Well, I am aware of that from occasional instances that are reported in the press, but I certainly have no access to the kind of information you may have access to that gives you the impression of a massive effort on their part.

However, in saying that, I am not—I have no basis for disputing the point you are making.

Senator GARN. Well, there is plenty of evidence. I don't think anybody really disputes that. So my question is, how do you suggest we combat this? In your testimony you have said that legitimate intelligence activities should go on, that you want the country protected. Isn't it just as important to protect the rights of American citizens or attempt to protect the rights of American citizens from illegal surveillance and investigation, regardless of the source? Are we so going to attack our own intelligence community and yet leave open you and I and everybody else, to this massive violation of our constitutional rights by foreign governments?

Mr. SCHNEIDER. Well, I would make this point, that you accurately interpret our testimony as suggesting that the CIA be confined in its activity to intelligence gathering, but we are altogether opposed to the CIA engaging in illegal surveillance of our own citizenry.

Senator GARN. Well, so are we.

Mr. SCHNEIDER. And I would call that illegal political surveillance.

Senator GARN. So do we, but your testimony, all three of you, goes far, far, far beyond that, to state that really you can't trust anybody in government. It seems to me your testimony is saying

that regardless of what we do, no matter how narrowly we define it, that because of what you call the bureaucratic mentality, that you are not going to be able to trust anybody, and that if we allow the CIA overseas, it obviously is going to come back here.

Now, to me, that is as big of an overreaction as saying that because you are for peace and individual rights, you are suspect. That isn't right. That kind of guilt by association is not correct. Your testimony is absolutely right in that case. Just because you are working for peace you should not be investigated. I certainly agree with that.

On the other hand, it seems to me you are participating in the same thing by condemning the whole intelligence community and by saying that they cannot be trusted. And that is exactly what your testimony has said, that they are suspect.

Isn't that just as big an evil as the other side, of automatically assuming that those who have different political views should be investigated?

I can't condone either position. That is a tremendous indictment on some of your fellow citizens because my opinion is, in looking at the CIA very critically and very carefully, the vast, vast majority of people working there have never violated the law, they have never intruded on your or my rights. They have no intentions of doing so. Most of them are engineers and scientists who never venture outside the building. They look at intelligence. They try and evaluate it. They look at missile firings to try and verify whether the Soviet Union is keeping disarmament agreements. The vast majority of the work of the intelligence community never involves American citizens.

So I am just very sincerely puzzled at how you expect, from a practical standpoint, to accomplish this if you abolish the CIA.

Mr. SCHNEIDER. Well, I should have said when we made this statement, the information that was being made available to the public led us to believe that the CIA has lost all its credibility. We have had a certain amount of experience, as I have indicated in my testimony, with the CIA which would lead us to come to that conclusion based solely on the relationship between the CIA and the American Friends Service Committee.

Senator GARN. Well, I can't imagine that you did a very thorough investigation or you would have found out what the majority of the CIA activities were. Most are not even involved in the operational end of it, the covert operations. We have got some bespectacled, thick-glassed people out there with Ph. D.s who are involved in some very technical assessments of the very thing you want to accomplish, ma'am, disarmament. Without verification, you are never going to be able to have any adequate disarmament or relaxation of tensions.

I am still not getting an answer to my——

Mr. SCHNEIDER. Could I remind you that the burden of my testimony, as I think of the others here, is clear opposition to CIA or other intelligence agency's surveillance of the political freedom of Americans.

Senator GARN. I agree with you, but your testimony goes far, far beyond that; it goes to the total distrust of anybody or any agency involved in this. Much of your testimony I can agree with, but if all

of your suggestions were followed, we would severely go far beyond what you have just stated, and which I and every member of this committee would agree with you is what we are trying to accomplish, and severely inhibit the legitimate intelligence gathering activities of this country, we would endanger our national security, and we would contribute to massive violations of the civil liberties of our citizens by foreign governments.

I wish Senator Moynihan were here. I can almost give his speech for him, I have heard it enough.

Mr. GUTMAN. Senator?

Senator GARN. But I would like to have some more specifics of how you justify your commitment to national security with what you have said.

How are we going to protect the American citizen from the KGB and the Soviet Union, and other hostile nations if we didn't have good legitimate intelligence. Although I can't tell you any details of the kind of work the CIA does, do you have any idea what our military budget would have to be if we did not gather the information that we do? It would be so increased, so massive if we did not have some of the information we do have on what the Soviet Union was doing, what their plans were, that I can't stress enough the importance of legitimate intelligence gathering activities.

Mr. SCHNEIDER. Right. I think, if I understand you, you make a very important point in this discussion, and that is if you could share with me what you know, I would be impressed. [General laughter.]

But you can't do that.

Senator GARN. Well, I can't really because I can't give details, but certainly there is a great deal of general knowledge that is in the press all the time. I said we have an open society, and I can't believe that you don't know a great deal about that kind of intelligence gathering activity in a general way.

Mr. SCHNEIDER. It isn't enough to support the credibility of the CIA in the last few years. I mean, that is all I would have to say.

Senator GARN. Do you know that there have been public tours of the CIA?

Mr. SCHNEIDER. Yes, but——

Senator GARN. Go through there and take a look at the type of activities I am talking about from a technological standpoint.

Mr. SCHNEIDER. But I think you know things that because of your privileged position that I do not know, and furthermore, I am not entitled to know.

Senator GARN. Well, but there is a great deal of very general knowledge that is printed in the press all the time about these other types of activities.

I want to correct the abuses. I will say it again. I will say it over and over again, but the attacks on the legitimate intelligence gathering activities must stop. I don't think any of you and the groups you represent would want to see the kind of society we would have if we did not protect it from these foreign operations.

Mr. GUTMAN. Senator, I think there is no disagreement between us that legitimate intelligence gathering on foreign intelligence and counterintelligence matters is proper and necessary. However, as to the nature of the CIA, Victor Marchetti, in his book—and Mr.

Marchetti was a top official in the CIA, he stated that a majority of the money that the CIA spends, at the time that he wrote his book, was for covert operations rather than intelligence gathering.

And another matter. We believe that——

Senator GARN. Well, that is not true.

Mr. GUTMAN. Well, I am just quoting Mr. Marchetti, who was in the CIA.

Senator GARN. Well, then, I would say that Mr. Marchetti could not have possibly had access to the budget figures. For the first time in history, this committee does, every line item, total budget, where it is in the budget, which is rather unique in our history.

Mr. GUTMAN. Well, what year is that for, sir?

Senator GARN. And that exists, and I don't place much credibility in any of these——

Mr. GUTMAN. Is that a more recent period?

Senator GARN [continuing]. Individuals who decide to make money by printing great exposés?

Mr. GUTMAN. Senator, could I ask you what year the figures are that you saw?

Is that——

Senator GARN. We have the current figures this year.

Mr. GUTMAN. So that would be the current figure. There is a possibility that the CIA has decreased their covert activities because of the exposures and——

Senator GARN. Well, again, I am not going to get into a discussion with you where I may be revealing something, but let me just say that it is a fact, it is not true.

Mr. GUTMAN. Well, what about the period——

Senator GARN. Not even close to being a majority of the CIA expenditures.

Yes, ma'am.

Ms. TAYLOR. Senator Garn, I find it very difficult to understand how you could expect that we, who have been victims of the tremendous excesses of the CIA over a period of many years—the CIA has broken every law on the books as far as we are concerned—that we should respect and have confidence in this agency. And you talk about the massive espionage of the Soviet Union in this country and we all know that massive espionage is reciprocal, and we are carrying it out in the Soviet Union and they are carrying it out here, and I almost wish, sometimes, that each act would cancel out the other.

But all of this is based upon standards of national security which have been so discredited in the past, and as I mentioned in my own testimony that a former Attorney General is now in jail because of his misuse of the term of national security, so that I find it difficult to understand why you should be so shocked that we as victims of excesses should be so persistent in our demands that not only these excesses cease, but the power to commit these excesses be absolutely restricted.

Senator GARN. I am shocked because I think you are participating in the same excesses by not limiting your opposition to those abuses. You go far beyond them in vast generalizations——

Ms. TAYLOR. Our testimony went——

Senator GARN [continuing]. Of attacking thousands of dedicated, loyal American citizens who have never participated whatsoever in any wrongdoing and so I think you are guilty, frankly, of going too far.

Again, we agree on goals. This committee wants to protect the rights of citizens. That's why we exist. It is the only reason we exist.

But I would especially think that people of your kindly nature and pacifist nature and the things you are trying to accomplish would be more discriminating in your criticism and not participate in the wide, vast generalizations and condemnation far beyond what really exists. I am not trying to minimize what has been done to you, but I am talking about your condemning the entire agency, this guilt by association. That is just like saying every used car dealer is dishonest. Well, there are some that are and some that are not, and there are dishonest politicians and there are honest ones.

And the whole burden of your testimony, all three of you today, is a broad condemnation of the entire thing rather than being more specific, and I think that is participating in the same type of thing that you are condemning?

Mr. SCHNEIDER. Could I say in response to that, Senator, that I don't think we are impunging individuals who compose the CIA or the FBI, but the agencies themselves, and I think the record is clear of their performance that such criticism is warranted.

Senator GARN. Such criticism is warranted on the specific areas you have been talking about. It is not warranted to extend it to all foreign intelligence and to ignore the important technological means of intelligence. You are not saying, "well, we believe in the legitimate intelligence gathering activities" but you go far beyond the illegal activities, which we both agree should be stopped. That is what I am saying.

If we followed the recommendations, many of them at least, we would go beyond correcting the abuses. My point is we would go far, far beyond that and we would severely limit the legitimate intelligence gathering activities which are necessary to the survival of this counrty, and more importantly, to the protection of the individual constitutional rights of American citizens that are being violated massively by foreign governments. If we followed all of your recommendations.

Mr. SCHNEIDER. Could we assume for purposes of this discussion the CIA and the FBI were not being terminated as a result of our recommendation, and then go to some of the specific points we have made about this bill?

Do they appear to you to be—to warrant serious consideration?

Senator GARN. Well, as I said, we are happy to have your testimony. That is the reason we are taking so long and having testimony from so many people, to have input on individual provisions of the bill so that when we recommend it to the floor, that the bill will accomplish what we would like it to, in eliminating the abuses and providing the framework and guidelines within which the agencies can work.

You may be interested to know that a vast majority of the people in the agencies want charters and guidelines. They would like to

know definitely the parameters within which they can work so that they are not faced years later with someone coming back with new standards and saying hey, you violated the law 10 years ago and now we are going to prosecute you. I think it would help the legitimate intelligence-gathering activities to have those parameters defined so that we do not have agents pulling back from things that would help the intelligence activities but they are now afraid to do.

So you might be surprised to know that the vast majority of the CIA and the FBI want charters and guidelines. They want limitations and legal parameters within which they can work for the certainty of their operation as well.

So certainly, all of the testimony, the time, and the witnesses, hopefully will allow us to accomplish what we want to but not go beyond. Our only really basic difference of opinion as far as I am concerned is that the sum total of all of your recommendations put together, I repeat again, I think would severely limit the legitimate intelligence-gathering activities and go beyond eliminating the abuses.

Ms. TAYLOR. Senator Garn, do you believe that S. 2525 as it stands now allows for excesses which we hope would be prohibited by this law?

Senator GARN. I certainly do not share the belief of all of your testimony that it has giant loopholes. I think that you are looking at the broadest, most far out interpretations of what might happen based on your lack of confidence in some of your fellow citizens. I think there are some adjustments that need to be made. As the testimony comes in, I am sure we will make changes in the final product of this particular bill, and there are some areas that do need tightening.

Mr. Chairman, I have taken far more than my time.

I will turn it back to you.

The CHAIRMAN. I appreciate the fact that you have been willing to take far more than your normal share of time, and I want to apologize to you and our witnesses for the fact that the meeting at the White House that was supposed to take about 45 minutes has ended up taking an hour and a half. So I apologize to all concerned.

I appreciate your making it possible for us to go ahead and have the hearings.

Senator GARN. Now we have another intrusion, Pavlov's dogs, lights and bells going on.

The CHAIRMAN. If you would like to go vote, I would like to make just a few observations before doing so.

I might say I personally appreciate the opportunity to have in our record—and I shall read it carefully after the fact, not having had the chance to share it personally—the experience of those of you who have been the subject of abuse of the way the system has worked in the past.

As I am sure at least some of you know, I have been deeply offended by the fact that American citizens have been treated this way. I do not feel that these abuses have been casual in nature. I have to say that I believe starting with the previous administration, the previous Attorney General and reinforced even further by

this Attorney General and this President, we do have a different environment in which our intelligence agencies are now acting.

That does not mean that we should be oblivious of the fact that, unless we are willing to learn by past occurrences and put something into the law of the land, an administration which appears to be sensitive to these problems now will pass from the scene and other circumstances and other individuals could indeed regress to the old practices.

That is why I think these guidelines are important. I wish I had been part of observing the colloquy because I don't want to repeat anything that may have transpired between you and Senator Garn, but we are in a very difficult position in which I think if we are going to be able to get the legislative process to work, we probably will have to accept a package that will not be fully accepted by anybody.

And it is a delicate balance. I must say to you right now I am very concerned that there seems to be a movement back, away from the sensitivity and concern that appeared immediately after the disclosure of all these matters, and that I sense increasing pressure to let business as usual be transacted.

This committee is not going to accept that. Some of you have every reason to be extremely sensitive and just outright mad and angry because you have been treated as citizens of a totalitarian state instead of a free state. I would ask you not to agree necessarily but to have some understanding of tbe difficulty of the legislative process under which we are working.

The purpose of these hearings is to try to examine this language, which is really a first draft, and which, let me suggest to you, has already resulted in a number of efforts to try to accommodate the differing positions. So none of us, as we introduce this bill, are completely satisfied with the content of it. I think the Friends Service—Mr. Schneider?

Mr. SCHNEIDER. Mr. Schneider.

The CHAIRMAN. You expressed concern in one area that I am particularly concerned in and that is the dual standard as far as the way American citizens are being treated under this bill abroad. We are trying to resolve this, but there are some very deep differences of opinion that have to do with the practical aspect of how the real world operates in a foreign country where we are dealing with the enforcement of foreign laws instead of American laws. We are also dealing with relationships, informal or formal, with foreign intelligence agencies which establish a different standard than ours.

So it is a complicated kind of thicket to work our way out of, and these hearings are designed to help us do that. The product of your testimony accentuating or accenting what can happen when individuals within a system go awry and don't establish the right standard or don't follow the right standard is very helpful, I think.

I have to say that although I am willing to accept an imperfect solution, that with all its imperfection, I think the draft which you are understandably critiquing is much preferable to where we are now, even with a higher sensitivity in this administration.

I think you, sir, expressed concern about one element of the bill and said it was too broad. Let me suggest to you that the intelli-

gence community and people very high in the administration are very deeply concerned because we are insisting in this bill on putting in details that have never been in law before. They want to handle it by executive orders, and executive orders that are promulgated by one executive, can be unpromulgated by the next.

I just want to say, I appreciate your willingness to come and to share your personal experiences and to analyze the bill, and I am not criticizing you at all for pointing out weaknesses in it.

I would just like to point out that it is a delicate balance on one side of which I am concerned, very frankly, right now, and I have mentioned this concern to the President no more than an hour ago. I am concerned that if we are not very careful, that the alternative to prudent action and prudent legislation will be no action, no legislation, and I find that very unacceptable.

Mr. SCHNEIDER. Is there time for me to make just one brief response, Senator?

The CHAIRMAN. Yes.

Mr. SCHNEIDER. Thank you.

The CHAIRMAN. I can come back if you have a long response.

Mr. SCHNEIDER. I think the burden of my concern, and I think this is shared by the other witnesses this morning, is that—I'll put it this way to make a point. Under no circumstances are U.S. intelligence agencies entitled to surveil the political expressions and activity of the American citizenry. I think for them to have that power is inimical to the very foundation of this country.

The CHAIRMAN. Well, we have tried, and we will pursue this with all diligence, and I think with almost unanimous support of the divergent philosophical views represented on this committee, to see that political views are excluded. In locking at the wiretap bill in its early form, one of the concerns that we had was that it was so broad in its interpretation that it could permit intelligence gathering and wiretapping of what by reasonable definition were indeed constitutionally protected political activities. I concur with your concern.

I didn't hear your testimony but I am familiar with your organizations and the contributions I think you make to our society, and I would think that we would probably share common goals as to where we want to head, and that rather we would differ on the ingredients of the legislative process that gets us there. I might find myself, on first studying this situation, or maybe on final analysis, a lot closer to where you think we ought to be than in the opposite position.

But in this position of getting 51 Members of the U.S. Senate and half of the House and the President of the United States to sign off on this, we are going to have to have enough give and take so that we can look forward to progress and put ourselves in a much stronger position than we are right now, I think, even with the executive order. Senator Huddleston has done a marvelous job in supervising the drafting of these provisions. A lot of people have participated. These hearings have been very fruitful, and the very dialog and then sensing the parameters of our disagreements is very helpful.

Mr. SCHNEIDER. Well, I hope the criticisms we bave offered are useful to you in improving the legislation.

The CHAIRMAN. Well, as I say, I have not had a chance to read them, but I will, and if you feel inclined to stay, I will be glad to go over and vote and come back.

Mr. GUTMAN. Could I make just one comment?

The CHAIRMAN. I will leave it to you whether you stay or not, but I am going to have to vote, and then I'll call and see whether anybody has left.

Excuse me.

[A brief recess was taken.]

The CHAIRMAN. If we could reconvene here, I appreciate your patience.

I think you have some comments you wanted to make.

Mr. GUTMAN. Thank you, Mr. Chairman.

We sympathize with your situation of having to balance various considerations, but our major concern is that we believe that this bill, as it is written, does not prohibit abuses of the past, and we think that is the bottom line of the matter, and that is our major concern, and we fear that to the extent that it doesn't actually prohibit them, it is in a sense permitting it, and we just feel that the bill as it is currently written doesn't really permit——

The CHAIRMAN. Let me ask you a question. Do you think there is any way to prohibit them, by your definition, without closing down the intelligence agencies?

Mr. GUTMAN. Yes, I do. I think that the criminal standard is sufficient, a reasonable suspicion of criminal activity including——

The CHAIRMAN. Well, this is the first time in history, the one section that you criticized, section 213(1)—it is the first time in history that any intelligence community has been subjected to a criminal standard. We have come a long way. This is so much closer to where you and I would like for us to be than has ever been accomplished before.

Mr. GUTMAN. Well, one of the major concerns we have is that this is the first time that a charter is being enacted, and therefore it is extremely important because it will set the standard, we feel, and we doubt whether there will bo a period in the future that is as open to change and limitation as there is now. And so we are very concerned that it doesn't tie the matter to a criminal standard tightly enough.

The CHAIRMAN. Well, I think that is a reasonable assessment, but I think it is not accurate to suggest this is the first time for charter standards. I mean, if one can compare this effort to the 1947 act, which is what we are laboring under now, you could drive three Greyhound buses and a tractor-trailer truck through the holes in that statute.

As I say, I appreciate your critique and we are going to try our best to make what we admit is an imperfect legislative effort as perfect as we possibly can. But I was of the opinion that we have tried not only to require a criminal standard, but for the particular kinds of targets that you think are sensitive and we think are sensitive, we have made exceptions so that they are given additional protection. Perhaps that protection is not as much as you would like to see them have, but again, it is a delicate kind of situation that we are facing right now, and I am very concerned as time

passes that we could well end up with no legislation, which I find completely unacceptable.

Ms. TAYLOR. Senator Bayh, I am concerned that within this bill the CIA could do exactly to us what it did when it was prohibited by law to do it, and I refer to the section 222(b) which gives them permission to collect information against any U.S. person who is reasonably believed to be engaging in any activity that poses a clear threat to the physical safety of any installation. It was under this that they had Women Strike for Peace under surveillance when it could not be proven against us or any other peace organization that we were funded and supported by Moscow gold, so that this pretext was used to keep domestic—to allow them to keep us under surveillance.

The CHAIRMAN. I must confess, this is not unique in our law. I mean, the Capitol Police have the same responsibility to protect physical facilities.

Ms. TAYLOR. Yes, but we were targeted to: "Continue periodic monitoring of the following indicator organizations which are of interest to the parent organization," and one such organization was Women Strike for Peace, and I don't see anything in this new law that would prohibit this continuous monitoring of Women Strike for Peace. But——

The CHAIRMAN. Well, may I—shall we read the rest of that?

> Shall be limited to such information as is necessary to determine whether the matter should be referred to an appropriate law enforcement agency, at which point the collection of such information shall be terminated. In no case shall the collection of such information within the United States go beyond physical surveillance within, on the grounds of, or in the immediate vicinity of any installation of such entity.

Now, if for reasons that seem to be good to you or to me we are out here on the grounds of the Capitol Building ready to do something that will damage the physical security of that building, do you think it is wrong for us to be surveilled and information collected on us while we are on that present facility?

Ms. TAYLOR. Well, on what basis, why would it be reasonably believed that we would endanger Langley or whatever? I mean, what is the standard——

The CHAIRMAN. Well, I don't think that you would.

I think the surveillance directed at you was unreasonable. I am not saying that this is perfect by any means, but we have gone, I think, at least quite a ways to try to limit the abuses before. Here are the limitations:

> In no case shall the collection of such information within the United States go beyond the physical surveillance within and on the grounds, et cetera, national agency checks, requests for information from the records of any federal, state or local law enforcement agency, and interviews.

Ms. TAYLOR. But it is the same standard——

The CHAIRMAN. You can't, you know, slap a wiretap on anybody.

Ms. TAYLOR. It is the standard I am concerned about that would give rise to the agency reasonably believing that we are, that we would endanger Langley, based on what——

The CHAIRMAN. Well, you know, frankly, I don't see how this would apply to Women Strike for Peace.

Ms. TAYLOR. But it did. I mean——

The CHAIRMAN. Well, what do you mean? This isn't even into the law right now. You are dealing with a 1947 statute that is big enough for all of us to have a picnic in. I mean with all respect, I solicit and encourage your continued critique not only of this but of the second generations and third generations of this act, but I think it is unreasonable to suggest that activities that were directed at you, practices that were followed pursuant to you and your members under the old standard, are similar to the kind of standard that is applied here. I mean, it is a much different kind of thing.

Ms. TAYLOR. I wish I was so secure in that.

The CHAIRMAN. I mean, is that unfair? Can you really compare this, as imperfect as this language is, is it really in the same league as the much more nebulous wording, much more open ended wording of the previous authority? Well you think this is nebulous, I guess.

Ms. TAYLOR. We are very edgy, based on our past experience.

The CHAIRMAN. I don't blame you for being edgy and I think it is important to have people, that have reason to be edgy from past experiences, before this committee testify so that you can remind us of how severe these violations of individual rights can be.

Mr. GUTMAN. Mr. Chairman, on this provision, doesn't this authorize the CIA to engage in law enforcement, which is forbidden under the 1947——

The CHAIRMAN. We are talking about collection of information.

Mr. GUTMAN. Pardon me?

The CHAIRMAN. We are talking about collection of information. That is not law enforcement.

Mr. GUTMAN. Well, isn't collection of information an inherent part of law enforcement when you are talking about violation of criminal law?

The CHAIRMAN. Only for the protection of the facility involved.

There is no need for me to read the limitations again. I think it is rather clear what we are trying to do.

Mr. GUTMAN. Well, we are not disputing the——

The CHAIRMAN. What this is designed to do is to try to give the Agency the ability to gather information to see whether indeed it is a significant threat that will violate a law and then turn it over to law enforcement and stop all this business.

Mr. GUTMAN. Well, Mr. Chairman, I mean, given the fact that the CIA in the past has used protection of its facilities as in Operation RESISTANCE and Operation MERRIMAC to engage in pretty widespread spying on political activities, don't you think that perhaps this intelligence gathering on physical threats to installations should be given to a regular law enforcement agency like the FBI or the local police?

The CHAIRMAN. Well, that is a possibility. Here again I go back to what I mentioned just a moment ago to Ms. Taylor. Nobody is questioning the fact that there have been abuses. That is why this language is in here, because there was no language like this at the time the abuses occurred. It was easy to use some of these excuses, national security, physical damage or damage to the physical premises. It was easy to use those excuses because there was absolutely no effort to define them.

Now, I suppose one alternative would be to say that automatically an agency assumes that even the most peaceful demonstration and the most innocent protest is going to damage the physical facilities so they call the police and everybody gets boxed up in jail. That doesn't seem to me to be a reasonable alternative. Maybe there is a better one than this. If you have any specifics, we would be glad to deal with them.

Yes.

Ms. TAYLOR. Senator Bayh, do you think that the majority of the select committee reflect Senator Garn's obviously terrible fear of a tremendous Soviet espionage network in this country, and what is frightening to me about that is that this bill might reflect that kind of fear?

Do you—I mean, is that—is this, as Senator Garn said, a massive Soviet network of espionage in this country? Is that the feeling that this is so by most members of the committee, because I think that could have a chilling effect on this legislation if that was thought to be the case?

The CHAIRMAN. Well, I am not familiar with every bit of detail of Senator Garn's concern and fear. I am sure he expressed it very eloquently to you. I wasn't present at the time he did it. I have no way to compare that with other members of the committee who have not been as eloquent recently as he. Without evading the question, which I think I successfully have so far, the dimensions, the numbers of agents, I don't know how to assess. Certainly we are not in a position to play the numbers game with you, and I don't think you would want us to. I think there is a threat. How big it is I don't know. I think we should be prepared to deal with it and to deal with it firmly and to deal with it in a way that doesn't violate the rights of American citizens. That is the delicate balance. I find myself in the middle of a situation where I don't think there are very many people around that are more sensitive to the rights of American citizens than I, and I would hope that they could be protected in a way that would not seriously damage the ability of our intelligence and military agencies to protect our country.

I don't see Communist agents lurking under every bed, but they are doing some things in this country that really alarms me, and that we haven't been able to find a way to constitutionally come to grips with, and I think we probably could come to grips with them if it weren't for fear of reciprocity in their country. I don't know how you balance that off. It is difficult for me to balance it off, and I guess I would say amen to what you said or what you intimated you said. I can say unequivocally I would be perfectly happy if the Russians would stop their activities in our country and we would stop our activities in their country. That would be a fair exchange for me, but I am not so naive as to think that if the President of the United States sent down the order tomorrow, stop, cease, desist all efforts in the Soviet Union, that automatically we would get reciprocity. I don't think it works that way.

Now, maybe I am too callous and too cynical.

Ms. TAYLOR. In either country.

The CHAIRMAN. Pardon me?

Ms. TAYLOR. In either country.

The CHAIRMAN. Well, let us presume, which may be a fairy tale presumption, but I think if the President sent the order down that it would stop. That order is not likely to happen and I think the reason that order is not likely to happen is that not very many of us believe that sending that order down and stopping would get reciprocity. But we can argue with that.

Ms. TAYLOR. If only one side spies, you know, it takes the fun out of it, really.

The CHAIRMAN. Well, I don't think it is a very humorous thing.

Ms. TAYLOR. No; but if only one side is spying, it is—it is a difficult situation. Unilateral.

The CHAIRMAN. Pardon me?

Ms. TAYLOR. I mean, unilateral spying is not very——

The CHAIRMAN. Well, I tell you. I guess you take a more casual view of Soviet intentions than I do. I guess that is what makes the world go round, that we look at things a little differently. Yes.

Mr. SCHNEIDER. Well, I should have thought our intelligence agencies, particularly the CIA and the FBI, are sufficiently competent to be abreast of the intelligence activities of other foreign countries not to have to extend their purview to the American citizenry.

The CHAIRMAN. You see, that is the whole purpose of this legislation, to keep them from doing what they have in the past. We are not questioning what has happened in the past, are we. I don't know what Senator Garn said, but I think it is an unfortunate and sad record about what has happened in the past.

Mr. SCHNEIDER. Well, then, I think one point that the three of us seem to be making is that in respect to specific provisions of the legislation, the proposed legislation, there is too much reliance on reasonable belief rather than a criminal standard, and to rely on reasonable belief opens the door to a wide range of discretion on the part of one or another agency, and I think, we think, that is questionable.

The CHAIRMAN. Well, look, we will be glad to sit down with you, if you could find some time to spend with our staff, to point out the specifics and have a dialog here.

We have a sort of sliding set of standards, instead of one standard, depending on the seriousness of the activity. Terrorism is one of the matters that really concerns me because on one hand it is one of the most insidious forms of activity that one group of human beings can participate in against another. On the other side, it is the best excuse going to lower the bars and invade the privacy and the rights of American citizens.

Now, what we have done there is to create a looser standard. We provide less protection there, very frankly, and if you have any answer to this question, the very real question that I have in my mind, I would be glad to have it. But if somebody is spying and getting military secrets and we find out about it after the fact, with only rare exceptions, we can punish the individual involved, and it has not done irreparable damage to the country. If someone blows up a Federal building or a post office and people are killed, it seems to me that just the Government's response of saying, OK, arrest after the fact is all we need to worry about, that is insufficient. That is an area where we have to try to find out in advance,

to prevent that act because we know it is going to cause very serious damage. And so we might consider a different standard there than for certain kinds of traditional spying, and we would be glad to go over those with you, be glad to have your comment on them. I have got to believe in our society we are wise enough to be able to find a delicate balance on the one side of which we protect the rights of individuals. There would be no question that we differentiate normal kinds of intelligence gathering activities from spying on people who are expressing their political beliefs. That ought to be relatively simple to sort out. It hasn't been in the past but we are trying to do it in this bill. But we must balance that off against the need in tbe very real, tough world to give our government and our people protection against those who would do us in.

Now, if we start with the premise that there is nobody out there wanting to do us in, then there is very little room to compromise, frankly, because some of us feel that that is a false premise. We merely disagree in this committee about how serious the threat is, how insidious it is.

But are there other observations?

I am going to read with care the transcript and the testimony and I invite you to have a continued input and participation in this process.

Anybody else care to make a comment here?

Well, thank you very much for taking the time to be with us.

Ms. TAYLOR. Thank you, Senator.

Mr. SCHNEIDER. Thank you.

Mr. GUTMAN. Thank you.

[Whereupon, at 12:19 p.m. the committee recessed subject to the call of the Chair.]

27-462 O - 78 — 34

TUESDAY, JULY 18, 1978

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The committee met, pursuant to notice, at 10:17 a.m., in room 5110, Dirksen Senate Office Building, Senator Birch Bayh (chairman of the committee) presiding.

Present: Senators Bayh (presiding), Huddleston, Goldwater, Pearson and Wallop.

Also present; William G. Miller, staff director and Audrey Hatry, clerk of the committee.

The CHAIRMAN. The Committee will come to order.

We are fortunate this morning to have three individuals who have had a long personal and professional interest in the kinds of issues involved in writing charters: Mr. Jerry Berman, legislative counsel of the American Civil Liberties Union and Mr. John Shattuck, director of the Washington office of the American Civil Liberties Union, who I understand will go first, and then Ambassador Silberman, senior fellow of the American Enterprise Institute for Public Policy Research will follow.

Is that the way you want to handle this?

Mr. SILBERMAN. I will defer.

The CHAIRMAN. Well, I don't know whether any deference is required. Maybe that is a strategy.

Fire away, then, gentlemen, please. It is good to have you here.

[The ACLU sectional analysis of S. 2525 follows:]

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AMERICAN CIVIL LIBERTIES UNION

Washington Office

MEMORANDUM July 1978

TO: Senator Birch Bayh
Chairman, Senate Select Committee on Intelligence

Senator Walter D. Huddleston
Chairman, Subcommittee on Charters and Guidelines

FROM: American Civil Liberties Union and the Center for National Security Studies

RE: S. 2525 and H.R. 11245, the "National Intelligence Reorganization and Reform Act of 1978".

Introduction and Overview

This memorandum sets forth our initial comments on S. 2525, the "National Intelligence Reorganization and Reform Act of 1978" introduced in the United States Senate February 9, 1978 and in the House of Representatives (H.R. 11245) on March 2, 1978.

Because the draft charter has been introduced as a "discussion paper", we will defer a complete analysis of its provisions and instead focus on the critical issues raised by the draft legislation. The memorandum is divided into two parts to facilitate this discussion. The first covers the principal concern of the ACLU, the rights of Americans at home and abroad and the rights of resident aliens in this country as they may be affected by the foreign and domestic intelligence activities that would be authorized and in some measure restricted if this seven-title legislation were enacted into law. The second part examines the draft charter's proposed authorization of covert operations abroad ("special activities"), sensitive clandestine espionage activities, and paramilitary operations and how the legislation attempts to restrict or prohibit certain of these activities.

While the ACLU continues to strongly support the congressional effort to legislate controls and restrictions on U.S. intelligence activities at home and abroad, we object to the draft charters as introduced. Contrary to other witnesses who have appeared before the Committee in recent months, we do not believe the proposed charters are overly restrictive. On the contrary, we believe the charters authorize too much, restrict too little, and prohibit virtually nothing.

Certainly, the draft charters do not incorporate the positions advocated by the ACLU and which are set forth in legislation introduced in the House (H.R. 6051 and H.R. 4173) in the spring of 1977 with over twenty co-sponsors. That legislation proposes:

(1) a ban on covert and paramilitary operations except in time of war. S. 2525 would authorize both and euphemistically rename them "special activities";

(2) a ban on human espionage except in time of war. S. 2525 would authorize sensitive and other clandestine collection activities at home and abroad;

(3) a ban on the use of independent American institutions, including the media, academic community, and religious organizations in covert activities. S. 2525 permits such use in a number of circumstances.

(4) a requirement that intrusive intelligence investigations of U.S. persons and resident aliens be conducted under a "reasonable suspicion" of crime standard under strict procedures to minimize interference with lawful political activity. S. 2525 does not incorporate the "reasonable suspicion" standard in major counterintelligence, counterterrorism, and foreign intelligence investigations, permits intrusive non-criminal investigations of U.S. persons in a number of circumstances, authorizes other non-criminal investigations of U.S. persons, and subjects all resident aliens to intrusive investigation under non-criminal standards;

(5) a ban on the use of undercover agents or informers in lawful political organizations. S. 2525 permits this for purposes of "cover" and investigative purposes;

(6) a judicial warrant requirement for undercover or informant infiltration of organizations suspected of crime. S. 2525 imposes no independent check on the executive in the use of these intrusive investigative techniques;

(7) a ban on all electronic surveillance and a judicial warrant based on traditional probable cause of a crime for mail covers, mail opening, and physical search. S. 2525 incorporates the judicial warrant for electronic surveillance based on less than probable cause of crime contained in the Foreign Electronic Surveillance Act of 1978 (S. 1566) and authorizes more intrusive multiple physical searches and mail openings under similar procedures. Mail covers are not subjected to a warrant requirement;

(8) a subpoena or warrant requirement for the inspection of confidential and private records. S. 2525 permits inspection of all records in the central files of all federal agencies, tax records, medical records, bank and credit records without supoena or warrant and often without suspicion of crime;

(9) a strict prohibition of COINTELPRO or "preventive action" other than exercise of traditional powers, such as to warn victims and arrest suspects. S. 2525 authorizes activities to "counter" espionage and "prevent" terrorism, including authorization for intelligence agents to ignore or violate the law under certain circumstances. At the same time the proposed bill "prohibits" COINTELPRO:

More distressing, the draft charter even departs in substantial measure from the minimal recommendations proposed by the Church and Pike Committees to prevent a recurrence of the massive abuses of human rights abroad and constitutional rights at home committed by U.S. intelligence agencies. These committees recommended:

(1) limiting covert operations to extraordinary circumstances in which there is a "grave threat" to national security. S. 2525 permits covert operations whenever the president finds them "essential" but not only to national security but to the much broader "foreign policy" interests of the United States;

(2) prohibiting paramilitary operations except in time of war (a recommendation of the Pike Committee). S. 2525 would authorize them;

(3) requiring, except for limited preliminary investigations, that intelligence agencies have "reasonable suspicion" of criminal activity to conduct intrusive investigations of citizens and resident aliens. As noted, S. 2525 departs from this standard in a number of circumstances;

(4) a judicial warrant requirement based on probable cause of crime for wiretapping, mail opening, and physical searches. S. 2525 departs from the strict probable cause of a crime standard in authorizing these techniques for surveillance against U.S. persons and resident aliens;

(5) strict procedures to minimize the acquisition, retention and dissemination of information. S. 2525's minimization procedures are exceedingly broad.

(6) a ban on COINTELPRO or preventive action. S. 2525 authorizes certain of these activities.

Despite these substantial shortcomings, S. 2525 does modestly improve on Executive Order 12036 on United States Intelligence Activities issued by the Carter Administration on January 24, 1978:

(1) the Carter Executive Order permits covert operations whenever the President deems them "important." S. 2525 raises the standard to "essential";

(2) the Carter Executive Order permits intrusive investigations of U.S. persons and resident aliens whenever they are "reasonably believed to be acting on behalf of a foreign power" even if the activity is wholly lawful. S. 2525 more closely relates counterintelligence and counterterrorism investigations to suspected criminal activity;

(3) the Carter Executive Order permits the Attorney General to approve warrantless electronic surveillance, television monitoring, physical searches (surreptitious entries), and mail opening whenever he has "probable cause" to believe a person is an "agent of a foreign power" without defining agent of a foreign power. S. 2525 proposes a judicial warrant requirement for these intrusive techniques.

In addition S. 2525 mandates a panoply of reporting requirements and establishes executive and congressional oversight mechanisms not found in the Order. Finally S. 2525 does what executive orders cannot do in setting forth criminal penalties for officials who violate its provisions and civil remedies for victims of intelligence agency abuses. (Unfortunately, unlike H.R. 6051, S. 2525 does not establish a temporary special prosecutor to prosecute violations but leaves the authority in the hands of the Attorney General despite inherent confict of interest.)

The overriding question is whether these modest improvements over current practice proposed in S. 2525 argue for its enactment into law in its present form. We think not.

First, while S. 2525 would do away with the sweeping claims of inherent power contained in the Carter Executive Order, the statute would be flexible enough to permit the Executive Branch and U.S. intelligence agencies to do by express grant of authority much of what they now do under claims of inherent power. While some of these activities may be required to protect national security, there is no public record which satisfies the burden of proof on the intelligence community to establish the "necessity" of this broad grant of authority, or to counterbalance the Church Committee findings that many of these activities were not only dangerous but wasteful, counterproductive, and unnecessary.

Second, in the absense of a showing of "compelling interest" or that "less intrusive means" would not suffice, we believe many of the activities are constitutionally suspect and subject to legal challenge.

Third, the grants of dangerous authority in the charter are not required to protect legitimate national security interests. The abandonment of traditional counterintelligence policy in favor of one which is far more intrusive is not supported by the public record. This is a central objection, and as discussed in Part One of the memorandum, supports the constitutional objection that the least means have not been authorized in the charter.

Fourth, the flexible standards in the legislation assume self-restraint on the part of the Executive Branch. This ignores the lessons of Watergate and the Church Committee findings that even well-intentioned intelligence agents, especially in time of crisis, interpret even narrow grants of authority broadly.

Fifth, the legislation's preference for reporting and oversight rather than clear restrictions and prohibitions ignores the historical failure of Congress to oversee the intelligence community in the past, the ease with which oversight committees may be coopted or captured by those they seek to oversee, and the considerable difficulty in exercising oversight responsibility without clear standards to apply.

Finally, while we are well aware that executive orders can not place our constitutional liberties on a firm foundation since they are subject to change at any moment, we would oppose the charter as drafted on the ground that a permissive statute offers even less protection for civil liberties and democratic values. Unlike a flexible executive order, a statute is far more difficult to alter.

Based on the foregoing comments and the analysis that follows, it is our recommendation that S. 2525 should be redrafted to reflect fundamental constitutional principles and more traditional counterintelligence practice as proposed in the remainder of this memorandum.

Part One

The Rights of Americans and Resident Aliens

Although S. 2525 purports only to authorize and establish a statutory framework for the conduct of foreign as opposed to domestic "intelligence activities", the legislation grants U.S. intelligence agencies extensive powers which may interfere with or otherwise adversely affect the rights of Americans at home and abroad and the rights of resident aliens in this country. These include the authority to investigate Americans and resident aliens for counterintelligence, counterterrorism, and foreign intelligence purposes (Title II), to employ intrusive investigative techniques against targets of investigation (Title II, Title III), to maintain and disseminate non-public information gathered from these investigations (Title II, Title III), to engage in forms of preventive action to "counter" espionage and sabotage or to "prevent" international terrorism (Titles I and II), and to use independent institutions for purposes of recruitment and cover, and in certain circumstances, for operational assistance in covert actions and clandestine intelligence activities (Title I and II).

All of these activities must in our judgment be required to meet a three part test in order to determine whether S, 2525 achieves its stated purpose of protecting "individuals against violations and infringements of their constitutional rights," (§203 (2)). The first test is whether each intelligence activity should be authorized at all, For in the absence of compelling interests or evidence that less intrusive means would not suf-

fice, activities which adversely affect or interfere with the rights of Americans and resident aliens (such as COINTELPRO activities) should not be authorized or restricted but prohibited. The second test is whether each intelligence activity is adequately restricted by the provisions of the charter, particularly Title II of the legislation, so that the kinds of abuses documented on the public record could not be repeated. Finally, each activity must be measured by the agency which is authorized to conduct it. For example, serious civil liberties questions are raised by grants of authority to the CIA and NSA to investigate or "counter" or "prevent" espionage or terrorism when Americans or resident aliens may be involved because of the excessive secrecy and insulation from accountability granted to these agencies. Applying these tests, we turn to the major public policy and constitutional rights issues posed by the Charter.

A. Counterintelligence, Counterterrorism, Foreign Intelligence and Related Investigations against Americans at Home and Abroad and Against Resident Aliens.

A Troublesome Policy Choice

Under Title I of S. 2525, United States intelligence agencies are broadly authorized to engage in foreign intelligence, counterintelligence, and counterterrorism activities (§111). This includes the "collection" of any and all information "pertaining" to positive intelligence about foreign governments ("foreign intelligence information," §104 (13), the threats they pose to this country in conducting espionage or other clandestine intelligence and international terrorism (counterterrorism intelligence §104 (8)). While the scope of intelligence inquiry is broad, and may be gathered by the entities by covert means (§131, §413, §507, and §611), the focus of intelligence is on foreign threats to this country from abroad.

Title II shifts the focus of "foreign intelligence" by adding a possibly new and dangerous dimension to it. Title II authorizes the FBI and CIA to conduct covert intrusive investigations under flexible standards to collect foreign intelligence, counterintelligence, and counterterrorism intelligence from Americans and permanent resident aliens.

As we view the investigative scheme of Title II, we believe a basic policy choice has been adopted which has potentially dangerous consequences for civil liberties in this country. The drafters of this legislation, faced with a policy choice between

limiting our intelligence agencies to focusing counterintelligence on foreign threats and permitting them by permitting a concomitant focus on citizens, has chosen the more intrusive approach.

Traditional counterintelligence, as described in the Church Committee Final Report, targets foreign governments, hostile intelligence services, and other foreign threats for investigation and surveillance in addition to citizens only when their involvement has been established. As described in the Church Committee Supplemental Reports:

> "The more traditional CIA policy has been to monitor hostile intelligence services and then, only if it thereby learns of their involvement with particular Americans, to investigate those Americans abroad or request an inquiry here. Generally, CIA has not tried to work backward from a surveillance of traveling Americans who seemed likely prospects in order to see what kinds of connections could be found."

On the other hand, the more "efficient" approach, according to CIA officials, is to "watch...citizens to see what they are doing." To be even more systematic, the "way to look for foreign direction...is to start at both ends of the suspected connection."

We submit that Title II, with its minimal standards for targeting Americans and resident aliens for intrusive investigation, and its collateral grant of authority to the agencies to collect all "publically available" information, determine "contacts" and "targets" and "develop "potential sources" is the statutory embodiment of this approach.

What is most distressing is that the Committee has adopted this policy in the face of the Church Committee record that it was this very approach which the CIA used in conducting Operation CHAOS. According to the report:

> "CHAOS sought to sift through the leaders and more active segments of domestic protest movements in order to learn of travel and other foreign contacts and then to investigate the possibility that those Americans were supported or controlled by foreign powers."

In other words, Operation CHAOS worked backwards. And so did the FBI in conducting its COMINFIL program and New Left investigation of the Anti-War Movement. While this approach may be more "efficient," it is also far more sweeping and intrusive.

In the most strenuous terms, we urge the Committee to redraft the investigative sections of Title II to reflect incorporation of the "less intrusive" traditional forms of counter-intelligence.

Without compelling necessity, and in view of the availability of less intrusive means, the Committee should redraft these sections on civil liberties grounds alone. Instead of "protecting individuals against violations and infringements of their constitutional rights" the overbroad investigative scheme in Title II will "chill speech" by making citizens fearful of reprisal for engaging in unpopular advocacy and run roughshod over the privacy of political associations guaranteed by the First Amendment. e.g. Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958). The authority to investigate citizens and resident aliens without reasonable suspicion of crime violates the Fourth Amendment. Terry v. Ohio, 392 U.S. 1 (1968). Furthermore, particular care must be taken to craft standards when both First and Fourth Amendment rights are involved, as they are in this area. United States v. United States District Court, 407 U.S. 297 (1972). That care has not been taken in drafting Title II.

We continue to advocate the adoption of a statutory framework which establishes that, except for limited preliminary investigations, no person entitled to the protection of the Constitution can be investigated except under a strict criminal standard pursuant to procedures designed to minimize intrusion on lawful political activity. Those standards are not present in Title II.

1. The Overbreadth of Counterintelligence and Counter-terrorism Investigations Authorized Under Title II Against U.S. Persons At Home

Under Section 213 of Title II, the FBI and CIA may target citizens, associations of Americans, or permanent resident aliens (U.S. Persons) whenever they are:

> reasonably believed to be engaged in espionage or any other clandestine intelligence activity which involves or may involve a violation of the criminal laws of the United States, sabotage, any international terrorist activity, or any assassination, to be aiding and abeting any person in the conduct of any such activity, or to be conspiring with any person engaged in any such activity.

Under this standard, which is even lower if the American or permanent resident alien happens to be abroad, the agencies may employ, with the approval of the Attorney General or his designee under Section 215, such intrusive investigative techniques as inspection of confidential tax records, around the clock physical surveillance, use of informants ("covert human sources"), mail covers, and inspection of medical, credit, employment, and a host of other private record information.

First of all, this is not a criminal standard, or at least one sufficient to sustain the intrusiveness of the search authorized in these investigations. "Reasonably believed to be engaged," even assuming that all of the conduct referred to in the section constituted criminal acts, which is not at all certain with respect to espionage and clandestine intelligence activity, is not the standard articulated or suggested by the Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968), the leading case in the area of defining the power to investigate. In Terry, the Court stated that "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts reasonably warrant that intrusion." In Terry the police were only required to have a reasonabla suspicion that "criminal activity may be afoot," but the Court emphasized that this was only a limited "stop and frisk" and not a "full-blown search." An on-going intelligence investigation, as would be authorized here, is more akin to a "full-blown search" requiring a higher degree of certainty that criminal conduct is involved than in a stop and frisk. Yet "reasonably believed" is not defined in terms of Terry and requires no "specific and articulable facts" to justify the "belief."

Second, the standard permits investigation of persons who are engaged in lawful political activity not punishable under the laws of the United States. For example, "clandestine intelligence activity" is defined as

> "any intelligence activity on behalf of a foreign power which is planned and executed in a manner intended to conceal the nature or fact of such activity or the role of such foreign power, and any activity carried out in support of such activity." ($204 (b) (1)

In addition, "foreign power" is defined to include any foreign government or agency, any faction or insurgent group, any foreign political party, or any foreign group which tries to influence the government of a foreign government, and finally, any U.S. corporation "directed and controlled by any governmant of a foreign country." ($204 (8). As defined, this standard would have permitted:

(a) the targeting of any anti-war activist who traveled abroad and attended secret meetings with a foreign government, a member of the British Labor Party, a liberal organization also opposed to the war and so on. (For abroad, clandestine intelligence activity is not even modified by the requirement that the intelligence agency believe that the activity "involve or may involve a violation of law."(§213 (2)).

(b) the targeting of any American or permanent resident alien in the United States who attended secret meetings of the Communist Party, U.S.A or any "front group" since the party would have met the official definition of a U.S. corporation "directed and controlled" by a foreign government(the Soviet Union). The "involve or may involve" a violation of law would not prove a problem because the FBI reasonably believed the meetings were a possible violation of the Smith Act.

(c) the targeting of a member of the American Jewish Committee who traveled to Israel and then returned to lobby Congress on the Middle East situation since an agency could reasonably believe this was an intelligence activity on behalf of a foreign power and the lobbying a possible violation of the Foreign Agents Registration Act.

Taking the "aiding and abetting" and conspiracy sections of the standard into account, the reach of the investigatory authorization is sweeping. To aid and abet or conspire does not require persons to knowingly aid in the specified activities. Persons could be investigated for mere association. Thus, under this section, the FBI could have targeted Dr. Martin Luther King, Jr for "conspiring with" two associates the FBI considered communists. The FBI could reasonably believe that King was conspiring with persons "engaged in clandestine intelligence activities"in violation of the Smith Act.

Third, the standard permits investigations of politically motivated crimes with no foreign connections. As introduced, S. 2525 does not include a section expressly covering investigations of persons suspected of engaging in politically motivated crimes but with no foreign connections. According to Senator Birch Bayh, Chairman of the Senate Intelligence

Committee, "domestic security investigations are more in the nature of "criminal investigations" and should be subject to more strict investigative standards and procedures to protect the rights of Americans.

Under Section 213, however, domestic security investigations may be conducted under the lower standards considered necessary to protect "national security" from foreign threats. The first reason is that unlike the "Foreign Electronic Surveillance Act" (S.1566), section 213 does not require a reasonable suspicion that persons are knowingly acting for or on behalf of a foreign power or pursuant to the direction of a clandestine intelligence network of a foreign power, except in the case of "clandestine intelligence activities". Thus, under this section a sabotage of a local police station by a domestic radical organization with no foreign ties could be investigated, since sabotage is not confined to national defense installations. That same radical organization could be targetted if reasonably suspected of engaging in "any assassination."

Domestic security matters will also be under the ambit of section 213 because of the bill's failure to define espionage in its classic meaning or in terms of criminal statutes. Thus, for example, "leaks" of classified information to the press could lead to investigation, since the government indicted Ellsberg for espionage in the Pentagon Papers Case. If such espionage is included, the conspiracy section would permit investigation of members of the press who "conspired with" or "aided and abetted" Ellsberg in printing the Papers.

Similar problems are posed by the broad definition of "international terrorist activity" in the Act (§104 (20). The definition not only encompasses violent acts intended to intimidate the civilian population but also includes "violent destruction of property" or a "credible threat" to do so in order to "influence the policy of government...by intimidation." Broadly read, this would allow the targetting of persons engaged in forms of civil disobedience or who participate in civil disorders. While this terrorism must be "international" in nature, the standard may be satisfied if any of the "means by which its objective is accomplished" (e.g. weapons, financial support, etc) transcend national boundaries.

In interpreting the terms of this section, we have obviously given it a broad reading. We think this appropriate in view of the considerable evidence that intelligence agencies in the past, particularly in times of crisis, read authorizations in just this way. We point, for example, to the FBI's conduct of over one million investigations under the vague standard of

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"subversive activities" and its mounting of massive investigative programs under a 1939 Presidential Directive as broadly drawn as the section in the draft charter. In 1939 President Roosevelt instructed the FBI to investigate "matters relating to espionage, sabotage, and violations of the neutrality regulations." Section 213, with its substitution of "clandestine intelligence activities" for the discredited "subversive activities,"threatens similar overbroad investigation.

This analysis also establishes the validity of our judgment that Title II embodies a policy choice to allow our intelligence agencies to investigate "foreign connections" by targeting Americans as much as hostile foreign agents, since the standards in Section 213 obviously constitute a broad authorization to target citizens and resident aliens. It is also clear that however efficient the policy, it is effective at the expense of civil liberties.

It is our recommendation that the Committee redraft this section to reflect a criminal standard clearly related to foreign intelligence interests. Because of the intrusiveness of the search authorized, we recommend at least the targetting standards included in the Foreign Intelligence Surveillance Act of 1978 (S.1566) as passed by the Senate in April of this year.

2. The Overbreadth of Foreign Intelligence Investigations Authorized Under Title II Against U.S. Persons At Home.

Under Section 214 of Title II, the FBI and CIA may target citizens, permanent resident aliens, and associations of such persons in the United States for intrusive investigations to collect foreign intelligence information whenever they are "reasonably believed" to be engaged in the same activities set forth in Section 213 discussed above.

The standard is identical to and, in our estimation, suffers from the same defects and raises the same issues . We simply refer to that discussion and make the same recommendation as to how the section should be redrafted.

3. The Overbreadth of Counterintelligence, Counterterrorism, and Foreign Intelligence Investigations Authorized Against U.S. Persons Abroad.

Under both Sections 213 and 214 of Title II, Americans and permanent resident aliens abroad may be targeted for intrusive counterintelligence, counterterrorism, and foreign intelligence investigations under lesser non-criminal standards than apply to U.S. persons at home.

For example, under both sections, U.S. persons may be targeted if they are "reasonably believed to be engaged in any clandestine intelligence activity outside the United States" even though United States intelligence agencies have no reasonable belief that these activities "involve or may involve" a violation" of law. As we have pointed out in our analysis of Section 213 above, "clandestine intelligence activity" can mean almost any secret or undisclosed contact or association with a foreign government, political party, public official, or organization engaged in political advocacy. In effect these sections authorize potentially massive intrusions into the privacy of lawful political associational activity in violation of the First Amendment, Buckley v. Valéo, 424 U.S. 1 (1976) and amount to unreasonable searches and seizures under the Fourth Amendment, Terry v. Ohio, 392 U.S. 1 (1968), since it is clearly established that constitutional rights extend to Americans abroad. See Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (1976) Moreover, the lesser standard discriminates against this class of Americans and permanent resident aliens in violation of the Equal Protection clause of the Constitution.

Both sections 213 and 214 also set forth separate targetting standards for United States persons who may be "officials" of any foreign government, political party, or association. Under section 213, officials may be targeted if the "foreign power or organization" is "reasonably believed to be engaged in espionage or any other clandestine intelligence activity, sabotage, any international terrorist activity, or any assassination." While this is a relatively higher standard, it is meaningless protection for such United States persons since they may easily be targeted for any organizational association under the lesser standard. Under section 214, the separate standard for targeting an official is even broader, permitting the investigation of his or her political associational activity without any evidence that it is unlawful if an intelligence agency believes it "significant foreign intelligence." We contend these standards are equally defective and violative of constitutional rights.

More distressing than these vague investigative standards, numerous Americans abroad may be wholly exempt from any of the protections contained in S. 2525. Under the definitional sections for United States Persons, "associations" of Americans abroad may be presumed to be foreigners until information indicates "the contrary." (103(31)(C). Similarly, permanent resident aliens who reside outside the United States for a year may be "presumed to have lost status as a United States person for purposes" of the Act "until information is obtained

which indicates an intent on the part of such alien to return to the United States...is obtained." (§104(31)(B). As a consequence of these presumptions, intelligence agencies would be able to investigate these United States persons for any foreign intelligence purpose, employ all investigative techniques without being subject to the standards and procedures in the legislation, and target them in covert operations. We believe these presumptions are patently unconstitutional.

United States persons abroad should be subject to the same investigatory and procedural safeguards granted to Americans and resident aliens in this country. There has been no showing, compelling or otherwise, why this should not be the case. Thus, we recommend striking the presumptions and applying the same criminal standard to United States Persons abroad as we have recommended for Americans and permanent resident aliens at home in our discussion of section 213 above.

4. The Danger of Open-Ended Intelligence Investigations Authorized in Title II.

As previously noted, whenever an intelligence agency "reasonably" believes" a United States Person is engaged in the activities specified in sections 213 and 214, it may conduct a full scale intrusive investigation. Without ever requiring more than a "reasonable belief" that the target is engaged in dangerous or criminal activities, Title II permits the investigation to continue indefinitely. Obviously this magnifies the intrusiveness of the surveillance and constitutes a further departure from the principal that United States persons should only be investigated under a criminal standard.

The key sections that must be examined are 216 and 217 of Title II. Under section 216, investigations based on a "reasonable belief" may be initiated for ninety days in writing, and extended for another ninety days in writing. After 180 days, however, the investigation may be continued for an unspecified period if the Attorney General or his designee makes a written finding under section 217 that the investigation is "necessary and reasonable." While that finding requires the Justice Department official to consider the degree to which the investigation violates the rights of the target, the "importance" of the information to be collected, or the likelihood, immediacy, and magnitude of any threatened harm from the activity, the investigation may be continued based simply on "information gathered" which sustains a "reasonable belief" that the target is engaged in potentially criminal or dangerous conduct threatening to the national security.

As we do not believe that a "reasonable belief" even constitutes sufficient grounds to open intrusive investigations, we object even more to this authorization to continue them indefinitely on this flimsy basis. The Church Committee Report documented numerous intelligence investigations which continued for decades (e.g. the 40 year investigation of the Socialist Worker Party) without ever producing evidence of wrongdoings. As a consequence, the Church Committee recommended that dangerous or criminal activity must "soon" occur to sustain an investigation. That is not the standard or the effect of the sections in Title II which purport to limit the duration of investigations.

In order to avoid the dangerous intrusiveness of open-ended intelligence investigations, we recommend the following change in the findings required under Section 217 to continue an investigation for one additional 90 day period. The Attorney General must find that "specific and articulable facts" have been gathered in the investigation to constitute "probable cause to believe that a crime has been, is being, or is about to be committed."

5. Related Counterintelligence, Counterterrorism, and Foreign Intelligence Investigations Authorized Against U.S. Persons in Title II.

The intent of the drafters of this legislation to permit intelligence agencies to routinely investigate wholly innocent Americans and permanent resident aliens to monitor, assess, and counter foreign threats arising from foreign agent activity in the United States and even, in limited circumstances, to collect foreign intelligence, is clearly demonstrated by the investigations authorized by sections 218 through 222 in Title II.

(a) Recruitment and Target Investigations

Section 218 authorizes intelligence agencies to investigate U.S. persons "reasonably believed to be the object of a recruitment effort by the intelligence service of a foreign power by any person or organization engaged in any international terrorist activity..." Obviously foreign intelligence services make efforts to recruit U.S. persons. But instead of only authorizing intelligence agencies to watch foreign agents until they have evidence that they are recruiting particular U.S. persons, this section allows them to investigate wholly innocent persons to determine if they are susceptable to recruitment by foreign agents. This is the obvious though unstated purpose of the investigation.

Section 218 also authorizes intelligence agencies to investigate United States persons "reasonably believed to be the target of any international terrorist activity or the target of any clandestine intelligence collection activity, or...the target of any assassination attempt by any foreign person or by international terrorists..." On its face, this investigatory authority appears designed to protect innocent persons, and the section so states, but the target may not be informed of the investigation if there is "reasonable uncertainty as to whether such person may be cooperating with the foreign intelligence service or international terrorists." The target may be a suspect, and if not, may not be informed of the risk posed by the hostile activity however dangerous if it would jeopardize sources and methods. Obviously, the less intrusive means to protect a target would be to authorize the intelligence agency to watch the foreign threat until it is substantiated and then take appropriate measures to protect against it (e.g. warn the target, arrest the terrorists). But again, this section allows U.S. persons to be investigated to monitor the foreign threat.

As a possible consequence of these authorizations, scores of Americans and resident aliens might be subjected to investigation because they are reasonably believed to be objects of recruitment or possible targets of foreign agents. While the more intrusive techniques authorized in section 215 may not be used in these investigations, the agencies have extensive leeway to compile massive dossiers on law abiding citizens and resident aliens. For example, the agencies can

(1) conduct unlimited interviews, including pretext interviews of friends, business associates, and other persons who know the subject of investigation;

(2) check confidential sources, including already in place "covert human sources" or informants;

(3) engage in physical surveillance for identification purposes, including photographic surveillance;

(4) request information from the records of any Federal, State, or local law enforcement agency;

(5) and conduct a "national agency check", which by definition includes "a record check of the Federal Bureau of Investigation fingerprint and investigative files, the Civil Service

Commission security/ investigations index, the Department of Defense central investigative index, the central files of the Department of State, and when there is a reasonable likelihood that relevant biographic information will be found in such files, the central files of any other Federal agency (§204 (10));

(6) and use any other technique not included in section 215 and thereby authorized unless prohibited by law.

When we consider that "the central files of any other Federal agency" include tax, social security, employment, welfare, medical, and other data on citizens and increasingly include more data because of computer technology and interface, we can begin to grasp the potential breadth of these investigative authorizations.

This departure from traditional counterintelligence erodes the principle that citizens should be free from unconsented investigation so long as they obey the law. These statutory authorizations provide a ready pretext for any adminstration determined to maintain surveillance or compile dossiers on those who dissent from its foreign policy or activities. It is a departure which should be rejected by the Congress. We recommend that the recruitment investigation be stricken from the charter and the target investigations be authorized only with informed consent.

(b) Contact Investigations

Section 220 authorizes the investigation of any person who has "contact" with any person "reasonably believed" to be engaged in "espionage or any other clandestine intelligence activity." Again, this is further sweeping authorization to investigate law-abiding Americans and permanent resident aliens to monitor foreign threats by working backward from U.S. persons in order to determine the nature of the threat.

For example, the contact is not confined to clandestine meetings which evidence some intent on the part of the U.S. person to collaborate with a hostile foreign power. Arguably, it permits investigation of any member of Congress who attends embassy parties or any person who has contact with bloc country visitors. Having any contact with a member of the Communist Party, U.S.A would also be grounds for investigation under this section.

While the investigation is limited to "identifying" the U.S. person and determining whether he or she "currently has, has had, or will have access to any information, disclosure of which to a foreign power would be harmful to the United States," these are hardly limitations. Identification may include a complete biography of a person, as well as a detailed profile of social habits, political views, and associations. In these investigations, the techniques permissible in recruitment and target investigations may also be used to "identify." The further qualification as to "information" which if disclosed to a foreign power would "harm the United States" covers a wide range of non-classified and political information (e.g. that a U.S. Senator opposes the Vietnam War policy of the Administration).

This section must be substantially revised. It should cover only substantial and clandestine contacts which give some evidence that a U.S. person may be collaborating with a foreign agent. Information should be defined and limited to properly classified information. The charter must close off these open-ended opportunities for U.S. intelligence agents to focus investigations on Americans rather than primarily on foreign agents to fulfill their counter-intelligence mission.

(c) Foreign Intelligence Information.

Section 219 authorizes U.S. intelligence agencies to investigate law abiding U.S. persons to gather positive foreign intelligence "not otherwise obtainable." Although limited to "information about the United States person "essential to understanding or assessing the foreign intelligence" and to"interviewing any other person to whom such United States person may have voluntarily disclosed such foreign intelligence," this authorization is wholly unacceptable and a dangerous precedent.

As we have argued throughout, no citizen should be investigated without suspecting him of criminal activity even when the investigation relates to potential criminal activity. Here,there is not even the potential for crime as a predicate for investigation, but simply the intelligence agency's need to gather foreign intelligence broadly defined.

While on its face, the section's stated limitation that inquiries be confined to "interviewing" other persons seems to be innocuous, the section does not preclude "pretext interviews" designed to deceive persons into disclosing the information sought from or about the target of the investigation which they would not otherwise have disclosed. Posing as businessmen, lawyers, foreign journalists, police officers, bartenders, and cocktail hostesses, intelligence agents could attempt to find out about the foreign policy views of members of Congress, the business dealings of U.S. corporations abroad, the financial status of foreign corporations abroad, or the sexual preferences of foreign ministers, ad infinitum.

We believe the President's Executive Order authorizes this kind of collection on a larger scale without limiting investigative techniques so rigidly. Others, such as former Director William Colby, would go further. In recent testimony before the House Judiciary Committee, he suggested permitting electronic surveillance against resident aliens for positive intelligence purposes wholly in disregard of their Fourth Amendment rights. He would not require that they meet the definition of "agent of a foreign power" under S. 1566 for purposes of surveillance.

We state for the record that we object to Section 219 as drafted and to any proposal to expand its authorization either with respect to what may be collected or by what means. This would make a mockery of the stated purpose of this legislation to control and restrict dangerous intelligence activities.

(d) Potential Source Investigations

Section 221 authorizes an intelligence agency to investigate any United States person "who is reasonably believed to be a potential source of information or operational assistance." Although the section appears to require the consent of the person investigated in most cases, a proviso that consent need not be obtained whenever it might jeopardize the activity for which information or assistance is sought" means most of these investigations will be non-consensual. Because intelligence agencies believe secrecy to be essential, they will view obtaining consent as jeaprodizing "activity" in most cases.

This authorization permits extensive investigations of unwitting United States persons. Millions of Americans are potential sources of information or assistance given the breadth of the field of intelligence inquiry authorized in this legislation. More importantly, it provides a backdoor basis for intelligence agencies to target and establish files on members and associates of every person or organization of interest under the pretext of developing potential sources or informants.

While only three investigative techniques are permitted, namely, publicly available information, interviews, and national agency checks, these are sufficient to develop dossiers on innocent Americans. We have already discussed the potential for conducting "pretext interviews" (see discussion of section 219 above on Foreign Intelligence Information) and the breadth of information available through "national agency checks" (see discussion of Recruitment Investigations above). We note that interviews could also include chocking with established informants and confidential sources and that publicly available information appears to include attending meetings and gatherings of citizens so long as they are public to collect intelligence on persons.

We believe any investigation of a potential source should be consensual. Otherwise, this authorization should be omitted from the Charter.

(e) Security Investigations

Section 222 of Title II authorizes three separate investigations to permit U.S. intelligence agencies to protect their installations, or personnel, communications, sources and methods by surveillance of United States persons. We have problems with all three.

(i) Protecting Against U.S. Persons or Within the Vicinity of Installations.

Section 222 (a) permits intelligence agencies to investigate U.S. persons on or in the vicinity of their installations to determine whether they should be "excluded from that installation or from the immediate vicinity of that installation." We believe it should be limited to whether a person should be excluded from an installation, and we see no reason why persons cannot be notified that to enter that installation may require a limited security investigation. The techniques are appropriate if national agency checks do not include "the files of any other Federal agency" which is unnecessarily overbroad.

We believe the broader purpose of investigating persons to determine whether they should be excluded from the vicinity of an installation is inappropriate. Unless a crime is being committed or threatened, we do not believe a person can be excluded from the vicinity of the installation. If it cannot be done, the inquiry should not be conducted for this purpose. Further, we do not know what the "immediate vicinity" means since it is not defined. In Operations Resistance and Merrimac, the CIA took the position that the immeidate vicinity to Langley included the whole metropolitan area.

(ii) Physical Threats

Section 222 (b) permits U.S. intelligence agencies to investigate U.S. persons who pose "a threat to the physical safety of any installation or of any personnel of that entity..." We believe this investigatory authorization is unnecessary and unwise.

First, it authorizes an entity to conduct physical surveillance of U.S. persons on the grounds or within the vicinity of the installation. We assume such surveillance is traditional and need not be authorized.

Second, if the threat is posed in the immediate vicinity, that will be detected by physical observation, or under section 222(a).

Third, a U.S. person who poses a physical threat either is covered under section 213 of the charter (e.g. sabotage) or under the criminal laws of the United States. The section is superfluous.

If the purpose is to allow the CIA or NSA to conduct investigations of U.S. persons to protect against physical threats to installations and personnel in the United States, it is contrary to the policy to restrict the CIA from conducting internal security, counterintelligence, or any law enforcement functions in the United States. If a threat is posed, these agencies should turn over the information to the FBI which has jurisdiction to conduct a 213 investigation or a criminal investigation of the persons who pose the threat to installations or personnel in the United States.

In the face of the need to restrict the CIA to foreign intelligence and counterintelligence operations abroad and the evidence on the public record that the CIA used this "physical threat" pretext to conduct massive investigations of civil rights and anti-war activists, it is inexpicable why this section has been drafted in this way.

(iii) Employee and Contractor Investigations

Section 222 (c) authorizes intelligence agencies to investigate any employee or contractor or employee of a contractor "to determine"whether they have violated any rule or regulation of that entity pertaining to the security of that entity's installations, personnel, communications, sources or methods." The investigations may be extremely intrusive, involving all of the techniques set forth in section 215. Certainly, it can be and must be more narrowly drafted.

First, employees should be notified that they are subject to such investigations when they are hired. In no case, however, should "employee" include former employees, particularly with respect to the CIA and NSA. Former employees should only be investigated under section 213 or 214, or for violation of the criminal laws of the United States, and only by the FBI in the United States.

Second, contractors and their employees should be notified that they may be subject to such investigations before they enter into the contract. Moreover, this must include all of the employees of the contractor involved in the work of the contract. Employees who are not informed or who do not work on the contract should only be investigated under section 213, or the criminal laws of the United States, and only by the FBI in the United States.

B. Counterintelligence, Counterterrorism, and Foreign Intelligence Investigations of Foreign Persons in the United States.

Section 225 of Title II authorizes intelligence agencies to conduct intrusive counterintelligence, counterterrorism, or foreign intelligence investigations of foreign persons in the United States. The grant of authority is sweeping and unconscionable.

First, the basis for investigation is open-ended. The agencies can investigate any officer or employee of any foreign government or organization merely based on the person's status. They may investigate any foreign person who may have any secret association with any foreign government, political party, or political association however innocent (e.g. clandestine intelligence activities) simply if the circumstances indicate that he or she may have such relationships. More sweeping, foreign persons can be investigated if the agencies believe it would constitute "significant" foreign intelligence, a standard that easily permits targeting of any resident alien in this country who takes a trip abroad or who teaches or writes about his or her foreign experiences, or who engages in political activity; or any foreign businessman, politician, teacher, or scientist who visits this country. It also permits investigation of Americans in a number of cases.

In effect, any foreign person of interest to the intelligence community, whether an officer or employee of a "foreign government or organization," a foreign visitor, or resident alien in the United States may be subjected to intrusive investigations involving every investigative technique from pretext interviews to inspection of confidential records and informant penetration. More distressing, if foreign persons meet any of the standards for collection applicable to Americans, investigations can be conducted without "any limitation" under the charter "on duration or techniques of collection that would be applicable to collection concerning a United States person."

As we have argued in this memorandum, intelligence agencies should focus on foreign threats from abroad. But while "foreign persons" include those hostile foreign intelligence officers, foreign terrorists, and persons who may have valuable foreign intelligence, the statute is not crafted to focus intelligence agencies on these persons but broadly sweeps within its definitions all resident aliens, officials from democratic governments, and many Americans.

While different standards may apply for different categories of foreigners in the United States, the overbroad basis for investigation proposed here and the removal of procedural safeguards on the use of investigative techniques wholly ignores that foreigners, even foreign espionage agents, are protected under the Fourth Amendment of the Constitution. We point out again, as we did in criticizing the foreign person standards in S. 1566 that the Fourth Amendment refers not to the rights of citizens or residents only, but to the "rights of the people" to be free from unreasonable searches and seizures. Just as the term "person" in the Fifth Amendment has long been held to be "broad enough to include any and every human being within the jurisdiction of the

republic," Wong v. United States, 183 U.S. 228, 242 (1896), the "people" who are protected by the Fourth Amendment have been held to include all persons within the territorial jurisdiction of the United States. More than fifty years ago, for example, the Supreme Court established that an alien could invoke the exclusionary rule in a deportation proceeding. United States ex. rel. Bilokumsky v. Tod, 263 U.S. 149 (1923).

The extension of full Fourth Amendment protection to foreign nationals has been recognized by lower courts, e.g. In re Weinstein, 271 F. 5 (S.D. N.Y. 1920), aff'd 271 F. 673 (2nd Cir. 1920) (Learned Hand, J.) and was noted by the Supreme Court in Abel v. United States, 362 U.S. 217 (1960). Abel involved a joint investigation by the FBI and immigration officials of a suspected Russian spy. A search was made of the suspect's hotel room at the time of his administrative arrest preliminary to deportation, with FBI conducting a subsequent search on its own. These searches turned up not only proof of Abel's alienage and illegal entry into the United States, but of espionage (coded messages and microfilm), and the government brought an espionage prosecution and obtained a conviction. Abel appealed on the ground that the evidence on which he was convicted was the fruit of an illegal search, and therefore should have been excluded. The Supreme Court affirmed the conviction by finding that the search had been incidential to a valid deportation arrest and was therefore legal itself. But the important point is that it was assumed by the majority (and stressed by the dissenters) that aliens--even those who entered this country illegally and who were engaged in espionage--were entitled to full Fourth Amendment protection.

Although a deportation arrest like the one conducted in Abel may be based on less than probable cause, an alien who is investigated for purposes other than deportation is fully protected by the Fourth Amendment. As the Seventh Circuit Court of Appeals recently stated, plenary Congressional powers to deport aliens "cannot be interpreted so broadly as to limit the Fourth Amendment rights of those present in the United States." Illinois Migrant Council v. Pilliod, 54 F. 2d. 1062 (7th Cir. 1976). By the same token, the border searches of automobiles for illegal aliens on less than probable cause, see. e.g. United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976), cannot be taken to permit sweeping intrusive noncriminal surveillance of foreign visitors anywhere in the United States. See Alameida-Sanchez v. United States, 413 U.S. 266 (1973).

In a recent letter from the Office of Legal Counsel of the Justice Department to Honorable Edward P. Boland, Chairman, Permanent Select Committee on Intelligence House of Representatives dated April 18, 1978, the Justice Department essentially affirmed this position, stating that:

> the existing cases indicate that alien employees or agents of a foreign power are in the same position as other aliens. That is, unless the United States has consented to grant them immunity, they are fully subject to its laws while in its territory...(and) within the protection of the Fourth Amendment.

Certainly the intrusive searches proposed in section 225 are not limited to persons entitled to diplomatic immunity. As such, their substantial departure from the requirements of the Fourth Amendment's standard for investigative searches, set forth in Terry v. Ohio (see discussion at page 9 supra) raise serious Fourth Amendment questions as to the constitutionality of this charter authorization. We believe the section should be redrafted to comply with Fourth Amendment principles and to focus intelligence agencies on clear foreign threats.

Fifth, there is no compelling reason, except "exigent circumstances", for dropping the procedural safeguards on duration and techniques under this section when certain U.S. person collection standards are satisfied.

The evidence on the record is that the counterintelligence threat to this country is posed by Soviet bloc countries. If so, the standard should be drafted to reflect the evidence. If it was, civil liberties could be protected as well. The same is true for foreign intelligence. There is no compelling reason demonstrated for clandestine and intrusive collection of this information from visitors to this country other than from some visitors from closed countries. The counterterrorism interests of this country can best be protected by surveillance of known foreign terrorists and associates who come to this country (which information we receive from intelligence gathered abroad by U.S. and other intelligence agencies and police forces). Here again, careful drafting can protect the national interest and civil liberties. The necessity for this redrafting is recently demonstrated by the revelation that the State Department has disagreed with the FBI over who should be an excludable alien in almost 100 percent of the cases considered. This indicates the overbroad definition of foreign threat perceived by the FBI which

can only be regulated by tighter standards. We point out that S. 1566 included in Title III of this bill provides a starting point for a more precise standard for foreign persons.

First, the section should not apply to any U.S. persons as it presently does. For example, the definition of "foreign person" includes any "foreign power" which includes "any corporation incorporated in the United States which is directed and controlled by any government of a foreign country." (see § 204(b)(7) and (b)(8)(D)). Arguably this applies to the Communist Party, U.S.A. and other groups which may be "directed and controlled by a foreign government" (a term undefined in the legislation). Certainly it applies to organizations employing Americans. The foreign person definition should not include any United States persons.

Second, the section should limit the targeting of foreign persons to those from countries which engage in hostile clandestine intelligence activities contrary to the national security of the United States in this country.

Third, the standard for targeting should require a "reasonable suspicion" that foreign persons are knowingly acting on behalf of such foreign powers and engaging in those activities, or international terrorism, etc.

Fourth, foreign persons who are resident aliens and not temporary visitors in this country should be targeted only under the U.S. person standard under the legislation, particularly if they are not from the countries defined as engaging in hostile activities in the United States.

C. Controls on Intrusive Investigative Techniques

Section 212 provides for Attorney General approval of procedures and regulations to authorize the use of particular techniques of collection and to insure that the least intrusive technique necessary to collect the information sought is employed. Attorney General approval for the use of intrusive techniques in a particular investigation (section 215) is a further safeguard against intelligence agency abuses. But significant and fundamental changes must be made.

1. The Need to Strengthen Procedural Checks

This overall framework should be strengthened by the inclusion of the following procedural checks:

(1) Applications for the approval of intrusive techniques under section 215 should be required to include a detailed description of the specific techniques contemplated, the reasons why the use of these techniques is "necessary and reasonable" and an explanation as to why less intrusive techniques have not or would not be sufficient. The applicant should also be required to submit a plan for "minimizing" the collection of information not within the proper scope of investigation.

(2) The procedures and regulations (governing the use of investigative techniques approved by the Attorney General) should be uniform for the whole intelligence community. Different agencies should not be permitted varying degrees of latitude in intruding upon the privacy of U.S. persons and foreigners (under similar circumstances) within this country.

(3) The Attorney General designee referred to in section 215 responsible for approving the employment of intrusive techniques should be confirmed by the Senate and should not be permitted to also act as an official of any intelligence agency. These provisions would insure the high level review from outside the intelligence community intended in the statute.

(4) "Pretext interviews" - interviews in which the interviewer's affiliation with the agency is deliberately concealed or in which the interviewer claims a false affiliation in order to gain the trust of the interviewee - should require Attorney General approval under section 215. Pretext interviews are a covert investigative technique which can uncover a considerable amount of confidential information about the subject of an investigation.

Because investigators can assume roles designed to induce the interviewee to divulge information, pretext interviews can effectively be directed at specific aspects of a subject's life. Moreover, by assuming roles which gain the interviewee's trust, interviewers can pry deeply into the private life of a subject. Information obtained from interviewing a subject's accountant, for example, can easily be as detailed and as personal as information obtained in a record search - a technique which requires Attorney General approval in S.2525 and which we believe should require a judicial warrant. Indeed, an interviewee might well divulge information which could not be gleaned from a record search - e.g. information about the sexual habits of the subject of investigation. The volume and the nature of the information which can be obtained through the use of this covert investigative technique argue for high level review of its employment.

Further, the nature of pretext interviews is conducive to the collection of misinformation. A well-meaning neighbor, for example, might mislead some one who presented himself as an insurance investigator. The possible damage which could be done by a malicious interviewee is incalculable.

Finally, pretext interviews can effectively cause the dissemination of misinformation about the subject of investigation resulting from "gossip."

Attorney General approval should be required to safeguard against the abusive use of pretext interviews because of the volume and nature of the information obtained and the liabilities inherent in the employment of this technique.

These additional safeguards would strengthen the essentially sound procedural scheme for the approval of investigative techniques.

2. New Warrant Procedures

Our major objection to the controls on the use of intrusive investigative techniques implemented in Title II is in the application of procedural safeguards to particular intrusive techniques. Attorney General approval is not the ultimate safeguard against abuse. An independent check on Executive discretion should be provided for certain techniques which, in effect, are as intrusive as electronic surveillance - an extremely intrusive technique for which S.2525 requires that a judicial warrant be obtained. Specifically, we recommend:

(1) "The direction of covert human sources to collect information" - the targeting of informants - should be placed

under a warrant requirement similar to that required for electronic surveillance within the U.S. in the "Foreign Intelligence Surveillance Act of 1978" (S.1566), recently passed by the Senate and incorporated into Title III of S.2525.

(2) Record searches - requests for information pertaining to tax returns, employment, education, medical care, insurance, telecommunications services, credit status, or other financial matters from the records of any private institution or any Federal, State or local agency - should be employed only upon judicial authorization.

(3) A judicial warrant should be required for the use of "mail covers."

The proper pairing of procedural safeguards and particular intrusive investigative techniques is essential to preventing undue intrusion upon the constitutionally recognized right to privacy. Warrants for techniques which are as intrusive as wiretapping are necessary checks against intelligence abuses.

For the same reason that a warrant is required to conduct a wiretap, it should be used to guide and restrict the use of other equally intrusive techniques. Nowhere is the need for judicial supervision greater than in cases involving national security, where First and Fourth Amendment rights are simultaneously jeopardized. As the Supreme Court pointed out in Keith:

> National security cases. . . often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech . . . History abundantly documents the tendency of government--however benevolent and benign its motives--to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. (See U.S. v U.S. District Court (407 U.S. at 306))

The objection that a warrant is not constitutionally required in such instances is unpersuasive. The First Amendment guarantees freedom of speech, of the press, of assembly and of the right to petition for redress of grievances. The Supreme Court has often observed that the effective exercise of these rights requires associational privacy. Citizens must be able to meet and associate privately to discuss their political beliefs and plans and to consider what lawful actions to take to promote their ideas. Records relating to these associational activities are protected unless they contain evidence of crime.

The right of associational privacy was firmly established by the Supreme Court in repelling the effort of the State of Alabama to compel disclosure by the NAACP of its membership lists. NAACP v. Alabama, 357 U.S. 499 (1958). It was sustained and emphasized most recently by the Court in its decision modifying certain intrusive disclosure provisions of the Federal Election Campaign Act. Buckly v. Valeo, 424 U.S. 1 (1976). As Chief Justice Burger pointed out in his concurring opinion:

> (S)ecrecy and privacy as to political preferences and convictions are fundamental in a free society. . . This Court has seen to it that governmental power . . . cannot be used to force a citizen to disclose his private affiliations, even without a record reflecting any systematic harassment or retaliation. . . For one it is far too late in the day to recognize an ill-defined 'public interest' to breach the historic safeguards guaranteed by the First Amendment.

If the First Amendment prevents the government from compelling disclosure of information related to lawful political and other associational activity, it must also require restraints to be imposed on the use of intrusive investigative techniques to gather such information.

The absence of an explicit ruling by the Supreme Court on these specific issues does not preclude the Congress from acting to protect civil liberties. The question for Congress is whether the clear danger to civil liberties posed by the targeting of informants and the conduct of record searches and mail covers is balanced by a significant public interest in employing these techniques without the safeguard of judicial review. It is not.

(a) The intrusive nature of informants, record searches and mail covers

(i) Informants:

The record on the use of paid informants in political groups shows a massive violation of First Amendment rights. The worst abuses in the last three decades occurred in the undercover counterintelligence provocations of the COINTELPRO and COMINFIL programs; the Church Committee also documented many examples of routine informant activities which cut deeply into associational privacy.

Informants are at once the most complex, comprehensive and unpredictable investigative tools that the Bureau employs. The informer is, as the Church Committee pointed out, a "vacuum cleaner" for information; the information provided is often distorted or inaccurate and in this respect is far less reliable than information obtained by a wiretap.

An informer who pretends to be a member of a political group cannot simply gather information. He or she must participate actively in the decision making of the organization, taking stands on issues and seeking to enhance credibility by influencing the positions the organization takes and the actions in which it engages.

Consequently, the authorization contained in section 244(c) for undisclosed participation in a U.S. organization for investigative purposes is violative of the First Amendment rights of members of organizations engaged in protected activities. The proviso that investigations be conducted so as not to influence the lawful activities of the organization or its members is inconsequential; such influence is inevitable. The directing of informants to infiltrate organizations engaged in First Amendment activities or to pose as members of any such organization should be prohibited.

While it is true that the Supreme Court has held that an individual has no independent Fourth Amendment right to be free from warrantless informer surveillance, Hoffa v. United States, 385 U.S.293 (1966), the Court has never directly addressed the question of what restrictions may be constitutionally required when informers are used to conduct surveillance of private political or other associational activities. The Court has intimated, however, that here the balance would shift and a warrant would be required. As Justice White put it in his opinion in United States v. White, 401 U.S. 745, 752 (1971), upholding the legality of a "wired informer" targeted at an individual, "our problem, in terms of the principle announced in Katz v. United States, 389 U.S. 397 (1967), is what expectations of privacy are constitutionally 'justifiable' --what expectations the Fourth Amendment will protect in the absence of a warrant." Since an expectation of associational privacy is constitutionally justifiable, the First and Fourth Amendments converge to require a warrant for the use of informers in criminal investigations of groups.

(ii) Records Searches

The inspection of private records is a form of intrusive search which raises both First and Fourth Amendment questions. In Burrows v. Superior Court, 13 Cal. 3d 238, 529 P.2d 590 (1974), the California Supreme Court recently pointed out in invalidating a warrantless search of copies of cancelled personal checks in the custody of a bank that;

> "For all practical purposes, the disclosure by individuals or business firms of their financial records to a bank is not entirely willful since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings the depositor reveals many aspects of his personal affairs, opinions, habits, associations. Indeed the totality of bank records provides a virtual current biography. The development of photocopying machines, electronic computers and other sophisticated instruments have accelerated the ability of government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds. Consequently, the judicial interpretations of the reach of the Fourth Amendment constitutional protection of individual privacy must keep pace with the perils created by these new devices."

Investigative searches of private records have become increasingly routine in recent years. With the arrival of new computerized storage systems and methods of facilitating access to and exchange of computerized information (e.g., the bank industry's fledgling "electronic funds transfer" system), government investigations have turned increasingly to private records. At the same time, legislation such as the Bank Secrecy Act of 1970 has facilitated record searching by requiring private records to be retained for longer periods of time. In short, a revolution in information technology has far outstripped the expectations people have about the privacy of their personal records.

Records searches are an important and permissible criminal investigative technique. Nevertheless, they can intrude substantially on associational privacy and therefore raise the same First and Fourth Amendment issues that arise in the case of informant searches. Although the Supreme Court has held that a warrant procedure is not constitutionally required for bank records searches, United States v. Miller, 96 S.Ct. 1619 (1976), statutory guidance is clearly needed in this area.

Government investigators should not be able to obtain access to records without legal process - i.e. an administrative summons, subpoena or search warrant issued upon a showing appropriate to the method of process. The need for secrecy in intelligence investigations makes a warrant procedure the most

practical means of safeguarding the privacy of confidential records; objections to legislation currently before Congress (HR 214) which would require disclosure of access to recrods would thus be met.

(iii) Mail Covers

Mail covers permit the systematic recording of all persons, businesses and organizations with whom a person corresponds. Such information can often reveal significant personal information as well as information about a person's political, associational and religious practices which is protected by the First Amendment.

This investigative technique is quite similar to the use of pen registers to record all telephone numbers both reaching a given number and reached by that number. The use of pen registers for foreign intelligence, counterintelligence or counterterrorism purposes within the U.S. would require a warrant under S.1566. The intrusiveness of the technique and its similarity to a technique which already would require a warrant under Title III indicate that the warrant requirement should be extended to include mail covers.

(b) The warrant requirement would not jeopardize legitimate intelligence investigations

The above techniques - the targeting of informants, records searches and mail covers - are extremely intrusive investigative techniques and bear a striking resemblance to investigative techniques the use of which require judicial authorization in the form of a warrant. employment should not be left to the sole discretion of the Executive. Judicial review should be required by law. This conclusion is especially persuasive in the absence of significant public interests against outside review of Executive discretion:

(1) The value and pervasiveness of informants as an investigative tool is not an argument against subjecting the technique to judicial scrutiny. One can think of any number of investigative techniques practiced in police states - e.g. torture, area searches - which would be valuable to investigators in the U.S. Such a statement is clearly no endorsement of the activity. Moreover, the value of informants in counterintelligence and counterterrorism investigations is subject to question. James Q. Wilson claims that:

> Certain groups are less vulnerable to being penetrated by, or being deceived by an in-

formant than others. Among these are domestic political revolutionaries, especially those with strong feelings of mutual solidarity, and foreign spy rings. Whereas a member of a gang of bank robbers might be induced to give information in exchange for money or leniency, a revolutionary or spy might have a price no government could pay.

(2) It is true that a warrant requirement would place a bureaucratic roadblock in the path of investigators intent on resorting to these techniques. Such a safeguard is proper when intrusive techniques such as these are contemplated. Certainly, it has not proved to be insurmountable in the case of electronic surveillance.

(3) Courts are the most leak-proof arm of government; there is no reason to believe that federal courts cannot maintain secrecy where necessary in intelligence cases. Warrant applications could be heard by the same special court provided for in Title III. Indeed, the confidentiality of sources might ultimately be protected from exposure in civil suits resulting from the abusive use of informants if the use of such techniques were subjected to prior judicial scrutiny.

(4) There is no reason to believe that a federal judge cannot apply a statutory standard and determine whether the use of one of these intrusive techniques is warranted. Certainly, the expertise of theAttorney General is as open to question as that of a judge.

In sum, the procedural framework for the authorization of investigative techniques is generally sound but must be improved as recommended above. The application of procedures to particular techniques should be revised. Pretext interviews should require Attorney General approval under section 215. The targeting of informants and the use of record searches and mail covers should be subjected to judicial scrutiny as a check on executive discretion. The use of informants engaged in First Amendment activity is particularly threatening to civil liberties and should be prohibited.

D. Provisions for Foreign Electronic Surveillance, Unconsented Physical Searches and Mail Opening in Title III

Title III extends the provisions of S.1566 to foreign electronic surveillance, unconsented physical searches and mail opening by providing for a warrant requirement for the conduct of these activities similar to that mandated for electronic surveillance within the U.S.

We did not vigorously oppose the passage of S.1566 because it was an improvement upon current law. We would not object to the logical extension of its provisions to foreign electronic surveillance in so far as these provisions of Title III also improve upon current law. Such an extension must be based upon the presumption that U.S. persons abroad are entitled to the same constitutional protections as those afforded them at home.

We do not support the proposed extension of S.1566 to the conduct of physical searches and mail opening. Although these provisions of Title III largely parallel those covering electronic surveillance, they retreat significantly from protections afforded Americans and resident aliens by current law. The authorizations for these activities embodied in S.2525 are clear violations of the Fourth Amendment.

Our discussion of Title III which follows proceeds from the assumption that the debate over the provisions of S.1566 has ended. It is limited to those provisions of the title which expand upon that bill.

1. Foreign Electronic and Signals Intelligence

We support legislation in the area of foreign electronic and signals intelligence because the constitutional rights of Americans abroad should be recognized and protection for those rights guaranteed and expanded by a statute. However, legislation which retreats from current law would be worse than congressional inaction.

Provision for foreign electronic and signals intelligence must recognize that Americans abroad are not subject to any reduction in constitutional protection. This principle has been upheld in ACLU litigation. (See Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144 (1976)). Applied to electronic surveillance as dealt with in Title III, it requires that section 321 embody at least the same standards, procedures and restrictions regarding the targeting of U.S. persons as those set forth in section 311 for targeting U.S. persons within the U.S. Section 321 as written departs from the provisions of section 311 to the detriment of the civil liberties of U.S. persons abroad:

(1) Section 321 authorizes the targeting of a U.S. person who is an officer or employee of a foreign power residing abroad under a non-criminal standard for purposes of obtaining any information fitting the broad definition of "foreign intelligence information." This standard is a clear threat to the civil liberties of a whole class of U.S. persons of which the majority is certainly law abiding. This provision has no parallel in section 311; residence abroad does not justify targeting. The section should be stricken from Title III.

(2) Section 321 provides for the targeting of fugitives from justice abroad who are U.S. persons for purposes of obtaining foreign intelligence information - once again a broadly defined term not necessarily constituting evidence of a crime. This provision is not a logical extension of the provisions of section 311. Fugitives abroad are entitled to constitutional protection, including protection from electronic surveillance for purposes of obtaining what may merely be "interesting" information. The section should be stricken.

(3) Section 321 does not require that the application for electronic surveillance certify that less intrusive means cannot provide the necessary information. Section 311 does. This omission has no logical basis.

(4) Section 321 does not restrict the duration of electronic surveillance abroad. Section 311 rightly does. Again, the omission is not logically supportable.

This list is not exhaustive. The important point we wish to make is not the details here but the broad principle - U.S. persons abroad are entitled to the same constitutional protections as U.S. persons at home. Title III must reflect this thinking.

2. Unconsented Physical Searches by Surreptitious Entry

We strenuously oppose the authorization for physical searches by "surreptitious entry" proposed in section 341. The courts have never recognized a national security exception for a physical search. Cf. United States v. Ehrlichman, 376 F.Supp. 29 (D.D.C. 1974). As the Court noted in that case, the only exception has been made for wiretapping, which has only recently been interpreted to violate the Fourth Amendment. If the Fourth Amendment was designed to protect against anything, it was unreasonable "general searches" of "persons, houses, papers, and effects" directed at citizens. This authorization would strike at the heart of the Fourth Amendment, going far beyond current law. Section 341 would:

(1) authorize unreasonable searches since it departs from the traditional standard of probable cause of a crime;

(2) authorize "general searches" by permitting multiple searches to gather "foreign intelligence information" broadly defined. This does not satisfy the Fourth Amendment's requirement as to particularity with respect to the person or place to be searched and the "things to be seized;"

(3) violate the traditional rule that except in exigent circumstances, the target of the search shall be notified. Section 341 waives the notice requirement and, in effect, authorizes burglary.

The Church Committee noted that intelligence agents who committed burglaries and other such searches recognized that they were "clearly illegal." In effect this bill would make those searches legitimate. But the judicial warrant requirement here does not change the inherent constitutional defects, since it does not meet the requirements of the Fourth Amendment.

Section 341(b) should be stricken from the bill, which would in effect limit the intelligence agencies to the conduct of physical searches under the rules of criminal procedure. Although the President's Executive Order authorizes these searches without a warrant, we believe the Order is in violation of the Constitution and subject to challenge.

However, we are prepared to discuss the terms of this section if "physical search" were defined to mean infiltration of organizations by informants or undercover agents pursuant to authorized counterintelligence, counterterrorism, and foreign intelligence investigations.

3. Mail Opening

As with physical searches, Title III would authorize a general search of a U.S. person's mail for foreign intelligence purposes. Rather than authorize the opening of a particular piece of mail, it would authorize a "general warrant" for the opening of all of a person's mail to collect foreign intelligence information rather than evidence of crime. Again, probable cause of a crime would not be required or a person notified of the search.

This was another activity which intelligence agencies considered "clearly illegal" that would be authorized by the charter. The warrant requirement does not cure the constitutional dubiousness of this new exception to the Fourth Amendment on the grounds of national security. Even the Executive Order implicitly recognizes the lack of a legal basis for this activity by authorizing mail opening only outside U.S. postal channels, although we consider this unconstitutional as well. Title III expands on the Executive

Order by authorizing mail opening in the United States postal channels. Section 351(b) should be stricken, which in effect would require intelligence agents to obtain a warrant under current and traditional law enforcement standards.

The attempt in Title III to extend the provisions of S.1566 for electronic surveillance within the U.S. to other extremely intrusive investigative techniques is plagued by retreats from current law and would effect a general slackening of protection for civil liberties. Foreign electronic and signals intelligence, conducted under standards and procedures embodied in Title III, would at once cause the targeting of U.S. persons under standards which bear no resemblance to the requirements of the Fourth Amendment and legitimize the wholly erroneous notion that U.S. persons abroad are subject to the diminution of their constitutional rights. At the very least, the standards and procedures for electronic surveillance of U.S. persons abroad should be equal to those embodied in S.1566. The attempt to extend the provisions governing electronic surveillance to unconsented physical searches and mail opening should be abandoned. Such an enterprise results only in clear violations of the Fourth Amendment.

E. Retention and Dissemination of Information Concerning U.S. Persons

The private information which is maintained and disseminated by intelligence agencies can have a devastating impact on the lives of Americans. As the political history of the Watergate era demonstrates, this information is the single most effective tool for political manipulation at the disposal of the government. If the maintenance and use of private information is not sharply limited, institutionalized intelligence abuses are inevitable.

S.2525 does virtually nothing to restrict the loose information maintenance and exchange practices which intelligence agencies follow today. This failure to restrict maintenance and retention is particularly dangerous in light of the bill's sweeping authority to collect information about U.S. persons. Thus, there is no control mechanism built into the process at any stage: in general, whatever is collected may also be maintained and disseminated.

Section 231 permits agencies to retain private information indefinitely if any one of seven conditions is met. Two of these conditions are broad enough to encompass virtually any imaginable circumstance. The first allows an agency to retain any private information "when it is reasonably believed that such information may provide a basis for initiating" any of the types of investigation authorized by the bill. [Sec.231(a)(2)]. This compounds the low standard for initiating investigations by permitting an agency to compile unlimited amounts of private information to justify any investigation it might seek to initiate in the future.

Thus, information concerning the fact that an American citizen telephoned the Soviet embassy to inquire about a visa could be retained indefinitely in the CIA files on the ground that it might eventually provide a basis for initiating a "recruitment" or "contact" investigation of the American under Sections 218 or 220. A second broad category of authority for maintaining private information covers any information "collected in the course of authorized foreign intelligence, counterintelligence, or counterterrorism intelligence collection [which] is essential for understanding or assessing such intelligence" [Sec. 231 (a) (5)]. Again, it is difficult to discern any realistic limit to this authorization, particularly in light of the bill's sweeping definitions of "foreign intelligence, counterintelligence and counterterrorism" information. Clearly, for example, it could be considered "essential" to retain information about the members of an antiwar group under investigation because of the group's contacts with a foreign political organization, in order to "understand" or "assess" the purpose of these contacts. This line of reasoning, it should be recalled, is what led to the development of the CIA's extensive Operation CHAOS files on domestic antiwar activities.

Apart from these sweeping authorizations, the most striking feature of Section 231 ("Retention") is that it contains virtually no minimization requirements either with respect to private information about persons who are not targets of authorized investigations, or with respect to persons who are targets but the information is irrelevant or outdated. Presumably the reason no obligation to minimize is imposed on the agencies is that the authority to retain information is so broad that minimization would be virtually impossible. In any event, it is astonishing that the agencies are permitted to retain private information collected as a result of pure coincidence (e.g., the telephone conversation of an American with a Soviet Embassy clerk about a visa). Furthermore, there is no obligation to purge or seal private information at any time, which ignores Church Committee Recommendation 65 that personally identifiable information about Americans obtained in terrorist or foreign counterintelligence investigations should be "sealed or purged...as soon as the investigation is terminated by the Attorney General or his designee."

The authority to disseminate private information [Sec. 232] is no less sweeping than the authority to retain it. The general rule is that anyone within the collecting agency can have access to private information on a "need-to-know" basis [Sec. 232(b)]. With respect to dissemination outside the collecting agency, slightly different standards apply to foreign intelligence private information on the one hand, and counterintelligence or counterterrorism private information on the other. The foreign intelligence standard is whether the private information is "essential to an understanding or assessment of the information's importance" [Sec. 232 (c)]. The counterintelligence or counterterrorism standard is whether the outside agency has a "direct interest" in the information [Sec. 232 (d)]. In both cases the standard is so loose as to make a mockery of any claim that dissemination can be limited and private information protected.

in this section
Perhaps the most dangerously loose standard of all, however, is the standard for disseminating private information to foreign governments [Secs. 232 (d) (2), (e) (2)]. Any information indicating that a U.S. citizen "may be engaged in international terrorist activities or in clandestine intelligence activities" can be disseminated to any foreign government which has a "direct interest" in the information, so long as dissemination "is clearly in the interests of the United States." Given the bill's broad definitions of "international terrorist activities" and "clandestine intelligence activities," this section is subject to enormous abuse. For example, private information about activities which are "of direct interest" to a foreign government may not be subject to use or dissemination in this country. Take, for example, information about an American citizen's membership in a pro-Palestinian organization in the United States. That information is protected under the First Amendment. Nevertheless, the information may be "of direct interest" to the government of Israel where membership in pro-Palestinian organizations is illegal. Since there is a close cooperation between U.S. and Israeli intelligence agencies, a U.S. agency could reasonably assume that dissemination of this information to Israel "is clearly in the interests of the United States." The result could be devastating: the American citizen could be arrested in Israel and charged with being a member in the United States of an organization banned in Israel, but lawful in the United States, based solely on information disseminated by a U.S. intelligence agency. Such an eventuality is by no means far-fetched under Section 232 (d) (2).

An additional source of great potential abuse in the area of dissemination is Section 232 (g), which authorizes broad dissemination of private information about potential recruits. Under this section, an intelligence agency can simply request of another agency information about the "suitability" of a particular person "as a source of information or assistance." The information must be disseminated if the requesting agency certifies that "there is a serious intention to use" the person as a source. This provision compounds the violation of privacy of the potential source which would result from a source recruitment investigation under Section 218.

<u>These Sections (231 and 232) must be totally revised. They should provide for minimization, access by record subjects and prompt and periodic purging or sealing of private information. Dissemination of such information should be limited to narrow and compelling circumstances. Foreign governments should not be given access to private information about American citizens unless it relates to an activity which is criminal under the laws of the United States. Civil and criminal sanctions for wrongful dissemination of private information should be provided. Random auditing of intelligence agency files by the General Accounting Office or some other independent agency should be authorized.</u>

F. Prohibitions Needed to Protect the Rights of Americans From Abusive Intelligence Activities.

The public record of official misconduct by our intelligence agencies supports the need to enact four strict prohibitions into law in order to protect the rights and liberties of citizens and resident aliens of the United States. First, there must be a flat ban on political surveillance. Second, there must be a prohibition on the infiltration of any organization engaged in lawful First Amendment activity for purposes of cover or investigation. Third, a total ban on "preventive action" or COINTELPRO must be established. Finally, the CIA must not be permitted to engage in any counterintelligence or counterterrorism investigations directed at citizens or resident aliens in the United States or any internal security or law enforcement activities in the United States. Although in principle, the drafters seem to recognize the need for these prohibitions, they have included enough exceptions to purported prohibitions as to have the effect of broadly authorizing these dangerous activities.

1. The Statute Permits Rather than Prohibits Political Surveillance.

The need for a ban on political surveillance is demonstrated. The public record shows that U.S. intelligence agencies conducted massive surveillance programs directed at citizens simply because they did not agree with these persons' lawful political advo or activities. S. 2525 recognizes the need and contains an apparent prohibition. Section 241 states that "no intelligence activity may be directed against any United States person solely on the basis of such person's exercise of any right protected by the Constitution or laws of the United States..."

In fact, however, the net effect of S.2525's approach is to authorize such investigations. There are so many non-criminal investigations in Subpart C of Title II that can be targeted against persons engaged in lawful political activities that the term "solely" provides no protection whatever. Even counterintelligence and counterterrorism investigations authorized under section 213 and foreign intelligence investigations authorized under section 214 permit such investigation because of the charter's failure to establish a strict criminal standard. Moreover, no protection for non-United States persons, including resident aliens, is afforded even by the proviso. Paradoxically, some Americans are also exempted from the minimal protection of section 241 because they are defined as non-U.S. persons (e.g. corporations "directed or controlled by a foreign government or associations of Americans abroad until it is established that they are United States persons.)

The only way to provide a ban in the charter is to drop the non-criminal investigations, require a criminal standard for intrusive investigations, and strike the word "solely" from section 241. We strongly recommend all of these changes.

2. The Statute Permits Rather than Prohibits Infiltration of Organizations Engaged in Lawful First Amendment Activity.

To protect the constitutional guarantees of privacy of political association and the exercise of constitutional rights, intelligence agents must be prohibited from posing as members of or infiltrating any lawful political organization. S. 2525 appears to recognize the principle by proposing to restrict "undisclosed participation" in such organizations, but the exceptions effectively authorize this practice broadly. S. 2525 also recognizes the reason for restricting such participation, by adding a proviso that such participation shall be conducted "so as not to influence the lawful activities of the organizations and members." We submit that mere participation influences the lawful activities of First Amendment organizations and that the proviso is a contradiction in terms. To participate is to join, act, vote, and perhaps even lead, which can only mean "to influence."

Section 244 (c) authorizes infiltration of organizations not necessarily targeted for investigation under sections 213 and 214 if it is necessary to collect information about, for example, another organization. It also authorizes infiltration of an organization if even one of its members is targetable. The exceptions swallow the rule. Further, section 244 (d) permits participation merely for purposes of establishing cover for activities abroad.

We have already pointed out that these exceptions do mean participation. But consider the meaning of establishing cover, which in effect authorizes an intelligence agent to pose as a member of an organization to spy or conduct covert operations abroad. The activity, or the disclosure of it, could effectively discredit or destroy the viability of the organization.

More disturbing, we note that the CIA is authorized to maintain cover under section 421 (e) of Title IV by engaging in any activity, "notwithstanding any other provision of law" except as "otherwise provided in this Act" to maintain cover. We do not understand the meaning of this term, except that it is incompatable with the proviso that an agent under cover shall not conduct his or her self so as to "influence" the lawful activities of an organization.

We read these exceptions and authorizations to constitute a form of indirect investigation of lawful organizations, because by mere participation and reporting on that participation to an agency, the agent is collecting information on lawful First Amendment activity.

We urge a flat ban on undisclosed participation in any First Amendment organization for purposes of cover, and only participation in such an organization if it is subject to investigation under a criminal standard, and a warrant has been issued by a magistrate as recommended earler in this memorandum (see discussion of the need for warrants supra).

3. Preventive Action

The most important prohibition is one which would effectively prevent any repetition of COINTELPRO, the FBI's "counterintelligence" action program to "disrupt, neutralize, and destroy organizations" in gross violation of their civil and constitutional rights.

S. 2525, rather than prohibit such activities, proposes to authorize them to "counter" espionage or "prevent" terrorism and other acts of political violence. While the drafters can point to a restriction set forth in section 241 which "prohibits" any "intelligence activity" from being "designed and conducted so as to limit, disrupt, or interfere with the exercise of any right by any United States person", it must be stressed that the FBI has always defended COINTELPRO as a program designed not to interfere with civil liberties but to "prevent violence" and, in the case of the Communist Party, U.S.A program, to "counter" espionage. Because other sections broadly authorize preventive measures, intelligence agencies will be able to assert a "good faith" defense in any prosecution or civil action based on a violation of section 241 that they were in fact acting under these other authorizations. Like the prohibition on political surveillance, the statute's ban on COINTELPRO provides little or no protection whatsoever.

The validity of this judgment is based on comparing the broad authorizations of these activities to the meager restrictions placed upon them. The statutory scheme for preventive measures involves a number of related sections of the bill. First, the intelligence agencies are authorized to engage in preventive and counter measures both within and outside the United States by section 111 of Title I. This section authorizes agencies to engage in "counterintelligence activities" and "counterterrorism activities" which, under the definitions contained in section 104 of Title I include measures to counter and prevent espionage or foreign connected political violence. A procedure is established for planning, reviewing, and authorizing these activities in section 141 of Title I which only restricts them to the extent of requiring that"steps...be taken to safeguard rights protected by the Constitution and laws of the United States." This boilerplate leads us to the "restrictions" contained in Title II on such activities. While restricting certain activities, these sections in effect authorize others, including the dissemination of derogatory information in certain circumstances under anonymous and false pretext (section 242) and more ominously, "breaking the law" to conduct these activities, so long as it does not involve violence and has the Attorney General's approval.

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In effect the statute provides sweeping authority to conduct activities which could easily lead to abuse. Moreover, the authority provides a statutory defense not available in law today for any officer who engages in these activities in a suit for civil damages or injunctive relief. We point out that if this authority had been on the books in the past, the intelligence agencies could have conducted a number of the COINTELPRO activities which the Church Committee and the Congress termed outrageous, foolish, illegal, and dangerous regardless of the purpose. For example:

First, it would have permitted the FBI's original COINTELPRO operation against the Communist Party that eventually spread to every left group in the country. "Foreign persons" are not covered even by the minimal restrictions on "counter" or preventive activities and this includes corporations "directed and controlled" by a foreign power. In 1956 and throughout the cold war, the FBI believed---indeed a majority of the country assumed--that the party was directed by the Soviet Union.

Second, it would permit the dissemination of derogatory information about Martin Luther King, Jr. to any organization to prevent terrorism, broadly defined to include "threats" to destroy property or engage in dangerous acts to "influence public policy" by intimidation. Under 241 the FBI can disseminate derogatory information anonymously (e.g. the tapes of King's personal life) to any organization suspected of engaging in terrorism or sabotage to prevent these acts. The protection afforded by the qualification that the dissemination not be undertaken "because" of a person's exercise of rights, does not prevent dissemination in order to prevent violence. While the FBI could not send the information to the press, it could send it to SCLC, or the Black Panther Party, or CORE believing these organizations "radical extremists"and "rabble rousers" engaged in potential terrorism and that it was necessary to discredit Martin Luther King, Jr. to stop these activities, spread dissension, and destroy his leadership.

Similary, the FBI could attempt to prevent FALN violence today by sending discrediting information to the FALN about protestant ministers sympathetic to the cause of Puerto Rican independence and in contact with its members saying that they were all informants for the FBI. This could be done anonymously to prevent violence.

Section 243 allows an intelligence agency to break the law to prevent violent acts of terrorism or sabotage or to counter espionage by conducting activities in violation of law as long as they do not involve violence. There is no specificity as to when the acts have to occur or that they are imminent, or that there are no other means to prevent them. While violence is prohibited, the FBI could under this authority, given the appropriate Attorney General,

> establish a phony organization to compete with, or engage in counter advocacy in order to disrupt a possible terrorist organization, or its possible supporters;
>
> conduct a burglary of a possible terrorist organization to steal its funds or its office equipment so that it could not function;
>
> send credit, bank, or other private information gathered about one organization to its affiliate to establish that embezzlement was going on in order to disrupt their activities;
>
> order an undercover agent inside an organization of terrorists or suspected saboteurs to alter the books, steal money, or blackmail a member in order to prevent violence.

We offer this limited parade of horrors, which may be extended depending only upon your imagination, to demonstrate that this authority is indeed dangerous. While we understand that in some circumstances, legitimate law enforcement or intelligence activities might require law violations, these statutory authorizations are not crafted to limit these occasions to exigent and carefully circumscribed occasions. Except in those rare instances, we think that traditional law enforcement methods must be used to prevent espionage, or violence: that is, arrest, warning possible victims, defusing explosives, taking away weapons in the illegal possession of a person. These are permitted activities, and need no statutory authorization, especially not under a statutory scheme which is non-specific as to these authorities.

We know that agencies want their officers protected from liability and public censure. But it is a violation of the principles at the foundation of this country to remove the "chilling effect" that we normally want to place on government in view of its august power. This authorization has the opposite effect of chilling the exercise of rights and posing the possibility of putting police state tactics into effect.

We submit that these statutory authorizations must be stricken from the statute as drafted and a flat ban on preventive action imposed.

4. Prohibitions Needed on CIA Activities At Home

In 1947 the CIA was barred from exercising "any police, subpeona, enforcement powers, or internal security functions within the United States." Because of excessive secrecy surrounding the CIA and its covert mission, and the consequent lack of public accountability, Congress determined that the agency's focus should be exclusively outward. The Church Report documents the dangers inherent in the breakdown of this structure---the abuses of Operation CHAOS, Operation MERRIMAC, and Operation RESISTANCE.

S. 2525, designed to prevent such abuses in the future, instead legitimizes them by broadly conferring and expanding exactly those powers which the CIA has heretofore been denied by the Congress. Instead of flatly prohibiting domestic activities by the CIA to restore the barrier, Title IV (Section 432 (b)) states that the agency "shall have no police, subpoena or law enforcement powers, nor perform any internal security or criminal investigation functions except to the extent expressly authorized by this Act." The exceptions are numerous.

First, the CIA is permitted to conduct foreign intelligence investigations in the United States directed against foreign persons, a category which includes resident aliens and some citizens. The CIA may also conduct counterintelligence and counterterrorism activities within the United States as are "integrally related" to its activities abroad. These activities may include investigations and preventive actions directed against United States persons as well as foreigners. Moreover, virtually all counterintelligence and counterterrorism activites could be deemed "integrally related" to its activities abroad. No showing has been made that these investigations could not be handled by the FBI.

Second, the CIA is broadly authorized to conduct investigations in the United States to determine objects of recruitment, possible targets, foreign contacts, and "potential sources", activities now barred by law. See Weismann v. CIA, 565 F. 2d 692 (D.C. Cir. 1977)

Third, the authority of the CIA to conduct investigations to protect its installations and personnel in the United States from "physical threats" and to engage in activities to "counter" espionage or "prevent" terrorism in this country gives the CIA police and law enforcement functions.

S. 2525 effectively opens the door to the exercise of internal security functions by the CIA in the United States. Moreover, the domestic jurisdiction flowing from all of these authorizations is subject to expansion. Because jurisdictional disputes are to be settled independent of the charter's provisions (see § 141 (3) and §113(k)), CIA authority may be further expanded. This whole scheme to permit the super-secret CIA to operate in this country should be recast to reestablish and effectively implement the 1947 Act. No credible showing has been made that these activities could not or should not be handled by the more accountable FBI.

G. The Use of First Amendment Institutions for Purposes of Recruitment, Cover, and Operational Assistance in Covert Action and Clandestine Intelligence Activities Abroad.

S2525 explicitly recognizes that the use of independent institutions for covert and clandestine purposes violates the integrity of those institutions. It embodies many of the recommendations of the Church Committee to protect the necessary independence of these institutions. However, the restrictions do not go far enough: the only way to adequately protect these institutions is to prohibit covert and clandestine activities. But, assuming these activities will be authorized, the charter's restrictions should be strengthened in critical areas.

1. The Restrictions Designed to Protect Independent Institutions are Incomplete.

The scope of protection for First Amendment institutions is inadequate. Provisions in the charter designed to protect individuals affiliated with independent institutions indicate that the drafters of S2525 understand the detrimental consequences that relationships with the CIA have on these institutions. However, S2525 does not sufficiently insulate these institutions from involvement with the intelligence community.

(a) Protecting Media Organizations.

S2525 restricts use of the media by intelligence agencies. Section 132 (a) (3) prohibits intelligence agencies from paying certain media employees to "engage in any intelligence activity...or provide any intelligence information." However, this prohibition applies only to accredited journalists and those persons involved with United States media organizations as regular contributors, editors, or policy makers.

The Church Committee found that the largest category of CIA/media relationships involved freelance journalists, "stringers," who work for newspapers or news services. The draft charter authorizes continued relationships with stringers. Moreover, S2525 defines media organization narrowly by failing to include book publishers. The scope of protection should be expanded to prohibit covert relationships with publishers and "stringers."

(b) Protecting Religious Organizations.

The restrictions on using clergy for operational purposes only covers persons who follow a "full time religious vocation." The adjective is inappropriate. The Church Committee correctly recommended a ban on all covert or contractual relationships between the CIA and "any American clergyman or missionary." Furthermore, section 132 (a) (6) prohibits the use of "U.S. religious organizations"--undefined--for purposes of cover. It is not clear whether the term would even include the Catholic Church in this country.

(c) Protecting Academic Institutions.

Section 132 only restricts the use for operational assistance of a "United States person" who is "sponsored and supported by a United States academic institution." This is inadequate protection. First, academics who are not U.S. persons but affiliated with an academic institution in the United States are not covered. Second, academics who may be sponsored by a foundation, for example, when traveling abroad would be exempted from the restriction. In effect, §2525 only covers a narrow class of academics who may travel abroad.

Like United States religious organizations, "United States academic institution" is undefined. Thus, the scope of the minimal restrictions on the use of academics for operational purposes or academic institutions for "cover" is unclear.

(d) Protecting Other First Amendment Institutions.

The institutions for which the charter affords some protection all engage in First Amendment activity. It implicitly recognizes that all institutions involved in the exercise of these rights require protection to maintain an open society. Organizations such as Common Cause, the Democratic and Republican National Committees, and the Brookings Institution need to be free from taint or manipulation.

The need for protecting all First Amendment organizations has been amply documented on the public record. In 1967 public disclosure of CIA financial support for NSA and other public institutions destroyed the credibility of those institutions and raised questions about the independence of all First Amendment organizations. To restore and maintain confidence in the openness of the political process, the Katzenbach Commission appointed to study CIA involvements recommended that it should be "the policy of the United States Government that no federal agency shall provide any

covert financial assistance or support, direct or indirect, to any of the nation's education or private voluntary organizations." §2525 overrules this implemented restriction and also opens the door for the use of these institutions for operational assistance and cover. For example, Section 244 (d) authorizes undisclosed participation for "cover" and under section 421 (a) (9) and 421 (e) of Title IV, the broad CIA authorization to maintain and use any means "notwithstanding any other provision of law" to maintain cover overrules the Katzenbach restrictions.

The scope of the charter's protection is inadequate. All not-for-profit organizations as defined in section 501 (c) (3) and (4) of the Internal Revenue Code should be covered by charter restrictions.

2. Wide-ranging use of First Amendment Institutions is Authorized.

Instead of prohibiting clandestine relationships with First Amendment institutions, §2525 broadly authorizes intelligence agencies to initiate these involvements.

(a) Cover

Because of definitional problems noted above, the prohibition in section 132(a)(6) on the use of academic and religious organizations is uncertain. The prohibition on the use of media organizations is incomplete because of the exclusion of freelancers and publishing houses. Moreover, other First Amendment organizations are wholly unprotected.

Cover clearly endangers First Amendment rights and an across-the-board ban is needed. Cover requires participation which by definition means influencing the lawful activities of organizations. Disclosure threatens to destroy their credibility. Even the CIA is asking for a criminal penalty in this charter for the unauthorized use of its name.

(b) Operational Assistance

The use of academics for operational assistance is authorized in section 132(b)(2). The requirement that "appropriate officials" at the institution be notified is not a meaningful restriction. The term is undefined. "Appropriate" could in fact be read "cooperative." Moreover, university administrators are not the academic community which by definition means those who are engaged in academic pursuits at the institution. Moreover, any member of the faculty or student body can be used for operational assistance if he is not a U.S. person or not currently sponsored and supported by the institution.

Members of media organizations and religious institutions excluded from the general provisions of section 132 are open to any use for purposes of operational assistance, as are all other First Amendment institutions. One form of operational assistance, recruitment, is unrestricted for all First Amendment institutions. The dangers here are obvious and these loopholes should be closed.

(c) Contracting

Section 139 authorizes secret contracting with academic institutions. The Harvard University Report on relationships between the Harvard community and U.S. intelligence agencies explains why such contracts must be publicly acknowledged, rather than merely disclosed to appropriate officials. The publication of research supported but not acknowledged to have been done under the auspices of an intelligence agency is subject to abuse for propaganda purposes. If the fruits of the research are classified, the project is not academic. Students and faculty may be unwittingly involved in work for purposes they do not support. Finally and most distressing, contracting opens the door to intrusive investigations of members of the academic community, many of whom are unaware of their connection with the intelligence community.

We presume that the authorization to contract with "any private company or institution in the U.S." without disclosing the agency connection excludes all other First Amendment organizations. If the intent of the statute is otherwise, the same objections apply. All contracts with First Amendment institutions should be publicly acknowledged and the research available to the public under the Freedom of Information Act.

(d) Recruitment

The expressed authorization for the paid undisclosed use of representatives of any and all First Amendment institutions swallows all of the limited restrictions described above. It establishes a relationship between the agency and the member of the institution which is no different from cover or operational assistance. Institutional ties are used to probe the views of other members to determine likely recruits. Likely prospects are subjected to potential source investigations. The recruiter is effectively asking other members of the institution to engage in intelligence activities. The recruiter, for example, a faculty member at a university, is using the authority conferred by the institution on behalf of the agency. If these people are recruiting abroad, as members of the press, academic community, the Peace Corps or a religious organization, they are engaged in espionage or covert operations. If this practice is not prohibited, the Soviet Union would be justified in preventing American journalists from communicating with dissidents.

(e) Voluntary Contacts

Section 132(e) expressly authorizes any and all voluntary contacts between First Amendment institutions and their members. This is another authorization which renders the prohibitions in section 132 ineffectual. These relationships can have the same devastating effects upon the independence and integrity of an institution as a paid relationship. One example suffices:

> Because of a voluntary relationship between a manager of a radio station and the FBI, the integrity of a news organization was compromised, the free flow of ideas and information censored, and the organization used for operational purposes including the unwitting use of a reporter. Disclosure of the relationship injured the credibility of the station and the media in general. We refer of course to the station manager who voluntarily assisted the FBI by turning over the tapes and reports of an unwitting reporter at Wounded Knee in 1973 and not airing his complete stories.

Voluntary relationships must be as tightly restricted as paid relationships. The intelligence community should be prohibited from initiating covert relationships with First Amendment institutions.

H. Enforcement Mechanisms to Protect Civil Rights and Civil Liberties

S. 2525, as drafted, contains only the rudiments of an enforcement scheme to protect civil rights and civil liberties. Primarily, it relies on reporting and oversight mechanisms. Although we approve of these requirements (see part II of this memorandum), other safeguards are more essential. The charter must establish absolute prohibitions on certain intelligence activities and set criminal penalties and civil remedies for their violation. In order to effectuate this enforcement scheme, the charter must incorporate both a mechanism for triggering a special prosecutor and new judicial procedures to deal with the enforcement problems presented by secrecy.

1. The Need for Prohibitions

Without absolute prohibitions, enforcement of the charter may well be impossible. Exceptions to the rule provide intelligence agents a good faith defense. Moreover, because the disclosure of secrets may be necessary to prove that a good faith defense exists, prosecutors will hesitate to proceed in criminal cases (e.g. the Helms case). The "state secrets" privilege may bar the enforcement of civil liability (e.g. the NSA case).

2. The Need for a Special Prosecutor

A temporary special prosecutor is necessary to insure that intelligence agents who violate the law will be brought to justice. Recent history demonstrates that this responsibility cannot be left to the Attorney General because of the inherent conflict of interest between his duties to enforce the law and maintain the morale of the FBI. A special prosecutor is even more necessary under the scheme of the charter since the Attorney General is designated the principle officer to approve procedures, investigations, and preventive activities which may affect the rights of Americans. This situation intensifies the conflict of interest.

3. New Civil Remedies Must Be Created

The charter must make it easier for citizens to obtain redress for violation of their constitutional rights. Because damages are difficult to measure in this area, remedies must include liquidated damages. Citizens should not have to establish the amount of potential damages to have standing to sue in federal court. For civil remedies to serve as a deterrent, intelligence agents must not be immunized from personal liability, while at the same time thegovernment should also be held liable for damages.

4. New Procedures to Handle Secrecy

Secrecy must not be a bar to either the prosecution of intelligence agents or governmental liability for constitutional torts. Otherwise, secrecy will permit intelligence agencies to operate outside the law regardless of the charter's strictures. Again, strict liability is the principal solution. However, in doubtful cases, a procedure must be developed for the courts to determine whether legitimate state secrets are relevant without requiring their disclosure. The charter must also establish that when the government asserts the state secrets privilege in a civil action in which there is any reasonable basis for liability, the refusal to disclose shall be deemed an admission of culpability.

Part II

COVERT ACTION AND ESPIONAGE ACTIVITIES ABROAD

Introduction and Overview

This memorandum comments upon the "National Intelligence Reorganization and Reform Act of 1978," S.2525, as it affects the conduct of covert action, renamed "special activities" in the bill, and espionage and related support clandestine activities, dubbed "collection," abroad. Provisions regarding these activities are primarily contained in Titles I, IV and VI of the proposed charter legislation. Our comments on these sections in large measure repeat those which we made in our memorandum of November 28, 1977 to Senator Huddleston, Chairman of the Subcommittee on Charters of this Committee, while S.2525 was still in the drafting stages. Because most of the problems we noted then remain and because we consider the current version of the bill open to constructive changes, we are reiterating our concern over these sections of the proposed charter.

The provisions of S.2525 are an improvement over President Carter's Executive Order 12036 of January 24, 1978, which currently governs foreign intelligence activity. The draft's oversight provisions are generally commendable and its command and control procedures are stricter than those elaborated in the Executive Order.

Nevertheless, the provisions of Title I require substantial revision if the new charter is to protect our constitutional system from severe abuses similar to those it has suffered in the past as a result of our foreign clandestine intelligence activities. In its present form, S.2525 fails to effect the fundamental reforms necessary to insure that the abuses of the past are not repeated. In some crucial ways, Title I fails even to provide the minimal reforms proposed by the previous Senate Select Committee on Intelligence, chaired by Senator Church, and by the Pike Committee. Indeed, in the area of "special activities," Title I retreats from protections afforded by current law as embodied in the Hughes-Ryan Amendment.

S.2525 would authorize a wide range of foreign intelligence activities. It would not prohibit "special activities" abroad by limiting the intelligence agencies to intelligence collection, coordination and analysis. It would not prohibit espionage in peacetime, thereby dismantling what the Church Committee termed a "world-wide covert infra-structure."

Assuming a decision to authorize covert intervention abroad, which we strongly oppose, S.2525 would fail even to:

(1) establishes a standard for presidential approval which insures that any "special activity" will be exceptional and short-lived and begun only in response to the most grave threats to the nation's security;

(2) establish clear and meaningful standards and procedures to govern the clandestine conduct of collection activities;

(3) place clear prohibitions on activities which constitute gross violations of acceptable norms of international behavior, or which require the infiltration and subversion of free institutions and democratic processes abroad;

(4) prohibit covert military and paramilitary intervention and would instead establish in law for the first time authority for the president to order covert paramilitary operations, involving either civilian or military officials.

Unless they at least embody the standards, procedures and prohibitions described above, the provisions of S.2525 dealing with the conduct of "special activities" and espionage activities would serve more to legitimize constitutional abuses than to eliminate them.

S. 2525 Should Prohibit Covert Action Abroad

We oppose section 111(a)'s authorization of continued "special activities" and the resulting maintenance of what the Church Committee described as a "world-wide infra-structure of individual agents, or networks of agents, (engaged) in a variety of covert activity." Covert action has proven to be costly to the United States for a quite negligible return. Former CIA Director William Colby has stated that covert action could be eliminated at this time without having "a major impact on the current security of the United States." This admission that covert action is not integral to the protection of our nation's security must be placed alongside the public record of abuses and dangers posed by such activities.

Covert action dangerously influences democratic decision-making processes within this country. Specifically:

--The Church Committee concluded that covert action projects stood "in basic tension - if not incompatibility" with the demands of our constitutional system. The history of CIA involvement with universities, missionaries, the press and unions demonstrated how a covert agency must inevitably undermine independent institutions in the U.S. The constitutional conflicts between the conduct of "special activities" and the congressional power to make war, the requirement that the budget be openly published, the protection against prior censorship and the official secrets acts all demonstrate the basic contradiction between a covert action capability and the constitutional order.

--The Church Committee concluded that secrecy created a "temptation on the part of the Executive to resort to covert operations in order to avoid bureaucratic, congressional and public debate."

--Covert action projects tend to create secret involvement and commitment which limit our political options abroad, the Church Committee concluded, by "creating ties to groups and causes that the United States cannot renounce without revealing the earlier covert action." Such secret commitments also inhibit informed public debate over policy alternatives.

"Special activities" affect democratic institutions abroad and color the perception of the United States within the world community. Specifically:

--Covert action undermines the same democratic freedoms and institutions abroad as it threatens at home. "Special activities" contradict the government's expressed commitment to human rights abroad. The Church Committee found that the CIA's covert action infra-structure included agents in local media, political parties, unions, police forces, the military, statehouses and legislatures. The Pike Committee found that approximately 29% of covert action projects approved at the operations coordination level were propaganda and media operations; another 32% involved election support. Thus, over half of the operations were based on taking advantage of free elections or an independent press.

--Covert action requires the United States to announce in law - as proposed in Title I - that it stands in suspicious antagonism with the rest of the world and maintains the right to intervene covertly abroad, even in violation of international law or treaties. The Church Committee found that the exposure of certain covert operations "have resulted in damaging this nation's ability to exercise moral and ethical leadership throughout the world."

No proper defense of "special activities" has yet been made on the public record. No activity of the last fifteen years thus far exposed has borne even a remote relationship to the defense or security of the United States. The Church Committee "gave serious consideration to proposing a total ban on all forms of covert action" and backed away only for the possibility of a "grave, unforseen threat." We believe maintenance of a covert action infra-structure requires far greater justification than preparation for the unforseen; it should be clear that the mere fact that its activities are secret does not empower the intelligence community to handle the unforseen. The dangers posed by such a structure are real and have been demonstrated. Therefore, we oppose S.2525's unprecedented statutory authorization of "special activities" in the absence of any substantial evidence that such activities are vital to the security of the nation.

S.2525 Should Prohibit Espionage in Peacetime

We oppose section 111(a)'s authorization of clandestine collection abroad absent any congressional declaration of war. No reasonable showing has been made to suggest that espionage in peacetime has more than a negligible value or provides information of signifi-

cance other than tactical intelligence for "special actitivies." The questionable value of such activities must be balanced against many of the abuses and threats to the constitutional system noted above in our discussion of "special activities:"

--Espionage activities require the maintenance of the same covert infra-structure which "special activities" require and about which the Church Committee expressed grave reservations.

--Espionage activities undermine democratic freedoms and institutions abroad by improperly influencing the functioning of local media, political parties, unions, police forces, the military and legislative bodies.

--Statutory authorization of espionage diminishes the moral and ethical standing of the United States in the world community.

--Untimely exposure of espionage operations abroad can negatively affect the conduct of our foreign policy both by causing immediate crises and gradual erosion of credibility.

Although we oppose all "special activities" and espionage in peacetime, we recognize that the legislative course ultimately taken will likely authorize these activities. Consequently, we outline below the minimal standards, procedures and narrow prohibitions we deem essential to safeguard the constitutional system from the consequences of such activities.

The Charter Should Define an Approval Process Which Clearly Defines "Special Activities" as Rare, Extraordinary Activities Undertaken Only in Response to the Gravest Threat to U.S. Security.

Section 131 establishes procedures for approval and review of "special activities." We oppose these procedures because they authorize covert action. At the very least, however, these procedures require considerable tightening. One question must direct the redrafting: are "special activities" to remain a routine tool of American foreign policy or are they to be employed only in rare, isolated instances, brief in duration and emergency in nature? Unless the latter is assumed, then S.2525 will merely legitimize activities which pose a continual threat to the constitutional system while imposing no meaningful safeguards against abuse.

Section 131(d) effectively requires three Presidential findings before the initiation of a "special activity." The activity must be deemed "essential to the national defense or the conduct of the foreign policy of the United States." The President must determine that the anticipated benefits outweigh the risks of exposure and, lastly, that less sensitive alternatives would not likely achieve the desired ends.

This standard for Presidential approval must be greatly strengthened "Essential...to the conduct of the foreign policy of the United States" is a standard which establishes covert action as a routine

tool of American policy. The "foreign policy of the United States" is implemented daily, often directed at the achievement of goals which are limited in scope and importance to national security. That the anticipated benefits outweigh the risks of exposure does not significantly limit the conduct of special activities since presumably such a calculation should always be made in determining public policy; benefits should always outweigh costs, even in the most cold-blooded, amoral decisionmaking process. The finding that less sensitive techniques would not likely achieve the desired ends is an important restriction. However, we fear that, in practice, contingencies may too easily become eventualities.

The fourth finding required by section 131(d), that "the circumstances require the use of extraordinary means," we interpret as merely hortatory and adding no new restrictions to the conduct of "special activities."

Rather than provide additional safeguards with respect to the conduct of "special activities," the provisions in section 131 retreat from the restrictions placed on such activities by the Hughes-Ryan Amendment to the Foreign Assistance Act of 1963. The standards and procedures set forth in S.2525 should not be implemented as a replacement for the reporting requirements currently in effect.

The elaborate reporting requirements spelled out in section 131 of S.2525 effectively add up to little more than the Hughes-Ryan requirement that the President report, "in a timely fashion, a description and scope of such operation." The quality of executive reporting will ultimately depend upon the vigilance of Congress. Most important, the Hughes-Ryan Amendment requires that the President report to eight congressional committees - the foreign relations committees, the armed services committees and the appropriations committees of both houses as well as to the two intelligence committees to which S.2525 requires reporting. This additional scrutiny can only be beneficial. If S.2525 is to supercede the Hughes-Ryan Amendment, it must embody these strict reporting requirements.

The Hughes-Ryan standard requires that covert action operations be "important to the national security of the United States." Although "important" is less restrictive than "essential," this standard at least ties the conduct of covert action operations to national security rather than mere policy interests.

Section 131 is inadequate to govern the conduct of "special activities." The recommendations of the Church Committee should serve as a guide in redrafting it. The Committee recommended that Presidential approval require certification that a "special activity" is required "by extraordinary circumstances to deal with grave threats" to the national security. It would also have required the President to provide the appropriate congressional committees the reasons justifying a presidential decision to authorize covert aciton. At the very least, the Church standard, which explicitly assumes that covert action projects will be rare, isolated and particular, should be adopted in S.2525.

Section 131 requires an immediate, prior notification to the two intelligence committees of Congress with an emergency exception. We see no reason why the appropriate legislators cannot be kept fully and currently informed in the same manner as are executive branch officials. Also, the Church Committee recommendation requiring Presidential certification that the activity meets the statutory standards as well as a report of the reasons should be followed.

S. 2525 Should Establish Clear and Meaningful Standards and Procedures to Govern the Conduct of Clandestine Collection Activities

Section 131 sets forth standards and procedures for the approval of certain clandestine collection activities. Other clandestine collection activities, however, remain unregulated. Because the determination as to which types of collection activities merit special scrutiny is left to the President, S. 2525 fails to establish clear lines of responsibility.

Section 131(b)(1) requires National Security Council review of "sensitive collection activities" and section 131(c) sets forth some but not not all of the criteria for review. In addition, section 131(b)(1) requires Presidential approval for exceptionally sensitive collection activities. Collection activities not deemed "sensitive" are left unregulated.

Criteria by which to identify activities which require NSC review and/or Presidential approval are left to the President to determine. These criteria are subject to change with succeeding administrations. Moreover, a President can effectively waive procedures and standards by defining certain activities as not sensitive enough to require review. Thus, S. 2525 does not adequately provide for accountability in the conduct of clandestine collection activities. The bureaucratic deniability which has plagued intelligence collection in the past remains possible.

S. 2525 Should Prohibit Activities Which Are "Incompatible With American Principles"

Title I ostensibly prohibits particular forms of "special activities." Section 135 lists the following forms of prohibited activities:

> "(1) The support of international terrorist activities;
> (2) the mass destruction of property;
> (3) the creation of food or water shortages or floods;
> (4) the creation of epidemics of diseases;
> (5) the use of chemical, biological, or other weapons in violation of treaties or other international agreements to which the United States is a party;
> (6) the violent overthrow of the democratic government of any country;

(7) the torture of individuals; or
(8) the support of any action, which violates human rights, conducted by the police, foreign intelligence or internal security forces of any foreign country."

Section 134 prohibits political assassination.

The prohibitions listed need to be tightened and extended; other prohibitions need to be included in order to eliminate covert war-making or to insure U.S. adherence to minimal human rights standards. The listed prohibitions need to be extended and clarified as follows:

--Section 135(a)(2) prohibits the "mass destruction" of property without defining "mass." Most assuredly, the adjective creates a loophole which negates the prohibition. The Air Force, for example, described its bombing in North Vietnam as selective and surgical. The prohibition should ban the destruction of property.

--Section 135(a)(2) prohibits the creation of food or water shortages. It should prohibit the larger category of weather modification (e.g. the creation of floods) and should also be extended to cover the creation of energy shortages or disruptions.

--Section 135(a)(6) prohibits the violent overthrow of a "democratic" government. The definition of the word "democratic" is the first and most obvious problem; once again the adjective risks negating the prohibition. The prohibition should be extended to cover the non-violent as well as violent overthrow of any government in peacetime - an act which would violate the U.N. Charter and accepted international law.

--The prohibition on support of any action which violates human rights (section 135(a)(8)) should be extended to prohibit ongoing support for any police, foreign intelligence or internal security forces which violate human rights as a matter of policy.

--Section 134 prohibits assassinations of foreign officials. The law applies only to officials. Under the laws of war - rules adopted by the United States Army for warfare - all assassination is prohibited. Political murder should receive no greater protection because it is done covertly in peacetime. Further, the law would require that the murder be committed for a political motive; this narrowing of a prohibition is unnecessary.

Moreover, several prohibitions should be added to insure that covert actions projects are not undertaken in violation of basic American principles. For example:

--Bribery or extortion of foreign officials should be prohibited. We cannot both foster independent officials and then use their

independence to our advantage. The bribery scandals at the beginning of this Administration and those involving the South Korean CIA and the Congress illustrate that such activities are seen as improper by the vast majority of American citizens.

--Provocation of violence, demonstrations, strikes or boycotts should be prohibited. The United States should not be party to provoking violence in other societies.

Finally, these prohibitions must be absolute in time of peace. Section 136(a)(3) provides for a Presidential waiver of many of the prohibitions in section 135 under extraordinary circumstances. This provision should be stricken from the bill.

S.2525 Should Prohibit Any Paramilitary or Mercenary Activities

A most vital set of prohibitions concerns the limits placed upon paramilitary activities and the employment of mercenaries. Section 133(a) retreats from both the Church Committee and the Pike Committee recommendations by authorizing the assignment of a civilian U.S. person as a combatant abroad for up to 90 days upon Presidential approval and indefinitely upon congressional approval.

The House Committee recommended that "all paramilitary activities shall be prohibited except in time of war." The Church Committee recommended that civilian combatants be handled in the same fashion as military personnel under the War Powers Act (which requires Congressional approval within sixty days). The Church Committee also recommended that the executive branch be prohibited from conducting any covert military assistance program without "the explicit prior consent of the intelligence oversight committee(s) of Congress."

We urge that the House recommendation be adopted. The statute should flatly prohibit the covert employment of paramilitary activities and military assistance programs in peacetime. The Church Committee found that of five paramilitary activities studied only one achieved its objective and that in no instance was complete secrecy successfully preserved. The Committee's conclusion was "the evidence points toward the failure of paramilitary activity as a technique of covert action." Moreover, paramilitary activities have an ominous potential for escalating into major military commitments. Current Secretary of State Cyrus Vance informed the Church Committee that "paramilitary operations are perhaps unique in that it is more difficult to withdraw from them, once started, than covert operations."

Section 133 is wholly inadequate. Aside from the authorization for the use of U.S. persons who are civilians, it does not in any way restrict the paid use of foreign nationals or the supplying of weapons and materiels, training and assistance for foreign combat. As written, this section opens the door for the use of paramilitary operations as a means of circumventing the restrictions placed on executive discretion by the War Powers Act.

If there is but one lesson to be learned from our recent experiences in Indochina and Angola, it is that no U.S. military commitment should be made without public discussion and commitment by Congress. Covert civilian paramilitary intervention should be banned and all military and paramilitary interventions should be governed by the provisions of the War Powers Act.

Accountability

If covert operations abroad are to be continued, strict standards, procedures and prohibitions must be reinforced by provisions for intelligence community and executive accountability to congress and the public. Committees other than the intelligence committees of Congress, individual congressmen and the general public must all be able to scrutinize intelligence activities.

Congressional oversight must be broadened. Necessary revisions in S.2525 include:

(1) The access of legislators to information relating to the conduct of national intelligence activities should not be restricted. Certainly, procedures designed to safeguard the secrecy of information should be implemented but they should not include denying congressmen access to information. In the recent debate over the CIA budget, some congressmen complained that even the classified reports which they examined were excerpted. S.2525 should provide for complete access for all congressmen.

(2) All CIA activities should be subject to GAO audit without the proviso in section 123(e) that the DNI can except certain funds expended for a particular national intelligence activity.

(3) All committees of Congress should be empowered to order an audit of any or all CIA activities. The provision (section 123(b)) requiring intelligence committee clearance of audit results before release to another committee should be stricken.

(4) Individual members of the intelligence community faced with improper or illegal orders of any other evidence of impropriety should be free to report such information to any legislator, not merely to a congressional intelligence oversight committee as provided for in section 151(j)(3)(A).

The public's right to know should not be neglected. S.2525 can be amended to strike a better balance between the need for public

accountability and secrecy interests. Some changes are:

(1) The total figure for the intelligence budget should be made public. The minimal threat to the national security posed by the release of this single figure is far outweighed by the need to give the public some sense of how many tax dollars are being spent on intelligence activities. Moreover, the Constitution probably requires such disclosure.

(2) S.2525 should prohibit the initiation of civil suits against persons publishing unclassified or improperly classified information.

The above recommendations must be incorporated into S.2525 in order to insure executive accountability for the conduct of national intelligence activities to both the Congress and the public.

Conclusion

We oppose the authorization of "special activities" and clandestine collection activities because of the dangers which the conduct of such activities poses to the constitutional system. If clandestine operations abroad are to be authorized then the standards, procedures and limited restrictions outlined above - a standard for "special activities" which clearly labels them as exceptional, strict and explicit standards and procedures for the implementation of clandestine collection activities, prohibitions on activities which are contrary to traditional American principles, prohibitions on paramilitary and mercenary activities -- are the minimal safeguards necessary to protect the democratic decision-making process. The current provisions of S.2525 dealing with covert operations abroad serve more to legitimize constitutional abuses than to eliminate them.

STATEMENT OF JOHN SHATTUCK, DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION; AND JERRY BERMAN, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. SHATTUCK. Thank you very much, Mr. Chairman.

It is always a great privilege to testify before you, Mr. Chairman, and particularly here before this committee on an issue of the highest concern to the ACLU, and I think most would agree to the entire American public. Reforming our intelligence agencies so that they operate under the Constitution and in a manner consistent with our system of liberty is one of the greatest challenges that Congress has ever faced. As you know, there is nothing abstract about this challenge. It arises out of a disturbing and extensive record of intelligence activities which many have characterized as abuses during the last decade. This record shows that the FBI, the CIA, the NSA and other agencies responded to a period of great social unrest and turmoil by investigating and in some instances disrupting the activities of many law abiding American citizens and organizations.

I think it is fair to say, as the Church committee and many other observers have concluded, that when these abuses were uncovered, there was a rather extensive secret form of Government tbat was growing in this country. Mr. Chairman and members of the committee, we are very pleased that under your leadership there are efforts being made right now to bring this secret government under control, under legislative control.

We think that one of the first achievements of this committee and of the Congress in this area was the development of wiretap legislation to bar all warrantless wiretaps and taps of Americans who were not suspected of any crimes under a claim of Presidential inherent power.

We were pleased to be able to work closely with you and with other members of the Senate and subsequently in the House to develop the minimal standards that are now in this bill and that were inserted in this bill as a result of the legislative give and take in this committee and elsewhere, and we are very hopeful that this achievement can be a building block for further legislative reforms.

And we have made the achievement of these reforms a matter of the very highest organizational priority for the ACLU. It is in that spirit that we appear before you this morning to discuss S. 2525.

Our testimony on this bill, as most of our work on this bill and on other important legislative intelligence issues, will be presented by Jerry Berman, our legislative counsel, and whose really prodigious work is a measure of the commitment that we at the ACLU have made to the intelligence issues that are pending before this committee.

Mr. Berman has exhaustively analyzed S. 2525 in a lengthy memorandum that is appended to our prepared testimony. Let me just point out before turning our presentation over to Mr. Berman that in attempting to treat all the issues in the bill we have felt compelled to make some generalizations that may appear to be harsh. These generalizations are not aimed in any way at impugning the intentions or the purposes of this committee which we know we share. We are well aware that the drafting of this legisla-

tion is an enormous task, and we are sure that the committee is aware that the drafting process has only just begun. And although we are prepared to discuss the details of S. 2525, we also feel that it is very important for us to state for the record at the outset our general conclusion that the bill as it now stands is more of a threat to civil liberties than it is a reform.

We reached that conclusion reluctantly but firmly at this stage, and we believe that it is a conclusion that many persons outside of the intelligence agencies will share unless the bill is redrafted to address some of the concerns that we will express.

I think our conclusion is based on one central and powerful fact, and that is that S. 2525 would grant a broad statutory authority to those intelligence agencies which have always construed their authority broadly. For this reason we have measured the language of the bill against the dangerous practices, dangerous to civil liberties, that we believe the bill should restrict or prohibit, and which we know that the committee has addressed in its deliberations over the bill.

On this standard, the bill does not measure up to our minimal expectations and we are therefore opposed to it as it stands. On the other hand, we are very hopeful that in the months ahead we will be able to work closely with you, Mr. Chairman, other members of the committee and your staff to redraft portions of S. 2525 so that it achieves the purpose that we all want to achieve, and that is to protect civil liberties as well as national security.

Now, to give you some of the more detailed aspects of our conclusion, let me turn our presentation over to Mr. Berman, who, as I say, is our premier expert on intelligence matters, in the legislative area.

Mr. BERMAN. Thank you, Mr. Chairman.

Today we want to testify generally on some of the critical issues raised by this complex legislation to demonstrate that it has truly enormous consequences for civil liberties in this country. Of course, we cannot consider every important issue in detail, even in general terms. The legislation simply covers too much ground. However, as John Shattuck has mentioned, we have prepared an extensive analysis in a two-part memorandum for the committee and tbe staff that analyzes the legislation in some detail and submit it for the record and for your consideration. Hopefully, the committee will react positively to its many recommendations for change in the charter, and at the end of my testimony, I will try to focus on where we think we have to go.

Because our remarks are highly critical of the legislation as drafted, we want to first state in no uncertain terms again, that we strongly support the work of this committee in attempting to legislate controls and restrictions on United States intelligence activities at home and abroad. Moreover, we stand ready to work with this committee, its staff, and the Congress to improve this legislation so that it enhances rather than erodes civil liberties, as we worked to improve the Foreign Intelligence Surveillance Act, S. 1566. On the other hand, we are prepared to put every resource at our disposal to work actively to defeat any legislation which in the name of reforming our intelligence agencies and restricting their

activities, unnecessarily enhances their powers at the expense of constitutional values and democratic principles.

Contrary to the testimony of other witnesses before this committee, particularly some who were involved in past intelligence activities which threatened the very foundations of our constitutional democracy, we believe that S. 2525 would authorize too much, restrict too little, and fails to prohibit many of the activities that led to abuse in the past.

As our detailed analysis demonstrates, S. 2525 appears to broadly authorize intrusive investigations of American citizens, fails to place adequate controls on certain intrusive investigative techniques, authorizes forms of preventive action tactics, and fails to prohibit some of the intelligence activities which the public record demonstrates are especially threatening to civil liberties. The policy assumption underlying such authorizations must be closely examined.

S. 2525 reflects a policy choice, a public policy decision about how counterintelligence and foreign intelligence activities should be conducted in the United States. Because basic civil rights and constitutional questions are at stake, policy assumptions as to exactly what is required to adequately protect the Nation from foreign threats and advance our national defense and foreign policy aims must be closely examined. Just as the courts require when balancing interests in the first amendment area, we must ask whether the Government's interest is compelling and whether less intrusive means would suffice. Today we will argue that this legislation may be premised on a policy choice which imperils civil liberties.

S. 2525 is represented as a foreign intelligence bill, and yet title II broadly authorizes intelligence agencies to investigate Americans to detect and counter foreign threats. It permits foreign intelligence to be directed both at foreign threats and at Americans at home not engaged in crime.

While we are not experts in counterintelligence, we have exhaustively reviewed the record of the Church committee on this issue. Traditional counterintelligence, as described in the "Committee's Final Report, Book I," showed the FBI counterintelligence branch to be separate from the internal security branch. It focused on targeting hostile governments, hostile intelligence services, and other foreign threats for investigation and surveillance. Citizens were only targeted when their involvement in hostile foreign activities was established. The CIA had the same focus.

As described in the report:

> The more traditional CIA policy has been to monitor hostile intelligence services and then, only if it thereby learns of their involvement with particular Americans, to investigate those Americans abroad or request an inquiry here. Generally, CIA has not tried to work backward from a surveillance of traveling Americans who seemed likely prospects in order to see what kinds of connections could be found.

The other approach described by one CIA official as the most efficient approach is for intelligence services to "watch their citizens to see what they are doing." To be even more systematic, the "way to look for foreign direction is to start at both ends of the suspected connection."

We submit that title II, with its minimal standards for targeting Americans and resident aliens for intrusive investigation, and its collateral grants of authority to the agencies to investigate citizens based on virtually any foreign contact or as possible targets or objects of recruitment or even as potential sources of assistance appears to adopt the other more dangerous approach.

It is troubling that this policy is embodied in S. 2525 in the face of the Church committee record that this very approach was used by the CIA in conducting Operation CHAOS. According to the report:

> CHAOS sought to sift through the leaders and more active segments of domestic protest movements in order to learn of travel and other foreign contacts and then to investigate the possibility that those Americans were supported or controlled by foreign powers.

In other words, Operation CHAOS worked backwards. And so did the FBI in conducting its New Left investigations of the antiwar movement. The efficacy of this approach, which attempts to prove a negative, is open to question. That it is very sweeping and intrusive is not. It requires many investigations and many files. As Richard Ober, formerly at the CIA, testified:

> To respond with any degree of knowledge as to whether there is significant foreign involvement in a group, a large number of people, one has to know whether each and every one of those persons has any connection. And having checked many, many names and coming up with no significant connections, one can say with some degree of confidence that there is no significant involvement, foreign involvement with that group of individuals. But if one does not check the names, one has no way of evaluating that, without a controlled penetration agent of the FBI by that group, or a control penetration agent of the KGB abroad who works on the desk which deals with these matters through us.

This policy, to direct agents to "check the names" is manifest in S. 2525. As our detailed analysis demonstrates, S. 2525 authorizes a broad array of intelligence activities which could permit the agencies to investigate and attack "both ends of the suspected foreign connection." The scheme could be devastating for civil liberties in a time of social crisis.

First, the draft legislation authorizes intrusive investigations of citizens and resident aliens for counterintelligence, counterterrorism, and foreign intelligence purposes without strict reasonable suspicion of crime, in violation of the fundamental principle that law abiding citizens and persons are entitled to be free from government intrusion into their lives. Furthermore, it authorizes a number of other investigations which we have mentioned without a clear criminal nexus. Although limited to relatively less intrusive techniques, these investigations nevertheless permit extensive dossier building of Americans in this country. All of these investigations threaten first amendment rights

The array of investigative techniques placed at the disposal of the agencies in S. 2525 is formidable. It authorizes pretext interviews, checks with confidential sources, physical surveillance, inspection of all the central files of any Federal agency, photographic surveillance, and checks of all law enforcement and intelligence files. These are the less intrusive techniques in the bill. With only a reasonable belief based on information and not specific and articulable facts that a person is engaged in activity which may involve any crime, including conspiracy with foreign connections, more

intrusive techniques may be employed, including around-the-clock physical surveillance, systematic inspection of mail covers, examination of all public and private bank, health, tax, employment, credit, and other confidential records in the possession of any agency, and infiltration by informers. Although the public record establishes that most of these techniques are as intrusive as or are analogous to techniques that require a warrant, S. 2525 would not adequately check Executive discretion by placing any outside check on that discretion.

In the name of reform, S. 2525, albeit with a restriction of a judicial warrant requirement, would authorize multiple physical searches, physical searches by surreptitious entry, and wholesale mail opening in violation of fourth amendment requirements. These provisions legitimize techniques heretofore assumed to be illegal.

Most distressing, S. 2525 authorizes some forms of preventive action. We interpret these provisions to permit intelligence agencies to violate the law and engage in some COINTELPRO type activities.

Most, if not all, of the prohibitions in the draft charter have exceptions which come close to swallowing the rule. For example, intelligence agencies could not investigate any U.S. person solely because he or she is exercising constitutional rights, but the breadth of authorized investigations renders the prohibition almost meaningless. Even traditional prohibitions are abandoned. For example, S. 2525 gives the CIA broad authority to conduct activities in the United States wisely prohibited by current law, including traditional law enforcement and internal security functions.

The practical effect of these authorizations could be read to permit many of the abuses documented in the Church report. Based on our detailed analysis, we believe that although it certainly is not the intent of the drafters, this legislation, in a time of social crisis, under a very different administration, or if it had been the law or the law at the time, would legitimize such programs as operation CHAOS, the CIA program to determine the possible foreign connections of the antiwar movement; Operations MERRIMAC and RESISTANCE, the CIA programs to protect its installations from physical threat; the FBI investigation of Martin Luther King, Jr., for conspiring with two Communist associates who the FBI would have reasonably believed to be engaged in clandestine intelligence activity involving possible violation of the Smith Act; the FBI's COINTEL program to discredit Dr. Martin Luther King, by disseminating derogatory information about his private life, perhaps not to the press, but to civil rights organizations, perhaps radical organizations, ostensibly to prevent violence, and not solely because of his first amendment activities; and the FBI's COINTEL operations against the Communist Party U.S.A., the Ku Klux Klan, the Black Panther Party, and elements of the New Left believed to be engaged in sabotage and international terrorism on behalf of Hanoi.

Of course, we are giving a broad reading to these authorizations in the legislation and downplaying the possible salutary role of the reporting and oversight mechanisms in the bill. While we know that the committee does not intend to authorize but rather to

prohibit the abuses of the past, we are all aware that intelligence agencies, especially in times of crisis, read even narrow authorizations broadly. When broad authorizations are granted by statute, the danger that they will be construed in a way that undermines constitutional rights becomes particularly acute.

We would rather put our trust in strict criminal standards and clear prohibitions, neither of which are sufficiently contained in this legislation. While S. 2525 is a marked improvement over the Executive order issued by President Carter in January, S. 2525 as drafted retreats substantially from some of the recommendations of the Church committee and could begin to erode certain constitutional principles.

We urge this committee to determine whether faced with foreign threats of espionage and international terrorism as they really exist, the broad authorizations in this bill are necessary. The agencies assert that they are and even that the bill is far too restrictive. We suspect they are not. These hearings can elevate debate on this issue above the level of this kind of assertion and unexamined assumptions by requiring the agencies to substantiate their needs on the public record as this committee did in finally getting the Justice Department to ask why they couldn't operate under a criminal standard in the wiretap bill. They responded with hypothetical cases to show the need for a noncriminal standard. After looking at those hypotheticals, this committee and the Judiciary Committee and the Congress decided that a criminal standard was feasible.

Only if we do this, can the validity of the policy and possible alternatives to it be intelligently determined. Otherwise, we fear that this committee, the Congress and the public are being asked to endorse a fundamental policy assumption with possible serious and dangerous consequences without a public record to support it.

Our comments today are critical, but not of this effort by this committee to find a way to frame a rational intelligence system into law without sacrificing our civil liberties. If proper standards, procedures, and prohibitions are incorporated in this legislation, both national security and civil liberties can be protected.

We certainly do not want to continue with rule by inherent power and Executive order. We have stated time and again that Executive orders cannot place our constitutional liberties on a firm foundation since they are subject to change at any moment. But we are also guided by a corollary in thinking about the charters. We would oppose a broadly permissive statute since it offers even less protection for civil liberties, for unlike a flexible Executive order, a statute is far more difficult to alter.

Therefore, in the coming months, if we are going to work on this legislation and make a good faith effort to turn this legislation into a serious reform effort from our point of view, we would like to propose to work with this committee on five particular areas. We would like to see reflected in this bill a criminal standard that reflects the *Terry* v. *Ohio* standard discussed in the Church committee, and a standard which is carefully calibrated to include some reasonable suspicion of crime for the other less intrusive investigations, for example, recruitment, source and target, that are in the charter now.

Also we would like to work on warrant requirements. While the procedures for less intrusive techniques in general, requiring Attorney General approval, are important landmarks in the legislation, we believe that certain of these techniques must be subjected to a warrant requirement because they are as intrusive and perhaps more intrusive in some cases than wiretapping or other warrant techniques. We refer to penetration of informants into organizations, which is in our mind a walking, talking form of bug which—unlike a telephone—interferes in the legitimate activities of organizations. We would like to see some warrant requirement protecting national security interests but which would guarantee that there was some check on the broad private records checks and investigations that are permitted in the legislation. And we would also like to see mail covers, by analogy to pen registers which are included under S. 1566, covered by a warrant in this legislation.

Under title III, we have to object to the way that you drafted the mail and surreptitious entry warrant requirements to reflect the same standard in the wiretapping legislation. You are talking about, I think, a serious departure from the fourth amendment. We are talking about multiple mail openings, not particularized mail openings required by Constitution. Under current law you have to follow traditional law enforcement procedures and have probable cause of a crime. You know that we have slipped that standard in the wiretap area. Here, we are talking about surreptitious entries, multiple surreptitious entries, or multiple mail openings, not a particular search for a particular thing and without notice. Under traditional law, we require notice, except in extraordinary circumstances, and probable cause of a crime. Under title III, only reasonable suspicion of engaging in clandestine intelligence activities is sufficient.

However, while we would just simply oppose these two authorizations as drafted, we would work on the surreptitious entry provisions seriously with this committee if it were interpreted to include forms of infiltration of organizations by informants which can be defined as a form of, over a period of time, multiple surreptitious searches or ongoing searches of an organization.

Third, we have got to really go back and redraft these preventive action provisions in the bill. Section 242, allowing dissemination of information, for some purposes, to prevent acts of violence is just vaguely drafted. Section 243, which permits intelligence agents to break the law to prevent violence, is unprecedented in our judicial system and legal system, and while it requires Attorney General approval and it cannot involve violence, we can read out a parade of horribles for you wbich are possible under this section without careful redrafting to narrow preventive action to what we think at this point should be traditional methods already available to law enforcement—arrest, warnings, defusing of weapons. You will have informants in terrorist organizations. You can stop an act from occurring..

Fourth, we want to deal with the broad authorization for the Central Intelligence Agency to operate at home. Clearly this bill departs from the 1947 act which prohibited the CIA from conducting activities in this country. This legislation says except as authorized in this legislation. Title IV, the entity charter for the CIA, in

violation of the wise policy that restricted this inherently secret organization, more insulated from accountability than other law enforcement and intelligence agencies such as the FBI to operations abroad, authorizes the CIA to operate in this country, to conduct counterintelligence investigations, related, integrally related to their mission abroad. That can involve many investigations of Americans in this country by the CIA.

The collateral investigations permit any entity to conduct source, recruitment and other investigations in this country, and CIA source investigations are prohibited by law as the *Weissman* decision has already decided. The charter would overturn *Weissman* and allow the CIA to operate here. We would like to see the FBI responsible for all counterintelligence responsibilities in this country.

Fifth, we want to focus on the spillback from title I of the Charter. Title I of the Charter authorizes covert operations, and we of course at the ACLU have called for a total ban on covert actions abroad. They are unnecessary, unreasonable, not in the interests of national security, and dangerous to our human rights position abroad. But we think that we probably have lost this argument. Thus we must press for more careful restrictions in title I.

For example, the restrictions on the use of American institutions at home just simply do not go far enough. There is the spillover effect of covert operations into unconsenting organizations in this country. Congress may want to authorize covert operations, but this bill only places restrictions on covert use of certain first amendment organizations, we are calling them that—the press, the media, journalists, and academic institutions. The restrictions are not sufficient even in these areas. But wholly left out from the protections of this bill are other first amendment institutions which would include the American Civil Liberties Union, for example.

Under this title, the Central Intelligence Agency, could under cover, pretend to work with Roger Baldwin who at the ACLU is concerned with international human rights all over the world. The CIA could infiltrate the American Civil Liberties Union for purposes of operational service abroad.

Maintaining that cover and representing that they are members or officials of the American Civil Liberties Union abroad, they could engage in recruitment practices for espionage and for covert operations which are in direct violation of the nonpartisan nature of our organization and our own principles. Further title IV permits the CIA, notwithstanding any other law, except as described in this title, to maintain that cover, which means they could break the law in some ways—we can't even understand the total dimensions of what that authorization means.

Now, in 1967, the Katzenbach committee, after disclosure that the CIA was financing the National Student Association and other public organizations, determined that there should be no financial or other support of any public charity organization which could be defined as any organization under section 501(c) (3) or (4) of the Internal Revenue Code. That restriction is in place, as we understand it, but by a broad reading or even on the face reading of the authorization in title IV, we believe this restriction would be over-

ruled, and that the CIA could, for example, provide financial support to get an agent into the ACLU in order to provide cover for himself, and then operate as the ACLU abroad or as part of other public institutions, media, and religious organizations which are specially protected.

Now, one of the problems is that participation is defined so that an agent is not to influence the lawful activities of an organization. But our integrity and our independence are based on being able to control the activities of our organization, and this undisclosed participation could take it away. Moreover, participation is influence. It similarly would be influence to participate on the staff of a Congressman or a Senator in order to prepare for operations abroad and to interfere by making policy decisions with staff. It is to be involved in the lawful activities of that institution in violation of its first amendment rights.

Even the CIA recognizes this and the charter on behalf of the CIA restricts undisclosed and unpermitted uses of the name "CIA" in title IV. It proposes a criminal penalty for any organization or any institution or any person who uses the name of the Central Intelligence Agency and represents that it is the Central Intelligence Agency, for any activity. That is a libel on the Central Intelligence Agency, dangerous to it. But in the same breath this charter says that the CIA can engage in undisclosed participation in the American Civil Liberties Union and operate abroad against the principles which we are recommending in this charter. That is the spillover effect of parts of this charter, and these are serious issues, and they have not been adequately addressed.

In conclusion, we have looked at this draft legislation exhaustively. We are prepared to work with this committee, but some of these issues must be addressed more seriously by this committee or we are moving in the wrong direction with intelligence reform.

Thank you very much. I am open to your questions.

Thank you.

The CHAIRMAN. Well, thank you, Mr. Berman.

Mr. Silberman, should I say, Mr. Ambassador, do you want to proceed now and then we will have questions directed at all of you?

[The prepared statement of Mr. Silberman, entitled "Testimony on Electronic Surveillance for National Security Purposes" before the House Permanent Select Committee on Intelligence follows:]

Statement of
Laurence H. Silberman
before the
House Permanent Select Committee
on Intelligence
February 8, 1978

Testimony on Electronic Surveillance for National Security Purposes

Laurence H. Silberman

Mr. Chairman, thank you for the opportunity to express my views on bills before this committee dealing with procedures governing electronic surveillance for national security purposes. As a former deputy attorney general and former ambassador, I have had extensive opportunity to consider the nature of the problems with which this committee is grappling.

Indeed, it was Attorney General Saxbe, under whom I served, who initiated a process which has, in truth, led to this committee's proceedings. Although it is not generally known, in the fall of 1974 Attorney General Saxbe refused to approve any further national security electronic surveillance that required the attorney general's sanction unless and until the President issued an order which delineated the attorney general's authority and articulated guidelines for the exercise of that authority. Saxbe was, thus, the first attorney general to assert the need for a written conceptual framework governing national security electronic surveillances.

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As you might imagine, Saxbe's action precipitated a hasty effort on the part of the administration to draft such an order—an effort in which I was deeply involved. The executive order that followed was subsequently superseded by a new executive order, publicly issued in 1976, which reflected continuing experience. However, a good deal of the language in various bills before this committee has as its genesis the initial executive order issued by President Ford.

Moreover, as acting attorney general in the winter of 1975, I had the unpleasant duty to examine the official and confidential files of the FBI, the existence of which had just been disclosed by the press. These files revealed—to my never to be forgotten shock—abundant examples, stretching back through Roosevelt's administration, of misuse of the President's national security authority to engage in electronic surveillance. Most, if not all of this, has become publicly known by virtue of subsequent congressional investigations.

Finally, as acting attorney general—albeit for a short time—I did make some determinations as to whether or not to authorize electronic surveillance for national security purposes.

After having thought a good deal about the problems this committee is addressing, I firmly believe the egregious abuses of the past will almost certainly not occur whether or not the Congress legislates on this subject. I am convinced that the single most important deterrent to executive branch malfeasance is the prospect of subsequent disclosure. The extensive publicity, and accompanying criticism, which previous administrations, as well as the law enforcement and intelligence bureaucracies, have recently suffered will effectively deter serious future abuses of national security electronic surveillance. That is not to say that I believe legislation to be inappropriate; I simply wish to put the scope of the problem in perspective.

Much of the discussion about this kind of electronic surveillance has assumed that the interests at stake are only the privacy of individuals on the one hand, and the protection of national security

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on the other. The question of the appropriate distribution of power and authority within our government has not, in my judgment, been given the explicit attention it deserves. I hasten to say that I find the notion that the President's constitutional authority to conduct foreign affairs and to command the armed forces precludes congressional intervention into the *manner* by which the executive branch gathers intelligence—by electronic or other means—to be unpersuasive. But to concede the propriety of a congressional role in this matter is by no means—and this is the burden of my testimony—to concede the propriety or constitutionality of the judicial role created by the administration's bill [H.R. 7308].

Since I believe the judiciary's role in national security electronic surveillance should be circumscribed, I strongly support the general thrust of Congressman McClory's bill [H.R. 9745]. That bill limits executive authority to engage in electronic surveillance generally to those situations in which the administration's bill authorizes electronic surveillance. But it relies on senior officials in the executive branch—reporting regularly to Congress—to comply with its commands without providing for judicial intervention.

I have no doubt that Congressman McClory's bill would amply protect against future executive branch abuses of power. H.R. 9745 sets forth tough substantive and procedural standards (indeed, in some respects I think too restrictive), but most importantly that bill would fix record responsibility on senior executive branch officials, the President, and his political appointees, who, when they act, would surely be aware of the likelihood of future exposure if they should be tempted—as in the past—to direct surveillance at the wrong people for the wrong reasons.

But would not prior judicial approval ensure greater protection? Phillip Lacovara, in an excellent 1976 article, argued that prior judicial approval will force articulation "of the reasons for a proposed search in language that will be convincing beyond the circle of the President's immediate advisors."[1] Perhaps. And perhaps that is a mixed blessing. Under the administration's bill, the President and his senior advisors are not likely to pay very close attention to questions of electronic surveillance for national security purposes.

The presurveillance judicial warrant requirement will permit senior executive branch officials to avoid the degree of responsibility which Congressman McClory's bill would place upon them. The greater the authority given to the courts in this area, the less the responsibility exercised by the executive branch. When in doubt their posture will surely be: Try for the warrant.

As Mr. Lacovara's article implies, the real issue presented by the bills before this committee is: Should executive power be further reduced, and, if so, which branch of government should gain at the executive's expense? If one believes, as I do, that the so-called imperial Presidency was actually in decline almost from the time it was discovered (in some respects, the most recent executive abuses were actually precipitated by that decline), and that today the chief threat to American democracy is the *imperial judiciary*, one views any new delegation to the judiciary with apprehension.

Many of those who have opposed presurveillance warrants have argued that the judiciary is incapable of making the kinds of policy judgments necessary in gathering intelligence or conducting foreign policy. I do not make that argument. Unfortunately, judges are all too capable of these functions. As Justice Powell said in the *Keith* case, responding to a similar argument concerning internal security, "We cannot accept the government's argument that internal security matters are too subtle and complex for judicial evaluation. *Courts regularly deal with the most difficult issues of our society*" [emphasis added].[2] Although I have the greatest respect for Justice Powell and I reluctantly agree with the holding in *Keith* (ensuring domestic security can come too close to repressing domestic dissent), I, nevertheless, find Justice Powell's off-handed observation terribly sad. Courts do, in truth, deal regularly with many of the most difficult issues in our society—*but they should not*. They are, it will be recalled, not responsive to the democratic political processes, and the most difficult issues are political.

Not surprisingly, Judge Wright in the *Zweibon*[3] case seized upon Justice Powell's unfortunate language to make the same argument in the national security field: that judges are perfectly capable of employing that "analytical ability or sensitivity of foreign affairs

necessary to evaluate—recommendations"—for electronic surveillance. Indeed, Judge Wright went further to assert that judges were even better equipped than attorneys general to make such determinations; the attorney general, according to Judge Wright, is chosen only for his "ability as a lawyer rather than as a diplomat," and attorneys general have not gained much tenure in recent years, whereas "a federal judge has lifetime tenure and could presumably develop an expertise in the field of foreign affairs if consistently resorted to for authorizations for foreign security wiretaps."[4]

Since Judge Wright places no apparent value on political accountability—attorneys general after all are responsible to elected Presidents—he might as easily suggest the judiciary take over *all* foreign affairs responsibilities to balance their increasing dominance of domestic affairs.

But it is not just greater expertise which Judge Wright offers us in behalf of the federal judiciary. In contrast to the executive branch, Judge Wright (and others) contend that judges bring to the task of balancing national security interests against individual privacy claims a "neutral and detached attitude." Detached from political accountability, yes; neutral—hardly. It is particularly ironic that probably the most activist judge, speaking on the behalf of the most activist federal appeals court in the United States, would make that claim. Few American legal scholars whether or not in sympathy with decisions of the U.S. Court of Appeals for the District of Columbia would deny that the court has over recent years ranged as far as any court from what Professor Wechsler of Columbia calls neutral principles.[5] I don't mean to criticize this court; I do mean to make the point that the judiciary is neither theoretically nor actually more neutral than the executive, or for that matter the Congress, in reaching answers to the difficult questions which national security electronic surveillance presents. It can as easily be argued that the judiciary will overweigh the interests of individual privacy claims—it is, after all, the protection of those claims on which judicial authority is based—as it can be argued that the executive will unduly emphasize national security. And since judges are not politically responsibile, there is no self-correcting mechanism to remedy *their* abuses of power.

The appropriate institution to oversee the President's use of electronic surveillance for national security purposes is the Congress. The crucial distinction between Congressman McClory's bill and the administration's is that the former implies—indeed, virtually guarantees—continued congressional oversight of required procedures and substantive standards, whereas the administration's bill would delegate all of that authority to the judiciary. H.R. 7308 is cut from a familiar pattern; Congress once again would act as a conveyor belt, transferring authority from both the executive and itself to the judiciary, under the illusion that it is Congress which is asserting authority. But, once the magic wand of a presurveillance judicial warrant is invoked, Congress will surely abdicate any responsibility for continuing oversight.

Although I am generally concerned about the growth of judicial power at the expense of both congressional and Presidential authority, I maintain that the administration's bill, if passed, would be a particularly unfortunate addition to this trend.

As Congressman McClory put it in his opening statement, the subject matter is so closely tied to national security policy formulation as to be inappropriately put to the judiciary. The scope of judicial review for targeted U.S. persons under the administration bill clearly propels the judiciary into policy determinations of breathtaking scope.

For instance, in reviewing whether the executive's determination is "clearly erroneous" as to whether the information sought is "foreign intelligence information," the courts will be invited, indeed obligated, to consider the following: What information is *necessary* to protect the United States against attack or other grave hostile acts (which implies authority to determine which foreign countries are hostile to the United States)? and, What information, with respect to a foreign power, is deemed essential to the defense of the nation or the successful conduct of foreign affairs (which implies authority to determine what *is* the successful conduct of foreign affairs)? Prior judicial determinations on these staggeringly broad questions would presumably be binding on the executive even where the target is a non-U.S. person. Truly, under the ad-

ministration's bill, Judge Wright might get what appears to be his wish: the judiciary could gain the opportunity decisively to influence the foreign policy of the United States.

But, even if judicial review of these substantive policy issues under the clearly erroneous test were eliminated, I would oppose any prior judicial scrutiny of this kind of electronic surveillance even for the purpose of determining factual probable cause. In the first place, I doubt whether the judiciary can be held to the limitations of the probable cause standard of the Ford administration's bill. We have seen too many recent examples of legislation which grants the judiciary authority only to ensure executive branch procedural regularity. Invariably, under such legislation, the courts reach—as they did in the environmental field—for substantive review authority as well.

Moreover, despite the efforts of draftsmen to cast both the Ford and the Carter bills in terms of criminal activity, much of the foreign intelligence information is *not* sought for criminal law purposes. Even where the activity surveyed might be criminal in nature, the executive often chooses not to prosecute. That is why electronic surveillance for foreign intelligence purposes is so fundamentally different from that employed to attack domestic crime. And it is also why the traditional prior judicial scrutiny for domestic wiretaps is so clearly inappropriate here. In fact, the criminal law "probable cause" standard has been artificially engrafted onto executive intelligence gathering for the sole purpose of granting authority to the judiciary.

The administration's bill would limit jurisdiction to seven "superjudges" appointed by the Chief Justice. This interesting device was chosen, I assume, to counter concerns for maintaining security as well as to develop judicial expertise in foreign affairs. But I find it troubling. Is the Chief Justice to appoint only those judges he believes to be "sound" on national security matters? Should he exclude from his select group judges like Judge Gibbons of the third circuit who has already expressed a view in the *Butenko*[6] case that the Vienna Convention may limit certain activities respecting foreign embassies? The need for this special device suggests the im-

propriety of the entire delegation to the judiciary; when matters cannot be entrusted to any federal judge they should be entrusted to no federal judge.

Even more troubling is the secrecy with which judicial deliberations are to be encased. As I have emphasized, judges are not elected; the legitimacy of their actions, therefore, depends—even more than do actions taken by either the executive or the legislative branches—on *public* decision making. To be sure, aspects of the judicial process have traditionally been kept from the public; various hearings in camera and even the applications for warrants in domestic criminal proceedings fall within that category. But—and it is a big *but*—normally that part of a judicial proceeding hidden from the public is ancillary to a public trial; a criminal search warrant application will be part of an investigative proceeding which, since probable cause is shown, will probably lead to a criminal trial (the target of Title III wiretaps are subsequently notified). Here, on the other hand, virtually an entire phase of judicial activity will go underground. Those of us not in government will never know how the judiciary exercises the supervisory authority over national intelligence gathering which the administration bill grants it. This consideration, in my view, also weighs against pre-surveillance judicial warrants.

Finally, I should like to question explicitly the constitutionality of the administration bill. First, it denies any inherent authority on the part of the executive to conduct warrantless electronic surveillance, despite the fact that the Supreme Court has specifically reserved that question and a number of appeals courts have held that it exists (U.S. Court of Appeals for the District of Columbia is an exception). Among those who have found inherent executive authority is the 5th Circuit. Judge Bell writing for this court in 1973 said, "Restrictions upon the President's power which are appropriate in cases of domestic security become artificial in the context in the international sphere"[7] (apparently where Judge Bell stands depends on where he sits).

The Ford administration bill, at least, wisely recognized that if such inherent power existed—inherent meaning beyond congres-

sional control—it would probably be invoked in circumstances not specifically contemplated by proposed legislation. Therefore, the Ford administration bill contained a reservation for this executive authority which is probably constitutionally compelling. To have said, as did the Senate Judiciary Committee's report, that the Carter administration bill *resolves* this constitutional question by simply denying the existence of any inherent executive authority is folly. If this constitutional authority exists, and I believe it does, Congress cannot legislatively repeal it.

Moreover, I have serious doubts as to the constitutionality of the judiciary's role in the administration bill. Although I have not had an opportunity to research the question exhaustively (nor for that matter as far as I can determine has the Justice Department), I question whether the courts can accept authority to make determinations required by the administration bill.

The task of the judiciary under this legislation seems much closer to rendering the traditionally prohibited advisory opinion than to the constitutionally sound adjudication of cases and controversies. Although it is true that judges have traditionally issued search warrants ex parte, they have done so as part of a criminal investigation process which, for the most part, leads to a trial, a traditional adversary proceeding. Here, however, as I have already indicated, it is more likely that the warrant will be issued to gain information for entirely different purposes, not traditionally the business of judiciary. Of course, the broader the scope of judicial inquiry into executive determinations as to the need for information sought through electronic surveillance, the more dubious the constitutionality; the court is brought further and further away from its traditional responsibilities. For that reason the "clearly erroneous" standard in the administration bill is surely the most constitutionally vulnerable aspect of that legislation.

NOTES TO TEXT

[1]Phillip Lacovara, "Presidential Power to Gather Intelligence: The Tension Between Article II and Amendment IV," *Law and Contemporary Problems*, vol. 40 (Summer 1976), p. 106, 128.

[2]United States v. United States District Court, 407 U.S. 297, 320 (1972). This decision is commonly referred to as the *Keith* decision. U.S. District Judge Damon Keith was a respondent in the case.

[3]Zweibon v. Mitchell, 516 F. 2d 594 (D.C. Cir. 1975).

[4]Ibid., 516 F. 2d 644, note 138.

[5]Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review*, vol. 73 (1959), p. 1.

[6]United States v. Butenko, 494 F. 2d 593, 626 (3rd Cir. 1974).

[7]United States v. Brown 484 F. 2d 418, 426 (5th Cir. 1973).

STATEMENT OF AMBASSADOR LAURENCE H. SILBERMAN, SENIOR FELLOW, AMERICAN ENTERPRISE INSTITUTE, AND OF COUNSEL, DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD

Mr. SILBERMAN. Of course, Mr. Chairman.

Mr. Chairman, my testimony today juxtaposed with my colleagues beside me, reminds me of the proverbial two persons who look at the glass, one seeing it half full and the other half empty.

I appreciate the opportunity to testify on this enormously important bill. I have been asked to direct my testimony to titles II and III, and I shall do so, but I wish also to comment on certain provisions of title I which trouble me.

I have already testified before the House Intelligence Committee as to my objections to the bulk of title III which incorporates the bill the Senate has already passed covering electronic surveillance for foreign intelligence purposes. I have brought today reprints of that testimony.

My objections to the role that earlier bill confers upon the judiciary extend to those portions of title III in this bill which reach beyond electronic surveillance and which raise similar policy issues. Thus, I believe any authority to conduct mail opening or physical intrusions should be framed in terms similar to Congressman McClory's approach in the House with respect to electronic surveillance.

Turning to title II, I have a general objection to the underlying premise of this title, that is, Congress should legislate in excruciating detail to either authorize or prohibit virtually every conceivable activity in the area of intelligence or counterintelligence which touches U.S. persons and, should further provide detailed guidance as to the priority and duration of intelligence and counterintelligence techniques.

I would doubt the wisdom of this premise even if I agreed with the hyperbolic finding in section 202(2), that the draftsmen used to justify such detailed regulation.

I do agree that the Attorney General must play a direct role in the supervision of the operations of intelligence and counterintelligence vis-a-vis U.S. persons and also supervise all phases of FBI activity. But that supervision should focus on policy and cannot meaningfully extend to the approval of every single target of surveillance, every technique utilized, and the enforcement of arbitrary time limits. Nor do I believe that it is possible to so carefully fine tune and prioritize methods of collection of information as is required in sections 215, 216, and 217. Indeed, written findings required in section 217 will become, I suspect, routinized and meaningless.

Second, the threshold test for initiating any counterintelligence activity is in my view tied too closely to a violation of U.S. criminal law. As others who have testified before this committee have pointed out, the fact that a group has not yet crossed the line between legal activity and criminal conduct should not forbid the FBI from collecting any information concerning that group if it can reasonably be expected that they may cross the line. And I recognize this is a very difficult area. I have a similar concern as to the threshold test for foreign intelligence activity in section 214. That

is not to say, of course, that disruptive tactics such as practiced by the FBI under the COINTEL program should be permitted. But I do not believe that mere collection of information or, indeed, passive surveillance, should be subject to the limitations in your bill.

Perhaps the most troubling aspect of title II, in my judgment, is the almost casual and wholesale delegation to the judiciary in section 253(a)(2) to enforce and interpret much of titles I and II, and the consequent blizzard of litigation which I foresee upon the passage of this act. I have already expressed my concern about propelling the judiciary into the business of foreign policy in the intelligence and counterintelligence fields with respect to the wiretapping bill, again, the reprint of my testimony, but section 253 would significantly compound the problem. There are scores of standards in this bill which will be grist for the judicial mill. What will the courts conclude to be the least intrusive techniques? What constitutes reasonable belief that a person is engaged in clandestine intelligence activity or is engaging in an official capacity for a foreign power? How many different judicial views will we have as to when it is necessary to collect information concerning an organization, section 244(c), and how will the courts interpret a prohibition against influencing lawful activities of such organizations? In that regard, is it possible for an informant to avoid, in some respects, affecting the lawful activities of an organization without revealing his identity, his or her?

Although I appreciate the committee's efforts to provide a good-faith defense for individuals, I wonder whether section 253(b)(2) will sufficiently insulate senior officials in the Government, particularly the Attorney General, from the prospect of suffering substantial personal expense in defending himself or herself against lawsuits. In this respect, I understand the last Attorney General has been obliged to assume enormous costs, in the thousands of dollars, to defend himself in lawsuits, just the legal fees.

In sum, title II, in my judgment, is much too expansive an encroachment into executive authority to protect the country's national security, an intrusion on the part of both the Congress and the judiciary, but more importantly, the latter.

There are a number of provisions in title I which I find troubling, but I should like to specifically call attention to several. I do not believe that it is wise or appropriate for the Congress to legislatively limit the classes of Americans who for compensation aid the intelligence community. Section 132 seems to me to have as its operative philosophic premise that certain groups in our society have superior moral status, some refer to them, as Mr. Berman referred to them, as first amendment people or first amendment organizations, but actually the first amendment covers everyone, and thus should, by law, be insulated from even voluntarily agreeing to aid American intelligence. As I read that section, the Congress would be saying in effect that it is perfectly all right for the intelligence community to recruit doctors, lawyers, businessmen, and housewives, but newspapermen, including even those like myself who regularly contribute to newspapers and magazines, academics, and, I suppose to emphasize the moral superiority of this class, some might refer to it as the new class, those engaging in a full-time religious vocation are restricted resources.

Whatever might be wise policy on the part of the intelligence community—and there are good reasons not to recruit newspapermen—I thoroughly disagree with these legislative restrictions. Ironically, most nations around the world won't believe they will be honored in any event so their primary purpose seems to me to be a domestic political impact, and that I believe to be unfortunate.

I further disagree with the legislative prohibitions against special activities, in part because the terms used there are undefinable. How would one define democratic governments for purposes of this act, torture, and mass destruction of property, and perhaps most puzzling, human rights? The last term is of enormous philosophic and ideological importance, but I do not see how it can be used in the statute as a term of law. I suspect the delegation to the director to formulate regulations interpreting these terms is placed in the bill because the Senate couldn't interpret them themselves.

I do not mean to suggest that no bill is appropriate—a bill which provides legislative authority for intelligence and counterintelligence activities surely is needed. My view, however, is that it should not be so comprehensive and restrictive. It would be sufficient to set forth general policy to be complemented by the existing Executive order. A few statutory prohibitions might also be appropriate but I would wish the Congress in the main to rely on a system of executive branch reporting to the intelligence committees to insure conformance with both general guidance and specific prohibitions.

In truth, the bill, particularly titles II and III, as now drafted is a platform for massive judicial intervention and thus, in my judgment, constitutes congressional abdication of much responsibility for continuing oversight.

The CHAIRMAN. Thank you, Mr. Silberman.

I appreciate very much all of you taking the time to give us your thoughts. Certainly, whether the glass is half full or half empty, you certainly approached this problem that confronts us from different perspectives.

Ambassador Silberman, you seem to have one of your major concerns directed at what is the linchpin of our legislation in many respects, trying to find a way in which these critical decisions as far as protections for our citizens are governed by the judiciary.

I have not had a chance to read your dissertation there. I would like to. Is that directed at getting the Federal judiciary involved in wiretap as far as foreign intelligence is concerned, or across the board?

Mr. SILBERMAN. No, as far as foreign intelligence is concerned.

The CHAIRMAN. How do you make a distinction between your concern for the Federal judiciary having a role to play in foreign intelligence wiretaps on one hand as being distinct from domestic wiretaps on the other, or are you opposed to a judicial role in the establishment of criteria for domestic wiretaps?

Mr. SILBERMAN. No, but I think there is a substantial difference, indeed, even a constitutional difference, as I argued in the House, with at least some success, and that is that in the domestic area you have an adversary proceeding contemplated, and that is a criminal prosecution. In the foreign intelligence area you do not, for the large part, contemplate an adversary proceeding, and——

The CHAIRMAN. Well, let me suggest to you, that may augur on the side of needing the judicial protection more where you don't have an adversarial proceeding because everything that is done goes on behind closed doors.

Mr. SILBERMAN. Well, it is going to go on behind closed doors under the wiretap bill. You set up a secret judiciary, which I think, Mr. Chairman, if you will forgive me, is a perversion of the judicial role in this country. The judiciary, from the founding of this Republic, has been perceived as an enormous power which should always be exercised in the open, and your bill, the wiretap bill which is incorporated in this act, sets up a secret system in which the public will never know how judges are deciding these questions, and I find that a perversion of the judiciary.

The CHAIRMAN. Are you suggesting that we have the whole intelligence process being done in the open? It seems to me the reason the judicial system in the wiretap bill and in this bill is set up *in camera,* so to speak, in private, is because that is the way this business operates.

Mr. SILBERMAN. Maybe that is——

The CHAIRMAN. If we are going to have any control at all, it has to operate in that environment.

Mr. SILBERMAN. That suggests to me the inappropriateness of putting the judiciary in the role that you have. You have, in my judgment, and forgive me for that, perverted one branch of our Government by giving them this extraordinary new and different role, and I believe it is unconstitutional. I believe it runs afoul of both article 3 and article 1. It deals with, most importantly, with the question of case or controversy, and you have given the judiciary a role here which is not consistent with the Constitution. But beyond that, it is inappropriate institutionally.

Now, I believe that the judiciary is not appropriately responsive to the public in engaging in setting policy in the foreign intelligence field.

The CHAIRMAN. I think we all recognize it is very difficult to say where the line stops and starts with some of the responsibilities that exist under our Constitution. There are some clearcut lines, and then there are a number of shared responsibilities. I am glad to have your thoughts, but I fail to see the distinction between saying it is constitutionally all right for the judge to get involved in making a decision as to when a warrant is going to be directed at a bank robber and not constitutionally all right for a judge to get involved as to when a warrant is going to be directed at how you deal with a spy, which in essence is what you are saying.

Mr. SILBERMAN. Yes. I think if you read the testimony, I point out, for instance:

> In reviewing whether the executive's determination is clearly erroneous as to whether the information sought is foreign intelligence information, the courts will be invited, indeed obligated to consider the following.
>
> What information is necessary to protect the United States against attack or other grave hostile acts, which implies authority to determine which foreign countries are hostile to the United States. And what information with respect to a foreign power is deemed essential to the defense of the nation or the successful conduct of foreign affairs, which implies authority to determine what is the successful conduct of foreign affairs?

The CHAIRMAN. Well, now——

Mr. SILBERMAN. Prior judicial determination on these staggeringly broad questions would presumably be binding on the executive, even when the target is a non-U.S. person.

I think you have propelled the judiciary into the very essence of executive authority, and I think it is unconstitutional.

The CHAIRMAN. I respect your judgment on that. I don't agree with it because we say very clearly in both the wiretap legislation and in this, when you are talking about those grand designs of foreign policy or national defense, we take the certification of the Secretary of Defense, Secretary of State, and the Attorney General.

Mr. SILBERMAN. Yes, but as I pointed out——

The CHAIRMAN. We don't ask the judge to look behind that certification and determine the accuracy of every bit of evidence that is presented it.

Mr. SILBERMAN. Well, I think as a matter of law, the clearly erroneous test does give them authority to go beyond that, but I should ask you to take a look at the testimony I presented, and also——

The CHAIRMAN. All right, we will.

I don't want to be argumentative about this. We are here to get your opinion, not mine.

Mr. SILBERMAN. Well, Mr. Chairman, in the House some of us did testify on these points, and there is considerable more doubt in the House at present as to the wisdom of the judicial role.

The CHAIRMAN. What we are trying to do is to recognize the fact that we now have rather dramatic evidence of infallibilities, and people succumb to human temptations. The whole process of our tripartite system, rightly or wrongly, suggests that the judiciary is in a position of judging absent as many pressures to succumb to some of those temptations, with a better perspective than the executive and the Congress. You suggest that the judge is going to have so much trouble deciding the standards, but somebody has to make those decisions in the executive branch, and I don't see how a judge is going to be any less intelligent, less able to deal with making those decisions than the Attorney General or some third-rate deputy who may be consigned to really making the actual decisions.

Mr. SILBERMAN. As a previous deputy—[General laughter.]

The CHAIRMAN. Well, you were not a third-rate deputy. You were a first-rate deputy.

Mr. SILBERMAN. Well, I appreciate that.

I would call your attention to something I said in my testimony to the House that has been reprinted:

> But it is not just greater expertise which Judge Wright offers us in behalf of the Federal judiciary. I am referring to Judge Wright's decision in the *Zweibon* case. In contrast to the executive branch, Judge Wright and others contend that judges bring to the task of balancing national security interests against individual privacy claims a "neutral and detached attitude" which is just the point you made. Detached from political accountability, yes; neutral, hardly. It is particularly ironic that probably the most activist judge speaking on behalf of the most activist Federal appeals court in the United States would make that claim. Few American legal scholars, whether or not in sympathy with decisions of the U.S. Court of Appeals for the District of Columbia, would deny that the court has, over recent years, ranged as far as any court from what Professor Wechsler of Columbia calls neutral principles.

I don't mean to criticize this court. I do mean to make the point that the judiciary is neither theoretically nor actually more neutral than the executive, or for that matter the Congress, in reaching answers to the difficult questions which national security electronic surveillance presents. It can as easily be argued that the judiciary will overweigh the interests of individual privacy claims—it is after all, the protections of those claims on which judicial authority and their power is based—as it can be argued that the executive will unduly emphasize national security, and since judges are not politically responsible, there is no self-correcting mechanism to remedy their abuses of power.

Mr. SHATTUCK. Senator, excuse me. If I could just jump in for a moment to defend this aspect of the bill—the role of the judiciary now in determining what the Ambassador has characterized as——

The CHAIRMAN. Mr. Shattuck, may I ask you to suspend, wait to respond until Mr. Silberman comes back.

Mr. SILBERMAN. Excuse me. I have an emergency call to call home.

The CHAIRMAN. I understand you do. I thought since you are dealing with that particular point——

Mr. SHATTUCK. I'm sorry.

The CHAIRMAN. Let me ask you just one question here before I think a time constraint is going to be imposed so that others can share this responsibility.

I appreciate very much the fact that you gentlemen have given this such a close, high degree of analysis, and of course, it is our responsibility to work with all groups that have concern on this matter. Particularly with the degree of expertise that you bring to bear, we would be more than glad to accept your invitation to work with you.

I guess we are on the horns of a dilemma where I think, Mr. Shattuck, you start out by saying this is more of a threat than a reform, and yet your colleague, Mr. Berman, says it is marked improvement over the executive order.

Now, like it or not, we are dealing in the real world here. I have talked to some intelligence people who have dedicated their lives to intelligence just as you dedicate your lives to the protection of civil liberties, who come down opposing this bill for just the opposite reason, and somewhere, east and west have got to meet. I am hopeful we can do it, but it is going to take a good deal of persistence and determination on all of our parts, I think, to use that barometer of as near perfect as we can come, as we can possibly get it, recognizing we are trying to improve the status quo.

Mr. BERMAN. Well, a couple of points there.

We are on the horns of a dilemma partly because from our point of view, it is the relatively broad assertion of power that is in the Executive order, so this is relative an improvement from that point of view, but it still poses substantial questions.

Now, the Executive order, as I pointed out at the end of my statement, is a flexible Executive order we can change. We can also challenge it in court. For example we will file an amicus brief in terms of the standards that they applied in the *Truong Wiretap* case, or if they conduct a surreptitious entry, but——

The CHAIRMAN. How are you going to change all this? After the fact you can change it. You can't change it before the fact.

Mr. BERMAN. Well, we can change it before the fact in terms of this legislation, but we can also change it simply by leaving a

substantial doubt as to the legitimacy of the Executive order. One of the reasons why the executive branch wants charters is they are not sure whether the broad assertions of power in the Executive order are constitutional. We at least at this point have remedies, the ability if something is disclosed to challenge it in court, and contrary to Mr. Silberman, many national security issues, not by our intent but by the activities of the agencies, have got themselves into court.

But we have some remedies, and what we are worried about is, on top of an overbroad Executive order, adding congressional authority and possible new good faith defenses under a statutory scheme which gets too close to that Executive order. It will make it difficult for us to sue under a civil rights statute. It will raise new good faith defense. So you can see it possibly cutting down on civil liberties.

So to get off the horns of the dilemma, we have got to be more calibrated and careful in the drafting of the statute, and to cite an example of how that is possible, I don't think we should debate the wiretap bill here today, but the administration, with all of its national security concerns, started out 3 years ago with a very broad version of the wiretap bill, and it looked in many respects like this draft charter. When introduced, we read the wiretap bill to permit many of the abuses, even with a warrant, that we have read into the draft charter.

But 2 years later the bill passed—after intensive work and sorting out what the priorities were, with a good faith effort on both sides to go to the table and say what is important here, can we do our job and still protect civil liberties. As far as the wiretap bill is concerned, both we and the executive branch have concluded it is better to have the courts protecting citizens than an oversight committee where there may be 20 different opinions about what would be permitted.

The court is asked simply to arbitrate both the civil liberties and national security interests, and the court is asked only to apply the standard which makes sure that the Government is not trespassing, the fourth amendment. And contrary to Mr. Silberman's account of the history of the fourth amendment, I think it was placed there because of intelligence activities, broadly construed by the British against American colonists, including all kinds of things to find out who was committing treason against the State. That is the heart of the fourth amendment.

So from our founding to the present, that is the principle we can operate under.

I think that we can calibrate and work on this, on the statutory authorizations in the charter so it can more carefully focus on the national security targets and foreign threat targets legitimate to the intelligence community, and to focus them more outwardly.

The CHAIRMAN. I think we did make significant improvements in the wiretap bill and we pretty well signed off on it here. Those on one side of the philosophical spectrum and those on the other, none of us were totally happy but all of us thought we had come forth with a pretty good creation there that was important for the country. It is important to recognize that we have a third option here, and that is not of one side or the other winning this argument, but

of nothing happening, and in my judgement, then, the whole country suffers.

It has not been an easy task for Senator Huddleston and some others of us involved in this, but he particularly is the man who has been involved personally as the chairman of the subcommittee to try to move as far as we have now.

Perhaps I should yield here to my colleague and then to others so that they can participate in this.

Do you want to go first?

Senator GOLDWATER. Well, I don't have any particular questions, Mr. Chairman. I would like to make a comment that I made before and I know the chairman has made. When all of us introduced S. 2525, all of us admitted that we had some reservations. I think we were unanimous in the statement that we didn't think a bill could be reported out for about 2 years, and the more testimony I hear, the more I am convinced that this was right and the less I envy Senator Huddleston's position and feel somewhat sorry for what we invoked on him.

As I see this whole question, we are talking about intelligence over here and FBI over here, and I think where the two have similarities, we have to discuss them in the same vein. And on the other hand, I look on intelligence as an absolute must to run this country in foreign affairs, and the FBI, I look on more or less as the Federal type of police.

Now, through the days that I have sat on the Church committee and this committee, I think I can make this statement without fear of contradiction. I don't know what percentage to use, but nearly all of the so-called misdeeds of the CIA particularly were occasioned by a presidential order. I have known the CIA for a great many years, and I know that they have respected their charter and they have respected their bounds. But, throughout the Church committee testimony, when we heard of poisons being ordered made, guns being ordered made for the purposes of assassination, it turned out that it was the President who gave the orders.

And just last night, for example, I was reviewing materials that I put together everytime I return from a conference that I think will be of some importance, I sit down and dictate what went on. I don't know whether this was Operation CHAOS that you referred to, but it was in that area. I had returned from a meeting at the White House at which Mr. Kleindienst was appointed, in fact, directed to organize surveillance and apprehension of people who had been involved in or were going to become involved in a Vietnam demonstration here. What interested me was the police chief finally told Mr. Kleindienst that was his job, and he performed his job.

So when we are talking about this, particularly you fellows in law, I think you have to help us decide what kind of a fence we can build around that presidential office to keep them from meddling in our internal affairs. Now, I don't care what President you want to go back to. I go back rather actively to the days of Hoover, and every one of them, right on down the line, has used some department of Government to harass Americans.

I think of the Internal Revenue Service, for example. You say on page 6 that systematic inspection of mail covers, examination of all

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public and private bank, health, tax, employment, credit, and other confidential records in the possession of any agency.

The IRS does this daily, and we now have a computer system that is becoming more and more centralized where IRS or CIA or FBI or the Arizona Highway Department can get a lot of the information they want on any one of us just by turning on a computer.

So I would hope, in your further assistance with this bill that you put a lot of attention on how we can control the President who for political purposes wants to get even. And I am not defending Republican or Democrat on this. They have all done it.

Mr. BERMAN. It has been bipartisan abuse.

Senator GOLDWATER. I wouldn't be at all surprised to find the present occupant of the White House trying it someday. It is a hell of a lot of power.

But please, I am going to ask all people who testify to concentrate on that one source of power that has brought discomfort and discredit to organizations that I have all the faith in the world in, to being able to give us the intelligence we need, to keep us out of war.

Mr. SILBERMAN. Senator Goldwater, may I add to that. As Deputy Attorney General, indeed, as Acting Attorney General in the early part of 1975, it became my sad duty upon the exposure in the Washington Post of the secret files of the FBI, to be the first person to review those files in preparation for testimony before the House, and I would say without question you have every right to raise that concern, because of all the abuses of various agencies of Government over the last 20 years, I think the most single egregious abuse was President Johnson's direction to the FBI to see if they could find any dirt on your staff 2 weeks before the election, and I testified to that before the House back in 1975. So you have every right to be concerned about that, and indeed, that is in my judgment——

Senator GOLDWATER. I hadn't even thought of that.

Mr. SILBERMAN. I beg your pardon?

Senator GOLDWATER. I hadn't even thought of that.

Mr. SILBERMAN. Oh. Well, it is true.

Senator GOLDWATER. He just didn't look far enough.

Mr. SILBERMAN. In fact, they looked very hard indeed. The fact that they couldn't find any doesn't mean that they didn't look far enough.

But that is a central concern, and I believe, Senator Goldwater, that the most important sanction of all today is the possibility of subsequent publicity which reveals the misdeeds of the executive branch, and the high——

The CHAIRMAN. Oh, Mr. Ambassador, do you really mean that?

Mr. SILBERMAN. Well, but you——

The CHAIRMAN. That's the whole reason for the judiciary. The judiciary isn't going to be out there running for election, neither Republicans nor Democrats. In fact, we had a Republican appointee who showed more courage than the average, even the average judge has in the latest kind of disclosure, and so our track record of the judicial system being separate and apart from the kind of everyday pressures that all of us are under is a good one. We are

tempted to do something we might not normally be tempted to do 2 weeks before election, maybe, and the judiciary is the one branch that can say, OK, let's not be content to be disclosed afterwards and embarrassed afterwards, but let's try to have a system that keeps it from happening in the first place.

Mr. SILBERMAN. Well, I was making the point——

The CHAIRMAN. Excuse me for interrupting.

Mr. SILBERMAN. That's all right. I was making the point that the prospect of future publicity is a very real and a most effective deterrent on the present actions of people. I am quite convinced of that, by far and away the most important deterrent. If people in the executive branch are convinced that their actions will be eventually public, they are much more scrupulous, indeed, than they are otherwise, and one of the things that troubles me about your wiretap bill and title III is I believe much of that will go underground and people will be inclined to think if they can get it by a single judge, they are fine. And so I think there will be an abdication of both executive and congressional responsibility.

Let me go on to make a point, if I may. Even if you disagreed with me with respect to my broad objections to your use of the judiciary in titles I, II, and III, surely my point with respect to the interpretation of 253(a)(2) ought to be considered by the committee, and that is this point.

Mr. Berman a moment ago you said after all, these are only constitutional protections which the court will be involved in, but that isn't so. Section 2, which would be subject to judicial interpretation, authorizes engaging in any intelligence activity, unless such activity was engaged in for the purpose of limiting, disrupting or interfering with the exercise of any right of such person protected by the Constitution, or the laws of the United States, including this law. Now, I believe that is an open sesame for the courts to interpret at each stage of the process, in litigation which in some cases may be designed perversely to limit legitimate activities of the intelligence agencies, to interpret all of the vague language, in fact, in many respects, new language that you have put in this bill. It seems to me that even if you are going to give judicial authority here, it ought to be very carefully crafted so it is clear exactly what it is the courts have jurisdiction to interpret and what it is they do not.

The CHAIRMAN. Well, that is certainly something we ought to consider.

Mr. BERMAN. May I make a response to that?

That provision, that restriction the courts can already determine in civil litigation. We have a number of lawsuits right now based on violation of constitutional rights under the ability to sue intelligence agents acting outside the scope of their authority under Bivens. I won't go into the technicalities but we can go to court, and I think that this legislation is designed, is attempting, to protect civil liberties, but also as Senator Goldwater points out, to prevent the executive branch from pushing intelligence agencies into activities which would destroy their credibility and their intelligence effectiveness. So to say that this restriction adds something new, that by not passing this bill, intelligence is outside the law, is wrong. They are within it, and I am hopeful one of the reasons why

the intelligence community wants charters, is so that they have some clear standards and authorization about what they can and cannot do, not only to protect against civil liability, which is our only effective remedy at this point, but also to stay within their mission as Senator Goldwater puts it. And I think the gist of our statement is that by carefully drafting the provisions along constitutional grounds, with clear restrictions and guidelines and calibrated standards, that the intelligence community will be better off. The CIA can stay at home and the FBI can look at law enforcement or whatever counterintelligence espionage investigations it has in the United States.

Mr. SILBERMAN. I don't think the CIA should stay at home.

Mr. BERMAN. I mean stay abroad, excuse me.

Mr. SILBERMAN. Oh.

Mr. BERMAN. That was a misquote.

Mr. SILBERMAN. Well, I am afraid this act may keep them at home, spending their time litigating.

Mr. BERMAN. Well, that is our point, and we would like to just draft it to push them back abroad where they want to be.

Senator GOLDWATER. Let me just ask you, Mr. Berman, how do you get around the fact that the President is the Commander in Chief, and when he orders anything done, whether the person is in uniform or civilian, it either gets done or the fellow turns in his suit.

The CHAIRMAN. Before you answer, I would like to express my apologies. I have another committee that is meeting in about 2 minutes and I bave a bill that I have been trying to get out of there for about 4 months.

Senator WALLOP. Can I come up and vote against it?

The CHAIRMAN. No; I want you to stay here. We need you here to keep a quorum.

I will turn it over to our distinguished colleague from Kentucky.

Mr. BERMAN. Thank you very much, Senator.

Senator GOLDWATER. Would you address yourself, not now but give some thought to that question because while the Constitution is not explicit, he is the Commander in Chief, and when your boss says do something, by God you do it.

Mr. BERMAN. I wonder. I think that pressure put on the CIA, for example, to engage in Operation CHAOS was unconscionable. The CIA ended up doing it for Lyndon Johnson and doing it for President Nixon, and got itself out of its legitimate mission and in violation of civil rights. But there had been an erosion, clear erosion because executive guidelines are so changing. There were no clear standards and sometimes the CIA was forced into using pretexts to conduct those investigations.

Hopefully it is the tripartite structure of standards which the courts could apply when very intrusive techniques are used and records are searched, standards which the Congress can apply in exercising oversight, because oversight is going to be nearly impossible unless there are some guidelines set up because one person's abuse is another person's national security necessity. And so it is reaching this understanding of what the guidelines are so that you can judge when they are overstepping those lines. It is the standards and oversight accounting responsibilities in this bill which

have been missing before. It would have allowed this Intelligence Committee and the House Intelligence Committee to say don't conduct that operation, or at least we don't think you can. To violate this charter when properly drafted, it will require a three-branch decision to violate the law. In the past it has been the executive operating in secret, all by itself. And so all three requirements—clear standards, judicial supervision, and congressional oversight—are the only means that we have to check the Commander in Chief from ordering improper activities.

Mr. SILBERMAN. The delegation to the judiciary indeed does force stricter standards than would otherwise be utilized. My own notion is that many of the issues dealt with in this statute are enormously difficult, and I am not at all troubled about the fact that, given particular crises in the future, there should be some play in the interpretation of the present Executive order, plus a stripped-down charter bill which would set forth general policy. I am not at all troubled that, in the area of foreign intelligence—which is so closely tied, as Senator Goldwater put it, constitutionally tied to the President's Commander in Chief responsibility—indeed, so closely tied that much of this bill may be vulnerable under the Constitution—but I am not troubled at the notion that in a given crisis, in a given situation, the Executive, the President of the United States, would come to this committee and a number of Senators, responsive as they are to the American people in a way in which no judicial officer is, would be forced to make tough policy decisions. I am not troubled about that at all.

I am very troubled about hampering the intelligence capability of the United States and hampering the counterintelligence capability of the United States on the altar of judicial imperialism.

Mr. SHATTUCK. Senator, if I could just add one point to that. I think when you refer to the Commander in Chief power, that is not the area in which the power was asserted to do many of the things that you have characterized, and that we have also characterized, as abuses, the kinds of investigations of American citizens which intrude upon their constitutional rights. In that area, to the extent that these activities have gone on in the past, they have gone on under an assertion of inherent presidential power, and in that respect I think it is perfectly constitutional for Congress to move into the field and to legislate to prohibit or restrict those kinds of activities. Those are not Commander in Chief activities so much as they are activities that are conducted under a rather vague historic assertion of inherent power to engage in the kinds of intelligence activities which we believe should be brought under control in this legislation.

Se I think, partially in response to Ambassador Silberman's observation, that we are not dealing here with a serious constitutional question when it comes to the power of this committee and the Congress to restrict where the President has acted pursuant to a claimed inherent power that affects the rights of citizens, but not the Commander in Chief type of activities which are more military in nature.

Mr. SILBERMAN. Mr. Chairman, if I may——

Senator WALLOP. Could I just ask a question here, because this is one of the things that troubled me with the wiretap bill, and I so

stated on the floor, and I tried an amendment on it because it really concerns me. If you involve the three legs of our Government acting in concert on this thing, then if you, as a citizen, are aced out, you have got nowhere to go. That is what worries me about involving the Congress, the Executive, and the Judiciary from day one. If all of them abuse you, to whom can you then appeal?

Wouldn't it be better to have this kind of thing done by the Congress and the Executive but held to account by the courts? You then would have some room to argue. But if somebody says, well, hell, I got my warrant, I got my permission from the courts, then there is no more room. Where is a citizen going to go if he has been abused?

Mr. BERMAN. The bill has a number of other checks. I think it makes the judgment by the Congress that no intelligence committee is going to be overseeing all of the authorizations for, say, wiretapping, but it permits the court to apply that standard on initiation, and it also permits quarterly reporting to this committee. If the courts were interfering with clear national security interests, this intelligence committee would know about it, because you have the right under the wiretap bill to demand enormous amounts of information about how that is being conducted, and you can amend that law.

Senator WALLOP. True, but my concern is that, as an ordinary citizen out there who has had the full decisionmaking process of all three branches come prior to the fact, not after the fact, of their intrusion upon my rights, I don't think I would have any place left to go. I am not even saying that there would be collusion, but if it is all done, if it is all said and done, the Congress has laid down standards and you have had a judge give his approval, and the President says go get him, there you are, Charlie. It seems to me that you ought to save one in reserve.

Mr. SHATTUCK. Senator, I think we agree with the spirit of your comment, but the problem right now is that there is no place to go. There is, under current law——

Senator WALLOP. I am not saying that we should do nothing. I am talking about doing everything all at once, and that seems to me that there is somewhere in the middle that——

Mr. SHATTUCK. But as one of the attorneys who for years has labored in the vineyards of judicial review, I can tell you that it is——

Senator WALLOP. I wouldn't want to deprive you of a living.

Mr. SHATTUCK. Don't worry. We are sure that we can find something to do under this bill.

Mr. BERMAN. The Ambassador is examining the role.

Mr. SILBERMAN. Yes, I was going to say they will expand their Washington staff significantly if the bill is passed.

Mr. SHATTUCK. We don't regard this as a relief measure. But it's certainly true that there is very little place to turn now if you are the victim of the kind of intelligence abuse that we are all discussing this morning.

Senator WALLOP. There is. There is the court.

Senator HUDDLESTON. There always will be. I mean, in our system of government there is no absolute power, not with the

President, not with the judiciary, not with the Congress. There is always a place to go.

Mr. BERMAN. Let me give you an example. We are litigating a case, which this Committee investigated, involving the NSA cable and overseas microwave communications intercepts of American citizens without a warrant. We consider that to violate the fourth amendment, and we can argue, for instance, as we go up whether national security required that or whether that was focused on domestic dissent.

But in the Court of Appeals it was held that, because of sources and methods and a state-secret privilege available to the National Security Agency because of its sources and methods, there would be no disclosure of even the names of the people who were intercepted, admitting the interception, because it would disclose the source and method. So, because of the structure of present law, we are barred from the remedy by that decision.

The purpose of this legislation is to provide remedies for such abuse; but also on the front end, if to the extent that that remedy is limited by such national secrets being abused, to make sure that there is prior authorization and some other check besides the executive who uses it. And I think that is the answer, and it runs across this bill.

Senator HUDDLESTON. Well, let me first say that I appreciate the expressed sympathy and concern for the subcommittee in developing this legislation. I might say, though, that after these hearings and the testimony we have had similar to that of today, in which the two poles of the question have been explored, I feel more confident that the subcommittee has probably come closer to reaching the right balance than anybody is willing to admit right now.

Mr. SILBERMAN. Well, Mr. Chairman, may I add at this point. The mere fact that the present bill looks to you now as somewhere between, maybe roughly between, the two positions expressed here today does not, in my judgment, guarantee it as achieving the appropriate balance between all of the interests involved.

If, for example, I should be more right than they, or vice versa, then the mere fact that the bill is somewhere between the two does not reflect the appropriate standards.

Senator HUDDLESTON. I recognize that, and we——

Mr. SILBERMAN. I recognized that this was a problem of our both appearing here today, too.

Senator HUDDLESTON. Our objective is not to satisfy everbody, or maybe anybody, as far as that is concerned. I think Mr. Shattuck very succinctly outlined the objectives for which we were reaching in his most recent statement in response to Senator Goldwater, but at the same time, as I read his testimony—and I am sorry I wasn't here to hear it all—and his interpretations and concerns, it raises doubt in my mind whether by his own interpretation and own objectives, what he outlined as the objectives of the bill is possible.

Mr. BERMAN. Senator, I think they are possible. One of the things that makes it most difficult for us to know about what is possible and not possible is that the only public record available to citizen organizations like ourselves, to whom this legislation is terribly important and we want to participate in it, and I think we have mentioned this to you before, is we have the record of the

Church committee, actually your committee. I mean you helped put a lot of that record together, and we have our litigation, we have real cases.

A lot of witnesses have asserted that this is going to interfere and destroy and upset the national security interests of the United States, like the reporting requirements, too many reporting requirements. J. Edgar Hoover managed to operate very well with reporting everything, and everything was on paper. He managed to do his job inappropriately and outrageously, but he did it with paper and paper. We are still sitting over tons and tons of paper from the CIA involved in all of this litigation.

So reporting requirements, all these restrictions, I don't think that's the issue. I think that what our statement is trying to get at is that we need more examination of the policy choice, the necessity for the authorizations, to really force the executive branch to articulate its priorities, not all the hypotheticals or possible things that they might need which causes exception after exception or vaguer and vaguer terms to be drafted into the statute, but to really sit down and force that out.

Now, if the subcommittee has done that, it has done it in executive session, and that is one of the problems of secrecy in this society, the fact that we don't know what——

Senator HUDDLESTON. Well, we spent hours and hours with the executive branch and with the various agencies discussing what they considered to be their requirements for a certain amount of flexibility. They can't, they say, anticipate every possible situation that might develop, and we have tried to take into account the fact that some flexibility is needed. But on the other hand, as Mr. Silberman suggested, I can't see that it would be sufficient just to have broad general policies and depend on the oversight committees to exercise enough judgment and enough control to make sure that the abuses don't occur. I think that is asking too much.

I don't believe that we can function that way, and for that reason we did write in a number of specific prohibitions and restrictions.

Mr. SILBERMAN. There are some specific prohibitions that I agree with, as a matter of fact, Mr. Chairman. But what I am most troubled about is even where you tried to give flexibility, my own view is having given judicial authority to interpret all that means that what is flexible, if this bill were passed tomorrow, would become increasingly rigid as the courts interpreted it, because the courts can't adequately deal with flexible standards, and that is what so much troubles me.

And I also have a philosophic point. You have an Executive order in existence now. Mr. Berman and Mr. Shattuck say that is not sufficient because it can always be changed by the President. Well, it can't be changed unless it is public, and it is inconceivable to me that there would be any change in that Executive order which would not be in the future subordinate to the agreement of this committee, even if you did not legislate as extensively as this bill does. That is to say, if you took my framework, which is certain general policies, certain specific prohibitions, and take account of the fact that there is an existing Executive order, recognizing that

much of this will necessarily be added to the experience that people have in the future.

You are going to have a continuing control over that situation and the country is going to have a continuing control through you. It is inconceivable the President would willy-nilly change the Executive order.

Now, there may well be—well, I have noticed that this administration, the longer it stays in office, seems to get more and more concerned about restrictions on its intelligence activities, and I am not surprised. I would have, indeed, did predict that that would happen. Wasn't it just recently that the President said, contrary to the way he was talking during the campaign, that present law which requires the reporting to so many committees, is a danger to national security.

So, I think there may well be in the future some views that even—that certainly the restrictions in this bill, and maybe other restrictions, are too tight given the exigencies which the United States may face, and therefore there may well be changes. If you write it all into law, it is much more difficult to change. In fact, it may be virtually impossible to change it.

So I only commend to the committee that there be some caution, some deference. The New York Times in an editorial recently said that what troubles them so much about this bill is that the impelling need or drive or political support for reform seems to be slipping away, and that therefore the committee must act very quickly to put a bill out. Well, I interpret that to mean that as we go further, we see that there are broader interests involved than simply the interests which my colleagues, geographically only, to the left here at this table are asserting, but I think there are other interests and I fully suspect that if this bill were passed as it is now, just as some previous bills have been passed by the Congress, within a couple of years there may be a number of Senators and Congressmen who felt, my gosh, we moved too quickly, we really should have let this sift around and think about it for a while.

Senator HUDDLESTON. Well, I can't agree with the Times or anyone else who contends that there is any great haste on the part of the committee in developing this legislation or presenting it. We have been dealing with the problem now for 4 years, pretty near.

Mr. SILBERMAN. No, no, they criticized you for being too slow. But I thought your deliberateness, your deliberate speed, if you will, has been commendable, and the fact that you have been as open in soliciting testimony from varying views about this bill is commendable, and I would hope that in the future that development of the bill will continue to have that careful attention.

Senator HUDDLESTON. I am troubled some by your concern about the secrecy of the judicial participation. It seems to me that one of the things we are trying to do is to create a mechanism in which you can generally have some confidence, even though you are dealing with matters that many times must remain secret. But if you understand that a judicial order is required, even though you don't know all the particulars, it seems to me the citizens would have some confidence that it is not a willy-nilly thing, it is not a whim of some agent or maybe some overzealous individual, but it has gone through a process that is designed at least to protect the

liberties of our citizens and also to make sure that it is within the law.

All judicial proceedings are not open to the public now, from what little I know about the judicial process. I would suppose that grand juries could be considered part of the judicial process. Certainly their deliberations are in secret and generally remain so.

Mr. SILBERMAN. But on the other hand, if there is a prosecution, if there is any action by the State, it must become public, and I think you will see that traditionally where the judiciary had been involved in, *in camera* or secret or *ex parte* proceedings, it is only ancillary and preliminary to a public proceeding if there is any action taken, and that is indeed the framework and structure of domestic wiretaps, where in fact individuals can sue if they are wiretapped inappropriately.

Now, this national intelligence wiretapping doesn't fall within—this is a sharp break with constitutional and institutional precedent in this country, and indeed——

Senator HUDDLESTON. If there is legal action, would not then the judicial process be part of the case?

Mr. SILBERMAN. But in national intelligence, you are not looking to take legal action in 99 percent of the cases. You are looking to protect the security of this country using devices totally different from the court procedure——

Senator HUDDLESTON. That's why we have this process.

Mr. SILBERMAN. Well, you know, I guess it goes to a philosophy. In the last analysis, I am much more willing to trust the American people as a whole, and therefore those representatives of our government who are closest to them, than I am to, with respect to the formulation of basic policy, than I ever am to those who do not have to stand and respond to the American people—I think this is classic doctrine. I do not think we should give to the judiciary policy formulation, and I am afraid this bill, the criteria that you tried to put in, which are indeed flexible, combined with the judicial review section, really abdicates and gives to the judiciary an enormous amount of policy formulation which should be—which is really inconsistent with our structure.

Senator HUDDLESTON. I don't think we had considered that was much of a possibility or a threat. The judiciary, after all, will be working within policy that is established by the act.

Mr. SILBERMAN. That all?

Senator HUDDLESTON. Any departure from that could, of course, bring an amendment to the act or whatever might be necessary to get them back on track, it seems to me. A judicial interpretation which might become part of the law is still subject to change.

Mr. SILBERMAN. But I would submit respectfully that much of the language of titles I and II and III is very general, very general indeed, and as I suggested in my testimony in the main I am absolutely certain that would crystallize and rigidify under the onslaught of gentlemen such as Mr. Shattuck and Mr. Berman.

Senator HUDDLESTON. I think the ACLU testimony mentioned that a number of things could still happen under the present law that were revealed as very serious abuses by previous investigations, such as the Martin Luther King type investigation.

How specifically would the law permit that type of thing to happen?

Mr. BERMAN. Senator, with the following qualifications—that we thought it was our task, given the way that the bill was drafted, to treat it seriously and read it broadly in terms of——

Senator HUDDLESTON. Worst possible case.

Mr. BERMAN. Worst possible—not, well, maybe not the worst possible case, but we want to assume that we had a wrong-minded FBI. Let's just take this bill backward, and under the standards look at a couple things.

For example, the Martin Luther King investigation was started by the FBI on the grounds that Martin Luther King was associating with two members of the Communist Party who were on his staff. This led to wiretapping and intrusive covert infiltration of his organization. This is just the investigation.

Under this bill's definitions, if you reasonably believe that someone is engaging in clandestine intelligence activity for or on behalf of a foreign power, that may or may not involve a violation of law, you can investigate. I think J. Edgar Hoover would have made that test, that he had a reasonable belief.

Foreign power is broadly defined in the definitional sections to include any corporation controlled or directed by a foreign government. It was the assumption at the time that the Communist Party, USA was directed and controlled by a foreign government. Therefore, Martin Luther King, by secretly associating, with two Communists, who were possibly interfering with the civil rights movement, trying to engage in sabotage and demonstrations could have been targeted under this bill for investigation.

Now, let's look at the COINTELPRO assertion. As we analyze the bill, section 243 is drafted to deal with terrorist acts by breaking the law. Let's also look at 242, the dissemination of information, not to discredit any person, right? But to prevent terrorism.

Now, the way the bill is drafted, it says if you disseminate information which doesn't pose a physical threat to someone, not because of a person's involvement in constitutional rights, but to prevent terrorist acts, not defined in terms of time, immediacy or whatever, you could have disseminated the information, derogatory information about any United States person, including the tapes of Martin Luther King, which you got from the investigation, to other organizations who might be engaged in terrorism, or to supportive organizations in order to cause disruption and dissension in order to prevent terrorism from occurring, potential terrorism.

Therefore, the derogatory information about Martin Luther King could have been disseminated under the terms of the statute. That is not the intent, but could have been done if the Attorney General approved and so forth. But we are dealing with—at that time it was Attorney General Robert Kennedy, but for some reason they went around talking about how awful this was but they didn't seem to be able to do anything about the FBI.

We downplay the reporting and oversight requirements which would bring it to this committee because we are talking about a time of social crisis. Hysteria might have grabbed the Congress as well as an oversight committee being captured, which they often

have in the past, and we can't guarantee against that. So we have to give a broad reading.

Let me give you—I can take you through the other examples, if you would like, if you want me to.

Senator HUDDLESTON. Well, in the case of the conspiracy in the *King* case, would the potential repeal of the Smith Act——

Mr. BERMAN. Well, the conspiracy section of 213—is another ground. For instance, even if Martin Luther King was not reasonably believed to be engaged in clandestine intelligence activity, the conspiracy provision of 213 includes anyone conspiring with any person engaging in any of the above activities. So Martin Luther King—it doesn't say knowingly, it doesn't say for and on behalf of a foreign power, it doesn't say in the activities, but just conspiracy broadly interpreted, which could be tied to the criminal laws, but not necessarily because these statutes jump out of strict criminal standards. Martin Luther King could have been targeted as an associate for conspiring.

It is arguable and I think a credible case can be made that the standard as drafted would permit that, which doesn't mean that the bill is impossible. It means that it needs to be more carefully drafted, and we have—and——

Senator HUDDLESTON. Well, how would you suggest that the intelligence agencies would be able to take any action against any person or group prior to that person or group committing some overt act that does violence to the interests of the United States.

Mr. BERMAN. Are we talking about the 243 section which involves breaking the law, or act or investigation?

Either one. We are talking about international terrorism, and for example, or sabotage, for and on behalf of a foreign power, by simply a drafting error in the last——

Senator HUDDLESTON. Or even espionage.

Mr. BERMAN. Or espionage. There is a carefully crafted provision for disseminating information to an intelligence officer of a foreign power, which would be, I think should be a hostile foreign power or someone engaged in espionage, but besides that definition, the definition for disseminating derogatory information to prevent an act of violence may not be a technique which you can statutorily afford, or public policy wise or constitutionally afford to authorize. We think that there are many ways that you can act against terrorism. A terrorist organization engaged in terrorism claiming in public—and they have always publicly claimed that they are engaged in terrorism because that is how they intimidate the public—would be under investigation. You would have penetrated it with informants under a criminal standard. You would be maintaining electronic surveillance and every other technique in the arsenal under a criminal standard. You would be able to warn, advise, arrest, defuse explosives——

Senator HUDDLESTON. I don't know that that is necessarily——

Mr. BERMAN. I just don't understand. Obviously there have been some exceptions discussed where the situation may not apply. In other words, instead of a parade of horribles from our point of view, a parade of horribles of situations which the FBI might face in dealing with a situation like that, but——

Senator HUDDLESTON. But there is an area of——

Mr. BERMAN. We don't know what they are and——

Senator HUDDLESTON. An area of potential acts, and it seems to me we have to leave some way for our agencies to find out about them and to act, even before there is a criminal intent established.

Mr. BERMAN. Well, that is raising serious, serious problems.

Senator HUDDLESTON. I realize it is from your standpoint.

Mr. BERMAN. From our standpoint.

And when we looked at the evidence of preventing terrorism before it occurred through intelligence investigations, just in the domestic area, never mind a foreign contact. Let's not make it——

Senator HUDDLESTON. Right.

Mr. BERMAN. The record is almost wholly barren of examples where violence is prevented by intrusive, extensive investigation. Some of the techniques are inappropriate, informants are difficult to——

Senator HUDDLESTON. Well, it is hard to make that kind of statement because you don't know what might have happened, and——

Mr. SILBERMAN. And indeed, I would disagree with it. In my experience as Deputy Attorney General and Ambassador, I have seen situations where both American and other western governments acting in concert have been able to, through penetration of various groups, head off violent activity, and if one is limited to a criminal standard before one acts, even in a passive sense, to surveil, I think you have jeopardized the security of Americans and indeed of other countries also. One has to, Mr. Chairman, worry about the fact that this country has not yet seen, and we hope it never will, the kind of internal, but linked to external terrorism that our allies in Western Europe are struggling with now, but to hamper our agencies at this point, when there is indeed in my judgment a clear and present danger, to hamper our intelligence and counterintelligence agencies, at this point in history, seems to me folly.

Senator HUDDLESTON. Well, we have talked to state attorneys general and some Governors who believe that violent acts have been prevented because of intelligence that was available to them in advance.

Mr. BERMAN. We are limited, of course, to what we read, what was in the Church committee, which was asking the FBI to come up with it. Lots of violence had occurred, and very few examples were given of prevention.

The GAO audit of FBI investigations proved that there was overbroad targeting of groups, under very loose standards. Instead of focusing on terrorist organizations, they focused on social protests and potential terrorists, thereby getting into a dragnet.

Senator HUDDLESTON. We are trying to address that and——

Mr. BERMAN. So we are talking about, in order to get them as a public policy, both to focus an agency and keep it focused on the mission, and at the same time to keep it out of lawful political activity, which might be social protests, you have got to just do some more crafting——

Senator HUDDLESTON. We would admit that the draft charter attempts to do that at least.

Mr. BERMAN. Of course it attempts to do that. We just say that we haven't gone—you know, it is going to be a while, but I think——

Senator HUDDLESTON. It specifically prohibits action against any lawful political action by a group.

Mr. SILBERMAN. Mr. Chairman, there are two occasions on which I personally was the target of assassination efforts, one as Deputy Attorney General and one as Ambassador. In both cases it was intelligence activity that came from the FBI which was, to say the least, useful in avoiding that unfortunate and untimely occurrence.

Senator HUDDLESTON. You don't know whether it prevented it or not, but you are still here.

Mr. SILBERMAN. Yes, that's right. It's a little hard to make it, to go back and evaluate it for purposes of this hearing, to determine whether that information was a *sin qua non*, but in one case particularly, I thought it was.

Mr. BERMAN. Mr. Chairman, may I just respond for a moment.

Senator HUDDLESTON. Yes.

Mr. BERMAN. Maybe I can try to make the point in a different way. It is not that intelligence information might not be helpful to prevent an act of violence. The question is, in any of the cases that the Governors talk about or the FBI talks about, where did the intelligence come from? What standard of investigation did they use, and where were they? Did it come from an investigation of an antiwar group that was like SDS and therefore led to the Weather Underground, or was it from an undercover penetration in a recent case of the Weather Underground specifically which prevented, allowed them to prevent a terrorist act?

But the standards that we propose here would not prevent you from making that penetration of the Weather Underground. They are engaged in criminal acts. All we are asking for is some kind of real and sufficient probable cause standard and a justification on the part of the agencies that that is restricting them from focusing the mission. Why, in order to prevent terrorism, must they have more general and more broadly cast standards for investigation, intrusive investigation, in order to get a threat? That is the issue here. It is looking at those examples in terms of the cases and seeing what kind of standards they were applying when they got the intelligence. If out of all the broad investigations, under general standards they stopped two acts of terrorism, we have got to balance the risks that you take in terms of protecting against terrorism, against infiltrating and distorting the open political process.

Mr. SILBERMAN. You feel differently about that balance if you have been a target than you do if you haven't, human nature being what it is.

Mr. BERMAN. Of course, of course.

Mr. SILBERMAN. Mr. Chairman, I would commend for your attention with respect to one particular aspect which is regarded sometimes as an intrusive use of investigative technique, the use of informants. I would commend to you a new book by James Q. Wilson at Harvard, the title of which is "The Investigators," which is a careful and I think enormously useful analysis of the use of informants in law enforcement in part through the FBI and DEA,

and one realizes if you read that book and if you have had the experience, how much law enforcement—and this includes, of course, intelligence and counterintelligence by analogy, does depend upon informants, and informants which are often just patriotic citizens who volunteer. There is no sharp line between them.

Senator HUDDLESTON. They run the gamut.

Mr. SILBERMAN. I firmly believe, I firmly believe that if for counterintelligence purposes or any other purposes, law enforcement agencies are limited to certain techniques such as my colleagues would suggest, until there is a demonstrable evidence of a criminal purpose on the part of the organization, it could offen be too late.

I remember vividly, for instance, the example that plagued me when I was Deputy Attorney General, of the Symbionese Liberation Army and Patty Hearst, and I remember criticizing Clarence Kelley and the Bureau for not having known anything about that organization before they burst upon the scene in California that time, and they agreed that they just never heard of them, and that one of the things they said, well, you characters are putting such limitations on our capacity to worry about these things, that sometimes we just don't focus on all of the groups that we should be.

Now, I am perfectly willing to admit openly that during the sixties the Bureau did in its COINTELPRO efforts engage in activities which should not be permitted again, particularly the disruptive efforts on certain organizations, but I think passive surveillance, when there is a reasonable belief that an organization will engage in criminal activity, even if they haven't yet, or may cross the line, may cross the line from legal activity into illegal activity, is essential.

But I don't think that can be subject to judicial review at that point because the group will run into court and say we are being surveilled illegally and we are entitled to all the protections of this new statute that Congress passed, and let's go through the discovery procedure and find out exactly what the Bureau is doing, and that is a very dangerous business.

Senator HUDDLESTON. OK.

Mr. BERMAN. OK, he cites James Q. Wilson on the informant issue in order to support a case in terms of terrorism. James Q. Wilson in a recent article, quoted at page 33 of our memorandum, states:

> Certain groups are less vulnerable to being penetrated by or to being deceived by an informant than others. Among these are domestic political revolutionaries, especially those with strong feelings of mutual solidarity, and foreign spy rings. Where a member of a gang of bank robbers might be induced to give information in exchange for money or leniency, a revolutionary spy might have a price no government could pay.

In that article he goes on to recommend a focus of different techniques.

So the kind of public policy question about the use of techniques and how they are related can't simply be supported by the assertion that informants are valuable to law enforcement. The question is: Are informants valuable for the missions outlined in this legislation, or would any restrictions that we place on them prevent them from carrying out that mission? I think that is the gist of our

analysis throughout and the reason why we think more carefully and tightly drafted standards are not impossible and indeed, are necessary.

Senator HUDDLESTON. Let me pose a hypothetical situation here.

Suppose that intelligence agencies determine that a particular U.S. person might be useful as a source of information or as a source of assistance in intelligence operations. They might, for example, want the assistance of the owner of an apartment house in which a foreign intelligence agent was living, but before they decide whether they would want to ask that individual's assistance, they might want to determine whether that individual is for some reason unsuitable. Is there any reason to believe that he himself might be engaged in foreign intelligence operations? Does he have some personal problems, alcoholic, or otherwise clearly unreliable?

S. 2525 would permit the intelligence agencies to collect information about that individual without his knowledge, to determine his suitability.

Now, there have been many allegations of abuse of this sort of collection authority in the past. Is it reasonable to provide that kind of authority?

Mr. BERMAN. Senator, not the way it is drafted in the bill.

The way it is drafted in the bill, it allows a potential source inquiry, broadly construed, of that apartment owner to determine whether he has any connection. First of all, it permits these least intrusive techniques—unlimited interviews including pretext interviews of friends, business associates and other persons who know the subject of the investigation, a check of confidential sources including already in place covert human sources or informants, physical surveillance for identification purposes including photographic surveillance, requests for information from the records of any Federal, State, or local law enforcement agency, and a national agency check which under the definitions of this bill includes the central records of any file, central file of the Federal Government.

That is an enormously broad inquiry into a potential source. Any agency record in the central files, as we become more centralized in our files and indeed—sometimes we argue the rhetoric of the national data bank—you are offering a very intrusive suveillance of a potential source.

Senator HUDDLESTON. Well, how are they to know? How are they to find out whether it would be detrimental to the interests of the United States to approach this particular individual who might be an enemy of the country unless they can make some kind of an initial ascertainment?

Mr. BERMAN. I just think that the authority is so dangerous and subject to abuse as drafted, that it should be our first rule that it really——

Senator HUDDLESTON. Well, how could the FBI get information on anybody then?

Mr. BERMAN. By asking for their consent?

Senator HUDDLESTON. Without asking for consent.

Mr. BERMAN. From consentual investigation, unless they have—now wait a second. We have provided, in our——

Senator HUDDLESTON. Are you going to ask a potential spy if you are able to——

Mr. BERMAN. If they have a reasonable belief, a reasonable belief—perhaps the standard that is now imposed for doing every other 215 technique in this bill—a preliminary investigation which had been suggested by the Church committee recommendations, under certain circumstances might be feasible, but not as broadly cast as this. If you have a reasonable suspicion that the apartment owner might be collaborating in a spy ring, then perhaps we can reacb an accommodation, but not——

Senator HUDDLESTON. How do you ever get that first impression or first belief if you——

Mr. BERMAN. Well, not from this range of techniques. This is——

Senator HUDDLESTON. Well, in this case, here is a fellow——

Mr. BERMAN. Maybe that check of the investigative records of intelligence agencies or law enforcement, the Federal Government is fine, but this is far more sweeping to find out about any apartment owner, and then——

Senator HUDDLESTON. It is not any apartment owner. It is an apartment owner who is leasing to a known espionage agent.

Mr. BERMAN. It also permits, collateral to any other investigation, the possible investigation using all these techniques of any U.S. person——

Senator HUDDLESTON. But you do agree they can collect some information in some manner——

Mr. BERMAN. Some information, publicly available information.

Senator HUDDLESTON. Against somebody who is not——

Mr. BERMAN. Not engaged in a crime; yes.

Senator HUDDLESTON. Not engaged in crime or thought to be engaged in crime.

Mr. BERMAN. It is, as we pointed out, a calibrating problem. It is a hard calibration, as the Church committee and you pointed out in drafting recommendation 44, the most difficult section in the bill to draft.

Senator HUDDLESTON. But you have got a fellow here who may be, maybe he is leasing five apartments to five known espionage agents——

Mr. BERMAN. Oh, well, now you are opening the end.

Senator HUDDLESTON. But he still hasn't committed any crime.

Mr. BERMAN. No; but then you might have a reasonable belief, based on that information that he is in cooperation and the question is potential source for what.

Senator HUDDLESTON. Source for information.

Mr. BERMAN. Are you going to approach him or are you going to investigate—is he a potential source for investigation, or are you——

Senator HUDDLESTON. Well, before you approach him you have got to find out his own attitude, his own position I would think.

Mr. BERMAN. Well, I would think that once you have the five apartments, I think you have, I think you can reasonably say he is not going to be a potential source.

Senator HUDDLESTON. He might well be.

Mr. BERMAN. But if he might well be, then it applies to just all kinds of people who might well be in every social protest organization in the country, every one might well be a potential source in the Socialist Workers Party, or in the Communist Party or in the

antiwar movement, or in the ACLU who represents these crazy people in court. You know, I——

Senator HUDDLESTON. But in this case, suppose you are not thinking of him as a potential enemy. Suppose you are thinking of him as a potential aid, and you just want to find out whether or not he is reliable. You can't go to a fellow——

Mr. BERMAN. You can come to me and say you want me to be a potential source for you. You can find out about me. You can say, Jerry Berman, do you want to be a potential source for us? We want to check out your reliability and let's check it out.

Senator HUDDLESTON. Yes, but then in that case, you may have to reveal to him more than he ought to know if he happens to be somebody who is inclined the other way.

Mr. BERMAN. Then you don't——

Senator HUDDLESTON. In other words, you want us to take all the risk, the Government.

Mr. SILBERMAN. Not the Government, the people.

Senator HUDDLESTON. Pardon?

Mr. SILBERMAN. The people.

Senator HUDDLESTON. The security of the country.

Mr. BERMAN. It may be the security of the country, but it may also be a serious risk of intrusive investigation of innocent Americans.

I think it can be worked out, but not the way it is drafted. That's all.

Senator HUDDLESTON. Of course, the problem is you can present hypotheticals and run into all kinds of difficulty, but how do you draft a piece of legislation that covers every conceivable kind of situation?

I think the agencies, the CIA and the FBI and the administration and everybody would be severely criticized if we were to sit here and see a potential collaboration of an American citizen with a foreign agent but not be able to find out whether there is in fact collaboration——

Mr. BERMAN. But that is not, you see. That's using a potential source inquiry for something else. Then you have to be premised on—then you have to go to some other investigation. If you bave a reasonable belief that a person is in collaboration, you can conduct a preliminary investigation under the schemed legislation of tbe Church committee, but you just can't throw the book at them with 215 techniques as outlined in this legislation. That is just too much of a risk to civil liberties.

Senator HUDDLESTON. We had Prof. Thomas Emerson of Yale, I believe, here with us, who is very concerned about civil liberties, as you know, and he initially was strong, of course, for the probable cause or standard of criminal activity, but he did finally agree that there has to be some movement, some collection, some freedom to find out about a person even if he has not yet committed any crime.

Mr. BERMAN. Thomas Emerson has worked with us extensively in the ACLU's efforts to draft model legislation to control the FBI, and in that legislation he recommended a limited preliminary investigation, certainly without the range of techniques suggested here. We asked him whether he had changed his mind in testifying

before this committee, and Thomas Emerson said that no, he just was misunderstood, and I think he plans to communicate in writing with this committee that he did not mean to suggest that they had to have no base, that they didn't have to have any basis, supportable with facts, to conduct such an investigation, and he certainly was not relating it to the range of techniques which we have been able to define under this legislation. This legislation is complex. For the first time, we are reading all the new definitions of special activity. A U.S. person includes organizations and people. A foreign power sometimes includes U.S. persons, U.S. persons abroad. Sometimes a group abroad can be investigated under a noncriminal standard, but then it says, until it is determined that they are U.S. persons it may be presumed that they are foreign persons, thus subjecting them to the targeting for foreign persons where there is no protection whatsoever abroad.

So you could be operating under intrusive surveillance techniques with nothing, based on definitions. I am saying that this is a first draft, maybe it is the second draft, but there's going to be much more drafting before it satisfies both sides.

Senator HUDDLESTON. How about when the FBI sees an American citizen in contact with a KGB agent? They don't know whether he is even aware that the man he is in contact with is a KGB. On the other hand, it might be that he is in collaboration with them.

Now, what investigative authority do you propose that they have there in checking out that citizen?

Mr. BERMAN. You see, this is what we call in our testimony approaching the problem from both ends. We just don't understand, based on the public record, and we are not experts in counterintelligence, why it is not possible to keep the focus on the foreign espionage agent, and after a period of time there might be more contacts which would give you enough information to conduct a preliminary investigation or to meet a criminal standard. But to say, oh, boy, what we have done, let's go this way. Let's use our 218, 219, 220, 221, and 222 authorities to investigate rather than just watching for contacts which become surreptitious or look like collaboration and then turn to your investigation. What this charter proposes to do is allow the agencies, I think, overbroadly and with potential danger, to operate from both directions.

Mr. SILBERMAN. Well, Mr. Chairman, I would disagree with that. I think Mr. Berman overestimates the capacity of counterintelligence to quickly make some of the kinds of determinations he suggests. Keeping your eye only on the suspected agent of, as you put it, the KGB, and paying no attention to the individuals with which he is in contact, is a recipe, in my judgment, for disaster. One of the things that is insufficiently understood generally in this country is how undermanned our counterintelligence activities really are, and how it is virtually impossible for them to even blanket the known espionage agents of foreign and hostile powers, and sometimes the only way you can have an effective investigation which heads off or detects espionage is to focus in occasionally on something that you suspect, but you don't have reason to believe. You suspect, but it is a good suspicion, does constitute the essence or the key to an espionage ring.

I think Mr. Berman's suggestion and the ACLU's suggestion is just unrealistic. It would be nice if we could do it that way, but I just don't think it will work.

Senator HUDDLESTON. Could we even run a security check on the individual who might have some contact with the KGB, even if it is a casual contact, to find out whether he has clearance?

Mr. BERMAN. Yes, we have less problems with some limited inquiry like that, but you define national agency checks in the broadest way.

Senator HUDDLESTON. Gentlemen, it is 12:30 p.m., and I appreciate your testimony. It has been very interesting and helpful, and I am sure we will be working with all of you as we move on down the road someplace. You have been patient with your time, and we appreciate that.

Mr. BERMAN. Thank you, Senator.

Senator HUDDLESTON. Thank you very much.

The committee will stand in recess.

[Whereupon, at 12:28 p.m., the committee recessed, subject to the call of the Chair.]

THURSDAY, JULY 20, 1978

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The committee met, pursuant to notice, at 10:14 a.m., in room 5110, Dirksen Senate Office Building, Senator Walter D. Huddleston presiding.

Present: Senators Huddleston (presiding), Hathaway, Moynihan, and Goldwater.

Also present: William G. Miller, staff director; Earl Eisenhower, minority staff director; Audrey Hatry, clerk of the committee.

Senator HUDDLESTON. The committee will come to order.

Today's hearing is concerned with the proper relationship between the intelligence activities of the United States and the academic world. In the investigations of the Church committee, it was clear that the involvement of the intelligence agencies in the affairs of the academic community had to some degree adversely affected its independence and professional integrity. The key finding of the Church committee was that, whatever the relationship between intelligence agencies of the United States and the academic community, it should be a witting one.

In S. 2525, the intelligence charters, the approach this committee has taken is to assure that the relationship between the academic community and the intelligence agencies, whatever it may be, is indeed a witting one. Further, such restrictions as there are are imposed on the intelligence agencies. Our universities, colleges, and other academic institutions are to make their own rules.

So we seek the views of our witnesses this morning on this approach. These hearings are of critical importance, because the integrity and strength of our academic institutions are clearly fundamental to our freedom.

And we are pleased to have before the committee this morning the president of Harvard University, Derek Bok; Morton Baratz, the general secretary of the American Association of University Professors; and Richard Abrams, professor of history at Berkeley and chairman of the Statewide Committee on Academic Freedom for the University of California.

Gentlemen, we would be very pleased to have your statements individually, and then if you will continue to sit as a panel, the committee may pose such questions as they deem appropriate.

We will begin with President Bok.

[The prepared statement of Mr. Derek Bok follows:]

PREPARED STATEMENT OF DEREK C. BOK, PRESIDENT, HARVARD UNIVERSITY

Mr. Chairman and members of the committee: I appreciate the invitation to come before you today to discuss the activities of American intelligence agencies as they affect our universities. I think that I can contribute most directly to your delibera-

tions by talking about the policies of my own university in this field and the differences that have arisen between Harvard and the Central Intelligence Agency.

In its 1976 report, a Select Committee of the Senate raised the question whether the integrity and professional standards of faculty members and institutions had been compromised or violated by some of the relationships existing between the academic and intelligence communities. The Select Committee also declared that it was the responsibility of the American academic community to set professional and ethical standards for its members with respect to intelligence activities.

In response to this suggestion and with the view that the problem needed careful thought, I appointed a committee at Harvard to study the specific issues raised by the Select Committee. In choosing the members of the committee, I appointed individuals who were respected within the University and experienced in both the academic and governmental communities. The members included Archibald Cox, Professor of Law; Henry Rosovsky, Dean of the Faculty of Arts and Sciences; Don Price, Dean of the School of Government; and Daniel Steiner, Counsel to the University.

After many months of study and consultation with interested parties, including the Central Intelligence Agency, the Harvard committee issued a report, a copy of which is attached to this statement.[1] The report began by listing several fundamental premises. Three of them deserve mention here:

First, in an era of international tension and conflict it is important for the United States to have an effective system of foreign intelligence.

Second, U.S. foreign intelligence efforts, like other forms of professional work and public service, can benefit considerably from the research and expertise that can be obtained from universities and their faculty members.

Third, the relationship between U.S. foreign intelligence agencies and universities must be structured in ways that protect the integrity of universities and the academic profession and safeguard the freedom and objectivity of scholarship.

With these three premises in mind, the committee considered the several questions raised by the Select Committee and recommended the following guidelines to govern relationships between the Harvard community and the CIA and other U.S. intelligence agencies:

1. Harvard may enter into research contracts with intelligence agencies provided that such contracts conform with Harvard's normal rules governing contracting with outside sponsors and that the existence of a contract is made public in the usual manner by University officials.

2. Individual members of the Harvard community may enter into direct or indirect consulting arrangements with intelligence agencies to provide research and analytical services. The individual should report in writing the existence of such an arrangement to the Dean of his or her Faculty, who should then inform the President.

3. Any member of the Harvard community who has an ongoing relationship with an intelligence agency as a recruiter should report that fact in writing to the Dean of the appropriate Faculty, who should inform the President of the University and the appropriate placement offices within the University. A recruiter should not recommend to an intelligence agency the name of another member of the Harvard community without the prior consent of that individual. Members of the Harvard community whose advice is sought on a one-time or occasional basis should consider carefully whether under the circumstances it is appropriate to give the agency the name of another member of the Harvard community without the prior consent of the individual.

4. Members of the Harvard community should not undertake covert intelligence operations for a government agency. They should not participate in propaganda activities if the activities involve lending their names and positions to gain public acceptance for materials they know to be misleading or untrue. Before undertaking any other propaganda activities, individuals should consider whether the task is consistent with their scholarly and professional obligations.

5. No member of the Harvard community should assist intelligence agencies in obtaining the unwitting services of another member of the Harvard community nor should such agencies employ members of the Harvard community in an unwitting manner.

These guidelines are now in effect at Harvard on an interim basis. In my opinion, they strike a sensible balance. On the one hand, they permit institutional and individual research and consulting arrangements that can benefit universities and individual academics and make available to intelligence agencies the intellectual

[1] See p. 643.

resources of the University. On the other hand, they prohibit participation in covert recruiting on the campus and in operational activities of intelligence agencies.

It is with respect to these two activities—covert recruiting and operational activities—that significant differences of opinion have arisen between Harvard and the CIA. Over the past year, through staff discussions and correspondence with the CIA, we have unsuccessfully attempted to resolve these differences. In order to give you the substance of our exchange, I have attached to this statement the principal correspondence between us, beginning with a letter from Admiral Turner reacting to the issuance of the Harvard guidelines.[1] These letters, as well as direct discussions with the CIA, make it clear that the CIA plans to ignore these two central elements of our guidelines.

This disagreement between Harvard and the CIA in regard to covert recruiting and operational use of academics raises fundamental questions that deserve consideration by this Committee.

Covert recruiting involves the secret use by the CIA of faculty members, administrators, and possibly students to identify individuals, primarily foreign nationals studying at U.S. universities, as likely candidates for employment or other service with the CIA on a regular or sporadic basis. In the course of serving as a covert recruiter of foreign nationals for the CIA, a professor will presumably use the various means at his disposal to put together information for the CIA. For example, in a seminar discussion the professor might probe the student's views on international affairs to advise the CIA with respect to the student's attitudes. In a counselling session the professor might ask questions about the student's financial situation, not for the purpose of helping the student but to provide additional information to the CIA that might be useful in obtaining the student's services. Professors might invite students to social occasions in order to observe the student and gain background information of use to the CIA.

In these ways, recruiters become part-time covert agents of the CIA who use their positions as professors or administrators to identify foreign nationals on U.S. campuses who may be useful to the CIA. Such covert recruiting is highly inappropriate. A university community depends upon trust and candor to promote the free and open exchange of ideas and information essential to inquiry and learning. This atmosphere of trust has already been threatened by the widespread belief that certain foreign governments employ agents to observe and report on the views and behavior of their nationals enrolled as foreign students on American campuses. If it is known that our professors may also be observing foreign students and reporting on them to American intelligence agencies, the free exchange of views will be weakened still further.

As educators, we must be particularly sensitive to the interests of our students. Many of these students are highly vulnerable. They are frequently young and inexperienced, often short of funds and away from their homelands for the first time. Is it appropriate for faculty members, who supposedly are acting in the best interests of the students, to be part of a process of recruiting such persons to engage in activities that may be hazardous and probably illegal under the laws of their home countries? I think not.

The operational use of academics abroad raises equally serious questions. Put most simply, a professor's academic status is used as a cover to engage in activities which presumably include collecting intelligence on instructions from the CIA, performing introductions on behalf of the CIA, playing a role in a covert CIA activity, or participating in some other way in CIA operations. Continuation of this kind of activity will be harmful to the academic enterprise. As stated in the report of the Harvard committee, the operational use of academics "inevitably casts doubt on the integrity of the efforts of the many American academics who work abroad and, as a practical matter, may make it more difficult for American academics to pursue their interests in foreign countries." If the CIA will not use Fulbright-Hays scholars for operational purposes, as I understand is the case, I see no reason for the CIA to use other scholars for such purposes. If your own draft legislation prevents intelligence agencies from paying academic personnel for providing information acquired while participating in a U.S. Government program abroad, I see no reason why the CIA should enlist the services of academics travelling abroad on other scholarly missions. The same considerations apply in all these situations.

A decade ago, one scholar revealed that his research findings in Nepal had, unknown to him, been regularly reported to the CIA. Thereafter, the work of other professors in India became suspect; requests to do research were subject to long delays; and efforts to work in sensitive areas of the country were blocked. As this example reveals, when the CIA uses professors for a variety of operational tasks,

[1] See p. 650.

the motives and actions of all scholars abroad become suspect. Answers to inquiries are likely to be guarded; access is likely to be restricted. The apprehension of one professor for engaging in an illegal activity in a foreign country may well result in the total exclusion of other scholars. At that point it will be too late to repair the damage. In the interest of scholarship, therefore, it would be most welcome if the CIA stopped using academic personnel for covert intelligence activities before further incidents take place.

In correspondence with me, the CIA has advanced three arguments to justify its refusal to respect our guidelines.

First, the CIA believes that is has unfairly been singled out as the object of special restrictions. In fact, our report expressly covers all U.S. intelligence agencies. We have not extended such restrictions to other institutions that recruit on our campus only because we have no reason to believe that corporations or other private institutions are either using our professors for covert intelligence or recruiting our students for unusually hazardous assignments or for activities that may be illegal under the laws of another nation.

Second, the CIA asserts that our guidelines interfere unjustifiably with the freedom of individual professors and employees to offer their services to the government. Harvard is not eager to impose a moral code on the behavior of its faculty and staff. Like all institutions, however, Harvard does claim the right to promulgate rules which prevent behavior that may compromise its mission or adversely affect the activities of other members of its community. As I have previously pointed out, we have drafted our present rules because we consider them necessary to preserve the integrity of our scholarly activities abroad and the atmosphere of candor and trust that are essential to the free exchange of ideas. The interests protected by our guidelines are important to everyone who seeks to learn and do research in the University.

Third, the CIA has argued that it must disregard our guidelines in the interests of national security. Let us be clear about exactly what this argument implies. Although the CIA emphasized the "immense benefits we receive from extensive relationships with scholars and academic institutions throughout the country," it insists upon the right to use financial inducements or other means of persuasion to cause our professors and employees to ignore our rules of employment and enter into secret relationships whenever it considers such activities to be justified by the interests of national security.

I do not believe that an agency of the United States should act in this fashion. A Senate committee has called upon the academic community to set standards to govern its relations with the intelligence agencies. Harvard has attempted to set such standards. Yet the CIA is declaring that it will simply ignore essential provisions of our guidelines.

Essentially, our common task is to strike a proper balance between the needs of intelligence agencies in promoting our national security and the interests of the academic community in preserving conditions essential to learning and inquiry. The CIA may have special knowledge of our intelligence needs. But the CIA is hardly the appropriate arbiter to weigh these needs against the legitimate concerns of the academic community. It has no special knowledge of universities nor does it have the experience to weigh the intangible values involved in maintaining the integrity of the scholarly enterprise or an atmosphere of candor and trust on the nation's campuses. In addition, as an agency dedicated to the pursuit of intelligence activities, it cannot claim to have complete objectivity in weighing its own needs against the interests of a separate class of institutions.

I recognize that similar arguments can be applied to universities. As the representative of an educational institution, I cannot claim to have expert knowledge of our intelligence needs nor can I pretend to have complete objectivity where academic interests are at stake. But it is an extraordinary step for a government agency to assert the right to interfere with the relations between an institution and its employees and to disregard the internal rules that an institution has developed to safeguard its essential activities. Such decisions should be made only under the express authority of the Congress and only on the basis of clear and convincing evidence.

If Congress finds that such evidence exists and that the national security requires its agencies to act in disregard of our rules, we must, of course, submit to such a judgment. But I believe that the evidence will be of a different nature. I suspect that careful examination will show that covert recruiting and the operational use of academic personnel may make the job of the CIA somewhat easier but that such methods are not essential to carrying out its intelligence function. If this is the case, Congress should make it clear that these activities cannot continue, and that the

internal rules of academic institutions should be respected. The added effort and inconvenience required of the CIA to carry out its mission should be an acceptable price to pay in order to preserve the integrity of the academic profession, the independence of our educational institutions, and the atmosphere of openness and trust essential to free inquiry and learning.

STATEMENT OF DEREK C. BOK, PRESIDENT, HARVARD UNIVERSITY

Mr. BOK. Thank you very much, Mr. Chairman. Thank you for issuing an invitation for me to appear and discuss these matters with you this morning. I thought in the interest of time I might very briefly summarize the first half of the statement and concentrate on the second half which I think speaks more directly to the issues before you.

As you indicated, in 1976 the Senate select committee issued a report outlining a number of questionable activities relating to the relationships between the intelligence and the academic communities, and called for the universities to review those relationships. I then appointed a committee which was composed of people chosen because they had experience in government life and were respected, influential members of our own university community. The committee issued a report which proceeded on the basis of certain premises of which the most important are to make certain that intelligence agencies have access to the knowledge and expertise that universities can provide and at the same time to protect the integrity of universities and the atmosphere of candor and trust and free exchange on which universities depend.

Pursuant to those premises. the committee issued a number of guidelines for the Harvard community covering consulting and research of an overt nature as well as participation in covert activities, and a copy of those guidelines and the Committee's report have been submitted to you.[1]

In my opinion those guidelines strike a sensible balance. On the one hand they do permit institutional and individual research and consulting arrangements that can benefit universities and individual academics and make available to intelligence agencies the intellectual resources of the university. On the other hand, they prohibit professors and employees from participating in covert recruiting on the campus and engaging in covert operational activities of intelligence agencies, including the gathering of information and other intelligence activities while traveling abroad.

It is with respect to those two activities, covert recruiting and operational intelligence activities, that significant differences of opinion have arisen between Harvard and the CIA. Over the past year, through staff discussions and correspondence with the CIA, we have unsuccessfully attempted to resolve those differences. In order to give you the substance of that exchange, and with the prior knowledge of the CIA, I have attached to my statement the principal correspondence between us, beginning with a letter from Admiral Turner reacting to the issuance of the Harvard guidelines.[2] Now, these letters as well as direct discussions with the CIA make clear that the CIA plans to ignore the two central elements

[1] See p. 643.
[2] See p. 650.

of our guidelines relating to covert recruiting and operational intelligence activities by employees and faculty of our university.

This disagreement between Harvard and the CIA raises fundamental questions, I think, that deserve consideration by your committee.

Covert recruiting involves the secret use by the CIA of faculty members, administrators, and perhaps students, to identify individuals, primarily foreign nationals studying at U.S. universities, as likely candidates for employment or other service for the CIA on a regular or sporadic basis. In the course of serving as a covert recruiter of foreign nationals for the CIA, a professor will presumably use the various means at his disposal to put together background information for the CIA. For example, in a seminar discussion the professor might probe the student's views on international affairs to help advise the CIA with respect to that student's attitudes. In a counseling session the professor might ask questions about the student's financial situation, not for the purpose of helping the student, but to provide additional information that might be useful in obtaining his services. Professors could conceivably invite students to social occasions in order to observe the student and gain background information of use to the CIA.

In these ways, recruiters can become part-time covert agents of the CIA who use their positions as professors or administrators to identify foreign nationals on U.S. campuses who may be useful to the CIA. Such covert recruiting is in our view inappropriate. A university community depends on trust and candor to promote the free and open exchange of ideas and information that are essential to inquiry and learning. This atmosphere of trust has already been threatened by the widespread belief that certain foreign governments employ agents to observe and report on the views and behavior of their nationals enrolled as foreign students on American campuses. If it is known that our professors may also be observing foreign students and reporting on them to American intelligence agencies, the free exchange of views will be weakened still further.

As educators, we must also be particularly sensitive to the interests of our students. Many of these students are highly vulnerable. They are frequently young and inexperienced, often short of funds and away from their homelands for the first time. Is it appropriate for faculty members, who supposedly are acting in the students' best interest to be part of a process of recruiting such persons to engage in activities that may be hazardous and probably illegal under the laws of their home countries? Is it proper for a professor to trigger a secret government investigation of the private views and behavior and background of one of his students without that student's knowledge or consent? We think not.

The operational use of academics abroad raises equally serious questions. Put most simply, a professor's academic status is used as a cover to engage in activities which presumably include collecting intelligence on instructions from the CIA, performing introductions on behalf of the CIA, playing a role in the covert CIA activity, or participating in some other way in CIA operations. Continuation of this kind of activity will be harmful to the academic enterprise. As stated in the report of the Harvard committee, and I quote, the operational use of academics—

. . . inevitably casts doubt on the integrity of the efforts of many American academics who work abroad, and as a practical matter, may make it more difficult for American academics to pursue their interests in foreign countries.

If the CIA will not use Fulbright-Hays scholars for operational purposes, as I understand to be the case, I see no reason for the CIA to use other scholars for such purposes. If your own draft legislation prevents intelligence agencies from paying academic personnel for providing information acquired while participating in a U.S. Government program abroad, I see no reason why the CIA should enlist the services of academics traveling abroad on other scholarly missions. The same considerations apply to all these situations.

About a decade ago, one scholar revealed that his research findings, I believe in Nepal, had, unknown to him, been regularly reported to the CIA. Thereafter, the work of other professors in India became suspect; requests to do research were subject to long delays; and efforts to work in sensitive areas of the country were blocked. As this example suggests, when the CIA uses professors for a variety of operational tasks, the motives and actions of all scholars abroad can become suspect. Answers to inquiries are likely to be guarded, access may be restricted. The apprehension of one professor for engaging in an illegal activity in a foreign country may well result in the total exclusion of other scholars. At that point it will be too late to repair the damage.

In correspondence with me, the CIA has advanced three arguments to justify its refusal to respect our guidelines.

First, the CIA believes that it has been unfairly singled out as the object of special restrictions. In fact, our report expressly covers all U.S. intelligence agencies. We have not extended similar restrictions to other institutions that recruit on our campus only because we have no reason to believe that corporations or other private institutions are either using our professors for covert intelligence activities or recruiting our students for unusually hazardous assignments or activities that may be illegal under the laws of another nation. And the report even makes clear that if analogous situations do arise with respect to other kinds of institutions, the guidelines, at least the spirit of the guidelines should be considered as relevant and applicable by the professor involved.

Second, the CIA asserts that our guidelines interfere unjustifiably with the freedom of individual professors and employees to offer their services to the government. Now, Harvard is not eager to impose a moral code of its own sake on the behavior of its faculty and staff. Like all institutions, however, Harvard does claim the right to promulgate rules which prevent behavior that may compromise its mission or adversely affect the activities of other members of the community. As I have previously pointed out, we have drafted our present rules because we consider them necessary to preserve the integrity of our scholarly activities abroad and the atmosphere of candor and trust that are essential to the free exchange of ideas on our own campus. And so the interests protected by these guidelines are important to everyone who seeks to do research and to learn within our university.

Third, the CIA has argued that it must disregard our guidelines in the interests of national security. Let us be clear about exactly

what that argument implies. Although the CIA emphasizes, and I quote, the "immense benefits we received from extensive relationships witb scholars and academic institutions throughout the country," the CIA insists upon the right to use financial inducements or other means of persuasion to cause our professors and employees to ignore our rules of employment and enter into secret relationships whenever it considers such activities to be justified by the interests of national security.

I do not believe that an agency of the United States should act in this fashion. A Senate committee has called upon the academic community to set standards to govern its relations with the intelligence agencies. Harvard has attempted to set such standards. Yet the CIA is declaring that it will simply ignore important provisions of our guidelines.

Essentially, our common task is to strike a proper balance between the needs of intelligence agencies in promoting our national security and the interests of the academic community in preserving conditions essential to learning and inquiry. The CIA may have special knowledge of our intelligence needs, but the CIA is hardly the appropriate arbiter to weigh these needs against the legitimate concerns of the academic community. It has no special knowledge of universities, nor does it have the experience to weigh the intangible values involved in maintaining the integrity of the scholarly enterprise or an atmosphere of candor and trust on the nation's campuses. In addition, as an agency dedicated to the pursuit of intelligence activities, it cannot claim to have complete objectivity in weighing its own needs against the interests of a separate class of institutions.

I recognize fully that similar arguments can be applied to universities. As the representative of an educational institution, I cannot claim to have expert knowledge of our intelligence needs, nor can I pretend to complete objectivity where academic interests are at stake. But it is an extraordinary step for a Government agency to assert the right to interfere with the relations between an institution and its own employees and to disregard the internal rules that an institution has developed to safeguard its essential activities. Such decisions should be made only under the express authority of the Congress and only on the basis of clear and convincing evidence.

If Congress finds that such evidence exists and that the national security requires its agencies to act in disregard of our rules, we must, of course, submit to such a judgment. But I believe that the evidence will be of a different nature. I suspect that careful examination will show that covert recruiting and the operational use of academic personnel may make the job of the CIA somewhat easier but that such methods are not essential to carrying out its intelligence function. If that is the case, Congress should make it clear that these activities cannot continue, and that the internal rules of academic institutions should be respected. The added effort and inconvenience required of the CIA to carry out its mission should be an acceptable price to pay in order to preserve the integrity of the academic profession, the independence of our educational institutions, and the atmosphere of openness and trust essential to free inquiry and learning.

Thank you very much.

Senator HUDDLESTON. Thank you, Mr. Bok, for your very fine statement, and the material you submitted with it, the letters from Admiral Turner, and your response, and the report of the Committee on Relationships between the Harvard community and U.S. intelligence agencies will be made part of the record.

Mr. Baratz?

[The information referred to follows:]

REPORT OF THE COMMITTEE ON RELATIONSHIPS BETWEEN THE HARVARD COMMUNITY AND U.S. INTELLIGENCE AGENCIES

In April 1976, the United States Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities ("the Select Committee") issued its final report. In the section of the report which discussed relationships between the American academic community and the Central intelligence Agency ("the CIA"), the Select Committee expressed its concern over some of the relationships that have existed in recent years. The Select Committee concluded that it would not recommend legislation to remedy the problems because it viewed "such legislation as both unenforceable and in itself an intrusion on the privacy and integrity of the American academic community. The [Select] Committee believes that it is the responsibility of * * * the American academic community to set the professional and ethical standards of its members. This report on the nature and extent of covert individual relationships with the CIA is intended to alert [the academic community] that there is a problem." (p. 191)[1]

In May, 1976 President Derek C. Bok, in response to the Select Committee's report, asked each of us to serve on a Harvard committee to consider the issues raised by the Select Committee. President Bok expressed the view that the issues needed to be explored and that new rules of conduct for members of the Harvard community might be needed.

Before proceeding to the discussion section, we would like to emphasize four convictions underlying this report.

First, in this era of international tension and difficulties it is extremely important for the United States to have an effective system of foreign intelligence.

Second, U.S. foreign intelligence efforts, like other forms of professional work and public service, can benefit considerably from the support of research activities that directly or indirectly involve universities and their faculty members.

Third, the relationship between U.S. foreign intelligence agencies and universities must be structured in ways that protect the integrity of universities and the academic profession, and safeguard the freedom and objectivity of scholarship.

Finally, as explained in the discussion section, our proposed guidelines, which have evolved from discussion of the Central Intelligence Agency in the report of the Select Committee, should apply equally to relationships with the other intelligence agencies of the United States.[2]

DISCUSSION

At the outset we would like to express our appreciation to the Select Committee for its consideration of the relationships between the CIA and the academic community. Some of the past relationships alluded to in the Select Committee's report do raise serious questions, and the Select Committee deserves credit for focusing attention on these questions. We appreciate also the Select Committee's forbearance in urging legislative solutions. That legislation can itself be "an intrusion on the privacy and integrity of the American academic community" (p. 191) has become painfully clear in recent years.

In writing this report and making our recommendations we are unable to be precise in describing the past relationships between the CIA and the academic community in general or members of the Harvard University community in particular. The Select Committee itself indicates that it did not have full access to CIA records for the period from 1967 to 1976. (pp. 180–1) Certain key passages in the public version of the report of the Select Committee have been abridged for security reasons, and we have access only to the public version. Neither we nor President

[1] All page references are to the report of the Select Committee.

[2] In a more general way this report may also be useful in providing guidance for relationships with other institutions, private and governmental, which may constrain the academic independence of faculty members or reduce their or universities' reputations for independence and objectivity.

Bok has any specific knowledge of any covert CIA relationships with members of the Harvard community, and we have no way of determining whether any such relationship exists.

We think it is possible, however, to discuss the issues and make recommendations without having precise information on past practices. The Select Committee's report indicates some areas of concern and hints at others. By reading the report carefully and drawing reasonable inferences and by talking with a few people familiar with intelligence activities, we believe that we have identified the main problem areas and have sufficient information to carry out the mandate given to us by President Bok. Should new problems come to light, they can be dealt with within the framework of the guidelines we propose.

The CIA's involvement with the academic community has consisted of institutional and individual relationships. The latter are a sensitive area for discussion because universities traditionally and for good reasons have exercised restraint in attempting to control the individual activities of members of their communities. There has not, however, been a complete absence of regulation either at Harvard or other institutions. For example, the Faculty of Arts and Sciences and some other Faculties at Harvard have adopted, with the approval of the Harvard Corporation, conflict of interest guidelines. The rationale of such regulation seems twofold. First, every profession, be it law, medicine or teaching, has certain obligations and standards to which its members can and should be held accountable. The obligations and standards differ in many respects from profession to profession, and in suggesting guidelines for members of the academic community we are attempting to reflect what we believe to be a consensus within the Harvard Community on the standards and obligations of our profession. Second, individual actions, when one is a member of an academic community, can affect adversely the institution and other members of the community. When such actions seem to be inconsistent with professional obligations and standards, we think it appropriate for the institution to promulgate guidelines that govern such actions and are applicable to faculty and staff members.

Because relationships between the CIA and the academic community were the basis for the mandate given to our committee, our report discusses concerns related only to the CIA, and not other United States Intelligence Agencies. To the extent that other intelligence organizations, such as the Defense Intelligence Agency or the National Security Agency, have relationships with the academic community, we believe that our recommendations and the principles on which they are based are equally applicable to such relationships. We would suggest, therefore, that this report and the guidelines it contains be construed to apply to relationships between members of the Harvard community and all U.S. intelligence agencies.[3]

We will now proceed to a discussion of the areas of concern and our recommendations for guidelines in each area. For the convenience of readers the recommended guidelines are set forth both in the text of the report and in Appendix A to the report.

A. Institutional Relationships With the CIA

The CIA, like other governmental agencies, has entered into research contracts with universities to meet CIA research and analytical needs. We see no reason for Harvard to decline to enter into a contract for research which would otherwise be appropriate for a Harvard scholar simply because the research is for the CIA. As stated by the Select Committee, to meet its needs the CIA "must have unfettered access to the best advice and judgment our universities can produce * * *" (p. 191) If the CIA believes that it can benefit from work done at Harvard and if members of the Harvard community are interested in doing the work, research contracts between Harvard and the CIA are a legitimate expression of this mutual interest.

We assume, of course, that any such contracts must comply with Harvard's normal rules governing contracting with outside sponsors. These rules provide, for example, that the work cannot be classified, that results may be published by the researchers and that sponsorship may be stated when the results are published.

We would suggest, however, one additional rule in regard to Harvard research contracts with the CIA. Because of the legitimate fear of covert relationships between academic institutions and the CIA and because of the suspicions that have been aroused by recent activities of the CIA, it would be appropriate to make public, perhaps in the list of research contracts frequently published in the Gazette, the existence of any institutional contracts with the CIA. Such disclosure might include

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[3] We do not consider in this report activities of the intelligence agencies of foreign countries. These activities can pose very serious problems but they present a number of different legal and practical issues, especially when foreign nationals are involved.

the subject matter of the contract, the dollar amount and the name of the principal investigator.

Recommendation.—Harvard may enter into research contracts with the CIA provided that such contracts conform with Harvard's normal rules governing contracting with outside sponsors and that the existence of a contract is made public by University officials.

B. Individual Consulting Arrangements With the CIA

In addition to institutional contracts, the CIA has made arrangements with individuals within the academic community to help the CIA meet its research and analytical needs (we are not referring to CIA operational needs). On occasion these needs are met indirectly by a third party acting under contract for the CIA and informing individuals that the CIA is the client. These arrangements, whether direct or indirect, enable the CIA to obtain the benefit of expertise available in the academic community and enable academics to pursue work or engage in discussions that may be of interest to them. Many individuals at Harvard engage in this kind of activity for a variety of governmental or private organizations. We believe that consulting arrangements with the CIA do not pose any peculiar professional or institutional problems and that, consistent with any Faculty rules governing outside activities of Faculty members, members of the Harvard community may enter into such arrangements.

There would seem to be no need for consulting arrangements to be kept private between the CIA and the individual, and if they are, they can become subject to misunderstanding or be confused with other possible relationships with the CIA. We therefore suggest that any direct or indirect consulting arrangements with the CIA be reported in writing by the individual to the Dean of the appropriate Faculty (as may now be required for all consulting arrangements by the rules of some Faculties) and by the Dean to the President of the University. Any question about the consistency of a consulting arrangement with these guidelines can be resolved when the arrangement is reported to the Dean.

Recommendation.—Individual members of the Harvard community may enter into direct or indirect consulting arrangements for the CIA to provide research and analytical services. The individual should report in writing the existence of such an arrangement to the Dean of his or her Faculty, who should then inform the President of the University.

C. CIA Recruiting on Campus

We understand that, broadly speaking, the CIA uses two methods for systematic recruiting on university campuses. The first method involves sending an identifiable CIA recruiter to interview students and others who may be interested in becoming employees of the CIA. This method is open and visible and comparable to the recruiting efforts of other public and private organizations. We think it poses no issues of principle for the academic community.

The second method involves the use of individuals who may be professors, administrators or possibly students and who have an ongoing and confidential relationship with the CIA as recruiters. The job of these covert recruiters is to identify for the CIA members of the community, including foreign students, who may be likely candidates for an employment or other relationship with the CIA on a regular or sporadic basis. Although we are not certain how the recruiting process works, we understand that when the recruiter believes that a likely candidate has been identified, the name of the candidate is reported to the CIA, which then conducts a background check on the individual and creates a file with the information it obtains. Neither the recruiter nor the CIA informs the individual at this stage that he or she is being considered for employment or other purposes by the CIA. If the investigation confirms the view of the recruiter, the individual is then approached to discuss a present or future relationship with the CIA.

For a number of reasons we believe that members of the Harvard community should not serve as covert recruiters for the CIA. First and most importantly, it is inappropriate for a member of an academic community to be acting secretly on behalf of the government in his relationship with other members of the academic community. The existence on the Harvard campus of unidentified individuals who may be probing the views of others and obtaining information for the possible use of the CIA is inconsistent with the idea of a free and independent university. Such practices inhibit free discourse and are a distortion of the relationship that should exist among members of an academic community, and in particular of the relationship that should exist between faculty members and students.

There are other reasons for members of the Harvard community not to be involved in such a covert recruiting system if our understanding of it is correct. Foreign students pose a special problem. It is not unreasonable to suppose that recruitment of a foreign national by the CIA may lead to requests that the person engage in acts that violate the laws of his own country. We do not consider it appropriate for a member of the Harvard community—especially a faculty member who may have a teaching relationship with the foreign national—to be part of a process that may reasonably be supposed to lead to a request to an individual to violate the laws of another country. More generally, we question whether it is appropriate for a member of the Harvard community to trigger a secret background investigation of another member of the community. Such an investigation is an invasion of individual privacy, whether the subject of the investigation be a United States citizen or a foreign national. Moreover, the conduct of a secret investigation is likely to lead to additional secret governmental intrusion into the campus as the CIA tries to develop more information about the subject of the investigation. Finally, it is impossible to know to what uses the information may be put in future years and in what ways the life of the subject of the investigation may be adversely affected.

For these reasons we conclude that any member of the Harvard community who has an on-going relationship with the CIA as a recruiter, with or without compensation, should make his or her role known to the Dean of the appropriate Faculty who in turn should inform the President of the University and the appropriate placement offices within the University. At the placement offices the names of recruiters would be available to all members of the Harvard community. Because of the CIA's authority to conduct secret background investigations, no recruiter at Harvard should suggest a name of a member of the Harvard community to the CIA as a potential employee or for other purposes without the consent of the individual.

We recognize that there are other possible CIA "recruiting" situations that do not involve an on-going relationship between the CIA and the individual whose advice is being sought. For example, when a new President of the United States is elected, a faculty member might be asked to recommend candidates for top staff positions in the CIA. Or a faculty member who has had a consulting relationship with the CIA may be asked to recommend a colleague to undertake some specialized research for the CIA. Occasional acts of recommendation such as these would ordinarily pose no special problems. Even here, however, an individual should exercise discretion to make certain that he or she is not causing difficulty or embarrassment for another member of the Harvard community. Depending on the circumstances, it may be appropriate to request consent from an individual before presenting his or her name to the CIA. Because of the special situation of foreign nationals, consent should be obtained before recommending a foreigner to the CIA.

Recommendation.—Any member of the Harvard community who has an ongoing relationship with the CIA as a recruiter should report that fact in writing to the Dean of the appropriate Faculty, who should inform the President of the University and the appropriate placement offices within the University. A recruiter should not give the CIA the name of another member of the Harvard community without the prior consent of that individual. Members of the Harvard community whose advice is sought on a one-time or occasional basis should consider carefully whether under the circumstances it is appropriate to give the CIA a name without the prior consent of the individual.

D. Operational Use of Members of the Academic Community

According to the Select Committee, the CIA has used academics for a variety of operational purposes. (pp. 189-91) For security reasons the Select Committee's report does not state with any precision what these purposes have been, although it does indicate that they have included writing books and other materials for propaganda purposes, the collection of intelligence and making introductions for intelligence purposes. It appears from the report that most of these relationships have been covert but at some universities at least one university official is aware of the operational use of the academics on the campus. The report does not state precisely what is involved in these "operational uses" or whether any of them take place on the campus. It is indicated that the "CIA considers these operational relationships with the United States academic community as perhaps its most sensitive domestic area and has strict controls governing these operations." (p. 190) These controls prohibit the use of academics who are working abroad under the Fulbright-Hays Act. (p. 190)

It is understandable that the operational use of academics should be considered a sensitive area because it poses several serious problems. Covert intelligence activi-

ties within the walls of a university are clearly an unacceptable intrusion into the academic community. When the CIA uses an academic when he is abroad to collect intelligence or make intelligence introductions, the CIA is using with the consent of the academic the academic's ability to travel and meet with people in furtherance of his academic work. Put most simply, the academic enterprise provides a "cover" for intelligence work. This use of the academic enterprise should not, in our opinion, continue. It inevitably casts doubt on the integrity of the efforts of the many American academics who work abroad and, as a practical matter may make it more difficult for American academics to obtain permission to pursue their interests in foreign countries. Speaking more broadly, we believe that the use of the academic profession and scholarly enterprises to provide a "cover" for intelligence activities is likely to corrupt the academic process and lead to a loss of public respect for academic enterprises.

We would conclude, therefore, that members of the Harvard community should not undertake intelligence operations for the CIA. They should not, for example, when travelling abroad agree to perform any introductions for the CIA or attempt to obtain any information for the CIA.

This stricture does not mean that after returning to the United States academics should refuse to discuss their travels with the CIA, if they so desire. As stated by the Select Committee, occasional de-briefings, which are analogous to the consulting arrangements discussed abeve do not pose a "danger to the integrity of American private institutions." (p. 189) Occasional de-briefings do not involve an academic's taking actions or making observations as a result of instructions in advance from the CIA. However, de-briefings of an individual on a regular or systematic basis can lead to implicit understandings between the CIA and the individual on the gathering of intelligence.

The involvement of academics in writing books and other materials for propaganda is a more difficult question to assess, because the Select Committee for security reasons provides no specific examples and because there is a wide range of possible propaganda activities. We hesitate to suggest a complete prohibition on involvement in all propaganda activities. We hope that members of the Harvard community would not, as a matter of personal principle, become participants in activities that are known to involve partial truths or distortions. We would suggest a complete prohibition where the academic is publicly lending his name and position to material that he knows to be misleading or untrue, such as writing a signed introduction to a fabricated diary of a defector or writing for publication a review of such a diary. In such cases the academic is using the public respect for the academic profession to gain acceptance for material that is not true, an act which seems to us inconsistent with the scholarly and professional obligations of an academic.

Recommendation.—Members of the Harvard community should not undertake intelligence operations for the CIA. They should not participate in propaganda activities if the activities involve lending their names and positions to gain public acceptance for materials they know to be misleading or untrue. Before undertaking any other propaganda activities, an individual should consider whether the task is consistent with his scholarly and professional obligations.

E. The "Unwitting" Use of Members of the Academic Community

The Select Committee indicates that on occasion academics are used in an unwitting manner for some activities. We would assume that this means, for example, that an academic performs a task under what he believes to be private auspices when in fact he is working for the CIA.

This practice should stop. It poses dangers to the integrity of the academic community and is a violation of the rights of the individual whose services are employed. The practice also seems to be inconsistent with the CIA's internal directive that "consenting adults" may be involved in operations. (p. 189) A person should not be deemed to have consented to perform a task if he is misled about the purposes of the task and given false information on who is his employer.

Recommendation.—No member of the Harvard community should assist the CIA in obtaining the unwitting services of another member of the Harvard community. The CIA should not employ members of the Harvard community in an unwitting manner.

F. Interpretation and Application of These Guidelines

From time to time there are likely to be questions concerning the interpretation of these guidelines in given situations. Moreover, it is likely that we have not discussed a number of other relationships between the CIA and members of the

27-462 O - 78 — 42

Harvard community. Should the possibility of such relationships arise, we would hope that individuals would be aware that there may be a problem that should be considered in light of the principles stated in this report. If guidance is needed, we would suggest that the matter be discussed with the Dean of the appropriate Faculty and then, if necessary, with the President of the University or a member of his staff.

Recommendation.—Questions concerning the interpretation and application of these guidelines should be discussed initially with the Dean of the appropriate Faculty and, if necessary, with the President of the University or a member of his staff.

CONCLUSION

We recognize that our recommendations, if adopted, may make it more difficult for the CIA to perform certain tasks. This loss is one that a free society should be willing to suffer. We do not believe that present relationships between the CIA and the academic community, as outlined by the Select Committee, can continue without posing a serious threat to the independence and integrity of the academic community. If the academic community loses some of its independence, self-respect and the respect of others, our society has suffered a serious loss. We believe that the potential harm to the academic enterprise, and consequently to our society, far outweighs the potential losses that the CIA may suffer.

We recognize also that our recommendations will need to be reexamined from time to time. As mentioned earlier, we do not have complete information on past practices. Our conclusions should be reviewed in the light of future experience. Moreover, times and circumstances change and may require a reevaluation of the relationship between Harvard and the government.

Our recommendations are designed to provide guidelines where there have been none in the past. As we stated near the beginning of the Discussion section of this report, we have no specific knowledge of past or present covert relationships at Harvard, and our report is not intended as criticism of the actions of any member of the Harvard community. We have tried, as suggested by the Select Committee, to suggest guidelines to protect the academic community and enable it to serve the most productive role in a free society.

Respectfully submitted,

ARCHIBALD COX,
DON K. PRICE,
HENRY ROSOVSKY,
DANIEL STEINER,
May 12, 1977.

APPENDIX A

RECOMMENDED GUIDELINES

A. Harvard may enter into research contracts with the CIA provided that such contracts conform with Harvard's normal rules governing contracting with outside sponsors and that the existence of a contract is made public by University officials.

B. Individual members of the Harvard community may enter into direct or indirect consulting arrangements for the CIA to provide research and analytical services. The individual should report in writing the existence of such an arrangement to the Dean of his or her Faculty, who should then inform the President of the University.

C. Any member of the Harvard community who has an on-going relationship with the CIA as a recruiter should report that fact in writing to the Dean of the appropriate Faculty, who should inform the President of the University and the appropriate placement offices within the University. A recruiter should not give the CIA the name of another member of the Harvard community without the prior consent of that individual. Members of the Harvard community whose advice is sought on a one-time or occasional basis should consider carefully whether under the circumstances it is appropriate to give the CIA the name of another member of the Harvard community without the prior consent of the individual.

D. Members of the Harvard community should not undertake intelligence operations for the CIA. They should not participate in propaganda activities if the activities involve lending their names and positions to gain public acceptance for materials they know to be misleading or untrue. Before undertaking any other propaganda activities, an individual should consider whether the task is consistent with his scholarly and professional obligations.

E. No member of the Harvard community should assist the CIA in obtaining the unwitting services of another member of the Harvard community. The CIA should not employ members of the Harvard community in an unwitting manner.

F. Questions concerning the interpretation and application of these guidelines should be discussed initially with the Dean of the appropriate Faculty and, if necessary, with the President of the University or a member of his staff.

The Director of Central Intelligence

Washington, D.C. 20505

13 JUN 1977

Derek C. Bok, President
Harvard University
Cambridge, Massachusetts

Dear President Bok:

I have read with interest the new guidelines you have announced to regulate the relationships between Harvard, its faculty and staff, and the Central Intelligence Agency. I particularly welcome your recognition of the need for an effective system for the production and collection of foreign intelligence within our government and your realization of the important contribution that the American academic community continues to make toward improving our understanding of foreign developments.

May I say that we in the Intelligence Community of the United States recognize and appreciate the immense benefits we receive from extensive relationships with scholars and academic institutions throughout the country. Leading historians and political scientists and some of their best pupils have brought a high degree of intellectual energy, curiosity, and integrity to our profession and have made sure that our analytical efforts continually take account of the best research available in the private sector. Indeed, we have systematically and conscientiously built many of the components and practices of the intelligence profession on models from academia. American scholars who have been willing to share information and interpretations of developments in the international arena often have contributed valuably to intelligence support of the U.S. foreign policy-making process. Without the continuing assistance of the academic community, our ability to provide the President and other senior officials with objective and enlightened analyses and estimates would be hampered. I believe strongly that in this increasingly complex and competitive world it remains in the best interests of both the academic and intelligence communities to expand and refine their contacts in a spirit of mutual respect and understanding.

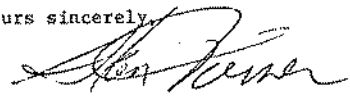
Current CIA policy covering our relations with American staff and faculty members of U.S. academic institutions is already, to a large degree, consistent with the Harvard guidelines. Present Agency policies may be summarized as follows:

> All of our contracts with academic institutions are entered into with the knowledge of appropriate senior management officials of the institution concerned.
>
> All recruiting for CIA staff employment on campus is overt.
>
> It is against our policy to obtain the unwitting services of American staff and faculty members of U.S. academic institutions.

I am pleased that you have a guideline which expressly authorizes individual consulting arrangements with intelligence agencies. As I have said, these relationships are of inestimable value to us. I must, however, take exception with the provision in this guideline which requires your faculty members to report such arrangements in writing to the dean of their faculty. At least, I take such exception if a similar regulation is not applicable to liaison arrangements with industry, other governmental agencies, foreign governments, etc. If such is not the case, I believe that attempts to regulate the private lives of our citizens in a manner discriminatory to any particular group, profession or segment of society poses serious risks. I believe that we would be far safer not to single out any group, despite what may be transient enthusiasm for so doing. In point of fact, it is our policy in these cases to suggest to individual scholars that they inform appropriate officials at their universities of their relationship with CIA. Frequently, however, scholars object to advising any third parties on the understandable grounds that to do so would violate their constitutional rights to privacy and free association and possibly expose them to harassment and damage to their professional careers. As you are aware, there are two such cases of unfair and prejudicial harassment at this time on other campuses. Thus, the decision on whether to advise their institution of a relationship with CIA is left to the discretion of the individual. We intend to continue respecting the wishes of individuals in this regard.

In closing, let me express the hope that your guidelines will help in improving the cooperation that already exists between the U.S. academic and intelligence communities. I also wish that you would bring promptly to my attention any case in the future where you think there has been an abuse or improper use of our authority. You can be assured that I will move quickly to ascertain the facts and to take such remedial action as may be necessary.

Yours sincerely,



STANSFIELD TURNER

July 12, 1977

Dear Admiral Turner:

Thank you very much for your letter of June thirteenth concerning the guidelines promulgated by Harvard. I am pleased but not surprised that there are a number of similarities in your and our approaches to the question of relationships between the Central Intelligence Agency and universities such as Harvard.

There appear, however, to be some differences which may be significant. You refer to one--informing university officials of individual consulting relationships--in your letter. Although I think it is better for such relationships to be reported, the question seems to be one for individual institutions and the consultants to decide. The difference in our views may not, therefore, be of great significance.

I am more concerned about two other points. The first relates to recruiting on campus. In your letter you summarize present Agency policy as requiring that "All recruiting for CIA staff employment on campus is overt." The apparent limitation of this policy to "staff employment" could leave room for practices, outlined in our report, that I would regard as inconsistent with the nature of a university campus. The second relates to our guideline on faculty and staff involvement in intelligence operations. Your letter does not refer to Agency policy in this area.

It may be that amplification of your views and policies will reconcile any apparent differences in these two areas. It also may be that there are real differences that need to be explored through further discussions. If the latter is the case, I would be happy to designate a member of my staff to meet with your representative to discuss these matters more fully. The issues are important, and it might be in both our interests to try to resolve any differences that may exist. In any event, I would be happy to try.

Sincerely,

Derek C. Bok

Admiral Stansfield Turner
The Director of Central Intelligence
Washington, D.C. 20505

cc: Dan Steiner

December 5, 1977

Dear Admiral Turner:

Now that there have been discussions and correspondence between your representatives and mine concerning Harvard's guidelines on relationships between U.S. intelligence agencies and Harvard, it seems appropriate for me to write you directly to express my views and to invite your response.

The CIA's position, as I understand it, differs from ours on two significant issues: the operational use, including the gathering of intelligence on assignment, of faculty and staff members, and the use of faculty and staff members as covert recruiters on campus and practices associated with covert recruiting. The Harvard guidelines, in Sections C and D of the report that we issued, conclude that these two activities are inappropriate. The CIA has taken the position that these activities are a matter for decision on a case-by-case basis by the individual faculty or staff member and the CIA without the knowledge of the university and without regard to its rules. The rationale for the CIA's position appears to be that faculty and staff members can help the CIA perform its function in our society and that individuals at universities should be free to reach their own decisions on serving their country. (One aspect of the CIA's position is unclear. Mr. Lapham's letter of October 28th to Mr. Steiner states that the CIA should not "unilaterally deny any citizen...the opportunity to furnish information or services...." Does this mean that the CIA is precluded from directly or indirectly requesting or suggesting that a faculty or staff member serve the CIA and will consider the use of an individual for operational or covert recruiting purposes only if the initiative comes solely from the individual? We would appreciate clarification of this question by the CIA.)

I do not think that I need repeat the underlying rationale for Harvard's position on these two issues. The reasons are set forth in the two sections of our report. (A copy of Sections C and D is enclosed for your convenience.) But it might be helpful if I tried to address what I take to be the core of the CIA's position: that individual faculty and staff members, as citizens of the United States, should be free to serve the CIA and their country as they see fit.

I would not, of course, argue with the general proposition that citizens as a matter of individual choice can serve our country in a variety of ways, including the gathering of intelligence and other covert activities on behalf

of the CIA. Citizens, however, are frequently subject to limitations on their right to engage in certain activities because of professional obligations they have voluntarily assumed or relationships they have voluntarily entered into. Let me illustrate this point with two examples. Citizens ordinarily have the right to comment freely to the press concerning litigation in progress. However, a lawyer representing a party in a case before the courts is expected to restrict his comments to the press. Citizens ordinarily have the right to act as undercover agents for the FBI. It is doubtful, however, that a staff member of the Select Committee on Intelligence of the U.S. Senate could serve covertly the FBI by reporting information and conversations to which he was privy because of his job. In the first example our society's interests in the fair administration of justice are deemed to justify a restriction on free speech. In the second our aystem of separation of powers and the obligations assumed to one's employer justify restricting a person's ability to serve his country by helping the FBI.

In our guidelines we do ask our faculty and staff members, because of professional obligations and their voluntary relationship with other members of the academic community, to forego rights that they would otherwise have as citizens. We made this request because we concluded that the practices in question are inconsistent with the nature of a university community and the obligations of a member of the academic profession. Covert recruiting by university personnel and its attendant practices bring a new and disturbing element into the relationships among members of the academic community, represent a serious intrusion of the government into our campus and classrooms, and violate the privacy of individuals within the community. The use of a professor for operational purposes while he is abroad for academic purposes, such as attending a conference in his field, is simply a use of the academic profession as a cover and consequently compromises the integrity of the profession and casts doubts on the true purposes of the activities of all academics.

As pointed out in the introduction to the discussion section of our report, we proceed with caution when considering guidelines that would restrict the activities of our faculty and staff members. We also are aware, as stated in the conclusion of the report, that restrictions may make it more difficult for the CIA to perform certain tasks it has been asked to do. We remain convinced, however, that the primary thrust of the guidelines is appropriate and serves the interests of our society. Although there is perhapa room for reasonable differences of opinion on some details, and your response may be helpful in this regard, we believe that the guidelines provide a sensible answer to the serious problems brought to our attention by the U.S. Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities.

I might be more comfortable with the case-by-case approach, with the striking of individual bargains between a faculty or staff member and the CIA if the process and the resulting bargain were open and subject to scrutiny.

Then members of the academic community and others could weigh the competing interests in each case and reach a decision. But the very nature of the activities in question--their covertness--precludes such a result, and the CIA and the individual, whatever his motivations for agreeing to serve the CIA may be, are the sole judges. The covertness also means that universities such as Harvard will have no way of knowing to what extent the integrity of the American academic community is being compromised. Only the CIA will have the complete picture on an on-going basis.

The matters at issue are, of course, important not only to Harvard but to other academic institutions. It is fair to say that the present position of the CIA appears to mean a continuation, at the discretion of the CIA and individuals, of the covert relationships that caused the most concern to the Select Committee in the April, 1976 report. For this reason I would welcome your personal consideration of the issues described above.

Sincerely,

Derek C. Bok

Admiral Stansfield Turner
The Director of Central Intelligence
Washington, D.C. 20505

cc: D. Steiner

Enc. Section C and D of Report of the Committee on Relationships between the Harvard Community and United States Intelligence AGencies

The Director
Central Intelligence Agency

Washington, D.C. 20505

15 May 1978

Derek C. Bok, President
Harvard University
Cambridge, Massachusetts 02138

Dear President Bok:

I want to thank you for your letter of last December 5, which correctly identified the two points as to which our representatives were unable to reach agreement in their discussions of the Harvard guidelines. I have not replied sooner, wanting first to reconsider my own position and to take full account of the views that you expressed. While my reappraisal has not caused me to shift my ground, or to accept as internal CIA controls the two Harvard guideline policies that were the focus of the discussions between our staffs, I would like to explain to you my recent thinking on this subject.

What we are dealing with here, in one of its many forms, is the question of what restraints should be observed by CIA in the performance of its intelligence functions. It is natural that we should approach that question from our separate institutional perspectives, but I am confident that we share the same fundamental concerns. Like you, I am resolved to see that academic freedoms are not threatened by intelligence activities, just as I assume that you are resolved with me to see that our national capacity to carry out these activities is not undercut or unduly reduced. Whatever our differences, we surely are agreed that in the end the country cannot afford either an ineffective intelligence service or a crippling of its academic life through governmental interference or intrusion, and that therefore ways must be found to bring the interests at stake here into a proper balance so that both can be served.

Information about foreign events and trends is the raw material from which finished national intelligence is derived. Much of the necessary information is not openly available and therefore cannot be obtained by open or publicized methods. Some of what is needed is gathered by technical means. The rest, being a critically important part of the whole, is gathered from human sources. Information-gathering from human sources is a particular responsibility of CIA, but the Agency is not self-sufficient in this regard. At almost every turn it requires the support and assistance of others. That is true, to take but one example among many that could be chosen, when it comes to arranging access

or introductions to potential sources of information. If we are cut off from that base of support, or if it is too far narrowed, our effectiveness will be badly eroded or ended altogether. While in the present climate there is a certain clamor to add to the list of those with whom it is thought improper for CIA to maintain any confidential relationships, for the reasons stated I cannot accept such additional restraints in absence of a truly compelling justification.

The proposition you are asking me to adopt would rule out of bounds any confidential relationship with any academic for the purpose of conducting or aiding the intelligence activities specified in your letter. We are asked to forego all such relationships, and presumably to terminate any that exist, on the grounds that they are contrary to obligations that one assumes upon becoming a member, not just of the Harvard faculty or staff, but of the academic profession in general.

In support of your position, you argue that citizens "are frequently subject to limitations on their right to engage in certain activities because of professional obligations they have voluntarily entered into." As illustrations, you cite: a) the duty of confidentiality that a lawyer has to a client involved in litigation and the attendant restrictions this duty places on the lawyer's "right" as a citizen under the First Amendment to speak freely and publicly concerning his client's case; and b) the fact that a citizen's "right" to act as an FBI informant does not extend to a Senate intelligence committee staffer covertly providing the Bureau with information gained as a result of his position with the committee. While obviously I cannot quarrel with either your basic premise or with the illustrations themselves, I do think that our relationships with academics are wholly different in both principle and substance. Neither CIA nor the academics with whom it deals view the services rendered by them as a breach of professional ethics or otherwise underhanded or disloyal to the individual's primary employer. For instance, we do not ask a university official to provide us with a student's university biographical file or transcript without the latter's permission. Similarly, we do not seek (nor are we interested in) information from a professor on his institution's internal workings, activities, curriculum, etc. In short, countervailing considerations such as the fair administration of justice or a blatant conflict of interests, as exist in your examples, simply are not present in the nature and scope of the confidential relationships which academics have with this Agency. Rather, we consider these individuals to be acting wholly out of good faith and praiseworthy motives in lending their assistance to our endeavors, and we doubt that they in any way compromise the integrity of the academic profession or infringe upon their official responsibilities to their institution.

I want to emphasize that the views I am expressing do not merely reflect the "CIA's position," as your letter terms it; rather, our position is dictated not only by our perceptions of the national interest but also by the strongly-held beliefs of the academics with whom we deal. The initiatives leading to

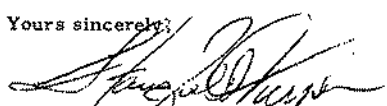
these relationships may come either from the Agency or from the individual academics, but it is our policy to leave to the individual concerned, as a matter of choice or conscience, the decision whether to offer assistance in the performance of our functions. As has been pointed out in previous correspondence, these relationships are frequently kept confidential at the insistence of the individuals themselves, their concerns being that they might otherwise be exposed to harassment or other adverse consequences as a result of exercising their right to assist their Government.

It should not be inferred that CIA mindlessly ignores the status of the U. S. academic community as a discrete segment of our society, or that it follows no special procedures in its dealings with the institutions themselves and the employees thereof. On the contrary, we have recently adopted and rigorously adhere to an internal CIA Headquarters regulation which sets forth detailed, stringent restrictions on permissible relationships between CIA and academia. I am enclosing a copy of the actual text of this regulation for your information. Although I can fully recognize and understand the bases for Harvard's particular concerns, I nevertheless firmly believe that the standards set forth therein clearly evidence a reasonable and good faith effort by CIA to balance the principle of an independent academic world free from Government intrusion on the one hand with the needs of the nation and the rights of individual academics on the other. As it is, the restraints which we have already imposed on ourselves in this area have on occasion limited the capability of the intelligence community to perform the tasks it exists to perform. Nevertheless, CIA has chosen to formulate and operate under these limitations in the interests of and out of respect for the freedom and independence of the U. S. academic community. At the same time, it is our considered opinion that any further extension of the restrictions to effectively rule out the two types of activities in question is neither legally required nor is otherwise advisable in light of the potential obstacles which such action would pose to this Agency's ability to further avail itself of a willing, valuable resource to assist the Government in the performance of legitimate endeavors in furtherance of the nation's foreign policy objectives.

I fully recognize that the Harvard guidelines were established pursuant to a suggestion contained in the April 1976 report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities. Of course I do not question Harvard's basic right to promulgate internal procedures which place reasonable restraints on relationships between its employees and outside organizations in general. Nevertheless, I simply cannot lend my affirmative support to or consider this Agency bound by any set of procedures which, when read as a whole, singles out CIA, implies that any confidential association that an academic has with us is so inherently suspect as to require it to be publicly acknowledged and made "subject to scrutiny," as your letter puts it, and deprives academics of all freedom of choice in relation to involvement in intelligence activities.

On behalf of this Agency, I want to thank you, Mr. Steiner and the rest of your colleagues at Harvard for the considerate and responsible manner in which you have dealt with us on these difficult and complex issues.

Yours sincerely,



STANSFIELD TURNER

CIA HEADQUARTERS REGULATION ON RELATIONSHIPS WITH THE U. S. ACADEMIC COMMUNITY

CIA may enter into classified and unclassified contracts and other arrangements with the United States academic institutions of higher learning as long as senior management officials of the institution concerned are made aware of CIA's sponsorship. CIA may enter into personal services contracts and other continuing relationships with individual full-time staff and faculty members of such institutions but in each case will suggest that the individual advise an appropriate senior official thereof of his CIA affiliation, unless security considerations preclude such a disclosure or the individual objects to making any third party aware of his relationship with CIA. No operational use will be made either in the United States or abroad of staff and faculty members of United States academic institutions on an unwitting basis. CIA employees will not represent themselves falsely as employees of United States academic institutions. CIA personnel wishing to teach or lecture at an academic institution as an outside activity must disclose their CIA affiliation to appropriate academic authorities; all such arrangements require approval in advance from the Director of Security. Pursuant to Federal law, CIA will neither solicit nor receive copies of identifiable school records relating to any student (regardless of citizenship) attending a United States academic institution without the express authorization of the student, or if the student is below the age of 18, his parents.

STATEMENT OF MORTON S. BARATZ, GENERAL SECRETARY, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

Mr. BARATZ. Mr. Chairman and members of the committee, I appreciate the invitation to testify before the committee on the relationships between the intelligence agencies and the academic community. S. 2525, the National Intelligence Reorganization and Reform Act of 1978, is the most significant legislation affecting national intelligence agencies considered by the Congress since the Central Intelligence Agency was established in 1947. From this committee's deliberations there will come, I am confident, a marked improvement in the body of law governing the intelligence system of the United States, which will assure effective intelligence activities consistent with preserving the integrity of other national institutions and professions.

Strong, effective intelligence activities are in the national interest. Their strength and effectiveness can be enhanced with access to the energy, talents, skills, and physical resources housed in the Nation's institutions of higher education.

An academic community known by all concerned to be devoted to the search for truth, wherever truth may lie, is also in the national interest. One necessary condition for assurance of the integrity of intellectual inquiry is insulation of scholars from those persons, groups, and institutions that have an interest either in suppressing relevant kinds of information or using it in ways that are antithetical to the pursuit of truth.

Are the respective imperatives of intelligence work and of scholarly inquiry irreconcilable? If not, what rules may be established and by whom to regulate the relationships between intelligence agencies and the academic community, such that legitimate national security objectives can be more nearly achieved without causing significant dilution of academic freedom and academic self-government?

The American Association of University Professors has, for the more than 60 years of its existence, defended the academic freedom of teachers and scholars. We have done so not as some particular entitlement of teachers and scholars, but in service of the inestimable value of academic freedom to the Nation. In the words of the 1940 "Statement of Principles on Academic Freedom and Tenure," a document endorsed by more than 100 scholarly and educational organizations:

> Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free expression.

The pursuit and expression of knowledge, the distinguishing characteristics of the academic community, must be open and independent. There must, in other words, be no justifiable suspicion that the academic profession is being used for nonprofessional purposes. Such suspicions would cast a pall of doubt over the activities of the academic profession, and thus gravely reduce the benefits to society from teachers and scholars freely discussing, teaching or publishing their views.

We realize that this committee has an imposing task in deciding what is suitable and what is permissible for intelligence agencies in

their relationships with the academic community. What can and should be legislated, and what can and should be left to self-governance on the campus are issues for which answers are hard to find. The AAUP believes firmly in the principle of self-governance by colleges and universities, and on that basis, encourages their faculties and administrators to devise professional codes of ethics to guide members of the academic community in their relations with intelligence agencies. We also believe, however, that the law should delimit the claims that the intelligence agencies can legitimately make upon academics, lest the latter find themselves asked by their Government to do that which their professional obligations preclude.

Legislation consistent with maintaining the integrity of higher education as well as with facilitating the work of the intelligence agencies is possible and desirable. It is our view, however, that S. 2525 falls short of that kind of accommodation in that it calls into substantial question the "free search for truth and its free expression" upon which the common good rests. Here is a quick listing of its defects.

(A), it draws an untenable distinction between the academic who travels abroad under the aegis of an academic institution and the academic whose travels are private. (B), it expressly fails to prohibit covert recruitment in academic institutions. (C), it leaves to tenuous implication whether restrictions on contracting by an intelligence agency with an academic institution apply as well to individual members of the academic profession. (D), it places limits upon disclosure of participation in United States organizations which allow covert intelligence activities among campus groups composed primarily of foreign students and foreign scholars.

Each of these points deserves further, but brief, discussion.

Section 132 of the bill states that no intelligence agency may "pay or provide other valuable consideration" to a U.S. person traveling abroad as part of a Government program "designed to promote education or the arts, humanities, or cultural affairs" for purposes of intelligence activities or providing intelligence information, and no intelligence agency may use for purposes of cover any academic institution. These are welcome provisions. But Section 132 goes on to state that no entity of the intelligence community may use as a source of operational assistance in clandestine intelligence activities in foreign countries any individual who—

is a United States person whose travel to such country is sponsored and supported by a U.S. academic institution unless the appropriate senior officials of such institution are notified that such person is being used for such purpose.

Our first concern is with the word "unless" and the language which follows. "Appropriate senior officials," identified, we assume, by the intelligence agency, are informed that an individual from their campus is being used for clandestine intelligence activities abroad. Presumably, then, the practice goes forward. The restriction on the intelligence agencies in lines 17 to 19 of this subsection is, in effect, removed in lines 19 to 21. But a practice which is wrong is not made right by informing "appropriate senior officials." We urge the deletion of lines 19 to 21 so that the intention of the legislation with respect to a limitation upon intelligence agencies may be fully implemented.

We are also troubled that the limitation on the intelligence agencies against using members of the academic community traveling abroad does not extend to the individual whose travel is not sponsored and supported by a U.S. academic institution. This distinction is, in our view, inappropriate and unworkable.

The individual who travels to a professional symposium in Greece with his own funds or funds provided by a foundation is no different in the eyes of his colleagues at home or those he meets abroad from the scholar sponsored and supported by an academic institution. Both seek to advance their own and others' knowledge of a field of study, and their institutional affiliations are widely publicized. An intelligence agency, however, may approach the academic who has arranged his own funding, but not the dependent scholar, to use in operational activities in the foreign country. The clarity sought in S. 2525 does not exist, for what we understand this language seeks to avoid, taint of academic institutions through intelligence agencies in covert activities abroad, cannot be accommodated to the richly complex world of traveling academics.

There are, of course, scholars who travel as tourists, often with families, seeking recreation as any of us might. But we do not see, for the purposes of this legislation, a substantial difference between the scholar traveling privately and the scholar traveling professionally. Neither scholar is meaningfully separable from his institution. Unlike lawyers or physicians, most of whom are self-employed, but like legislators, whose professional identification is bound to an institution, the scholar abroad does not shed his institutional affiliation. It defines how he is perceived, whether or not his presence in a foreign country is sponsored and supported by an academic institution.

In 1976, the 62d annual meeting of the AAUP called on all academics to—

> participate only in those Government activities whose sponsorship is fully disclosed, and to avoid any involvement which might conflict with their academic obligations and responsibilities.

The avoidance of a conflict of interest is an affirmative obligation resting upon academics to accept no responsibilities which would substantially interfere with their professional responsibilities. The academic who consents to participate in clandestine activities abroad provides a cover for intelligence work. In doing so, the academic, as the "Report of the Committee on Relationships between the Harvard Community and United States Intelligence Agencies" observed—

> casts doubt on the integrity of the efforts of the many American academics who work abroad and, as a practical matter, may make it more difficult for American academics to obtain permission to pursue their interests in foreign countries.

The academic who performs covert intelligence work thus assumes an obligation at odds with his obligations as a teacher and a scholar, for his secret activities inhibit professional relationships without which members of the academic profession may not effectively discharge their duties to students and colleagues. It follows, we believe, that that which is improper for an academic to accept and do consistent with professional ethical standards, would be just as improper for intelligence agencies to induce.

We recommend that intelligence agencies be prohibited from using, as sources of operational assistance in foreign countries, all academics traveling abroad.

Section 132, subsection (f) states that intelligence agencies are not prohibited from using any person described in subsections (a) and (b) of this provision to aid in recruitment of employees, sources of information, and oporational assistance for the intelligence community.

The wording of this subsection troubles us. If an intelligence agency may use the described persons, including clergy, journalists, and academics abroad, to assist in recruitment of sources of operational assistance, how is the constraint upon the agencies toward academics traveling in foreign countries to be maintained? We have no detailed knowledge of operational assistance programs, but we are hard pressed to understand how helping to recruit sources of operational assistance is distinguishable from being used as a source of operational assistance. Because the distinction in practice between the two is blurred, the limitation upon the intelligence agencies intended to safeguard the academic community is correspondingly weakened.

More troublesome, subsection (f) establishes a statutory mandate for covert recruitment on the campus. Opon recruitment at colleges and universities by identifiable representatives of the intelligence agencies is unobjectionable. But the practice by intelligence agencies of maintaining confidential relationships with faculty members, students, or administrators for recruitment purposes is inconsistent with the requirement that all conflicts of interest which may affect teaching and scholarship be fully disclosed.

The unidentified member of the academic community who seeks the views of others for possible use by the intelligence agencies engages in false pretenses. He encourages reliance by others in his professional capacity for nonprofessional reasons. In doing so, he places all members of the academic community under suspicion. Thus, the unfettered exchange of ideas, central to free and independent institutions of higher learning, tends to be constrained, and the relationships that should exist in the academic community to the benefit of society, particularly those between students and faculty, are potentially distorted.

Further, we question if it is appropriate for the intelligence agencies to enlist the covert aid of a member of the academic community in activities that can result in a secret investigation of another member of the academic community, whether a U.S. citizen or foreign national, which may lead to additional secret Government intrusion on the campus. We find nothing in S. 2525 that would restrain this possible conduct by Government and are deeply troubled that information may be collected by the executive branch about persons at colleges and universities to be used in ways unknown to those persons and whose professional reputations and careers may in consequence be put at risk.

Foreign students and foreign scholars create special difficulties with respect to covert recruitment. These individuals are on our campuses in increasing number. It may be appropriate for the intelligence agencies, in pursuit of their responsibilities, to probe the views of foreign nationals or recruit their aid. But we believe it

inappropriate for the intelligence agencies to use academics as a means of attaining their purposes. These practices, especially when conducted in secret on the campus, discredit the integrity of the academic profession in the same degree as covert recruitment on the campus directed against U.S. persons. We are concerned that any member of the academic community would consent to be part of this covert process. We are distressed that S. 2525 encourages such practices.

Accordingly, we urge that language be added to S. 2525 that prohibits the intelligence agencies from maintaining covert relationships with members of the academic community, whether witting or not, for purposes of recruitment in the United States and abroad, and that recruitment on the campus by the intelligence agencies be confined to known representatives of the agencies whose names are made a matter of public record.

Section 139 places restrictions on contracting by an entity of the intelligence community with an academic institution, and allows no exception to revealing contract sponsorship with an academic institution. This restriction is an important and probably a necessary means of assuring access by the intelligence agencies to the best advice and knowledge which universities can offer, consistent with canons of institutional independence. The wording of the section, however, leaves us uneasy in two respects and troubled in a third.

We understand that the intelligence agencies have established and funded independent establishments or proprietaries which enter into contracts or arrangements with academic institutions. It is not clear if these kinds of establishments are envisioned as entities, part and parcel of the intelligence community. We welcome clarification of this point, preferably through a definition of "entity of the intelligence community" in section 104 of the bill.

Section 139 states that "entity sponsorship" is made known to "appropriate officials" of the academic institution. We assume that the intelligence agencies decide who and how many are appropriate officials. It is plausible to suppose that the intelligence agencies will differ among themselves as to the meaning of "appropriate officials"; the many different colleges and universities in this country, with their varied structures of governance alone would secure this result. Our concern is that different practices in the context of a broad standard can readily defeat the purpose of the obligation to reveal contract sponsorship, to prevent conflicts of interest, and thus to protect the integrity of the objectives and needs of the cooperating institutions. Contract disclosure to appropriate officials by the intelligence agencies would, we suspect, be more likely to reflect prudential concern for the interests of the agencies than to achieve the purpose of disclosure. The likely result will be to inhibit disclosure of contract sponsorship.

To guard against this likelihood, we suggest the following language to conclude the sentence now ending on line 20 of section 139, page 67:

consistent with the normal rules governing contracts with outside sponsors as made known by the company or institution to the entity of the intelligence agency.

The more troubling aspect of section 139 is that restrictions on contracting apply only to companies and institutions. Apparently individuals are excluded. The intelligence agencies are free to enter covert contractual relationships with members of the academic community but not with academic institutions. We agree that it is important for the learning and expertise of members of the academic community to be available to the intelligence agencies. But we know of no compelling reason why this relationship should not be disclosed. Indeed, secrecy may work to the disadvantage of the intelligence agencies for suspicions created about hidden contracts become a warning signal to individuals to avoid all contracts sponsored by the intelligence community. We thus recommend that the obligation of intelligence agencies to disclose contracts with institutions extend to individuals, and that the prohibition against concealing entity sponsorship apply to individual members of the academic community, as well as academic institutions.

Finally, I invite your attention to section 244, with its restrictions on undisclosed participation in U.S. organizations. Disclosure may be waived by the head or designee of an entity of an intelligence agency if an individual joins an organization which is "composed primarily of foreign persons and is acting on behalf of a foreign power." The definitions of foreign person and foreign power under title II of the bill appear sufficiently broad to encompass any campus-based group in the United States composed primarily of foreign students and foreign scholars. An intelligence agency would thus be able, without disclosure, to ask a faculty member to join a group of colleagues, say Korean nationals, in efforts to affect relationships between the United States and a foreign state, say, the Republic of Korea. But absent full disclosure, the practice undermines the necessary trust between students and scholars. Foreign nationals in our institutions of higher education are just as entitled to that assurance as are U.S. nationals.

We recommend that language be added to section 244 exempting academic institutions from the presently drafted waiver of disclosure.

The work of the intelligence agencies is an important part of America's efforts to live securely and peacefully in the world. Academic freedom and principles of professional ethics are essential to sustaining and expanding our democratic traditions and practices. For the most part, the intelligence community and the academic community pursue their responsibilities separately. Where they come together, the possibility for friction is high. Secrecy, necessarily woven into the fabric of intelligence activities, is basically antagonistic to the free and open exercise of teaching and inquiry by members of the academic profession.

S. 2525, in recognition that academic freedom holds a place of valued importance in our country, establishes protections, among them, a prohibition on intelligence agencies from using for purposes of cover any academic institution, in order to safeguard the academic community from indiscriminate use by the intelligence agencies. For the reasons stated, however, we believe these protections to be insufficient.

S. 2525, if enacted as presently drafted, will leave the door open to unacceptable intrusions by the intelligence agencies in colleges

and universities throughout America. The free search for truth, the essential quality of the academic enterprise in a free society, will be compromised, the respect of others withdrawn, and adverse consequences for society longlasting.

We appreciate that our recommendations can lead to additional restrictions on the intelligence agencies in their performance of certain tasks. We are confident that the intelligence agencies can accomplish their vital functions within these restrictions: that the prohibition on intelligence agencies from using as a source of operational assistance in clandestine intelligence activities academics traveling in foreign countries sponsored and supported by a U.S. academic institution apply to all academics abroad; that the intelligence agencies be prohibited from entering covert relations with members of the academic community for recruitment purposes, and that all recruitment by the intelligence agencies in colleges and universities be open; that restrictions on contracting by an intelligence agency with an academic institution extend to individual teachers and scholars; and that the restriction on intelligence agencies to disclose participation in U.S. organizations not be waived with respect to academic institutions.

It is our firm conviction that these proposed revisions of S. 2525 are acceptable alternatives for national intelligence activities consistent with the proper functioning of the academic enterprise, so that the academic community and the intelligence community both may better serve the common good.

Senator HUDDLESTON. Thank you very much, Mr. Baratz.

There is a vote on now on the floor of the Senate, and it will be necessary for us to suspend for about 10 minutes and return and resume with the testimony of Mr. Abrams.

So we will be in recess for 10 to 15 minutes, however long it takes us.

[A brief recess was taken.]

Senator HUDDLESTON. The committee will resume.

There is a vote on, and I will excuse myself in a few minutes and go vote. Senator Goldwater has agreed to keep the testimony going so it will not be interrupted, so we will hear now the presentation from Mr. Abrams.

STATEMENT OF RICHARD M. ABRAMS, PROFESSOR OF U.S. HISTORY, UNIVERSITY OF CALIFORNIA AT BERKELEY, AND CHAIRMAN, STATEWIDE COMMITTEE ON ACADEMIC FREEDOM FOR THE UNIVERSITY OF CALIFORNIA

Mr. ABRAMS. Thank you.

I am appearing before the U.S. Senate Select Committee on Intelligence in my capacity as chairman of the Statewide Committee on Academic Freedom for the University of California. I speak for the nearly unanimous view of that committee as presented in its recent report to the academic council which represents the faculty leadership of the nine-campus university. The committee report has not as yet been endorsed by the council nor presented to the full membership of the academic senate, or to the regents of the university. The council, I am told, plans to consider the report in its meeting early in September and then forward it to the regents.

In this statement, I will first summarize the recommendations my committee has made, and then briefly explain the thinking behind the recommendations. I will follow this with a brief statement about the legislation proposed in S. 2525.

The Academic Freedom Committee report recommends that the university adopt as declared policy, with appropriate sanctions, the requirement that there be public notice of any research, advising, or consulting arrangements between Government intelligence agencies and the university, any division, school, institute, or department of the university, or any individual enjoying student or employee status with the university.

In reaffirming commitment to the general principle that no member of the university shall abuse professional credentials by using them to deceive or misrepresent, the report also recommends that members of the University community be formally prohibited from engaging in covert operations or activities on behalf of any Government intelligence agency. It specifies covert intelligence gathering, debriefing after professional or scholarship-related sojourns abroad, advising, recruiting, and publication of materials designed for essentially political effects, that is to say, propaganda. On the grounds that suspicion of covert activities by anyone in the university community tends to disrupt normal university functions and the necessary trustful relationship among scholars, between teachers and students, and among students, the report recommends also that the proscriptions against covert activities extend to students, research associates and technicians, and administrators, as well as all faculty.

This, then, is to summarize the present posture of the Academic Freedom Committee of the University of California.

Now, I would like to present something of the rationale behind all this.

It is more than 2 years since the report of the U.S. Senate Select Committee on Governmental Operations With Respect to Intelligence Activities, of April 1976, called to the country's attention the fact that for at least two decades many hundreds, perhaps thousands of academicians in more than 100 universities and colleges across the United States have engaged in covert activities for the Central Intelligence Agency. These activities have ranged from various forms of espionage to assisting in the recruitment of colleagues and students for covert intelligence work. The report made it evident, moreover, that some professors had lent the authority of their credentials to publications which offered less than scholarly or accurate statements, and which were actually shaped for propagandistic purposes, to affect political events at home and abroad.

Having expressed concern about how CIA and other Government intelligence agencies have already compromised the integrity of the universities, the Senate select committee indicated its concern that it might be equally destructive to legislate on what academicians can legally do, that legislation might become, in the words of the committee's report, "in itself an intrusion on the privacy and integrity of the American academic community." The select committee recognized, correctly we believe, that, again I quote it, "it is the responsibility of the American academic community to set the professional and ethical standards of its members."

The Academic Freedom Committee appreciates the sensitivity of the select committee to the problem of setting the proper balance between freedom and responsibility for a profession that requires the maximum degree of private choice to be effective in its premier social functions. When Government gets into the business of writing rules of ethical behavior for scholars, scientists, artists, clergy, and the press, it inevitably runs the risk, a grave one for any free society, of equating morality and the national interest with the welfare of the Government.

But we also appreciate how seriously damaging to the entire academic community and the national interests a regular abuse of professional credentials can be. Any profession that is unclear about its standards or fails to apply them rigorously serves itself and its society poorly. It would thereby fail to justify the privileges it claims on behalf of its special social functions. So we have welcomed the opportunity to contribute to a restatement and reaffirmation of the ethical standards of the profession.

Now, to begin with, we should say that we view it as essential that the United States have an effective foreign intelligence system. We believe it is equally important that Federal, State and local governments also be well informed about activities or developments that may affect the public safety. Members of the academic community have much to contribute to investigative agencies of all kinds; it would be a waste of social resources to deprive such agencies of the energies and expertise available at universities. In addition, we believe no institution or profession commands all of an individual's time or conscientious commitment. Every citizen reserves some sizable measure of private prerogative for engaging in activities of his or her choosing on private time. Now, this consideration is a vitally important requirement for an open society, and it necessarily conditions all codes of ethics and behavior that demark the special character of particular institutions and membership therein.

For all these reasons, individuals in the academic community have every right to offer their services and resources to public and private institutions or organizations in general, and to a governmental intelligence agency in particular, on some basis consistent with legal and professional obligations.

On the other hand, it must be clear that a university is above all else an institution whose primary and indispensable function is organizing and disseminating knowledge, supporting and stimulating scientific inquiry, and advancing the frontiers of knowledge; that toward such ends, its faculty must enjoy especially broad parameters of intellectual freedom and experimentation; and that to justify that special academic freedom, the university has an obligation to maintain the highest standards of intellectual honesty. Anything that compromises that honesty undermines the whole foundation of the university and of the profession and damages the vital interests of all its members. This is the essential point to keep up front.

A covert relationship between a member of the academic community and a Government intelligence agency, however high-minded the purpose, is unavoidably compromising and virtually in and of itself constitutes an abuse of credentials. A scholar's credentials

are supposed to attest to honesty as well as competence, nonpartisan objectivity as well as analytical expertise, scientific disinterest as well as excellence. Intellectual honesty is not merely one of the values of the profession; it is the indispensable virtue, the very essence of what scholarship stands for. When a scholar's credentials are deliberately used as cover for activities unrelated or only incidentally related to scholarship, such as intelligence gathering, recruitment for espionage, or propaganda, those credentials are demeaned. Indeed, for such activities the credentials are specifically exploited to falsify, to create an impression of authenticity where something else prevails; the intelligence agency could have little need of the scholar except that the credentials will likely deceive. And while it may be conceded that cover and deception are often necessary in intelligence gathering, for a member of the academic profession to so serve is for such a person to damage the very essence of what she or he is presumed to stand for.

We acknowledge that every citizen has a variety of loyalties that claim his or her moral support. We recognize that in entering into a covert relationship with a Government intelligence agency, a student, professor, or administrator may well be doing so for the highest reason of conscience. We know, for example, that in the struggle against Nazism 35 to 40 years ago, some professors used the cover of their university credentials to engage in espionage, serve as secret couriers, and assist in the recruitment of agents. As long as people have consciences, we can expect rules and laws to be broken for conscientious reasons. Indeed, we can expect that whatever rules a university or government may write, men and women of conscience will make a choice about flouting the rules in pursuit of some cause for which they will claim a higher purpose.

But none of this gainsays the need for rules or laws, or for their enforcement. In the first place, the rules, and the sanctions they imply, raise the stakes, the costs against which even conscience must measure the risks, while more frivolous impulses hopefully may be turned back. Second, the rules set forth the standards and obligations of the profession and make explicit the prime principle on which the academic community must stand, namely, honesty in all its professional postures. No university can afford to permit the use of its credentials in ways that would contribute to deception. To concede even tacitly or by default, that for good cause a scholar may play fast and loose with the tenents of intellectual honesty would be to invite distrust of all the work that all members of the community do. All credentials, every judgment, every conclusion, every protestation offered in the name of the profession would be suspect. Within the community itself, such practices tend to eat at the very vitals of the scholarly process, to contaminate the implicit trust between scholar and scholar and between student and teacher that is indispensable to the objectives of higher education, to scientific inquiry, and to explorations at the frontiers of knowledge.

Now, it has been argued that in straightforward, honest consulting arrangements with the CIA, some scholars seek confidentiality, even when it is of no special value to the CIA, in order to avoid possible harassment by anti-CIA campus activists. The Academic Freedom Committee is highly sensitive to the value of confidentiality for maximizing freedom for private choice by members of the

academic community. Except where private choices may imply or cause suspicion of a clear conflict of interest—such as where financial, political, religious, ideological, or sexual preferences may be especially relevant to subject matter treated in class, in print or in public—we see no reason to expect students or faculty to make public their private interests and every reason to protect their privacy.

But in cases where academicians choose to serve intelligence agencies even on the most limited consultative bases, we see a difference. Because deception and secrecy are a necessary and legitimate part of intelligence work, "confidentiality" loses its primary connotation having to do with mere privacy and shades over toward "covert" with its connotation of the insidious, the secretive, the disguised, the untrue. Except where the relationship is open and a matter of public record, there will always be reason to be suspicious that the consultant may be doing something professionally indefensible.

Perhaps more important, if all consulting with the CIA and other intelligence agencies were of public record, there might be less likelihood of an intimidating harassment, and greater likelihood that the information the CIA is getting will represent the best thinking available. Confidentiality and covert arrangements have encouraged the habit for members of the CIA to seek consultation with friendly or so-called friendly scholars. Consequently, to be known as a consultant for the CIA is to suggest something of a likeness of mind for the scholar and the CIA. If all consulting arrangements were necessarily public ones, the CIA would find it necessary to seek advice from a broader representation of scholars, and there would be in consequence less of a stigma attached to offering disinterested analysis to the CIA. And of course, this extends to other Government intelligence agencies as well.

Well, to sum it up, the Academic Freedom Committee of the University of California is recommending that the nine campuses of the University establish guidelines for faculty, student, and administrative relationships with Government intelligence agencies that would bar all covert arrangements between the academic community and the agencies, and would encourage cooperation between the university and the intelligence community on a freely open basis.

Insofar as the legislation proposed in S. 2525 would prevent Government intelligence agencies from tampering with or exploiting the academic community, it should contribute positively to academic freedom as well as to the greater efficiency of intelligence efforts. It would complement the efforts of the universities.

As I read the bill, however, it may not go far enough. Section 132(a)(6) prohibits the use of a U.S. academic institution "for the purpose of establishing, furnishing, or maintaining cover for any officer, employee, or agent" of an intelligence entity. But this does not clearly forbid such use of an individual member of a U.S. academic institution. Section 132(e) explicitly permits "voluntary contacts and the voluntary exchange of information," without specifying that these contacts should be open and not covert. Section 132(f) permits use of individuals in the academic community

for a variety of activities, including recruitment for espionage, again without specifying that such cooperation must be open.

These facts, together, with provisions in S. 2525 that would suspend the force of the proscriptions in times of declared national emergencies, make it evident that universities must maintain their own standards and sanctions on behalf of professional ethics and the integrity of the academic community. Perhaps that is as it should be in any case.

Thank you.

Senator HUDDLESTON. Thank you very much, gentlemen, for your very fine presentations. I think the concerns and difficulties that each of you has expressed are parallel to the ones that the committee considered. There is a difference in degree, perhaps, and in the method for correcting what might be possible abuse, which is to be expected, I think.

I was interested in the exchange of letters that Mr. Bok has had with the Central Intelligence Agency relating to the two points in the Harvard Policy. I might say that we wrestled with the question as to how far the law itself ought to go in prohibitions and where the universities, the academic community should take over.

We felt, No. 1, that if any relationship were made known to the university officials—the "appropriate officials" phrases—then from that point on the relationship was a question the university and the individual member of the academic community himself should determine. That doesn't solve the problem that Mr. Bok is confronted with, where an impasse apparently has developed.

What is your feeling there, Mr. Bok? Should the law specifically prohibit any member of academia from engaging in any kind of relationship other than the open contractual relationship to which you referred?

Mr. BOK. I would like to distinguish between the two items that I mentioned. Since the effects of covert recruiting extend only to the relationship between students and faculty on each campus involved, I would be satisfied with a provision that simply indicated that unless there is express congressional authorization to the contrary, the CIA should respect such rules as a university chooses to impose.

If there are universities that don't mind the use of their professors in covert recruiting activities that is the prerogative of the university. What I do object to is the notion that the CIA can decide for itself whether it wishes to respect a university's own internal rules or not.

Now, where you get to the other item, the covert use of academics abroad for intelligence activities, there is a stronger case for a prohibition by the Congress because the interests of all universities are inextricably bound up with one another. If a professor from one university is found to be engaging in such activities, that discredits the whole academic enterprise, and interferes with the work of professors from other campuses.

So I think my feeling would be that where possible, as in the case of recruiting, one should simply leave universities free to set their own rules, but with respect to practices like intelligence activities abroad, where the work of one academic in one institution affects the work of academics in others, then it is necessary to

have a congressional restriction that prevents such covert intelligence activities by all academics.

Senator HUDDLESTON. Right.

Mr. Baratz, would you have any further comment on that specific question?

Mr. BARATZ. Well, I certainly endorse the second point. The one that gives me some discomfort is the first one, that is to say, essentially a laissez faire treatment of recruiting on campuses, maybe an unfair characterization of Mr. Bok's statement. It just seems to me in general, as I tried to express as concisely as I could in the statement, that recruiting on a campus should not be encouraged in any way. Putting it another way, it is a matter of professional ethics that faculty members discourage this kind of thing, but I am deeply troubled that the law may very well induce academics to behave in a way which is contrary to what the appropriate code of conduct should be.

Senator HUDDLESTON. Mr. Abrams?

Mr. ABRAMS. I think the thing to stress is the compromising of the entire academic community, that activities by any member of it may induce wben he or she serves covertly in any intelligence gathering or even recruiting for intelligence gathering abroad or even at home.

Now, in this respect, obviously, each individual university will be terrifically ineffective except insofar as it may tend to cite the professional standards that we all would adhere to, in effect, to challenge the credentials of a university that does not enforce the professional standards against covert and implicitly deceptive activities.

I think what I should like to see the Congress do is to get at it from the other angle, that is, not to make prohibitions on individuals or on institutions engaged in academic work and scientific inquiry and the like, but rather place the proscriptions against the Government agencies. As I said in my statement, I think it is dangerous when the Government gets in the business of declaring what is ethical, what is moral, and proper for certain sectors of the society which the society has reason to leave alone, and to give maximum freedom to. I think it is a national——

Senator HUDDLESTON. Well, that is what bothered us about it, whether we were in fact asking the Government not only to set standards for the academic community, but to enforce those standards. What we were trying to achieve was some way in which we could leave that with the academic community.

Mr. ABRAMS. Yes, I think that would be fine, and I think that what we need now to complement the academic community's regulations would be proscriptions against Government agencies inducing unprofessional bebavior among members of the academic community. That would be of great benefit to the Nation, I think, and to the institutions that serve the Nation in the academic community.

Senator HUDDLESTON. I believe Mr. Baratz referred to the question of what was an appropriate university official or college official. We wrestled with that question, too, and came to the conclusion that it might vary from institution to institution, that in some cases the president of the institution might be the best person to

inform, or perhaps it might be the president of the board of trustees or whatever governing body the school might have. That is the reason we left the phrase in that manner rather than trying to specify some individual or some office of an institution.

But that was the core of our effort, to make sure that for any type of activity, proper officials at the university would be made aware of the fact that there was a contact with a faculty member or that he was engaging in some type of activity. So, then, presumably, the institution would be able to enforce its own regulations and policy relating to activities of faculty members, and the faculty member himself would have the choice to make, whether he would conform or not conform. I don't know what kind of problems that might get you into in case of tenure and whatever, but at least we were trying to leave the enforcement principally with the institution.

Mr. Bok?

Mr. BOK. I just want to make clear that the restrictions I spoke of should be imposed on the intelligence agency because the university cannot enforce rules against covert activity except in the very rare instances where knowledge of those activities becomes public. I didn't read the legislation to prohibit intelligence agencies from engaging professors in covert recruiting activities——

Senator HUDDLESTON. No, it does not.

Mr. BOK [continuing]. To pick one example, so that in that posture it is impossible——

Senator HUDDLESTON. But it does require——

Mr. BOK [continuing]. For the university to enforce its own guidelines because it is trying to enforce behavior which by its very nature it has no knowledge of.

Senator HUDDLESTON. Well, I believe the legislation, in the area of recruiting does not require that the university officials be advised, so your point is probably valid there.

Mr. BARATZ. Mr. Chairman, on that point, I went back to this to reassure myself I was on firm ground. The emphasis upon the appropriate senior officials was mainly in the context of what was given in the first two lines, I think it is lines 17 to 19, if I am not mistaken, in section 132, is taken away 2 lines later. You see, what it says is that no entity of the intelligence community may use as a source of operational assistance in foreign countries any individual, et cetera, unless the appropriate senior official is notified.

Now, what this does, then, is to permit the agency to notify the senior official and then they are home free. Our position on this really is that no matter what standards of professional ethics you have, once you permit the agency upon notification to carry forward, then the professional code gets undermined.

Senator HUDDLESTON. Well, the purpose of the statute as it is drawn is to permit it, with the information made available to the officials.

I believe Mr. Bok cited the instance of the professor in India. I think a very, very valid, issue central to our consideration of the whole question, is what happens when you do cast suspicion on all of our academics who may be in various places in the world. Have any of you noted any other direct results from the revelations that occurred from, for instance, the Church committee report that

indicated that the use of academics was somewhat widespread by the CIA?

Mr. BARATZ. Most of the evidence I have, Mr. Chairman, is so anecdotal that I am very reluctant to offer it.

Senator HUDDLESTON. Is there any feeling on your part that if there were strict legislative prohibitions, that this would be accepted by foreign countries and confidence would be enhanced or restored?

Mr. BARATZ. Well, I can speak to that, Mr. Chairman. From my own experience, I am quite confident on the basis of recent travels, not so recent, but the last one, that there was and I believe still is widespread suspicion in many countries among academics, among Government officials and so on that visiting scholars are indeed agents for the CIA, either full time or part time or something else, and I do believe that the prohibitions of the kind you are talking about would go far to remedy that.

Senator MOYNIHAN. Mr. Chairman, may I just say that that is true, but that widespread suspicion and the general allegation is in almost every circumstance—in all the circumstances of which I have any knowledge—a lie that originates in Communist elements in that society, acting usually as part of the disinformation efforts directed by the KGB. They are lying about you, and they will lie about you when this law is passed, too.

Mr. BARATZ. But Senator, one way to deal with that is to remove any possibility for legitimate suspicion. You see, the lie has much greater impact if indeed it is.

Senator HUDDLESTON. You want to try to prevent them from proving the lie.

Senator MOYNIHAN. What more self-evident form of subterfuge to enable them to go forward than a law which forbids them to do so? Everybody understands that.

Senator HUDDLESTON. I think it might be pertinent to say that there are groups or types of individuals that come to this country that are generally assumed by our intelligence agencies as at least likely or possibly to be agents of foreign powers. When those categories are established, it causes a little greater attention to be given to them and to their activities when they are in this country. The same is true of our people that travel in other countries.

Senator Goldwater, do you have any questions?

Senator GOLDWATER. I don't have any questions. I want to thank the gentlemen for presenting some understandable testimony. We usually either get people who are all for it or all against it.

I think you all can understand why the intelligence community thinks so highly of academic types for use, particularly overseas. I found this to be true not only for academicians but for any people who have a particular specialized interest or line. I know Dr. Nutter very well at the University of Virginia, and he probably knows more about the Russian economy than anybody in Russia and he gets his information by openly talking with the Russian academicians.

I found, with my interest in aviation, when I visited air shows overseas, that there is no difficulty at all to get the Russians to tell me all about their airplane, but I also find myself telling them all about ours, so it sort of goes two ways.

Any one of you can answer these questions.

Is there an accepted rule or rules of conduct for academicians?

Mr. ABRAMS. Yes.

At the University of California we have a code of faculty ethics and faculty behavior, and it includes, of course, a prohibition against deception.

Senator GOLDWATER. Is that general across the United States? I had never really thought of that before, or heard of it.

Mr. BARATZ. Senator, there is—the association that I work for adopted some years ago a statement on professional ethics. It represents a set of aspirations. Now, I think those are very widely accepted as aspirations. I would be the very first to concede, if you didn't insist that I would, that there are many people who ignore those proscriptions.

Senator GOLDWATER. Mr. Bok, what if you have a professor who wants to help intelligence? Would your rules that you cited here prohibit him from doing that?

Mr. BOK. Yes, I think they would, but only with respect to those forms of help that impair the interests of other members of the Harvard community. For example, you might have a professor who wanted to engage in covert recruiting, but we simply oppose that, not because we want to tell the professor what to do, but because secret recruiting does impair the attitudes and confidence that the students have about faculty members in general.

Senator GOLDWATER. Now, suppose the approach were an overt approach?

Mr. BOK. I don't think there is anything in our guidelines that would prohibit overt approaches. We don't forbid any faculty participation or employee participation in recruitment for the CIA so long as it is public. Our guidelines simply say if you are going to do that, you have to list your name like any other recruiter in our placement office, and you have to inform a student before you recommend his name to the CIA, and thus trigger an investigation of his background. As long as recruitment is overt, we have no objection under our guidelines.

Senator GOLDWATER. Would any of you have objections to an academician who came back from some overseas country and felt that he had learned something that would be of value to an intelligence agency, of volunteering to give that information?

Mr. BOK. Our guidelines would not prohibit that, but we do try to prohibit understandings before the professor goes abroad as to special covert activities which that professor will engage in while traveling.

Senator GOLDWATER. Any of you, would academic agreement with your rules be necessary for employment?

In other words, would you ask a prospective professor if he would abide by the rules, and if he said no, would you employ him?

Mr. BOK. That situation has never come up. That would cause us a good deal of difficulty. Basically, we have gotten along one way or another for a long time by having rules and trusting our people to abide by them, and not by trying to structure a whole set of penalties or punishments in advance.

It is a community, as I say, of trust, and I think most professors have lived up to that without the necessity of a lot of legalistic penalties and proscriptions.

Senator GOLDWATER. I have just one more question.

Would any of your rules that we have talked about this morning prevent your universities from accepting a study requested by an intelligence agency for which you would be paid?

Mr. ABRAMS. As long as it was a contract that was a matter of public record, there would be nothing wrong with that at all.

Mr. BOK. That would be true of our guidelines, too.

Senator GOLDWATER. That's all I have.

Senator HUDDLESTON. Senator Moynihan?

Senator MOYNIHAN. Thank you, Mr. Chairman.

I would like to thank the panel, particularly my colleague, President Bok, and make just a general remark about the whole work that you are valiantly engaged in. The political climate changes, and in that situation, what is expected of you changed. There is a social history of the CIA which will be written one day, and, of course, it starts out as the most elite of American Government institutions. The collaboration was extensive, and everyone very proud of it, and they were proud of the foreign policy that it was associated with. Then foreign policy went sour, and we lost a war; since surely it wasn't going to be academe that was to blame, it must be the other people. So we have now gotten into an adversary relationship and whether that will, in a decade or two, change again, I don't know.

I worry abeut just one thing in your comments, and I wonder if you would comment on it, which is the code of behavior for professors. What you mean is that the AAUP has drawn up one of these things, but as you made very clear, sir, it would be appalling to most professors to think that anybody else devised a code of behavior for them save they themselves. There are patterns of behavior, and we think we have general norms, but it is the characteristic of the academic to be autonomous in his judgment. That is what tenure is about. That is what the profession is about, and there is no way in which this regulation and these exchanges can impose upon that autonomy.

And President Bok remarked earlier on an article I had written recently on the behavior of institutions in conflict. The simple thesis is that institutions in conflict become like one another, and, in this present moment, when academe and the U.S. Government are said to be in conflict, we are imposing our patterns on you, and you are increasingly willing to accept them. For example, read this line: no entity of the intelligence community may make use of someone who is a U.S. person whose travel to such country is sponsored and supported by a U.S. academic institution unless the appropriate senior officials of such institution are notified and so on, and so forth.

That is the whole idea: appropriate senior official. I taught at Harvard for a long, long while, and I was not cognizant of any person on that campus who I would refer to as an appropriate senior official. [General laughter.]

There was a dean who did his duty, and a president—distant—whose presence was tolerable because it was so indistinct, but now

you are going to have an appropriate senior official and he will have a deputy. [General laughter.]

It is the iron law of emulation, Mr. Chairman, associated with the German sociologist George Simmel, and if it truly is a pattern of institutional behavior, nothing can be done about it by us, and so I thank the panel and thank the chair.

Senator HUDDLESTON. Just one other question, now. It is not uncommon, of course, for a person connected with an institution, perhaps business college professors and whatever, to enter into consultation contracts with business.

Are these contracts required also to be made public and the other officials of the university to be knowledgeable of them?

Mr. BOK. That would be true of research contracts.

Mr. ABRAMS. That is not true at the University of California as yet.

Senator HUDDLESTON. I am not talking about research contracts or contracts that might flow through the University itself. I am talking about individual, personal contracts that a person who happens to be a professor of business, for instance, might have with a private company. They do exist, I understand, and I am wondering how they are handled by the institution itself, generally. Is there a general policy?

Mr. BARATZ. I don't know that there is a general policy, Mr. Chairman, but at every institution where I worked—and it was something on the order of eight or nine—that was the understanding. That is to say that any commitment that an individual made of any substance of his time was to be reported to the appropriate senior official—and I am sorry Senator Moynihan has left—typically the president of the college or the university, or some deputy, simply on the ground that it might very well impair the individual's capacity to fulfill his or her primary responsibility.

Senator HUDDLESTON. Is this the general case as you understand it, Mr. Abrams?

Mr. ABRAMS. Only in the case where there might be some reason to believe that the commitment, the personal commitment, would interfere with the professor's responsibilities to the university would he be expected to report this, and as yet there are no requirements that personal contracts that presumably are executed on private time be reported to anybody in the university.

It is usually a matter of, since there is a proscription against doing anything that is not compatible with one's professional obligations, and is not conducive to fuller scholarly efforts of the individual, the usual kind of contract is something that the individual faculty member would include on his bio-bib, biographical, and bibliographical form which we fill out each year and submit to indicate what activities we are engaged in of public service as well as of scholarly and teaching significance and those, the bio-bibs, are public record. That is, they are available, so in that sense, voluntarily, I would guess just about everybody does in one way or another reveal his or her private contracts. But it is a voluntary matter.

And I could say in addition that I speak for the Academic Freedom Committee at the present in opposing any laws about that, in opposing any requirements that force public disclosure of personal

arrangements in the private sector and in contacts with even Government agencies that are not intelligence agencies. These things should be a matter that an individual faculty member ought to be allowed to keep confidential.

Mr. BOK. The situation at our university varies. We are a very decentralized institution. In some of the faculties such as the business school, all consulting arrangements must be made public or at least disclosed to the dean. In other faculties, that is not a rule. Our guidelines suggest, not that consulting relationships with intelligence agencies be published, but that they be reported to the dean and president. The reason for this rule is simply that the line between those individual consulting relationships and some of the guidelines that we have discussed here this morning is sufficiently close and perhaps ambiguous that disclosure is a precautionary device, to make sure that the consulting relationships respect the rest of the guidelines. That is not a problem that comes up with other forms of consulting arrangements and therefore doesn't require the same treatment.

Senator HUDDLESTON. I believe Harvard has made public at least the fact that it did conduct two research projects for the CIA's somewhat controversial MKULTRA project. Have those projects and the research been made public, Mr. Bok?

Mr. BOK. These must have been a very long time ago.

Senator HUDDLESTON. Well, the activity was some time ago, yes.

Mr. BOK. Certainly, all the information that we have with respect to those projects was a matter of public discussion, yes.

Senator HUDDLESTON. I have a news release of September 1977, indicating that a full statement detailing the specific research projects was being prepared at that time. I think it might be helpful if the committee had a copy of that, if it is available.

Mr. BOK. We will do our best to supply that, sir.

Senator HUDDLESTON. We appreciate that.

[The information referred to follows:]

STATEMENT OF DANIEL STEINER, GENERAL COUNSEL TO HARVARD UNIVERSITY

Last year the Central Intelligence Agency notified Harvard and a number of other universities that the CIA had covertly funded certain research projects about 15 or 20 years ago as part of the CIA's project MKULTRA. In response to a request that I sent to the CIA, I was informed that Harvard was apparently involved in two projects involving a total of about $78,000 and that there was no evidence of any drug or other such testing on human subjects in either project. The CIA also furnished me with the available documents about each project, but the documents were primarily financial records and key information, such as the names of the investigator and the sources of the funds, was deleted. In response to press inquiries, I said that I would look into the matter and issue a statement after doing so.

As best as I can determine, the first project was not funded through Harvard University. Our central financial records have been checked, and there is no evidence that any money came to Harvard or was disbursed by Harvard in connection with the project. According to the documents furnished by the CIA, the subject matter of the project was the use of teaching machines for foreign language instruction, and the only reference to Harvard in the documents is that the investigator was "a psychologist and linguist of Harvard University". I have spoken with the chairman of the Psychology and Social Relations Department and, after checking, he reported that he was unable to find anyone now in the Department who remembers or participated in such a project. It is possible that someone at Harvard or with some connections with Harvard in the past had been involved in this project as an individual, but there appears to have been no University involvement or involvement of a present faculty member.

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Our central financial records indicate that the second project was funded through Harvard in the early sixties. By means of these records I was able to find the name of the principal investigator, a person who is now at another university. In conversation with and correspondence from the principal investigator, I learned that he did not know that the project was indirectly funded by the CIA. He wrote me that "The studies which resulted from this support were published (by me and others) and the source of this support (as known to me) was acknowledged in print. . . . there was no effort made to induce me to work on problems other than those which interested our research project or to in any way restrict the circulation of our findings. . . . None of the research carried out involved the use of drugs, and all research was carefully reviewed to protect the subjects who were participating." Enclosed with his letter were reprints of the publications that resulted from research supported in part by the grant in question.

The principal investigator has requested that I do not make public his name or information that could lead to his identification. My preference was to release all information available to me because as a general proposition full disclosure seems to me appropriate in a situation like this one. Moreover, as far as I know, neither the University nor the principal investigator has anything to hide.

I have, however, told the investigator that I will respect his desire not to become a public figure in this matter. In light of the facts known to me, and after consultation with some faculty members and administration at Harvard, his right to privacy seems to me to outweigh the University's interest in full disclosure and the public's right to know. All evidence indicates that the principal investigator acted in a responsible fashion and that he is involved in this matter now only because the CIA made "unwitting" use of him and the University a number of years ago. When the research was completed, the results were published, with sources of support and methodology indicated, and available then and now for critical examination by all interested in his area of work. It is questionable whether anything is gained by disclosure of his name and identification of his research. Under the circumstances, if he does not wish to become a public figure, to invade his privacy and the privacy of other authors of the publications does not, on balance, seem to me appropriate.

The CIA has informed Harvard that it will not make "unwitting" use of faculty members. It is hoped, therefore, that this problem will not occur again.

Senator HUDDLESTON. Any further questions?

Senator GOLDWATER. I am just wondering if the CIA and the other intelligence agencies hadn't undergone such an attack if you would have had a different attitude toward this whole subject. Prior to the Church committee's revelations, did you think that this activity was wrong?

Mr. BOK. Yes, I would like to speak on that.

The first intimations I had of the Church committee findings caught me and my associates completely by surprise. The triggering mechanism for our review was that realization, not any attack on the CIA or anything of that kind. I could detail for you a number of things that we have been doing recently in cooperation with the CIA having to do with midcareer training, the development of standards of ethics in intelligence agencies and other efforts of that kind, and we will certainly continue to do so.

Had we learned that activities of the kind outlined by the Church committee were widespread 10 years before, I am sure our reaction would have been the same because they would have posed at that time, as they do today, the same conflicts with very fundamental and permanent tenets of what an academic community is all about.

Senator GOLDWATER. I was prompted to ask that because I know that industry and I think Government to some extent, have professors who spot promising young men or women for industrial jobs or for Government jobs. In fact, I think Justice Frankfurter used to recommend to Oliver Wendell Holmes people who might be considered as law clerks, and I didn't see anything wrong with that.

I hate to think that this was occasioned just because it happened to be an intelligence outfit, and I can understand your arguments perfectly.

Mr. BOK. No, I recognize that Justice Frankfurter and many other people associated with our institution have suggested names or helped young people get positions where they could make a contribution. I think the difference is that neither Justice Frankfurter nor other professors systematically gathered information about those individuals without their knowledge. I don't think they would have done anything to trigger a Government investigation of those students' backgrounds without the students knowing about it, and I don't think that they were recommending students for work in the Government that would have involved the same kind of hazardous and potentially illegal activities that are involved here.

That is not in any sense a criticism of intelligence. But the nature of intelligence work does involve a very different set of circumstances as far as the professor's role toward his or her students is concerned.

Senator HUDDLESTON. Is there a concern by any of you that by pursuing these restrictions to the extent that have been suggested we are in fact seriously hampering the legitimate intelligence efforts of the United States and causing difficulties that might have a bearing on the national security? Are you satisfied that by taking academia out of it, virtually totally as far as covert operations or covert recruiting might be concerned, we are not doing irreparable damage to the capabilities of the agencies to operate?

Mr. ABRAMS. If I may address that question, I think that you have two institutions that do—two institutions that serve the society that are somewhat on collision course here, and that the academic community can serve the public interest best when it does not engage in covert activities, that its value is very seriously demeaned and impaired when it does, and that I should think we were in agreement that it is an extremely great value to society that the academic community operate efficiently in doing what it has to do for the public interest.

It can even serve the CIA better, I think, if what it does for the CIA and other Government intelligence agencies is done on an open and above-board basis, that we can be sure that the intelligence agencies are getting the very best intelligence from the academic community and not skewed, biased, or limited analysis because of the habit of covert operations and clandestine operations and secretiveness that has led to seeking only friendly kinds of advice and advice from only friendly, so-called friendly kinds of advisers.

So that it seems to me that just from the concerns that you have expressed, the need for an efficient intelligence community seems to me the best justification for separating these two agencies or institutions of society in the manner in which we have suggested.

I should like, if I may, to add that there, insofar as we have talked about who is to apply the sanctions against what, there is something in the bill that is not there that I think might be there. And that is, insofar as the universities will be left pretty much to themselves to enforce the professional ethics, standards of professional ethics we have talked about, I should like to see a provision

in the bill that specifically declares that under no circumstance may a university be penalized by Government action in any way because of sanctions imposed on members of the university community who have violated the standards of professional behavior and ethics. Because what I foresee is the possibility of CIA agents or some other intelligence agent seeking to recruit somebody from the university, the university says, to the professors, well, OK, that's your role that you believe you have to do, but we regard any member of our institution doing that sort of thing as violating certain professional obligations that we take very, very seriously. So you can go ahead and do that, but if we find out about it, we are going to fire you or demote you or suspend a sabbatical leave or deprive you of tenure or whatever sanctions we may deem appropriate. And what I worry about is then, the U.S. Government is going to get angry at the university and we all know that given the federalization of our life these days, the Federal Government has a lot of clout with universities, that it could do serious damage to the university's general efforts.

I would like to see a statement in the bill that would prohibit that.

Senator HUDDLESTON. That is a good point.

Mr. Baratz, do you have anything to add to that, or Mr. Bok?

Mr. BOK. No, except to reiterate a point I made before. I think I share the suspicions of my colleague that the intelligence activities will not be seriously damaged. I have to acknowledge, however, that I am not an expert on intelligence activities.

But one thing I am clear about, and that is that intelligence agencies should not be able to decide for themselves which university rules they are going to accept and which they are going to reject. If the Congress looks at all the evidence and decides that certain academic interests have to be put aside, then it seems to me that you are the legitimate body to do that. But I don't think that CIA is really an appropriate agency for that function.

Senator HUDDLESTON. Do the Harvard guidelines apply to all intelligence agencies from any other country, or do they specifically prohibit any kind of cooperation with any other intelligence force that might——

Mr. BOK. They apply to intelligence agencies in general.

Senator HUDDLESTON. Senator Hathaway?

Senator HATHAWAY. Thank you, Mr. Chairman.

I want to apologize to you gentlemen for not being present for your entire testimony. We have a markup going on in the Health Subcommittee.

I wondered if you could give me your comments on what the difference is between, say, Westinghouse Corp., talking to a professor about recruiting his students to work for Westinghouse, and the CIA or any other Government agency doing the same thing.

Anyone can or all could comment.

Mr. BARATZ. Well, I will make a stab at it, Senator.

I think it is fairly routine for members of faculties to recommend students to various employers. I did it to private employers, public employers, and indeed the CIA, two or three of my students whom I referred there. But that was done with the full knowledge and

consent of the individual and in some cases, the individual asked, would you help me get a job with——

Senator HATHAWAY. Well, what if it isn't done with the full knowledge of the student? What if Westinghouse is interested in John Smith, who is a student, and asks the professor, "will you watch John Smith for me?" We are interested in hiring him but we would like you to report to us without letting John Smith know that you are watching him. We'd like to learn how good an engineer he really is and what some of his habits are, such as whether he drinks too much.

Mr. BARATZ. I personally would regard that as unethical behavior just as I would in the case in which we are talking about the involvement——

Senator HATHAWAY. Would you say to Westinghouse, no, you can't do that?

Mr. BARATZ. No, I would simply say to Westinghouse, if you would like to find out about that student, I will be very glad to tell you, provided, however, I have notified the student that I am doing this, and that the approach has been made——

Senator HATHAWAY. Has Harvard said to the private companies throughout the country, "A professor can only report on a student if the student knows that the professor is watching him?"

Mr. BOK. Mr. Senator, I am simply not aware that private companies in this country use professors in that way. They may call up a professor and say what do you know about X——

Senator HATHAWAY. Right.

Mr. BOK. But I am not aware of companies hiring our professors on a covert basis to develop specific information about students without telling them. I think that if we became aware that this was a widespread practice, we would have to deal with it. It would be a little bit different than this case because you wouldn't be recommending students for hazardous and quite possibly illegal activity, but still the notion that professors were finding out about a student's background for some purpose that they didn't disclose to the student, I think would be sufficient for us to look very much askance at that.

But we simply don't have evidence that companies are entering into covert relations with our professors for that purpose.

Senator HATHAWAY. But if you did, you would have the same attitude you have toward the CIA doing it.

Mr. BOK. I think so.

Mr. ABRAMS. At the same time, I think that it is not a subject that I would care to see formalized in law. I think it is a professional obligation in individual cases for a professor to avoid serving a private company, say, in that covert way, as Mr. Baratz has just said.

But I think we are trying to draw some very fine lines, and that is that there are private sectors which are valuable to us, and they are valuable not only to academicians, but to all citizens, and we try to avoid writing laws to cover every kind of behavior. The distinction that I would make here is that we aren't just talking about any organization, even any Government agency. We are talking specifically about intelligence agencies, and intelligence agencies legitimately, because of their function, necessarily engage

in secretive activities, necessarily engage in activities which require deception. This is not to disparage them, but only to say that this is what they have to do.

Now, insofar as they do engage in deception, then when a professor or a member of an academic community cooperates with such an agency, it places a burden of suspicion on him that goes over the line that he may be engaging in activity that cannot be defended professionally, that he has gone on doing something professionally indefensible, and therefore, because the presumption of suspicion suggests he has in those cases gone beyond the line, then that is why I say there ought to be rules about it coming from the academic side that prohibit a member from engaging in that kind of activity, with an intelligence agency, government intelligence agency, foreign or United States. And from the Government's side of it, the Government ought to prohibit intelligence agencies from demeaning institutions which the society holds very highly valuable, such as the academic communities.

Senator HATHAWAY. Are you restricting this type of recruitment by the CIA just to instances where the intended position will involve covert activity? I mean, if somebody hiring in the CIA calls a professor and just says, "What kind of a guy is John Smith, does he drink very much, does he have good habits, and so forth? We are thinking or hiring him as an interpreter or cryptanalyst or something like that, and the job will have nothing to do with covert activity whatsoever." Would you say that was all right?

Mr. ABRAMS. Well, if it is not covert. But that means that the agent would come to the professor and the professor would have inquired of his—would already have contacted his student to indicate that he is going to talk to a CIA agent about him. I think that just because the CIA does engage in covert activities and therefore may well present a danger to someone the CIA is inquiring abeut, the professor has an obligation on behalf of the trust that must prevail between students and teachers in general, to inform his student that he is inquired about and if the student doesn't mind, he would talk to the CIA agent about him, recommend him if he likes.

You see, there is the distinction that I wanted to make. I think we are talking about a very special institution.

Senator HATHAWAY. What if Westinghouse called and asked if it were true that a certain student was an alcoholic. And the professor says I'll check and call you back——

Mr. ABRAMS. I would never——

Senator HATHAWAY. And he never gets in touch with the student.

What's that?

Mr. ABRAMS. I think if Westinghouse called me on the telephone, in the first place, I wouldn't talk to anyone on the telephone about somebody else's personal characteristics.

Senator HATHAWAY. No. What if Westinghouse came to see you in your office and asked you that.

Mr. ABRAMS. I would have to have good reason to know what he wanted to know and why, and even so, I think it would be a professional obligation on my part to give no information about a

student of mine to anybody unless the student knew I was talking about him or had asked me to do so.

Senator HUDDLESTON. How would that set with the privacy laws that would prevent you from giving certain information about students without the student's permission? Would that apply in that kind of a case?

Senator HATHAWAY. I doubt that there is any privacy law that governs a mere opinion about some individual, such as my knowledge about some individual, or the professor's knowledge about some individual. I don't think there is any privacy law that prevents a professor from revealing that if he knows it.

Mr. ABRAMS. I am not aware of any privacy law of that sort, but there is a professional obligation, I think. We have talked about the special relationship between students and teachers, and that obligates a professor to maintain the trust.

Senator HATHAWAY. So you are saying generally whether it is Westinghouse or the CIA, that the student should know.

Mr. ABRAMS. That's right.

Mr. BARATZ. Yes, that's my position.

Senator HATHAWAY. And you are saying to us that with respect to CIA, that we ought to have something in the charter that says the CIA absolutely can't do this. It seems to me, however, that this prohibition ought to be done by the school itself, rather than a charter specifying that the CIA cannot do this.

For example, say you have a Russian student in a class, and the CIA knows that this Russian student is going back to Russia and that he is a potential informer for us once he goes back there.

Now, why couldn't the CIA get in touch with his professor, and say "would you mind watching this particular student?" Why couldn't the CIA give the professor a checklist of the things it would like to know about the student to see whether or not it would be worthwhile for our agents in Russia to contact him, or agents in Europe someplace to contact him once he goes back.

Do you think that would be a proper thing to do?

Mr. ABRAMS. I don't think it is a proper thing to do at all.

Senator HATHAWAY. Well, the Russians can do this. They can plant their spies in all the classrooms in the country, and you are saying that CIA or the FBI can't get at these spies through their professors without notifying the administration and getting the approval of the administration of the school.

Mr. ABRAMS. I think this is one of the differences in our systems that we should value. President Bok spoke of this before, of the dangers to the student, to the individual, if he is a potential informer, he may not want to be approached by a CIA member, and may want to choose his own means of contacting the CIA. I think the CIA tampering in this fashion not only injures the academic institution but may seriously endanger the individual student.

I think it would be a breach of professional ethics for the professor to do what you are suggesting he do, and I think that as a matter of Government policy the CIA ought to be prevented from doing it.

Senator HATHAWAY. Well, it seems to me it puts a pretty harsh standard upon the CIA or the FBI in a situation where they know of a spy in the classroom and they just want to get some additional

information through the professor and don't want to run the risk of having it leak out that they are watching this individual; so therefore, they don't want to contact the administration, not because they don't want to get their permission, but rather because the fewer people who know about it, the less chance there is of a leak.

Mr. ABRAMS. Yes, I may have misunderstood you. You are now talking about a Russian student who is acting as a spy for, say, the KGB.

Senator HATHAWAY. Right.

Mr. ABRAMS. I see. Well, I don't see what—can you tell me why the professor has to know then?

Senator HATHAWAY. The FBI or the CIA might want to get some information about this particular student spy through the professor.

Mr. ABRAMS. Well, again I am saying that this is a form of tampering, that it would be very difficult to control in any way. What it says is that the CIA ought to enter into some sort of covert relationship with the professor for information about a student. Whether the Russian student is a Russian spy or not is not really a matter of the business of the professor and what he is doing, and in that relationship, it would cast the professor in a position where he might be suspected of all the things that he does with regard to his students.

He may not be able to believe the CIA when they tell him what he is being told insofar as the CIA has been known to engage in deceptive activities. Again I say, you make a good point——

Senator HUDDLESTON. Well, I think we are getting into an interesting area here because we are talking now about a law enforcement procedure. We are talking about the FBI having reason to believe that either a student or a faculty member is in fact an agent of a foreign power. Now, what is the proper approach in that situation to the university or to the faculty member to protect the integrity of the institution, and at the same time, allow the proper agency to proceed with its very legitimate investigation, if indeed there was some information that would be helpful to its investigation, if it had it from either a student or a faculty member?

Does the Harvard policy address that kind of situation, Mr. Bok?

Mr. BOK. No, the Harvard policy deals only with recruitment, and this is a different case.

Senator HUDDLESTON. You might be just as shocked to learn of the totality of that as you were of the other.

Mr. ABRAMS. I would like to read the provision that the recommended guidelines to the University of California of my committee would be to cover that. Our recommendation No. 4, that no member of the university faculty, staff, or student body offer the name of another member of the faculty, staff or student body for recruitment by an intelligence agency without the prior consent of the person concerned, and that no member of the UC faculty offer personal information about another member of the faculty, or about a member of the student body to any Government investigating agency without prior consent of the person concerned; except where the faculty member may have direct knowledge that such a

person may have committed or is imminently about to commit a felonious offense.

Senator HUDDLESTON. Well, that was the point I was trying to get to. You don't attempt to take yourself out of legitimate law enforcement procedures.

Mr. ABRAMS. That's right.

Senator HUDDLESTON. I mean, they are two separate things.

Mr. BOK. Absolutely not. Our guidelines would not interfere with that at all.

Senator HUDDLESTON. Do you have further questions?

Senator HATHAWAY. No, thank you.

Senator HUDDLESTON. I thank you very much. It is nearly 12:30 and you gentlemen have been very patient and generous with your time, and we appreciate your presentations.

Thank you.

[Whereupon, at 12:27 p.m., the committee recessed subject to the call of the Chair.]

THURSDAY, AUGUST 3, 1978

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The committee met, pursuant to notice, at 10:06 a.m., in room 1318, Dirksen Senate Office Building, Senator Barry Goldwater (vice chairman of the committee) presiding.

Present: Senators Goldwater (presiding), Huddleston, Chafee, and Wallop.

Also present: William G. Miller, staff director; Earl Eisenhower, minority staff director; and Audrey Hatry, clerk of the committee.

Senator GOLDWATER. The committee will come to order.

I want to explain that Senator Bayh, the chairman, has another commitment that he is responsible for. He is very sorry that he can't be here, but those of us here welcome you. General Wilson, you may proceed as you care.

STATEMENT OF GEN. SAMUEL WILSON, FORMER DIRECTOR, DEFENSE INTELLIGENCE AGENCY

General WILSON. Thank you, sir.

Mr. Chairman, I do not have a formal opening statement, but with your indulgence, I do have several observations I would like to make on an impromptu basis for the record.

May I say, sir, that I sincerely salute the development of this legislation. Thirty years ago we really did not know what was needed. Now, with over 30 years of experience behind us since the National Security Act of 1947, some of this experience painful, we do know. I think that this kind of legislation is overdue and that it will be extremely helpful to my erstwhile colleagues, the professional intelligence officers in the intelligence community.

I would like to note, sir, a couple of cautionary observations, if I may. With the increasing cost of intelligence in terms of both dollars and people, I think we have to be extremely careful not to proliferate the intelligence reporting requirement. It is always difficult for the senior intelligence officer, indeed, almost impossible for him to say no to an intelligence customer, and as requirements increase, and my quick review of the draft legislation suggests that the reporting requirement will indeed increase as a result of this legislation, one of two things is likely to happen: Either the cost of intelligence is going to be driven up still further, or quality—the quality of intelligence is going to suffer. I think the draft bill is potentially expensive in this connection, and I would suggest some careful review toward simplification and possibly trimming down the reporting requirement to the various entities of the Congress.

These extensive reporting requirements also have obvious security implications as more people get drawn into sensitive aspects of the intelligence picture, and I would add with a slight sense of

temerity, that they may tend to put the Congress in the position of practically running our national intelligence effort, as opposed to providing the legislative basis and subsequent oversight.

Another point I would like to make is to stress the importance of being sensitive to the effects of strong centralized control of the intelligence process, particularly as it bears on departmental and tactical intelligence. I believe there exists and has existed for some time a syndrome which I would call the sunflower syndrome where the various elements of the intelligence community tend to look upward to the perceived sources of political power, sometimes to the detriment of customers to the flank, and particularly the commanders, the customers down the command chain.

I believe it is extremely important that there be strong policy control from the top, but detailed supervision from the top, I think, would detrimentally affect the capability of the subentities of the intelligence community as a whole, at the departmental and particularly the tactical levels.

I have no specific recommendation concerning this in the legislation itself. I simply raise it as a point that I wish to call attention to and would ask that people be sensitive to it.

Finally, Mr. Chairman, my last observation which has occurred to me since my retirement almost a year ago, while I sit, rocking on my porch overlooking my lake and thinking about things, I have come to the conclusion that in the years lying immediately ahead of us, there are a number of threats and potential problems to the security of this country which are more likely to eventuate and which may be more immediate than the possibility of an armed attack from the direction of the Soviets or the Red Chinese.

I think it is extremely important that intelligence be geared to work these problems, and while this is essentially a management task, the writers of legislative charters I think should be sensitive to this reality as well and insure that in nowise we hamstring our flexibility to respond to intelligence requirements which emerge from the existence of these separate, largely nonmilitary problems.

That concludes my observations, sir. I would reiterate that I consider this a very healthy development, the production of a charter under which people can find themselves and play their roles and carry out their functions in a way that does not offend the constitution, the rights and interests of the American public.

Thank you, sir.

Senator GOLDWATER. Thank you, General.

If the committee has no objection, I think we will hear from General Dougherty. Then we can ask questions of both.

Is that all right with you?

Senator HUDDLESTON. Yes, sir.

Senator GOLDWATER. All right, General, welcome. We are glad to have you.

STATEMENT OF GEN. RUSSELL DOUGHERTY, FORMER COMMANDER IN CHIEF, STRATEGIC AIR COMMAND

General DOUGHERTY. Thank you, Senator Goldwater, and I am privileged to appear today. As a former user of intelligence, and certainly as an interested observer now in retirement, of what it is that this committee is setting about to do, I find a great contradic-

tion in constitutional privileges and guarantees and in the real world of intelligence collection, particularly covert intelligence collection. From my position as Commander in Chief of Strategic Air Command and as Director of Strategic Target Planning, I used all sources of intelligence in a very real and active nature in doing the planning for the strategic operations of U.S. nuclear forces and for contingency operations both nuclear and nonnuclear in a planning sense. I also had three tours directly associated with widespread intelligence activities in Europe, both in Supreme Headquarters, Allied Powers, Europe and in the U.S. European Command, as the planner and as the Deputy Director of Operations.

So I recognize how difficult this seeming paradox of living in the real world of intelligence activities is with living in the equally real world of the constitutional guarantees for all our people in all walks of life. I think that the bill, as I have read it and reviewed it, following receipt of a copy from you, is very well balanced in trying to handle that seeming contradiction, and I compliment the staff and this committee for wrapping up the experiences of the years into what I think is, basically, a workable charter legislation to enable these things to happen.

My first impression in reading this bill, this draft bill, was that it was full of "thou shalt nots". But then on second reading I found that there also are some "thou shalls", and I think this is useful because a group of negatives has a way of atrophying the essential nature of some of our intelligence collections; and, if I read the bill correctly, I think that it has properly balanced what must be done and the environment in which it must be done with the constraints that must be placed on us as American instrumentalities. I certainly compliment the careful drafting in that regard.

I am also impressed with the difficulty of trying to define "tactical intelligence;" because in the area in which I recently worked as Director of Strategic Target Planning and as the Commander in Chief of Strategic Air Command, I couldn't properly define what is "tactical intelligence." I note that on page 19 of this draft bill you restrict military intelligence to those things that directly affect the order of battle of the armed forces of a foreign or potentially inimical nation "and"—and the word "and" is in that legislation—those things that are of interest to the U.S. military forces in their planning.

I suppose that word "and" is very specifically drafted there. I would have chosen "or" because I find from my role at Omaha that there are many things essential to our planning that are not directly a part of the order of battle of the armed forces of a foreign or potentially inimical nation; but, that are of distinct importance to the United States in our military planning. It is one of those grey areas where the dividing line accentuated by the coupling word "and" is difficult. It was hard for us to plan the strategic posture of our forces, the strategic targeting of our forces without taking into consideration many things beyond just the armed forces of potentially inimical nations.

I think that the role of the Chairman of the Joint Chiefs of Staff is going to be very critical in years ahead, as he becomes increasingly the intra and inter agency spokesman for the armed forces and their interests, particularly if some of the recommendations

just recently announced from the Steadman Study Group are implemented. His should be not merely a permissive role or an ad hoc role, but possibly an institutionalized role; and, in that regard, I note that in various definitions of the statutory committees who will undertake to consider and recommend special activities and the like, that the Chairman is not included. Certainly the Secretary of Defense is included there, but the Chairman will represent, I think increasingly, the long-term continuity and specific needs and interests of the military. I would commend to the committee a more formalized legislated role, a more institutional role for the Chairman of the Joint Chiefs of Staff because of that vital interface between purely tactical military intelligence and other intelligence that is equally essential but not directly related only to the armed forces of other nations.

I think this is likely to become more critical as the judgmental factors take on more and more importance and as the verification processes in various stategic arms limitations become increasingly difficult, maybe impossible. Judgmental factors that stem from experience of the armed forces of the United States can be voiced by the Chairman in some of these special activities to a degree that I would think would be useful, and I would commend that to you.

As a general observation, I think that the objectivity of our intelligence collection, our intelligence evaluation and assessment is going to become increasingly critical in years ahead as the potential for mistakes or for gaps or for errors becomes more and more important, potentially more devastating to our Nation and to our allies. And I think that the draft legislation does promote objectivity, and importantly, to a degree not heretofore done, to my knowledge, it seizes the Senate and the House into this area of essential activity to a degree that was not widespread enough in some of the oversight activities of the Congress in earlier days. Our intelligence people deserve to have the confidence of legislative support of their activity.

Personally, I would think that a joint committee would be far more flexible and workable from the point of view of formulating and administering our various intelligence activities, but that of course is in your domain. I would hope that the multiple reporting and the widespread reporting of intelligence activities does not inhibit or jeopardize the essential production of intelligence, particularly that of a covert nature, that must go on. As objectivity becomes more important and as reporting becomes more widespread the potential for error becomes potentially more devastating.

But I think it is a very useful thing you are doing for the Nation and I think it is very well done to date. I thank you for the opportunity of being here and would be glad to go into greater detail as the committee may desire on any of my experiences over the years.

Thank you sir.

Senator GOLDWATER. Well, thank you very much, both of you.

Since Senator Huddleston is from your home State, and both of you being southerners, and the fact that he is the chairman responsible for the subcommittee's action that produced S. 2525, I think it only proper that he start the questioning.

Senator HUDDLESTON. Thank you very much, Mr. Chairman. General Dougherty is a native just down the road from me, and we are very proud of him in Kentucky for his achievements on behalf of our Nation.

Both of you gentlemen have touched on some of the areas that gave the subcommittee and its staff a lot of long hours of consideration in trying to reach a proper balance. We have tried to balance the need for a certain amount of restraint and control with the need for an operational capability that must exist, and we tried to keep one from impinging on the other too much.

I might say to you that the process is still continuing, even though the bill is drafted and is being considered now. We are working with the various agencies to try to find places where the bill may be unduly restrictive on operations without having at least a counterbalancing benefit of proper control and restraint. So we are very much concerned with that entire area.

As General Wilson mentioned, there is a considerable grey area between tactical and national intelligence. I am wondering if in your experience there were instances or times when you felt you were not getting from the total intelligence community all of the information that was needed by you from a tactical standpoint because somebody might have felt it was national intelligence or a type of intelligence that didn't necessarily apply to your situation?

General WILSON. In the command roles which I have filled in the past I have been fortunate always to have a strong intelligence section. Having an interest in intelligence since my early days as General Frank Merrill's intelligence and reconnaissance officer in Burma, this was an area of particular interest for me. So I normally succeeded, while a user, in getting the kind of intelligence that I needed.

On the other hand, I have found on occasion in my other role as an intelligence officer that I was somewhat inhibited in providing to commanders the kinds of things that I would like to give them. If I may cite a specific example to strengthen my point, I believe that we can provide for the services more effective intelligence in support of training activities. Indeed, I believe that with some additional emphasis in this area, we can significantly improve the capacity of our armed forces to respond to a tactical situation.

In the case of the Army, for example, if we can provide clear, simple and vivid pictures of what Ivan Ivanich is going to look like when he comes over that hill and what are the stages, the paces he is going to be going through, this would make it possible for our soldier in a tank or in a foxhole and for his immediate commanders to respond more effectively.

Now, that kind of intelligence is relatively cheap moneywise, but to provide handbooks and scenarios and training problems that would help to improve the training process for our troops requires, of course, investing a certain number of people to do it. And I found that as Director of the Defense Intelligence Agency, that to divert nine people to this activity was very costly in terms of my being able to respond to other requirements that were coming down to me from above. Hence my reference to the sunflower syndrome. It is a very real thing.

I felt in this connection that my solid line, so to speak, on the organizational chart, led from me as the Director, Defense Intelligence Agency, to the Chairman of the Joint Chiefs of Staff and to the Secretary of Defense, and that my dashed line led to the Director of Central Intelligence, which sort of put him in third place in terms of my responding to him.

There were occasions when I deliberately had to make the choice as to whether I should invest my priority or place greater emphasis on something which he—the Director of Central Intelligence—required in the national intelligence arena, or whether I should invest it in the direction of tactical intelligence or the departmental intelligence user.

I might add that where I could I chose the latter, which did not particularly endear me to the Director of Central Intelligence, and since the Chairman of the Joint Chiefs of Staff or the Secretary of Defense didn't know that I was doing this, I got no credit on that side either.

This is why I am a little sensitive to the business of ensuring that intelligence is pushed down to the individual being shot at, and I think that this is simply something that people responsible for policy and political direction must be sensitive to in order that this basic principle not be offended.

Senator HUDDLESTON. Do you think a Director of Central Intelligence properly understanding that but given more control, more authority for tasking and budgeting the various intelligence services would enhance the prospects of your having the right kind of information at the right time?

General WILSON. I think the potential for a problem is there. This kind of problem is, of course, somewhat personality driven, but I have no difficulty whatsoever with the Director of Central Intelligence having budgetary and program control. I think this is necessary. This is what I mean by strong policy direction and guidance. On the other hand, I think if he can task to the detriment of other requirements at lower levels, then this is going to cause the commander at the unified and specified command level and lower to come up short.

Senator HUDDLESTON. General Dougherty, at the Strategic Air Command, did you have at any time any sense that certain types of intelligence were not coming to you on a regular basis that might have been helpful to you but might have been considered by somebody as outside of your requirements?

General DOUGHERTY. Yes, sir. The answer to that, Senator Huddleston is that there have been occasions of that, and strange that Gen. Sam Wilson would be here this morning because he was one of the prime movers in helping us get some near real time access to both raw technical intelligence and raw human intelligence.

The logic behind the delay, as I have heard it expressed both in Omaha and in Europe, was that it is better to delay, and that you can get a better evaluation of intelligence through delay.

But we have found now, over several years of working with some direct readouts, that we at the unified and specified command level I think are better prepared and equipped by having a direct readout from some of the key aspects of technical and human intelligence—to have the raw information immediately and then wait for

the evaluation, if situations permit. But it gives the tactical commander an opportunity to posture his forces or to increase his degree of readiness—and not in a provocative sense, but in a prudent sense—while he is waiting for the evaluation. And we have resolved some of those earlier problems, particularly at the Strategic Air Command and at the Joint Strategic Target Planning Staff, by being able to get direct readout, particularly those things of a warning and force posture nature. We have direct accesses to technical intelligence where we can get a direct readout, and then can participate in the evaluation process in much better role.

I think that one of the things that evaluated intelligence was remiss in in the past was its emphasis on enemy strengths. It failed to produce intelligence on some of the weaknesses in foreign and potentially inimical activities. The operational commands can use to a very great degree indications of weakness, and they are in a good position to evaluate weaknesses in what they are reading, what they are seeing, and what they are obtaining.

Defenses, and intelligence concerning the change in the character, the nature and the disposition of defenses was particularly important to us in Omaha, and the closer to real time we could get that, the better we were able to alter, modify our plans in order to take advantage of weaknesses that were apparent.

A lot of this has been corrected.

Senator HUDDLESTON. In other words, you preferred to have it direct rather than to have it go through the analytical process?

General DOUGHERTY. Well, if I can have it direct in as near real time, even though unevaluated, it gives me an opportunity to take some internal readiness measures——

Senator HUDDLESTON. Make some judgment about it.

General DOUGHERTY. It makes me better able to understand and to handle the evaluated intelligence when it does come down.

This was also true in Europe, and this I think was one of the difficult things that Sam and I worked on for many years. I did with Gene Tighe, the present Director of the Defense Intelligence Agency. The Defense Intelligence Agency is very important to the operational and to the field commands because it is their direct source of composite intelligence—our fountain of evaluation, though that fountain backs up at the national level into many different agencies that participate in evaluation.

But I think we made great strides. I never think we have arrived at an optimum position because the field commander is so very heavily dependent on multiple evaluations. But, he is also very heavily dependent on real time indications, and I think that those changes that have been made in recent years that enable the operational commanders to, if you will, listen out but at least get direct indication of major aspects of technical intelligence and to some degree, human intelligence, certainly improves their position.

We are all blessed with competent intelligence organizations, and I think we are all reasonably equipped with common sense to know where the limits of our actions, by way of readiness or posture, must require waiting for national evaluation and direction. And we are improving in our worldwide military command and control structure, in our communications, in our ability to handle intelligence that enable us to have this without hazard. We have it at

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Omaha and I am glad. Those direct downlinks we do have and those direct accesses to national intelligence have proved to be very, very useful.

Senator HUDDLESTON. Thank you.

General Wilson, as you read the draft legislation, and with your experience in the Defense Intelligence Agency, how do you see the day-to-day operation of that agency would be changed by the bill?

General WILSON. I don't think that the Defense Intelligence Agency as an element within Defense and responsible primarily to the Secretary and to the Chairman of the Joint Chiefs of Staff will be detrimentally affected in any large degree as things currently stand. I see the potential for painful choices having to be made by the Director of DIA when he gets requirements of an immediate nature that come down the intelligence chain and which require the expenditure of a number of man hours at the same time that he may be working on something of significance for the Chairman of the Joint Chiefs of Staff or the Secretary of Defense or his people. The potential for an awkward predicament is there, particularly in the tasking and collection arena, also to a degree in the estimative arena.

The Director of the Defense Intelligence Agency does face increasingly serious personnel limitations. It is not a very large agency, and its budget, comparatively speaking, is not a very large one. So he is vulnerable to, susceptible to being overtaxed at any given point in time. It is here—and again, a lot of this is personality driven—it is here that the day-to-day operations of the Defense Intelligence Agency could be affected if the supervisory line of the DCI or DNI winds up strengthened to the point that it could bring him on a kind of a collision course with the Secretary of Defense or the Chairman, Joint Chiefs of Staff.

Senator HUDDLESTON. Mr. Chairman, I don't want to monopolize the time, so I yield.

Senator GOLDWATER. Thank you.

I think it is a rather sad thing that we meet this morning when the morning papers carry the story of a former member of the CIA speaking in an enemy country against our intelligence service, in effect, against our country. This man has already been denied residence in France and England, and I am writing the Attorney General to see what steps we can take to denying him a continuation of his American citizenship.

Now, this is a question that has not been exactly approached by the charter changes in S. 2525, and I would like both of you to address yourself to the question. I am going to try to put it as well as I can. It involves the position of the different intelligence agencies during steps to war, and my concern is whether the charter spells this out adequately or recognizes it.

I could lay out just a small scenario. We have a constant idea of who our enemies might be. Therefore, we are constantly collecting intelligence about those people. Now, let's assume that through the Department of State, through intelligence, through the President's office it becomes rather obvious that something is taking place in that country which would indicate they are approaching a readiness for war. For instance, we would have satellite information

that would indicate a marshalling of forces at central points, and then possibly a movement.

Now, I would think by the time marshalling occurred, that movement would be expected. My question is, at what point in this picture do the intelligence agencies revert to the military, in other words, where they can make total demands for the raw material, as General Dougherty indicated, for their own assessment and for immediate assessment to be made available to the military?

I think what I am trying to say is, where in a scenario like that does the military take over intelligence? I am not worrying about what might happen at home in a similar movement because I think we have enough resources to keep abreast of groups in this country who would try to destroy our Government.

Would you care to comment on that? Both of you have had command, and I know that you are aware of what I am talking about.

General DOUGHERTY. Well, one of the concerns I had in reading the legislation, but I didn't mention it early on, is on page 57 where it defines the limits of members of the Armed Forces on active duty to a period of war declared by Congress or during any period beginning on the day in which armed forces are introduced.

Certainly some of the intelligence collection activities of the command that I had at Strategic Air Command, I thought needed the latitude to operate in areas of hostilities or imminent degrees of readiness that might lead to hostilities where U.S. forces might ultimately be deployed short of a situation of declared war. That could turn to be, Senator, the most important aspect of intelligence if it results in degrees of readiness and preparations that preclude conflict. And without being critical, my reaction to that page was it might well turn out to be overly restrictive on the use of military forces, and military intelligence activities, to collect in a period of hostility or in the imminent period of hostilities.

We always considered at Omaha that our duty was best served if we could contribute to precluding conflict, deter an outbreak of war and could dampen and restrain a period of hostile activity rather than to get into a declared war, and that our best service was in advance of hostilities to keep them from occurring. That restraint on military intelligence activities could well turn out to be an overly restrictive aspect, and I would think that the department could and probably should comment on whether that is overly restrictive or not.

Sam?

General WILSON. Mr. Chairman, I think you raise a truly critical point and one which I have seen addressed variously during different crisis periods.

During my tenure as the Director of the Defense Intelligence Agency, we had several such potential crisis periods. They pertained to the evacuations of American citizens from Beirut in Lebanon and then there was the exercise called Paul Bunyan, the tree cutting episode in the demilitarized zone in Korea. In the last instance, I think the Director, Central Intelligence, Mr. George Bush, took a very wise step. When that situation arose and it was necessary or at least when there was a decision to go cut the tree down, we formed an interagency task force in the bowels of the

Pentagon, next to the National Command and Control Center, under my control, as the J-2 of the Joint Staff. Mr. Bush placed his people under my control to support intelligence process since the situation had become, at this juncture, a military problem, obviously one with horrendous political overtones, but there was a military action about to take place. And so in effect, the wand of responsibility was passed from Mr. Bush to me. And I think this was very properly done, that it stands as an example of how the type of situation which you raise can be addressed.

Finally, I rather seriously doubt that it is practical to define in legislation the precise point in time when this wand of intelligence responsibility should be passed. I think it is of necessity an executive determination, a Presidential determination. My somewhat off the cuff thinking would be that the legislation should reflect this as a Presidential responsibility in order to heighten sensitivity on the part of all concerned, that this point in time does exist that we have to know when we get there, and then the President has to decide, so that at least it emerges as a problem we know must be addressed.

I doubt that we could prescribe the precise circumstances in every possible scenario at which this responsibility should be passed.

Senator GOLDWATER. Thank you.

Welcome, Admiral Zumwalt.

We will finish this brief questioning and then let you make your statement.

Admiral ZUMWALT.Thank you.

Senator GOLDWATER. And then we can have all three of your views.

My concern is that we might write into this charter language that would restrict the intelligence agencies from doing just what you gentlemen said is needed and which I think we all agree is needed.

I was interested in your comment, General Dougherty, because on page 57 of the bill we get back into this rather restrictive language, "except during a war declared by the Congress." And just for the record, out of the 200, maybe 201 times that the Commander in Chief has called out the troops, we have only had five declarations of war, and two of those were in the same war. And this is something that it seems impossible for the American people to realize, that the Congress does not have to declare war.

So I would much prefer to see any language requiring a declaration of war stricken because there will be times, in spite of what I call rather——

Senator HUDDLESTON. If the Senator would yield, we tried to address that problem, and it is on page 62 of the bill, where we give the President the authority to waive many otherwise applicable restrictions and thereby assume total control or adjust the control any way he sees fit when there is a grave and immediate threat to the national security. That is trying to take care of that period when no war has been declared or a period during which under the War Powers Act he can effectively engage our troops in a warlike situation. Those instances, of course, are definitely covered.

We tried to address a period when something may be developing, where it may be apparent or might even be reasonably expected that some difficulty may occur, so when he sees that there is a grave or immediate threat to the national security, he can put into effect all of the emergency situations.

Senator GOLDWATER. Well, I am very glad that is in there, and——

Senator HUDDLESTON. Now, it may not be far enough and it is something we still are working on.

Senator GOLDWATER. No; I don't think we should have legislation written that in any case or any place makes a declaration necessary before any action can be taken. In spite of the War Powers Act, which I honestly believe is unconstitutional, I think the President will continue, as President Ford did, when the emergency arises, to in effect call out the troops, and I wouldn't want anybody to be able to say, oh, oh, you can't use the intelligence the way you want to because we haven't declared a war. And I think—I hope in writing the final writing, we will make that very clear.

Senator HUDDLESTON. We have addressed that and we are dealing now with the administration on just precisely what the mechanism ought to be for transferring control to the military in times of that kind of a threat.

Senator GOLDWATER. Admiral Zumwalt, we are very happy to have you here. The Admiral was the former Chief of Naval Operations and performed a service that we are very proud of.

So you can proceed as you want.

Senator HUDDLESTON. Would the Senator yield before the admiral begins?

It is going to be necessary for me to leave and go to the floor and handle the military construction appropriations which you gentlemen in the past have been very interested in. I don't know that you have that much interest now. But I will have to do that, Senator, and I am sorry to have to leave you gentlemen. I appreciate your appearance here.

Senator GOLDWATER. Go right ahead.

Admiral?

STATEMENT OF ADM. ELMO ZUMWALT, FORMER CHIEF OF NAVAL OPERATIONS

Admiral ZUMWALT. Mr. Chairman, I apologize for my lateness. My plane was delayed an hour and a half due to a clogged runway at National. I can't resist the opportunity to comment that if there is any concern about the judgments that I express here as a former Chief of Naval Operations, you have no one better to blame than Senator Chafee in your midst, who was largely responsible for my being in that position.

Senator CHAFEE. I feel very secure.

Admiral ZUMWALT. The experience that I have had, in addition to that of which you are aware, in earlier years included an opportunity to observe the unfolding of the Cuban missile crisis as a captain in the Navy, working for one of the members of the executive committee of the National Security Council, and to serve as Director of Arms Control in the Office of the Secretary of Defense during the period of negotiation of the Test Ban Treaty.

My years as a member of the Joint Chiefs of Staff included the period during which we were heavily committed in South Vietnam, the Jordan crisis, the Yom Kippur crisis, and the mining and bombing of Haiphong, as well as the negotiation of the SALT I treaty and later SALT II negotiations.

My concern as I view this bill is that I see it largely as a retroactive reaction to a very tragic period in our history, the Watergate crisis, and the transgressions that occurred during that period, but I see it as not adequately reactive to our present situation. To put it simply, I believe that this bill will make it much more difficult for the domestic transgressions to take place in the future, and much likelier that the United States will become engaged in a war in the future.

I make this judgment based on my opportunity to observe first hand for now well over a decade the dramatic decline in our military capabilities vis-a-vis the Soviet Union and the way in which the Soviet Union has taken advantage of its now impressive superiority in both the strategic nuclear field and in the conventional military field. The advantages whicb the Soviet Union is taking are not the option of war, but rather to avoid war while forcing the west to accommodate to one Soviet violation after another around the globe.

Her conduct in the Middle East has constantly sought to unbalance the situation which the United States seeks to stabilize. Her operations in Africa have been impressive for their brilliance in creating the local instability and increased Soviet influence, which is their aspiration. Their violations of the Helsinki summit need very little to be mentioned here. Of more direct relevance to this bill is the fact that the Soviet KGB has been very instrumental in bringing about, in my judgment, recent important Soviet successes such as the two invasions of Zaire with all of the instability that created, the coup in Afghanistan, the double coup actions in the two Yemens and so forth.

And the question, then, that one has to ask is whether or not in an era in which the Soviet Union has gained such impressive military superiority, in an era in which the Soviet Union is using that superiority to force our acquiescence, while exploiting its own covert intelligence capabilities in an impressive fashion, this bill is germane to the major problem which the United States faces.

I believe that the political result of the tragedies of the Watergate crisis have been the bringing to office of an administration which has a very strong dedication to the Christian ethic and to the virtue of morality, but which has not been adequately attuned, perhaps is somewhat naive, with regard to Soviet misbehavior. I believe that the awakening process is now going on and that the administration is, during the tenure of this President, quite possibly, and certainly during the tenure of the next Presidency, going to have to come to grips with this increasing Soviet misbehavior. I believe that the only way in which they can do so, short of war, is to put together a combination of overt political and covert actions designed to stem this Soviet tide while rearming to regain equality from which to negotiate more balanced arrangements.

When I review this bill in that light, I find myself concerned about a number of things. I believe that the best possible action for

the Senate to take at the present time is no action. We need to allow more time for the debate to take place in this country which will really determine the long-term future of this country with regard to our military posture, and with regard to our attitude toward Soviet misbehavior, and therefore with regard to how badly we are going to need the capability that this bill proposes to exercise.

If in the wisdom of the Senate some action has to be taken, then I believe there are a series of changes to the bill that ought to be carried out. First, I believe that there has got to be better care taken to preserve the sanctity of the sources, and the techniques of the intelligence field. Second, I believe that there is far too much reporting of detail to Congress required in the covert field. I believe that in essence the reporting detail required in this bill means that there can be no intelligent covert activity. I believe that it is a significant error that the Chairman of the Joint Chiefs of Staff and the Secretary of Defense are not made members of the NSC Special Coordination Committee. I believe that the need for covert activities in the future is going to be so great that I find myself surprisingly siding with Clark Clifford in suggesting that there should be no prohibition of specified covert activities.

I believe that there is one significant oversight in this bill that relates to a different kind of concern and one that tends somewhat to conflict with the thrust of what I have been saying. I believe that in some way the bill needs to provide for a means of insuring the accuracy of intelligence reporting.

Now, what do I mean by that? I believe that there is documentable evidence available to this committee through the unpublished Pike committee report that makes it quite clear that it has been the practice of previous administrations sometimes to "tweak" the intelligence facts before they are officially reported throughout the community. I believe that that stems from very strong political concerns on the part of powerful administrations and that the coequal body needs to assure itself by having some means of looking—perhaps after the fact—at the changes made in the intelligence analyses, that they have not been made for purposes of political improvement of an administration's position, but rather for greater accuracy.

Thank you, Mr. Chairman.

Senator GOLDWATER. Thank you very much, General—I mean Admiral, pardon me.

Senator Chafee?

Senator CHAFEE. Thank you very much, Mr. Chairman.

First I want to join in a general welcome to Admiral Zumwalt, with whom I had many years of delightful association, turbulent at times, but always invigorating.

Well, Admiral, I just want to say that I think you, in your remarks, have echoed the concerns of many of us here in whether this isn't, this effort in the charter isn't tilted toward covering past errors that legitimately exist, but I just don't think we ought to flagellate ourselves over them continually, and we are in a very serious situation, as you have pointed out, vis-a-vis the Soviets and I share the concerns you have enunciated.

Let me just ask you one thing.

The national intelligence estimates, many have felt, have underestimated the Soviet strategic buildup, and I would be interested in the views of General Dougherty and General Wilson on this also. What do you think of having two separate teams, call them A and B or whatever you want to call them, to analyze the material to come up with two separate estimates?

Do you think that is a waste of time, particularly in view of what General Wilson was talking about, the shortage of manpower, or do you think it is valid?

Admiral ZUMWALT. I think it was a very worthwhile thing to do, Senator Chafee.

First, I believe that the team A group was the bureaucratic result of this tendency that I have reported on the part of an administration to force the intelligence analyses to agree with preconceptions for political reasons and I believe——

Senator CHAFEE. That is a very serious charge you are making, I think, as of course, you are aware.

Admiral ZUMWALT. Yes, sir, I am.

Senator CHAFEE. And if that is occurring or if it is continuing to occur, we have got a very serious situation.

I am not suggesting it is occurring certainly presently, and I can't speak for the past.

Admiral ZUMWALT. Senator, I recognize the seriousness of the charge. I testified along these lines before the Pike committee. I urgently recommend that the committee try to get access to the unpublished results of that hearing. I believe that there is a reasonable case for asserting that perjury was committed by some of the people who testified there, and I would personally like to see them all called in and put under oath and required to retestify.

I think, to get back to your question, Senator Chafee, that the bringing together of team B brought in a group of people from outside the Agency who were as well informed as team A but had not been subject to the 4 or 5 years of stroking operations, and who, therefore, were much more objective. I believe that if one examines today the conclusions of team A and team B, you will find that the conventional wisdom of the media has now begun to catch up with team B's views, and that team B will be judged much more accurate in their report than team A.

Senator CHAFEE. Well, I am talking about the general case, forget that particular expedition that took place. But generally, in major things, do you think it would be worthwhile to have a team A and team B approach.

Admiral ZUMWALT. I do, and I believe that in intelligence one cannot have sufficient checks and balances to insure dissent and contrary points of view.

Senator CHAFEE. General Dougherty, have you got any thoughts on that?

General DOUGHERTY. Yes, sir, Senator Chafee, I certainly do.

First, on the underestimates of the Soviet buildup, I think that that hasn't always been true, but I think you have to read the footnotes over the years, and the estimates, to find it out.

I think it was due to mirror imaging and without truly appreciating the fact that the Soviets were embarked on their own course

and not necessarily one that we might have followed under similar circumstances.

I think there have been some accurate estimates, but I think that those have not necessarily been a majority view within the intelligence community.

On the team A and team B, I certainly agree with Admiral Zumwalt. I think it was a very valuable exercise, a very serious exercise, and very useful for us. I think the concept is useful, but not if team A and team B are going to be a part of the same fabric, of the same community, and I think the utility of the team A-team B concept was that it was not from the fabric of the intelligence community that produced team A, to use team A as being the incumbent group, and its utility was because it brought fresh insights.

I had always thought that the Foreign Intelligence Advisory Board brought great objectivity to estimates. I am not currently familiar with the status of the Foreign Intelligence Advisory Board, but I looked at it as almost a team B-type concept in the past. I think it bas utility because it provides another look at something that we can't take too many looks.

I guess I am at variance with Admiral Zumwalt in this. I find that the potential for this legislation in effect creates a team B in the Congress of the United States, and that this could be very useful. I know it is erroneous to use the phrase team B, but the extent to which this could seize the Members of the Congress in the details of intelligence, if it can be done, Bud, without making it impossible to conduct covert intelligence, special activities in advance of conflict and at times when judgments can be brought to bear, it could prove very useful in that regard, and it could have another deeply knowledgeable voice from another aspect of our Government focused on these issues. I see that potential here in this joint seizure of Congress with the detailed problems of special intelligence and special activity collections in advance of hostility.

Senator CHAFEE. General Wilson?

General WILSON. Well, Senator Chafee, from the time I returned from the post of the Defense Attache in Moscow in the spring of 1973, from then on until the end of last summer, I participated rather intimately in the national intelligence estimative process. I am at a loss to know how to respond to those intelligence professionals who objected to the team A-team B experiment, because if there is anything that is going to refine and improve tbe quality of intelligence, it is the scrubbing action of differing views. I found it an extremely healthy experiment. It doesn't always have to be done in exactly the same form, but I think for every major estimate, the psople who are recognized specialiste and experts in that area somehow should be called in on a selective basis in order that their possibly differing views be heard.

So I think it is simply a very healthy thing to do.

There have been minor instances which I am not prepared to describe in open session, when I felt that someone was trying to get the handle on me and get me to agree to a certain point of view. Whether it was because that individual held views he was espousing so deeply or whether he was simply playing a political game, I am not prepared to judge.

There are two dicta that apply to the intelligence estimative process, and they simply can never be affronted. One is intelligence is not intelligence if it is instructed. And the professional intelligence officer has to sort of swear a bloody oath, if only to himself in a closet, that this is the rule he is going to live by. Second, the process, the procedures themselves must guarantee that the substantially dissenting voice is heard. That guarantee has to be there.

Now, I have never found any difficulty if I stood my ground in getting a footnote inserted in an estimate, albeit recognizing that the footnote tends not to carry the same weight as the main text. In some instances we have been able to fight things through to where we use the gimmick of parallel texts, that is, certain people believe so and so while others think thus and so. I think it is simply extraordinarily important that this guarantee be protected and preserved so that the dissenting voice is always heard and is heard as clearly and equally with the views espoused in the main text.

I think that is about the extent of my remarks on this one.

Senator CHAFEE. Thank you.

I don't want to overdo my time here, but I would say to General Dougherty, as to his suggestion that maybe the Congress could act, the committees could act as team B, I really don't think that is feasible because——

General DOUGHERTY. No; and I really didn't mean that it would be like a team B, but it does broaden the scope of complete exposure to those Members of Congress who would serve on these committees in the House and the Senate, that would be seized with the background of the need for special activities, and though I think that it is hazardous in its breadth and in its exposure, and I appreciate what Admiral Zumwalt had to say on that, it does, then, require a running evaluation in order to take cognizance of the need for special activities. Certainly I didn't mean that it would be a team B.

Senator CHAFEE. I must say I am concerned about how any secret in this Federal Government—and I am talking now of the intelligence field—can be kept, as we expand the group of people, earnest and honest thougb they might be, who have access to it. I have really deep concern and——

General DOUGHERTY. Well, tbere are problems of implementation of this legislation.

Senator CHAFEE. I certainly think that.

Thank you very much, Mr. Chairman.

Senator GOLDWATER. Thank you.

Senator Wallop?

Senator WALLOP. Thank you, Mr. Chairman. I apologize to General Wilson and General Dougherty for not being here for the entirety of their testimony.

I think I share the concerns that you expressed on it. It seems to me that the legislation in front of us is approaching the problem from the wrong direction. The legislation comes out and describes a sort of list of sins we are not allowed to do. Presumably by exclusion we are allowed to do everything that isn't cataloged in here, and that is going to cause people trouble.

Admiral Zumwalt, I incline toward your recommendation that Congress not act too hastily in response to a series of unfortunate events and the abuse of power that preceded them. Part of the answer to these events seems to me just the very structure that we have set up here for oversight, that before deciding to go ahead with the kinds of activities that took place, people will know that they are going to have to be explained to the Congress. My guess is that this is going to take care of the real abuses quite well.

I would like to have any of you comment on what appears to me a vast and impressive move away from human collection into the field of high technology collection. I worry that although the more expensive high technology may be more capable it can focus on a smaller arena in the world. I mean, it tends to focus more and more narrowly, both in space and conceptually because we can't afford to have other assets all over the world.

Then you get down to the question of the value of one human being's judgment on the ground. Is that judgment replaceable, really, by any amount of machinery, and——

Admiral ZUMWALT. My own view is that there are elements of HUMINT that are just irreplaceable, and that the features of this bill which force the disclosure of arrangements with foreign nations, and which force reporting of a high degree of details to the Congress are going to make it much more difficult to maintain the quality of HUMINT in the future, Senator.

General WILSON. Well, I am very much—well, go ahead, please, sir, please.

General DOUGHERTY. I am concerned over the great reliance that we have on technical intelligence, and increasingly greater reliance on it because of the atrophy of human intelligence. Also I am concerned, Senator, because our technical intelligence is a very thin venecr. We put such great reliance on it and yet it is fragile, it is expensive. It has tremendous capabilities, timely reporting, but it really is such a thin veneer, and that given an inadvertent breakdown in some aspect, or given an ability to spoof it, we could find ourselves with tremendous gaps in our essential requirements.

Senator WALLOP. I know it is fun to play with these toys, you know, pretty marvelous. They are not really toys. They are pretty incredible pieces of machinery, but is it part of the conversation current in the Community, part of the reason for reliance on machines that a machine some how or another isn't going to break the law like humans might?

Is this part of the reason for conscious decision, not necessarily at the executive level, but at the professional level, to move away from HUMINT?

General WILSON. The human intelligence operators, Senator, in the aftermath of what some euphemistically have called the intelligence inquisition of the period December 1974, to about May 1976, have found it increasingly difficult to do their jobs. Foreign liaison services who heretofore have been quite willing to share intelligence with us have been more loath to be as forthcoming because of prospects of leaks and exposure of their intelligence and their role in providing it to us. All of that has become more difficult.

I think that we tend as a people somewhat to be preoccupied with and glamorized by technological gimmicks and we like to

emphasize precision, some of which is missing in the human being by his very nature.

I very much support the comments which you made in conjunction with your question. Sound intelligence stands on three legs, three collection legs, signals intelligence—SIGINT, photographic intelligence—PHOTINT, and human intelligence, or HUMINT. There is no substitute for either the covert operator or the overt intelligence observer-reporter who reports a fact or series of facts either from his observations or what he has been told and then adds his own professional commentary. The machine simply cannot do that for you. It gives you a dimension you cannot obtain otherwise.

Also, to pick up on a point made by Gen. Russ Dougherty, it is conceivable that at any point in time the intelligence adversary may achieve some type of technological breakthrough of a defensive nature, and where you have invested millions of dollars in some technological collection system made up of an array of sensors, and you are suddenly blind and deaf, then you have to fall back on the human being.

My last observation in this connection is one which has been with me for a number of years. We have seen magnificent improvements to the point of revolutionary developments in technology, which have improved our ability to see and hear things of interest to us. We have not invested to the same degree in the soft science area in improving the human intelligence sensor. Indeed, compared with technological sensor systems, with our overt and covert operators we are somewhat still in the horse and buggy days, and I believe that we need to give this particular matter a bit more attention. There are things in the soft science area, I think, that we can at least explore which will improve a human intelligence sensor. Maybe we will not keep pace with the blazing tempo of technological development in the other areas, but nonetheless, he can bring the human being further along. I speak in this case from personal experience as a human intelligence operator.

So there has been a tendency over the past few years to downgrade the importance of the human being, and I think this trend has been considerably to our detriment.

Senator WALLOP. Do you find this trend enhanced within the concepts developed within this bill?

General WILSON. I don't find——

Senator WALLOP. It will lead us more and more from reliance?

General WILSON. Let me admit that while I read the press releases on the bill, I reviewed the bill itself in its final draft form for the first time early this morning, so I am not as conversant with all of its provisions as I would like to be.

Nonetheless, What I was able to peruse would say to me that HUMINT has not necessarily been helped by the bill, quite to the contrary. I could not put my finger on specific paragraphs or subparagraphs which hinder or inhibit a human intelligence operator.

Senator WALLOP. No, I was impressed by your statement that you can't define the precise moment in time for a number of events. It seems to me you can't define, also, equally, the precise number of events and the circumstances surrounding them that

would trigger either prohibitions or permissions. It seems somewhere in there you have to rely on the good judgment of the President, and sometimes you are going to be disappointed and sometimes you will have to rely on the good judgment of the professionals in the field, and sometimes you are going to be disappointed.

I would hope that the oversight function that we have developed here, and the plain fact that we did in fact bring many people and many events to a point of legal satisfaction, ought to be enough.

Thank you.

Senator GOLDWATER. Thank you.

Do you have anything else?

Senator CHAFEE. No, I think all the witnesses have been extremely helpful, and I am grateful to them.

Just taking a little poll, as it were, I gather that Admiral Zumwalt would not proceed with this legislation, better what we have got, than proceeding. General Dougherty indicated some satisfaction with the legislation, although some pause also, but basically I didn't find you objecting quite so much to it as perhaps Admiral Zumwalt.

Would that be a fair summary?

Admiral ZUMWALT. I think it is accurate as to my views, Senator Chafee, except that I would advocate hearings like this in another year, after the national debate on defense and foreign policy has clarified our alternatives.

General DOUGHERTY. I think it is a fairly accurate summary of my judgment, sir. I recognize the background that led up to this legislation in draft, and I recognize the committees, the Pike committee, the Church committee, this committee, this legislation, the Executive order. It is one of those things that the cure could be worse than the disease—and it could be that the past is behind us and that the catharsis that has taken place over the last few years has served its purpose. But if there is to be legislation, then I think that this is a good piece of legislation. Admiral Zumwalt used the term "accuracy" in his intelligence plea, and earlier I had used the term "objectivity." I suppose they are about the same thing. And I think that this kind of oversight—intense, deep oversight by people seized with the problems and responsibilities, and equally seized with the burgeoning capabilities and the potential of the Soviet Union and its activities throughout the world as they change the character of their actions—can be useful. Having the Congress of the United States seized with this kind of detailed oversight is difficult to implement, is difficult to constrain, is difficult to keep the nature of intelligence actions secret, but is not impossible. And I do think that it will lend to the accuracy of intelligence and the objectivity of intelligence evaluations. It will broaden the potential for exposure with all of its hazards, but those things are not impossible to implement, particularly if there is a serious intention and a long-term intention to make it work.

I think that is all I have to say on that, sir.

Senator CHAFEE. General Wilson, I think I could, your summary, you put forward some philosophical views that we should be careful of in this legislation, and you I don't think either endorsed or rejected it.

General WILSON. If I may rephrase my views quickly for you, sir, I feel that after 30 years, some type of legislation is needed. If I were still active in the intelligence business, I would want to be able to perceive a little more clearly what my guidelines, the frame of reference for me is, in terms of what is expected of me.

My criticism of this particular bit of legislation is that in some instances it goes further into detail than I believe is needed or proper. Someone on the committee made a comment, which has been voiced before, about the lengthy list of proscriptions. I feel that this is dangerous. The Judeo-Christian ethic has been founded for a long time on only 10 commandments. You have got many more here, and I think by trying to be somewhat encyclopaedic, you do run the risk of those things which have been left out being assumed as proper to pursue.

I am concerned, to reiterate, about the extensive reporting requirements that are listed in the bill in its present draft form. I think they add to the burden of tbe committee and that they are not necessary.

I am most encouraged, more encouraged by the existence of something else than I am about this legislation, and that is the existence of this committee, and the role which you are playing. I am encouraged from what I see in this legislation of your determination to review, to actively pursue the oversight role. I am more impressed with the procedure, with the mechanism which has been established, which I think is a sine qua non to the effective pursuit of our intelligence activities, than I am with the welter of detail in the document itself, although I find only a few things, some of which I have not voiced, that I would take minor exception to in the draft legislation.

Senator CHAFEE. Thank you.

I must say that I—I just want to say, you gentlemen taking the trouble to come here, you may think it is an onerous burden, perhaps, but your testimony is very, very helpful. Certainly to me it has been. And I just wish more of the Senators could be here, but certainly they will receive reports from various staff members.

Thank you.

Senator GOLDWATER. I am wondering if any members of the staff have any questions.

If not, in conclusion, I want to thank you on behalf of the Senate, Admiral Zumwalt, General Dougherty and General Wilson, for coming here this morning, and I want to just remind you and others of what was said when Senator Huddleston completed his long, arduous work on compiling S. 2525, that—and we all agreed with different stages of acceptance, that we probably are faced with a 2-year task at least, which precludes anything being done this Congress, and could even preclude anything being done in the next Congress because the nature of this legislation, the requirement for this legislation has been based more on a series of situations that were not invented by the intelligence community. I think it is very safe to say that every incident that we have lived through in hearings before the Church committee and this committee, were the brainchilds of Presidents. Almost every President that we have had in my memory has been guilty of misusing the intelligence community.

Now, the question is, is it misuse just because the President has done it, or is it in line with his duties as Commander-in-Chief, and I think probably the most important thing we are going to have to do is to try and build some kind of a fence around the President's ability to say to the intelligence agencies, I want this person eliminated or I want this country to experience this or that or the other thing.

So it is very necessary that you gentlemen with your extremely broad experience keep up with this. I would appreciate it if you would just keep abreast of the developments of these intelligence testimonial periods that we are going through and give us any ideas that you have.

For example, Admiral Zumwalt I know has been very outspoken on the situation vis-a-vis the United States and the Soviet, and I happen to agree with you on this, but the problem I see is to get people to accept what is valid intelligence. I find myself, for example, debating with the Secretary of Defense as to whether we are ahead or behind the Soviet, and we both read the same intelligence. We find it being argued in the press almost daily. We find now that this has gone so far that we have had organizations appear before this committee and say that we don't need any intelligence gathering agencies at all; do away with all of them.

We have organized, I see in the morning paper, another group to in effect do away with intelligence in this country.

So it is more of a job than just educating the Members of the Senate and the House. I think it has a much broader touch when we realize that the average American, even including many of us who have been through war, never have really understood intelligence as we use the term relative to the safety of our country and our people, and our place in the world.

So anything that you can add to this testimony, please feel free to offer it any time, and I think you will find that the staff will probably be calling you as we go along to see what you think of this, that or the other thing. It might just be that we would wind up with nothing. It might just be that would make a hell of a lot of people happy.

So again, I thank you gentlemen. You have given us some very, very valuable information.

Thank you.

[Whereupon, at 11:34 a.m., the committee recessed subject to the call of the Chair.]

APPENDIX I

E. Drexel Godfrey, Jr.

ETHICS AND INTELLIGENCE

The three-year public agony of the Central Intelligence Agency may be coming to an end. Richard Helms has been convicted, the President has issued a new set of regulations restricting certain surveillance activities, and the torrent of public exposés by "insiders" seems to be abating. What remains to be seen is whether the traumas suffered since the sweeping congressional investigations began in 1975 have made any significant impact on the heart and guts of the Agency.

There are some suggestions, of course, that nothing much has changed. When Mr. Helms returned from receiving a suspended sentence, he was given a hero's welcome by an indulgent group of ex-colleagues. Simultaneously the announced intention of Admiral Stansfield Turner, the present Director, to reduce Agency operational personnel by several hundred was met by smear campaigns so powerful that the President soon felt obliged to publicly declare his continuing support for the Admiral. These responses from traditional intelligence officers may not be all that significant, however. Angry reactions to reductions in force are not, after all, new in Washington. Any pruning of career public servants can result in mid-level bureaucrats making high-level mischief.

The Helms case was quite another matter. Far from resolving any of the deeper issues of recent Agency conduct, it did not even address them. The case did, however, expose the persistent failure of several administrations to establish appropriate congressional arrangements for the exercise of intelligence operations. All post-war Presidents have permitted Directors of Central Intelligence to appear before congressional committees in the full knowledge that they would be closely questioned about secret operations approved and placed under tight security restrictions by the National Security Council. A long tradition had been built up over the years with the leaders of the Congress itself, that the facts concerning political operations (or clandestine intelligence operations) should be revealed only to selected members of Congress, and denied to

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formal committees at least in open session.

From time to time efforts were made by individual Presidents, or their staffs, to reach an accommodation with Congress that would reduce the vulnerability of CIA officials, caught between the professional obligation for secrecy and the legislative thirst for candor. No true resolution of this dilemma was achieved until President Ford declared for candor and so instructed Mr. Helms' successor. By then, of course, Mr. Helms had presented the testimony on operations in Chile, to a Senate committee, which a federal judge subsequently found to be not only misleading but false.

Not unnaturally many intelligence officials felt their ex-Director had been victimized. In a narrow sense he had. Lacking a presidential mandate to reveal the full nature of the U.S. involvement in the Chilean elections, Mr. Helms opted to give testimony that was less than truthful.

The irony of the case, however, is not that Mr. Helms was forced to choose between two ethical imperatives, one honoring his oath of secrecy, the other telling the truth. Far more significant is the fact that because it focused on such a narrow issue—and one where responsibility for the sorry turn of events could be laid as much at the doors of a succession of Presidents and leaders of Congress as to the Agency Director—the trial and judgment ignored a whole range of ethical problems concerning intelligence practices in a free society.

II

To some the mere juxtaposition of ethics and intelligence may appear to be a contradiction in terms. But at heart intelligence is rooted in the severest of ethical principles: truth telling. After all, the end purpose of the elaborate apparatus that the intelligence community has become is to provide the policymaker with as close to a truthful depiction of a given situation as is humanly possible. Anything less is not intelligence. It may be useful opinion—in some cases it may even be more accurate than prevailing intelligence—but if it is, the opinion maker is lucky, or in the particular instance possessed of more facts and sharper judgmental skills than the professional intelligence officer. Even the CIA has long recognized the centrality of truth telling. As a contributor to *Foreign Affairs* observed several years ago, the motto of the CIA, chosen by the doughty old Presbyterian, Allen Dulles, is "And the Truth Shall Make You Free."[1]

[1] Chester L. Cooper, "The CIA and Decision-Making," *Foreign Affairs*, January 1972, p. 223.

Even as the motto was being chosen in the mid-1950s, however, the point was being lost and the purpose of the Agency corrupted. Perhaps because of the personality of Mr. Dulles and his operational successes in Switzerland during World War II, emphasis on activities having little or nothing to do with the pursuit of truth grew to preoccupy the CIA. The Church Committee's excellent report on intelligence activities makes it abundantly clear that foreign operations won top priority under Mr. Dulles' leadership; worse, foreign operations expanded from a tiny "psych warfare" section of the clandestine collection division to absorb a major share of the Agency's budget, its personnel, and skills. Operations both foreign and domestic, with a host of concomitant and now familiar malpractices, became the bread and butter of the Agency during the 1950s and 1960s.[2]

To accept the approximation of truth as the purpose of intelligence is one thing. To accept the methods by which truth can be obtained poses ethical dilemmas. The truth, after all, is often a set of facts, or concrete physical entities, or intentions, which the party with whom they are entrusted will guard jealously as a precious, not to say sacred, element of the national preserve. Ferreting out the truth under these circumstances often requires means and techniques not ordinarily employed in human intercourse.

At this point the ethical absolutist is compelled to say: "Exactly, an ethical society should renounce foreign intelligence altogether; given the new Administration's emphasis on human rights, domestic intelligence might best be scuttled, too." In this formulation the argument that other nations will not cease intelligence gathering activities simply because the United States renounces them, carries little weight. Ethical conduct is a force of its own; powerful nations lead by example; renunciation of intelligence gathering would be an act of moral courage with untold beneficial international consequences, etc.

But we are not all ethical absolutists. Value trade-offs are probably the best that most people in an uncertain world will accept. And it is because intelligence offers security that bizarre methods to obtain it are acceptable to most. Foreign policy making without an intelligence input of some kind would be capricious; in the uncharted waters of world crisis situations it would be scandalously foolhardy. It follows that the more ambiguous the international situation, the greater the value of intelligence in the decision-

[2] *Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities*, U.S. Senate, 94th Cong., 2nd sess., April 14, 1976, seven volumes.

making process. Put another way, of course, this means that where intelligence does not add to international security, but rather, say to the obsessive comfort of knowing more about Ruritania than even the Ruritanians, or where it merely facilitates the feeding of salacious tidbits about foreign leaders to inquisitive Presidents, questionable methods to collect it are not acceptable.

The security returns of intelligence are probably inestimable, and they are welcomed by both world superpowers and tacitly condoned by almost all active participating nations on the world stage. Satellites monitor the missile developments of the superpowers; microwave telephone messages between foreign embassies and capitals are intercepted for critical information. Without technology of this kind in the hands of both the United States and the Soviet Union, there would of course have been no SALT talks; there would not now be any form of SALT agreement. Nikita Khrushchev implied just this when he half seriously suggested to President Eisenhower in 1958 that the two countries exchange intelligence chiefs. Both leaders recognized that inspections in each other's countries would probably be out of the question for many years to come; each knew that in order to make any progress on arms limitation he would have to rely on the safety of his own intelligence monitoring system and avert his eyes to monitoring by the other.

In a world where the two great powers can no longer guarantee international stability and where weaponry is no longer the exclusive currency of power, intelligence monitoring must sweep targets other than the principal antagonist—e.g., China or the Middle East. It must also be as concerned with economic and energy considerations as missiles. But the principle governing the choice of targets remains the same. Intelligence must promote international security, or the ethical compromises necessary to accommodate the requisite collection methods cannot and should not be stomached.

Intelligence monitoring substitutes for full faith and credit between nations, and technology provides a pitiful but workable substitute for the joyful conditions of a distant One World. The tensions of the nation-state system are, in other words, held in bounds not only by diplomacy and by mutual common sense but by carefully calibrated monitoring systems.

Assuming, then, that intelligence can help toward security in a dangerous international order, how can the intelligence function be carried out at the least risk to other values in our society? To put this most succinctly, how can a professional intelligence service

operate so that officials within it perform their roles in an ethical manner? Most public officials would prefer that this be the case; certainly most private citizens expect nothing less.

The traditional easy answer, of course, is that in international affairs a double standard operates. What is unacceptable human behavior at home or in one's own society can be forgiven in dealings with foreign societies or with the representatives abroad of those societies. War is the ultimate expression of this double standard. But the assassination of foreign leaders in peacetime stretches the standard furthest, beyond, as is now wholly agreed, its breaking point. Under the shelter of the double standard, self-justification usually takes the form of: "Someone's got to do the dirty work"; or "Distasteful as the task was, it served the national purpose." On examination both statements contain implicit assertions by the makers of ethical standards. This, then, is the nub of the matter.

Foreign intelligence is not, by and large, conducted by people lacking the capacity to recognize ethical standards, but standards are lowered to accommodate the perceived national purpose. Once lowered, they can be more easily lowered a second time, or they can be lowered further and further as routine reduces ethical resistance to repugnant activities. This is the area of human dynamics where yesterday's managers of the intelligence community have been the most irresolute. Management rarely blew the whistle on subordinates. When subordinates succeeded in operations of questionable morality, they were as often rewarded with promotions as reprimanded for using dubious methods.

A high management official of one intelligence agency — in this case the FBI — blurted out to the Church Committee an incredibly candid confession of amorality. In response to questions as to whether any supervisory official of the Bureau had voiced reservations about the legitimacy of the infamous Operation Cointelpro (active disruption of citizen groups) he answered:

> We never gave any thought to this line of reasoning, because we were just naturally pragmatists. The one thing we were concerned about was this: Will this course of action work; will we reach the objective that we desire to reach? As far as legality is concerned, morals or ethics, it was never raised by myself or anyone else. I think this suggests really that in government we are amoral.[3]

To disagree with this official's conclusion is easy; to refute the implicit charge that government itself contributes to, if not insists

[3] Testimony of William Sullivan, *Final Report*, *op. cit.*, Book II, p. 141.

on amorality, is more difficult. Presumably, the official, like most Americans, entered government service with some sense of ethics and acceptable norms of moral behavior. He came to believe, apparently, that the responsible intelligence officer *should not* concern himself with such matters. They are, he said, irrelevant to the conduct of his government business.

III

Most professions, such as the law and medicine, have for centuries provided themselves with fail-safe systems to ensure that ethical norms are not compromised out of existence, or rusted from misuse. Some of these systems work better than others, some are susceptible to corruption themselves and a few are mere shams, but the fact that they exist and generally are taken seriously by the members of the profession is critically significant. At the very least, it means that there are limits to a professional's freedom and that those limits are defined by ethical codes sanctioned by colleagues.

A profession whose end purpose it is to root out the truth cannot afford to resist asking where its limits should be set. However, the intelligence professional has in the past operated under the simple guideline, "don't get caught." Recently there have been signs that suggest that the intelligence community is busily, if somewhat ponderously, groping towards a limit-setting policy for its professionals.

The business of limit setting will not be easy, particularly for the centerpiece of the community, the CIA, and specifically for its large clandestine services element. It will not be easy because of the grim ethos of clandestine collection and operations, developed long before orbiting photographic satellites or sophisticated interception systems were ever conceived. That ethos is rooted in a concept as old as human society: the weak or the vulnerable can be manipulated by the strong or the shrewd. Human intelligence collection is a major preoccupation of the clandestine service. Simply put, this is the process of extracting from others information or national assets they would not willingly part with under normal circumstances.

In some cases the creation of appropriate circumstances is relatively easy. This is where the source is a willing volunteer acting out of his own sense of patriotism. Anti-Soviet emigré Hungarians providing detailed information on Russian military units occupying their country fall into this category. The clandes-

time officer must provide the means whereby the emigré can return to his country. By and large the clandestine officer can content himself with the knowledge that the Hungarian is as anxious to recover his homeland illegally as he is anxious to have him make the effort.

But the highest art in tradecraft is to develop a source that you "own lock, stock and barrel." According to the clandestine ethos, a "controlled" source provides the most reliable intelligence. "Controlled" means, of course, bought or otherwise obligated. Traditionally it has been the aim of the professional in the clandestine service to weave a psychological web around any potentially fruitful contact and to tighten that web whenever possible. Opportunities are limited, but for those in the clandestine service who successfully develop controlled sources, rewards in status and peer respect are high. The modus operandi required, however, is the very antithesis of ethical interpersonal relationships.

Sometimes the information obtained by these methods can be important. It is, however, rarely of critical importance. At best it may provide a measure of confirmation of some already suspected development or fill in a missing piece of a complex mosaic of facts. There have been occasions when controlled sources have been successful in snatching internal documents off high-level desks in their own governments, but even in these instances the "take" has not been earthshaking. Perhaps the faintly disappointing record of achievement by clandestine operatives is explainable in bureaucratic terms. Well-placed officials with immediate access to critical policymaking circles—and for the most part this means they are part of the policymaking process—are generally well rewarded by and well satisfied with their own governments. If they were not, they would not hold powerful positions. The main targets for clandestine collectors are usually second- and third-level officials who may not be fully privy to policy developments.

Finally, there is the human consideration. Most controlled sources are ambivalent about the roles they are obliged to play. On the one hand, there may be gratification that their retainer fees enable them to reduce some crushing personal debts, or to meet other expenses incurred as a result of weaknesses or personal misjudgments. On the other hand, they will almost certainly feel a sense of guilt in betraying trusts they are expected not to betray; they may also feel more than a little self-loathing that they have been too weak to resist being used by those who pay them or blackmail them. How these feelings subconsciously affect what they report and how they report is anybody's guess. It is at least

possible that the clandestine officer who "owns" a controlled source may not have the extraordinary asset that his "tradecraft" teaches him he should have.

Quality of information obtained aside, a fundamental ethical issue concerning clandestine human collection remains. That issue is the impact on the clandestine officer of his relationship with his source. The former's bread and butter is the subversion of the latter's integrity. The officer is painstakingly trained in techniques that will convert an acquaintance into a submissive tool, to shred away his resistance and deflate his sense of self-worth. Of course, the source may be thoroughly cynical, even a venal merchant of his country's privacy, and in that case the task of the clandestine officer is less burdensome—although he may come to find the relationship just as repellent as if the source had slowly and resistingly been bent to compliance. Whatever the chemistry between the two individuals, collector and source, or perhaps more pointedly, dominant and dominated, the biggest loser is the one whose ethical scruples are most damaged in the process. Depending on the techniques he may have to use to bring the source under control and maintain that relationship, the biggest loser may be the clandestine officer.

Another prime concern of the clandestine services is the development of methodologies and devices to thwart the defensive measures of other intelligence agencies and other national political systems. While much of this activity is purely technical electronic engineering, a significant investment has also been made in such exotica as "truth drugs," complex psychological warfare strategies, bizarre bugging devices and the like. Some of these devices and techniques have been used with profit and success by clandestine officers operating overseas; others have proved impractical in the field or have stalled on the drawing board as development costs got out of hand. But the search for new ways to penetrate other societies goes on. Today's drug experimenters (if there are indeed any left) may become tomorrow's experts in long-range behavior modification processes.

Whatever the state of these arcane arts, they have two things in common. First, their purpose is almost always to facilitate the manipulation of man by man. In this sense they are not dissimilar in effect and impact to the process of controlled source development. Secondly, the practitioners of these arts and the "psych warfare" experts are obliged by the very nature of their trade to presume that they are operating in hostile environments. The end point of their efforts, after all, is to bypass normal authority, or at

the least, to use semi-legal means to overcome obstacles placed in their path by the authorities of other nations. The professional premise of the officers engaged in these practices, then, is the constructive use of illegality. While revolutionaries around the world have lived long and comfortably with this paradox, it is quite another matter for sober and presumably accountable U.S. public servants to be exposed to its temptations.

In this connection it is important to note that over the years officers whose careers have primarily been spent in clandestine activities have occupied the preeminent roles in the management of the CIA. At least until recently, when heavy reductions in clandestine staff were ordered by the current Director, Admiral Stansfield Turner, roughly two-thirds of the highest executive positions at any given time were filled by officers whose careers blossomed in the clandestine services. Years of hardening in the ugly business of source control and penetration of foreign capitals have surely taken their toll. Little wonder that the CIA's top leadership did not traditionally spend much time setting "limits" on the Agency's activities. Little wonder that management developed a process of compartmentalizing what it recognized to be questionable activities. The most bizarre operations, such as Chaos (to be discussed below) and human drug experimentation, have been traditionally walled off even from other Agency colleagues whose questions might have been embarrassing. Mr. Helms himself testified before the Church Committee that in many instances the CIA's General Counsel was simply excluded from knowing of the existence of particularly exotic activities and operations.[4] The inference is inescapable that he was shut off out of fear that he would, as he had occasionally done in the past, advise that the operations overstepped legal limits. Similarly, the Church Committee report makes clear that even the recommendations of the Agency's elaborate Inspector General system could be, and sometimes were, rejected by the Agency Director.[5]

Thus, a picture emerges of a highly compartmentalized bureaucracy whose direction has been largely controlled by officials with long experience in the seduction of other human beings and societies. Not immoral or even without ethical standards themselves, they had lost the habit of questioning where they should set limits on their official conduct. And other officers who might have been expected to remind them of these limits were kept in ignorance. This state of affairs is particularly distressing when it

[4] *Final Report, op. cit.*, Book I, p. 282.
[5] *Ibid.*, p. 286.

involves an organization where high premiums are paid for inventiveness, for "outsmarting the opposition."

In an organizational context where the edge of possibility is bounded only by the stretch of the imagination, special arrangements for limit setting are necessary. Each management level of the clandestine services, from the most immediate and parochial to the highest, should have an officer who plays the role of "nay-sayer." His task would be to review operational plans for their ethical consequences and occasionally to remind the imaginative subordinate that daring and innovativeness must sometimes bow to prudence. Every organization has informal "nay-sayers" seeded through its ranks. In traditional bureaucracies they are almost always negative influences, cruel stiflers of initiative and zeal. In intelligence organizations, institutional "nay-sayers" could have just the opposite effect: they could be critical to a rediscovery of ethically acceptable limits of activity.

IV

That element of the CIA whose job it is "to tell the truth," as opposed to collecting the truth overseas, is the overt Intelligence Directorate. It would appear at first glance to have the easier job. But this is not necessarily so. For one thing, truth is rarely simple fact; it is almost always a combination of fact and judgment and as such almost always subject to second guessing. The intelligence analyst has no monopoly on wisdom and prescience, but he does have one advantage. He is not subject to the policy considerations of the operating departments, such as State and Defense. He is, in this respect, free to call the shots as he sees them, whether or not they substantiate or confirm some fundamental premise of U.S. policy. Ignoring the policy assumptions of the Administration in a search for the most defensible judgment can be an unhappy affair, as those analysts who toiled through the Vietnam years can testify. While support from Agency superiors for the views of the analysts was strong during the Johnson and Nixon Administrations, the analytic product—that is, the truth as the analysts saw it—was not always palatable to higher consumers. The "truth" more often than not implicitly cast doubt on the outcome of the U.S. efforts in Indochina. Reaction to such judgments at White House and National Security Council levels was at worst unfriendly, and at best indifferent.

Nevertheless, the obligation remains for the analytic component of the CIA to produce what it believes to be the least assailable version of a given situation and its consequences for the future

course of events. In this lonely and sometimes scorned pursuit, there are ethical pitfalls no less severe than those encountered by the overseas clandestine collectors.

A case in point is the unusual episode surrounding the studies of radical youth produced by the Agency at the demand of both Presidents Johnson and Nixon in the late 1960s and early 1970s. The original order for such a study coincided with one of the peak points in protest against the Vietnam War, protests conducted in Europe and the Far East as well as in the United States. When the order was first relayed to the Agency by Walt Rostow, then National Security Special Assistant to the President, it was accompanied by the hypothesis that the protest actions were so vociferous and so universal that they must be orchestrated by communists. Dubious at best, this became the principal theme of the first study and the several successive versions that were subsequently ordered. The Agency undertook, in other words, to determine whether communist instigation lay behind the worldwide protests.

The first edition of the study concluded that there had been no discernible communist involvement in the student protests, with a purely theoretical aside that, at least as far as U.S. student protests were concerned, there were a variety of justifications for protest that made communist intervention unnecessary. The study was ill received by the White House. In effect, it was rejected out of hand with the pointed question: "Are you sure of your conclusions? Have you turned over every rock?" These injunctions were to be repeated twice more as the Agency, confident of its original judgments, tried to produce the evidence, or demonstrate the absence of evidence, that would similarly persuade two reluctant Presidents and a host of presidential advisors.

The costs to the CIA of "turning over every rock" were shatteringly high. The dearest cost was the decision to expand greatly the patently illegal "Operation Chaos," which had begun modestly with the intention of collecting evidence for the analysts preparing the first version of the student paper. To this end U.S. agents under control of the Clandestine Services, counterintelligence component were infiltrated into student groups within the United States and abroad. Once again the operation was carefully compartmentalized so that few even of the most senior Agency officials were aware of its existence—including those responsible for the production of the study. When the first study was rejected, Chaos was built up into a sizable operation, with access to computer technology and a network of overseas and domestic employees keeping book on many thousands of U.S. and foreign students.

Not only was the Agency's legislative charter, which mandates *only* overseas espionage, violated, but so too were privacy rights of thousands of young Americans.

The second cost was a natural concomitant of the first. As more and more "rocks got turned over," the pursuit of evidence became an end in itself. A tendency developed among the collectors to believe that if they hunted long enough and assiduously enough, some communist involvement might be found, and if it were, the President would be satisfied. In short, the collection effort lost perspective. Had it found communist affiliations—say, in the leadership of a particular student organization—it would not have been of much significance given the overwhelming negative findings elsewhere in the great majority of student movements. The notion that an assertion can be converted to a truth if there is one scrap of positive evidence to support it is dangerous nonsense—in this case nonsense entertained by desperate Presidents and abetted by officials who might better have said: "We have turned over enough rocks, Mr. President." Thus, at the end of the unhappy affair called Chaos, one side of the Agency was unwittingly engaged in what was a corruption of the search for truth, to say nothing of extensively illegal activities, while the other side of the Agency was frenetically trying, under heavy fire, to stick to its best judgment.

In retrospect, it can be rationalized that all the actors in this unhappy drama were victims of the curious political climate of Washington as the Vietnam conflict ground to a conclusion. The psychological ingredients were all there: bureaucratic weariness with a clearly failing U.S. policy to which the Agency had already committed much of its manpower energies for a decade was one. Presidential frustration as various ways out of the dilemma were closed off was another. When all is said and done, however, there can only be one satisfactory explanation for the Agency's plunge into massive illegal activities. Top management had the means, the manpower and the mind-set to do the President's bidding and to do it without arousing suspicion or inviting investigation. Only in the waning days of Chaos (and the War) did complaints from lower echelons of the Agency begin to be registered around Washington. What top management lacked was the habit of limit setting, the reflex that warns of dangerous consequences—not of being found out, but of transgressing minimal ethical standards. Presidents can perhaps be forgiven for obsessiveness, but for the servants of Presidents, particularly those whose business is truth, the first duty is to guard against those personal and institutional

frailties that make a mockery of the search for truth.

V

Is it possible, then, to introduce, or better to revive, a sense of ethics in the intelligence community? Certainly much can be accomplished simply by strong leadership that sets an appropriate tone. Presumably some efforts are being made in this direction now. But rhetoric alone cannot do the job that is required. Some specific prescriptions are offered in the following paragraphs.

The time would appear ripe, from the perspective both of history and the complexities of a world where energy resources, food supply and technological sophistication carry as much, if not more weight than weapons superiority, for the intelligence community to get out of political operations. The massive investment in these activities in recent years has paid off only rarely in terms of advancing U.S. interests. At times, as in the Congo, they have done more to confuse and unsettle an already fluid situation than to stabilize it. Some operations have probably cost the United States goodwill for years to come. Cost-benefit factors apart, political operations are often, although not always, illegal activities in which the greatest skill is to thwart the established authorities of foreign countries. To live clandestinely, to manipulate others, to distress the political ecology of another society—these are all activities that induce an amoral view of life. While they may or may not produce critical effects in the countries where they are undertaken, they almost certainly will affect those who engage in them. They are, finally, activities that have little or nothing to do with intelligence.

It can be argued that there are occasions, or there may be occasions, when political action of a clandestine nature may be the only feasible way to produce a desirable circumstance beneficial not only to the instigating country, but to a larger portion of the world's peoples. One can imagine, for example, such operations, mounted in South Africa, that might have positive consequences throughout the southern part of the continent. U.S. policy interests could be served at the same time as the interests of South Africa's neighbors. Indeed, there have been occasions when massive infusions of U.S. funds and skills have turned the tide in tightly balanced and critical political contests. Support for the non-communist parties in Italy and France in 1948 comes to mind as does the far less obtrusive (and, one gathers, predominantly European) support in 1975 for democratic elements threatened by hard-line (and Soviet-supported) Communists in Portugal.

The opportunity for U.S. intervention in political events of high international significance would not be lost by the abolition of a political operations capability. Private citizens recruited for the occasion have carried out such tasks for Presidents before and could again. On the other hand, there could be two salutory consequences for the United States in abandoning political operations as an ongoing activity of the CIA. First, Presidents would have to shoulder the burden themselves and create ad hoc arrangements for each instance. This would almost certainly sharpen their discrimination and force them to concentrate on interventions with the highest chance of success and the least chance of exposure. Second, the elaborate network of clandestine operators currently in place could be drastically reduced. No longer would it be necessary to nurture and maintain agents around the world on a contingency basis. The temptation to indulge in operational mischief of low or ambiguous priority for the sake of keeping agents alert would be foreclosed.

Many of the arguments used to question the efficacy and suitability of political operations can be applied to the process of human clandestine intelligence collection. The product is not all that impressive; the moral damage to the collectors is high; intelligence tends to be collected as an end in itself; and there is always the risk of exposure. Nevertheless, intelligence must be collected in selected areas and against specific subject targets. Technology is now the workhorse of the collection business and it should remain so. The present Director has in effect recognized this evolution in collection methods; he has justified his reduction of covert officers on this ground. Photographic and audio satellites and other interception devices are immensely expensive, but they have the advantage of doing only minimal damage to the ethical standards of the operators and processors. As noted above, technological intelligence collection is in at least one highly significant area—that of arms limitation control—tacitly accepted as essential to security by both superpowers.[6]

Of course, even with the phasing down of clandestine human collection, the need will remain for residual capability in certain esoteric collection techniques. Atmospheric conditions in some geographic locations may be so unfavorable that short-range

[6] Harry Rositzke in "America's Secret Operations: A Perspective," *Foreign Affairs*, January 1975, pp. 334–51, has presented a sophisticated view of the remaining need for clandestine human intelligence and counterintelligence collection. And Herbert Scoville, Jr., writing from a consumer's viewpoint (as I do) has laid I think the right stress on the predominant need for technological methods today. "Is Espionage Necessary for our Security?," *Foreign Affairs*, April 1976, pp. 482–95.

collection devices will be needed to supplement "stand-off" equipment, such as satellites. There will always be the need for personnel skilled in the techniques of situating these devices. Similarly, there must be those who can exploit the defector or the "walk-in" source.

Counterintelligence is another field of clandestine intelligence activity which probably cannot be dispensed with for some years to come. But if counterintelligence is to survive, it should be organized on a purely defensive basis as a protection against foreign penetration of the U.S. intelligence services and their technical capabilities. It should be a small, lean component with a sophisticated understanding not only of the technological capabilities of major foreign intelligence services, but also of those countries' political dynamics. Far from being walled off from other Agency components as in the past, it should be a vital part of Agency life, as much to gain from exposure to varying points of view as to influence those points of view.

A vigorous reexamination of the entire collection function, both in terms of techniques and targets, would be salutary at this point in the intelligence community. Collection that goes beyond what the satellite and the intercept station provide cannot be forsaken altogether. Indeed, it should be improved with renewed emphasis on (a) analytic collection and (b) the old-world expertise of the open dialogue replacing the controlled source. Collectors with the training to mine and exploit technical materials in archives and specialized libraries or statistical centers could be the intelligence pick-and-shovel men of the future.

For those tightly closed societies where access to such material is almost completely denied to the United States, a different methodology will be necessary. Third-country officials with some access privileges in the host country must be assiduously cultivated, but (breaking with past practice) in an open and reciprocal manner. Collectors with substantive knowledge of their data targets should be authorized to disseminate "trading materials" to their foreign counterparts in exchange for hard-to-get data and technical material. This will be a delicate business. Maladroit handling of such negotiations could result in even tighter controls over information by the host country. Needless to say, negotiations could not be conducted *in* the target country without risking the expulsion of third-country nationals. New expertise in content evaluation both of the materials desired by the United States and the data to be used as trading currency will have to be developed.

At the higher levels of intelligence collection—that is, gaining

insight into the sensitive complex of issues concerning political, economic and military developments in a target country—emphasis should be on the old-fashioned method of diplomatic dialogue. Reports that contribute to an understanding of social or economic trends or that sort out shifting national priorities are almost always more significant and useful than the one-shot item that reveals a specific decision or records some finite act. "Think pieces" have traditionally been the preserve of the ambassador or senior Foreign Service official. Their quality has, however, been uneven; they suffer from irregularity. Part of the problem is that few Foreign Service officers stay long enough on a single posting to become in-depth analytical experts. Only a few of the largest embassies have enjoyed the luxury of having one such person on their staffs for a number of years. What is being proposed here is that CIA officers fill the roles of permanent in-country experts. These would be senior officials, chosen for their substantive familiarity with the political and economic cultures of the countries to which they are posted. They would be expected to cultivate openly the widest circle of acquaintances and to report selectively both to headquarters and the ambassador. Clandestinity would give way to substantive expertise.

The finely trained and highly skilled clandestine collection officer with years of service in the field is likely to scoff at these suggestions. It has always been the contention of the clandestine collector that overt techniques could indeed uncover immense amounts of data about the capabilities of a foreign nation target, but that the intentions and plans of the same country could only be unlocked by controlled penetrations. There is, of course, some truth to this proposition. Final and critical decisions—e.g., to go to war with a neighbor, to begin the development of nuclear weaponry—are so tightly held and originate from such complex motivations that they do not suddenly spring off printed pages being turned by a lonely researcher. On the other hand, neither have such decisions been revealed with any great degree of success by penetration agents in the past.

Once the CIA has begun to turn itself around by the actions suggested above, it will have taken the most painful steps. But backsliding into old habits and behavior patterns will surely occur unless other, less dramatic moves are made. The influence of the clandestine service in the Agency remains strong and, given the sheer weight of numbers, it will have a significant voice in internal Agency affairs for years to come.

Something of the flavor of how that voice might express itself

can be inferred from the hero's welcome given to Richard Helms when he appeared at a reception of recently retired covert officers fresh from his conviction in federal court. The old methods of compartmentalization and tightly controlled operations have become a way of life not easily shaken in the insular bureaucracy of an intelligence service. Radical rearrangements of traditional procedures must be considered.

At the least the Inspector General's function should be strengthened, as the Church Committee has recommended. Specifically, this officer's role should be expanded beyond its traditional one of internal control and response to employee complaints. One ex-Agency official who is a careful student of its recent history has suggested the creation of an ombudsman accessible to employees who felt they were being used in improper activities.[7] This would be a helpful addition to the Inspector General's staff, freeing him for the vital task of constructively intervening in questionable plans and programs throughout the Agency.

Similarly, the Legal Counsel must be given more steel to put under his velvet glove, particularly when his rulings are ignored or overturned by the Director. Traditionally matters of legal propriety have been referred to the Legal Counsel by other senior officers when and if they chose to do so; in effect his role has been passive. It should be a relatively simple internal matter to reverse this pattern. President Ford followed up one Church Committee recommendation by giving the Legal Counsel access to the Executive Oversight Board in the event that one of his rulings was ignored by the Director. This is a significant step in strengthening the legal review function in the Agency.

VI

A more sweeping structural change for the Agency has been suggested from time to time. This would entail a complete divorce of overt and covert intelligence activities. Overt functions (analysis, reporting, estimates, etc.) would be aggregated under one organizational roof and covert functions (collection, operations, counterintelligence, technical development of human control devices, etc.) under another. The objective behind such proposals has usually been to remove from the intelligence end product the taint of the methods used to obtain the raw data, in other words to strengthen the dignity and credibility of the Agency's truth-telling function.

[7] See Harry Rositzke, *CIA's Secret Operations*, New York: Reader's Digest Press, 1977, Chapter 18.

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There are merits to these suggestions, but perhaps the optimum time for divorce has passed. Indeed, if political operations were now eliminated and clandestine collection minimized, the temptation to breach ethical standards by the clandestine services would be reduced significantly. Moreover, cutting the clandestine services adrift would result in the concentration in one organization of most of those officers—now at high positions—who have been exposed to the highest ethical risks. Backsliding would be a great temptation, managerial control an administrator's nightmare.

But the measures discussed above will amount to little more than tinkering if not buttressed by a radical new personnel policy that places a premium on ethical values. Beyond native intelligence, recruitment criteria have in the past emphasized such psychological factors as stability, intellectual curiosity and phlegm. Once selected on the basis of favorable readings on these counts, the candidate had, of course, to survive the polygraph test—a final screening against the possibility of penetration by a foreign agent or a duplicitous adventurer. To this battery a test of ethical values should be added.

Law enforcement agencies in a few communities have provided something of a model in an area almost as contentious. A handful of larger police departments have been including in their selection procedures a "violence test" for rookie candidates.[8] The tests are basically psychological, designed to determine which applicants, in the normal course of their duties, would resort too readily to heavy-handed or bullying tactics. The results are not yet wholly clear—in part, one suspects, because there is little or no reinforcement of the desired value level as the new patrolmen become acculturated by their older colleagues, who possessed badges years before consideration of behavior patterns became a professional concern.

An ethics test could be constructed from an array of situational choice problems inserted into the Agency's selection instruments. Such problems would present difficult ethical decision choices for the test-taker in a variety of interpersonal and organizational settings. To prevent the job applicant from tilting his answers toward problem solutions he presumes the testers are seeking, the questions would have to be scattered throughout the various portions of the questionnaires used—psychological, intelligence,

[8] The "Machover DAP" test is one frequently used to detect overly aggressive personalities. Sophisticated screening instruments are described in the publication *Police Selection and Career Assessment*, issued by the Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice, U.S. Dept of Justice, 1976.

etc. All ethics questions could then be selected out of the various test parts and reviewed separately. One hopes that a rough profile of the applicant's personal ethical standards could be obtained by this device, but at best it would probably do no more than single out applicants with unacceptably low or hopelessly confused ethical standards. Follow-up tests for those who enter the Agency and have served for several years would be considerably more difficult to design, but they are not beyond the skills of Agency psychologists.

Surely this is slippery ground. One man's ethical floor may be another's ethical ceiling. Who is to define what the acceptable level of ethical beliefs should be? How would Agency management keep its ethical sights straight in a period of rapidly changing moral values? The issues raised are immensely difficult, but dismissing the concept will not solve the problem of the current low estate of the Agency in the public mind. Tackling the problem head on would, if nothing else, constitute a clear signal of top Agency management's concern to current employees, prospective recruits and the general public.

VII

Finally, the real purpose of intelligence—truth telling—must be placed at the center of Agency concerns. This is a harsh prescription; it is certainly the most difficult objective of the lot. But it must be the principal purpose of Agency leadership to establish beyond question the capacity of its experts and its facilities to seek out and find the truth, or the nearest approximation of the truth possible. Public cynicism will have to be dispelled before this is possible; it will take time. There are no easy paths to this objective. Indeed, the present mood of the public toward the Agency militates against its succeeding. The best graduate students do not gravitate to the Agency; its name is suspect in much of academia; business and professional groups are fearful of association.

Where such circumstances exist they must be met with new and probably at first more too credible approaches. Insistence on being primarily in the business of truth telling will not automatically convince the skeptic that it is so. But CIA leadership that condones no other competing role and that demands that ethical questions be asked before internal Agency policies are decided upon will have made a beginning in the long journey back to public accountability. None of these steps, of course, would avert the damage that an unscrupulous President, intent on misusing intelligence talents, could produce. Only loud, angry public resignations by intelligence leaders could in such a case underscore a professional's ethical commitment to truth.

APPENDIX II

IS ESPIONAGE NECESSARY FOR OUR SECURITY?

By Herbert Scoville, Jr.

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IS ESPIONAGE NECESSARY FOR OUR SECURITY?

By Herbert Scoville, Jr.

THE recent revelations of abuses by all our intelligence agencies and the multitudinous investigations of the CIA in particular have raised serious questions as to whether the United States can and should continue to maintain a capability to conduct any clandestine operations. Most of the horror stories have related to what is known as covert action—i.e., operations to secretly influence foreign governments, groups or individuals, often by illegal means. The Chile case is the most highly publicized. Almost none have involved the collection of intelligence abroad, but many of the techniques used in foreign countries have been occasionally practiced at home where the CIA cannot legally carry out such operations and where the responsibility rests with the FBI. As a consequence of these activities, there is widespread belief that the CIA should halt all covert operations and disband that part of the organization which has been responsible for carrying them out.

Before making a decision on this score, the importance of covert operations to our security should be evaluated and balanced against their risks. Although covert actions have had some measure of success in some localities, particularly at the height of the cold war, the recent disclosures raise serious questions as to whether they have really been to the benefit of the United States. Almost inevitably, even during periods when secrecy could be relatively easily maintained, their existence has leaked out, and they have now seriously undermined the reputation of the U.S. government. In the current climate, it seems unlikely that they could be kept secret for any period of time; thus, covert operations by a democratic American government may simply not be feasible any longer.

But even if they could be kept secret, they are not the proper way for the United States to conduct its foreign policies. We must combat hostile influences by using the good qualities of our democratic society, not by copying the reprehensible tactics of those we are opposing. In the long run, this will be far more beneficial to our security than will any temporary local successes obtained through covert action. Therefore, without any further discussion of this issue, which has been, and is still being, debated in many other forums, I would propose that this country should henceforth cease all covert action operations.

Covert operations for intelligence collection, which have not had the same public attention, require much more thorough consideration. Such operations involve the recruiting of agents in foreign nations, encouraging the defection of knowledgeable individuals, audio-surveillance, and other techniques falling under the general heading of espionage. At least for the purpose of this discussion, espionage does not include large-scale and remote-control secret operations such as satellite reconnaissance, "spy planes," or the interception and analysis of communications and electronic emissions performed outside the borders of the target country.

The information sought by clandestine means may include not only positive intelligence on the plans and programs of other nations but also the quite different category of counterintelligence on threats from foreign intelligence or terrorist groups. While covert intelligence collection abroad has not been free of criticism, it has not, at least since the unique U-2 incident of 1960, seriously embarrassed the U.S. government or caused major international repercussions. However, counterintelligence activities, the responsibility of both the FBI (at home) and the CIA (abroad), have raised some of the most serious domestic issues of illegality and abridgment of civil rights—notably the CIA's screening and opening of mail to the Soviet Union. In addition, domestic burglaries and the surveillance, penetration and disruption of dissident groups have been carried out to a small but clearly illegal extent by the CIA within the United States, but much more massively by the FBI over a period of years going back to operations against the German-American Bund before World War II. In this area, evaluation of the consequences must weigh both actual violations of law or of proper standards of civil rights and the inherent tendency of such operations, even when apparently legal, to slip into such violations. The decision as to whether counterintelligence operations should be continued, and if so under what aegis and with what safeguards, may have to be made independently of what is done about positive intelligence collection.

But in each case, covert intelligence abroad and at home, the place to start is with a serious evaluation of the importance of the activity to our total national security and foreign policies. How much does covert intelligence matter as compared with other forms of intelligence collection? Can its risks and drawbacks abroad be minimized so that it is worth continuing? And can the special problems of domestic counterintelligence be handled so that it can do a worthwhile job and still adhere to legal and constitutional standards?

In recent years, the value of human clandestine intelligence sources

has come into increasing question as the capabilities of technical methods have become more and more all-encompassing and sophisticated and as the political liabilities of covert operations have become increasingly evident. Too often, extreme points of view have been taken: on one side it has become popular in this country to condemn all covert operations, and on the other for the intelligence traditionalists to defend nostalgically the experiences of the past. Certainly it is not a black-and-white situation, and it would be irresponsible to say that espionage has no value as an intelligence tool. Even if it never produced any useful information, the existence of a covert collection capability could still be a deterrent because leaders in other nations could never be certain that their plans would go undetected. On the other hand, it would be equally foolish not to recognize the limitations on such sources.

First, the major alternative sources of intelligence information should be briefly reviewed, and their usefulness and limitations in satisfying our principal intelligence requirements evaluated, together with the political risks entailed. Then it will be possible to analyze how espionage can realistically be expected to supplement other sources, how necessary it really is, and what scale and nature of covert capability it would be desirable for us to have. In determining the value of any intelligence source, consideration must be given not only to the quality of the information but also to its usability in formulating and getting support for national policies. Information is only a means to an end and not an end in itself.

To simplify analysis, the means of intelligence collection can be roughly broken down into four major categories: overhead photographic observation primarily from satellites; communications and other electronic intelligence collected outside the borders of the target country; open sources (i.e., press, speeches, published materials and overt contacts); and the espionage techniques already defined.[1]

Similarly, the types of positive intelligence information can be roughly broken down. To conduct its foreign policy, to design its military posture, to negotiate arms control agreements, and to prepare for military contingencies, the United States has a clear need for military information on the forces, weapons and plans of potentially hostile or disruptive nations; economic intelligence on the resources, technology and finances of all countries; and political intelligence on

[1] For purposes of this rough breakdown, I have treated the intelligence gained from normal diplomatic activity as well as that provided voluntarily by businessmen or other private citizens not acting as covert agents, as coming essentially from "open sources," even though such intelligence may, for reasons of confidentiality, be classified by the government and not used for public purposes.

the make-up, intentions and interrelations of individuals and organizations in and out of foreign governments. Of course, these areas cannot in actuality be clearly delineated since, for example, military and political intentions are strongly interconnected, and economic factors will have a profound influence on both other areas. However, they do provide useful headings for analyzing the usefulness of various intelligence sources.

II

In the area of military development and deployment, there is little question that photo-intelligence today provides not only the greatest quantity but also the highest quality of information. Satellite photography—unlike aircraft reconnaissance, which it has largely supplanted—can, in a relatively short period of time, provide visual evidence of military deployments throughout a country or even a continent. Moderate-resolution photography can be used to provide almost continuous surveillance of a country even as large as the Soviet Union, and high-resolution systems can provide detailed information on targets of specific interest. The greatest drawback is cloud cover, which can impose considerable delay in many areas of the world. The initial discovery by U-2 photography of the offensive missile sites in Cuba in 1962 was held up for a couple of weeks by weather. However, satellite photography is now so extensive that for a nation to rely on cloud cover to conceal its operations would be a risky tactic.

Of course, a camera cannot see through the roofs of buildings, but with modern military technology it is hard to keep any significant weapons program or troop deployment completely concealed from the camera's eye. The construction of new facilities above or even under the ground, the shapes of buildings, and the required logistic support almost inevitably provide clues as to the existence and nature of a military target. Road patterns and excavations give evidence of missile sites long before they become operational: successive Secretaries of Defense have, for many years now, been announcing new Soviet missile silo construction more than a year before the launchers were ready for use. Without photographic intelligence, productive strategic arms limitation talks would be impossible: it is essential both in determining the desirability of an agreement and in verifying that no violations occur.

Since photography, even using sophisticated infrared or laser techniques, is not capable of making observations beneath the surface of the water, satellites have no potential for locating submerged submarines, but such ships are observable in their home ports and during

construction. Acoustic sensors on ships or in the ocean must be used in place of cameras to maintain surveillance of submarines underwater.

One other drawback to satellite photography is the time delay between the observation and the analysis of the picture by the intelligence expert. The picture can be relayed back to earth through a television link when the satellite is in range of a friendly receiving station, but the transmission causes some degradation in the quality of the photograph. For best results, the film capsule must be returned to earth, and this can involve delays of three or more days even under the best of circumstances. In addition, there are practical difficulties in getting a satellite over a specific cloud-free area at a specific time.

For all these reasons, the usefulness of satellites as a source of tactical intelligence is limited. Where immediate results are required, an aircraft platform is often necessary in place of a satellite, but in peacetime this, of course, creates many serious political obstacles, being regarded as a clear infringement of sovereignty (to an extent not now the case for satellites). Such aircraft overflights are generally known by the nation covered, and there is always a risk that the plane will be destroyed. The political furor that was created when the U-2 piloted by Gary Powers was shot down in May 1960 as it was attempting to get intelligence on Soviet missile deployment before the Eisenhower-Khrushchev summit is too well known to need elaboration.

In some circumstances, however, the need for information may override the potential political hazards. Two years after the ill-fated Powers flight, American U-2 planes overflew Cuba looking for Soviet missile deployment, and an Air Force pilot was even killed. The need was clearly urgent, and the political repercussions were actually minor because of the worldwide recognition of the dangers presented by the Soviet move. In more recent times, photography obtained by aircraft operating in the Middle East has been widely recognized as a stabilizing influence. Thus, despite the political and, in some cases, military risks of aircraft operations, the need may justify them. Where possible, though, reliance should be placed on satellite platforms, which do not have the same political drawbacks.

Photography is not only useful in providing intelligence on capabilities but frequently is the most reliable source on intentions as well. Pictures showing the location of deployed forces, their movements, and their capabilities give valuable clues as to probable plans for their use. Observations of the movement of aircraft to forward bases would be a strong indicator of possible plans for an attack. Conversely, the failure of naval vessels to put to sea would be an indication that no immediate attack was planned.

Communications intelligence is also a primary source of information on intentions. Tight communications security, through the use of codes and other techniques, can of course sharply limit what can be learned from these sources, but it is not always practical to use such countermeasures on the scale needed to conceal modern military operations. Opportunities for security breaks are manifold. Conversely, however, communications intelligence is quite susceptible to deception, and too heavy reliance on these methods can lead to grievous intelligence failures. Careful manipulation of communications procedures can sometimes lead to false alarms or failures to recognize the imminence of an event. Misinterpretation of communications intelligence reportedly contributed to the failure to predict the outbreak of the October 1973 Middle East conflict.

Electronic intelligence is not limited purely to monitoring communications. Most modern military systems make extensive use of radar, and telemetry is normally used to give the design data from tests of new weapons such as missiles; the ability to record the emanations from such equipment, sometimes at great distances, is an important intelligence asset. An air defense radar that is not in operation, and therefore potentially monitorable, provides little air defense since it must be turned on to detect and track incoming aircraft. Testing and training exercises make it possible to learn the detailed characteristics of such systems long before the equipment is operational. And "spoofing" this type of intelligence is almost always impractical.

While the mass of published material on U.S. military matters is undoubtedly a valuable resource for foreign intelligence organizations, no similar open sources exist on the military capabilities of the U.S.S.R. and China. These nations have no parallel to *Aviation Week* or published congressional hearings. Even the military literature that does fall into our hands is often suspect. Those writers who are allowed to publish in the Soviet Union rarely express the inner thinking of the influential Soviet military planners. Sometimes, as in this country, such articles express the wishes of military minds but bear little resemblance to real policies. Often they are released to serve political objectives and are therefore untrustworthy, or, in many cases, are simply mirroring U.S. thinking in order to make up for the author's inability to publish Soviet views. Technical literature almost never contains any material of real military interest, and too often intelligence analysts are left to draw conclusions from what is not published rather than from what is. Even the published Soviet military budget is not a useful intelligence source: both former CIA Di-

rector William Colby and General Daniel Graham, then Director of the Defense Intelligence Agency, testified on July 21, 1975, before the Congressional Joint Economic Committee that dollar comparisons of the U.S. and U.S.S.R. defense budgets "were doomed to produce misleading results." Only the forces and weapons in being or under development are meaningful.

While rarely providing important information on military capabilities, technology or strategies, open sources can occasionally supply useful background on military intentions. With the large size of the current nuclear arsenals, it is unlikely that either the U.S.S.R. or China would launch an attack out of the blue. Instead, it is more likely that there would be a period of rising tensions in which they would be seeking to gain broad world public support for their position.

Open sources are, however, of much greater value for determining the military capabilities of Third World countries. In most cases of real interest, the forces, levels and types of weapons available have been publicly known as a result of coverage by the international press, from attachés, and from information furnished by nations supplying these countries with arms.

What is the true usefulness of espionage on military matters as compared with photography, communications intelligence and open sources? The honest fact, I believe, is that human covert sources rarely provide useful intelligence in the military area. It is hard enough to recruit an agent who has any inside knowledge on military affairs, but it is even more difficult to recruit one who has sufficient technical background to provide timely and meaningful information on the characteristics of modern weapons. Even Penkovskiy, the most celebrated Soviet defector-in-place and Western spy, who supplied intelligence on Soviet missile and other military programs in the early 1960s, provided in retrospect little information of major importance.[2] Every little tidbit that he provided was gobbled up with great avidity by the intelligence community, but now it is hard to pinpoint any specific information which had a significant effect on our intelligence estimates. He was primarily useful in describing organizational relationships, confirming data from other sources, and adding confidence to existing assessments. And this was at a period when our technical means of collection were less advanced than they are today. While another Penkovskiy may be developed in the future, it is difficult to

[2] Colonel Penkovskiy was a high official in Soviet military intelligence with wide access to high military circles. He was recruited as an agent but was eventually detected and executed, in circumstances recounted fully in *The Penkovskiy Papers*, trans. Peter Deriabin, New York: Doubleday, 1965.

see how such agents can ever be counted on as a major factor in our intelligence on Soviet or Chinese military matters.

In other countries, where security is less stringent, covert operations can be of somewhat greater value. Occasionally, Soviet equipment is obtained in such areas, and its capabilities studied and evaluated, but weapons exported from the Soviet Union are rarely if ever of recent origin and are therefore of marginal value. If the Soviet submarine had been successfully raised from the Pacific floor last year by the *Glomar Explorer,* it might have been well worth the high price of that operation, but this should not be considered a covert operation in the normal sense of the term. The salvage of a sunken ship in international waters is, after all, perfectly legal.

Only in the area of military intentions does espionage have an important role, but even here the potentialities are often greatly exaggerated. It would be extremely fortuitous if an agent could be recruited to provide advance information of an impending military operation. A defector might, by chance, supply some facts, but the time delay in getting his knowledge to the intelligence community would normally be too great to permit appropriate counteraction. Furthermore, the very nature of such sources renders them very unreliable in time of crisis. Agents are too often doubled or suspect for personality reasons. It seems likely that unless the information could be confirmed by other means, it might well be—or should be—ignored. For example, in World War II, the British succeeded in doubling the entire German spy net in England and then used the agents effectively to deceive their German masters on the nature of the invasion of the continent.

At the time of the Cuban missile crisis in 1962, there were reports from many sources that Soviet offensive missiles were being emplaced in Cuba. Many of these were patently false, partly because untrained observers were confused between offensive missiles and the defensive ones that were known to be in the process of deployment there. In a postmortem after the crisis was over, it was determined that only a handful of these reports were accurate, and the value of even this limited good information from these human sources was lost in the noise of the inaccurate. Such reports, true and false alike, did flag targets for U-2 photography, but not until the pictures were available could our policymakers begin to react to this hostile Soviet move.

Apart from what information on military programs and intentions can be obtained by the various methods, there is an important factor concerning the public usability of such information. In a world where governments (especially the American government) have not only to

know things privately, but to persuade their own people and other governments of the validity of their conclusions, this factor tips the scales of emphasis sharply in the direction of the overt or semi-overt forms of collection. Agent operations can almost never be disclosed without the likelihood of seriously impairing or destroying the future usefulness (or life) of the source, and also of political repercussions. And while the general practice of communications intelligence is accepted today as a fact of life by most countries, the disclosure of individual operations is almost always fatal to their continuing usefulness. Therefore, information from such sources is extremely difficult, often impossible, to use.

The same should not be true for overhead photography. Although this initially involved very sensitive operations because of the need for illegal and very provocative aircraft overflights—such as the U-2—satellite platforms have fundamentally changed the situation. As a practical matter, satellite photography has now been given international legal status by the Russians when, in the Anti-Ballistic Missile Treaty of 1972, they formally recognized that "national technical means" should be used for verification and could not be interfered with. The negotiating history makes it clear that satellite observation is included among these methods. In view of this recognition of the legality of such intelligence techniques to obtain military information, the removal of the high classification barriers imposed by our government to the broader use of satellite photography is long overdue. The claim that such action would provoke Soviet political counteraction against satellite observation, as was done in the case of the U-2, no longer has any validity.

III

In the economic area, espionage probably has even less application than in the military. Economic information by its very nature tends to be more openly available even behind the iron and bamboo curtains. Such data must be more widely disseminated than military, since it is necessary for the normal operation of the government. This is particularly true in such nations as the U.S.S.R., with its highly centralized economic planning. And there are many opportunities to obtain information from non-classified sources to assist the economic intelligence analyst. Even photography can be useful—it apparently provided advance evidence of Soviet crop failures in the summer of 1972 but unfortunately was never used by those who were outwitted on the grain deal. Even though economic information is becoming increasingly important, it is rarely necessary or desirable to risk a recruited

agent for the supply of economic data, although overt human sources, such as visiting businessmen, can often provide useful information in this area. To an overwhelming extent, accurate and timely economic information depends on the meticulous analysis of the immense volume of data that is available from open and semi-overt sources throughout the world.

In the political intelligence field, however, espionage finds greater justification. Here, the goal is to understand what people are thinking or planning. This is less susceptible to technological intelligence collection. When such ideas are translated into words or put on paper, the opportunities for procuring the information by espionage increase. The theft of a plan is always a distinct possibility, but the difficulties in carrying out such a covert operation are extraordinarily great. Bugging the Kremlin is a nice idea for spy fiction, but our national security planners had better not place any reliance on such a source. Recruiting an agent who is privy to the inner Soviet circles can be an important goal of our clandestine services but is not to be counted on. Soviet and Communist Party activities outside the Soviet Union are a much more lucrative target for clandestine intelligence operations. While a considerable part of such operations falls under the heading of counterintelligence (to be discussed later), these operations are often capable of providing important political information of a positive nature. For example, in 1956 it was actually CIA counterintelligence operations that obtained and led to the publication of Khrushchev's secret speech to the 20th Party Congress, thus revealing to the world a vital development in Soviet internal politics—and of course deeply embarrassing the Russians.

As to non-communist countries, in the more advanced nations normal diplomatic reporting and the availability of full and frank press reports almost always make the need for clandestine positive intelligence operations minimal. However, in the less advanced countries such open sources are often not adequate. In such countries decisions are often made by a small coterie of persons inside or outside the government without exposure to the press. In many countries, governments come and go with extraordinary rapidity, thus creating simultaneously a need for timely inside information and large numbers of dissident or dissatisfied individuals with access to it. Understanding of the political motivations and advance knowledge of the plans of all elements in a country is, of course, an important intelligence objective.

I suspect the need for covert intelligence operations in these areas is today increasing. A number of Third World countries have been erecting their own barriers to outside inquiry of all types and thus

hampering the activity of foreigners, especially Westerners, whether from the press, academic institutions, or diplomatic representatives.[2] To a very considerable extent, such nations are becoming themselves closed societies in which it is not possible to obtain even the kind of information readily available in the United States without resort to covert methods of intelligence collection.

However, in weighing the usefulness of covert intelligence to obtain political information, it must always be remembered that an agent can also frequently be an important source of misinformation since he may often have ulterior motives in supplying intelligence. This risk can be particularly great in cases where covert action, such as the overthrow of the government or influencing internal politics, may be simultaneously involved. This is another reason why such covert actions should be abandoned or at least divorced from intelligence collection. It has been claimed that political support is a useful tool for procuring information, but the gains therefrom are more than overbalanced by the fact that the information mission is all too often subordinated or subverted and the intelligence consumer suffers.

Even in the case of closed societies, public information and overt means are still probably the most important sources of political intelligence. Over the years, a coterie of experts on Soviet politics has grown up. The so-called Kremlinologists study every facet of Soviet life, its open literature and public statements, to develop an understanding of the social and political factors influencing Soviet decision-making. Similar groups, although far less extensive, follow other areas of the world. And the intelligence community has its own inside experts who have access to classified as well as to public information. Undoubtedly, information obtained by espionage provides for them a small but occasionally high-quality addition to the more readily available data. But even when sound information is provided by a covert source, it is useful to have a parallel open reference to the same material in order to use it publicly.

Similarly, while the interception and decoding of important communications may on occasion be useful for political and economic purposes, it is surely, again, the careful study of what is openly and widely transmitted that is most effective. The CIA's Foreign Broadcast Intelligence Service is quite properly an important tool widely shared with scholars and others throughout the world. And there have been occasions when open radio messages have provided crucial advance information: I recall particularly the case in 1961 when the

[2] See for example, Henry Kamm, "The Third World Rapidly Turning Into a Closed World for the Foreign Correspondent," *The New York Times*, January 14, 1976, p. 12.

Soviets sent over the radio, uncoded and three days in advance, the text of a press release announcing that they were conducting a nuclear test—thus unilaterally terminating the test ban moratorium that had been in existence for nearly three years. Unfortunately, in this case, the intelligence break was squandered when it was decided that it would be unwise for the President to put his prestige on the line by making strong representations to reverse the Soviet plan.

IV

So far I have discussed the collection of positive intelligence in the military, economic and political fields. Counterintelligence is very different, very arcane, but nevertheless very important. Not only must we continue to detect and counter the continuing very extensive operations of the KGB, the Soviet secret intelligence organization, but we must also now deal with the new and rapidly growing threats from terrorism by unstable individuals or dissident groups. In the future, we may be faced with even higher levels of violence than we have been in the past. The burgeoning nuclear power industry is making available in many parts of the world ever-greater quantities of fissionable material, particularly plutonium, which can be readily converted into nuclear explosives. The opportunities for nuclear threats or even an atomic catastrophe are growing rapidly. Physical security over these dangerous materials can probably never be 100 percent effective, and we cannot await a blackmail letter before attempting to address the problem; counterintelligence may be a vital tool for combating terrorism both at home and abroad.

Nevertheless, counterintelligence operations, particularly at home, have certainly produced unacceptable abuses of our fundamental constitutional rights, and we must develop new methods of guarding society from violence or foreign subversion without trampling on individual liberties. While the transgressions of the CIA have attracted the greatest public notice because its charter does not permit active operations within the United States, the activities of the FBI, which has the primary responsibility for internal counterintelligence, raise the most critical constitutional problem. To date, foreign operations have not come under serious criticism for having abridged civil rights even though many of their types of operations are similar to those carried out within the United States. Since internal security is a very large and in many respects a separate field which goes beyond what can be adequately covered in this article, I shall concentrate my attention on those aspects of counterintelligence operations which have foreign as well as domestic implications and not attempt to draw con-

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clusions on how we solve our national constitutional problems.

There can be little doubt that covert human operations abroad—all that goes into counterespionage—remain a vital technique. In this area neither overhead photography nor the direct use of open sources can play a major part. The infiltration of potential threatening organizations or groups is a basic tool of the game. Defectors have been extremely important in the past, and it is interesting to note that the more productive of these have come from the KGB and have probably provided better information on the intelligence operations of the communist bloc than on any other aspect of their society. Moreover, the defectors and agents that have produced the best positive intelligence in many other areas have also often come from foreign intelligence services—for example, Penkovskiy. It is a strange commentary that members of these supposedly high-security organizations should be the most susceptible to subversion.

Much more serious issues are raised by new technical methods that have significantly advanced the art of counterintelligence but unfortunately—instead of making it easier to obtain information without provocation as similar advances have done in the positive intelligence areas—have created a whole new class of threats to personal privacy. Today electronic eavesdropping and computer data banks are prime tools of the counterintelligence trade, aiming to sift out the messages and activities of foreign agents or terrorists but at the same time almost necessarily catching up in their net a vast amount of information on ordinary citizens. (This problem also applies acutely to the collection of communications intelligence for positive intelligence purposes.) The same is true of security checks on our own intelligence personnel, which are necessary to expose dangerous individuals and to protect against the unremitting efforts of the KGB in particular to penetrate our own sensitive organizations.

How are our intelligence agencies to collect what is important, and at the same time to ensure that information irrelevant to valid counterintelligence purposes is destroyed or put aside beyond reach of misuse? Are there areas of information that must simply be omitted—as, for example, the CIA, under threat of disclosure of a patently illegal activity, abandoned in 1973 its scanning and occasional opening of mail to the Soviet Union? And can the balance be struck through legislation? The problems are immensely difficult, already addressed in part by newly proposed FBI guidelines, and doubtless to be considered further in the report of the Church Select Committee that is in press as this article is written. I suspect, however, that we shall need to go further than these efforts to get at the roots of the problems and

to establish balanced standards for operation, which should then be rigorously applied through some form of continuing supervision.

Counterintelligence operations go against the grain for many Americans, an attitude compounded by the fact that the information gained through them is almost always extremely sensitive, difficult to use publicly without compromising sources, and thus frequently useful only for guidance and warning to our law enforcement officials, rarely as a practical means of bringing an enemy agent into a court of law. But in the world of today—again having in mind not only the KGB but also the rapid spread of terrorist groups—it is hard to avoid the conclusion that effective counterintelligence, in turn largely covert, is essential to our true security—indeed that it may in itself justify the continuance of a major covert foreign intelligence organization in some form. But a whole new effort to establish standards and controls over such operations is plainly needed.

V

In sum, espionage would appear to have a limited but nevertheless critical potential as a source of intelligence information. For counterintelligence, covert agent operations are probably irreplaceable. However, on the national security and military activities within the Sino-Soviet blocs, it will rarely supply data of any great value or data easily usable for decision-making in a democratic society; it is, therefore, a relatively unimportant and less reliable adjunct to technical methods of collection such as satellite photography and communications and other electronic monitoring. These latter probably are more valuable than espionage, even in providing the basis for estimating the intentions of Soviet and Chinese leaders. Open published information and that obtained through diplomatic and other overt contacts is by far the most generally useful source of political and economic intelligence.

Nevertheless, it would be wrong to halt clandestine agent operations even for the collection of foreign intelligence. These can be most useful, not in the U.S.S.R. and China where security and control over individuals are great, but in Third World nations where the knowledge of the attitudes of persons outside, as well as inside, the government is essential if we are to conduct a sound foreign policy. The threat of espionage can also be at least a deterrent behind the Iron Curtain. However, the limited value of agent operations combined with their potential political liabilities makes it incumbent on the U.S. government to limit such activities to those targets where the potential gains clearly outweigh the potential risks. We have no room for operations for operations' sake in our intelligence structure.

federal register

APPENDIX III

THURSDAY, JANUARY 26, 1978
PART II

THE PRESIDENT

■

UNITED STATES INTELLIGENCE ACTIVITIES

Executive Order 12036

3674

presidential documents

[3195-01]

Title 3—The President

Executive Order 12036 • **January 24, 1978**

United States Intelligence Activities

By virtue of the authority vested in me by the Constitution and statutes of the United States of America including the National Security Act of 1947, as amended, and as President of the United States of America, in order to provide for the organization and control of United States foreign intelligence activities, it is hereby ordered as follows:

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SECTION 1

DIRECTION, DUTIES AND RESPONSIBILITIES WITH RESPECT TO THE NATIONAL INTELLIGENCE EFFORT*

1-1. *National Security Council.*

1-101. *Purpose.* The National Security Council (NSC) was established by the National Security Act of 1947 to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security. The NSC shall act as the highest Executive Branch entity that provides review of, guidance for, and direction to the conduct of all national foreign intelligence and counterintelligence activities.

1-102. *Committees.* The NSC Policy Review Committee and Special Coordination Committee; in accordance with procedures established by the Assistant to the President for National Security Affairs, shall assist in carrying out the NSC's responsibilities in the foreign intelligence field.

1-2. *NSC Policy Review Committee.*

1-201. *Membership.* The NSC Policy Review Committee (PRC), when carrying out responsibilities assigned in this Order, shall be chaired by the Director of Central Intelligence and composed of the Vice President, the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the Assistant to the President for National Security Affairs, and the Chairman of the Joint Chiefs of Staff, or their designees, and other senior officials, as appropriate.

1-202. *Duties.* The PRC shall:

(a) Establish requirements and priorities for national foreign intelligence;

(b) Review the National Foreign Intelligence Program and budget proposals and report to the President as to whether the resource allocations for intelligence capabilities are responsive to the intelligence requirements of the members of the NSC.

(c) Conduct periodic reviews of national foreign intelligence products, evaluate the quality of the intelligence product, develop policy guidance to ensure quality intelligence and to meet changing intelligence requirements; and

(d) Submit an annual report on its activities to the NSC.

1-203. *Appeals.* Recommendations of the PRC on intelligence matters may be appealed to the President or the NSC by any member of PRC.

1-3. *NSC Special Coordination Committee.*

1-301. *Membership.* The NSC Special Coordination Committee (SCC) is chaired by the Assistant to the President for National Security Affairs and its membership includes the statutory members of the NSC and other senior officials, as appropriate.

1-302. *Special Activities.* The SCC shall consider and submit to the President a policy recommendation, including all dissents, on each special activity. When meeting for this purpose, the members of the SCC shall include the Secretary of State, the Secretary of Defense, the Attorney General, the Director of the Office of Management and Budget, the Assistant to the President for National Security Affairs, the Chairman of the Joint Chiefs of Staff, and the Director of Central Intelligence.

1-303. *Sensitive Foreign Intelligence Collection Operations.* Under standards established by the President, proposals for sensitive foreign intelligence collection operations shall be reported to the Chairman by the Director of Central Intelligence for appropriate review and approval. When meeting for the purpose of reviewing proposals for sensitive foreign intelligence collection operations,

*Certain technical terms are defined in Section 4-2.

the members of the SCC shall include the Secretary of State, the Secretary of Defense, the Attorney General, the Assistant to the President for National Security Affairs, the Director of Central Intelligence, and such other members designated by the Chairman to ensure proper consideration of these operations.

1-304. *Counterintelligence.* The SCC shall develop policy with respect to the conduct of counterintelligence activities. When meeting for this purpose the members of the SCC shall include the Secretary of State, the Secretary of Defense, the Attorney General, the Director of the Office of Management and Budget, the Assistant to the President for National Security Affairs, the Chairman of the Joint Chiefs of Staff, the Director of Central Intelligence, and the Director of the FBI. The SCC's counterintelligence functions shall include:

(a) Developing standards and doctrine for the counterintelligence activities of the United States;

(b) Resolving interagency differences concerning implementation of counterintelligence policy;

(c) Developing and monitoring guidelines consistent with this Order for the maintenance of central records of counterintelligence information;

(d) Submitting to the President an overall annual assessment of the relative threat to United States interests from intelligence and security services of foreign powers and from international terrorist activities, including an assessment of the effectiveness of the United States counterintelligence activities; and

(e) Approving counterintelligence activities which, under such standards as may be established by the President, require SCC approval.

1-305. *Required Membership.* The SCC shall discharge the responsibilities assigned by sections 1-302 through 1-304 only after consideration in a meeting at which all designated members are present or, in unusual circumstances when any such member is unavailable, when a designated representative of the member attends.

1-306. *Additional Duties.* The SCC shall also:

(a) Conduct an annual review of ongoing special activities and sensitive national foreign intelligence collection operations and report thereon to the NSC; and

(b) Carry out such other coordination and review activities as the President may direct.

1-307. *Appeals.* Any member of the SCC may appeal any decision to the President or the NSC.

1-4. *National Foreign Intelligence Board.*

1-401. *Establishment and Duties.* There is established a National Foreign Intelligence Board (NFIB) to advise the Director of Central Intelligence concerning:

(a) Production, review, and coordination of national foreign intelligence;

(b) The National Foreign Intelligence Program budget;

(c) Interagency exchanges of foreign intelligence information;

(d) Arrangements with foreign governments on intelligence matters;

(e) The protection of intelligence sources and methods;

(f) Activities of common concern; and

(g) Other matters referred to it by the Director of Central Intelligence.

1-402. *Membership.* The NFIB shall be chaired by the Director of Central Intelligence and shall include other appropriate officers of the CIA, the Office of the Director of Central Intelligence, the Department of State, the Department of Defense, the Department of Justice, the Department of the Treasury, the Department of Energy, the Defense Intelligence Agency, the offices within the Department of Defense for reconnaissance programs, the National Security Agency and the FBI. A representative of the Assistant to the President for National Security Affairs may attend meetings of the NFIB as an observer.

1-403. *Restricted Membership and Observers.* When the NFIB meets for the purpose of section 1-401(a), it shall be composed solely of the senior intelligence officers of the designated agencies. The senior intelligence officers of the Army, Navy and Air Force may attend all meetings of the NFIB as observers.

1-5. *National Intelligence Tasking Center.*

1-501. *Establishment.* There is established a National Intelligence Tasking Center (NITC) under the direction, control and management of the Director of Central Intelligence for coordinating and tasking national foreign intelligence collection activities. The NITC shall be staffed jointly by civilian and military personnel including designated representatives of the chiefs of each of the Department of Defense intelligence organizations engaged in national foreign intelligence activities. Other agencies within the Intelligence Community may also designate representatives.

1-502. *Responsibilities.* The NITC shall be the central mechanism by which the Director of Central Intelligence:

(a) Translates national foreign intelligence requirements and priorities developed by the PRC into specific collection objectives and targets for the Intelligence Community;

(b) Assigns targets and objectives to national foreign intelligence collection organizations and systems;

(c) Ensures the timely dissemination and exploitation of data for national foreign intelligence purposes gathered by national foreign intelligence collection means, and ensures the resulting intelligence flow is routed immediately to relevant components and commands;

(d) Provides advisory tasking concerning collection of national foreign intelligence to departments and agencies having information collection capabilities or intelligence assets that are not a part of the National Foreign Intelligence Program. Particular emphasis shall be placed on increasing the contribution of departments or agencies to the collection of information through overt means.

1-503. *Resolution of Conflicts.* The NITC shall have the authority to resolve conflicts of priority. Any PRC member may appeal such a resolution to the PRC; pending the PRC's decision, the tasking remains in effect.

1-504. *Transfer of Authority.* All responsibilities and authorities of the Director of Central Intelligence concerning the NITC shall be transferred to the Secretary of Defense upon the express direction of the President. To maintain readiness for such transfer, the Secretary of Defense shall, with advance agreement of the Director of Central Intelligence, assume temporarily during regular practice exercises all responsibilities and authorities of the Director of Central Intelligence concerning the NITC.

1-6. *The Director of Central Intelligence.*

1-601. *Duties.* The Director of Central Intelligence shall be responsible directly to the NSC and, in addition to the duties specified elsewhere in this Order, shall:

(a) Act as the primary adviser to the President and the NSC on national foreign intelligence and provide the President and other officials in the Executive Branch with national foreign intelligence;

(b) Be the head of the CIA and of such staff elements as may be required for discharge of the Director's Intelligence Community responsibilities;

(c) Act, in appropriate consultation with the departments and agencies, as the Intelligence Community's principal spokesperson to the Congress, the news media and the public, and facilitate the use of national foreign intelligence products by the Congress in a secure manner;

(d) Develop, consistent with the requirements and priorities established by the PRC, such objectives and guidance for the Intelligence Community as will

enhance capabilities for responding to expected future needs for national foreign intelligence;

(e) Promote the development and maintenance of services of common concern by designated foreign intelligence organizations on behalf of the Intelligence Community;

(f) Ensure implementation of special activities;

(g) Formulate policies concerning intelligence arrangements with foreign governments, and coordinate intelligence relationships between agencies of the Intelligence Community and the intelligence or internal security services of foreign governments;

(h) Conduct a program to protect against overclassification of foreign intelligence information;

(i) Ensure the establishment by the Intelligence Community of common security and access standards for managing and handling foreign intelligence systems, information and products;

(j) Participate in the development of procedures required to be approved by the Attorney General governing the conduct of intelligence activities;

(k) Establish uniform criteria for the determination of relative priorities for the transmission of critical national foreign intelligence, and advise the Secretary of Defense concerning the communications requirements of the Intelligence Community for the transmission of such intelligence;

(l) Provide appropriate intelligence to departments and agencies not within the Intelligence Community; and

(m) Establish appropriate committees or other advisory groups to assist in the execution of the foregoing responsibilities.

1-602. *National Foreign Intelligence Program Budget.* The Director of Central Intelligence shall, to the extent consistent with applicable law, have full and exclusive authority for approval of the National Foreign Intelligence Program budget submitted to the President. Pursuant to this authority:

(a) The Director of Central Intelligence shall provide guidance for program and budget development to program managers and heads of component activities and to department and agency heads;

(b) The heads of departments and agencies involved in the National Foreign Intelligence Program shall ensure timely development and submission to the Director of Central Intelligence of proposed national programs and budgets in the format designated by the Director of Central Intelligence, by the program managers and heads of component activities, and shall also ensure that the Director of Central Intelligence is provided, in a timely and responsive manner, all information necessary to perform the Director's program and budget responsibilities;

(c) The Director of Central Intelligence shall review and evaluate the national program and budget submissions and, with the advice of the NFIB and the departments and agencies concerned, develop the consolidated National Foreign Intelligence Program budget and present it to the President through the Office of Management and Budget;

(d) The Director of Central Intelligence shall present and justify the National Foreign Intelligence Program budget to the Congress;

(e) The heads of the departments and agencies shall, in consultation with the Director of Central Intelligence, establish rates of obligation for appropriated funds;

(f) The Director of Central Intelligence shall have full and exclusive authority for reprogramming National Foreign Intelligence Program funds, in accord with guidelines established by the Office of Management and Budget, but shall do so only after consultation with the head of the department affected and appropriate consultation with the Congress;

(g) The departments and agencies may appeal to the President decisions by the Director of Central Intelligence on budget or reprogramming matters of the National Foreign Intelligence Program.

(h) The Director of Central Intelligence shall monitor National Foreign Intelligence Program implementation and may conduct program and performance audits and evaluations.

1-603. *Responsibility For National Foreign Intelligence.* The Director of Central Intelligence shall have full responsibility for production and dissemination of national foreign intelligence and have authority to levy analytic tasks on departmental intelligence production organizations, in consultation with those organizations. In doing so, the Director of Central Intelligence shall ensure that diverse points of view are considered fully and that differences of judgment within the Intelligence Community are brought to the attention of national policymakers.

1-604. *Protection of Sources, Methods and Procedures.* The Director of Central Intelligence shall ensure that programs are developed which protect intelligence sources, methods and analytical procedures, provided that this responsibility shall be limited within the United States to:

(a) Using lawful means to protect against disclosure by present or former employees of the CIA or the Office of the Director of Central Intelligence, or by persons or organizations presently or formerly under contract with such entities; and

(b) Providing policy, guidance and technical assistance to departments and agencies regarding protection of intelligence information, including information that may reveal intelligence sources and methods.

1-605. *Responsibility of Executive Branch Agencies.* The heads of all Executive Branch departments and agencies shall, in accordance with law and relevant Attorney General procedures, give the Director of Central Intelligence access to all information relevant to the national intelligence needs of the United States and shall give due consideration to requests from the Director of Central Intelligence for appropriate support for CIA activities.

1-606. *Access to CIA Intelligence.* The Director of Central Intelligence, shall, in accordance with law and relevant Attorney General procedures, give the heads of the departments and agencies access to all intelligence, developed by the CIA or the staff elements of the Office of the Director of Central Intelligence, relevant to the national intelligence needs of the departments and agencies.

1-7. *Senior Officials of the Intelligence Community.* The senior officials of each of the agencies within the Intelligence Community shall:

1-701. Ensure that all activities of their agencies are carried out in accordance with applicable law;

1-702. Make use of the capabilities of other agencies within the Intelligence Community in order to achieve efficiency and mutual assistance;

1-703. Contribute in their areas of responsibility to the national foreign intelligence products;

1-704. Establish internal policies and guidelines governing employee conduct and ensure that such are made known to each employee;

1-705. Provide for strong, independent, internal means to identify, inspect, and report on unlawful or improper activity;

1-706. Report to the Attorney General evidence of possible violations of federal criminal law by an employee of their department or agency, and report to the Attorney General evidence of possible violations by any other person of those federal criminal laws specified in guidelines adopted by the Attorney General;

1–707. In any case involving serious or continuing breaches of security, recommend to the Attorney General that the case be referred to the FBI for further investigation;

1–708. Furnish the Director of Central Intelligence, the PRC and the SCC, in accordance with applicable law and Attorney General procedures, the information required for the performance of their respective duties;

1–709. Report to the Intelligence Oversight Board, and keep the Director of Central Intelligence appropriately informed, concerning any intelligence activities of their organizations which raise questions of legality or propriety;

1–710. Protect intelligence and intelligence sources and methods consistent with guidance from the Director of Central Intelligence and the NSC;

1–711. Disseminate intelligence to cooperating foreign governments under arrangements established or agreed to by the Director of Central Intelligence;

1–712. Execute programs to protect against overclassification of foreign intelligence;

1–713. Instruct their employees to cooperate fully with the Intelligence Oversight Board; and

1–714. Ensure that the Inspectors General and General Counsel of their agencies have access to any information necessary to perform their duties assigned by this Order.

1–8. *The Central Intelligence Agency.* All duties and responsibilities of the CIA shall be related to the intelligence functions set out below. As authorized by the National Security Act of 1947, as amended, the CIA Act of 1949, as amended, and other laws, regulations and directives, the CIA, under the direction of the NSC, shall:

1–801. Collect foreign intelligence, including information not otherwise obtainable, and develop, conduct, or provide support for technical and other programs which collect national foreign intelligence. The collection of information within the United States shall be coordinated with the FBI as required by procedures agreed upon by the Director of Central Intelligence and the Attorney General;

1–802. Produce and disseminate foreign intelligence relating to the national security, including foreign political, economic, scientific, technical, military, geographic and sociological intelligence to meet the needs of the President, the NSC, and other elements of the United States Government;

1–803. Collect, produce and disseminate intelligence on foreign aspects of narcotics production and trafficking;

1–804. Conduct counterintelligence activities outside the United States and coordinate counterintelligence activities conducted outside the United States by other agencies within the Intelligence Community;

1–805. Without assuming or performing any internal security functions, conduct counterintelligence activities within the United States, but only in coordination with the FBI and subject to the approval of the Attorney General;

1–806. Produce and disseminate counterintelligence studies and reports;

1–807. Coordinate the collection outside the United States of intelligence information not otherwise obtainable;

1–808. Conduct special activities approved by the President and carry out such activities consistent with applicable law;

1–809. Conduct services of common concern for the Intelligence Community as directed by the NSC;

1–810. Carry out or contract for research, development and procurement of technical systems and devices relating to authorized functions;

1–811. Protect the security of its installations, activities, information and personnel by appropriate means, including such investigations of applicants,

employees, contractors, and other persons with similar associations with the CIA as are necessary;

1-812. Conduct such administrative and technical support activities within and outside the United States as are necessary to perform the functions described in sections 1-801 through 1-811 above, including procurement and essential cover and proprietary arrangements.

1-813. Provide legal and legislative services and other administrative support to the Office of the Director of Central Intelligence.

1-9. *The Department of State.* The Secretary of State shall:

1-901. Overtly collect foreign political, sociological, economic, scientific, technical, political-military and associated biographic information;

1-902. Produce and disseminate foreign intelligence relating to United States foreign policy as required for the execution of the Secretary's responsibilities;

1-903. Disseminate, as appropriate, reports received from United States diplomatic and consular posts abroad;

1-904. Coordinate with the Director of Central Intelligence to ensure that national foreign intelligence activities are useful to and consistent with United States foreign policy;

1-905. Transmit reporting requirements of the Intelligence Community to the Chiefs of United States Missions abroad; and

1-906. Support Chiefs of Mission in discharging their statutory responsibilities for direction and coordination of mission activities.

1-10. *The Department of the Treasury.* The Secretary of the Treasury shall:

1-1001. Overtly collect foreign financial and monetary information;

1-1002. Participate with the Department of State in the overt collection of general foreign economic information;

1-1003. Produce and disseminate foreign intelligence relating to United States economic policy as required for the execution of the Secretary's responsibilities; and

1-1004. Conduct, through the United States Secret Service, activities to determine the existence and capability of surveillance equipment being used against the President of the United States, the Executive Office of the President, and, as authorized by the Secretary of the Treasury or the President, other Secret Service protectees and United States officials. No information shall be acquired intentionally through such activities except to protect against such surveillance, and those activities shall be conducted pursuant to procedures agreed upon by the Secretary of the Treasury and the Attorney General.

1-11. *The Department of Defense.* The Secretary of Defense shall:

1-1101. Collect national foreign intelligence and be responsive to collection tasking by the NITC;

1-1102. Collect, produce and disseminate foreign military and military-related intelligence information, including scientific, technical, political, geographic and economic information as required for execution of the Secretary's responsibilities;

1-1103. Conduct programs and missions necessary to fulfill national and tactical foreign intelligence requirements;

1-1104. Conduct counterintelligence activities in support of Department of Defense components outside the United States in coordination with the CIA, and within the United States in coordination with the FBI pursuant to procedures agreed upon by the Secretary of Defense and the Attorney General, and produce and disseminate counterintelligence studies and reports;

1-1105. Direct, operate, control and provide fiscal management for the National Security Agency and for defense and military intelligence and national reconnaissance entities;

1-1106. Conduct, as the executive agent of the United States Government, signals intelligence and communications security activities, except as otherwise directed by the NSC;

1-1107. Provide for the timely transmission of critical intelligence, as defined by the Director of Central Intelligence, within the United States Government;

1-1108. Review budget data and information on Department of Defense programs within the National Foreign Intelligence Program and review budgets submitted by program managers to the Director of Central Intelligence to ensure the appropriate relationship of the National Foreign Intelligence Program elements to the other elements of the Defense program;

1-1109. Monitor, evaluate and conduct performance audits of Department of Defense intelligence programs;

1-1110. Carry out or contract for research, development and procurement of technical systems and devices relating to authorized intelligence functions;

1-1111. Together with the Director of Central Intelligence, ensure that there is no unnecessary overlap between national foreign intelligence programs and Department of Defense intelligence programs and provide the Director of Central Intelligence all information necessary for this purpose;

1-1112. Protect the security of Department of Defense installations, activities, information and personnel by appropriate means including such investigations of applicants, employees, contractors and other persons with similar associations with the Department of Defense as are necessary; and

1-1113. Conduct such administrative and technical support activities within and outside the United States as are necessary to perform the functions described in sections 1-1101 through 1-1112 above.

1-12. *Intelligence Components Utilized by the Secretary of Defense.* In carrying out the responsibilities assigned in sections 1-1101 through 1-1113, the Secretary of Defense is authorized to utilize the following:

1-1201. *Defense Intelligence Agency*, whose responsibilities shall include:

(a) Production or, through tasking and coordination, provision of military and military-related intelligence for the Secretary of Defense, the Joint Chiefs of Staff, other Defense components, and, as appropriate, non-Defense agencies;

(b) Provision of military intelligence for national foreign intelligence products;

(c) Coordination of all Department of Defense intelligence collection requirements for departmental needs;

(d) Management of the Defense Attache system; and

(e) Provision of foreign intelligence and counterintelligence staff support as directed by the Joint Chiefs of Staff.

1-1202. *National Security Agency* (NSA), whose responsibilities shall include:

(a) Establishment and operation of an effective unified organization for signals intelligence activities, except for the delegation of operational control over certain operations that are conducted through other elements of the Intelligence Community. No other department or agency may engage in signals intelligence activities except pursuant to a delegation by the Secretary of Defense;

(b) Control of signals intelligence collection and processing activities, including assignment of resources to an appropriate agent for such periods and tasks as required for the direct support of military commanders;

(c) Collection of signals intelligence information for national foreign intelligence purposes in accordance with tasking by the NITC;

(d) Processing of signals intelligence data for national foreign intelligence purposes consistent with standards for timeliness established by the Director of Central Intelligence;

(e) Dissemination of signals intelligence information for national foreign intelligence purposes to authorized elements of the Government, including the military services, in accordance with guidance from the NITC;

(f) Collection, processing, and dissemination of signals intelligence information for counterintelligence purposes;

(g) Provision of signals intelligence support for the conduct of military operations in accordance with tasking, priorities and standards of timeliness assigned by the Secretary of Defense. If provision of such support requires use of national collection systems, these systems will be tasked within existing guidance from the Director of Central Intelligence;

(h) Executing the responsibilities of the Secretary of Defense as executive agent for the communications security of the United States Government;

(i) Conduct of research and development to meet needs of the United States for signals intelligence and communications security;

(j) Protection of the security of its installations, activities, information and personnel by appropriate means including such investigations of applicants, employees, contractors and other persons with similar associations with the NSA as are necessary; and

(k) Prescribing, within its field of authorized operations, security regulations covering operating practices, including the transmission, handling and distribution of signals intelligence and communications security material within and among the elements under control of the Director of the NSA, and exercising the necessary supervisory control to ensure compliance with the regulations.

1-1203. *Offices for the collection of specialized intelligence through reconnaissance programs*, whose responsibilities shall include:

(a) Carrying out consolidated reconnaissance programs for specialized intelligence;

(b) Responding to tasking through the NITC; and

(c) Delegating authority to the various departments and agencies for research, development, procurement, and operation of designated means of collection.

1-1204. *The foreign intelligence and counterintelligence elements of the military services*, whose responsibilities shall include:

(a) Collection, production and dissemination of military and military-related foreign intelligence, including information on indications and warnings, foreign capabilities, plans and weapons systems, scientific and technical developments and narcotics production and trafficking. When collection is conducted in response to national foreign intelligence requirements, it will be tasked by the NITC. Collection of national foreign intelligence, not otherwise obtainable, outside the United States shall be coordinated with the CIA, and such collection within the United States shall be coordinated with the FBI;

(b) Conduct of counterintelligence activities outside the United States in coordination with the CIA, and within the United States in coordination with the FBI, and production and dissemination of counterintelligence studies or reports; and

(c) Monitoring of the development, procurement and management of tactical intelligence systems and equipment and conducting related research, development, and test and evaluation activities.

1-1205. *Other offices within the Department of Defense* appropriate for conduct of the intelligence missions and responsibilities assigned to the Secretary of Defense. If such other offices are used for intelligence purposes, the provisions of Sections 2-101 through 2-309 of this Order shall apply to those offices when used for those purposes.

1-13. *The Department of Energy.* The Secretary of Energy shall:

1-1301. Participate with the Department of State in overtly collecting political, economic and technical information with respect to foreign energy matters;

1-1302. Produce and disseminate foreign intelligence necessary for the Secretary's responsibilities;

1-1303. Participate in formulating intelligence collection and analysis requirements where the special expert capability of the Department can contribute; and

1-1304. Provide expert technical, analytical and research capability to other agencies within the Intelligence Community.

1-14. *The Federal Bureau of Investigation.* Under the supervision of the Attorney General and pursuant to such regulations as the Attorney General may establish, the Director of the FBI shall:

1-1401. Within the United States conduct counterintelligence and coordinate counterintelligence activities of other agencies within the Intelligence Community. When a counterintelligence activity of the FBI involves military or civilian personnel of the Department of Defense, the FBI shall coordinate with the Department of Defense;

1-1402. Conduct counterintelligence activities outside the United States in coordination with the CIA, subject to the approval of the Director of Central Intelligence;

1-1403. Conduct within the United States, when requested by officials of the Intelligence Community designated by the President, lawful activities undertaken to collect foreign intelligence or support foreign intelligence collection requirements of other agencies within the Intelligence Community;

1-1404. Produce and disseminate foreign intelligence, counterintelligence and counterintelligence studies and reports; and

1-1405. Carry out or contract for research, development and procurement of technical systems and devices relating to the functions authorized above.

1-15. *The Drug Enforcement Administration.* Under the supervision of the Attorney General and pursuant to such regulations as the Attorney General may establish, the Administrator of DEA shall:

1-1501. Collect, produce and disseminate intelligence on the foreign and domestic aspects of narcotics production and trafficking in coordination with other agencies with responsibilities in these areas;

1-1502. Participate with the Department of State in the overt collection of general foreign political, economic and agricultural information relating to narcotics production and trafficking; and

1-1503. Coordinate with the Director of Central Intelligence to ensure that the foreign narcotics intelligence activities of DEA are consistent with other foreign intelligence programs.

SECTION 2

Restrictions on Intelligence Activities

2-1. *Adherence to Law.*

2-101. *Purpose.* Information about the capabilities, intentions and activities of foreign powers, organizations, or persons and their agents is essential to informed decision-making in the areas of national defense and foreign relations. The measures employed to acquire such information should be responsive to legitimate governmental needs and must be conducted in a manner that preserves and respects established concepts of privacy and civil liberties.

2-102. *Principles of Interpretation.* Sections 2-201 through 2-309 set forth limitations which, in addition to other applicable laws, are intended to achieve

the proper balance between protection of individual rights and acquisition of essential information. Those sections do not authorize any activity not authorized by sections 1-101 through 1-1503 and do not provide any exemption from any other law.

2-2. *Restrictions on Certain Collection Techniques.*

2-201. *General Provisions.*

(a) The activities described in Sections 2-202 through 2-208 shall be undertaken only as permitted by this Order and by procedures established by the head of the agency concerned and approved by the Attorney General. Those procedures shall protect constitutional rights and privacy, ensure that information is gathered by the least intrusive means possible, and limit use of such information to lawful governmental purposes.

(b) Activities described in sections 2-202 through 2-205 for which a warrant would be required if undertaken for law enforcement rather than intelligence purposes shall not be undertaken against a United States person without a judicial warrant, unless the President has authorized the type of activity involved and the Attorney General has both approved the particular activity and determined that there is probable cause to believe that the United States person is an agent of a foreign power.

2-202. *Electronic Surveillance.* The CIA may not engage in any electronic surveillance within the United States. No agency within the Intelligence Community shall engage in any electronic surveillance directed against a United States person abroad or designed to intercept a communication sent from, or intended for receipt within, the United States except as permitted by the procedures established pursuant to section 2-201. Training of personnel by agencies in the Intelligence Community in the use of electronic communications equipment, testing by such agencies of such equipment, and the use of measures to determine the existence and capability of electronic surveillance equipment being used unlawfully shall not be prohibited and shall also be governed by such procedures. Such activities shall be limited in scope and duration to those necessary to carry out the training, testing or countermeasures purpose. No information derived from communications intercepted in the course of such training, testing or use of countermeasures may be retained or used for any other purpose.

2-203. *Television Cameras and Other Monitoring.* No agency within the Intelligence Community shall use any electronic or mechanical device surreptitiously and continuously to monitor any person within the United States, or any United States person abroad, except as permitted by the procedures established pursuant to Section 2-201.

2-204. *Physical Searches.* No agency within the Intelligence Community except the FBI may conduct any unconsented physical searches within the United States. All such searches conducted by the FBI, as well as all such searches conducted by any agency within the Intelligence Community outside the United States and directed against United States persons, shall be undertaken only as permitted by procedures established pursuant to Section 2-201.

2-205. *Mail Surveillance.* No agency within the Intelligence Community shall open mail or examine envelopes in United States postal channels, except in accordance with applicable statutes and regulations. No agency within the Intelligence Community shall open mail of a United States person abroad except as permitted by procedures established pursuant to Section 2-201.

2-206. *Physical Surveillance.* The FBI may conduct physical surveillance directed against United States persons or others only in the course of a lawful investigation. Other agencies within the Intelligence Community may not undertake any physical surveillance directed against a United States person unless:

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(a) The surveillance is conducted outside the United States and the person being surveilled is reasonably believed to be acting on behalf of a foreign power, engaging in international terrorist activities, or engaging in narcotics production or trafficking;

(b) The surveillance is conducted solely for the purpose of identifying a person who is in contact with someone who is the subject of a foreign intelligence or counterintelligence investigation; or

(c) That person is being surveilled for the purpose of protecting foreign intelligence and counterintelligence sources and methods from unauthorized disclosure or is the subject of a lawful counterintelligence, personnel, physical or communications security investigation.

(d) No surveillance under paragraph (c) of this section may be conducted within the United States unless the person being surveilled is a present employee, intelligence agency contractor or employee of such a contractor, or is a military person employed by a non-intelligence element of a military service. Outside the United States such surveillance may also be conducted against a former employee, intelligence agency contractor or employee of a contractor or a civilian person employed by a non-intelligence element of an agency within the Intelligence Community. A person who is in contact with such a present or former employee or contractor may also be surveilled, but only to the extent necessary to identify that person.

2-207. *Undisclosed Participation in Domestic Organizations.* No employees may join, or otherwise participate in, any organization within the United States on behalf of any agency within the Intelligence Community without disclosing their intelligence affiliation to appropriate officials of the organization, except as permitted by procedures established pursuant to Section 2-201. Such procedures shall provide for disclosure of such affiliation in all cases unless the agency head or a designee approved by the Attorney General finds that non-disclosure is essential to achieving lawful purposes, and that finding is subject to review by the Attorney General. Those procedures shall further limit undisclosed participation to cases where:

(a) The participation is undertaken on behalf of the FBI in the course of a lawful investigation;

(b) The organization concerned is composed primarily of individuals who are not United States persons and is reasonably believed to be acting on behalf of a foreign power; or

(c) The participation is strictly limited in its nature, scope and duration to that necessary for other lawful purposes relating to foreign intelligence and is a type of participation approved by the Attorney General and set forth in a public document. No such participation may be undertaken for the purpose of influencing the activity of the organization or its members.

2-208. *Collection of Nonpublicly Available Information.* No agency within the Intelligence Community may collect, disseminate or store information concerning the activities of United States persons that is not available publicly, unless it does so with their consent or as permitted by procedures established pursuant to Section 2-201. Those procedures shall limit collection, storage or dissemination to the following types of information:

(a) Information concerning corporations or other commercial organizations or activities that constitutes foreign intelligence or counterintelligence;

(b) Information arising out of a lawful counterintelligence or personnel, physical or communications security investigation;

(c) Information concerning present or former employees, present or former intelligence agency contractors or their present or former employees, or applicants for any such employment or contracting, which is needed to protect foreign intelligence or counterintelligence sources or methods from unauthorized disclosure;

(d) Information needed solely to identify individuals in contact with those persons described in paragraph (c) of this section or with someone who is the subject of a lawful foreign intelligence or counterintelligence investigation;

(e) Information concerning persons who are reasonably believed to be potential sources or contacts, but only for the purpose of determining the suitability or credibility of such persons;

(f) Information constituting foreign intelligence or counterintelligence gathered abroad or from electronic surveillance conducted in compliance with Section 2-202 or from cooperating sources in the United States;

(g) Information about a person who is reasonably believed to be acting on behalf of a foreign power, engaging in international terrorist activities or narcotics production or trafficking, or endangering the safety of a person protected by the United States Secret Service or the Department of State;

(h) Information acquired by overhead reconnaissance not directed at specific United States persons;

(i) Information concerning United States persons abroad that is obtained in response to requests from the Department of State for support of its consular responsibilities relating to the welfare of those persons;

(j) Information collected, received, disseminated or stored by the FBI and necessary to fulfill its lawful investigative responsibilities; or

(k) Information concerning persons or activities that pose a clear threat to any facility or personnel of an agency within the Intelligence Community. Such information may be retained only by the agency threatened and, if appropriate, by the United States Secret Service and the FBI.

2-3. *Additional Restrictions and Limitations.*

2-301. *Tax Information.* No agency within the Intelligence Community shall examine tax returns or tax information except as permitted by applicable law.

2-302. *Restrictions on Experimentation.* No agency within the Intelligence Community shall sponsor, contract for, or conduct research on human subjects except in accordance with guidelines issued by the Department of Health, Education and Welfare. The subject's informed consent shall be documented as required by those guidelines.

2-303. *Restrictions on Contracting.* No agency within the Intelligence Community shall enter into a contract or arrangement for the provision of goods or services with private companies or institutions in the United States unless the agency sponsorship is known to the appropriate officials of the company or institution. In the case of any company or institution other than an academic institution, intelligence agency sponsorship may be concealed where it is determined, pursuant to procedures approved by the Attorney General, that such concealment is necessary to maintain essential cover or proprietary arrangements for authorized intelligence purposes.

2-304. *Restrictions on Personnel Assigned to Other Agencies.* An employee detailed to another agency within the federal government shall be responsible to the host agency and shall not report to the parent agency on the affairs of the host agency unless so directed by the host agency. The head of the host agency, and any successor, shall be informed of the employee's relationship with the parent agency.

2-305. *Prohibition on Assassination.* No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.

2-306. *Restrictions on Special Activities.* No component of the United States Government except an agency within the Intelligence Community may conduct any special activity. No such agency except the CIA (or the military services in wartime) may conduct any special activity unless the President determines, with

the SCC's advice, that another agency is more likely to achieve a particular objective.

2-307. *Restrictions on Indirect Participation in Prohibited Activities.* No agency of the Intelligence Community shall request or otherwise encourage, directly or indirectly, any person, organization, or government agency to undertake activities forbidden by this Order or by applicable law.

2-308. *Restrictions on Assistance to Law Enforcement Authorities.* Agencies within the Intelligence Community other than the FBI shall not, except as expressly authorized by law:

(a) Provide services, equipment, personnel or facilities to the Law Enforcement Assistance Administration (or its successor agencies) or to state or local police organizations of the United States; or

(b) Participate in or fund any law enforcement activity within the United States.

2-309. *Permissible Assistance to Law Enforcement Authorities.* The restrictions in Section 2-308 shall not preclude:

(a) Cooperation with appropriate law enforcement agencies for the purpose of protecting the personnel and facilities of any agency within the Intelligence Community;

(b) Participation in law enforcement activities, in accordance with law and this Order, to investigate or prevent clandestine intelligence activities by foreign powers, international narcotics production and trafficking, or international terrorist activities; or

(c) Provision of specialized equipment, technical knowledge, or assistance of expert personnel for use by any department or agency or, when lives are endangered, to support local law enforcement agencies. Provision of assistance by expert personnel shall be governed by procedures approved by the Attorney General.

2-310. *Permissible Dissemination and Storage of Information.* Nothing in Sections 2-201 through 2-309 of this Order shall prohibit:

(a) Dissemination to appropriate law enforcement agencies of information which indicates involvement in activities that may violate federal, state, local or foreign laws;

(b) Storage of information required by law to be retained;

(c) Dissemination of information covered by Section 2-208 (a)-(j) to agencies within the Intelligence Community or entities of cooperating foreign governments; or

(d) Lawful storage or dissemination of information solely for administrative purposes not related to intelligence or security.

SECTION 3

Oversight of Intelligence Organizations

3-1. *Intelligence Oversight Board.*

3-101. *Membership.* The President's Intelligence Oversight Board (IOB) shall function within the White House. The IOB shall have three members who shall be appointed by the President and who shall be from outside the government and be qualified on the basis of ability, knowledge, diversity of background and experience. No member shall have any personal interest in any contractual relationship with any agency within the Intelligence Community. One member shall be designated by the President as chairman.

3-102. *Duties.* The IOB shall:

(a) Review periodically the practices and procedures of the Inspectors General and General Counsel with responsibilities for agencies within the Intelligence Community for discovering and reporting to the IOB intelligence

activities that raise questions of legality or propriety, and consider written and oral reports referred under Section 3-201;

(b) Review periodically for adequacy the internal guidelines of each agency within the Intelligence Community concerning the legality or propriety of intelligence activities;

(c) Report periodically, at least quarterly, to the President on its findings; and report in a timely manner to the President any intelligence activities that raise serious questions of legality or propriety;

(d) Forward to the Attorney General, in a timely manner, reports received concerning intelligence activities in which a question of legality has been raised or which the IOB believes to involve questions of legality; and

(e) Conduct such investigations of the intelligence activities of agencies within the Intelligence Community as the Board deems necessary to carry out its functions under this Order.

3-103. *Restriction on Staff.* No person who serves on the staff of the IOB shall have any contractual or employment relationship with any agency within the Intelligence Community.

3-2. *Inspectors General and General Counsel.* Inspectors General and General Counsel with responsibility for agencies within the Intelligence Community shall:

3-201. Transmit timely reports to the IOB concerning any intelligence activities that come to their attention and that raise questions of legality or propriety;

3-202. Promptly report to the IOB actions taken concerning the Board's findings on intelligence activities that raise questions of legality or propriety;

3-203. Provide to the IOB information requested concerning the legality or propriety of intelligence activities within their respective agencies;

3-204. Formulate practices and procedures for discovering and reporting to the IOB intelligence activities that raise questions of legality or propriety; and

3-205. Report to the IOB any occasion on which the Inspectors General or General Counsel were directed not to report any intelligence activity to the IOB which they believed raised questions of legality or propriety.

3-3. *Attorney General.* The Attorney General shall:

3-301. Receive and consider reports from agencies within the Intelligence Community forwarded by the IOB;

3-302. Report to the President in a timely fashion any intelligence activities which raise questions of legality;

3-303. Report to the IOB and to the President in a timely fashion decisions made or actions taken in response to reports from agencies within the Intelligence Community forwarded to the Attorney General by the IOB;

3-304. Inform the IOB of legal opinions affecting the operations of the Intelligence Community; and

3-305. Establish or approve procedures, as required by this Order, for the conduct of intelligence activities. Such procedures shall ensure compliance with law, protect constitutional rights and privacy, and ensure that any intelligence activity within the United States or directed against any United States person is conducted by the least intrusive means possible. The procedures shall also ensure that any use, dissemination and storage of information about United States persons acquired through intelligence activities is limited to that necessary to achieve lawful governmental purposes.

3-4. *Congressional Intelligence Committees.* Under such procedures as the President may establish and consistent with applicable authorities and duties, including those conferred by the Constitution upon the Executive and Legislative

Branches and by law to protect sources and methods, the Director of Central Intelligence and heads of departments and agencies of the United States involved in intelligence activities shall:

3-401. Keep the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate fully and currently informed concerning intelligence activities, including any significant anticipated activities which are the responsibility of, or engaged in, by such department or agency. This requirement does not constitute a condition precedent to the implementation of such intelligence activities;

3-402. Provide any information or document in the possession, custody, or control of the department or agency or person paid by such department or agency, within the jurisdiction of the Permanent Select Committee on Intelligence of the House of Representatives or the Select Committee on Intelligence of the Senate, upon the request of such committee; and

3-403. Report in a timely fashion to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate information relating to intelligence activities that are illegal or improper and corrective actions that are taken or planned.

SECTION 4

General Provisions

4-1. *Implementation.*

4-101. Except as provided in section 4-105 of this section, this Order shall supersede Executive Order 11905, "United States Foreign Intelligence Activities," dated February 18, 1976; Executive Order 11985, same subject, dated May 13, 1977; and Executive Order 11994, same subject, dated June 1, 1977.

4-102. The NSC, the Secretary of Defense, the Attorney General and the Director of Central Intelligence shall issue such appropriate directives and procedures as are necessary to implement this Order.

4-103. Heads of agencies within the Intelligence Community shall issue appropriate supplementary directives and procedures consistent with this Order.

4-104. The Attorney General shall have sole authority to issue and revise procedures required by section 2-201 for the activities of the FBI relating to foreign intelligence and counterintelligence.

4-105. Where intelligence activities under this Order are to be conducted pursuant to procedures approved or agreed to by the Attorney General, those activities may be conducted under terms and conditions of Executive Order 11905 and any procedures promulgated thereunder until such Attorney General procedures are established. Such Attorney General procedures shall be established as expeditiously as possible after the issuance of this Order.

4-106. In some instances, the documents that implement this Order will be classified because of the sensitivity of the information and its relation to national security. All instructions contained in classified documents will be consistent with this Order. All procedures promulgated pursuant to this Order will be made available to the Congressional intelligence committees in accordance with Section 3-402.

4-107. Unless otherwise specified, the provisions of this Order shall apply to activities both within and outside the United States, and all references to law are to applicable laws of the United States, including the Constitution and this Order. Nothing in this Order shall be construed to apply to or interfere with any authorized civil or criminal law enforcement responsibility of any department or agency.

4-2. *Definitions.* For the purposes of this Order, the following terms shall have these meanings:

4-201. *Communications security* means protective measures taken to deny unauthorized persons information derived from telecommunications of the United States Government related to national security and to ensure the authenticity of such telecommunications.

4-202. *Counterintelligence* means information gathered and activities conducted to protect against espionage and other clandestine intelligence activities, sabotage, international terrorist activities or assassinations conducted for or on behalf of foreign powers, organizations or persons, but not including personnel, physical, document, or communications security programs.

4-203. *Electronic Surveillance* means acquisition of a nonpublic communication by electronic means without the consent of a person who is a party to an electronic communication or, in the case of a nonelectronic communication, without the consent of a person who is visibly present at the place of communication, but not including the use of radio direction finding equipment solely to determine the location of a transmitter.

4-204. *Employee* means a person employed by, assigned to, or acting for an agency within the Intelligence Community.

4-205. *Foreign Intelligence* means information relating to the capabilities, intentions and activities of foreign powers, organizations or persons, but not including counterintelligence except for information on international terrorist activities.

4-206. *Intelligence* means foreign intelligence and counterintelligence.

4-207. *Intelligence Community* and *agency or agencies within the Intelligence Community* refer to the following organizations:

(a) The Central Intelligence Agency (CIA);

(b) The National Security Agency (NSA);

(c) The Defense Intelligence Agency;

(d) The Offices within the Department of Defense for the collection of specialized national foreign intelligence through reconnaissance programs;

(e) The Bureau of Intelligence and Research of the Department of State;

(f) The intelligence elements of the military services, the Federal Bureau of Investigation (FBI), the Department of the Treasury, the Department of Energy, and the Drug Enforcement Administration (DEA); and

(g) The staff elements of the Office of the Director of Central Intelligence.

4-208. *Intelligence product* means the estimates, memoranda and other reports produced from the analysis of available information.

4-209. *International terrorist activities* means any activity or activities which:

(a) involves killing, causing serious bodily harm, kidnapping, or violent destruction of property, or an attempt or credible threat to commit such acts; *and*

(b) appears intended to endanger a protectee of the Secret Service or the Department of State or to further political, social or economic goals by intimidating or coercing a civilian population or any segment thereof, influencing the policy of a government or international organization by intimidation or coercion, or obtaining widespread publicity for a group or its cause; *and*

(c) transcends national boundaries in terms of the means by which it is accomplished, the civilian population, government, or international organization it appears intended to coerce or intimidate, or the locale in which its perpetrators operate or seek asylum.

4-210. *The National Foreign Intelligence Program* includes the programs listed below, but its composition shall be subject to review by the National Security Council and modification by the President.

(a) The programs of the CIA;

(b) The Consolidated Cryptologic Program, the General Defense Intelligence Program, and the programs of the offices within the Department of

Defense for the collection of specialized national foreign intelligence through reconnaissance except such elements as the Director of Central Intelligence and the Secretary of Defense agree should be excluded;

(c) Other programs of agencies within the Intelligence Community designated jointly by the Director of Central Intelligence and the head of the department or by the President as national foreign intelligence or counterintelligence activities;

(d) Activities of the staff elements of the Office of the Director of Central Intelligence.

(e) Activities to acquire the intelligence required for the planning and conduct of tactical operations by the United States military forces are not included in the National Foreign Intelligence Program.

4-211. *Physical surveillance* means an unconsented, systematic and deliberate observation of a person by any means on a continuing basis, or unconsented acquisition of a nonpublic communication by a person not a party thereto or visibly present thereat through any means not involving electronic surveillance. This definition does not include overhead reconnaissance not directed at specific United States persons.

4-212. *Special activities* means activities conducted abroad in support of national foreign policy objectives which are designed to further official United States programs and policies abroad and which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but not including diplomatic activity or the collection and production of intelligence or related support functions.

4-213. *United States*, when used to describe a place, includes the territories of the United States.

4-214. *United States person* means a citizen of the United States, an alien lawfully admitted for permanent residence, an unincorporated association organized in the United States or substantially composed of United States citizens or aliens admitted for permanent residence, or a corporation incorporated in the United States.

Jimmy Carter

THE WHITE HOUSE,

January 24, 1978.

[FR Doc. 78-2420 Filed 1-25-78; 11:12 am]

EDITORIAL NOTE: The President's statement and remarks of Jan. 24, 1978, on signing Executive Order 12036, are printed in the Weekly Compilation of Presidential Documents (vol. 14, No. 4).

Deputy Assistant Attorney General
Office of Legal Counsel

Department of Justice
Washington, D.C. 20530

MAY 25 1978

Ms. Monica Andres
Center for National Security Studies
122 Maryland Avenue, N. E.
Washington, D. C. 20002

Re: FBI Guidelines

Dear Monica:

Enclosed are the pages from the Government's Memorandum in Opposition to Defendants' Motion to Suppress Evidence in United States v. Humphrey, No. 78-25-A. As you can see the statement here elaborates considerably upon the content of the "extraordinary technique" portion of the guidelines. I hope that this additional material is a useful supplement to the Department's Freedom of Information release.

Sincerely,

Larry A Hammond

Larry A. Hammond
Deputy Assistant Attorney General
Office of Legal Counsel

Enclosures

> Information about the capabilities, intentions, and activities of other governments is essential to informed decision-making in the field of national defense and foreign relations. The measures employed to acquire such information should be responsive to the legitimate needs of our Government and must be conducted in a manner which preserves and respects our established concepts of privacy and civil liberties.

Executive Order 12036 of January 28, 1978, maintains the essential oversight provisions and the divisions of responsibility set forth in Order 11905.

Pursuant to Section 5(h)(2) of Order 11905, the Attorney General, on May 28, 1976, promulgated guidelines for the foreign intelligence collection and foreign counterintelligence activities of the Federal Bureau of Investigation. 78-25-5 (Appendix B). The portion of these guidelines produced for counsel in this case describes standards and procedures for the utilization of extraordinary investigative techniques which include electronic surveillances by telephone and microphone. These guidelines require, in substance,

1. Their use, with the approval of the Attorney General, only where there is probable cause to believe that the person against whom the extraordinary technique is directed is an agent of a foreign power.

2. Minimization of the acquisition of information not relating to foreign intelligence or counterintelligence;

3. Specific findings to be made by the Attorney General in writing, before authorization of extraordinary techniques, that their use is necessary for one of the following reasons:

   a. To protect the nation against actual or potential attack, or other hostile act of a foreign power;

   b. to obtain foreign intelligence information deemed essential to the security of the nation;

   c. to protect national security information against foreign intelligence activities; or

   d. to obtain information relating to foreign affairs essential to the security of the nation.

4. That requests for use of extraordinary techniques be made in writing by a Presidential appointee, and

5. That where physical instrusion is necessary in the use of electronic surveillance, that the minimum physical intrusion necessary be used.

On February 3, 1977, at the request of the Attorney General, the President confirmed the delegation to the Attorney General of authority to approve warrantless electronic surveillance within the United States for foreign intelligence and counterintelligence purposes where requested

APPENDIX IV

ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

Department of Justice
Washington, D.C. 20530

23 MAY 1978

Mr. Morton Halperin
122 Maryland Avenue, N. E.
Washington, D. C. 20002

Dear Mr. Halperin:

This responds to your appeal under the Freedom of Information Act requesting a copy of the guidelines for the FBI's foreign intelligence collection activities and foreign counterintelligence investigations. The Attorney General has designated me to act on your appeal. Attached please find an edited copy of these guidelines, as well as a copy of a recent amendment which has become a part of the guidelines.

The excisions from these guidelines have been very carefully reviewed, and only those portions the disclosure of which could reasonably be expected to cause serious damage to the national defense or the conduct of foreign relations of the United States have been excised. Executive order 11652. See also draft of May 10, 1978 of proposed Executive order to replace E.O. 11652. All of the excisions address sources and methods of investigation and their applicability to certain categories of subjects. Without being specific, I can state that the guidelines establish levels of investigative activity, including methods and duration of investigations. Periodic Justice Department reviews of investigations of United States persons are mandated to insure the greater protection afforded to United States persons under these guidelines. Such reviews are conducted by Department of Justice officials designated by the Attorney General. With regard to non-United States persons, distinctions are based on the status of their entry into this country and the nature of the foreign power whose interests they serve. Greater investigative scope is contemplated with regard to countries that engage in intelligence activities contrary to the

interests of the United States. Standards for initiating investigations must be met and those standards quite obviously delineate the methods of collection of information which are permissible in a given situation. Special rules are also applied to insure that domestic groups which are targeted by foreign powers for infiltration are not subjected to overly intrusive investigative techniques by our own government. In addition, those techniques that may be regarded as particularly intrusive require the Attorney General's personal authorization.

These guidelines, which were drawn up by a working group in the Department of Justice, were issued by former Attorney General Levi on May 28, 1976. They are subject to continuing review and amendment by the Department of Justice. The addendum to these guidelines entitled "Dissemination of Information Obtained by Extraordinary Techniques" which was recently issued illustrates our continuing concern to develop guidelines in the foreign counterintelligence area which are designed to permit effective foreign counterintelligence activities by the FBI and at the same time effectively to guard the rights and privacy of Americans.

These guidelines and all amendments to them have been provided to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate for their review. In addition they have been provided to the Intelligence Oversight Board. Such broad-based review of these guidelines provides, in our judgment, a responsible test of their reasonableness and should assure the American people that effective controls in this sensitive area have been established. We believe that it is important that the FBI's foreign counterintelligence investigations not be made more difficult by disclosures that reveal or tend to reveal information about methods of investigation or the circumstances of their use which, if acquired by sophisticated foreign intelligence services, would permit them to adjust their clandestine operations in this country to reduce their vulnerability to detection.

We sincerely regret the Department's delay in responding to your appeal. As I am sure you are well aware, this requested release required a careful review by the FBI and by the Department of Justice generally. We hope that you will find the portions we are able to release helpful to you. We have also endeavored to provide you with a paraphrased description of each of the deleted portions.

You may seek judicial review of this partial denial in the United States District Court for the district in which you reside, have your principal place of business, or in the District of Columbia which is the district in which the record is located.

Sincerely,

John M. Harmon

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

Attachment

May 28, 1976.

FOREIGN INTELLIGENCE COLLECTION AND FOREIGN COUNTERINTELLIGENCE INVESTIGATIONS

I. DEFINITIONS

A. FOREIGN POWER: Includes foreign government, factions, parties, military forces, or agencies or instrumentalities of such entities, whether or not recognized by the United States, or foreign-based terrorist groups.

B. The determination that activities are PURSUANT TO THE DIRECTION OF a foreign power is based on the following factors:

1. control, leadership or policy direction by a foreign power;

2. financial or material support by a foreign power;

3. participation in leadership, assignments, or discipline by a foreign power;

(Deals with countries whose intelligence activities are contrary to interests of the United States.)

D. FOREIGN INTELLIGENCE: Information concerning the capabilities, intentions and activities of any foreign power relevant to the national security or to the conduct of foreign affairs of the United States.

M. FOREIGN TERRORIST: One who engages in terrorist activities pursuant to the direction of a foreign power.

II. FBI RESPONSIBILITIES

In fulfilling its foreign intelligence and foreign counterintelligence responsibilities the FBI is, under standards and procedures authorized in these guidelines, authorized to:

A. Detect and prevent espionage, sabotage, and other clandestine intelligence activities, by or pursuant to the direction of foreign powers through such lawful foreign counterintelligence operations within the United States and its territories, including electronic surveillances, as are necessary or useful for such purposes.

B. Conduct within the United States and its territories, when requested by officials of the Intelligence Community designated by the President, those lawful activities, including electronic surveillance, authorized by the President and specifically approved by the Attorney General, to be undertaken in support of foreign intelligence collection requirements of other intelligence agencies.

C. Collect foreign intelligence by lawful means within the United States and its territories, when requested by officials of the Intelligence Community designated by the President to make such requests.

D. Disseminate, as appropriate, foreign intelligence and foreign counterintelligence information which it acquires to appropriate Federal agencies, to State and local law enforcement agencies, and to cooperating foreign governments.

E. Detect and prevent terrorist activities conducted pursuant to the direction of a foreign power.

F. Coordinate all foreign counterintelligence efforts in the United States.

G. Request other agencies of the U.S. Government to conduct and request agencies of foreign governments to conduct, or with the concurrence of the Director of Central Intelligence conduct investigations outside the U.S. in connection with matters within

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the investigative jurisdiction of the FBI.

H. Conduct certain investigations within the United States based upon the request of law enforcement, intelligence or security agencies of foreign governments.

(Deals with investigative techniques and levels of investigative activity.)

Pages 4, 5, 6 and 7.

E. FOREIGN COUNTERINTELLIGENCE: Investigative operations conducted within the United States to protect the national security from activities of foreign intelligence services, or to prevent terrorist activities undertaken pursuant to the direction of a foreign power.

F. FOREIGN INTELLIGENCE OFFICER: An individual who is a member of a foreign intelligence service.

G. FOREIGN INTELLIGENCE AGENT: An individual, not an officer of an intelligence service, engaged in clandestine intelligence activities pursuant to the direction of a foreign power.

H. TARGET: An individual or organization which is, or is likely to become, the object of a recruitment effort by a foreign intelligence service, or by terrorists acting pursuant to the direction of a foreign power; or information, property, or activities in the United States which are or are likely to become the object of intelligence activity by a foreign intelligence service, or the object of activity by terrorists acting pursuant to the direction of a foreign power.

(Deals with categories of subjects of investigation.)

K. FOREIGN VISITORS: Foreign nationals in the United States who are not resident aliens of the United States.

L. TERRORIST ACTIVITIES: Criminal acts of violence dangerous to human life, intended to intimidate, coerce, demoralize or influence government or civil population.

(Deals with groups targetted for infiltration by foreign powers.)

E. In collecting foreign intelligence information or conducting foreign counterintelligence investigations, the FBI shall not use drugs, physical force except in accord with law, or any apparatus or technique contrary to fundamental standards of due process under the Constitution and laws of the United States.

F. FBI requests to an agency of the U.S. Government or to a law enforcement, intelligence or security agency of a foreign government to conduct investigations abroad shall be limited to those cases which are within the investigative jurisdiction of the FBI.

(Deals with sources and methods of investigation.)

H. In conducting investigations outside the United States, the FBI shall not request or otherwise encourage, directly or indirectly, an agency of the U.S. Government or of a foreign government, to undertake investigative techniques, or employ investigative methods, which are forbidden by United States law to the extent it is applicable or by the Constitution of the United States; and Extraordinary Techniques may not be used without the express approval of the Attorney General as provided in section VII of those guidelines.

(Same)

V. INVESTIGATIONS FOR FOREIGN GOVERNMENTS

A. Requests for FBI investigations within the United States, on behalf of a law enforcement, intelligence or security agency of a foreign government, shall identify the information sought and specify the purposes of the investigation.

(Same)

C. Whenever a request from a law enforcement, intelligence or security agency of a foreign government raises a question of the propriety of the FBI providing assistance, the Bureau shall refer the matter to the Department of Justice before undertaking to provide information or assistance.

D. Foreign counterintelligence investigations undertaken upon request of a law enforcement, intelligence, or security agency of a foreign government shall be conducted in accordance with guidelines relating to foreign counterintelligence investigations conducted in the U.S.

(Same)

VI. FOREIGN INTELLIGENCE

The role of the FBI in collecting foreign intelligence information is limited as follows:

A. Requests for Collection of Information

1. The FBI may collect supplementary information to clarify or complete foreign intelligence information previously disseminated to the intelligence community, and may collect information in response to requirements of topical interest from the U.S. Intelligence Board (USIB), or its successor, directed to the Intelligence Community.

2. Collection of information to clarify or complete foreign intelligence previously furnished, and in response to USIB requirements, shall be conducted only upon a request, made or confirmed in writing, by an appropriate member of the Intelligence Community. Copies of such requests shall be provided to the Department.

(Deals with methods of collection of intelligence.)

B. Collecting Foreign Intelligence Information

1. The FBI may collect foreign intelligence information for agencies in the U.S. Intelligence Community.

2. Foreign intelligence information shall be collected only upon the request, made or confirmed in writing, by an appropriate official of the U.S. Intelligence Community designated by the President. The requesting official shall certify that the information sought is foreign intelligence information relevant to the mission of the requesting agency, and the request shall set forth the reasons why the FBI is being asked to conduct the investigation.

3. Foreign intelligence information shall be collected only with the express approval of the Attorney General or his designee.

(Deals with methods and techniques of intelligence collection.)

C. Operational Support

1. The FBI may, upon request, provide operational support to agencies in the Intelligence Community.

2. Requests for operational support to the authorized mission of U.S. intelligence agencies shall be made or confirmed in writing, by an appropriate official of the U.S. Intelligence Community designated by the President. The requesting official shall describe the support required; the reasons why the FBI is being requested to furnish such assistance; and shall also certify that such assistance is relevant to the mission of the requesting intelligence agency.

3. Operational support to U.S. intelligence agencies shall be undertaken only with the approval of the Attorney General or his designee.

4. In collecting, or assisting other agencies to collect, foreign intelligence information by the use of Extraordinary Techniques as defined in these guidelines, the FBI shall follow the standards as provided in these guidelines.

VII. EXTRAORDINARY TECHNIQUES

(Deals with techniques of intelligence collection.)

2. Procedures to be followed shall be reasonably designed to minimize the acquisition of information not relating to foreign intelligence or counterintelligence.

investigative techniques.

4. The request for use of an extraordinary technique must be made in writing by a Presidential appointee, and must certify that the information sought cannot feasibly be obtained by other investigative techniques.

B. Specific Techniques

To fulfill its responsibilities as set forth in section II of these guidelines, the FBI may employ the following Extraordinary Techniques when their use is authorized by the President or by statute and justified in writing by the Director of the FBI, and in each case is approved in advance by the Attorney General in writing after he determines they meet the standards set forth in section VII A above.

(Deals with techniques of intelligence collection.)

2. Future Extraordinary Techniques: New technical devices which might intrude on privacy or otherwise violate provisions of these guidelines shall not be utilized without the express written authorization of the Attorney General.

(Same)

(Deals with mandated review procedures.)

IX. REPORTING, DISSEMINATION, AND RETENTION

A. Reporting

(Deals with review procedures and levels of investigative activity.)

3. FBI Headquarters shall promptly notify the Department of Justice of any request by a law enforcement, intelligence or security agency of a foreign government for information or assistance in a foreign counterintelligence matter involving a United States citizen. FBI Headquarters shall maintain, and provide to the Department of Justice upon request, statistics on the number of requests for assistance received from law enforcement, intelligence or security agencies of foreign governments involving United States citizens or persons not foreign officials or foreign visitors. The statistics shall identify the nature of the request, and whether assistance requested was furnished or declined.

(Same)

5. Reports on all foreign intelligence information collection and all counterintelligence investigations shall be maintained at FBI Headquarters, and shall be available for review by Department officials specially designated by the Attorney General.

6. Summaries furnished under paragraph 4 or reports of investigations reviewed under paragraph 5 concerning assets or potential assets may be prepared for review in a form which protects identity, but must include the status of the subject, i.e., whether a foreign national or American citizen, and a description of the techniques used for recruitment or attempted recruitment. These summaries or reports shall be available for review by the Attorney General or persons specially designated by the Attorney General.

7. To insure the security of foreign intelligence collection and counterintelligence investigations, the Department of Justice shall conduct reviews of FBI reports in a physically secure area at FBI Headquarters.

B. Dissemination

Other Federal Authorities

1. Subject to limitations set forth below, the FBI may disseminate facts or information obtained during foreign intelligence collection and counterintelligence investigations to other federal authorities when such information:

   a. falls within their investigative jurisdiction;

   b. constitutes foreign intelligence information required by federal agencies having primary

responsibility therefore;

c. should be furnished to another federal agency as required by Executive Order 10450; or

d. may be required by statute, National Security Council directive, interagency agreement approved by the Attorney General, or Presidential directive.

2. When facts or information relating to criminal activities within the jurisdiction of other federal agencies is acquired by Extraordinary Techniques, during collection of foreign intelligence or counterintelligence investigations, the FBI may:

a. disseminate information pertaining to uncompleted criminal activity threatening endangerment to human life;

b. disseminate information pertaining to completed criminal activity, with the concurrence of the Department of Justice, when the risk of compromising the source or the investigation by disclosing the means or source of information is outweighed by the desirability of identifying and prosecuting the offender.

All dissemination to other federal authorities shall include a notice to the recipient that the information being furnished should not be used for evidentiary purposes without the express written approval of the Department of Justice, after consultation with the FBI.

State and Local Government Authorities

3. Subject to limitations set forth below, the FBI may disseminate facts or information obtained during collection of foreign intelligence or counterintelligence investigations, relating to crimes within the jurisdiction of State and local governments, to the appropriate lawful authorities, provided such dissemination is consistent with the interests of U.S. national security.

4. When facts or information relating to criminal activity within the jurisdiction of State and local governments is acquired by Extraordinary Techniques during foreign intelligence collection or counterintelligence investigations the FBI may:

   a. disseminate information pertaining to uncompleted crimes of violence threatening endangerment to human life;

   b. disseminate information pertaining to completed crimes of violence, with the concurrence of the Department of Justice, when the risk of compromising the source or the investigation by disclosing the means or source of acquiring the information is outweighed by the desirability of identifying and prosecuting the offender.

All dissemination to State or local government authorities shall include a notice to the recipient that the information being furnished should not be used for evidentiary purposes without the express written approval of the Department of Justice, after consultation with the FBI.

Foreign Governments

5. In accordance with Executive Order No. 11905 of February 18, 1976, the FBI may cooperate with foreign intelligence services by furnishing relevant information obtained during foreign intelligence collection and counterintelligence investigations, when such dissemination may serve the interest of U.S. national security.

6. Information received from or obtained at the request of a law enforcement, intelligence or security agency of a foreign government may be disseminated by the FBI, in the same manner as similar information acquired by the FBI within the United States, subject to the applicable guidelines.

7. Nothing in these guidelines shall limit the authority of the FBI to inform individual(s) whose safety or property is directly threatened by planned force or violence, so that they may take appropriate protective safeguards.

8. The FBI shall maintain records to the extent required by law, of all disseminations made outside the Department of Justice, of information obtained during foreign intelligence collection and counterintelligence investigations.

(Same)

APPENDIX V

TRUST IN LAWS, NOT 'HONORABLE MEN'

by

Harry Howe Ransom*

The basic issue now before the Senate Select Committee on Intelligence is whether the intelligence establishment can operate effectively within the limits of the American Constitutional system. Since the whole purpose of a strategic intelligence capability is to defend the U.S. Constitution and the way of life it promises, our only logical alternative is to require by statute that intelligence agencies operate within the principles of limited government.

I have been an academic "CIA-Watcher" for more than 20 years, having devoted most of my research time as a professional political scientist to this subject. I do not claim to have all the answers -or even to have identified all of the questions- but I have some historical perspective, and a few opinions to offer.

In trying to think intelligently about balancing security needs against American democracy's requirements, our nation's leaders over the years have offered some all too easy answers. For example:

*Woodrow Wilson, campaigning for the League of Nations told a St. Louis audience, September 5, 1919, that, to quote Wilson's words "a spying system. The more polite call it a system of intelligence" is incompatible with democratic government. Only despotisms, he thought, required secret intelligence services.

*Harry Truman, reminiscing 10 years after his Presidency, suggested that had he known what the CIA was to become, he

*Professor of Political Science, Vanderbilt University. Author of the book, The Intelligence Establishment (Harvard Press, 1970).

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never would have created it. Its creation was a mistake, he suggested, because it got out of control. Of course President Truman forgot, or forgot to mention, that he signed the order in 1948 creating a secret charter sending the CIA down the back alleys and gutters of world politics.

*President Nixon has given us no enlightening comment from his lonely San Clemente exile. But certainly he discovered painfully that the CIA was a sharp, double-edged sword which mortally wounded him politically when he misused it.

*President Gerald Ford, joined by Vice-President Rockefeller and Secretary Kissinger, later advised us with regard to covert political intervention in foreign lands that everybody's doing it, that the Russians KGB spends more money on it than does America, and that covert action offers an option between sending in the Marines or doing nothing when the national interest is endangered.

*President Jimmy Carter, early in 1978, issued an Executive Order designed to define and assign more precisely the functions and limits of American intelligence agencies. He also importantly conceded the necessity for Congressional legislation to assure the American people "that their intelligence agencies will be working effectively for them and not infringing on their legal rights."

In accepting this challenge to design precise charters for the CIA, the FBI, the National Security Agency and military intelligence, Congress should consider the validity of the following generalizations: first, the CIA and other parts of the intelligence establishment have lost their legitimacy in the American constitutional system. This can only be restored through careful legislative reforms. Second, most of the covert political action overseas and much of the espionage and counter-espionage conducted by U.S. "intelligence" agencies have been

a waste of money, counter-productive, damaging to the nation's image and destructive of credability of government. International espionage and covert action, in fact, constitute one of the world's largest boondoggles, and this includes the KGB as well as CIA. And third, many of these American activities have been beyond the effective control of the President, Congress and the Courts. Many have been outright illegal, outside the CIA's charter, and sometimes in violation of international law and the UN Charter.

The excesses and abuses of secret intelligence reflect early organizational mistakes and conceptual carelessness; they do not mean that intelligence is unnecessary. The problem at its heart is conceptual. Put most simply, when the CIA was created in 1947, and in its later development, the following basic questions were never answered with careful precision: What is the CIA supposed to do, and not do? What can be expected from strategic intelligence agencies, and what is not to be expected? Congress initially avoided these crucial conceptual questions and instead adopted, unwisely, a "trust in honorable men" principle. Clearly this faith in "honorable men" choice too often has led to deception, abuse or foreign policy disaster. Overlooked was the fact that American democracy ultimately rejects the faith in men principle, except perhaps in time of war. Democracy can only survive by adhering to the alternative principle of rule of law.

And so Congress must carefully attend to setting forth in law the rules that will limit the behavior of the persons, honorable or not, now or in future administrations, who command the intelligence services. The record, still only partially visible of the intelligence services over the past 30 years, measuring the benefits against the costs, suggests that intelligence charters must focus on the multiple objectives of responsible

control, accountability and rigorous evaluation procedures. Responsibility should center on the Presidency, but checks must exist against Presidential misuse. Operating heads of the various agencies must be held accountable by President, Congress, the General Accounting Office and the Courts. And President and Congress should both be required to concern themselves regularly with ruthless evaluation procedures.

Intelligence professionals habitually worship the false god of secrecy, which always hampers performance evaluation. It may be that an ultimate incompatibility exists between the rule of law and efficient covert operations. The recent past does not prove this. But clearly power tends to corrupt and secret power corrupts secretly, and perhaps absolutely.

For the past 30 years American intelligence services have been aping the adversary, an "enemy" who bothers little with the rule of law. This has not worked well, even by national security criteria. So let us ask that Congress lead us back to the rule of law, and take the calculated risk that intelligence systems can be made to work effectively within Constitutional boundaries.

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APPENDIX VI

Association of American Publishers, Inc.

1707 L Street, N.W., Suite 460
Washington, D.C. 20036
Telephone 202 293-2585

Townsend Hoopes
President

June 22, 1978

The Hon. Birch Bayh, Chairman
Select Committee on Intelligence
United States Senate
363 Russell Office Building
Washington, D.C. 20515

Dear Senator Bayh: Re: S. 2525

I write on behalf of the Association of American Publishers, Inc., which represents more than 300 of the leading general and educational book publishers in this country, to express AAP's position with regard to those provisions of S. 2525 that bear upon the operations, and the First Amendment interests, of the book publishing industry.

Clandestine Book Publishing and
Related Intelligence Activities

On January 16, 1978 AAP issued a statement concerning clandestine book publishing activities by U.S. intelligence agencies. (A copy of that statement is enclosed.) In its statement, AAP supported Church Committee recommendations 45, 46 and 47, subject to certain stated reservations.

The pertinent Church Committee recommendations appear generally to be reflected in Sections 132(a)(3), (a)(4) and (a)(5) of S. 2525, and AAP supports these sections subject to provisos (2) and (3) of AAP's January 16, 1978 statement. We urge that these provises, to the extent they are not already implicit in the bill, be reflected in appropriate Committee Report language.

AAP has one other concern with regard to these sections. It appears that book publishers have been excluded from the definition of the term "United States media organization" provided in Section 104(30). This definition relates to the important restrictions regarding the use in intelligence activities of persons who are journalists,

or who regularly contribute material to, edit or set policy for, U.S. "media organizations." AAP sees no reason to distinguish between book publishers and other United States media organizations and therefore urges that Section 104(30) be amended to include "books" on an equal footing with newspapers, magazines, journals, news services, radio and television, films and video or audio tapes.

Secrecy Agreements Signed
by Government Employees

In a letter dated November 13, 1975 from me to Senator Church, Chairman of the Senate Select Committee on Governmental Operations with Respect to Intelligence Activities, AAP expressed its concern over the use and attempted enforcement of mandatory, life-long secrecy agreements by the CIA (a copy of that letter is also enclosed). In its letter AAP urged the Church Committee to "render a considered judgment" on the validity of such secrecy agreements.

The recent civil case brought against former CIA analyst Frank Snepp demonstrates that the use of such secrecy agreements continues to present the potential for infringement of First Amendment rights; unfortunately, no provision of S. 2525 appears to clarify intelligence agency practice in this regard. While Section 105(j) of the bill does attempt to protect the so-called "whistleblower" who reports within the government on alleged wrongdoing by the intelligence community, we believe that further clarification of the rights of government employees to report publicly on alleged wrongdoing ought to be provided.

In closing, I want to express our appreciation for the opportunity to comment on this bill and to offer any further assistance that may be useful to you or your staff.

Sincerely,

Townsend Hoopes

c. c. : Members of the Senate Select Committee on Intelligence

Statement of
The Association of American Publishers
Concerning Clandestine Book Publishing Activities by
U.S. Intelligence Agencies
January 16, 1978

The Association of American Publishers (AAP), the trade association of book publishers in the United States, wishes to submit this statement to those legislative committees concerned with the activities of U.S. intelligence agencies. It is hoped that the views of the AAP, as the representative of a substantial segment of the American book publishing community, can be of assistance to the Senate, the House, and the Executive Branch in formulating needed restrictions or prohibitions on clandestine book publishing operations by U.S. intelligence agencies.

BACKGROUND

In its Final Report, the Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the Church Committee) made a number of findings with regard to the clandestine use of books and publishing houses by the Central Intelligence Agency. The Church Committee found that:

"i) Prior to 1967, the CIA sponsored, subsidized, or itself produced over 1,000 books, approximately 25 per cent of them in English. An 'important number' of these books were reviewed and marketed in the United States. Although it did not reveal the particulars of any of these CIA book publishing activities, the clear implication of the Church Committee report is that a portion of these covert book projects were undertaken with the unwitting assistance of established U.S. book publishing firms.

ii) Since 1967, despite termination of its book publishing within the United States, the CIA has published some 250 books abroad, a number of them in English.

iii) The Church Committee concluded that domestic 'fallout' from continued overseas book publishing by the CIA is inevitable. (Domestic 'fallout' is the intended or unintended re-entry of Agency propaganda into the United States.) Indeed, one prominent AAP member, John Wiley and Sons, recently unsuccessfully fully pursued a Freedom of Information Act claim against the CIA in order to ascertain whether a book it published in the United States, based upon a manuscript originally published in England, was -- as alleged in news stories -- a CIA-sponsored book. A post-1967 CIA directive, mentioned in the Church Committee report, indicates that the CIA continues to view such fallout as a 'permissible' consequence of otherwise proper agency activities.

iv) The Church Committee expressed its concern that such unwitting use of U.S. media organizations for clandestine operations is a threat to the integrity of American institutions -- 'institutions whose integrity is critical to the maintenance of a free society.' "

Based upon these findings and expressions of concern, the Church Committee recommended that:

> "The CIA should be prohibited [by statute] from subsidizing the writing, or production for distribution within the United States or its territories, of any book, magazine, article, publication, film or video or audio tape unless publicly attributed to the CIA. Nor should the CIA be permitted to undertake any activitiy to accomplish indirectly such distribution within the United States or its territories." [Church Committee Recommendation No. 45, Final Report, Book 1, page 456 (April 1976).]

In two related recommenations it urged that:

> The CIA should be prohibited by law from establishing "any paid or contractual relationship . . . with U.S. and foreign journalists accredited to U.S. media organizations." [Recommendation No. 46.]

> The CIA should be prohibited by law from "the operational use of any person who regularly contributes material to, or is regularly involved directly or indirectly in the editing of material, or regularly acts to set policy or provide direction to the activities of U.S. media organizations." [Recommendation No. 47.]

THE AAP POSITION

The AAP agrees with the Church Committee that the CIA, and other U.S. intelligence agencies, should be prohibited by law from disseminating propaganda within the United States that can result in manipulating or misleading the American public, and that such agencies should also be prohibited from establishing unwitting or other clandestine relationships with media organizations, journalists or editors that could threaten the independence and integrity of the American press. Such activities and relationships constitute an intolerable overreaching by the Government, undermining the fundamental premises of a free press and a free society. Such activities are at odds with our entire constitutionally-based system of freedom of expression without governmental interference.

For these reasons, AAP endorses Church Committee Recommendations 45, 46 and 47, with the following comments and provisos:

1. The three recommendations should be made applicable to all U.S. intelligence agencies, not only the CIA.

2. Recommendation No. 45 should be exclusively directed at the clandestine publishing operations of U.S. intelligence agencies, and any penalties for violation should apply only to the intelligence agencies and their employees.

The recommendation should not be construed to prevent, nor to support any injunction or other restraint of, the publication by the press or private citizens of any information they receive and sponsor for publication.

3. Neither these recommendations, nor related recommendations 42, 43 and 44 of the Church Committee, should be applied so as to prevent scholars, academics or other individuals who were formerly employed by, or associated with, U.S. intelligence agencies, from independently writing and publishing unclassified materials on subjects related to their intelligence agency work or research.

November 13, 1975

The Honorable Frank Church
Chairman
Senate Select Committee on Governmental
Operations with Respect to Intelligence
Activities
245 Russell Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

The Association of American Publishers, Inc., which represents more than 260 of the principal book publishers in the country, believes that the work of your Select Committee affects their role as disseminators of information to the public. The Association gave legal support to the efforts of one of its members, Alfred A. Knopf, Inc., in asserting First Amendment values in the recent litigation over Victor Marchetti's book on the CIA. The Association believes that the issues raised in the Marchetti litigation are appropriate for consideration by your Select Committee, and we urge you to consider them.

In the Marchetti litigation, the Court of Appeals for the Fourth Circuit raised a pro forma secrecy agreement (which Marchetti had signed at the commencement of his employment with the CIA) to a level of such primacy and importance as virtually to eclipse Marchetti's First Amendment rights. Earlier Supreme Court decisions had made clear that government employees have constitutional rights, and that contracts and other conditions of employment cannot be used to do away with them. Yet the Court of Appeals, in effect, brushed aside the heavy constitutional presumption against the government's right to impose a prior restraint on publication, and imposed on Marchetti the burden of proving that the material he sought to publish fell outside the scope of the secrecy agreement.

The Supreme Court's refusal to review the decision by the lower court was discouraging, but that fact does not of course preclude your Select Committee, or the Congress as a whole, from examining the deadly presumption that confidentiality oaths as used by the CIA and other government agencies are valid and enforceable, without limit as to time or degree, even as against a citizen's basic rights under the First Amendment.

The gross abuses of power by the CIA, its invasion of the constitutional rights of large numbers of American citizens, and the lid of secrecy under which such malfeasances have been carried on — all of which have been uncovered by your Select Committee — suggest that restoration of public confidence in the healthy functioning of a free democratic system cannot be achieved by reinforcing governmental power to hide its mistakes, especially not by muzzling American citizens; on the contrary, that it can be achieved only by reinforcing the fundamental constitutional right of every citizen to freedom of expression.

This Association believes that your Select Committee could render a signal public service by rendering a considered judgment on the validity of mandatory confidentiality agreements signed by government employees. The Association stands ready to submit further thoughts on this critical issue if that would be of interest and assistance to you and your staff.

Sincerely,

Townsend Hoopes

APPENDIX VII

JOHN WILLIAM WARD, PRESIDENT, AMHERST COLLEGE

One may take two perspectives on the Central Intelligency Agency: the first from the perspective of a citizen, the second from the perspective of a member of the academic community. The two perspectives converge, however, on a single important question: how to maintain conditions which support a free and open society?

We live in a culture used to verbal excess. The argument why the C.I.A. raises questions about the conditions of freedom in modern American society rests, however, on two assertions which may sound excessive, but which I mean seriously, however quietly I prefer to give voice to them.

First, the C.I.A. is a threat to the traditional meaning of the Constitution of the United States;

Second, the C.I.A. is a threat to the integrity of the academic community, and the integrity of the academic community is important to the social conditions of freedom in a democratic society.

1. The Founding Fathers had a deep skepticism about human nature and its weakness against the temptations of power. A proper constitution should, they thought, provide security against arbitrary power. To compress a long and complicated historical argument, one may say there have been from the beginning in American political thought two views how power may be made responsible.

The first view places emphasis on the form of government created by a constitution, on the institutional arrangement of the departments of government. Responsible government is to be achieved by setting up a government in which power is distributed carefully among the various parts in order to check undue power by any one particular branch in the whole, finely articulated, self-regulating system. In this view, checks against arbitrary or irresponsible power are institutionalized within the government which the constitution creates. A good constitution is judged by the form of government it creates. In the American experience, this is the view one normally associates with the term, "checks and balances."

The second view of the constitution puts emphasis not so much on the organization of the departments of government created by the constitution but on the act of constituting government itself, the process by which governments are made or unmade, and insists that the true check on the power of government, on any one or all of the particular branches of government, lies always in the power of the people outside the doors of government. In this view, the measure of a good constitution is not the form of government which the constitution creates but the effectiveness of the process by which the people out of government are constantly able to discipline government by exercising the inalienable power which ultimately creates and ssnctions all governments. In the American experience, it is the view one normally associates with the term, "constituent power."

The C.I.A. threatens to confound either view of the constitution as a check against irresponsible power. On the effectiveness of internal checks and balances (such devices as legislative oversight, the power of the purse, control by enabling legislation), the Senate Select Committee, chaired by Senator Church, concluded: "There has been, in short, a clear and sustained failure by those responsible to control the intelligence community and to ensure its accountability. There has been an equally clear and sustained failure by intelligence agencies to fully inform the proper authorities of their activities and to comply with directives from those authorities" (Final Report 111, Book II, p. 15).

On the effectiveness of the power of constituents outside of government, one may point only to the difficulty of receiving any information which may allow one to discover what one needs to know in order to make an informed judgment on any question. There is the Freedom of Information Act, to be sure, but the Director of the Central Intelligence Agency is also mandated by the National Security Act not to disclose information which in the Director's judgment may imperil the confiden-

tiality of sources or the security of the United States. The power of the people outside of government depends upon their capacity to know what goes on inside of government. That is not formally impossible, but it is practically improbable with the C.I.A.

2. The challenge the C.I.A. presents to traditional constitutional safeguards against arbitrary and unchecked power is, for the citizen, more important, more interesting, and more grave because it is a challenge to the general political order of modern American society. Yet, although on a less grand scale, the challenge of the C.I.A. to the integrity of the academic community is also a threat to the general political order because it is a threat to the social conditions of freedom in a democratic society.

Again, the argument, because it is interesting, is long and complex. One must indicate it in summary fashion. It is, essentially, the liberal argument against the power of the state, and argument for the necessity of pluralism to check inordinate power, whether political or social, wherever it appears. Madison and Tocqueville are its chief spokesmen.

The danger, especially in modern, complex, mass societies, is the dichotomy between the state and the single individual citizen. Despite political privilege and legal rights, the lone individual is hardly an equal in any contest with the state. The pluralistic argument for the social fabric of a free political order assumes the necessity of autonomous institutions, free from control by the state, which provide buffers between the state and the citizen. One thinks of business, the church, the press, unions, foundations, and the university.

Recent history has seen the erosion of the capacity of the ordinary citizen to believe in the integrity and the autonomy of such institutions. We have witnessed the loss of trust in the institutions of American society. The government, now wholly, to be sure, but in considerable measure, bears a considerable share of blame for weakening the conditions of trust which sustain the confidence of individual citizens. When foundations and universities, newspapers and publishers, unions and church organizations begin to be seen as covert extensions of the power of the state, and uneasy skepticism begins to pervade the mass of citizens. Nothing seems impossible; paranoia becomes plausible.

In the name of freedom and security, we have allowed an erosion of the meaning of the Republic and an erosion of the political and social safeguards which protect freedom within it. As one institution, although only one, the academic community has a responsibility, quite beyond its own special values and concerns, to demonstrate to the ordinary citizen that, yes, it is what it seems to be, that it is not an agency of the state, that it is an independent center of thought and teaching and research.

THE C.I.A. AND THE ACADEMIC COMMUNITY

The Report of the "Select Committee to Study Governmental Operations with Respect to Intelligence Activities" of the United States Senate, the "Church Committee" of 1976, sets forth in detail the history of the involvement of the C.I.A. with academic institutions and individual academics. The conclusion of its hearings was that "there is a problem." The Church Committee believed, however, in the necessary needs of the nation for intelligence and for the "best advice and judgment our universities can produce," and that legislation on the use of individuals in the academic world was beth unenforceable and a further intrusion of the state into the affairs of the academy, so it made no recommendations for legislation. Instead, the Committee concluded, it "believes that it is the responsibility of private institutions and particularly the American academic community to set up the professional and ethical standards of its members."

One can only welcome the reticence of the Church Committee in not recommending the intrusion of government into the internal affairs of colleges and universities, especially when a major concern generated by its report is the autonomy of academic institutions. Yet, the Church Committee report, itself censored by the very agencies it was investigating, puts a heavy burden on academic institutions because its Report deals with generalities at some distance from the "problem" it concludes is a real problem. It may be difficult to set one's own house in order when one does not know what disorder prevails, still the academic community has the obligation to think through and to be self-conscious of what its own professional and ethical standards are in relation to involvement with the C.I.A. or other agencies of the government and, even, with other institutions, public or private, which seek its services.

There is an obvious danger in doing so, of course, the danger of arousing apprehensions that there is or has been in a particular college or university some

unacceptable relationship with the C.I.A. As the President of one college, I can say I have no knowledge of any relationship, paid or unpaid, by any member of the faculty, student body, or staff of Amherst College with the C.I.A. As President of the College, under the Freedom of Information Act, I did seek to discover whether any relationship did exist. The Directors of the Central Intelligence Agency, Mr. Bush and later Admiral Turner, responded courteously and reflectively, but declined to answer the question.

There is the further danger of implying that any relationship with the C.I.A. is unacceptable. Surely, that cannot be so. It is of national importance that the government of the United States has the best intelligence possible on foreign affairs. It is obvious that the professional knowledge and scholarly competence of many faculty in American colleges and universities are an immensely valuable resource to an effective system of intelligence. The only caveat, the whole point of formulating standards for appropriate involvement in the gathering of intelligence, is that the relationship between an institution or an individual with the C.I.A., or any other agency or external body, not contradict general standards of professional conduct.

PREMISE.—*All members of the academic community have the responsibility to avoid actions which call into question the integrity of colleges and universities as independent and autonomous centers of teaching and research.*

The premise, one will quickly recognize is general, and not addressed only and particularly to involvement with the C.I.A., although the injunction of the Church Committee provides the occasion to reflect on criteria for the self-government of academic institutions. To put it another way, whatever standards or guidelines are established should be generalizable. If disclosure is appropriate for a relation with a governmental agency, so it is for a relation with other external bodies. For example, a professor teaching labor law who receives a fee as consultant with a labor union or corporate employer should let the students he teaches or the colleagues he addresses through word or publication know, so his objectivity may be considered and fairly assessed by those to whom he speaks.

To suggest there is an individual responsibility to the corporate good of the academic community raises a classic problem.

I will put aside the practical problem that if an individual chooses to engage secretly in an action which is contrary to the general norms of the community, there is—by definition—no way to know or to take that fact into account. It may be impossible to know whether a member of the academic community is acting in violation of the presumed norms of conduct for one who is a member of the academic community.

At the college of which I am president, there exists a code of intellectual responsibility. It asserts, "Amherst cannot educate those who are unwilling to submit their own work and ideas to critical assessment." That is a statement about intellectual responsibility on the part of students. It is also true for anyone connected with the College who cares about its essential educational purposes. That sentence is an attempt to capture in words the ideal of an intellectual community, namely, the belief that openness, honesty, the willingness to say what one has to say publicly, to accept criticism and to attend to opposing views, that all these qualities are essential, the necessary conditions of intellectual and educational life.

Secrecy subverts these essential values and conditions. Secrecy is, to put it shortly, intolerable in an academic community. The C.I.A., of course, insists that although it will not disclose any relation it has with a particular academic that any individual who does have a relationship with it is surely free to say so publicly.

In effect, there is no bar to individual disclosure. The AAUP, in a resolution passed at its Annual Meeting, June 1976, in response to the Report of the Church Committee, called "on all academics to participate only in those governmental activities whose sponsorship is fully disclosed." If the government refuses itself to disclose its sponsorship, then the responsibility devolves on the individual to disclose the nature of the relationship to students, professional colleagues, and others who may be affected by it.

To say so is to tread on delicate ground, namely, the freedom of the individual to do what he or she chooses with one's own time and energy, whatever the attitudes of others. Practically, as has already been suggested, there is no way to enforce the claim for openness on the individual who rejects the claim. The ground is more delicate than that, however. The difference may be principled, not just practical. The danger in laying down general or institutional rules for individual conduct is that the individual may, on principle, reject the premises on which the generality builds. Further, given widespread suspicion toward any involvement with the C.I.A. because of its past practices, there may be an understandable anxiety about public awareness of any association with the Agency.

Having said all that, having taken into account the practical, principled, and psychological objections, one may still insist that the nature of the intellectual enterprise requires as much candor as one is humanly capable of achieving. How each single college or university will arrange its affairs to insure the probability that individuals will live up to their professional responsibility is, as I have said, a delicate problem in governance. Local traditions and local mores will determine how that may best be done. But I do think that it is dangerous to imagine that each individual is the only judge because that is to take the very ground on which the C.I.A. defends itself, namely, that anyone connected with it is free to say so. There is a corporate responsibility which transcends the individual faculty. It is not the job of presidents and administrators to tell faculty what their professional or corporate responsibility is. It is up to the faculty of each institution to determine that, not just their professional responsibility to this or that particular institution, but their responsibility to the profession.

On the institutional side, namely, the responsibility of people like myself who are administrators, the problem seems to me much easier. I do not think that any administration of any college or university should:

1. Accept or administer grants or contracts whose sponsorship is not openly disclosed;
2. Allow sponsored research if the faculty member is not free to publish the results of that research openly;
3. Cooperate with any security clearance or inquiry into the background of any member of the faculty, staff, or student body without the obligation to inform the individual of such action;
4. Allow the recruitment of faculty, students, and staff for any employment by any agency unless the recruitment is public and open.

Finally, one comment to put things in a larger perspective. Situations may arise in which one chooses consciously to violate the standards of professional conduct because of the claim of a greater good. A respected colleague once put the dilemma by way of an anecdote. We know that the war against Nazi Germany was greatly helped by acquiring, in Poland, the cipher machine which was used to code German war orders. If conditions were such that an American professor, ostensibly acting as an independent scholar but in fact a secret agent, were necessary for the securing of the cipher machine, would it be permissible for the professor to do so?

The hard answer has to be that as an academic (as our philosophic friends like to say, qua academic) the action is impermissible because it violates professional standards of openness and honesty. The professor, conscious of the claim of the ethical standards of his or her professional calling, might well choose to put them aside. One good may have to give way to another.

But the principle of professional responsibility and the openness and honesty it dictates must be asserted and defended, and explicated in some of its particulars, before one may make an adequate judgment when, consciously, to violate it. The public one means finally to serve must be confident that only grave and pressing danger could possibly lead to the surrender of professional obligation. It is the responsibility of all members of American colleges and universities to conduct their professional life to deserve public confidence and to take no action which will call into question the integrity and the autonomy of American academic institutions.

ADM. STANSFIELD TURNER, DIRECTOR OF CENTRAL INTELLIGENCE

Good morning, good afternoon. In thinking about being with you here today, I was struck by the commonality of our profession. The intelligence profession, the academic profession are both founded on good research and searching out information. They're beth founded on analyzing that information, interpreting it, adding to the fund of knowledge available. They're both founded on publishing that data, making it available to those who need it so they can draw better conclusions in whatever line of work they are engaged. In our country there is a similarity because in the non-governmental sector there's a greater concentration of research skills as identified by a Ph. D. in the academic community than anywhere else; in the governmental sector that concentration is in the intelligence community. We have more PhD's than anyone else in the government. This commonality means in my view that we have a good enough foundation for a more comfortable, a more mutually supportive relationship than has existed in recent years. I happen to believe that a more mutually supportive relationship between us is particularly important to the United States of America today. Why? Because good intelligence is more important today than at any time since World War II. Your contribution to it can be significant and entirely proper.

Why is it more important that we have good intelligence? Thirty years ago we had absolute military superiority. Today we are in the position of mere parity.

Clearly, the leverage of knowing other people's capability and intentions in the military sphere is much greater when you are at a position of mere parity. Thirty years ago we were totally independent economically. Today we are clearly interdependent with many other countries. It is much more important today that we know what is going on and what is going to happen in the economic sphere than it was thirty years ago. Thirty years ago we were a dominant political power and many smaller nations took their cue from us automatically. Today not only do those nations not take cues from anybody, but there are many many more of them. Pick up your morning papers and read about a country you never heard of a decade ago. It's everyday in that way. Why, though, must we obtain information about the military, political and economic activities through intelligence? For the simple reasons that we are blessed by living in the most open society the world has ever known. But most of the nations of the world do not enjoy that privilege. And yet the activities of those closed societies have tremendous import and impact on our military, political and economic well being.

For instance, would anyone in this room even think of concluding an agreement on strategic arms limitation with the Soviet Union if we could not assure you from the intelligence side that we could check and verify whether that agreement is being carried out. This isn't a question of whether you trust the Soviets; whether you have confidence that they will do what they say. The stakes are too high in this perticular game for any country to put its total fate in the hands of someone else without any ability to check on them.

So, too, with the many other negotiations in which our government is engaged today in an attempt to reduce the threshold of the probability of resort to arms. Mutual and balanced force reductions in Europe; antisatellite negotiations; comprehensive test bans on nuclear weapons testing; reductions in conventional arms sales around the world—all of these are founded on good intelligence.

But much more than the military sphere is at stake. Our country stands for increased international economic growth, narrowing the gap between the underpriviledged nations of the southern hemisphere and those of us to the North. And yet, here too, you need good economic information. You need not be surprised by a closed society like the Soviet Union that entered the grain market in 1973 in a way that disturbs all of our economies and yours and my pocketbook.

The CIA today publishes unclassified estimates. One last summer on the future of the Soviet economy, trying to inform everyone what to expect from that closed society, saying that they are going to have some problems in the decade ahead. Problems which will lead to pressures that will keep them from entering the international market as much as they are today we believe, and therefore impact on American business. We've had a study that was published on the international energy situation—that said that over the next decade the demand for oil out of the ground will be greater than the amount we can physically get out; not that it's not down there, but than we can get out. Therefore, there are bound to be increased pressures on prices and there will be restriction on economic growth. If we are going to combat, as we would like to in this country, a war on international terrorism, you simply have to penetrate and find out what is going on in internatinal terrorist organizations. We do that from an intelligence base. If we are going to conduct the war on international drug trafficking, you have to do much the same kinds of things.

And in the international political sphere, if you're an interventionist, an activist, you want the United States to get involved, or if you're a pacifist and you don't want the United States to get involved, you simply have to have good information as a foundation for your policy in one direction or the other.

Hence this country must have today, some organization, call it the CIA or whatever you will, that can operate overseas, openly and clandestinely in order to gain the informatin that our policymakers need.

Today, however, the rules and the players have changed. Your intelligence community is under the tightest control and is operating more openly than ever before. We are, in my opinion, in an exciting period, an exciting experiment, in which we are evolving a new, uniquely American model of intelligence. What are these controls? What are these checks and balances that Bill refered to that we now have and did not have when the Church Committee report was written?

One, you have myself, the Director of Central Intelligence, with strengthened authority today. New authority to bring together all of the intelligence activities of our country, not just those of the CIA. And my personal conviction that the Intelligence Community will and must operate in conformance with the laws of this country and with its moral standards; and that it must cooperate fully with the oversight bodies that have been established.

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What are those oversight bodies? What are those checks and balances built into the governmental structure? First is the President and the Vice President who today take a very active and strong interest in our intelligence activities and supervise them closely.

Second, there is something known as the Intelligence Oversight Board; three distinguished citizens appointed by the President reporting only to him and to whom you or any of our employees can communicate directly. Call them up, write them and say you think Admiral Turner's off on a bad tack. They will investigate it; report only to the President.

Beyond that there is a new role in the Justice Department; new regulations which they write and tell me how I may go about conducting my business.

And finally, there are two very rigorous oversight committees of the Congress; one in each chamber. And I can tell you having been on the hill for over twelve hours this last week that they hold me to the task. They interrogate me, we provide them detailed information and they know what is going on. In addition to this, I rely very much on the American public as a form of control on our intelligence activities. So today we are responding more to the media; we are coming more to academic conferences and symposiums, writing papers and supporting your activities. We are lecturing more; we are participating more in panels like this—and we are publishing more; we're publishing all that we can legally declassify and still find that we have a value to the American public. And any university or college that is not subscribing to the Library of Congress for $255 a year to all the publications that we put out from the CIA, an average of two a week on an unclassified basis, is missing one of the greatest source bargains in the world. We have the Freedom of Information Act and a greater declassification program. These are not just a public relations gimmick, these are founded in a sincere conviction that the better informed the American public is on issues of national interst, the stronger our democracy will be.

We want particularly, however, to share with the academic community. On the one hand because we need you. We need, as any research organization does, outside scrutiny to ask, are we seeing the woods for the trees? Are we making those same old assumptions year after year? Are we mired in our own thinking? Is our analysis rigorous? On the other hand, I think there is an untapped potential for the academic community from the world of intelligence. Our new sophisticated technical means of collecting intelligence has all kinds of potential for you as well as for us. I just learned the other day, for instance, that there's tremendous potential for archeology in our aerial photography capability; an ability to get to archeological ruins that are politically or geographically unaccessible and even to find more when you're there than you can get on the ground. We're anxious to share if we can in spheres like this. At the same time we're anxious to have you share with us your expertise, your knowledge, because we have a basic principle. We do not want to risk and spend money to go out overseas and clandestinely collect information when it is openly available inside our own society. So whatever connections with you, and not only with you but the entire American public, is an informal connection to try to ask questions and find out what people have learned if they have traveled abroad as they have studied or they've done research. And this includes informal consulting in areas of academic and scientific, technical expertise.

Beyond them we do have formal, contractual paid relationships with consultants, or for providing information. These are normally open unless the recipient, the person with whom we contract wants them to be kept confidential. We want the universities, in the cases of academics, to be informed. But clearly the relationship between the individual professor and the university is the relationship between them and not between us and the universities.

We agree that if a university like Bill's requires that all outside commitments of academic members be reported to the administration the CIA should be no exception. We disagree, however, that the CIA relationship should be singled out uniquely as it is in the Harvard guidelines which assumes that only a relationship with the CIA would endanger the professor's or the school's integrity. With all the opportunities today for conflict of interest we think that is a naive assumption.

Beyond the exchange of information in both directions, it should be obvious that we in the intelligence community are just as dependent as the American business community and the American academic community itself on recruiting good U.S. students, graduates of our universities and our colleges. We can't exist over time without an annual imput of a relatively few of the high quality of American university graduates. We recruit today openly on about 150 different campuses just like businesses or other government agencies. I am sorry to have to tell you that there are a few campuses on which we are denied the right to have free communications and free associations.

In addition, the CIA needs to contract with some foreign students in our country, some very few of the 120,000 of these students. And despite malicious stories otherwise, let me assure you that all such contracts are without coercion, are entirely free, and entirely a matter of choice with individual foreign students.

Let me sum up by saying that in intelligence in our country today we operate under two imperatives. The first is to recognize that the juxtaposition of open and closed societies in our world has dangers for the open society. Now there is not one of us here who would trade the short term advantages that accrue to a closed society for the blessings of openness and respect for the individual human being that we have in our society and we all have faith that that is a long term strength of great advantage. But at the same time we cannot be so naive as to think that we can forego collecting information about these closed societies without giving them undue and unnecessary advantage.

Our second imperative is to recognize that the basic purpose of intelligence in our country is to support and defend its free institutions. We attempt to do that by providing the most comprehensive, the most reliable data we can to the President, to the Congress, to some extent to the American public so that the best decisions for all of us can be made. In my view, it would make no sense whatsoever for us to jeopardize any of those free institutions in the process of collecting that information. I assure you that we are dedicated to conducting intelligence in the United States in ways that will only strengthen the basic institutions, the basic standards of our country. Thank you.

MORTON HALPERIN

I appreciate this second opportunity to speak to you although I must say that hearing these two rather clear and somewhat classical statements of the two positions, I feel a little bit like the donkey in the famous story of the man who was visiting in Eastern Europe and had to get to a small village over the mountains. Not knowing how to go he hired a guide who arrived early in the morning in a wagon pulled by a donkey. They set off to a village over the mountains and they got to the first mountain and the donkey refused to go up. So the guide got out and he pulled the donkey up the mountain. They got to the second mountain and the same thing happened. At the third mountain as they got out the man said to his guide, I'm here because I have to get to the next village, you are here because you're guiding me, but tell me why did you bring the donkey? I want to say that I agree very much with what Admiral Turner said about the importance in research of an independent intelligence agency which provides that research to the Executive Branch, to the Congress and to the public. And I agree also on the importance of cooperation between the academic community and the CIA in the conduct of that research. But that seems to me to make it even more imperative that we "anti" the improper activities of the CIA because I think those improper activities interfere with the kind of relationship which Admiral Turner talked about this morning and which I think is in fact desirable.

Now I'd like to focus my comments on one issue: Namely, the issue of the role of academics, the American communities, and American universities in secret recruitment of Americans and foreigners for the CIA. As Admiral Turner well knows, that was the main problem which the Church Committee had in mind when it talked about its concern about curbing CIA activities on campus. He well knows that that is in fact the issue of great controversy between critics of the CIA's role on university campuses in the activities of the CIA. And I regret very much that in his statement he has continued the CIA policy of refusing to talk about that role. The role which is explained in the Church Committee report, and a role which is of course, familiar to every foreign intelligence service which is interested in activities in the United States. It is a role, in short, of the CIA which is not familiar to the American public; and I think the CIA has an obligation to discuss that role and to try to justify it rather than to refuse to debate or to discuss it publicly. I think of one speech which briefly ended by putting some questions to Admiral Turner in the hopes it will encourage him to end this silence about these activities to begin to discuss them with us.

The Church Committee, in its report, said it was disturbed by the current practice of operationally using academics and that the restraints on the activities of the CIA on university campuses were to put it "primarily those of sensitivity to the risks of disclosure" and not, the Church Committee says, an appreciation of the dangers to the integrity of individuals in institutions, "by those current activities." And the Committee went on to say that it believes it is the responsibility of the university—the universities themselves—to correct this problem. It went on to say, somewhat ironically, that this report on the nature and extent of covert individual relations

with the CIA is intended to alert these institutions that there is a problem. Now unfortunately, that was written at the time that the report contained a description, an accurate description, of what the CIA was now doing on the university campuses. But the Church Committee then submitted the report to the CIA. And the CIA, as the Committee told us, insisted that the report be substantially abridged and that the description of the CIA's role in secret recruitment on university campuses be cut down. It was cut down to the point that three members of that committee felt obliged in the concurring remarks to comment on that issue. One of those gentlemen has gone on to be the Vice President of the United States. And what he said to two of his colleagues was that the discovering of the role of the U.S. academics in the CIA clandestine activities has been so diluted in the Church Report that its scope and impact on American academic institutions is no longer clear. So we have to consider what the Church Committee said on the one hand was a great danger and on the other hand that the universities themselves should do something about it. But then they produce a report which Senator Mondale tells us is so diluted that academics cannot know what in fact, is going on on the campuses that the Church Committee said that they should be concerned about.

The Harvard Report in fact, discusses that problem. And yet in commenting here and elsewhere on the Harvard Report, Admiral Turner to my knowledge has never said anything about these two paragraphs. And I think we'll want to read them in the hopes that that will stimulate some discussion. Talking about CIA recruitment on campus, the Harvard Report says this: the method involves the use of individuals—who may be professors, administrators, or possibly students—and who have an ongoing confidential relationship with the CIA and recruiters. The job of these covert recruiters is to identify to the CIA members of the community, including foreign students, who may be likely candidates for employment or other relationships with the CIA on a regular or sporadic basis. They go on to say that they understand when a recruiter identifies a person he gives the name to the CIA and that the CIA then conducts a background investigation on the individual. But then neither the recruiter nor the CIA informs the individual at this stage that he or she is being considered for employment or other purposes. The Harvard Report goes on to say that it feels for a number of reasons, that I think would be obvious to this audience, such relationships are improper and should not continue. The Harvard Report then recommends that any person who is in this kind of relationship with the CIA identify him or herself publicly as a recruiter for the CIA. It goes on to say that no member of the Harvard community should give the name of an individual to the CIA without that individual's permission.

Now, you have been told that this legislation has been introduced in the Senate Intelligence Committee. That legislation authorizes the CIA to continue to operate secret recruiters on universities campuses. It authorizes the CIA to conduct secret background investigations of Americans and foreigners within the United States. Therefore, it seems to me that the academic community has an obligation to take a position, as the Harvard community has done, on whether it thinks this kind of secret recruitment is proper. And if it does not think so, it has an obligation to go before the Senate Intelligence Committee which will be holding hearings on this issue and to say what rules and regulations and what guidelines you'll permit. Now let me conclude simply by putting a few questions to Admiral Turner. First, I'd like to ask whether it's allowed, as the Church Committee reperts says, primary recruitment and CIA activities on the university campuses—is the risk of disclosure an embarrassment, rather than a threat to academic freedom? Second, I would like to ask him whether the activites which were described in the Church Committee report which have been quoted to you about activities on a hundred campuses as has been delicately put, maybe introductions have provided leads. Whether that is in fact, still going on on something like a hundred university campuses? Third, I would like to ask him whether he has considered making public, in view of this administration's commitment to greater openness, making public now those secret portions of the Church report so that, as Senator Mondale told us, we would be able to have publicly an accurate picture of what is now going on on campuses. Mr. Mondale, when he was a senator thought that that could and should be made public. I don't know whether Admiral Turner and others of the Administration have considered whether that can now be done. Fourth, I would like to ask him whether the Harvard Report's description is essentially correct, and insofar as it is or is not correct why it is that the CIA cannot discuss publicly, why it is that he does not discuss publicly, whether that kind of activity goes on without naming names or naming campuses; but just discussing in general terms whether that activity occurs. Finally, I would like to ask whether the CIA is observing the Harvard guidelines that are in effect, those guidelines of Syracuse and other univer-

sities; and I would like to ask whether if other universities adopt these rules, the CIA will observe them. And specifically I would like to ask whether the CIA has told its secret recruiters the same thing that it has told the people that it has research relationships with. Namely, that the CIA will reexamine the secrecy obligations that they have taken and permit those people to state publicly that they have been and are now recruiters for the CIA. I think the question of secret recruitment does, as the Church Committee implies, pose very serious problems for academic freedom. And I think the time is long past for the CIA to simply refuse to discuss a subject which puts important cases for academic freedom in the United States.

Further Remarks of Admiral Turner

In response to Bill Ward's very thoughtful comments on the threat of the CIA to our society: He said first it was a threat because there were not adequate organizational checks and balances. I hope I answered that in my comments. Let me point out that the Church Committee report is outdated by a great deal of the actions that we have taken to carry out these recommendations. Secondly, he was concerned that there can't be constituent power brought to bear as a check on the CIA because we can't tell the public everything about what we do. I agree with him that that is in fact the case. But at the same time, I am listening for a prescription of how to cure that. Our prescription is what I call surrogate public constituent oversight. That surrogate process are these committees of the Congress and the Intelligence Oversight Board that I referred to. As Bill has said, he supports the need for good intelligence in our country. But there is a conflict between having good intelligence and having 100% openness. And it is not the Intelligence Community alone that has secrets in our country. It is the academic community. CAP researchers certainly don't share their research before they publish it. It is the business community, who don't share information on their accounts and their plans and their programs. It is academics who consult with the business community and don't reveal the strategy for the firms that they are advising. All of us have this problem of where we draw the line between complete public inspection of our activities and some degree of secrecy. We have been drawing it further and further in this country and, under this new model of intelligence, forced public disclosure. We are trying our best, but there are great risks and there have been disclosures that have not been intended that have seriously jeopardized our ability to continue on intelligence function and institution.

Morton asked some questions here that are complex. I'm not sure I've got them all written down or I can decide how to answer them. I think he makes an inference that I want to establish principles. The CIA does not operate collecting intelligence in the United States of America. Our job is to collect foreign intelligence overseas. We don't clandestinely work against the American citizen, or against the foreign citizen in this country. We come to them openly to ask them for information. We're not allowed by law to so call "spy" on the American citizen, or on the foreign citizen in this country. He pointed out that he thinks it's wrong that there be recruiting in which the individual is not informed that he is being considered for a position in the CIA. Everyone of you, every year I suspect, get a number of letters asking who's a good graduate student to go work here, or who would be good professors for the head of a department in another university, or that IBM would like to employ this person or that—could you recommend somebody. And I am sure that if you sum up their qualities, their strengths, you rush right out and give that to the individual who is concerned. We recruit on campuses, we recruit just like everybody else does. Some of it's opon, some of it's not. The not portions—Morton didn't hear me talk about them in my speech; and which he complained vigorously that I did not address or the CIA will not address. For the first time in public I addressed this issue today of recruiting foreign students on campuses and I told you we do very few out of some 120,000 who are here. And there is utterly no coercion in it. And it's no more secretive than much of the other recruiting that is done.

Questions for Admiral Turner and His Responses

Question. If we agree that the best intelligence, the best analysis, is necessary for comment on foreign affairs or the whole variety of things which you named; Would it not be possible to split the operational side of the agency completely from the policy and analysis side so that the policy and analysis side would not only be publicly available but I think would even serve the interest of the agency. Secondly, I think that they would have the confidence that they would have a policy analysis for getting a particular spy to contract who is exposed to the scrutiny of other

professionals in the field. I think that split between the operational and the policy and analysis side would not only allow academics to participate comfortably, it would also serve the interest of the agency.

Answer. I think what you're really saying, Bill, is that academics simply have a built in bias—that if they associate with the CIA they're tarnished. Even Norman Bimbaum is associating with us these days. Seriously, the connection between the analysts and the people who collect intelligence—whether they collect it from our technical system, whether they collect it from our human intelligence system, whether they collect it from our overt, open system—is absolutely fundamental to the process of intelligence. It would be like somebody doing research on geological strata out in the field and digging cores and not being willing to talk to the people back in the university who are analyzing it and writing the dissertation. What happens in this game is that the analyst needs some information. He walks across the hall and talks to the man who goes out and collects it. He describes it and the man says well, I've got this system and that system and I'll try a little of each and see what I get. He comes back and says here's what I have and the analyst oh no, you missed the point a little bit over here. I want to know the color of the nodes, not how thick they are. They go back and they try it again. Otherwise, we collect information about Country X and we analyze it on Country Y. It is utterly essential. I have in my time moved within the organization, somewhat in directions other than indicated. I am making a very clear division here, but I can't just separate them and even if I did, what difference would it make. I'd call one the CIA and the other one XIA or something like that and they'd still have to be there and work together. I think it's a subterfuge to simply tell you all that you are not working for the CIA because I call it the XIA.

Question. There is a second issue which is the compatability between operations by intelligence agencies and analysis. It seems to me very different that I would ask Admiral Turner to put a contemporary version on that—whether he does not think it would be an incompatability. Let's say the President of the United States was to simultaneously order him: one, to produce the best possible analysis of the Cuban role in Africa and two, conduct a worldwide propaganda campaign using CIA assets to exaggerate and to alarm people about the Cuban role in Africa; and whether an academic should not wonder about whether he should cooperate with CIA on the first question if they are simultaneously engaged in the second activity.

Answer. Let me make sure we are understanding our terms here because that's a very good question. He called covert action the influencing of events in a foreign country. It is not really an intelligence function. Clandestine collection is collecting information secretly overseas about foreign activities. The third function we do is research. They're all lumped together because the country decided some years ago that when it was going to do covert action—attempt to influence events overseas, which is simply one step further in the diplomatic process but not going as far as sending in the marines—it decided that the Central Intelligence Agency would be the one to do that. There have been many studious proposals to separate all covert action activities out of the Central Intelligence Agency and put them elsewhere. When I first arrived I thought that might have some real merit and I looked at it quite carefully. It has some inferences that you want to be careful about. So we do a covert action overseas, like the propaganda situation Morton described, and we concentrate on getting the truth out to other people. We're not out to do a dirty tricks game, we're trying to penetrate and get people to understand what's happening in the world when their media or society is closed. Now, the same people who will do that for us are marvelous sources of intelligence. What would we do if we separate the two. We would construct two bureaucracies—many of them working with the same individuals overseas. It would number one be confusing and difficult, but think of the effect of having a second bureaucracy just for covert action. Ladies and gentlemen you know as well as I that bureaucracies tends to perpetuate themselves and tend to grow. Today if you're in covert action in the CIA, tomorrow it may be an entirely separate section. You don't have to push covert action in order to be sure you have a job tomorrow or that you'll be active and fully employed. If you have an agency just to do covert action, I'm afraid it will be forced upon us and that it will be generated by that agency, whereas today that is not the case whatsoever. We in the Central Intelligence Agency look on this as a subsidiary function and we only respond to requests for assistance in the covert action field.

Question. Admiral Turner, could you possibly answer one of Morton Halperin's questions about the Church Committee Report and the possible declassification of the censored parts?

Answer. I'd be happy to. I have not seen nor have access to the portions of the Church Committee Report that were not published. That's a matter of the United States Senate and its committees. I can only assure you that the senators who reviewed what the CIA recommended be published was not published, are by no means tools of the CIA, they made up their minds what was in the national interest to publish, and what was not in the national interest to publish. And if anybody is going to reverse their decision it will be the senators, not the CIA.

Question. My name is Norman Birnbaum, and I was just embraced by Admiral Turner. I would, with respect, distance myself a little bit. As some of you may know, I'm in litigation with the CIA in a mail opening case. This happened under the administration when directorship of the CIA was not an Amherst but a Williams graduate, Richard Helms. The point is this: The nearness to the CIA, on which Admiral Turner spoke on my part, is represented by a consulting appointment to the National Security Council of the Executive Office of the President. It's quite true that in this function as consultant presumably the reports I do could be read by the CIA, they could also xerox my articles and send them around. But the fact is that this relationship is an open relationship which my students and colleagues know about and I must say that I am pleased to be helping the administration in foreign policy—it needs help. I must say that if I had been asked to be a consultant to the CIA, I would refuse. And I would refuse not out of any disinclination to do a public service but because of—and I'm candid at this point—the CIA's record in covert operations and manipulations. It's really very, very difficult if not impossible for anybody interested in contemporary politics or social affairs to approach another colleague and say, look I'm working for the CIA but I'm only asking for local information. It makes it very, very difficult and this is the reason I think that the question raised by the Church Committee and also by Mort Halperin about the separation of covert operations from intelligence, is a question which is in the national interest and would it seems to me be of interest to all of us.

Answer. Let me start by reaffirming my written apology on behalf of my predecessor to Professor Birnbaum for his mail having been opened. There isn't one of us in the Agency today who doesn't believe that was a reprehensible mistake and we're very apologetic. At the same time, the professor's remark in attempting to distance himself from the CIA while he is working on the NSC, of which the CIA is a component part, strikes me as surprising. Although his relationship with the NSC is open, let me assure you he cannot work there without having access to secret information which he will not share with any of the rest of you or we will have to terminate his employment.

Question. Admiral Turner, I'm addressing a concern to you in your capacity not simply as the Director of the CIA but as head of the Intelligence Community, a position you alluded to yourself. You spoke of research and research is very dear to our hearts. So is science and I think it has to be made clear that research is even steven with science, but not quite the same thing. I'll try to make clear what I mean in a moment. That difference was very pointedly illustrated in several recent occurrences which involved attempts to preempt publication of the results of scientific research. One case I know of was supported by the National Science Foundation. Now the essence of science is not simply research, it is the availability of results to the scientific community and it seems to me that attempts to suppress this result, particularly when the Intelligence Community is not involved at all in financing or funding of these things, is to put it mildly insidious to the health of the scientific community and the academic community. And I don't understand how it could possibly be justified by anyone in the Intelligence Community.

Answer. To begin with, I looked into this and I know of no authorized intelligence community effort to suppress those pieces of information. It was apparently somebody from the Intelligence Community acting as a member of the association or something who did try to discourage that. At the same time, I hope you are not stating that the man who worked so diligently during the 1940s under Stack Stadium at the University of Chicago should not have been allowed to keep their scientific research secretive. We're only allowed to have secrecy in times during war, is that correct? The distinction between peace and war is not that clear cut. And you certainly don't wait until the day the war starts to start building tanks. Our objective today is to ensure that we don't get into war and we have to have both scientific development and good intelligence information in order to achieve that objective which is what drives all of us in government and international relations.

Question. I have been personally aware of Stan Turner's career for a good many years and I was pleased with his appointment and wish to assure him I would have

voted for the President had I known his intention to assign Stan to his present duty. (inaudible) . . . Do you feel that we do in fact have a balance of national intelligence effort to make proper use of that.

Answer. Thank you Dave. I do. As far as the reduction of clandestine intelligence operators is concerned, I would like to make it very clear that we did not reduce our clandestine people overseas where they are working on the important things. What we did was cut the overhead at headquarters. We were overstaffed and people were underemployed, and I don't see how I can challenge promising young people to make the future intelligence community unless we really challenge them and they were not being so challenged because of the excess number of people. The second part of your question was are we working with the academic community, and the answer is no to that. That is what I am striving to improve and I think it is most important to both of us. About once every six weeks I get out on a college campus and speak and talk with students, both in small groups and also big public audiences. I'm trying to open up these channels of communication again because I think there is so much benefit to both sides.

Question. Admiral Turner, for the sake of this question let's grant that proposition that it is essential from your perspective that the Intelligence Community and academia work together. It is a two part question: What is the professional identity status of the person who is recruited by the CIA as to the CIA's corps of professional and moral integrity? How is this relationship resolved where the contract with the person's university has a disclosure stipulation in other types of employment?

Answer. That is a very interesting and good question. We believe with great sincerity that we are as moral and have as much integrity at the Central Intelligence Agency and Intelligence Community in general as any profession. The moral conflicts that are generated in intelligence work are neither quantitatively nor qualitatively different than the moral conflicts that are faced by most other professions and lines of work in our country. I come to this job as a former military officer. Look at the moral conflicts a military man faces when he asks the question—will he shoot to kill. There is no greater moral conflict that a man must face in life. Look at the moral conflicts that have been exposed in recent years about the American business community. Will you lose that contract or will you offer a bribe to that foreign company, or country with whom you are dealing. So too, we in the intelligence have moral conflicts. But they are not different. They are tough and we work hard to get our people to understand basic ground rules under which they work, the standards which the President of the United States will accept, that I will accept, and it is not easy and it puts a tremendous load on the young people who come in and accept the sacrifices of being in the intelligence business. I assure you there are real sacrifices, but we do have a great sense of integrity and moral standards. I intend to insure that those are rigorously enunciated to all the people who join our organization. And I would like you to know that at this moment I am very engrossed in a project with the leading academics and the leading universities in writing a specific code of ethics for the intelligence community. I found when I took this job that this man had written an article in a leading journal he said there was a code of ethics needed in the intelligence community. I called him up and asked him if he would work. That was a year and a quarter ago, we are still working on it. You can laugh, but it is not easy to do. It is not easy to write something that will be specific enough to give guidance and not so specific as to tie people's hands. Yet, I owe it to my people to give them moral and ethical guidance, because the man in the field has got to take that responsibility on his shoulders. They're young men and women out there who are doing it for you. They are brave, they are capable and they are moral. I am trying hard to give them explicit guidance to help them on their course. I thank you for the privilege of being with you today. I look forward to more interchange between all of us in the intelligence community of our country and all of you in the academic professions we all hold in such high esteem.

APPENDIX VIII

Washington, D.C. 20505

OGC 78-2261
10 April 1978

Stephen B. Burbank, Esq.
General Counsel
University of Pennsylvania
Philadelphia, Pennsylvania 19174

Dear Mr. Burbank:

Thank you again for your letter of 20 February 1978 forwarding for our review a draft statement setting forth "General Policies Regarding Issues of Concern in Relationships Between the University of Pennsylvania and Members of the University Community, and Intelligence Organizations."

At the outset, let me say that in several major respects current CIA practices are already largely consistent with the thrust of many of the proposed policies contained in the draft statement. For instance, as is noted in the statement, it is contrary to established CIA policy to obtain the unwitting services of staff and faculty members of U.S. academic institutions. In addition, CIA will enter into classified and unclassified contracts and other arrangements with U.S. academic institutions of higher learning only if senior management officials of the institution concerned are made aware of the Agency's sponsorship. Furthermore, pursuant to Federal law, CIA will neither solicit nor receive copies of identifiable school records relating to any student (regardless of citizenship) attending a United States academic institution without the express authorization of the student or, if the student is below the age of 18, his parents.

I might also say that this Agency supports the principle espoused in the draft statement that a university's "policies applicable to intelligence organizations should be identical with those applicable to all other extramural organizations." As you may know, it is our firm belief that at a minimum it is both unfair and illogical for any set of such guidelines issued by an academic institution to attempt to regulate the private lives of its

membership in a manner which discriminates against or singles out any particular group, profession or segment of society. We do find it regrettable, therefore, that the draft policy statement stops short of applying this principle in a uniform, across-the-board fashion and instead in at least one area (i.e, the disclosure of factual information about a member of the University community) imposes more stringent restrictions on intelligence organizations than on other extramural organizations.

All of the above comments notwithstanding, our overriding difficulty with and objection to the draft statement stem not from any requirements which are directly imposed on CIA (there are none, as best as we can judge) but rather are based on what seems to us to be excessive, arbitrary, and potentially chilling restraints which some of the policies place on the right of privacy and freedom of choice of individuals covered by the statement's broad and somewhat ambiguous definition of the term "University community." Our concern in this area is largely prompted by this Agency's experience in dealing with staff and faculty members of U.S. academic institutions. As you are no doubt aware, CIA enters into personal service contracts and other continuing relationships with individuals in many walks of life, including academics. As previously indicated, Agency policy requires all such individuals to be made aware that they are dealing with CIA, so that under no circumstances do we seek or obtain services or assistance from such individuals on an unwitting basis. On occasion, security considerations preclude the disclosure of these relationships to any third parties. More frequently, however, these relationships remain confidential at the insistence of the individuals themselves, their concerns being that they might otherwise be exposed to harassment or other adverse consequences. In the case of academic staff and faculty, as in other cases, we see no reason and feel no responsibility to overrule these individual preferences by requiring that relationships be disclosed to the institutions for prior approval. Rather, we believe that the decision as to disclosure should be left to the discretion of the individuals involved.

We note that the draft statement specifically acknowledges that "University policies regarding issues of concern in relationships between members of the University community and intelligence organizations must also be consistent with the maintenance of individuals rights and freedoms." Ironically and unfortunately, however, much of the actual substance of the statement appears to undercut this principle by flatly requiring, for example, full-time faculty or staff members to adhere to the policies articulated therein "at all times" so as to cover any activities which they may choose to pursue in a strictly off-duty or off-campus capacity and which have no effect or connection whatsoever with their official relationship with the University. In another

particularly striking example of the pitfalls entailed in formulating policies of such wide breadth and vague scope, it is elsewhere provided that "members of the University community may not undertake activities on behalf of an intelligence organization which in any way extend beyond or are inconsistent with their normal University activities." The above restriction seems to us to be especially noteworthy in three respects: 1) as previously noted, it singles out for special and more stringent standards intelligence organizations; 2) the words "extend beyond" seem to effectively preclude any privately pursued outside activity on behalf of CIA, no matter how innocuous, and including open as well as confidential relationships; and 3) since it specifically applies to conduct which extends beyond or is inconsistent with University-related activities, the restriction, if read literally, has the anomalous and presumably unintended effect of tacitly allowing activities on behalf of an intelligence organization which flow from and relate to an individual's "normal" University activities.

Although our disagreement with these and certain other aspects of the University of Pennsylvania's proposed policies are clearly significant, we need not belabor these differences at this time. CIA appreciates the fact that the draft statement recognizes and makes a sincere effort to deal with the difficult and complex problem of maintaining a balance between the intellectual independence of academe on the one hand and the needs of the nation and the rights of individuals on the other. We believe that reasonable people may honestly disagree on whether any type of assistance made by a member of the U.S. academic community to an intelligence organization is advisable or proper. In the final analysis, however, it seems to us that the ultimate decision must be left to the individual to make.

Again, we thank you for your consideration in allowing us the opportunity to offer comments on your draft statement.

Sincerely,

Anthony A. Lapham
General Counsel

Washington, D.C. 20505

Dr. William J. McGill, President
Columbia University in the City
of New York
New York, New York 10027

Dear Dr. McGill:

The information in your letter of December 1, 1977 concerning your public disclosure of Subproject 130 of Project MKULTRA and its connection with Columbia University was most helpful to us and I thank you for it. While protection of the identities of institutions notified of MKULTRA activities makes little sense in circumstances where the institutions themselves have publicly acknowledged their involvement, we shall continue to protect, to the utmost of our ability, the identities of all individuals associated with this work. Consequently, please advise Professor Thetford that we do not intend to make any disclosures with respect to him personally.

We have examined the information you have furnished concerning the research activities you have described as relating to human behavior and funded through various medical research foundations and which you suspect were secretly sponsored by CIA. As I stated in my earlier letter to you, the recollections and records available to you apparently are more complete than ours and we have no evidence that CIA was involved in any of these activities, except of course for Subproject 130 which is listed first in your compilation. As to the remaining activities, given the generalized nature of the research as you have described it, it must be remembered that each of the funding mechanisms utilized by the Agency for Project MKULTRA also had something of an independent life. For the purpose of strengthening their credibility as sources of research funds, and because they received many private donations for medical research, these organizations provided support to many legitimate research activities having no connection whatever to MKULTRA or CIA. Also, as you may know, the Geschickter Fund for Medical Research, Inc., continues to be an independent source of funds for medical research. Thus, apart from the deficiencies which I described to you previously concerning our remaining records as to MKULTRA, it is not unreasonable to suggest that these activities might not, in fact, have been funded by CIA.

Another possible explanation which has developed as a result of your information concerning the nature of the additional research, at least as to the research activities noted in your table as items two, three and four, is provided by reference to Subproject 77 of MKULTRA. This activity, the record of which includes no reference whatsoever to Columbia University, was conducted in conjunction with another private organization during the period between approximately 1957 and 1962. An estimated $110,000 was expended through one of the research foundations in this subproject to explore the basic elements of two personality theories in order to develop a unified theory. Because of the correspondence in both time and subject matter it may be that the work at Columbia was somehow related to this larger project.

Be that as it may, let me once again assure you that, to the best of our knowledge and information based upon records available here at the Agency, there is no evidence of research grants, other than that connected with Subproject 130, made to Columbia University by CIA without the knowledge of the University. In addition to the three research studies you described in your letter, there appears to have been a classified contract in 1967-69 which I prefer not to describe in this letter; however, this activity and CIA support of it were not matters of which University officials were unaware or disapproving. As I stated in my previous correspondence to you, Executive Order 11905 and current regulations now require that all classified and unclassified contracts and other similar arrangements between CIA and U.S. institutions of higher learning must be made known to senior management officials at the institution.

Your letter expressed a conclusion, which you asked me to correct if it was mistaken, that CIA does not have "current secret contractual arrangements with any member of the faculty of Columbia University for research or any other personal or professional service." That is not a conclusion that I am prepared to either affirm or deny. CIA enters into personal service contracts and other continuing relationships with individuals in many walks of life, including academics. As a matter of Agency policy, all such individuals are made aware that they are dealing with CIA, so that under no circumstances do we seek or obtain services or assistance from such individuals on an unwitting basis. On occasion security considerations preclude the disclosure of these relationships. More frequently, however, these relationships remain confidential at the insistence of the individuals themselves, their concerns being that they might otherwise be exposed to harassment or other adverse consequences. In the case of academic staff and faculty, as in other cases, we see no reason and feel no responsibility to overrule these individual preferences by requiring that relationships be disclosed to the institutions. Rather we believe that the decision as to disclosure should be left to the discretion of the individuals involved. If I were to affirm or deny

your conclusion with respect to Columbia University faculty, I could hardly follow a different course in relation to similar requests that I might receive from other universities. I would then have set in motion a sequence of events that would result in a breach of trust with those who had chosen, as I think was their right, to deal with us in confidence, and I am unwilling to accept that result.

Your persistence is, of course, understandable and I am not unsympathetic to your efforts to acquire a full and complete statement of this Agency's relationships with Columbia. We have attempted to be as forthcoming as possible in connection with MKULTRA because of our recognition of the likelihood that institutions such as your own would be extremely vulnerable in the face of adverse publicity without prior knowledge of the underlying facts. We have shared with you all such facts within our possession, but we cannot share the other information you requested without seriously compromising our own interests or the interests of persons to whom we owe obligations of confidence.

Yours sincerely,

/s/ Stansfield Turner

STANSFIELD TURNER

APPENDIX IX

UNIVERSITY OF CALIFORNIA

THE ACADEMIC SENATE

July 28, 1978

Senator Walter D. Huddleston
United States Senate Select Committee on Intelligence
Washington, D. C. 20510

Dear Senator Huddleston:

On behalf of the University of California Committee on Academic Freedom, I wish to thank you for the invitation and opportunity to address the U.S. Senate Select Committee on Intelligence last Thursday (July 20, 1978) on the subject of S. 2525.

We are all gratified by the sensitivity of the Senate Committee to the problems of the academic community. In turn, we appreciate the difficulties you must be having in balancing the legitimate needs of intelligence-gathering agencies with the requirements for intellectual honesty among academicians.

We recognize that S. 2525 may not include as much protection for the academic community as we should desire. Insofar as you may find it impossible to endorse altogether our requirements that no member of the academic profession allow him/herself to be drawn into covert activities on behalf of intelligence agencies, academic institutions must be permitted to enforce their own standards of professional ethics, in defense of the essential activities of scientists, scholars, artists, and students. I share President Derek Bok's indignation over the CIA director's assertion that the CIA will not respect the Harvard Guidelines on faculty consultations with the CIA; but I can understand that the CIA is devoted to a task which, in its own terms, may appear to justify transgressions upon another institution's responsibilities. On the other hand, that merely requires that universities redouble their efforts to enforce their own standards of proper behavior. To these ends, I should like to repeat my plea that your committee add to S. 2525 a provision that guarantees the universities' power to discipline their own members in defense of their own standards of ethical or professional behavior.

There is danger, I believe, that various government agencies may single out for penalties any institution that applies sanctions against any of its members discovered to be violating professional obligations, specifically obligations

that preclude covert activities on behalf of the intelligence agencies. The federal government has enormous financial leverage with the major universities of the country. This leverage must not be permitted to interfere with university autonomy with respect to enforcement of professional standards among its members. It is necessary, therefore, that S. 2525 include a provision forbidding reprisals by a government entity against any academic institution that attempts to enforce its own professional standards, even when such efforts require non-cooperation or less than full cooperation with intelligence entities.

Once again, thank you for the invitation, and for your attention.

My best wishes,

Richard M. Abrams

RICHARD M. ABRAMS
Professor of History
Chairman, Committee on Academic Freedom
University of California

RMA:bjm

APPENDIX X

Department of Justice
Washington, D.C. 20530

September 1, 1977

Mr. Anthony A. Lapham
General Counsel
Central Intelligence Agency
Washington, D.C. 20505

Dear Mr. Lapham:

This is in response to your letter of July 5, 1977, in which you requested our advice with respect to the consequences of the recent decision of the Court of Appeals for the District of Columbia Circuit in Weissman v. Central Intelligence Agency, Civil Action No. 76-1566 (D.C. Cir., January 6, 1977). Let me say at the outset that, as you suggested, we have been in contact on several occasions over the last two months with attorneys in the Solicitor General's Office. We understand that the decision has been made by the Solicitor General not to seek Supreme Court review in this instance. We have discussed with them informally our general views on the Weissman case but we were not directly involved in the consideration of the question whether this was an appropriate case in which to seek certiorari. The question that remains is whether, and to what extent, the Weissman case proscribes the CIA's activities. For the reasons that follow, we are unable at this juncture to provide your Agency with a definitive opinion on the scope and consequences of the D.C. Circuit's opinion. We are able, however, to suggest the considerations that ought to be applied by the CIA in developing procedures dealing with the types of activities potentially affected by Weissman.

The troublesome portion of the decision in Weissman is the court's treatment of the Government's claim that

certain documents generated as a part of an investigation of Mr. Weissman need not be disclosed to him by reason of exemption seven of the Freedom of Information Act. 5 U.S.C. 552(b)(7). The district court had ruled that the CIA investigation fulfilled that exemption's requirement that the investigation be lawful, and that therefore the exemption protected the documents at issue from disclosure. The Court of Appeals held, however, that exemption seven was not available to the CIA for the sort of activity involved here, and remanded the case to the district court to determine whether other exemptions could protect the documents against disclosure in the absence of that exemption.

The reasoning of the court is not entirely clear. However, the court's ruling appears to be based on its belief that the investigative procedures used were not legally authorized where the target of those procedures was a United States citizen having no connection with the CIA. The court indicated its opinion as to the CIA's authority in this regard in several statements:

> [The proviso in 50 U.S.C. § 403(d)(3)] was intended, at the very least, to prohibit the CIA from conducting secret investigations of United States citizens, in this country, who have no connection with the Agency. Slip op. at 5-6.
>
> [The responsibility of the DCI to protect intelligence sources and methods] contains no grant of power to conduct security investigations of unwitting American citizens. Slip op. at 8.
>
> A full background check within the United States of a citizen who never had any relationship with the CIA is not authorized . . . . Slip op. at 8-9.

These three statements form the basis of the court's ruling that exemption seven is not available.

Neither the above statements nor the rest of the court's opinion make clear exactly what sorts of investigations the court believed were illegal; the court's opinion is ambiguous, for example, as to the scope of permissible investigations and the "connection" which the person under investigation must have with the CIA. In assessing the opinion, and in endeavoring to determine what restrictions it imposes upon the CIA, we believe that there are several factors which ought to be taken into consideration.

First, a restrictive interpretation of the court's language is justified in view of the context in which it was rendered. The opinion was rendered in a case involving the Freedom of Information Act, and not in an injunctive or declaratory action directly challenging the CIA's practices. The court was not presented with a full and direct briefing and consideration of the complex considerations that go into ascertaining the proper limitations on the CIA's substantive activities.

Secondly, this is the decision of only one Court of Appeals in a single case. The Government in other contexts has not always accorded final effect to the decisions of lower federal courts. For instance, in the areas of tax and labor law, the Government has frequently pursued in one circuit a statutory interpretation at odds with pertinent rulings by courts in other circuits. Moreover, there is reason to believe that further elaboration on the court's view of the CIA's authority will be forthcoming in the not too distant future. As you know the Government has now filed with the D.C. Circuit Court of Appeals its appellee brief in Marks v. Central Intelligence Agency, No. 77-1225. The Government devotes considerable attention to a discussion of the potential sweep of the Weissman case, and it may well be that the court will take this opportunity to expand upon or clarify its views.

Additionally, we do believe that a substantial argument can be made that the case was wrongly decided. As you know,

Executive Order 11905 prohibits foreign intelligence agencies from collecting information concerning the domestic activities of United States persons, except among other things, for information collected to determine the suitability or credibility of persons who are reasonably believed to be potential sources or contacts. Section 5(b)(7)(iii). See also Section 4(b)(8). The court did not discuss this provision at all. Additionally, the Church Committee recognized that the CIA had previously conducted such investigations, and apparently did not object to them as violations of the CIA's charter legislation; in fact, the Committee recommended that the practice be allowed to continue. See S. Rep. No. 755, Book II, 94th Cong., 2d Sess., pp. 302-03 (1976). In a perplexing footnote, the Court of Appeals referred to that treatment of the question by the Senate Committee, but it is unfortunately quite difficult to determine whether the reference was intended as a favorable comment upon the practice or as a simple statement of historical fact. See Id. Slip op. at 8, fn. 8. We are of the view that given the court's ambiguous treatment of these important questions, we should be slow to adopt any interpretation of the court's language which would be at odds with these conclusions drawn, respectively, by the Executive and Legislative Branches. Nonetheless, this is the only decided court case and its import cannot be ignored.

With those considerations in mind, the following are our general comments about the meaning of the Weissman case:

1. Knowledge of the subject. Your letter to the Civil Division expresses a concern that the court's opinion might be read to require that the subject of any proposed investigation be "made aware of both the fact and the CIA sponsorship of the investigation." The Civil Division does not believe this to be the case, and neither do we. While the court at times refers to investigations of "unwitting" Americans (Slip op., at 8) other statements in the opinion are not predicated on the factor that the investigation was unknown to the subject. See, e.g., Slip op. at 5-6, 8-9. Rather, these statements find investigations unauthorized by reason

of the lack of a "relationship" or "connection" with the CIA. While in many cases an individual will be aware of his relationship with the CIA, the lack of an explicit requirement to this effect in the court's opinion indicates that the court did not deem this to be an invariable prerequisite to an investigation.

2. Requisite connection with the CIA. The court made clear in several instances that the prohibition on CIA security investigations applied only with respect to those "who have no connection with the Agency" or "who never had any relationship with the CIA." This implies that the CIA might under appropriate circumstances conduct investigations of those who have some connection with the CIA; the opinion, however, does not specify what sorts of connections might justify a security investigation. While the end result makes clear that the CIA's unilateral, undisclosed interest, by itself, is not sufficient, much more than this may not be required to establish the requisite relationship to justify an investigation. For example, all those performing work for or on behalf of the CIA might have a sufficient relationship with the Agency to justify a security investigation--even if they themselves are unaware of CIA sponsorship or involvement. As another example, individuals who consent to an investigation, in the hope of becoming an employee or asset, would also seem to have a connection with the Agency that would justify a security investigation.

3. Permissible scope of the investigation. The court at one point states that "a full background check" is not authorized; we do not believe, however, that this is the only type of investigation which is prohibited. The court at other points states that the CIA is barred from "secret investigations" or "surveillance and scrutiny" of United States citizens, and this would indicate that some initiatives less than a full background check are precluded. At the same time, we agree with the Civil Division that all such initiatives are not precluded. The court's references to a "full background check" (p. 8), to "surveillance and scrutiny" (p. 6), to a "Gestapo" and a "secret police" (p. 7), and to a prolog

"into the lives and thoughts of citizens" (p. 6), together with the context of the thorough investigation that the court assumed occurred in this case, suggest that the court was concerned about the more intrusive security checks. The court also emphasized on several occasions the extensiveness of the investigation, pointing out that it spanned a "five year period." (Page 5). Additionally, in endeavoring to ascertain the limits of the court's opinion, the reference in footnote 8 deserves attention. In discussing the Church Committee's recommendations the court pointed out that a line had there been drawn between investigations "through surveillance" and those, which the Committee approved, "to collect information through confidential interviews about 'individuals or organizations being considered by the CIA as potential sources of information . . .'" Slip. op. at 8, fn. 8.

4. The relationship between "connection and intrusiveness." It is clear that the court was concerned about investigations of those who have no "connection" with the CIA. But it is also clear that the court was sensitive to the extensiveness and intrusiveness of such investigations. On the basis of the court's opinion, however, there simply is no definitive way in which we can determine the precise relationship between those two factors. Plainly, an investigation that is as long-lived as was the Weissman investigation, and which involves "detailed background checks" of a person who is unaware that he is being considered by the CIA and who has no "connection" with the Agency would be inconsistent with that case. Candidly, we share your feeling of frustration in attempting to ascertain whether the Weissman case has any further reach. The opinion offers little guidance in interpreting the statutory limitations upon your Agency's activities.

Given these uncertainties, we would suggest that the most productive course might be for the CIA to draft procedures governing the types of activities which require it to conduct investigations of United States citizens within the United States who have no clear connection with the CIA. Hopefully,

this memorandum will provide you with some assistance in addressing that task. 1/ This Office would be happy to review those procedures and to cooperate with you in any other way we can to assure that, at least until there is further judicial or legislative clarification, the CIA can continue to perform its appropriate functions without running afoul of whatever proscription follows from the Weissman decision.

Sincerely,

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

1/ The descriptive material marked as attachment "A" to your letter of May 27 to the Civil Division would seem to provide an appropriate starting point.

Deputy Assistant Attorney General
Office of Legal Counsel

Department of Justice
Washington, D.C. 20530

Mr. Anthony A. Lapham
General Counsel
Central Intelligence Agency
Washington, D.C. 20505

Dear Mr. Lapham:

Pursuant to conversations between George Clarke and John Gavin of this Office over the last several months, we are forwarding to you our thoughts on the CIA's proposed procedures regarding CIA investigations of United States persons in the United States. This informal discussion does not represent our final conclusions on this matter, but is meant to display our concerns and serve as a basis for future discussion. With the signing of Executive Order 12036 many of the issues touched upon by these procedures will, as you know, become the subject over the next few weeks and months of procedures promulgated under sections 2-206, 2-207, and 2-208 of that Order. The questions to be considered in that process are among the most difficult arising under the Order, and it is our intent here not to foreclose deliberation on any of those matters, but instead to give you the benefit of our preliminary thinking. On this basis, we believe the following issues raise problems in light of Weissman v. CIA, 565 F.2d 692 (D.C. Cir. 1977).

1. Delineation of individuals subject to investigation.

In our view, the decision in Weissman did not preclude entirely investigations by the CIA of those United States persons who have a "connection" with the agency. Several of the categories of individuals included in paragraph [1] of your proposed procedures will have an obvious connection

with the CIA, and we entertain little question about the propriety of investigations in these cases. For example, employees of the agency, those who are detailed to the agency, those who apply for employment with the agency, or those who expressly consent to an investigation (including employees of contractors) would meet this criterion rather easily.

However, the "connection" of other categories of personnel listed in paragraph [1] with the CIA is not so clear. Our principal concern is with those individuals who do not know that they are subject to a CIA investigation and who have no reason to believe that they may be investigated. In particular, this would refer to employees (or applicants for employment) of proprietaries and instrumentalities who are unaware of their employer's connection; it would also include contractors' employees and others who have no reason to believe that the CIA may investigate them. Since these individuals have no such knowledge, their "connection" with the CIA must rest solely on the fact that they have become unwittingly involved in a situation where the CIA considers it necessary to subject them to some form of investigation. We believe this raises two different sorts of problems under Weissman. First, as we stated in our September 1, 1977 letter, while we do not believe that the court made an individual's awareness of an investigation an "invariable prerequisite" to an inquiry by the CIA, the court was clearly troubled by an investigation of an American citizen "without his knowledge" or "security investigations of unwitting American citizens." 565 F.2d at 695, 696. In our view, this concern of the court may not legitimately be entirely ignored. Second, since the individuals here cannot be taken to have even implicitly consented to a background investigation, the requisite "connection" in such cases becomes more tenuous than where they were aware of, and consented to, such investigation.

We do not now believe that these problems under Weissman will preclude investigations of such personnel entirely. Rather, we wonder whether an approach along the lines suggested in our previous opinion on this matter would prove administratively workable -- i.e., gearing the extensiveness and intrusiveness of the contemplated investigation to the degree that an individual has a "connection"

with the CIA. More specifically, in cases in which an individual's connection is limited, the CIA might promulgate more restrictive procedures than are applicable to those that the CIA employs directly. The restrictions which we have in mind would pertain to approval authority, duration of investigation, methods of investigation, disposition of records, etc.

2. Purposes of investigation.

At present the proposed procedures do not state the purposes for which an investigation may be conducted. While we have no substantial objection to this open-ended approach with respect to Agency employees and others close to the Agency (provided that the purposes are lawful), we are troubled by the application of this approach to those who have less of a connection with the CIA. With respect to such individuals, if the CIA is to justify an investigation by reference to some limited "connection," we believe that the regulations should clearly specify that the investigation will not go beyond whatever is required by reason of that connection. Otherwise, it might be claimed that the CIA is using a rather tenuous connection to justify an investigation serving other purposes. Such a departure from the investigation's underlying justification may be an abuse of that aspect of Weissman allowing an investigation predicated upon a connection.

3. Method of investigation.

The proposed procedures do not now specify which methods of investigation may be used, and we believe that it would be necessary in light of Executive Order 12036 to delineate explicitly what methods will be used. Perhaps more importantly, paragraph [3] implies that physical surveillance may be used in some instances. While the Executive Order itself places limits on physical surveillance, additional limitations may be necessary to fulfill the Attorney General's responsibilities under section 3-305 of the Order. Weissman suggests such limitations. For instance, the Executive

Order allows for physical surveillance of present employees of CIA contractors. If these individuals were unaware of the possibility of a CIA inquiry into their lives, we question whether their "connection" with the CIA would suffice to justify the intrusiveness of a physical surveillance.*/

4. Paragraph [2]

The exception contained in paragraph [2] may be too broadly written. The provisions of paragraph [2A] appear to allow exactly the sort of investigation that occurred in Weissman, except that it would be limited in duration and subject to records disposal requirements. The provisions of paragraph [2B] would allow for an exception in all other areas, and hence provide for a way to avoid the limitations of the proposed procedures entirely. Nothing is said to set forth the conditions under which this may occur or to impose restrictions on the use of this broad exception. While George Clarke of your office has suggested that this provision could be modified to apply only to certain sorts of personnel, the open-ended nature of this approach would still trouble us. The application of this approach to those with only tenuous connections with the CIA may, for the reasons discussed above, cause problems under Weissman.

5. Coordination with HR 7-1c(1)(g).

We would suggest that more consideration be given to how the proposed procedures are to fit in with HR 7-1c(1)(g). As the situation presently stands, the CIA will have two different sets of procedures dealing with the problems raised in Weissman. In our view, these two sets of procedures are not now entirely consistent. For example,

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*/ The special concern about physical surveillance is one that was suggested by the Weissman court as we pointed out in our earlier memorandum. See 565 F.2d at 696 n. 8.

several provisions in the current regulations would appear to allow for investigations beyond those contemplated in your proposed procedures. See, e.g., HR 10-LC(1)(g)(4) and (6). In order to prevent possible conflicts or confusion, it may be advisable to promulgate one set of guidelines to cover this entire area. Presumably, this will be done in formulating procedures under Executive Order 12036.

6. Records retention.

Paragraph [2A] states that records of those investigated but not contacted will be disposed of in accordance with General Records Schedules. Since we do not know what these schedules provide for this type of information, we cannot now comment on the efficacy of this provision. We assume, however, that this question and others will be included in the preparation of procedures under Executive Order 12036 and, in that context, we would be pleased to provide whatever additional assistance we can.

Sincerely,

Larry A. Hammond

Larry A. Hammond
Deputy Assistant Attorney General
Office of Legal Counsel

APPENDIX XI

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

(Civil Action No. 78-0330)

NATHAN GARDELS, PLAINTIFF,

v.

CENTRAL INTELLIGENCE AGENCY, DEFENDANT.

AFFIDAVIT

John F. Blake, being first duly sworn, deposes and says:

1. I am the Chairman of the Information Review Committee of the Central Intelligence Agency (CIA). I am also the Deputy Director for Administration of the CIA and have held executive positions within the CIA since 1963. The statements made herein are based upon personal knowledge, information made available to me in my official capacity and upon conclusions reached in accordance therewith.

2. The function of the Information Review Committee (IRC) is set forth in 32 C.F.R. 1900.51 (1975). The IRC is responsible for reviewing Freedom of Information Act (FOIA) appeals and is the highest level committee in the Agency with this responsibility. As chairman of the IRC, I am ultimately responsible for the proper administration of the FOIA appeal process, which entails for each appeal a comprehensive review and recommendation by one or more IRC members to which appeals are assigned.

3. The Nathan Cardels' appeal has been reviewed by appropriate members of the IRC including myself. Although an appeal response was not sent to the plaintiff prior to the institution of this present litigation, an appeal review of each document responsive to his request was conducted. In his initial request the plaintiff requested that: "* * * all past and present contractual arrangements or agreements and personnel relationships between the CIA and the University of California be made public under the statutes of the Freedom of Information Act. * * *" In a letter dated December 15, 1976 plaintiff through his counsel reformulated his request. By that letter he requested documents falling into the following separate categories:

1. All responsive records retrievable through the Directorate of Operations;
2. All responsive records retrievable through the Domestic Collection Division;
3. All responsive records retrievable through the Foreign Resource Division;
4. All responsive records retrievable through the International Organizations Division;
5. All responsive records retrievable through the Office of Personnel;
6. All responsive records which were gathered together for use by either the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities or the House Select Committee on Intelligence.

4. The affidavit of Fred W. M. Janney filed herewith addresses documents discovered in the Office of Personnel. In a letter dated November 2, 1977 to the plaintiff responding to the plaintiff's request, CIA stated the following:

> "Any additional records, if they exist, which would be responsive to your request and which reveal any covert CIA connection with or interest in matters relating to those set forth in your request, and, indeed, and data that might reveal the existence of any such additional records would be duly classified under criteria set forth in Executive Order 11652. Accordingly, and pursuant to the authority of exemptions (b)(1) of the Freedom of Information Act, this is to

advise that this Agency will not grant access to any additional records that may exist which might be responsive to your request. By this answer, we are neither denying nor confirming that any such additional records exist.

"It has been determined further that the fact of the existence or non-existence of such additional covert records, if any, would relate to information pertaining to intelligence sources and methods which the Director of Central Intelligence has the responsibility to protect from unauthorized disclosure in accordance with section 102(d)(3) of the National Security Act of 1947 and section 6 of the Central Intelligence Agency Act of 1949. Accordingly, such additional records, if any, would be denied pursuant to exemption (b)(3) of the Freedom of Information Act."

Set forth below are the reasons why CIA can neither confirm nor deny the existence of records of the nature requested by the plaintiff in his reformulated request stated above.

5. It is generally known through official public disclosures of Congressional Committees and the Executive Branch that the Directorate of Operations and primarily its Domestic Contact Division and Foreign Resource Division have established relationships for foreign intelligence purposes with American colleges and universities. It is also generally known through official public disclosures that the Office of Personnel has in prior years maintained confidential contacts with personnel and students at American colleges and universities for CIA personnel recruitment purposes. The Director of Operations through its Domestic Contact Division collects information on a witting voluntary confidential basis from academics who have traveled abroad and draws upon the expertise possessed by academics in many disciplines. The Directorate of Operations through the Foreign Resource Division maintains confidential contacts with personnel at American colleges and universities for assistance in the recruitment of foreign intelligence sources. The Office of Personnel in the years prior to 1968 maintained confidential contacts with American colleges and universities' personnel for the purpose of recruiting students as employees who would serve in an undercover capacity. This program was discontinued in 1968.

6. The confidential relationships of the Directorate of Operations and the Office of Personnel are vital to the intelligence collection mission of the CIA. The Agency also has several kinds of contractual relationships with the academic community. They include negotiated contracts for scientific research and development, contracts for social science research on the many matters that affect foreign policy, paid and unpaid consultations between scholars and CIA research analysts and other similar contracts that help us fulfill our primary responsibility which is to provide the policymakers of our government with information and assessments of foreign developments.

7. Our contracts with academic institutions are, of course, made known to senior university officials. We also seek the witting and voluntary cooperation of individuals who can help the foreign policy processes of the U.S. Those who help are expressing a freedom of choice. Occasionally such relationships are confidential at our request, but more often they are discreet at the scholar's request because of his concern that he will be badgered by those who feel he should not make this particular choice. However, these individual consultants with whom we establish relationships are free to inform their institutions of the existence of the relationship. Whether the individual actually reports the arrangement or not, however, it is for him or her to determine.

8. The contacts we maintain with the academic community are invaluable. If CIA were to isolate itself from the good counsel of the best scholars in our country, we would surely become a narrow organization that could only give inferior service to the government. The complexity of international relations today requires a broad base from which to gather information. These individuals enable us to keep abreast of professional developments, including new insights, interpretations, and methodologies. To perform our job properly we need the assistance, criticism, and perspective of the best professional talents available in the private sector.

9. The academic community is currently the scene of efforts by some activists to prevent the CIA from maintaining any contacts with American campuses. If, then, we adopt the practice of publicly disclosing our campus contacts we must surely anticipate active and abrasive campaigns to discover and expose the individuals concerned on at least some of the campuses on which our replies are affirmative.

10. The CIA treats various college and university contacts, described above, as sources of intelligence. As such their identities and affiliation with CIA sponsored programs must be protected from unauthorized disclosure. In essence to compromise these relationships would result in their termination as institutions and individuals

will only cooperate as long as the confidentiality of the association can be assured. To the extent that Agency contacts with the academic community are diminished so is the national security damaged.

11. While there is a strong public interest in the public disclosure of the functions of governmental agencies, there is also a strong public interest in the effective functioning of an intelligence service. An intelligence service such as the CIA must have the capability of collecting foreign intelligence and information necessary to the discharge of its statutory duties from all sources within the academic community including, administrative personnel of the institutions, professors and students. In every case these individuals are sources of intelligence. Based upon the assurances of confidentiality provided by the CIA these sources in many cases place their reputations, credibility, livelihood and in some cases even their lives on the line in providing information. In recognition of these factors and the significant role relations with the academic community play in the maintenance of the national security, any documents that would evidence the confidential CIA-academic relationship at a particular university would be duly classified in accordance with the requirements of Executive Order 11652. Furthermore, academic sources of information at specific institutions must be protected by the Director of Central Intelligence from unauthorized disclosure in accordance with his responsibilities under section 101(d)(3) of the National Security Act of 1947, 50 U.S.C. § 403(d)(3) and the Central Intelligence Agency Act of 1949, 50 U.S.C. § 403g, which protects the "organization, functions, names, official titles, salaries, or numbers of personnel" employed by the CIA.

12. Where, as here, a request is made for information relating to confidential relationships, the CIA can respond only by refusing to confirm or deny that such relationships exist. Any other response would have the effect of divulging the very secret the CIA is directed to protect. To confirm the existence of CIA confidential contacts at a particular college or university would result in the revelation of classified information, intelligence sources and methods and undermine the structure of a valuable intelligence collection program. To deny the existence of CIA confidential contacts at a particular college or university could through FOIA requests by the plaintiff or others result in the ultimate identification, by a process of elimination, of those colleges or universities where CIA has confidential contacts.

13. For the above reasons to insure the viability of an extremely valuable intelligence collection program the CIA neither confirms nor denies the existence of a confidential relationship or documents evidencing such a relationship with any institution, its personnel or students, that is a part of the University of California system.

JOHN F. BLAKE.

Commonwealth of Virginia,
County of Fairfax, ss:

Subscribed and sworn to before me this 7th day of June, 1978.

LULA S. HOOK
Notary Public.

My commission expires: 3 November 1979.

APPENDIX XII

95TH CONGRESS
2D SESSION

S. 2525

IN THE SENATE OF THE UNITED STATES

FEBRUARY 9 (legislative day, FEBRUARY 6), 1978

Mr. HUDDLESTON (for himself, Mr. BAYH, Mr. GOLDWATER, Mr. MATHIAS, Mr. ROBERT C. BYRD, Mr. BAKER, Mr. BIDEN, Mr. CHAFEE, Mr. GARN, Mr. HART, Mr. INOUYE, Mr. LUGAR, Mr. MORGAN, Mr. MOYNIHAN, Mr. PEARSON, Mr. WALLOP, Mr. CHURCH, Mr. CRANSTON, Mr. MARK O. HATFIELD, and Mr. RIBICOFF) introduced the following bill; which was read twice and referred to the Select Committee on Intelligence

A BILL

To improve the intelligence system of the United States by the establishment of a statutory basis for the national intelligence activities of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Intelligence Reorganization and Reform Act of 1978".

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TITLE I—NATIONAL INTELLIGENCE

PART A—SHORT TITLE; FINDINGS; PURPOSES; DEFINITIONS

SHORT TITLE

SEC. 101. This title may be cited as the "National Intelligence Act of 1978".

STATEMENT OF FINDINGS

SEC. 102. The Congress hereby makes the following findings:

(1) Intelligence activities provide timely, accurate, and relevant information and analysis necessary for the conduct of the foreign relations and the protection of the national security of the United States.

(2) The collection and production of intelligence, while necessary for the conduct of the foreign relations and the protection of the national security of the United States, are

costly activities. Waste and unnecessary duplication of intelligence activities can be avoided by more effective centralized management.

(3) Without proper supervision and control, intelligence activities may disrupt the foreign relations of the United States or abridge the constitutional and legal rights of United States citizens.

(4) Existing law inadequately defines the authorities of the intelligence agencies of the United States, provides little guidance to the officers and employees of those agencies, and leaves unclear the roles of the various branches of Government with respect to intelligence activities.

STATEMENT OF PURPOSES

SEC. 103. It is the purpose of this Act—

(1) to authorize the intelligence activities necessary for the conduct of the foreign relations and the protection of the national security of the United States;

(2) to replace the provisions of the National Security Act of 1947 governing intelligence activities;

(3) to insure that the national intelligence activities of the United States are properly and effectively directed, regulated, coordinated, and administered;

(4) to insure that the executive and legislative branches are provided, in the most efficient manner, with such accurate, relevant, and timely information and anal-

ysis as those branches need to make sound and informed decisions regarding the security and vital interests of the United States and to protect the United States against foreign intelligence activities, international terrorist activities, and other forms of hostile action directed against the United States;

(5) to provide for the appointment of a Director of National Intelligence, to delineate the responsibilities of such Director, and to confer on such Director the authority necessary to fulfill those responsibilities; and

(6) to insure that the Director of National Intelligence and the entities of the intelligence community are accountable to the President, the Congress, and the people of the United States and that the intelligence activities of the United States are conducted in a manner consistent with the Constitution and laws of the United States and so as not to abridge any right protected by the Constitution or laws of the United States.

DEFINITIONS

SEC. 104. As used in this title:

(1) The term "Attorney General" means the Attorney General of the United States.

(2) The term "committee of the Congress" means any committee of the Senate or the House of Representatives or any joint committee of the Congress.

(3) The term "communications security" means the protection resulting from any measure taken to deny unauthorized persons information derived from the national security-related telecommunications of the United States, or from any measure taken to insure the authenticity of such telecommunications.

(4) The term "continuing resolution" means a bill or joint resolution of the Congress appropriating funds for one or more departments or agencies of the government for a temporary period of time pending the enactment of the regular appropriation Act or Acts for such departments or agencies.

(5) The term "counterintelligence" means information pertaining to the capabilities, intentions, or activities of any foreign government in the fields of espionage, other clandestine intelligence collection, covert action, assassination, or sabotage, or pertaining to such government's own efforts to protect against the collection of information on its capabilities, intentions, or activities.

(6) The term "counterintelligence activity" means—

(A) the collection, retention, processing, and dissemination of counterintelligence;

(B) the analysis of counterintelligence; or

(C) any activity undertaken by the United States to counter the espionage, other clandestine intelligence

collection, covert action, assassination, or sabotage, or similar activities of a foreign government or to counter such foreign government's efforts to protect against the collection of information on its capabilities, intentions, or activities.

(7) The term "counterterrorism activity" means—

(A) the collection, retention, processing, or dissemination of counterterrorism intelligence;

(B) the analysis of counterterrorism intelligence; or

(C) any activity undertaken by an entity of the intelligence community intended to protect against an international terrorist activity.

(8) The term "counterterrorism intelligence" means information pertaining to the capabilities or intentions of any foreign government or of any organization, association, or individual to commit or otherwise participate in any international terrorist activity.

(9) The term "cover"—

(A) when used in connection with the Central Intelligence Agency refers to any means by which the true identity or affiliation with the Central Intelligence Agency of any activity, officer, employee, or agent of the Central Intelligence Agency, or of a related corporation or organization, is disguised or concealed;

(B) when used in connection with the Federal Bureau of Investigation, refers to any means by which the true identity or affiliation with the Federal Bureau of Investigation of any activity, officer, employee, or agent of the Federal Bureau of Investigation is disguised or concealed; and

(C) when used in connection with the National Security Agency, refers to any means by which the true identity or affiliation with the National Security Agency or the Department of Defense of any activity, officer, employee, or agent of the National Security Agency is disguised or concealed.

(10) The term "departmental intelligence" means foreign intelligence that is collected, retained, processed or disseminated primarily for the use of the head of the department or agency for the conduct of the affairs of the individual department or agency and which has little or no significant national policymaking purpose.

(11) The term "departmental intelligence activity" means any foreign intelligence activity, the primary purpose of which is to produce departmental intelligence.

(12) The terms "departments and agencies" and "department or agency" mean any department, agency, bureau, independent establishment, or wholly owned corporation of the Government of the United States.

(13) The term "foreign intelligence" means information pertaining to the capabilities, intentions, or activities of any foreign state, government, organization, association, or individual and also pertaining to the defense, national security, foreign policy or related policies of the United States, including information on the foreign aspects of narcotics production and trafficking.

(14) The term "foreign intelligence activity" means—

(A) the collection, retention, processing, and dissemination of foreign intelligence; or

(B) the analysis of foreign intelligence.

(15) The term "intelligence activity" means—

(A) any foreign intelligence activity;

(B) any counterintelligence activity;

(C) any counterterrorism activity; or

(D) any special activity.

(16) The term "intelligence community" means—

(A) the Office of the Director of National Intelligence;

(B) the Central Intelligence Agency;

(C) the Defense Intelligence Agency;

(D) the National Security Agency;

(E) any office within the Department of Defense conducting special reconnaissance activities;

(F) the intelligence components of the military services;

(G) the intelligence components of the Federal Bureau of Investigation;

(H) the Bureau of Intelligence and Research of the Department of State;

(I) the intelligence components of the Department of the Treasury;

(J) the intelligence components of the Drug Enforcement Administration;

(K) the intelligence components of the Department of Energy;

(L) the successor to any of the agencies, offices, components, or bureaus named in clauses (A) through (K); and

(M) such other components of the departments and agencies, to the extent determined by the President, as may be engaged in intelligence activities.

(17) The term "intelligence method" means any means which is used to provide support to an intelligence source or operation, and which, if disclosed, is vulnerable to counteraction that could nullify or significantly reduce its effectiveness in supporting the foreign intelligence, counterintelligence, or counterterrorism activities of the United States, or

which would, if disclosed, reasonably lead to the disclosure of an intelligence source or operation.

(18) The term "intelligence-related activity" means any activity that is—

(A) a departmental or tactical intelligence activity that has the capability to provide national intelligence or to support national intelligence activities;

(B) is devoted to support of departmental intelligence activities;

(C) is conducted for the purpose of training personnel for intelligence duties; or

(D) is devoted to research on or development of intelligence capabilities.

Such term does not include any intelligence activity which is so closely integrated with a weapons system that the primary function of such activity is to provide immediate data for targeting purposes for that weapons system.

(19) The term "intelligence source" means a person, organization, or technical means which provides foreign intelligence, counterintelligence, or counterterrorism intelligence, and which, if its identity or capability is disclosed, is vulnerable to counteraction that could nullify or significantly reduce its effectiveness in providing such intelligence to the United States. Such term also means a person or organization which provides foreign intelligence, counter-

intelligence, or counterterrorism intelligence to the United States only with the understanding or on the condition that its identity will remain undisclosed.

(20) The term "international organization" means a public international organization designated as such pursuant to section 1 of the International Organizations Immunity Act (22 U.S.C. 288).

(21) The term "international terrorist activity" means any activity which—

(A) involves—

(i) killing, causing serious bodily harm to, or kidnapping one or more individuals;

(ii) violent destruction of property; or

(iii) an attempt or credible threat te commit any act described in subclause (i) or (ii); and

(B) appears intended to further political, social, or economic goals by—

(i) intimidating or coercing a civilian population or any segment thereof;

(ii) influencing the policy of a government or international organization by intimidation or coercion; or

(iii) obtaining widespread publicity for a group or its cause; and

(C) transcends national boundaries in terms of—

(i) the means by which its objective is accomplished;

(ii) the civilian population, government, or international organization it appears intended to coerce or intimidate, or

(iii) the locale in which its perpetrators operate or seek asylum.

(22) The term "national intelligence" means foreign intelligence which is collected, retained, processed, or disseminated primarily for the use of officials of the United States involved in the formulation and direction of national policy, particularly defense, national security, or foreign policy. Such term also means the production of intelligence analyses coordinated among the entities of the Intelligence Community.

(23) The term "national intelligence activity" means (A) any special activity in support of national foreign policy objectives, or (B) any foreign intelligence activity the primary purpose of which is to produce national intelligence. Such term includes any foreign intelligence activity of the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, any office within the Department of Defense supervising special reconnaissance activities, and any foreign intelligence activity conducted by any other department or agency and designated by the President as a national intelligence activity.

(24) The term "national intelligence budget" means the budget prepared by the Director of National Intelligence pursuant to section 121 of this Act and includes all funds for—

(A) the programs of the Central Intelligence Agency;

(B) the programs of the Office of the Director of National Intelligence;

(C) the Consolidated Cryptologic Program;

(D) the programs of any office within the Department of Defense conducting special reconnaissance activities;

(E) the General Defense Intelligence Program except such elements of the General Defense Intelligence Program as the Director of National Intelligence and the Secretary of Defense agree should be excluded; and

(F) any other program or programs of any department or agency designated jointly by the Director of National Intelligence and the head of such department or agency.

(25) The term "national intelligence program" means all intelligence activities funded in the national intelligence budget.

(26) The term "sabotage" means any activity which would be prohibited under chapter 105 of title 18, United States Code, if committed against the United States.

(27) The term "special activity in support of national foreign policy objectives" means an intelligence activity conducted abroad which is (A) designed to further official United States programs and policies abroad, and (B) planned and executed so that the role of the United States Government is not apparent or acknowledged publicly. Such term does not include any counterintelligence or counterterrorism activity or the collection, correlation, processing, dissemination and analysis of intelligence or related support functions, nor any diplomatic activity of the United States.

(28) The term "tactical intelligence" means foreign intelligence pertaining to the armed forces of a foreign government and required by the armed forces of the United States to maintain their readiness for combat operations and to support the planning and conduct of combat operations by the United States.

(29) The term "tactical intelligence activity" means the collection, retention, processing, and dissemination of tactical intelligence.

(30) The term "United States media organization" means any organization publishing on a regular basis for public dissemination any newspaper, magazine, journal, or other periodical publication, any news services, any radio or television network or station, or any organization producing and distributing films or video or audio tapes, if a substan-

tial part of such organization is owned by one or more United States persons, the principal place of business of such organization is in the United States, or the principal distribution of such organization is in the United States. Such term does not include any organization controlled or directed by a government of a foreign country.

(31) The term "United States person" means—

(A) any individual who is a citizen of the United States;

(B) any alien admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act), except that such alien may be presumed to have lost status as a United States person for purposes of this Act after one year of continuous residence outside the United States until information is obtained which indicates an intent on the part of such alien to return to the United States as a permanent resident alien;

(C) any unincorporated association organized in the United States or a substantial number of whose members are citizens of the United States or aliens lawfully admitted for permanent residence, except that an unincorporated association outside the United States may be presumed not to be a United States person until information is obtained which indicates the contrary; or

(D) any corporation which is incorporated in the United States and which is not controlled or directed by a government of a foreign country.

PART B—AUTHORIZATION FOR NATIONAL INTELLIGENCE ACTIVITIES, COUNTERINTELLIGENCE ACTIVITIES, AND COUNTERTERRORISM ACTIVITIES; DIRECTOR AND DEPUTY DIRECTOR; DUTIES AND AUTHORITIES

NATIONAL INTELLIGENCE ACTIVITIES, COUNTERINTELLIGENCE ACTIVITIES, AND COUNTERTERRORISM ACTIVITIES; AUTHORIZATION

SEC. 111. (a) The entities of the intelligence community are authorized to conduct, under the direction and control of the National Security Council, national intelligence activities, including special activities in support of national foreign policy objectives (hereinafter in this Act referred to as "special activities"), counterintelligence activities, and counterterrorism activities.

(b) National intelligence activities, counterintelligence activities, and counterterrorism activities may be undertaken only by entities of the intelligence community and only in accordance with the provisions of this Act.

(c) Nothing in this title shall be construed to prohibit any department or agency from collecting, processing, evaluating, or disseminating departmental or tactical intelligence if such department or agency is otherwise authorized to do so.

PRESIDENTIAL DESIGNATION OF NATIONAL INTELLIGENCE ACTIVITIES

SEC. 112. (a) The President shall determine annually which intelligence activities, if any, in addition to those specifically defined as national intelligence activities by this title, shall constitute national intelligence activities for the purposes of this Act.

(b) The Director of National Intelligence shall, on an annual basis, submit to the President and the National Security Council a report describing the relationships among national intelligence activities and other intelligence and intelligence-related activities and shall include in such report the recommendations of the Director of National Intelligence with respect to whether any changes should be made in those relationships and whether any intelligence or intelligence-related activity not specifically defined as a national intelligence activity by this title should be determined by the President, pursuant to subsection (a) of this section, to be a national intelligence activity.

DIRECTOR AND DEPUTY DIRECTOR

SEC. 113. (a) There is established in the executive branch of the Government an office to be known as the "Office of the Director of National Intelligence" (hereinafter in this title referred to as the "Office of the Director"). There shall be at the head of the Office of the Director a Director

of National Intelligence (hereinafter in this title referred to as the "Director"). There shall be a Deputy Director of National Intelligence (hereinafter in this title referred to as the "Deputy Director") to assist the Director in carrying out the Director's functions under this Act.

(b) The Director and the Deputy Director shall be appointed by the President, by and with the advice and consent of the Senate. The Director and the Deputy Director shall each serve at the pleasure of the President. No person may serve as Director or Deputy Director for a period of more than six years unless such person is reappointed to that same office by the President, by and with the advice and consent of the Senate. No person who has served as Director or Deputy Director for a period of less than six years and is subsequently appointed or reappointed to that same office may serve in that office under such appointment or reappointment for a term of more than six years. In no event may any person serve in either or both offices for more than a total of twelve years.

(c) At no time shall the two offices of Director and Deputy Director be occupied simultaneously by commissioned officers of the Armed Forces whether in an active or retired status.

(d) (1) If a commissioned officer of the Armed Forces is appointed as Director or Deputy Director, then—

(A) in the performance of the duties of Director or Deputy Director, as the case may be, the officer shall be subject to no supervision, control, restriction, or prohibition (military or otherwise) other than would be applicable if that officer were a civilian in no way connected with the Department of Defense, the military departments, or the Armed Forces of the United States or any component thereof; and

(B) that officer shall not possess or exercise any supervision, control, powers, or functions (other than those authorized to that officer as Director or Deputy Director) with respect to the Department of Defense, the military departments, or the armed forces of the United States or any component thereof, or with respect to any of the personnel (military or civilian) of any of the foregoing.

(2) Except as provided in this section, the appointment to the office of Director or Deputy Director of a commissioned officer of the Armed Forces, and acceptance of and service in such an office by that officer, shall in no way affect any status, office, rank, or grade that officer may occupy or hold in the armed forces, or any emolument, perquisite, right, privilege, or benefit incident to or arising out of any such status, office, rank, or grade. A commissioned officer shall, while serving in the office of Director or Deputy

Director, continue to hold rank and grade not lower than that in which that officer was serving at the time of that officer's appointment as Director or Deputy Director.

(3) The grade of any such commissioned officer shall, during any period such officer occupies the office of Director or Deputy Director, be in addition to the numbers and percentages authorized for the military department of which such officer is a member.

(e) The Director and Deputy Director whether civilian or military shall be compensated while serving as Director or Deputy Director only from funds appropriated to the Office of the Director.

(f) If a commissioned officer of the Armed Forces is serving as Director or Deputy Director that officer shall be entitled, while so serving, to the difference, if any, between the regular military compensation (as defined in section 101(25) of title 37, United States Code) to which that officer is entitled and the compensation provided for that office under subchapter II of chapter 53 of title 5, United States Code.

(g) The Deputy Director shall act in the place of the Director during the absence or disability of the Director or during any temporary vacancy in the office of the Director. The Director shall provide by regulation which Assistant Director of National Intelligence shall, whenever there is no

Deputy Director, act in the place of the Director during the absence or disability of the Director or during any temporary vacancy in the office of the Director and which Assistant Director of National Intelligence shall act in the place of the Deputy Director during the absence or disability of the Deputy Director or during any temporary vacancy in the office of the Deputy Director.

(h) In the event that no person has been appointed Director or Deputy Director under subsection (b) of this section as of the effective date of this title, the person holding the office of Director of Central Intelligence on the day before the effective date of this title may be designated by the President (without the advice and consent of the Senate) to serve as Director until the office of Director is filled as provided in subsection (b), and the person holding the office of Deputy Director of Central Intelligence on the day before the effective date of this title may be designated by the President (without the advice and consent of the Senate) to serve as Deputy Director until the office of Deputy Director is filled as provided in subsection (b); but no person designated to serve as Director or Deputy Director under authority of this subsection may serve in such office under such authority for more than 90 days following the effective date of this title. While so serving such persons shall receive compensation at the rates provided by subsection (e)

for the respective offices in which they serve. In computing the twelve-year limitation prescribed in subsection (b) of this section, any service by a person as Director or Deputy Director of Central Intelligence as those offices existed before the effective date of this title shall not be included.

DUTIES AND AUTHORITIES OF THE DIRECTOR

SEC. 114. (a) The Director shall serve, under the direction and control of the National Security Council, as the principal foreign intelligence officer of the United States.

(b) The Director shall be responsible for—

(1) the coordination of the national intelligence activities of the United States;

(2) the coordination of United States counterintelligence activities abroad; and

(3) the coordination of United States counterterrorism activities conducted abroad by the entities of the intelligence community.

(c) The Director shall, on a continuing basis, review all ongoing and proposed national intelligence activities of the United States in order to insure that those activities are properly, efficiently, and effectively directed, regulated, coordinated and administered; that those activities provide, in the most efficient manner, the executive and legislative branches with the information and analysis that those branches need to fulfill their responsibilities under the Con-

stitution and laws of the United States; that those activities do not abridge any right guaranteed or protected by the Constitution or laws of the United States; that those activities fully support the national defense or foreign relations of the United States; and that those activities are conducted in conformity with the provisions of this Act and the Constitution and laws of the United States. To achieve these ends the Director shall provide such guidance to the head of each entity of the intelligence community as the Director deems appropriate.

(d) Subject to the provisions of section 117, the Director shall act as the Director of the Central Intelligence Agency and of such staff as may be required to discharge the Director's responsibilities under this Act.

(e) The Director shall coordinate and direct the collection of national intelligence by the entities of the intelligence community by—

(1) developing such plans, objectives, and requirements for the entities of the intelligence community as are necessary to meet the intelligence needs and priorities established by the National Security Council;

(2) establishing procedures, in coordination with the heads of departments and agencies not within the intelligence community, to increase, insofar as is possible, the national intelligence contribution made by those

departments and agencies without adversely affecting the performance of their other authorized duties;

(3) coordinating all clandestine collection of intelligence outside the United States including all clandestine collection of intelligence outside the United States utilizing human sources.

(f) The Director shall be responsible for the production of national intelligence, including national intelligence estimates and other intelligence community-coordinated analyses, and shall—

(1) provide, under appropriate security procedures, the executive and legislative branches with accurate, relevant, and timely national intelligence needed by such branches to fulfill their responsibilities under the Constitution and laws of the United States;

(2) insure that in the production of national intelligence any diverse points of view are presented fully and considered carefully, and that differences of judgment within the intelligence community are clearly expressed for policymakers; and

(3) obtain, in consultation with the head of any entity of the intelligence community, such analytic assistance from that entity as is necessary for the Director to fulfill the Director's responsibilities under this subsection;

(g) The Director shall be responsible for the dissemination, under appropriate security procedures, of national intelligence, and shall—

(1) insure that departments and agencies and appropriate operational commanders of the Armed Forces of the United States are furnished such national intelligence as is relevant to their respective duties and responsibilities;

(2) establish procedures to increase the usefulness for departments and agencies (including departments and agencies not within the intelligence community) of information collected, processed, and analyzed through national intelligence activities; and

(3) insure access of each entity of the intelligence community to national intelligence relevant to that entity's authorized national intelligence, counterintelligence, or counterterrorism responsibilities which has been collected or produced by any other entity of the intelligence community.

(h) The Director shall be responsible for evaluating the quality of the national intelligence that is collected, produced, and disseminated by entities of the intelligence community and shall report on an annual basis to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate on

the results of such evaluations and on the Director's efforts to improve the quality of national intelligence.

(i) The Director shall insure the appropriate implementation of special activities and sensitive clandestine collection projects.

(j) The Director, in consultation with the Secretary of State, shall—

(1) formulate policies with respect to intelligence arrangements with foreign governments;

(2) coordinate intelligence relationships between the various entities of the intelligence community and the foreign intelligence or internal security services of foreign governments; and

(3) advise the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate of any proposed agreement governing the relationship between any entity of the intelligence community and any foreign intelligence or internal security service of a foreign government before such agreement takes effect.

(k) The Director shall assign to a single entity of the intelligence community, after consultation with the head of that entity, responsibility for any service which is of common concern to more than one entity but which can he more efficiently and effectively performed by a single entity.

(l) The Director shall be responsible, subject to the provisions of this Act, for the protection from unauthorized disclosure of intelligence sources and methods, and shall establish for departments and agencies security standards for the management and handling of information and material relating to intelligence sources and methods. The Director shall take such steps as are necessary, consistent with applicable laws and executive orders, to insure timely declassification of such information and material.

(m) The Director may appoint, promote, and separate such personnel or contract for such personnel services as the Director deems advisable, without regard to the provisions of title 5, United States Code, governing appointments to, promotions in, and separations from the competitive service, and without regard to the limitations on types of persons to he employed, and fix the compensation of such personnel without regard to chapter 51 and subchapter III of chapter 53 of such title, relating to classification and General Schedule pay rates, but at such rates not in excess of the maximum rate for Executive Schedule V under section 5316 of that title. Such personnel may include, but shall not be limited to, persons employed by any entity of the intelligence community.

(n) Notwithstanding any other provision of law, the Director may terminate the employment of any officer or

employee of the Office of the Director or the security clearance of any contractor of any entity of the intelligence community whenever the Director considers such termination necessary or advisable in the interests of the national security of the United States. The Director shall periodically report to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate on the exercise of the Director's authority under this paragraph.

(o) Any officer or employee of the Office of the Director who has been separated under subsection (m) or whose employment has been terminated under subsection (n) may seek or accept employment elsewhere in the Government if declared eligible for such employment by the United States Civil Service Commission. The Civil Service Commission may place such officer or employee in a position in the competitive civil service in the same manner as an employee who is transferred between two positions in the competitive service, but only if that officer or employee has served with the Office of the Director for at least one year continuously immediately preceding separation or termination.

(p) In order to carry out the Director's duties under this title, the Director is authorized to conduct program and performance audits and evaluations of the entities of the intelligence community and to obtain from any department

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or agency such information as the Director deems necessary to perform such duties; and each department and agency shall furnish, upon request and in accordance with applicable law, such information to the Director. The Director shall take appropriate steps to maintain the confidentiality of any confidential information which is provided by any department or agency.

(q) In order to carry out the Director's duties under this title, the Director shall review all research and development activities which support the intelligence or intelligence-related activities of the Government and may review all the intelligence and intelligence-related activities of the Government.

(r) Nothing in this section shall be construed to prohibit any entity of the intelligence community, if otherwise authorized to do so, from producing and disseminating its own analyses of national intelligence information collected by any entity of the intelligence community, but any such analyses shall be promptly provided to the Director.

DEPARTMENTAL RESPONSIBILITY FOR REPORTING NATIONAL INTELLIGENCE

SEC. 115. It shall be the responsibility of the heads of departments and agencies to insure that all national intelligence obtained by such departments and agencies is promptly

furnished to the Director or to the entity of the intelligence community designated by the Director to receive such intelligence.

ASSISTANT DIRECTORS; COMMITTEES AND BOARDS

SEC. 116. (a) The President is authorized to appoint, by and with the advice and consent of the Senate, not more than five Assistant Directors of National Intelligence to assist the Director in carrying out the responsibilities of the Director under this Act. At no time shall more than two of the positions of Assistant Director of National Intelligence be occupied by commissioned officers of the Armed Forces, whether in active or retired status.

(b) The Director, with respect to the Office of the Director, the Attorney General with respect to the Attorney General's duties and responsibilities under this Act, and the head of each entity of the intelligence community with respect to that entity, is authorized to establish such committees or boards, composed of officers and employees of the United States, as may be necessary to carry out effectively the provisions of this Act.

(c) (1) The Director, with respect to the Office of the Director, the Attorney General with respect to the Attorney General's duties and responsibilities under this Act, and the

head of each entity of the intelligence community with respect to that entity, is authorized to establish such advisory committees as may be necessary to provide expert advice regarding the administration of this Act.

(2) The provisions of the Federal Advisory Committee Act (86 Stat. 770; 5 U.S.C. App. I, 1–15) shall apply with respect to any advisory committee established under authority of this subsection except that the Director, Attorney General, or the head of any entity of the intelligence community, as the case may be, may waive the application of any or all of the provisions of that Act when such official deems such action necessary to the successful performance of the duties of the Director, the Attorney General, or any entity of the intelligence community, as the case may be, or to protect the security of the activities of the intelligence community. Any waiver exercised by the Director, the Attorney General, or the head of any entity of the intelligence community under this section shall be reported to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate and the names of all persons appointed to serve on any advisory committee established under authority of this subsection shall be reported to such committees.

AUTHORITY OF THE PRESIDENT TO TRANSFER CERTAIN DUTIES AND AUTHORITIES OF THE DIRECTOR OF NATIONAL INTELLIGENCE

SEC. 117. (a) The President is authorized to transfer any or all of the duties and authorities of the Director which pertain to the Director's duties and authorities as head of the Central Intelligence Agency to any person serving as the Deputy Director or to any person serving as an Assistant Director of National Intelligence if such person was appointed to the position of Deputy Director or to the position of Assistant Director of National Intelligence by and with the advice and consent of the Senate and if—

(1) such person is not a commissioned officer of the Armed Forces whether in active or retired status;

(2) the President notifies the Congress in writing of the proposed transfer and specifically describes the duties and authorities to be transferred and identifies the officer or employee to whom such duties and authorities are to be transferred;

(3) 60 days of continuous session of the Congress have expired following the day on which such notification was received by the Congress; and

(4) neither House of Congress has adopted, within such 60-day period, a resolution disapproving such transfer of authority.

(b) For the purposes of this section, the continuity of a session of Congress is broken only by an adjournment of the Congress *sine die,* and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of such 60-day period.

PART C—BUDGET AUTHORITY; LIMITATION ON APPROPRIATIONS; COMPTROLLER GENERAL AUDITS

NATIONAL INTELLIGENCE PROGRAM AND BUDGET AUTHORITY; INFORMATION

SEC. 121. (a) The Director shall be responsible for the preparation and approval of the national intelligence budget presented to the President through the Office of Management and Budget, and, after approval of such budget, for its presentation to the Congress. In carrying out the Director's responsibility under this section, the Director shall—

(1) provide guidance and assistance to the heads of the various entities of the intelligence community in the preparation of the programs and budgets of such entities which relate to national intelligence;

(2) after reviewing and evaluating the annual program and budget proposals submitted to the Director pursuant to subsection (b) of this section, prepare the national intelligence budget;

(3) present the national intelligence budget to the

President through the Office of Management and Budget; and

(4) present and justify to the Congress the President's annual budget for national intelligence and, concurrently, submit a report to the appropriate committees of the Congress on the decisions of the President made under the authority of section 112(a) of this title.

(b) The head of each entity of the intelligence community shall develop and submit to the Director and the head of the department or agency in which that entity is located—

(1) a proposed program and budget, in such form and at such time as the Director shall prescribe, for that entity based upon program and budget guidance from the Director; and

(2) such information as the Director may find necessary to carry out the Director's program and budget responsibilities under this section.

(c) The head of each department or agency that includes an entity of the intelligence community shall take such action as may be necessary to insure that internal program and budget decisions of such department or agency have no adverse effect on that department or agency's presidentially-approved program or budget relating to the activities of the entity of the intelligence community within that department or agency.

REQUIREMENTS RELATING TO APPROPRIATIONS FOR NATIONAL INTELLIGENCE, COUNTERINTELLIGENCE, AND COUNTERTERRORISM ACTIVITIES

SEC. 122. (a) No funds may be appropriated for any fiscal year beginning after September 30, 1978, for the purpose of carrying out any national intelligence activity, counterintelligence activity, or counterterrorism activity by any entity of the intelligence community unless funds for such activity have been previously authorized by legislation enacted during the same fiscal year or during one of the two immediately preceding fiscal years, except that this limitation shall not apply to funds appropriated by any continuing resolution.

(b) Whenever the Director determines such action to be necessary in the interest of the national security, the expenditure of funds to cover matters relating to national intelligence activities, counterintelligence activities, and counterterrorism activities shall be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount certified therein, but funds expended for such purposes may be expended only for activities authorized by law. The Director shall report quarterly to the Committee on Appropriations of the House of Representatives, the Committee on Appropriations of the Senate, the Permanent Select Com-

mittee on Intelligence of the House of Representatives, and the Select Committee on Intelligence of the Senate on expenditures made under the authority of this subsection.

AUDITS AND REVIEWS BY THE COMPTROLLER GENERAL

SEC. 123. (a) All funds appropriated to the Office of the Director, all funds appropriated to entities of the intelligence community, and all national intelligence activities, counterintelligence activities, and counterterrorism activities conducted by entities of the intelligence community, and information and materials relating thereto, shall be subject to financial and program management audit and review by the Comptroller General of the United States, upon the request of the Permanent Select Committee on Intelligence of the House of Representatives or the Select Committee on Intelligence of the Senate.

(b) Nothing in subsection (a) shall be construed as a limitation on the existing authority of any other committee of the Congress to request financial and program management audits and reviews by the Comptroller General of the United States of any national intelligence activity, counterintelligence activity, or counterterrorism activity over which such committee has legislative jurisdiction, but the results of any such audit or review conducted at the request of any committee of the Congress other than one of the two select committees named in subsection (a) shall be submitted to

(1) the Permanent Select Committee on Intelligence of the House of Representatives, in the case of any audit or review requested by a committee of the House of Representatives, and shall be made available by such select committee, in accordance with and subject to the provisions of section 153 of this title, to the committee of the House of Representatives which requested such audit or review, and (2) the Select Committee on Intelligence of the Senate, in the case of any audit or review requested by a committee of the Senate, and shall be made available by such select committee, in accordance with and subject to the provisions of section 153 of this title, to the committee of the Senate which requested such audit or review.

(c) Any audit or review of any national intelligence activity, counterintelligence activity, or counterterrorism activity conducted by the Comptroller General of the United States at the request of one of the two select committees named in subsection (a) or any audit or review conducted by the Comptroller General at the request of any other committee of the Congress of any national intelligence activity, counterintelligence activity, or counterterrorism activity over which such committee has legislative jurisdiction shall be conducted in accordance with such security standards as may be prescribed by the Director in consultation with the committee requesting such audit or review.

(d) The Comptroller General of the United States shall promptly notify the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate whenever the Comptroller General is conducting any audit or review of national intelligence activities, counterintelligence activities, or counterterrorism activities if such audit or review is being conducted under authority of law not requiring the request of a committee of the Congress. Upon completion of any such audit or review, the Comptroller General shall submit a copy of the results of such audit or review to such select committees.

(e) Notwithstanding the foregoing provisions of this subsection, the Director may exempt from any such audit and review any funds expended for a particular national intelligence, counterintelligence, or counterterrorism activity, and the activity for which such funds are expended if the Director (1) determines such exemption to be essential to protect the security of the United States, (2) notifies the appropriate committees of the Congress of such exemption and the reasons for granting it, and (3) reports semiannually to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate on each activity exempted under this subsection. In any case in which the Director exempts

from audit and review under this subsection an audit and review initiated hy the Comptroller General of the United States (not initiated at the request of any committee of the Congress), the Director shall submit the notification required under this subsection to the select committees named in the preceding sentence.

PART D—PROCEDURES, RESTRICTIONS, AND PROHIBITIONS RELATING TO INTELLIGENCE COLLECTION ACTIVITIES AND SPECIAL ACTIVITIES

PROCEDURES AND REQUIREMENTS FOR SENSITIVE INTELLIGENCE COLLECTION PROJECTS AND SPECIAL ACTIVITIES

SEC. 131. (a) The National Security Council shall review, in accordance with this section, each proposed special activity, and such clandestine collection activities as the President specifies, conducted by any entity of the intelligence community or by any organization or individual for or on behalf of the United States. No decision or recommendation to the President with respect to any such activity may be made for the purposes of this section unless the activity has been considered by the National Security Council or a subcommittee thereof at a formal meeting at which the following officers or, in unusual circumstances when such officers were unavailable, their designated representatives were present: the Secretary of State, the Secretary of De-

fense, the Attorney General, and the Director of National Intelligence. As used in this section, the term the "National Security Council" includes any subcommittee of such council if constituted as provided in the preceding sentence.

(b) (1) The President shall establish standards and procedures by which activities involving clandestine collection of foreign intelligence shall be reviewed and approved. Such standards and procedures shall provide criteria by which to identify activities whose importance or sensitivity requires review by the National Security Council and notification to the President of such review prior to initiation, and activities whose exceptional importance or sensitivity requires, in addition to National Security Council review, the President's personal approval prior to initiation.

(2) Any standard or procedure established pursuant to paragraph (1), any regulation promulgated to implement any such standard or procedure, and any amendment to any such standard, procedure, or regulation shall be submitted to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate at least 60 days prior to the date on which such standard, procedure, regulation, or amendment shall become effective.

(c) Whenever the National Security Council or the President reviews any special activity or clandestine collec-

tion activity, careful and systematic consideration shall be given to all appropriate factors, including, but not limited to, the following:

(1) the justification for such proposed activity;

(2) the nature, scope, probable duration, estimated cost, foreseeable risks, likely consequences of disclosure, and actions necessary in the event of the termination of such activity;

(3) the relationship between the proposed activity and any previously approved activity;

(4) the likelihood that the objectives of such activity would he achieved by overt or less sensitive alternatives; and

(5) the legal implications of the proposed activity.

(d) No special activity may be initiated unless the activity has been approved by the President and the President has made a written finding that, in the President's opinion—

(1) such activity is essential to the national defense or the conduct of the foreign policy of the United States;

(2) the anticipated benefits of such activity justify the foreseeable risks and likely consequences of its disclosure to a foreign power;

(3) overt or less sensitive alternatives would not be likely to achieve the intended objectives; and

(4) the circumstances require the use of extraordinary means.

(e) No clandestine collection activity requiring the President's personal approval, under standards and procedures established by the President pursuant to subsection (b), may be initiated unless the President has made a written finding that—

(1) the information to be obtained by such project is essential to the national defense or the conduct of the foreign policy of the United States;

(2) the importance of the information justifies the foreseeable risks or the likely consequences of disclosure to a foreign power; and

(3) overt or less sensitive alternatives would not be likely to accomplish the intended objectives.

(f) The National Security Council shall review at least annually each ongoing special activity and each ongoing clandestine collection activity which, prior to initiation, required approval by the President or review by the National Security Council and notification of the President. Any such activity whose initiation required the President's personal approval may be continued after such annual review by the National Security Council only if the President reaffirms in a timely manner the findings required by subsection (d) or (e), as the case may be.

(g) The Director shall, prior to the initiation of any special activity or any clandestine collection activity which, prior to initiation, requires personal approval by the President or review by the National Security Council and notification to the President, notify the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate of the facts and circumstances of such activity, and of the Presidential findings, if any, required by subsection (d) or (e), as the case may be. In extraordinary circumstances, any such special activity or clandestine collection activity may he initiated without such prior notification if the President notifies the select committees of the Congress named in the preceding sentence within 48 hours after the initiation of such activity, certifies to such committees that prior notification would have resulted in a delay which would have been harmful to the United States, and discloses to such committees the reasons why such delay would have heen harmful. This subsection shall not, however, he construed as requiring the approval of any committee of the Congress prior to the initiation of any such activity.

(h) Any significant change in any special activity or in any clandestine collection activity which, prior to initiation, required personal approval by the President or review by the National Security Council and notification to the President

shall require review, approval, and reporting to the select committees named in subsection (g) in the same manner as the activity itself.

(i) Any significant change in the factors considered under subsection (c) regarding any special activity or any clandestine collection activity which, prior to initiation, required personal approval by the President or review by the National Security Council and notification of the President shall be reported to the National Security Council and to the appropriate committees of the Congress.

(j) No department or agency other than (1) the Central Intelligence Agency, and (2) the armed forces of the United States during any period of war declared by the Congress may conduct any special activity. Notwithstanding the foregoing sentence, the Central Intelligence Agency, the armed forces, and other departments and agencies may provide support for any approved special activity conducted by the Central Intelligence Agency or the armed forces, as the case may be, if the President finds that the Central Intelligence Agency or, during a period of war declared by the Congress, the armed forces of the United States, as the case may be, would not be able to accomplish substantially the objectives of the special activity without such support from such other departments and agencies, and if the President promptly notifies the Permanent Select Committee on

Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate of such support.

(k) The National Security Council shall maintain a record of all written findings made by the President pursuant to subsection (d), (e), and (f).

(l) The Director shall submit a written report semiannually to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate on all ongoing special activities and clandestine collection activities which, prior to initiation, required personal approval by the President or review by the National Security Council and notification of the President being carried out by, for, or on behalf of, the United States.

RESTRICTIONS ON THE USE OF CERTAIN CATEGORIES OF INDIVIDUALS FOR CERTAIN INTELLIGENCE ACTIVITIES

SEC. 132. (a) No entity of the intelligence community may—

(1) pay or provide other valuable consideration to any United States person following a full-time religious vocation to—

(A) engage in any intelligence activity for or on behalf of the United States, or

(B) provide any intelligence information to any department or agency;

(2) pay or provide other valuable consideration to any United States person whose travel to a foreign country is sponsored and supported by the United States as part of a United States Government program designed to promote education or the arts, humanities, or cultural affairs to—

(A) engage in any intelligence activity for or on behalf of the United States while such individual is—

(i) participating in any such program, and

(ii) traveling or temporarily residing in any foreign country;

(B) provide any intelligence information acquired while such individual was—

(i) participating in any such program, and

(ii) traveling or temporarily residing in any foreign country;

(3) pay or provide other valuable consideration to any individual to engage in any intelligence activity for or on behalf of the United States or provide any intelligence information to any department or agency if such individual—

(A) is a journalist accredited to any United States media organization,

(B) is not an openly acknowledged officer, employee, or contractor of any entity of the intelligence community and regularly contributes material relating to politics, economics, international affairs, military, or scientific matters to any United States media organization,

(C) is regularly involved in the editing of material for any United States media organization, or

(D) acts to set policy for, or provide direction to, any United States media organization;

(4) pay for or otherwise knowingly or intentionally support the distribution within the United States of any book, magazine, article, publication, film, or video or audio tape, unless such support is publicly announced;

(5) pay for or otherwise knowingly or intentionally support the distribution in any foreign country of any book, magazine, article, publication, film, or video or audio tape if the purpose of the distribution in such foreign country, or if the likely result of such distribution would be the substantial redistribution of such book, magazine, article, publication, film, or video or audio tape, as the case may be, within the United States unless such support is publicly announced;

(6) use, for the purpose of establishing, furnishing,

or maintaining cover for any officer, employee, or agent of such entity, an affiliation, real or ostensible, with any United States religious organization, United States media organization, United States academic institution, the Peace Corps, or any United States Government program designed to promote education, the arts, humanities, or cultural affairs through international exchanges.

(h) No entity of the intelligence community may use as a source of operational assistance in any clandestine intelligence activity in any foreign country, any individual who—

(1) is a permanent resident alien who has applied for United States citizenship, unless the head of the entity which proposes to use such alien for such purpose makes a written finding that the use of such alien for such purpose is necessary to an authorized intelligence activity of that entity; or

(2) is a United States person whose travel to such country is sponsored and supported by a United States academic institution unless the appropriate senior officials of such institution are notified that such person is being used for such purpose.

(c) No entity of the intelligence community may use any United States person, other than an officer, employee, or contractor of an entity of the intelligence community or an individual assigned or detailed to an entity of the intelli-

gence community to provide operational assistance in the conduct of any clandestine intelligence activity unless such person is informed of the nature of such assistance and of any reasonably anticipated risks to physical safety that such assistance may pose and such person voluntarily consents to provide such assistance.

(d) The Director shall formulate regulations necessary to carry out the provisions of this section and submit such proposed regulations to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate; and no such regulation, or amendment thereto, shall become effective until sixty days after the date on which such regulation or amendment, as the case may be, has been submitted to such committees.

(e) Nothing in this section shall be construed to prohibit voluntary contacts or the voluntary exchange of information between any person referred to in subsection (a) and entities of the intelligence community.

(f) Nothing in this Act shall be construed to prohibit any person described in subsection (a) or (b) from recommending or assisting in the recruitment of (1) employees for any entity of the intelligence community, (2) sources of information for any such entity, or (3) sources of operational assistance for any such entity.

RESTRICTIONS ON THE USE OF UNITED STATES PERSONS AS COMBATANTS IN FOREIGN COUNTRIES

SEC. 133. (a) No United States person acting for or on behalf of any entity of the intelligence community, who is not a member of the armed forces of the United States serving on active duty, may be assigned by any entity of the intelligence community as a combatant in any foreign country, except pursuant to a declaration of war by the Congress, or unless—

(1) the proposed assignment has been approved in accordance with the provisions for approval of special activities set forth in section 131 of this title; and

(2) the Committee on International Relations and the Permanent Select Committee on Intelligence of the House of Representatives, and the Committee on Foreign Relations and the Select Committee on Intelligence of the Senate have been notified at least seventy-two hours in advance of the proposed assignment and informed of the circumstances necessitating the assignment, the constitutional and legislative authority under which the assignment will take place, and the estimated scope and duration of the assignment; except that in extraordinary circumstances the President may authorize such assignment without such prior notification of such committees if the President notifies such commit-

tees no later than 48 hours after the assignment has been made, describes in writing the nature of the situation that precluded notification to the committees 72 hours in advance of the proposed assignment, and informs the committees of the circumstances necessitating the assignment, the constitutional and legislative authority under which the assignment took place, and the estimated scope and duration of the assignment. The foregoing shall not be construed as requiring the approval of any committee of the Congress prior to making any such assignment.

(b) The President shall discontinue the assignment of any United States person described in subsection (a) not later than 60 days after the committees of the Congress named in subsection (a) (2) have been notified of such assignment unless the Congress has declared war or the continued assignment of such United States person as a combatant has been specifically authorized by law. Such 60-day period may be extended for not more than an additional 30 days if the President determines and certifies in writing to the committees of Congress named in subsection (a) (2) that unavoidable necessity requires the temporary continued assignment of such combatants in such foreign country solely for the purpose of insuring their prompt and safe removal from such country.

(c) No member of the armed forces of the United States serving on active duty who is assigned to duty with, or otherwise subject to the direction or supervision of, any entity of the intelligence community may be assigned by any entity of the intelligence community to any duty as a combatant except during a war declared by the Congress or during any period beginning on the day on which armed forces are introduced into a situation which requires a reporting of the President to the Congress under the War Powers Resolution (87 Stat. 555) and ending on the last day such forces are authorized to be in such situation (as provided in the War Powers Resolution).

(d) As used in this section, the term "combatant" means an individual who is introduced into hostilities in a foreign country or who is introduced into a situation in a foreign country where imminent involvement in hostilities is clearly indicated by circumstances. Such term does not include military or technical advisers not assigned to participate in hostilities.

PROHIBITION ON ASSASSINATION

SEC. 134. Title 18, United States Code, is amended by—

(1) redesignating chapter 85 (relating to prison-made goods) as chapter 86;

(2) redesignating section numbers 1761 and 1762

in the table of sections at the beginning of chapter 85 as section numbers 1771 and 1772, respectively;

(3) redesignating sections 1761 and 1762 as sections 1771 and 1772, respectively;

(4) amending the table of chapters in part I of such title by striking out

"85. Prison-made goods ..... 1751"

and inserting in lieu thereof

"85. Assassination of foreign officials ..... 1751"
"86. Prison-made goods ..... 1771";

and

(5) inserting after chapter 84 a new chapter as follows:

"Chapter 85.—ASSASSINATION OF FOREIGN OFFICIALS

"§ 1751. Assassination of foreign officials

"(a) Whoever, while within the United States or the special maritime and territorial jurisdiction of the United States, conspires with any other person to kill any foreign official because of such official's office or position or because of such official's political views, actions, or statements while such official is outside the United States and such jurisdiction, and one or more such persons do any overt act within the United States or such jurisdiction to effect the object of the conspiracy, shall be punished by imprisonment for any term of years or for life.

"(b) Whoever being an officer or employee of the United States, while outside the United States and the special maritime and territorial jurisdiction of the United States, conspires with any other person or persons to kill any foreign official, because of such official's office or position, or because of such official's political views, actions, or statements, while such official is outside the United States and such jurisdiction, and one or more such officers, employees, or other persons do any overt act to effect the object of the conspiracy, shall be punished by imprisonment for any term of years or life.

"(c) Whoever being an officer or employee of the United States, while outside the United States and the special maritime and territorial jurisdiction of the United States, attempts to kill any foreign official, because of such official's office or position, or because of such official's political views, actions, or statements, while such official is outside the United States and such jurisdiction, shall be punished by imprisonment for any term of years or life.

"(d) Whoever being an officer or employee of the United States, while outside the United States and the special maritime and territorial jurisdiction of the United States, kills any foreign official, because of such official's office or position, or because of such official's political views, actions, or statements, while such official is outside the

United States and such jurisdiction, shall be punished by imprisonment for any term of years or life, except that any such officer or employee who is found guilty of murder in the first degree shall be sentenced to imprisonment for life.

"(e) The provisions of subsections (a) through (d) of this section shall not apply in the case of any conspiracy, attempt, or killing described in such subsections if such conspiracy, attempt, or killing was committed (1) during any period of war declared by the Congress against another country or during any period when members of the armed forces of the United States were introduced into hostilities against another country under circumstances which required a reporting by the President to the Congress under the provisions of the War Powers Resolution (but the exemption from such subsection shall not continue after the last day such forces are authorized to be in such country as provided in the War Powers Resolution), (2) against an official of such country, and (3) at the direction of an official of the United States acting in that official's capacity as an official of the United States.

"(f) As used in this section, the term—

"(1) 'officer or employee of the United States' means any officer or employee, whether elected or appointed, in the executive, legislative, or judicial branch

of the Government of the United States (including the District of Columbia) and its territories and possessions, and includes any officer or member of the armed forces;

"(2) 'foreign official' means a Chief of State or the political equivalent, President, Vice President, Prime Minister, Premier, Foreign Minister, Ambassador, or other officer, employee, or agent of (A) a foreign government; or (B) a foreign political group, party, military force, movement, or other association; or (C) an international organization;

"(3) 'foreign government' means the government of a foreign country, irrespective of official diplomatic recognition by the United States; and

"(4) 'international organization' means a public international organization designated as such pursuant to section 1 of the International Organizations Immunity Act (22 U.S.C. 228).".

PROHIBITIONS AGAINST PARTICULAR FORMS OF SPECIAL ACTIVITIES

SEC. 135. (a) No special activity may be initiated or continued which has as its objective or is likely to result in—

(1) the support of international terrorist activities;

(2) the mass destruction of property;

(3) the creation of food or water shortages or floods;

(4) the creation of epidemics of diseases;

(5) the use of chemical, biological, or other weapons in violation of treaties or other international agreements to which the United States is a party;

(6) the violent overthrow of the democratic government of any country;

(7) the torture of individuals; or

(8) the support of any action which violates human rights, conducted by the police, foreign intelligence, or internal security forces of any foreign country.

(b) The Director shall formulate regulations necessary to carry out the provisions of this section and submit such proposed regulations to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate; and no such regulation or amendment thereto, shall become effective until 60 days after the date on which such regulation or amendment, as the case may be, has been submitted to such committees.

PRESIDENTIAL WAIVER OF THE APPLICATION OF CERTAIN RESTRICTIONS AND PROHIBITIONS IN TIME OF WAR

SEC. 136. The President may waive any or all of the provisions of sections 132(a)(1), (2), and (6), 132(b), and 135(a)(1), (2), (3), and (6) during—

(1) any period in which the United States is engaged in a war declared by the Congress;

(2) any period beginning on the day on which United States armed forces are introduced into a situation which requires a report from the President to the Congress under the War Powers Resolution (87 Stat. 555) and ending on the last day such forces are authorized to be in such situation (as provided in the War Powers Resolution), and (B) to the extent that the waiver is exercised for the purpose of, and is directly related to, the support of the United States armed forces in such situation, if the President determines such action is necessary to protect the security of the United States and notifies the appropriate committees of the Congress at least 72 hours prior to the execution of such waiver and informs such committees of the facts and circumstances requiring such waiver; except that the President may execute any such waiver during any such period without notification to such committees 72 hours in advance if the President notifies such committees not later than 48 hours after the execution of such waiver, describes in writing the nature of the situation that precluded notification to the committees 72 hours in advance of the proposed assignment and informs such committees of the facts

and circumstances requiring such waiver, including the relationship between such waiver and the introduction of United States armed forces into a situation which requires a reporting of the President to the Congress under the War Powers Resolution; or

(3) any period when the President determines that there is a grave and immediate threat to the national security of the United States, that it is vital to the security of the United States for one or more entities of the intelligence community to engage in the activities prohibited by such provisions, and that only such activities will accomplish the objectives necessary to protect the security of the United States. Whenever the President proposes to exercise waiver authority under this subsection, the President shall notify the committees of the Congress having jurisdiction over national intelligence at least 72 hours prior to the execution of such waiver and inform such committees of the facts and circumstances requiring such waiver; except that the President may execute any such waiver without prior notification to such committees if the President notifies such committees within 48 hours after the execution of such waiver, describes in writing the nature of the situation that precluded notification to the committees 72 hours in advance of the proposed

assignment and informs such committees of the facts and circumstances requiring such waiver.

(b) Any waiver executed by the President under this section shall be made a part of the records required to be maintained under section 152 of this title.

PROHIBITIONS AND RESTRICTIONS ON ACTIVITIES UNDERTAKEN INDIRECTLY

SEC. 137. (a) No entity of the intelligence community, and no officer or employee of any entity of the intelligence community, shall knowingly pay, cause, request, or otherwise encourage, directly or indirectly, any individual, organization, or foreign government to engage in any activity in which such entity of the intelligence community is prohibited from engaging.

(b) No entity of the intelligence community, and no officer or employee of any entity of the intelligence community, shall knowingly pay, cause, request, or otherwise encourage, directly or indirectly, any individual, organization, or foreign government to engage in any activity in which such entity of the intelligence community would be prohibited from engaging without prior Presidential approval or review, as the case may be, and prior notification to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate unless the same requirement or requirements

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have been complied with which would have been applicable to such activity, had such activity been undertaken by an entity of the intelligence community.

CONFLICTS OF INTEREST

SEC. 138. (a) The officers and employees of each entity of the intelligence community shall be subject to all laws, executive orders, regulations, and directives relating to conflicts of interest and the misuse of information obtained in the course of their official duties. The Director of National Intelligence shall issue regulations necessary to implement such laws, executive orders, regulations, and directives after consultation with and subject to the policy guidance of the Attorney General. The Director, or the head of any entity of the intelligence community with respect to any officer or employee of such entity, is authorized to waive the application of any operative provision of any such law, executive order, regulation, or directive when the Director of National Intelligence or the head of the entity, as the case may be, deems such action necessary because of the unique function and mission of any officer or employee, but such waiver may be granted in any case only with the written approval of the Attorney General and only after notification of the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence

of the Senate that such waiver is to be made and the reasons therefor.

(h) In any case in which the Director of National Intelligence or the head of any entity of the intelligence community waives any law, executive order, regulation, or directive, under the authority of subsection (a) relating to the filing and public disclosure of financial or other information regarding officers and employees of the United States, any officer or employee on whose behalf such waiver is exercised shall be required to file with the general counsel of the entity concerned the same information such officer or employee would otherwise have had to file, but such information shall not be subject to the Freedom of Information Act or other public disclosure requirements.

RESTRICTIONS ON CONTRACTING

SEC. 139. No entity of the intelligence community may enter into any contract or arrangement for the provision of goods or services with any private company or institution in the United States unless the entity sponsorship is known to appropriate officials of the company or institution. In the case of any company or institution other than an academic institution, entity sponsorship may be concealed if it is determined, pursuant to procedures approved by the Attorney

General, that such concealment is necessary to maintain essential cover or proprietary arrangements for intelligence purposes authorized by this Act.

PART E—COUNTERINTELLIGENCE AND COUNTERTERRORISM ACTIVITIES; COMMUNICATIONS SECURITY RESTRICTIONS AND REQUIREMENTS REGARDING COUNTERINTELLIGENCE AND COUNTERTERRORISM ACTIVITIES

SEC. 141. (a) It shall be the function of the National Security Council to advise and assist the President in the formulation of policy with respect to the counterintelligence and counterterrorism activities of the United States, to insure unified direction of such activities, and to insure that the counterintelligence and counterterrorism activities of the United States serve to protect the national security of the United States and are conducted in conformity with the Constitution and laws of the United States and in a manner that does not violate any right guaranteed or protected by the Constitution or laws of the United States. For the purposes of this subsection and subsection (b), the National Security Council shall include the Attorney General, the Director of National Intelligence, the Director of the Federal Bureau of Investigation, one employee of the Central Intelligence Agency designated by the Director, and such other members as the President may designate.

(b) It shall also be the function of the National Security Council, with respect to counterintelligence and counterterrorism, to—

(1) establish objectives and priorities for the counterintelligence and counterterrorism activities of the United States;

(2) monitor the coordination of the counterintelligence and counterterrorism activities of the United States;

(3) adjudicate disagreements among the entities of the intelligence community on matters relating to the counterintelligence and counterterrorism activities of the United States;

(4) prepare and submit to the President and to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate an annual assessment of the threat to which the United States and its interests may be subject as a consequence of the activities of intelligence and security services of foreign powers and international terrorist groups and an annual assessment of the effectiveness of the United States' counterintelligence and counterterrorism activities against this threat; and

(5) review and assess the impact of the nonintelli-

gence activities of the United States on the threat described in clause (4).

(c) (1) It shall also be the function of the National Security Council to review, in accordance with this subsection, each proposed counterintelligence and counterterrorism activity of the United States of a type specified by the President for review under this subsection. Each such proposed activity shall be considered by the National Security Council at a formal meeting at which the following officers, or in exceptional circumstances when such officers were unavailable, their designated representatives were present: the Secretary of State, the Secretary of Defense, the Attorney General, and the Director. No decision or recommendation may be made to the President by the National Security Council under this section regarding any such proposed activity unless such activity was so considered. As used in this subsection, the term "National Security Council" includes any subcommittee of such council if constituted as provided in the preceding sentence.

(2) The President shall establish standards and procedures by which counterintelligence and counterterrorism activities of the United States shall be reviewed and approved. Such standards and procedures shall provide criteria by which to identify counterintelligence and counterterrorism activities whose importance or sensitivity requires review by

the National Security Council and notification to the President of such review prior to initiation, and counterintelligence and counterterrorism activities whose exceptional importance or sensitivity requires, in addition to National Security Council review, the President's personal approval prior to initiation.

(3) Any standard or procedure established pursuant to paragraph (2), any regulation promulgated to implement any such standard or procedure, and any amendment to any such standard, procedure, or regulation shall be submitted to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate at least 60 days prior to the date on which such standard, procedure, regulation, or amendment shall become effective.

(4) Whenever the National Security Council or the President reviews any counterintelligence or counterterrorism activity, careful and systematic consideration shall be given to all appropriate factors, including, but not limited to, the legal implications of the proposed activity under the Constitution and laws of the United States and under the treaties and other international agreements to which the United States is a party and the steps to be taken to safeguard rights protected by the Constitution and laws of the United States.

(5) The National Security Council shall review at least annually each ongoing counterintelligence and counterterrorism activity of the United States which, prior to initiation, required personal approval by the President or review by the National Security Council and notification of the President. Any such activity whose initiation required the President's personal approval may continue after such annual review by the National Security Council only if the President reaffirms in a timely manner the necessity for such activity.

(6) The Attorney General shall, prior to the initiation of any counterintelligence or counterterrorism activity which prior to initiation requires personal approval by the President or review by the National Security Council and notification to the President, notify, in consultation with the Director with respect to any such activity conducted abroad, the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate of the facts and circumstances of such activity. In extraordinary circumstances, any such counterintelligence or counterterrorism activity may be initiated without such prior notification if the President notifies the select committees named in the preceding sentence within 48 hours after the initiation of such activity, certifies to such committees that prior notification would have resulted in a delay which would have been harmful to the United States, and discloses

to such committees the reasons why such delay would have been harmful. This paragraph shall not be construed as requiring the approval of any committee of the Congress prior to the initiation of any such activity.

(7) Any significant change in any counterintelligence or counterterrorism activity which, prior to initiation, required personal approval by the President or review by the National Security Council and notification to the President shall require review, approval, and reporting to the select committees of the Congress named in paragraph (6) in the same manner as the activity itself.

(8) Any significant change in the factors considered under paragraph (4) regarding any counterintelligence or counterterrorism activity which prior to initiation required the personal approval of the President or review by the National Security Council and notification to the President shall be reported to the National Security Council and to the select committees of the Congress named in paragraph (6).

(9) The Attorney General shall submit, in consultation with the Director with respect to counterintelligence or counterterrorism activities conducted abroad, a written report semiannually to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate on all ongoing counter-

intelligence and counterterrorism activities being carried out by, for, or on behalf of the United States and which, prior to initiation, required personal approval by the President or review by the National Security Council and notification to the President.

COMMUNICATIONS SECURITY

SEC. 142. (a) It shall he the function of the National Security Council to advise and assist the President in the formulation of policy with respect to communications security including the relationship hetween the communications security and intelligence activities of the United States. For the purposes of this section, the National Security Council shall include the Secretary of the Treasury, the Attorney General, the Secretary of Commerce, the Secretary of Energy, the Director of National Intelligence, the Director of the National Security Agency, the Director of the Federal Bureau of Investigation, one employee of the Central Intelligence Agency designated by the Director, and such other persons as the President may designate.

(b) It shall also he the function of the National Security Council with respect to communications security to—

(1) establish objectives for the communications security activities of the United States Government;

(2) develop communications security standards for departments and agencies;

(3) provide communications security guidance to

the Secretary of Defense in the Secretary's capacity as the executive agent of the United States Government for communications security;

(4) develop communications security policies governing the relationship between departments and agencies and foreign governments and between departments and agencies and international organizations, including policies governing the circumstances and terms and conditions under which departments and agencies may furnish to such foreign governments and organizations information and materials relating to communications security; and

(5) develop policies governing the circumstances and terms and conditions under which departments and agencies may furnish to United States persons information and materials regarding the vulnerability of non-governmental United States communications to unauthorized interception and exploitation and regarding appropriate means of securing such communications from unauthorized interception and exploitation.

(c) The National Security Council shall review, at least once every two years, the communications security needs of departments and agencies, the effectiveness of the communications security procedures utilized by departments

and agencies, and the vulnerability to interception of the communications of United States persons and organizations.

(d) The National Security Council shall report annually to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate regarding the communications security activities of the United States.

PART F—REPORTS ON VIOLATIONS; OVERSIGHT AND ACCOUNTABILITY; CONGRESSIONAL COMMITTEE REPORTS; DISCLOSURE PROVISIONS; ANNUAL REPORT OF THE DIRECTOR

INTELLIGENCE OVERSIGHT BOARD; REPORTING ON VIOLATIONS

SEC. 151. (a) The President shall establish a board to be known as the Intelligence Oversight Board (hereinafter in this section referred to as the "Oversight Board") composed of three members who shall be appointed by the President from outside the Government, by and with the advice and consent of the Senate. No member of the Oversight Board shall have any personal interest in any contractual relationship with any entity of the intelligence community. One member of the Oversight Board shall be designated by the President to serve as chairman.

(b) The Oversight Board is authorized to employ such personnel as may be necessary to assist in carrying out its

functions under this title. No person who serves on the staff of the Oversight Board shall have any contractual or employment relationship with any entity of the intelligence community.

(c) The Oversight Board shall, upon request, be given access to all information and materials relevant to the Oversight Board's functions under this title which are in the possession, custody, or control of any entity of the intelligence community.

(d) It shall be the function of the Oversight Board to—

(1) promptly forward to the Attorney General any report received concerning any intelligence activity in which a question of legality has been raised or which the Oversight Board believes raises a question of legality;

(2) report in a timely manner to the President, and, as appropriate, to the Attorney General and the Director, any intelligence activity of any entity of the intelligence community which the Board believes raises a serious question of legality;

(3) report in a timely manner to the President, and, as appropriate, to the Director, any intelligence activity the Board believes raises a serious question of propriety;

(4) conduct such inquiries into the intelligence activities of any entity of the intelligence community

as the Oversight Board deems necessary to carry out the Oversight Board's functions under this title;

(5) review periodically the practices and procedures of the inspectors general and general counsels of the intelligence community designed to discover and report intelligence activities that raise questions of legality or propriety;

(6) review periodically with each entity of the intelligence community that entity's internal rules, regulations, procedures, and directives concerning the legality or propriety of intelligence activities in order to ensure the adequacy of such rules, regulations, procedures, and directives; and

(7) report periodically to the President, and as the Oversight Board deems appropriate, to the Director, the Attorney General, heads of the entities of the intelligence community, and the inspectors general and the general counsels of the entities of the intelligence community on the Oversight Board's findings.

(e) The inspector general and general counsel of each entity of the intelligence community shall—

(1) report, in a timely manner and at least quarterly, to the Oversight Board and the head of such entity any intelligence activity that such inspector general or general counsel believes raises any question of legality

or propriety and report, as appropriate, any subsequent findings on such activities to the Oversight Board and the head of such entity;

(2) report promptly to the Oversight Board and the head of such entity actions taken, if any, with respect to the Oversight Board's findings, if any, concerning any intelligence activity that was reported pursuant to paragraph (1);

(3) provide to the Oversight Board any information requested by such Board relevant to such Board's functions under this title;

(4) formulate practices and procedures for discovering and reporting intelligence activities that raise questions of legality or propriety; and

(5) report to the Oversight Board, the Director, the Attorney General, and the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate on any occasion on which such inspector general or general counsel is directed by the head of the entity concerned not to report to the Oversight Board on any activity that such inspector general or general counsel believes raises a question of legality or propriety and on any occasion when such inspector general or general counsel is denied access to information or denied

authority to investigate a particular matter by the head of the entity concerned.

(f) The Attorney General shall—

(1) report, in a timely manner, to the Oversight Board any intelligence activity that raises any question of legality which had not been previously reported to the Attorney General by the Oversight Board;

(2) report periodically to the President, the Director, the heads of the appropriate entities of the intelligence community, and the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate on any intelligence activity that the Attorney General believes raises a question of legality;

(3) report periodically to the President, the Oversight Board, the Director, the heads of the appropriate entities of the intelligence community, and the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate on decisions made or actions taken in response to reports of intelligence activities;

(4) keep the Oversight Board, the Director, the heads and the inspectors general and general counsels of entities of the intelligence community, and the Permanent Select Committee on Intelligence of the House of

Representatives and the Select Committee on Intelligence of the Senate informed regarding legal opinions of the Department of Justice affecting the operations of the intelligence community; and

(5) transmit annually to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate a written report identifying and describing any intelligence activity during the preceding year which the Attorney General believes constituted a violation of any right guaranteed or protected by the Constitution or laws of the United States or which the Attorney General believes constituted a violation of United States law, executive order, Presidential directive, or Presidential memorandum, and describing corrective actions that have been taken or are being planned.

(g) The head of each entity of the intelligence community shall—

(1) keep the Director and the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate informed of intelligence activities that raise questions of propriety and of findings by that entity's inspector general or general counsel on such activities;

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(2) keep the Director and the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate informed of actions taken, if any, with respect to findings by the Oversight Board, if any, concerning any intelligence activity that was reported pursuant to subsection (e) (1);

(3) insure that the inspector general and the general counsel of that entity have access to any information necessary to perform their functions under this Act;

(4) provide to the Attorney General, in accordance with applicable law, any information required by the Attorney General to fulfill the Attorney General's responsibilities under this Act; and

(5) provide, immediately, to the Attorney General, the Director, the Oversight Board, and the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate an explanation, in writing, of any instance in which the inspector general or general counsel of that entity was denied access to information, instructed not to report to the Oversight Board on a particular activity, or was denied authority to investigate a particular activity.

(h) Notwithstanding any other provision of this sec-

tion, the head of each entity of the intelligence community and the inspector general and general counsel thereof shall have primary responsibility for insuring the legality and propriety of the activities of that entity.

(i) (1) The head of each entity of the intelligence community shall with respect to that entity—

(A) report to the Attorney General, pursuant to section 535 of title 28, United States Code, and the Oversight Board, immediately upon discovery, any evidence of possible violation of Federal law by any officer or employee of that entity;

(B) notify, in a timely manner, the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate that the Attorney General and the Oversight Board have been notified pursuant to clause (A) of this paragraph; and

(C) report to the Attorney General any evidence of possible violation by any other person of any Federal law specified in guidelines issued by the Attorney General pursuant to paragraph (2) (C) of this subsection.

(2) The Attorney General shall—

(A) submit a full report, in a timely manner, to the President, the Oversight Board, the Director, and the head of the entity concerned on any determinations

made by the Attorney General with respect to reports of possible violations described in paragraph (1) (A) of this subsection;

(B) submit, with due regard to the investigative and prosecutorial responsibilities of the Attorney General, a full report, in a timely manner, to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate on any determinations by the Attorney General, including any determination not to prosecute because of questions relating to the classification of information or material, with respect to possible violations reported pursuant to paragraph (1) (A) of this subsection; and

(C) issue guidelines governing the reporting by officers and employees of entities of the intelligence community of evidence of violations of Federal law by individuals who are not officers or employees of any entity of the intelligence community.

(j) (1) Any officer or employee of any entity of the intelligence community having information on any past, present, or proposed intelligence activity which appears to be in violation of the Constitution or laws of the United States, or of any executive order, Presidential directive, Presidential memorandum, or rule or regulation or policy of such entity,

or possessing any evidence of any possible violation of Federal law by any officer or employee of any entity of the intelligence community, shall provide such information or evidence to the inspector general, general counsel, or head of such entity. If such information or evidence is not initially provided to the general counsel of the entity concerned, the general counsel shall be notified by the head of such entity or by the inspector general of such entity.

(2) The Director shall regularly, but not less often than once each year, notify officers and employees of the intelligence community of (A) their duty to provide any information or evidence described in paragraph (1). (B) the officer or officers to whom such information or evidence should be provided, and (C) the necessity for fully cooperating with the Oversight Board and the Attorney General.

(3) (A) Nothing in this section shall prohibit any employee of any entity of the intelligence community from reporting any information or evidence described in this paragraph directly to the Director, the Attorney General, the Oversight Board, or to the Permanent Select Committee on Intelligence of the House of Representatives or the Select Committee on Intelligence of the Senate.

(B) The Attorney General shall take all steps necessary to insure that no employee who, in good faith, communicates information or evidence in such a fashion, or who

communicates such information or evidence to a superior shall be subject, on account of the reporting of such information or evidence, to discipline through dismissal, demotion, transfer, suspension, reassignment, reprimand, admonishment, reduction-in-force, or other adverse personnel action, or the threat thereof.

(k) The head of each entity of the intelligence community shall, with respect to that entity, transmit annually to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate a written report in which the head of the entity shall identify and describe any intelligence activity of the entity during the preceding year which the head of the entity believes constituted a violation of any right guaranteed or protected by the Constitution or laws of the United States or which the head of the entity believes constituted a violation of United States law, executive order, Presidential directive, or Presidential memorandum, and describing corrective actions that have been taken or are being planned.

OVERSIGHT AND ACCOUNTABILITY

SEC. 152. (a) Consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches, the heads of

each entity of the intelligence community, with respect to the intelligence activities of that entity shall—

(1) keep the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate fully and currently informed of all the national intelligence activities and all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any entity of the intelligence community, including any significant anticipated intelligence activity; but the foregoing provision shall not constitute a condition precedent to the initiation of any such anticipated intelligence activity; and

(2) furnish any information or material in the possession, custody, or control of the Director or the relevant entity of the intelligence community or in the possession, custody, or control of any person paid by the Director or by any such entity whenever requested by the Permanent Select Committee on Intelligence of the House of Representatives or the Select Committee on Intelligence of the Senate.

(b) The head of each entity of the intelligence community shall submit to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate, at least annually,

a report which includes a review of the intelligence activities of the entity.

(c) The Director shall maintain a complete record of all legal authorities, published regulations, and published instructions pertaining to the national intelligence activities of the United States; and the head of each entity of the intelligence community shall maintain a complete record of all legal authorities, published regulations, and published instructions pertaining to the intelligence activities of that entity. An index of each such record shall be maintained in the Office of the Federal Register, National Archives and Records Service, General Services Administration, under security standards approved by the Director.

(d) The Director shall maintain a full and complete record regarding the national intelligence activities of the United States; and the head of each entity of the intelligence community shall maintain a full and complete record regarding the intelligence activities of such entity.

(e) The head of each entity of the intelligence community, with respect to the records of that entity of the intelligence community, shall, to the maximum extent practicable and consistent with guidelines established by the Administrator of General Services, provide for the necessary destruction of records at regular periodic intervals. No record regarding the activities of any entity of the intelli-

gence community may be destroyed unless the head of the entity of the intelligence community concerned has given written notification of the proposed destruction, including a description of the records, to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate at least 60 days prior to implementation.

(f) The head of each entity of the intelligence community, with respect to the intelligence activities of that entity, shall promptly provide the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate a copy of all rules, regulations, procedures, and directives issued to implement the provisions of this Act and notify such committees, in a timely fashion, of any waivers of such rules, regulations, procedures, and directives, and the facts and circumstances of each such waiver.

CONGRESSIONAL COMMITTEE REPORTS; DISCLOSURE PROVISIONS

SEC. 153. (a) The Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate (hereinafter in this section referred to as the "permanent select committee" and the "select committee," respectively) shall report, at least annually, to their respective Houses on the nature and extent

of the intelligence activities of the United States. Each committee shall promptly call to the attention of its respective House, or to any appropriate committee or committees of its respective House, any matter relating to intelligence activities which requires or should have the attention of such House or such committee or committees. In making such reports, the permanent select committee and the select committee shall do so in a manner consistent with the protection of the national security interests of the United States. To the extent possible, consistent with the protection of the national security interests of the United States, such reports shall be made available to the public.

(b) No information or material provided to the permanent select committee or the select committee relating to the lawful intelligence activities of any department or agency that has been classified under established security procedures or that was submitted by the executive branch with the request that such information or material be kept confidential shall he made public by the permanent select committee or the select committee or any member thereof, except in accordance with the provisions of House Resolution 658 of the Ninety-fifth Congress in the case of the permanent select committee and its members, or in accordance with the provisions of Senate Resolution 400 of the Ninety-

fourth Congress in the case of the select committee and its members.

(c) (1) The permanent select committee shall, under such regulations as that committee shall prescribe, make any information described in subsection (a) or (b) available to any other committee or any other Member of the House. Whenever the permanent select committee makes such information available, that committee shall keep a written record showing which committee or which Members of the House received such information. No Member of the House who, and no committee which, receives such information under this paragraph shall disclose such information except in accordance with the provisions of House Resolution 658 of the Ninety-fifth Congress.

(2) The select committee may, under such regulations as that committee shall prescribe to protect the confidentiality of such information, make any information described in subsection (a) or (b) available to any other committee or any other Member of the Senate. Whenever the select committee makes such information available, the committee shall keep a written record showing which committee or which Members of the Senate received such information. No Member of the Senate who, and no committee which, receives any information under this paragraph, shall disclose such information except in accordance with

the provisions of Senate Resolution 400 of the Ninety-fourth Congress.

(d) The provisions of subsections (a), (b), and (c) are enacted by the Congress—

(1) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and as such they shall be considered as part of the rules of each House, respectively, and shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (as far as relating to such House) at any time, in the same manner, and to the same extent as in the case of any other rule of such House.

ANNUAL REPORT OF THE DIRECTOR

SEC. 154. The Director shall make available to the public an unclassified annual report on the national intelligence, counterintelligence, and counterterrorism activities conducted by entities of the intelligence community. Nothing in this subsection shall be construed as requiring the public disclosure, in any such report made available to the public, of the names of individuals engaged in such activities for the United States or the divulging of classified information which requires protection from disclosure by law.

TITLE II—INTELLIGENCE ACTIVITIES AND CONSTITUTIONAL RIGHTS

PART A—GENERAL PROVISIONS; RESPONSIBILITIES OF THE ATTORNEY GENERAL

SHORT TITLE

SEC. 201. This title may be cited as the "Intelligence Activities and Constitutional Rights Act of 1978".

STATEMENT OF FINDINGS

SEC. 202. The Congress hereby finds that—

(1) properly limited and controlled intelligence activities conducted within the United States or directed against United States persons abroad are necessary to protect against espionage and other clandestine intelligence activities harmful to the security of the United States, to protect against sabotage, international terrorist activities, and assassinations, and to collect information concerning foreign powers, organizations, or persons which is essential to the formulation and conduct of the foreign policy and to the protection of the national security of the United States;

(2) illegal or improper intelligence activities have undermined due process of law, inhibited the exercise of freedom of speech, press, assembly, and association, invaded the privacy of individuals, and impaired the integrity of free institutions; and

(3) legislation is needed to allocate clearly the responsibility for directing and supervising all intelligence activities conducted within the United States or against United States persons abroad, to establish standards and procedures for the conduct of such activities, to prohibit certain activities, and to establish adequate legal safeguards to insure adherence to such standards and procedures.

STATEMENT OF PURPOSES

SEC. 203. It is the purpose of this Act—

(1) to provide statutory authorization for intelligence activities which are directed against United States persons or performed within the United States and which are necessary for the formulation and conduct of the foreign affairs and the protection of the national security of the United States;

(2) to establish comprehensive statutory standards and procedures for the conduct of the intelligence activities of the United States in order to protect individuals against violations and infringements of their constitutional rights;

(3) to provide fair and effective remedies and sanctions whenever any person's rights under the Constitution or laws of the United States are infringed or violated by intelligence activities of the United States; and

(4) to delineate the role of the Attorney General in insuring that intelligence activities of the United States are conducted in conformity with the Constitution and laws of the United States.

DEFINITIONS

SEC. 204. (a) Except as otherwise provided in this section, the definitions in title I of this Act shall apply to this title.

(b) As used in this title:

(1) The term "clandestine intelligence activity" means any intelligence activity on behalf of a foreign power which is planned and executed in a manner intended to conceal the nature or fact of such activity or the role of such foreign power, and any activity carried out in support of such activity.

(2) The term "confidential records" means any documentary information or material which is not generally available to a private person.

(3) The term "covert human source" means any person acting on behalf of any entity of the intelligence community who is directed to collect specific information or material for such entity in a manner intended to conceal the nature or the fact of such collection, including any person who voluntarily agrees to perform such activity without compensation.

(4) The term "electronic surveillance within the United States" shall have the same meaning as in title III of this Act.

(5) The term "foreign electronic or signals intelligence activities" shall have the same meaning as in title III of this Act.

(6) The term "foreign organization" means—

(A) any unincorporated association organized outside the United States and not substantially composed of United States citizens or aliens lawfully admitted for permanent residence (as defined in section 101 (a) (20) of the Immigration and Nationality Act) ; or

(B) any corporation incorporated outside the United States.

(7) The term "foreign person" means any foreign power, any foreign organization, or any individual who is not a citizen of the United States or an alien lawfully admitted for permanent residence (as defined in section 101 (a) (20) of the Immigration and Nationality Act).

(8) The term "foreign power" means—

(A) any government of a foreign country, including any person or group of persons exercising sovereign *de facto* or *de jure* political jurisdiction over any country, other than the United States, or over any part of such country, and including any subdivision of any such group and any group or agency to which such sovereign

de facto or *de jure* authority or functions are directly or indirectly delegated;

(B) any faction or body of insurgents within a country presuming to exercise governmental authority whether such faction or body of insurgents has or has not been recognized by the United States;

(C) any foreign political party including any organization or any other combination of individuals in a country other than the United States, or any unit or branch thereof, having for an aim or purpose, or engaged in any activity devoted in whole or in part to, the establishment, administration, control, or acquisition of administration or control, of a government of a foreign country or a subdivision thereof, or the furtherance or influencing of the political or public interests, policies, or relations of a government of a foreign country or a subdivision thereof, but not including any United States organization; or

(D) any corporation incorporated in the United States which is directed and controlled by any government of a foreign country.

(9) The term "mail cover" means any systematic and deliberate inspection of the exterior of mail to or from a particular person without such person's consent before such mail is delivered to the person to whom it is addressed.

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(10) The term "national agency check" means a record check of the Federal Bureau of Investigation fingerprint and investigative files, the Civil Service Commission security/investigations index, the Department of Defense central investigative index, the central files of the Central Intelligence Agency, or the central files of the Department of State, and, when there is a reasonable likelihood that relevant biographic information will be found in such files, the central files of any other Federal agency.

(11) The term "physical surveillance" means (A) any systematic and deliberate observation of a person without that person's consent by any means on a continuing basis, or (B) unconsented acquisition of a nonpublic communication by a person not a party thereto or visibly present thereat through any means not involving electronic surveillance within the United States or foreign electronic or signals intelligence activities. Such term does not include overhead reconnaisance not directed at specific United States persons.

(12) The term "United States", when used to describe a geographic location, means the several States, the Virgin Islands, the Commonwealth of Puerto Rico and the possessions and territories of the United States.

(13) The term "United States organization" means

any unincorporated association or corporation which is a United States person.

RESPONSIBILITIES OF THE ATTORNEY GENERAL

SEC. 205. (a) It shall be the duty of the Attorney General to participate, as appropriate, in the National Security Council, and with the Director of National Intelligence, the Intelligence Oversight Board, and the heads of the entities of the intelligence community, in ensuring that all intelligence activities of the United States are conducted in conformity with the Constitution and laws of the United States and do not abridge any right protected by the Constitution or laws of the United States. In discharging this duty the Attorney General shall—

(1) have responsibility for the approval of all regulations or procedures proposed by the Director of National Intelligence or by the head of any entity of the intelligence community to implement any provision of this title;

(2) evaluate on a continuing basis all statutes, executive orders, Presidential directives and memoranda, and all regulations and procedures, relating to intelligence activities to determine whether they adequately protect the rights of United States persons under the Constitution and laws of the United States, and the legal rights of any other persons who are in the

United States, and make such recommendations for changes therein as the Attorney General may deem necessary to achieve such purposes;

(3) supervise the intelligence activities of the Federal Bureau of Investigation authorized in title V of this Act;

(4) review or approve intelligence activities when required to do so by this Act;

(5) submit a written report annually to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate on those intelligence activities which under this title require the approval or review of the Attorney General or his designee.

(b) (1) To assist the Attorney General in the discharge of his responsibilities under this title, the Attorney General shall designate—

(A) an official or officials from among the Deputy Attorney General, the Associate Attorney General, and Assistant Attorneys General who shall perform any duty assigned to the Attorney General's designee under this Act; and

(B) an internal inspection officer who shall have, to the extent determined by the Attorney General, the same responsibility and authority with respect to the

intelligence activities of the Department of Justice as the inspector general of each entity of the intelligence community has under section 151 of this Act with respect to the intelligence activities of that entity.

(2) The Attorney General, on or before the effective date of this Act, shall notify the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate which of the officials specified in paragraph (b) (1) (A) of this section shall perform the duties assigned to the Attorney General's designee under this Act. If any such duties are subsequently assigned or transferred to any person who on the effective date of this Act had already been appointed to such office by the President, by and with the advice and consent of the Senate, the Attorney General shall promptly notify the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate of such assignment or transferral. Any such duties shall be assigned or transferred to any person who on the effective date of this Act had not yet been appointed to such office only if the Attorney General designates such person to exercise such duties prior to such person's appointment to such office by the President, by and with the advice and consent of the Senate.

PART B—AUTHORITY TO COLLECT INFORMATION CONCERNING UNITED STATES PERSONS, AND FOREIGN PERSONS WITHIN THE UNITED STATES

Subpart 1—Principles and Procedures Governing Collection of Information Concerning United States Persons, and Foreign Persons Within the United States

GENERAL PRINCIPLES

SEC. 211. (a) No information concerning any United States person, or any foreign person within the United States, may be collected for any foreign intelligence, counterintelligence, or counterterrorism purpose except in accordance with this part.

(b) Information concerning any United States person, or any foreign person within the United States, may be collected by any entity of the intelligence community with the consent of that person. The consent of any such person shall be requested whenever making such a request would not frustrate the lawful purposes of the collection.

(c) Publicly available information concerning any United States person, or any foreign person within the United States, may be collected by any entity of the intelligence community when such information is relevant to an authorized function of that entity.

(d) All collection of information concerning United States persons, or foreign persons within the United States,

shall be conducted by the least intrusive means possible. Whenever the information sought can reasonably be obtained from publicly available information, it shall be so obtained. Whenever there is a choice between two or more techniques of collection, each of which can reasonably be expected to obtain the information sought, the technique which is least intrusive shall be used.

IMPLEMENTING PROCEDURES AND REGULATIONS

SEC. 212. The head of each entity of the intelligence community shall, subject to the approval of the Attorney General, promulgate procedures and regulations—

(1) designating those officials of that entity who are empowered to—

(A) authorize the initiation, renewal, or extension of collection of information under this part; and

(B) authorize the use of particular techniques of collection;

(2) insuring that the least intrusive techniques necessary to collect information concerning United States persons, or foreign persons within the United States, are used;

(3) providing guidance with respect to the circumstances in which the initiation or continuation of collection of information under the authority of this part

would be justified and in which the use of a particular technique would be appropriate;

(4) prescribing requirements for the maintenance of written records, in accordance with section 152 of this Act, on the use of particular techniques; and

(5) prescribing any other requirements necessary to protect constitutional rights and to limit the use of information collected under this part to lawful governmental purposes.

Subpart 2—Authority To Collect Intelligence Concerning United States Persons

AUTHORITY TO COLLECT COUNTERINTELLIGENCE AND COUNTERTERRORISM INTELLIGENCE CONCERNING UNITED STATES PERSONS

SEC. 213. Counterintelligence or counterterrorism intelligence may be collected concerning any United States person who—

(1) is reasonably believed to be engaged in espionage or any other clandestine intelligence activity which involves or may involve a violation of the criminal laws of the United States, sabotage, any international terrorist activity, or any assassination, to be aiding and abetting any person in the conduct of any such activity, or to be conspiring with any person engaged in any such activity;

(2) is reasonably believed to be engaged in any clandestine intelligence activity outside the United States; or

(3) resides outside the United States and is acting in an official capacity for any foreign power or organization which is reasonably believed to be engaged in espionage or any other clandestine intelligence activity, sabotage, any international terrorist activity, or any assassination.

AUTHORITY TO COLLECT FOREIGN INTELLIGENCE CONCERNING UNITED STATES PERSONS

SEC. 214. Foreign intelligence may be collected concerning any United States person when a properly designated official of an entity of the intelligence community determines that the foreign intelligence would be significant foreign intelligence, and when such person—

(1) is reasonably believed to be engaged in espionage or any other clandestine intelligence activity which involves or may involve a violation of the criminal laws of the United States, sabotage, any international terrorist activity, or any assassination, to be aiding and abetting any person in the conduct of any such activity, or to be conspiring with any person engaged in any such activity;

(2) is reasonably believed to be engaged in any

clandestine intelligence activity outside the United States;

(3) resides outside the United States and is acting in an official capacity for a foreign power and the information sought concerns such person's official duties or activities; or

(4) is a fugitive from United States justice abroad, reasonably believed to have relationships with foreign governments or organizations which would constitute significant foreign intelligence.

ATTORNEY GENERAL APPROVAL OF COLLECTION UTILIZING CERTAIN TECHNIQUES

SEC. 215. The following techniques may be used to collect intelligence concerning a United States person under this subpart, but only under exigent circumstances or when the Attorney General or his designee, or, in the case of counterintelligence or counterterrorism collection concerning a member of the armed forces, the appropriate service Secretary, has made a written finding that in the collection of information concerning such person the use of such techniques is necessary and reasonable:

(1) examination of the confidential tax records of any federal, state, or local agency in accordance with any applicable law;

(2) physical surveillance for purposes other than identification;

(3) the direction of covert human sources to collect information;

(4) mail covers in accordance with applicable law of the United States;

(5) requests for information, for purposes other than identification, pertaining to employment, education, medical care, insurance, telecommunications services, credit status, or other financial matters from the confidential records of any private institution or any Federal, State, or local agency; and

(6) electronic surveillance within the United States, foreign electronic or signals intelligence activities, physical search, or mail opening in accordance with title III of this Act.

DURATION OF COLLECTION

SEC. 216. (a) Intelligence collection under the authority of this subpart may be initiated only upon the written approval of a properly designated official of an entity of the intelligence community. Such approval shall be valid for not more than 90 days, renewable in writing for one additional 90-day period.

(b) Intelligence collection under the authority of this subpart may continue beyond the 180 days authorized in sub-

section (a) only if a properly designated official of the entity of the intelligence community conducting such collection makes a written finding that continuation of collection is necessary and reasonable.

(c) The Attorney General or his designee, or, when the subject of the collection is a member of the armed forces, the appropriate service Secretary, shall review annually each collection under this subpart which has continued for more than 180 days. Any such collection shall terminate after such annual review unless the Attorney General or his designee, or, if appropriate, the service Secretary, makes a written finding that the continuation of collection is necessary and reasonable.

WRITTEN FINDINGS

SEC. 217. Written findings under section 215 or 216 shall be based on the following considerations—

(1) the degree to which continuation of collection or the use of particular techniques of collection would infringe on the rights of the subject of the collection;

(2) the importance of the information sought;

(3) the credibility and specificity of information already obtained indicating that the subject of the collection continues to satisfy the standards for collection under this subpart; and

(4) when the collection is for a counterintelligence

or counterterrorism purpose, the likelihood, immediacy, and magnitude of any harm threatened by such activity.

Subpart 3—Authority To Collect Other Information Concerning United States Persons

AUTHORITY TO COLLECT INFORMATION CONCERNING TARGETS OF FOREIGN INTELLIGENCE SERVICES OR INTERNATIONAL TERRORISTS

SEC. 218. (a) Information may be collected for up to 180 days by any entity of the intelligence community concerning any United States person—

(1) who is reasonably believed to be the object of a recruitment effort by the intelligence service of a foreign power or by any person or organization engaging in any international terrorist activity; or

(2) who is engaged in activity or possesses information or material which is reasonably believed to be the specific target of any international terrorist activity or the target of any clandestine intelligence collection activity, or who is reasonably believed to be the target of any assassination attempt by any foreign person or by international terrorists, but only to the extent necessary to protect against such terrorist or intelligence activity or assassination attempt.

(b) Any person who is the subject of collection of information under this section shall be advised of any risks to

that person posed by the intelligence activities of a foreign power or by international terrorist activities, and such person's consent for collection shall be requested, unless a properly designated official determines that—

(1) informing the person would jeopardize intelligence sources and methods; or

(2) there is reasonable uncertainty as to whether such person may be cooperating with the foreign intelligence service or international terrorists.

AUTHORITY TO COLLECT FOREIGN INTELLIGENCE IN THE POSSESSION OF UNITED STATES PERSONS

SEC. 219. Foreign intelligence in the possession of a United States person may be collected by any entity of the intelligence community without the consent of such person if—

(1) a properly designated official of the collecting entity determines that such intelligence is significant foreign intelligence, not otherwise obtainable;

(2) collection of information concerning the United States person is limited to information essential to understanding or assessing the foreign intelligence; and

(3) collection is limited to interviewing any other person to whom such United States person may have voluntarily disclosed such foreign intelligence.

AUTHORITY TO COLLECT INFORMATION CONCERNING PERSONS IN CONTACT WITH SUSPECTED INTELLIGENCE AGENTS

SEC. 220. Information may be collected for not to exceed 90 days by any entity of the intelligence community concerning any United States person who has contact with any person who is reasonably believed to be engaged in espionage or any other clandestine intelligence collection activity, but such information may be collected only to the extent necessary to identify such United States person and to determine whether such person currently has, has had, or will have access to any information, disclosure of which to a foreign power would be harmful to the United States.

AUTHORITY TO COLLECT INFORMATION CONCERNING POTENTIAL SOURCES OF ASSISTANCE

SEC. 221. Information may be collected for up to 90 days by any entity of the intelligence community concerning any United States person who is reasonably believed to be a potential source of information or operational assistance, but only to the extent necessary to determine such person's suitability or credibility as such a source. Collection without the person's consent shall be limited to publicly available information, national agency checks, and interviews. The consent

of any such person shall be requested unless a properly designated official of the collecting entity makes a written finding that—

(1) there is a serious intention to use such person as a source of information or assistance, and

(2) such a request would jeopardize the activity for which information or assistance is sought.

AUTHORITY TO COLLECT INFORMATION FOR THE PROTECTION OF THE SECURITY OF INSTALLATIONS, PERSONNEL, COMMUNICATIONS, AND SOURCES AND METHODS

SEC. 222. (a) Each entity of the intelligence community, in order to determine whether any United States person within, on the grounds of, or in the immediate vicinity of any installation of that entity should, in accordance with any rule or regulation applicable to that installation, be excluded from that installation or from the immediate vicinity of that installation, may conduct physical surveillance of any such person, may request information concerning such person from the records of any federal, state, or local law enforcement agency, and may conduct a national agency check on such person.

(b) Each entity of the intelligence community may collect information concerning any United States person who is reasonably believed to be engaging in any activity

which poses a clear threat to the physical safety of any installation or of any personnel of that entity, but the collection of such information within the United States shall be limited to such information as is necessary to determine whether the matter should be referred to an appropriate law enforcement agency, at which point the collection of such information shall be terminated. In no case shall the collection of such information within the United States go beyond—

(1) physical surveillance within, on the grounds of, or in the immediate vicinity of any installation of such entity;

(2) national agency checks;

(3) requests for information from the records of any federal, state, or local law enforcement agency; and

(4) interviews.

(c) Each entity of the intelligence community may collect information concerning any employee or contractor of that entity or any employee of a contractor of that entity to determine whether such entity employee or contractor or contractor employee has violated any rule or regulation of that entity pertaining to the security of that entity's installations, personnel, communications, sources or methods.

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Such collection may continue beyond 180 days only with the written approval of the head of the entity. The head of each entity may approve in writing the use of the following techniques of collection with respect to any such employee—

(1) examination of the confidential records of any federal, state, or local tax agency in accordance with applicable law;

(2) physical surveillance for purposes other than identification;

(3) the direction of covert human sources to collect information;

(4) mail covers in accordance with applicable law of the United States; and

(5) requests for information, for purposes other than identification, pertaining to employment, education, medical care, insurance, telecommunications services, credit status, or other financial matters from the confidential records of any private institution or any federal, state, or local agency.

Subpart 4—Authority To Collect Information Concerning Foreign Persons Within the United States

AUTHORITY TO COLLECT INFORMATION CONCERNING FOREIGN PERSONS WITHIN THE UNITED STATES

SEC. 225. Information concerning any foreign person within the United States may be collected for foreign in-

telligence, counterintelligence, or counterterrorism intelligence purposes if—

(1) such person is an officer or employee of any foreign power or organization;

(2) the circumstances of such person's presence in the United States make it reasonably likely that such person may engage in espionage or any other clandestine intelligence activity;

(3) information concerning such person is determined by the head of the collecting entity of the intelligence community to be significant foreign intelligence; or

(4) the collection of information concerning such person would be permitted under this part if such person were a United States person, but any limitation under this part on duration or techniques of collection that would be applicable to collection concerning a United States person shall not apply to collection under this section.

PART C—RETENTION AND DISSEMINATION OF INFORMATION CONCERNING UNITED STATES PERSONS

RETENTION

SEC. 231. (a) Information concerning any United States person which is collected in the course of collection of information for any foreign intelligence, counterintelligence, or

counterterrorism purpose, which is not publicly available, and which permits the identification of such person (hereinafter in this part referred to as "private information"), may be retained in the records or files of any department or agency without such person's consent only if—

(1) collection of information concerning such person has been approved in accordance with the provisions of this title and such information is relevant to the approved purposes of collection;

(2) it is reasonably believed that such information may provide a basis for initiating intentional collection of information pursuant to the provisions of this title;

(3) such information concerns a possible threat to the physical safety of any person;

(4) it is reasonably believed that such information may be evidence of a crime;

(5) such information was collected in the course of authorized foreign intelligence, counterintelligence, or counterterrorism intelligence collection and is essential for understanding or assessing such intelligence;

(6) such information constitutes foreign intelligence, counterintelligence, or counterterrorism intelligence and the United States person concerned is the incumbent of any office of the United States Government having sig-

nificant responsibility for the conduct of United States defense or foreign policy; or

(7) such information was acquired by overhead reconnaissance not directed at any specific United States person.

(b) Publicly available information concerning any United States person may be retained in the records or files of any entity of the intelligence community when relevant to a lawful function of that entity.

(c) Notwithstanding any other provision of this part, information collected by means of electronic surveillance within the United States or foreign electronic or signals intelligence activities shall be retained or disseminated only in accordance with the provisions of title III of this Act.

DISSEMINATION

SEC. 232. (a) Private information may be disseminated without the consent of the person which such information identifies only in accordance with this section.

(b) Private information may be disseminated within the entity of the intelligence community collecting such information (hereinafter in this part referred to as the "collecting agency") or within any department or agency subsequently receiving such information only to those persons who require such information for the discharge of authorized governmental responsibilities.

(c) Private information which constitutes foreign intelligence may be disseminated outside the collecting agency if the dissemination is to another department or agency having lawful access to foreign intelligence information and the identity of the United States person is essential to an understanding or assessment of the information's importance.

(d) Private information which constitutes counterintelligence or counterterrorism intelligence may be disseminated outside the collecting agency if—

(1) the dissemination is to another entity of the intelligence community having lawful counterintelligence or counterterrorism responsibilities, as the case may be, and having a direct interest in the particular information; or

(2) the dissemination is to a foreign government, if the information indicates that the United States person concerned may be engaged in international terrorist activities or in clandestine intelligence activities of direct interest to that foreign government, and if such dissemination is clearly in the interests of the United States.

(e) Private information which relates to any criminal activity may be disseminated outside the collecting agency if the United States person concerned is apparently involved in such criminal activity or is or may become the victim of that activity, and if—

(1) dissemination is to any federal, state, or local law enforcement agency having investigative jurisdiction over such criminal activity or responsibility for protecting against such criminal activity; or

(2) dissemination is to a foreign law enforcement agency having investigative jurisdiction over such criminal activity, and such dissemination is determined by the Attorney General or his designee, having due regard to the seriousness of the activity and any legal obligation imposed on the United States by any treaty or other international agreement, to be in the interests of the United States.

(f) Private information relating to the trustworthiness of any United States person who currently has, has had, or is being considered for access to classified information may be disseminated to the department or agency which employs, employed, or intends to employ that person, the department or agency which granted that person a security clearance or access to classified information, or to any department or agency having responsibility to investigate that person's trustworthiness.

(g) Private information relating to the suitability of any United States person as a source of information or assistance for any lawful intelligence purpose may be disseminated to any entity of the intelligence community requesting such in-

formation, if the request certifies that there is a serious intention to use such person as such a source of information or assistance.

RETENTION AND DISSEMINATION FOR OVERSIGHT PURPOSES

SEC. 233. (a) In the event that private information is collected by a means or in a manner prohibited by this Act, such information may be retained or disseminated only for purposes of oversight, accountability, and redress. Such information, when relevant to any administrative, civil, or criminal proceeding, shall not be destroyed or otherwise disposed of if the collecting agency is on notice of such a proceeding.

(b) This part shall not be construed to limit or otherwise affect in any manner any right of the Congress or any committee, subcommittee, or member thereof to have access to any information.

(c) This part shall not be construed to prevent the retention or dissemination of information about any United States person in a manner which would clearly not permit the identification of the United States person concerned.

PART D—RESTRICTIONS AND LIMITATIONS

PROHIBITION OF POLITICAL SURVEILLANCE

SEC. 241. No intelligence activity may be directed against any United States person solely on the basis of such

person's exercise of any right protected by the Constitution or laws of the United States, and no intelligence activity may he designed and conducted so as to limit, disrupt, or interfere with the exercise of any such right by any United States person.

PROHIBITED DISSEMINATION

SEC. 242. No person acting on behalf of any entity of the intelligence community may disseminate anonymously or under a false identity information concerning any United States person without such person's consent unless such dissemination poses no risk to the physical safety of such person, is not for the purpose of discrediting such person because of such person's exercise of rights protected hy the Constitution and laws of the United States, and is made—

(1) to a foreign intelligence service when necessary to protect against espionage or any other clandestine intelligence activity;

(2) to persons engaged in sabotage, international terrorist activities, or assassination, when necessary to protect against any such activity; or

(3) te any person when necessary to the maintenance of properly authorized cover for an officer, employee, or person acting for or on behalf of an entity of the intelligence community.

PARTICIPATION IN ILLEGAL ACTIVITY

SEC. 243. No person acting on behalf of an entity of the intelligence community may instigate or commit any violation of the criminal statutes of the United States unless such activity is undertaken pursuant to procedures approved by the Attorney General and—

(1) does not involve acts of violence;

(2) does not involve a violation of any other provision of this Act; and

(3) is necessary to protect against acts of espionage, sabotage, international terrorist activity, or assassination.

RESTRICTIONS ON UNDISCLOSED PARTICIPATION IN UNITED STATES ORGANIZATIONS

SEC. 244. (a) No person may, except in accordance with this section, join or otherwise participate in any United States organization, or any other organization within the United States, on behalf of an entity of the intelligence community without disclosing such person's intelligence affiliation to appropriate officials of that organization.

(b) The head of an entity of the intelligence community or his designee may, when essential for intelligence activities authorized by this Act, authorize [~~undisclosed~~] participation on behalf of that entity, without disclosing affiliation with

that entity, in an organization within the United States which is composed primarily of foreign persons and is acting on behalf of a foreign power.

(c) The head of an entity of the intelligence community or his designee may authorize [~~undisclosed~~] participation in a United States organization without disclosing affiliation with that entity when necessary to collect information concerning the organization or its members under part B of this title. Such participation shall be confined to the collection of information as authorized by that part and shall be conducted so as not to influence the lawful activities of the organization or its members. Within the United States such participation may be undertaken to collect nonpublicly available information only on behalf of the Federal Bureau of Investigation.

(d) The head of an entity of the intelligence community or his designee may authorize [~~undisclosed~~] participation in a United States organization without disclosing affiliation with that entity when such participation is essential for preparing the participant for assignment to an intelligence activity ontside the United States. Such participation shall he conducted so as not to influence the lawful activities of the organization or its members.

RESTRICTIONS ON THE PROVISION OF ASSISTANCE TO LAW ENFORCEMENT AUTHORITIES

SEC. 245. (a) Except as otherwise provided in this Act, no entity of the intelligence community other than the entities of the Departments of Justice and Treasury having law enforcement responsibilities may provide services, equipment, personnel, or facilities to the Law Enforcement Assistance Administration or to state or local police organizations of the United States, or participate in or fund any law enforcement activity within the United States.

(b) Any entity of the intelligence community may—

(1) cooperate with appropriate law enforcement agencies for the purpose of protecting the personnel and facilities of such entity and conducting background checks on applicants for employment;

(2) participate in law enforcement activities, in accordance with this Act, to protect against espionage or any other unlawful clandestine intelligence activity, sabotage, any international terrorist activity, or any assassination; or

(3) with the prior approval of a designated official of such entity, provide specialized equipment, technical knowledge, or, pursuant to procedures approved by the Attorney General, the assistance of expert personnel for use by any Federal law enforcement agency or, when

lives are endangered, to support local law enforcement agencies.

(c) The Attorney General or the Attorney General's designee shall be notified in a timely manner of such provision of equipment, knowledge, or personnel, and shall review at least annually all provision of expert personnel to determine whether the procedures approved by the Attorney General have been followed.

RESTRICTIONS ON THE USE OF HUMAN SUBJECTS FOR EXPERIMENTATION

SEC. 246. No entity of the intelligence community shall sponsor, contract for, or conduct research on any human subject except in accordance with guidelines on research involving human subjects issued by the Secretary of Health, Education, and Welfare. The requirements for informed consent and the documentation relating to such consent shall be the same as provided in such guidelines of the Secretary of Health, Education, and Welfare. The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research shall have jurisdiction to monitor, under appropriate security arrangements, compliance with such guidelines by the various entities of the intelligence community which conduct research on any human subject; and such Commission shall advise the Director of National Intelligence and the Secretary of Health, Education, and Wel-

fare on any changes in such guidelines as may be necessary to protect fully the health and safety of such human subjects.

PART E—REMEDIES

Subpart 1—Criminal Sanctions

ILLEGAL PHYSICAL SEARCHES

SEC. 251. (a) Section 2234 of title 18, United States Code, is amended by inserting "or other appropriate court order," immediately after "search warrant".

(b) Section 2235 of title 18, United States Code, is amended by inserting "(a)" before "Whoever" at the beginning of such section and adding a new subsection as follows:

"(b) Whoever maliciously and without complying with the provisions of the Foreign Intelligence Surveillance Act of 1978 procures a court order under that Act for an unconsented physical search, shall be fined not more than $1,000 or imprisoned not more than one year.".

(c) The first paragraph of section 2236 of title 18, United States Code, is amended by—

(1) inserting "or engaged in any intelligence activity (as defined in the National Intelligence Act of 1978)", immediately after "any law of the United States"; and

(2) inserting "or other appropriate court order" immediately after "property without a search warrant".

UNCONSENTED HUMAN EXPERIMENTATION

SEC. 252. (a) Part I of title 18, United States Code, is amended by adding at the end thereof a new chapter as follows:

"Chapter 123.—UNCONSENTED HUMAN EXPERIMENTATION
"Sec.
"2551. Prohibition against unconsented human experimentation.

"§ 2551. Prohibition against unconsented human experimentation

"Any officer, employee, or agent of the United States who knowingly engages in or authorizes the use of a human subject for experimentation in a manner which results in injury to or seriously jeopardizes the health or safety of such subject without such subject's informed consent shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.".

(b) The table of chapters at the beginning of part I of title 18, United States Code, is amended by adding at the end thereof the following:

"123. Unconsented human experimentation.".

Subpart 2—Civil Damages

JOINT AND SEVERAL PERSONAL AND GOVERNMENTAL LIABILITY

SEC. 253. (a) Any person shall have a civil cause of action against any employee or agent of any entity of the intelligence community, and against the United States,

jointly and severally, if such person is aggrieved as the direct result of any act or omission committed by such employee or agent, under color of law, in which such employee or agent—

(1) authorizes or engages in any of the following activities without a court order where a court order is required by law or the Constitution:

(A) electronic surveillance within the United States;

(B) foreign electronic or signals intelligence activity;

(C) physical search; or

(D) mail opening;

(2) authorizes or engages in any intelligence activity and such activity was engaged in for the purpose of limiting, disrupting, or interfering with the exercise of any right of such person protected by the Constitution or laws of the United States; or

(3) sponsors, contracts, or conducts research on such person except in accordance with this title.

(b) Except as provided in subsections (c) and (d), civil damages shall be assessed against any employee or agent found liable under subsection (a) and against the United States, jointly and severally, as follows:

(1) actual and general damages, but in no event

less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(2) punitive damages; and

(3) reasonable attorney's fees and court costs.

(c) The provisions of this section shall not apply to any cause of action arising from the interception or disclosure of a wire or oral communication in violation of chapter 119, chapter 120, or chapter 121 of title 18, United States Code.

(d) (1) Proof that any act or omission committed by any employee or agent of any entity of the intelligence community giving rise to any civil action under this subpart was committed in good faith by such employee or agent shall constitute a complete defense to such action.

(2) A good faith reliance by an employee or agent of any entity of the intelligence community on—

(A) a written order or directive issued by an officer or employee of the United States having apparent authority to authorize the action in question; or

(B) a written assurance by any person employed as a legal counsel or legal adviser in any entity of the intelligence community stating that the action in question is legal,

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shall constitute conclusive proof of good faith under paragraph (1) on the part of such employee or agent.

(3) Notwithstanding the existence of a good faith defense under paragraph (1), the United States shall, if such employee or agent was acting under color of law, be liable for any damages actually sustained by any person who has a cause of action under this section.

SOLE GOVERNMENTAL LIABILITY

SEC. 254. Any person shall have a civil cause of action against the United States if such person is aggrieved as a direct result of any act or omission by any employee or agent of any entity of the intelligence community that—

(1) violates any provision of this Act;

(2) is committed under color of law; and

(3) violates any right of the aggrieved person protected by the Constitution.

JURISDICTION

SEC. 255. The district courts of the United States shall have original jurisdiction, concurrent with the United States Court of Claims, for all civil actions for money damages brought under section 253 or 254.

STATUTE OF LIMITATIONS

SEC. 256. No civil action may be brought under section 253 or 254 unless filed within two years after the date on which the aggrieved person discovered or reasonably should

have discovered the facts giving rise to a cause of action under such section.

EXCLUSIVE REMEDY

SEC. 257. The remedies provided under sections 253 and 254 shall be the exclusive remedies for money damages under the laws of the United States, but shall not exclude any other remedy or relief (except for money damages) under law.

DEFENDANT'S FEES AND COSTS

SEC. 258. (a) The Attorney General, upon recommendation of the head of the appropriate entity of the intelligence community, may pay reasonable attorney's fees and other litigation costs reasonably incurred by any employee or agent of such entity against whom a civil action is brought under section 253.

(b) The court may award any employee or agent of the United States not found liable under section 253 reasonable attorney's fees and other litigation costs reasonably incurred if such costs are not paid under subsection (a). Fees and costs so awarded shall be paid by the United States.

ADMINISTRATIVE ADJUSTMENT OF CLAIMS

SEC. 259. (a) The first paragraph of section 2672 of title 28, United States Code, is amended by striking out the colon before the proviso and inserting in lieu thereof a

comma and the following: "or any claim for money damages against the United States for any injury or loss arising under any provision of the Intelligence Activities and Constitutional Rights Act of 1978 committed by any employee or agent of any entity of the intelligence community (as defined in the National Intelligence Act of 1978), but the amount of damages may not exceed an amount that could be awarded under section 253 or 254 of the Intelligence Activities and Constitutional Rights Act of 1978, as determined by the head of the entity concerned with the approval of an official of the Department of Justice designated by the Attorney General:".

(b) The first sentence of section 2675(a) of title 28, United States Code, is amended by striking out the comma after "employment" and inserting in lieu thereof "or upon a claim against the United States for money damages arising out of any provision of the Intelligence Activities and Constitutional Rights Act of 1978 committed hy any employee or agent of any entity of the intelligence community (as defined in the National Intelligence Act of 1978),".

Subpart 3—Administrative Sanctions

DISCIPLINARY ACTION

SEC. 260. (a) The head of each entity of the intelligence community shall be empowered to take disciplinary action against any officer or employee of that entity for any

action or omission that violates the provisions of this Act or any regulation issued thereunder. Notwithstanding any other provision of law, such action may include—

(1) suspension from employment without pay for a period not to exceed 180 days;

(2) reduction of salary or grade or both;

(3) dismissal from employment; or

(4) a combination of (1) and (2).

(b) Before any disciplinary action is taken under this section, the officer or employee shall have the opportunity to present evidence and to cross examine accusers and witnesses offering evidence against such officer or employee.

(c) Any disciplinary action taken by the head of the entity concerned shall be conclusive with respect to both law and fact.

(d) Nothing contained in this section shall be construed to affect or limit the authority of the head of any entity of the intelligence community to terminate the employment of any officer or employee of such entity under any other provision of law.

FURTHER ADMINISTRATIVE AND DISCIPLINARY ACTION

SEC. 261. In any case in which an employee or agent of any entity of the intelligence community is found guilty or liable under section 251 or 253, committed any act or omission which resulted in government liability under sec-

tion 254, or committed any act or omission which resulted in an award, compromise, or settlement by the United States under section 2672 of title 28, United States Code, the Attorney General shall refer the matter to the head of the appropriate entity of the intelligence community for such further administrative investigation and disciplinary action as may be appropriate.

PART F—PRIVILEGED COMMUNICATIONS; RULEMAKING

PROTECTION OF PRIVILEGED COMMUNICATIONS

SEC. 271. No otherwise privileged communication shall lose its privileged character as a consequence of this Act; and the Attorney General shall promulgate regulations to protect privileged communications against intelligence activities of the United States.

ADMINISTRATIVE RULEMAKING

SEC. 272. The Director of National Intelligence and the head of each entity of the intelligence community shall, in consultation with and subject to the approval of the Attorney General, promulgate regulations necessary to carry out the provisions of this title. No such regulation, or amendment thereto, shall become effective until 60 days after the date on which such regulation or amendment, as the case may be, has been submitted to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

TITLE III—FOREIGN INTELLIGENCE SURVEILLANCE

PART A—SHORT TITLE; PURPOSE

SHORT TITLE

SEC. 301. This title may be cited as the "Foreign Intelligence Surveillance Act of 1978".

STATEMENT OF PURPOSE

SEC. 302. It is the purpose of this title to authorize applications for a court order approving the use of electronic surveillance within the United States to obtain foreign intelligence information and to regulate foreign electronic and signals intelligence activities, unconsented physical searches, and unconsented mail opening.

PART B—ELECTRONIC SURVEILLANCE WITHIN THE UNITED STATES

AMENDMENTS TO TITLE 18, UNITED STATES CODE

SEC. 311. Title 18, United States Code, is amended by adding a new chapter after chapter 119 as follows:

"Chapter 120.—ELECTRONIC SURVEILLANCE WITHIN THE UNITED STATES FOR FOREIGN INTELLIGENCE PURPOSES

"Sec.
2521. Definitions.
2522. Authorization for electronic surveillance within the United States for foreign intelligence purposes.
2523. Special courts.
2524. Application for an order.
2525. Issuance of an order.
2526. Use of information.
2527. Report of electronic surveillance.
2528. Congressional oversight.

"§ 2521. Definitions

"(a) Except as otherwise provided in this section the

definitions of section 2510 of this title shall apply to this chapter.

"(b) As used in this chapter—

"(1) 'Foreign power' means—

"(A) a foreign government or any component thereof, whether or not recognized by the United States;

"(B) a faction of a foreign nation or nations, not substantially composed of United States persons;

"(C) an entity, which is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;

"(D) a foreign-based terrorist group;

"(E) a foreign-based political organization, not substantially composed of United States persons.

"(2) 'Agent of a foreign power' means—

"(A) any person, other than a United States person, who—

"(i) openly acts in the United States in the capacity of an officer or employee of a foreign power; or

"(ii) is a national of a foreign nation which engages in clandestine intelligence activities in the United States, and the circumstances of

such person's presence in the United States make it likely that such person is or may be engaged in such activities in the United States;

"(B) any person who—

"(i) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;

"(ii) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;

"(iii) is or may be knowingly engaged in sabotage or terrorism, or activities in furtherance thereof, for or on behalf of a foreign power; or

"(iv) knowingly aids or abets any person in the conduct of activities described in subparagraph (B) (i)–(iii) above or conspires with any person knowing that such person is engaged in activities in subparagraph (B) (i)–(iii) above.

"(3) 'terrorism' means activities which—

"(A) are violent acts or acts dangerous to human life which would be criminal under the laws of the United States or of any State if committed within its jurisdiction; and

"(B) appear to be intended—

"(i) to intimidate or coerce the civilian population—

"(ii) to influence the policy of a government by intimidation or coercion, or

"(iii) to affect the conduct of a government by assassination or kidnapping.

"(4) 'Sabotage' means activities which would be prohibited by title 18, United States Code, chapter 105, if committed against the United States.

"(5) 'Foreign intelligence information' means—

"(A) information which relates to, and if concerning a United States person is necessary to, the ability of the United States to protect itself against actual or potential attack or other grave hostile acts of a foreign power;

"(B) information with respect to a foreign power or foreign territory which is important to, and if concerning a United States person is essential to—

"(i) the national defense or the security of the Nation; or

"(ii) the conduct of the foreign affairs of the United States:

"(C) information which relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against terrorism by a foreign power or an agent of a foreign power;

"(D) information which relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against sabotage by a foreign power or an agent of a foreign power; or

"(E) information which relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against the clandestine intelligence activities of an intelligence service or network of a foreign power or an agent of a foreign power.

"(6) 'Electronic surveillance within the United States' means—

"(A) the acquisition, by an electronic, mechanical, or other surveillance device, of the contents of any wire or radio communication sent by or

intended to be received by a particular, known United States person who is in the United States, where the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;

"(B) the acquisition, by an electronic, mechanical, or other surveillance device, of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, where such acquisition occurs in the United States while the communication is being transmitted by wire;

"(C) the intentional acquisition, by an electronic, mechanical, or other surveillance device, of the contents of any radio communication, under circumstances in wbich a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and where both the sender and all intended recipients are located within the United States; or

"(D) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire informa-

tion, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

"(7) 'Attorney General' means the Attorney General of the United States (or Acting Attorney General) or the Deputy Attorney General.

"(8) 'Minimization procedures' means procedures which are reasonably designed to minimize the acqnisition, retention, and prohibit the dissemination, except as provided for in subsections 2526 (a) and (b), of any information concerning United States persons without their consent that does not relate to the ability of the United States—

"(i) to protect itself against actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

"(ii) to provide for the national defense or security of the Nation;

"(iii) to provide for the conduct of the foreign affairs of the United States;

"(iv) to protect against terrorism by a foreign power or an agent of a foreign power;

"(v) to protect against sabotage by a foreign power or an agent of a foreign power; or

"(vi) to protect against the clandestine intelligence activities of an intelligence service or network of a foreign power or an agent of a foreign power; and which are reasonably designed to ensure that information which relates solely to the national defense or security of the Nation or the conduct of foreign affairs shall not be maintained in such a manner as to permit the retrieval of such information by reference to a United States person, without his consent, who was a party to a communication acquired pursuant to this chapter and shall not be disseminated unless it relates significantly to the national defense or security of the Nation or the conduct of foreign affairs; and if the target of the electronic surveillance within the United States is a foreign power which qualifies as such solely on the basis that it is an entity controlled and directed by a foreign government or governments, and unless there is probable cause to believe that a substantial number of the officers or executives of such entity are officers or employees of a foreign government, or agents of a foreign pewer as defined in section 2521 (b) (2) (B), procedures which are reasonably designed to prevent the acquisition, retention, and dissemination of communications of unconsenting United States persons who are not officers or executives of such

entity responsible for those areas of its activities which involve foreign intelligence information.

"(9) 'United States person' means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence or a corporation which is incorporated in the United States, hut not including corporations which are foreign powers.

"(10) 'United States' when used in a geographic sense means all areas under the territorial sovereignty of the United States, the Trust Territory of the Pacific Islands, and the Canal Zone.

"§ 2522. Authorization for electronic surveillance within the United States for foreign intelligence purposes

"Applications for a court order under this chapter are authorized if the President has, by written authorization, empowered the Attorney General to approve applications to Federal judges having jurisdiction under section 2523 of this chapter, and a judge to whom an application is made may grant an order, in conformity with section 2525 of this

chapter, approving electronic surveillance within the United States of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information.

"§ 2523. Special courts

"(a) There is established a Special Court of the United States with jurisdiction to carry out the judicial duties of this chapter and such other judicial duties as may be assigned to it by law. The Chief Justice of the United States shall, in consultation with the chief judges of the judicial circuits, publicly designate at least one judge from each of the judicial circuits who shall be members of the Special Court and one of whom the Chief Justice shall publicly designate the Chief Judge. The Special Court shall continuously sit in the District of Columbia.

"(b) There is established a Special Court of Appeals with jurisdiction to hear appeals from decisions of the Special Court. The Chief Justice shall publicly designate six judges, one of whom shall be publicly designated the Chief Judge, from among the district courts of the District of Columbia, the Eastern District of Virginia, or the District of Maryland or the United States Court of Appeals for the District of Columbia, any three of whom shall constitute a panel for purposes of reviewing appeals from the Special Court.

"(c) The judges of the Special Court and the Special

Court of Appeals shall be designated for six-year terms, except that the Chief Justice shall stagger the terms of the members originally chosen. No judge may serve more than two full terms.

"(d) The Chief Judges of the Special Court and the Special Court of Appeals shall, in consultation with the Attorney General and the Director of National Intelligence, establish such document, physical, personnel, or communications security measures as are necessary to protect information submitted to or produced by the Special Court or the Special Court of Appeals from unauthorized disclosure.

"(e) Proceedings under this chapter shall be conducted as expeditiously as possible.

"(f) If any application to the Special Court is denied, the reasons for that denial shall, upon the motion of the party to whom the application was denied, be transmitted under seal to the Special Court of Appeals.

"§ 2524. Application for an order

"(a) Each application for an order approving electronic surveillance within the United States under this chapter shall be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction under section 2523 of this chapter. Each application shall require the approval of the Attorney General based upon his finding that it satisfies the

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criteria and requirements of such application as set forth in this chapter. It shall include the following information—

"(1) the identity of the Federal officer making the application;

"(2) the authority conferred on the Attorney General by the President of the United States and the approval of the Attorney General to make the application;

"(3) the identity or a description of the target of the electronic surveillance;

"(4) a statement of the facts and circumstances relied upon by the applicant to justify his belief that—

"(A) the target of the electronic surveillance is a foreign power or an agent of a foreign power; and

"(B) the facilities or the place at which the electronic surveillance is directed are being used, or are about to be used, by a foreign power or an agent of a foreign power;

"(5) a statement of the proposed minimization procedures;

"(6) when the target of the surveillance is not a foreign power as defined in section 2521 (b) (1) (A), (B) or (C), a detailed description of the nature of the information sought;

"(7) a certification or certifications by the Assistant to the President for National Security Affairs or an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate—

"(A) that the information sought is foreign intelligence information;

"(B) that the purpose of the surveillance is to obtain foreign intelligence information;

"(C) that such information cannot reasonably be obtained by normal investigative techniques;

"(D) including a designation of the type of foreign intelligence information being sought according to the categories described in section 2521 (b) (5);

"(E) when the target of the surveillance is not a foreign power, as defined in section 2521 (b) (1) (A), (B), or (C), including a statement of the basis for the certification that—

"(i) the information sought is the type of foreign intelligence information designated; and

"(ii) such information cannot reasonably be obtained by normal investigative techniques;

"(F) when the target of the surveillance is a foreign power, as defined in section 2521(b)(1)(A), (B), or (C), stating the period of time for which the surveillance is required to he maintained;

"(8) when the target of the surveillance is not a foreign power, as defined in section 2521(b)(1)(A), (B), or (C), a statement of the means by which the surveillance will be effected, and when the target is a foreign power, as defined in section 2521(h)(1)(A), (B), or (C), a designation of the type of electronic surveillance within the United States to he used according to the categories described in section 2521(h)(6), and a statement whether physical entry is required to effect the surveillance;

"(9) a statement of the facts concerning all previous applications that have been made to any judge under this chapter involving any of the persons, facilities, or places specified in the application, and the action taken on each previous application; and

"(10) when the target of the surveillance is not a foreign power, as defined in section 2521(b)(1)(A), (B), or (C), a statement of the period of time for which the electronic surveillance is required to be maintained. If the nature of the intelligence gathering is such that the approval of the use of electronic

surveillance under this chapter should not automatically terminate when the described type of information has first been obtained, a description of facts supporting the belief that additional information of the same type will be obtained thereafter.

"(b) The Attorney General may require any other affidavit or certification from any other officer in connection with the application.

"(c) The judge may require the applicant to furnish such other information as may be necessary to make the determinations required by section 2525 of this chapter, including information necessary to determine that, where the target is a United States person, the certification or certifications are not clearly erroneous.

"§ 2525. Issuance of an order

"(a) Upon an application made pursuant to section 2524 of this title, the judge shall enter an ex parte order as requested or as modified approving the electronic surveillance within the United States if he finds that—

"(1) the President has authorized the Attorney General to approve applications for electronic surveillance for foreign intelligence information;

"(2) the application has been made by a Federal officer and approved by the Attorney General;

"(3) on the basis of the facts submitted by the applicant there is probable cause to believe that—

"(A) the target of the electronic surveillance is a foreign power or an agent of a foreign power; and

"(B) the facilities or place at which the electronic surveillance is directed are being used, or are about to be used, by a foreign power or an agent of a foreign power;

"(4) the proposed minimization procedures meet the definition of minimization procedures under section 2521(b)(8) of this title;

"(5) the application which has been filed contains the description and certification or certifications, specified in section 2524(a)(7) and, if the target is a United States person, the certification or certifications are not clearly erroneous on the basis of the statement made under section 2524(a)(7)(E) and any other information furnished under section 2524(c).

"(b) An order approving an electronic surveillance within the United States under this section shall—

"(1) specify—

"(A) the identity or a description of the target of the electronic surveillance;

"(B) the nature and location of the facilities or

the place at which the electronic surveillance will be directed;

"(C) when the target of the surveillance is not a foreign power as defined in section 2521(b)(1)(A), (B), or (C), the type of information sought to be acquired and when the target is a foreign power defined in section 2521(b)(1)(A), (B), or (C), the designation of the type of foreign intelligence information under section 2521(b)(5) sought to be acquired;

"(D) when the target of the surveillance is not a foreign power, as defined in section 2521(b)(1)(A), (B), or (C), the means by which the electronic surveillance will be effected, and when the target is a foreign power, as defined in section 2521(b)(1)(A), (B), or (C), a designation of the type of electronic surveillance to be used according to the categories described in section 2521(b)(6) and whether physical entry will be used to effect the surveillance; and

"(E) the period of time during which the electronic surveillance is approved; and

"(2) direct—

"(A) that the minimization procedures be followed;

"(B) that, upon the request of the applicant.

a specified communication or other common carrier, landlord, custodian, contractor, or other specified person furnish the applicant forthwith any and all information, facilities, or technical assistance, necessary to accomplish the electronic surveillance in such manner as will protect its secrecy and produce a minimum of interference with the services that such carrier, landlord, custodian, contractor, or other person is providing that target of electronic surveillance;

"(C) that such carrier, landlord, custodian, or other person maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the surveillance or the aid furnished which such person wishes to retain;

"(D) that the applicant compensate, at the prevailing rate, such carrier, landlord, custodian, or other person for furnishing such aid.

"(c) An order issued under this section may approve an electronic surveillance within the United States not targeted against a foreign power, as defined in section 2521 (b) (1) (A), (B), or (C), for the period necessary to achieve its purpose, or for 90 days, whichever is less; an order under this section shall approve an electronic sur-

veillance within the United States targeted against a foreign power, as defined in section 2521(b)(1)(A), (B), or (C) for the period specified in the certification required in section 2524(a)(7)(F), or for one year, whichever is less provided that the Attorney General and the certifying official or officials shall review the certification at least every 90 days. Extensions of an order issued under this chapter may be granted on the same basis as an original order upon an application for an extension made in the same manner as required for an original application and after new findings required hy subsection (a) of this section including a finding that the minimization procedures have been implemented in accordance with the original order or the previous extension. The extension may direct that changes be made in the minimization procedures so that they most effectively meet the definition of minimization procedures in section 2521(h)(8). In connection with applications for extensions where the target is not a foreign power, as defined in section 2521(b)(1)(A), (B), or (C), the judge may require the applicant to submit information, obtained pursuant to the original order or to any previous extensions, as may be necessary to make new findings required by subsection (a) of this section. In connection with applications for extentions where the target is a foreign power, as defined in section 2521(b)(1)(A), (B), or (C), the judge may

require the applicant to submit information obtained pursuant to the original order or to the previous extension, as may be necessary to make a finding that the minimization procedures have been implemented in accordance with the original order or the previous extension.

"(d) Notwithstanding any other provision of this chapter when the Attorney General reasonably determines that—

"(1) an emergency situation exists with respect to the employment of electronic surveillance within the United States to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained, and

"(2) the factual basis for issuance of an order under this chapter to approve such surveillance exists,

he may authorize the emergency employment of electronic surveillance if a judge designated pursuant to section 2523 of this chapter is informed by the Attorney General or his designate at the time of such authorization that the decision has been made to employe emergency electronic surveillance and if an application in accordance with this chapter is made to that judge as soon as practicable, but not more than twenty-four hours after the Attorney General authorizes such acquisition. If the Attorney General authorizes such emergency employment of electronic surveillance, he shall

require that the minimization procedures required by this chapter for the issuance of a judicial order be followed. In the absence of a judicial order approving such electronic surveillance, the surveillance shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of twenty-four hours from the time of authorization by the Attorney General, whichever is earliest. In the event that such application for approval is denied, or in any other case where the electronic surveillance is terminated without an order having been issued, no information obtained or evidence derived from such surveillance shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof, and no information concerning United States persons acquired from such surveillance shall be used or disclosed in any other manner by Federal officers or employees without the consent of the United States person. A denial of the application made under this subsection may be reviewed as provided in section 2523.

"§ 2526. Use of information

"(a) Information concerning United States persons acquired from an electronic surveillance conducted pursuant

to this chapter may be used and disclosed by Federal officers and employees without the consent of the United States person only for purposes specified in section 2521 (b) (8) (A) through (F), or for the enforcement of the criminal law if its use outweighs the possible harm to the national security. No otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character. No information acquired from an electronic surveillance conducted pursuant to this chapter may be used or disclosed by Federal officers or employees except for lawful purposes.

"(b) The minimization procedures required under this chapter shall not preclude the retention and disclosure, for law enforcement purposes, of any information which constitutes evidence of a crime if such disclosure is accompanied by a statement that such evidence, or any information derived therefrom, may only be used in a criminal proceeding with the advance authorization of the Attorney General.

"(c) Whenever the Government of the United States, of a State, or of a political subdivision thereof intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, or other authority of the United

States, a State, or a political subdivision thereof, any information obtained or derived from an electronic surveillance, the Government shall prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use the information or submit it in evidence notify the court in which the information is to he disclosed or used or, if the information is to he disclosed or used in or before another authority, shall notify a court in the district wherein the information is to be so disclosed or so used that the Government intends to so disclose or so use such information.

"(d) Any person who has been a subject of electronic surveillance and against whom evidence derived from such electronic surveillance is to be, or has been, introduced or otherwise used or disclosed in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any communication acquired by electronic surveillance, or evidence derived therefrom, on the grounds that—

"(1) the communication was unlawfully acquired; or

"(2) the surveillance was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion.

"(e) Whenever any court is notified in accordance with subsection (c), or whenever a motion is made by an aggrieved person pursuant to subsection (d), to suppress evidence on the grounds that it was obtained or derived from an unlawful electronic surveillance, or whenever any motion or request is made by an aggrieved person pursuant to section 3504 of this title or any other statute or rule of the United States, to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance, the Federal court, or where the motion is made before another authority, a Federal court in the same district as the authority, shall, notwithstanding any other law, if the Government by affidavit asserts that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and other materials relating to the surveillance as may be necessary to determine whether the surveillance was authorized and conducted in a manner that did not violate any right afforded by the Constitution and statutes of the United States to the aggrieved person. In making this determination, the court shall disclose to the aggrieved person portions of the

application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance. If the court determines that the electronic surveillance of the aggrieved person was not lawfully authorized or conducted, the court shall in accordance with the requirements of law suppress the information obtained or evidence derived from the unlawful electronic surveillance. If the court determines that the surveillance was lawfully authorized and conducted, the court shall deny any motion for disclosure or discovery unless required by due process.

"(f) If an emergency employment of the electronic surveillance is authorized under section 2525(d) and a subsequent order approving the surveillance is not obtained, the judge shall cause to be served on any United States person named in the application and on such other United States persons subject to electronic surveillance as the judge may determine in his discretion it is in the interest of justice to serve, notice of—

"(1) the fact of the application;

"(2) the period of the surveillance; and

"(3) the fact that during the period information was or was not obtained.

On an ex parte showing of good cause to the judge the serving of the notice required by this subsection may be post-

poned or suspended for a period not to exceed 90 days. Thereafter, on a further ex parte showing of good cause, the court shall forego ordering the serving of the notice required under this subsection.

"§ 2527. Report of electronic surveillance

"In April of each year, the Attorney General shall report to the Administrative Office of the United States Courts and shall transmit to Congress with respect to the preceding calendar year—

"(1) the total number of applications made for orders and extensions of orders approving electronic surveillance; and

"(2) the total number of such orders and extensions either granted, modified, or denied.

"§ 2528. Congressional oversight

"On a quarterly basis the Attorney General shall fully and completely report to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate concerning all electronic surveillance under this chapter. Such reports shall not be deemed to derogate from those committees' authorities and responsibilities to obtain additional information from the executive branch in order to fulfill their respective functions.".

PART C—AUTHORITY TO COLLECT INTELLIGENCE INFORMATION BY THE USE OF FOREIGN ELECTRONIC OR SIGNALS INTELLIGENCE ACTIVITIES

FOREIGN ELECTRONIC OR SIGNALS INTELLIGENCE ACTIVITIES

SEC. 321. Title 18, United States Code, is amended by adding after chapter 120, as added by section 311 of this Act, a new chapter as follows:

"Chapter 121.—FOREIGN ELECTRONIC OR SIGNALS INTELLIGENCE ACTIVITIES

"Sec.
2531. Definitions.
2532. Minimization procedures.
2533. Authorization for foreign electronic or signals intelligence activities.
2534. Procedure to conduct foreign electronic or signals intelligence activities.
2535. Emergency procedure to conduct foreign electronic or signals intelligence activities.
2536. Cooperative relationships.

"§ 2531. Definitions.

"(a) Except as otherwise provided in this section the definitions of sections 2510 and 2521 shall apply to this chapter.

"(b) The term 'foreign electronic or signals intelligence activities' means the acquisition of information by the interception of wire communications, nonpublic radio communications, or oral communications without the knowledge of all parties, or the installation or use of a device for monitoring to acquire information without the knowledge of the persons or

activities monitored, but does not include 'electronic surveillance within the United States' as defined in chapter 120 of title 18, United States Code.

"§2532. Minimization procedures

"No entity of the Intelligence Community may conduct foreign electronic or signals intelligence activities not targeted against a United States person, for foreign intelligence purposes unless information so obtained concerning United States persons is treated in accordance with minimization procedures, as defined in chapter 120 of title 18, United States Code, approved by the Attorney General.

"§2533. Authorizaton for foreign electronic or signals intelligence activities

"No entity of the intelligence community may intentionally attempt to acquire, directly or indirectly, information concerning a particular United States person or persons by means of foreign electronic or signals intelligence activities under circumstances in which a person has a reasonable expectation of privacy with respect to United States Government activities or in which a warrant would be required for law enforcement purposes within the United States, except pursuant to this section. Applications for a court order for foreign electronic or signals intelligence activities targeted against a United States person are authorized if the President has, by written authorization, em-

powered the Attorney General to approve applications to the special court having jurisdiction under section 2523 of chapter 120, title 18, United States Code, and a judge to whom an application is made may grant an order, in conformity with section 2534 (b), approving foreign electronic or signals intelligence activities targeted against a United States person.

"§2534. Procedure to conduct foreign electronic or signals intelligence activities

"(a) Each application for an order approving foreign electronic or signals intelligence activities under section 2533 shall be made by a Federal officer in writing upon oath or affirmation to a judge of the special court having jurisdiction under section 2523 of chapter 120, title 18, United States Code. Each application shall require the approval of the Attorney General based upon his finding that it satisfies the criteria and requirements of such application as set forth in this section. It shall include the following information—

"(1) the identity of the Federal officer making the application;

"(2) the authority conferred on the Attorney General by the President of the United States and the approval of the Attorney General to make the application;

"(3) the identity or a description of the target of the foreign electronic or signals intelligence activities;

"(4) a statement of the facts and circumstances relied upon by the applicant to justify foreign electronic or signals intelligence activities targeted against a United States person;

"(5) a statement of the proposed minimization procedures;

"(6) a statement whether the activities involve acquisition of information from a wire communication, from a radio communication, from an oral communication, or from the monitoring of another activity, and a statement whether physical entry may be involved;

"(7) a statement of the period of time during which the activities are required to be conducted;

"(8) a statement of the facts concerning all previous applications that have been made to any judge under this section or under chapter 120, title 18, United States Code, involving the person specified in the application, and the action taken on each previous application; and

"(9) any other information or affidavit from any other officer required by the Attorney General in connection with the application or required by the judge as

necessary for him to make findings required by section 2534(b).

"(b) Upon an application made pursuant to subsection (d) of this section, the judge shall enter an ex parte order as requested or as modified approving foreign electronic or signals intelligence under section 2533 if he finds that—

"(1) the President has authorized the Attorney General to approve applications for foreign electronic or signals intelligence activities targeted against a United State person;

"(2) the application has been made by a Federal officer and approved by the Attorney General;

"(3) on the basis of the facts submitted by the applicant there is probable cause to believe that—

"(A) the United States person targeted is an agent of a foreign power as defined in section 2521(b)(2)(B) of chapter 120, title 18, United States Code;

"(B) the United States person targeted is engaged in activities outside the United States which, if engaged in within the United States, would meet the definition of agent of a foreign power under section 2521(b)(2)(B) of chapter 120, title 18, United States Code;

"(C) the United States person targeted is an officer or employee of a foreign power residing abroad, information about whose official duties or communications may constitute foreign intelligence information as defined in chapter 120, title 18, United States Code;

"(D) the United States person targeted is a fugitive from United States justice abroad, information about whose relationships with foreign governments or organizations would constitute foreign intelligence information as defined in chapter 120, title 18, United States Code;

"(4) the proposed minimization procedures meet the definition of minimization procedures under section 2521(b)(8) of chapter 120, title 18, United States Code;

"(5) the period of time during which the activities are required to be conducted is reasonable; and

"(6) where the activities involve the installation of a device, either for monitoring or to intercept communications, such installation is reasonably necessary to effect the activities, and the nature, reliability, or timeliness of the foreign intelligence information sought cannot reasonably be duplicated by other means of collection.

"(c) An order approving foreign electronic or signals intelligence activities targeted against a United States person under this part shall—

"(1) specify the identity or a description of the target of the activities;

"(2) specify whether the activities involve acquisition of information from a wire communication, from a radio communication, from an oral communication, or from the monitoring of another activity, and whether physical entry may be involved;

"(3) specify the period of time during which the activities are authorized;

"(4) where appropriate, specify that the installation of a device is authorized; and

"(5) direct that the minimization procedures be followed.

"§ 2535. Emergency procedure to conduct foreign electronic or signals intelligence activities

"Where the senior United States official of an agency authorized by the President or by statute to conduct foreign electronic or signals intelligence activities in a foreign country, the head of such entity, or the United States chief of mission in such country reasonably determines that an emergency situation exists such that foreign intelligence information might be lost before an order authorizing such

activities targeted against a United States person could with due diligence be obtained, and the basis for the issuance of an order exists, he may authorize the conduct of such activities targeted against a United States person in that foreign country for a period not to exceed seventy-two hours, provided that—

"(1) an application for an order under section 2534 is filed within those seventy-two hours;

"(2) the activities shall cease upon the denial of the order or the expiration of seventy-two hours, whichever occurs first; and

"(3) information obtained before the order is granted or denied shall, to the maximum extent feasible, be treated in accordance with the minimization procedures in the order or be destroyed and not disseminated if the order is denied.

"§ 2536. Cooperative relationships

"Nothing in this section shall be construed to require any agency or any Federal officer or employee to confirm or deny the existence of any cooperative relationship any agency may have with any foreign government or component thereof; to identify any particular such cooperative relationship; or to reveal in any manner whether or not any information used in support of an application for an order was obtained directly or indirectly from such a relation-

ship, or whether or not any foreign government or component thereof may participate in any foreign electronic or signals intelligence activity.".

PART D—CONFORMING AMENDMENTS

AMENDMENTS TO TITLE 18, UNITED STATES CODE

SEC. 331. Chapter 119 of title 18, United States Code, is amended as follows:

(1) Section 2511 (1) is amended—

(A) by inserting "or chapters 120 and 121 or with respect to techniques used by law enforcement officers not involving the interception of wire or oral communications as otherwise authorized by a search warrant or order of a court of competent jurisdiction," immediately after "chapter" in the first sentence;

(B) by inserting a comma and "or, under color of law, willfully engages in any other form of electronic surveillance within the United States as defined in chapter 120, or engages in foreign electronic or signals intelligence activities as defined in chapter 121" immediately before the semicolon in paragraph (a);

(C) by inserting "or information obtained under color of law by any other form of electronic surveillance within the United States as defined in chapter 120 or foreign electronic or signals intelligence activities as

defined in chapter 121" immediately after "contents of any wire or oral communication" in paragraph (c);

(D) by inserting "or any other form of electronic surveillance within the United States, as defined in chapter 120 or foreign electronic or signals intelligence activity as defined in chapter 121," immediately before "in violation" in paragraph (c);

(E) by inserting "or information obtained under color of law by any other form of electronic surveillance within the United States as defined in chapter 120 or foreign electronic or signals intelligence activity as defined in chapter 121" immediately after "any wire or oral communication" in paragraph (d); and

(F) by inserting "or any other form of electronic surveillance within the United States, as defined in chapter 120 or foreign electronic or signals intelligence activity as defined in chapter 121," immediately before "in violation" in paragraph (d).

(2) (A) Section 2511 (2) (a) (i) is amended by inserting the words "or radio communication" after the words "wire communication" and by inserting the words "or otherwise acquire" after the word "intercept".

(B) Section 2511 (2) (a) (ii) is amended by inserting the words "or chapters 120 and 121" after the second appearance of the word "chapter," and by striking the

period at the end thereof and adding the following: "or engage in electronic surveillance within the United States, as defined in chapter 120 or foreign electronic or signals intelligence activities as defined in chapter 121: *Provided, however*, That before the information, facilities, or technical assistance may be provided, the investigative or law enforcement officer shall furnish to the officer, employee, or agent of the carrier either—

"(1) an order signed by the authorizing judge certifying that a court order directing such assistance has been issued; or

"(2) in the case of an emergency interception or electronic surveillance within the United States or foreign electronic or signals intelligence activities as provided for in section 2518(7) of this chapter or section 2525(d) of chapter 120 or section 2534 of chapter 121, a certification under oath by the investigative or law enforcement officer that the applicable statutory requirements have been met,

and setting forth the period of time for which the electronic surveillance within the United States or foreign electronic or signals intelligence activity is authorized and describing the facilities from which the communication is to be acquired. Any violation of this subsection by a communication common carrier or an officer, employee, or agency thereof, shall

render the carrier liable for the civil damages provided for in section 2520.".

3(A) Section 2511(2)(b) is amended by inserting the words "or otherwise engage in electronic surveillance within the United States, as defined in chapter 120, or engage in foreign electronic or signals intelligence activities as defined in chapter 121" after the word "radio".

(B) Section 2511(2)(c) is amended by inserting the words "or engage in electronic surveillance within the United States as defined in chapter 120, or engage in foreign electronic or signals intelligence activities as defined in chapter 121" after the words "oral communication" and by inserting the words "or such surveillance" after the last word in the paragraph and before the period.

(C) Section 2511(2) is amended by adding at the end of the section the following provisions:

"(e) Notwithstanding any other provision of this title or sections 605 or 606 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty under procedures approved by the Attorney General to conduct electronic surveillance within the United States as defined in section 2521(b)(6) of chapter 120 or foreign electronic or signals intelligence activities as defined in section

2531(b)(1) not targeted against a particular person or entity without a court order for the sole purpose of—

"(i) testing the capability of electronic equipment, provided that the test period shall be limited in extent and duration to that necessary to determine the capability of the equipment, that the content of any communication acquired under this paragraph shall be retained and used only for the purpose of determining the capability of such equipment, shall be disclosed only to the persons conducting the test, and shall be destroyed upon completion of the testing, and that the test may exceed ninety days only with the prior approval of the Attorney General; or

"(ii) determining the existence and capability of electronic surveillance equipment being used unlawfully, provided that such electronic surveillance within the United States or foreign electronic or signals intelligence activity shall be limited in extent and duration to that necessary to determine the existence and capability of such equipment, and that any information acquired by such surveillance shall be used only to enforce this chapter or section 605 of the Communications Act of 1934 or to protect information from unlawful electronic surveillance.

"(f) The procedures in this chapter and chapter 120 of this title, shall be the exclusive means by which electronic surveillance within the United States, as defined in section 2521 (b) (6) of chapter 120, and the interception of domestic wire and oral communications may be conducted; and the procedures in chapter 121 of this title shall be the exclusive means by which foreign electronic or signals intelligence activities, as defined in chapter 121, may be conducted against United States persons. In circumstances involving the unintentional acquisition, by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and where both the sender and all intended recipients are located within the United States, such contents shall be destroyed upon recognition.".

(4) Section 2511 (3) is repealed.

(5) Section 2515 is amended by inserting the words "or electronic surveillance within the United States as defined in chapter 120, or foreign electronic or signals intelligence activity as defined in chapter 121, has been conducted" after the word "intercepted", by inserting the words "or other information obtained from electronic surveillance within the United States as defined in chapter 120, or

foreign electronic or signals intelligence activity as defined in chapter 121," after the second appearance of the word "communication", and by inserting "or chapters 120 and 121" after the final appearance of the word "chapter".

(6) Section 2518 (1) is amended by inserting the words "under this chapter" after the word "communication".

(7) Section 2518 (4) is amended by inserting the words "under this chapter" after both appearances of the words "wire or oral communication".

(8) Section 2518 (9) is amended by striking the word "intercepted" and inserting the words "intercepted pursuant to this chapter" after the word "communication".

(9) Section 2518 (10) is amended by striking the word "intercepted" and inserting the words "intercepted pursuant to this chapter" after the first appearance of the word "communication".

(10) Section 2519 (3) is amended by inserting the words "pursuant to this chapter" after the words "wire or oral communications" and after the words "granted or denied".

(11) Section 2520 is amended by deleting all before subsection (2) and inserting in lieu thereof: "Any person other than a foreign power or an agent of a foreign power as defined in sections 2521 (b) (1) and 2521 (b) (2) (A) of chapter 120, who has been subject to electronic surveillance

within the United States, as defined in chapter 120, in violation of that chapter, or whose wire or oral communication has been intercepted, or about whom information has been disclosed or used, in violation of this chapter, or any United States person who has been subject to foreign electronic or signals intelligence activity, as defined in chapter 121, in violation of that chapter, shall (1) have a civil cause of action against any person who so acted in violation of this chapter, and".

PART E—PHYSICAL SEARCHES

REQUIREMENTS FOR PHYSICAL SEARCHES BY ENTITIES OF THE INTELLIGENCE COMMUNITY

SEC. 341. (a) No entity of the intelligence community may conduct unconsented physical searches within the United States or unconsented physical searches directed against United States persons abroad unless—

(1) such searches are conducted under the standards and procedures required by the Constitution or laws of the United States for law enforcement purposes; or

(2) such searches are authorized in an order issued under subsection (b) of this section.

(b) Applications for a court order to conduct unconsented physical searches within the United States or directed against a United States person abroad are authorized if the President has, by written authorization, empowered the Attorney

General to approve applications to Federal judges having jurisdiction under section 2423, title 18, United States Code. A judge to whom an application to conduct unconsented physical searches within the United States or directed against a United States person abroad is made may grant an order approving unconsented physical searches within the United States or directed against a United States person abroad if—

(1) the applicable requirements of chapter 120, title 18, United States Code, are satisfied; or

(2) in the case of a United States person abroad, the applicable requirements of section 321 of this Act are satisfied.

PART F—MAIL OPENING

REQUIREMENTS FOR MAIL OPENINGS BY ENTITIES OF THE INTELLIGENCE COMMUNITY

SEC. 351. (a) No entity of the intelligence community may engage in the unconsented opening of mail in United States postal channels or opening of mail of a known United States person not in United States postal channels unless—

(1) such opening of mail is conducted under the standards and procedures required by the Constitution or laws of the United States for law enforcement purposes; or

(2) such opening of mail of a known United States person not in United States postal channels is author-

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ized in an order issued under subsection (b) of this section.

(b) Applications for a court order to open the mail of a known United States person not in United States postal channels are authorized if the President has, by written authorization, empowered the Attorney General to approve applications to Federal judges having jurisdiction under section 2423 of chapter 120, title 18, United States Code, and a judge to whom an application to open the mail of a known United States person outside United States postal channels is made may grant an order approving the opening of such mail if the applicable requirements of section 321 of this Act are satisfied.

TITLE IV—CENTRAL INTELLIGENCE AGENCY

PART A—SHORT TITLE; PURPOSES; DEFINITIONS

SHORT TITLE

SEC. 401. This title may be cited as the "Central Intelligence Agency Act of 1978".

STATEMENT OF PURPOSES

SEC. 402. It is the purpose of this Act—

(1) to clarify the statutory authorities, functions, and responsibilities of the Central Intelligence Agency;

(2) to authorize the Central Intelligence Agency to perform intelligence activities which are necessary

for the conduct of the foreign relations and the protection of the national security of the United States;

(3) to insure that the foreign intelligence, counterintelligence, and counterterrorism activities of the Central Intelligence Agency are properly and effectively directed, regulated, coordinated, and administered; and

(4) to insure that the Central Intelligence Agency is accountable to the President, the Congress, and the people of the United States, and that the foreign intelligence, counterintelligence, and counterterrorism activities of the Central Intelligence Agency are conducted in a manner consistent with the Constitution and laws of the United States and so as not to abridge any right protected by the Constitution or laws of the United States.

DEFINITIONS

SEC. 403. (a) Except as otherwise provided in this section, the definitions in title I shall apply to this title.

(b) As used in this title, the term "proprietary" means a sole proprietorship, partnership, corporation, or other business entity owned or controlled by the Central Intelligence Agency but whose relationship with the Central Intelligence Agency is not publicly known.

PART B—ESTABLISHMENT OF AGENCY; DIRECTOR; FUNCTIONS

ESTABLISHMENT OF CENTRAL INTELLIGENCE AGENCY

SEC. 411. There is established an Agency to be known as the Central Intelligence Agency (hereinafter in this title referred to as the "Agency"). The Agency shall he under the direction and control of the National Security Council.

DIRECTOR; DUTIES OF DIRECTOR

SEC. 412. (a) There shall be at the head of the Agency a Director of the Central Intelligence Agency (hereinafter in this title referred to as the "Director"). The Director of National Intelligence, or, in accordance with section 117 of this Act, the Deputy Director of National Intelligence or an Assistant Director of National Intelligence, shall act as the Director. In the event that the Director and the Director of National Intelligence are not one and the same person, the Director shall be subject to the supervision of, and responsive to intelligence plans, objectives, and requirements established hy, the Director of National Intelligence.

(h) It shall be the duty of the Director to—

(1) insure that the functions of the Agency are conducted in accordance with the provisions of this Act and with the Constitution and laws of the United States, and that the performance of those functions does not

abridge any right protected by the Constitution or laws of the United States;

(2) insure that the activities of the Agency are properly and efficiently directed, regulated, coordinated, and administered; and

(3) perform with respect to the Agency the duties assigned elsewhere in this Act to the head of each entity of the intelligence community.

FUNCTIONS

SEC. 413. (a) All activities, duties, and responsibilities of the Agency shall be related to the intelligence functions set out in this section, and shall be performed in accordance with this Act.

(b) The Agency shall—

(1) collect foreign intelligence from publicly available sources and from any person willing voluntarily to provide such intelligence;

(2) when the information sought is not available publicly or from a person willing voluntarily to provide the information, collect foreign intelligence by clandestine means abroad and, when integrally and exclusively related to Agency activities outside the United States, from foreign persons within the United States; and

(3) develop and provide support for technical and

other programs which collect national intelligence from sources outside the United States.

(c) The Agency shall produce, analyze, and disseminate foreign intelligence necessary to meet the needs of the President, the National Security Council, the Congress, and other departments and agencies, and shall provide such support as the Director of National Intelligence requires for the production of national intelligence estimates and similar intelligence community-coordinated analyses.

(d) The Agency shall conduct special activities in support of national foreign policy objectives.

(e) The Agency shall—

(1) conduct counterintelligence and counterterrorism activities outside the United States;

(2) conduct such counterintelligence and counterterrorism activities within the United States as are integrally related to counterintelligence or counterterrorism activities of the Agency outside the United States; and

(3) produce and disseminate counterintelligence and counterterrorism studies and reports.

(f) The Agency shall act as the Director of National Intelligence's agent in the coordination of all counterintelligence and counterterrorism activities, and of all clandestine collection of foreign intelligence, including collection

utilizing human sources, conducted outside the United States by any other entity of the intelligence community.

(g) The Agency shall also—

(1) conduct or contract for research, development, and procurement of technical systems and devices relating to authorized functions;

(2) conduct services of common concern for the intelligence community as directed by the Director of National Intelligence;

(3) conduct liaison with foreign governmental agencies in coordination with the Director of National Intelligence;

(4) collect publicly available information which is relevant to any authorized Agency function but which does not constitute foreign intelligence, counterintelligence, or counterterrorism intelligence; and

(5) provide legal, legislative, and audit services and other administrative support to the Office of the Director of National Intelligence.

(h) (1) All Agency activities within the United States involving the collection of intelligence and all Agency counterintelligence and counterterrorism activities within the United States shall be conducted in coordination with the Federal Bureau of Investigation and in accordance with

procedures agreed upon by the Attorney General and the Director of National Intelligence.

(2) The Director of National Intelligence and the Attorney General shall conduct a review, at least annually, of all Agency activities within the United States for the purpose of insuring that such activities do not violate any right protected by the Constitution or laws of the United States, determining the necessity for continuing such activities, and making such recommendations in this regard as they deem appropriate to the President, the National Security Council, and the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

PART C—GENERAL AND SPECIAL AUTHORITIES OF THE AGENCY; AUTHORIZATION FOR APPROPRIATIONS; GENERAL COUNSEL AND INSPECTOR GENERAL

GENERAL AUTHORITIES OF THE AGENCY

SEC. 421. (a) In carrying out its functions under this Act, the Agency is authorized to—

(1) transfer to and receive from other departments and agencies for the sole purpose of carrying out functions authorized by this title, such sums of money as may be approved by the Director of National Intelligence and the Director of the Office of Management and Budget, and sums so transferred to the Agency may be

expended by the Agency without regard to any limitation on appropriations from which transferred but only when the Director certifies in writing that such limitation would unduly impede the performance of a function authorized by this title and transmits such written certification to the appropriate committees of the Congress;

(2) exchange funds without regard to the provisions of section 3651 of the Revised Statutes (31 U.S.C. 543);

(3) reimburse other departments and agencies for the services of personnel assigned or loaned to the Agency;

(4) reimburse other departments and agencies for expenses incurred when Agency personnel are assigned to such departments and agencies for cover purposes;

(5) rent any premises within or outside the United States necessary to carry out any function of the Agency authorized under this title; lease buildings without regard to the limitations prescribed in section 322 of the Act entitled "An Act making appropriations for the legislative branch of the Government for the fiscal year ending 30 June 1933, and for other purposes," approved 30 June 1932 (40 U.S.C. 278a); acquire, construct, or alter buildings and facilities without regard to the Public Buildings Act of 1959 (40 U.S.C. 601-

615); and repair, operate, and maintain buildings, utilities, facilities, and appurtenances;

(6) conduct background investigations of applicants for employment with the Agency;

(7) establisb, maintain, and operate secure communications systems in support of Agency operations and, as a service of common concern, establish, maintain, and operate such secure communications systems as may be required for the use of other departments and agencies;

(8) perform inspection, audit, public affairs, legal, and legislative services;

(9) establish, furnisb, and maintain, in coordination with the Director of National Intelligence, secure cover for Agency officers, employees, and agents;

(10) establish and operate proprietaries to support Agency operations;

(11) protect, in accordance with standards established by the Director of National Intelligence under section 114 and with any other applicable laws and executive orders, materials, and information related to intelligence sources and methods;

(12) perform sucb additional functions as are otberwise authorized by this Act to be performed by eacb entity of the intelligence community;

(13) conduct health-service programs as authorized by section 7901 of title 5, United States Code;

(14) transport, in accordance with regulations approved by the Director, officers and employees of the Agency in Government-owned automotive equipment between their domiciles and places of employment where such personnel are engsged in work which makes such transportation necessary;

(15) settle and pay claims of civilian and military personnel, as prescribed in Agency regulations consistent with the terms and conditions by which claims are settled and paid under the Military Personnel and Civilian Employees' Claims Act of 1964 (31 U.S.C. 240–243);

(16) pay, in accordance with regulations approved by the Director, expenses of travel in connection with, and expenses incident to attendance at meetings of professional, technical, scientific, and other similar organizations when such attendance would be a benefit in the conduct of the work of the Agency; and

(17) train Agency personnel and, as appropriate, personnel of other departments and agencies.

(b) Notwithstanding the provisions of section 3678 of the Revised Statutes (31 U.S.C. 628) or any provision of law enacted after the effective date of this title, unless such

subsequently enacted provision expressly cites this subsection, any department or agency may transfer to or receive from the Agency any sum of money approved, in accordance with subsection (a) (1) of this section, by the Director of National Intelligence and the Director of the Office of Management and Budget for use in carrying out any function authorized by this title.

(c) Notwithstanding any other provision of law, any department or agency is authorized to assign or loan to the Agency any officer or employee of such department or agency to assist the Agency in carrying out any function of the Agency authorized by this title. In any case in which any officer or employee of another department or agency is assigned or loaned to the Agency in a manner that would be prohibited except for this subsection, the Agency shall report the details of such assignment or loan to the appropriate committees of the Congress.

(d) (1) Any proprietary established and operated by the Agency may be operated on a commercial basis to the extent necessary to provide effective cover. Any funds generated by any such proprietary in excess of the amount necessary for its normal operational requirements shall be deposited by the Director into miscellaneous receipts of the Treasury.

(2) Whenever any Agency proprietary whose net value exceeds $50,000, is to be liquidated, sold, or otherwise dis-

posed of, the Agency shall, as much in advance of the liquidation, sale, or other disposition of the proprietary as practicable and subject to such security standards as the Director and Attorney General shall agree upon, report the circumstances of the intended liquidation, sale, or other disposition to the Attorney General and the Comptroller General of the United States. Any proceeds from any liquidation, sale, or other disposition of any Agency proprietary, in whatever amount, after all obligations of the proprietary have been met, shall be deposited by the Director into miscellaneous receipts of the Treasury.

(e) The authority contained in clauses (9) and (10) of subsection (a) shall, except as otherwise provided in this Act, be available to the Agency notwithstanding any other provision of law and shall not be modified, limited, suspended, or superseded by any provision of law enacted after the effective date of this title unless such provision expressly cites the specific provision of subsection (a) intended to be so modified, limited, suspended, or superseded.

(f) The Agency may continue to use the seal of office used by the Central Intelligence Agency prior to the effective date of this title and judicial notice shall be taken of such seal.

(g) Subject to the provisions of section 152 (a) of this Act, no provision of law shall be construed to require the Director or any other officer or employee of the United

States to disclose the organization, function, name, official title, salary, or affiliation with the Central Intelligence Agency of any person employed by the Agency, or the number of persons employed by the Agency, unless such provision specifically requires such disclosure and expressly cites this subsection.

(h) The Director may appoint and assign security officers to police the installations and grounds of the Agency, where such security officers shall have the same powers as sheriffs and constables for the protection of persons and property, to prevent breaches of the peace, to suppress affrays or unlawful assemblies, and to enforce any rule or regulation the Director may promulgate for the protection of such installations and grounds. The jurisdiction and police powers of such security officers shall not, however, extend to the service of civil process.

(i) The Director may authorize employees of the Agency to carry firearms within the United States for courier protection purposes, for the protection of the Director of National Intelligence, the Deputy Director of National Intelligence, and any Assistant Director of National Intelligence, and, in exigent circumstances, such officials of the Agency as the Director may designate, and for the protection of any defector from any foreign country or any

foreign person visiting the United States under Agency auspices.

(j) (1) The Agency may appoint, promote, and separate such personnel or contract for such personnel services as it deems advisable, without regard to the provisions of title 5, United States Code, governing appointments to, promotions in, and separations from the competitive services, and without regard to the limitations on types of persons to be employed, and fix the compensation of such personnel without regard to the provisions of chapter 51 and subchapter III of chapter 53 of that title, relating to classification and General Schedule pay rates, but at rates not in excess of the rate authorized for Executive Schedule V by section 5316 of that title.

(2) Notwithstanding any other provision of law, the Director may terminate the employment of any officer or employee of the Central Intelligence Agency or the security clearance of any contractor of the Agency or any employee of any such contractor whenever the Director considers such termination necessary or advisable in the interests of the national security of the United States. The Director shall periodically report to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate on the exercise of the Director's authority under this paragraph.

(3) Executive schedule positions within the Agency in addition to those of Director, General Counsel, and Inspector General and any positions in the grades of GS–16, GS–17, and GS–18 other than those transferred to the Agency under this Act shall be as authorized by law.

(4) Any Agency officer or employee who has been separated under paragraph (1) or whose employment has been terminated under paragraph (2) may seek or accept employment in the Government if declared eligible for such employment by the United States Civil Service Commission; and that commission may place such officer or employee in a position in the competitive civil service in the same manner as an employee who is transferred between two positions in the competitive service, but only if such Agency officer or employee has served with the Agency for at least one year continuously immediately preceding separation or termination.

PROCUREMENT AUTHORITY

SEC. 422. (a) The Agency is authorized to procure such property, supplies, services, equipment and facilities as may be necessary to carry out its functions under this Act. Such property, supplies, services, equipment and facilities may include purchase or rental and operation of photographic reproduction, cryptographic, duplication and printing machines, equipment, and devices, and radio-receiving and

radio-sending equipment and devices, including telegraph and teletype equipment; rental of news-reporting services; purchase, maintenance, operation, repair, and hire of passenger motor vehicles, aircraft, and vessels of all kinds; printing and binding services; the purchase, maintenance, and cleaning of firearms, including purchase, storage, and maintenance of ammunition; association and library services and dues required by any such association; supplies, equipment and personnel and contract services otherwise authorized by law or regulation, whether applicable to this Agency or not, when the Director determines that such supplies, equipment or services are essential to the performance of the Agency's functions.

(h) The provisions of chapter 137, relating to the procurement of property and services, and chapter 139, relating to the procurement of research and development services, of title 10, United States Code, shall apply to the procurement of property and research and development services by the Agency under this title in the same manner and to the same extent such chapters apply to the procurement of property, services, and research and development services by the agencies named in section 2302 (a) of chapter 137 of title 10, except that the Director is authorized to waive the application of any or all of the provisions of Chapters 137 and 139 of title 10 when the Director deems such action

necessary to the successful performance of any function of the Agenoy or to protect the security of activities of the Agency. Any waiver exercised hy the Director under this section shall be reported to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate together with the reasons for exercising such waiver.

(c) The Agency is also authorized to procure property, goods, or services, on the Agency's own behalf or on behalf of any other entity of the intelligence community, in such a manner that the role of the Agency or such other entity is not apparent or publicly acknowledged, if public knowledge that the Agency or such other entity is the procurer of the property, goods, or services will inhibit or interfere with the secure conduct of an authorized intelligence function. The procurement authority provided under this subsection may be exercised by the Agency only in accordance with section 139 of this Act but may be exercised without regard to any other provision of law. Such authority may not be modified, limited, suspended, or superseded by any provision of law enacted after the effective date of this title unless such provision expressly cites this subsection.

RELATIONSHIPS WITH OTHER GOVERNMENT AGENCIES

SEC. 423. In addition to those activities of the Agency which relate to other departments and agencies and which are

authorized in other provisions of this Act, the Agency is further authorized—

(1) to seek assistance from state and local law enforcement agencies in the conduct of background and security investigations of applicants for employment with the Agency, contractors of the Agency, and employees of contractors of the Agency;

(2) to provide technical guidance, training, and equipment, and, under exigent circumstances, expert personnel to any other entity of the intelligence community engaged in lawful intelligence activities;

(3) to provide technical information to assist the Passport Office of the Department of State in carrying out its documentation responsibilities;

(4) when extraordinary circumstances indicate that a foreign person associated with the Agency should enter or leave the United States under other than such person's true identity, to notify the Immigration and Naturalization Service of those circumstances and request a waiver of otherwise applicable rules and procedures;

(5) when the Internal Revenue Service is auditing the tax returns of an Agency proprietary or of an individual operating under Agency cover, to notify the Internal Revenue Service of such proprietary's or individual's affiliation with the Agency and request that

the audit be so conducted as to avoid public disclosure of that affiliation; and

(6) to maintain liaison relationships with other departments and agencies.

ADMISSION OF ESSENTIAL ALIENS

SEC. 424. Whenever the Director, the Attorney General, and the Commissioner of Immigration and Naturalization determine that the entry of a particular alien into the United States for permanent residence is in the interest of national security or essential to national intelligence activities, such alien and his immediate family shall be given entry into the United States for permanent residence without regard to their inadmissibility under, or their failure to comply with, any immigration law of the United States or any other law or regulation, but in no case may the number of aliens and members of their immediate families who enter the United States under the authority of this section exceed one hundred in any one fiscal year.

AUTHORIZATION FOR APPROPRIATIONS AND EXPENDITURES

SEC. 425. (a) Notwithstanding any other provision of law, sums made available to the Agency by appropriation or otherwise may be expended for purposes necessary to carry out the lawful functions of the Agency. No funds may be expended for activities which have not been authorized by legislation enacted during the same or during one of the two

immediately preceding fiscal years, except that this limitation shall not apply to funds appropriated by any continuing resolution.

(b) Whenever the Director determines such action to be necessary in the interest of the national security, the expenditure of funds appropriated or transferred to the Agency shall be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount certified therein, but such expenditures shall be made only for activities authorized by law. The Director shall report on all expenditures made under authority of this subsection on a quarterly basis to the Committees on Appropriations of the Senate and House of Representatives, to the Permanent Select Committee on Intelligence of the House of Representatives, and to the Select Committee on Intelligence of the Senate.

(c) (1) The Director is authorized to establish and maintain a fund to be known as the "contingency reserve fund" (hereinafter in this section referred to as the "reserve fund") and to credit to such reserve fund only moneys specifically appropriated to the Central Intelligence Agency for such fund. The Director is authorized to expend funds from the reserve fund in any fiscal year for the payment of expenses incurred in connection with any national intelli-

gence activity, counterintelligence activity, or counterterrorism activity if—

(A) the withdrawal of funds from the reserve fund and the proposed expenditure have been previously approved by the Office of Management and Budget;

(B) the Committee on Appropriations of the House of Representatives, the Committee on Appropriations of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Select Committee on Intelligence of the Senate have been notified of the facts and circumstances regarding such withdrawal and proposed expenditure at least 72 hours in advance of the withdrawal; except that in extraordinary circumstances the President may authorize the withdrawal of funds from the reserve fund without prior notification to the appropriate committees of the Congress if the President notifies such committees of the Congress within 48 hours after initiation of the withdrawal, describes the activity for which such funds have been or are to be expended, certifies to such committees that prior notification would have resulted in a delay which would have been harmful to the United States, and discloses to such committees the reasons why the delay would have been harmful. The foregoing shall not be construed as requiring the approval

of any committee of the Congress prior to the initiation of any such activity; and

(C) the money from the reserve fund is used solely for the purpose of meeting requirements that were not anticipated at the time the President's budget was submitted to the Congress for such fiscal year, the purpose for which such money was used requires protection from unauthorized disclosure, and the activities to be funded are authorized by law.

(2) Moneys from the reserve fund may be expended only for the specific purpose for which the withdrawal was approved under this subsection and any amount approved for expenditure but not actually expended for the specific purpose for which approved shall be returned to the reserve fund.

(3) No money may be expended and no financial obligation incurred for the initiation or major expansion of any activity to be funded from the reserve fund unless such expenditure or financial obligation has been approved by the Director and the Director of the Office of Management and Budget.

(4) Any activity funded from the reserve fund that continues after the end of the fiscal year in which it was funded by moneys from the reserve fund shall be funded thereafter through the regular budgetary process at the earliest practicable time.

GENERAL COUNSEL AND INSPECTOR GENERAL

SEC. 426. (a) There shall be a General Counsel of the Agency appointed by the President, by and with the advice and consent of the Senate. The General Counsel shall serve as the principal legal adviser to the Director and shall have the responsibility and authority to—

(1) review all activities of the Agency and advise the Director whether such activities are in conformity with the Constitution and laws of the United States, executive orders, Presidential directives and memoranda, and the rules, regulations, and policies of the Agency;

(2) review all proposed rules and regulations of the Agency, including but not limited to any rule or regulation proposed to implement the provisions of this Act, to insure that any such rule or regulation is in conformity with the Constitution and laws of the United States, executive orders, and Presidential directives and memoranda;

(3) perform the same duties with respect to the Agency as the general counsel of each entity of the intelligence community is required to perform in the case of such entity by section 151 of this Act; and

(4) perform such additional duties as the Director may prescribe.

(b) There shall be an Inspector General of the Agency

appointed by the Director. The Inspector General shall have the responsibility and authority to—

(1) investigate all activities of the Agency to determine in what respects the Agency may more effectively perform its lawful functions and to determine the facts and circumstances of any alleged wrongdoing;

(2) advise the Director and the General Counsel of the Agency of his findings regarding such activities;

(3) perform such other investigations as the Director deems necessary and appropriate consistent with the provisions of this Act;

(4) perform the same duties with respect to the Agency as the inspector general of each entity of the intelligence community is required to perform in the case of such entity by section 151 of this Act; and

(5) perform such other duties as the Director may prescribe.

PART D—CRIMINAL PENALTIES; RESTRICTIONS

CRIMINAL PENALTIES

SEC. 431. (a) Section 207 of title 18, United States Code, is amended by adding at the end thereof a new subsection as follows:

"(d) Whoever, having been an officer or employee of the Central Intelligence Agency and within two years after his employment with such Agency has ceased, knowingly

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participates in the liquidation, sale, or other disposition of a proprietary of the Central Intelligence Agency, either on his own behalf or as an agent or attorney for anyone other than the United States without a written waiver from the Director of the Central Intelligence Agency under section 139(a) of the National Intelligence Act of 1978, shall be fined not more than $10,000 or imprisoned for not more than two years, or both. As used in this subsection, the term 'proprietary' shall have the same meaning as prescribed in section 403 of the Central Intelligence Agency Act of 1978.".

(b) (1) Chapter 33 of title 18, United States Code, is amended by adding at the end thereof a new section as follows:

"§ 716. Misuse of the name, initials, or seal of the Central Intelligence Agency

"Any person who knowingly and without the express written permission of the Director of the Central Intelligence Agency uses the name 'Central Intelligence Agency', the initials 'CIA', the seal of the Central Intelligence Agency, or any colorable imitation of such name, initials, or seal in connection with any advertisement, book, circular, pamphlet, or other publication, play, motion picture, broadcast, telecast, or other production in a manner reasonably calculated to convey the impression that such use is approved, endorsed, or

authorized by the Central Intelligence Agency shall be fined not more than $20,000 or imprisoned not more than one year, or both.".

(2) The table of sections at the beginning of chapter 33 of such title is amended by adding at the end thereof a new item as follows:

"716. Misuse of the name, initials, or seal of the Central Intelligence Agency.".

(c) (1) Chapter 115 of title 18, United States Code, is amended by adding at the end thereof a new section as follows:

"§ 2392. **Unauthorized disclosure of identity of secret agents**

"(a) Any person who, having learned in the course of his official duties as an officer or employee of the United States the true identity of any officer or employee of the Central Intelligence Agency who is performing lawful functions for the Central Intelligence Agency under cover, knowingly communicates, furnishes, or otherwise discloses or makes available to any unauthorized person that identity in a manner which results in injury to or jeopardizes the safety of such officer or employee of the Central Intelligence Agency, or could reasonably have been expected to result in injury to or jeopardize the safety of such officer or employee of the Central Intelligence Agency, shall be fined not more

than $50,000 or imprisoned not more than five years, or both.

"(b) As used in subsection (a), the term 'cover' shall have the same meaning as prescribed in section 104 of the National Intelligence Act of 1978.".

(2) The table of sections at the beginning of chapter 115 is amended by adding at the end thereof a new item as follows:

"2392. Unauthorized disclosure of identity of secret agents.".

RESTRICTIONS

SEC. 432. (a) The authorities, duties, and responsibilities established in this title are subject to the procedures, prohibitions, and restrictions contained in titles II and III and in sections 131 through 139 of this Act.

(b) The Agency shall have no police, subpoena, or law enforcement powers, nor perform any internal security or criminal investigation functions except to the extent expressly authorized by this Act.

PART E—TRAVEL AND OTHER EXPENSES; RETIREMENT SYSTEM

TRAVEL, RELATED EXPENSES, AND DEATH GRATUITIES FOR CERTAIN AGENCY PERSONNEL

SEC. 441. (a) As used in this section:

(1) The term "employee" means any person employed by the Agency, but does not include, unless otherwise specif-

ically indicated, any person working for the Agency under a contract or any person who when initially employed is a resident in or a citizen of a foreign country in which the station at which such person is to be assigned to duty is located.

(2) The term "foreign area" means any geographic area outside the United States.

(3) The term "United States" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and the Canal Zone, but does not include Guam and other territories and possessions of the United States.

(b) Under such regulations as the Director of National Intelligence may approve—

(1) with respect to employees assigned to duty stations within the United States, the Agency may pay—

(A) travel, transportation, and subsistence expenses comparable to those provided for in chapter 57 of title 5, United States Code, and

(B) allowances in accordance with the provisions of chapter 59 of title 5, United States Code; and

(2) with respect to employees assigned to duty stations in any foreign area, the Agency may provide

allowances in accordance with the provisions of chapter 59 of title 5, United States Code, allowances and other benefits in the same manner and under the same circumstances such allowances and other benefits are provided employees of the Foreign Service under title IX of the Foreign Service Act of 1946 (22 U.S.C. 1131–1158), and death gratuities in the same manner and under the same circumstances such gratuities are provided employees of the Foreign Service under section 14 of the Act entitled "An Act to provide certain basic authority for the Department of State", approved August 1, 1956 (22 U.S.C. 2679a).

(c) (1) Whenever any provision of law relating to travel and related expenses or death gratuities of employees of the Foreign Service is enacted after the date of enactment of this Act, is not enacted as an amendment to one of the provisions referred to in subsection (b) (2) of this section, and the President determines that it would be appropriate for the purpose of maintaining conformity between provisions of law relating to travel and related expenses and death gratuities of the Foreign Service and provisions of law relating to travel and related expenses and death gratuities of employees of the Agency, the President may, by executive order, extend in whole or in part to employees

of the Agency the allowances and benefits applicable to employees of the Foreign Service by such provision of law.

(2) Any such executive order issued pursuant to this subsection shall have the force and effect of law and may he given retroactive effect to a date not earlier than the effective date of the corresponding provisions of law relating to Foreign Service personnel. Any such order shall modify, supersede, or render inapplicable, as the case may be, to the extent inconsistent therewith—

(A) all provisions of law relating to travel, related expenses, and death gratuities of employees of the Agency enacted prior to the effective date of the provisions of such executive order, and

(B) any provision of any prior executive order issued under authority of this section.

(3) An executive order issued under the authority of this subsection may not become effective until the expiration of at least 60 days after the President submits the proposed order to those committees of the Senate and House of Representatives having jurisdiction over the subject matter of the order.

(d) (1) Notwithstanding the provisions of subsections (b) and (c), and under such regulations as the Director of National Intelligence shall approve, the Agency may pay

expenses, benefits, and allowances equivalent to those specifically authorized in subsections (b) and (c), in any case in which the Director determines that, for reasons of operational necessity or security, the means of paying expenses, benefits, and allowances authorized in subsections (b) and (c), should not be utilized.

(2) The Director shall annually inform the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate of any expenditures made under this subsection and the reasons therefor.

RETIREMENT SYSTEM

SEC. 442. Employees of the Agency shall participate in the regular Federal civil service retirement system pursuant to subchapter III of chapter 83 of title 5, United States Code. The Director may, however, continue to designate for participation in the Central Intelligence Agency retirement and disability system, authorized by the Central Intelligence Agency Retirement Act of 1964 for Certain Employees (78 Stat. 1043; 50 U.S.C. 403 note), certain employees of the Agency whose duties are either (1) in support of Agency activities abroad and are hazardous to life or health, or (2) so specialized as to be clearly distinguishable from normal Government employment; but the number of employees of the Agency which may retire on an annuity

under such system in any period may not exceed the limits prescribed by law.

PART F—TRANSFER OF PERSONNEL, PROPERTY, AND FUNCTIONS; STATUTES REPEALED

TRANSFER OF PERSONNEL, PROPERTY, AND FUNCTIONS

SEC. 451. (a) All positions established in and personnel employed by the Central Intelligence Agency as in effect on the day before the effective date of this title, and all obligations, contracts, properties, and records employed, held, or used primarily in connection with any function to be performed by the Agency under this title, are transferred to the Director.

(b) All orders, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges which have become effective in the exercise of functions transferred under this title and which are in effect on the day before the effective date of this title, shall continue in effect until modified, terminated, superseded, set aside, or repealed by the Director or other properly designated Agency official, by any court of competent jurisdiction, or by operation of law.

(c) The provisions of this title shall not affect any proceedings pending before the Central Intelligence Agency as in effect prior to the effective date of this title.

(d) No suit, action, or other proceeding begun by or against any officer in his official capacity in the Central

Intelligence Agency, as in effect prior to the effective date of this title, shall abate by reason of enactment of this title.

(e) With respect to any function transferred by this title and exercised after the effective date of this title, reference in any other Federal law to any department, agency, office, or part thereof shall be deemed to refer to the department, agency, or office in which such function is vested pursuant to this title.

STATUTES REPEALED

SEC. 452. Section 102 of the National Security Act of 1947 (50 U.S.C. 403) and the Central Intelligence Agency Act of 1949 (50 U.S.C. 403a–403j) are repealed.

TITLE V—FEDERAL BUREAU OF INVESTIGATION

SHORT TITLE

SEC. 501. This title may be cited as the "Federal Bureau of Investigation Intelligence Activities Act of 1978".

STATEMENT OF PURPOSES

SEC. 502. It is the purpose of this Act—

(1) to authorize the Federal Bureau of Investigation, subject to the supervision and control of the Attorney General, to perform certain intelligence activities necessary for the conduct of the foreign relations and the protection of the national security of the United States;

(2) to confer upon the Director of the Federal Bureau of Investigation the authority necessary to fulfill the duties and responsibilities prescribed by this title, and to make that director accountable to the Attorney General, the President, the Congress, and the people of the United States;

(3) to insure that the intelligence activities of the Federal Bureau of Investigation are properly directed, regulated, coordinated, and administered; and

(4) to insure that the intelligence activities conducted by the Federal Bureau of Investigation do not infringe upon or violate rights protected by the Constitution and laws of the United States.

DEFINITIONS

SEC. 503. The definitions in titles I and II of this Act shall apply to this title.

SUPERVISION AND CONTROL

SEC. 504. (a) All activities, duties, and responsibilities of the Federal Bureau of Investigation (hereinafter in this title referred to as the "Bureau") shall be related to the intelligence functions authorized in this title, and all authorities of the Bureau shall be exercised in accordance with this Act.

(b) All intelligence functions of the Bureau shall be performed under the supervision and control of the Attorney

General. In exercising such supervision and control, the Attorney General shall be guided by policies and priorities established by the National Security Council, and shall be responsive to foreign intelligence collection objectives, requirements, and plans promulgated by the Director of National Intelligence.

(c) The Attorney General or the Attorney General's designee shall review all intelligence activities conducted or coordinated by the Bureau at least annually to determine whether those activities have been conducted in accordance with the provisions of this Act and procedures approved by the Attorney General pursuant to this Act.

DUTIES OF THE DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION

SEC. 505. (a) It shall he the duty of the Director of the Federal Bureau of Investigation (hereinafter in this title referred to as the "Director"), under the direction of the Attorney General, to—

(1) insure that intelligence activities conducted or coordinated by the Bureau are carried out in conformity with the provisions of this Act and with the Constitution and laws of the United States, and that such activities do not violate any right protected by the Constitution or laws of the United States;

(2) insure that the activities of the Bureau are

properly and efficiently directed, regulated, coordinated, and administered;

(3) keep the Attorney General fully and currently informed of all intelligence activities conducted or coordinated by the Bureau, and provide the Attorney General with any information the Attorney General may request concerning such activities;

(4) serve as the principal officer of the Government for the conduct and coordination of counterintelligence activities and counterterrorism intelligence collection activities within the United States;

(5) advise the Attorney General and the National Security Council regarding the objectives, priorities, direction, and conduct of counterintelligence and counterterrorism activities within the United States;

(6) assist the Attorney General and the National Security Council in the assessment of the threat to United States interests from the intelligence activities within the United States of foreign powers and from international terrorist activities within the United States, including assessment of the effectiveness of United States counterintelligence and counterterrorism activities against any such threat;

(7) protect, in accordance with standards established by the Director of National Intelligence under

section 114 and with any other applicable statute or executive order, materials and information of the Bureau related to intelligence sources and methods; and

(8) perform the duties assigned elsewhere in this Act to the head of each entity of the intelligence community.

(b) (1) To assist the Director in the fulfillment of the Director's responsibilities under this title, the Director shall appoint, with the approval of the Attorney General, appropriate senior officials of the Bureau, including—

(A) a legal adviser to the Director; and

(B) an internal inspection officer.

(2) The legal adviser to the Director shall have the same responsibility and authority with respect to the Bureau and its intelligence activities as the general counsel of each entity of the intelligence community has under section 151 of this Act with respect to the intelligence activities of that entity. In carrying out such responsibility the legal adviser to the Director shall consult with the Attorney General or the designee of the Attorney General.

(3) The internal inspection officer shall have the same responsibility and authority with respect to the intelligence activities of the Bureau as the inspector general of each entity of the intelligence community has under section 151 of this Act with respect to the intelligence activities of that

entity. In carrying out such responsibility the internal inspection officer shall consult with the internal inspection officer of the Department of Justice designated by the Attorney General under section 205 (b) of this Act.

(4) The Attorney General shall provide by regulation which officials of the Bureau shall perform the duties of the Director under this Act during the absence or disability of the Director or during any temporary vacancy in the Office of the Director.

AUTHORITY TO CONDUCT COUNTERINTELLIGENCE AND COUNTERTERRORISM ACTIVITIES; RESPONSIBILITY TO COORDINATE CERTAIN COUNTERINTELLIGENCE AND COUNTERTERRORISM ACTIVITIES OF OTHER ENTITIES OF THE INTELLIGENCE COMMUNITY IN THE UNITED STATES

SEC. 506. (a) The Bureau is authorized, in the fields of counterintelligence and counterterrorism, to—

(1) collect counterintelligence and counterterrorism intelligence within the United States from publicly available information and, when such information is not available from publicly available sources, by clandestine or technical means;

(2) conduct within the United States such counterintelligence and counterterrorism activities other than collection as are necessary to protect against espionage

or any other clandestine intelligence activity; sabotage, any international terrorist activity, or any assassination;

(3) collect information in any foreign country with the knowledge and consent of the government of that country;

(4) assist any law enforcement, intelligence, or security agency of a foreign government in the collection of information outside the United States when requested to do so by such agency;

(5) conduct such other counterintelligence or counterterrorism activities outside the United States as are integrally related to the conduct by the Bureau of such activities within the United States;

(6) conduct counterintelligence and counterterrorism activities outside the United States upon the request of the Central Intelligence Agency;

(7) analyze, produce, and disseminate counterintelligence and counterterrorism information and studies; and

(8) conduct, in accordance with procedures approved by the Attorney General and in coordination with the Director of National Intelligence, liaison for counterintelligence or counterterrorism purposes with foreign governmental agencies.

(b) Bureau activities conducted outside the United States under the authority of this section shall only be con-

ducted with the approval of the Attorney General or his designee and with the approval of a properly designated official of the Central Intelligence Agency. The request for Central Intelligence Agency approval shall be made or confirmed in writing.

(c) (1) The Bureau shall be responsible, in accordance with procedures agreed upon by the Attorney General and the Director of National Intelligence, for approving requests by any other entity of the intelligence community to conduct counterintelligence activities or counterterrorism intelligence collection activities within the United States. Any such request shall be made or confirmed in writing by a properly designated senior official of the requesting entity and shall—

(A) describe the activity to be conducted; and

(B) set forth the reasons why the requesting entity wishes to conduct such activity within the United States.

(2) The Bureau shall provide the Attorney General or the Attorney General's designee in a timely manner with copies of all requests made to the Bureau under this subsection and shall notify the Attorney General or his designee in a timely manner of any action taken by the Bureau with respect thereto.

(3) Any entity of the intelligence community conducting any counterintelligence or counterterrorism activity within the United States pursuant to the approval of the Bureau

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under this subsection shall keep the Bureau fully and currently informed regarding that activity.

(4) The requirements of this subsection shall not apply to counterintelligence activities of the military services directed solely against members of such military services.

AUTHORITY TO COLLECT FOREIGN INTELLIGENCE

SEC. 507. (a) The Bureau is authorized, in the field of foreign intelligence, to—

(1) collect within the United States foreign intelligence from publicly available information and, when such information is not available from publicly available information, by clandestine and technical means; and

(2) analyze, produce, and disseminate foreign intelligence.

(b) (1) The Bureau is also authorized to collect foreign intelligence within the United States or conduct activities within the United States in support of the foreign intelligence collection requirements of any other entity of the intelligence community, but only upon a request made or confirmed in writing by an official of such other entity who has been designated by the President to make such requests. The Bureau may not comply with any such request unless such request—

(A) describes the information sought or the support activities requested;

(B) certifies that the information sought or the support activities requested are relevant to the authorized functions and duties of the requesting entity; and

(C) sets forth the reasons why the Bureau is being requested to collect the information or conduct the support activities.

(2) The Bureau shall provide the Attorney General or the Attorney General's designee in a timely manner with copies of all such requests, and shall conduct such support activities only with the approval of the Attorney General or the Attorney General's designee.

AUTHORITY TO COOPERATE WITH INTELLIGENCE, SECURITY, OR LAW ENFORCEMENT AGENCIES OF FOREIGN GOVERNMENTS

SEC. 508. (a) The Bureau is authorized to collect counterintelligence and counterterrorism intelligence within the United States upon the written request of any law enforcement, intelligence, or security agency of a foreign government if (1) such request specifies the intelligence and the purposes for which such intelligence is sought, and (2) the collection of such intelligence is first approved by the Attorney General or the Attorney General's designee after a written finding by the Attorney General or the Attorney General's designee that the Bureau would be authorized under this Act to collect the intelligence requested in the absence of any such request.

(b) The Bureau is authorized to provide assistance to any law enforcement, intelligence, or security officer of any foreign country who is conducting an investigation within the United States, if—

(1) such officer provides prior notification to the Secretary of State;

(2) such officer specifies the assistance sought and the purpose of the investigation for which assistance is requested; and

(3) the Attorney General or the Attorney General's designee approves the request for such assistance after a written finding by the Attorney General or the Attorney General's designee that such assistance is in the interests of the United States.

(c) The Bureau shall keep the Attorney General or the Attorney General's designee fully and currently informed of all investigations conducted within the United States by officers and agencies of foreign governments and of all information and assistance furnished by the Bureau in response to requests made by officers and agencies of foreign governments for assistance in conducting any such investigations.

TITLE VI—NATIONAL SECURITY AGENCY

PART A—SHORT TITLE; PURPOSES; DEFINITIONS

SHORT TITLE

SEC. 601. This title may be cited as the "National Security Agency Act of 1978".

STATEMENT OF PURPOSES

SEC. 602. It is the purpose of this Act—

(1) to authorize, and provide guidance for, those signals intelligence and communications security activities necessary for the conduct of the foreign relations and the protection of the national security of the United States;

(2) to insure that signals intelligence and communications security activities are properly and effectively directed, regulated, coordinated and administered, and are organized and conducted so as to meet, in the most efficient manner, the signals intelligence and communications security needs of the United States;

(3) to establish by law an agency to be known as the National Security Agency, to provide for the appointment of a director of that Agency, to delineate the responsibilities of such director, and to confer upon such director the authorities necessary to fulfill those responsibilities;

(4) to insure that the National Security Agency is accountable to the President, the Congress, and the people of the United States and that the signals intelligence activities and communications security activities of the United States are conducted in a manner consistent with the Constitution and laws of the United States and so as

not to abridge any right protected by the Constitution or laws of the United States.

DEFINITIONS

SEC. 603. (a) Except as otherwise provided in this section, the definitions in title I shall apply to this title.

(b) As used in this title—

(1) The term "communications intelligence" means technical and intelligence information derived from foreign electromagnetic communications by other than the intended recipients.

(2) The term "cryptographic system" includes any code, cipher, and any manual, mechanical, or electrical device or method used for the purpose of disguising, concealing, or authenticating the contents, significance, or meanings of communications.

(3) The term "cryptology" encompasses both signals intelligence and communications security.

(4) The term "electronics intelligence" means technical and intelligence information derived from foreign electromagnetic radiations emanating from other than communications, nuclear detonations, or radioactive sources.

(5) The term "foreign communication" means a communication that has at least one sender or recipient outside the territorial United States or a communication that is sent or received using a communications system or a portion of

such a system operated within the United States by a foreign power, but does not include public broadcasts.

(6) The term "foreign instrumentation signals intelligence" means technical and intelligence information derived from the collection and processing of foreign telemetry, beaconry, and associated signals.

(7) The term "signals intelligence" includes, either individually or in combination, communications intelligence, electronics intelligence, foreign instrumentation signals intelligence, and information derived from the collection and processing of non-imagery infrared and coherent light signals.

(8) The term "signals intelligence activities" means activities that produce signals intelligence.

(9) The term "unauthorized person" means a person not authorized access to signals intelligence or communications security information by the President or by the head of any department or agency that has been designated expressly by the President to engage in cryptologic activities for the United States.

(10) The term "United States signals intelligence system" means an entity that is comprised of (A) the National Security Agency (including assigned military personnel); (B) those elements of the military departments and the Central Intelligence Agency performing signals intelligence

activities; (C) those elements of any other department or agency which may from time to time be authorized by the National Security Council to perform signals intelligence activities during the time when such elements are authorized to perform such activities.

PART B—ESTABLISHMENT OF AGENCY; DIRECTOR; DEPUTY DIRECTOR; GENERAL COUNSEL; INSPECTOR GENERAL; DUTIES

ESTABLISHMENT OF NATIONAL SECURITY AGENCY; FUNCTION

SEC. 611. (a) There is established within the Department of Defense an agency to be known as the National Security Agency (hereinafter in this title referred to as the "Agency").

(b) It shall be the function of the Agency to conduct signals intelligence activities and communications security activities for the Government of the United States. It shall also be the function of the Agency to provide an effective, unified organization for the conduct and control of the signals intelligence activities and the communications security activities of the United States and for formulating operational plans, policies, and procedures for such activities.

(c) The functions of the Agency shall be carried out under the direct supervision and control of the Secretary of Defense and shall he accomplished under the provisions of

this Act and in conformity with the Constitution and laws of the United States. In exercising supervision and control over the Agency, the Secretary of Defense shall comply with intelligence policies, needs, and priorities established by the National Security Council and with intelligence objectives and requirements established by the Director of National Intelligence.

DIRECTOR AND DEPUTY DIRECTOR

SEC. 612. (a) There shall be at the head of the Agency a Director of the National Security Agency (hereinafter in this title referred to as the "Director"). There shall also be a Deputy Director of the National Security Agency (hereinafter in this title referred to as the "Deputy Director") to assist the Director in carrying out the Director's functions under this Act.

(b) The Director and the Deputy Director shall be appointed by the President, by and with the advice and consent of the Senate. The Director and Deputy Director shall each serve at the pleasure of the President. Either the Director or Deputy Director shall be a person with cryptologic experience. No person may serve as Director or Deputy Director for a period of more than six years unless such person is reappointed to that same office by the President, by and with the advice and consent of the Senate. No person who has served as Director or Deputy Director for a period of

less than six years and is subsequently appointed or reappointed to that same office may serve in that office under such appointment or reappointment for a term of more than six years. In no event may any person serve in either or both offices for more than a total of 12 years.

(c) At no time shall the two offices of Director and Deputy Director be occupied simultaneously by commissioned officers of the armed forces whether in an active or retired status.

(d) (1) If a commissioned officer of the armed forces is appointed as Director or Deputy Director, then—

(A) in the performance of the duties of Director or Deputy Director, as the case may be, the officer shall be subject to no supervision, control, restriction, or prohibition of the military departments, or the armed forces of the United States or any component thereof; and

(B) that officer shall not possess or exercise any supervision, control, powers, or functions (other than such as that officer possesses, or is authorized or directed to exercise, as Director, or Deputy Director) with respect to the Department of Defense, the military departments, or the armed forces of the United States or any component thereof, or with respect to any of the personnel (military or civilian) of any of the foregoing.

(2) Except as provided in this section, the appointment

to the office of Director or Deputy Director of a commissioned officer of the armed forces, and acceptance of and service in such an office by that officer, shall in no way affect any status, office, rank, or grade that officer may occupy or hold in the armed forces, or any emolument, perquisite, right, privilege, or benefit incident to or arising out of any such status, office, rank, or grade. A commissioned officer shall, while serving in the office of Director or Deputy Director, continue to hold rank and grade not lower than that in which that officer was serving at the time of that officer's appointment as Director or Deputy Director.

(3) The grade of any such commissioned officer shall, during any period such officer occupies the office of Director or Deputy Director, be not less than a Lieutenant General or Vice Admiral and such grade shall be in addition to the numbers and percentages authorized for the military department of which such officer is a member.

(e) The Director and Deputy Director, whether civilian or military, shall be compensated while serving as Director or Deputy Director only from funds appropriated to the Department of Defense.

(f) If a commissioned officer of the armed forces is serving as Director or Deputy Director that officer shall be entitled, while so serving, to the difference, if any, between the regular military compensation (as defined in section 101

(25) of title 37, United States Code) to which that officer is entitled and the compensation provided for that office under subchapter II of chapter 53 of title 5, United States Code.

(g) The Deputy Director shall act in the place of the Director during the absence or disability of the Director or during any temporary vacancy in the office of the Director. The Secretary of Defense shall provide by regulation what officer or employee of the Department of Defense sball, wbenever there is no Deputy Director, act in the place of the Director during tbe absence or disability of tbe Director or during any temporary vacancy in the office of tbe Director and what officer or employee of the Department of Defense shall act in the place of the Deputy Director during the absence or disability of the Deputy Director or during any temporary vacancy in the office of the Deputy Director.

(b) In the event that no person has been appointed Director or Deputy Director under subsection (b) of this section as of the effective date of this title, tbe person bolding the office of Director of tbe National Security Agency on the day before the effective date of this title may be designated by the President to serve as Directer (without tbe advice and consent of tbe Senate) until tbe office of Director is filled as provided in subsection (b), and the person

holding the office of Deputy Director of the National Security Agency on the day before the effective date of this title may be designated by the President to serve as Deputy Director (without the advice and consent of the Senate) until the office of Deputy Director is filled as provided in subsection (b); but no person designated to serve as Director or Deputy Director under authority of this subsection may serve in such office under such authority for more than 90 days following the effective date of this title. While so serving such persons shall receive compensation at the rates provided by subsection (e) for the respective offices in which they serve. In computing the 12-year limitation prescribed in subsection (b) of this section, any service by a person as Director or Deputy Director of the National Security Agency as such agency existed on the day before the effective date of this title shall not be included.

DUTIES OF THE DIRECTOR

SEC. 613. (a) It shall be the duty of the Director to—

(1) serve as the principal signals intelligence officer of the Government;

(2) insure that the signals intelligence activities of the United States are conducted in accordance with the provisions of this Act and with the Constitution and laws of the United States, and that such activities do

not abridge any right protected by the Constitution or laws of the United States;

(3) direct all cryptologic activities of the Agency;

(4) maintain and manage an effective and unified United States signals intelligence system;

(5) control all the signals intelligence collection (including special signals intelligence collection by the Department of Defense), processing, reporting, and dissemination activities of the United States in accordance with intelligence policies, needs, and priorities established by the National Security Council and intelligence requirements and objectives promulgated by the Director of National Intelligance;

(6) manage signals intelligence resources, personnel, and programs;

(7) serve, under the Secretary of Defense, as the principal communications security officer of the United States Government and insure that the communications security activities of the United States are conducted in accordance with the provisions of this Act and with the Constitution and laws of the United States, and that such activities do not abridge any right protected by the Constitution or laws of the United States;

(8) fulfill the communications security requirements of all departments and agencies based upon policy

guidance from the National Security Council operating pursuant to section 142 of this Act;

(9) consolidate, as necessary, the performance of the signals intelligence and the communications security functions of the United States for the purpose of achieving overall efficiency, economy, and effectiveness;

(10) conduct such research and development in support of signals intelligence and communications security activities as may be necessary to meet the needs of departments and agencies authorized to receive signals intelligence or which require communications security assistance, or delegate responsibility for such research and development to other departments or agencies, and review research and development conducted by any department or agency in support of signals intelligence and communications security activities;

(11) determine the manpower resources and administrative support needed by the Agency to conduct effectively its signals intelligence activities and, in accordance with such terms and conditions as shall be mutually agreed upon by the Director of National Intelligence and the Secretary of Defense, enter into agreements with other departments and agencies for the provision of such manpower resources and administrative support;

(12) determine the manpower resources and administrative support needed by the Agency to conduct effectively its communications security activities, and, based upon guidance from the Secretary of Defense, enter into agreements with other departments and agencies for the provision of such manpower resources and administrative support;

(13) review all proposed budgets and resource allocations for the signals intelligence activities of the United States, prepare a proposed consolidated United States signals intelligence budget for each fiscal year based upon program and budget guidance from the Director of National Intelligence, and submit each such proposed budget to the Director of National Intelligence and the Secretary of Defense at such time and in such manner as the Director of National Intelligence shall specify;

(14) review all proposed budgets and resource allocations for the communications security activities of the United States, prepare a proposed consolidated communications security budget for each fiscal year, and submit each such proposed budget to the Secretary of Defense at such time and in such manner as the Secretary of Defense shall specify;

(15) provide appropriate mechanisms for the

control of all funds made available to the Agency to carry out its authorized activities;

(16) prescribe and enforce, in accordance with applicable law and policy guidance from the Director of National Intelligence, and, as appropriate, the Attorney General, security rules, regulations, procedures, and standards for the acquisition, handling, transportation, transmission, processing, and reporting of information relating to signals intelligence and communications security activities in order to protect such information from unauthorized disclosure;

(17) conduct, in coordination with the Director of National Intelligence, cryptologic liaison with foreign governments;

(18) provide for such communications support and facilities as may be necessary to (A) conduct signals intelligence activities in a timely and secure manner, and (B) insure the expeditious handling of critical information for the United States Government;

(19) prescribe all cryptographic systems and techniques, other than secret writing systems, to be used in any manner by the United States Government and provide for the centralized production and control of cryptographic systems and materials to be used by the United States Government;

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(20) evaluate, based upon policy guidance from the Attorney General, the vulnerability of United States communications to interception and exploitation by unintended recipients and, under the supervision of the Secretary of Defense and in accordance with policy guidance from the National Security Council operating pursuant to section 142 of this Act, institute appropriate measures to insure the confidentiality of such communications;

(21) insure that the Agency will receive, in a timely fashion, all signals intelligence data collected by any entity of the intelligence community;

(22) develop plans to insure the responsiveness of the United States signals intelligence system to the needs of the Secretary of Defense, including the delegation of such tasking authority as may be appropriate;

(23) provide the National Security Council and the Director of National Intelligence with such information as they may request on the activities of the Agency and on the signals intelligence activities and the communications security activities of the United States;

(24) issue such rules, regulations, directives, and procedures as may be necessary to implement this title; and

(25) perform with respect to the Agency the duties

assigned elsewhere in this Act to the head of each entity of the intelligence community.

(h) To assist the Director in the fulfillment of his responsibilities under this section, the heads of all departments and agencies shall furnish the Director, upon request and in accordance with applicable law, such data as the Director may require and the Director shall take appropriate steps to maintain the confidentiality of any confidential information which is so provided.

GENERAL COUNSEL; INSPECTOR GENERAL

SEC. 614. (a) There shall be a General Counsel of the Agency appointed by the President, by and with the advice and consent of the Senate. The General Counsel shall serve as the principal legal adviser to the Director and shall have the responsibility and the authority to—

(1) review all activities of the Agency and advise the Director on whether such activities are in conformity with the laws of the United States, executive orders, Presidential directives and memoranda, and the rules, regulations, and policies of the Agency;

(2) review all proposed rules and regulations of the Agency, including but not limited to any rule or regulation proposed to implement the provisions of this Act, to insure that any such rule or regulation is in conformity

with the laws of the United States, executive orders, and Presidential directives and memoranda;

(3) perform the same duties with respect to the Agency as the general counsel of each entity of the intelligence community is required to perform in the case of such entity by section 151 of this Act; and

(4) perform such additional duties as the Director may prescribe.

(h) There shall be an Inspector General of the Agency appointed by the Director. The Inspector General shall have the responsibility and the authority to—

(1) investigate all activities of the Agency to determine in what respects the Agency may more effectively perform its lawful functions and to determine the facts and circumstances of any alleged wrongdoing;

(2) advise the Director and the General Counsel of the Agency of the Inspector General's findings regarding such activities;

(3) perform the same duties with respect to the Agency as the inspector general of each entity of the intelligence community is required to perform in the case of such entity by section 151 of this Act;

(4) conduct such other investigations as the Director deems necessary and appropriate consistent with the provisions of this Act; and

(5) perform such other duties as the Director may prescribe.

(c) Any person holding the office of General Counsel of the National Security Agency as such agency existed on the day before the effective date of this title may continue to serve in the corresponding office established by this title until such person or that person's successor is appointed as provided in this title, but in no event for a period exceeding 30 days after such effective date.

PART C—GENERAL AND SPECIAL AUTHORITIES OF THE AGENCY; AUTHORIZATION FOR APPROPRIATIONS

GENERAL AUTHORITIES OF THE AGENCY

SEC. 621. (a) In carrying out its functions under this Act, the Agency is authorized to—

(1) transfer to and receive from other departments and agencies funds for the sole purpose of carrying out functions authorized hy this title;

(2) exchange funds without regard to the provisions of section 3651 of the Revised Statutes (31 U.S.C. 543);

(3) reimhurse other departments and agencies of the Government for personnel assigned or loaned to the Agency and services furnished to the Agency;

(4) rent any premises at the seat of government and elsewhere necessary to carry out any function of the

Agency authorized under this title, and make alterations, improvements, and repairs to premises of, or rented by, the Agency as may be necessary without regard to any limitation prescribed by law if the Director (A) expressly waives such limitation otherwise applicable to the renting, alteration, improvement, or repair, as the case may be, of premises after a finding that such waiver is necessary to the successful performance of the Agency's functions or the security of its activities, and (B) promptly notifies the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate of the waiver and of the reasons for exercising such waiver;

(5) lease buildings for the Government without regard to the limitations prescribed in section 322 of the Act entitled "An Act making appropriations for the Legislative Branch of the Government for the fiscal year ending 30 June 1933, and for other purposes," approved 30 June 1932 (40 U.S.C. 278a) or the provisions of section 2675 of title 10, United States Code;

(6) acquire, construct, or alter buildings and facilities (including family and bachelor housing in foreign countries only) without regard to the Public Buildings Act of 1959 (40 U.S.C. 601–615) or section 1682 of

title 10, United States Code; and repair buildings, utilities, facilities and appurtenances;

(7) repair, operate, and maintain buildings, utilities, facilities, and appurtenances;

(8) conduct health-service programs as authorized by section 7901 of title 5, United States Code;

(9) in accordance with regulations approved by the Director, transport officers and employees of the Agency in Government-owned automotive equipment between their domiciles and places of employment where such personnel are engaged in work that makes such transportation necessary, and transport in such equipment, to and from school, children of Agency personnel who have quarters for themselves and their families at isolated stations outside the continental United States where adequate public or private transportation is not available;

(10) settle and pay claims of civilian and military personnel, as prescribed in Agency regulations consistent with the terms and conditions by which claims are settled and paid under the Military Personnel and Civilian Employees' Claims Act of 1964 (31 U.S.C. 240–243);

(11) pay, in accordance with regulations approved by the Director, expenses of travel in connection with, and expenses incident to attendance at meetings of pro-

fessional, technical, scientific, and other similar organizations when such attendance would be a benefit in the conduct of the work of the Agency;

(12) establish, furnish, and maintain, in coordination with the Director of National Intelligence, secure cover for Agency officers, employees, and agents and activities;

(13) direct the transfer, on a non-reimbursable basis and after coordination with the Director of National Intelligence, of such cryptologic and cryptologic-related equipment and supplies among entities of the intelligence community and between entities of the intelligence community and departments and agencies as may be necessary for performance of the functions authorized by this title, and pay expenses of arrangements with foreign countries for cryptologic support as specifically approved by the Director of National Intelligence;

(14) perform inspection, audit, public affairs, legal, and legislative services;

(15) protect, in accordance with standards established by the Director of National Intelligence under section 114 of this Act and with any other applicable statute or executive order, materials and information related to intelligence sources and methods;

(16) perform such additional functions as are otherwise authorized by this Act to be performed by each entity of the intelligence community; and

(17) exercise such other authorities available to the Secretary of Defense as may be delegated by the Secretary of Defense to the Agency.

(b) The authority contained in clause (12) of subsection (a) shall, except as otherwise provided in this Act, be available to the Agency notwithstanding any other provision of law and shall not be modified, limited, suspended, or superseded by any provision of law enacted after the effective date of this title unless such provision expressly cites clause (12) of subsection (a) and specifically indicates how such authority is to be so modified, limited, suspended, or superseded.

(c) Notwithstanding the provisions of section 3678 of the Revised Statutes (31 U.S.C. 628) any department or agency may transfer to or receive from the Agency any sum of money approved by the Director of National Intelligence and the Director of the Office of Management and Budget for use in support of foreign cryptologic liaison functions authorized by this title.

(d) The Agency may continue to use the seal of office used by the Agency prior to the effective date of this title and judicial notice shall be taken of such seal.

(e) The Director may appoint and assign security

officers to police the installations and grounds of the Agency, where such security officers shall have the same powers as sheriffs and constables for the protection of persons and property, to prevent breaches of the peace, to suppress affrays or unlawful assemblies, and to enforce any rule or regulation the Director may promulgate for the protection of such installations and grounds. The jurisdiction and police powers of such security officers shall not, however, extend to the service of civil process.

(f) The Director may authorize employees of the Agency to carry firearms within the United States for courier protection purposes, for the protection of the Director and Deputy Director, and in exigent circumstances, such officials of the Agency as the Director may designate, and for the protection of any foreign person visiting the United States under Agency auspices.

(g) (1) The Agency may appoint, promote, and separate such personnel or contract for such personnel services as it deems advisable, without regard to the provisions of title 5, United States Code, governing appointments to, promotions in, and separations from the competitive services, and without regard to the limitations on types of persons to be employed, and fix the compensation of such personnel without regard to the provisions of chapter 51 and subchapter III of chapter 53 of that title, relating to classification and

General Schedule pay rates, but at rates not in excess of the rate authorized for GS–18 by section 5332 of that title;

(2) Executive schedule positions within the Agency other than the Director, Deputy Director, General Counsel, and Inspector General, and positions in the grades of GS–16, GS–17, and GS–18, other than those transferred to the Agency under this Act shall be as authorized by law.

(3) Any Agency officer or employee who has been separated under paragraph (1) may seek or accept employment in the Government if declared eligible for such employment by the United States Civil Service Commission; and that Commission may place such officer or employee in a position in the competitive civil service in the same manner as an employee who is transferred between two positions in the competitive service, but only if such Agency officer or employee has served with the Agency for at least one year continuously immediately preceding such separation.

PROCUREMENT AUTHORITY

SEC. 622. (a) The Agency is authorized to procure such property, supplies, services, equipment, and facilities as may be necessary to carry out its functions under this title. Such property, supplies, services, equipment, and facilities may include purchase or rental and operation of photographic reproduction, cryptographic, duplication, and printing machines, and all manner of equipment and devices

necessary to the cryptologic mission of the Agency; radio-receiving and radio sending equipment and devices, including telegraph and teletype equipment; rental of news-reporting services; purchase, maintenance, operation, repair, and hire of passenger motor vehicles, aircraft, and vessels of all kinds; printing and binding services; the purchase, maintenance, and cleaning of firearms, including purchase, storage, and maintenance of ammunition; association and library services and dues required by any such association; supplies, equipment, personnel services and contract services otherwise authorized by law or regulation.

(b) The provisions of chapter 137, relating to the procurement of property and services, and chapter 139, relating to the procurement of research and development services, of title 10, United States Code, shall apply to the procurement of property, services, and research and development services by the Agency in the same manner and to the same extent such chapters apply to the procurement of property, services, and research and development services by the agencies named in section 2302 (a) of such title, except that the Director is authorized, with the approval of the Secretary of Defense and the Director of National Intelligence, to waive the application of any or all of the provisions of chapters 137 and 139 of such title when the Director deems such action necessary to the successful per-

formance of any function of the Agency or to protect the security of activities of the Agency. Any waiver exercised by the Director under this section shall be reported to the committees of the Congress having jurisdiction over the Agency together with the reasons for exercising such waiver.

(c) (1) The Agency is authorized to procure property, goods, or services, on the Agency's own behalf, in such a manner that the role of the Agency is not apparent or publicly acknowledged if the Director of National Intelligence and the Secretary of Defense jointly find that (A) public knowledge that the Agency is the procurer of the property, goods, or services, as the case may be, will inhibit or interfere with the secure conduct of an authorized intelligence function, and (B) such procurement in such manner cannot be accomplished by the Central Intelligence Agency without substantial adverse impact on the National Security Agency's accomplishment of an authorized intelligence function. The procurement authority provided under this subsection may be exercised by the Agency only in accordance with section 139 of this Act but may be exercised notwithstanding any other provision of law.

(2) Any procurement made under the authority of this section shall be reported in a timely manner to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the

Senate, accompanied by a copy of the findings required under paragraph (1).

PRINTING AND BINDING

SEC. 623. The Director is authorized to operate a full scale printing plant, as defined by the Joint Committee on Printing of the Congress of the United States, for the production of cryptologic and cryptologic-related materials, subject to the rules of the Joint Committee on Printing of the Congress.

EDUCATION AND TRAINING

SEC. 624. The Director is authorized to establish and insure compliance with standards for training necessary to accomplish the cryptologic missions of the Government and to arrange for, fund, or provide training as may be necessary to accomplish the lawful functions of the Agency. The provisions of chapter 41 of title 5, United States Code, shall be applicable in the conduct of such training. Notwithstanding the foregoing sentence, the Director is authorized to waive the application of any or all such provisions if the Director deems such action necessary because of the unique mission and function of the Agency, and promptly notifies the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate of the waiver and the reasons for it.

AUTHORIZATIONS FOR APPROPRIATIONS AND EXPENDITURES

SEC. 625. (a) Notwithstanding any other provision of law, funds made available to the Agency by appropriation or otherwise may be expended for purposes necessary to carry out the lawful functions of the Agency. No funds may be expended for activities which have not been authorized by legislation enacted during the same or one of the two immediately preceding fiscal years, except that this limitation shall not apply to funds appropriated by any continuing resolution.

(b) (1) The Secretary of Defense may make funds available to the Agency for the purpose of meeting confidential, emergency, or extraordinary expenses of the Agency, but any funds made available to the Agency by the Secretary of Defense for such a purpose may be made available only from funds appropriated to the Secretary of Defense for the specific purpose of meeting confidential, emergency, or extraordinary expenses.

(2) Any funds made available to the Agency by the Secretary of Defense for meeting confidential, emergency, and extraordinary expenses may be used only to meet the expenses specified by the Secretary of Defense. The expenditure of such funds shall be accounted for solely on the certif-

icate of the Director and every such certificate shall be deemed a sufficient voucher for the amount certified therein, but such expenditures may be made only for activities authorized by law. The Director shall report all expenditures made under authority of this subsection on a quarterly basis to the Committees on Appropriations of the Senate and the House of Representatives, and to all other committees of the Congress having jurisdiction over the Agency.

PART D—AUTHORIZATION TO REQUEST AND RECEIVE SIGNALS INTELLIGENCE; ACCESS OF PERSONNEL TO INFORMATION

DESIGNATION OF ENTITIES TO REQUEST SIGNALS INTELLIGENCE

SEC. 631. (a) The President shall, within thirty days after the effective date of this Act, and at such times thereafter as necessary, designate in writing those authorized to request and receive signals intelligence information that has been obtained or produced by the Agency. The President shall annually provide a list of those so designated to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

(b) The Agency shall not furnish signals intelligence information except to those designated by the President under subsection (a) of this section.

(c) The Agency shall not act upon a request for signals intelligence information unless such request is lawful under the Constitution and the laws of the United States (including this title), and consistent with applicable executive orders and Presidential directives.

(d) Nothing in this section shall be interpreted as a limitation on the authority of any committee of the Congress to obtain information relating to any activity over which such committee has legislative jurisdiction.

ACCESS TO SIGNALS INTELLIGENCE AND COMMUNICATIONS SECURITY INFORMATION

SEC. 632. The Director may authorize any employee of the Agency or any employee of any contractor, prospective contractor, licensee, or prospective licensee of the Agency, or permit any employee of a department or agency or of any contractor of any department or agency, or any member of the armed forces of the United States, or any other person designated by the Director, to have access to signals intelligence or communications security information or to the facilities where such information is stored or utilized if such access is necessary to the effective performance of any duty performed for the Agency; except that, in the case of any person not an employee of the Agency or of a contractor of the Agency, the head of the appropriate department or agency or the designee of that department or agency head must

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first certify that the individual who is to have such access has been cleared in accordance with the established personnel security procedures and standards prescribed by the Director pursuant to title III of the Internal Security Act of 1950 (50 U.S.C. 831-835).

PART E—PATENTS AND INVENTIONS

SPECIAL AUTHORITY REGARDING PATENTS AND INVENTIONS

SEC. 641. (a) Section 181 of title 35, United States Code, is amended by adding at the end thereof the following new paragraph:

"Patents and inventions useful in the provision of security, confidentiality, or privacy of communications or other forms of transmission of data, or incorporating sensitive cryptologic techniques, which in the opinion of the Director of the National Security Agency, if published, might be detrimental to the national security, shall be handled in accordance with the provisions of this section as if the Commissioner had determined that the publication or disclosure of any such invention by the granting of a patent might be detrimental to the national security.".

(b) Section 188 of title 35, United States Code, is amended by inserting ", the Director of the National Security Agency,". immediately after "defense department,".

(c) Section 408(c) of title 17, United States Code, is

amended by adding at the end thereof the following new paragraph:

"(4) The Register of Copyrights shall take all such steps as may be specified by the Director of the National Security Agency to secure from disclosure any material which might otherwise be subject to copyright protection which involves the provision of security, confidentiality, or privacy of communications or other forms of transmission of data, or incorporating sensitive cryptologic techniques which in the opinion of such director, if available for public inspection and copying, might be detrimental to the national security.".

PART F—TRAVEL AND OTHER EXPENSES; SPECIAL FACILITIES; RETIREMENT SYSTEM

TRAVEL, RELATED EXPENSES, AND DEATH GRATUITIES FOR CERTAIN AGENCY PERSONNEL

SEC. 651. (a) As used in this section—

(1) The term "employee" means any person employed by the Agency, but does not include, unless otherwise specifically indicated, any person working for the Agency under a contract or any person who when initially employed is a resident in or a citizen of a foreign country in which the station at which such person is to be assigned to duty is located.

(2) The term "foreign area" means any geographic area outside the United States.

(3) The term "United States" means the several states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and the Canal Zone, but does not include Guam and other territories and possessions of the United States.

(b) Under such regulations as the Director of National Intelligence may approve—

(1) with respect to employees assigned to duty stations within the United States, the Agency may pay—

(A) travel, transportation, and subsistence expenses comparable to those provided for in title 5, United States Code, and

(B) allowances in accordance with the provisions of chapter 59 of title 5, United States Code; and

(2) with respect te employees assigned to duty stations in any foreign area, the Agency may provide allowances in accordance with the provisions of chapter 59 of title 5, United States Code, allowances and other benefits in the same manner and under the same circumstances such allowances and other benefits are provided employees of the Foreign Service under title IX of the Foreign Service Act of 1946 (22 U.S.C. 1131-

1158), and death gratuities in the same manner and under the same circumstances such gratuities are provided employees of the Foreign Service under section 14 of the Act entitled "An Act to provide certain basic authority for the Department of State", approved August 1, 1956 (22 U.S.C. 2679a).

(c) (1) Whenever any provision of law relating to travel and related expenses or death gratuities of employees of the Foreign Service is enacted after the date of enactment of this Act, is not enacted as an amendment to one of the provisions referred to in subsection (b) (2) of this section, and the President determines that it would be appropriate for the purpose of maintaining conformity between provisions of law relating to travel and related expenses and death gratuities of the Foreign Service and provisions of law relating to travel and related expenses and death gratuities of employees of the Agency, the President may, by executive order, extend in whole or in part to employees of the Agency the allowances and benefits applicable to employees of the Foreign Service by such provision of law.

(2) Any such executive order issued pursuant to this subsection shall have the force and effect of law and may be given retroactive effect to a date not earlier than the effective date of the corresponding provisions of law relating to Foreign Service personnel. Any such order shall modify, super-

sede, or render inapplicable, as the case may be, to the extent inconsistent therewith—

(A) all provisions of law relating to travel, related expenses, and death gratuities of employees of the Agency enacted prior to the effective date of the provisions of such executive order, and

(B) any provision of any prior executive order issued under authority of this section.

(3) An executive order issued under the authority of this subsection may not become effective until the expiration of at least 60 days after the President submits the proposed order to those committees of the Senate and House of Representatives having jurisdiction over the subject matter of the order.

(d) (1) Notwithstanding the provisions of subsections (b) and (c), and under such regulations as the Director of National Intelligence shall approve, the Agency may pay expenses, benefits, and allowances equivalent to those specifically authorized in subsections (b) and (c) in any case in which the Director determines that, for reasons of operational necessity or security, the means or method of paying expenses, benefits, and allowances authorized in such subsections should not be utilized.

(2) The Director shall annually inform the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the

Senate of any expenditures made under this subsection and the reasons therefor.

COMMISSARY AND MESS SERVICES AND RECREATION FACILITIES

SEC. 652. (a) The Director is authorized to establish and maintain emergency commissary and mess services in such places abroad and in Alaska where, in the Director's judgment, such services are necessary to insure the effective and efficient performance of the duties and responsibilities of the Agency, but only if such services are not otherwise available from other departments and agencies of the Government. An amount equal to the amount expended for any such services shall be returned to the Treasury as miscellaneous receipts.

(b) The Director is authorized to assist in the establishment, maintenance, and operation, by officers and employees of the Agency, of non-Government operated commissary and mess services and recreation facilities at certain posts abroad, including the furnishing of space, utilities, and properties owned or leased by the United States for use by the Agency. Commissary and mess services and recreation facilities established pursuant to this subsection shall be made available insofar as practicable, to officers and employees of other Government agencies and their families who are stationed abroad or in Alaska. Such services and facilities shall not be sold

lished in localities where another department or agency operates similar services or facilities unless the Director determines that such additional services or facilities are necessary.

(c) Notwithstanding any other provision of law, charges at any post abroad or in Alaska by a commissary or mess service or recreation facility authorized or assisted under this section shall be at the same rate for all civilian and military personnel of the Government serviced thereby, and all charges for supplies furnished to such a facility abroad or in Alaska by any department or agency shall be at the same rate as that charged by the furnishing department or agency to its civilian or military commissary or mess services or recreation facilities.

RETIREMENT SYSTEM

SEC. 653. Employees of the Agency shall participate in the regular Federal civil service retirement system provided for under subchapter III of chapter 83 of title 5, United States Code, except that the Director is authorized to designate a limited number of employees whose duties either are in support of Agency activities abroad, hazardous to life or health, or so specialized as to be clearly distinguishable from normal government employment, for participation in a separate retirement and disability program which may hereafter be authorized by law.

PART G—RESTRICTIONS; SPECIAL DELEGATION OF AUTHORITY; PRESERVATION OF CERTAIN AUTHORITY AND RESPONSIBILITY

RESTRICTIONS

SEC. 661. The authorities, duties, and responsibilities prescribed in this title are subject to the restrictions of titles II and III and sections 131 through 139 of this act.

SPECIAL DELEGATION AUTHORITY; MISCELLANEOUS PRESERVATION OF AUTHORITY AND RESPONSIBILITY

SEC. 662. (a) In exercising control over all signals intelligence intercept and processing activities of the United States, the Director shall make special provision for the delegation of limited control of specified signals intelligence facilities and resources required to provide signals intelligence close support to military commanders or the heads of other departments and agencies of the Government. Such special provision shall be made in any case for such period and for such activities as the Director determines to be appropriate. The Director shall also enter into arrangements with any department or agency not part of the United States signals intelligence system which is capable of producing signals intelligence when such arrangements are appropriate to assist the Director in fulfilling the Director's responsibilities under this title and when such arrangements will not ad-

versely affect the performance of the other authorized duties of such department or agency.

(h) Nothing in this title shall contravene the responsibilities of any department or agency for the final evaluation of signals intelligence, the synthesis of such intelligence with intelligence from other sources, and the dissemination of finished intelligence to users in accordance with prescribed security procedures.

(c) Nothing in this title shall contravene the authorized functions of any department or agency to organize and conduct individual communications security activities other than the development of cryptographic systems, devices, equipment and procedures. Each department and agency concerned shall be responsible for implementing all measures required to assure communications security in accordance with doctrines, standards, and procedures prescribed by the Director.

(d) Nothing in this title shall contravene the authority of the Central Intelligence Agency to conduct, as approved by the Director of National Intelligence after review by the Director, clandestine signals intelligence operations in support of clandestine activities; to conduct, in coordination with the Director, clandestine operations designed to achieve signals intelligence objectives; and to prescribe unique com-

munications security methods and procedures, after review by the Director, in support of clandestine activities.

(e) All elements of the United States signals intelligence system shall conduct signals intelligence activities in response to operational tasks assigned by the Director and in accordance with directives issued by the Director. Except as authorized in subsection (a), no other organization outside the United States signals intelligence system shall engage in signals intelligence activities unless specifically authorized to do so by the National Security Council.

(f) Nothing in this title shall be construed as amending or superseding the provisions of the Act entitled "An Act to provide certain administrative authorities for the National Security Agency, and for other purposes", approved May 29, 1959 (73 Stat. 63; 50 U.S.C. 402 note).

(g) The provisions of sections 2 and 3 of the Act entitled "An Act to fix the responsibilities of disbursing and certifying officers, and for other purposes", approved December 29, 1941 (55 Stat. 875; 31 U.S.C. 82 c and d, shall apply to certifications for payments and to payments made by or on behalf of the National Security Agency by certifying officers and employees and by disbursing officers and employees under the jurisdiction of any military departments, notwithstanding the provisions of section 4 of such Act (31 U.S.C. 82e).

(b) Clause (1) of section 552 of title 5, United States Code, is amended by inserting "or the National Security Agency" after "Central Intelligence Agency".

PART H—TRANSFER OF PERSONNEL, PROPERTY, AND FUNCTIONS

TRANSFER OF PERSONNEL, PROPERTY, AND FUNCTIONS

SEC. 671. (a) All positions established in and personnel employed by the National Security Agency, as in effect on the day before the effective date of this title, and all obligations, contracts, properties, and records employed, held, or used primarily in connection with any function to be performed hy the Agency under this title, are transferred to tbe Director.

(b) All orders, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges wbich have become effective in the exercise of functions transferred under this title and wbich are in effect on the day before tbe effective date of this title, shall continue in effect until modified, terminated, superseded, set aside, or repealed by the Director, or other appropriate Agency officials, by any court of competent jurisdiction, or by operation of law.

(c) Tbe provisions of this title shall not affect any proceedings pending before the National Security Agency as in effect prior te the effective date of this title.

(d) No suit, action, or other proceeding begun by or

against any officer in that officer's official capacity in the National Security Agency, as in effect prior to the effective date of this title, shall abate by reason of enactment of this title.

(e) With respect to any function transferred by this title and exercised after the effective date of this title, reference in any other Federal law to any department, agency, office, or part thereof shall be deemed to refer to the department, agency, or office in which such function is vested pursuant to this title.

TITLE VII—MISCELLANEOUS AMENDMENTS AND EFFECTIVE DATE

AMENDMENT TO THE NATIONAL SECURITY ACT OF 1947

SEC. 701. The third paragraph of section 101(a) of the National Security Act of 1947 (50 U.S.C. 402(a)) is amended to read as follows:

"The function of the Council shall be to (1) provide guidance and direction to and an ongoing review of the conduct of all national intelligence, counterintelligence, and counterterrorism activities of the United States, and (2) advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security.".

AMENDMENTS TO TITLE 5, UNITED STATES CODE

SEC. 702. (a) Section 5312 of title 5, United States Code, is amended by adding at the end thereof the following:

"(15) Director of National Intelligence."

(b) Section 5313 of such title is amended by striking out

"(15) Director of Central Intelligence."

and inserting in lieu thereof

"(15) Deputy Director of National Intelligence.".

(c) (1) Section 5314 of such title is amended by striking out

"(35) Deputy Director of Central Intelligence."

and inserting in lieu thereof

"(35) Director of the National Security Agency."

(2) Section 5314 of such title is further amended by adding at the end thereof the following:

"(67) Assistant Directors of National Intelligence (5).".

(d) Section 5315 of such title is amended by adding at the end thereof the following:

"(122) Deputy Director of the National Security Agency.

"(123) General Counsel of the Central Intelligence Agency.

"(124) Inspector General of the Central Intelligence Agency.".

(e) Section 5316 of such title is amended by adding at the end thereof the following:

"(144) General Counsel of the National Security Agency.

"(145) Inspector General of the National Security Agency.".

AMENDMENT TO THE FEDERAL ADVISORY COMMITTEE ACT TO ELIMINATE EXEMPTION FOR THE CENTRAL INTELLIGENCE AGENCY

SEC. 703. Section 4 (b) of the Federal Advisory Committee Act (86 Stat. 770) is amended to read as follows:

"(b) Nothing in this Act shall be construed to apply to any advisory committee established or utilized by the Federal Reserve System.".

EFFECTIVE DATE

SEC. 704. This Act shall become effective on the first day of the third calendar month following the month in which it is enacted.

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