# INTELLIGENCE IDENTITIES PROTECTION LEGISLATION

## HEARINGS

BEFORE THE

## SELECT COMMITTEE ON INTELLIGENCE

OF THE

## UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

## S. 2216, ET AL.

INTELLIGENCE IDENTITIES PROTECTION LEGISLATION

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# INTELLIGENCE IDENTITIES PROTECTION LEGISLATION

TUESDAY, JUNE 24, 1980

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

The committee met at 10 a.m., pursuant to notice, in room 1202, Dirksen Senate Office Building, Hon. Birch Bayh (chairman of the committee) presiding.

Present: Senators Bayh, Leahy, Garn, Chafee, and Durenberger.

Chairman BAYH. May we bring our committee deliberations to order this morning.

The committee's hearings this week will focus on a problem of deep concern to the committee and I think to most thoughtful Americans. It is the betrayal of trust by persons who are pledged to protect the lives of American intelligence agents and who break that pledge by disclosing the identity of intelligence agents.

Our Nation asks those who serve our intelligence agencies abroad to take risks for the good of their country. Fortunately for all of us many dedicated Americans are prepared to take this risk. Those risks are real and CIA intelligence officers have in fact lost their lives in the line of duty overseas.

At the same time we face the fact that at least one renegade employee of the CIA has undertaken to disclose the names of intelligence officers serving abroad and by doing so placed their lives in great jeopardy. As the result, a great many proposals have been introduced in this Congress to make it a Federal criminal offense if a present or former Government employee who has been given access to information identifying intelligence agents uses that position of trust and intentionally discloses the identity of agents working abroad.

Such criminal statute was an essential part of the intelligence charter bill introduced earlier this year. However, the committee decided in early May that it was impossible to bring comprehensive charter legislation to the Senate floor this year and postponed that effort until the next session of Congress.

Instead the committee reported and the Senate passed on June 3, the Intelligence Oversight Act of 1980, which limits reporting of intelligence activities to two intelligence committees and established a presumption of prior notice of significant intelligence activities, including covert operations.

As part of the agreement to report out the Oversight Act it was decided that the committee would continue its active consideration of other issues raised by the charter bill. The first of these issues is before us today. We intend to consider other areas in this legislation so that the committee can prepare to move ahead actively with additional legislation that is necessary to place the intelligence committee on a firm legal foundation.

The question of a criminal statute has been complicated for the committee by the large number of different approaches that have been proposed. For the purpose of these hearings we have asked the witnesses to address the provisions of five bills and the proposals submitted on behalf of the administration by Admiral Turner.

We want to deal with this problem. I have been one of those who have felt that it is critical that we have a comprehensive charter, that indeed we make our intelligence community as effective as it possibly can be and at the same time protect the rights of Americans. I have done everything I know how to do and will continue to do what I can to recognize the important oversight role of the Congress.

Having said this, and being one Member of the Senate who I think the record will show has been a strong proponent of the protection of the rights of the individual citizens of this country, I nevertheless find it abhorrent that some employees or former employees of our intelligence community might be prepared, for reasons that appear good to them, to violate the sacred oath they take to protect the informaion that is theirs while they are working within the intelligence community.

I find that practice abhorrent, unacceptable and am prepared to support legislation that will say that anyone who undertakes that kind of activity does so at his own peril and should go to jail if indeed he violates that kind of pledge and jeopardizes the lives of others who are serving their country.

We are trying to find the best way to deal with this. I appreciate the interest that has been expressed by my colleagues on the committee, the distinguished colleague from Utah, the distinguished colleague from Rhode Island who in his typical fashion of cooperation did not propose an amendment to the oversight bill as it went through the committee and who is here today, as well as the other members of the committee who share a concern for resolving this problem.

[The opening remarks of Senator Huddleston are as follows:]

OPENING REMARKS OF SENATOR WALTER D. HUDDLESTON, HEARINGS ON PROPOSED AGENTS' IDENTITIES STATUTES

Many loyal and decent Americans work for the intelligence agencies of this country. They work long and hard to help give our country the strong and effective intelligence system it needs in today's world. Given the secrecy necessary to their work, most of their efforts must go unrecognized in the outside world. In many instances, even the families and closest associates of these individuals cannot be privy to the nature of their work. Such people assume a solemn responsibility with their jobs; they are entrusted in the course of their work with some of the most sensitive intelligence information in the possession of the United States Government. They are granted access to this material on the condition that they agree in writing not to disclose it publicly without appropriate authorization. Theirs is not an easy task. It takes an extraordinary kind of person to work within such strictures. It is fortunate that there are such dedicated,

patriotic citizens working within the ranks of the U.S. intelligence community. Most of these people handle their responsibility admirably, respect the conditions under which they work, and do not abuse their privilege.

A few, however, do not. With increasing regularity these days, we learn of individuals who fail to uphold the commitment they have made to maintain the confidentiality of the information with which they work. The flood of leaks of intelligence information in recent years has been alarming. One kind of leak is especially irresponsible, it seems to me. I refer to the revelation of the identities of U.S. intelligence agents which appears to be in vogue these days. Certain parties in our society have made it their business to publish lists of people they claim are working for U.S. intelligence agencies overseas. They are prompted, they assert, by the highest of principles, as if by exposing these names, they are helping to eliminate, one man at a time, the evils of U.S. intelligence activities overseas and the perils of American interventionism. Their approach is naive, but the tactics they employ are terribly reckless. It is not an idea or a principle that lies in the balance, it is the lives and livelihoods of people—of individuals who serve their country under cover overseas, performing intelligence missions necessary to the security of their fellow citizens and otherwise furthering the principles for which this nation stands.

There is an impression abroad in certain quarters that intelligence activities, by virtue of their clandestine nature alone, are inherently suspect—and that therefore all facets of intergovernmental and international relations should be open to public scrutiny. Such reasoning is simply wishful thinking in the complicated times in which we live. We demand that our intelligence agencies act in a responsible manner; we have intelligence oversight committees in each house of Congress to help ensure that they do, but we cannot reasonably ask to be aware of every detail of their dealings. Often sensitive tasks which can be crucial to the formulation and conduct of a sensible foreign policy lie in the hands of the country's clandestine service. In short, in a number of instances, confidentiality is not only a useful adjunct to but a key component of our relationships with other nations. To reveal the identities of people serving under cover abroad or to expose their relationship with U.S. intelligence services would radically reduce if not completely destroy their effectiveness in accomplishing their mission overseas. And yet this is precisely what some individuals are dead set on doing. A recent book of this genre, Dirty Work II, features an appendix of biographies of individuals alleged to be U.S. intelligence agents overseas. This "who's who" listing is entitled "Naming Names." Such naming of names must stop.

Efforts are currently underway in the U.S. Congress to bring this practice to a halt. I myself strongly support a provision which would prescribe a criminal penalty for anyone who "having or having had authorized access to classified information identifying officers, employees, agents, or sources of operational assistance of U.S. intelligence agencies, intentionally discloses this information to an individual not authorized to receive it." The language of this provision, drawn from S. 2284, as introduced, has been very carefully framed. It would subject employees and former employees of U.S. intelligence agencies who intentionally reveal the identities of U.S. intelligence agents overseas to a penalty of up to $50,000 or imprisonment for up to ten years or both. The limits on prosecution are designed in particular to protect a journalist or publisher who might print material of this nature which had been released to him by a present or former employee of a U.S. intelligence agency. This is an area where we as lawmakers must exercise great caution in order to safeguard the First Amendment freedoms guaranteed to our citizens under the Constitution.

The Administration would prefer to apply the criminal penalty more broadly, to cover anyone who released identities of agents. Other pieces of legislation currently pending before Congress also seek to extend the application of the criminal statute to cover journalists and publishers. For example, S. 2216, the Intelligence Reform Act of 1980, introduced by Senators Moynihan, Jackson, Wallop and others, would cover anyone who "with intent to impair or impede the foreign intelligence activities of the United States discloses to any individual not authorized to receive classified information" the identities of U.S. intelligence agents overseas. I believe such wording is too broad and might have a "chilling effect" on legitimate discussion of CIA activities. This judgment has been borne out by the views of a number of prominent attorneys around the country.

Leaks must be stopped. Ultimately, it is not the responsibility of the press or the general public to see that this is done. It is the responsibility of those who have undertaken a position of trust in the government. Any statute aimed at them is necessary but must be carefully drafted. The Select Committee on Intelligence has been reviewing the issues involved as part of the process of writing comprehensive charter legislation for the U.S. intelligence agencies. I am happy to hear additional thoughts on these matters. I myself view such a statute as an integral part of the package of intelligence legislation referred to as "charters".

Chairman BAYH. Do my colleagues have any comment to make?

Senator GARN. Mr. Chairman, I will say while we are pausing I have no prepared statement but only briefly to say how strongly I support legislation to attempt to solve this problem. The Philip Agees and Stockwells of this world should be punished. In my opinion, their actions border on treason and we must have a legislative vehicle to deal with those types of people who would endanger the lives of their colleagues and the security of this United States for their personal financial gain.

Chairman BAYH. The Senator from Rhode Island?

Senator CHAFEE. Thank you, Mr. Chairman.

First of all, I would like to thank you for holding these hearings. I know your record as far as protection of individual rights is certainly not surpassed in this Congress and I applaud your willingness to proceed with this area since you view it, as I do, as one of extreme importance to our Nation and to those individuals who are serving our Nation.

Last fall, Mr. Agee and his colleagues published a book, "Dirty Work II: The CIA in Africa," which reveals the names of 729 persons which they claim are CIA officers who serve or are now serving overseas in Africa. In his introduction to the book Agee stated that his intention was "to expose * * * clandestine operations."

In the last few weeks Covert Action Information Bulletin, a magazine whose stated purpose is to destroy the effectiveness of the Central Intelligence Agency, has printed the names and countries and assignments of an additional 38 alleged CIA agents, listing them in the rear here alphabetically by country.

It is my opinion, Mr. Chairman, that this willful disclosure of the names of persons who are lawfully engaged in intelligence work for this Nation falls in the same category, as the Senator from Utah said, as an act of treason.

Yet as we speak here today there is no law in this country which can be used effectively to prosecute individuals who make their living by the practice of "naming names," as this column in Covert Action Bulletin is entitled. I find this very difficult to accept.

My purpose in asking for these hearings, and I know the purpose of all of us here today, is to provide an open and public forum in which this important issue can be discussed and resolved. We have before us a number of legislative proposals—I put in one, others have been put in—which address the issue of protection of intelligence identities and we have a number, of course, of highly qualified witnesses who are able to make judgments about these proposals.

It is my hope in the 2 days allotted to us we can come up with a legislative proposal which will help this Government and this Nation

to protect itself and its people from those whose stated intention is to damage, both the country and the individuals.

I realize these are difficult and controversial issues. Tomorrow we will hear from some representatives of the press who oppose this legislation but nonetheless I believe it is vitally important to our country that we stop this hemorrhaging of sensitive information.

So I thank you, Mr. Chairman.

Chairman BAYH. The Senator from Minnesota.

## TESTIMONY OF HON. DAVID DURENBERGER, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator DURENBERGER. Thank you, Mr. Chairman.

I express my appreciation to the chairman for the coffee and I do have a statement and I will not take the time to read it into the record. But I would ask that it be introduced in the record.

I will just add one additional comment that comes from our experience with charters, that everyone so far today and, I am sure everyone on this committee is going to express himself with the concerns that we have, the need to take corrective action.

You in your statement, Mr. Chairman, listed a long series of bills and amendments that have been introduced. I think my great concern is that we are going to fall all over ourselves with our combination of concerns and end up without a specific piece of legislation on which we can all agree. Obviously I need not lecture any member of this committee or anybody in the audience on the issue of give and take, if you will, in the process of arriving at a conclusion.

I think in this particular case it is absolutely essential. While there are strong principles involved here with the issue that we are involved in on both sides, the existence of those principles certainly does not make it impossible for us to put together an approach that will satisfy the principles involved on all sides because it is so important that we take action and that we take it as soon as possible.

I trust that my statement reflects that as will my questions to the witnesses.

[The prepared statement of Senator Dave Durenberger follows:]

PREPARED STATEMENT BY SENATOR DAVE DURENBERGER

In holding these hearings, the Senate Select Committee on Intelligence is embarking on an important—and somewhat difficult—endeavor. Our efforts are important because employees and agents of U.S. government agencies are endangered, and their effectiveness impaired, by persons who use disclosure as a weapon in the campaign to undermine the effectiveness of our intelligence services. And these efforts are difficult because the legislative remedy that we construct must be effective without intruding upon the constitutional rights of our fellow citizens.

The disclosure of agents' identities is an immoral, intolerable act. It bears no relation to whistleblowing. The actions of Philip Agee and others have exposed honorable public servants to personal peril and reduced their effectiveness in their chosen careers.

These are acts of moral callousness. They go beyond the norms of the American system, and represent a philosophy in which the end justifies the means and politics outweighs humanity. Small wonder, then, that we often find those who have disclosed agents' identities appearing in the pages of Soviet propaganda organs, naming purported agents while villifying American policy. And small

wonder that both our intelligence agencies and the American people are outraged by this situation.

It is clear that the disclosure of agents' identities must be stopped. But there is not yet a clear consensus on how this should be done. We need to counter those who use classified information to expose agents; but we want a law that is used successfully, rather than one that clogs the lawbooks without ever leading to prosecutions. We want to block a source of information that has been used in the media; but we do not want to infringe upon the constitutional rights of a free press and a free people.

I hope that as we examine the several bills before us, we will all keep open minds regarding the means to our common end. It would be ironic if, in our haste to correct this wrong, we were party to the creation of new wrongs.

I look forward to a reasoned discussion of the merits and difficulties in the various approaches. It is a particular pleasure to see that this set of hearings will feature both the Justice Department and the intelligence agencies, both the ACLU and the Association of Former Intelligence Officers. I hope that some of the political battlelines that formed over intelligence charters will be blurred a little, as we all work together to frame a law that is both effective and in keeping with a free society.

Chairman BAYH. Thank you, Senator Durenberger.

We are fortunate to have a man who is highly qualified to speak on the subject and the country is fortunate to have him serving in his present capacity, the Deputy Director of the Central Intelligence Agency, Mr. Frank C. Carlucci. Mr. Carlucci, it is good to have you with us.

## TESTIMONY OF FRANK C. CARLUCCI, DEPUTY DIRECTOR OF CENTRAL INTELLIGENCE; ACCOMPANIED BY DANIEL SILVER, GENERAL COUNSEL

Mr. CARLUCCI. Thank you, Mr. Chairman. I am accompanied by our General Counsel, Mr. Daniel Silver.

Mr. Chairman, I want to thank you and the other distinguished members of this committee for the opportunity to discuss legislation which I consider to be urgently needed and vital to the future success of our country's foreign intelligence collection efforts.

I start this morning from the premise that our efforts to collect information about the plans and intentions of our potential adversaries cannot be effective in a climate that condones revelation of a central means by which those efforts are conducted. The impunity with which misguided individuals can disclose the identities of our undercover officers and employees and other foreign agents and sources has had a harmful effect on our intelligence program.

Equally significant is the increased risk and danger such disclosures pose to the men and women who are serving the United States in difficult assignments abroad. It is outrageous that dedicated people engaged or assisting in U.S. foreign intelligence activities can be endangered by a few individuals whose avowed purpose is to destroy the effectiveness of activities and programs duly authorized by the Congress.

Mr. Chairman, recent world events have dramatically demonstrated the importance of maintaining a strong and effective intelligence apparatus. The intelligence community must have both the material and the human resources needed to enhance its ability to monitor the military activities of our adversaries and to provide insights into the political, economic and social forces which will shape world affairs in the 1980's.

It is particularly important that every effort be made to protect our intelligence officers and sources. It is imperative that the Congress clearly and firmly declare that the unauthoribed disclosure of the identities of our intelligence officers and those allied in our efforts will no longer be tolerated.

The President has expressed his determination to "increase our efforts to guard against damage to our crucial intelligence sources and our methods of collection, without impairing civil and constitutional rights." We recognize that legislation in this area must be carefully drawn; it must safeguard the Nation's intelligence capabilities without impairing the first amendment rights of Americans or interfering with congressional oversight.

Mr. Chairman, at this point I would like to make clear for the record the damage that is being caused by the unauthorized disclosure of intelligence identities. I would then like to address briefly several fallacies and misconceptions that have crept into public discussion and debate about the problem.

Finally, I will deal with the issue of how a legislative remedy can be structured so as to discourage these unauthoribed disclosures without impairing the rights of Americans or interfering with congressional oversight.

Obviously, security considerations preclude my confirming or denying specific instances of purported identification of U.S. intelligence personnel. Suffice it to say that a substantial number of these disclosures have been accurate. The destructive effects of these disclosures have been varied and wide ranging.

Our relations with foreign sources of intelligence have been impaired. Sources have evinced increased concern for their own safety. Some active sources and individuals contemplating cooperation with the United States have terminated or reduced their contact with us. Sources have questioned how the U.S. Government can expect its friends to provide information in view of continuing disclosures of information that may jeopardize their careers, liberty, and very lives.

Many foreign intelligence services with which we have important liaison relationships have undertaken reviews of their relations with us. Some immediately discernable results of continuing disclosures include reduction of contact and reduced passage of information. In taking these actions, some foreign services have explicitly cited disclosures of intelligence identities.

We are increasingly being asked to explain how we can guarantee the safety of individuals who cooperate with us when we cannot protect our own officers from exposure. You can imagine the chilling effect it must have on a source to one day discover that the individual with whom he has been in contact has been openly identified as a CIA officer.

The professional effectiveness of officers so compromised is substantially and sometimes irreparably damaged. They must reduce or break contact with sensitive covert sources. Continued contact must be coupled with increased defensive measures that are inevitably more costly and time consuming.

Some officers must be removed from their assignments and returned from overseas at substantial cost. Years of irreplaceable area experi-

ence and linguistic skills are lost. Reassignment mobility of the compromised officer is impaired.

As a result, the pool of experienced CIA officers is being reduced. Such losses are deeply felt in view of the fact that, in comparison with the intelligence services of our adversaries, we are not a large organization. Replacement of officers thus compromised is difficult and, in some cases, impossible.

Once an officer's identity is disclosed, moreover, counterintelligence analysis by adversary services allows the officer's previous assignments to be scrutinized, producing an expanded pattern of compromise through association.

Such disclosures also sensitize hostile security services and foreign populations to CIA presence, making our job far more difficult. Finally, such disclosures can place intelligence personnel and their families in physical danger from terrorist or violence-prone organizations.

Mr. Chairman, at the convenience of the committee, I am prepared to discuss in executive session individual cases which exemplify the damage done to our intelligence-gathering capabilities. These cases serve to illustrate the pernicious effects which unauthorized disclosures of intelligence identities have had in particular instances.

But it is also essential to bear in mind that the collection of intelligence is something of an art. The success of our officers overseas depends to a very large extent on intangible psychological and human chemistry factors, on feelings of trust and confidence that human beings engender in each other and on atmosphere and milieu. Unauthorized disclosure of identities information destroys that chemistry.

While we can document a number of specific cases, the committee must understand that there is no way to document the loss of potential sources who fail to contact us because of lack of confidence in our ability to protect their identities.

Mr. Chairman, in a time when human sources of intelligence are of critical importance, there can be no doubt that unauthorized disclosures of identities of our officers, agents, and sources constitute a serious threat to our national security.

The threat may not be as direct and obvious as the disclosure of military contingency plans or information on weapons systems. It is indirect and sometimes hard to grasp. But the net key result is damaged intelligence capability and reduced national security.

Those who seek to destroy the intelligence capabilities of the United States, and others whose opposition to identities legislation is based upon genuine concern about first amendment considerations, have propagated a number of fallacies and misconceptions. Understandably, some of these have found their way into discussions of identities legislation before the Congress and in the press.

One of these fallacies is that accurate identification of CIA personnel under cover can be made merely by consulting publicly available documents like the State Department's Biographic Register, and that identities legislation would impinge on discussion of information that is in the public domain.

This is absolutely untrue. There is no official unclassified listing anywhere that identifies undercover CIA officers. The intelligence

relationships which we are seeking to protect are classified and a great deal of money and effort is expended to maintain their secrecy.

The names of individuals who are intelligence officers do appear in certain unclassified documents but they are not identified as intelligence officers. This is consistent with our need to establish and maintain cover to conceal the officer's intelligence affiliation.

The State Department Biographic Register, an unclassified document until 1975, and similar documents cannot be used without additional specialized knowledge and substantial effort to make accurate identifications of intelligence personnel.

It is only because of the disclosure of sensitive information based on privileged access and made by faithless Government employees with the purpose of damaging U.S. intelligence efforts that the public has become aware of indicators in these documents that can sometimes be used to distinguish CIA officers.

It is noteworthy, however, that these indicators do not invariably lead to correct identification. The substantial number of accurate identifications that are being made by the Covert Action Information Bulletin long after the Biographic Register ceased to be publicly available indicates that these disclosures are based on extensive additional investigation, presumably using many of the same techniques as any intelligence service uses in its counterintelligence efforts.

Another fallacy widely circulated by opponents of identities legislation is that prohibition of the unauthorized disclosure of intelligence identities would stifle discussion of important intelligence and foreign policy issues.

This simply is not so. Identities legislation is not designed to forestall criticism of intelligence activities, prevent the exposure of wrongdoing, or "chill" public debate on intelligence and foreign policy matters. Rather such legislation would protect a narrow, essential element of our Nation's foreign intelligence programs for which the Congress appropriates taxpayer dollars year after year.

In this regard, it is important to recall that virtually all of the legitimate official and unofficial examinations of intelligence activities which have taken place over the past several years have been accomplished without the revelation of intelligence identities of the kind we are seeking to protect. Extensive public and congressional scrutiny and criticism of intelligence activities has taken place without recourse to wholesale disclosure of the names of intelligence personnel.

Mr. Chairman, identities legislation is designed to discourage activity that threatens the very lifeblood of our Nation's intelligence apparatus. I urge the committee to examine closely the claims of those who contend that there are legitimate reasons for the unauthorized disclosure of intelligence identities and that such disclosures are in the public interest.

These claims are without merit and must be rejected when weighed against real and certain damage to the national interest.

Another serious misconception which has arisen in connection with the debate over identities legislation is the contention that such a statute would prevent legitimate "whistle-blowing" by individuals whose intent is to expose alleged illegality or impropriety. A properly drafted statute will have no such effect.

Provision can be made to insure that the transmittal of information to the House and Senate Intelligence Committees is not covered by the statute's prohibitions and we support language such as that contained in subsection 502(d) of S. 2216. Identities legislation, therefore, need not impact at all on those whose legitimate purpose is to report alleged wrongdoing.

Still another misconception is the contention that passage of identities legislation would spell the end of efforts to enact comprehensive intelligence charter legislation. It has been suggested that the intelligence community would lose interest in a comprehensive charter if an identities bill were to be enacted separately.

Mr. Chairman, the commitment of the intelligence community to comprehensive charter legislation is well known and has been stated often. I state it again before you today. We sincerely regret that it was not possible to proceed with a full charter bill this year.

The intelligence community's interest in charter legislation will not evaporate upon passage of a separate identities bill. Identities legislation is urgently needed and should proceed on its own merit. It must not be held hostage to comprehensive charter legislation.

Mr. Chairman, I would like now to discuss how identities legislation can be structured so as effectively to proscribe the most damaging unauthorized disclosures without impairing the rights of Americans or interfering with congressional oversight.

Congress should enact legislation which will fully remedy the problems we face. Passage of a statute that is too limited in its coverage, that could be easily circumvented, or which would go unenforced because of unmeetable burdens of proof would be counterproductive. Such a statute would give the impression of solving the problem without actually doing so.

Legislation in this area should, first of all, hold current and former Government employees and others who have had authorized access to classified identities information to a higher standard than persons who have not had such access.

Such individuals, because of their employment relationships or other positions of trust, can legitimately be held accountable for the deliberate disclosure of any identity they know or have reason to know, is protected by the United States.

With regard to such individuals the legislation should require proof that a disclosure is made with culpable knowledge or with knowledge of sufficient facts to make the average person aware of the nature and gravity of his actions.

This is an important element because it must describe a state of mind which will support the attachment of criminal sanctions and at the same time be capable of proof in the kinds of disclosure cases which have been damaging. If a person with authorized access discloses information knowing that it identifies an intelligence officer under cover, that person should be considered to have acted with culpable knowledge.

The knowledge formulation must not be so difficult of proof as to render the statute useless. We would oppose, therefore, any requirement such as the one contained in Representative Aspin's bill, H.R. 6820, for the Government to prove that the specific information disclosed was acquired during the course of the individual's official duties.

Second, we believe it is essential that individuals who conspire with or act as accomplices of persons having authorized access to classified identities information not escape responsibility for their actions. Thus, the legislation should not negate the normal applicability of the general Federal accomplice and conpiracy statutes.

Mr. Chairman, a statute in this area, if it is to be effective, must also cover those who have not had an employment or other relationship of trust with the United States involving authorized access to classified identities information. The identities provisions in S. 2284 as introduced, in Senator Bentsen's S. 191, and in Representative Aspin's H.R. 6820, are seriously deficient because they omit this broader coverage.

Additional safeguards are in order with respect to the broader coverage which is sought by the administration. The approach contained in section 501(b) of the proposed identities legislation in S. 2216 would necessitate, in addition to the requirements applicable to individuals who have had authorized access, that individuals who have not had such access act "with the intent to impair or impede the foreign intelligence activities of the United States."

This formulation would make possible prosecution of those who seek to destroy the intelligence capabilities of the United States while leaving untouched anyone who makes a disclosure without the requisite intent.

The administration proposal drafted by the Department of Justice, on the other hand, would cover persons who have not had authorized access to classified identities information in a different way. Such persons would be covered if they disclose a protected identity "with the knowledge that such disclosure is based on classified information."

This formulation could cover the most egregious current cases, such as the disclosure by Covert Action Information Bulletin, but only if the use of criminal investigative techniques provided sufficient proof that the disclosure were based on classified information.

Mr. Chairman, the suggestion has been made that criminal penalties for the unauthorized disclosure of intelligence identities should apply only when there is actual injury to the individual whose identity is revealed or where the revelation could reasonably be expected to jeopardize the individual's safety.

We strongly oppose such a limitation. While the personal safety of our officers and sources is a very important consideration in our pursuit of this legislation, we are also concerned about the maintenance of an effective intelligence apparatus.

Unauthorized disclosures of intelligence identities damage intelligence capabilities, and criminal penalties should apply regardless of whether the particular individual whose identity is revealed is physically harmed or immediately threatened by the disclosure.

Mr. Chairman, there is a pressing need for effective legislation to discourage unauthorized disclosure of intelligence identities. The credibility of our country and its relationships with foreign intelligence services and agent sources, the personal safety and well-being of patriotic Americans serving their country and the professional effectiveness and morale of our country's intelligence officers are all at stake.

As matters now stand the impunity with which protected intelligence identities may be exposed implies a governmental position of neutrality. It suggests that U.S. intelligence officers are "fair game"

for those members of their own society who take issue with the existence of CIA or find other perverse motives for making these unauthorized disclosures.

Specific statutory prohibition of such activity is critical to the maintenance of an effective foreign intelligence service. It is imperative that a message be sent that the unauthorized disclosure of intelligence identities is intolerable.

I sincerely appreciate your genuine concern about our intelligence capabilities and wholeheartedly support your efforts to deal with this serious problem. I encourage you to proceed to report legislation that will provide an effective remedy.

Thank you very much, Mr. Chairman.

Chairman BAYH. Thank you very much, Ambassador Carlucci. We appreciate your statement. I think you laid it pretty well on the line. I would like to ask unanimous consent to put in a statement just prior to Ambassador Carlucci's from Senator Huddleston.[1]

Mr. Carlucci, you mentioned that you regret that we were unable to go ahead with comprehensive charters and I assume we are going to continue to work in that direction.

I want to compliment you and Director Turner and others in the intelligence community for the efforts that were made to try to put together the first step in this package, S. 2284. We had your assistance and the assistance of several members of your staff at the CIA in the negotiations which took place.

This was a give and take matter as you know over a good long period of time. I think it is fair to say nobody is entirely happy, because it reconciles irreconcilable interests and responsibilities. I guess the bottom line for some of us who feel that we have a responsibility to see that you have the tools with which to work to protect all of us is: Can the CIA function under the provisions of S. 2284?

Mr. CARLUCCI. Mr. Chairman, as the committee is aware, we think we can function under the statutory provisions but we do have some problems with certain aspects of the dialog that took place. We are hopeful that we can work these problems out in the course of this dialog with the committee to which you have referred.

Chairman BAYH. I hope that reasonable people can recognize that if we all act reasonably on the problems that occur that both your function as the principal Intelligence Agency and others as the legislative body of this country can be melded together and the country will be better served because of our joint efforts.

Mr. CARLUCCI. I certainly support that, Mr. Chairman. I can speak from the standpoint of the CIA that the relationship that we have had with the committee and indeed the guidance and criticism and support that we have received from the committee in my judgment have all helped to make us a more effective organization.

So, I am certainly hopeful that the problems which have arisen in connection with S. 2284 can be worked out as rapidly as possible.

Chairman BAYH. I must say that I think that if we are trying to come up with legislation that meets the absolute requirements of either side in this discussion we are going to end up with a big round zero.

[1] Senator Huddleston's remarks appear on p. 2.

Mr. CARLUCCI. I think I would agree with that, Mr. Chairman. We are fully prepared to continue the process of dialog. I think both sides have made accommodations. What we need is a better understanding of what the statutory language actually intends and I think we can arrive at such an understanding.

Chairman BAYH. I must say that I thought the Senate had a pretty good understanding of that with the measure that passed 89 to 1. I would hope that we could put that to bed and get on to running the Intelligence Agency and running the Congress in other areas.

This whole question of leaks has been a matter that has really worried the committee. I appreciate your addressing yourself specifically to one aspect of leaks, the kind that we are gathering here to try to insure against or rate as the critical kind of act that it is by assessing appropriate penalties to those involved.

Could you update the committee? We have tried to deal with other kinds of leaks. You have expressed concern, Admiral Turner has expressed concern, and has written a letter to the Justice Department.

I think you are familiar with our letter to the Director of the Federal Bureau of Investigation urging him to conduct a full inquiry and find out as best we can what we can do to stop some of this hemorrhaging involving a wide variety of activities, invasion into Afghanistan by the Soviet Union, the rescue mission undertaken by brave Americans to free our hostages, the dispute which currently exists between your Agency and the Pentagon over the strategic balance of power where you read in the local newspaper the page numbers of the defense intelligence estimates, where are we on that?

I am anxious to get to the bottom of that. The Philip Agee type activity is highly publicized and I think we are determined to do everything we can to stop that. What can we do to get at the people who might do just as much damage to the whole security of the country but we cannot seem to get at them?

Mr. CARLUCCI. Mr. Chairman, I fully share your concern on this subject. We have sent a number of letters, separate letters, to the Attorney General requesting investigations of specific leaks, I think the Justice Department would be better equipped to respond to the actual status of those investigations than I would be.

Let me say that leaks cannot be stopped just by investigation. Indeed, investigations of leaks are often fruitless. Leaks result from an atmosphere which in my judgment has existed in this country for the past 4 or 5 years. It is an atmosphere which is conducive to carelessness with national security information, an atmosphere which has tended to glorify those who leak information, an atmosphere that says in effect if you do not agree with the policy or what is printed it is your obligation to go public, an atmosphere in which the term "national security" has become a discredited word.

I think we have to put some content back into the term "national security." Certainly we want to encourage dissent, whistle blowers, oversight mechanisms, inspections. These have a very important role but the kinds of dissent that do irreparable damage to our intelligence apparatus need to be dealt with forcefully. There are appropriate channels for expressing dissent.

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In terms of security requirements we have taken a lot of steps in the CIA to tighten up on security practices. We have undertaken a rather sweeping review of the way we handle documents and information. We have stepped up our training courses. We have stepped up our security reinvestigations and we have tightened physical security in coming to and leaving the building.

All of these are parts of a program, an overall program, which we hope will convince everybody concerned, whether in the executive branch or other branches of Government, that the leaking of information can cause very serious damage to our country and can be harmful to the lives of individuals.

I would suggest that legislation to deal with the practice of revealing the identities of CIA officers and agents overseas would be a very important step in this direction.

Chairman BAYH. Let me ask you this, if I might, because if we are passing legislation to deal with unauthorized leaking of information, in this case names of agents, do you not feel that we should provide legislative authority to deal with the atmosphere that you described in which a good deal of the leaking is done by people who do not consider themselves Philip Agees?

I get tired of reading in the newspaper information that has to come from people in high places that would ostracize me, you or anybody else. They were doing as much damage to the country as Philip Agee. We went through this whole SALT verification and it was like a leaking sieve. On one side you had somebody leaking a pro-SALT position, the next day somebody leaking an anti-SALT position.

The Russians were sitting there lapping it all up. Should we not be just as severe, perhaps more so, in directing our criticism at somebody who knows better, who is a Presidential adviser or three-star general or person in command in the Pentagon on either side of any of these issues that if you leak that kind of information through the back door to try to guide public opinion and direction of policy, that is of the same character as Philip Agee, who is leaking the same kind of information? I want to get it stopped across the board.

Mr. CARLUCCI. I share your desire, Mr. Chairman. It is a question of what means you can use. I do not know what kind of legislative remedy you can fashion but I would be willing to work with the committee on any ideas you might have on this subject.

Let me make a distinction, though. In the case of disclosure of intelligence identities, this is a little bit more than just leaking. As I indicated in my prepared statement, we are really grappling with a sophisticated counterintelligence operation where people are using sophisticated techniques to identify our people overseas. It is not just the casual leak. It is not a leak for foreign policy purposes.

This is the revelation of classified information by people who are avowedly out to destroy our Nation's intelligence capability. I suggest that is very different from the misguided and possibly harmful leak by some policymaker in the executive branch of Government.

Chairman BAYH. I think the motivation is different, though. It is sort of like the fellow who shot his wife with an empty gun; she is still dead. I just think that there are ways information should be made available and people who try to govern policy by leaks I think are doing great jeopardy to the country.

We are talking about different kinds of problems but I just raise this point because I think the result to the country is very negative in both instances.

Mr. CARLUCCI. I agree with that.

Chairman BAYH. I yield to my colleague from Utah.

Senator GARN. I thank the chairman.

Ambassador Carlucci, the *Snepp* decision certainly held it was constitutional for the United States to take preventive action and prevent publication of classified information important to our national security. So I do not think there seems to be any constitutional objection to reasonable restrictions concerning agents and former agents and their disclosure.

There is some testimony that there is already such legislation, which I do not happen to agree with, but do you believe that the Justice Department is effetcively enforcing existing law concerning disclosure?

Mr. CARLUCCI. I would have to defer to the Justice Department on whether they believe existing law is effective. My personal belief is that it is not. We have not been able to prosecute anybody under the Espionage Act. The threshold of proof I think there is very high. I would like to defer to my General Counsel.

Senator GARN. I agree with you; I do not think there is. I do think there is a necessity for more. Mr. Keuch testifies for the Justice Department that wrongful disclosure of a covert CIA agent is a violation of current law, specifically the espionage statute.

I agree that there should be additional law. I am not convinced we are doing as much as we can under current law to discourage this kind of activity while we look for a new legislative solution.

There is a vote going on, so I will hurry along. There are just a couple of quick questions.

I believe the language of S. 2216—the original Moynihan bill—would effectively prohibit disclosure of classified information by former agents?

Mr. CARLUCCI. Yes, I do.

Senator GARN. This afternoon, John Stockwell, whom we all know very well as a former agent of the CIA, will testify. His book, "In Search of Enemies," was published without security review. Do you believe the publication of this book hurt the national security of the United States?

Mr. CARLUCCI. Do I believe it did?

Senator GARN. Yes.

Mr. CARLUCCI. Yes, I do.

Senator GARN. He claims that he did not reveal the names of agents. In your opinion, did he reveal or give out enough information that tended to reveal directly the names of agents or sources?

Mr. CARLUCCI. It has been a long time since I have read his book but my impression is that—Mr. Chairman, this is a case that could come under litigation. I think I had better not comment on it in a public forum. Let me refer to my General Counsel. My General Counsel agrees I should not comment on it.

Senator GARN. I respect your judgment there because I would like to see the man prosecuted and I will tell him so personally this after-

noon. I do appreciate your testimony and your continuing interest in things that the chairman has talked about.

Some day, maybe we will achieve both some legislative remedies in this area and also the areas that the chairman is talking about.

Thank you. I think I had better run and vote.

Senator CHAFEE. I understand there are going to be several votes in a row. So I think perhaps I had better ask my questions now of Mr. Carlucci so that he might be able to go.

Mr. Ambassador, in your statement and in answer to a question from Senator Garn, you said that you thought the provisions of S. 2216 would take care of the problem we are trying to wrestle with. Yet as you know, those provisions have raised intense opposition.

I thought your statement was a good one on trying to meet that prospective opposition which we will hear tomorrow. Is there anything else we might do to alleviate that fear on the part of the media?

Mr. CARLUCCI. Let me clairfy my statement, Senator Chafee. I said that S. 2216, in my judgment, would deal effectively with the problem and I so testified on the House side on a companion bill.

Since that time, we have worked with the Justice Department and the Department and the administration position has been reformulated. The Agency is now supporting the Justice Department bill which is somewhat different in its approach. In S. 2216, those who were not former employees would have to pass a threshold of proof and that would involve intent to impair and impede foreign intelligence activities and the knowledge that the United States is concealing the identities of the persons involved.

The Justice Department formulation would provide a separate nexus to classified information; that is to say, they would find anyone culpable who discloses information with the knowledge that such disclosure is based on classified information.

So, the threshold of proof is somewhat different here. We think that both bills will deal with the problem but the Justice Department formulation, as I indicated in my prepared statement, would require the use of criminal techniques to determine that the information released was based on classified information.

Senator CHAFEE. I thought you said that made a pretty difficult burden of proof, as far as you are concerned?

Mr. CARLUCCI. I think it would be a more difficult burden of proof. I do not find it an impossible burden of proof. Let me ask my General Counsel.

Mr. SILVER. I think it would depend entirely on the circumstances of the case. We are hopeful that in the egregious cases that exist today, we would be able to support prosecution under the Justice Department proposal.

Senator CHAFEE. It seems to me that we could have a situation where you could have a skilled trained person who would, like Agee, take some assistant and teach him or her the techniques without that person ever having had access to classified information. That person could then publish in certain journals and publications that one could read. They would publish with the intent to disclose that information and to do damage to the CIA.

Now would that person be prosecuted under this Justice Department legislation?

Mr. CARLUCCI. Senator Chafee, I think we perhaps had better defer to the Justice Department to answer that question since it is their legislation and they would be responsible for prosecution. My own belief is that, yes, we probably could but I think Justice can better describe it.

Senator CHAFEE. My real question to you is, are you saying you are supporting the Justice Department's position because that is the party line or because you believe it?

Mr. CARLUCCI. We believe that the Justice Department bill, with the use of good investigative techniques, would be an effective bill. We think that bill does accommodate some of the concerns that were raised subsequent to my testimony last time, concerns to which you have referred, and in the interest of getting legislation to deal with this critical problem, we are supporting the Justice Department measure.

Senator CHAFEE. You are happy with it, content with it?

Mr. CARLUCCI. We are content with it.

Senator CHAFEE. There is the second bell. We will have to recess now subject to the call of the chair for probably 20 or 25 minutes or a half hour. Ambassador, there is no point in your staying around. You can go. If we have any questions we will submit them to you for the record.

Mr. CARLUCCI. I thank you very much, Senator.

[Whereupon, a brief recess was taken.]

Senator CHAFEE [presiding]. Gentlemen, we will start. We have Mr. Keuch from the Justice Department here. Of course, the Justice Department has a profound interest in this because they are the people in the end who will have to do the prosecuting in the event we come up with a law.

Mr. Keuch is Associate Deputy Attorney General. We welcome you here.

## TESTIMONY OF ROBERT L. KEUCH, ASSOCIATE DEPUTY ATTORNEY GENERAL

Mr. KEUCH. Mr. Chairman and members of the committee, I am here today to discuss a serious problem in American intelligence operations: how to safeguard the confidential identities of the agents and sources who serve our country overseas.

Current proposals for a new criminal statute to punish unauthorized disclosure of agent and source identities are important and merit thorough consideration. I would like to begin today by discussing why we should think about a new statute at all, then describe the Department's proposed identities protection statute, and finally comment at some lengh on current Senate and House proposals on identities, especially S. 2216, and indicate in what respects we believe the Department's alternative proposal may be advantageous.

Identities protection is an area where we must steer carefully between two monumental interests: On the one hand, the protection of freedom of speech, the constitutional right of citizens to discuss and debate issues concerning politics and government, including issues of American foreign policy; and on the other hand, the need to protect the effectiveness of American intelligence gathering abroad.

The reasons for protecting the identities of covert foreign intelligence agents and sources are utterly clear in a world where a strong intelligence capability is essential to national security. Unauthorized disclosure of our undercover personnel and sources can measurably diminish the quality of our intelligence gathering, inhibit our ability to conduct covert operational activities and expose individual agents and sources to physical danger.

No source will cooperate with the United States if he believes he is in serious danger of exposure. Even for career intelligence personnel operating under relatively light cover, naming names puts them out of business because of loss of cooperation from foreign governments, hazards from local groups, and loss of camouflage effective against less sophisticated foreign intelligence services.

Wrongful disclosure of classified information concerning agent identities is considered by the Department of Justice to constitute a violation of the existing espionage statutes. These are in title 18 of the United States Code, sections 793 (d) and (e).

Those two sections would penalize any knowing identification of a covert agent or source of the Central Intelligence Agency or a foreign intelligence component of the Department of Defense if the disclosure is knowingly based on classified information and the individual had reason to believe the disclosed information could be used to the injury of the United States or to the advantage of any foreign nation.

Why then are the existing espionage statutes not enough? There are three problems which new legislation can usefully address in our view.

Publication as a prohibited means of disclosure: The first is to make explicit that publication of classified information in a newspaper, book, or magazine is prohibited just as much as any clandestine delivery of such information to an unauthorized person.

The Department has consistently taken the position that acts of publication in a newspaper, book, or magazine are covered by sections 793 (d) and (e) when based on classified information relating to the national defense, just as any other means of communication or transmission of classified information to unauthorized persons is so covered. That was our position in the *Pentagon Papers* case 9 years ago.

But the language of 793 (d) and (e) is not explicit; it speaks of wrongful attempts to "communicate, deliver, or transmit" information and at least one lower court judge in the *Pentagon Papers* litigation, the late Judge Gurfein, then of the district court, rules against us in holding this did not include newspaper publication. 328 F. Supp. 324, 329 (S.D.N.Y. 1971).

The Supreme Court did not resolve the issue when it heard the *Pentagon Papers* appeal. (See *New York Times* v. *United States*, 403 U.S. 713, 714 (1971); id. at 737–739 and n. 9 (White, J., concurring); id. at 720–722 (Douglas, J., concurring).)

Under these circumstances it seems to the Department prudent to settle the question for agent covert identities by explicit statutory language prohibiting, in so many words, the publication of identity information knowingly based on classified sources.

Avoiding extra elements of proof: Any prosecution under the existing espionage statutes requires proof that the disclosed information "relates to the national defense" and is information which the defend-

ant had "reason to believe could be used to the injury of the United States or to the advantage of any foreign nation."

While those elements are not difficult to establish as a theoretical matter in regard to any covert agent or source identity, the necessary proof at trial might require revelation of additional sensitive information concerning the agent or source's activities.

A statute that avoids those elements of proof would be fair to the individual yet would avoid the augmented cost to national security from additional revelations which must be weighed in deciding whether to bring any particular prosecution.

Use of inside methodology by former Government employees: The third important reason to consider new legislation is that we have all been witness to a new sort of problem in protecting covert identities: the possible use by former intelligence employees of their inside experience and expertise as a way of piecing together available information from the public record to establish and disclose numerous agent identities.

Potential problems in treating such acts of disclosure under existing espionage statutes include not only whether the act of publishing is covered and the added elements of proof the espionage statutes require, but also a question remaining from a case decided 35 years ago of whether the espionage statutes penalize compilation of materials from the public record.

The skeptical source on this last question is a Second Circuit Court of Appeals decision, *United States* v. *Heine*, 151 F. 2d 813 (1945), written by Judge Learned Hand, which held that assembling materials from public sources was not covered by the espionage statutes, even if performed with the worst intent in the world.

While one may question the persuasiveness of Heine's reasoning and while one certainly may question any extension of Heine to former intelligence employees who have gained inside expertise through their employment, it is nonetheless prudent to have an explicit statutory prohibition of public record compilations by former Government intelligence personnel that have the effect of disclosing identities.

The Department's proposed bill: After extensive review within the Department and consultation with representatives of the intelligence community, the Department of Justice concluded last fall that it should propose and support new legislation to punish unauthorized identification of covert intelligence agents and sources who serve overseas.

The Department has formulated a draft bill which we title the "Foreign Intelligence Identities Protection Act." A copy of the bill is attached to my prepared statement. In the judgment of Attorney General Civiletti, who reviewed the House Intelligence Committee bill, H.R. 5615, and the Department's draft proposal last November, the Department bill

* * * stands the best chance of providing an effective tool for the presecution of the most egregious disclosures, while avoiding potential first amendment difficulties.

As an aid to effective law enforcement, the proposal would enable the Government to avoid the several potential hurdles which exist in prosecutions brought under the present espionage statutes.

The first section of the Department's proposed bill would create a new criminal statute, 18 U.S.C. 801, to prohibit any identity disclosures knowingly based on classified information. Disclosure of information correctly identifying a covert agent or source by any person acting with knowledge that the disclosure is based on classified information would be punishable by up to 10 years and a $50,000 fine.

Persons gaining unauthorized access to classified information are covered as much as those with authorized access. Even if made abroad, disclosure by any American citizen or permanent resident alien can be prosecuted. An "attempt" provision would permit prosecution of any person who has taken a substantial step toward disclosure of identifying information with the requisite intent, even though detected before completing the offense.

The statute includes within the scope of its protection any covert agent, employee, or source who is currently serving outside the United States or who has served abroad within the last 5 years.

This part of the Justice Department bill would extend to classified identity information the same protection currently provided under Federal law for classified communications information and cryptographic information in 18 U.S.C. 798.

It removes any question about the covered means of disclosures, making crystal clear in its definition of "disclosure" that publication in a newspaper or book is as much prohibited as any other means of communication or transmission.

And paralleling section 798's protection of communications or cryptographic information, once it is shown that a defendant disclosed covert identity information which he knew to be based on classified sources, there is no further required proof involving potential revelation of sensitive information, that he had "reason to know" the disclosure could injure the United States.

The Department's bill contains a second provision U.S.C. 802, which would impose a powerful constraint on the class of current and former Government employees who have ever had access to information concerning covert identities in the course of their employment.

These persons would be prohibited from making any disclosures of agent or source identity even if the particular identification is based purely on speculation or is deducted from information compiled from public sources. Such a restriction on discussion of public available information is justified for this limited group of Government employees because their prior inside access to identify information can give them a special expertise in discerning how covers are arranged and a special authority and credibility when discussing covert intelligence activities.

The persons coming within the reach of this provision have occupied sensitive positions of trust within the Government and have been in a position to learn how the United States establishes cover for its agents abroad and conceals its relationships with foreign intelligence sources.

To permit such persons to piece together covert identities, even though the conclusions as to particular agents and sources are based on publicly available information, would pose a concerted threat to the maintenance of secret intelligence relationships.

In addition, conclusions drawn by such persons concerning intelligence identities will be imbued with a special credibility and authority stemming from the prior Government service that makes the identifications especially injurious to the security of personnel.

As a result, the Department believes that additional restrictions are justified and can be sustained for this class of persons even for identifications based on unclassified information. Under the Department's bill, a 5-year and $25,000 sentence could be imposed on any such person who knowingly discloses information that correctly identifies a covert agent or source or attempts to do so.

S. 2216/H.R. 5615. I would like to spend some time commenting on the identities protection bill introduced by Senator Moynihan as part of S. 2216, the Intelligence Reform Act of 1980. The same bill was introduced by Congressman Boland in the House as H.R. 5615.

I appeared before the House Intelligence Committee at the end of January to discuss the provisions of this bill and my remarks today will bear a suspicious resemblance to my remarks on that occasion.

We believe the Department's bill would serve the same end as S. 2216 and yet would avoid some areas of constitutional controversy and unnecessary difficulties for effective prosecution that S. 2216 might present.

S. 2216, unlike the Department's proposed legislation, does not seek any enhancement protection against the disclosure of classified information as such. Instead, both identity provisions contained in title V of S. 2216 would give uniform treatment to the disclosure of classified and unclassified information concerning agent identity.

The first section, 501(a) is quite similar to the second provision of the Department's bill, 802. Both specially limit disclosures by former Government employees who have had authorized access to inside information about identities.

These are the people who from their former position of trust reasonably owe a special duty of confidentiality even in their later handling of publicly available information. S. 2216, like the Department bill, would criminalize any disclosure of identifying information even based on publicly available sources by such former employees.

Our suggestions here are only limited ones. Section 501(a) differs in two ways from the Department's bill and in each we believe the Department's formulation is probably preferable on policy grounds.

First the Department bill covers any former employee who had inside access to identities information, whether or not the inside information was technically classified. In contrast, S. 2216 would cover only those employees who had authorized access to classified identities information.

Second, the Department bill would cover anyone who conspires with or aids and abets a former Government employee in violating his trust, whereas S. 2216 would exclude cooperating persons unless intent to impair or impede foreign intelligence activities could be shown. Under the circumstances we believe that the Department's broader coverage aimed at preventing breach of trust is more appropriate.

The second provision of S. 2216, section 501(b), is the provision that gives us pause. It would create a misdemeanor offense that covers any disclosure of identifying information by any person, including ordi-

nary citizens who never have served in the Government and never have had access to classified or inside inforamtion.

The prohibition of section 501(b) applies to disclosures even of publicly available information by any voter, journalist, historian or dinner table debater, if the disclosure is made "with the intent to impair or impede the foreign intelligence activities of the United States."

To fall within the prohibition a person need not realize that his disclosure of indirect information has the cumulative impact of identifying an agent or source but only have "reason to know." To fall within the prohibition a person need not have any special expertise, authority or credibility stemming from prior Government service.

Our reservations regarding section 501(b) are based both on policy and on constitutional uncertainty. In proposing a section of such breadth, S. 2216 marches overboldly, we think, into a difficult area of political, as opposed to scientific, "born classified" information, in a context that will often border on areas of important public policy debate.

Conversational speculation about whether foreign official X may have been a CIA source and whether we have covert operatives in country Y, ordinary discussions by citizens about foreign affairs and the nature and extent of our intelligence activites abroad, could come chillingly close to criminality under the standard of section 501(b).

A speaker's statement about covert activities could be punished even though they are not based on direct or indirect access to classified information, do not use inside methodology acquired by the speaker in Government service, and are unimbued with any special authority from former Government service.

Section 501(b)'s specific intent requirement that an individual must have acted with "intent to impair or impede the foreign intelligence activities of the United States" and that such intent cannot be inferred from the act of disclosure alone is not a fully adequate way of narrowing the provision, either in serving first amendment values or in facilitating effective prosecutions.

The specific intent requirement may itself have the effect of additionally chilling legitimate critique and debate on CIA policy because general criticism of the intelligence community could seem to corroborate an intent to impair or impede.

A mainstream journalist who occasionally writes stories based on public information concerning which foreign leaders are thought to have intelligence relationships with the United States may fear that and other stories by him critical of the CIA will be taken as evidence of an intent to impede foreign intelligence activities.

Speculation and debate concerning intelligence activity and actors would be seemingly more hazardous if one had ever taken a general position critical of the conduct of our covert foreign intelligence policy.

Taking the problem from the other direction, since any past or present criticism of the CIA might provide the something extra beyond the act of disclosure to prove specific intent, citizens may be unwilling to hazard a speculative discussion of covert intelligence policy for fear they will unwittingly name an intelligence source correctly.

The specific intent requirement also can hamper effective enforcement by creating a difficult jury question. Any person willing to gamble on the outcome of a prosecution can claim to a jury that his intent was to inform the American people of intelligence activities he believed to be improper or unnecessary rather than to disrupt successful intelligence gathering; the government may often find it difficult to convince a jury beyond a reasonable doubt that there was intent to impede in light of such a claim.

A related serious enforcement problem is that the specific intent requirement could provide an opening to defendants to use the trial as a forum to demonstrate alleged abuses by the intelligence community or to press for disclosure of sensitive classified information on the ground that it was relevant to showing their intent was to reform rather than disrupt. The Justice Department is concerned that the specific intent element will facilitate graymail efforts to dissuade the Government from prosecuting offenders.

In my appearance last January I was asked by the House Intelligence Committee whether the Department believes section 501(b) of H.R. 5615 and S. 2216 would be held constitutional. Our sincere answer has to be that we do not know.

Under the first amendment the viability of a criminal statute does not depend entirely upon how it is applied in a particular prosecution. Even if the conduct that the Government seeks to punish is not protected by the first amendment, the court may ask whether the statute is drafted so broadly that it could be applied in other cases to reach protected speech and by that overbreadth perhaps chill protected speech.

If the court so finds, it may hold the statute void. Though the doctrine of overbreadth is apparently now undergoing some change and may not carry the force it once had, as was witnessed in the Supreme Court's decision in *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), it still is a doctrine to be reckoned with.

In our view section 501(b) has the potential for constitutional and unconstitutional application. Given the current uncertainty regarding the overbreadth doctrine, I simply do not know whether a court would find this measure so substantially overbroad as to be unsuitable as a vehicle for prosecution in any and every case.

There are certainly other approaches, such as the Department's bill, which far more clearly fall on the safe side of the constitutional mark. The Department's approach is tailored not on the criterion of intent but rather on the wrongful use of inside information, whether it be classified information obtained from an inside source or inside methodology and expertise applied by former Government intelligence personnel to public record information.

This focus on inside access will we believe seem to courts more carefully fitted to the harm the Government is seeking to avoid and far less burdensome on the right of the general public to discuss policy questions concerning foreign affairs and intelligence activities.

We believe that the Justice Department bill will provide significant protection against any escalation of the undesirable actions of anti-intelligence groups over the last several years. Undisclosed methods of creating intelligence covers will not be subject to breach in a show-

and-tell display by irresponsible former Government employees unless they are willing to suffer a felony consequence.

By restricting the ability of persons who formerly occupied positions of trust within the intelligence community to abuse that service-acquired expertise, the Department bill will go far toward inhibiting the purposeless revelation of covert identities.

Other Senate and House bills: I have talked at length about S. 2216. Let me say a few words about the remaining bills which Chairman Bayh has informed me are presently being considered by the select committee.

Title VII of S. 2284, as introduced by Senator Huddleston, is substantially similar to section 501(a) of S. 2216 and to section 802 of the Department's proposal. My first suggestion above concerning section 501(a) is thus applicable here too.

As another minor matter, S. 2284's coverage of extraterritorial offenses is narrower than our bill or S. 2216, excluding permanent resident aliens who commit acts of disclosures abroad. S. 2284 also includes no penalty for those who act in concert with former Government employees, which we believe is an unwarranted omission.

S. 191, introduced by Senator Bentsen, is more or less akin to the first part of the Department's bill in that it deals with unauthorized disclosures of classified information.

From our point of view, however, it has several hampering limitations. It only covers persons who have had "authorized" possession of classified information, excluding those who gain unauthorized access to classified documents or information.

Second, it does not especially define the term "disclosure" to include "publishing" and thus does not resolve once and for all the Pentagon Papers question. Third, it covers only CIA identities and not the covert identities used by other defense intelligence agencies.

Amendment 1682 to the Criminal Code Revision, introduced by Senator Simpson, substantially embodies the two provisions of S. 2216 but with one radical difference: It would also restrict identity information concerning undercover agents and informants cooperating in domestic law enforcement activities with the Federal Bureau of Investigation, the Drug Enforcement Administration, and any other Federal law enforcement agency.

In our view, the problems of domestic law enforcement and of foreign intelligence operations are sufficiently dissimilar and the scope of the interests at stake so different that it is a mistake to try treating both at the same time.

Senator CHAFEE. Does Mr. O'Malley agree with that?

Mr. O'MALLEY. Yes. I would like to comment on that.

Mr. KEUCH. The final bill under consideration is title II of H.R. 6820, introduced in the House by Representative Aspin. Like the second provision of the Department's bill, Congressman Aspin's proposal covers present and former government employees.

H.R. 6820 would penalize any disclosure of inside identity information that was "acquired as a result of having authorized access to classified information." In addition, it would penalize any "use" of such inside information to publicly identify covert agents.

This appears to be quite similar in aim to section 802 of the Department's bill seeking to prevent former intelligence employees not only

from disclosing inside information but also from using inside methodology and expertise to assemble public record information.

However, while carefully targeted at the objectionable use of inside information, the Aspin bill may create some almost impossible problems of proof for the Government. It is one thing to show that a former employee had access to covert identity information in the course of his employment; the Department favors restricting all identity statements even when based on public information by such individuals on the rationale that their employment has probably given them special expertise in discerning covers.

It is much more difficult to prove in each particular case that beyond a reasonable doubt a former intelligence employee's sifting of publicly available information "used" his inside methodology or expertise, that is, could not have been performed by an outside person.

Because of the difficulties in proof created by Congressman Aspin's formulation, the Department prefers the broader coverage provided for in our draft bill prohibiting all knowing statements about identity by former insiders.

In light of our comments concerning the various bills under discussion today, the Department of Justice would recommend that consideration should be given to its current draft proposal. We would be happy to work with the staff of your committee to draft a bill which would avoid the problems we believe inherent in S. 2216 and several of the other proposals.

Senator Chafee, I have a personal letter from the Attorney General of the United States which I would like to enter as part of the record. This letter evidences his support for the concept of this legislation.

Dear Mr. Chairman, I would like to take this opportunity to express to you and to the committee the great importance that I attach to legislation to protect the identities of United States intelligence agents, and to share with you some of my personal views on the subject.

While we must welcome public debate about the role of the intelligence community as well as the other components of our government, the wanton and indiscriminate disclosure of the names and cover identities of covert agents serves no salutary purpose whatsoever. As public officials, we have a duty, consistent with our oath to uphold the Constitution, to show our support for the men and women of the United States intelligence service who perform duties on behalf of their country, often at great personal risk and sacrifice.

The proposed legislation drafted by the Department of Justice carefully establishes effective prohibitions on egregious disclosures of identities of intelligence agents, while recognizing essential rights of free speech guaranteed to us all by the First Amendment and the important role played by the press in exposing the truth.

In summary, I would like to join personally in urging the positive consideration and ultimate enactment of this important legislation. Sincerely, Benjamin R. Civiletti, Attorney General.

Mr. Chairman, that concludes my prepared statement. If you or the other members of the committee have any questions, I would be pleased to attempt to answer them at this time. Thank you very much.

[The prepared statement of Robert L. Keuch follows:]

PREPARED STATEMENT OF ROBERT L. KEUCH, ASSOCIATE DEPUTY ATTORNEY GENERAL

Mr. Chairman and Members of the Committee: I am here today to discuss a serious problem in American intelligence operations—how to safeguard the confidential identities of the agents and sources who serve our country overseas. Current proposals for a new criminal statute to punish unauthorized disclosure

of agent and source identities are important and merit thorough consideration. I would like to begin today by discussing why we should think about a new statute, at all, then describe Department's proposed identities protection statute, and finally, comment at some length on current Senate and House proposals on identities, especially S. 2216, and indicate in what respects we believe the Department's alternative proposal may be advantageous. Identities protection is an area where we must steer carefully between two monumental interests—on the one hand, the protection of freedom of speech, the Constitutional right of citizens to discuss and debate issues concerning politics and government, including issues of American foreign policy; and on the other hand, the need to protect the effectiveness of American intelligence gathering abroad.

1. THE PURPOSE OF NEW LEGISLATION

The reasons for protecting the identities of covert foreign intelligence agents and sources are utterly clear in a world where a strong intelligence capability is essential to national security. Unauthorized disclosure of our undercover personnel and sources can measurably diminish the quality of our intelligence gathering, inhibit our ability to conduct covert operational activities, and expose individual agents and sources to physical danger. No source will cooperate with the United States if he believes he is in serious danger of exposure. Even for career intelligence personnel operating under relatively light cover, naming names puts them out of business because of loss of cooperation from foreign governments, hazards from local groups, and loss of camouflage effective against less sophisticated foreign intelligence services.

Wrongful disclosure of classified information concerning agent identities is considered by the Department of Justice to constitute a violation of the existing espionage statutes. These are in Title 18 of the United States Code, sections 793(d) and (e). Those two sections would penalize any knowing identification of a covert agent or source of the Central Intelligence Agency, or a foreign intelligence component of the Department of Defense, if the disclosure is knowingly based on classified information and the individual had reason to believe the disclosed information could be used to the injury of the United States or to the advantage of any foreign nation.

Why then are the existing espionage statutes not enough? There are three problems which new legislation can usefully address, in our view.

*a. Publication as a prohibited means of disclosure.*

The first is to make explicit that publication of classified information in a newspaper, book, or magazine is prohibited just as much as any clandestine delivery of such information to an unauthorized person. The Department has consistently taken the position that acts of publication in a newspaper, book, or magazine are covered by sections 793 (d) and (e) when based on classified information relating to the national defense, just as any other means of communication or transmission or classified information to unauthorized persons is so covered. That was our position in the Pentagon Papers case nine years ago.

But the language of 793 (d) and (e) is not explicit—it speaks of wrongful attempts to "communicate, deliver, [or] transmit" information—and at least one lower court judge in the Pentagon Papers litigation, the late Judge Gurfein, then of the District Court, ruled against us in holding this did not include newspaper publication. 328 F. Supp. 324, 329 (S.D.N.Y. 1971). The Supreme Court did not resolve the issue when it heard the Pentagon Papers appeal. See *New York Times* v. *United States*, 403 U.S. 713, 714 (1971) ; *id.* at 737–739 & n.9 (White, J., concurring) ; *id.* at 720–722 (Douglas, J., concurring). Under these circumstances, it seems to the Department prudent to settle the question for agent covert identities by explicit statutory language prohibiting, in so many words, the publication of identity information knowingly based on classified sources.

*b. Avoiding extra elements of proof.*

Any prosecution under the existing espionage statutes requires proof that the disclosed information "relat[es] to the national defense" and is information which the defendant had "reason to believe could be used to the injury of the United States or to the advantage of any foreign nation." While those elements are not difficult to establish as a theoretical matter in regard to any covert agent or source identity, the necessary proof at trial might require revelation of additional sensitive information concerning the agent or source's activities.

A statute that avoids those elements of proof would be fair to the individual, yet would avoid the augmented cost to national security from additional revelations which must be weighed in deciding whether to bring any particular prosecution.

*c. Use of inside methodology by former government employees.*

The third important reason to consider new legislation is that we have all been witness to a new sort of problem in protecting covert identities—the possible use by former intelligence employees of their inside experience and expertise as a way of piecing together available information from the public record to establish and disclose numerous agent identities. Potential problems in treating such acts of disclosure under existing espionage statutes include not only whether the act of publishing is covered and the added elements of proof the espionage statutes require, but also a question remaining from a case decided 35 years ago of whether the espionage statutes penalize compilation of materials from the public record. The skeptical source on this last question is a Second Circuit Court of Appeals decision, *United States* v. *Heine*, 151 F.2d 813 (1945), written by Judge Learned Hand, which held that assembling materials from public sources was not covered by the espionage statutes, even if performed with the worst intent in the world. While one may question the persuasiveness of *Heine*'s reasoning, and while one certainly may question any extension of *Heine* to former intelligence employees who have gained inside expertise through their employment, it is nonetheless prudent to have an explicit statutory prohibition of public record compilations by former government intelligent personnel that have the effect of disclosing identities.

2. THE DEPARTMENT'S PROPOSED BILL

After extensive review within the Department and consultation with representatives of the intelligence community, the Department of Justice concluded last fall that it should propose and support new legislation to punish unauthorized identification of covert intelligence agents and sources who serve overseas. The Department has formulated a draft bill, which we title the "Foreign Intelligence Identities Protection Act." A copy of the bill is attached to my prepared statement. In the judgment of Attorney General Civiletti, who reviewed the House Intelligence Committee bill, H.R. 5615, and the Department's draft proposal last November, the Department bill "stands the best chance of providing an effective tool for the prosecution of the most egregious disclosures, while avoiding potential First Amendment difficulties." As an aid to effective law enforcement, the proposal would enable the Government to avoid the several potential hurdles which exist in prosecutions brought under the present espionage statutes.

The first section of the Department's proposed bill would create a new criminal statute, 18 U.S.C. 801, to prohibit any identity disclosures knowingly based on classified information. Disclosure of information correctly identifying a covert agent or source, by any person acting with knowledge that the disclosure is based on classified information, would be punishable by up to ten years and a $50,000 fine. Persons gaining unauthorized access to classified information are covered as much as those with authorized access. Even if made abroad, disclosure by any American citizen or permanent resident alien can be prosecuted. An "attempt" provision would permit prosecution of any person who has taken a substantial step toward disclosure of identifying information with the requisite intent, even though detected before completing the offense. The statute includes within the scope of its protection any covert agent, employee, or source who is currenly serving outside the United States or who has served abroad within the last five years.

This part of the Justice Department bill would extend to classified identity information the same protection currently provided under Federal law for classified communications information and cryptographic information in 18 U.S.C. 798. It removes any question about the covered means of disclosure, making crystal clear, in its definition of "disclosure", that publication in a newspaper or book is as much prohibited as any other means of communication or transmission. And paralleling section 798's protection of communications or cryptographic information, once it is shown that a defendant disclosed covert identity information which he knew to be based on classified sources, there is no further required proof, involving potential revelation of sensitive information, that he had "reason to know" the disclosure could injure the United States.

The Department's bill contains a second provision, 18 U.S.C. 802, which would impose a powerful constraint on the class of current and former government employees who have ever had access to information concerning covert identities in the course of their employment. These persons would be prohibited from making any disclosures of agent or source identity even if the particular identification is based purely on speculation or is deduced from information compiled from public sources. Such a restriction on discussion of publicly available information is justified for this limited group of government employees because their prior inside access to identity information can give them a special expertise in discerning how covers are arranged and a special authority and credibility when discussing covert intelligence activities. The persons coming within the reach of this provision have occupied sensitive positions of trust within the government, and have been in a position to learn how the United States establishes cover for its agents abroad and conceals its relationships with foreign intelligence sources. To permit such persons to piece together covert identities, even though the conclusions as to particular agents and sources are based on publicly available information, would pose a concerted threat to the maintenance of secret intelligence relationships. In addition, conclusions drawn by such persons concerning intelligence identities will be imbued with a special creditibility and authority stemming from the prior government service that makes the identifications especially injurious to the security of personnel. As a result, the Department believes that additional restrictions are justified and can be sustained for this class of persons even for identifications based on unclassified information. Under the Department's bill, a five year and $25,000 sentence could be imposed on any such person who knowingly discloses information that correctly identifies a covert agent or source, or attempts to do so.

S. S. 2216/H.R. 5615

I would like to spend some time commenting on the identities protection bill introduced by Senator Moynihan as part of S. 2216, the Intelligence Reform Act of 1980. The same bill was introduced by Congressman Boland in the House as H.R. 5615. I appeared before the House Intelligence Committee at the end of January to discuss the provisions of this bill, and my remarks today will bear a suspicious resemblance to my remarks on that occasion.

We believe the Department's bill would serve the same end as S. 2216, and yet would avoid some areas of constitutional controversy and unnecessary difficulties for effective prosecution that S. 2216 might present.

S. 2216, unlike the Department's proposed legislation, does not seek any enhanced protection against the disclosure of classified information as such. Instead, both identity provisions contained in Title V of S. 2216 would give uniform treatment to the disclosure of classified and unclassified information concerning agent identity.

The first section, 501(a), is quite similar to the second provision of the Department's bill, section 802. Both specially limit disclosures by former government employees who have had authorized access to inside information about identities. These are the people who, from their former position of trust, reasonably owe a special duty of confidentiality even in their later handling of publicly available information.

S. 2216, like the Department bill, would criminalize any disclosure of identifying information even based on publicly available sources, by such former employees. Our suggestions here are only limited ones. Section 501(a) differs in two ways from the Department's bill, and in each we believe the Department's formulation is probably preferable on policy grounds. First, the Department bill covers any former employee who had inside access to identities information, whether or not the inside information was technically classified. In contrast, S. 2216 would cover only those employees who had authorized access to classified identities information. Second, the Department bill would cover anyone who conspires with or aids and abets a former government employee in violating his trust, whereas S. 2216 would exclude cooperating persons unless intent to impair or impede foreign intelligence activities could be shown. Under the circumstances, we believe that the Department's broader coverage aimed at preventing breach of trust is more appropriate.

The second provision of S. 2216, section 501(b), is the provision that gives us pause. It would create a misdemeanor offense that covers any disclosure of identifying information by any person, including ordinary citizens who never have served in the government and never have access to classified or inside information. The prohibition of section 501(b) applies to disclosures even

of publicly available information by any voter, journalist, historian or dinner table debater, if the disclosure is made "with the intent to impair or impede the foreign intelligence activities of the United States." To fall within the prohibition, a person need not realize that his disclosure of indirect information has the cumulative impact of identifying an agent or source, but only have "reason to know." To fall within the prohibition, a person need not have any special expertise, authority or credibility stemming from prior government service.

Our reservations regarding section 501(b) are based both on policy and on constitutional uncertainty. In proposing a section of such breadth, S. 2216 marches overboldly, we think, into a difficult area of political, as opposed to scientific, "born classified" information, in a context that will often border on areas of important public policy debate. Conversational speculation about whether foreign official X may have been a CIA source and whether we have covert operatives in country Y, ordinary discussions by citizens about foreign affairs and the nature and extent of our intelligence activities abroad, could come chillingly close to criminality under the standard of section 501(b). A speaker's statements about covert activities could be punished even though they are not based on direct or indirect access to classified information, do not use inside methodology acquired by the speeaker in government service, and are unimbued with any special authority from former government service.

Section 501(b)'s specific intent requirement, that an individual must have acted with "intent to impair or impede the foreign intelligence activities of the United States," and that such intent cannot be inferred from the act of disclosure alone, is not a fully adequate way of narrowing the provision—either in serving First Amendment values or in facilitating effective prosecutions. The specific intent requirement may itself have the effect of additionally chilling legitimate critique and debate on CIA policy because general criticism of the intelligence community could seem to corroborate an "intent to impair or impede." A mainstream journalist, who occasionally writes stories based on public information concerning which foreign leaders are thought to have intelligence relationships with the United States, may fear that any other stories by him critical of the CIA will be taken as evidence of an intent to impede foreign intelligence activities. Speculation and debate concerning intelligence activity and actors would be seemingly more hazardous if one had ever taken a general position critical of the conduct of our covert foreign intelligence policy. Taking the problem from the other direction, since any past or present criticism of the CIA might provide the "something extra" beyond the act of disclosure to prove specific intent, citizens may be unwilling to hazard a speculative discussion of covert intelligence policy for fear they will unwittingly name an intelligence source correctly.

The specific intent requirement also can hamper effective enforcement by creating a difficult jury question. Any person willing to gamble on the outcome of a prosecution can claim to a jury that his intent was to inform the American people of intelligence activities he believed to be improper or unnecessary, rather than to disrupt successful intelligence gathering; the Government may often find it difficult to convince a jury beyond a reasonable doubt that there was intent to impede in light of such a claim.

A related, serious enforcement problem is that the specific intent requirement could provide an opening to defendants to use the trial as a forum to demonstrate alleged abuses by the intelligence community or to press for disclosure of sensitive classified information on the ground that it was relevant to showing that their intent was to reform, rather than disrupt. The Justice Department is concerned that the specific intent element will facilitate "graymail" efforts to dissuade the Government from prosecuting offenders.

In my appearance last January, I was asked by the House Intelligence Committee whether the Department believes section 501(b) of H.R. 5615 and S. 2216 would be held constitutional. Our sincere answer has to be that we don't know. Under the First Amendment the viability of a criminal statute does not depend entirely upon how it is applied in a particular prosecution. Even if the conduct that the Government seeks to punish is not protected by the First Amendment, the court may ask whether the statute is drafted so broadly that it could be applied in other cases to reach protected speech and by that "overbreadth" perhaps chill protected speech.

If the court so finds, it may hold the statute void. Though the doctrine of overbreadth is apparently now undergoing some change and may not carry the force it once had, as was witnessed in the Supreme Court's decision in *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), it still is a doctrine to be reckoned with.

In our view, § 501(b) has the potential for constitutional and unconstitutional application. Given the current uncertainty regarding the overbreadth doctrine, I simply do not know whether a court would find this measure so "substantially overbroad" as to be unsuitable as a vehicle for prosecution in any and every case. There are certainly other approaches, such as the Department's bill, which far more clearly fall on the safe side of the constitutional mark. The Department's approach is tailored not on the criterion of intent, but rather on the wrongful use of inside information—whether it be classified information obtained from an inside source, or inside methodology and expertise applied by former government intelligence personnel to public record information. This focus on inside access will, we believe, seem to courts more carefully fitted to the harm the Government is seeking to avoid, and far less burdensome on the right of the general public to discuss policy questions concerning foreign affairs and intelligence activities.

We believe that the Justice Department bill will provide significant protection against any escalation of the undesirable actions of anti-intelligence groups over the last several years. Undisclosed methods of creating intelligence covers will not be subject to breach in a show-and-tell display by irresponsible former government employees unless they are willing to suffer a felony consequence. By restricting the ability of persons who formerly occupied positions of trust within the intelligence community to abuse that service-acquired expertise, the Department bill will go far towards inhibiting the purposeless revelation of covert identities.

#### 4. OTHER SENATE AND HOUSE BILLS

I have talked at length about S. 2216. Let me say a few words about the remaining bills which Chairman Bayh has informed me are presently being considered by the Select Committee.

Title VII of S. 2284, as introduced by Senator Huddleston, is substantially similar to Section 501(a) of S. 2216, and to Section 802 of the Department's proposal. My first suggestion above concerning Section 501(a) is thus applicable here too. As another minor matter, S. 2284's coverage of extraterritorial offenses is narrower than our bill or S. 2216, excluding permanent resident aliens who commit acts of disclosure abroad. S. 2284 also includes no penalty for those who act in concert with former government employees, which we believe is an unwarranted omission.

S. 191, introduced by Senator Bentsen, is more or less akin to the first part of the Department's bill in that it deals with unauthorized disclosures of classified information. From our point of view, however, it has several hampering limitations. It only covers persons who have had "authorized" possession of classified information, excluding those who gain unauthorized access to classified documents or information. Second, it does not especially define the term "disclosure" to include "publishing", and thus does not resolve once and for all the Pentagon Papers question. Third, it covers only CIA identities, and not the covert identities used by other defense intelligence agencies.

Amendment 1682 to the Criminal Code Revision, introduced by Senator Simpson, substantially embodies the two provisions of S. 2216 but with one radical difference: It would also restrict identity information concerning undercover agents and informants cooperating in domestic law enforcement activities with the Federal Bureau of Investigation, the Drug Enforcement Administration, and any other Federal law enforcement agency. In our view, the problems of domestic law enforcement and of foreign intelligence operations are sufficiently dissimilar, and the scope of the interests at stake so different, that it is a mistake to try treating both at the same time.

The final bill under consideration is Title II of H.R. 6820, introduced in the House by Representative Aspin. Like the second provision of the Department's bill, Congressman Aspin's proposal covers present and former government employees. H.R. 6820 would penalize any disclosure of inside identity information that was "acquired as a result of having authorized access to classified information." In addition, it would penalize any "use" of such inside information to publicly identify covert agents. This appears to be quite similar in aim to section 802 of the Department's bill, seeking to prevent former intelligence employees not only from disclosing inside information but also from using inside methodology and expertise to assemble public record information. However, while carefully targeted at the objectionable use of inside information, the

Aspin bill may create some almost impossible problems of proof for the Government. It is one thing to show that a former employee had access to covert identity information in the course of his employment; the Department favors restricting all identity statements, even when based on public information, by such individuals on the rationale that their employment has probably given them special expertise in discerning covers. It is much more difficult to prove in each particular case that beyond a reasonable doubt a former intelligence employee's sifting of publicly available information "used" his inside methodology or expertise, that is, could not have been performed by an outside person. Because of the difficulties in proof created by Congressman Aspin's formulation, the Department prefers the broader coverage provided for in our draft bill, prohibiting all knowing statements about identity by former insiders.

In light of our comments concerning the various bills under discussion today the Department of Justice would recommend that consideration should be given to its current draft proposal. We would be happy to work with the staff of your Committee to draft a bill which would avoid the problems we believe inherent in S. 2216 and several of the other proposals.

Mr. Chairman, that concludes my prepared statement. If you or the other members of the Committee have any questions, I would be pleased to attempt to answer them at this time.

## APPENDIX—DEPARTMENT OF JUSTICE BILL

A BILL To prohibit the disclosure of information identifying certain individuals engaged or assisting in foreign intelligence activities of the United States

*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 "Foreign Intelligence Identities Protection Act."

### STATEMENT OF FINDINGS

Sec. 2. The Congress hereby makes the following findings:

(a) Successful and efficiently conducted foreign intelligence activities are essential to the national security of the United States.

(b) Successful and efficient foreign intelligence activities depend in large part upon concealment of relationships between components of the United States government that carry out those activities and certain of their employees and sources of information.

(c) The disclosure of such relationships to unauthorized persons is detrimental to the successful and efficient conduct of foreign intelligence and counterintelligence activities of the United States.

(d) Individuals who have a concealed relationship with foreign intelligence components of the United States government may be exposed to physical danger if their identities are disclosed to unauthorized persons.

Sec. 3. Title 18, United States Code, is amended by adding the following new chapter:

"Chapter 38—Disclosure of information identifying certain individuals engaged or assisting in foreign intelligence activities"

Section 800. Definitions. As used in this Chapter:

(a) "Discloses" means to communicate, provide, impart, transmit, transfer, convey, publish, or otherwise make available to any unauthorized person.

(b) "Unauthorized" means without authority, right, or permission pursuant to the provisions of a statute or Executive Order concerning access to national security information, the direction of the head of any department or agency engaged in foreign intelligence activities, the order of a judge of any United States court, or a resolution of the United States Senate or House of Representatives which assigns responsibility for the oversight of intelligence activities.

(c) "Covert agent" means any present or former officer, employee, or source of an intelligence agency or a member of the Armed Forces assigned to duty with an intelligence agency (i) whose present or former relationship with the intelligence agency is protected by the maintenance of a cover or alias identity, or, in the case of a source, is protected by the use of a clandestine means of communication or meeting to conceal the relationship and (ii) who is serving outside the United States or has within the last five years served outside the United States.

(d) "Intelligence agency" means the Central Intelligence Agency or any foreign intelligence component of the Department of Defense.

(e) "Classified information" means any information or material that has been determined by the United States government pursuant to an executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security.

Section 801. Disclosure of Intelligence Identities.

(a) Whoever knowingly discloses information that correctly identifies another person as a covert agent, with the knowledge that such disclosure is based on classified information, or attempts to do so, is guilty of an offense.

(b) An offense under this section is punishable by a fine of not more than $50,000 or imprisonment for not more than ten years, or both.

(c) There is jurisdiction over an offense under this section committed outside the United States, if the individual committing the offense is a citizen of the United States or an alien lawfully admitted to the United States for permanent residence.

Section 802. Disclosure of Intelligence Identities by Government Employees.

(a) Whoever, being or having been an employee of the United States government with access to information revealing the identities of covert agents, knowingly discloses information that correctly identifies another person as a covert agent, or attempts to do so, is guilty of an offense.

(b) An offense under this section is punishable by a fine of not more than $25,000 or imprisonment for not more than five years, or both.

(c) There is jurisdiction over an offense under this section committed outside the United States if the individual committing the offense is a citizen of the United States or an alien lawfully admitted to the United States for permanent residence.

Senator CHAFEE. Thank you, Mr. Keuch. That was very helpful. As I understand it, the reason that the Department did not prosecute Agee is based upon the doubt deriving from the Pentagon Papers case as to whether publication qualifies under the existing statutes.

Mr. KEUCH. Senator, that would be part of our concern in considering prosecution. The full reasons for the failure to date to prosecute Mr. Agee, I think, are matters that could be covered only in executive session. In response to your question, however, the concern whether or not we believe the passage of legislation such as the committee is discussing here would meet some of the concerns that have lead to the failure to prosecute Mr. Agee at this point, I think the answer to that has to be yes.

Senator CHAFEE. Let me see if I can get the difference between the prosecution of a former employee and the prosecution of one who conspires with and aids and abets a former employee in violating his trust. Let us take the situation of Agee who, with this expertise, hires some bright young college student who has never been near the CIA and who has never had access to classified information, but who Agee trains to use existing documents.

Can we nail that person? I refer to page 10 of your testimony.

Mr. KEUCH. I would say that the individual could be covered under the formulation of the Department's bill in two separate ways: First, if the methodology itself is, in fact, protected by the classification process—that is, the system and method of discerning agents is classified—then it seems to me the individual could directly if it could be established he was aware of that fact, be prosecuted under the first section of the Department of Justice bill.

The second is foreshadowed by the introduction to your question, that is the conspiracy or aiding and abetting section, the second part of the Department of Justice bill. If the prior employee is using methodology, using his background and expertise to provide a means by which the intelligence agents identity can be disclosed, the Depart-

ment would be in a position that that individual could be prosecuted as an aider, abettor, or conspirator with Mr. Agee under the second section.

We think there are two methods under the present formulation by which that individual could be reached.

Senator CHAFEE. You keep referring to it as the Department bill. Mr. Carlucci says his agency supports your bill. Why don't you call it the administration bill?

Mr. KEUCH. I think that is probably a better terminology. It is the administration's bill.

Senator CHAFEE. It is the administration's bill?

Mr. KEUCH. Yes.

Senator CHAFEE. Let us look at page 10. The Department bill would cover anyone who conspires with or aids and abets a former Government employee in violating his trust, whereas S. 2216 would exclude cooperating persons unless intent to impair and impede foreign intelligence activities can be shown. Under your bill, do we have to show that the former agent was using classified information?

Mr. KEUCH. No. It is our concept that the individual who is a former employee, who was in a position of special trust, is violating that trust and there is no need to show that the disclosure of the covert identity was based on classified information. Of course, there are provisions of the bill that would require that the identities that are being disclosed are, in fact, identities that the Federal Government and intelligence services are taking steps to protect.

The definition of "covert agent" in the bill has a number of requirements that indicate the individual must be presently in covert status or with regards to a source he must be protected by clandestine means of communication. My point is that it does not cover those individuals who are in fact not secret, covert agents.

Senator CHAFEE. If we had your bill on the books now, what could we do to Mr. Agee? Would we have to get personal jurisdiction over him?

Mr. KEUCH. No, sir; he is a citizen of the United States at this point. The bill would have extra territorial application to citizens and resident permanent aliens of the United States. Even though they were acting outside the United States, there would be criminal jurisdiction.

Investigations could be conducted and if proof could be developed, an indictment could be returned, and if Mr. Agee returned to the jurisdiction at any time, we could take effective criminal prosecution steps.

Senator CHAFEE. As a member of the Justice Department, how confident would you be in proceeding—forget Mr. Agee—against someone of his ilk under this statute? Would you feel that you had a reasonable opportunity to obtain a guilty verdict?

Mr. KEUCH. Yes.

Senator CHAFEE. In other words, you do not think that we are wandering into a new thicket here that is fraught with problems of constitutionality and objections of that nature?

Mr. KEUCH. One of the reasons the Department of Justice and the administration support the Department of Justice formulation is that we do believe that in legislating in this area we are raising constitu-

tional concerns, and there are questions, very important questions, of public policy. That is why we feel that the narrow, more limited approach taken, in our view, in the Department of Justice formulation is the preferable approach.

But we do believe we have met those constitutional concerns and claims, and do feel it would be an effective prosecutive tool.

Senator CHAFEE. I think we would be a pretty helpless nation if we are so tangled up with the first amendment that we are not able to obtain prosecution and convictions in a case as flagrant as this. I cannot believe that was the objective of the Founding Fathers when they included the first amendment.

Mr. KEUCH. I absolutely agree, Senator.

Senator CHAFEE. Mr. O'Malley, Mr. Keuch stated he did not think we really ought to include the FBI in the legislation? That is the comment on Senator Simpson's bill. I guess that the Justice Department believes that we would be getting into too much to try to cover the FBI situation in this legislation. What do you think?

## TESTIMONY OF EDWARD O'MALLEY, ASSISTANT DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Mr. O'MALLEY. Senator, I have a brief opening statement.

Senator CHAFEE. Go ahead.

Mr. O'MALLEY. Mr. Chairman and members of the committee, it is a pleasure to be here this morning to examine the provisions of S. 2216 and related measures designed to protect covert sources and employees from disclosure by employees or former employees and others who intend to damage the national security of the United States.

The last few years have been examples of those who seek to cause injury to our intelligence efforts and at that same time place the lives of our employees and sources at risk. There is no question that this issue must be addressed before additional damage occurs.

Mr. Chairman, Director Webster, in his recent appearance before this committee on the intelligence charter, supported a criminal statute to protect the security of individuals who are in a covert relationship with the United States and suggested that the charter version of identities protection include protection for FBI foreign counterintelligence and international terrorist sources and employees within the United States and abroad.

As you recall, Admiral Turner introduced the administration version of identities protection at the time of his testimony before the committee and the FBI fully supports this formulation.

I recognize that CIA personnel have received the brunt of harmful disclosures to date but there is no assurance that any intelligence entity will be exempt from these disclosures in the future. I find it difficult to distinguish between the potential harm from disclosure of a CIA employee or source and an FBI employee or source.

All of us in the intelligence community need this measure of deterrence so that our efforts will not be compromised. It is my suggestion that any proposal for protection of identities should include covert employees or assets of any U.S. intelligence agency or entity.

There has been some controversy about the application of some of the versions of the bill to coconspirators or aiders and abetters of the

principal, particularly as it may relate to a journalist who might publish the identities. The FBI does not support the proposition that these versions are aimed specifically at journalists or any other class of persons but I do not believe that any immunity should be granted from the criminal laws if in fact a conspiracy exists.

There is some concern that the provision of S. 2216, which requires the element of specific intent to impair or impede the foreign intelligence activities of the United States, may be an extremely difficult, if not impossible, standard of proof to meet.

It is my belief that a knowing disclosure based on classified information or current or former access to covert identities information should be the appropriate standards. As we all know this protection could be very significant to the intelligence efforts of the United States and to the lives of those whose affiliations are disclosed.

Mr. Chairman, that concludes my statement. I will be pleased to answer any questions the committee may wish to ask.

Senator CHAFEE. Mr. O'Malley, we have a little difference of approach here. As I understand your statement, you would like some protection, some coverage for your people, and your sources, and Mr. Keuch does not wish to go into that.

Mr. O'MALLEY. There is no difference of opinion here. The expression that Mr. Keuch used was "domestic law enforcement." I am distiguishing between the domestic law enforcement side of the FBI and the foreign counterintelligence area.

Mr. KEUCH. The administration and Department of Justice fully support the FBI's wish to be covered insofar as it relates to counterintelligence personnel.

Senator CHAFEE. You think your act does that?

Mr. KEUCH. Not at the present time but we would certainly agree with an amendment of the definition of covert agent to cover that class of FBI agent, source, or employee.

Senator CHAFEE. How complicated would that be?

Mr. KEUCH. Not complicated at all, sir.

Senator CHAFEE. But you do not yet have it. Do you have an amendment prepared?

Mr. KEUCH. No, sir, but I can have it to the committee staff very quickly. We would agree with that amendment and support it.

Senator CHAFEE. Here is my problem. I do not know whether I am representative of the whole committee on this. Yes, we would like to accommodate the FBI because the counterintelligence is an area obviously in which they deal as well. Whether that makes our problems more difficult in that it might insure that we would have to go to the Judiciary Committee for review I do not know.

I suppose that probably it would have to go there anyway. In any event, why don't you send up that amendment, maybe by the first of next week. Do you think you could get it up then?

Mr. KEUCH. Yes.

Senator CHAFEE. Show us where to incorporate it and we will do that.

These comments are very helpful, particularly your statement, where you refer to the bills presented both by Senator Simpson and Mr. Aspin, both of whom are going to be here this afternoon. So, I will

be able to discuss with them their approach and the approach that the administration feels is a more favorable one as regards their proposals.

We may have questions we want to get back to both you gentlemen on after we complete the hearings and hear from the opposition.

We thank you very much for coming. We appreciate your patience while we were absent for the vote.

Mr. KEUCH. Thank you, sir.

Chairman BAYH. We will recess now until 2 o'clock this afternoon.

[Whereupon, at 12:35 p.m., the committee was recessed to reconvene at 2 p.m. the same day.]

AFTER RECESS

[The committee reconvened at 2:25 p.m., Hon. Jake Garn presiding.]

Senator GARN. The committee will come to order.

We are happy to welcome as the first witness this afternoon our colleague Alan Simpson and Representative Charles Bennett. Do you have anything you would like to say, Senator Chafee?

Senator CHAFEE. I would like to welcome Representative Bennett, whom I had the great pleasure to work with when I was in the Navy Department. I am glad to see you once again.

Mr. BENNETT. Thank you, sir.

Senator GARN. Proceed.

Senator SIMPSON. Congressman Bennett and I have been speaking with each other. He has a time problem and I am certainly prepared to defer to him so that he might proceed if that is acceptable to the committee.

Senator GARN. Certainly.

## TESTIMONY OF HON. CHARLES E. BENNETT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. BENNETT. We are having a series of rollcalls.

I appreciate the opportunity to appear before your distinguished committee to give testimony on the need for legislation to provide criminal penalties for the unauthorized disclosure of information identifying individuals engaged in foreign intelligence activities.

These types of disclosures have no redeeming social value and have been made mainly by individuals who are openly undermining our Nation's vital intelligence efforts. Leading the list is Philip Agee, a former CIA employee, who has published the names of some 1,200 alleged CIA personnel and whose most recent book, "Dirty Work," purports to identify over 700 past and current CIA employees in Europe alone.

That these disclosures have been made with relative impunity and commercial success is a travesty and serves no purpose but to encourage others in the continuation and expansion of such destructive activity.

Such disclosures not only place in jeopardy the lives and safety of this Government's intelligence officers and their families as well as the lives and safety of those who cooperate with the United States in fulfilling its intelligence mission but also have an adverse effect on

the foreign intelligence and counterintelligence efforts of the United States.

The fact that the United States to date has not been able to fashion a legal remedy to put a stop to such disclosures has severely damaged this Nation's credibility in its relationship with essential foreign sources of intelligence.

The problem can be simply stated as follows: Current law is insufficient to cover the type of conduct that must be protected against; Congress has been unable to legislate a remedy; the disclosures continue to be made; the net result is a damaged intelligence capability and reduced national security.

A remedy is needed now. It is urgent that the 96th Congress clearly and compellingly demonstrate that the unauthorized revelation of the identities of our intelligence officers and those allied in our efforts will no longer be tolerated.

The bill I have introduced provides the needed remedy. Subsection (a) of H.R. 3762 would make it a criminal offense for any present or former officer or employee of the United States or member of the military to knowingly disclose to anyone not authorized to receive it information which identifies anyone not publicly associated with the U.S. Government's foreign intelligence or counterintelligence efforts and whose association therewith is classified.

Subsection (b) would criminalize the same activity as described above for subsection (a) but is focused on those who, even though not present or former U.S. Government officers or employees or military personnel, have or have had a position vis-a-vis the U.S. Government which granted them access to identifying information. The U.S. Government contractor or his employee is an example of the subsection (b) potential defendant.

Subsection (c), in turn, would make it a criminal offense for anyone not described in subsection (a) or (b) to knowingly disclose to anyone not authorized to receive it information which identifies anyone not publicly associated with the U.S. Government's foreign intelligence or counterintelligence efforts and whose association therewith is classified where, as a result of the disclosure, the identified individual's safety or well-being is prejudiced or where such disclosures damage the foreign intelligence or counterintelligence activities where this prejudices the individual's safety or adversely affects the foreign affairs functions of the United States.

The individual identified as being associated with the U.S. intelligence efforts, whether correctly or incorrectly, may be nonetheless prejudiced and his or her future effectiveness called into question as may be the role he or she plays in the foreign affairs functions of the U.S. Government.

In addition, my bill provides injunctive relief and makes provision for an in camera proceeding so that the court in camera may determine whether the information about to be disclosed is that for which a criminal penalty may be imposed.

The bill does not purport to criminalize disclosures made pursuant to a Federal court order or to either of the Intelligence Oversight Committees or disclosures otherwise authorized by Executive order or by directive of the head of any U.S. department or agency engaged in foreign intelligence or counterintelligence activities.

On the other hand, the bill would allow prosecution of accomplices or conspirators, including, if guilty, members of the news media in those cases of prosecution under subsection (c). The courts have consistently recognized that the first amendment freedom of speech does not prevent legislation such as I propose. Our distinguished forefathers who drafted the first amendment clearly never intended it to be a shield behind which those who would wish to undermine the intelligence efforts of the United States might stand with impunity.

Mr. Chairman, I urge my colleagues to take swift and sure action in the 96th Congress to pass legislation to accomplish the purposes I have outlined. I am optimistic that the 96th Congress will be remembered as one that dared to speak out against those who currently are working to destroy our intelligence agencies.

Thank you. I appreciate the courtesy shown me in allowing me to testify out of order.

Senator GARN. We are happy to have you today. We certainly agree there is a loophole as large as a barn door that is open and we must do something about these disclosures.

Senator CHAFEE. Do you have to dash out right now?

Mr. BENNETT. Within 2 or 3 minutes I do.

Senator CHAFEE. Let me ask you quickly: Where do things stand now on your bill or on the House version?

Mr. BENNETT. The testimony has been taken. It is being written up and I think it will be enacted but it has not yet passed the House. It has not come out of the Intelligence Committee but I am sure it will.

Senator CHAFEE. Will that have to be referred in any way to the Judiciary Committee?

Mr. BENNETT. It is my understanding it goes straight to the floor. My prognosis is that it is going to pass.

Senator CHAFEE. This year?

Mr. BENNETT. This year, yes, sir.

Senator CHAFEE. Thank you very much.

Mr. BENNETT. I appreciate both of you fine gentlemen with whom I have served in a military capacity. You are doing an excellent job.

Senator GARN. Mr. Simpson.

## TESTIMONY OF HON. ALAN K. SIMPSON, A U.S. SENATOR FROM THE STATE OF WYOMING

Senator SIMPSON. Thank you, Mr. Chairman and Senator Chafee. Obviously these are times of crisis and concern with the crises overseas and the flood of illegal immigration and unparalleled crises in drug traffic and insidious growth in organized crime. I think we should be doing everything possible to strengthen the ability of our intelligence and our counterintelligence and our Federal law enforcement agencies to function effectively and efficiently.

Senator CHAFEE. I wonder if you could speak into the mike a little bit. It is a little hard to hear.

Senator SIMPSON. I do not think that we can afford the luxury of handcuffing the CIA and the FBI and the DEA and other agencies with restrictions. I realize fully that I am on the scene only 18 months but, observing from afar when I was in private life, we have observed

with an almost morbid fascination the near destruction and dismantling of the American intelligence and counterintelligence capability and the crippling of this Government's ability to conduct undercover investigation. Obviously that is true or we would not be dealing with these many aspects of legislation.

This, of course, has come about in part because of the inability of the Justice Department to successfully prosecute those individuals who intentionally disclose the identities of undercover employees and agents and informants working in behalf of those Federal agencies which are charged with human source intelligence collection and law enforcement investigative functions.

Of course, one such international disclosure led to the assassination of our CIA station chief in Athens, Greece, and for the same reason now many foreign intelligence-gathering services which had previously cooperated quite willingly with us refuse to do so out of the simple fear that the fact of their cooperation will be made public or their sources of intelligence will be compromised.

I think we have been responsible in recognizing, however belatedly, the absolute necessity for simplifying the awesome, difficult task of the CIA by repealing the Hughes-Ryan amendment and legislating the appropriate oversight functions of the Intelligence Committees in Congress.

I am very pleased by the fact that so many other Senators and Congressmen have proposed legislation that would also provide for CIA agents the type of legal protection that, in my judgment, the proposed criminal code will provide. I join in support of these efforts.

I doubt, however, that members of this committee can predict if or when such legislation will be reported, and I am one who believes that the criminal code is here and should be considered on the floor of the Senate and it will be considered on the floor of the Senate before the end of this session.

So my amendment is also more appropriately considered in conjunction with the criminal code since it is a general criminal provision and it does not in any way deal with the substance of the CIA or the FBI or any other Federal agency in their daily operations. It merely serves to protect those CIA, FBI and DEA and other Federal agency personnel who are daily risking their lives in undercover capacities from having their undercover identities deliberately and maliciously disclosed by those who are often hostile even to the very idea of the existence of these agencies, or those who are in league with elements whose hostile or criminal activities threaten international harmony or domestic tranquility.

Domestic law enforcement agencies, including the FBI and the Drug Enforcement Administration, have also experienced great difficulty in recruiting agents and informants because those persons rightly fear simply that their lives are in danger.

Three years ago we witnessed the spectacle of the DEA's trying to prevent a local newspaper from publishing the names of DEA agents who were risking their lives working in undercover operations in the Washington metropolitan area. In order to prevent those and similar aberrations of logic from recurring, I have introduced this amendment to the proposed criminal code.

The amendment will make it a crime to deliberately reveal the identity of any undercover agent or a criminal offense to reveal the identity of any person giving assistance to a Federal law enforcement or intelligence agency. This amendment, I think, would assure that there will no longer be any doubt concerning this Government's willingness or ability to protect those of its citizens and the citizens of other nations who choose to risk their lives by providing their Government with the information necessary to protect our country from those who would seek the obstruction of our various freedoms.

The first portion of the amendment makes it unlawful for any present or former employee of any intelligence or law enforcement agency to use that position to reveal the identity of any undercover employee or agent of a Federal law enforcement or intelligence agency. This strict criminal liability for present or former employees of such Federal agencies, I believe, is entirely consistent with the voluntary contractual agreement that the employee and the employer enter into upon their appointment not to intentionally disclose classified or sensitive information.

This is very important, Mr. Chairman and members. In those instances where prosecution is sought against a third party who publishes such a disclosure, it would be necessary under this amendment for the Government to prove a premeditated intent to impair or impede the Federal law enforcement or intelligence functions of our Government.

The requirement to establish that intent protects the first amendment provisions which, I think, are so necessary to protect the news media in the legitimate conduct of their constitutionally guaranteed functions.

For too long, in my mind, it has been fashionable in certain self-styled circles to deride and pooh-pooh the need for a strong intelligence-gathering and counterespionage capability. It has similarly been, I think, the "in" thing to deride the FBI and other law enforcement agencies as somehow being out of touch with the will of the people.

I have found that, in my observations from afar, some, I think, have thought that by attacking and crippling the CIA and the FBI, they might ride that political tiger into high political prominence and office because of those elements who enjoy giving them an audience for those views.

So it took the kidnaping of our diplomatic personnel in Tehran and the brutal Soviet invasion of Afghanistan to suddenly convince this administration that perhaps there are those in the world who perceive restraint and desire for human understanding as a weakness to be exploited at any and every opportunity. If we desire to know their intentions before their actions, then we need a functioning CIA and not just a lifeless shell to tell us about it and necessarily do something about it.

In conclusion, Mr. Chairman, I appreciate your courtesy. I do not want in these remarks to imply that I unreservedly approve anything or everything that is done in the name of national security by the FBI or CIA during the past 30 years, but I do think that it is time to get rid of the orgy of guilt and self-flagellation through which we have now come to this end.

The errors have been exposed and corrected, and I think this able and very effective committee, your committee, in which I have tremendous confidence, stands ready to exercise the necessary oversight to assure that the abuses do not occur; but we can't continue to demand that the CIA and the FBI of the 1980's pay for the errors and omissions and the sins of those who preceded them in the 1950's and 1960's.

It is a new ball game and a far more dangerous world and we must face those realities. I feel this amendment is a small step in that direction. I solicit your assistance and will try to answer any questions I can about the amendment specifically.

Senator LEAHY. May I ask a couple of questions first since I have to go to a caucus at 3 unless you would like to go to the caucus, Jake, and I will stay here.

Senator GARN. He is talking about a Democrat caucus and I don't think I have too much influence.

Senator LEAHY. Probably as much as I have.

Let me make sure I fully understand the gist of what you are saying. I have said over and over again during my days in private practice of law, during my days as a law enforcement official and since I have been in the Senate that anybody is naive to think that a country as militarily powerful as ours could operate without a very effective and very good intelligence service.

In fact, if we had an absolutely perfect intelligence service with the ability to give us intelligence on any matter we wanted, to that extent it would be one of the greatest things possible for peace. We would not make military mistakes with perfect intelligence; we don't make foreign policy mistakes.

We don't live, however, in a perfect world and while we strive and will strive to have the best intelligence service conceivable, there will always be some areas of less than perfection. To the extent that we have less than perfection, we are diminished in our ability to carry out foreign policy and military policy, and so forth.

I also feel that, if we have an intelligence service that acts in a clandestine fashion and the operation requires acting in a clandestine fashion, it is also diminished to the extent that that clandestine action becomes public. While there is a lot that our intelligence services can do, and do, in the open, there is a great deal that they have to do in a secret fashion. Again, anybody would be naive to suggest otherwise or to want that secret activity made public. I think we are all in agreement on that.

Having said that, let us go back another step. What happens if somebody within the intelligence service leaks something to the press and the press publishes it? Let me go another step: The Justice Department knows who published it because it is in the morning paper but they have no idea who leaked it to the ones who published it. Who do they prosecute? Do they go after the one who published it or do they find out who leaked it in the first place?

Senator SIMPSON. Senator Leahy, under this amendment of mine, under the section on page 3, the prosecution must prove an intent to impair or impede the intelligence or law enforcement functions of the United States. That is a difficult burden of prosecution. Thus, in

my mind, this provision will not hinder the news media in the proper conduct of their constitutionally guaranteed right to inform the public.

The whistle-blower under this amendment is given confidentiality if he goes to your committee. Hopefully, then, instead of leaks and instead of that type of activity, they will begin to leak it to the right spot, and that is the intelligence committees of the House and of the Senate.

Senator LEAHY. As the principal author of the basic whistle-blowers provisions, my main reason for doing that was to make sure that the people did come to the appropriate oversight committees and the appropriate arms of the Government prior to going public, whether it is within the intelligence service or other agencies.

Senator SIMPSON. Let me add that whistle blowers under this amendment would still be able to use the news media but they must not disclose identities in establishing an impropriety. The news media can still choose to publish identities as long as their intent is to disclose such identities to reveal impropriety and not to impair and impede the legitimate intelligence-gathering capability of the agencies.

Senator LEAHY. Let me, as devil's advocate, go further. I am increasingly concerned, as we sit here in the Intelligence Committee, and we are very, very protective of the secrets that come before us. I know of no member of either party on the committee who would or has knowingly or wittingly revealed anything that has come before us in secret fashion, but we are constantly bothered by the fact that we will have a closed hearing and almost coterminously the information becomes public.

We can buy an afternoon edition of either one of the two local dailies in Washington or some of the others and find exactly what we are being told in the utmost secrecy, leaks obviously coming from within the administration itself. I have been here under two different administrations and it has happened with both of them.

There seems to be a kind of feeling on the part of someone in the White House or within the various agencies, as there was when President Ford was here, and I am sure there were back with President Nixon and President Johnson and everybody else, that on the one hand, they stand up and say with righteous indignation that they are concerned with sending anything to Congress because it may leak out and some of the news media will reprint that and say, "Yes, that is terrible up there," but then the same news media and the same agencies will quickly collaborate to leak something that will help to carry out a particular administration policy.

We have seen it just this year alone in several instances. We saw it following the situation in Iran. If there was ever a time when the public postmortem should have been withheld until everybody was back safely out of that country, it was then. In at least one instance, we could read more in the local papers about matters that had been given freely to the press in press conferences by the Defense Department than we were able to get up here in secret session.

What do we do in a situation where someone can legitimately argue that the net result of publishing something indeed impedes the activities of one particular intelligence agency? It has not been unknown to have rival intelligence agencies within the Federal Government

leaking things to the detriment of the others. We have seen that happen in the last 10 or 15 years in a number of instances. It has not been unknown to find one department of the Government leaking something to the detriment of the other.

I am not suggesting any solution to that. Do you see a problem with that?

Senator SIMPSON. It is something that I have given a lot of careful thought to, and that is why I have stayed with the specific word "identities." Identities are described in the amendment and they are important because people's lives are at stake. Leaks that have to do with letting something leak out with great glee and the revelation of some secret of Government or policy or action of the United States are bad enough; but when we leak that and a man's identity is at stake, a person who is involved in an operation for this Government that is clandestine, then, I think that must be protected above all else.

Just one little bit of philosophy of the Wyoming variety. There are persons who greatly enjoy doing that. They get a great visceral reaction out of leaking materials. There is a glee that accompanies that. That is what I have found in my travels here. You can look around this room and then wonder how you protect confidentiality just by the size of staffs that inhibit this particular location of the Earth.

That is the most significant reason why there will always be leaks, because there are those who are involved in the observation or the internal processes who really would like to dismantle some of these agencies and get quite a charge out of that because everything is high drama in this place. We thrive on that, apparently. There is a great issue of self-importance that goes with us in our jobs and the egos of our staff people.

It is something that you can leak to the New York Times, and when you are in Georgetown sucking the suds on Saturday afternoon, you can really tell them a story that is really something and certainly better than anything you would be doing around here.

Senator LEAHY. I don't think you will find anybody here engaged in that type of activity, but my concern still goes very much to those in our Government who don't do it so much gleefully but with very cold calculation, figuring that it can be done to advance a momentary policy of the Government or as part of interdepartmental or interagency rivalry.

I think that kind of activity is absolutely reprehensible and I find it especially so because those people probably have more of a sense of collegial politics. Members of this committee, for example, have not done that.

I see the names of agents published, especially those people in the field who are not the "James Bondian" super-trained war machine but could very well be an economist or language specialist or somebody else with a family abroad, who suddenly finds that the job they are doing is a dangerous one.

I have taken more than my share of time and I apologize.

Senator GARN. Senator Chafee.

Senator CHAFEE. Senator Simpson, I would like to thank you for your contribution here and your interest. You might be interested that previously we had testimony this morning from the Justice Depart-

ment in which they discussed the various bills, including yours, which they indicated an opposition to because your bill would not restrict the identity information to solely those involved with the CIA but would also include the FBI and DEA and other Federal law enforcement agencies.

Perhaps through your powers of persuasion and certainly with the support of the FBI the administration is now going to come in with a revision to the bill which will include protection for counterintelligence agents and, I suppose, also for the Drug Enforcement Administration agents, although I am not sure. So your views are becoming more accepted, which, I think, is encouraging.

Now, yours is an amendment to the criminal code provision. How would you envision that occurring? What is the status of the criminal code? I remember, when we dealt with it a year or so ago, all amendments were very, very strongly resisted by both Senator Kennedy and Senator Thurmond for fear that if one came in, then the floodgates would be open. So you had this unusual tandem of Senator Kennedy and Senator Thurmond standing together fighting off amendments from the right and from the left with equal skill.

First my question is: Where is the criminal code revision? Has it come out of the committee yet? If so, what chance does your amendment to that have?

Senator SIMPSON. Senator Chafee, the criminal code came out of committee—I can't recall the exact date—2 or 3 months ago and will be ready for floor action about July 23 of this year. One of the vexatious things to me—and I am a cosponsor of it—was that on the very last day of the markup, when we met in what I guess is the old barber shop—I felt that I got trimmed in there anyway—there were some 200 amendments presented. I may be wrong on the figure.

I guess they were weighing them instead of counting them, because a bale of amendments was presented at that time which no one had any opportunity to properly view and there was a great deal of what we are all aware of here, tradeoff and so on.

But within that we didn't deal with the proper addressing of criminal penalties for intentional disclosure. We did not deal with labor extortion being outside the scope of the criminal code. We did not deal with the death penalty. We did not deal with decriminalization of marihuana. We did not deal with abortion. All of the hot stuff went to the bottom.

I can understsand that process, but those things are going to come up in the debate because they are very important parts of the criminal code. Hopefully this can be presented as a reasonable approach. I have no pride of authorship here. Well, I did do it, and my staff, but I don't care whether it comes out as Simpson's effort or whatever, if we just address the issue.

So I intend to present it on the floor and hopefully get it to a vote or you can adapt it or meld it into whatever might be appropriate coming out of here.

The thing I found, Senator Chafee, is that I was conducting the hearings with regard to the FBI charter, which is where I came to my interest here, suddenly realizing that the lifeblood of the FBI is

the informant, not the charter. There is no more appropriate intelligence-gathering device than the informer. Sometimes they are paid; sometimes they are not. But that is the guts of the FBI.

When we are finding that they are refusing to do things because of the Freedom of Information Act and because their cover is blown, you dry up the richest source of law enforcement. That is where my interest came from.

I think Judge Webster is doing a tremendous job with the FBI. I think we will find as time goes on he was probably one of the finest at it because he has a great judicial background and temperament of protection of persons and civil rights and first amendment rights.

Senator CHAFEE. Thank you very much. I originally came into this reluctant to get any further afield than the CIA, which is, of course, the agency that we on this committee deal with closest. After hearing your testimony and the testimony this morning of Mr. Keuch from the Justice Department and Mr. O'Malley from the FBI, I am persuaded that we should adopt the approach you have taken, not going with the criminal code necessarily—we will see how that comes out; I see a lot of problems there—but incorporating protection against disclosure of identites of individuals involved in those agencies, the DEA, and others.

I think you have made a very valuable contribution. We appreciate it.

Senator SIMPSON. Let me say, John, after sitting next to you for 18 months, I know you are a reasonable man who will listen, and I appreciate that very much. I mean that.

Senator CHAFEE. Thank you, Mr. Chairman.

Senator GARN. Thank you very much, Alan. We appreciate your testimony.

Senator SIMPSON. Thank you for your courtesy. I appreciate the opportunity.

Senator GARN. Is Willliam Colby here?

Senator LEAHY. The next witness, then, will be John F. Blake, president of the Association of Former Intelligence Officers.

Mr. Blake, I will note that I am going to be leaving. That is not in any way a comment on your testimony, which I will read. I do have to go to a caucus at 3 o'clock. I know that any questions I want to ask will be asked by Senators Garn and Chafee. If there are any questions that have not been covered, I might submit some questions to you to get your feelings on them.

Mr. BLAKE. Thank you, Senator.

Senator GARN. Mr. Blake, you may proceed. If you don't want to read the entire statement, we will be happy to put the entire statement in the record. You may summarize in any way you would like.

## TESTIMONY OF JOHN F. BLAKE, PRESIDENT, ASSOCIATION OF FORMER INTELLIGENCE OFFICERS, ACCOMPANIED BY JOHN WARNER, LEGAL ADVISER

Mr. BLAKE. If I may, I would like to identify John Warner, legal adviser of the association, a former intelligence officer, who is sitting with me today.

Gentlemen, the American sense of fair play is a universally known and respected characteristic of our people and their Government. There exists no need to cite evidence to this body to support the fairness thesis. It is in connection with this spirit of fair play that I would like to postulate my observations to you today as you undertake your study of the various legislative proposals designed to protect the identities of intelligence officers and agents who are serving their Government under cover.

Allow me to develop my position. What is involved is this: The Congress of the United States, through the National Security Act of 1947 and the annual appropriations process, authorized and directed the conduct of the foreign intelligence functions by this Government.

The executive branch, through the CIA and other elements of the intelligence community, implements the congressional authorization and undertakes the recruitment of men and women to perform intelligence tasks. Included are individuals whose duties consist of acquiring information in foreign countries by the use of clandestine methods. Some of these countries will have hostile attitudes toward the United States. Some of these countries will give safe haven to international terrorists who are hostile to the United States.

The intelligence agencies, in pursuit of their mandated missions, will post many of these U.S. Government employees abroad in a guise other than their true purpose. To develop the necessary cover requires much imagination, the cooperation of other entities in the Government as well as in the private sector and it is an expensive and time-consuming process.

Our Government, the employer, expects much from these people. They will have to perform not only their cover function which is the ostensible reason for being at a foreign location but also, most importantly, they must perform their clandestine intelligence mission.

The day is just so long for all of us, but for this group of people it cannot be long enough. The performance of these dual roles can come at only some expense of normal family life and deprivation of their own leisure time.

Because of the high degree of selectivity exercised in picking these people and because of their extraordinary degree of motivation and dedication, the Government is blessed by their services and they quietly and effectively pursue their chosen lot. These people are exposed to risks to their persons as well as to their families. It is a fact that some have been injured, some killed, some murdered, and some have been arrested and jailed.

Up to this point of posting people abroad the Government has acted as a responsible and honorable employer. But at this point the matter of fair play comes to the fore. It is at this point that the Government must say, in honesty, that there is just one thing it cannot do for these people.

The Government cannot take steps to prevent any American citizen from undoing all it has done to establish proper cover abroad for these employees so that the missions for which the Government hired and is paying them can be performed. It is forced to say the following to each:

It makes no difference concerning the taxpayers' expense in hiring and training you;

It makes no difference what diplomatic difficulties may be encountered by your exposure as an intelligence operative;

It makes no difference that you and your family may have to be preemptively removed from your local scene;

It makes no difference that your son or daughter is only three months away from high school graduation;

It makes no difference that you cannot immediately reoccupy your house in the United States;

It makes no difference that you must immediately sever all intelligence contacts you have established in order to protect them;

It makes no difference that your career, and all the time and expense involved in creating it is now perhaps ended because of your exposure; and, lastly and most seriously,

It makes no difference that not only your own personal safety and welfare is perhaps fatally put in jeopardy abroad but also the lives of your wife and children who accompany you to your foreign station.

In sum, all that our Government can say to its overseas intelligence employees is that a witting American whose political biases are contrary to the politics of his country can expose you abroad so that your life and that of your family may be forfeited. And the Government today can do absolutely nothing about it but say: "Farewell, thou good and faithful servant."

And that employee, quite properly and correctly, has the right to ask: "But where is the American sense of fair play?" And that, gentlemen of this committee, is, in my opinion, what this matter of the protection of intelligence identities is all about.

Of equal importance, of course, is the fact that the furtherance of the intelligence mission of the U.S. Government is impaired and impeded. But the gut issue is that the U.S. Government put these people in their perilous positions and that the U.S. Government, in its own enlightened self-interest as well as in a sense of fairness, owes them protection which to date it has seen fit to provide.

This is not the first time that this issue has been aired in the halls of Congress. In January of this year the House Permanent Select Committee on Intelligence held hearings on H.R. 5615, the "Intelligence Identities Protection Act." I testified in favor of that legislation and I heard those who opposed it. I am submitting for the record today a copy of my statement read before the House committee.

[The statement follows:]

STATEMENT OF JOHN F. BLAKE BEFORE THE HOUSE PERMANENT SELECT COMMITTEE, JANUARY 30, 1980

Mr. Chairman and members, I wish to thank you for requesting me to appear before this committee on behalf of the Association of Former Intelligence Officers, AFIO, to give our views on H.R. 5615, the Intelligence Identities Protection Act. I note that this bill is sponsored by all of the members of the House Permanent Select Committee on Intelligence.

We in AFIO fully support this bill and urge early committee action looking toward enactment into law. The need for this legislation is clear and compelling. It is appalling that the names of confidential employees, agents and informants of our intelligence services can be spread about or published with impunity. There must be a law to deter those who would disclose those identities. Not only is the safety and well-being of such employees and agents put in jeopardy, but there is significantly harm to ongoing intelligence activities.

In the aftermath of excessive charges and certain ill-founded allegations of the mid-1970's, this legislation is a concrete step to enhance the effectiveness of intelligence. Against the backdrop of world events, positive action will be seen as well timed. Furthermore, the men and women engaged in intelligence activities will see this as a positive effort to protect them in their daily work and the resulting boost in morale will be immeasurable.

Many times legislative objectives are shared, but the proposals when drafted cause difficulties. We recognize the considerable effort and care which have gone into the specific wording of H.R. 5615. We wish to express our appreciation to the Subcommittee on Legislation which sent to AFIO in March of last year preliminary drafts dealing with the subject matter of H.R. 5615. Prior to forwarding our written comments, AFIO representatives met with your staff for candid discussions. We believe these efforts were worthwhile and produced an excellent result.

The problem, Mr. Chairman, addressed by your committee today is both very real and very current. I should like to call your committee's attention to the most recent edition of the Covert Action Information Bulletin, December 1979–January 1980. This bulletin is published by Covert Action Publications, a District of Columbia nonprofit organization. Its board of directors is listed on page 2, and prominent among those mentioned is Mr. Philip Agee. A regular feature of this bulletin is a section entitled "Naming Names and Sources and Methods." In this particular, most recent issues, three pages are devoted to names. The introduction to the names says, in part, and I quote, "As a service to our readers, and to progressive people around the world, we will continue to expose high-ranking CIA officials whenever and wherever we find them."

In this particular issue to which I make reference, 16 names are mentioned. I will not address myself to the accuracy of the identifications because to do so would only give aid and comfort to the enemy. The potential harm to the individual and his family stands the same, whether identification is correct or not. The impediment to the work of the Government, let alone the potential damage to the individual and his family, screams forth if the identifications are correct.

I would also call your attention, Mr. Chairman, to the latest edition of Counter Spy magazine, identified as volume 4, No. 1, but undated. This piece of journalism ceased publication for a period but now has resumed. In its current issue, under the title of "U.S. Intelligence," it lists the names of 34 individuals resident in five different foreign countries as U.S. intelligence operatives. Everything I said previously about names in the Covert Action Information Bulletin applies with equal force to the situation here. In the two issues of these magazines alone you have 50 potential examples of U.S. Government employees who today are bereft of protection from their Government. Swift passage of H.R. 5615 would remedy this egregious wrong.

In conclusion, Mr. Chairman, I would merely state that the membership of the Association of Former Intelligence Officers is grateful to this committee for its collective sponsorship of legislation so necessary to protect the best interests of this country and to protect the welfare of those who in circumstances that can be both trying and dangerous, labor in the best interests of the Republic. We hope the enlightened leadership shown here by the Congress will also be followed in matters pertaining to the protection of sources and methods, modifications to the Hughes-Ryan Amendment of the Foreign Assistance Act of 1961, and more reasonable treatment of sensitive information under the amendments to the Freedom of Information Act.

The main opposition argument was based on the assertion that legislation such as we are discussing today would be an abridgement of the first amendment rights. I was not impressed or persuaded by that argument. The first amendment does not give any of us unfettered rights. In the absence of a conflagration, I have no right to scream "Fire" in a crowded theater. In the absence of documented proof, I have no right to question the parentage of a fellow citizen. I have no right to tell an untruth to this committee or on a court of law.

Identical language on this subject is included in S. 2216 and H.R. 5615, to which previous mention has been made. There are basically two provisions in each. The first makes it a crime for one having had

access to classified information to disclose the identity of an undercover officer or agent to anyone not authorized to receive classified information.

The second provision makes it a crime when whoever, with intent to impair or impede the foreign intelligence activities of the United States, discloses to anyone not authorized to receive classified information the identity of an undercover officer or agent of an intelligence entity.

It is this second provision which has caused cries of anguish from an assorted group of critics, some of whose motives are open to question. They assert that first amendment rights include the right to publicize the identities of undercover intelligence officers and agents. We flatly disagree with this interpretation of the Constitution. The Government has a right and a duty to conduct intelligence activities.

I have shown earlier that a truly enormous effort is put forth to recruit and put in place trained intelligence officers. It is a misreading of the Constitution to say that the Government is powerless to preserve the laboriously constructed network of intelligence officers and agents and powerless to provide a degree of protection for the physical safety of the persons concerned.

As I said earlier, first amendment rights are not absolute. The critics of this legislation are composed of some of those who raised howls of first amendment rights when the Government sought in court to enforce contract rights against Marchetti and Snepp. CIA went to the courts to have determined the question of first amendment rights. And the courts, all the way to the Supreme Court, held that the Government was not powerless to protect its secrets and that its contracts of secrecy were enforceable in the courts and that first amendment rights were not being infringed.

If you believe that the identities of intelligene officers and agents should be protected with criminal sanctions from disclosure, I urge passage of this legislation. I do not believe we should be moved by seemingly specious arguments hiding behind the assertion of first amendment rights. I say: Let the courts rule on the constitutional issue. The critics have raised their issues before and have lost in the courts.

What redeeming social purpose is served by permitting, in the name of the first amendment, a person intending to impair the foreign intelligence activities of the United States to publicly disclose the identity of an undercover intelligence officer or agent, thus knowingly subjecting such officer or agent and his family to the risk of physical harm or death?

It is simply incredible to us that such action is believed to come under the umbrella of the first amendment. I say again: Let us attempt to protect our intelligence activities and the persons engaged in them with appropriate legislation and then let the constitutional question be placed before the courts.

In closing, I ask each one of you to answer honestly whether, in today's world, you would place yourself in the position I have previously described and in which the Government places its intelligence employees today. I ask you if you would have peace of mind if your son or daughter placed themselves in that position. I ask you if you

can reasonably expect patriotic but intelligent Americans to continue to assume and bear this intolerable and unfair burden.

I believe it is time we Americans, both individually and in our institutions, realize that we live in a dangerous and complex world. I believe it is time we give as much weight to our obligations and responsibilities as we do to our rights and freedoms. I believe it is time we practice what we preach—namely, the American sense of fair play. For if we fail to do it in this instance, we may well contribute to a future situation where we will be unable to speak of, much less exercise, the American sense of fair play. Thank you.

Senator GARN. Thank you, Mr. Blake. I appreciate your testimony very much. I certainly agree with it. As I have said before, I think legislation must be enacted to solve these problems. Senator Chafee.

Senator CHAFEE. Thank you, Mr. Chairman. Mr. Blake, I would like to thank you also for that very well reasoned statement. As you know, we are working hard on this problem. I think the pendulum has swung the other way. You have seen the pendulum swing a long way in the other direction and now we have what we hope will be final legislation passing both branches dealing with repeal of Hughes-Ryan and then getting on with this legislation. Perhaps you heard Mr. Bennett give a very optimistic prognosis of what will happen in the House.

Mr. BLAKE. I did.

Senator CHAFEE. I was not sure that much could be accomplished this year because of the heavy schedule in the Senate and I do not know what we can accomplish, but nonetheless we are going to try in this committee to come up with a bill and get it out.

I don't know whether you heard the testimony of Mr. Keuch this morning.

Mr. BLAKE. I did not, sir; I was not present.

Senator CHAFEE. He stated that there is a question on disclosure under the currently existing law, whether that covers publication. I am talking about existing law. I guess it is section 793 of U.S.C. 18.

Mr. BLAKE. Would that be the National Espionage Act?

Senator CHAFEE. Yes. He stated that the problem with that was the question of whether it pertained to publication and they had this in the Pentagon papers and one lower judge ruled that it did not cover newspaper publications. After all, this "covert action bulletin" will qualify as a publication.

Mr. BLAKE. I believe so.

Senator CHAFEE. So that is based on the defense that was used in the *Pentagon Papers* case.

Have you known of any prosecutions that have taken place in the CIA under the Espionage Act?

Mr. BLAKE. Sir, if I may, I would like to turn that question to Mr. Warner, whose previous incarnation was General Counsel of the CIA.

Senator CHAFEE. Mr. Warner.

Mr. WARNER. Yes, there have been some prosecutions arising out of employees' acts in CIA and there have been prosecutions under both 793 and 794, title 18. However, these cases were clearcut espionage cases—that is, trafficking with the Soviets. That is what those laws

were designed to deal with. They were not designed to deal with leaks and disclosures of the kinds we are talking about. The fact that there have been no prosecutions of people who have named CIA officers shows the complete ineffectiveness of those statutes to deal with the problem.

Senator CHAFEE. Have you looked at the Justice Department's bill?

Mr. WARNER. Yes, sir.

Senator CHAFEE. Give me your thoughts on that.

Mr. WARNER. Certainly it is a step in the right direction. My analysis of the Justice Department's bill as contrasted with the provisions of S. 2216 and H.R. 5615 leads me to believe that the latter two bills afford a more useful remedy in this kind of situation.

Senator CHAFEE. As you know, the Justice Department's bill is now the administration's bill supported by the CIA itself.

Mr. BLAKE. I understand that, sir.

Senator CHAFEE. So that gives it a powerful push.

Mr. WARNER. Of course, it does.

Senator CHAFEE. I think there will probably be some tendency in the committee to go with a bill that is acceptable to the administration, particularly the Justice Department. I am not sure that it will but it gives it a tilt. Ambassador Carlucci indicated he supported it. I was wondering how much trouble you found with it.

Mr. WARNER. Sir, again I have worked with Bob Keuch over the years and I understand his views and the views of the Department of Justice very well. It is just that I feel that the provisions, again, of S. 2216 and H.R. 5615 have a slightly broader reach than the current administration bill. Therefore I would rather see it. I would not be adverse to seeing the Justice Department bill going on the books but let us go as far as we can. I do not believe there are valid reasons for not going the few steps further as in H.R. 5615 and S. 2216.

Senator CHAFEE. I do not want to pin you down too much but could you give us exactly what you mean by "in going further?" What are your specific references?

Mr. WARNER. I have in mind the second provision basically of H.R. 5615 and S. 2216 when whoever, with intent to impede our foreign relations, publishes or discloses to unauthorized persons the name of an individual under cover is subject then to criminal penalties without ifs, ands and buts. All you have to do is establish intent to harm or impede foreign intelligence activities of the United States.

I believe that is enough. What more do we want? If a man tells his name because he wants to destroy the CIA, let him go to jail.

Senator CHAFEE. We want to bear in mind always the possible around here.

Mr. WARNER. I agree, sir.

Senator CHAFEE. We don't want to get bogged down in a long fight that might make us come up with nothing. We are going to hear tomorrow from the representatives of the press, the ACLU and so forth. I will be interested in their reaction both to the Justice Department bill and to S. 2216.

Thank you very much, gentlemen. We appreciate your taking the time to give us your thoughts. They are very helpful. Thank you, Mr. Chairman.

Mr. BLAKE. Thank you, Mr. Chairman.

Senator GARN. Thank you very much.

John STOCKWELL. If you are prepared to proceed we will be happy to hear your testimony at this time and then have you respond to questions.

## TESTIMONY OF JOHN STOCKWELL, AUTHOR OF "IN SEARCH OF ENEMIES"

Mr. STOCKWELL. Thank you, Senator Garn.

Senator GARN. I assume you would like your full statement included in the record.

Mr. STOCKWELL. I would like my full statement included in the record. I must draw to your attention the fact that the CIA read my statement because I am under injunction not to publish and it was ruled that a statement to your committee was a publication. Therefore on page 12 there are portions that are deleted by the CIA.

Senator GARN. We will be happy to include your full statement in the record.

[The prepared statement of John Stockwell follows:]

PREPARED STATEMENT OF JOHN STOCKWELL BEFORE THE SENATE SELECT COMMITTEE ON INTELLIGENCE

Senator Bayh, members of the select committee for intelligence. Gentlemen. I would like to express my appreciation for having this opportunity to testify on a bill which I consider to be of monumental importance to the free functioning of the United States' system of government, and one that affects me personally.

First, let me introduce myself. I am John Stockwell, the son of an engineer who worked for a chemical plant during World War II and then went to Africa to build a hydro-electric plant for a mission hospital in the Belgian Congo, a man who after retirement carried a sticker on the bumper of his car which read, "I support my local police." With the help of a Naval ROTC scholarship, I worked my way through the University of Texas and took my commission in the Marine Corps, serving 3 years active duty as a parachute reconnaissance officer. Altogether I served 4 years in the Naval Reserves and 15 years in the Marine Corps Reserves, until I was summarily dropped from the Marine Corps reserve program when I left the CIA in March 1977, and criticized it publicly.

In 1964, I voted for Senator Barry Goldwater in the presidential election, and I joined the Central Intelligence Agency as a clandestine field case officer. I was fully convinced I was joining the elite of our foreign service and that our activities would serve to keep the world free from tyranny. For the next 12½ years, I served under cover for the CIA, running operations on four continents; for six of my seven CIA tours I managed other undercover agents. I was promoted regularly at the head of my peer group and on December 18, 1975 I was awarded by William Colby the CIA's Medal of Merit for my conduct during the collapse and evacuation of South Vietnam.

However, during my 12 years of service I had become increasingly aware that the CIA was not the elite foreign policy action arm I had thought it to be. In three tours in Africa, where I rose to chief of station, I became convinced that we were running operations for their own sakes, because it was our function as case officers to run operations. What we did had little if anything to do with United States' national security. Our activities were illegal, unnecessary, disruptive of the local political situations, and they discredited the legitimate diplomatic efforts of the State Department officers in the embassies from which we worked.

I was not alone in my conclusions. Simultaneously the Macomber report, an in-depth review of the State Department's effectiveness in managing our foreign affairs was reaching the same conclusions about the CIA that I was. The Macomber report concluded that the CIA's presence in Africa was not justified in terms of our foreign policy interests.

In 1975, I was part of the CIA's dishonorable, cowardly, bungling evacuation of South Vietnam in which it failed to produce reliable intelligence of what was happening and it disowned any responsibility for the lives of three thousand of its own agents.

Also in 1975, in Langley, Virginia, I served as chief of the CIA's Angola task force and participated in the management of a secret war in which 10,000 lives were lost. I watched first hand as the directors of the CIA and of its Angola program willfully and deliberately planned the lies and cover stories that would be used to thwart the efforts of the press in general and very specifically the committees of the Senate and the House of Representatives to determine what the CIA was doing in Angola. I watched CIA managers speak contemptuously of the Senate, and heard case officers laugh about the things they had done to thwart this committee's investigations.

At exactly the same time the CIA director, William Colby, was testifying to the Senate Select Committee for Intelligence that "we have taken particular caution to ensure that our operations are focused abroad and not at the United States to influence the opinion of the American people about things from the CIA's point of view" (Senate Select Committee Study, April 26, 1976, p. 129), the Angola Task Force was doing exactly the opposite. With the full knowledge of the National Security Council, we were funding and guiding paid propaganda agents who were working in New York and Washington, D.C., planting fabricated propaganda stories directly and indirectly in United States newspapers and national television shows to present to the American public and the Members of Congress a distorted view of the issues and factions in Angola.

By 1976, I was thoroughly skeptical of the worth of the CIA operations I had been part of and I was troubled by the CIA's arrogance. I felt that its secrecy was primarily intended to keep the American people and their elected representatives from knowing the full and often shocking truth of what it was doing, whereas it was callously insensitive to the victims of its overseas activities. It was indifferent to the security and safety of its own agents and activities abroad. Behind the CIA's cover stories and the often altruistic rationales of its operations lay numerous activities that could only be described as crimes against humanity. Even pragmatically, its secret activities had in the long run been counterproductive to our national security interests.

I felt that if the American people knew the full truth about what the Central Intelligence Agency was doing in their name and with their tax dollars, then and only then would they be qualified to judge whether or not they wanted their Government to include such an organization, involved in such activities.

Again, I was hardly alone in my skepticism of the CIA. In 1975, the press and the Congress focussed on the CIA's 27-year history. They probed and documented a seemingly endless succession of covert activities that ranged from felonious, to violent, to depraved. Coups, assassination plots, massive programs to deceive the American people, and even long term programs of experimentation on unwitting American citizens with debilitating, mind-altering drugs were uncovered. And even as the Senate Select Committee for Intelligence was probing its past crimes, CIA directors were actually seeking to thwart its investigations and they were lying to the Congress to cover up ongoing covert activities.

In the spring of 1977, I sincerely believed I had the constitutional right of freedom of speech, the right to criticize my own Government. I believed I had the responsibility to expose the CIA when I saw that it had set itself above the law, the Congress, and the Constitution. On April 10, 1977, I published a letter in the Washington Post documenting my reasons for leaving the CIA. In June 1977, I testified for 5 days to two Senate committees, including this one, reporting full detail of how they had been manipulated by the CIA during the Angola War. In May 1978, I published a book, "In Search of Enemies," documenting my observations.

I sincerely believed in the wisdom and determination of the Senate to respond to its findings about the CIA, including my revelations, by subduing it and bringing it firmly back in line with what is legally and morally acceptable under the laws of this country.

In February 1980, the Supreme Court ruled in the case of *U.S.* v. *Frank Snepp* that I had been wrong in presuming that my responsibility to the Constitution and constitutional rights superseded the CIA's secret oaths and codes. The court decided that it was proper for Frank Snepp to be punished by having to pay to the Government all of the proceeds of his book, "Decent Interval." The ma-

jority argued that its action was necessary in order to protect the confidentiality essential to the functioning of our intelligence organizations, thereby enacting new law, usurping the powers of the Congress.

On March 10, the CIA sued me under the *Snepp* precedent, claiming the right to the proceeds of my book. That its motive was purely political rather than to protect sources or methods is proven by the fact that it never accused either myself of Mr. Snepp of revealing any secrets. Its objective was to muzzle us and to intimidate other potential critics.

My astonishment and confusion were increased when I learned that instead of moving to punish the CIA for its past activities, instead of moving to enact legislation that would protect the cherished rights of the American people, instead of developing legislation to restore to Mr. Snepp and me our freedom of speech and our rights to our just enrichment for our courage and career sacrifices to publish meaningful books about epic historic events, the Senate was considering legislation that would give the CIA legal protection for a continuation of its deplorable activities. It is as though I had gotten on the wrong plane and landed in some other country than the one I had served and believed in for nearly all of my adult life. It seemed to confirm the accusations of our enemies that I had discounted as propagandistic, that we were in fact a callous nation, hypocritical in our pretensions of highest regard for human rights and civil liberties, and insensitive to the lives and needs of the rest of the world.

You are assembled today to hear testimony on a bill that would make it a criminal offense to publish the identities of CIA secret agents or information about secret activities that might spotlight the agents involved. This bill would clearly infringe on the most cherished and unique American freedoms: Freedom of speech and freedom of the press. In so doing it would restrict the very freedoms for which our forefathers fought and died, and our fathers, and some of ourselves, the basic principle of government that has made us unique among major nations of the world.

This monumental sacrifice of our cherished freedom is not being considered as a desperate measure to save the United States from some cataclysmic threat, but rather to bolster an intelligence organization that has a long and continuing record of arrogance, incompetence, cruelty and irresponsible activities.

There is no question in my mind that the founders and directors of the CIA sincerely thought of themselves as honorable men. Their original objectives were sincere and patriotic. They set out to protect this Nation from what they thought to be a grave international challenge. But somewhere along the course of years their motives were corrupted by the nature of what they were doing, by their very zeal, until they actually betrayed the principles they set out to defend. There was little honorable about the activities discovered by this committee in 1975.

The CIA has failed dramatically in its primary objective, of stopping international communism. In 1947, when the CIA was founded, there were perhaps two countries whose governments were based on Marxist ideologies. Today there are 30 or 40 and country after country continues to turn to Marxism for relief from the dictatorships and brutal, oppressive police forces the CIA has installed, supported. and trained.

In the Hoover Commission report of 1954, the CIA's credo was enunciated, that the United States must duplicate the activities of our enemies (the KGB), that it must: "learn to subvert, sabotage and destroy our enemies by more clever, more sophisticated and more effective methods * * *" Toward that objective, the CIA has succeeded. It has persuaded much of the world that, whatever we may proclaim about human rights, the United States in fact regularly engages in activities as brutal and subversive as the Soviet Union. The United States' credibility as the true leader the peace, democracy and human rights is vastly diminished from 1947, because of the CIA's activities.

The resentment and hostility that is currently directed toward the United States in nearly every corner of the world is well deserved because of the CIA's bloody, secret operations. It has engineered and sponsored violent enterprises in dozens of countries. The toll of victims, people killed as a direct result of those activities, exceeds 300,000. The indirect victims, people who died in situations that had escalated from CIA covert operations in Vietnam, Cambodia, Laos, would be counted in the millions. More tragic yet, the 300,000 dead include a trivial number of enemies of the United States—perhaps a dozen KGB officers, possibly 2 or 3 percent Communist part cadres. The rest were people: Vietnamese. Cambodians, Kurds, Angolans, who had the misfortune of being caught in the CIA's line of fire.

And yet, incredibly, this committee is now considering a bill that would reward the CIA for its brutality, incompetence, and violation of American law by giving it unprecedented license for its operatives, at the expense of our unique and cherished liberties.

The KGB and international communism have never succeeded much in their assaults on the United States and its envied way of life, but the CIA and its covert actions have dragged us into major wars, the first military defeat in our history, and a series of policy debacles that have included Chile, the Bay of Pigs, Iran, Angola, Brazil, Indonesia . . . the list is almost endless. And now, in these hearings, this country is threatened with the abrogation of our most basic and cherished freedoms, not because of anything the KGB has done, but on behalf of the CIA.

On a recent television show the CIA Director, Stansfield Turner, referred to individuals who had exercised their freedom of speech to criticize the CIA as "traitors." He made an impassioned plea for a law—this bill we are discussing today—to protect the identities of his agents. In the same breath he admonished that in the Soviet Union such people (as his traitors) would never be permitted to do the things they had done. Who, I ask you, is the traitor to the American way of government?

Admiral Turner and Deputy CIA Director Frank Carlucci like to point out that in other countries, England and France, a citizen would never be permitted to publish expose's of the secret police. This is exactly the point that makes the United States different than those countries. We control our police forces and not vice versa. The French SDECE and surete have monstrous reputations for brutality, kidnapping and killing private citizens with immunity, and censorship of the press. It is difficult to have a private conversation with a British journalist without their bringing up stories of reprehensible activities of British Government officials against the people that go unpublished because of their official secrets act. If Admiral Turner and Mr. Carlucci are uncomfortable with the American way, perhaps they would like to emigrate to England or France or Russia where they would find protection for the things they want to do out of sight of public scrutiny.

By curtailing the freedom of the press, the bill would seriously jeopardize the delicate balances of power and healthy controls on which our system of government depends. Had it been in existence 6 years ago, Woodward and Bernstein would not have been able to bring out the Watergate revelations because they would have pinpointed the identities of secret agents. Frank Snepp would never have been able to publish his book, nor I mine. Of course, the CIA would have preferred that we not be permitted to publish such critical books—freedom of speech is the anathema of a secret police—but these books contributed important knowledge about recent events in Southeast Asia and Africa, events that affected the lives of thousands of Americans in myriad personal and professional ways. It is a constitutional right of the American people to have access to such information. However, rather than adjust to the American system, the CIA has instead exercized its enormous leverage and power to punish Frank Snepp, me, Victor Marchetti, and Philip Agee, and to gain support for the bill you are now considering.

I personally have chosen not to publish CIA officers' names simply to expose them. However, on June 16 two individuals associated with the Space Research Agency were sentenced to jail for the illegal sale of arms to South Africa. They had been intially exposed by journalists, then investigated by U.S. Customs Officers. I cooperated with those investigations but if the bill had been in existence, I would not have been able to do so and the crime might have gone unpunished.

The implications of this bill are mind boggling. For example, if a citizen were to learn of CIA involvement in something monstrous, say a plot to kill a president or drug/sex experimentation on American citizens, he might be unable to go public with the information without risking indictment and a jail sentence.

Moreover, the objective of the bill is clearly not to protect the safety of secret agents as its proponents claim, but rather to gain an important weapon for the CIA to use in silencing its critics in its domestic fight for existence.

In fact, the CIA itself is flagrantly careless of the identities of its own agents and the very principle of cover is routinely accepted by people inside the CIA as a superficial mechanism. Their agents are widely and well known in the communities in which they live and function to be CIA. This dates back to experi-

ences of Allen Dulles in World War II when he found it advantageous to be widely known to have intelligence connections (*see* p. 7, "The Craft of Intelligence." Allen Dulles). Since then CIA directors have annually toured the world, holding regional meetings in hotels with case officers that were much like public sales conferences. [Deleted.] In Kinshosa the Chiefs of Stations traditionally required all members of their station to attend cocktail parties that were given for the host government police officials. In Rome, both official cover and non-official cover officers openly met with well-known CIA officers. [Deleted.] In Vietnam, CIA officers up country, drove green Jeeps; in Saigon, they drove yellow Datsuns with sequential license plates. In the real world of overseas communities it can never be otherwise as our own embassies' local employees and members of the diplomatic communities watch our operatives come and go, year after year.

This disregard of cover was tolerated because it posed no serious hazard to CIA operatives' lives or their ability to function as case officers. In its 30-year history, the CIA has had three dozen officers die violent deaths in the line of duty. This is fewer than the State Department lost to assassinations and kidnappings, and it is a remarkably small number considering the hot war situations, especially in Southeast Asia, in which thousands of CIA officers functioned freely. Well over 1,000 CIA officers' names have been published in recent years, and not one has been killed as a result. The CIA made much out of the death of its Chief of Station, Richard Welch, in Athens, December 19, 1975. They even used assassination to attack and discredit this committee's hearings that were being conducted at that time. However, the facts are now clear: Welch was killed because he was flagrantly and widely known to be CIA and because the CIA was resented for is subversive activities in the Mediterranean and not because his name had been published in a local newspaper.

The victims of CIA activities nearly always know they are under CIA assault—but because of the might and strength of the United States they are often helpless to do much about it, and the CIA rarely worries much about their knowledge.

However, the CIA puts an enormous amount of energy into deceiving, propagandizing and manipulating the people who can stop its depradations, namely the American people and their elected representatives. For example, the CIA's prolonged wars against China and Cuba, its 7-year covert operation in Vietnam that dragged us into that war, were carefully shielded from public awareness at home, while massive propaganda campaigns were waged to incite the American people to anger against the Chinese, Cubans, and Vietnamese.

The bottom line for all arguments defending the CIA seems to be that its clandestine operations are essential to our national security; therefore it must be coddled, forgiven everything, and protected, if necessary by making a radical change in our cherished constitutionally guaranteed freedoms. The now popular argument that modern times are more dangerous and threatening than ever before, therefore dictating the absolute necessity at any price of keeping the CIA in action and protecting its secrets, is specious. It is only to say that we have less courage and determination than our forefathers did when they saw our capital sacked by the British in 1812, or faced the Kaiser and then Hitler, without signing away our unique constitutional heritage.

And a system of government that depends on such a brutal organization for its survival may have lost its moral right to exist and function. This is equally true of the United States as it was of Nazi Germany with its Gestapo, Stalinist Russia with the KGB, or Pol Pot's regime in Cambodia.

However, I personally do not believe it to be true that the CIA's covert activities are essential to our existence. To the contrary, had the CIA never existed, had the United States stubbornly and courageously restrained from emulating the KGB and sincerely committed itself to the advancement of democracy, peace, human rights, and open commerce, there is little doubt that the nation would be stronger today, our credibility in the international forum would be greater, and the world that is now teeming with bitter conflict would be a safer place in which to live and function.

We must never yield our cherished freedoms to the CIA. If it or any other organization cannot adapt to the American system of government, then it and not the system must be modified or even abolished.

Gentlemen, it is your sacred responsibility to reject this bill. Take whatever measures are necessary to protect the American people and the less fortunate

people of the world from the depradations of such an organization. Reject this bill and exercise your responsibility to defend our cherished system of government of, by and for the people.

Senator CHAFEE. Mr. Stockwell, it will be necessary to keep that microphone close there. It is a little hard to hear in here.

Mr. STOCKWELL. Senator Chafee and members of the Select Committee on Intelligence, I want to express my appreciation for being able to come and talk to you about this bill that I think we all agree is of great importance. It is one that indirectly affects me perhaps more than some other people who are testifying. It is called in the press sometimes the Agee bill.

I have in common with Phil Agee that I quit the Government, quit the CIA and published a book without prior review. The difference between me and Agee is that I have chosen not to reveal names of agents and he has, and this is a significant difference. So perhaps the bill is not aimed directly at me.

Nevertheless I am greatly concerned about this bill for the license it will give CIA operatives and the degree to which it would prevent what I consider to be the very healthy and constitutionally guaranteed function of journalists and citizens to investigate what their officials are doing. Obviously if the bill had been in existence, for example, 6 years ago, Messrs. Woodward and Bernstein would not have been able to reveal the Watergate revelations without committing a crime.

Senator CHAFEE. I do not mean to interrupt. You have to substantiate that a good deal more than just giving the statement. I would not want the record to show that the lack of interruption indicates assent in anyway on the part of this committee to that statement.

Mr. STOCKWELL. Certainly.

As I understand this bill, it would provide that it was a crime to reveal an intelligence agent's name or information that would pinpoint agents' identities. Clearly the Woodward and Bernstein revelations revealed activities that had been done by intelligence agents.

Senator GARN. Certainly it would not have prevented them from doing their story. Possibly it could have inhibited them from giving names. That would hardly change the character of their story. But please continue.

Mr. STOCKWELL. In my case, for example, my book would not have been published under this law because you could not discuss the Angola situation without talking about the liberation leaders involved.

Senator GARN. You must understand that some of us don't think your book should have been published.

Mr. STOCKWELL. On the other hand, I think my book presented a detailed and accurate account of events that happened in a part of the world that this Goverment claimed to be of national security importance. There were thousands of Americans who were affected by it, their professional lives, by events that happened in Angola and they will be affected in the future by what happened in Angola.

I submit that the Constitution is quite clear on the matter of freedom of speech. I did have the right to write that book according to the Constitution, not according to the CIA. I also submit that it is the right of the American people to have access to such information that does concern them.

Senator CHAFEE. Why don't you go ahead with your statement; then we will question you when you are through.

Mr. STOCKWELL. My statement is 14 pages and, of course, you and your staff can read it later. I think we can move directly to the point that I can contribute that, that other people who are testifying cannot contribute so much.

I was a clandestine case officer for 12½ years. I lived under cover. I did CIA operation on four continents. For six of my seven tours, I managed other case officers who were under cover and therefore I think it is fair to say that I know how cover functions.

What I would like to suggest to you is that the entire mechanism of cover is a great deal more superficial than you might realize. It is not intended to be nor has anyone in CIA ever pretended that the 95 percent of its officers are, in fact, safely and completely covered when they go overseas. They live and work mostly out of embassies in overseas posts but everyone around them knows they are CIA.

In most countries in the world where there is a large CIA presence, they have a separate installation for the CIA people. In Vietnam, for examplee, we were the Office of the Special Assistants. All CIA operatives in the country drove green jeeps as opposed to gray and other jeeps that other members drove. In Saigon we drove yellow Datsuns. We had sequential license plates.

Allen Dulles wrote in his book "The Craft of Intelligence" that he found it to be of advantage for people to know he was CIA. This was the first thing my first chief of station overseas told me. He said:

> Forget everything you learned in training about cover. You want people to know you are CIA so that they will come to you, they will report to you, they will know where to go with their information.

In this environment the CIA has functioned, and this is true in every continent I served in, with the officers widely known to be CIA and finding it to be an advantage to be known that you are CIA, and very little effort to cover up CIA identity, playing to it rather than against it.

The reason it functions this way and the CIA perimtted it to function this way is because it was not dangerous for CIA people to be known as CIA and, in fact, I believe that the record is clear that there have been a thousand or so CIA agents' names revealed in the last few years, which is obviously very offensive to the CIA; but the fact is: Not one of those agents has been killed as a result of having the name revealed.

That, in sum, is what I came here to tell you because I do not believe that you are having this situation, the superficiality of cover, explained to you clearly by the proponents of this bill.

Senator GARN. Does that conclude your statement?

Mr. STOCKWELL. Yes, sir.

Senator GARN. Mr. Stockwell, it is a little bit difficult for me to handle this because I have such disgust for your activities and your book and your disloyalty to this country.

Mr. STOCKWELL. I cannot let anyone challenge my loyalty to this country. I have been awarded medals. I have served in three wars for this country. I was 19 years in the Marine Corps Reserve. I am sorry I cannot let you challenge my loyalty to this country. The CIA is not the United States of America.

Senator GARN. I just did, Mr. Stockwell—you can deny it—I just did challenge your loyalty to this country because of the harm that you and the Snepps and others who, in the name of profit or whatever else your motivation is, have done this country. That is the end result. Deny it if you want.

I have my freedom of speech to say that I do think you have been disloyal to this country, this Congress, the people of this country, and you have harmed the legitimate intelligence-gathering activities of this country.

I want to give you a little bit of background. Yes, you have been a station chief. Yes, you were in the CIA for 12 years. But you totally ignore that for the last 4 years there has been an oversight committee that, I would suggest, knows a great deal more about the CIA in total than you do because it is compartmentalized, and we do happen to know and have had for 4 years knowledge of and approve all covert, clandestine operations. They do not go on without the approval of this committee.

Mr. STOCKWELL. Approve operations or are you briefed about operations?

Senator GARN. We have the right to express our disapproval.

Mr. STOCKWELL. You are not talking about stopping operations CIA purposes to run. You can express disapproval but you cannot stop it.

Senator GARN. We can, and I will not get into circumstances of how we can. You have a diverse committee. If you look at the names around here, we are deliberately very broad-based from liberal Democrats to conservative Republicans. There have been no leaks from this committee as far as I know. There has been considerable cooperation, and I make the point of the diverse political interests from Pat Leahy to a Jake Garn or Birch Bayh or Barry Goldwater and others.

I am proud of the job that we have done. We know every line item now that didn't used to be known. There were problems in the CIA, greatly magnified by the press and some of your colleagues as if that was a majority of the CIA operation, defaming, hurting morale there.

But for the last 4 years there is intimate knowledge and oversight by this committee and the one in the House. Yet your book was written in 1977 or 1978, and I have read your book, and from a great deal of testimony that you would never be privy to, and would not have knowledge as a station chief or an individual operator, the exaggerations in your book are incredible to where they are leading.

Now that I have gotten that off my chest, let me ask you some questions.

Mr. STOCKWELL. OK, but I have to comment. I was station chief. At one point I was also Chief of the Angola Task Force sitting on the Subcommittee of the International Security Council and reading every document that had to do with the Angola situation. I testified to this in the Senate at length in 1977.

I would be delighted for you to have hearings about the Angola operations. I conducted every detail in this book and I testified to this committee, chapter and verse, cable and date.

Senator GARN. You stated in a telegram to this committee asking to testify:

* * * Numerous CIA agents publish regular columns and articles and over 100 are currently writing their memoirs in various forms.

I would suggest that that comment in your telegram even strengthens the need for the legislation that you oppose. I doubt very much if you seriously think that more than 100 former agents can write books and talk about methods, sources and names without destroying the effectiveness of the CIA and our legitimate intelligence gathering activities.

I am sure you are very well aware, as you talk about it in your opening statement, the Supreme Court in *Snepp* v. *the United States*, and I quote:

> The government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service. Even in the absence of an express agreement the CIA could have acted to protect substantial government interests by imposing reasonable restriction on employees' activities that in other context might be protected by the First Amendment.

No one will fight harder for the first amendment than I and this Supreme Court is hardly known as a conservative court with some of the Justices there, but that is their statement. Yet you are here in the cloak of the first amendment that you can say anything that your conscience tells you to say without regard to the security of this country or the lives of some of your fellow former agents.

The Court held that if fiduciary relationship existed between CIA employees and the agency, that when a former agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA, with its broader understanding of what may expose classified information, confidential sources could have been identified and harmed.

Even in the dissenting opinion, the Court points out that the Government may regulate activities of its employees that would be protected by the first amendment in other contexts. I repeat: the Court correctly points out that "the Government may regulate certain activities of its employees that would be protected by the first amendment in other context."

With all your background and experience—are you a constitutional lawyer?—you have decided you are the supreme law and you have made this decision and the Supreme Court is wrong? Is that what you are telling me?

Mr. STOCKWELL. I wrote my book before that ruling. At the time I wrote that book, I really thought we had freedom of speech in this country. I had been trained that way. The wars that your forefathers and ours had fought for were for freedom of speech, freedom of the press. You are supporting a bill curtailing that freedom. You are setting up a few individuals, including yourself and 10 others, who will decide whether or not the people have these freedoms.

You are doing this not to save this Nation from some great holocaust. You are doing it on behalf of an intelligence organization whose activities in the past have ranged from the illegal to the depraved. Its record does not justify this. The CIA is not our national security.

Its own self-proclaimed objective at the outset and throughout—what they trained me for—was to counter international communism. It has failed. In 1947 when it started, there were two countries that were on marxism ideology. Now there are 30 or 40. It is not succeeding.

Senator GARN. You attribute all that failure to the CIA?

Mr. STOCKWELL. Clearly, it has failed.

Senator GARN. It has nothing to do with the Soviet ideology, KGB, the Communist stages in Cuba?

Mr. STOCKWELL. Country after country is turning to marxism today for support to free themselves from dictatorship that has been set up by the CIA. Mind you, as Mr. Colby has said in criticizing me——

Senator GARN. You mean that is why they are turning to marxism? They are just sitting back there benignly waiting for these things to fall in their lap and there is no subversion? You must know of the KGB operations in this country alone, the incredible numbers of agents within this country and their subversive activities. Why don't you write a book about what you know about them?

Mr. STOCKWELL. Because I was not a specialist on the Soviet Union but I was a specialist in CIA activities.

Senator GARN. You seem to be an apologist for them.

Mr. STOCKWELL. I never apologized for the KGB. I have criticized the CIA. The CIA has killed in its covert activities over 300,000 people in the Third World and not 12 of them, perhaps 12 of them, were KGB officers and 1 or 2 percent Communist—add it up from the Senate committees' own revelation.

You add up the Kurds, the Iranians, not to mention the Vietnamese killed under the Phoenix program and the Chileans and Laotians and Thai. You can get easily 300,000. Those are the direct victims killed in CIA activities.

Senator GARN. I find that an incredibly ridiculous statement that you can attribute that loss of life to CIA operations.

Mr. STOCKWELL. What would you attribute the dead bodies to? It is activities like Angola where the CIA escalated the fight and there were 10,000 people killed and we did not have a serious national security interest there. The CIA lied to this committee to cover it up. This committee did nothing about those lies. The people went on being killed.

Senator GARN. What an incredible distortion in your mind of the fact of who started things in Angola and Vietnam.

Mr. STOCKWELL. That is the CIA chronology of events before I joined that program.

Senator GARN. Mr. Stockwell, I listened to you. Please be quiet while I say what I want to say. Look at what has happened. I am sure you must really be proud of the millions of Cambodians starving to death since Vietnam fell. What has happened in the last 2 days, going into Thailand and overrunning refugee villages?

I am sure you can justify in some way 40,000 Cuban stooges in Africa killing black Africans. Come on, let us be realistic. I repeat, you are disloyal to this country.

Mr. STOCKWELL. I cannot permit that statement to go unchallenged. My record stands on its own. I have never defended the Vietnamese activities in Cambodia and Thailand.

Senator GARN. I thank God that somebody like you has the right to come and say these things, that we still have freedom of speech in this country. Try it in Cuba. Try it in Russia.

Mr. STOCKWELL. Your objective is to make this country more like Russia in terms of freedom of speech?

Senator GARN. Don't be asinine.

Mr. STOCKWELL. You are proposing a bill for it to be illegal for me to say what I have said.

Senator GARN. You can write the book. The issue is whether you disclosed classified information and endangered people's lives.

Mr. STOCKWELL. No one is accusing me of disclosing classified information. The CIA has never accused me of that. The war was over and done when I wrote this book.

Senator GARN. You describe yourself and others like you as whistleblowers. Yet I think you defend the right to do what in time of war would be considered treason. Mr. Stockwell, at this point, I probably had better stop and let Senator Chaffee take over because I am so biased against you and others like you and my disgust level is so high at your disloyalty that it is probably better that I stop at this point and turn it over to Senator Chafee.

Mr. STOCKWELL. OK, but I have to answer one question you raised. That is about this committee's role in relation to the CIA. You noticed I asked for the opportunity to come and testify to this Senate committee about a bill that affects this Nation's freedom of speech.

Everyone is a witness that I have been castigated by one of the members of this committee. In 1977, I came and testified in an executive session of this committee for 5 days giving great detail about how this committee had been lied to, to cover up an operation in Africa.

I was guaranteed at the outset of that hearing that my testimony would be secret, that it would be held secret from the CIA. I did not ask for this protection but it was given to me. I was told by the committee that it would have no credibility at all if someone could not come and testify to this committee and be protected from CIA's knowledge of that testimony.

My testimony was transcribed and a copy was delivered by the committee to the CIA before I saw it myself.

Senator GARN. Senator Chafee?

Senator CHAFEE. Mr. Stockwell, the reason we are here today is to discuss legislation that we are proposing and the position you have taken is against that legislation. As you know, the legislation is directed to protect the identities of agents for the CIA, the FBI, and the Drug Administration.

Let us set aside those others and let us concentrate on the CIA.

As I understand your testimony, you are saying there is no need for such legislation because, first, you say the CIA itself makes no effort to provide cover for its agents and you recount that they drive around in different colored jeeps and they hold gatherings in hotels that are like sales meeting.

Now your testimony flies exactly counter to that that has been given by the Deputy Director of CIA. Now what do you say to that?

Mr. STOCKWELL. Mr. Carlucci never served as a case officer in his life. He was the Ambassador in Portugal at a time when our station in Portugal included a few officers who were all well known to be CIA. He is familiar with at least the general situation.

I do not know where he gets his information but I have functioned for years in CIA stations with cover. I have no problem in swearing to my statement and, if you would like, to take you to the field and show you the truth of what I am saying.

Senator CHAFEE. Indeed I have been in the field and visited a number of stations where the question of cover was discussed in some detail. Cover was sought and given and cherished indeed by those agents operating there. Those are 10 countries that I have been in that I have observed that.

What you are doing today is giving us evidence that is quite contrary to the evidence by the former head of the Association of Intelligence Officers, whom you just heard, that of Mr. Carlucci, that of station chiefs that we have met. We have had long hearings dealing with the subject of cover in which station chiefs have come in, retired, active, and all of them have stressed not only the need for better cover but the need to keep the cover that they currently have available to them.

Now you seem to be taking an absolutely different tangent.

Mr. STOCKWELL. Yes. You have to note that my role as a whistle blower is trying to tell the truth on issues that I have seen the CIA elaborately mislead the Senate as well as the public on. The great weakness in your effort, and obviously I accept the fact that you are all conscientiously trying to function as oversight of the CIA, but the great weakness in your effort is that you only know what you are told by CIA briefers.

The CIA people come to you and say:

This is what we are doing; this is what we propose to do. Here are some papers and files that prove that. You do not go into the buildings and get down on the desks——

Senator CHAFEE. That really is not so. As I pointed out to you, I do not know what you can do more in the field than to meet with a station chief, meet with his operatives, meet with those who are right there on the firing line, as I have done, as Senator Garn has done.

Mr. STOCKWELL. You sit with them probably in their home and they tell you the party line of what cover is supposed to be just like they tell young case officers in training. It is not that way. You have been deceived in those conversations.

Senator CHAFEE. Is this a master plot that involves the junior operatives, senior operatives, station chiefs, wherever they are all over the world?

Mr. STOCKWELL. And who are the people you have named who will stand up while they are working on their careers and say: "Senator, this cover does not work; every one in town knows who I am?" It is not a plot. It is the sense that it is a party line. It is part of the role they play.

Senator CHAFEE. It is not quite that either, Mr. Stockwell, because it is not what they say that they are not claiming that the cover does work. As a matter of fact, what they are saying is that:

* * * We have great trouble with cover and why can we not have A, B, C, and D changes in the law to give some protection to us or to aid us?

So, it is not that they are standing up and spouting any party line saying:

We find cover is a magnificent thing and we would like to go around with capes and black coats and sneak around corners.

They are not saying that at all. They are saying:

We have a difficult job to do and that we need greater cover and greater protection than we currently have.

They are not at all saying what you are saying.

Mr. STOCKWELL. I was trying to answer your question. You were telling me what they had said and I was trying to answer your question.

Senator CHAFEE. Yes; you are suggesting, as I gather it, that they are all in some kind of cabal together. Yet I have not found that at all.

Mr. STOCKWELL. If they have been telling you that their cover works, and they are conscientious about their cover is true, I was trying to answer the question, if they have been telling you that the cover is very superficial and it does not work and it cannot work the way the CIA operates overseas, then I would agree with them.

Setnator CHAFEE. They are not saying that it cannot work. They are saying that they have great difficulty making it work and unanimously they deplore the publication of a Covert Action Bulletin. What do you say about that? Do you think it is helpful?

Mr. STOCKWELL. That certainly is highly offensive to them but my understanding is that that information in the Covert Action Bulletin is overt. The people who publish it are not inside the CIA. They are getting that information from the Library of Congress.

The CIA is that careless of its own cover. I personally do not reveal names. I do not see the point of revealing names. I make that clear in that book. I think on the other hand, the Constitution until it is amended does permit Mr. Snepp and crew to republish public information.

Senator CHAFEE. Yes; but the very law that we are dealing with here, working on, would take care of this situation. That is what we are trying to do.

Mr. STOCKWELL. How would it, sir?

Senator CHAFEE. It would make the publication by those who have been former employees of the CIA or those who are working under them, using the skills that they have been taught, would make it punishable and punishable very severely. That is what we are trying to do.

Mr. STOCKWELL. It would also make the press punishable for publishing.

Senator CHAFEE. We are going to deal with that tomorrow. We have very able representation from the press in the form of the American Civil Liberties Union, in the form of those who are going to testify—don't worry about their views being represented.

Mr. STOCKWELL. No; but it does affect me directly because I have published and I am also a writer now.

Senator CHAFEE. The press will be represented by attorneys, a host of attorneys. What we are trying to do is prevent the disclosure of names of agents. That is what we are dealing with.

Now, you can advance one assumption that it does not make any difference to tell everybody who is out there, that it does not affect their ability to do their mission, nor does it affect the safety of the allies? Is that what you are saying?

Mr. STOCKWELL. Yes; for 30 years they have worked with their identities flagrantly widely known in the communities where they were doing their activities, and there has been a trivial number of CIA agents killed over those years, less than were assassinated in the State Department, for example.

Senator CHAFEE. I am sure the person whose life was taken did not consider it trivial, or Mr. Welch's widow.

Mr. STOCKWELL. Mr. Welch was not killed because his name was revealed. He was killed because of the CIA sloppy security practices in the cover of their own agents.

Senator CHAFEE. In the what?

Mr. STOCKWELL. Mr. Welch was killed because his identity was already widely known in Athens, and I have to stop there because we get into information that the CIA censored from my statement but he was not killed because his name was published in a newspaper. That has been clearly thoroughly documented.

Senator CHAFEE. You seem to be saying two different things. One, you are saying it does not make any difference. On the other hand, Mr. Welch was killed because his identity was widely known.

Mr. STOCKWELL. I had said a trivial number was killed over the years in this dangerous business. Mind you, they were killing 300,000 people and 30 CIA officers were killed in the process.

Senator CHAFEE. There is a mission to be accomplished. Either we believe that the CIA has an important mission in the total national security picture of this country or if you do not believe that, then there is no need to have legislation such as this. Indeed there is no need to have a CIA.

Mr. STOCKWELL. You have come close to my position.

Senator CHAFEE. You are not close to my position.

Mr. STOCKWELL. You said, I believe, the CIA is not essential to our national security.

Senator CHAFEE. If you start with that presumption obviously there is no need for legislation. Indeed there is no need for the CIA. Is that your position?

Mr. STOCKWELL. My position is that the CIA is not essential to our national security. It has done some good. It has done a lot of bad.

Senator CHAFEE. If it is not essential for our national security, is it necessary to have it?

Mr. STOCKWELL. I think there is a need to have a better analytical section than we now have. I think the clandestine services have gotten us into a long chain of foreign policy debacles and have rarely pulled our chestnuts out of the fire.

Senator CHAFEE. It may be your view that such debacles are indigenous to the system. Is that your view?

Mr. STOCKWELL. Not necessarily. Secrecy does not work very well in foreign affairs, in covert action. It does not remain secret. People get killed, the world is angry, the United States is discredited. The United States has done far more damage than the KGB ever does. It has engendered the first military defeat in our history.

There is the matter of Iran, Chile, Angola, situation after situation, that the CIA has dragged us in, not the KGB, and the Nation has been stuck with it afterward. Certainly if any objective persons from another planet read the Church committee report in 1976, the only conclusion that you could reach is that this organization has been a monstrous liability.

Any basic historic American position of "show me," reading its track record, would say what on Earth do we need this thing for? In-

stead of cutting it down, restricting it, curtailing it, instead of taking action to protect the American people from the crimes they committed and truly some of those crimes were depraved, there is no other word for them, I now see that the Senate is considering legislation that would give them legal protection so that if it happens in the future——

Senator CHAFEE. Let us just stick to the legislation. If you advance the assumption, as obviously you do, that the CIA is a liability to the Nation, then any statement you make as regards disclosure of identities, whatever it is, naturally follows because you are opposed to the whole thing. Is that right?

Mr. STOCKWELL. I am opposed to the clandestine activities, covert aciton and covert HUMINT, human intelligence, spies.

Senator CHAFEE. You would have a few analysts in Langley analyzing whatever information was picked up through overt sources? Is that what you are saying?

Mr. STOCKWELL. I would have a lot of analysts in Langley, if necessary, the best in the world, with less secrecy. Secrecy where it is necessary but less secrecy so there would be no interchange with the rest of the society that knows that is going on and I would have operatives only in countries where there was truly national security interests at stake, Moscow and places like that, and not in every one of the little African countries where there are no secrets to be gathered.

Senator CHAFEE. Since you are opposed to any clandestine activities, all the disclosures in this booklet would be perfectly all right in your judgment?

Mr. STOCKWELL. If the CIA would cut down what its original intention was when the National Security Act was passed you wouldn't have 5,000 operatives in every corner of the world compulsively running operations because that is their function.

Senator CHAFEE. I can see very clearly that we are operating from two very different assumptions. Your assumption leads you to assert a conclusion so that you are unable to comment constructively it seems to me and lend us much assistance on this legislation because you are opposed to the whole idea.

Mr. STOCKWELL. I believe that you are making a very poor deal if you trade freedom of speech or freedom of the press for the clandestine service of the CIA.

Senator CHAFEE. I think freedom of the press will be protected. I think also we can work it out so that there will be protection of the agents against disclosure of names and identities of those who are serving in stations abroad in a job that we have sent them to do.

I do not know whether you listened to the statement of Mr. Blake or not but it seems to me Mr. Blake, who is president of the Association of Former Intelligence Officers, made a very clear point. If the Nation is going to send people on these missions, then it behooves us to do everything we can to protect them and to permit them to do their job in the safest manner possible. That is our obligation here.

Thank you.

Mr. STOCKWELL. If the Nation is going to send the CIA to kill as many people as it has, certainly the fault lies with our policies, the basic policies. I really wonder if the Nation sends these people out to run drug mind control experiments on the American people. Did the

Nation send them out to open your mail, send them out to get involved in every assassination they could cook up? I do agree with Mr. Blake.

Senator CHAFEE. I do not want to replay old charges. I have served on this committee now for 3 years, Senator Garn I guess for 5, I do not know. I am not going to take responsibility for whatever is alleged to have taken place in years past.

It is our duty to provide oversight to this agency and we will fulfill our duty.

Mr. STOCKWELL. What about your duty to the American people, to protect the American people's constitutional rights?

Senator CHAFEE. One of the oaths we take is to uphold the Constitution of this Nation. Amongst that is to provide for the defense of the American people.

That completes my questioning, Mr. Chairman.

Senator GARN. Mr. Stockwell, I said at the outset——

Mr. STOCKWELL. If you are going to challenge my loyalty to the country again, I do not know what more can be said.

Senator GARN. Mr. Stockwell, I was speaking about something else. At the outset of my remarks I said that one of the reasons I came on this committee was because I was concerned about some of the abuses. There is no doubt that some of the things you talk about occurred, the drugs, that sort of thing, most of them 12, 13, and 14 years ago.

For a period of time day after day after day there were big exposés in the press, the average American thinking they were occurring now, when in fact they had occurred years before and they had stopped. I went deeply into that when I first came on this committee, as did the rest of the committee, to find out what those were, when they occured, whether they were still occuring or not.

What we found is that some of them did occur. Most of them were many, many years before. They were certainly not authorized and they were certainly an extremely small part of the operations blown out of all proportion as to the number of quantity that was going on.

The vast majority of your colleagues were not involved in those sorts of things at all. Good law-abiding American citizens were not violating laws. That is the thing that bothers me I suppose the most about your testimony is you choose an incident and blow it up into a huge thing that this is all the CIA does. That is a terrible indictment of thousands of loyal Americans who are serving our country.

Mr. STOCKWELL. The first thing you mentioned I believe was the 300,000 people who were killed that were not enemies of this country. They were people who were caught in the crossfire of the CIA-KGB fighting. But it did not advance our national security interests to kill all these people.

This may not be important to very many Americans but I have lived overseas over half my life——

Senator GARN. I am not going to get into the 300,000 argument because I think it is ridiculous to try to attribute that to the CIA.

Mr. STOCKWELL. You assume responsibility for what your own reports disclose, a lot of dead people.

Senator GARN. In your testimony and in your book you seem to have great respect for the Cuban system of education under Castro. You

talk about how impressed you were with the Angola student's morale and enthusiasm while attending school at the Isle of Youths in Cuba.

Mr. STOCKWELL. In my book or in my testimony?

Senator GARN. One is in the New York Times article you wrote last November 1979. You note the Cubans are proud of their national school system. This is when you are replying to Mr. Saffire. You suggest he fly to Cuba and see for himself the glories of Cuban education.

You presented sort of as if it were back in the old Tom Brown school days. Do you really believe the Cuban education of foreign students is purely altruistic or is it political indoctrination of future revolutionaries and terrorists?

Mr. STOCKWELL. I do not have a copy in front of me but I urged us to compete. Instead of sitting here and throwing rocks at what they are trying to do, which is obviously in their interest, why don't we open up schools for African children and bring them over here and be competitive in this field?

Mr. Saffire published blatantly untrue statements. I was trying to get the truth out and make the point, instead of throwing rocks why don't we compete?

Senator GARN. Mr. Stockwell, this country has provided a greater standard of living, more freedom and opportunities for our citizens than any country that has ever existed on the face of the Earth. At the same time we have shared over $300 billion of our money with other countries since the end of World War II.

We rebuilt our enemies in Germany and Japan. We are having difficulty with that today because they have more modern steel plants and automobile plants and so on. We have given more aid in Africa and in Central and South America than all the other countries put together.

I would suggest that we are way ahead of the game and have nothing to apologize for for our aid and our help to universities, through the Peace Corps and all we have done for more than 30 years. There has never been any nation on the face of the Earth that has matched that.

Now we have to hear you talk about competing with Mr. Castro in providing schools? We are providing more schools, more medication and more health care——

Mr. STOCKWELL. I am glad you brought this issue up. I do not believe we have any schools here that are the equivalent of what the Cubans have opened for African students to come over at a subcollege age and be grouped together and be educated. Cuba is a very small country. It has a small and poor education system but they have done pretty well with it.

Senator GARN. I would hope we do not have schools like they have in Cuba for the indoctrination and the way they are training. I am asking you a question that I am puzzled about.

There was also a reply, and quoting from your book about how Savimbi was such a good man by any standard, a living legend among his people and a throwback to the great tribal leaders of afar.

Stockwell called him an Angolan patriot still committed to negotiation, compromise. free elections as a means of resolving the Angola conflict and achieving independence for his country.

I am puzzled about that because then in your November 22, 1979, article "Savimbi has no ideology. He believes in nothing beyond his own selfish ambitions. Fighting has been his way of life," and on and on and on.

Mr. STOCKWELL. Yes. There was a few years difference in the time between when those two things were written. Savimbi showed himself to be more and more selfish and personally ambitious and much less a patriot. The point I was trying to reveal even in my book was to show how a sympathetic individual was set up by the CIA and encouraged to fight and then dropped so that more people were killed for nothing.

This is the same pattern as in Hungary, as in Cuba, as occurred in Iran. Go in with the Vietnamese people, go in and encourage them to fight. More people are killed and then at crunch time back out and leave them hanging and let them die.

Senator GARN. There is a good deal of evidence that a lot of these African children are being taken by force, not of their own free will, from their parents, to be educated in Cuba. As Senator Chafee pointed out, we are getting away from the subject. I agree completely you have nothing to contribute to this particular piece of legislation and I diverted to some of these areas to show the inconsistency of some of your statements, and we could go on, in your book there is a good deal of contradiction.

Mr. STOCKWELL. I challenge you to debate my book publicly. You bring your information and I will bring mine.

Senator GARN. I would be at a distinct disadvantage because I would honor the oath I took about keeping secrets and being loyal to my country where you would not be restrained by the same moral principle.

Thank you very much for coming, Mr. Stockwell.

The hearing is recessed until 2 tomorrow afternoon.

[Whereupon, at 4:05 p.m., the committee was recessed until 2 p.m., Wednesday, June 25, 1980.]

# INTELLIGENCE IDENTITIES PROTECTION LEGISLATION

**WEDNESDAY, JUNE 25, 1980**

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

The committee met at 2 p.m., pursuant to notice, in room 1202, Dirksen Senate Office Building, Hon. Birch Bayh (chairman of the committee) presiding.

Present: Senators Bayh, Garn, Chafee, and Durenberger.

Chairman BAYH. We will reconvene the committee meeting. We are privileged to have this morning one of our distinguished colleagues who has expressed a concern early on in this discussion over the need to provide more security for those folks who are out there willing to lay it on the line for the rest of the country to try to make the intelligence system have the capacity to gather the necessary information, our distinguished colleague from Texas, Senator Bentsen, who is one of the busiest of our colleagues.

Nevertheless, he has taken time to pursue his concern and stress it before us today.

Senator Bentsen, we appreciate your letting us know your thoughts on this subject.

## TESTIMONY OF HON. LLOYD BENTSEN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator BENTSEN. Thank you, Mr. Chairman.

You are right, I was early on. I introduced a piece of legislation in 1975 and that was to punish former intelligence employees who informed on the identity of current personnel. I am very pleased to be before you and your committee to urge the early passage of that bill.

What we are seeing today with recent Soviet aggression, with danger and trouble spots around the world, clearly shows the needs for a stronger intelligence capability. We have rooted out a lot of abuses of the past and abuses that you and I certainly agree must never be repeated. We have initiated certain safeguards and some very strong congressional oversight.

Today we are discussing another important reform, one that will enable our intelligence service to perform more effectively. Ever since George Washington first sent American troops behind the British lines we have understood the value of intelligence work. We need timely and accurate information. We need the capacity to act on that information. If we anticipate a crisis, then we are going to be better able to cope with that crisis.

We live in a dangerous world. We are facing a Soviet Union that shows contempt for human rights or national sovereignty and for international law.

It is vital that the identities of our intelligence people be protected. They are performing dangerous missions: they are serving at great risk and they undertake important tasks. The very anonymity of their profession mandates that their work, which is often unheralded, their failures are often criticized and their successes often are not known.

They accept a very serious responsibility. They have access to secret and sensitive information. They know the names of officers who could be killed if they were identified. They have knowledge of operations that would be devastated if they were exposed. They deal with foreign sources that can be deterred from giving them information by fear of disloyalty or release.

Those involved have accepted a trust and they knew it when they went in. Others have honored that trust to protect them with life and death at stake. With the national interest in the balance they have pledged to serve their country and to protect their colleagues. Those who break that trust have committed a reckless and vicious crime.

In recent years a small band of renegade former intelligence employees have embarked on a crusade to destroy our intelligence services. Let us be clear about what they are doing. They are not fighting abuses. They are not fighting excesses. They are fighting the very idea that we should have a secret intelligence service. They announced their war against the CIA at the Youth Festival in Havana. Whether they mean it or not, and they probably do, they serve the interest of those who would murder thousands of the Afghanistan people.

They strengthen the hand of those who put Dr. Sakharov under House arrest. They gave practical assistance to those whose main world goal is to destroy our way of life. They serve the cause of terrorists. They share the aim of destroying our intelligence service. They serve those whose goal is totalitarianism, whose method is Gulag, whose policy is invasions, whose tactics include gunning down Afghanistan schoolchildren.

Mr. Chairman, I do not known their true motives. They certainly have not declared war against the Soviet KGB, nor have they publicly stated the names of Soviet agents or attacked Soviet policy. The effect of their actions is clear: To endanger the lives of American intelligence people and to threaten our national security.

My bill is specifically aimed at those who have broken that trust. It aims to punish former intelligence personnel who have violated their basic obligation of protecting their colleagues and their nation. My bill is targeted, it is narrow in its focus. My bill can pass tomorrow on the Senate floor and be enacted almost immediately without delay.

It would serve as a message to friend and foe alike. It would be a statement of support for loyal intelligence people. It would be a statement of warning to the disloyal and dishonorable. It would punish those who have undertaken a responsibility and have violated that responsibility. It would avoid the first amendment issues of broader proposals, and because it does it can be passed and signed into law in this Congress.

I sympathize with the views of those who would prosecute anyone who publishes identities, including the press. Some information simply has to be kept secret, including identities.

There is something to be said for a broader bill. But you run right into the problems of the concerns about the first amendment because it is difficult to prove the identity to cause the damage that would justify prosecution under that broader approach.

So I think we ought to move on this narrow approach. There is an inherent friction between the needs to serve the maximum security and the need to protect the first amendment. I frankly do not have the answer but I do have some advice. We can get this bill passed and we can move ahead. I introduced this bill in 1975. I do not want to see us role this stone up the hill year after year, Congress after Congress, only to have it rolled right back down again before we can act.

We can run the risk of endless delay in the search for perfection. We can run the risk of endless inaction in another Congress without enactment of an identities protection bill. My bill would give us more than half a loaf and without the problems. It would punish the most guilty and irresponsible people without the pitfalls of the broader approach.

In recent years our intelligence service has had some pretty tough days. We have seen abuses that must never be tolerated. We have seen reforms that are unique among great nations. We can protect our national security in a manner consistent with our national principles.

My bill is clearly, indisputably and unquestionably, consistent with both. I think it ought to be enacted this year and I would urge this committee to act promptly.

Chairman BAYH. Senator Bentsen, I think you make an extremely strong case for the merits of the bill. I find myself in sympathy not only with its purpose but the procedure. You describe the parameters of the problem if you broaden the scope of the legislation. I appreciate your interest.

I regret that it has taken so long to focus on this. But we are here now and I appreciate your being here.

My distinguished colleague from Rhode Island.

Senator CHAFEE. Senator Bentsen, I would like to join in expressing thanks to you for your long-time interest in this area. Some of us, speaking personally anyway, have become more recently involved and you have been at this, as you have indicated, since 1975.

I do not want to see us roll this stone up the hill year after year only to see it roll back down before we can act. I do hope that we can take some action this year. As you know, we have received a very optimistic report yesterday from Congressman Bennett. He indicated that he thought his legislation, which is akin to yours, would pass this year. He gave a very optimistic prognosis.

I join with you in the hope that we can move something out of here rather quickly and I appreciate your coming.

Senator BENTSEN. Thank you very much.

Chairman BAYH. Senator Durenberger?

Senator DURENBERGER. If I may ask a couple questions, Senator.

There are several parts of your bill that differ from some of the others. If I may just ask a couple of wide questions, I would appreciate it. Your bill protects not only employees and agents of the CIA, but also persons who have, I think, associated with the CIA. I am wondering what your definition would be of the kinds of people who would fit in that category, employees or agents of the Agency. It seems like a kind of broad characterization.

Senator BENTSEN. I would think that would be one where in the committee report you would try to tighten it down. I think that is a fair concern. What we are trying to do obviously is those who have been in and taken an oath of loyalty and who have had access to all of these names, that they incur that obligation and responsibility.

I would not object at all to the language being tightened in that regard.

Senator DURENBERGER. The bill also covers only information which is "specifically designated by an Executive order of the President as requiring a specific degree of protection." Is that intended to be as limiting as it appears it might be, or is there some specific reason for using the Executive order by way of defining information?

Senator BENTSEN. Senator, I have been trying for 5 years to get a bill passed and I have narrowly defined it for that purpose. I am sympathetic to its being somewhat broader but I am also trying to realize the realities of the objections that we have.

Senator DURENBERGER. Thank you very much.

Chairman BAYH. Thank you very much, Senator Bentsen. We will certainly keep you posted. We are close with you on this and we appreciate your help this afternoon.

Senator BENTSEN. Thank you, Mr. Chairman.

Chairman BAYH. Our next witness is Floyd Abrams, counsel for the New York Times, but I understand he is here in his own right and not representing that newspaper today.

## TESTIMONY OF FLOYD ABRAMS

Mr. ABRAMS. Mr. Chairman and members of the committee, I wish to state, as the chairman has indicated, that I do appear on my own behalf. I did represent the New York Times in the *Pentagon Papers* case and have been active in litigations which have touched upon the area about which I will testify today.

But my testimony is entirely personal and not on behalf of the Times or any other client.

My own view is that the naming or listing of undercover intelligence officers, agents, informants, and sources by any of their colleagues is an outrage and that those who have engaged in such activities have disgraced themselves and disserved both their colleagues and their country.

I also appear as one who believes that covert intelligence operations within proper bounds constitute one useful and significant function of any nation's intelligence service. Indeed, I think it especially appropriate to reaffirm that proposition on this 30th anniversary of the North Korean invasion of South Korea. Without covert intelligence operations we would lose much of our ability to deter aggression before it occurs.

I appear as well, however, as one who believes, as I am sure every member of the committee believes, that in considering legislation in this delicate area it is essential to adhere to the commands of the first amendment, that legislatioin threatening to any degree freedom of expression must be narrowly and not broadly drafted, that in areas of doubt we must take the risks of freedom and not of repression.

All that being said, I appear before you for the primary purpose of urging upon you that any legislation in this area burdens, at least to some extent, freedom of expression. It thus raises significant constitutional questions.

The burden is least substantial and a determination of constitutionality most likely when two principles are borne in mind. The first is that legislation making criminal the disclosure of information by agents or former agents themselves is far more constitutionally defensible than is legislation which makes criminal the publication by third parties of information obtained by them.

The second is that the narrower the definition of the information which may not be disclosed, the people who may not disclose it and the circumstances under which it may not be disclosed, the more likely it is that a statute containing such a definition would be held constitutional.

Put a bit more concretely and personally, I believe that narrowly drafted legislation barring disclosure of certain information in this area may and I believe should be adopted as regards disclosures by former CIA employees or officials themselves; that such legislation should not be adopted as regards recipients of such information; but that any statute that is adopted must be, in the language of the Supreme Court just last Friday, "precisely drawn," certainly no more expansively so "than necessary to further the state's interest. * * *"

With those principles, which I will attempt to flesh out during my testimony, in mind I will turn to each piece of legislation under consideration by the committee. I will concentrate most on S. 2216 and S. 2284 since my comments on those bills apply as well to the other bills before you.

When I say I will address S. 2284, I would add that I did not have before me when I prepared my statement, the testimony you had yesterday. So what I have to say about that is based upon previous testimony of the CIA and the Department of Justice.

As regards S. 2216, as the committee is well aware, S. 2216 deals with two categories of persons: The first is those who have or have had "authorized access to classified information" (section 501(a)); the second (section 501(b)) relates to all others. I will direct the major thrust of my remarks to the second category although I will offer a few suggestions at the conclusion of my statement about the first.

I believe section 501(b) is facially unconstitutional. On its face, that section would permit the criminal prosecution of any newspaper, broadcaster, publisher, author, journalist, or any other citizen who in any way, and however innocently, learns the name or other facts concerning the identity of any agent, informant or the like, that the United States is attempting to keep secret and publishes or otherwise discloses it.

That person and those entities under section 501(b) may be charged with a crime and sentenced to 1 year in prison and/or fined $5,000 so long as a jury finds that such disclosure has been made and that the intention or purpose of the disclosure was "to impair or impede the foreign intelligence operation activities of the United States."

The effect of such a statute I believe would be startling and unprecedented. Under the terms of the statute when Frances Gary Powers was

captured by the Russians for overflying their air space in a U–2, every publication in the United States that published Mr. Powers' name would have been subject to criminal prosecution under the statute until the executive branch of the United States "had publicly acknowledged or revealed the intelligence relationship to the United States" (section 501(a)) of Powers.

Let me insert right here that that flaw remains in the administration bill and that flaw remains in the testimony of the CIA before every committee of which I have knowledge.

Prosecution would have been possible notwithstanding the fact that Colonel Powers' name was widely, indeed internationally, known, that the Russians had themselves revealed Powers' capture and that, indeed, Powers was then facing charges in the Soviet Union.

It is true that under the statute all who mentioned Colonel Powers' name could have defended on the ground that they did not intend to impair or impede the foreign intelligence activities of the United States. But the effect of this would simply have been to permit different results as to different individuals who had done precisely the same thing—to disclose what had already been disclosed.

I would go further. Subject to its exceptions, the statute would not only have made it a crime for the news media to repeat Powers' name but for each and every American who read it or heard it to repeat the name. Under the statute no matter how often the name had been heard or reheard, no matter how well known an individual was, each individual who mentioned the name would be subject to criminal liability, including all those to whom it was told and who then repeated it to others.

Let me offer another example, because I do think that this flaw of section 501(b) of this piece of legislation and the equivalent section of the administration proposal are very significant.

In 1958 another American pilot, while flying for the CIA, was shot down, this time in Indonesia. According to the book The Invisible Government written by David Wise and Thomas B. Ross, the pilot, Allen Pope, was initially held by the Indonesian authorities, was then publicly tried by them for the murder of civilians and was sentenced to death, and that in 1962, 2 years later, Pope was released by the Indonesians.

Under the proposed section 501(b), the authors of The Invisible Government, the publisher of the book which I represented and each and every reader of it who repeated Pope's name would have risked criminal prosecution. I would note here that the CIA was extremely unhappy about publication of The Invisible Government, a book which was widely and favorably reviewed in the Nation's press.

It is in precisely cases such as this that the "intent" exception of the statute is of least help to a prospective publisher. It is one thing to say that a publisher which in fact did not intend to impair or impede the foreign intelligence activities of the United States should be acquitted of a crime. I am confident in this case it would have been. It is quite another to say that the CIA at the time The Invisible Government was published would not have sought prosecution if it could have done so or that it would not seek to do so if a similar situation were to recur.

One could cite many other examples of material which I believe should have and should be published and as to which publication under section 501(b) would subject all connected with prospective criminal liability.

What of, for example, a situation in which it is learned that an intelligence operative is acting illegally under American law by, for example, spying on Americans who have done nothing wrong but oppose those in power? What of a student who learns that his professor has been recruited by the CIA in violation of law and wishes to tell others of that fact?

What of any instance of criminal wrongdoing by the CIA or any other intelligence operation? On its face section 501(b) puts at risk all who would disclose such illegal acts, whether they refer to the name of the individuals who have committed the acts or simply provide any information from which such identification could be made.

These examples illustrate some of the ways by which section 501(b) may operate to restrict freedom of expression. At its core, section 501(b) flies in the face of a first principle of the first amendment: While Government may try to keep information secret the disclosure of information which has already become public may not later be criminally punished.

Indeed, as phrased by Chief Justice Burger, "The government cannot restrain publication of whatever information the media acquires and which they elect to reveal."

Beyond these objections to section 501(b), I would urge the committee to consider this question: Law aside, even constitutional law aside, is it really necessary for the first time in our Nation's history to attempt to make criminal the publication of material which is essentially within the public domain?

Ambassador Carlucci testified before the House Select Intelligence Committee and, I suspect, testified before you yesterday, that even if all information were public there could and should still be liability. This is absolutely unprecedented and terribly dangerous.

I would urge upon you that whatever you may decide to do with respect to the disclosure by CIA agents or the like that you adopt no legislation which bars the rest of the American people from disclosing fully the activities of our Government for better or worse of which they learn. To do otherwise would not only deprive the public of information; it would deprive us all of credibility as we deal with each other: press with public, citizens with each other.

As for section 501(a), which deals with individuals who are in authorized control or possession of information, I have the following comments.

As I previously indicated, it seems to me that legislation designed to assure that agents do not disclose the identity of their colleagues in the intelligence service is constitutional. And as I will urge in a moment, notwithstanding some overbroad language, S. 191, introduced by Senator Bentsen, is it seems to me, as a general matter, in a constitutional range.

However, section 501(a) of S. 2216 is flawed in a number of ways which I would urge require serious study by the committee.

Perhaps the most important of these is what I believe to be the overbroad language of section 501(a) in two distinct ways. For one

thing section 501(a) would make it criminal not alone to disclose the identity of an intelligence officer or the like but to disclose "any information" that identifies the person.

I appreciate the concern that there may be some instances in which disclosing something less than the agent's name may in fact lead to his ultimate disclosure. Nevertheless, I think it is constitutionally imperative that the statute be limited in some fashion so as to make criminal only the disclosure of the identity of the agent or other employee or of information which, in and of itself, identifies the agent.

The words "any information" are so broad, so sweeping, so susceptible to differing interpretation that they may well not give sufficient notice as to precisely what may or may not be said.

Beyond this, the definition in S. 2216 of what information may not be disclosed is, I believe, far too broad. What is barred is communication of "any information" that identifies any officer or employee of any intelligence agency so long as the information is classified, as virtually all such information is, and the person is now serving outside the United States or has served in any such capacity outside the United States within the last 5 years.

Such language makes criminal the disclosure of the identity of far too many people, people who may have done little of importance, people, who are not in any real sense covert agents.

There are still further difficulties with section 501(a). I believe, for example, that any such statute should at the very least allow a defense be made that the material in question was not in fact classified, that the Government should be required to prove, as presumably in this area it could often prove, that the identities have been classified, and that the Government should be obliged to prove as well that the material is still validly classified.

Additionally, I would urge upon the committee that the Government be obliged to demonstrate, or at the very least the accused be permitted to refute the proposition, that the disclosed information was learned during the course of service of the accused.

Finally, it seems to me appropriate that the statute contain some provision allowing a defense in situations in which the individual whose name is referred to is himself or has himself committed crimes under American law. To do otherwise may well shield the CIA and other intelligence entities from a kind of "whistle blowing" which all of us I think would believe is in the national interest.

With this catalog of complaints behind me, I turn to title VII of S. 2284 and the administration's new proposed version of it as set forth by Admiral Turner. S. 2284 is in some respects an improvement over S. 2216. But in others it is either no improvement or worse.

Let me offer a positive note first. Admiral Turner's new version of S. 2284, similar to the draft the Department of Justice introduced before the House Select Intelligence Committee, wisely and prudently limits the information which may not be disclosed to the disclosure of the identity of covert agents, a term narrowly defined in the redraft of S. 2284.

I believe any legislation in this area should confine itself to barring disclosure of this information and no other and I commend the Department and the CIA for its willingness to focus on this information only.

But S. 2284, as resubmitted by Admiral Turner, still seems to me flawed in some significant respects. The first is technical, but important, and I must say I am not sure and I cannot believe I am right in what I am about to say, but it is important.

I have read and reread the proposal submitted to you yesterday and as I read it, although there is a definition of unauthorized persons in the statute, there is nothing in the statute which again uses the word "unauthorized." The criminal sections themselves make no reference to what is or is not authorized.

On the assumption that this is unintended, I will continue my analysis as if only "unauthorized" disclosures of information were prohibited. As so read, section 701(c) would make criminal the disclosure of intelligence identities not alone by Government employees but by anyone who knowingly discloses unauthorized information "with the knowledge that such disclosure is based on classified information."

The difficulty here is the definition of what is and is not "authorized." As in S. 2216, S. 2284 would bar the repetition by any of us of still officially classified, but notoriously well-known, information. There is no way I believe that such a limitation can be deemed constitutional.

Moreover, one critical distinction between 701(c) and 701(d) seems to me absolutely untenable. For some reason, the administration seeks to punish outsiders who disclose intelligence identities more harshly than Government employees who do so. I am most interested in any basis for this approach. To me, it remains incomprehensible.

Finally, and most broadly, I believe the imposition on private citizens, who are not and have never been Government employees, of any liability is unacceptable. There is little basis for believing it is needed. If it is, we can certainly see so after we first make illegal disclosure of the identities of covert agents by their former colleagues.

And, as noted above, it raises a host of constitutional problems, most particularly when applied to those who simply repeat or report what they have heard from others.

Of S. 191, Senator Bentsen's proposed legislation, I will simply repeat what I suggested earlier with one amendation. It is, I believe, constitutional to make criminal the disclosure by those "in authorized possession of control" of information identifying covert agents of that information.

However, S. 191 has a definition of what information may not be disclosed which is, I think, broader than is necessary or appropriate, for example, "any information which identifies or which can lead to the identification of any individual . . .".

I would suggest that some combination of the definition of "covert agent" from the administration proposal's new submission and S. 191's definition of who may not speak is likely to be well within constitutional bounds.

Both H.R. 6820 and amendment No. 1682 to S. 1722 appear to me to make, in one form or another, the same errors as stated above with respect to S. 2216 and/or one version or another of S. 2284. Rather than parse through both drafts, therefore, I will simply add that if it is thought advisable, as in amendment No. 1682, to prohibit the disclosure of the names of FBI agents, drug enforcement agents, or the

like, and I have no views as to such matters, here, too, the need for narrow definitions is a critical one.

Again, the determination of (a) who may not speak, (b) what may not be said, and (c) under what circumstances it may not be said, must be done with maximum precision and narrowness.

On February 8, 1980, I had occasion to write to Senator Moynihan, at his request, to offer him my views as to the form legislation might take in this area. I take the liberty, in conclusion, of paraphrasing my conclusions which urged consideration of legislation containing the following elements:

(a) Criminal penalities to be imposed on, and only on, individuals who are or have been—

in authorized possession or control of any information" which identifies "any present or former officer, employee, or source of an intelligence agency of a member of the Armed Forces assigned to duty with an intelligence agency (i) whose present or former relationship with the intelligence agency is protected by the maintenance of a cover or alias identity or, in the case of a source, is protected by the use of a clandestine means of communication or meeting to conceal the relationship and (ii) who is serving outside the United States or has within the last 5 years served outside the United States.

The first quoted portion above is taken from S. 191, the legislation introduced by Senator Bentsen; the second portion is taken from the legislation proposed by the administration.

(b) No criminal penalties to be imposed on the publication of such material unless it is made by an individual who is or who has been in authorized possession or control of the information being disclosed. Hence, Mr. Agee could be liable under the statute; a publication which simply repeated what Agee had disclosed would not be.

(c) Some kind of "whistle-blowing" defense. While I do not feel as strongly about this as I do about the points made above—I am well aware of the potential of abuse of such a defense—I remain of the view that if the CIA agent being disclosed has himself committed some kind of grievous crime under American law, that the disclosure of his identity alone should not be, per se, criminal.

Members of the committee: It is not easy, when the CIA seeks legislation designed to protect the lives of those who work for us all, for you to conclude that the legislation goes too far, that other factors must be taken into consideration, that there are countervailing interests.

But the interests that I would urge upon you are not small ones. Judge Murray Gurfein, in deciding the *Pentagon Papers* case in favor of the New York Times, put it this way:

The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions.

That says as well as any words known to me what you should bear in mind as you engage in the difficult task that lies before you.

Thank you, Mr. Chairman.

Chairman BAYH. Thank you very much, Mr. Abrams. Your experience actually defending against certain charges and pursuing this matter through the judicial process uniquely qualifies you to share that experience with us and we appreciate it.

You, in your testimony, limit the scope that you would prescribe for us to the identity of agents disclosed by Government officials. What

about the leaking of the information on troop movements, the operation of weapons systems, the keys to our coding systems, nuclear secrets, again by Government employees who are charged with the responsibility of maintaining the security of this information?

Mr. ABRAMS. I believe all the examples you have mentioned, Mr. Chairman, are currently encompassed in the espionage laws as they exist. If they are not, I would not object to legislation making that clear. I do believe, and unfortunately I had occasion to become conversant with the espionage laws, that each and every one of the claims you cited would constitute a crime under the espionage law.

I note, in the testimony provided to you yesterday by the Department of Justice, it was urged upon you that the espionage laws be clarified so as to make clear that the publication of certain information which may lie within the area that your questions spoke to would also be made criminal. That was a central issue in the *Pentagon Papers* case itself, the issue of being whether the Congress indeed meant to make publication of the information which had become known to the press, criminal or not.

It would certainly be in the area of codes. It was quite clear that the Congress had intended that the publication of secret code information would be and was criminal. In certain other areas, it was far less clear. We urged successfully before the district court and did not receive any ultimate resolution before the Supreme Court that publication should not be made criminal.

My own view is that the disclosure by agents or government employees is clearly illegal and under current law. If you should become persuaded that is not so, I have no basis and no inclination to oppose legislation making it clear that it is so.

I had thought the purpose of this legislation was to sweep beyond current legislation so as to deal with the agent or source problem. It is only when you get to the third part of the area of someone who has supplied information, such as you adverted to, that I think you have debate and there I would recommend that the law stay as it is.

Chairman BAYH. In my judgment on publication of the information now, I share your assessment. According to some, it is very difficult to prove and thus very little effort is made, particularly when it is difficult to nail down the intent involved, that the intent may not be malicious as far as seeking to damage the country.

You mentioned that you thought the Government should prove validity of the—

Mr. ABRAMS. Of the fact of the classification.

Chairman BAYH. One of the problems has been the whole "graymail" area where you can have somebody you have nailed down, you have the intent and you have the whole business, but in order to prosecute this case the disclosure of the evidence to convict the defendant brings more damage than the activities of the defendant already. Do you have any suggestion as to how that could be dealt with?

Mr. ABRAMS. Let me say that in certain litigations, including one in which I was involved, the case of *Knopf* against *Colby*, sort of round 2 of the *Marchetti* case, which wound up in the *Snepp* case, which the Supreme Court decided a few months ago, certain portions of the trial were conducted in camera when they related to what the

Government claimed was classified information or information the disclosure of which would be harmful to the national interest.

I think the judge in that case, and I know the judge in the *Pentagon Papers* case, came to regret the fact that the case was closed to the public to the extent that it was because I think he concluded that very much of the information which was said in advance to be of such a "hot" nature that it should not be disclosed did not turn out to be that way at all.

One way to deal with the problem, then, is to conduct portions of the proceedings in secret.

Another way to deal with the problem is to make the crime easier to prove, which is what the Department of Justice has urged. It seems to me far more problematical to say that someone should be convicted of espionage without the Government meeting the burden which legislation now requires. It seems to me to go pretty far, probably too far.

I guess all I can say is that the Graymail problem is a real problem. I think we live with those problems in other areas of our law. I think we are willing as a general matter to live with the proposition that guilty people might even get off because we think we are preserving some other very important rights. I think that the current statutory language in the Espionage Act as a general matter fairly and properly states the burden to which the Government should be subject.

That is almost a fact question rather than a legal question, a fact question about how factual it really is as to whether we really have people walking the streets now who ought to be in jail because of what we would all like to have be a violation of the espionage law. I think the kind of legislation that Senator Bentsen has proposed to you with the amendment that I have proposed would deal with that problem or would deal with most of that problem.

I think you have to recognize there are some of these problems that we are not going to be able to deal with, either because they are unconstitutional for us to do it or because we think there are other interest which overcome the desire to prohibit disclosure of this information. I think S. 191, as amended, would be a good first step.

Chairman BAYH. I appreciate your assessment. We do have a bill that has been reported out of the Judiciary Committee dealing with the Graymail question. It provides for matters to be considered in camera. We might take a look at it. If we could ask our staff to give you a copy because of your experience, if you don't mind let us have your thoughts on it. We have a different kind of situation here where traditionally criminal intent is necessary. That is an important part of our system of jurisprudence, intent to do damage, to do bodily harm, to injure the country.

Yet the proliferation of leaks has come from people pretty high up the chain of authority that are designed I don't think intentionally to hurt the country but rather to shape the policy of the country and in the process they give to our adversaries more information than they can get with KGB agents.

Mr. ABRAMS. Most of that, I would think, Senator Bayh, is more a matter of internal control within the Department of Justice, within the CIA, within the Department of State than it is anything that

criminal legislation is liable to deal with. Whatever legislation there is, it will not stem the tide of high level leaks unless we have a cadre of public servants who are willing not to leak.

Chairman BAYH. I concur. I think if Congress expresses its determination to raise the standard of severity of this kind of act so that it doesn't become just sort of taking off your shirt, putting on the shirt, the people might think a little longer before they do it. We sat here in this committee and we had witnesses come before us for over a year disclosing the most secret information about our surveillance systems and our ability to dissect what the Russians were doing. It imposed on this committee a very serious responsibility for security.

None of it leaked out of this committee. Periodically we found in the newspapers people, first, who were pro-SALT leaking information to prove that SALT could be verified and then the following day you have the opponents leaking information to prove that it couldn't be. As I have said on occasion it makes you wonder if the Russians are getting their money's worth in hiring intelligence agents. They would be better to hire some secretary to clip the newspapers.

I share your assessment of the danger of pursuing third parties, publications, where I think you run into very strong first amendment questions. But we will try to work that out. Thank you, Mr. Abrams.

My colleague from Rhode Island.

Senator CHAFEE. Thank you, Mr. Chairman.

Mr. Abrams, I would like to see if I could go through a series of steps here as to where you think we could proceed. Let us take the situation of Agee, himself, based on his access to authorized—let us not get into authorized and unauthorized—he had access to classified material and he revealed that information not through publication. Now clearly you would think that we could prosecute him under the original Moynihan bill S. 2216, under section 501(a).

Mr. ABRAMS. Yes; I do, My only qualification there is that I would recommend based on my own overview and some sense of constitutional considerations, that we not simply limit it to classified materials. So much is classified. I think you have to narrow what it is that may not be said. I think the administration's bill does that, for example, and I think section 501 does that. I am saying I would have some trouble simply saying that the disclosure of any classified material can be made criminal.

Now I must tell you that my view on this is not that the constitutional argument that I would make about this is in this area, one which I think would necessarily prevail. I believe the Supreme Court as it sits today would probably say that it is constitutional to make criminal disclosure by Mr. Agee of any classified material. I think there are the votes for that.

Senator CHAFEE. Let us take the next one. Let us say that a former employee such as Mr. Agee than publishes it in a Covert Action Bulletin. Let us say he owns 100 percent of the publication.

Mr. ABRAMS. I think it is just the same. I think Mr. Agree could be held guilty of a crime, whether he says it or writes it.

Senator CHAFEE. Now let us say he gives the information to a publication which he does not own. He sells them a story, and it is published. Do we get Mr. Agee and what could we do about this publication?

Mr. ABRAMS. I think you could get Mr. Agree if you could prove what you said occurred in fact occurred. I think in regard to publication here is where you start to run into stormy weather constitutionally and here is where I believe legislation must be narrowly worded. I would like to give one brief example. When Mr. Agee's book was published listing certain names and addresses of purported CIA agents, dependents and the like in Europe, a decision had to be made by various newspapers in the United States about what to write about the facts of that book. Now I just know the decision was made at the New York Times that it just was not newsworthy and they didn't think it was responsible to publish the names of anyone that Agee had published in the book. Nonetheless it is my view that if Agee sits up on a rostum or hands out leaflets or writes a book, that anyone who hears what he has to say is constitutionally free to repeat it.

So I think where you have to focus your attention is on the person who violates his trust. I understand that the harm that is caused is not just caused by the person who breaches his trust. If Agee breaches his trust and announces it to five people and they go out to tell more people and they go out to tell still more people, the ultimate harm is greater because of the retelling. Nonetheless I don't think you can draw a constitutional line there and I don't think you should try to draw a line there. I think both as a prudential matter because you are approaching legislation here in this area for the first time and as a constitutional matter because once you do start getting into the possible punishment of people who repeat information, it is extremely dubious constitutionally that you can do it.

Senator CHAFEE. Suppose you have a standard with intent to impair or impede the foreign intelligence activities of the United States?

Mr. ABRAMS. I don't take a lot of comfort from that standard, Senator Chafee. Part of what I do for a living is to advise publishers, broadcasters and the like what their legal risks are. I must tell you I don't know what I would tell a publisher who has, let us say, published a lot of books particularly critical of the CIA or certain foreign intelligence gathering practices of the United States about what a jury might find if they were to publish a book down the road with the kind of information that we are talking about, even if it is a repeat of what Agee or someone else has said. I don't think we ought to have that kind of imprecision. I don't think we ought to take that kind of risk.

Senator CHAFEE. Now it is the publication with which you have reservations, is that correct?

Mr. ABRAMS. The publication but it is not just because it is a publication. It is also because it has a third party element. I would say the same thing about the right of anyone in this audience to whom Mr. Agee went and gave a speech and anyone who heard it, then went out and said, "Agee says so and so is a CIA agent."

Senator CHAFEE. Suppose I worked very closely with Mr. Agee, I am one of his disciples, and I learn his technique. First of all, let us say, and I am not a former employee of the CIA, based on the information he told me, my working very closely with him, he says, "We have something pretty good here but Abrams said I could be caught by the law." So you publish it, what happens then? Or I write an

article disclosing names, addresses, past experience, and let us say I am a person of some standing and it gets read. It is a list of all the active CIA agents in Greece, it is all the CIA agents wherever it might be. Is there nothing we can do about that under your theory?

Mr. ABRAMS. Under my theory if the list is one which is created by someone who has not been in the employee of the Government and who has been trained, as it were, by Agee in the technique of making a judgment——

Senator CHAFEE. Supposing he just hands me a list?

Mr. ABRAMS. If he hands you a list?

Senator CHAFEE. And I publish it but the U.S. Government does not know that I am working for Agee. It is just a list.

Mr. ABRAMS. The reason for my pause is that it is a hard question. The reason that for me it is a hard question is that I could imagine a situation where when you tell me someone is working for Agee, that maybe it could be constitutional and appropriate to impose some kind of liability through Agee.

If I may, let me take the subsidiary question that you asked. If Agee gives me or someone here the list and I disclose the list or I publish the list, then I may be wrong but I am clear at least that it is unconstitutional to punish me for publishing the list because the list is already published, it is out, it is lost information by the Government.

My problem with your question, the reason the question is a difficult one for me——

Senator CHAFEE. Excuse me, let me follow that up. You have the list from Agee.

Mr. ABRAMS. Yes.

Senator CHAFEE. And you publish it.

Mr. ABRAMS. Yes.

Senator CHAFEE. You are a publisher.

Mr. ABRAMS. Yes.

Senator CHAFEE. Was that your example?

Mr. ABRAMS. Yes. My answer to that question is that there can be no liability. That is precisely the same as if Agee gave a speech and read it. Agee's giving the publisher a list is the same as Agee's saying what is on the list and the publisher printing it. I am confident that the law is that we do not and cannot make criminal disclosure of information which is public even if we are terribly distressed that it became public.

Chairman BAYH. Will the Senator yield as a logical extension of that. Suppose the publisher pays Agee $1,000 to get the list and to give him the list?

Mr. ABRAMS. I think criminal liability probably would be proper against a publisher who pays for information in a situation where the person who gives it does so illegally. I would want to look into that and see if any of my clients are going to go to jail because I said that. But I don't think so.

Certainly you could pass a constitutional statute—I don't know if we have one right now—which makes criminal paying money to someone who has a legal obligation not to do something but does it. That does not violate any constitutional principle that I know about.

Senator CHAFEE. Now you get a list from Agee and you don't publish it but you just go around and announce it. Is that the same as publishing?

Mr. ABRAMS. I believe it is the same. I don't think that in this area there is the distinction between the right to publish it and the right to say it. I think once information is out, it is out, and I don't think you can rebottle what I believe to be an old secret.

Senator CHAFEE. It wasn't a secret. It was a secret until you told everybody.

Mr. ABRAMS. It was secret until he gave it to me.

Senator CHAFEE. Suppose you take the situation that we have existing here, which is a series of people who have been trained by agents to ferret out this information. They never worked for the CIA. They are not doing it based on any knowledge they had gained from the CIA but they mastered the technique of identifying covert agents abroad and then they publish it under their names. What can we do?

Mr. ABRAMS. It does not contribute much to you for me to tell you that I think it is a hard question. I do think it is.

Senator CHAFEE. That is the question we have.

Mr. ABRAMS. I don't think it is the only one that you have. My answer to your question is that I do not believe, at this time at least, that you ought to start down the road and making illegal the publication or disclosure of information by people who have nothing to do with the Government itself. Of course I speak of Government information. If a time came when after you had legislation such as this before you now which would make criminal the disclosure by agents, informants and the like, and you determined this wasn't doing enough, that it was not solving the covert action problem as it were, then I think you ought to reconsider it.

My own view would be that that would probably be that even if you did reconsider it, it isn't worth the price that we pay. I understand and I am sympathetic to the view that such publications do enormous harm but it seems to me that there is a high price to be paid if we are starting down the road of making publication or disclosure of information illegal when the people who do the publishing or disclosing have no relationship with the Government at all.

Senator CHAFEE. Even though you have to prove and you do prove that their published intent is to destroy an agency of the Federal Government, you are against it?

Mr. ABRAMS. I don't think that their intent ought to bear on your decision. They do bad things maybe for bad reasons but the question I would urge on you at least is whatever the intent is, whether you ought to start down the road of deciding what can be said or written by people who don't happen to work for the Government, whether you like or approve of their intent or not. I don't think that factor ought to be that they don't like the CIA. They have a constitutional right not to like the CIA. They may not have a constitutional right to publish certain information but they have absolute right to like or dislike what they choose. When you get to the question of what limits you can put on what they can say I acknowledge it is a hard question.

I come out on the question by saying that, as I said earlier, as both a prudential and constitutional matter I don't think we ought to start down the road of making what they say or do illegal. At least yet.

Senator CHAFEE. As you know, such an act may be very harmful to a person on the firing line. That is one of the prices we pay, I assume, under your presentation. What about in Britain, for example, where they are far more restrictive? Does that have the chilling hand on the press that you indicate might take place?

Mr. ABRAMS. I believe it does. The Official Secrets Act in Britain is what I believe to be a very significant restrain on the British press. The only reason it is not a worse restraint on the British press is that it is often not enforced. I have had occasion to say to British journalists now and then that they live in a society which is free but, of all things, in this area at least, not a society of law. That is to say that the Official Secrets Act makes illegal the publication of so much information relating to the national defense, national security, what have you, that they then put to the Attorney General as it were the question of when to enforce it and they act pretty reasonably.

Because they act pretty reasonably in their enforcement decisions Great Britain of course remains an enormously free society. But because they could act unreasonably—but lawfully—Great Britain retains a body of unenforced law which is troublesome.

There are situations particularly in Northern Ireland where there have been significant limitations on what the English press has been allowed to publish.

Senator CHAFEE. Thank you for what help you have been to us in solving this problem.

Mr. ABRAMS. Thank you very much.

Senator CHAFEE. I commend to you "Freedom of Speech" by Chafee.

Mr. ABRAMS. I will read it again. Thank you.

Senator CHAFEE. Mr. Berman and Mr. Halperin. Are they present?

Mr. Berman is not here. He is instead represented by whom?

Mr. ADLER. Allen Adler.

Senator CHAFEE. Why don't you proceed? How do you want to divide it up?

## TESTIMONY OF MORTON H. HALPERIN; ACCOMPANIED BY ALLEN ADLER, ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION

Mr. HALPERIN. With your permission I will make the presentation and then we can both answer any questions. Mr. Berman is on paternity leave.

Senator CHAFEE. I understand his wife has had a baby. We will take notice of that and we will disclose it.

Mr. HALPERIN. I might say it is an authorized disclosure, for the record.

Senator CHAFEE. I will tell you, and this applies to later witnesses too, I know you have prepared testimony but as much as possible please direct your testimony toward the solution of a problem which we think we have. Now maybe you don't think so but we face the problem of disclosure of the names of agents or alleged agents around the world represents a threat to their lives on missions which we, the U.S. Government, have sent them on and the problem we face is what can we do about it. So we seek your counsel on a solution to a problem.

Mr. HALPERIN. With that in mind I would like to ask that my prepared statement simply be made part of the record. There is one phrase missing on page 5 and I would like to submit for the record a substitute page.

Mr. Chairman, we do not support the view that there should not be a CIA or intelligence community. We support the enactment of a comprehensive charter which would put the intelligence community on an appropriate legislative footing. Nor do we support, to use Mr. Carlucci's words, the "wholesale" listing of names of purported CIA employees, agents, or assets. We are sympathetic with and understanding of the desire of this committee, the CIA and many people to try to deal with this problem.

Nevertheless I have to say that the more we look at the difficulties of drafting narrowly drawn legislation, the more we look at the problem of trying to draft something that accomplishes some purpose in solving the problems that you have identified, but which do not at the same time interfere with important public debate, the harder we find it is hard to do that.

Mr. Abrams gave you a number of examples of situations in which the public and the press ought to have the right to repeat information. He cited those in relation to the bill that Senator Moynihan introduced. They would all apply. I would say, equally to the administration's draft. While the administration withdraws the limitation that you have to prove that it was done with the intent to injure, it substitutes something for it, something that is much easier in fact to prove, that the information is classified. Therefore, the administration bill would in fact interfere not only with a person who is a government employee but any person, including a reporter, including a newspaper, revealing information which revealed not simply a long list of agents but a particular case where revealing the identity of a single agent was viewed by people to be important to public debate.

We have in our statement a number of other examples of situations where we think that would be true.

I would like to call the committee's attention to one other. It is contained in the memoirs of a former executive branch official, a person who I think you will agree and this committee will agree, is very sensitive to the improper disclosure of classified information and yet who thought it was important to make the point, important to public debate to reveal the identiy of a person who is a source of assistance to the CIA. The paragraph talks about allegations that the U.S. Government was giving assistance to Indian politicians in the Congress Party of India. This former Government official reports that he had this investigated and was informed, in an official capacity was given access to the information and discovered that the United States had twice given money to the Indian Congress Party. Both times, he writes, the money was given to the Congress Party which had asked for it. Once it was given to Mrs. Gandhi, herself, who was then a party official. That paragraph would be a violation of every one of the bills that appear before you.

It appears in a book called "The Dangerous Place" by Daniel Patrick Moynihan. I think it is typical of the problem that former Government officials have and newspapermen have in the fact that

often it is impossible to make a point without revealing a name. The point he was making was that Mrs. Gandhi was complaining about CIA support of opposition politicians in India when she knew very well sometimes she had received that. I don't know that we would all agree that particular revelation was necessary but I think it is an important example and another example of the view that in certain circumstances you have to make that information public.

Senator CHAFEE. It seems to me that there is more than the disclosures required. Mr. Abrams I know was not concerned with this particular paragraph but do the words "with intent to impair or impede," mean nothing?

Mr. HALPERIN. There are two different drafts. The administration has abandoned the "impair and impede" language and has substituted "classified information." Clearly if it is true that Mrs. Gandhi received assistance it would be classified information. So I think it would be covered by the administration bill. Now as far as the CIA draft which talked about "impair and impede" the problem with that is the one that Mr. Abrams explained, namely that it would have a very chilling effect on a reporter who was covering the CIA and who knew if he or she ran a story that criticized the Agency that information could be used against them in a criminal trial to prove that their purpose was to impair or impede the function of the CIA.

I think that a citizen has the right to impair and impede the functions of a Government agency, whether it is the Federal Trade Commission or the CIA. The fact that your intent is to impair or impede those agencies does not make your activity a crime if it is otherwise legal. I don't think it is much protection. If the New York Times was trying to decide whether to publish information which revealed that university professors were functioning as CIA agents, the purpose of that clearly would be, one could argue, to reduce the likelihood that the CIA could use university professors in that way and therefore the allegation that the purpose of that series was to impair and impede the CIA's ability to use professors would, I think, be difficult to disprove before a jury.

A New York Times editorial came out as against the use of journalists as functionaries of the CIA. Admiral Turner says publicly he needs to use journalists in certain situations. So I think you are impairing and impeding the CIA when you publish information which has the purpose of limiting their ability to do things which you think is improper for them to do.

So I don't think that provides much of a defense of that activity.

As I say, the administration bill which goes in the other direction of saying you don't have to prove "impair or impede" but rather you have to prove that the information is classified, I think would have a much more chilling effect. It would create in effect an Official Secrets Act for any information about former CIA employees. So that if somebody told a newspaper that Watergate burglars had worked for the CIA the newspaper would not print that information without violating the statute.

Again we have it on paper in our testimony. One can think of many other similar examples. I don't think one can distinguish between one magazine publication and another. I have not seen a draft that effectively does that.

The second section of the administration bill which talks about disclosure by persons who have had access to authorized information which reveals the identities of covert agents is I think much broader than has yet been brought out in the testimony before this committee. It is important to understand that very many Government officials who are not CIA employees have access to that information. In most of the testimony that has been given here there are references to penalizing former CIA employees or former employees of the intelligence community who had access to this information.

The fact is that vast numbers of Government employees, employees of the Department of Defense, of the State Department, or other agencies, have access to the identities of what are called in the bill covert agents. All of them would under this bill be penalized not only for revealing names of agents that they learned in the course of their official duties but any other names of agents. Indeed I would have violated that statute, the second section of the administration draft, by reading you that paragraph from Senator Moynihan's book because I would have been further revealing the identity of the source of assistance to the CIA—I am a former Government official and while in the Government I learned the identities of some covert CIA agents.

The bill sweeps far broadly to cover a range of situations that I find it very hard to believe that the administration intends to cover. It is another illustration of the great difficulty of dealing with this problem.

Furthermore I think the administration has simply failed to produce a bill to cover the Covert Action Information Bulletin. If you look at Mr. Carlucci's not very enthusiastic support of the administration position, he says we can reach the Covert Action Information Bulletin if we may assume that their use of what he called the techniques normally used by intelligence agencies means that they know that the information is classified. Now I think that is an enormously strange interpretation of the statute. Because the Covert Action Information Bulletin may ask people in a country to engage in a normal activity of what I think most of us would refer to as investigative reporting, of what Mr. Carlucci refers to as activities that intelligence agencies engage in, that cannot make it a crime by the assumption that they know the information is classified. This would not only reach the Covert Action Information Bulletin, it would reach every investigative reporter in the United States.

Any reporter who went after information would be using investigative techniques and therefore under the CIA definition would know that the information they were publishing was classified. I don't believe that is a reasonable interpretation of this statute. Therefore I think the administration bill simply has not covered the Covert Action Information Bulletin. I think there is no way to cover what they do without having a bill that is in fact clearly unconstitutional.

What I would urge that you do is deal with this matter within the context of the charter and not separately because I think it is an issue that is far easier to deal with in its limited form if you are simultaneously legislating to control the intelligence agencies in other ways.

I would urge you to proceed with great caution. I would also urge that you deal with the problem raised with the *Snepp* case, of the

CIA's ability now to censor the publications of all former CIA employees and the danger that some future administration may take the authority of the *Snepp* case and apply it against all former employees who have had access to any classified information including employees of the previous administration. I think Congress ought to consider whether it wants to legislate if not to overrule the *Snepp* decision, at least very severely narrow it and basically to substitute criminal penalties, if you do pass a criminal statute, for the injunctive relief that is provided in the *Snepp* decision.

Thank you.

[The prepared statement of Jerry J. Berman and Morton H. Halperin follows:]

STATEMENT OF JERRY J. BERMAN AND MORTON H. HALPERIN ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman, we appreciate the opportunity to testify before this committee on the specific question of the appropriateness of the Congress legislating criminal penalties for the disclosure of the identities of intelligence officers and agents. We are testifying on behalf of the American Civil Liberties Union, a membership organization of some 200,000 Americans dedicated to the protection of the Bill of Rights.

We understand the concern which many members of this committee and many others in the Senate and in the Congress have about the publication of names of Americans and others who are working clandestinely and secretly for the CIA and for other intelligence agencies. We appreciate the desire to try to do something about these revelations. We have testified elsewhere as well as before this committee previously on this subject and it remains our position that it is not impossible to draft legislation which would be sufficiently narrow that it would not be unconstitutional. Nonetheless, the more we look at proposed alternative drafts and the more we consider the consequences of the adoption of legislation, the more we become convinced that the problem is more complicated than it seems. We would urge that any legislation be deliberately considered and that the precise wording be subject to careful scrutiny. Our own current views may be summarized as follows:

Even a relatively broad bill would not be able to deal with what is the main current concern, namely, the publication in the Covert Action Information Bulletin of the names of CIA station chiefs and other prominent CIA officials. Those listings derive from unclassified information. It is our firm view that any statute which purported to punish private citizens for using unclassified information would be unconstitutional.

Even a relatively narrow bill which might survive a constitutional challenge would interfere with vital public debate and with the ability of private institutions to police their own integrity particularly in the absence of a prohibition on the use of such institutions embodied in a comprehensive charter.

The problem of criminal penalties for the disclosure of names of agents should be seen as part of a more comprehensive problem, namely, how to protect the legitimate secrets of the intelligence community without interfering with needed public debate on intelligence agency matters. The Congress needs to consider the appropriate mix of contractual obligations, and criminal penalties. We need to keep in mind that the object is to protect legitimate secrets and not to use constitutionally sensitive techniques if other less burdensome means may be more effective.

Mr. Chairman, as you are aware, there are a large number f proposals both formally and informally before this committee. We would ask permission to submit for the record an analysis of these approaches in which we would attempt to point out, as we understand them, the different consequences of alternative formulations. We believe that the existence of this wide variety of different measures shows how difficult it is to draft a bill which does not do violence to the First Amendment and which at the same time deals effectively with the concerns which the CIA and members of this committee have.

Rather than analyze the differences between those bills, what we would like to do briefly today is to focus on the problems which would be created by even

the narrowest bill, i.e., one limited to those who had authorized access to information and who revealed the identity of agents whose names and identities they learned as a result of that official access. What we will seek to show is that:

There are many situations in which names—usually not of Americans—need to be revealed if the public is to be adequately informed and to make an appropriate judgment on intelligence activities.

Private institutions need to have access in some circumstances to names of current employees who may be violating the rules of that private institution.

Even these narrow bills could not prevent the publishing of lists of names which are not secret and which are derived from public sources.

Let us turn then to some brief illustrations of circumstances in which the revealing of names or the release of information which might well reveal the names of those who cooperate with the CIA is necessary for the public to understand an issue of vital importance.

In thinking about this question, much discussion proceeds as if the bill protects only Americans and indeed only those Americans who are formal employees of the CIA. In those circumstances the American employees' identity is usually not necessary to describe the intelligence activity. However, in some cases it may not be possible to describe an issue with sufficient precision to allow public debate without at the same time revealing information which could well reveal the identity of an American who is a CIA employee or a source of operational assistance.

Consider for example, the issue of the Watergate burglary. A government official who knew that several of the individuals captured at the Watergate had been or were sources of operational assistance to the CIA might well have found it impossible to raise the issue of CIA involvement if there were criminal penalties for revealing information which identified a CIA agent.[1]

Or consider the allegation made from time to time that the CIA had infiltrated parts of the federal government. Suppose that a government official learned that a member of the staff of this committee or some other congressional committee was in fact a CIA employee. By making that information public he runs the risk of identifying a CIA agent and violating the proposed criminal statute.[2] Moreover, as we attempt to show below, protecting the integrity of private institutions often requires a willingness to reveal the names of CIA agents.

Unless the bill has a specific provision providing that Americans can reveal that they were themselves secret CIA agents at least after they complete their service with the CIA, the statute would have a very major inhibiting effect on public debate.

As some of the bills—but not the Administration bill, are now drafted, no secret employee of the intelligence services could, for example, join the Association of Retired Intelligence Officers. Nor could any former secret agent testify before a congressional committee, as many now do, and invoke the authority and insight which comes from having served within the government. Nor could any former official write an article or a book taking a policy position if he or she revealed the fact that he or she was a CIA agent. No description could, of course, be made of activities in which the individual had engaged even if those descriptions did not involve revealing the identities of any other individual. Thus, at the very least, any statute needs to have an exception permitting an individual to reveal the fact that he or she had been a CIA agent or source of operational assistance to the agency.

Where the person identified is a foreigner, the number of situations in which release of information, which might reveal the name, would be absolutely essential for public discussion of a major intelligence or foreign policy issue is substantially greater.

John Stockwell's book, "In Search of Enemies," could probably not have been written without violating the criminal laws of the United States if the proposed names of agents statute were in effect. Stockwell was the head of the Angolan

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[1] The Administration bill requires that the "covert agent" be serving outside the United States. This limitation is of some value. However, a person in possession of information that a Watergate burglar was a CIA agent might well not know if the person had served abroad and would risk criminal penalties if he had.

[2] The Administration bill does not have an exception for transmittal of information to Congress. Mr. Carlucci in his testimony on June 24 indicated CIA support for an exception for the intelligence committees of the Congress. Such a provision should be added to the bill but it is not sufficient. This committee and its counterpart in the House do not have the resources to investigate every allegation of wrongdoing.

task force in the CIA which ran the Angolan intervention. He could not have written a book at all without revealing his own identity which would be a crime under the statutes as currently drafted. More generally, he could not have described CIA involvement with various groups contending for power in Angola without making it clear that the heads of those movements were working with the agency. Nor could the story of the CIA's involvement—at the direction of the White House—with Kurdish rebel groups in Iraq have been discussed publicly without revealing that the heads of those movements worked with the CIA.

Of course, the Washington Post could not have published the story that King Hussein was the recipient of CIA assistance—a story which it considered to be of substantial news value—if the broader bill was in effect and that information could not have been provided to the Post and other newspapers by individuals inside the government without violating the proposed criminal statute. The CIA's connections with various kinds of unsavory individuals—whether they be dictators or criminals (including dope smugglers), or alleged torturers—could not be discussed publicly without information coming from someone who had apparently violated the proposed criminal statute. In short, in a variety of circumstances, the proposed criminal statute would interfere with public debate on issues of major importance. It is simply not the case that in all circumstances debate can go forward without revealing information which tends to reveal the identity of particular individuals.[3]

The proposed statute could have a substantial effect on the ability of private institutions such as universities, churches or newsgathering organizations to protect themselves from improper infiltration by the intelligence community.

Consider the case in which a CIA employee discovers that a Harvard professor is assisting the CIA in the secret recruitment of foreign students studying at Harvard. This activity is in violation of Harvard University regulations but not of any CIA regulations or guidelines. Thus the individual would probably not get very far bringing the information to either of the intelligence committees or even to the Intelligence Oversight Board. He would be told that, as Admiral Turner has stated publicly, the CIA intends to use individuals in violation of Harvard's rules, provided the individuals are prepared to cooperate with the agency. Thus, the individual might well place a phone call to an official at Harvard advising the university that one of their professors was operating in violation of their rules and perhaps identifying the professor or at least providing information which might tend to identify the professor. That phone call would be illegal under the proposed statute and hence it would be much less likely to be made substantially reducing the ability of Harvard or other universities to police their own campuses.[4]

It is worth adding that under the bill now supported by the Administration, if the call came to the president of the university and if he in turn used that call to initiate an investigation for the purpose of stopping professors from engaging in secret recruitment activities, then the university president would be in violation of the proposed statute, since the information would be classified.

The situation would be even more absurd under the statute originally proposed by CIA and introduced in the House Intelligence Committee. Under that statute if a Harvard University professor doing research in the archives of Harvard University came upon unclassified letters which identified a current Harvard University professor as a secret CIA recruiter, the Harvard professor doing the research would not be free to disclose the information. Should the professor take this unclassified Harvard-generated information from the archives and pass it on to other Harvard professors accompanied by his conclusion that a current Harvard professor was still a CIA recruiter and that this was a violation of the Harvard rules and should be stopped, that individual would be using information which tends to reveal the name of a CIA informant and doing so for the purpose of hindering or interfering with CIA activities.

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[3] Mr. Carlucci in his testimony states that it is a "fallacy" to assert that the proposed legislation "would stifle discussion of important intelligence and foreign policy issues." However, he goes on to note that public debate "has taken place without recourse to wholesale disclosure of names of intelligence personnel" (emphasis added). That is of course not the issue. We do not suggest that public debate requires the wholesale listing of names but only the occasional revelation of an identity in the context of discussing a specific issue or operation. The proposed bill would of course impose criminal penalties not only for "wholesale" identification.

[4] Under the Administration bill the act would be illegal only if the professor had "served" outside the United States. Of course, the government official could have no way to know if the professor working with the CIA had "served" abroad.

The same issues would arise in the case of churches or newsgathering organizations. A tip to a church that a particular church official was a CIA informant or agent would violate the statute and the use of that information by the church to cleanse itself would violate the provisions of the administration bill or the proposed CIA bill. Efforts by newsgathering organizations to police their own house would meet with similar difficulties.

Most of the problems that we have identified could be eliminated by returning to language similar to that contained in S. 2525 which would have provided criminal penalties only for the release of names in a situation where the release was done deliberately for the purpose of placing the life of the individual in jeopardy and where the release of the name did, in fact, have that result. Any bill which goes beyond that would go too far in chilling important public debate and therefore should be rejected.

We also must note, Mr. Chairman, that no bill which is conceivably constitutional can, in fact, prevent the publication by the Covert Action Information Bulletin, or by other publications in the United States or abroad of the names of CIA officers who are assigned to positions in American embassies.

The simple truth is that those individuals are only under what is referred to as light cover. The CIA has never had any real confidence that the identity of those officials would be kept from foreign intelligence services, host governments, or even from the local or American press. Anyone who has traveled abroad or who now travels abroad to engage in newsgathering activities or political activities of any kind can tell you that the CIA officers at a particular embassy are widely known not only within the diplomatic community but within the local and American press communities and within the political community of the host country.

The individuals are not identified as being with the CIA almost entirely for diplomatic reasons. That is, most governments do not want to formally acknowledge the fact that the United States or other countries have intelligence agencies operating within their embassies and enjoying diplomatic immunity, but they all know that is going on and anybody in the country with an interest in finding out who the CIA station chief is can readily do so.

It is worth considering carefully in this regard the few words on cover included in the Church Committee report. This reads as follows:

"The Committee examined cover because it is an important aspect of all CIA clandestine activities. Its importance is underscored by the tragic murder of a CIA Station Chief in Greece, coupled with continuing disclosure of CIA agents' names. The Committee sought to determine what, if anything, has been done in the past to strengthen cover, and what should be done in the future.

"The Committee found conflicting views about what constitutes cover, what it can do, and what should be done to improve it. A 1970 CIA Inspector General report termed the Agency's concept and use of cover to be lax, arbitrary, uneven, confused, and loose. The present cover staff in the CIA considered the 1970 assessment to be simplistic and overly harsh. There is no question, however, that some improvements and changes are needed.

"The Committee finds that there is a basic tension between maintaining adequate cover and effectively engaging in overseas intelligence activities. Almost every operational act by a CIA officer under cover in the field—from working with local intelligence and police to attempting to recruit agents—reveals his true purpose and chips away at his cover. Some forms of cover do not provide concealment but offer a certain degree of deniability. Others are so elaborate that they limit the amount of work an officer can do for the CIA. In carrying out their responsibilities, CIA officers generally regard the maintenance of cover as a 'nuisance.'

The situation of the Athens Station Chief, Richard Welch, illustrates the problem of striking the right balance between cover and operations, and also the transparency of cover. As the Chief of the CIA's Cover Staff stated, by the time a person becomes Chief of Station, 'there is not a great deal of cover left.' The Chief of the Cover Staff identified terrorism as a further security problem for officers overseas, one that is aggravated by the erosion of cover." [5]

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[5] "Foreign and Military Intelligence," Book I, Final Report of the Select Committee to Study Government Operations with respect to Intelligence Activities, U.S. Senate, 94th Cong., 2d Sess., Report No. 94–755, April 26, 1976, p. 458, footnote omitted. The Report explains that this particular material has been substantially abridged at the request of the executive agencies. The classified version of this material is available to members of the Senate under the provisions of Senate Resolution 21 and the Standing Rules of the Senate.

We would urge this committee to look at the original, uncensored Church Committee discussion of cover and to take with a great deal of skepticism any assertion that these names cannot be derived from a combination of public sources and local gossip. In fact, manuals and directories published by the United States government enable anyone using simply public sources and publicly available methods of analysis to deduce who is or who might very well be a CIA agent.[6] There is no way we believe constitutionally to punish the disclosure of such deductions. If that cannot be done there is no way to prevent the publication of lists of names of CIA officers.

The Administration bill would punish release of any name by anyone who, while in the government, had access to any agents' identities and who reveals any identity. In our written submission we will discuss the difficulties with this bill in greater detail. Now we wish only to make one point, namely that the number of people covered by this provision would be very large. While it is true that few government employees know the names of deep cover American CIA employees or foreign assets. Vast numbers of government officials know the identities of one or more CIA employees who are under normal cover when abroad. All of these people would be in jeopardy of violating the statute if they analyzed or discussed any CIA covert activities even if they were in no way involved in any CIA activities when in the government. For this reason among others we prefer the formulation of the Aspin bill.

This leads us finally to our view that a names of agents bill should not be enacted as a separate piece of legislation. If criminal penalties are to be established for revealing the names of agents on the part of people with authorized access that should be done in the context of a comprehensive legislative charter which should provide firm limitations on the surveillance of Americans and which should provide for the protection of the independence of institutions such as universities, the press and the clergy.[7] Moreover, Mr. Chairman, we believe that the new situation created by the Supreme Court in *U.S.* v. *Snepp* cannot be ignored in considering congressional action in this area. The CIA has justified the need for prior review of manuscripts as necessary to persuade those who may cooperate with the CIA that it will protect classified information about them. However, as William Colby, former Director of Central Intelligence explained in hearings before the House Intelligence Committee, a foreign source considering cooperation with the CIA is not likely to be reassured by the knowledge that if somebody reveals his identity in a book the profits of that book will be seized by the United States government. In Mr. Colby's judgment, with which we concur, he is much more likely to be reassured if told that the United States will take the steps to keep that information secret when it can and that those steps include criminal penalties for those who reveal the names of such agents.

Thus we think that the severe limitations on the First Amendment which stem from the *Snepp* decision are both unnecessary and ineffective and that Congress ought to take away from the CIA the authority to require pre-publication review under the threat of court-ordered sanctions, if and when Congress provides criminal penalties for the release of the names of agents by former CIA officials. The existence of that criminal penalty should provide a more effective incentive for former officials to submit books to make sure that they are not inadvertently revealing the names of agents. That would provide much more effective protection than provided by the *Snepp* decision without violating the constitutional rights of former officials to publish their memoirs and the rights of all of us to learn from those books about the activities of the CIA.

Mr. Chairman, once again, we want to say how much we appreciate the attention given to our views by this committee and we are, of course, prepared to answer your questions.

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[6] Mr. Carlucci labels this position as another "fallacy" but here again his discussion is less than precise. He suggests that public sources alone are not sufficient but admits that they sometimes are because information has been publicly disclosed which reveals the "indicators." That being the case, many names can now be derived from public sources. Others are apparently the result of what Mr. Carlucci refers to as "the same techniques as any intelligence service uses in its counterintelligence efforts" or what others would call the activities of newsgathering organizations. Mr. Carlucci suggests that the CIA has gone along with the Administration bill drafted by Justice only if it would reach the Covert Action Information Bulletin because its "use of criminal investigative techniques" would provide sufficient proof that the disclosures were based on classified information. We urge the Committee to carefully explore the meaning of the assertion.

[7] Mr. Carlucci's assertion that the CIA's support for comprehensive charters would not diminish if a separate names of agents bill were passed misses the point that such restrictions on public debate would be less objectionable if a comprehensive charter were in place.

Chairman BAYH. Thank you, Mr. Halperin. I appreciate your letting us have your thoughts. You have had a personal interest in this. You have been very helpful to the committee in past deliberations as to where you draw the line. Would you care to comment on a broader problem of information, how it could be defined in a way that would not be unnecessarily violative of first amendment rights, how it could be confined to that kind of information which would be generally accepted as the kind of information that really is classified information, not to "put the stamp on it if in doubt" kind of information?

Mr. HALPERIN. I think insofar as that problem, the Administration bill does probably as well as you can. It talks about disclosing information that directly identifies another person as a covert agent. I think in doing there are created very serious problems of proof because they are going to have to publicly reveal information and make it clear that you have correctly identified somebody as a covert agent. I have some problem with their definition of covert agent.

Chairman BAYH. I might interrupt, I don't think I asked the question in a manner that let you know I was changing gears. I am talking about different kinds of information other than information that would relate to the identity of agents, information about our secret codes, information about troop movements, operations of weapon systems, the operation of satellite collection systems and this kind of thing.

Mr. HALPERIN. I should say, Mr. Chairman, I neglected to say in the beginning that Mr. Adler and I are appearing on behalf of the American Civil Liberties Union and therefore unlike the other people who testified today the views expressed are not our own but those of the ACLU.

Let me give you a personal view in response to that question. I think that this problem of names of agents should be looked at in the broader context of the set of procedures and regulations that the Government has to control, the improper disclosure of information relating to the national defense, foreign relations and intelligence. The way to go in all of those areas is to draw up narrowly drawn criminal statutes which penalize the intentional disclosure of those narrow categories of information to people who choose to get access to that information and at the same time makes it clear that no criminal penalty is attached to the use of information which reaches them by members of the press or others, whether they get it from those Government officials or some other sources, and which also makes it clear that no prior restraint on the publication of that information can be had against the newspaper which gains access to the information.

If you take that approach the problem is to narrowly draft the categories so that they don't have a chilling effect which cuts across vast quantities of information. As far as names of agents the language "knowingly discloses information and correctly identifies" is probably as narrow as you can get. We have such a statute on codes which penalizes those who are former officials of the Government who reveal the fact that we have broken a diplomatic code or the content of the diplomatic code. We have a statute on atomic energy. That one has turned out to have a definition of atomic energy information that is too broad.

We have a statute that relates to communications intelligence which is probably pretty good. Now one could go on. Strangely enough we have no statute relating to troop movements or design of weaponry. There is a danger in those that if you draft it too broadly they can affect the whole range of information. There again it is possible to define, for example, the technical details of weapon systems or the details of military contingency plans. Those could also be defined in a way that did not cast a chill over the ability of former officials to engage in public debate. What is needed is a fundamental decision on the part of the administration. It must agree that the real problem is precisely that, the unauthorized disclosure of information by people, whether they are heads of the National Security Council or Secretaries of State or career officials in Government or heads of independent agencies, and that the way to deal with that problem is a system of narrowly drawn statutes that can in fact be enforced in the court. If the Administration was prepared to adopt that approach, it would be possible to begin to draft these definitions which would keep the bills narrow enough that they would not infringe on legitimate debate.

Chairman BAYH. I appreciate your assessment here. We might ask you to take a look at some language later on if you don't mind. I have a rather strange feeling in the pit of my stomach that there is perhaps not a willful but indeed an unintentional application of a dual standard here for those who want to go out and apply a standard against publication of something that is not classified and at the same time those folks are not as concerned in diligently pursuing people who may be in the very highest hierarchy of the governmental establishment, who for reasons that appear to be good to them make information available to the press to try to create a certain public opinion and thus form public policy by leaks.

It seems to me if we have information that is not vital to the national security it ought to be made public and should not have a classified stamp put on it in the first place.

Mr. HALPERIN. May I make one observation? The purpose of this bill is said to be at least in substantial part to enable the CIA to get people to cooperate with the agency because we show that we have some means to protect the unauthorized disclosure of information about people who cooperate with us. If you look at the unauthorized disclosures that have occurred in the past several years it might discourage people. I think one is the Covert Action Information Bulletin. But I think the other, which is much more important in my view, is the disclosure about the details of the planned operation to rescue the American hostages, information about the fact that American intelligence agents had infiltrated, disguised as European businessmen, the fact that warehouses had been rented and so on. This was all revealed in the press for reasons that one can speculate about.

If I was a citizen of a foreign country and was approached by the CIA to help rent a warehouse for some purpose in the next several years I must say I would be much more likely to be deterred by those detailed descriptions in the American press than by the fact that names of CIA station chiefs, which are not really secret and everybody knows are not secret, would be published in the Covert Action Information Bulletin.

Yet I have not heard from anybody in the administration with a proposal on what to do about those leaks.

Chairman BAYH. I don't know where you put the Senator from Indiana but you heard howls of anguish.

Mr. HALPERIN. I have heard them from the Congress. From the executive branch we hear a great deal about the Covert Action Information Bulletin. We have heard nothing about Iranian warehouses.

Chairman BAYH. I should hasten to say that my howls of anguish should not be interpreted as verifying the authenticity and accuracy of reports that I am howling in anguish about.

It does not matter whether they are true or not. That is correct as far as damaging the ability of our agencies to get cooperation in the future. I don't believe that a Presidential Secretary or a Cabinet official or Congressman or Senator should be immune if indeed there is a standard established that is designed to protect certain kinds of information it ought to apply across the broad.

Thank you very much, gentlemen. We appreciate your helping us. Senator Durenberger.

Senator DURENBERGER. I have a relatively narrow point. I apologize for not being here for your presentation. As I pointed out in a letter that you may have received by now, one of my concerns, I guess a concern of all of us is that we don't sink ourselves into some kind of constitutional swamp here in our efforts to find a solution. I am interested in taking a little part of this and talking about what we can do about the people whom the Agee types train to ferret out CIA employees and agents. Let us assume just for a minute that we refrain wholly from subjecting to prosecution the publishers of a leak. How strongly do you think we could draft a bill that deals with the leaker, himself? Could it cover the disclosure of classified techniques for determining agent identities? How far do you go in including information that leads to the identification of agents?

Mr. HALPERIN. I think you can do something about that. I would call to your attention Congressman Aspin's bill which is the only bill I know of that deals specifically with that issue and which makes it a crime for a former official to use covert techniques he learned in the Government to identify other people. I think that is probably about as far as you can go. The bill does have that language, and I would urge you to take a look at that. I think it is also important to say that I think the CIA greatly exaggetrates the degree to which these techniques are esoteric and Mr. Carlucci seems to concede that when he says the problem is that people like Philip Agee have revealed the techniques already. Insofar as that is true those cats are out of the bag and nothing can be done to put them back in.

I also think he greatly exaggerates the degree to which one needed Philip Agee or anybody else to figure out what those techniques are. In any case I think there is now a set of publicly described techniques which can in fact be used by anybody—if not Americans, by foreigners—to identify a certain class of CIA agents who are not undercover agents but people who are under the nominal diplomatic cover. I urge you to look at the report on cover which the predecessor committee, the Church Committee, prepared and which deals with this issue. The

only thing I have seen is six paragraphs of italic language but they are very tantalizing and I would urge you to look at them.

I think what you will discover is that the cover the "Station Chief" is under is nominal cover for diplomatic niceties and not in fact something that anybody believes keeps anyone who wants to, from finding out who the "Station Chief" is. The "Station Chiefs" will tell you, except when under orders to promote this bill, that they want most identities known because if a Russian wants to defect they want him to know whom to come to and they in fact are not very secret.

Chairman BAYH. Thank you very much.

Mr. HALPERIN. Thank you, Mr. Chairman.

Chairman BAYH. The next witness is Mr. Raymond J. Waldmann, intelligence consultant to the Standing Committee on Law and National Security of the American Bar Association.

## TESTIMONY OF RAYMOND J. WALDMANN, OF SCHIFF HARDIN & WAITE, INTELLIGENCE CONSULTANT TO THE STANDING COMMITTEE ON LAW AND NATIONAL SECURITY OF THE AMERICAN BAR ASSOCIATION

Mr. WALDMANN. I would like to shorten my statement if I may. Rather than read the entire statement I will read portions of it.

The first full sentence and the first paragraph of the second page should be omitted from the statement. I inadvertently refer to an ABA report and, as that report is not part of the ABA's official position, there should not be a reference to that document in the statement. I will begin in the middle of page 2.

It should be self-evident that an intelligence agency must be able to operate in secrecy, to provide reasonable protection to those who cooperate with it, and to defend itself against those who attack it. The report discussed briefly the inadequacies in present espionage laws and their enforcement in achieving these goals.

Earlier congressional hearings have provided examples of the need for new legislation. Protection of identities is necessary not only to protect the lives of intelligence officers and agents but also to protect intelligence operations.

The difficulty in this area is not in deciding what to do, but in deciding where to stop. Legislation in the area will be regarded by some as potentially eroding the first amendment protection of free speech, and therefore it must be carefully drawn. It must be sufficiently narrow and precise to withstand constitutional challenge, yet broad enough to deter unacceptable acts and general enough to allow for unforeseen situations and circumstances.

For example, laws in analogous areas, such as those prohibiting the utterance of threats, have been found constitutional. The Moynihan bill appears carefully drafted to satisfy these needs.

In considering the various legislative proposals, this committee will have to take a position on a very important issue. The case of the Government employee who discloses classified identifying information raises little controversy. And all proposals propose punishment in such a case. More difficult is the extension of criminal sanctions to the following situations:

a. Identification made through analysis of publicly available information by former Government employees with special expertise gained during their employment; and

b. The republications of identifications by the press or journalists who come into possession of the information through an intermediary.

On the one hand, the risks of such extensions are obvious. The possibilities of harassment, censorship, and the chilling effect on free speech in the name of agent protection should not be discounted. The prohibition of these possibilities is what the first amendment is all about.

On the other hand, the first amendment is not absolute; its protections must be weighed against other interests. Those interests include at least the protection of human life and may extend, in extreme cases, to national security.

Given the very real practical problem of adequately dealing with the Government leaker, serious consideration must be given by this committee to the extension of liability to those outside the Government who disclose identifying information with the requisite intent to impair or impede our foreign intelligence activities.

Provisions to accomplish this in the bills before the committee are sections 501(a) and 502(b), and section 501(b) of the Moynihan bill; section 701(c) of the administration bill; and section 1127(a)(2) of amendment No. 1682 to S. 1722 offered by Senator Simpson.

The Simpson formulation is troublesome in that it imports law enforcement concepts into intelligence activities in attempting to extend protection to FBI and other law enforcement officials, and is less precise than the Moynihan or administration versions.

The administration version is too broad, punishing attempts to diclose information. The Moynihan formulation is technically less troublesome, allowing the Government to plug leaks after the fact. It does so within acceptable limits since the Moynihan bill requires a specific intent for prosecuting either the principal or the accessory, thus minimizing the adverse effects of attempting to plug such leaks.

It is important to note that some forms of accessorial liability may be found under section 501(a) of the Moynihan bill even if section 501(b) is not retained. Under section 502(b), those who "cause" a felony (aiders and abettors and accessories before the fact, as described in section 2, of title 18 United States Code), those who fail to report a felony (misprisioners as described in section 4 of title 18), or those who conspire (18 U.S.C. § 371) could be reached if they had the requisite intent to impair or impede foreign intelligence activities.

It is useful to examine how these provisions might be applied. The spring 1980 issue of CounterSpy contains, on page 36, a list of four names with brief biographical information under the heading: "The following officials, presently assigned to the U.S. Embassy in Kabul, are CIA officers." Presumably, if these identifications are accurate, a CIA personnel officer could so testify at a trial. Since the Embassy titles ("Attaché," "Second Secretary," et cetera) are also given by "CounterSpy," it is evident that the United States is taking affirmative measures to conceal these individuals' intelligence relationship and that they are serving outside the United States, two elements of proof required under the Moynihan bill. To be reached as an accessory, misprisioner or coconspirator, however, requisite intent to impair or

impede must be found. In its editorial on page 2 of the same issue, CounterSpy provides the evidence, saying:

> Given the CIA's disregard of the law and its enormous record of consciously committed crimes it is folly, at best, to talk of reforming the CIA. The only acceptable humane response is to work for the abolition of the CIA. Accordingly, CounterSpy, as we have stated in the past, fully supports the abolition of the CIA.

Thus, I believe, CounterSpy could be prosecuted either under sections 501(a) and 502, as an accessory or an aider or abettor, or under section 501(b), directly as a principal. A significant difference, however, is that under the former prosecution, complicity with a person who had authorized access would also have to be shown.

It is worth noting in passing that similar reasoning could be applied to the "Covert Action Information Bulletin." In its June 1980 issue's section entitled, "Naming Names," on pages 29–34, it purports to identify 40 CIA officers and one Pentagon intelligence chief. In both these cases, whether true or not, individuals in highly volatile parts of the world, such as Afghanistan, have had their lives placed in jeopardy. If true, these identifications may also have obviously hindered intelligence operations. Such an activity should not be protected.

A few other comments may be helpful in the committee's work. If the prosecution is unable to confirm the existence of the confidential relationship, the legislation is self-defeating in destroying an operational capability. One way to allow such prosecutions is to lengthen the statute of limitations from 5 to 10 years, so that the employee or agent may continue his operations as long as possible. This preserves the Government's option to prosecute for a reasonable period.

The term "whoever" used in several bills should and would seem to include artificial persons, but this may be easily clarified in the bill or the committee report. Similarly, the words "knowingly," "intentionally," and "willfully" are used in various versions to modify the operative verb disclose. There appears to be little legal difference between these; any one could convey the desired intent.

Protection should be extended beyond the CIA to any agency of the U.S. Government engaged in foreign intelligence activities; extending protection in this legislation even further to domestic law enforcement officers creates unnecessary problems.

The Moynihan bill effectively contains the requirement of proving a specific intent as an element in the prosecution of a principal. In the Bentsen bill, the absence of such a specific intent in the definition of the crime leads to a list of exceptions—section (b) of S. 191—which may not be complete. This bill also says that prosecution "shall be barred," a confusing and legally imprecise term.

The administration bill could reach attempts to disclose, bringing with it problems of determining why the attempts failed and the differences between legal and factual impossibility. The erroneous identification of a person as an agent could thus theoretically be punishable even though reaching such disclosures is not the primary intent of the bill.

Finally, the Moynihan bill is drafted as an amendment to the National Security Act of 1947. It thus preserves and expands the existing statutory charter of the intelligence agencies and continues the inter-

pretation of that act by the courts, the Comptroller General, and the executive branch. It is therefore the most logical form for this necessary and desirable legislation to take.

Thank you.

[The prepared statement of Raymond J. Waldmann, follows:]

PREPARED STATEMENT OF RAYMOND J. WALDMANN, ESQ., OF SCHIFF HARDIN & WAITE

It is a pleasure to appear before the Committee today to support the passage of legislation to protect the identities of intelligence officers and agents. I served as Deputy Assistant Secretary of State from 1973 through 1975 and assisted President Ford in his review of the intelligence community in late 1975. In the last year, I have been a consultant to the American Bar Association Standing Committee on Law and National Security.

In my March 27, 1980. testimony on the intelligence charter, I discussed the activities of the Standing Committee and the ABA's procedures for arriving at positions on substantive issues. As in the case of a comprehensive intelligence charter, the ABA has not adopted a position with respect to agent identity legislation, and thus this statement does not reflect an official ABA position on the issue. The ABA Standing Committee's Advisory Group on Intelligence Legislation, which I chair, reported on May 6 to the Standing Committee on various proposals.

It should be self-evident that an intelligence agency must be able to operate in secrecy, to provide reasonable protection to those who cooperate with it, and to defend itself against those who attack it. The report discussed briefly the inadequacies in present espionage laws and their enforcement in achieving these goals. Earlier Congressional hearings have provided examples of the need for new legislation. Protection of identities is necessary not only to protect the lives of intelligence officers and agents but also to protect intelligence operations.

The difficulty in this area is not in deciding what to do, but in deciding where to stop. Legislation in the area will be regarded by some as potentially eroding the First Amendment protection of free speech, and therefore it must be carefully drawn. It must be sufficiently narrow and precise to withstand Constitutional challenge, yet broad enough to deter unacceptable acts and general enough to allow for unforeseen situations and circumstances. For example, laws in analogous areas, such as those prohibiting the utterance of threats, have been found Constitutional. The Moynihan Bill appears carefully drafted to satisfy these needs.

In considering these various legislative proposals. this Committee will have to take a position on a very important issue. The case of the government employee who discloses classified identifying information raises little controversy. And all proposals propose punishment in such a case. More difficult is the extension of criminal sanctions to the following situations:

(*a*) Identification made through analysis of publicly available information by former government employees with special expertise gained during their employment; and

(*b*) The republications of identifications by the press or journalists, who come into possession of the information through an intermediary.

On the one hand, the risks of such extensions are obvious. The possibilities of harassment, censorship and the chilling effect on free speech in the name of agent protection should not be discounted. The prohibition of these possibilities is what the First Amendment is all about. On the other hand, the First Amendment is not absolute; its protections must be weighed against other interests. Those interests include at least the protection of human life and may extend, in extreme cases, to national security.

Given the very real practical problem of adequately dealing with the government leaker, serious consideration must be given by this committee to the extension of liability to those outside government who disclose identifying information with the requisite intent to impair or impede our foreign intelligence activities. Provisions to accomplish this in the bills before the Committee are sections 501(a) and 502(b), and section 501(b) of the Moynihan Bill; section 701(c) of the Administration Bill; and section 1127(a)(2) of Amendment No. 1682 to and S. 1722 offered by Senator Simpson.

The Simpson formulation is troublesome in that it imports law enforcement concepts into intelligence activities in attempting to extend protection to FBI and other law enforcement officials, and is less precise than the Moynihan or Administration versions. The Administration version is too broad, punishing attempts to disclose information. The Moynihan formulation is technically less troublesome, allowing the government to plug leaks after the fact. It does so within acceptable limits since the Moynihan Bill requires a specific intent for prosecuting either the principal or the accessory, thus minimizing the adverse effects of attempting to plug such leaks.

It is important to note that some forms of accessorial liability may be found under section 501(a) of the Moynihan Bill even if section 501(b) is not retained. Under section 502(b), those who "cause" a felony (aiders and abettors and accessories before the fact, as described in section 2 of Title 18 U.S.C.), those who fail to report a felony (misprisioners as described in section 4 of Title 18), or those who conspire (18 U.S.C. § 371) could be reached if they had the requisite intent to impair or impede foreign intelligence activities.

It is useful to examine how these provisions might be applied. The Spring 1980 issue of "CounterSpy" contains, on page 36, a list of four names with brief biographical information under the heading: "The following officials, presently assigned to the U.S. Embassy in Kabul, are CIA officers." Presumably, if these identifications are accurate, a CIA personnel officer could so testify at a trial. Since the Embassy titles ("Attache," "Second Secretary," etc.) are also given by "CounterSpy," it is evident that the U.S. is taking affirmative measures to conceal these individuals' intelligence relationship and that they are serving outside the U.S., two elements of proof required under the Moynihan Bill. To be reached as an accessory, misprisioner or co-conspirator, however, requisite intent to impair or impede must be found. In its editorial on page 2 of the same issue, "CounterSpy" provides the evidence, saying:

"Given the CIA's disregard of the law and its enormous record of consciously committed crimes it is folly, at best, to talk of reforming the CIA. The only acceptable, humane response is to work for the abolition of the CIA. Accordingly, CounterSpy, as we have stated in the past, fully supports the abolition of the CIA."

Thus, I believe, "CounterSpy" could be prosecuted either under sections 501 (a) and 502, as an accessory or an aider or abettor, or under section 501(b), directly as a principal. A significant difference, however, is that under the former prosecution, complicity with a person who had authorized access would also have to be shown.

It is worth noting in passing that similar reasoning could be applied to the "Covert Action Information Bulletin." In its June 1980 issue's section entitled "Naming Names" on pages 29–34, it purports to identify 40 CIA officers and one Pentagon intelligence chief. In both these cases, whether true or not, individuals in highly volatile parts of the world such as Afghanistan have had their lives placed in jeopardy. If true, these identifications may also have obviously hindered intelligence operations. Such an activity should not be protected.

A few other comments may be helpful in the Committee's work. If the prosecution is unable to confirm the existence of the confidential relationship, the legislation if self-defeating in destroying an operational capability. One way to allow such prosecutions is to lengthen the statute of limitations from 5 years to 10 years, so that the employee or agent may continue his operations as long as possible. This preserves the government's option to prosecute for a reasonable period.

The term "whoever" used in several bills should and would seem to include artificial persons, but this may be easily clarified in the bill or the Committee report. Similarly, the words "knowingly," "intentionally," and "willfully" are used in various versions to modify the operative verb disclose. There appears to be a little legal difference between these; any one could convey the desired intent. Protection should be extended beyond the CIA to any agency of the U.S. government engaged in foreign intelligence activities; extending protection in this legislation even further to domestic law enforcement officers creates unnecessary problems.

The Moynihan Bill effectively contains the requirements of providing a specific intent as an element in the prosecution of a principal. In the Bentsen Bill, the absence of such a specific intent in the definition of the crime leads to a list of exceptions (section (b) of S. 191) which may not be complete. This Bill also says that prosecution "shall be barred," a confusing and legally imprecise term.

As pointed out on page 65 of the Advisory Group's report (attached), the Administration Bill could reach attempts to disclose, bringing with it problems of determining why the attempt failed and the differences between legal and factual impossibility. The erroneous identification of a person as an agent could thus theoretically be punishable even though reaching such disclosures is not the primary intent of the Bill.

Finally, the Moynihan Bill is drafted as an amendment to the National Security Act of 1947. It thus preserves and expands the existing statutory charter of the intelligence agencies and continues the interpretation of that Act by the courts, the Comptroller General and the Executive Branch. It is therefore the most logical form for this necessary and desirable legislation to take.

EXCERPT FROM DISCUSSION DRAFT REPORT ON INTELLIGENCE CHARTER LEGISLATIVE PROPOSALS TO THE ABA STANDING COMMITTEE ON LAW AND NATIONAL SECURITY FROM THE ADVISORY GROUP ON INTELLIGENCE LEGISLATION

5. PROTECTION OF AGENT'S IDENTITIES

*Introduction.*—Precipitated by media publication of the names of intelligence operatives which allegedly led to attempts on their lives, the proposed charter and related legislative proposals contain provisions to criminalize the disclosure of information leading to such identification. The proposals have raised, in the minds of some, serious issues concerning freedom of speech and of the press; at the same time, the proposals incorporate a legitimate concern to protect the effectiveness of covert intelligence agents and their sources. It is argued by some that the provisions could serve to stultify legitimate critical expression by former intelligence agents and expository investigative reporting by the press, particularly by non-"mainstream" reporters.

*Present Law.*—The government (Department of Justice) contends that the disclosure of such identities is presently prohibited by 18 U.S.C., §§ 793(d) and (e), but admits that they have not been so applied in practice. It is felt by some, however, that there are both inadequacies in the statute and a lack of enforcement. The former section prohibits persons with lawful access to certain documents relating to the national defense, or "information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation," from willfully communicating or attempting to communicate such documents or information to a person not lawfully authorized to receive it. The latter section extends the same prohibition to persons who were not authorized to come into possession of the information in the first place. Substantive violations, attempts, and conspiracies carry a punishment of $10,000 and/or 10 years.

*Moynihan Proposal (S. 2216).*—Section 4 of the bill prohibits persons with authorized access to classified information which identifies a covert intelligence agent, informant or source from intentionally disclosing any information to an unauthorized recipient, knowing or having reason to know that the information (including even unclassified information) disclosed serves to identify a person as a covert agent whose status as such was detailed in the classified information, when the government is trying to conceal such identification. Punishment is $50,000 and/or 10 years. A second provision punishes anyone who, with "intent to impair or impede the foreign intelligence activities of the United States" similarly discloses such information, with punishment of $5,000 and/or one year.[1] Hence, the Moynihan proposal differentiates, in the main, between government employees[2] and others. In addition, the bill proposes to lessen the impact on nongovernment persons by restricting accessorial criminal liability under either provision only to persons who were accessories or co-cospirators with "intent to impair * * * foreign intelligence activities * * *" and by providing that such intent cannot be inferred from the fact of disclosure alone. Prior government disclosure of the information is a defense. Attempts are not criminal.

*Huddleston Proposal (S. 2284).*—Section 701 of the bill is identical to the first substantive proposal by Senator Moynihan and carries the same punishment, but all accessorial criminal liability is specifically decriminalized. Hence, the bill creates a pure status offense pertaining only to persons with authorized access

[1] Sen. Moynihan has subsequently disavowed this provision.
[2] This term, as used here, includes those with authorized access.

to the information; i.e., mainly government employees. Attempts are not punishable and prior government disclosure is a defense. In a recently considered shorter draft version of the Huddleston bill, this provision continues to survive in almost unaltered form.

*Administration Proposal (testimony of ADAG R. L. Keuch before House Select Committee on Intelligence of January 30, 1980.*—Under the first section, disclosure to an unauthorized recipient of any information that serves to identify a covert agent by anyone, with knowledge that the information is based on classified information, or attempts so to do, are punishable by $50,000 and/or 10 years. Under the second section, disclosure to an unauthorized recipient of any information which correctly identifies a covert agent, by a present or former government employee with access to any information that reveals the identities of covert agents, or attempts so to do, are punishable by $25,000 and/or 5 years. Accessorial liability is unrestricted and prior government disclosure is not explicitly incorporated in the bill as a defense.

*Aspin Proposal (H.R. 6820).*—Section 202 of the bill, like *Huddleston*, criminalizes only the conduct of persons with authorized access to classified information; i.e., government employees in the main. The bill specifically provides for a pure status offense by decriminalizing accessorial liability. It contains no provision for punishing attempts. The punishment is $50,000 and/or ten years. The proposal prohibits a government employee with authorized access to classified information which identifies a covert agent, informant or source from disclosing any information which serves to identify a covert agent, informant or source. In this respect, the bill is substantively, but texturally, similar to Moynihan's proposal. In addition, the bill would prohibit a government employee from using such unclassified special knowledge gained from classified information to identify agents, informants and sources not identified in the classified information, if he discloses his conclusions to another. In this respect, the bill is substantively similar to the Administration's proposal. Prior government disclosure is a defense.

*Discussion.*—The present statute makes no distinction between disloyal government employees and others who come into possession of identifying information. Disclosure of information other than documents relating to the national defense is punishable, however, only if there is the requisite scienter, which may be difficult to prove. Present law appears restricted only to disclosure of classified information itself. All four proposals for legislation have extraterritorial application and are not restricted to the disclosure of classified information.

Of them, the Administration's proposal is the most expansive. It criminalizes even disclosure of unclassified information, including arguably information made public inadvertently by the government or supplied by foreign governments or nationals to American nationals, as happened in Iran, if the defendant has knowledge that his information "is based" on classified information. Because the proposal also punishes attempts, and since with respect to attempts the line between legal and factual impossibility is murky at best, it is entirely conceivable that even an erroneous identification of another as a covert agent may be punishable. In essence, the Administration's proposal covers with a shroud of secrecy anything that may be related to classified information, as long as the information incidentally identifies an agent.

Under the second offense, the Administration's proposal also punishes government employees who, by nature of their occupations, are able to analyze unclassified information and thus identify covert agents. And this is so even though the employee may not have gained his special knowledge through classified information. For example, a GSA clerk who reads declassified OSS reports from World War II during his lunchbreak and learns that commercial attaches at American embassies abroad are usually intelligence officers, would be prosecutable if he tells his girlfriend. What is most remarkable about the Administration's proposal is that it criminalizes without requiring an intent which is arguably inimical to our national interests. This proposal, if enforced according to its terms, could serve to stifle perfectly legitimate public criticism of the intelligence community.

The Moynihan proposal, in its first provision, appears to be a reasonable attempt to deal with the problem. The proposal attacks the root of the problem; i.e., loose-lipped government employees and those who induce government employees to violate their trust. Moynihan's proposal also ties unclassified information disclosed to the classified information to which the offender had access.

Moynihan's proposal becomes problematical, however, when it seeks to punish as misdemeanants, non-government persons who have the "intent to impair or impede the foreign intelligence activities of the United States." While such an intent may be reprehensible, the Moynihan proposal subjects such persons to misdemeanor punishment even if the information which they gained is unclassified. In effect, the second provision of the Moynihan proposal allows the government to plug leaks after the fact. While there is merit in this approach from the standpoint of national security, it does not appear wise to criminalize conduct of this nature, given the fact that this conduct involves speech.

The Huddleston proposals closely track the first provision of the Moynihan bill without, however, the provision for accessorial liability. In this aspect, the Huddleston bills appear unduly restrictive. Those who induce a government employee to violate his trust, with "the intent to impair or impede the foreign intelligence activities of the United States," should be punished as accessories.

The Aspin proposal, in precluding accessorial liability for those who induce government employees to violate their trust, also appears unnecessarily restrictive. In part, the proposal can be viewed as a viable alternative draft to the first provision of Moynihan. However, in seeking to accommodate the Administration's desire to preclude former government employees from using their specialized knowledge to make identifications, the bill may be unduly expansive, although in this regard, the specialized knowledge is more closely tied to access to classified information than it is under the Administration's proposal.

*Recommendation.*—The Committee should examine the need to modify the present law to improve its clarity. In addition, the type of conduct to be covered should be addressed. If it is decided that action is required, then, because of its provision concerning accessorial liability, at least the first provision of the Moynihan proposal appears to merit support.

Chairman BAYH. Thank you very much, Mr. Waldmann, for an analytical assessment of the terminology and the specific criteria established in the bill. This will be very helpful to us as we try to make certain of accomplishing what we want to accomplish, not too much nor too little. I don't think I have any questions. The statement speaks very well for itself.

Senator Durenberger?

Senator DURENBERGER. I have no questions, Mr. Chairman.

Chairman BAYH. Thank you very much. We appreciate your assistance.

Our next witness is Mr. Ford Rowen, an attorney and former NBC correspondent.

It is good to have you with us.

## TESTIMONY OF FORD ROWAN, ATTORNEY, AND FORMER NBC CORRESPONDENT

Mr. ROWAN. It is good to be here. If you want, I will be glad to shorten this considerably.

Chairman BAYH. Whatever you see fit.

Mr. ROWAN. Mr. Chairman, I appreciate the invitation to testify. When I was called, I remembered a statement attributed to Bismarck. He warned that national security would be imperiled if certain things were not shielded from the average citizen. Bismarck said the citizen should not see how laws are made nor should he see how sausages are made. Perhaps we are discussing the American equivalent of sausages today.

I fully sympathize with the desire of the CIA to protect its agents, and the FBI to protect its informants, and the NSA to protect its sources and methods, and the DIA, the DEA, the IRS, and any other agency that must use confidential sources covertly in order to perform

its mission. It might surprise you to hear that from someone who has reported on some of these secret activities, but reporters also must have confidential sources to do our jobs well.

I am willing to go to jail to protect the identity of a source who gives me information, so I can understand why the CIA wants to send someone to jail if he reveals the identity of one of the agency's agents.

Furthermore, I sympathize with the desire to shield American intelligence officers and agents from publicity which could endanger their lives. However, I have serious reservations about whether this proposed legislation would prove to be effective. Moreover, parts of the proposal seem to be unconstitutional.

With your permission, I will summarize the remainder of my remarks.

Chairman BAYH. We will ask that your entire statement be put in the record. Thank you.

Mr. ROWAN. In looking at various proposals, I see two targets: first, an insider with legal access to secrets who discloses identities or covert relationship, and second, an outsider who is not supposed to know the secret information but has found out and shares it with others. As for the first category, I think Congress is within its power to legislate these penalties. Congress can tell Government employees they cannot divulge classified information.

My only problem with it is that I don't think it will work. Some people will leak information, no matter what the rules and no matter what the penalties. An insider who feels strongly enough that a clandestine operation is wrong and is willing to disclose it probably will base his decision on whether to also name names on reasons unrelated to potential criminal penalties.

My main concern, however, is with the second category of potential offenders, the outsiders. My objections are strenuous because the category would include all of us—the press and individuals who have never taken a secrecy oath.

Unlike CIA or military intelligence officers, reporters have not taken an oath of secrecy and Congress should not try to force reporters to take a secrecy oath. Reporters would violate their responsibility as disseminators of information when they are forced to keep secrets rather than to evaluate whether to release or publish what they have learned.

We have to face one fact. Most reporters just usually don't come across this kind of information. A few pursue it and few really want to name names at all. In my coverage of intelligence activities and covering this committee and writing a book about electronic surveillance and privacy, I found almost no occasion to name names. In no case did I name a name that had not been officially released. I think I am not unlike a lot of other reporters who did basically the same thing.

We can make the worst case where the reporter is a traitor. But let us look at an example where disclosure of names might be in the public interest. We can all remember the uproar over alleged assassination plots against foreign leaders. When it became known that the CIA had engaged in such plots, there was disagreement between public officials over whether such activities were ordered from the White House or whether the agency was acting as a rogue elephant out of control.

The public had an important stake in the answer to that question. Official investigators recognized the importance of identifying some of the intel officers involved and some names were made public.

One might argue that certain disclosures could be made by the press under this legislation provided the reporter was not intending to impair or impede the foreign intelligence activity of the United States. While inclusion of the intent provision in some of these proposals is an improvement over the CIA's recommended language, it would not solve the dilemma posed by the example above. Reporters who got names, who named the names to get at the truth about the assassination plots usually were opposed to such plots and wanted to assure that they did not recur.

People who revealed such plots and the plotters wanted to impair this form of intelligence activity. Most reporters may have hoped the disclosure would have helped the U.S. regain its moral stature and regain the respect it had lost in the world and retain a steady hand over covert operations, but still they wanted to impair and impede this one type of intelligence activity.

I am sure the committee has an understanding of some of the other types of intelligence activities that ought to be impaired because those activities impaired civil liberties of American citizens.

In addition to the disclosure of the assassination plots, we can think of the drug experiments and spying on law-abiding American citizens whose disclosure has helped our Nation's interest in preserving freedom at home.

In sum, it is a mistake to decree that all foreign intelligence activities of the United States equally merit secrecy. Some should be exposed, disowned, and dismembered. Congress should not pass legislation that would interfere with the first amendment right to expose illegal, immoral, and unethical conduct.

Mr. Carlucci testified before the House Intelligence Committee that reporters who disclose secret information would only be prosecuted if they embarked on a crusade to destroy the intelligence activities of this country but the legislation recommended by Director Turner would open the door for wholesale prosecutions of a broader class of offender. Instead of requiring proof of intent to harm intelligence activities, Turner's proposal would punish anyone who discloses such information as long as he had knowledge that his disclosure is based on classified information.

If the reporter knows the identity of a secret agent and knows it is a secret, he would be liable if he published it.

The CIA proposal talks of protecting "successful and efficient foreign intelligence activities," but our Nation has always been willing to sacrifice some efficiency to protect democracy and freedom.

On overly broad criminal provision giving the CIA bureaucrat with a secret stamp, the power to stamp out free expression is too big a price to pay for efficiency.

I do not think that any of these proposals, whether containing the intent provision or not, will successfully stop the disclosure of names. If the Government cannot stop disclosure of atomic secrets, I doubt that it can stop disclosure of the names of some of its spies. Spilling atomic secrets seems much more threatening to national survival.

I mention that case because there are parallels here. It is relevant to our discussion today because the bill would punish a reporter who combs through open sources such as biographical registers, to identify covert officers. The Government extracts a high price from journalists when it seeks to punish them for revealing what the Government itself was too inept to keep secret.

It is well known that for years it was possible to identify CIA personnel on embassy staffs by checking State Department registers. The Government itself made it easier for outsiders to figure out the identities of CIA operatives. So before you try to punish the outsiders I think you could tighten secrecy and use more care in choosing those those who will know the secrets.

That is the path I would recommend for you: strengthening the internal processes for intelligence agencies while avoiding new prohibitions which would unconstitutionally interfere with freedom of the press.

Democracy works best that knows most.

Some conflicts between the press and government are healthy—symptomatic of a dynamic society with competing values. An independent press with watchdog functions, the tradition of open criticism, the disclosure of corruption, the reform of institutions—these all contribute to a vibrant society.

Society—the public—pays a price when Government attempts to seal off part of its activities from public view. In some cases the courts have sided with national security, due process and privacy rights in limiting access to information by the media. In other cases the courts have evaluated, then decided against, claims that publication of certain information would harm the national security.

First amendment guarantees may not be absolute, but they should be tampered with only very cautiously. These proposals are unnecessary, unworkable, unconstitutional.

I am reminded of the statement by Archilocus, the Greek poet, that "the fox knows many things, but the hedgehog knows one big thing." It is easy to understand how the hedgehogs of intelligence burrowing in pursuit of their goals would resent the foxes of the press.

The reality of the world we live in forces us to have hedgehogs.

The ideal of the democracy we cherish requires that we tolerate the foxes as well.

Thank you, sir.

[The prepared statement of Ford Rowan follows:]

PREPARED STATEMENT OF FORD ROWAN, ON PROTECTING COVERT AGENTS

Mr. Chairman, I appreciate the invitation to testify. When I was called I remember a statement attributed to Bismarck. He warned that national security would be imperiled if certain things were not shielded from the average citizen. Bismarck said the citizen should not see how laws are made nor should he see how sausages are made. Perhaps we are discussing the American equivalent of sausages today.

I fully sympathize with the desire of the CIA to protect its agents, and the FBI to protect its informants, and the NSA to protect its sources and methods, and the DIA, the DEA, the IRS, and any other agency that must use confidential sources covertly in order to perform its mission. It might surprise you to hear that from someone who has reported on some of these secret activities, but reporters also must have confidential sources to do our jobs well.

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I am willing to go to jail to protect the identity of a source who gives me information, so I can understand why the CIA wants to send someone to jail if he reveals the identity of one of the agency's agents.

Furthermore, I sympathize with the desire to shield American intelligence officers and agents from publicity which could endanger their lives. However, I have serious reservations about whether this proposed legislation would prove to be effective. Moreover, parts of the proposal seem to be unconstitutional.

I would like to begin with a story that was told to me by one of the people this bill seeks to protect. This man fought for his country as a pilot, obtained a doctorate, and served as an intelligence officer. He is a perfect combination of soldier, scholar, and spy. I will never forget one encounter with this man during the period when two Congressional committees were investigating alleged assassination plots directed against foreign leaders.

"Let me tell you the story about the dead man who went seeking a decent burial," my CIA source said. It was a simple story about a fellow who tried to arrange for his own burial because he claimed, "I've been dead for two weeks." A priest and then a doctor were called in, but both failed to shake the poor fellow's conviction that he had already died.

Finally, the CIA man recounted, the doctor turned in desperation to logic. "My man, isn't it true that a corpse that's been dead for two weeks cannot bleed? the Doctor asked. When the fellow agreed the doctor took a little knife and knicked the fellow's hand and, of course, it bled. "See," the doctor said, "You're bleeding."

"Well what do you know," the fellow answered, "corpses do bleed."

My CIA source told that story to point out that different people can look at the same facts and reach very different conclusions. Everyone processes information through his own frame of reference, his own mind set, his world view. Facts which do not fit preconceived notions or rub against deeply held attitudes often are rejected or cause conflict in the eye of the beholder.

This CIA officer mentioned two samples. The civil rights demonstrations contradicted the bigoted view of many whites. The pictures of American soldiers burning civilians' homes in Vietnam did not match our view of ourselves as honorable victors. Turmoil resulted in both these cases when new realities confronted old attitudes.

I have always tried to keep in mind how important perceptions can be when news is communicated. Let's say that the House Intelligence Committee releases a report that outlines some analytical failures by the CIA. Aside from the written report, my story would be based on comments by committee members, staff, CIA officials, and intelligence consumers at the White House. Each would speak from his own perspective. When I would write my story my own attitudes would assert themselves no matter how hard I tried to be objective. Then my editors and producers would get a whack at the story. Finally, when the listeners heard the story each would interpret it from his own perspective—that means millions of perspectives.

So is it any wonder that many people may have very different impressions after listening to that story—far different from those intended by the committee members when they voted on the report?

In a pluralist democracy uniformity of thought is no virtue. But agreement about the facts encourages wiser public understanding of events, wiser choices between competing goals. Put another way, clarity in the description of a problem permits advocates of varying approaches to work out better solutions. Or, as a former Director of Central Intelligence, James Schlesinger, is quoted as saying, "Everyone is entitled to his own opinion, but not to his own facts."

I'd like to start with some facts about news reporting. I have been a reporter for 15 years, eleven of them in Washington. After I resigned from NBC News in December I became a Visiting Associate Professor of Journalism at Northwestern University. In April I joined the law firm of Sanford, Adams, McCullough, and Beard, a North Carolina firm, as their counsel in Washington. As a lawyer I am specializing in First Amendment and communications law.

I am not out of the news business, however. I am doing some work as a commentator for the Independent Network News, a new organization which now has 27 affiliated television stations around the country. While it is not always easy to pursue both legal and news activities, for the purpose of discussing the subject matter before this committee today I may have a unique perspective.

I believe strongly in responsible journalism. I resigned as NBC's Pentagon correspondent in a dispute over editorial policy; I felt NBC was irresponsible in providing an unedited prime time propaganda platform to terrorists when

the network agreed to broadcast an interview with one of the hostages in Iran last December.

Episodes of terrorism require self-restraint by journalists. So too does today's subject demand restraint so that lives are not jeopardized needlessly.

I first became involved in covering the CIA and other intelligence agencies in 1974 for NBC News, and most of my time until early 1978 was devoted to this subject. In 1978 my book about surveillance and privacy, "Technospies," was published by Putnam's.

During the course of the investigations of these agencies I learned both the best and the worst about the people who serve their country in the intelligence community. Most of them are honest, intelligent, patriotic. Some, however, fit this description: ". . . men of zeal, well-meaning, but without understanding." That quote is from Justice Brandeis who warned that "the greatest dangers to liberty lurk in the insidious encroachment of men of zeal, well-meaning, but without understanding."

The disclosures of recent years, although widely condemned by some as undermining the effectiveness of the CIA, may actually have helped intelligence officers regain an understanding of their duty within the constitutional framework. Publication of the investigative findings may have contributed to a healthier intelligence community by refocusing its attention on its proper role and deemphasizing the undue stress on covert operations, some of which were directed against law-abiding American citizens.

It was a challenge to cover the probes of the CIA, FBI, NSA, IRS, and military intelligence units. In the race to dig up the dirt about drug experiments, assassination plots, and domestic spying, there was always the danger that reporters, too, would become zealots who meant well but lacked the necessary understanding to fit the stories into a broader perspective.

I say this to try to convey what some public officials may doubt, that reporters believe in many of the same values as you. The First Amendment confers enormous power upon journalists and most of us feel that the responsibilities are also enormous. Most of us are patriots, but the day is past when simply waving the flag will convince a reporter or editor to kill a story without exceptionally compelling reasons.

Too many reporters have seen the phrase "national security" used to try to hide embarrassing and illegal conduct by government agencies.

In covering intelligence activities a reporter had to exercise judgment when deciding which way to direct his investigatory efforts, in deciding which facts to stress or omit, when deciding which activities should be disclosed. For example, when I broadcast the first story about computerized electronic surveillance by the National Security Agency in 1975 I felt that the domestic spying, directed by an agency involved in foreign intelligence gathering against American citizens, was so newsworthy that disclosure outweighed any arguments about sensitive sources and methods being compromised. I cite this example because it was a hard case and one that could still spark disagreement today.

I realize that intelligence officers and many public officials feel very uncomfortable knowing that journalists—unelected and sometimes unwashed—sit in judgment on their conduct. Aside from reminding you that this is a result of the First Amendment, I would like to stress that most American journalists try to make responsible judgments. Most try to balance competing values. Most do not favor disclosure for disclosure's sake. Few want to damage their nation's true security interests. Of course, others fall back on the old idea of letting the chips fall where they may. And some just don't give a damn, perhaps a few hate this country.

But I know enough reporters to feel secure in testifying that most do not want good news stories to produce bad results.

I can understand how this committee would want to legislate a halt to some bad results. Few of us want to see an intelligence operative's life endangered by having his cover blown, or to see an ongoing covert operation derailed, or to see future sources of information dry up for fear of exposure. At the committee's invitation I have examined the proposed legislation to make it a crime to reveal the identity of a clandestine American intelligence officer or his agent.

I have tried my best to avoid letting where I sit (in the press gallery) determine where I stand on this issue. But as a journalist I cannot consider this legislation without becoming concerned about preserving First Amendment rights. (Although I am also a lawyer, I will leave the legal evaluation of this legislation to more expert witnesses.)

In looking at the various proposals I see two targets: First, an insider with legal access to secrets who discloses an identity or a covert relationship, and Second, an outsider who is not supposed to know this secret information, but having found out, shares it with others.

As for the first category, I think Congress is within its power to legislate these penalties. Congress can tell government employees they cannot divulge classified information. My only problem with this is that I do not think it will work. Some people will leak information no matter what the rules, no matter what the penalities. An insider who feels strongly enough that a clandestine operation is wrong and is willing to disclose it probably will base his decision on whether to also name names on reasons unrelated to potential criminal penalties.

As for the second category of potential offender my objections are much more strenuous. This category would include the press. Unlike CIA or military intelligence officers, reporters have taken no oath to keep secrets. Congress should not—in effect—try to force reporters into a secrecy oath. Reporters violate their responsibility as disseminators of information when they are forced into keeping secrets rather than permitted to evaluate whether what they have learned should be published.

Let's face it: most reporters just do not usually come across this type of information, few pursue it, and very few want to name names at all. We can imagine a worst case, where the reporter is a traitor. But let's look at an example where disclosure of names might be in the public interest. Remember the uproar over alleged assassination plots against foreign leaders a few years ago. When it became know that the CIA had engaged in such plots there was disagreement between public officials over whether such activities were ordered from the White House or whether the agency was acting as a rogue elephant out of control. The public had an important stake in finding the answer to that question. Official investigators recognized the importance of identifying the intelligence officers involved and many names were made public.

Some might argue that certain disclosures could be made by the press under this legislation provided the reporter was not intending to impair or impede the foreign intelligence activities of the United States. While inclusion of the intent provision in some of these proposals is an improvement over the CIA's recommended language, it would not solve the dilemma posed by the example listed above. Reporters who named names to get at the truth about the assassination plots usually were opposed to such plots and wanted to assure they did not recur. People who revealed such plots and the plotters wanted to impair this form of intelligence activity. Most reporters may have hoped that disclosure would help the United States regain its moral stature, regain some of the respect it had lost in the world, regain a steady hand over covert actions, still they wanted to impair and impede this one type of intelligence activity.

And this committee has a full understanding of some of the other types of intelligence activities that ought to be impaired because they impaired the civil liberties of American citizens. Disclosure of assassination plots, drug experiments, spying on law abiding American citizens has helped our nation's interest in preserving freedom at home.

In sum, it is a mistake to decree that all foreign intelligence activities of the United States equally merit secrecy. Some should be exposed, denounced, dismembered. Congress should not pass legislation that would interfere with the First Amendment right to expose illegal, immoral, and unethical conduct.

Deputy Director Carlucci testified before the House Intelligence Committee that reporters who disclose this secret information would only be prosecuted if they "embark upon a crusade" to destroy the intelligence activities of this country. But the legislation recommended by Director Turner would open the door for wholesale prosecutions of a broader class of offender. Instead of requiring proof of intent to harm intelligence activities, the proposal would punish anyone who discloses such information as long as he had the knowledge that his disclosure is based on classified information. If a reporter knows the identity of a secret agent and knows it's a secret, he would be liable if he published it.

The CIA proposal talks of protecting "successful and efficient foreign intelligence activities," but our nation has always been willing to sacrifice some efficiency to protect democracy and freedom. An overly broad criminal provision giving the CIA bureaucrat with a secret stamp the power to stamp out free expression is too big a price to pay for efficiency.

But before you start thinking that inclusion of the intent provision cures these problems, let me suggest that it could ensnare reporters who object to specific

intelligence activities yet love their country while leaving loopholes for those who hate America.

There are reporters outside the mainstream of responsible journailism who do wish to harm their country. They may be able to sidestep the provision requiring proof of intent to impair or impede the intelligence activities of the United States. They would have to be less blatant in their anti-Americanism, of course, but they could claim that the names were being made public to strengthen American intelligence activities by getting rid of covert types and freeing the money for more analysis, for example. Such arguments from some critics would not be very persuasive, but it could complicate prosecution. If this seems farfetched to those of you who have read Philip Agee's disclosures, let me remind you that as far as I know Agee has never used the label "defector" to describe himself. My hunch is that this bill is directed against Agee and the Covert Action Information Bulletin. While he might be prosecuted as someone who had received authorized information while employed by the CIA, to prosecute others would require proof of intent under some of these proposals. My feeling is that a skillful propagandist would be able to disguise his true intentions, perhaps sufficiently to discourage the Justice department from acting against him.

In short, the bill contains loopholes for traitors but could ensnare patriotic reporters who criticize certain intelligence activities.

Frankly, I do not think that any of these proposals—whether containing the intent provision or not—will successfully stop the disclosure of names. If the government cannot stop disclosure of atomic secrets I doubt that it can stop disclosure of the names of some of its spies. Spilling atomic secrets seems much more threatening to national survival.

The H bomb article was based in part on unclassified information available in government libraries open to the public. That's relevant to our discussion today, because this bill would punish a reporter who combed through open sources such as biographical registers to identify covert officers. The government extracts a high price from journalists when it seeks to punish them for revealing what the government itself was too inept to keep secret.

It is well known that for years it was possible to identify CIA personnel on embassy staffs by checking State Department registers. The government itself made it easier for outsiders to figure out the identities of CIA operatives. So before you try to punish the outsiders I think you could tighten secrecy and use more care in choosing those who will know the secrets.

That is the path I would recommend for you: strengthening the internal processes for intelligence agencies while avoiding new prohibitions which would unconstitutionally interfere with freedom of the press.

Democracy works best that knows most.

Some conflicts between the press and government are healthy—symptomatic of a dynamic society with competing values. An independent press with watchdog functions, the tradition of open criticism, the disclosure of corruption, the reform of institutions—these all contribute to a vibrant society.

Society—the public—pays a price when government attempts to seal off part of its activities from public view. In some cases the courts have sided with national security, due process and privacy rights in limiting access to information by the media. In other cases the courts have evaluated, then decided against, claims that publication of certain information would harm the national security.

First Amendment guarantees may not be absolute, but they should be tampered with only very cautiously. These proposals are unnecessary, unworkable, unconstitutional.

I am reminded of the statement by Archilocus, the Greek poet, that "the fox knows many things, but the hedgehog knows one big thing." It is easy to understand how the hedgehogs of intelligence burrowing in pursuit of their goals would resent the foxes of the press.

The reality of the world we live in forces us to have hedgehogs.

The ideal of the democracy we cherish requires that we tolerate the foxes, as well.

Chairman BAYH. Thank you, Mr. Rowan.

I have heard descriptive phrases to describe those who work in the intelligence system. Hedgehog is a new one. I think you have been very helpful in confirming some of the concerns I had earlier about the need to distinguish carefully between those who are public servants charged

with specific responsibilities, who have one set of responsibilities, and those of you in the fourth estate have a different set of responsibilities, a vital important role in our society.

Mr. ROWAN. Could I comment on the distinction between Government employees and outsiders? I believe that the committee should be very careful in forever consigning someone to the category of Government employee. It is a very large class of people who have access to confidential, secret or top secret information in this Government.

If this legislation is to pass and it does pass with broadly worded language, it is conceivable that anyone who held any position, even unrelated to knowledge about covert operatives, could find himself covered by this bill. For example, someone who worked for one of the administrations on the National Security Council staff and then left the staff and years later was to become a reporter, journalist, an author of a book, and was to write about something that he did not learn when he was covered by the secrecy oath but later would publish it, I don't think this committee would rush to put a lifetime ban on people who served in the Government.

While I make that dichotomy and while I argue that point of view for the press, I think we should show some concern that first-amendment rights don't end when you sign the secrecy oath.

Chairman BAYH. I concur that there has to be direct relationship as to how the individual got access to the information. I appreciate you being here.

Senator Chafee?

Senator CHAFEE. Thank you, Mr. Chairman.

I apologize that I was not here for all of your testimony, Mr. Rowan. I just heard the last part.

Do I understand that your position is that we should not do anything, we should leave the espionage statutes on the book but don't take any separate action, even the action dealing directly with, say, Mr. Agee? I was not here for some of the other witnesses but Mr. Abrams suggested that we have a series of steps and we agreed on the first step. You would not even do that?

Mr. ROWAN. I listened with great interest as you went through those steps. I would say it is possible for this committee and certainly within its responsibility if it wishes to pass legislation that would put criminal penalties on people like Mr. Agee for disclosing identities of covert operatives. You might do it and it might be a good thing to do it. I think people will leak information anyway if they want to. My principal objection is only to including outsiders, non-Government employees. That is the thrust of my testimony today, to not include everyone else like the press. You can go after Government employees, that is certainly within the power of the Government.

I think it is constitutional. I don't think frankly it is necessary. I see in this legislation an effort to get Mr. Agee and the Covert Action Information Bulletin folks. I think it is directed just at them and a few other people. I wonder about the utility of that kind of legislation because I think those people are going to continue to do what they are doing whether you pass laws against them or not.

I don't really know. I know it is politically possible to do something to protect these covert operatives but I don't think frankly it is going to work. I think it raises a lot of constitutional questions.

Let me say furthermore, depending on how you write this legislation it is possible that aiders and abettors and conspirators from outside, for example, the press, could be included in the prohibitions, could be subject to prosecution, even if it were only drawn to apply to Government employees.

Suppose a reporter encourages a former Government employee to divulge the names of some operatives so that the reporter can publish them. Would he not be aiding and abetting? I would hope if you do decide to pass this legislation that you exclude outsiders from its reach specifically and say this bill does not apply to anyone who has not had a Government secrecy oath.

I see a lot of problems even going down your steps. The short answer to your question is that I would rather not do anything.

Senator CHAFEE. One of the last points I heard you make was that under this you might catch somebody who had been a Government employee many years before and then inadvertently reveals some information. What do you say about the attitude that we frequently take here, and there are constitutional arguments back and forth, we had them yesterday on a vote on aid to parochial schools? Finally people say, after having constitutional arguments back and forth, after all we have had the Justice Department testify exactly contrary to you and Mr. Abrams on the constitutional issue, that we proceed and let the Supreme Court decide it.

Mr. ROWAN. I think that is a denial of your duty.

Senator CHAFEE. Are we to stay out of all waters that some say we might be violating the Constitution if we pass this?

Mr. ROWAN. I was not advocating that. I think you should balance the same kind of equities the Court would. We have a society with competing values. The first amendment is not the only amendment to the Constitution. Journalists have to think when writing stories about whether the stories they are writing would undercut the society that provides freedom of the press.

In evaluating all those things I am not urging you to run away from the issue because it is a constitutional one. I have tried to offer you my guidance on it as a person who has been involved in journalism and who might see the world a little differently than you would and might give insight in the way the reporters think because reporters do balance those concerns in their minds and some people come out differently than others.

Senator CHAFEE. Your view is that the Agees of the world cause problems but in the effort to regulate them we might be doing more harm to the Republic?

Mr. ROWAN. I think that is accurate. I think something should be remembered. I don't want to be placed in the role as defender of the Covert Action Information Bulletin because frankly I don't find their output very good but I must say that running off pamphlets is the kind of thing that Tom Paine did and it is the kind of thing that the first amendment was written to protect.

Senator CHAFEE. I don't think the fact that it is published on cheap paper and has a modest circulation means that it should be hounded or even that it is disturbing to us. If they want to advocate tearing down the Capitol or any other type of action, so-called seditious, that would not bother me. But here we have an issue of where we are sending

people out on jobs which in my opinion and I think in your opinion too and the opinion of others who have testified, is in the interest of the Nation. We send them on these jobs and then somebody comes forward and publishes their names which from a covert point of view, you have heard the testimony, you might have read it, makes them useless. That is one of the prices we pay.

Then we get into their career and the personal danger to them. It becomes very difficult. You know the problem.

Mr. ROWAN. I sympathize with the problem. I sympathize with the effort of the Agency to protect its sources and methods. I don't believe this will prove workable and I think parts of it will prove unconstitutional.

Senator CHAFEE. We appreciate your coming. You have had an interesting career, I must say. I don't know whether I call going from a journalist to a lawyer a lateral movement.

Mr. ROWAN. I don't know either.

Senator CHAFEE. In any event I congratulate you for your very interesting life and thank you very much for coming.

Mr. ROWAN. Thank you, sir. I appreciate it.

Senator CHAFEE. Now I have one statement for the record that I would put in. I have one thing here for the stenographer. It is a telegram from the executive director of the National Military Intelligence Association which we would like to include in the record.

[The document referred to follows:]

STATEMENT OF CHARLES THOMANN, EXECUTIVE DIRECTOR, THE NATIONAL MILITARY INTELLIGENCE ASSOCIATION

The National Military Intelligence Association met in convention in Hawaii on 17 and 18 June. Members worldwide were present or represented. It was resolved that the Association will support the most stringent criminal penalty against those United States citizens who would wittingly disclose classified information to unauthorized persons. We resolve that the Senate in its wisdom should assure that the penalties for unauthorized disclosure should be so severe that they deter such acts, that the law should be so clearly written that judges and juries have no choice but to impose stringent sentences upon conviction, the severity of the sentence depending on the harm to the national security. We believe in no parole for such offenses and that imprisonment for willful disclosure should range from ten years to life, that fines should not be in lieu of imprisonment and such fines should range from a minimum of $10,000 to $50,000 and be only concurrent with imprisonment if imposed.

We support stipulation in legislation that exempts the investigating agencies from provisions of the Privacy Act and the Freedom of Information Act during and after such investigations. We believe that any U.S. citizen who willfully engages in such acts, particularly as such acts bring harm to the national security, forfeits certain rights as a citizen when it becomes clear to authorized authority during investigation that a reasonable doubt exists as to that person's loyalty to the United States. We urge the Senate in its wisdom to assure that members of Congress and others in high office who engage wittingly in unauthorized disclosure are subject to the same laws regardless of the immunity normally accorded their office, the President as the highest authority being the only exempt person. [Request that the essence of this resolve be made a matter of record during the discussion of the subject by the Senate Select Committee.]

Senator CHAFEE. That concludes our hearings. I would like to thank everybody who contributed, made the effort to come here. We will take all this under advisement.

Thank you very much.

[Whereupon, at 4:15 p.m. the Select Committee on Intelligence hearings adjourned.]

## APPENDIX I

NATIONAL NEWSPAPER ASSOCIATION,
*Washington, D.C., June 26, 1980.*

Hon. BIRCH BAYH,
*Chairman, Select Committee on Intelligence, U.S. Senate,*
*Washington, D.C.*

DEAR MR. CHAIRMAN: The National Newspaper Association remains concerned with legislative efforts to prohibit the disclosure of names of intelligence agents. We would like to take this opportunity to submit our views for the record. We firmly believe that the lives and limbs of our intelligence agents must not be unnecessarily jeopardized in this or any other way. But that spectre of danger cannot and should not be used to curtail constitutional rights which are as essential to the survival of this nation as is the work performed by the intelligence community.[1] Thus, our apprehension focuses on the potential penalization of newspapers and other third parties who publish or otherwise communicate information accurately identifying agents.

For your information, NNA is a trade association composed of some 5,500 weekly and daily community newspapers located throughout the United States.

Mr. Chairman, as we mentioned, NNA does not wish to see the lives of agents unduly imperilled nor do we wish to see our nation's intelligence effort undermined. Further, we do not imply that it is infeasible to draft a sufficiently precise bill as to meet constitutional standards. However, we do believe that to do so such a bill must be limited to punishing government employees or others who have had authorized access to classified information, and those who affirmatively induce them by ways of financial or similar awards to breach their trust. We unfortunately have no suggestions to make to aid you in resolving the difficult question of identifications which do not derive from classified information. We believe that it is constitutionally impermissible to legislate in this area and that such identifications are one of the hazards of a society which venerates freedom of expression.

Mr. Chairman, there are a number of bills before your Committee at this time designed to protect against revealing agents' identifications. Our fundamental criticism applies to all, so we will not burden you and the members of the Committee by specifically discussing each. However, we do wish to comment briefly upon Admiral Turner's proposal.

This bill, from our standpoint, is the least acceptable of all before you. It unquestionably would affect the press and other third parties; there is no restriction to government employment or authorized access to classified information. It would likely act as a brake upon publication and would raise serious constitutional questions. Along this line, it is not difficult to foresee that this provision would have a "chilling effect" upon the ability of the press to perform its traditional function of serving as a watchdog on government by foreclosing from being cast into the public domain information necessary for a genuine debate upon intelligence issues affecting all the people.

Moreover, the sweep of the provision is so broad as to conceivably exert an influence upon the integrity of the journalism profession. Under the wording of subsection 701(c), it would be unlawful for, say, a reporter of a newspaper to disclose to the editor or publisher that a fellow reporter was a CIA agent. This could, of course, limit the capacity of newspapers to remain fully independent of the government overseas. In turn, this could undermine credibility with sources and compromise the American press' position in international negotiations to maintain a free press and a free flow of information worldwide. A decline in the integrity of the journalism profession—either actual or perceived—would ultimately have an adverse effect upon our society, which so much depends upon the news it receives from journalists, particularly from abroad. (Of course, this problem could be remedied by simply barring the use of journalists as agents or journalism as a cover.)

A corollary problem with the Turner proposal is the provision for twice the penalty to third parties for disclosure as to government employees who are entrusted with classified information. All constitutional questions aside, we are at an utter loss to account for such differing treatment. And, if one does consider what has or has not historically been considered an accetable restraint

[1] On April 16, 1980, NNA appeared with the Reporters Committee for Freedom of the Press before the Select Committee on Intelligence hearing on S. 2284 National Intelligence Act of 1980. We would refer you to our comments at page 534 of that testimony.

on expression (those with authorized access to classified information as contrasted with third parties), the distinction becomes even more puzzling.

Mr. Chairman, permit us to add a word about provisions, such as section 501(b) of Senator Moynihan's bill, which would incorporate some sort of intent to harm the United States test. We believe that this is not a useful test. Arguably, simple criticism of or, indeed, any disclosure touching upon, the CIA or other intelligence agencies could be construed as evincing such intent. By this reasoning, it would be an easier standard to meet than showing knowing disclosure of classified information.

In conclusion, Mr. Chairman, we do not envy you your task. Determining how to safeguard our agents and intelligence operations in the face of what we regard as an equally or more compelling competing constitutional interest will be a severe test of congressional wisdom. We would only again urge you to adopt the most narrowly drawn of provisions: provisions which would not wreak, in effect, any direct restraint upon the First Amendment rights of any third party.

Thank you for considering our views.

Respectfully submitted,

ARTHUR B. SACKLER,
*General Counsel.*

## APPENDIX II

NEWHOUSE NEWS SERVICE,
*Washington, D.C., June 26, 1980.*

Hon. BIRCH BAYH,
*Chairman, Senate Select Committee on Intelligence, Dirksen Senate Office Building, Washington, D.C.*

This is in reference to your letter of June 12, 1980, inviting the Society of Professional Journalists to comment on legislative proposals providing penalties for the disclosure of intelligence agents' identities.

The Society believes the Central Intelligence Agency should have adequate powers to prevent persons with access to classified data from disclosing the identities of CIA agents, provided a showing is made that such disclosure endangers human life and presents a direct, immediate and irreparable danger to this country's national security.

But we do not believe the penalties should be extended to reporters, authors and other recipients of information that identifies or may lead to the identification of intelligence agents. Admiral Stansfield Turner's proposal, which would subject reporters to 10 years imprisonment and a $50,000 fine, and S. 2216, which has a similar provision, would place a severe burden on journalists to avoid writing stories that might be, even remotely, a Section 701 violation. The provision is particularly onerous in view of the fact the government would not be required to show such publication endangered the national security.

While sympathetic to the need to protect the identity of intelligence agents, we feel a former agent should not be subject to prosecution for identifying himself as a former agent, providing such disclosure did not damage the national security. To subject a former agent to prosecution for disclosing his past employment with the CIA infringes on his First Amendment right to write about his experiences. H.R. 6820 recognizes this problem and provides, in Section 202 (b)(2), that it is not an offense for a former intelligence agent to disclose his past association.

I hope this is helpful in your efforts to draft a CIA Charter.

Sincerely,

ROBERT LEWIS,
*Chairman, Freedom of Information Committee,*
*Society of Professional Journalists.*

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