INTELLIGENCE IDENTITIES PROTECTION ACT OF 1981—S. 391

[redacted]

HEARING

BEFORE THE

SUBCOMMITTEE ON SECURITY AND TERRORISM

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 391

A BILL TO AMEND THE NATIONAL SECURITY ACT OF 1947 TO PROHIBIT THE UNAUTHORIZED DISCLOSURE OF INFORMATION IDENTIFYING CERTAIN UNITED STATES INTELLIGENCE OFFICERS, AGENTS, INFORMANTS, AND SOURCES AND TO DIRECT THE PRESIDENT TO ESTABLISH PROCEDURES TO PROTECT THE SECRECY OF THESE INTELLIGENCE RELATIONSHIPS

MAY 8, 1981

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FRIDAY, MAY 8, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON SECURITY AND TERRORISM,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:38 a.m., in room 2228 of the Everett McKinley Dirksen Senate Office Building, Senator Jeremiah Denton (chairman of the subcommittee) presiding.

Also present: Senators Thurmond, East, Biden, and Leahy.

Senator DENTON. The hearing will come to order.

The subject of the Subcommittee on Security and Terrorism hearing this morning is the Intelligence Identities Protection Act of 1981, Senate bill 391.

Before proceeding further, I would like to recognize the presence of the distinguished chairman of the overall committee, a man who has my great admiration and to whom I look daily for leadership, my distinguished colleague from South Carolina, Senator Strom Thurmond.

OPENING STATEMENT OF SENATOR STROM THURMOND

Senator THURMOND. Thank you very much, Mr. Chairman, for your kind words.

Mr. Chairman, I would like to commend you for the expeditious manner in which you have set up this hearing.

As a cosponsor of this necessary piece of legislation, I believe it is imperative that we act quickly but effectively to see that this matter is given a full and fair hearing. It is also necessary that parties with special concerns be heard and their views weighed by the subcommittee.

We must, however, keep in mind the special needs of the brave and unsung emloyees of the intelligence agencies of this country. We must remember, too, that uninformed policymakers cannot properly serve the people, and without the information these employees provide, policy will suffer.

This bill aims at protecting the identities of those individuals whose anonymity serves the interest of the country. Moveover, this legislation would insure an appropriate balance between individual rights and the absolute necessity for secrecy in intelligence collection vital to the Nation's security.

Mr. Chairman, I shall not be able to stay throughout the whole hearing, as I have a bill coming up in the Senate in a few minutes; but I want to take this opportunity to welcome the head of the CIA

here this morning, Mr. Casey, who is an experienced, well-versed man on intelligence matters.

I would also like to join in welcoming to this committee the distinguished Senator from Rhode Island, my good friend Senator Chafee.

Thank you, Mr. Chairman.

OPENING STATEMENT OF CHAIRMAN JEREMIAH DENTON

Senator DENTON. Thank you very much, Mr. Chairman. I know how busy you are as President pro tem of the Senate, and with the many bills you are managing in the Senate.

We would like to welcome my distinguished colleague, Senator Leahy, who has a great deal of background in this subject and has, in his experience with the Select Committee and other committees on which we happen to serve together, shown me how much he is going to help us in the future as he has in the past. After I welcome the witnesses, I will ask you for anything you care to say, sir.

Our witnesses I will introduce one at a time, and then ask them to take their positions. First, we already have in the witness chair the Honorable John H. Chafee, Senator from Rhode Island, who actually sponsored this bill and who has urged us not to waste any time in getting to it; and I assure you, John, that we have not. We have had a Department of Justice review of the bill in which certain things were questioned, and we have gotten to it as quickly as we could.

We have William J. Casey, the Director of the Central Intelligence Agency; Richard K. Willard, Counsel for Intelligence Policy, Department of Justice; Morton H. Halperin, director, Center for National Security Studies, American Civil Liberties Union; Jerry J. Berman, legislative counsel, American Civil Liberties Union; and John M. Maury, president, Association of Former Intelligence Officers.

You will be seeing them one at a time as they come up. Welcome to you all, gentlemen.

I will make my opening statement, and then proceed.

In this subcommittee's previous hearing on Friday, April 24, 1981, which was devoted to the origins, direction, and support of terrorism, all of the witnesses testified regarding past and present Soviet and surrogate support for international terrorism. It is relevant to see the expulsion of the Lybian Embassy personnel which took place only yesterday.

In reviewing the media coverage which ensued after our last hearing, I was disappointed, to say the least, that some of those journalists covering the hearing seemed to miss the central thrust of the testimony. They tended to focus on an apparent lack of evidence of Soviet masterminding of international terrorism, a point of view to which no one connected with this hearing has ever subscribed.

That I should have been described as "surprised" or "disappointed" by a lack of evidence showing Soviet masterminding of this pernicious activity is to misrepresent my views, which I have repeatedly articulated. And it seems curious that that alleged disap-

pointment for many reporters was the No. 1 news fact, which was reported.

Since my personal views have been so variously reported in the press, I feel compelled to state again for the record that it is the intention of the subcommittee to hold hearings to examine judiciously the extent to which terrorism poses a threat to the security of the United States. We have not prejudged this matter. We are and we will remain sensitive to the need to search out the evidence and to deal with it responsibly.

There were many elements of the media that reported the hearings objectively, but superficial reports of this type are sufficiently widespread to cause me concern that the American people are not being well informed.

I am convinced by my own experiences that there is an irrefutable link between terrorism and national security. This has been demonstrated time and again in those countries whose survival is crucial to our own security. Turkey, the Federal Republic of Germany, South Korea, and South Africa are current examples. Similarly, the protection of covert sources has a direct bearing on our own national security through our ability to monitor terrorist and other activities worldwide.

Therefore, with this in mind, the Subcommittee on Security and Terrorism today undertakes a most important task. An examination of provisions of S. 391 which is a bill to amend the National Security Act of 1947 to prohibit the unauthorized disclosure of information identifying certain U.S. intelligence officers, agents, informants, and sources; and to direct the President to establish procedures to protect the secrecy of these intelligence relationships.

Events transpiring in the world continue to demonstrate that it is absolutely essential that our country maintain a strong and effective intelligence apparatus in order to insure that our national security is maintained unimpaired. Human collection sources of intelligence are of vital importance to the success of this overall effort. It would follow, therefore, that unauthorized disclosures of information identifying individuals engaged in, or assisting in our country's foreign intelligence activities, are undermining the intelligence community's human source collection capabilities and exposing to needless dangers the lives of our intelligence officers in the field.

The disclosure of the identity of a covert agent is an immoral act which cannot be tolerated. It has no relation whatsoever to speaking out against Government programs which are wasteful. It in no way bears a relationship to the whistleblower who seeks to enhance his Government's ability to perform more efficiently by bringing to the attention of those in responsible positions deficiencies such as fraud or waste in the agency in which the whistleblower serves.

No; the reprehensible activities, the commission of which this bill is designed to criminalize, have repeatedly exposed honorable public servants to personal peril and vastly reduced their effectiveness in pursuing their endeavors. The insensitivity and moral degeneracy on the part of those who seek to undermine the effectiveness of our intelligence capability is so inimical to our American democratic system that it seems, to me at least, that much of what

we are prepared to do today should be totally unnecessary; and it is indeed unfortunate that this is not the case.

While in a free society we must welcome public debate concerning the role of the intelligence community as well as that of other components of our Government, the irresponsible and indiscriminate disclosure of names and cover identities of covert agents serves no salutory purpose whatsoever.

As elected public officials, we have a duty consistent with our oaths of office to uphold the Constitution and to demonstrate our support for the men and women of the U.S. intelligence service who perform duties on behalf of their country, often at great personal risk and sacrifice, a service vital to our national defense.

Extensive hearings before the House and Senate Intelligence Committees have documented these pernicious effects. The underlying basic issue is our ability to continue to recruit and retain human sources of intelligence whose information may be crucial to the Nation's survival in an increasingly dangerous world.

No existing law clearly and specifically makes the unauthorized disclosure of clandestine intelligence agents' identities a criminal offense. Therefore, as matters now stand the impunity with which unauthorized disclosures of intelligence identities can be made implies a governmental position of neutrality in the matter. It suggests that the U.S. intelligence officers are fair game for those members of their own society who take issue with the existence of a CIA or find other perverse motives for making these unauthorized disclosures.

In the area of identities' protection, we must steer a course carefully calculated between enormous interests. On the one side we have the protection of a constitutional right of free speech; and on the other, the vital need to protect the effectiveness of U.S. intelligence gathering around the world.

Today we will hear from six witnesses with varying viewpoints who can enlighten us in this important area.

Senator Leahy, before the questioning begins, would you care to make an opening statement?

OPENING STATEMENT OF SENATOR PATRICK J. LEAHY

Senator LEAHY. Thank you, Mr. Chairman.

I compliment the Chair on having hearings on what I think is an extremely important subject. I am delighted to see our colleague from New England—southern New England—Senator Chafee, who has done yeoman's service in this field in the Intelligence Committee and on the floor of the Senate.

Mr. Chairman, few Americans are ever going to be in a position to assess the full extent of the extraordinary contribution of our intelligence officers to the security of our Nation. Perhaps because of the nature of their work—well, in fact, it is because of the nature of their work that we will never be in a position to fully assess it. There can be no doubt, however, that the naming of names has resulted in the diminished effectiveness of our intelligence efforts, and the loss of life.

The legislation before this committee effectively deals with the violations of oath and good judgment by those who have had authorized access to classified information about covert agents. There

is no first amendment purpose to be served in assuring the rights of agents to violate their professional duties, and I give these provisions my strongest support.

Mr. Chairman, section 601(c) of the bill tries to deal with information that has gotten beyond the perimeter of the intelligence community, beyond the hands of those whose silence we may require as a matter of contract. We do have a legitimate interest in protecting the security and effectiveness of the intelligence agents even where compromising information is in the hands of agency outsiders. But the standards cannot be standards growing out of the notions of contract and duty, but rather, standards that examine the purpose of and intent of disclosure and define "prohibited activity" with care.

The bill that does not clearly separate legitimate discussion of the intelligence function in this country from the purposeful and malicious naming of names could mean the effective end of all meaningful discourse about intelligence. The first amendment has always been a very down-to-earth concept for me. It means writing or speaking without fear. And nothing would dampen honest expression faster than confusion about the legal limits of that expression.

If we adopt legislation that makes it perilous to write about the CIA, or if the bill is so vague that the only safe course of action is to write nothing, not only is the public the loser but I think our intelligence agencies are the losers, also. What is true of other government agencies is true of the intelligence agencies—they operate poorly in a permanent vacuum.

There has been concern about the constitutionality of section 601(c) because it limits the use of information in the public domain. While I share that concern, I recognize that there will be instances where information in the public domain but not widely circulated can become dangerous to our security if circulated with notoriety.

So let us try to identify those instances and define them with such precision that misunderstanding of the law's intent would be difficult. Let us also recognize that this bill will not by itself cure intelligence leaks. If the identity of agents has come into the public domain, somewhere the system has broken down. Our first job is not to tamper with the first amendment, but to fix the system and make sure that the leaks do not occur in the first place.

Resting on a strong system for insuring adequate cover for our intelligence agents, a bill like S. 391, carefully drafted, can immeasurably improve both the quality and the security of our intelligence services. Unless carefully done, however, the bill might fall short of the enforceable protection we need, and yet weaken legitimate expression in an area where the need for continuing dialogue has been clearly demonstrated.

I have no truck with those who feel that they must, under the guise of whistleblowing, run out and hold a press conference and endanger the lives of agents to get their point across. We have provided legitimate forums for whistleblowers—not only in legislation that I have drafted that has been passed by previous Congresses, but in the Senate Select Committee on Intelligence, there is an easy, immediately available forum for people within any of the intelligence agencies with legitimate gripes to come to us, and they

will be heard by a bipartisan forum on relatively short notice in as complete detail as they want.

That is a proper and appropriate forum for those people who have been entrusted with the greatest and most delicate secrets of our Nation. That is the proper and appropriate method to take. I think that within our intelligence community steps should be taken to insure that that is the way it is done.

In saying that, however, we should also be aware as a nation that when information has come into the public domain through whatever means, that we also as a nation have a duty to protect the first amendment rights involved when such information has gotten out into the public domain.

Let us continue to make everybody within the intelligence agencies aware of the fact that we do have legitimate areas for legitimate gripes to be aired without taking steps that may well endanger our whole system and our whole country.

Thank you, Mr. Chairman.

Senator DENTON. Thank you, Senator Leahy.

Senator LEAHY. I should also comment, Mr. Chairman, that I am on another committee, Senator Helms' committee, that has been having a markup of the farm bill for 2 weeks now, and at some point this morning I will have to leave for that.

Senator DENTON. We are all familiar with that problem, and we appreciate your presence here this morning for the time you are able to devote to it, Senator Leahy.

Before we begin with our distinguished witness, I wish to place a copy of S. 391 in the record.

[Copy of S. 391 follows:]

97TH CONGRESS
1ST SESSION

S. 391

To amend the National Security Act of 1947 to prohibit the unauthorized disclosure of information identifying certain United States intelligence officers, agents, informants, and sources and to direct the President to establish procedures to protect the secrecy of these intelligence relationships.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 3 (legislative day, JANUARY 5), 1981

Mr. CHAFEE (for himself, Mr. GOLDWATER, Mr. BENTSEN, Mr. DANFORTH, Mr. DOMENICI, Mr. GARN, Mr. GLENN, Mr. HAYAKAWA, Mr. JACKSON, Mr. LAXALT, Mr. LUGAR, Mr. NUNN, Mr. PRESSLER, Mr. ROTH, Mr. SCHMITT, Mr. SIMPSON, Mr. WALLOP, Mr. HATCH, Mr. HUDDLESTON, and Mr. THURMOND) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the National Security Act of 1947 to prohibit the unauthorized disclosure of information identifying certain United States intelligence officers, agents, informants, and sources and to direct the President to establish procedures to protect the secrecy of these intelligence relationships.

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 "Intelligence Identities Protection Act of 1981".

SEC. 2. (a) The National Security Act of 1947 is amended by adding at the end thereof the following new title:

"TITLE VI—PROTECTION OF CERTAIN NATIONAL SECURITY INFORMATION

"PROTECTION OF IDENTITIES OF CERTAIN UNITED STATES UNDERCOVER INTELLIGENCE OFFICERS, AGENTS, INFORMANTS, AND SOURCES

"SEC. 601. (a) Whoever, having or having had authorized access to classified information that identifies a covert agent, intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $50,000 or imprisoned not more than ten years, or both.

"(b) Whoever, as a result of having authorized access to classified information, learns the identity of a covert agent and intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined

not more than $25,000 or imprisoned not more than five years, or both.

"(c) Whoever, in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States, discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both.

"DEFENSES AND EXCEPTIONS

"SEC. 602. (a) It is a defense to a prosecution under section 601 that before the commission of the offense with which the defendant is charged, the United States had publicly acknowledged or revealed the intelligence relationship to the United States of the individual the disclosure of whose intelligence relationship to the United States is the basis for the prosecution.

"(b)(1) Subject to paragraph (2), no person other than a person committing an offense under section 601 shall be subject to prosecution under such section by virtue of section 2

or 4 of title 18, United States Code, or shall be subject to prosecution for conspiracy to commit an offense under such section.

"(2) Paragraph (1) shall not apply in the case of a person who acted in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States.

"(c) It shall not be an offense under section 601 to transmit information described in such section directly to the Select Committee on Intelligence of the Senate or to the Permanent Select Committee on Intelligence of the House of Representatives.

"(d) It shall not be an offense under section 601 for an individual to disclose information that solely identifies himself as a covert agent.

"PROCEDURES FOR ESTABLISHING COVER FOR INTELLIGENCE OFFICERS AND EMPLOYEES

"SEC. 603. (a) The President shall establish procedures to ensure that any individual who is an officer or employee of an intelligence agency, or a member of the Armed Forces assigned to duty with an intelligence agency, whose identity as such an officer, employee, or member is classified information and which the United States takes affirmative measures to conceal is afforded all appropriate assistance to ensure that

the identity of such individual as such an officer, employee, or member is effectively concealed. Such procedures shall provide that any department or agency designated by the President for the purposes of this section shall provide such assistance as may be determined by the President to be necessary in order to establish and effectively maintain the secrecy of the identity of such individual as such an officer, employee, or member.

"(b) Procedures established by the President pursuant to subsection (a) shall be exempt from any requirement for publication or disclosure.

"EXTRATERRITORIAL JURISDICTION

"SEC. 604. There is jurisdiction over an offense under section 601 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 (as defined in section 101(a)(20) of the Immigration and Nationality Act).

"PROVIDING INFORMATION TO CONGRESS

"SEC. 605. Nothing in this title may be construed as authority to withhold information from the Congress or from a committee of either House of Congress.

"DEFINITIONS

"SEC. 606. For the purposes of this title:

"(1) The term 'classified information' means information or material designated and clearly marked or clearly represented, pursuant to the provisions of a statute or Executive order (or a regulation or order issued pursuant to a statute or Executive order), as requiring a specific degree of protection against unauthorized disclosure for reasons of national security.

"(2) The term 'authorized', when used with respect to access to classified information, means having authority, right, or permission pursuant to the provisions of a statute, Executive order, directive of the head of any department or agency engaged in foreign intelligence or counterintelligence activities, order of any United States court, or provisions of any rule of the House of Representatives or resolution of the Senate which assigns responsibility within the respective House of Congress for the oversight of intelligence activities.

"(3) The term 'disclose' means to communicate, provide, impart, transmit, transfer, convey, publish, or otherwise make available.

"(4) The term 'covert agent' means—

"(A) an officer or employee of an intelligence agency or a member of the Armed Forces assigned to duty with an intelligence agency—

"(i) whose identity as such an officer, employee, or member is classified information, and

"(ii) who is serving outside the United States or has within the last five years served outside the United States; or

"(B) a United States citizen whose intelligence relationship to the United States is classified information, and—

"(i) who resides and acts outside the United States as an agent of, or informant or source of operational assistance to, an intelligence agency, or

"(ii) who is at the time of the disclosure acting as an agent of, or informant to, the foreign counterintelligence or foreign counterterrorism components of the Federal Bureau of Investigation; or

"(C) an individual, other than a United States citizen, whose past or present intelligence relationship to the United States is classified information and who is a present or former agent of, or a present or former informant or source of operational assistance to, an intelligence agency.

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"(5) The term 'intelligence agency' means the Central Intelligence Agency, a foreign intelligence component of the Department of Defense, or the foreign counterintelligence or foreign counterterrorism components of the Federal Bureau of Investigation.

"(6) The term 'informant' means any individual who furnishes information to an intelligence agency in the course of a confidential relationship protecting the identity of such individual from public disclosure.

"(7) The terms 'officer' and 'employee' have the meanings given such terms by sections 2104 and 2105, respectively, of title 5, United States Code.

"(8) The term 'Armed Forces' means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

"(9) The term 'United States', when used in a geographic sense, means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.

"(10) The term 'pattern of activities' requires a series of acts with a common purpose or objective.".

(b) The table of contents at the beginning of such Act is amended by adding at the end thereof the following:

"TITLE VI—PROTECTION OF CERTAIN NATIONAL SECURITY INFORMATION

Senator DENTON. Senator Chafee, would you offer your opening statement, please, sir?

STATEMENT OF HON. JOHN H. CHAFEE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. Thank you, Mr. Chairman, and members of the committee.

First I want to say that I appreciate a great deal, Mr. Chairman and members, that you have moved expeditiously with this piece of legislation that I consider of great importance.

Mr. Chairman, S. 391 is essentially the same as S. 2216 as it was reported from the Senate Intelligence Committee in August of last year by a vote of 13 to 1. The only changes are the numbering of the title and the paragraphs.

The purpose of the Intelligence Identities Protection Act is to strengthen the intelligence capabilities of the United States by prohibiting the unauthorized disclosure of information identifying certain American intelligence officers, agents, and sources of information. In short, the bill places criminal penalties on those enemies of the American intelligence community engaged in the pernicious activity of naming names.

In my judgment, the governmental protection of the identities of American intelligence officers is an idea whose time has come and indeed it is long overdue. As has been mentioned in previous remarks, others have made efforts in this field. My colleague, Senator Bentsen, introduced bills which would accomplish this purpose in 1976 and 1977, following the tragic murder of Richard Welch in Athens in December 1975.

I might say, Mr. Chairman, that Richard Welch was born and raised in Providence, R.I. So I have a deep personal, as well as an official interest in preventing the reoccurrence of events such as that.

In 1979, Representative Boland, chairman of the House Intelligence Committee, introduced a House bill which was the predecessor of H.R. 4, which has been introduced this year. In January of last year, S. 2216, the bill I previously referred to, was introduced on the Senate side, and its subsequent refinement and alteration is this bill we are considering today, namely S. 391.

Extensive hearings have been held on the issue of intelligence identities protection in both the House and the Senate Intelligence Committees, and before the Judiciary Committee. The issues which this legislation involves have been heard in detail, and the wording of S. 391 has been carefully amended and refined in its current state.

The point I am making, Mr. Chairman and members of the committee, is: This is no draft bill that we are submitting that has been conjured out of thin air. This is the result of a long, definite effort covering many years with hearings in the Intelligence Committees in the House and the Senate on this subject.

The Republican Party platform in 1980 contained a plank supporting legislation "to invoke criminal sanctions against anyone who discloses the identities of U.S. intelligence officers." Mr. William Casey and Admiral Turner have both publicly expressed their

support for intelligence identities protection, and of course I am delighted that Mr. Casey will be testifying this morning.

Our bill, this one we are considering today, is the only one to receive the endorsement of both the Reagan and the Carter administrations' Justice Departments. Support for this legislation also comes from a broad, bipartisan base of Senators with extensive knowledge and experience in intelligence and national security affairs.

This bill has currently over 40 cosponsors from both sides of the aisle, 10 of whom are committee chairmen, and 30 of whom chair subcommittees. I am particularly pleased that the distinguished Majority Leader, Senator Baker is also an original cosponsor of this bill, as well as Chairman Thurmond and Chairman Goldwater of the Senate Intelligence Committee.

Mr. Chairman, the expeditious passage of this legislation in my judgment is vital to the lives and safety of those Americans who serve this Congress and this Nation on difficult and dangerous missions abroad.

Now, Mr. Chairman, opponents of this legislation prevented its coming to the floor of the Senate last year in the closing hours. As a result, the 96th Congress completed its business without offering us the opportunity for free debate and vote. Since that time, I am told that the Covert Action Information Bulletin has published additional names of alleged covert agents, and their editors have traveled abroad to pursue this pernicious activity. As a consequence, six Americans were expelled from Mozambique recently following charges of engaging in espionage there.

A great deal of debate has centered on the constitutional issues of intelligence identities legislation. The American Civil Liberties Union, for example, recently referred to this sort of legislation as "a violation of the first amendment."

The section of the first amendment to the Constitution that pertains to our discussion states that: "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *." The first point that I wish to make with regard to this amendment is the provisions of the Bill of Rights cannot be applied with absolute literalness; but are subject to exceptions.

It has long been recognized that the free speech clause of the Constitution cannot wipe out common law regarding obscenity, profanity, and the defamation of individuals. This point was reiterated by Justice Oliver Wendell Holmes in the classic Espionage Act decisions in 1919 when he stated:

> The first amendment * * * obviously was not intended to give immunity for every possible use of language * * *. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.

A second and equally important point is that if unlimited speech interferes with the legitimate purposes of Government, there must be some point at which the Government can step in. My uncle, Zechariah Chafee, who was the leading defender of free speech during his 37 years at the Harvard Law School, wrote in his book entitled "Free Speech in the United States" as follows:

> The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion * * *. Nevertheless, there are other purposes of government, such as

order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must be balanced against freedom of speech.

Or to put the matter another way, it is useless to define free speech by talk about rights. * * * Your right to swing your arms ends just where the other man's nose begins.

The true boundary line of the first amendment can be fixed only when Congress and the course realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth.

Thus, our problem of locating the boundary line of free speech is solved. It is fixed close to the point where words will give rise to unlawful acts.

It is evident, Mr. Chairman, that the activity of naming names has given rise to unlawful acts, and that it has endangered the lives and safety of American citizens abroad. I have already mentioned the murder of Richard Welch in Greece. I am sure you also know of the series of assassination attempts in Kingston, Jamaica, following the Covert Action Information Bulletin's publication of the names of 15 alleged CIA officers there last year. What you may not know—and I think this is very important, Mr. Chairman and members of the committee—is how terribly those events have affected the lives of the American officials involved, their wives, and their children.

Mrs. Richard Kinsman, who wrote to me last year on this issue and whose letter I would like to insert into the record, has since stated that her life has been "terribly disrupted" by the assassination attempt on her husband and her family. Her children, one of whose bedrooms was riddled by machinegun bullets, "did not understand why anyone would want to hurt them."

The family has been forced to move several times for reasons of their own personal safety, required to give up jobs, sever friendships, withdraw from and reenter schools, and suffer long periods of separation. They also wonder whether they will ever travel abroad again for any purpose.

I understand that another wife whose home was also the target of an assassination attempt in Jamaica last year was hospitalized for stress disorders following the incident. They have also left Jamaica. It is clear, then, that the personal safety and missions of those named have been placed in jeopardy by naming names.

In the balancing of two important social interests, public safety, and the search for truth, it is clear that the protection of the lives of our agents overseas far outweighs a pattern of activities which identifies and discloses the names of those agents. And I use the term "pattern of activity," Mr. Chairman, because that is the language in section 601(c) of the act.

In this regard, Mr. Chairman, I think it is essential, and it is important to stress, that this bill would not prevent Mr. Philip Agee from publishing the articles contained in his publications, obnoxious though they might be. This bill would only restrain his publication of the names of persons he claims are covert agents.

By the same token, there is nothing in this bill which would prevent Louis Wolf from continuing to publish his Covert Action Information Bulletin which does contain articles purporting to be based on research into U.S. intelligence operations at home and abroad. I wish to stress this: This bulletin can continue to be published. The only impact of this legislation would be on the

section of the bulletin entitled "Naming Names." And here, Mr. Chairman [indicating], is an example of "Naming Names." It sets forth the names of alleged agents serving this Nation and this Congress abroad.

I hope that this brief review of the constitutional questions will show that the first amendment does not provide absolute protection for all speech; and that the Government can in certain circumstances intervene in the exercise of free speech in the interest of public safety without jeopardizing the search for truth.

As the Attorney General stated last year on this subject:

> Our proper concern for individual liberties must be balanced with a concern for the safety of those who serve the Nation in difficult times and under dangerous conditions.

It goes without saying that these important constitutional considerations were very much in our minds when my colleagues and I worked up the final draft of the Intelligence Identities Protection Act. We are not challenging the Constitution. We are working with it. In my judgment, we have worked well within its limits. We have successfully followed what my uncle called the boundary line of free speech.

Mr. Chairman, I will not take the time this morning to discuss the specific provisions of S. 391, or to point out in detail how this formulation reflects our proper concern for first amendment rights. This has been the subject of previous testimony, and others will testify this morning, and it is part of the extensive record on this issue. I recommend the Intelligence Committee's Report on this subject, as well as the published hearing record of both the Intelligence and the Judiciary Committees.

However, there is one additional issue which I believe must be addressed before I conclude my remarks, because there has been so much confusion surrounding it. During the long debate on this issue, and in the hearings before the Senate Intelligence Committee, I have heard it suggested or implied that it should be acceptable for people to disclose the names of covert agents if this information derives from unclassified sources.

The implication of this view is that there exists somewhere in this Government an official but unclassified list of covert agents; and that those who have found this list should be free to publish the names thereon.

Mr. Chairman, I have studied the matter of covert agents within the Senate Intelligence Committee, and have even held a series of detailed hearings on the subject. Without going into specifics in this session, I can assure you that there is no such list. What we have found are unclassified official or semiofficial documents which contain the names of covert agents in among the names of other officials of the U.S. Government. The covert agents are not identified. The very purpose of these documents is to cover or to hide the true identity of the covert agents named thereon, and in no case is an identification explicitly made.

However, to say that the Government has never published an unclassified list of covert agents as such does not mean that certain persons, employing basic principles of counterespionage, and after considerable effort, cannot determine identities of covert agents with some degree of accuracy. It is possible.

It is the purpose of S. 391 to punish the publication of names acquired through these techniques, regardless of whether the identification was made with reference to classified or unclassified material. It is not the mechanism of identification which places people's lives in jeopardy or threatens our intelligence capabilities; it is the actual publication of the names as covert agents that does so. It is the pattern of activity involved in the pernicious business of naming names that we want primarily to prevent.

In closing, Mr. Chairman, I would like to make a special appeal to you and to my colleagues on your committee to report S. 391 intact so that the interminable delays which seem to follow any change to a bill might be avoided. You have my assurance, in turn, that I will do whatever I can to see that this vital bill is moved with the deliberate speed it deserves.

Over the past 5 years, more than 2,000 names of alleged CIA officers have been identified and published by a small group of individuals whose stated purpose is to expose U.S. intelligence operations. I think it is time we legislated an end to this pernicious vendetta against the American intelligence community.

Mr. Chairman, we send fellow Americans, we in the U.S. Congress, members of the U.S. Government, abroad on dangerous missions. We owe it to them to do our utmost to protect their lives as we go about our business.

Finally, Mr. Chairman, it has been my privilege as a member of the Intelligence Committee to have traveled somewhat in different sections of the world. In doing so, I make an attempt to meet with our intelligence agent station chiefs and converse with them, discuss with them their problems, what we might do in the U.S. Senate as Members of the Senate, as members of the Intelligence Committee, to be more helpful to them in discharging their duties.

I can say, Mr. Chairman, that everywhere I go, without question, unanimously the question is raised that the most disconcerting activity that takes place, the most demoralizing activity, is the publication of names in bulletins such as this [indicating]. Our officers find it difficult to understand why nothing can be done about this.

Mr. Chairman, I have a deep personal interest in seeing—and I know this concern is shared by Members of the Committee here and Members of the Senate throughout—to do the best we can to protect the lives of our agents and their families abroad.

Thank you, Mr. Chairman. I would be glad to answer any questions that you might have.

Senator DENTON. Thank you very much, Senator Chafee. Your Uncle Zachariah has spoken very well, and he shall become one of my valuable sources of quotations. We do have the letter from Mrs. Kinsman. I have read it and been much impressed by what that lady had to say.

I will have no questions of our colleague. Would you, Senator Leahy?

Senator LEAHY. I wonder if I just might, Mr. Chairman, with your indulgence, ask a couple of questions. I have been singularly impressed over the past several years that I have been on the Intelligence Committee with how often we as a committee act with complete unanimity. I would say we do so in the vast majority of

circumstances, certainly far, far more than any other committee in the U.S. Senate.

It is interesting, too, because the membership of the Intelligence Community is made up with a very real effort to have a broad ideological, and geographical mix, so it can be truly representative of the U.S. Senate. I know of no issue where the Intelligence Committee has spoken with stronger unanimity than our great concern over the release of the names of our agents worldwide.

The people who serve us in the intelligence agencies around the world—certainly all the ones I have met, and I have done the same thing as you in visiting our people abroad—are dedicated individuals. They are hard working. Many times they are operating under serious disadvantages, personal disadvantages to their family, themselves, in the way they are living and working. Many certainly do not fit the image of a John Le Carré spy novel. They are many times people who carry out what appear to be fairly mundane things, but very necessary; certainly not the type who should be expecting or anticipating being put in great personal danger, and yet they are when their names are bandied about as being the lead person for some American worldwide intelligence apparatus.

These persons may well be working on economic issues or something like that, but suddenly find that they are going to have to defend their lives, and worse yet, defend the lives of their spouses and children.

So there is no question that we want to put an end to the pernicious practice of naming names of our cover intelligence personnel, especially in the case of the Covert Action Information Bulletin where it is being done purposely to impede foreign intelligence activities in the United States.

We all agree absolutely that that has to stop. What I am concerned about is how we do it. The issues of the constitutionality of section 601(c) have been raised. Philip Heymann has suggested different language, and so on.

Maybe it is a philosophical question, John, that I have more than anything else. Do we run a great risk—even a greater risk in some ways—if we passed the bill, and if section 601(c) were to be found unconstitutionally broad? In some ways, is that not a greater risk? If that is the result of this effort, haven't we opened the floodgates, wouldn't it take years to restore any sense of security not only to our own personnel but to those that may act against them?

A number of constitutional scholars have said it would not be constitutional unless it contained an element of malicious intent or bad purpose. Do you think we should adopt that approach?

Senator CHAFEE. First, Mr. Chairman and Senator Leahy, I want to pay tribute to the work you have done on the Senate Intelligence Committee, a very valuable member and you have as great concern in this area as any one member of the committee. I know that you have worked extremely hard to devise an approach in which we might solve this problem which bedevils all of us.

This section 601(c) has had support from the Justice Department. The version that is in the House is somewhat different in that it has an "intent" standard—what the Justice Department calls a "subjective standard of intent," whereas you will notice on line 4 in the bill where it uses the word "intended" in connection with the

"pattern of activities," that is described as an "objective standard of intent," one that is not in the mind but can be weighed objectively.

So in answer to your question, it seems to me that what we have done here is to replace the subjective standard of intent with a more objective standard which requires that the disclosure must be "in the course of a pattern of activities intended to identify and to expose covert agents and with reason to believe that such activities would impair and impede the foreign intelligence activities of the United States."

I do not think it has to be done with any malicious intent, because we have described the action. It is like—I suppose analogies are always dangerous—shooting somebody. You shoot them, and whether you do it with "intent" or not to murder them, it is a "killing" and it is punishable.

Senator LEAHY. But you do recognize philosophically the problem that we would face? That if we were to pass one part of the statute and have it held unconstitutional, that it would almost encourage these activities?

Senator CHAFEE. Well, I do not think so, because I do not think that if this were found unconstitutional—I am not accepting the assumption—but if it were found unconstitutional, I just do not think responsible American citizens are going to go out and say: Three cheers! We can now publish all the names of all the agents we can discover, and we will do it freely.

I mean, I do not believe that the mass majority of Americans are going to do this. There is a limited group that is doing it now. But it is enough to cause damage.

Senator LEAHY. Well, let me take Mr. Agee and Mr. Wolf's activities. Would those not fall clearly within that "bad purposes" test, the test suggested by Mr. Heymann, and by the House language?

Senator CHAFEE. I am not sure I get your question.

Senator LEAHY. Well, would not the kind of thing that we seem to be zeroing in on, would not that fall under the more restrictive language that has been suggested by the Department of Justice and suggested by the House bill?

Senator CHAFEE. Well, the Department of Justice approves this language.

Senator DENTON. If you would yield, sir?

Senator LEAHY. Sure.

Senator DENTON. The delay which I mentioned was due to their consideration of the wording, and the ultimate judgment was in favor. There is total confidence that it is constitutional.

Senator LEAHY. Let me go to another question. How does this affect those things that seem to pervade all administrations, Republicans and Democrats, the so-called authorized leak? So I will not appear to be partisan, I will just take the last 4 years. There was one person at a high level in the administration who appeared to virtually have a member of one of the larger newspapers in this country on his payroll given the way leaks would flow through to him. We sometimes had to hurriedly schedule meetings of our intelligence committees so that we could be briefed by the intelligence community prior to—or at least within a few days of having

read the same material on the front page of that particular newspaper. Does this bill involve that sort of thing?

Senator CHAFEE. This solely deals with "names."

Senator LEAHY. Then let me just ask you one last question, because I understand that the "pattern" could be a series of events leading up to just one publication; it does not necessarily mean by a "pattern" a series of publications, but a series of events, rather, that may lead to just one publication.

We heard testimony here on the origins and support of international terrorism in this subcommittee recently. We had Claire Sterling, the journalist Michael Ledeen, and Arnold De Borchgrave. Now all of these authors have named a source who could fall under the definition of "covert agent" contained in the bill. They used that source to make their case that the Soviet Union was supporting international terrorism.

Now I do not believe by any stretch of the imagination that any of these authors wrote with the intent of impairing or impeding the effectiveness of the foreign intelligence activities of the United States. But they were all told, as I understand it, by U.S. Government sources, that they were wrong in their conclusions.

Now could the objective standard of "with reason to believe that such activities would impair or impede the foreign intelligence activities in the United States" have had a chilling effect on their ability to use and name a high-caliber source to prove a point which the U.S. Government continues to deny?

Senator CHAFEE. Well, I do not know the facts of that exact case, but there are a whole series of hurdles that have got to be overcome before you can achieve a successful prosecution under this section 601(c). There are six of them.

First, that there was an intentional disclosure which did in fact identify a covert agent.

Second, that the disclosure was made to an individual not authorized to receive classified information.

Third, that the person who made the disclosure knew the information identified a covert agent.

Fourth, that the person who made the disclosure knew that the United States was taking affirmative measures to conceal the agent's classified intelligence affiliation.

Fifth, that the disclosure was made in the course of a pattern of activities.

And sixth, that the person making the disclosure had reason to believe that his activities would impair or impede the foreign intelligence activities of the United States.

Now those are pretty big hurdles to jump.

Senator LEAHY. I understand. I can think of things I have read—well, to be totally bipartisan about it—things I have read in the last 6 years since I have been in the Senate, based on the knowledge that I had first in the Armed Services Committee and then on the Intelligence Committee, material that has gone from high administration officials, both Republican and Democratic administrations, directly to members of leading news media in this country that would fall under every one of those tests, and were published in the newspapers or within the electronic media. The leaks came

directly by high officials of both Republican and Democratic administrations that fall directly under that.

Senator CHAFEE. With the names? I think that is probably the difference.

Senator LEAHY. Well, the definition of "names," if you use a source that could only be one conceivable person that it could come from, or one conceivable place that it could come from, that is the same as the name.

Senator DENTON. If the Senator would yield, I do have two specific pieces of answers to two previous questions he made reference to.

One is the mentioning of names by Messrs. de Borchgrave and Ledeen and Mrs. Sterling. In every case which we know of, the names named were all taken from foreign sources, meaning that the agencies inimical to our interests already had the names. This Department of Justice ruling was dated February 25. We did not get it until about the last part of March. But one sentence which does directly address your question about "with reason to believe"—that is, the constitutionality or advisability of that—the relevant quote says: "The Department supports Section 601(3)(c)'s requirement that an individual must act with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States." They go on to say that: "This is preferable to the House version of the bill, H.R. 4, which requires that an individual must act with the intent to impair or impede the foreign intelligence activities of the United States."

For what it is worth, those are the closest responses I can make to those two questions.

With regard to the high officials leaking names, if that is what we are getting into I am personally interested in trying to tighten up the punitive measures which might deter such leaks when they are against the security of the United States.

Senator LEAHY. Unfortunately, administrations have for years leaked when they think it is to their benefit. We usually catch hell for it up here, because people start talking about all the leaks from Congress. With respect to the Intelligence Committee at least, I know of no leak that has ever come out of that committee; but I know of an awful lot of hours of frustration that both Senator Chafee and I have expressed at leaks that have come elsewhere.

I realize, Mr. Chairman, that you have an awful lot of other witnesses, and I will forego any other questions. I simply want to establish the fact that there is certainly unanimity within the Senate on the desire to protect the names of agents. We do not want our agents' names bandied about. They are operating under enough problems as it is. Their own safety, the safety of their families is going to become more and more difficult, and it is already becoming more and more difficult to recruit good men and women for a job that is absolutely essential to the security of the United States. I think that good intelligence, properly used, is one of the best guarantees of freedom in the world, and one of the best guarantees that we do not stumble into such things as what would be the worst case, of course, an accidental nuclear war.

So we must have it, and we must protect the identity and the safety of those agents. But I also want to make sure, however, that

in doing so we do not infringe, first, on the basic constitutional rights that we are ultimately trying to protect for all of us. And second, that we do not pass legislation which may ultimately be overturned, for whatever reason; because I think that that would exacerbate the situation even further.

So we are all striving for the same end, and I raise the questions to make sure that when we finally come out with a bill it will be the best one possible. And I compliment Senator Chafee on this. I think in the Intelligence Committee he has been a yoeman in the work that he has done in trying to educate all the rest of us, Mr. Chairman, in working with us and in trying to bring together the disparate views on the whole subject.

Thank you.

Senator CHAFEE. Well, thank you, Senator Leahy. Again, I appreciate the efforts that you are making, along with all the rest of us, to arrive at a successful solution to this problem.

I would just conclude by making two brief points. First, the whistleblower problem is taken care of on page 4 of section 601(c) where it does provide that it is perfectly permissible to go to the Intelligence Committees, as you pointed out.

Second, in some of the testimony we had last year the point was made by opponents to this act that there have been all of these publications of names—and I think I mentioned in my testimony some 2,000 names—and only 1 person has been murdered, and only 1 agent has been murdered, and only 1 house or a few houses have been shot up, so why bother passing legislation?

To me, Mr. Chairman, I do not buy that argument. First of all, I do not think anybody should be murdered or endangered. But second, and I am sure you can adduce this from the testimony of the Director, the effect of these names on our ability to function has been severe. Regardless of whether it is a murder of an agent or not, or the shooting up of a home, the deleterious effect on our intelligence operations has been severe.

So I just hope that no one succumbs to the argument that there have been 2,000 names, and only 1 person murdered, so why bother?

Senator LEAHY. I do not think anybody is going to buy that argument here.

Senator CHAFEE. I do not think any of us will take that argument.

Senator DENTON. And we recognize that, aside from the loss of life or the injury to individuals, the neutralization of their function by revealing their names, is a deleterious effect on our security.

Thank you very much, Senator Chafee, for your testimony here this morning.

Senator CHAFEE. Thank you, Mr. Chairman. I appreciate it.

Senator DENTON. Mr. Casey has a Cabinet meeting at 11:30, and we are going to try to expedite our questions so that he will be prompt in making that meeting.

We will ask William J. Casey, the Director of the Central Intelligence Agency, to come forward. Would you wish, Mr. Casey, your two colleagues to accompany you? John Stein, Acting Deputy Director of Operations, and Fred Hits, Legislative Counsel for the CIA.

STATEMENT OF WILLIAM J. CASEY, DIRECTOR, U.S. CENTRAL INTELLIGENCE AGENCY, ACCOMPANIED BY JOHN H. STEIN, ASSOCIATE DEPUTY DIRECTOR FOR OPERATIONS, CIA; AND FRED HITS, LEGISLATIVE COUNSEL, CIA

Mr. CASEY. I am pleased to be here, and I would ask that my prepared statement be inserted in the record, and I will give you the gist of my statement orally.

Senator DENTON. It shall be done, sir.

Mr. CASEY. Early last month I appeared before the House Intelligence Committee on legislation and testified on the House version of this bill. With both chambers considering this legislation, I am very hopeful that we will soon see enactment of a measure that will finally put an end to the pernicious and damaging unauthorized disclosures of intelligence identities.

We need criminal penalties as soon as possible on the unauthorized disclosure of information identifying certain individuals engaged or assisting in the foreign intelligence activities of the United States. This administration believes that the passage of the Intelligence Identities Protection Act is essential to the maintenance of a strong and effective intelligence apparatus. Enactment of this legislation is vital to President Reagan's determination and commitment to enhance the Nation's intelligence capabilities.

Mr. Chairman, there exists a tiny group of Americans who openly proclaim themselves to be devoted to the destruction of the Nation's foreign intelligence agencies. This group has engaged in activities avowedly aimed at undermining the Nation's intelligence capability through the identification and exposure of undercover intelligence officers.

Those perpetrating these disclosures understand correctly that secrecy is the lifeblood of an intelligence organization, and that disclosure of the individuals engaged in that activity and whose identity is deliberately concealed will disrupt, discredit, and they hope ultimately destroy an agency such as the CIA.

Some of the persons engaged in this activity have actually traveled to foreign countries with the aim of stirring up local antagonism to U.S. officials through thinly veiled incitements to violence.

Mr. Chairman, I might say that since taking the post of Director of the Central Intelligence Agency only a few months ago, I can confirm that these disclosures have resulted in untold damage and, if not stopped, will result in further damage to the effectiveness of our intelligence apparatus and to the Nation itself.

I am appalled at the degree to which concerted activity is being carried out around the world to destroy the capacity which is critical to our national security, and which has been painstakingly developed over many years with the full participation and support of the Congress and an investment of many billions of dollars.

The traggic results of these unauthorized disclosures have been reviewed by Senator Chafee so well that I will not take your time to go into all the details, except to say that just a few weeks ago six Americans were expelled from Mozambique following charges of engaging in espionage. These expulsions followed and were directly attributable to visits to that country by members of the Cuban Intelligence Service and the editors of the Covert Action Information Bulletin.

So this is a continuing threat that hangs over our heads which can result in serious damage, increasing discouragement, and retirements of people engaged in this activity who have developed years of experience which is enormously valuable to our national security.

Mr. Chairman, I do not think it necessary to go into great detail about the adverse effects that these disclosures are having. Simply put: The credibility of our country and its relationship with foreign intelligence services and individual human sources, the lives of patriotic Americans serving their country, and the effectiveness of our entire intelligence apparatus are being placed in jeopardy daily.

Extensive hearings before the House and Senate Intelligence and Judiciary Committees have documented these damaging effects. The underlying basic issue is the fact that our ability to continue to recruit and retain human sources of intelligence whose information could be crucial to the Nation's survival in an increasingly dangerous world, our equally important relations with the intelligence services of other nations, are in continuing jeopardy as long as we are exposed to this threat.

It is important to understand what legislation in this area seeks to accomplish. It seeks to protect the secrecy of the participation or cooperation of certain persons in the Foreign Intelligence Service of the United States. These are activities which have been authorized by the Congress, activities which we as a nation have determined to be essential. Secrecy is essential to the safety and effectiveness of the case officers and the agents, without which no intelligence service can operate. It is essential to get individuals to undertake this delicate, demanding, and frequently dangerous work.

No existing statute clearly and specifically makes the unauthorized disclosures of intelligence identities a criminal offense. As matters now stand, the impunity with which unauthorized disclosures of intelligence identities can be made implies a Government position of neutrality, of not caring about the matter. It suggests that U.S. intelligence officers are fair game for those members of our own society who take issue with the existence of the CIA, or find other perverse motives for making these unauthorized disclosures.

I might say that other intelligence services around the world, and other nations, the leaders of other nations, witness this continuing specter where the United States leaves its people who have undertaken this work exposed to this kind of risk and look at it with amazement. You hear it wherever you go.

I believe it is important to emphasize that the legislation which you are considering today is not an assault on the first amendment. It would not inhibit public discussion and debate about U.S. foreign policy or intelligence activities. It would not operate to prevent the exposure of allegedly illegal activities or abuses of authority. It is carefully crafted and narrowly drawn to deal with conduct which serves no useful informing function whatsoever. It is not related to alleged abuses. It does not bring clarity to issues of national policy. It does not enlighten public debate. It does not contribute to an enlightened and informed electorate.

Mr. Chairman, there is virtually no serious disagreement over those provisions of this legislation which impose criminal penalties on the unauthorized disclosure of intelligence identities by those individuals who have had authorized access to classified information. Controversy has centered on subsection 601(c) of S. 391 which imposes criminal penalties on the disclosure of information identifying a covert action by anyone under certain specified conditions.

Disclosure of intelligence identities by persons who have not had authorized access to classified information will be punishable only under certain specified conditions which have been carefully crafted and narrowly drawn so as to encompass persons only engaged in an effort or pattern of activities designed to identify and expose intelligence personnel and impair our intelligence capabilities thereby.

The proposed legislation also contains offenses and exceptions which reinforce this narrow construction. It is instructive in this regard to look at the elements of proof that would be required in a prosecution under this section, keeping in mind that the Government would have to prove each of these elements beyond a reasonable doubt.

The Government would have to show that there was an intentional disclosure of information which did in fact identify a cover agent;

That the disclosure was made to an individual not authorized to receive classified information;

That the person who made the disclosure knew that the information disclosed did in fact identify a covert agent;

That the person who made the disclosure knew that the United States was taking affirmative measures to conceal the covert agent's classified intelligence affiliation;

That the individual making the disclosure did so in the course of a pattern of activity intended to identify and expose a covert agent;

And that the disclosure was made "with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States."

Because of these strict conditions which narrowly define the prohibited conduct, I believe it is clear that this subsection is directed at conduct which the Congress has the authority and power to proscribe consistent with the first amendment, and that this bill does so in a constitutional manner.

Mr. Chairman, I understand that the Department of Justice believes that the Senate version of the bill better captures the concerted nature of the activity which is intended to be proscribed than does the House bill, and that there are prosecutorial and evidentiary advantages to the Senate language. I believe the Department's witness will speak to this matter.

Mr. Chairman, S. 391 will deal with a clear and immediate danger which currently each and every day endangers our intelligence activities, our staff officers, and the lives of those who are cooperating with our Nation abroad.

I want to express my gratitude and appreciation to the subcommittee for so promptly bringing this legislation forward, and to reiterate the hope that it will be enacted into law as quickly as

possible so that this intolerable situation is remedied and no longer permitted to exist.

I will be happy, Mr. Chairman, to answer any questions that you or anybody else may have.

Senator DENTON. Thank you, Mr. Casey, for your most expert and helpful testimony. I will be very brief in my questioning in view of your time constraints.

Let me say at the outset that, while you have evinced your sense of being appalled at the situation which we are now addressing—with such incredible tardiness—from my own background and personal contact with high-ranking Communists, I can assure you that they too are amazed, amused, and highly pleased that such a situation exists.

I did hear you say, sir, that there is no existing legislation which adequately deals with the problems of disclosure which S. 391 is formulated to address. May I ask what steps, if any, the CIA may have taken to tighten up its security practices and cover for its own agents and sources? And would the Agency develop standards for cover sufficient to protect its covert employees from identification, if this bill is passed and prosecuted properly?

Mr. CASEY. Well, we take extensive precautions to equip our agents, and indeed our case officers with cover and identities which facilitate the conduct of their task that is assigned to them, and to protect them from both disclosure and identification by foreign intelligence services, and disclosure and violence from any source.

Senator DENTON. Can congressional oversight and legitimate official and unofficial scrutiny of intelligence activities take place without the likely revelation of intelligence identity?

Mr. CASEY. Well, our experience with congressional oversight and the informing of the relevant committees about our proposed and actual operations has not resulted in any serious disclosure at all, as far as I know. Much of the conversation which takes place with the committees generally describes what we intend to do and the risks and other things that may be involved that seem relevant to the adequate understanding and proper oversight, and very unusually does it take us into identifying the particular individuals who will undertake the particular mission. So I do not see any risk there at all for the oversight process.

Senator DENTON. My final question, sir. I am not a lawyer, but I cannot help but be somewhat impressed that the offense which we are trying to establish as culpable would only result in a punishment of a fine not to exceed $15,000 and imprisonment of not more than 3 years or both. This seems inadequate considering the deaths which have resulted and the harm to our national security which can be translated in terms of peacetime terroristic activities or wartime situations into deaths.

In your opinion, are the penalties provided in S. 391 sufficient or severe enough for the proscribed activities mentioned in the bill?

Mr. CASEY. Well, I would not be opposed to more severe penalties. I believe, however, the fundamental requirement is that we establish the illegality of this action, the criminal nature of this activity, and that we do that as promptly as possible. So I would not be inclined to encourage the imposition of more severe penal-

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ties if that were to result in a delay in the enactment of the legislation.

Senator DENTON. I entirely agree, sir.

Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman.

Mr. Casey, I am always delighted to see you before any of our committees. I would also want to commend your department for some help that they provided for me and my staff during the past few weeks. It was extremely well done and very professionally done, and I appreciate it.

Mr. CASEY. Your visits were very helpful to the morale and spirit of our people.

Senator LEAHY. Thank you, sir.

I found an interesting thing in preparing for this that the American Civil Liberties Union and the Heritage Foundation in what was probably an historic moment held hands on one major item; that they feel that the issue is not so much disclosure made by the press or public, but the question of adequate cover for intelligence officers abroad, something touched on by the chairman earlier.

I am concerned about that, as I know you are and I know others here, I see Mr. Maury in the audience, and others who have expressed the same concern in one regard or another. I know that many agents' identities have been uncovered through the use of the State Department's "Biographic Register," I must admit an item that I was not aware of until I got on the committee and started looking through a copy of it. I understand that register is no longer in general circulation, but it is still published as an unclassified document.

Have you discussed the problem this might create with Secretary Haig?

Mr. CASEY. Yes, I have, Senator. I think generally speaking we are getting a high degree of cooperation on the provision of official cover. There has been some thought of resuming the publication of the State Department's "Biographical Register," and that is under discussion now, the impact it would have or might have on protecting cover. I think we will get full cooperation in the executive branch with respect to all steps necessary to provide maximum cover.

Senator LEAHY. It occurs to me that both the ACLU and the Heritage Foundation are correct in suggesting that no matter what kind of laws we might have, if we do not have adequate cover there is always going to be somebody, for one reason or other, who is just going to look to something which is relatively easy to decipher and make a big thing out of just passing out the deciphered information, no matter what their motivation might be.

Mr. CASEY. Even the State Department's "Biographic Register" took a certain amount of interpretation. It was not always accurate; but with the nature of this kind of activity, it does not really matter too much whether it is accurate or inaccurate, insofar as the damage it imposes and the disrespect and impairment of morale it creates. So the publication of false information is almost as damaging as the publication of the correct information.

It is really the pattern of activity that I think the legislation will address, and the thing that needs to be proscribed.

Senator LEAHY. Do you know, or has your office come across cases where the names of agents were disclosed with reason to believe that that disclosure would impair or impede the foreign intelligence activities of the United States, but at the same time felt that the person did so without any intent of neutralizing the agent or impairing our intelligence activities?

Mr. CASEY. Well, I think that there has been occasional publication in the press which divulged the name in the course of writing an article intended to generally inform the public; yes. I do not believe that that kind of a one-shot publication would be reached by this legislation, which it is clearly not designed to reach.

This bill goes to the active use of the information for a particular purpose in a particular way. As Senator Chafee's distinguished uncle put it.

It is not the swinging of the arm that is proscribed; it is the smashing of the nose.

Senator LEAHY. But you also agreed, however, that under this law we could be dealing simply with one publication, but a series of events leading up to it.

Mr. CASEY. Well, we could be; yes. There you have got "acted in the course of a pattern of activities intended to identify and expose." Unless the primary purpose is to divulge a single agent's name, I do not think it would be reached. You have to have a course or a pattern of activities intended to identify.

Senator LEAHY. But it could be one disclosure, but a pattern of activities leading up to one disclosure.

Mr. CASEY. The disclosure I think would have to be part of a pattern of activities.

Senator LEAHY. But it could be a single exposure.

Mr. CASEY. It could be a single publication.

Senator LEAHY. I may have other questions, Mr. Chairman, but I will submit them for the record. I know the Director has to go to a Cabinet meeting.

Senator DENTON. Thank you.

And I think I should communicate here that Senator Biden is delayed because of a train accident, all the trains being held up. He will be here as soon as possible.

We would like to thank you very much, Mr. Casey, and hope that you get to your Cabinet meeting on time, sir.

Mr. CASEY. I appreciate it very much. Thank you.

[Prepared statement of William J. Casey follows, plus responses to questions by Senator Leahy:]

PREPARED STATEMENT OF WILLIAM J. CASEY

DIRECTOR OF CENTRAL INTELLIGENCE

Mr. Chairman, Members of the Subcommittee, I am pleased to be appearing before the Subcommittee on Security and Terrorism, which is considering S. 391, the "Intelligence Identities Protection Act." Early last month, I appeared before the House Intelligence Subcommittee on Legislation to testify on the House version of the Bill. With both chambers considering this legislation I am hopeful that we will soon see enactment of a measure which will finally put an end to the pernicious and damaging unauthorized disclosures of intelligence identities.

The Intelligence Community's support for legislation to provide criminal penalties for the unauthorized disclosure of information identifying certain individuals engaged or assisting in the foreign intelligence activities of the United States is well known. I want to emphasize that this Administration believes that passage of the "Intelligence Identities Protection Act" is essential to the maintenance of a strong and effective intelligence apparatus. Enactment of this legislation is an important component of the Administration's effort to implement President Reagan's determination to enhance the nation's intelligence capabilities.

Mr. Chairman, there exists a coterie of Americans who have openly proclaimed themselves to be devoted to the destruction of the nation's foreign intelligence agencies. This group has engaged in actions avowedly aimed at undermining the nation's intelligence capabilities through the identification and exposure of undercover intelligence officers. The perpetrators of these disclosures understand correctly that secrecy is the life blood of an intelligence organization and that disclosures of the identities of individuals whose intelligence affiliation is deliberately concealed can disrupt,

discredit and--they hope--ultimately destroy an agency such as the CIA. Some of the persons engaged in this activity have actually traveled to foreign countries with the aim of stirring up local antagonism to U.S. officials through thinly veiled incitements to violence. Mr. Chairman, I might say that since taking the position of Director of Central Intelligence only a few months ago I can confirm that these unauthorized disclosures have resulted in untold damage, and, if not stopped, will result in further damage to the effectiveness of our intelligence apparatus, and hence to the nation itself. I might also say that I am appalled at the degree to which concerted activity is being carried out around the world to destroy a capacity which is critical to our national security and which has been painstakingly developed over many years with the full participation of the Congress and an investment of billions of dollars.

The tragic results of unauthorized disclosures of intelligence identities are well known. Five years ago, Richard Welch was murdered in Athens, Greece. Last July, only luck intervened to prevent the death of the young daughter of a U.S. Embassy officer in Jamaica whose home was attacked only days after one of the editors of a publication called Covert Action Information Bulletin appeared in Jamaica, and at a highly publicized news conference gave the names, addresses, telephone numbers, license plates, and descriptions of the cars of U.S. government employees whom he alleged to be CIA officers. Most recently, six Americans were expelled from Mozambique following charges of engaging in espionage. These expulsions followed visits to that country by members of the Cuban intelligence service and the editors of the Covert Action Information Bulletin.

Extensive hearings before the Senate and House Intelligence Committees and before the two Judiciary Committees during the

96th Congress documented the pernicious effects of these unauthorized disclosures. 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. Unauthorized disclosures are undermining the Intelligence Community's human source collection capabilities and endangering the lives of our intelligence officers in the field. 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 discernible 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 experience and linguistic skills are lost. Reassignment mobility of the compromised officer is impaired.

As a result, the pool of experienced CIA officers available for specific overseas assignments 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.

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.

Mr. Chairman, I do not think it is necessary or advisable to go into greater detail about the adverse effects that unauthorized disclosures of intelligence identities are having on the work of our nation's intelligence agencies. Simply put,

the credibility of our country and its relationships with foreign intelligence services and individual human sources, the lives of patriotic Americans serving their country, and the effectiveness of our intelligence apparatus are all being placed in jeopardy. The underlying basic issue is the fact that our ability to continue to recruit and retain human sources of intelligence whose information could be crucial to the nation's survival in an increasingly dangerous world, and our equally important relations with the intelligence services of other nations are in continuing jeopardy.

It is important to understand what legislation in this area seeks to accomplish: It seeks to protect the secrecy of the participation or cooperation of certain persons in the foreign intelligence activities of the U.S. Government. These are activities which have been authorized by the Congress; activities which we, as a nation, have determined are essential. No existing statute clearly and specifically makes the unauthorized disclosure of intelligence identities a criminal offense. As matters now stand the impunity with which unauthorized disclosures of intelligence identities can be made implies a governmental position of neutrality in the matter. 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.

Mr. Chairman, I believe it is important to emphasize that the legislation which you are considering today is not an assault upon the First Amendment. The "Intelligence Identities Protection Act" would not inhibit public discussion and debate about U.S. foreign policy or intelligence activities, and it would not operate to prevent the exposure of allegedly illegal activities or abuses of authority. The legislation is carefully crafted and narrowly drawn to deal with conduct which serves no useful informing function whatsoever; does not alert us to alleged abuses; does not bring clarity to issues of national policy; does not enlighten

public debate; and does not contribute to an educated and informed electorate.

The Bill creates three categories of the offense of disclosure of intelligence identities:

a. Disclosure of information identifying a "covert agent" by persons who have or have had authorized access to classified information that identifies such a covert agent. This category covers primarily disclosure by intelligence agency employees and others who get access to classified information that directly identifies "covert agents";

b. Disclosure of information identifying a "covert agent" by persons who have learned the identity as a result of authorized access to classified information. This category covers disclosures by any person who learns the identity of a covert agent as a result of government service or other authorized access to classified information that may not directly identify or name a specific "covert agent;" and

c. Disclosure of information identifying a "covert agent" by anyone, under certain specified conditions outlined below.

There is virtually no serious disagreement over the provisions of the legislation which provide criminal penalties for the unauthorized disclosure of intelligence identities by individuals who have had authorized access to classified information. Controversy has centered around subsection 601(c) of S. 391.

Disclosures of intelligence identities by persons who have not had authorized access to classified information would be punishable only under specified conditions, which have been carefully crafted and narrowly drawn so as to encompass only persons engaged in an effort or pattern of activities designed to identify and expose intelligence personnel. The proposed legislation also

contains defenses and exceptions which reinforce this narrow construction. It is instructive, in this regard, to look at the elements of proof that would be required in a prosecution under subsection 601(c) of S. 391, keeping in mind that the government would have to prove each of these elements beyond a reasonable doubt. The government would have to show:

-- That there was an intentional disclosure of information which did in fact identify a "covert agent;"

-- That the disclosure was made to an individual not authorized to receive classified information;

-- That the person who made the disclosure knew that the information disclosed did in fact identify a covert agent;

-- That the person who made the disclosure knew that the United States was taking affirmative measures to conceal the covert agent's classified intelligence affiliation;

-- That the individual making the disclosure did so in the course of a pattern of activities intended to identify and expose covert agents; and,

-- That the disclosure was made with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States.

Because of these strict conditions, which narrowly define the prohibited conduct, I believe it is clear that subsection 601(c) is directed at conduct which the Congress has the authority and power to proscribe consistent with the First Amendment, and that this Bill does so in a constitutional fashion.

Mr. Chairman, I understand that the Department of Justice believes that the Senate version of the Bill better captures the concerted nature of the activity which is intended to be proscribed than does the House Bill, and that there are prosecutorial and evidentiary advantages to the Senate language. I believe that the Department's witness will speak to this matter.

Mr. Chairman, S. 391 will deal with a clear and immediate danger which currently--each and every day--endangers our intelligence activities, our staff officers, and the lives of those who are cooperating with our nation abroad. I want to express my gratitude and appreciation to the Subcommittee for so promptly bringing this legislation forward and reiterate the hope that it will be enacted into law as quickly as possible so that this intolerable situation is remedied.

I will be happy to answer any questions you may have.

PATRICK J. LEAHY
VERMONT

United States Senate
WASHINGTON, D.C. 20510

COMMITTEES
AGRICULTURE, NUTRITION, AND FORESTRY
APPROPRIATIONS
JUDICIARY
INTELLIGENCE
DEPUTY DEMOCRATIC WHIP

May 12, 1981

Mr. William Casey
Director of Central Intelligence
Central Intelligence Agency
Washington, D.C. 20505

Dear Mr. Casey:

I want to thank you again for your most helpful testimony on S. 391, the Intelligence Identity's Protection Act of 1981.

I would like to get your response, for the record, to three additional questions which time did not permit me to ask at the hearing on Friday. They are as follows:

1) You have testified that you have a preference for the "reason to believe" language of Section 601 (c) contained in S. 391, as opposed to the "with the intent to impair or impede" language of Section 601 (c) contained in H.R. 4. I understand that the Justice Department is of the view that this element of the crime would be easier to prove under the language of the Senate Bill than that contained in the House version. My question is, do you know of actual circumstances where the names of agents were disclosed with reason to believe that disclosure would impair or impede the foreign intelligence activities of the United States, but the person did so without any intent of neutralizing a covert agent or impairing or impeding our intelligence activities? (I understand that you may not be able to submit the answer to this question for the public record.)

2) By letter dated April 29, 1981, to the House Permanent Select Committee on Intelligence, you suggested a technical amendment to H.R. 4. You suggest including the offenses contained in H.R. 4, the offenses listed in the Privacy Protection Act of 1980, the Stanford Daily legislation, which would give rise to a newsroom search and seisure. You did not raise this amendment in your testimony before the Subcommittee on Security and Terrorism. 1) Is this because you have changed your position? 2) If you have not changed your position, why do you believe it is necessary to expand the list of exemptions to the subpoena-only standard set up in the Stanford Daily legislation? 3) Have you consulted with the Department of Justice about seeking this amendment to H.R. 4?

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3) In reporting the Privacy Protection Act of 1980, the Senate Judiciary Committee recognized a legal controversy concerning 18 U.S.C. 793, which covers the espionage offense of gathering, transmitting or losing defense information. The controversy concerned whetner that statute required proof of intent to injure the United States or give advantage to a foreign power. There is a conflict of judicial authority on this point. The Committee stated in its report on the bill:

> Obviously, the Committee does not attempt to settle this controversy in this bill. However, to the extent that S. 1790 provides a suspect exception related to the national security statutes which are stated, it is the intent of the Committee that with regard to 18 U.S.C. 793 the suspect exception to the ban on searches would apply only if there was an allegation of an intent to injure the United States or give advantage to a foreign power. For the purposes of this Act, the government shall recognize the higher standard, the requirement of intent, before utilizing the suspect exception for searches for materials sought under 18 U.S.C. 793.

S. Rep. 874, 96th Cong., 2d Sess. 12 (1980).

S. 391 presents a similar problem to the Committee if it is to consider a simultaneous amendment to the Privacy Protection Act of 1980. Assuming the Committee considers some amendment to the Stanford Daily legislation, would you support including only section 601 (a) and 601 (b) in the list of exempted statutes, that is, would you support elimination of section 601 (c) which presently does not contain an intent to injure standard?

I look forward to receiving your responses to these questions.

Sincerely,

PATRICK J. LEAHY
United States Senator

PJL:kmp

9 June 1981

Honorable Patrick J. Leahy
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

This is in response to your letter of 12 May in which you posed a number of questions concerning S. 391, the "Intelligence Identities Protection Act."

With regard to your first question, the Administration believes that from a prosecutorial perspective the Senate's subsection 601(c) "reason to believe" standard is preferable to the "intent to impair or impede" language of H.R. 4. The Department of Justice is in the best position to evaluate the practical evidentiary problems that can develop in a criminal prosecution. Although it might appear that past disclosures which would have met all of S. 391's other criteria and which also would have met the requisite "reason to believe" standard have been accompanied by something like an "intent of neutralizing a covert agent or impairing or impeding our intelligence activities," the Administration's concern is that it could be difficult to prove beyond a reasonable doubt the kind of subjective intent as to purpose now contained in H.R. 4. Such proof might be particularly troublesome if an unauthorized disclosure were to be accompanied by a declaration that its ultimate intent was to somehow enhance intelligence capabilities.

Your second and third questions deal with my suggestion that the House Intelligence Committee consider amending the "Privacy Protection Act of 1980" (P.L. 96-440) so as to include unauthorized disclosures of intelligence identities among the enumerated offenses for which court authorized searches and seizures may be conducted. As you know, this enumeration was not intended to give the listed statutes any special standing. It was designed to ensure that their enforcement was not obstructed by the Privacy Protection Act's prohibition of court authorized searches to enforce relatively minor receipt, possession, or communication offenses. The sole effect of this enumeration is to preserve with respect to the listed national security-related offenses an authority applicable to virtually all other offenses, i.e., use of a search warrant to obtain documentary evidence in the possession of a suspect.

Addition of the Intelligence Identities Protection Act to the offenses now listed in the Privacy Protection Act would not conflict with the Judiciary Committee's intent with respect to 18 U.S.C. 793. I do not view that intent as inconsistent with the Administration's position that the pattern of activities and knowledge elements of the Identities legislation, combined with the serious consequences of unauthorized disclosures, make it appropriate to include the offense among those for which a search warrant may be obtained pursuant to the Privacy Protection Act whether the Identities legislation is ultimately enacted with a "reason to believe" or an "intent to impair or impede" standard.

I would emphasize that this is not an issue which should be allowed to delay consideration of the Identities Bill, and I would support separate consideration of the extent to which the Identities statute ought to be added to the Privacy Protection Act. My letter to Chairman Boland of the House Intelligence Committee merely suggested that the Committee might wish to consider the issue, and I did not raise the matter in my Senate testimony because I do not consider it to be integral to the Identities Bill. I thank you for your continuing interest in this matter and look forward to working with you to ensure speedy enactment of the Identities legislation.

Sincerely,

William J. Casey

Senator DENTON. Our next witness is Richard K. Willard, Counsel for Intelligence Policy, Department of Justice.

Good morning, Mr. Willard, and welcome.

STATEMENT OF RICHARD K. WILLARD, ESQ., COUNSEL FOR INTELLIGENCE POLICY, U.S. DEPARTMENT OF JUSTICE

Mr. WILLARD. Thank you, Mr. Chairman.

It is a pleasure for me to appear before you on behalf of the Attorney General today to express the views of the Department of Justice regarding S. 391. With your permission, Mr. Chairman, I would like to make a few brief remarks at the outset, and submit my prepared statement for the record without reading it in its entirety at this time.

Senator DENTON. Surely; permission granted, sir.

Mr. WILLARD. I would like to emphasize at the outset that the Department of Justice strongly supports the enactment of this legislation to protect the identities of the clandestine intelligence officers, agents, and sources who serve this country.

Senator Chafee and Director Casey have spoken eloquently today of the need for this legislation, and we fully agree with their views in this regard. It has been the position of the Department that the knowing disclosure of the classified identity of a clandestine officer, agent, or source of an intelligence agency could constitute a violation of certain sections of the existing espionage laws. Nevertheless, we agree that additional and more specific legislation would

facilitate prosecution of those who seeks to make these disclosures, and thus neutralize the intelligence agents who serve our country.

I would like to turn specifically to S. 391 which is now under consideration after having been introduced in this Congress by Senator Chafee on behalf of himself and a number of other distinguished Senators.

This bill would prohibit the disclosure of information identifying a "covert agent." This is a defined term covering a range of Government employees, agents, informants and sources. Varying penalties would be applied to three different categories of persons who may be involved in the unauthorized disclosure of such information.

SECTIONS 601(A) AND (B)

The first two categories provided in this bill have not been controversial. These provisions add substantial protection against disclosure by current and former Government employees and contractors who have had authorized access to classified information and the identities of covert agents. The fact that these persons have had access to such classified information lends an aura of credibility to disclosures by them. In addition, this access may provide them with a degree of expertise regarding how covert identities are concealed and the means for piercing such concealment measures.

We have one suggestion with regard to these provisions, which are identified as sections 601(a) and 601(b) in S. 391. Neither section now includes a provision that would criminalize attempts to commit the proscribed actions. An "attempts" provision would specifically authorize the Government to initiate the prosecution of any person who meets the standards of these two sections, and who has taken a substantial step toward, but has not completed, the disclosure of the identities of covert agents.

Such conduct should be subject to punishment without forcing the Government to delay until the identities have actually been disclosed to the public and the harm already done. We believe the penalty for a violation of an "attempts" provision should be somewhat lower than for an actual disclosure.

SECTION 601(C)

The third and final category of persons covered by the bill is described in section 601(c). This section has attracted the most attention and includes persons who have not had authorized access to classified information that identifies or results in learning the identities of covert agents.

Section 601(c) would penalize a person who knowingly discloses the identity of a covert agent in the course of a:

> Pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States.

This provision would provide a criminal penalty for any person, including those who have never had authorized access to classified material, who discloses information identifying a covert agent with the requisite state of mind, even if the information is derived entirely from public sources.

It has been argued that the principles of the first amendment are done violence when the Government seeks to punish actions based on information that is made available to the public. We do not believe this argument has any merit. As Senator Chafee pointed out, the first amendment is not absolute. We are totally confident that a carefully drafted bill such as S. 391 is constitutional.

Congressional hearings over the past 2 years have well documented the serious harm to the national defense caused by the actions this statute is intended to prevent. When compared with the extremely limited burden on speech, we believe that this serious harm justifies the proposed legislation.

We also believe that the objective standard of "intent" in section 601(c) would pass constitutional muster under a first amendment or due process challenge. We believe that this standard is preferable to the specific "intent" standard contained in the current House version of this legislation, section 601(c) of H.R. 4.

PROTECTION OF COVERT FBI AGENTS

In the discussion of H.R. 4, various Congressmen raised the question of whether it is appropriate to include penalties for the disclosure of the identities of covert FBI agents, sources and informants from this legislation. Two arguments have been made for excluding FBI covert agents.

One is that FBI personnel operate domestically rather than abroad, and hence are better protected from the risk of physical harm. The second argument is that there is no empirical record of exposures of FBI covert intelligence agents. We disagree, however, with both of these contentions.

It is inaccurate to state that FBI covert agents are insulated from a risk of physical harm, or that they operate exclusively in the United States. We note, for example, that people have attempted to use the Freedom of Information Act to determine the identities of FBI informants in a law-enforcement context.

In addition, there are many instances where FBI undercover agents must travel abroad in the course of a counterintelligence or counterterrorism investigation.

Moreover, FBI agents operating domestically may be operating undercover in a violence-prone terrorist group. In this situation, their safety cannot be assured if their FBI affiliation is revealed.

More significantly, however, the argument against including FBI agents in this legislation appears to underestimate the harmful effects such a disclosure would have on the Government's ability to maintain effective counterintelligence and counterterrorism operations. These operations are critical to our ability to monitor and prevent damaging penetrations by hostile intelligence services. If compromised by public disclosure of our covert agents' identities, serious damage to our national security could result.

Mr. Chairman, it is our belief that this bill will strike the proper balance among the various competing interests we must consider. Legislation of this nature is critical to the morale and confidence of our intelligence officers and their sources. The Justice Department strongly recommends that it be reported out of this subcommittee with a favorable recommendation for enactment by this Congress.

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I would be happy to address any questions you may have at this time.

PROSECUTIONS UNDER S. 391

Senator DENTON. Thank you very much, Mr. Willard.

Does the DOJ feel that the unauthorized disclosures that S. 391 addresses can be effectively prosecuted under its provisions?

Mr. WILLARD. Yes, sir, Mr. Chairman, we do. These provisions have been developed in consultation with the lawyers who prosecute crimes of this nature, and they believe that this statute is both constitutional and enforceable.

Senator DENTON. Do you foresee any problems with the various burdens of proof which it must meet in prosecuting violations under S. 391?

Mr. WILLARD. Well, Mr. Chairman, we have to say that section 601(c) imposes a very heavy burden on the Government. There are six separate elements to this offense, and it will not be easy to prove a violation. However, we believe that prosecution will be possible for the serious disclosures that concerns this committee.

Senator DENTON. What would you see as the impact on addressing the problem of unauthorized disclosures if section 601(c) were removed from the bill?

Mr. WILLARD. We think this would seriously limit effectiveness of the bill. The unauthorized disclosures that have concerned this committee and other committees in the Congress have frequently been made by people who cannot be shown to have had direct access to classified information. Therefore, we believe it is essential to have a provision like section 601(c) to eliminate the harm that concerns the committee.

APPLICATION OF EXISTING LAW

Senator DENTON. The Department of Justice has stated in the past that it feels wrongful disclosure of classified information concerning an agent's identity constitutes a violation of the existing espionage statutes, 18 U.S.C. 793 (d) and (e), and 18 U.S.C. 794.

How many prosecutions have there been under these statutes for offenses addressed by S. 391? That is, the revealing of identities of intelligence officers and sources?

Mr. WILLARD. To my knowledge, Mr. Chairman, there have been none.

Senator DENTON. Do the present espionage statutes cover activity proscribed by section 601(c) of S. 391 such as publication or republication?

Mr. WILLARD. Section 601(c) is a different, more specific statute. We think it will be more useful in prosecuting these types of activities than the existing espionage law.

Senator DENTON. I would like to take time to recognize the presence of my distinguished colleague from North Carolina who is the chairman of the Subcommittee on Separation of Powers on this committee. I serve with him on that subcommittee, and unfortunately we are often having hearings at the same time.

For the record, I would like to submit my feeling of great admiration for him as a Senator, and for his conscientious efforts in his current hearings.

Welcome, Senator East.

Senator EAST. Thank you, sir.

REVELATION OF FBI AGENTS

Senator DENTON. To date, FBI secret identities of agents who travel abroad have not been revealed. Would it have an adverse effect if identities were revealed, as has happened to CIA agents?

Mr. WILLARD. Yes, Mr. Chairman. We do not think that the FBI's good record of protecting its agents should be held against it and used to deny FBI agents the kind of protection that would be very helpful to them in the future.

Senator DENTON. Have the problems encountered by the CIA impacted on the FBI's ability to conduct foreign intelligence, foreign counterintelligence, and foreign counterterrorism activities? And if so, how?

Mr. WILLARD. Mr. Chairman, I think that the climate created by the activities that this committee has addressed has an effect on the activities of all the intelligence services in a general way. I am not prepared at this point in open session to discuss specific ways they have impacted on FBI counterintelligence or counterterrorism operations, but I think that the Bureau would be happy to provide that information in classified form to this committee.

Senator DENTON. We would look forward to receiving that, sir.

I would like to welcome Senator Biden who has survived some train difficulties. He informs us that, regrettably, one person was killed in the train ahead of his.

Welcome, Senator Biden, and again I want to acknowledge your tremendous experience in this field, and your most effective efforts in the past.

Senator BIDEN. Thank you, Mr. Chairman.

Mr. Chairman, for the record, there was no one in the train that I was riding who was killed, but a northbound Metroliner going through the Baltimore tunnel struck a flagman who was supposed to be the one warning of the train coming that killed him, blocking the tunnel for 1 hour. So I apologize to the witnesses who have already gone, and to those of you who are here, for being late. It does not evidence a lack of interest in this topic on my part.

Thank you, Mr. Chairman.

Senator DENTON. Thank you, Senator Biden.

I would pause here and ask Senator East, first, if he cares to make any statement due to perhaps the transiency of appearance here, because of overriding requirements somewhere else?

Senator EAST. Senator, I thank you for the opportunity. I am pleased to be here. I am sorry that because of other conflicts I have not been able to be with you from the beginning, but as a great admirer of your service in Vietnam and of the great contribution you are now making as a U.S. Senator, it is a pleasure to be associated with you on this subcommittee.

I am a cosponsor of this bill, so my sentiments and commitments are well known there, and I will not then delay the hearings with any further comment, except to say publicly, which I would like to say, my great admiration for you as a person and as one of America's truly national heroes and the great honor I consider it as a

freshman Senator to be a part of your class and to serve under your leadership here on this subcommittee.

Thank you, Mr. Chairman.

Senator DENTON. Thank you, Senator East.

I would invite Senator Biden to make any remarks he might choose to at this point.

OPENING STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

Senator BIDEN. Mr. Chairman, I will be brief. I have an opening statement which I intended to deliver prior to any witnesses being heard, but I think it is worth my making it at this point for the remaining witnesses to have a framework within which to understand my questions that will follow their testimony.

Mr. Chairman, through today's hearings we are involved in a thorough and open analysis of the extremely important piece of legislation. This legislation to protect Americans, covert agents abroad, had its origin in terrible tragedy, the brutal murder of Mr. Richard Welch in front of his home in Greece within a month after he was publicly identified as the CIA Station Chief in Athens, and the attempt on the lives of American Embassy officials and their families in Jamaica following publication of their names, addresses, license plate numbers, and phone numbers along with the allegations that they were CIA officials.

A civilized society, Mr. Chairman, cannot ignore efforts to cripple its intelligence agencies by hampering its foreign covert activities.

The systematic identification of persons as CIA officials has caused further harm because it interferes with the relationship between the United States and foreign sources of intelligence. It is no surprise that sources in other countries are somewhat reluctant to assist the United States when they fear for their safety through exposure. In the last Congress, the Intelligence Committee of which I have been a member since its inception, and the Judiciary Committee, laid the groundwork for legislation to protect covert agents. The bill before this subcommittee, S. 391, is the product of that effort of the Intelligence Committee, and it provides a valuable vehicle by which this subcommittee can begin its analysis of the Intelligence Identities Protection Act.

Although I voted against the Intelligence Committee's bill and I filed dissenting views, I have supported legislation in this area in the past. As I noted in the committee report on a related issue, the gray-mail legislation, limited further protection of intelligence sources especially in the identity of foreign agents appears to be very necessary. We reached that conclusion the better part of 2 years ago as a consequence of our efforts in the gray-mail area.

The Intelligence Identities Protection Act before this subcommittee, has three parts. The first two parts create a Federal offense with stiff penalties for persons who have authorized access to classified information, and use that information to disclose the identity of covert agents. I have absolutely no problem with those first two sections, and I do not think anyone really does have much of a problem with those.

The third part of the bill also creates a new offense. According to our Intelligence Committee report, and I quote:

It encompasses only individuals whose intentional will evidenced by a course of conduct involves, first, a pattern of activities; second, those activities are intended to identify and expose covert agents; and third, with reason to believe that such course of conduct would impair or impede U.S. foreign intelligence activities.

The purpose of this section, again according to the Intelligence Committee report, is to:

Apply criminal sanctions only in very limited circumstances to deter those who make it their business to ferret out and publish identities of agents.

The report further states:

It does not affect the first amendment rights of those who disclose the identity of agents as an integral part of another enterprise such as news media reporting of intelligence failures or abuses, academic studies of U.S. Government policies and programs; or private organizations in the enforcement of internal rules.

I question whether the bill accomplishes these goals although we all agree it should. The language of that provision, section 601(c), is at best ambiguous and at worst, as a number of constitutional scholars have argued, unconstitutional.

The ambiguity in the language has led more than one legal scholar to conclude that section 601(c), although having a very laudable goal, would prohibit the use of unclassified material by private citizens who disclose willful misconduct by intelligence agencies themselves. This committee should, and I am sure will, place a great deal of emphasis on this concern since we have already seen the value of thorough investigative authors such as Claire Sterling, whom you have had before this subcommittee, on questions of intelligence agencies.

This subcommittee must also give weight to the concern that section 601(c) is unconstitutional. In fact, Prof. Philip B. Kurland, Professor of Law at the University of Chicago, one of the Nation's leading constitutional scholars, reviewed section 601(c) and stated matter of factly that he "had little doubt that it is unconstitutional."

Now, Mr. Chairman, I look forward to reviewing the testimony already given by the witnesses thus far, and the witnesses to come, on the concerns I have raised and hope that they will assist us in this subcommittee in finding an effective but more acceptable means to protect the names of agents, which we all wish to do.

Finally, I would like to point out that this bill is no substitute for an effective cover for foreign agents. We have had in the Intelligence Committee numerous hearings on the inability and the lack of vigilance in my opinion on the part of the Agency themselves to protect the identities of their own people. We even had to go so far in S. 391 as to instruct the intelligence agencies to "take affirmative measures to conceal the identities of agents."

So I think that we have a twofold purpose here. I think your effort in expediting this legislation is not only noteworthy, it is very important, and you have my full support in that effort.

Let me conclude by reading the text of what I was going to ask Mr. Casey, and I will now read it so you all know what I am going to pursue with regard to the constitutionality of S. 391. Professor Kurland said:

I can frame my opinion on the constitutionality of this section very precisely. I have little doubt that it is unconstitutional. I cannot see how a law that inhibits the publication without malicious intent of information that is in the public domain and previously published can be valid. Although I recognize an inconsistency in Su-

preme Court decisions, I should be very much surprised if that Court, not to speak of the lower Federal courts, would legitimize what is for me "the clearest violation of the first amendment attempted by the Congress in this era."

With all good wishes, Philip Kurland.

I wish he had a strong opinion on this subject. [Laughter.]

Senator BIDEN. But the point is, I plan to work with you, Mr. Chairman, to see to it that we get a bill. We must stop the Agee's. We must find a way to do it. It is outrageous and reprehensible what they do. But I do not want to stop publications of books like "The Spike." I do not want to stop publications of books like "The Terrorist Network." I do not want to stop publications of books that we all think are important. And whether or not they would fall within the purview of this is a real question.

I am not being facetious. I am being serious about that. So thank you very much. I apologize for the delay and the ability to make an opening statement midway into the questioning.

Senator DENTON. Well, thank you, Senator Biden. I too would not be interested in stopping publications of books like "The Spike" or "The Terrorist Network." "The Spike" was a novel with fictional characters, and I do not want to so abruptly take a difference with you, because I want to express first my admiration for you in this field, especially in your invaluable leadership in the Drug Enforcement Administration area in which we share activity. But I do believe that "The Spike," being a novel, and "The Terrorist Network," which contained information on identities derived from foreign services, do not really constitute arguments against the passage of this bill—at least that is my persuasion.

Senator BIDEN. They may not, Mr. Chairman. I am anxious to see.

Senator DENTON. Well, then, why do we not just ask him outright if you think this bill is going to be unconstitutional?

Mr. WILLARD. Mr. Chairman, it is our position that the bill is constitutional, and we do not have any doubt that S. 391 would be sustained in a proper case as presently drafted.

Senator DENTON. That of course was in the letter which was sent from the Department of Justice to the chairman of the Committee on the Judiciary. So we did have that information ahead of time, but I am glad to get it on the record during this hearing.

I have only one more question and then I will turn the questioning over to Senator East, and then Senator Biden.

Mr. Willard, do you have any suggested amendments to S. 391 to render it more effective in the prosecution of unauthorized disclosures of the identities of agents and sources?

Mr. WILLARD. Yes, Mr. Chairman. I mentioned briefly in my prepared statement the addition of an "attempts" provision for sections 601 (a) and (b). Attempt provisions are quite common in the criminal law and we believe it would be appropriate to include an "attempts" provision in these noncontroversial sections. We have submitted suggested language for an "attempt" provision to the House Intelligence Committee in response to its request, and we would be happy to submit that language to this committee, as well.

We also suggested the inclusion in the legislative history of section 601(c) of a definition of "foreign intelligence activities." Such a definition would eliminate any doubt that this section is intended to protect the full range of intelligence activities of the United States, not merely the collection of foreign intelligence.

Senator DENTON. So your amendments would not include any increase in severity of penalties, for example?

Mr. WILLARD. No, Mr. Chairman, we have not considered altering the severity of the penalties provided in S. 391. We agree with Director Casey that the important thing is swift and certain punishment for criminal offenses. The actual length of the sentence and the amount of the fine is not as important to us.

Senator DENTON. Senator East?

OPENING STATEMENT OF SENATOR JOHN P. EAST

Senator EAST. Thank you, Mr. Chairman.

I would just like to take a moment to make an observation on the distinguished Senator Biden's comment on this matter of constitutionality, so I really am not directing my question at Mr. Willard. That is, I do agree with his—personally, my own agreement would be that the act as it stands is constitutional.

The trouble I have is that if we constantly assume that this expert or that, that their voice is determinative of the matter, then in effect you would never really draft any legislation, it occurs to me.

Now Mr. Kurland is a distinguished constitutional scholar, but of course there are many others. As we all know, in the study of constitutional law, reasonable-minded, fair-minded, well-intentioned scholars can differ over constitutionality. In terms of Mr. Kurland, I would suggest that his opinion could be a factor that one might wish to weigh in determining constitutionality, but it certainly ought not to be determinative and decisive.

The particular section here in question that Senator Biden was directing his comments to, the section (c), I would contend—not suggesting I am in the same league as Mr. Kurland, but as a lawyer and as a holder of a Ph. D. in political science, I will just throw in my two cents' worth. I think it is constitutional.

So one can run through that gamut. I think it is all very valuable to get comments on constitutionality, but ultimately of course the tribunal that would determine that would be the U.S. Supreme Court. And as one who is greatly covetous of protecting the idea of separation of power, I would just as soon have the Supreme Court ultimately make that determination, as opposed to Professor Kurland at the Law School at the University of Chicago.

One other comment if I might, Mr. Chairman. I am very solicitous of the very perceptive remarks Senator Biden makes, and I am not suggesting that one might not come up with some alternative to this; but the trouble I have, there seems to be a general consensus among all of us that we need to do something. I am just concerned that we do something effective; that we not say: Yes, there is a genuine need. And then in describing it in statutory language, we simply define any remedy out of existence; that we

make it so difficult to apply or to enforce, that it not have any teeth in it so it would give us a false sense of security.

We thought we were protecting our intelligence agents, and in fact we were not, because of the nature of the language. To me, this language in (c) is straightforward. It is clear. It involves intent. It has all of the characteristics that we associate with the criminal law: Intent, action, conduct designed to accomplish ends contrary to the well-being and to the best interests of the United States.

Since we all agree that there is a great need for it, I wholeheartedly commend this language to all members of the subcommittee, and ultimately to the Judiciary Committee of the U.S. Senate.

There is a demonstrated need to protect our agents. As we see the growth of the pattern of terrorism, as we see the growth of the pattern of subversion in the world as an instrument to further national and ideological aims, there is an enormous responsibility on the part of this Congress, this Senate, this Judiciary Committee, and this subcommittee to try to come up with a bill that is going to protect those people that we put out on the front line and ask to try to do the job of protecting us, and anticipating threats to our internal security.

Was it not Justice Jackson who said one time that the Bill of Rights is not a suicide pact? Indicating that we of course, want to protect first amendment rights. It is like any good thing in the area of political theory: You have many things to balance.

We not only want to protect the right of freedom of speech, but also society certainly has the right to protect itself against genuine threats to its internal security. I would contend that the greatest threat to freedom of speech today in America comes from the use of internal subversion and the threat to civil liberties through the use of terror. And certainly fairminded and reasonable-minded people ought to be able to find a way of protecting themselves from that kind of thing.

I look upon this as an integral part of the effort to do that. I would like to feel, when we are finished with this hearing, if you put it in balance and weigh all the things we are trying to do—protect first amendment rights, protect security, and so on and so forth—that we would come down on the side of. This is a good bill; this is a strong bill; it is a solid bill; it is well thought out and it clearly defines the conduct to be forbidden. In short, it is not vague and hence unconstitutional.

So I would support Mr. Willard in his testimony, and do feel very strongly we are on the right track, Mr. Chairman. Thank you.

Senator DENTON. Thank you, Senator East. That is particularly valuable coming from a political scientist who has expressed himself so well.

Senator Biden?

Senator BIDEN. Thank you, Mr. Chairman.

I concur with the elements that Senator East has laid out, Mr. Willard, and I would like to question you about them a little bit. That is, I concur that we have to do something. The issue is: Can we do something effective?

My concern about the constitutionality is that I can think of nothing worse than passing a bill that may be unconstitutional on its face and having the court rule it is unconstitutional. Having

been given a false sense of security the American people and the intelligence community, we can further undermine the credibility of the entire judicial and political system by demonstrating that we not know how to draft a bill to protect them.

So "effectiveness" is the issue; not whether or not we need a bill. I will get right to the point. The Professor pointed out that this has all the elements. The first element, that he "knowingly set out" is the most essential element in a criminal offense, "intent." He specifically stated, "intent."

My question is. Our bill differs from the House bill. The House bill uses the words "with intent." Our bill says "with reason to believe." I would like to pursue that with you. I would move that we amend it to say "with intent" like the House bill, exactly like the Senator says we should. Now he did not say that we should amend it, but that "intent" is an important element.

I think we should be clear, like we try to do in all legislation. We want to be crisp and clear so there is no misunderstanding. Any reasonable person has little difficulty understanding the phrase "with intent." Reasonable women and men could disagree about the phrase "with reason to believe."

So would you support the stronger language of "with intent" as opposed to the language "with reason to believe"?

Mr. WILLARD. Senator, as I testified before the House Intelligence Committee, the Department of Justice would support either bill. We have a preference for the wording of S. 391 as it stands now. We think either bill would be a great improvement over the present situation, and both bills would be held constitutional and would be enforceable.

Senator BIDEN. You would not object to my moving to amend this bill to conform with the house bill to use the phrase "with intent," then? Is that correct?

Mr. WILLARD. We have reservations about that lauguage and thus prefer the Senate version as it now stands. We think it would be more easily enforceable.

Senator BIDEN. Why?

Mr. WILLARD. We think there could be more difficulty in applying a subjective-intent standard a defendant who is prosecuted under this section could say, "Well, my intent really was not to impair and impede intelligence activities; my intent was to promote public dialog on these issues," or "to expose wrongdoing." And, "Although I knew good and well that it was going to impair and impede intelligence activities, in my heart of hearts I really intended something else to happen."

Senator BIDEN. Well, is that not the same kind of standard we have on almost every other criminal offense? There are some that we do not, but by and large people come before juries and they say. I knew I was shooting Cock Robin, but I did it in self-defense. In my heart, I had no intention to kill him.

Prosecutors deal with that every day. For example, it seems to me that the "with reason to believe" standard really imposes an additional burden on the Government. In the view of all the publicity surrounding this issue that it has had already, will have, and should have, will not everyone possess a "reason to believe" that

foreign intelligence activities will be impeded if anything is disclosed?

I mean, is that not going to be an argument that is even fuzzier to make? Will you not be able to stand up and say—I can picture, having been a trial lawyer handling criminal cases, someone standing before a jury saying: Ladies and gentlemen of the jury, if you have read—and take out the last 2 years' newspapers—everyone in America knows our intelligence agency is under siege. Everyone knows that. Any reasonable person would have "reason to believe." They would have to be stupid. "Did you not read the newspaper the last 12 years?"

I mean, that becomes a fuzzier standard. Why do we not get tough? Why do we not have the tough, clear, precise standard of intent?

Mr. WILLARD. Senator, I would first point out that there is an "intent" standard in the Senate bill as it is presently drafted. What we are talking about is not "should there be an intent standard?" But, should there be two intent standards?

Senator DENTON. Exactly right.

Mr. WILLARD. That is what the House bill contains.

Senator BIDEN. Because there are two separate things we are going after; two separate items. As I tried to explain, this bill essentially has two parts. The first part covers where somebody signs up and has access to classified information. In return for—every American can understand this—in return for access to this information, I get a "classified" clearance; I make a promise that if I ever reveal any of this, you all can prosecute me.

That is very different than somebody who is no part of an agency, has no clearance, has no access, goes out and compiles from other sources, rightly or wrongly, information. The reason why there are two intent standards is to make it clear that we are dealing with two different situations, fundamentally different. Fundamentally different, whether a reporter writes an article that exposes an agent, and whether a CIA agent goes off and sells information to a foreign government and/or just flatout publishes it, like Mr. Agee.

I do not think anybody has any doubt about Mr. Agee. We should lock him away, in my opinion. The question is: Are we going to have, as they say, "a chilling effect"? Why not make intent clear? We make intent clear elsewhere.

So even though there are two separate parts of the bill, we are not setting up two "intent" standards. There "ain't no such thing." You cannot have double "intent." You either intend; or you do not intend.

So for example, would not republication in the United States of the names of our covert agents which had been previously published overseas constitute a violation of this bill? Let us say there is an article in Le Monde; a French newspaper person publishes the names of our agents. Somehow he gets hold of them. Obviously we cannot punish the editor in chief of Le Monde; but, the New York Times reads Le Monde and reprints the article. Are they guilty of a criminal offense under this bill?

Mr. WILLARD. Well, Senator Biden, I think your hypothetical illustrates the advantages of a "reason to believe" standard. Under

that standard, if the identities have already been widely published, no reasonable person would believe that an additional publication would impair or impede intelligence activities.

Senator BIDEN. Oh, do you want to bet? I will bet we have 50 reasonable people here in the Congress that would believe it right off the bat. [Laughter.]

No; really and truly, as a famous American once said: In your heart, you know I am right about that. [Laughter.]

Seriously, I mean this sincerely. You know darn well that if the New York Times republished an article that appeared in a French newspaper, or a Cuban newspaper, or a Venezuelan newspaper, that reveal the names of agents, there would be people on the floor of the U.S. Senate and the House of Representatives who would be saying that that was reprehensible action on the part of the New York Times and we should do something about that.

Mr. WILLARD. Under certain circumstances, it could be reprehensible.

Senator BIDEN. Right. If they had the intent. Right? If they had the intent. How do you prove they had reason to know, in that case?

Mr. WILLARD. I respectfully disagree, Senator. I think that the test should be the relatively objective one of whether the Venezuelan publication had been so widely circulated that it would be reasonable to believe that an additional publication would or would not be harmful.

Senator BIDEN. For example, let us assume you could prove it had only been published in Venezuela. Would there be reason to believe that republication in the United States would be a violation of this law?

Mr. WILLARD. I think it might depend on where the agent was stationed, whether he was stationed in Venezuela or in China.

Senator BIDEN. Let us say he was stationed in China. Let us say he was stationed in Canada—not that we have any there. I mean, pick someplace close, other than Venezuela. Seriously.

Mr. WILLARD. If the original publication had only limited circulation in a foreign country in a foreign language, then I think it would be reasonable to believe that the republication by a major publication in the United States in English would be harmful to American intelligence activities. But it would not turn on whether the New York Times was critical of the Government, or what their hidden motivations were.

Senator BIDEN. That is right.

Mr. WILLARD. It would turn on the objective determination of whether a reasonable person would believe that intelligence activities would be impaired or impeded by such action.

Senator BIDEN. So let us carry that a little further. Picture the situation in the editorial room of the New York Times. They have a Venezuelan paper in front of them. What do they do, then? Is it their affirmative obligation to send an investigative reporter to Venezuela to determine how widely the paper is circulated, how many people have read it, whether or not it is available in other countries? I am not being facetious. I am being serious. Would they then have that affirmative obligation?

Mr. WILLARD. I think that anyone who would otherwise meet the elements of the statute and who it considering whether to publish the identity of a covert agent will have to consider whether or not that publication would be harmful or will impair or impede the foreign intelligence activities of the United States.

Senator BIDEN. How do they make that judgment? In other words, see, you are putting on them the judgment of whether or not—how do they have "reason to believe"? I mean, you just said that one of the things it would depend on is whether or not the agent is in Venezuela, or in China.

I mean, how does the newspaper make that decision? Seriously. What sort of manual can we give them to say: You do not publish this one; but you can publish other ones, or reprint other ones?

Mr. WILLARD. We think that using an objective standard is less insidious in some ways than a standard that would turn on specific intent which might draw into question evidence such as whether the defendants were pro-CIA or anti-CIA, for example. A specific intent standard might require prying into the political views of the defendant during the trial. This is one reason why the Justice Department has consistently expressed a preference for the Senate version of this standard rather than the House version.

I would like to, if I could, go back and correct something that I think I may have misstated.

Senator BIDEN. Sure.

Mr. WILLARD. When I mentioned two "intent standards," there are two specific intent standards contained in the House counterpart of section 601(c).

As the Senate bill now reads, it provides: "Whoever in the course of a pattern of activities intended to identify and expose covert agents"; so there is one specific intent standard that is still included in the Senate bill.

Senator DENTON. Which has to be proved.

Mr. WILLARD. The question, then, is whether there should be a second specific intent standard regarding the effect of the activities on U.S. foreign intelligence activities.

What we are talking about is whether we should have one specific intent standard or two specific intent standards.

Senator BIDEN. Well, let me ask it another way, then. Why would it not be more consistent to eliminate the first intent standard? Why would we not say, then, to be consistent, for all the reasons you just said, "have reason to believe"?

Senator DENTON. Because, if the Senator would yield, I am not a lawyer, but I am not bad at logic. It says——

Senator BIDEN. Well, being a lawyer does not help with that.

Senator DENTON. It is more libertarian to have it this way, "in the course of a pattern of activities intended to identify and expose covert agents." You must prove the intent there, and you must prove the nature of the course of the pattern of activities. So it is more liberal to have it in that way.

Senator BIDEN. Well, I am for it being liberal throughout, but let me move on to another section, if I may. I have more questions.

I appreciate your explanation, sir, but let me be sure I understand. You would not oppose—you would support either version.

You prefer the Senate version, but you would support either version? Is that correct?

Mr. WILLARD. That is correct, Senator.

Senator BIDEN. With regard to—bear with me just a second here, Mr. Chairman—the issue of, as I understand it, the Sterling book, "The Terrorist Network." If she published information about hostile terrorist groups that she gained from a U.S. official, not to disclose the name of the official, but if she found through her contacts with CIA agents the fact that there was a terrorist group operating within this country, and then went on from there to substantiate that and wrote a book exposing the terrorist network, not exposing the agent, and a reasonable person would know that the hostile group could figure out where she got that information, she would have reason to believe that by publishing the information about the terrorist network that she would be exposing the source without naming the source, would she be guilty of a violation under this section?

Senator DENTON. Would you believe that she was engaged in the course of a pattern of activities intended to identify and expose covert agents? I would not.

Senator BIDEN. With all due respect, Mr. Chairman, I know your view. I am curious at what the Justice Department's view is. I think I know your view.

Mr. WILLARD. I would have to agree with Senator Denton that this statute includes multiple elements. Thus, the fact that someone might be engaged in benign activity that satisfies one or two of these elements does not mean that a prosecution would be possible. I think that is why the drafters of this legislation put in so many elements. It makes it fairly difficult to put together a case.

Senator BIDEN. Now let us assume—the next step. Let us assume that someone were to publish an article or write a book that had the dual intent of exposing a terrorist network and an agent in this country who that person believed was part of the terrorist network, a "mole." The pattern of activity was designed to go after people who were double agents, to uncover people in our intelligence community who were double agents. In doing so, she wrote an article or a book identifying someone as an American agent for the express purpose of making the case that they were a double agent. Would she be guilty of violating this law?

Mr. WILLARD. Well, it is difficult of course to deal with hypotheticals. The one you pose immediately raises the question of whether one would have reason to believe that activity would impair or impede the foreign intelligence activities.

Senator BIDEN. Well, I guess it would, though, would it not? Is there not reason to believe that if you were able to name someone who is deep cover, if you had access to naming that, would that not have a chilling effect? Is that not what happens now? Does it not have a chilling effect, to say the least, upon the British intelligence or the French intelligence, even if it was for a purpose that was a laudable one? Would they not ask—I can guarantee you, being on the Intelligence Committee, they would ask: I wonder how she got the name in the first place?

Mr. WILLARD. I would also like to point out that under section 601(c), someone who has valuable information of that sort can communicate it to the House and Senate Intelligence Committees.

Senator BIDEN. I understand that, and I think they should. I am just asking the question. I am not saying that they should not be prosecuted, I am trying to home in on this so we do not pass a bad law.

If she did it, if someone—forget Ms. Sterling; let us not talk about her—if a newspaper person for the express purpose of exposing corruption and/or a double agent within our intelligence network published the name of that agent or other agents working with that agent for the purpose of pointing out that they were a mole, would they be guilty under this law?

Senator DENTON. Although the Senate may know my views, as a Senator I am qualified to offer them.

Senator BIDEN. I know that, Senator.

Senator DENTON. I do not know how it could be fitted into a pattern of activities intended to identify and expose covert agents if the overall impact of her thrust or his thrust were to help rather than impede or impair foreign intelligence activities in the United States. In that case, I think it would, and since there would be no pattern of activity intended to identify and expose covert agents, per se, I would say that neither of those specifications are met.

Senator BIDEN. Well, I am delighted to hear that, Mr. Chairman. Now maybe I could rephrase it again for our witness. Maybe what I should do is direct each question to you, first, and then to the witness. [Laughter.]

Senator DENTON. No, but we are getting short on time. Normally we have a 10-minute limit. We are trying to get through at 12.30.

Senator BIDEN. Fine; I will yield my time back now and wait for my next round of 10 minutes. I yield to you, Mr. Chairman, because I have exceeded 10 minutes, and I will wait until your 10 minutes is up, and Senator East's, and then I will ask mine again.

Senator DENTON. Well, the point is that we do have witnesses from the American Civil Liberties Union, and one from the Association of Former Intelligence Officers, at which time if we are not satisfied, we will recess rather than extend this hearing beyond the time at which our participation in the voting and so forth and other activities would preclude questions that you or others would like to ask.

Senator BIDEN. But I assume we would be able to have another day of hearing, Mr. Chairman, like we always did in the past when we ran this committee and anyone sought, not for the purpose of impeding, to seek information.

I wonder, it may help if I just ask you the questions, sir, and you answer the question, and then we would not be taking out of my time as much. Let me ask it again.

I imagine a newspaper person sets out in a pattern of activity to expose persons that they believe to be double agents, and they spend the next 3 years of their life doing nothing but devoting themselves to finding agents they do not believe are good ones, finding agents they believe are on the payroll of somebody else, and in the process of that effort they write articles and/or books that specifically name agents who they then allege are double

agents. Would or would not they be guilty under the law, knowing that by exposing the names they would reveal that they had access into the inner sanctum of the agency, or that they would not get the name if they did not have access. Would that not put them in a position of being subject to the "reason to believe it would impair"?

Mr. WILLARD. I am not sure that I can agree with that.

Senator BIDEN. Would you believe that it is possible that it could be?

Mr. WILLARD. It would seem to me that the exposing of Communist double agents in the ranks of the CIA would assist American intelligence activities and not impair or impede them.

Senator BIDEN. It surely would; but do you think it would assist? Why do you think it is that we in the Intelligence Committee and in the intelligence community do not expose agents who are double agents? Why do you think we do not do that? Do you realize that we do not do that? Do you realize that when we find out there is something awry within the community, by naming the person as a double agent we will in fact jeopardize an operation, we will in fact somehow blow the cover of other people, so we do not do it? Do you realize we do not do that?

Mr. WILLARD. Well, then, I would suggest that the journalist whom you have hypothesized should take advantage of the provisions of the bill and inform the committee of these double agents.

Senator BIDEN. I agree; the question I have is: If they do not, are they guilty of a crime? That is all I am trying to find out.

Mr. WILLARD. I think the "reason to believe" standard is one that requires consideration of all the facts and circumstances. It is hard to predict from such a bare hypothetical exactly how the standard would be applied.

Senator BIDEN. Would you acknowledge that it would at least raise a question?

Mr. WILLARD. I think, Senator Biden, you have raised a question.

Senator BIDEN. Thank you. [Laughter.]

Thank you very much. I have no more questions for this witness, Mr. Chairman. Thank you for your indulgence.

Senator DENTON. Senator East?

Senator EAST. Mr. Chairman, I think we have exhausted this subject. I appreciate that you have other witnesses, and I do not wish to unduly impose upon their time, so I would like to propose that we proceed with our next witnesses.

Senator DENTON. Thank you. And as usual, we will hold the record open for written questions to be submitted to the witnesses.

Thank you very much, Mr. Willard, for your helpful testimony this morning.

Mr. WILLARD. Thank you for your courtesy, Mr. Chairman.

Senator BIDEN. Thank you, Mr. Willard.

[Prepared statement of Richard K. Willard follows, also responses to questions submitted by Senator Leahy:]

PREPARED STATEMENT OF RICHARD K. WILLARD, COUNSEL TO THE ATTORNEY GENERAL FOR INTELLIGENCE POLICY

Mr. Chairman and members of the Subcommittee on Security and Terrorism, it is a pleasure for me to appear before you on behalf of the Attorney General to express the views of the Department of Justice regarding S. 391.

I would like to emphasize at the outset that the Justice Department strongly supports the enactment of legislation that would provide additional criminal penalties for the unauthorized disclosure of the identities of the clandestine intelligence officers, agents and sources who play such an essential role in this Nation's foreign intelligence, counter-intelligence and counter-terrorism efforts. The national security of the United States depends to a substantial degree on the strength and vitality of our intelligence services. This strength and vitality is diminished, and the very lives of the individuals involved in these activities on behalf of the United States may be endangered, by their unauthorized identification to the media, the public and, as a natural consequence, to the intelligence and security services of our adversaries. We believe that additional legislation of this type would be invaluable in deterring and punishing those who would make such unauthorized disclosures.

It has been the position of the Department since discussion of such legislation began in earnest a few years ago, that the knowing disclosure of the classified identity of a clandestine officer, agent or source of a U.S. intelligence agency can constitute a violation of sections 793(d) and (e) of the existing espionage statutes included in Title 18 of the United States Code. Nonetheless, additional and more specific legislation would facilitate prosecutions of those who seek to neutralize such individuals by their public exposure. Such legislation would clearly demonstrate the Government's concern for the welfare of these persons and, if carefully crafted, will

enable the Government to avoid several difficult problems that are encountered in prosecutions pursued under the current espionage laws. For example, current law criminalizes attempts to communicate, deliver or transmit information relating to the national defense. It has never been clearly established that the publication of such information in a book, magazine or newspaper is activity of a nature intended to be deterred by this prohibition. While the Department has argued that publication is included, we agree it would be desirable for the Congress to resolve this issue as regards the classified identities of clandestine intelligence personnel. An intelligence agent's identities protection bill would also remove from the Government the burden of demonstrating in each case that the information disclosed is related to the national defense and could be used to the harm of the United States or the advantage of a foreign nation.

I will now address the provisions of S. 391, the bill being considered by this Subcommittee after its introduction in this Congress by Senator Chafee on behalf of himself and a number of other distinguished Senators. The bill would prohibit the disclosure of information identifying a "covert agent" -- a defined term covering a range of Government employees, agents, informants and sources. Varying penalties would be applied to three different categories of persons who may be involved in the unauthorized disclosure of such information.

The first category is described in section 601(a) of the bill and includes persons who have or have had authorized access to classified information that identifies covert agents. A person in this category who intentionally and knowingly identifies such an agent to a person not authorized to receive classified information would be subject to a maximum fine of $50,000, a prison term of up to ten years, or both.

The second category is described in section 601(b) and includes persons who learn the identities of covert agents as a

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result of having authorized access to any classified information. The information to which the person has access need not, as in the first category, specifically identify covert agents. However, it is necessary to prove that the identity is learned by virtue of the authorized access. A person in this category who knowingly and intentionally identifies a covert agent to a person not authorized to receive classified information would be subject to a maximum fine of $25,000, a prison term of up to five years, or both.

These provisions will add substantial protections against disclosures by current and former Government employees and contractors who have had authorized access to classified information and the identities of covert agents. The fact that these persons have had access to classified information lends an aura of credibility to disclosures by them and may provide them with a degree of expertise regarding how covert identities are concealed and the means for piercing such concealment measures. Because they have occupied positions of special trust and have been provided access to classified information by the Government, these persons would be barred by the bill from making any unauthorized disclosure of the identity of a covert agent, even when based on informed speculation or the analysis of publicly available information. The Department believes these restrictions are justified and sustainable.

We have one suggestion concerning these provisions. Neither section now includes a provision that would criminalize "attempts" to commit the proscribed actions. Such a provision would specifically authorize the Government to initiate a prosecution of any person who meets the standards of sections 601(a) or (b) and who has taken a substantial step toward, but has not completed, the disclosure of the identities of covert agents. Such undertakings should be deterred and subject to punishment without forcing the Government to delay until the identities have actually been disclosed to the public. We

believe the penalty for a violation of an attempt provision should be less than for an actual disclosure.

The third and final category of persons covered by the bill is described in section 601(c) and includes persons who, in contrast to the first and second categories, have not had authorized access to classified information that identifies or results in learning the identities of covert agents. This provision would penalize a person in this category who knowingly discloses the identity of a covert agent in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair and impede the foreign intelligence activities of the United States. A person who violates this provision would be subject to a maximum fine of $15,000, a prison term of up to three years, or both. This section has been the source of the most difficult issues presented by this bill since it would provide a criminal penalty for any person, including those who have never had authorized access to classified material, who discloses information identifying a covert agent with the requisite state of mind even if the information is derived from public sources.

The scope of this provision extends it beyond the reach of the current espionage laws as they have been applied. As I have stated, those laws extend protection to information relating to the national defense. In the case of U.S. v. Heine, 151 F.2d 813 (2d Cir. 1945), it was held that providing a foreign government with information accumulated from public sources did not constitute an offense under the current espionage statutes even if the action is accompanied by the requisite intent to injure the U.S. or provide advantage to a foreign power. That case was based, however, on the court's understanding of the specific statutory language in question and the legislative intent underlying its enactment. Certainly the language and

history of the current proposed legislation will preclude any effort to limit its scope based upon the Heine precedent.

It has also been argued that the principles of the First Amendment are done violence where the Government seeks to punish actions based upon information that is available to the public. We do not believe this argument has any merit. The First Amendment is not absolute, and we are confident that a carefully drafted bill such as S. 391 is constitutional. Congressional hearings over the past two years have well documented the serious harm to the national defense caused by actions the statute is intended to prevent. When compared with the extremely limited burden on free speech, we believe that this serious harm justifies the proposed legislation.

We also believe the objective standard of intent in section 601(c) would pass constitutional muster under a First Amendment or due process challenge. This type of "reason to believe" standard has been found by the courts to be valid and has survived constitutionally based charges of overbreadth and vagueness. See, e.g., United States v. Bishop, 555 F.2d 771 (10th Cir. 1977); Schmeller v. United States, 143 F.2d 544 (6th Cir. 1944). We believe this standard is preferable to the specific intent standard contained in the current House version of this legislation, section 501(c) of H.R. 4. We believe it would facilitate prosecution of proscribed disclosures and would be sustained by the courts.

A question has been raised by various Congressmen analyzing their analogous identities bill, H.R. 4, whether it is appropriate to include covert FBI agents, sources and informants in the scope of this legislation. The argument for noninclusion is premised on the dual contentions that FBI personnel operate domestically, rather than abroad, and hence, are better protected from the risk of physical harm and that there is no empirical record of FBI covert intelligence agents being exposed by individuals in the business of "naming names." These

contentions, however, miss the mark for two significant reasons.

First, it is inaccurate to state that FBI covert agents are insulated from a risk of physical harm or that they operate exclusively in the United States. The fact that someone has not as yet successfully exposed an FBI agent does not indicate there is no threat that it can occur. We know, for example, that people have attempted to use Freedom of Information Act requests to determine the identities of FBI informants' identities in a law enforcement context. In addition, there are many instances when FBI undercover agents or assets must travel abroad in the course of a counter-intelligence or counter-terrorism investigation. When they are operating abroad they are as vulnerable to exposure and physical harm as a similarly located covert agent working for the Central Intelligence Agency or the Department of Defense.

Moreover, even when an FBI agent operates domestically, he may be operating undercover in a violence-prone terrorist group. In this situation, his safety cannot be assured if his FBI affiliation is revealed.

More significantly, however, the argument against noninclusion of FBI agents appears to underestimate the deleterious affect of such a disclosure on the U.S. government's ability to maintain effective counter-intelligence and counter-terrorism operations. These operations are critical to our ability to monitor and prevent damaging penetrations by hostile intelligence services. If compromised by public disclosure of our covert agents, serious damage to our national security could result. In my view, the risk of exposure to FBI covert agents is sufficiently high and the magnitude of the harm sufficiently grave to warrant inclusion of FBI covert agents in this bill.

I should add in conclusion that in the view of the Department, S. 391 can be improved in one minor respect. There is currently no definition or explanation in the bill regarding

the meaning of the term "foreign intelligence activities" as used in § 601(c) of the bill. It would be helpful to make clear, at least in the legislative history of the bill, that this term is intended to encompass both intelligence collection functions and the conduct of covert operations.

Mr. Chairman, it is our belief that this bill will strike a proper balance among the various competing interests. Legislation of this nature is critical to the morale and confidence of our intelligence officers and their sources. The Justice Department strongly recommends that it be reported out of this Subcomittee with a favorable recommendation for enactment by this Congress.

I would be happy to address any questions you may have at this time.

Response to Questions Submitted to
Richard K. Willard, Counsel for Intelligence Policy,
by Senator Patrick Leahy Concerning S. 391, Proposed
Intelligence Identities Protection Act

Question 1:

Mr. Willard, you state in your prepared testimony that the Justice Department prefers S. 391 to H.R. 4 because "we believe it would facilitate prosecution of proscribed disclosure." Do you think that's the standard that we ought to apply when legislating in the sensitive area of the First Amendment? Is trying to get as close to the line as possible without crossing over a somewhat dangerous strategy? Many constitutional scholars have commented that section 601(c) of this bill does cross the line into unconstitutionality. Don't you think we might be more prudent and pass legislation which would clearly meet a constitutional test?

Response :

As I testified before the Subcommittee on May 8, 1981, it is the view of the Department of Justice that both S. 391 and H.R. 4 are constitutional as presently drafted. Both proposed bills criminalize only a very narrow, clearly defined category of conduct. We prefer the objective intent standard of S. 391 because it can be more effectively enforced and avoids requiring an exploration into the political or ideological beliefs and prior statements of a defendant in order to prove specific intent. Where the Congress is considering two constitutional approaches toward criminalizing the unauthorized disclosure of covert agents' identities, we do not believe it to be dangerous or imprudent to choose the alternative that can be most effectively and objectively enforced.

Question 2:

You refer in your testimony to the well documented harm to the National Defense caused by actions the statute is intended to prevent. The cases of well documented harm you refer to are all cases where the person naming names had the unrefutable intent of neutralizing the covert agents identified. S. 391 does not require that the person identifying the agent have this "bad purpose." Do you think that the evidence that you have seen to date, forces us to go further than enacting a law which would only punish people with access to classified information or other people who had the specific intent to neutralize a covert agent or assist a foreign power to impair or impede the effectiveness of our covert activities?

Response :

The simple answer is "yes." S. 391 now requires that an individual engage in a pattern of activities with the specific intent of identifying and exposing covert agents. This standard was adopted to criminalize only those disclosures made by persons who are in the business of "naming names." The purported motive for the specific disclosures made by such persons should be irrelevant where the activities would predictably lead to impairment of U.S. foreign intelligence capabilities and risk of harm to the agents who are exposed.

According to testimony by Senator Chafee before the Senate Judiciary Committee last year, the publishers of the Covert Action Information Bulletin, who have been responsible for a number of the disclosures that have prompted this legislation, have maintained that their disclosures are made "to improve the intelligence activities of the United States." Intelligence Identities Protection Act, S. 2216, S. Rep. No. 96-86, 96th Cong., 2d Sess. 27 (1980). This example illustrates that the "reason to believe" standard included in S. 391 is necessary to prevent the type of disclosures that have harmed U.S. intelligence activities to date, and that a specific intent standard requiring proof of a "bad purpose" may result in an ineffective statute.

Question 3:

The bill would allow prosecution of an individual whose only sources for material are in the public domain. Do you think that we are under a constitutional law duty to seek other remedies to end the practice of naming names from public sources, before we take the step of making the activity itself illegal?

Response to Question 3:

We understand that the Executive branch has been attempting to devise various means to enhance the protection afforded the identities of covert intelligence covert agents. The bill itself requires the President to take additional steps to improve this situation. While there is a general preference for exploring other measures before criminalizing conduct, we believe the proposed bill is a necessary and reasonable approach to the immediate problem and that these other measures do not preclude the Congress from acting now to pass legislation such as S. 391.

Question 4:

Your prepared testimony refers to the case of U.S. v. Heine which held that providing a foreign government with information accumulated from public sources did not constitute an offense under the espionage statutes. You dismiss the case as merely a statutory interpretation of the Espionage Law. Do you give any credence to the argument that Judge Hand's statutory interpretation was done to save the constitutionality of the statute?

Response:

The pertinent holding in U.S. v. Heine, 151 F.2d 813 (2nd Cir. 1945) very clearly relies on an interpretation of the espionage provision that was then included at 50 U.S.C. § 32. We are unable to determine whether Judge Hand's intention in deciding the case on this statutory ground was to save the statute from some constitutional infirmity. In any event, the bill under consideration is much more narrowly drawn and would, we believe, survive such a challenge.

Question 5:

Section 601(c) requires that exposure of a covert agent be done "in the course of a pattern of activities intended to

identify and expose covert agents." I want to ask you a couple of questions about the meaning of the term, pattern of activities. Would this term in your view require the exposure of more than one agent or would a series of activities leading to the exposure of a single agent constitute proof of this element of the offense?

Wouldn't a reporter investigating whether a foreign official, no longer in office, had at one time provided the CIA with information be engaged in a pattern of activities intended to identify a covert agent?

Response :

The term "pattern of activities" is defined in section 606(1) of S. 391 to mean "a series of acts with a common purpose or objective." It has been the position of the Department that an investigation focusing on an individual asset or source does not meet this statutory definition. Intelligence Identities Protection Act, S. 2216, S. Rep. No. 96-86, 96th Cong., 2d Sess. 51 (1980)(statement of Robert Keuch, Associate Deputy Attorney General). Therefore, a reporter in the scenario provided in your question would not be liable under this statute.

Question 6:

You have suggested that we create attempt crimes under Section 601 (a) and 601 (b). I assume you would oppose creating an attempt crime under Section 601 (c). Is that correct?

Could you describe how one would attempt to disclose any information identifying a covert agent?

I can imagine a situation where someone is carrying a packet of leaflets down the street getting ready to pass them out. But what about the situation of a person going off to a meeting with the thought that he may disclose the name of an agent to an unauthorized person? Would that constitute an attempt to disclose the name of a covert agent?

Response :

Yes, we would oppose the addition of an "attempt" provision to section 601(c). We have suggested adding an "attempt" provision only to the two sections involving government employees or contractors who have occupied positions of special trust and who have been provided access to classified information in the course of their official duties.

The criminal law of attempts punishes only a person who has taken a substantial step toward commission of the crime and whose activities reflect an intent to carry out the proscribed action. Therefore, in the situation you have described where a person goes to a meeting with the thought that he may disclose a name of a covert agent, his conduct would not constitute an attempt unless there was evidence beyond a reasonable doubt that he intended to disclose a covert identity and he had taken a substantial step toward that end. For example, if he had called a press conference, told others what he intended to say and placed on the podium a written list of the names he intended to disclose, a jury would be entitled to consider all these

circumstances surrounding the defendant's actions to determine whether his actions sufficiently evidenced a design unlawfully to disclose the classified identities of covert agents.

A more likely example of a punishable attempt is where an employee having access to classified information that identities a covert agent mails or delivers a list of covert agents to a person believed to be an unauthorized person, and that person turns out to be an undercover agent of the U.S. Government. A jury could conclude that a substantial step toward fulfillment of the crime had been undertaken by this employee.

Senator DENTON. I would like to welcome Mr. Morton H. Halperin, director, Center for National Security Studies, American Civil Liberties Union; and Mr. Jerry J. Berman, legislative counsel, American Civil Liberties Union, and ask them if they would summarize their statement as the last witness did in the interest of time. Your entire statement will be in the record, gentlemen.

STATEMENTS OF MORTON H. HALPERIN, DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES, AMERICAN CIVIL LIBERTIES UNION, AND JERRY J. BERMAN, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. BERMAN. Thank you, Mr. Chairman, and members of the committee.

We want to thank you for extending the American Civil Liberties Union this opportunity to testify on S. 391, the Intelligence Identities Protection Act of 1981. The American Civil Liberties Union is a nonprofit and nonpartisan organization of over 200,000 members dedicated to defending the Bill of Rights. We have testified many times on this legislation over the last several years, and we also have interests in other matters now before the Subcommittee on Security and Terrorism. So this probably will not be our last appearance before this committee.

Mr. Halperin to my left, and myself have a joint statement, but we take turns delivering testimony on this bill and it is Mr. Halperin's turn. [Laughter.]

Mr. HALPERIN. Thank you, Mr. Chairman.

I will summarize very briefly what seem to us the main points about this legislation.

First, as Senator Leahy noted before, there is a real question in our view, and one which seems to be shared by the Heritage Foundation, about whether the real problem here is the action of individuals who publish names, or whether the real problem is not the fact that the CIA and the U.S. Government has put information in the public domain which while, as Senator Chafee notes, does not say these people are CIA agents, does enable people, as the CIA has said again in its testimony today, with a high degree of accuracy to identify who are the CIA agents serving abroad under light cover.

The fact is that if those names can be identified with a high degree of accuracy by a small number of Americans working in the United States, they can equally be identified with a high degree of accuracy by foreign groups who would propose to do harm to those

individuals by threatening their lives, or doing physical harm to them, or disrupting their activities.

We think the primary focus should be on taking steps which make it impossible for foreign terrorist groups or American citizens with a high degree of accuracy, with not a substantial amount of effort, to identify covert agents. We would suggest that this legislation is almost entirely symbolic in that it, as the testimony has said, suggests that the Congress of the United States does not approve of naming names; but we suggest that legislation which impinges on the first amendment should not be passed for a symbolic purpose; that such legislation should only be passed if it can have some real effect on protecting lives.

We think the case has not been made that this legislation, and particularly section 601(c), will have any real effect unless steps are taken to provide adequate cover. And if those steps are taken, the protection would not be necessary.

Now second, it is the view, as has been noted, not only of the American Civil Liberties Union but of a substantial number of legal scholars, that this section as now drafted is unconstitutional because it makes it a crime to sift public information and draw conclusions from that information. There are a substantial number of Supreme Court cases, and it is the view of a number of constitutional scholars, that the Supreme Court has held that one cannot make it a crime for the press to publish information which the press lawfully acquires.

This bill would make it a crime for the press to publish information which it lawfully acquires, whether it acquires that information from foreign intelligence sources, from foreign governments, from foreign newspapers, from official publications of the U.S. Government, it would be a crime for a reporter or a scholar to engage in an effort to mine those sources to learn the identities of agents and to publish, for any purpose, even to ferret out corruption or illegal activities. We think that the Constitution as it has been defined by the Supreme Court—not simply in the judgment of the American Civil Liberties Union—prohibits the Congress from passing a law that punishes private citizens who analyze publicly available information and who draw conclusions from it and publish that information.

Now we think it is even clearer that the statute is unconstitutional, since the Senate version also lacks any need for a bad purpose. The Supreme Court in the *Gorin* case, in analyzing the espionage laws, said they were constitutional because one had to have a bad purpose. One had to intend to injure the United States or give advantage to a foreign power; that if you did things with that purpose, with that bad purpose, the Congress could make that illegal even if you were talking about the transfer of information.

Professor Kurland is not alone in the judgment that a bad purpose is clearly needed. Professor Scalia, the University of Chicago, now at Stanford, testifying before the House committee just a few days ago expressed the clear view that the absence of a bad purpose would make the statute unconstitutional. That is the view of almost every person who has examined this bill who is not in fact now in the Justice Department.

The Justice Department has now made it clear, and it did it again this morning, that a bad purpose would be acceptable; that it could accept the House version as well as the Senate version. We think that any chance that this bill has to be constitutional requires that there be a bad purpose; and that it be a bad purpose which goes to directly neutralizing agents' activities or injuring the United States.

Finally, I would like to say just a brief word about the question of the inclusion of the FBI. The objection is not to the inclusion of FBI agents who serve abroad. The objection is simply to the inclusion of FBI agents who serve within the United States who may be involved in spying on American citizens involved in political activities who are suspected of being involved with foreign powers. We think that raises very serious additional constitutional questions about the right of those groups to ferret out informers who may be within their organizations. In our judgment, that carries the bill into another dangerous area for which there is no record at all of necessity.

Mr. Chairman, that is a brief summary of our remarks. We would be delighted to answer your questions.

[The complete joint statement of Mr. Halperin and Mr. Berman follows:]

PREPARED STATEMENT OF JERRY J. BERMAN AND MORTON H. HALPERIN ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman,

We want to thank you for extending the American Civil Liberties Union this opportunity to testify on S. 391, the "Intelligence Identities Protection Act of 1981." The American Civil Liberties Union is a non-profit, and non-partisan organization of over 200,000 members dedicated to defending the Bill of Rights.

The driving force behind S. 391 is, of course, the desire of the Administration and the Congress to provide protection for Americans serving their country abroad under cover and to prevent their intelligence relationships from becoming known to foreigners who may seek to harm them or neutralize their work. We do not condone the practice of naming names and we fully understand Congress' desire to do what it can to provide meaningful protection to those intelligence agents serving abroad, often in situations of danger.

At the same time, we believe the Congress must be mindful--and we believe it is--that this legislation, particularly section 601(c) will operate in an area, as one Committee Report puts it, "fraught with first amendment concerns."[1/] As such, it deserves the most careful scrutiny both to determine (1) whether its prohibitions will provide meaningful protection to our agents serving abroad so as to justify its limitation on freedom of speech, and (2) whether the legislation is drawn in such a way as to pass constitutional muster.

In testifying on last vear's identical version of this bill, S. 2216 as reported by the Senate Intelligence Committee, we stressed before this Committee our view, one shared by over 60 law professors and consitutional experts, that section 601(c) (formerly section 501(c)) is unconstitutional on its face. While

reiterating our position that the section is unconstitutional, we want to focus our comments today on whether this bill will accomplish the purpose it is designed to serve. In particular, will section 601(c)'s prohibitions make it difficult or impossible for foreign intelligence services, terrorist organizations, or others opposed to our interests to identify our intelligence officers serving under cover abroad? We believe the answer is no. If we are correct, then the legislation before you is merely symbolic in its protection for agents but does violence to the principles of the First Amendment. Certainly, Congress should not enact such legislation.

At the outset, we want to make it clear that we do not view sections 601(a) and (b) as symbolic or constitutionally defective. These sections would make it a crime for a present or former government official who learned the identity of CIA or FBI agents or sources through access to classified information to knowingly reveal those identities to an unauthorized person. Since such officials have obtained access to the identities of sources through their employment, we do not think the imposition of a criminal penalty on the disclosure of such information by these officials to be unreasonable. Moreover, these officials are in a position to reveal the identities of agents and sources under deep cover and whose identities cannot be gleamed from public sources.

Section 601(c), on the other hand, would seek to punish any person who "discloses any information that identifies an individual as a covert agent," even if the information is in the public domain or readily available to any person or group who takes the trouble to ferret it out. The information which is needed to identify most of those whose names are published is available, the CIA admits, from the Biographic Register and the diplomatic lists. According to the CIA, the group that is targeted for prosecution under this section, the Covert Action Information Bulletin, prints lists of CIA agents that are

> a regurgitation from some compendium...Others could ...be taken from reports or other kinds of documents that may have been in unclassified context...In short, what they are taking it from is a garden variety biographical compendium. They are saying this is past history, but presently he is the CIA station chief in country X. 2/

The Biographic Register is, of course, a United States government publication whose back issues are available in libraries around the world. Although the issues for the past few years have not been released, the State Department has not classified them, and the government may be forced to release them as a result of a pending Freedom of Information Act lawsuit brought on behalf of diplomatic historians. Simpson v. Vance, No. 79-1889 (D.C. Cir., Sept. 25, 1980). Indeed, the State Department considered decision not to classify the Biographic Register casts considerable doubt on the need for and wisdom of congressional enactment of section 601(c).

The techniques for determining the identities of CIA employees under light diplomatic cover from these publically available sources have been explained in several widely published articles. The root of the problem, according to the CIA, is that

> 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...the public has become aware of indicators in these documents that can sometimes be used to distinguish CIA officers. 3/

If the CIA were completely candid, it would admit that without regard to faithless employees, it has been widely known for many years that the Biographic Register could be used to determine which persons listed there are likely to be CIA officials, and journalists and academics have routinely used this technique to determine who the CIA officers in any given capital are.

The issue, Mr. Chairman, is not disclosures made by the press or public but the failure to provide adequate cover for our intelligence officers abroad. And we are not alone in making this observation. As the Heritage Foundation states in its report and recommendations on the Intelligence Community:

> Unfortunately, the 'official cover' provided to officers of the Central Intelligence Agency, usually by the Department of State, is routinely inadequate to withstand all but the most cursory of inspections. 4/

The main import of this is that Congress cannot, by virtue of this legislation, prevent any group in a foreign country which seeks to disrupt American intelligence activities or to harm CIA employees from learning the identities of the CIA employees stationed under diplomatic cover in its capital. Certainly, the bill will not protect against the counterintelligence activities of hostile intelligence services or others who use the surveillance techniques these groups are said to use.

The First Amendment Issue

While section 601(c) will not stop foreigners from learning the identities of CIA employees under diplomatic cover and may even encourage them to use the above mentioned techniques by underscoring their effectiveness, section 601(c) will clearly succeed in chilling public debate about intelligence matters in violation of the First Amendment. The legislation before you could make criminal the publication of identities in circumstances fully protected by the First Amendment and in many circumstances where the publication of intelligence identities is essential for understanding or debating important issues.

To understand the potential impact of this bill on public debate, it is first of all necessary to separate rhetoric from reality as to the breadth of the intelligence identities protected by this legislation. Because the protection of Americans serving abroad in a covert capacity is the principal concern of the bill's drafters, they have often described the reach of the legislation in terms which would lead the public to believe that only the identities of Americans serving abroad would be off limits to the press or public. As Senator Chaffee put it last year:

> We send fellow Americans abroad on dangerous missions which are supported by us as Senators. We owe it to them to do our utmost to protect their lives as they go about our business. 5/

Or as Frank Carlucci, former Deputy Director of Central Intelligence, stated before this Committee in September of 1980:

> (O)ur officers willingly have accepted the risks necessarily inherent in their taxing and dangerous occupation. They have not accepted the risk of being stabbed in the back by their fellow countrymen and of being left unprotected by their Nation's government.[6/]

In fact, S. 391's definition of "covert agent" (sec. 606(4)) is far broader. While it covers United States intelligence officers or employees who are serving abroad or who have served abroad in the last five years and United States citizens who are residing abroad and acting outside the United States as agents, informants, or sources of operational assistance to our intelligence agencies, it also includes all foreigners in the United States and abroad who at any time have served as agents, informants, or sources of operational assistance to our intelligence agencies. By amendment last year, covert agent also includes FBI agents and informants with the foreign counterintelligence and counterterrorism components of the FBI in the United States or abroad.

Because of the breadth of the definition of "covert agent," witnesses before this and other committees have fairly argued that, unless narrowed in some other way, section 601(c) could have applied to a number of past press stories, academic studies, and other research had it been on the books. For example,

-- the New York Times story that Francis Gary Powers was pilot of the U-2 spy plane;

-- the Washington Post story that King Hussein of Jordan was an agent or source of operational assistance to the CIA;

-- press stories about Cubans involved in the Bay of Pigs operation;

-- FBI agents involved in illegal breakins targeted against persons associated with the Weather Underground (a counterintelligence,

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counterterrorism investigation);

-- a Wall Street Journal article detailing covert ties between the CIA and Boeing's Japanese agent.

In all of these stories, the press or an author made the decision that the name was essential to tell the story or to give it credibility. All of the stories involve "covert agents" as definied in S. 391, even though in none of these cases is it arguable that the narrow purpose of the bill is being served--the protection of Americans serving abroad in circumstances which place their lives in jeopardy.

According to the bill's drafters and supporters, it is not their intent to reach cases such as this, but only those who are in the business of "naming names." To avoid this result, they added the requirement that a person must be shown to be engaged in

> a pattern of activities intended to identify and expose covert agents...

However, we believe this describes the activities of the press, researchers, and scholars. The very act of investigative reporting to uncover CIA involvement in foreign assassination plots or illegal FBI COINTELPRO activities is a "pattern of activities intended to identify and expose covert agents..." And the Justice Department testified that "a single act of disclosure" meets the disclosure element of the bill.[7/]

Although the Senate Intelligence Committee Report of last year is replete with language that suggests that the bill distinguishes between public communication of information essential to informed discussion and the indiscriminate naming of names, the committee made a change in the bill during mark-up at the suggestion of Justice Department officials who wanted to avoid such a distinction. It included an objective "reason to believe" standard rather than a subjective, bad purpose test. This "objective" standard would clearly cover members of the press

and those contributing to public debate and not simply those in the business of naming names.

Given the definition of covert agent, the absense of bad purpose, and the fact that investigative reporters may engage in a "pattern of activities intended to identify and expose covert agents," S. 391 as introduced could reach the following scenarios,

-- A reporter suspects that the Administration in its eagerness to give aid and assistance to the Savimbi-led effort in Angola has interpreted the Clark Amendment to permit aid which is used for other than military purposes. He investigates, discovers, and exposes the fact that the CIA is giving such aid to Savimbi. He reports also that the intelligence committees were not notified of the aid, in apparant violation of the oversight provisions of the National Security Act as amended last year.

-- A reporter suspects that a terrorist group made up of Cuban exiles in Florida is controlled by persons who were former sources of operational assistance to the CIA. She investigates, uncovers the past CIA relationships, and publishes the story, giving their identities.

These scenarios and a number of others make it clear that the scope of the bill would cover legitimate newsgathering activity and public debate on important intelligence and foreign policy issues. We understand the drafters to be saying they have no intention of covering such situations, but the plain language of the bill remains very broad and would clearly chill public debate.

The Constitutional Issue

We believe that section 601(c) is facially unconstitutional in punishing the publication of information which has come into the possession of private citizens, the public, and the press. We believe this is so even if the information were classified,

see New York Times v. United States, 403 U.S. 713 (1971) but particularly because it includes information--however sensitive--which has come into the public domain. The government has the right to restrict sensitive information, but it cannot attempt to punish its publication once it has become public or come into the possession of the press. A line of Supreme Court cases supports this position. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (statute prohibiting publication of confidential proceeding into judicial misconduct); Cox Broadcasting v. Cohn, 420 U.S. 469 (1975) (statute prohibiting publication of the identity of a juvenile offender which press obtained from court records). As Justice Burger has stated

> The government cannot restrain publication of whatever information the media acquires--and which they elect to reveal.

Hutchins v. KQED, Inc., 438 U.S. 1, 13-14 (1978); see also Smith v. Daily Mail Pub. Co., Inc., 99 S. Ct. 2267 (1979); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977).

Perhaps the case most directly on point is the widely quoted opinion of Judge Learned Hand in United States v. Heine, 151 F. 2d 813 (1945). Heine engaged in an activity very similar to that which appears to have given rise to section 601(c) of S. 391. In overturning this conviction for espionage, Judge Hand stated

> The information which Heine collected was from various sources: ordinary magazines, books and newspapers; technical catalogues, handbooks and journals;...This material he condensed and arranged in his reports...All this information came from sources that were lawfully acessible to anyone who was willing to take the pains to find, sift, and collate it.

Although it can be argued that Heine simply involves statutory interpretation, it can also be read as a judicial inter-

pretation which saved the constitutionality of the espionage statute by excluding analysis of published information even if undertaken to aid a hostile foreign nation. In this regard, it should be pointed out that the Justice Department last year cited Heine in testifying that section 501(c) of S. 2216 and H.R. 5615 was constitutionally dubious. Stating that no one can be convicted of espionage or of compromising information relating to the national defense "if the information was made available to the public, or if the government did not attempt to restrict its dissemination or if the information was available to everyone from lawfully accessible sources," Deputy Assistant Attorney General Robert L. Keuch expressed critical doubts about section 501(c):

> 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...A speaker's statements about covert activities could be punished even though they are not based on 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...[8/]

Unaccountably, the Justice Department retracted its constitutional concerns when the Senate Intelligence Committee amended section 501(c) (now 601(c)) to add a "pattern of activities" element and changed the specific intent requirement (intent to impair or impede intelligence activities) to an objective intent (reason to believe that such activities would impair or impede the foreign intelligence activities of the United States). To be sure, the Justice Department expressed the concern that the subjective intent element could have a "chilling effect" on critics of intelligence activities:

> 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.

However, the "reason to believe" standard does not cure the "chilling effect" since critic and non critic must guess as to whether or not he or she is covered by the statute and certainly does not resolve the "political born classified" problem.

Significantly, while the ACLU and a number of constitutional experts such as Lawrence Tribe of Harvard and Floyd Abrams believe that the section cannot be made constitutional, the weight of opinion is that if section 601(c) has any chance of passing constitutional muster, it must include a specific intent, or bad purpose requirement. Not, we might add, a general "intent to impair or impede intelligence activities" as set forth in H.R. 4--which every citizen has a right to do through speech and communication under the First Amendment--but a bad purpose such as giving advantage to a foreign power or neutralizing the activities of an agent by the fact of disclosure itself. In this regard, see Gorin v. United States, 312 U.S. 19 (1941) interpreting the espionage statute's "intent or reason to believe that (information) will be used to the injury of the United States or to the advantage of a foreign nation" to require bad faith on the part of the defendant. See also Letter from Professor Philip B. Kurland to Senator Edward Kennedy, September 25, 1980:

> In response to your request, I can frame my opinion on the constitutionality of Section 501(c) very precisely. I have little doubt that it is unconstitutional. I cannot see how a law that inhibits the publication, without malicious intent, of information that is in the public domain and previously published can be valid. Although I recognize the inconstancy and inconsistency in

> Supreme Court decisions, I should be very much surprised if that Court, not to speak of the lower federal courts, were to legitimize what is, for me the clearest violation of the First Amendment attempted by Congress in this era...[9/]

We also call your attention to the testimony of Antonin Scalia, Professor of Law, Stanford University, and Philip B. Heymann, Professor of Law, Harvard University Law School before the House Intelligence Committee on April 8, 1981; both of them took similar positions with respect to H.R. 4.

Conclusion

Mr. Chairman, S. 391 is unprecedented legislation. Only twice in our history has Congress legislated a prohibition on the right of the press to publish classified information, a narrow prohibition on publishing codes, 18 U.S.C.§ 798 and highly sensitive atomic energy information, 42 U.S.C. § 2274. Both involve highly technical information which minimally rstrict the flow of news. When broader categories of information have been involved, such as when Congress considered and enacted the current espionage laws, the press and publication were excluded from the reach of the statutes. See Edgar and Schmidt, The Espionage Statutes and the Publication of Defense Information, 73 Col. L. Rev. 930-1087 (1973).

As we and others have shown, S. 391's section 601(c) can seriously impact on speech and communication concerning important intelligence and foreign policy matters. It is opposed on policy and constitutional grounds by almost every major press organization, by leading newspapers including the New York Times, the Washington Post, and Chicago Tribune, and by over 60 law professors and constitutional experts. Even most constitutional experts who favor this legislation, oppose the Senate version.

Moreover, the bill may have a serious impact on First Amendment principles without solving the problem of protecting our agents and intelligence activities overseas. Because of light

cover, the bill may amount to no more than a symbolic gesture if passed.

We urge you not to pass S. 391's section 601(c). However, if you are going to proceed, we ask you to explore ways to narrow the reach of the bill. For example, the definition of covert agent should be narrowed to include only those U.S. officers or employees serving overseas. Foreign leaders and FBI agents at home should be excluded from the definition. At the same time, the bill should substitute a bad purpose, perhaps along the lines of the espionage statutes, in place of the objective "reason to believe" standard. (We submit that both intent and reason to believe present similar prosecution proof and graymail problems and should not be the basis for choosing one or the other formulation). Finally, we believe that a "justification" defense, which professor Robert Bork implies, 10/ should be spelled out in the bill, so that it will not apply if the disclosure involves illegal or unauthorized intelligence activities.

We again thank you for the opportunity to testify today on S. 391.

FOOTNOTES

1. Intelligence Identities Protection Act, Report of the House Select Committee on Intelligence to Accompany H.R. 5615, p. 5 (Rept. 96-1219, Part I, 96th Cong. 2d Sess. 1980)

2. Intelligence Identities Protection Act, Report of the House Committee on the Judiciary to Accompany H.R. 5615, p. 5 (Rept. 96-1219, Part 2, 96th Cong. 2d Sess 1980).

3. Ibid.

4. "The Intelligence Community", in Heatherly, Charles L. ed., Mandate for Leadership: Policy Management in a Conservative Administration, p. 915 (Heritage Foundation 1981)

5. Statement of Senator John H. Chafee, Hearings before the Committee on the Judiciary, U.S. Senate, 96th Cong. 2d Sess. (Sen. No. 96-86, 1980) p. 34.

6. Statement of Frank C. Carlucci, Deputy Director of CIA, on S. 2216 before the Senate Judiciary Committee, Sept. 5, 1980, in Hearings Before the Committee on the Judiciary, United States Senate, 96th Cong. 2d Sess. (Sen. No. 96-86, 1980) p. 66.

7. Statement of Robert L. Keuch, Associate Deputy Attorney General on S. 2216, Before the Senate Judiciary Committee, Sept. 5, 1980, Hearings, Note 5 supra., p. 90.

8. Statement of Robert L.Keuch, Associate Deputy Attorney General on H.R. 5615, in Hearings Before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence, House of Representatives, 96th Cong. 2d Sess, (1980) p. 31.

9. First Principles, Vol. 6, No. 2, p. 6 (Center for National Security Studies, November 1980).

10. Letter from Robert Bork, to The Honorable Peter P. Rodino, Sept. 2, 1980.

FIRST AMENDMENT PROTECTION

Senator DENTON. Thank you very much, Mr. Halperin.

Either of you gentlemen may respond to these questions. Do you believe that first amendment protection should ever give way to national security interests? And if so, under what circumstances?

Mr. HALPERIN. We believe that Congress can pass legislation which punishes individuals who disclose information with the intent to injure the United States or give advantage to a foreign power. That is what the current espionage laws do. We do not think there is any doubt about their constitutionality; nor do we think there is any doubt about the constitutionality of the first sections of this bill, sections 601 (a) and (b) to punish individuals who have gotten authorized access to classified information and used that access to learn the identities of agents.

We do not believe that it is constitutional to punish private citizens who use only publicly available information and who publish that information without any bad purpose.

Senator DENTON. Would you describe the nature of the American Civil Liberties Union as an organization, its purposes and so forth?

Mr. BERMAN. I think I said that at the start.

Senator DENTON. Nonprofit, nonpartisan?

Mr. BERMAN. Yes. It is a——

Senator DENTON. I did not hear any tittering when we said nonpartisan. I am hearing a lot of tittering on other statements.

Mr. BERMAN. I do not hear any tittering, Senator.

Senator DENTON. No, I do not in this audience, but I think I would out in the hinterlands.

Mr. BERMAN. Well, I state that we are a nonprofit, nonpartisan organization dedicated to the defense of the Bill of Rights. You only have to look at the caseload of the American Civil Liberties Union to know that we have cases in the first amendment area and in other areas where the Bill of Rights is affected which cross the political spectrum. I could list some of those cases for you, if that is your wish.

Senator DENTON. Thank you, sir.

On Tuesday, July 8, 1978, Mr. Berman testified before the Senate Intelligence Committee on S. 2525, and at that time inserted for the record a long memorandum from the ACLU and the Center for National Security Studies. Since that was joint, is there some connection between the ACLU and the Center for National Security Studies?

Mr. BERMAN. Yes, Senator, the American Civil Liberties Union—the Center for National Security Studies is a project of the American Civil Liberties Union Foundation.

Senator DENTON. It may be relevant, then, in this hearing to note that among other things that memorandum stated that it was the position of the ACLU and the CNSS not to support covert action or espionage activities abroad in peacetime and this is a continuation of the quote: "i.e., absent any congressional declaration of war."

It would seem to me that since that is not the position of the U.S. Government, that we might have a conflict of interest here. Is this still the position of the ACLU and the CNSS?

Mr. BERMAN. Yes; it is. It is the official policy of the American Civil Liberties Union. We have advocated that position before the Congress. The Congress has not agreed with us, and has authorized covert operations. We are still prepared, at a hearing where that is the issue, to discuss that; but that is the position of the American Civil Liberties Union.

By the way, it does not mean that because we have a position against covert operations that that is the basis for or has any reason why we object to the third section, section 601(c), of this legislation.

Senator DENTON. It does strike me as curious that a group containing men as intellectual as you would not realize that every other major power, and indeed every minor power I can think of, does engage in such activities and that it would not be in our interests for self-protection to do the same. Do you know of any major power that does not engage in these activities in peacetime?

Mr. BERMAN. No, Senator; we do not.

Senator DENTON. Does the ACLU and the CNSS believe that American decisionmakers should be kept informed? And how can this be done without intelligence collection?

Mr. BERMAN. I think we do need intelligence collection, sir.

Senator DENTON. But, then, not covert action or espionage activities abroad in peacetime?

Mr. BERMAN. I think the heart of our position goes to covert operations abroad, Senator. The position on espionage, I think there is room for disagreement within the ACLU. I just want to recall that it was not surprising, I think, for the policy statement at that time, given the record of revelations of how intelligence collection and covert operations had gotten involved in dubious operations abroad, the conduct of secret foreign policy, when our commitment is to open government. There is also a record compiled by a number of committees before this Congress of illegal and unconstitutional activities directed at American citizens in the United States arising from the same covert capabilities of the United States. The visceral reaction of the American Civil Liberties Union is to protect the Bill of Rights, and to give the widest latitude to the first amendment and to an open society.

We realize the tensions between a national security state and the first amendment. We try to, within the Congress, to accept the dimensions of the debate and to argue for the widest latitude, and also have supported legislation which attempts, we believe, to

strike a balance between national security and civil liberties' concerns.

Senator DENTON. Well, in this era of intercontinental ballistic missiles, nuclear weaponry of various kinds, the difficulty of ascertaining without a free process of open verification invited by the other governments, how would you see it to be in our national interest, or even in our realm of survivability possibility, if we did not conduct covert information to find out about the possession of weapons, the degree, the number? Do you support arrest nuclear proliferation? And how can this be done without foreign intelligence?

Mr. HALPERIN. Senator, I want to make it clear that what we have to say about this bill does not depend on the formal position of the ACLU that we should not be engaged in peacetime espionage. If what you want to do is engage in a discussion about how we learn about Soviet weapons, we are prepared to do that; but that is not what we understood to be the purpose of this hearing, or the scope of this hearing.

The fact is that most of the information, if not all of the information which we rely on to monitor weapons' deployment of our potential adversaries, is collected by technical means of intelligence, as you know. The ACLU position clearly distinguishes between that and what has been referred to as "human espionage." It supports the technical collection of intelligence by various means. It supports the analysis of that information and the provision of intelligence information to the President and to senior officials.

Similarly, in the case of nuclear proliferation. The information about nuclear proliferation is not a secret. The problem is, what to do about it. As numerous Senators have stated on the floor of the Senate, we know which countries are making nuclear weapons. The problem we have is to decide how to deal with that problem.

So that I do not think one needs to support particular kinds of espionage if one is concerned about those issues. But I think those views on that issue do not bear in any way on the position we have taken on this legislation.

Senator DENTON. Well, none of us, especially myself, is exempt from questioning regarding the philosophy from which we come and how that might color or explain positions that we take. The ACLU and CNSS cannot support the SALT Treaty—I mean, I am sure you have a view on that. How you can support such treaties when we do not have verification unless we conduct covert activities is something that escapes me. And I believe, were you to extend—this is a personal belief—were you to extend your efforts on behalf of what I believe to be a true love of liberty and get into that field, you would change your position.

Mr. HALPERIN. Senator, with all due respect, the SALT Treaty is something I happen to know a great deal about.

Senator DENTON. No; I do not mean about the SALT Treaty. I mean about the necessity for covert intelligence overseas against which you have taken a position in general.

We have a vote pending. We will recess for 15 minutes now and come back after we register our votes.

[Recess.]

Senator DENTON. The hearing will resume.

I will defer now to Senator East for any questions he might have.

Senator EAST. Thank you, Mr. Chairman.

I will try to make my remarks very brief, because I know of the great time constraints under which we are all working. I am somewhat troubled with the ACLU's position on this matter of protection of internal security. I do not mean to make the philosophy of the ACLU the center point of our discussion, because I appreciate that that would be an interesting subject for another forum and you are not here to discuss that, but as commendable as ACLU's efforts are I think in many areas, and you frequently have taken a very unpopular cause on the far left and on the far right and many things in between—I am just trying to work up to this point.

One thing that is sometimes troubling to the ACLU is not their devotion to the cause of civil liberties or to our freedoms under the Constitution or the first amendment, but sometimes an insensitivity to the fact that in the real world of politics we have many things to balance. You have the problem of freedom; you have the problem of security. It reminds me of Thomas Hobbes, the famous Englishman.

Now Hobbes was obsessed with security. He thought security was the only thing that mattered. So he developed the theory for the modern authoritarian state, which I am deeply resistant to, as I well know you gentlemen are. Hobbes raised a good point. Security is important, but if you raise it to the first principle of politics and exclude everything else, you are going to get some very perverse results—authoritarianism, and perhaps even ultimately totalitarianism.

Now it occurs to me that if you take the concept of the individual's freedom, intellectual and in every other way in the broadest scope of the word under the first amendment and the entire Constitution, and you elevate that to your first principle of politics and you exclude everything else, you get some perverse results, in the sense that it seems to preclude a really genuinely effective policy of national security.

We know that in the real world of international and American politics that this is a genuine problem, a genuine threat. The problem of national security and effective intelligence gathering is just imperative, it seems to me, to maintain the kind of society we want.

If we are not able to strike some balance here, we may in the name of preserving the freedom end up losing it because we are unable to develop the ability to defend ourselves against those who are less sensitive, the authoritarians and the totalitarians.

Thus, it strikes me that in your position, gentlemen, that although your intentions are most honorable and I am not questioning that, I have a little bit of a theoretical problem of whether, if you take that position and keep pushing it to the furthest extreme, at some point all of these other things are never considered. For example, the problem of security.

I admired your courage in defending the Nazis marching in the Jewish community in Skokie, yet I felt at the time that perhaps Nazis ought not to be parading in Skokie. The purpose was to provoke. The purpose was not really to make any legitimate, fundamental point of communication under the first amendment.

Now these are difficult lines to draw, I agree with you. But in the real world in which we live and move and have our being politically, we have to make those judgments. Sometimes we err. Sometimes we balance it too far in the case of security; sometimes we balance it too far in the case of freedom. But it occurs to me at this point we have a very legitimate problem in this country of facing the threat of international terrorism, of protecting our internal security, of having effective intelligence gathering, and we are going to have to make some kinds of concession in order to be effective in that area; and the greater goal will be to defend this system which does allow us, with all of its shortcomings, in the long run to have a greater degree of freedom than most countries clearly enjoy in the world today.

I am just concerned here—and then I shall be silent—whether your objections, as commendable as they are, ultimately if you strip it down and probe it to its deepest level of rationalization, there really is not anything we could effectively do in this area in terms of protecting CIA agents or other agents from being exposed by private citizens or others, destroying their effectiveness, imperiling their lives and thereby imperiling the national security of the United States?

At some point this Congress, and I think reflecting the will of the American people, is going to want to find a way to protect those people. It is a legitimate national concern to national security, and it is indispensable in order to preserve the freedoms we all cherish under the first amendment.

Let me rest there. Do you think I am correct in that assessment?

Mr. HALPERIN. Senator, I think we have no doubt, and we actually testified last year that we were certain the Congress would pass a bill last year. I do not think we have any doubt that the Congress will pass a bill; nor do we have any doubt that it will include a section (c).

We have tried, therefore, both to state our principal constitutional objections to that; but also to try to offer some advice to the Senate and to the House on the assumption that you are going to go forward of ways to make the bill narrower, to reduce the chilling effect on first amendment debate.

One of the suggestions we have made is that you include a "bad purpose." The view that that is required by the Constitution is a view that Professor Scallia has put forward, that Professor Kurland has put forward, and neither of them have ever been accused of being single mindedly dedicated simply to civil liberties. But I think both of them are people who have a deserved reputation for balancing the kinds of considerations which we have talked about.

The Justice Department has said that the bill with a "bad purpose" would accomplish the purposes of the legislation. We have also urged, and I would urge again, that you narrow the scope of the bill to cover the people that everybody this morning talked about should be covered.

If you look at what was said this morning, both before you came in and after you came in, people talked about people we send abroad to protect us, employees of the United States, those who serve the United States abroad. We would urge you to limit the scope of the section (c) to those individuals.

What we have said is: If you do those two things, if you limit it to individuals who are serving the United States abroad, what we talked about this morning, and if you require the kind of generalized bad purpose that has been urged on the House committee, you will have substantially reduced the constitutional problem. We would still have our principled objection that we would state, but we would in those circumstances feel that the Congress had done as good a job as it could do in balancing the different pressures that were upon the committee and upon the Congress.

Senator EAST. Let me just, if I might, Mr. Chairman, one follow-up question and then I will be silent.

Senator DENTON. You are well within your time.

Senator EAST. On this "bad purpose" point that you make a great deal of here, I find "bad purpose" here. That is, implicit in this statute is the idea of knowingly and purposely giving information that would identify these people for the purpose of interfering with intelligence gathering on the part of the United States, knowing that the United States was attempting to protect that. To me, there is a "bad purpose." The "bad purpose" is trying to disrupt the orderly and effective operation of intelligence gathering which is designed to protect our internal security.

Now those who are trying to frustrate that process, to me that is a "bad purpose."

Mr. HALPERIN. Yes. I think that is——

Senator BIDEN. You do not disagree with that, do you?

Mr. HALPERIN. I agree that that is a bad purpose. It is just not in the bill.

Mr. BERMAN. It is not in the bill.

Mr. HALPERIN. And that is what we are urging you to put in the bill.

Senator EAST. Well, to me, when you say it is not in the bill, it is niggling. You could say that about any kind of criminal definition. You mean you want the words "bad purpose" in there?

Mr. HALPERIN. No. We want the purpose of "intent to disrupt" by the act——

Senator EAST. Well, I would simply contend that it is there; that the notion—maybe it blends in with Senator Biden's remark. You do not find "intention" in here, you say. You do not find "bad purpose." I do. Intent to do certain things with the ultimate end of weakening the security gathering, the data gathering, intelligence gathering effectiveness of the U.S. Government.

Maybe I am missing the point, gentlemen, but is that not a bad purpose?

Mr. HALPERIN. That is a bad purpose. The bill does not require that you have that intent. A person who deliberately discloses names that he has gathered in a pattern of effort to uncover names is guilty of violating section (c) even if his purpose is to improve the intelligence activities of the United States, or expose corruption.

What we have urged upon this committee is language which the Justice Department says will meet the purposes of the bill, which is to require this "bad purpose" of disrupting or neutralizing the activities of the intelligence agencies by the act of disclosure.

Senator EAST. Well, first of all, I think it is a distinction without a difference. It is a very subtle point. But if I do understand what you are saying, I think the effect of it would be to make it impossible to have an effective law by what you are saying, because then you would always be questioning whether there was a "bad purpose."

What we do not want—what we do not want—is people engaging in this kind of activity of fingering informants which makes that impossible for us as a nation to carry on effective intelligence gathering. To me, that is a very legitimate, proper, appropriate national goal.

This agonizing over the subtlety of language and semantics here I know is critical in the criminal law and the constitutional law, do not misunderstand me, and I am not questioning anyone's good intentions, but I have an uneasy feeling that if you slice it that thin, actually what you would do is you would appear to be giving us an effective tool, but as a practical matter of application in enforcement, there is nothing there. It is an empty hand.

Mr. HALPERIN. Senator, we think it can be enforced, and so does the Justice Department. I would refer you to Mr. Willard's testimony on behalf of the Justice Department and the Attorney General in which he says:

> While there is a preference for the Senate bill, that it is the judgment of the Justice Department that both versions—that is, the House bill which has a "bad purpose," as well as the Senate version—can be effectively used to prosecute to cover the range of cases that the Congress is concerned about.

So that is the judgment of the people in the Justice Department who would have the responsibility for prosecuting under this bill. It is not only our judgment.

Senator EAST. Well, obviously of course, as I understand the Justice Department's testimony this morning, they are fully content with paragraph (c). That is, that was their first preference, was it not, unless I misunderstood what the gentleman was saying?

Mr. BERMAN. They said that they would prefer the Senate version of the bill.

Senator EAST. Yes.

Mr. BERMAN. But that they thought that both bills were constitutional; and, while it might create a bit more of a burden on them, that they could successfully prosecute under the House version of the bill.

Senator EAST. Yes, but again, to keep the record straight as far as their preference, they prefer our version. That is the one I am defending.

Mr. BERMAN. But they are not taking the position which you have articulated that it is impossible to prosecute under the House bill.

Senator EAST. Well——

Mr. BERMAN. Just one other point, Senator, in response to your question. It seems that unless it is a part of the elements of proof in the trial whether there is a bad purpose or not, then all of the avowals of Senators and report language surrounding this bill that it cannot reach the legitimate communication of news about intelligence matters, foreign policy, but only people with a bad purpose is eviscerated. It has to be a part of the element of crime to support

that report language and that congressional intent to effectively not reach those cases.

Senator EAST. Well, I shall end on this comment. I appreciate your candor and your very helpful testimony. I feel there is a real need here, and I want something of substance. I am concerned that by the time we would hone it in the way you would have us go, I am not quite sure we would have an effective instrument.

It would be one so difficult of interpretation in application it would not deal with the genuine felt need to prevent people from interfering with effective intelligence gathering. And to me, that is the goal; and we are going to have to make some reasonable adjustments to get there.

It is an overriding question of national security, national defense, and effective security. I look upon this as a reasonable concession. Then, too, we have demonstrated this morning that reasonable minds can differ over that. So I yield to the chairman.

Senator DENTON. Thank you, Senator East.

Senator Biden?

Senator BIDEN. Thank you.

Gentlemen, maybe I am confused, but do you gentlemen oppose efforts to stop the exposure of agents, if the reason for the exposure is for the purpose of hurting the United States of America? Do you oppose that?

Mr. HALPERIN. We would not oppose the bill which contained that.

Mr. BERMAN. We do not oppose that bill.

Senator BIDEN. That concept, you do not oppose?

Mr. BERMAN. We state on page 1 that we do not condone the practice of naming names which place our agents' lives in jeopardy.

Senator BIDEN. Do you acknowledge the right of our Government under our system of laws to protect itself against subversion, espionage, and terrorism?

Mr. BERMAN. Defined as "criminal acts," Senator, yes.

Senator BIDEN. I think we are discussing two bills, essentially, a House bill which will work according to the Justice Department, and a Senate bill which they think will work more easily. Both will work.

Balancing again whether or not the Senate or House bill will impact upon the competing interests of any government and a free people, I would like to read to you some language and question whether or not you would think it would be preferable to either the Senate language or the House language.

I should say at the outset that it is not language either of you have given me; it is language that was suggested on April 23, I believe, by the former head of the Criminal Division, Philip B. Heymann. It says:

> * * * whenever in the course of a pattern of activities undertaken for the purpose of uncovering the identities of covert agents and exposing such identities (1) in order to encourage or assist foreign nationals, or foreign powers, or their agents to impair or to impede the effectivess of covert agents or the activities in which these agents are engaged; or (2) in order to neutralize covert agents or the activities in which they are engaged by the fact of such exposure itself discloses to any individual not authorized to receive classified information, any information that identifies a covert agent, knowing that the information disclosed so identifies such covert agent, and that the United States is taking affirmative measures to conceal such covert agent's

intelligence relationship to the United States, shall be fined not more than $15,000 and not imprisoned more than 3 years.

That is a lot to swallow in one sitting, but do you understand the language?

Mr. HALPERIN. Yes; we have seen that language. Our understanding is that Mr. Heymann sent the letter to Mr. Boland, the chairman of the House intelligence Committee, on behalf of himself and Mr. Scalia and Floyd Abrams, who were the three witnesses on constitutionality who testified before the House committee, expressing the view that that language, better than even the House or the Senate bill or anything else they had seen, was likely to survive constitutional muster.

I think we would join in that judgment. That does not mean that we believe it is constitutional. We continue to believe no language which punishes the republication of publicly available information is constitutional. But our view is that that language has a better chance of surviving constitutional muster, and would chill less legitimate public debate, than an alternative version that we know of; and it would, I think, raise substantially fewer problems.

Senator BIDEN. The ACLU's purpose, credibility, inclination, intent, if you will, has been raised here this morning.

Mr. Halperin, I would like to ask you specifically. Have you ever worked for the Federal Government?

Mr. HALPERIN. Yes; I have.

Senator BIDEN. In what capacities and for whom?

Mr. HALPERIN. I served as a Deputy Assistant Secretary of Defense in the Johnson administration; and as a member of the staff of the National Security Council in the Nixon administration.

Senator BIDEN. So you have dealt with intelligence matters as a government official in the Nixon administration?

Mr. HALPERIN. Yes; I did.

Senator BIDEN. I would like to pursue one other point. In your legal judgment—I am not asking for your preference, now, I am asking for your legal judgment, try to give me as dispassionate a view as you can—Mr. Phillip Agee who makes it his business to publish the names of agents whenever he has an opportunity, and whom I personally would like to see put out of business—would Mr. Phillip Agee fall under sections (a), (b), (c), or all three, of the Senate version of the bill? If you were going to prosecute him and this bill were law, which section would you prosecute him under based on the activity we know of thus far without reciting all of what it is?

Mr. HALPERIN. He would fall under section (a) as having had authorized access to classified information that identifies a covert agent for those identities he learned while in the Government.

Senator BIDEN. So to prosecute Mr. Agee, we would not even have to have subsection (c). The debate that is going on here does not affect Mr. Agee. The three of us Senators disagree much in philosophy I suspect, but we agree that sections (a) and (b) are fine as they are, I am not asking your position; we believe they are fine. Mr. Agee would not even rise to the level of being subject to the debate because we would be able to prosecute him under the first section.

Mr. HALPERIN. That is correct.

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Senator BIDEN. Now let me ask you a hypothetical. What if a former employee or present employee or agent of the Federal Government, a person who never had access to classified information, but by whatever means either by paying for it, by having it leaked or by republishing it were to find himself in the following situation.

There have been a number of books and articles written in recent years suggesting that our intelligence agencies have been fooled by Soviet disinformation agents—disinformation—and indeed some journalists and authors contend that our intelligence agencies have been penetrated by the KGB, and that a so-called "mole," is ensconced high up in the CIA. One set of allegations surrounding a number of Soviet defectors existed around the time of the Kennedy assassination, including conflicting stories about the Soviet relationship with Lee Harvey Oswald. It is further alleged by some journalists that this information obtained from defectors was kept from the Warren Commission, or at least that the Commission was also fooled by the defectors.

Now assume for the moment that a journalist had this information, this information from defectors, early in 1964. After failing to convince the intelligence agencies or the Warren Commission of its validity, and knowing that it might compromise a source, and having warned the agency of his intent to disclose the information so that they might protect the source, their agent, the journalist proceeds with a story.

The story says:

> A defector named Smith—so I will not get into any existing cases—a defector named Smith has told the intelligence community that the Soviets financed and trained Lee Harvey Oswald to assassinate President Kennedy.

The journalist tells that to the agency, saying "I know that; do something about it." They choose not to. He then tells the Warren Commission of this, and they choose not to print it, because they believe it is disinformation. The intelligence community concludes that it is disinformation.

Now the journalist after doing all that goes out and writes an article or publishes a book setting that out, blowing the cover of American CIA agents.

Are they prosecutable under this law?

Mr. HALPERIN. Yes.

Senator BIDEN. I am not sure they are. Your answer is "yes." I am not sure they are, but that is the kind of thing that I am very worried about. I am worried about it because I think there is, having served on the Intelligence Committee since its inception, such a thing as disinformation. I am concerned that foreign intelligence agencies attempt to manipulate American intelligence activities.

I am concerned that there is infiltration. I know of no intelligence community in the world that has not been infiltrated. That concerns me. And I worry that we might very well find people who lack intent, who want to try to go out to prevent that kind of thing, expose it, being prosecuted for their efforts to try to be good Americans.

By the way, is a "pattern" one event, or two, or three? Or is a "pattern" established by the investigation and only one article? Can there be a pattern if there is only one article written?

Mr. HALPERIN. It was testimony of all the witnesses in support of this legislation both in the last Congress and this Congress, that one disclosure was enough if it followed a pattern of effort to uncover.

Senator BIDEN. A "pattern of effort"? OK. So there is a reporter with a pattern of effort who attempts to disclose the names of agents who he or she believes to be double agents, and so discloses them. As my two colleagues pointed out, America would be better served if they were disclosed. Obviously they would be reasonable in disclosing them.

But what happens if they in fact were engaged in disinformation themselves and were triple agents? I am serious. This is not a joke. These gentlemen are intelligent men, they know there are such things as triple agents. It is not something we make up in books; it is real.

What is the standard? What happens if they disclose the name of an agent? Are they prosecutable under this? What is the test?

Mr. HALPERIN. There are—and I may have misunderstood the Chairman, but I understood him to be suggesting that if the names were gotten from foreign intelligence sources that they would not be covered by the bill; and I see nothing in the bill that would exclude penalties for republishing names that came from foreign intelligence sources, or from U.S. intelligence sources, or from public data. But to go through the six hurdles that Mr. Casey listed in his testimony that the Government has to follow.

To take your scenario, or the real book that was published on the Warren commission and the allegation that CIA disinformation agents were sent over to distract us from investigating Oswald's alleged connections with the KGB, if this person set out to write a book, or take your scenario that there was an intentional disclosure of information which identified a covert agent, saying that a particular Soviet defector was now working for the CIA, that defector is in the definition of "covert agent."

The disclosure was made to an individual not authorized to receive classified information, and clearly if you publish a book or write an article you do that.

The person who made the disclosure knew that the information disclosed did in fact identify a covert agent, and saying that a KGB defector is working for the CIA, you know that you are identifying a covert agent.

The person who made the disclosure knew that the United States was taking affirmative measures to conceal, and again you would know that and presumably say that in the story.

And the individual made the disclosure in a pattern of activities intended to identify and expose covert agents, and both in your scenario and in the real book the individual set out to find out whether there were these disinformation agents and to learn their identity.

And the disclosure was made with reason to believe that the activity would impair or impede intelligence activities. You would get that "reason to believe" by doing what most journalists would

do, which is to go to the CIA and say. I am about to publish this story; should I do it? Do you have any comment? The agency would say publishing that story would injure the intelligence activities of the United States. And, having been warned of that, you would have great difficulty persuading a jury that you did not have that "reason to believe."

Senator BIDEN. One last question, Mr. Chairman. I can see you are anxious to conclude. One quick one. That is, I think that there is a reasonable argument that the language I am suggesting requiring intent might very well have a more chilling effect on the media than the language that exists in the Senate bill.

As you know, it was argued last year by some, that to prove intent prosecutors could look for example in a prosecution against the New York Times at previous editorials criticizing foreign policy, et cetera. The argument being that if the House language were adopted, it would have more chilling effect on the freedom of the press than the other language.

Do you have an opinion on that specific question?

Mr. HALPERIN. I think that might be true of the current House language, but I think it would not be true of the specific "bad purpose" in the language which you read to me. And I think that is why those three gentlemen think that that raises fewer constitutional problems.

Senator BIDEN. Thank you, very much.

Thank you, Mr. Chairman.

Senator DENTON. Thank you, Senator Biden.

We made previous inquiry regarding the ACLU and the Center for National Security Studies respecting a position on not supporting covert action or espionage activities abroad in peacetime absent a declaration of war by Congress. That was a position in 1978 and affirmed here today with some qualifications.

A previous statement in 1975, December 5, by you, Mr. Halperin, I would like to know, since it was before the Senate select committee, whether or not you still hold to the view that the United States should no longer maintain a career service for the purpose of conducting covert operations and covert intelligence collection by human means? I left out—there was no reference to "abroad" or anything in that statement, so I wondered if that is still your current view?

Mr. HALPERIN. The implication of that statement was "abroad," but it is not still my current view.

Senator DENTON. Thank you, sir. Frankly, I am very glad to hear that.

We will be holding the record open for written questions to these gentlemen. We thank you very much for your forthright testimony this morning, gentlemen.

Senator BIDEN. Mr. Chairman, before you adjourn, I have no questions for the witnesses—these are our last witnesses?

Senator DENTON. No; one more.

Senator BIDEN. Oh, OK. Good. Thank you.

Senator DENTON. We will call on Mr. John M. Maury, president of the Association of Former Intelligence Officers.

STATEMENT OF JOHN M. MAURY, PRESIDENT, THE ASSOCIATION OF FORMER INTELLIGENCE OFFICERS, ACCOMPANIED BY JOHN S. WARNER, LEGAL ADVISER, AFIO

Mr. MAURY. Mr. Chairman, with your permission I would like to have Mr. John Warner, the legal adviser of the association, and former General Counsel of the Central Intelligence Agency, with me here to field possible questions.

Senator DENTON. Welcome to you, Mr. Maury, and also to your associate, Mr. Warner. I suppose it would be better were it to reveal that there is a suspicion that Mr. Maury and I are related through marriage, before we begin this, and I only learned that today.

Would you care to make an opening statement, sir?

Mr. MAURY. Sir, I will submit for the record the statement which I believe your staff has. I will make a few very brief, general remarks.

First of all, I am the president of some 3,000 former intelligence officers from the armed services, the FBI, the State Department, and the CIA, and appear in that capacity. I am, like my predecessors I believe, a completely impartial witness. As Admiral Turner I am sure will testify, I have been just as critical of the CIA on some points as Mr. Halperin has, I think.

But I do feel very strongly the importance in this day and age of an effective intelligence service as the first line of defense against subversion and surprise, and the best hope for peace in our time. As a wise colleague on the NSC staff once remarked, perhaps the greatest danger to peace in our time would be an ill-informed American President. I think in this day and age, that is more true than ever.

I think, in that connection, human sources are more important than ever. They can tell you many things of vital interest that no satellites or electronic systems can contribute. I speak from the perspective of these human sources because I have been one, and I have been involved with them off and on for the past 40 years, and I was 8 years Chief of Soviet Operations for the CIA.

These people are rather strange, Mr. Chairman. They live lonely lives. They operate a long way from home. They are under severe pressures, and inducements, and temptations in operating in a hostile environment, and there is no way we can compensate them to an extent commensurate with their true worth. We cannot give them public acclaim, of course, because that would give them away. And we cannot reward them with material things, because an affluent lifestyle would immediately raise suspicions.

So all that they can get in the way of compensation for their work is a feeling that their work is valued and appreciated. It is awfully hard for them to feel that it is valued and appreciated by the Government unless the Government can provide them some protection for the effectiveness of their job, and for their lives and the lives of their families.

And as long as it is possible for an organization right here in the Nation's Capital to freely publish the identities of these people without any legislation that can effectively restrain that publication, it is awfully hard to convince these people that we are doing our part to support and protect them.

I speak with some personal involvement in the Welch case, which was mentioned by previous witnesses. It has been said of my friend, Dick Welch, who was my successor as station chief in Athens, that the KGB of course knew who he was, and that the fact that his name was published in the United States by "Counterspy" and then was picked up by the Greek press and sensationalized, in no way contributed to his death.

Well, I happened to be visiting Dick and Kika Welch in Athens during Thanksgiving just before his death, and his name had just appeared on the front pages of several Athens newspapers. We talked about this, and he said:

> Of course most people around here could find out who I am; I operate in a NATO government where I am dealing with a lot of local officials, and so on, but the important thing is that I am not a celebrity. Once I become a celebrity, then I am a prime target for action by the terrorists that are operating in this part of the world.

Recall the assassinations of the athletes at the Olympic Games in Munich. They were not intelligence agents, but they were prominent personalities. So what I am saying, sir, is that the argument that these identities can sometimes be devined by skillful research misses the point. The point is that the real damage comes from the widespread publication of their identities, which has two effects:

One, it does make them attractive targets for assassination or violence;

Second, it creates an impression throughout the world that the United States Government is unable or unwilling to get serious about its intelligence work, and presumably even its national security interests, if it cannot or will not protect the people I speak of by adequate legislation.

As a former KGB officer once said to me:

> Our primary objective has always been to put out the eyes of our adversary by discrediting and demoralizing and disrupting his intelligence service.

Another KGB officer is quoted as saying:

> We never dreamed that we could do as much damage to the U.S. security as you people have done to it yourselves by your public revelations and irresponsible attacks on your intelligence agencies.

Now putting those two things together, Mr. Chairman, I do not think that anything could contribute more to these Soviet objectives than for us to allow the continued uninhibited publication of the identities of our most sensitive intelligence personnel engaged in dangerous and difficult assignments.

Thank you very much for your attention, sir.

Senator DENTON. Thank you very much, Mr. Maury.

I will have only two questions, since your opening statement answered the remainder of them. Does the association and its membership feel that S. 391 will be effective in reducing the dangers engendered by the unauthorized disclosures of identities of intelligence officers and their family members?

Mr. MAURY. Mr. Chairman, I think it will contribute a great deal. I do not think there is ever a perfect solution to this sort of problem in a free society, but I think S. 391 will make a great contribution not only to the practical results, but also to the morale of the troops in the field.

Senator DENTON. Do you have any suggestions as to how this bill could be rendered more effective, not necessarily in amending now,

but perhaps later in addressing the problem of unauthorized disclosures?

Mr. MAURY. Mr. Chairman, I think time is of the essence, and therefore I would urge prompt action on this bill. There may be refinements that could come later, but it is far better I think that we move quickly on this bill, rather than delay in the interest of polishing it further.

Senator DENTON. Thank you, sir.

Senator East?

Senator EAST. Mr. Chairman, I will keep my remarks brief. I found the statement very valuable, and it will be of course, I know, a part of the record. I do agree, obviously—or perhaps not so obviously—with the general concern that Mr. Maury raises, and I appreciate hearing what the professionals think about the problem.

They do think this act would fill a gap here that needs to be filled, and that simply enhances my support for the measure. I appreciate his coming and making the effort to be a part of these hearings. Since we would be in basic agreement, I shall not proceed to waste any further time, but my lack of comment should not be interpreted as a lack of enthusiasm for his statement and his personal presence here.

Thank you, Mr. Chairman.

Senator DENTON. Thank you, Senator East.

Senator Biden?

Senator BIDEN. Thank you also for your statement, sir. It may come as a surprise to you that I do not disagree with your statement, either. The fact of the matter is that I think you are absolutely right, particularly as it relates to morale, but more importantly as it relates to the single greatest instrument for peace we have at our disposal in this Government—a functioning, well-ordered, and good intelligence community. I have been exceedingly supportive of budget requests and matters that would relate to strengthening that Agency. As a matter of fact, I have been the prime mover most of the time in those issues in the Intelligence Committee.

So we have no disagreement at all in terms of both the philosophy of the need for covert activities. I, like you, reject the argument that merely because a KGB agent does not sanction a CIA agent who has been exposed, that therefore there is no harm to the agent.

We are not only worried about the KGB agent blowing agents away. That is a worry, but not related to this. There is no doubt that they know who the station chief in every station in the world is, just like I know we know theirs. But that is not the point.

You are absolutely right, and I want to reiterate your point on the record, that both the demoralizing effect and the physical danger created as a consequence of exposing agents in foreign lands, even when the KGB already knows about them, is very, very damaging both to the physical safety and to the morale of the agency. It does not make us look good, either, as a nation. So I concur with you completely.

I have two questions. Do you believe that the House bill, which differs only in the argument that you have heard take place here today, the question of "reason to believe" or "intent," do you

believe that the House bill would prevent us from accomplishing the goals of further protecting those CIA agents? Is the House bill a positive move? I know you prefer the Senate bill, but is the House bill positive? Does it help?

Mr. MAURY. Sir, I would defer to Mr. Warner, our legal adviser, on that if I may?

Senator BIDEN. Surely.

Mr. WARNER. Mr. Biden, we have studied both of these bills very carefully and, somewhat like the Department of Justice, we would urge passage of either one. We feel that they both clearly stand constitutional muster. I believe that the House bill would make prosecution somewhat more difficult, having engaged in many cases in discussion of "shall we prosecute this case, or that case?" I believe that the House bill would be slightly tougher to prosecute.

Senator BIDEN. I appreciate your answer.

Mr. WARNER. But either bill.

Senator BIDEN. I just want to make it clear that, from my point of view, although I do not share the same philosophic view of my colleagues on a number of issues, on this issue, the issue for me, Joe Biden, one Senator, the ranking Member of this Full Committee and this subcommittee, is simply the latter point—intent.

There is no disagreement. There is no disagreement on the need for action in this area. Your answer is crystal clear.

The second question I want to ask you, I address to our principal witness. Can you explain to me and my colleagues, or can you think of from your past experience, as you have cited past experience to us by making reference to KGB agents you have known, examples where the disclosure of the name of an agent who was a double agent would be something that would not be the desire of the Agency?

Mr. MAURY. Yes, sir.

Senator BIDEN. Sometimes it makes sense for us to have double agents who are working against our interest continue to be double agents as long as we know it? Right?

Mr. MAURY. Very valuable.

Senator BIDEN. Very valuable. Now the second point on that second question that I would like to make, that is, first effort, with the cooperation of your former agency, to the best of my knowledge I am the first person to ever have access to all the Agency damage assessment reports for the past 10 years. For my colleagues who may not know the term of art, when something goes wrong you all write a damage assessment: How much did it hurt us?

We went back to try to figure out why were not you fellows and the Justice Department prosecuting these guys, we found out that one of the reasons why you did not prosecute was not because you were un-American, but because in order to prosecute under our system it required you to disclose more than you would gain by the prosecution.

So we worked together and we came up with the Gray-Mail bill which, according to Justice, according to the prosecutions that have taken place since then, and according to the Agency, has had a significant impact on allowing you a mechanism to go get those folks and punish them without having to reveal more than you

wanted to. There are still some cases you cannot go forward with, because to go after it you would reveal too much.

Now having said that, what are the other valuable means beyond us passing either this House bill or the Senate bill that you believe as a qualified and experienced agent are needed to protect the identities of CIA agents?

Mr. MAURY. One suggestion, sir, would be to the executive branch. That would be the adoption of a new policy under an Executive order specifying who can or should be available for supporting intelligence operations, for example, by providing cover or other facilities for intelligence officers throughout the executive establishment. That could be very useful in certain circumstances.

I think we have unilaterally disarmed, in a number of cases, by deliberately putting——

Senator BIDEN. Making it clear who we have as cover by acknowledging others.

Mr. MAURY. We have identified so many people that we say that we are not using—and I do not think anybody abroad ever believes us; but still we have done it to ourselves at home. So we have shot ourselves in the foot in that respect. That would be one comment.

Maybe Mr. Warner could add to that.

Senator BIDEN. Is it not the case that unless we do take that kind of action, that even if newspaper people do not publish this stuff, and the Agees of the world do not publish these identities, that terrorist organizations are getting sophisticated enough to figure it out themselves—are they not? They are not the KGB, but they are getting more sophisticated, are they not?

Mr. MAURY. No doubt; no doubt about it.

Senator BIDEN. So even with this law, whichever one we pass, we have to do more, do we not?

Mr. MAURY. I think so. And I might add, sir, that I think there should be some restrictions and revisions in the Freedom of Information Act, and the Foreign Intelligence Surveillance Act.

Senator BIDEN. I am anxious to hear what you have to say, Mr. Warner, but with the permission of the Chairman, I would ask permission that we leave the record open to give you time to add to, in more detail if you would like, some of the other things beyond this kind of legislation that you think is useful, but it is up to the Chairman in terms of time whether he wants to hear it now, or have it in writing.

Mr. WARNER. I can do it very briefly, Mr. Chairman.

Senator DENTON. Go ahead, Mr. Warner.

Mr. WARNER. I think one of the measures in S. 391 itself is highly desirable. That is, requiring the President to issue an Executive order dealing with the procedures under which cover will be provided. Because while, from time to time, various departments are cooperative, at other times the policymaker in charge is not so cooperative, nor are the procedures standardized. And it is a very complex business, putting a person under cover and keeping him under cover. It is very complex. I think a central directive from the President would be of material assistance.

Senator BIDEN. I personally thank you for your concise, dispassionate, and honest responses to my questions. Thank you.

Senator DENTON. I would like to confirm that the only difference that appears to exist between the minority members and the majority members on this committee relates to the efficacy or lack thereof of the statement regarding "intent" between the House and Senate version.

I can confirm that Senator Biden, in my experience and before my experience here, has been a veritable bird dog in promoting intelligence, not only in the sense in which we are discussing here, but he made quite a point with the Drug Enforcement Administration hearing the other day of insisting that the director give adequate attention to the intelligence gathering facility of that organization.

So I have no qualms whatever about acknowledging that, Senator Biden.

Senator BIDEN. Thank you, Mr. Chairman. I may have to use that some day. [Laughter.]

Senator DENTON. Thank you, Senator East, for not only your political science background here, but your legal background. You are one of the versatile men here, and one of the finest men here, in my opinion.

I want to thank the witnesses, Mr. Maury and Mr. Warner. We will hold the record open until next Wednesday, 13 May, for the submission of written questions by any Senators here or absent who wish to do so. This hearing stands in recess, subject to the call of the Chair.

[Whereupon, at 1:33 p.m., the hearing was recessed, subject to the call of the Chair.]

[Prepared statement of John M. Maury follows:]

STATEMENT OF JOHN M. MAURY

My name is John M. Maury. I am here today in my capacity as President of the Association of Former Intelligence Officers, made up of some 3,000 veterans of our several military intelligence services, CIA, the FBI, the OSS and the intelligence components of the State, Treasury and other Federal Departments. I have with me John S. Warner, Legal Adivsor of AFIO and former General Counsel of CIA.

My background includes law practice in Charlottesville, Virginia; service in World War II as a Marine officer assigned to Naval Intelligence and commanding the U.S. Military Mission to North Russia in Murmansk; 27 years in CIA, including assignments in Berlin, on the NSC staff, on a Presidential Task Force to review U.S. foreign policy, on a disarmament delegation in Geneva, eight years as chief of Soviet operations, six years as Chief of Station in Athens, and five years in charge of CIA liaison with the Congress. After retirement from CIA, I served two years, 1974--1976, as Assistant Secretary of Defense.

Mr. Chariman, I appreciate the opportunity to appear before you on a matter with which I have been long involved and about which I am deeply concerned. It has to do with S. 391 concerning the protection of the identities of our undercover intelligence personnel. Having been associated with the intelligence business -- either military or civilian -- over the past 40 years, I believe that the threats to our security have never been greater. Our military strength, and with it our national credibility, has seriously deteriorated in comparison with that of our adversaries over recent years. Therefore, we must rely all the more on our eyes and ears and wits -- our intelligence services -- to stay alive and secure. Without good intelligence we are a blind man stumbling through an uncharted minefield. As a friend of mine on the NSC staff once said, "Per-

haps the greatest danger to peace in our time would be an ill informed American President."

In these circumstances, it seems to me that the need for protecting our covert personnel -- our human sources -- is of special urgency. But, I am afraid this need is often poorly understood. In some quarters, there is an apparent feeling that old-fashioned espionage is incompatible with our free society. The answer to that, I think, is that so long as our adversaries persist in policies threatening our vital interest, and rely on an all-pervasive secrecy in carrying out these policies, we must seek to penetrate this secrecy in order to preserve our free society.

It is also contended that modern technology, with its satellite photography and electronic devices, has made human sources obsolete. These systems do indeed tell us much of enemy capabilities, but little of intentions. Nor do they tell us of the plots and plans of terrorist groups in the cellars of Munich or Milan, or in the coffee houses of the Middle East or the guerilla hideouts of Latin America. Moreover, we can ill afford to rely too heavily on any single system of intelligence collection, either human or technical. They are all highly perishable; they are all subject to the counter-measures of the enemy; and they are all potential targets of deception, for example through the KGB's massive "disinformation" program.

It has been contended that certain provisions of S. 391 are unconstitutional. Our legal experts disagree, as do many others, including Senators and Congressmen and Executive Branch lawyers who have carefully studied this issue. There is no relevant case law to support the contention of unconstitutionality. The Supreme Court has repeatedly rejected the argument that the First Amendment is absolute. Among those who urge this absolutist view are those who asserted in court that Marchetti and Snepp could not be held to their secrecy agreements -- that the higher law was the First Amendment. The Supreme Court clearly

and firmly stated that the U.S. Government can take steps to protect its intelligence secrets, specifically stating that the first amendment privilege did not prevail in all circumstances. Those who lost their First Amendment argument at the bar of the Supreme Court are now trying to win that argument in these Committee rooms.

It is ironic that we have laws providing severe and clear-cut criminal penalties for the unauthorized disclosure of such information as Department of Agriculture estimates of future crops, identities of persons on Federal relief, income tax information, selective service records, recipients of Land Bank loans, etc., but no effective laws to protect our most sensitive intelligence sources, methods or identities.

If I may inject a personal note, in November 1975 my wife and I were in Athens visiting my close friend and successor as Chief of the CIA Greek Station, Richard Welch. Just before that Welch had been identified as a "CIA agent" in the Washington-based magazine Counter-Spy published by a leftist group calling itself "The Fifth Estate". This infromation immediately, and quite predictably, received sensational replay in the Athens press. A few weeks later Welch was gunned down on the steps of his home as he and his wife were returning from a Christmas party. As the Washington Post commented at the time, Welch's death "was the entirely predictable result of the disclosure tactics chosen by certain American critics of the Agency." It seems to me that when our laws give better protection to statistics about our soy bean crops than to the lives of people like Dick Welch, it's time to re-examine our priorities.

Mr. Chariman, the Nation asks much of its covert personnel. We often call on them to undertake assignments which may put not only their own lives or safety in grave danger, but also that of their families. We can offer little in return. Public acclaim is of course out of the question, as is material reward commensurate with their worth. But through legislation such as S. 391, we can

offer some protection from calculated exposure by those who, for whatever motives, seek to destroy the effectiveness or jeopardize the safety of our undercover personnel. How can we ask those whose services the Nation so badly needs to put their trust in our ability and determination to protect them, when we tolerate, right here in the nation's capital, publication of the identities of our people in the most sensitive undercover positions?

It has been argued that the legislation under consideration be rejected because it might have a "chilling effect" on public disclosure and discussion of intelligence matters. As drafted, this bill in no way prevents discussion or indeed criticism of intelligence --it will however deter the indiscriminate naming of identities. We urge that this legislation be passed and indeed hope that it will have a chilling effect on revelation of sensitive identities. For as General Washington wrote to Colonel Elias Dayton just 204 years ago:

> The necessity of procuring good Intelligence is apparent & need not be further urged -- All that remains for me to add is, that you keep the whole matter as secret as possible. For upon Secrecy, Success depends in most Enterprizes of the kind, and for want of it, they are generally defeated however well planned ...."

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