Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

INTELLIGENCE IDENTITIES PROTECTION LEGISLATION

HEARINGS

BEFORE THE

SELECT COMMITTEE ON INTELLIGENCE

OF THE

UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

S. 2216, ET AL.

INTELLIGENCE IDENTITIES PROTECTION LEGISLATION

JUNE 24, 25, 1980

Printed for the use of the Select Committee on Intelligence

U.S. GOVERNMENT PRINTING OFFICE

67-144 O WASHINGTON : 1980

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

SENATE SELECT COMMITTEE ON INTELLIGENCE

[Established by S. Res. 400, 94th Congress, 2d session]

BIRCH BAYH, Indiana, *Chairman*
BARRY GOLDWATER, Arizona, *Vice Chairman*

ADLAI E. STEVENSON, Illinois
WALTER D. HUDDLESTON, Kentucky
JOSEPH R. BIDEN, Delaware
DANIEL P. MOYNIHAN, New York
DANIEL K. INOUYE, Hawaii
HENRY M. JACKSON, Washington
PATRICK J. LEAHY, Vermont

JAKE GARN, Utah
CHARLES McC. MATHIAS, JR., Maryland
JOHN H. CHAFEE, Rhode Island
RICHARD G. LUGAR, Indiana
MALCOLM WALLOP, Wyoming
DAVID DURENBERGER, Minnesota

ROBERT C. BYRD, West Virginia, *Ex Officio Member*
HOWARD H. BAKER, JR., Tennessee, *Ex Officio Member*

WILLIAM G. MILLER, *Staff Director*
EARL D. EISENHOWER, *Minority Staff Director*
AUDREY H. HATRY, *Chief Clerk*

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

CONTENTS

HEARING DAYS

	Page
Tuesday, June 24, 1980	1
Wednesday, June 25, 1980	71

LIST OF WITNESSES

Tuesday, June 24, 1980

Hon. David Durenberger, A U.S. Senator from the State of Minnesota	5
Frank C. Carlucci, Deputy Director of Central Intelligence; accompanied by Daniel Silver, General Counsel	6
Robert L. Keuch, Associate Deputy Attorney General	17
Edward O'Malley, Assistant Director, Federal Bureau of Investigation	34
Hon. Charles E. Bennett, A Representative in Congress from the State of Florida	36
Hon. Alan K. Simpson, A U.S. Senator from the State of Wyoming	38
John F. Blake, president, Association of Former Intelligence Officers accompanied by John Warner, legal adviser	45
John Stockwell, Author of "In Search of Enemies"	52

Wednesday, June 25, 1980

The Honorable Lloyd Bentsen, a U.S. Senator from the State of Texas	71
Floyd Abrams	74
Morton H. Halperin, accompanied by Allen Adler, on behalf of the American Civil Liberties Union	87
Raymond J. Waldmann of Schiff, Hardin & Waite, intelligence consultant to the Standing Committee on Law and National Security of the American Bar Association	99
Ford Rowan, attorney, and former NBC correspondent	106

MATERIAL FOR THE RECORD

Opening remarks of Senator Walter D. Huddleston	2
Prepared statement of Senator Dave Durenberger	5
Letter from Benjamin J. Civiletti, Attorney General to Chairman, Senate Select Committee on Intelligence	25
Prepared statement of Robert L. Keuch	25
Statement of John F. Blake before the House Permanent Select Committee, January 30, 1980	47
Prepared statement of John Stockwell	52
Prepared statement of Jerry J. Berman and Morton H. Halperin	91
Prepared statement of Raymond J. Waldmann	102
Prepared statement of Ford Rowan	109
Telegram from the National Military Intelligence Association to Senate Select Committee on Intelligence, June 23, 1980	116

APPENDIXES

Appendix I.—Letter from Arthur B. Sackler, general counsel of National Newspaper Association	117
Appendix II.—Letter from Robert Lewis, chairman of Freedom of Information Committee, Society of Professional Journalists	118

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

INTELLIGENCE IDENTITIES PROTECTION LEGISLATION

TUESDAY, JUNE 24, 1980

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

Opening Remarks of Senator Walter D. Huddleston, Hearings on Proposed Agents' Identities Statutes

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

Chairman BAYH. The Senator from Rhode Island?

Senator CHAFEE. Thank you, Mr. Chairman.

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

So I thank you, Mr. Chairman.

Chairman BAYH. The Senator from Minnesota.

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

Senator DURENBERGER. Thank you, Mr. Chairman.

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

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

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

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

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

[The prepared statement of Senator Dave Durenberger follows:]

PREPARED STATEMENT BY SENATOR DAVE DURENBERGER

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

Chairman BAYH. Thank you, Senator Durenberger.

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

Thank you very much, Mr. Chairman.

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

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

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

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

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

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

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

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

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

---

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

67-144 O - 80 - 2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

Mr. CARLUCCI. I agree with that.

Chairman BAYH. I yield to my colleague from Utah.

Senator GARN. I thank the chairman.

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

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

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

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

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

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

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

Mr. CARLUCCI. Yes, I do.

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

Mr. CARLUCCI. Do I believe it did?

Senator GARN. Yes.

Mr. CARLUCCI. Yes, I do.

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

Mr. CARLUCCI. We are content with it.

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

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

[Whereupon, a brief recess was taken.]

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

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

TESTIMONY OF ROBERT L. KEUCH, ASSOCIATE DEPUTY ATTORNEY GENERAL

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

1. THE PURPOSE OF NEW LEGISLATION

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

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

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

a. Publication as a prohibited means of disclosure.

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

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

b. Avoiding extra elements of proof.

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

c. Use of inside methodology by former government employees.

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

2. THE DEPARTMENT'S PROPOSED BILL

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

3. S. 2216/H.R. 5615

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

4. OTHER SENATE AND HOUSE BILLS

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

APPENDIX—DEPARTMENT OF JUSTICE BILL

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Foreign Intelligence Identities Protection Act."

STATEMENT OF FINDINGS

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

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

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

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

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

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

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

Section 800. Definitions. As used in this Chapter:

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

Section 801. Disclosure of Intelligence Identities.

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

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

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

Section 802. Disclosure of Intelligence Identities by Government Employees.

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

Senator CHAFEE. It is the administration's bill?

Mr. KEUCH. Yes.

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

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

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

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

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

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

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

Mr. KEUCH. Yes.

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

Mr. KEUCH. I absolutely agree, Senator.

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

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

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

Senator CHAFEE. Go ahead.

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

Senator CHAFEE. You think your act does that?

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

Senator CHAFEE. How complicated would that be?

Mr. KEUCH. Not complicated at all, sir.

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

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

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

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

Mr. KEUCH. Yes.

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

Mr. KEUCH. Thank you, sir.

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

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

AFTER RECESS

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

Senator GARN. The committee will come to order.

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

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

Mr. BENNETT. Thank you, sir.

Senator GARN. Proceed.

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

Senator GARN. Certainly.

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

the foreign intelligence and counterintelligence efforts of the United States.

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

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

Senator CHAFEE. This year?

Mr. BENNETT. This year, yes, sir.

Senator CHAFEE. Thank you very much.

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

Senator GARN. Mr. Simpson.

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

Senator LEAHY. Probably as much as I have.

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

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

Senator GARN. Senator Chafee.

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

Senator CHAFEE. Thank you, Mr. Chairman.

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

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

Senator GARN. Is Willliam Colby here?

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

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

Mr. BLAKE. Thank you, Senator.

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2

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

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

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

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

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

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

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

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

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

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

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

[The statement follows:]

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

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

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

Approved For Release 2008/10/31 : CIA-RDP85-00003R000200080006-2