AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON LAW AND NATIONAL SECURITY

INTELLIGENCE REPORT

Vol. 2, No. 5 | Morris I. Leibman, Chairman | May 1980

Senate Actions Affecting Intelligence

Since its introduction in February, the comprehensive charter legislation, S.2284, has been in a state of flux. The attempt by Congress to write a detailed charter for the U.S. intelligence agencies appears to have collapsed in a stalemate between the Carter Administration and the Hill. Election-year politics seem to have created a climate for delay of any action until next year. After having reworked and shortened the original 172-page bill several times, and after many closed sessions of the Senate Intelligence Committee, it is obvious that no version is acceptable to all parties involved.

The Intelligence Accountability Act of 1980, the most recent and shortest (7-page) version, was considered by the Committee at its closed April 30 meeting. This bill amends the National Security Act of 1947 and provides that only the Senate and House Intelligence Committees be briefed by the Director of Central Intelligence of "any significant anticipated activity," prior notice of such activities is limited to the chairman and ranking minority members of each Committee in extraordinary circumstances as determined by the President; makes it a crime, punishable by jail sentences of five or ten years and fines up to $50,000, for an official or former official of the government to disclose the identity of an intelligence agent; provides that any actions by an intelligence agency be done according to procedures approved by an agency director; provides for the Attorney General to approve agency guidelines for activities directed at U.S. persons; and modifies the provisions of the Freedom of Information Act to protect classified information and to limit judicial review. This draft is being considered by the full Committee as this newsletter goes to press.

The Senate Foreign Relations Committee held a hearing on April 17 on the role and accountability of the National Security Advisor. Testimony was heard from Warren Christopher, Deputy Secretary of State; Brent Scowcroft, former Assistant to the President for National Security Affairs; Thomas Frank and I.M. Destler.

House Actions Affecting Intelligence

The House Intelligence Committee has continued hearings on the comprehensive charter legislation, H.R.6588. Hearings were held on April 15 and 22 with testimony heard from journalists, clerics and academicians, focusing on section 132 which would prohibit their use by intelligence agencies as cover. A summary of the testimony is included elsewhere in this newsletter.

The Oversight Subcommittee commenced hearings on prepublication review and secrecy agreements on April 16 and 24 and continued these on May 1st. This interest is a direct result of the recent Supreme Court decision in the Snepp Case. The subcommittee expects to continue its study of the matter in May, and a summary of the April testimony is included elsewhere in this newsletter.

The House Judiciary Committee's Civil and Constitutional Rights Subcommittee met on April 24 to resume its consideration of the graymail legislation, H.R.4736 and H.R.4745. The CIA, Department of Defense and Department of Justice offered further evidence of the administration's desire for passage of this needed legislation. A summary of the testimony is included elsewhere in this newsletter.

On April 30, the House Intelligence Committee decided in open session not to take any action on the Hughes-Ryan Amendment, but rather to leave intact the language proposed by the House Foreign Affairs Committee. The proposed new rule would limit reporting of covert actions to the House and Senate Intelligence Committees. This language was adopted March 12 as part of this year's foreign aid legislation, H.R. 6942, International Security and Development Authorization FY81. (See April newsletter.) The foreign aid bill will now move to the floor of the House. The Intelligence Commitee agreed, without formal vote, to Rep. Aspin's proposal to pose no objection to the separate law, leaving open the possibility of the Intelligence Committee coming up with its own version later as part of a charter.

Inside

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ABA Activities Affecting Intelligence

Standing Committee

The Standing Committee on Law and National Security met in Longboat Key, Florida on April 17, 18 and 19 to review its present and future activities. Among the many issues discussed were the draft report on the CIA charter as prepared by the Charter Advisory Group, chaired by Committee Consultant Waldmann, the Conference to be held at the University of Chicago Law School in June, the Portland and University of St. Louis Conferences, and future intelligence-related projects. The Charter Advisory Group is preparing a report for the Committee on legal issues in pending legislation. The University of Chicago Conference will explore legal issues involved in charter legislation. See page 8 for the preliminary program.

Section of Individual Rights and Responsibilities

Following a presentation by Mr. Jerry Berman of the ACLU, Committee Consultants Waldmann and Scalia, accompanied by Axel Kleiboemer, presented a summary of the Charter Advisory Group's consideration of the CIA charter legislation before a meeting of the Council of the ABA Section of Individual Rights and Responsibility in Washington on April 25.

This presentation focused on the need for balance in legislating intelligence chartes, the complexities of the present legislation and the differences between the FBI Charter, on which the Section had already taken a position, and the intelligence charters, where national security issues and positive intelligence collection are more important considerations than collection of evidence for criminal prosecution. As a result of the presentations, the Section's Council deferred action on a draft resolution and instead will call for a thorough review of the issues by the ABA.

Senate Select Committee on Intelligence—Intelligence Charter

March 31, 1980

Testimony focused on the issue of the structure of the intelligence community and the quality of intelligence analysis. Witnesses included Andrew W. Marshall, Director of Net Assessment, OSD; Lt. General D.O. Graham, Former Director, DIA; Paul Nitze; David Kahn; Prof. Roy Godson; and Graham Allison.

Mr. Marshall urged the Congress to endorse the concept of the highest level of intelligence analysis by adopting mechanisms to attract the most talented individuals. He advised that the necessary resources must be supported and encouraged both within and outside the intelligence community.

General Graham warned that competition within the community and political considerations often impede the analytic process. He posed a solution that might separate the analytic side of the CIA from the Directorate of Operations, which would then split it into two individual agencies. He also suggested that the size, independence and competence of the Defense Intelligence Agency be strengthened. He said, "It is less important to decide where the analytical resources of the intelligence community should be located than to decide that there should be more than one, and that both should have equal access to the nation's policymakers."

Mr. Nitze addressed the proper relationship between the policymakers and the intelligence estimators, and the problems of net assessments and estimating intentions. He blamed past shortcomings in past history on these difficulties. He advised that the principal role of Congress should be that of oversight of the Executive Branch. He went on, "From that point on, the estimators should be backed up in doing their job as rigorously and objectively as they can, even if their estimates deviate from the then prevailing mood of the Executive Branch, the Congress, or the public."

David Kahn (author of *The Codebreakers*) endorsed the intention to place NSA under statutory guidelines to prevent the recurrence of past abuses. Stating that revelation of cryptologic information is often thought to be more dangerous than it is in reality, he proposed three specific recommendations: (1) thoroughly oversee and investigate the cryptologic agencies; (2) bring NSA within the purview of the FOIA; and (3) reword charter section 613(a)(16) to read, "ensure that cryptologic information is classified and declassified in accordance with applicable law. . . ."

Prof. Roy Godson presented essentially the same testimony he gave to the House Committee, summarized in the April *Report*.

April 1, 1980

With only Senator Huddleston (D-Ky.) present, the following people testified: a panel with Robert Lewis of the Society of Professional Journalists, Jack Landau of the Reporter's Committee for Freedom of the Press, and Joseph Sterne of the American Society of Newspaper Editors; a panel with Reed Irvine of Accuracy in Media, Marshall Perlin of the Fund for Open Information and Accountability and Katherine Meyer of the Freedom of Information Clearinghouse; and a panel with Melva Mueller of the Women's International League, Ethel Taylor of the Women's Strike for Peace, Brennon Jones and Peter Weiss of the Center for Constitutional Rights.

Representing Sigma Delta Chi, an organization with 35,000 members, Mr. Lewis urged the Senate to curtail the CIA's censorship powers over former employees. He suggested that an option to the present contract requirement might be a ban only on writings that irreparably harm the national security or the setting of a five-year time limit during which former CIA employees would have to submit manuscripts for clearance. Joseph Sterne, editor of *The Baltimore Sun*, said the legislation would "pull down a curtain of secrecy that is simply unnecessary" on legitimate historical and journalistic research. Asked whether they objected to the use of journalists by the CIA, the panel agreed that a voluntary exchange was acceptable, but a formal contract for a continuing arrangement was not.

Reed Irvine, spokesman for Accuracy in Media, strongly opposed the ban on use of journalists, warning that intelligence services all over the world use this effective cover and "to deny this tool to the CIA, while leaving it available to our enemies" would be "foolish." Katherine Meyer strongly objected to section 421(d) of S.2284 and said that any legislation concerning the public's right of access through the FOIA should be through amendments to the FOIA itself. She stated it is

"astonishing" that the CIA seeks to impose greater secrecy.

The Fund for Open Information and Accountability charged that S.2284 goes even further than the Huston Plan and gives "carte blanche to the executive" in the area of national and internal security, national defense and foreign relations. In even harsher language, Peter Weiss contended that the bill "... makes the chief legal officer of this country, the Attorney General, into the chief dispenser of illegality" and "a law which legalizes an illegal act is the ultimate perversion of the Law..." In closing, he said that he looked forward to challenging the courts in the future should this legislation become law.

April 2, 1980

Senators Huddleston, Jackson, Moynihan, Chafee, Garn and Wallop heard testimony from James R. Schlesinger, former CIA Director for six months in 1973. In very critical language, Schlesinger appealed to the Committee to amend existing legislation rather than repeal it. Reflecting that intelligence agencies must operate in a "penumbra of jurisprudence," he said a detailed charter would make insufficient allowance for the flexibility required under unforeseen circumstances. He added that, "... the quest for tablets of stone by which to guide the intelligence community is both misguided and self-defeating." Excerpts are found on page 7.

Huddleston immediately challenged Schlesinger's statement by retorting that Turner, Webster, Inman, Colby and other present and former officials had endorsed the legislation as necessary. Schlesinger advised that a strong joint resolution by the Committee restoring confidence in our intelligence services would be of greater value. In an exchange with Senator Moynihan, he agreed that the process of bureaucratization acceptable for most agencies is inappropriate when dealing with intelligence.

Schlesinger agreed with Senator Jackson that an "unwritten constitution" for the CIA with oversight by Congress is a better approach. Jackson reiterated a point made previously during hearings that the greatest single mistake has been the failure of Congress to set up one joint intelligence committee. Jackson supported Schlesinger's plea for a system within the intelligence community that would follow the devil's advocacy process whereby dissent would be both allowed and encouraged. Schlesinger also recommended establishment by Congress of an awards system for intelligence service personnel for recognition of their efforts.

Sen. Huddleston challenged Mr. Schlesinger's statement that the proposed charter would have prevented the type of rescue performed by the Candians in Iran. They agreed only that this could better be debated in closed session.

A panel followed to address the question of counterintelligence. Appearing before the Committee were William Harris, Dr. E. Drexel Godfrey, Newton Miler and Eugene Burgstaller. Mssrs. Miler and Burgstaller had served with the CIA for some 30 years each. Due to lack of time, each summarized his statement and was asked to respond to written questions. In essence, they advised that unless and until counterintelligence is given the full attention and support it deserves, our intelligence capabilities will be stunted. They reconfirmed earlier testimony that an effective intelligence system requires flexibility and that the proposed legislation would only prove to atrophy what exists.

Presidential Protection of Intelligence Information

The President's Inherent Powers

The basic power of the President to protect information in the Executive Branch, even from the other two branches of the Government, is not found in the Constitution but is believed to be inherent in his office. This has been asserted by every President, beginning with Washington, and accepted by the Judiciary and the Congress, although recognition of such privilege has not been without exceptions and qualifications. The President, in withholding information, also may rely, in some circumstances, on section 2, Article II, U.S. Constitution (his authority as Commander in Chief of the Army and Navy), and section 3, Article II (his duty to see that the laws are faithfully executed).

The Nixon case (418 U.S. 683 (1974)) is the landmark case on the Executive power to withhold information. That case arose when the special prosecutor, in a criminal proceeding against former Attorney General Mitchell, convinced the trial court that the interests of justice required certain tapes and documents then in the possession of President Nixon. President Nixon declined to produce these materials, claiming Executive privilege. President Nixon's refusal was overturned.

The Court held unanimously, firstly, that it had the Constitutional power and duty to decide finally all claims of Executive privilege. The Court explicitly stated that its power to decide Constitutional questions and the President's power of Executive privilege were implicit in their Constitutional grants of authority. Secondly, that, as the material sought was necessary to the proper functioning of the Federal court system in a criminal case, it must be released in this case. The opinion noted, while deciding against the President, it reaffirmed the concept of Executive privilege but that the high privilege it would accord to a claim based on military, diplomatic, or sensitive national security secrets was lacking in this case. It quoted (at p. 710 of its opinion) *C. & S. Airlines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), as follows:

"The President, both as Commander-in-Chief and as the nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

It also quoted from *United States v. Reynolds*, 345 U.S. 1, 10 (1953), as follows:

"It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the

court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination, even by the judge alone in chambers."

It can be expected that Executive privilege when claimed properly will, except in unusual cases, serve to protect intelligence information in the hands of the Executive Branch, and may, in certain instances, as an inherent Constitutional power, allow the President to override laws (such as FOIA) requiring the divulging of general classes of information. The Court in the Nixon case did not, however, state that it would give the President an absolute privilege even on onational security matters. There the matter rests.

Recent Studies

United States v. Nixon triggered an explosion of books and law review articles, as well as other materials, concerning the authority and the limits of Executive privilege and the protection of Executive information. Among the leading law review articles have been those of A.D. Sofaer (Executive Power, 1977 Duke Law Review 1 (1977)), Raoul Berger (War, Foreign Affairs, and Executive Secrecy, 72 Northwestern University Law Review 309 (1977)), Morton Halperin and Daniel Hoffman (Secrecy and the Right to Know, 40 Law and Contemporary Problems 132 (1976)), and Abe Fortas (The Constitution and the Presidency, 49 Washington Law Review 987 (1974)). A long list of recent books, articles, and other materials, on Executive privilege is contained in the Congressional Research Service Report No. 79-158, April 2, 1979.

—Prepared by Maj. Gen. Lawrence Williams, U.S. Army Ret.

House Permanent Select Committee on Intelligence—Intelligence Charter

April 15, 1980

Hearings resumed on H.R.6588, the National Intelligence Act of 1980, with a focus on section 132 which would prohibit the use by intelligence agencies of certain types of cover (e.g. academicians, clerics, journalists, Peace Corps, etc.), but would not prohibit their voluntary cooperation. Appearing as a panel were: Reverend Anthony Bellagamba, Executive Secretary, U.S. Catholic Mission; Dr. James Wood, Jr., Executive Director, Baptist Joint Committee on Public Affairs; Dr. Ernest W. Lefever, President, Ethics and Public Policy Center; Professor Douglas Rendleman, American Association of University Professors; and Dr. Charles A. Moser, George Washington University.

Reverend Bellagamba appealed to the representatives to delete section 132 from the legislation for four specific reasons which he labeled: historical, circumstantial, sociological, and religious grounds. He elaborated by emphasizing the incompatibility between the role of the missionary and the espionage agent, the repeated explusions of missionaries from various countries due to accusation of assisting intelligence agencies, the possible erroneous linkage between missionaries and the CIA, and the damage incurred on the delicate services rendered by missionaries. He voiced regret that the National Council of Churches had not been invited to appear before the House to oppose this section as they had before the Senate Committee.

Dr. Wood stated that the Baptist position, at least on charters, was in absolute agreement with that of the Catholics. He cited passage of this section as a blatant affront to the separation of church and state guaranteed by the Constitution, a perversion of the church's mission, and a death sentence for innocent missionaries.

Dr. Lefever questioned the propriety of intelligence charters in the first place and the wisdom of denying the use of any particular group or profession as cover specifically. He stated, "All American citizens, regardless of station or profession, have an equal obligation to protect the state and the institutions and values for which it stands."

Professor Rendleman reviewed the conflict between academic values and the critical role of intelligence. He advocated that comprehensive guidelines are needed for the intelligence community which prohibit relationships that tend to violate the ethics of other professions. Dr. Moser, in contrast, objected to the blanket prohibition under consideration, insisting that "... the good achieved by such deception outweighs the evil of the deception itself."

House Permanent Select Committee on Intelligence—Secrecy Agreements

April 16, 1980

The Oversight Subcommittee opened hearings on secrecy agreements and prepublication review. Daniel C. Schwartz, General Counsel, National Security Agency; Lloyd E. Dean, Security Officer, FBI; George A. Zacharias, Vice Deputy Assistant Director for Security Services, Defense Intelligence Agency; Ernest Mayerfield, CIA; and Charles Wilson testified. These hearings reflect renewed interest in this area since the Snepp Supreme Court decision. (See April newsletter.)

Starting with the information that NSA does not have a prepublication review requirement, Mr. Schwartz reviewed the procedure for present rather than former employees. He explained the administrative procedure for such review applicable to current Agency employees and the threat of possible administrative action or criminal prosecution as a strong deterrent. He mentioned an on-going internal review by the DIA of the possibility of using a secrecy agreement, including prepublication review, that would apply to NSA as well as other agencies.

Appearing on behalf of Director Webster, Lloyd Dean reviewed the FBI employment agreement, in effect since 1976 and now under study as a result of the Snepp decision. He noted that the agreement's objectives are to provide an effective means of preventing unauthorized disclosure of information that could: (1) result in impaired national security, (2) place human life in jeopardy, (3) result in denial of due process to those under FBI investigation, or (4) prevent the FBI from discharging its responsibilities.

Mr. Zacharias stated that DOD does not have any standard form for all of its components. He provided the Committee with DIA form 22 (signed by each newly employed or assigned person with access to classified information) and form 364 (signed by personnel upon termination of employment). He advised that the wisdom and utility of a standard secrecy form is currently under study. He also stated that there is a long-standing DOD policy governing review of information proposed for public release that is independent of any signed agreement to submit for review.

April 24, 1980

The Oversight Subcommittee continued hearings on ramifications of the Snepp decision on April 24 with testimony from Theodore J. Jacobs, Director, Fund for Constitutional Government's Project for Open Government; Henry R. Kaufman, Vice President and General Counsel, Association of American Publishers; and Robert Lewis, Chairman, Freedom of Information Committee, Society of Professional Journalists. Each was concerned with the Snepp decision and the interpretation of the scope of that decision.

Mr. Jacobs warned that, "If these agreements are deemed to be necessary, however, they should be uniform, narrow in scope and coverage, and uniformly enforced." He insisted that the review system was biased against critics of the intelligence community, ". . . while the former Directors, supporters, and high-ranking officials are sometimes immune." He urged Congress to examine the problem in depth.

Mr. Kaufman insisted that lifelong CIA secrecy agreements are unconstitutional under the First Amendment. He recommended that the following areas be pursued: (1) Snepp sanctions must not be applied to publishers or others without direct, contractual relationships to the government; (2) prepublication review contracts should be strictly limited to employees with access to properly classified information involving foreign intelligence and counterintelligence; and (3) the ultimate authority for censoring materials be lodged in an independent reviewing agency. He advocated an approach by which government employees, like the press and other citizens, publish without prior restraint at their own risk. He asked Congress to study the jurisdictional, substantive, and procedural criteria involved, as well as potential remedies.

Robert Lewis emphasized the "chilling effect" the Snepp decision will create, asking whether any government agency ought to be the sole arbitor in such decisions. He offered the following alternatives to the contract requirement: (1) a statute of limitations, perhaps of five years, after which former CIA employees would no longer have to submit manuscripts for clearance; (2) reliance on criminal statutes; and (3) collection of civil damages only when the government has proven a former CIA employee's writings had disclosed classified information and impaired the national security.

Canadian Review of RCMP Intelligence Activities

In the 1970's, Canada was shaken by allegations of wrongful activities on the part of the Royal Canadian Mounted Police, strikingly similar to some of the CIA and FBI disclosures in this country. The reaction of that government was quite different from ours. In July of 1977, the Canadian Government established the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, composed of a prominent jurist as chairman, and two prominent members of the bar, with substantial staff support.

The Commission has recently published its First Report, dealing with that portion of its charge relating to the "adequacy of the laws of Canada as they apply to . . . policies and procedures" governing the "activities of the R.C.M.P. . . . in the discharge of its responsibility to protect the security of Canada." The Report addresses the laws governing and penalizing the disclosure of national security and criminal justice information—the Official Secrets Act, espionage laws and freedom of information legislation. As a whole, the recommendations (like the current Canadian law) are much more protective of sensitive information than the laws in effect and the proposals currently put forward in this country. Among the recommendations are the following:

Criminal Disclosure Legislation

4. WE RECOMMEND THAT new espionage legislation cover the disclosure of, or an overt act with the intention to disclose, information whether accessible to the public or not, either from government sources or private sources if disclosure is, or is capable of being, prejudicial to the security of Canada.
5. WE RECOMMEND THAT new espionage legislation include the following basic provision with respect to the offence of espionage:
   No person shall:
   (a) obtain, collect, record or publish any information with the intent of communicating such information to a foreign power, or
   (b) communicate information to a foreign power,
   if such person knows that the foreign power will or might use such information for a purpose prejudicial to the security of Canada or acts with reckless disregard of the consequences of his actions to the security of Canada.
9. WE RECOMMEND THAT new legislation with respect to the disclosure of government information should make it an offence to disclose without authorization government information relating to security and intelligence.
10. WE RECOMMEND THAT new legislation should empower the court trying an offence of unauthorized disclosure of government information relating to security and intelligence to review the appropriateness of the security classification assigned to such government information.

14. WE RECOMMEND THAT the communication of government information relating to security and intelligence or the administration of criminal justice by a person who receives such information, even though such information is unsolicited, be an offence.
15. WE RECOMMEND THAT it be an offence to retain government documents relating to security and intelligence or to the administration of criminal justice notwithstanding that such documents have come into the possession of a person unsolicited and that there has been no request for the return of such documents.

Graymail

18. WE RECOMMEND THAT with respect to section 14(2) of the Official Secrets Act which permits *in camera* proceedings that:
    (a) the provisions of section 14(2) be retained and made applicable to all offences, either offences in new legislation or in the Criminal Code, in which the Crown may be required to adduce evidence the disclosure of which would be prejudicial to the security of Canada or to the proper administration of criminal justice. . . .
38. WE RECOMMEND THAT the provisions of section 41(2) of the Federal Court Act not apply to security and intelligence documents or their contents and that new legislation be enacted providing that
    (a) when a Minister of the Crown claims a privilege for such information on the grounds that its disclosure would be injurious to the security of Canada; or
    (b) any person hearing any judicial proceedings is of the opinion that the giving of any evidence would be injurious to the security of Canada

    the matter shall be referred to a judge of the Federal Court of Canada, designated by the Chief Justice of that court, to determine whether the giving of such evidence should be refused. . . .

Freedom of Information

31. WE RECOMMEND THAT there be a specific exemption from disclosure in freedom of information legislation of the whole of all security and intelligence documents relating to or consisting of:
    1. security and intelligence operations
    2. security intelligence information
    3. information obtained from confidential sources
    4. policy papers and intelligence analyses
    5. manuals and directives of security and intelligence agencies
    6. management, personnel and financial information of security and intelligence agencies sources information
    7. resources information
    8. information received in confidence from foreign governments and security and intelligence agencies
    9. structures of security and intelligence agencies
    10. intra-governmental structural relationships
    11. inter-governmental structural relationships
33. WE RECOMMEND THAT any documents not included in the previously mentioned exemptions which could, if released, reasonably be expected to threaten the security of Canada, be exempted from disclosure under freedom of information legislation.
34. WE RECOMMEND THAT any information relating to the administration of criminal justice the disclosure of which would adversely affect
    (a) the investigation of criminal offences;
    (b) the gathering of criminal intelligence on criminal organizations or individuals;
    (c) the security of prisons or reform institutions; or,
    (d) might otherwise be helpful in the commission of criminal offences

    be exempted from disclosure under freedom of information legislation.

    Recommendation 37 would provide for *administrative* review of denials of FOIA requests on security or criminal justice grounds—but no *judicial* review except for criminal justice denials based on the limited grounds set forth in clauses (c) and (d) of Recommendation 34.

Copies of the First Report may be obtained by mail from Canadian Government Publishing Centre, Supply and Services Canada, Hull, Quebec, Canada K1A 0S9 (Catalogue No. CP32-37/1980-1E, ISBN 0-660-10493-8. Price: $5.95 Canada, $7.15 other countries). In addition, three background studies prepared for the Commission have been published and are available from the same address:

"Parliament and National Security" by Prof. C.E.S. Franks, Queens Univ. ($3.50)

"Ministerial Responsibility for National Security" by Prof. J.U.J. Edwards, Univ. of Toronto ($5.25).

"National Security: The Legal Dimensions" by Prof. M.L. Friedland, Univ. of Toronto ($8.00).

Excerpts from Statement of James R. Schlesinger, April 2, 1980

The question before this Committee and the Congress is not whether American intelligence should have a charter or enabling legislation. Such legislation has existed in skeletal form since the National Security Act of 1947. The question before you is whether to repeal the existing legislation and to replace it with a lengthy and detailed charter specifying countless do's and don'ts, establishing (until such legislation is again changed) the criteria, limits, and obligations not only for the intelligence community and the American people but for the entire international audience as well.

I submit that the proper path to follow to have an effective intelligence community for the United States is to retain the skeletal form and to amend it as necessary. Repealing the existing legislation and replacing it with newly formulated legislation will, by itself, create confusion by wiping out over 30 years of court decisions. Substituting a detailed charter will restrict future flexibility, severely handicap liaison relationships and agent recruitment, and grossly curtail special operations capabilities. I believe a detailed charter is an inherently bad idea—that would permanently damage the intelligence capacility of the United States.

. . . While virtually all democratic states maintain intelligence establishments, it is significant that other democracies have not seriously considered this type of legislation. The comprehensive legislative charter is an idea that was germinated in the investigations and exposures, much of it ill-advised, that started in 1975. The comprehensive charter is an idea whose time has passed—I believe beneficially passed. Much has been said in recent months about the desirability of easing the restrictions that have been placed upon the CIA in recent years. It is sometimes suggested that the charter would assist in that process. Regrettably, it would not. A charter would intensify restriction. And more restriction, by any other name, is still more restriction.

In the last five years, incalculable damage has been done to the U.S. intelligence establishment. While we have been engaged in a quest for purity and in extended discussion of the meaning of righteousness (or of self-righteousness), the intelligence instrument itself has been deteriorating. Morale has declined. Recruitment, internal and external, has suffered. The capacity for intelligence gathering has suffered concomitantly; both special operations and counterintelligence have been severely damaged. Our actions have been viewed with amazement by foreign intelligence agencies and foreign governments—with regret and apprehension by our friends and sheer *schadenfreude* by our enemies. Thus, the immediate goal for this Nation—and for this Committee—should be the rebuilding and revitalization of the intelligence establishment.

Above all, it is time to stop the self-abuse. The practice of self-flagellation is not confined to Shiite Muslims in the month of Moharram. The United States has spent much of the last decade indulging in self-flagellation; much of it, though certainly not all, at the expense of the intelligence community. . . .

. . . Intelligence agencies must operate in a penumbra of jurisprudence, in the grey area of the law. Much effort—misguided effort—has been devoted to attempting to compress all intelligence operations within a narrowly defined framework of law. To the extent that such efforts are pushed to their logical conclusion, it will inevitably result in intelligence operations far purer than the world's experience indicates is practicable—and far less effective than this Nation requires. . . .

This Committee has a creative role to play in the larger national interest. What the intelligence community today requires is time and the room for maneuver in which to rebuild. It requires stability. It requires a renewed sense of mission. It requires a clear and continuing indication of public support. In these matters, I hope that this Committee can guide the way.

ABA/UNIVERSITY OF CHICAGO LAW SCHOOL CONFERENCE ON INTELLIGENCE LEGISLATION

Thursday, June 26 Dinner: Honorable Frank Carlucci

Friday, June 27 *Welcoming Remarks:* Morris Leibman, Dean Caspter and Honorable John Marsh

Keynote Speaker: Honorable James Schlesinger*

Session I: Overview of Intelligence Charters

Moderator: Raymond Waldmann

Speakers: William Miller, Kenneth Bass and Professor Roy Godson

Session II: The Role of the Judiciary and the Standards Applied to Intelligence Operations

Moderator: Professor Antonin Scalia

Speakers: Honorable Edward Levi, Jerry Berman and Professor Robert Bork

Luncheon Speaker: Honorable William Webster

Session III: The Congressional Role

Moderator: Anthony Lapham

Speakers: Representative John Ashbrook,* Professor Ernest Gellhorn and Frederick Hitz

Saturday, June 28

Session IV: The Public's Right to Know and Operational Secrecy

Moderator: Michael Uhlmann

Speakers: Daniel Silver, Floyd Abrams and Angelo Codevilla

Luncheon Speaker: Mr. Frank Barnett

*Invited

House Judiciary Committee Civil and Constitutional Rights Subcommittee—Graymail

April 24, 1980

Hearings on H.R.4736, Graymail legislation, resumed after a hiatus with testimony from the Department of Justice, the Department of Defense and the CIA.

George Clarke, Deputy General Counsel, CIA, made it clear at the outset that passage of either H.R.4736 or H.R.4745 (the Administration proposal) would be a significant improvement over the present situation. He advised that current law makes criminal litigation of cases involving classified intelligence information severely complex. He reviewed that both bills provide for a pretrial conference to consider classified information, permit this conference to be held *in camera* and provide for an interlocutory appeal, allow alternative forms of disclosure, and permit writings, recordings, and photographs of classified information to be admitted into

evidence without change of classified status. All concurred that final agreement on a graymail bill was near, and that the required and needed uniformity for these procedures would be most welcome by all concerned parties.

CIA Study Details Soviet Covert Action and Propaganda

On February 6, 1980, Mr. John McMahan, Deputy Director for Operations, Central Intelligence Agency, presented to the Permanent Select Committee on Intelligence of the House of Representatives by far the most detailed analysis yet made public of Soviet covert action techniques and the manner in which these techniques are orchestrated with Soviet propaganda and diplomacy. The study, which was prepared at the request of Congressman Ashbrook, ran over 100 typewritten pages, and was supplemented by an annex containing 16 examples of Soviet forgeries of U.S. Government documents and a technical analysis of these forgeries.

In dealing with covert action techniques, examples were given of the Soviet use of propaganda, clandestine radios, foreign communist parties and international front organizations and "friendship societies", agents of influence, and disinformation to manipulate foreign governments. The study also dealt with the Soviet use of economic warfare and Soviet support for terrorist and paramilitary operations.

The study presented a detailed analysis of the Soviet campaign against the proposed modernization of the NATO Theatre Nuclear Forces (TNF), focusing on the Soviet campaign against the "neutron bomb". These studies underscored the skillful orchestration of diplomacy, propaganda and covert techniques in support of a single objective.

In the case of the "neutron bomb" it was pointed out that in late January, 1978 every Western government received a letter from Leonid Brezhnev warning that the deployment of the "neutron bomb" would constitute a serious threat to detente. These announcements received heavy media coverage worldwide. On the heels of this, Western parliamentarians received similar letters from members of the Supreme Soviet and Soviet trade union officials sent letters to union organizations and leaders in the Western countries. The next stage was a whole series of conferences under the auspices of well-known international front organizations, sometimes in partnership with other organizations like the International Atomic Energy Agency, which is a United Nations body. In late March of 1978, the Dutch Communist Party (CPN) was instrumental in organizing an "International Forum Against the Neutron Bomb" in Amsterdam, which brought in sympathizers from all over Europe and culminated on March 19 in a march of some 40,000 anti-"Neutron bomb" demonstrators.

In passing, it should be noted that while the appellation "neutron bomb" has been used occasionally—and incorrectly—in the Western press, the Soviets have employed this appellation consistently in their propaganda because it has far greater scare potential. To be precise, we should speak of "neutron weapon". Neutron weapons, by their nature, are designed for discriminating use on the battlefield and not for destroying cities. They do not pose a danger to the civilian population because they do not produce radioactive fallout and their lethal effect would have a maximum radius of about 1000 yards. However, used primarily as artillery shells, they would be deadly to tank formations because the burst of neutrons could penetrate the heaviest armor to kill or incapacitate tank crews. The possession of an arsenal of such weapons would put NATO in a position to nullify the overwhelming advantage which the Soviets now possess in tank divisions. That is why the Soviets singled out the proposed deployment of neutron weapons for special attention. And that is why their propaganda presented the "neutron bomb" as the most horrifying of all nuclear weapons, when, in reality—as nuclear weapons go—it is without question the most humane.

Summarizing the scope of the Soviet effort on the "neutron bomb," Mr. McMahan estimated that, over a three year period, the Soviets have put over $100,000,000 into this campaign in the form of subsidies to West European communist parties and front groups, the organization of front operations and gatherings, the suborning of non-communists, etc. This concerted effort, the report noted, paid off. It quoted Janos Berecz, Chief of the International Department of the Hungarian Communist Party, as saying that "the political campaign against the neutron bomb was the most significant and most successful since World War II." And it noted that the Soviet ambassador to the Hague was subsequently decorated by his government in recognition of the success which the Dutch Communist Party had had, under his direction, in organizing the March 17-19 demonstration in Amsterdam, which was the high point of the anti-neutron bomb campaign.

—Prepared by David Martin.