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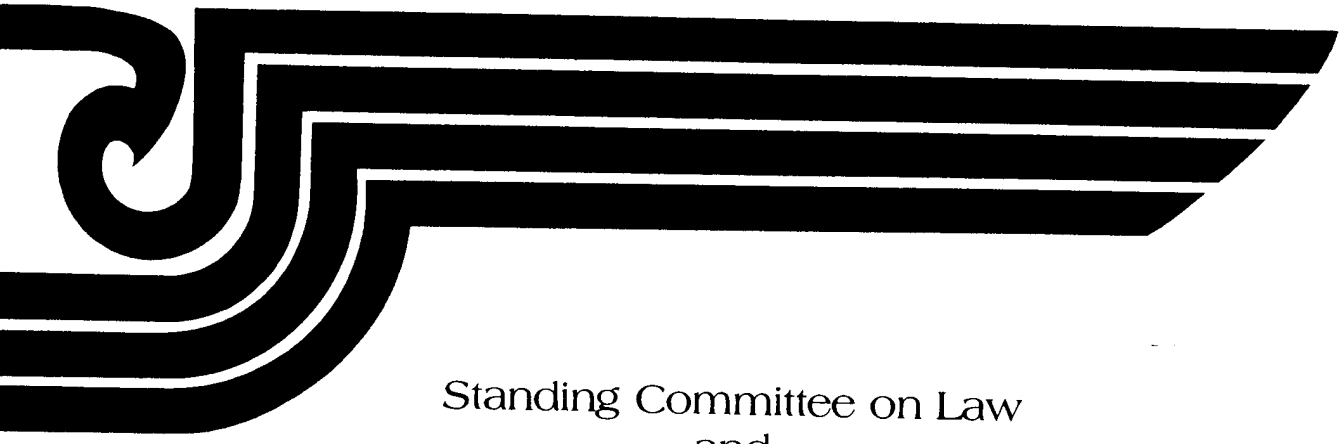
CONFERENCE ON INTELLIGENCE LEGISLATION



Standing Committee on Law
and
National Security
American Bar Association

June 26-28, 1980
University of Chicago Law School
Chicago, Illinois

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FOREWORD

As part of its continuing effort to enrich public understanding of critical national security issues and, particularly, to involve the Bar in their resolution, the American Bar Association's Standing Committee on Law and National Security sponsored a Conference on Intelligence Legislation, June 26-28, 1980, at the University of Chicago Law School, Chicago, Illinois. The purpose of the Conference was to provide a forum for a broad-gauged discussion of the relevant issues by representatives of groups and organizations with special competence and interest in intelligence matters. The desired representation was achieved through the participation of more than 150 present and former government officials, media representatives, law professors, private practitioners, American Civil Liberties Union officials, members of the intelligence community, and leaders of the business community.

The substantive program, revolving around the competition between the public's right to know and the government's need to protect information generated or utilized in its operations, consisted of presentations by leading specialists on media, civil rights and national security law. The specific subjects included the history of intelligence, the "great debate" concerning the need to balance individual and national security interests, the specific legislative proposals and actions of the 1970s, and the anticipated developments in the 1980s. The format provided ample opportunity for extensive group participation, including partisan debate which, although heated at times, never lost its constructive tone. The amount of light generated far overshadowed the accompanying heat.

The positive response to the Conference has encouraged the Committee to prepare the written proceedings that follow. Convinced that an informed approach to national security issues is key to the survival of an open society, the Committee will pursue its enrichment effort.

Morris I. Leibman
Chairman, Standing Committee on
Law and National Security

Chicago, 1980

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CONFERENCE ON INTELLIGENCE LEGISLATION

AMERICAN BAR ASSOCIATION

June 26-28, 1980
University of Chicago Law School
Chicago, Illinois

Welcome and Introduction: Mr. Morris I. Leibman
Chairman, Standing Committee on Law and National Security, ABA

Welcome to our Conference on Intelligence Legislation. We of the American Bar Association are delighted to join in this program with our host partner, the University of Chicago Law School, headed by Dean Casper. One of our friends, whom many of you know, wrote me this morning from the Middle East saying that he hoped we'd do well because he, too, is trying to learn the difference between intelligence legislation and intelligent legislation. In our previous workshops and conferences the first evening, this evening, is usually reserved for a dinner for the panelists and the people on the program. When we were advised that our speaker for the evening would rearrange his difficult schedule to fly in to be with us tonight, we decided his remarks should be available to all of the participants. We are delighted that Mr. Carlucci has made this possible.

Frank Carlucci is truly a man of all seasons. He's been in business and his government service includes the Navy, Foreign Affairs, and Domestic Affairs. He was educated at Princeton and Harvard, served in the Navy, and joined the Foreign Service in 1956, spending a good deal of his time in Africa and Brazil. I first met Frank in 1969, as he joined the Office of Economic Opportunity and became its Director at a time when I was Chairman of the President's Council. His ability was recognized by all, and he went on to become the Deputy Director of the Office of Management and Budget in the White House and then served as Undersecretary of HEW. While Frank was there, they didn't take the "E" out.

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The President designated him as United States Ambassador to Portugal in 1974, and he served in that sensitive post for three critical years. His superior service has earned him numerous awards from the State Department, the Defense Department, and HEW. Certainly, we are fortunate that a man with such broad, deep, and relevant experience was selected as the Deputy Director of the Central Intelligence Agency, to which post he was appointed by the President on February 18, 1978. We are delighted to have him with us, and I give you Director Carlucci.

Honorable Frank Carlucci
Deputy Director
Central Intelligence Agency

Thank you, Morry, for those very kind words. I am delighted to be with you tonight, and I congratulate you, Morry, and Dean Casper for organizing this conference. I think this kind of conference can do a great deal to illuminate the very difficult issues that our country faces in the intelligence area. And as you begin your deliberations, let me start off with a reminder. You will be studying in depth the role of the Congress, the role of the Executive, and the role of the Judiciary in structuring the legal framework for our intelligence agencies. In doing this you will necessarily bring to bear traditions of the American legal profession and the American governmental system. But, as you do this, I think it is important that you bear in mind that those of us in the intelligence agencies, that GS-12 or 13 up there in some other country trying to recruit an agent, operate under circumstances where our rules are not necessarily applicable. Our cultures are very different.

I'm reminded of the time when I was a young Foreign Service officer back in 1960, and I'd been assigned to the Congo, Zaire, then Leopoldville. It was shortly after independence and the Congo was in chaos. We had a visit from three American senators--Senator Gore, Senator Hart, and Senator Neuberger. I was named as escort officer and I had arranged for them to have lunch at the home of the President of the Congolese Senate, a man named Victor Cumarico. In those days you very seldom saw the wives of the Congolese, but as we came in the door a woman came up who I introduced as his wife. We were sitting around having drinks before lunch (I was interpreting), and another woman came in and shook

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hands all around, went over and sat down next to the first woman. Senator Gore turned to me and said, "Who is she?" And I said, "Well, I don't know, maybe she's his wife." He said, "I thought you said that first woman was his wife." I said, "Let me ask him." I asked him and he said, "Oh yes, both of them are my wives." Well, with that the interest of the American senators picked up considerably. And Cumarico said, "Oh, you must really understand that over here our customs are very different from yours. From where I come from in the Leopold district of the Congo, I'm a big tribal chief and as a tribal chief I'd normally be entitled to five or six wives. But since I'm a Catholic, I have only two."

So if we think about it, the strangeness of the intelligence business operating in other cultures becomes apparent. We, in organizations like the CIA, must go forward with our task, often in disregard of foreign law. And there's a paradox here, because in this country we are sometimes mesmerized by our legalisms when we structure our environments in which our intelligence agencies must live. But in so doing we must be careful not to block out the realities of our operating environment. The decision makers in our country need a great deal of information. This information is not easy to come by, by definition. We in the intelligence business go after the most difficult and, by definition, other countries want to conceal it from us. Our job is to get it. We do so in many cases by establishing a contractual relationship, something very familiar to you lawyers. The agent provides a service, information, and we frequently but not always provide some compensation, salary. There are two significant differences from the usual contract. One is that in many instances that contract may break the law of the agent's host country. And the second is that that contract by nature must be secret. Now, I don't think any of us should make any apologies for this procedure. When it comes down to the hard facts, our country has no alternative. The problem that we all face, and you as lawyers in particular face, is how we sanction this kind of activity within a carefully drawn legal framework.

The 1947 National Security Act simply said do what's necessary. It dodged the issue. Or perhaps it is possible, I personally think it is, to be more specific; but in being more specific, we must always bear in mind that we are legalizing an activity that is inherently antagonistic to the interests of other countries in which that activity is going to be conducted.

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There's another upside down element to the intelligence business. In our society openness is a virtue. The government can't be closed. We have sunshine laws, open advisory committee meetings; we're perhaps unique in the world in this aspect. But in the intelligence business we must by nature circumscribe our openness. Secrecy is absolutely imperative. Well, you say, that's a truism. Of course, we all know that. But I can tell you quite frankly in the two and a half years that I've been in the CIA, getting this simple concept across has been our single most difficult problem. Our problem throughout the world is that nobody believes we can keep a secret. And it's not just a simple problem of leaks. Quite frankly it's the entire atmosphere in which we operate. As you're all aware, we're living in the post-Watergate, post-Vietnam syndrome where the emphasis has been placed on the investigative reporter, the inspector, the oversight mechanism, the leaker who almost inevitably takes on a moral mantle and says he's a whistle blower. All of these people and functions have a very legitimate role. No question about it. I don't mean to gainsay it. So does the doer have a legitimate role and we have to strike a balance. I would suggest to you the balance has been tilted a bit away in government from the man who must accomplish the mission. We need to give him some incentives, too. We need to give him some tools. In the intelligence business the principal tool--I'm almost tempted to say the only tool--is secrecy, because nobody is going to impart information to an intelligence representative if he thinks he's going to see it in the open press and if this information is going to be traced to him. This inability to protect confidentiality of the information given to us has hurt us.

Now our critics say, "Demonstrate this." Well, you as lawyers know how difficult it is to prove a negative. Nobody is going to come up to you and say, "Well, I didn't give you this information for this reason." We've had some cases of people who have said, "I can't trust you; therefore, I'm signing off." But in the vast majority of cases people just discontinue contact or don't establish contact in the first place, and you never know how much information you didn't receive. But time and time again we are asked, "Well, is this information going to go to the Congress? Can you protect me? What about the Freedom of Information Act?" When you're involved in high stakes, nobody wants to play with a partner who can't control his own hand.

Before we frame new laws in any business, including the intelligence business, I think we need to be clear on the existing laws. Some moments ago I

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suggested that because of the world in which we operate some of our usual norms do not apply. I would suggest also that our standards have not remained constant but have changed over time. We have had a propensity to indulge in retroactive morality and to give it a legal base. We have perceived in the seventies what seemed to have been a good idea for law in the fifties and sixties. We have seen numerous accusations that intelligence agencies have acted illegally when, in fact, the law has only been interpreted as such in recent times. An example is the retention by CIA of counterintelligence information on U.S. persons. Everybody readily concludes that that's illegal, although the CIA has long had counterintelligence responsibilities and much of the same kind of information is held by other agencies without any problem. Sorting out this particular issue has been complicated. It has now been determined that CIA can act in this area only in cooperation with the FBI. That is a recent development, not as much of the press would have you believe the law as it existed in the sixties. Of course we recognize that times have changed, and we in the intelligence business don't want to turn the clock back. To the contrary, we think our mission is to look ahead into the 1980s and to put all the polemic behind us. And in so doing we welcome guidelines and safeguards through statutory authority and through the surrogate process. These are helpful, providing of course that they don't impede our ability to do our job.

As we've gone through successive iterations of intelligence legislation, there are some concepts that have arisen that I personally consider a bit curious or difficult. One is that we can reduce every detail of the intelligence business to statute. The original intelligence charter, S. 2525, 273 pages, had an array of prohibitions, restrictions, and reporting requirements. There was even one that said CIA should be prohibited from covertly taking action likely to lead to flood, pestilence, plague, or mass destruction of property. And in CIA there was a tongue-in-cheek comment that we ought to oppose this just to keep our options open. But the sting was there. I think all of us, including the vast majority of people on the Hill, now realize that we can't legislate the intelligence business in that kind of detail.

There is another interesting concept, legislation which is perhaps not unique to the intelligence business but which runs somewhat along the following lines. If

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you don't like the policy--kill the instrument. This has happened with covert action, our ability to try and influence events in other countries clandestinely. There were people who objected to how this instrument was used--in Chile, Angola, perhaps elsewhere. Fair enough, but saying that you can't have this capability because we object to that policy is like saying we can't have an aid program around the world because we object to the way aid was handled in Brazil in 1966. It's even gone one step further, in my judgment. We created an optical illusion, because we said our country will have a covert action capability. All that has to happen before you start one of these operations is for the President to make a finding and you brief eight committees of Congress. That's two hundred members of Congress, perhaps fifty staff. Now, fair enough, we haven't always had to brief that many members. But as long as the requirement exists it is a significant deterrent to a flexible instrument that purportedly has been given to the President.

Despite the problems that I've mentioned, it seems to me that we have reached agreement in the body politic on some of the very large issues that have faced our country in the intelligence area. First of all, we have agreed that we need an effective intelligence organization; we need an effective CIA. Some of you may have seen the ABC program the other night on intelligence; the commentator was Britt Hume. He interviewed me for some forty minutes--none of the interview was used on the program--but the theme he was following in the interview was how in the world have you guys pulled the wool over the eyes of the Congress and the American people, because four or five years ago we were ready to tear you apart and now we find this outpouring of sympathy for CIA. I allowed as how I didn't exactly see an outpouring of sympathy, but I detected a lot of support and I presumed that some of the arguments we were making carried a certain amount of weight. But the fact is that the American people, perhaps as never before, realize how important intelligence is to their well-being and we can no longer continue to pull it out by the roots just to see how it's growing.

We have decided that the U.S. government will have covert action capability and that it will be housed in the CIA. I think there is a widespread consensus on the Hill that we do need to cut down the reporting requirements from eight

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committees to two. And if there's any bill that will pass this year, I think it is a bill that cuts down on the Hughes-Ryan reporting requirement. There is a consensus that CIA needs to protect the information it receives. The only issue is how to do this. There is a consensus that U.S. citizens must receive a full measure of protection of their constitutional rights vis-a-vis intelligence organizations. And there is a consensus that there will be effective oversight of our intelligence organizations. I'm pleased to report to you that, in my judgment at least, oversight is working well. We don't always agree with our friends on the committees and vice versa. We get criticism, we get support, and we have a heated dialogue. The important thing is that it's there and it's working and it's working well in my judgment.

These new aspects of agreement are now very much a part of intelligence community life. There are still some issues that remain to be resolved. One of these is the whole question of statutory access to CIA intelligence information. Is it necessary for the oversight process? There are those who argue that it is. We've had a relationship for the past two years which we both say is satisfactory. Let's continue that relationship where we are furnishing the information that you need. If you build in a statutory requirement, there must be some exceptions, otherwise you raise questions around the world. I myself have been told by people who were giving us very important information, "We will give you this information providing you promise us that you will not give it to the Congress." I was able to make that commitment because if I passed that kind of a commitment onto the Congress today, they respect it. With a statutory right of access, there is no way that I could make that kind of commitment.

There remains to be worked out the question of details on the collection of intelligence on U.S. persons. Now there's been a lot of debate on the tensions between civil liberties and intelligence. As a practical matter, looking at its pragmatic aspects, I think this debate has been overdone. We don't need a lot of intelligence on Americans. The problem is that when we do need it, it's liable to be critical. We can all think of cases where intelligence collection on an American citizen might be important: a dual national who is in a high position in a particularly critical country or the American scientist who might be engaged in the building of a bomb for a potential nuclear proliferator.

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The question, in my judgment, is not whether or what kinds of thresholds should be built. And we agree that there ought to be substantial thresholds. So we see it not as an either/or question but as essentially a design question. There is the issue of how much exemption there should be from freedom of information concepts. And here there's been a good deal of misunderstanding. The press would have you believe that we have sought a blanket exemption from the Freedom of Information Act. We have not. We have sought the authority to exempt our most sensitive sources and methods from release and from judicial review. This position has been supported by the Justice Department, but we will continue to respond to first-person requests and to requests for our finished product.

Also unresolved is the form identities legislation should take. Everybody agrees that the practice of deliberately exposing CIA personnel and CIA agents overseas with the avowed purpose of destroying our intelligence organizations is abominable. The question is how to deal with this practice without infringing on First Amendment rights. We believe this can be done and we hope that it will be done this year.

These are all issues that you will be debating and we will read the results of your deliberations with great interest. But let me give you, for just a minute before closing, a non-lawyer's appreciation of what is at stake. The 1980s, in my judgment, will be a very difficult period. We are finding that our nation's interests are increasingly intertwined with developments in all parts of the world. We learned in Afghanistan that it's not sufficient to know Soviet capabilities. We have to know their intent. We learned in Iran that we need to have intelligence on political/social developments. We learned in Central America the importance of intelligence in subversive activities. And we learned in the oil crisis the importance of intelligence collection and analysis in the resource areas. The U.S. and Soviet strategic forces are now more in balance than ever before. My judgment is Soviet leaders see themselves free to undertake additional Afghanistans and Ethiopias as long as they don't challenge vital U.S. interests. Under the protection of their strategic power they can wield their very substantial conventional power and their very substantial capability for political action.

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There are two uncertainties in Soviet society. They have their problems: rising consumer expectations; labor shortages; declining growth rate; unrest in Eastern Europe; topping out in oil production which is perhaps the most important transition. I frankly doubt that we should take any satisfaction in the problems of the Soviet Union. We know very little about the leadership that is likely to come in after the transition phase--post-Stalin leadership. We have a conservative leadership in the Soviet Union right now. Nobody knows how a new leadership under the pressure of the topping out of oil production, consumer expectations, and the other problems I mentioned, will react. The 1980s clearly will be a difficult period in our relations with the Soviet Union. Similarly, there will be no let up, in my judgment, in the problems of the Third World. In addition to the aspirations of the Third World, we have a growing division between the upper and lower tier of Third World countries. And then in Europe we see an emerging economic power that could lead to stronger political positions on the part of our allies.

The ramifications of all of this for intelligence are profound. There is less and less margin for error. We must succeed in getting good intelligence with regard to both intentions and capabilities. During the period to come, intelligence could make that crucial margin of difference. There are those who think that the paramount threat in this country comes from within, from the excesses of our own institutions. As one who has lived in a number of countries where democratic institutions have been destroyed, I share that concern. But I've also seen Soviet expansionism at work, and that danger is no less real. And what we're talking about is not a tradeoff. It seems to me we can certainly accommodate concerns on both sides of the intelligence issue if we can just control our emotions in channeling our intellects. You as lawyers are the dispassionate element in American society. We need your help. The tools of the profession here assembled are those of law. Thanks to the legal system, the richness of the legal system, there are a variety of measures that can be seized upon to work our will. And thanks to the constitutional framework of that system, the levers and gears of our self-governance are never very far away.

While the tools are there in profusion, it must take the wisdom of the law to ensure that the measures apply to stimulate good help without permitting

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abnormal growths or flooding the system with toxic medicines. Lawyers know only too well that the cry "there ought to be a law" takes us only to the starting point of inquiry. Thank you.

QUESTION PERIOD

The question period following Mr. Carlucci's address included discussions of what type of Freedom of Information Act could the CIA support; what type of legislation does the CIA support to prevent agent disclosure; what kind of oversight can be had without making the Agency ineffectual; and the power of the Congress, through funding, to control, slope, and direct Agency activities.

Welcoming Remarks: Mr. Morris I. Leibman
Chairman, Standing Committee on Law and National Security, ABA

Welcome to this morning's session. I thought I might just take a few brief moments and give some little history of the Bar Association's interest and antecedents in this area. In 1961, almost twenty years ago, Lewis Powell, who was then Chairman, prepared a report on "The Educational System and the Need for the Comparative Study of Totalitarianism, Communism, and the Free Society." In this report he said that the first objective of the ABA as stated in its constitution is to uphold and defend the Constitution of the United States and maintain representative government. If the ambitions of the communist dictators are realized, our constitution and representative government in America will be destroyed. In a broader sense, freedom under law would be destroyed everywhere. The preservation of this basic freedom, which embraces all of our cherished freedoms, traditionally has been within the unique competency and responsibility of lawyers and judges. For some quarter of a century we have conducted numerous programs, including law professor workshops which are held at various institutions such as the University of Chicago, with the University as a co-host, and with the cosponsorship of the International Law Section. We have had a number of these and we're delighted to be here at the University of Chicago.

We also present a program each year at the Association of the American Law Schools. In 1979, our featured speaker was our Counselor to the Committee, Edward H. Levi, who spoke on "The Intelligence Issues in the Open Society." In

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1980, at the last session, our Committee member John Norton Moore spoke on "The Developments in the Field of National Security Law."

The activities have multiplied since we became interested in the role of intelligence in a free society. As that area became more recognized, and we understood that we were developing a new body of law, this again became of interest to the Committee, and we were very fortunate at that point in having Professor Scalia, Ray Waldmann, and Mike Uhlmann join us in this work.

The last large conference was held in December 1979 in Washington and many of you were there. Those proceedings have now been transcribed and copies are available for everybody.

Four years after I graduated from this law school, when the building was on the other side, an older but beautiful old Gothic, and Herb Fried in the audience sat next to me, a beautiful male child was born in Hamburg, Germany, to the Casper family. Forty-three years later he is our host and the celebrated Dean of the Law School. I want you to know a little about his distinguished career. He was educated in Hamburg, studied law at the Universities of Freiburg, Hamburg, and Yale. He received a doctorate from the University of Freiburg in 1964. From 1964-66 he was a member of the faculty of the Political Science Department of the University of California at Berkeley. He was a visiting Professor of Law at the Catholic University of Louvain in the fall of 1970. He's known widely as a great writer and expert in the field of constitutional law, constitutional history, the law of the European Community, and our own Supreme Court. He is a real master of comparative law and jurisprudence. I don't want to embarrass him any further by reading his honors, degrees, and awards. Dean Casper.

Dean Gerhard Casper
University of Chicago Law School

Morry, as Dean, one gets used to being introduced. You surely get the prize for the most unique introduction yet. It is a great pleasure indeed, ladies and gentlemen, to welcome you to this conference at the University of Chicago Law

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School. In his opening remarks Mr. Leibman did not make clear that without his moving spirit there would have been no conference. If you have never seen one before, look at him closely. Mr. Leibman is a conditio sine qua non. So is my colleague, Professor Scalia, who has applied to the conference project the combination of acute academic inquiry and high level government experience which has so greatly enriched the Law School since he joined its faculty in 1977.

If I may be permitted a decanal type of remark, I view this conference in part as marking the special place of the University of Chicago Law School in the field of scholarship concerned with the separation of powers. I think it is fair to state that no other law school has so consistently recognized the extraordinary importance of separation of powers issues in its research and teaching. From the past I would single out only the names of Ernst, Freund, and Crosskey. As to the present faculty, at least five of its members have concerned themselves in major ways with these matters. In addition to Mr. Scalia, I may mention Edward Levi, Philip Kurland, Kenneth Dam, and--last and least--myself.

In the last decade or so, there has emerged from Congress a type of legislation that, while not unprecedented, is novel in its frequency and particular applications. I have defined this type of legislation as framework legislation, a term which is slowly gaining recognition in the literature. Framework legislation attempts to ensure that the collective judgment, especially of Congress and the President, will apply to important areas of public policy. It interprets the Constitution by providing a legal framework for the governmental decision-making process. Examples of such legislation are the War Powers Resolution of 1973, the Congressional Budget and Impoundment Control Act of 1974, and the National Emergencies Act of 1976. In part, framework legislation results from the increasing awareness that the judicial model of constitutional constraints is not an all-purpose model.

Charter legislation, which sets up a framework for the intelligence activities of the United States, is obviously of the same family--formally as well as substantively. In these remarks I can be concerned only with the phenomenon itself, not the particular substantive problems associated with these legislative endeavors. Whatever these may be, and whether Congress will enact such a

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framework or not, the separation of powers issues will not go away. Intelligence activities are simply too interrelated with the great questions of foreign policy and, indeed, war and peace. These are not just political but also constitutional questions. Furthermore, nagging doubts persist whether presidents and their experts are the sole owners of the perspective and knowledge needed to define the national interest in a hostile and complex world.

In facing the legal questions it will not do to juxtapose the simple world of the early republic with the complexities of the modern world. This argument proves too much, condemning the entire Constitution to irrelevancy. But one may also doubt its accuracy. At the time of the Constitutional Convention, Europe presented America with incredibly intricate foreign policy problems. The Europe of that period was a tangled skein of shifting alliances, dynastic ambitions, incipient revolution, and trade rivalries. The framers undoubtedly came to appreciate the complexity of foreign affairs in a troubled world.

Nineteen-seventy nine saw the uncelebrated two hundredth anniversary of the birth of Joseph Story. In his Commentaries on the Constitution, which date from 1833, Story said about the ultimate question of war and peace and the matters closely related to our subject here today, the following, and I may quote: "But in the exercise of such a prerogative, as declaring war, dispatch, secrecy, and vigor are often indispensable, and always useful towards success. On the other hand, it may be urged in reply, that the power of declaring war is not only the highest sovereign prerogative; but that it is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation and the successive review of all the councils of the nation. War, in its best state, never fails to impose upon the people the most burthensome taxes and personal sufferings. . . . It is sometimes fatal to public liberty itself, by introducing a spirit of military glory, which is ready to follow, wherever a successful commander will lead, and in a republic, whose institutions are essentially founded on the basis of peace, there is infinite danger, that war will find it both imbecile in defense, and eager for contest. . . . The cooperation of all the branches of the legislative power ought, upon principle, to be required in this the highest act of legislation, as it is in all others." I hope we will have a very successful conference.

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Morris Leibman

There are a number of very technical lawyers in the audience who pointed out to me that in the first draft of the program we had some references to Mr. Schlesinger. Then it said John Marsh. Well, that was done deliberately because when Jim said he might be here, we knew how uncertain he was and we made arrangements immediately that Jack would be here to either introduce him, welcome him, or substitute for him. But more than substitute for him, we are proud of Jack as being a Committee member of tremendous experience and abilities. Jim did call and said that he got back from Europe but his foot was still bothering him, and he had promised his family a bird-watching holiday.

In introducing Jack, I take a particular pride in the fact that he's a Committee member and we are very proud of our Committee which includes as one of our latest achievements Max Kampelman who will be our representative at Madrid. Max was here for awhile yesterday but unfortunately couldn't stay for the whole program.

Jack Marsh is a truly distinguished lawyer. He's a partner in the firm of Mays, Valentine, Davenport, and Moore of Richmond, Virginia, and Washington, D.C. He has practiced law for almost thirty years but has interrupted his private practice for devoted service to his country. At the age of 19 he graduated Infantry OCS and was a veteran of World War II. He's a retired Lt. Colonel who insisted on graduating from the Army Parachute School and Jump Masters School. He served four successive terms in the United States House of Representatives and decided not to seek reelection in 1970. The Congressman was an active member in many areas, but he should be recognized as the introducer of the original legislation to establish the American Revolution Bicentennial Commission. I know we were all thrilled by the tall ships and the other events of that wonderful day. But on that memorable July 4, my thoughts turned to Jack who fought a really long battle to create the Bicentennial apparatus. He subsequently served as Assistant Secretary of Defense, then as Assistant to Vice President Ford. When Mr. Ford became President, Jack was appointed as a Counselor with Cabinet rank.

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In that connection, Jack had many important duties. I think the one that's most important and most relevant to our work is that he chaired for the President the Intelligence Coordinating Group which handled the intelligence hearings; it conducted reorganization of the intelligence community. The membership consisted of the Counsel of the President, the Director of the NSC, the CIA, the Attorney General, Secretary of Defense, and Secretary of State. And Jack served in that important and responsible post.

There is, however, a very personal story about Jack that really indicates the character of this wonderful, wonderful man. Some years ago before he went to Congress, we sat in a hotel in Washington one evening, concerned about the destiny of the Nation, and Jack said, "Morry, I'm tired of all these talks and conferences and seminars. I'm going to do something to get something done. I'm going to run for Congress." Those of us who sat there just couldn't believe it but he went ahead and did it and served for four terms. Subsequently, when he was in the White House, he was nice enough to have me there one day and we were having a visit and I said, "Jack, did you ever think back to that night when we sat there and you said you were going to get something done? Did you ever believe you'd be sitting here in this throne of power?" And he looked at me and he said, "Morry, I've been thinking about that a lot." He said, "I really want to get something done. I think I want to run for Congress again." If all of us, and I mean it, if our government understood this great personal lesson and governmental lesson, I'm sure we'd have the finest government in the world. I give you my dear friend, my sole Committee member, who is a true son of Virginia, and a lover of American history. Jack.

Honorable John O. Marsh, Jr.
Standing Committee, ABA
Former Counselor to President Ford

Thank you very much, Morry, for that introduction. I'm very grateful to you. You did not point out that four years before you graduated a child was born in the valley of Virginia in Winchester.

I'd like to review for you some background and history and also point out from a vantage point of having been a member of Congress dealing with the

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Executive Branch of government and with the intelligence community, and then later having had Executive Branch responsibilities on that same subject, some of the problems and considerations that cause us really today to discuss means, to strike a balance in our society between the needs of national security and individual liberties.

At about 3:00 A.M., on the morning of October 22, 1781, as the watchman in Philadelphia walked his post, he was surprised to hear a horse moving at a fast pace, thundering down the dirt streets of that city. The rider was one of Washington's aides. Exhausted, barely able to stay in the saddle, he had ridden from Yorktown three days before as a courier with a message from the Commander-in-Chief to the President of the Continental Congress, Thomas McKean.

He sighted the watchman and reined to a halt, seeking directions to McKean's home. Before departing he disclosed the message he brought to Philadelphia. Cornwallis had surrendered. The British Army in Virginia had been captured. The watchman hurried down the streets calling in a sing-song voice, "Past 3:00 o'clock, and Cornwallis is taken." Suddenly, the city of Philadelphia was awakened to the news that the American Revolution appeared to be over. The Colonies were independent.

I go back to this Revolutionary experience because the victory that occurred at Yorktown in 1781, and was eventually capped by the Treaty of Paris in January of 1783, ended a war where espionage and intelligence played a key part in its prosecution and outcome.

From Concord Bridge to Yorktown--in the six years between these two great events can be recited a litany of intelligence operations ranging from Vermont to Georgia. These intelligence operations reached across the Atlantic to the continent of Europe.

There were covert operations in which the French were participants. It was a war of black propaganda in which Franklin excelled. It was a war of double agents, covert operations, secret codes, and daring spies.

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These operations were so skillfully conducted by both the British and the American operatives that to this day the identities of some of these intelligence agents have not been established. They conducted operations, submitted written reports on their activities, and were known to a few key Revolutionary figures. For example, it is suspected there was an American agent in London at or near the Cabinet level in the British Government. That agent has never been identified. It was not until 1930 that a scholar examining the papers of the British Commander, General Gage, would come across evidence in the General's notes that conclusively proved a leading American patriot, Dr. Church, was really a British agent.

Also, in the 1930s, an American researcher noted in examining records of the Revolution a similarity in handwriting that he had seen on another document in Massachusetts. By this historic detective work, this scholar established for the first time the identity of the Chief of the highly effective Culper Ring which was the name of Washington's espionage network for the New York-New England area. That individual was Robert Townsend, a Quaker who operated in Manhattan and who many of his fellow citizens believed was an officer in the British Provincials.

The news of the victory that Washington's courier brought to Philadelphia occurred as the end result of intense military action. It was climaxed by the storming of Redoubt 10 in a night bayonet assault which was led by a 24-year old Lt. Colonel on Washington's staff who was also Washington's French interpreter. That officer was Alexandria Hamilton. But that assault on Redoubt 10 occurred because of a highly dangerous but successful intelligence mission carried out a short time before by an American soldier in Lafayette's command, Private Charles Morgan, of a New Jersey light infantry battalion. It was vital the British Army be kept on the York Peninsula which lies between the York and James Rivers, until Washington and Rochambeau, who were in the North, could join Lafayette and the other American troops in the South.

Lafayette sought volunteers from a New Jersey battalion to defect to Cornwallis' Army. Morgan volunteered and was promised by his commanding officer that, if he were executed as a spy, he would publish the true

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circumstances of his desertion in New Jersey. On this cheerful note, Morgan deserted his unit, and was able to convince the British he was a genuine defector, with information on the American plans.

Cornwallis was considering abandoning his position at Yorktown by crossing the James and thereby escape the trap which was being laid. Cornwallis interrogated Morgan who deceived them into believing Lafayette had a number of small boats capable of crossing the James in a swift pursuit should Cornwallis try to escape.

In Morgan's presence, Cornwallis indicated to his staff escape was not a good plan. Sometime later, Morgan was able to slip away from his British unit. He suddenly appeared at Lafayette's headquarters in the dress of a British soldier and brought with him not only four British soldiers who he had convinced to defect, but a Hessian sentry who tried to intercept them.

The sands of time had run out for Cornwallis. Washington and Rochambeau had moved to Virginia. The French fleet was in the Chesapeake. It was now a waiting game, and the hand was finally played out when the British band played "The World Turned Upside Down" as a tune for the surrender ceremonies.

I make reference to these incidents in the American Revolution not only because of the significance they played in the outcome of that struggle, but the fact they show an historical precedent for intelligence operations in our own government. They indicate a clear awareness by the Revolutionary leaders on the vital role intelligence plays in national defense. There are many other examples in the Revolutionary experience. These practices were accepted, encouraged and refined. They were carried out with daring and skill. They were sophisticated and complex. They were dangerous and the risks of severe penalties including death were great, witness Nathan Hale.

Obviously, the Continental Congress was easier to deal with than the modern Congress, and you were not likely to find Washington's Order of Battle printed in the Williamsburg Gazette.

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As you are aware, the real chief and director of the American intelligence operation was Washington. He performed that task with consummate skill. As we know, he had been a Member of the Continental Congress and he served as the Chairman of the Constitutional Convention. Many of his compatriots, both on the military and the civilian side, had played a significant part in many aspects of American intelligence operations ranging from Franklin to Jefferson to Jay, who became the Chief Justice of the Supreme Court.

These Revolutionary leaders became the framers of the Constitution and the sponsors of the Bill of Rights. When the Republic was established after eight years of unsuccessful government under the Articles of Confederation, the draftsmen of the Constitution must have remembered the Revolutionary experience and anticipated in our national defense, the arts of intelligence would be employed.

In the latter years of the twentieth century, as we move to the two hundredth anniversary of the founding of the Republic, we are confronted with the dilemma of need for national security, intelligence operations, and attendant secrecy balanced against the institutions of an open and democratic society founded on the corner-stone of individual liberty whose well springs are found in the Declaration of Independence. It is a delicate but necessary balance. In recent years, a power struggle of enormous proportions continues between the Executive and Legislative Branches of our Government as the Congress seeks to redress its power.

The later struggle is not new to the American system. Rather it is a cyclical one, as, historically, Executive or Legislative power have ebbed and flowed. For example, there were years of marked Congressional assertiveness following the War Between the States, as there has been a marked Executive assertiveness since the Depression years of the 1930s.

The Constitution is not express in establishing or defining a foreign intelligence function in the Federal system. However, such a function has always been considered a part of the Federal role and generally considered to flow from the authority of the Republic to conduct relations and effect its national

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defense, a role with significant authority vested in the Congress and the President.

The Constitutional authority also comes from the Article II, Powers of the President, and includes his authority to conduct foreign affairs and importantly his duties as Commander-in-Chief. It is clear in the latter role, his authority for intelligence operations in a situation where war has been declared by Congress, goes well beyond his power absent that condition.

The duties of the Legislative Branch to raise and support armies and to provide for Defense, as well as the important appropriations role, have been recognized through the years as a Charter for the Congress in this field. The "necessary and proper clause" is a basis for legislative action inasmuch as it contemplates the Congress has the authority to enact such laws as are necessary and proper for the governance of the Nation. There are Court decisions and legislative precedents that when taken together provide a considerable body of legislative and judicial precedents.

However, in examining the Constitution and the conduct of foreign intelligence operations, this must be considered in context of the whole document. In this regard, the First and Fourth Amendments are of enormous consequence. They are the bulwark of personal liberty. The freedom of speech, assembly, petition, and security against unlawful search and seizure are the bedrock of rights of a citizen of the Republic.

The First and Forth Amendments pose contrasting balances which are the dilemma of the open society as it seeks to secure its own survival from predator nations less inhibited by such Constitutional scruples, or concerns about the unwarranted excesses of naked power. The present situation of our intelligence community can only be appreciated in an historical context.

In the nineteenth century, safely behind our two ocean walls, and in a wilderness world, safe from the intrigues of Europe and the wars of the Continent, we did not establish an intelligence effort in the National Government. This function, to the extent it was performed, in large measure

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was contained in the reports of diplomats or was relegated to the Army and Navy as a classic part of their military function, but was not national in scope.

The importance of intelligence efforts surfaced in the War between the States, but it developed nothing of permanence. An interesting historical footnote was the temporary employment of Pinkerton to carry out this function on behalf of the Union.

It should be noted the Supreme Court decided in 1875, in Toten vs. the U.S. (92 U.S. 105), arising out of the War, the President had the authority to hire a secret agent for intelligence purposes during time of war.

World War I found us with no real improvement in our intelligence capability. Even when war was declared on Germany in April 1917, there was still no American intelligence unit. This became a cause for a young major in the Army named Van Deman. However, the Major's efforts to convince the Chief of Staff of the Army to form such a unit were repeatedly disapproved. In short, he was told to drop it, and not approach the Secretary of War. However, Major Van Deman was not a man to be put off. First, he informed a visiting novelist of the inadequacies, and perhaps more resourcefully he found a secret ally. Aware that the Chief of Police of the District of Columbia was a frequent breakfast guest of the Secretary of War, he prevailed on the Chief of Police of the District of Columbia to convince the Secretary of war to do something about this glaring deficiency in America's preparedness. Secretary of War, Newton Baker, responded from either one or both contacts and the Major was promoted to Lt. Colonel and ordered to form an intelligence unit.

World War II is the genesis of the modern American intelligence community. Pearl Harbor convinced us of its necessity.

Noting the example of allies and our enemies, we formed the O.S.S. for military and paramilitary intelligence operations. This concern for a national intelligence organization survived World War II. It is important to note there is relatively little congressional authority for our intelligence organizations.

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The 1947 National Security Act established the Central Intelligence Agency; however, it is not a precise and comprehensive charter as to mission, responsibility and authority. With the exception of the last several years, there has been relatively little legislation on the subject. An earlier statute gave a special protection to what is called signals communications--a relatively narrow area.

The classification system used in government for national security matters, such as Top Secret, Secret, etc., is not a creature of statute, but an administrative control mechanism, for the Executive Branch. There is no charter or statutory authorization for the FBI's role in counterintelligence. The National Security Agency is a product of an Executive Order.

What is not understood is that by-and-large the American intelligence community has been created by a series of Executive Orders. Most of these Executive Orders were highly classified.

For security purposes, there has been a fragmentation of the intelligence effort with significant pieces found in the Central Intelligence Agency, the National Security Agency, various Department of Defense, the National Security Council, Treasury, Justice and the Intelligence Oversight Board.

A major issue for President Ford in 1974 and 1975 in his efforts to reform and reorganize the intelligence community was whether to endorse statutory charters as opposed to Executive Orders, and whether Executive Orders were to be classified or unclassified. In an historic decision, President Ford on February 18, 1976 issued Executive Order 11905 which for the first time publicly recognized various components of the American intelligence community and in broad guidelines set forth their authority, and mission, as well as spelled out certain safeguards to their operations. The backgound factors bringing President Ford to this decision are important.

The winds of change for the intelligence community began to blow in the middle sixties. Prior to that time, the Executive Branch had had almost a carte blanche relationship with Congress. The major function of appropriations was controlled by literally a handful of legislators in the House and Senate.

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Powerful committee chairmen and bi-partisan congressional leaders could be counted on to obtain Committee approval and provide swollen majorities on the floor, with a minimum of assurances and sparse answers to the few questions that were asked about intelligence programs.

By mutual agreement, reporting to congressional leaders intelligence was confined to several people and this was not in great detail. Often it was after the fact with interim status reports. There's no question they could have known more, but there was an attitude that it was best not to know. This dimension of congressional desire for minimum knowledge of intelligence operations cannot be overlooked.

This method of congressional oversight would come under serious attack in the 1970s.

But there were other factors that would lead to the intelligence crisis of the 1970 s:

-- New Technology, particularly in the field of electronic collection, including microwave interception. Electronic chip microphones, laser devices, new techniques in telephone interception and improved photography monitoring are but a few. These new technologies became the tools of the trade in the twilight world of espionage and covert operations. They are not exclusive American tools. They are being used against Americans by our friends and our adversaries not only abroad but here at home.

-- Improved communications in trade and personal exchanges nationally and internationally lend themselves to exploitation for intelligence purposes. Transmittal of diagrams, charts and blue prints through facsimile processes became targets of opportunity for interception.

-- New generation computer capabilities went hand-in-hand with an information explosion and became capable of compiling for rapid recovery mountains of information on a person ranging from health records to credit status, military service and employment data.

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Two statutes became of consequence. They were in part citizen protests about Big Government meddling in their lives. They have created a problem for our intelligence community. I refer to the Privacy Act and the Freedom of Information Act. These two statutes must be viewed not simply from what they require or the rights they give, but what they represent. Although their adverse consequences go well beyond intent, their existence is a guidepost of concern to the intelligence community.

-- Court decisions--In the last two decades the Courts, particularly in the domestic and criminal fields, have sharply limited the parameters of telephone interception.

-- There have been other legislative developments such as the Safe Streets Act of 1968, the scope of which although largely in the domestic criminal field, does become cautionary from a foreign intelligence standpoint. The Foreign Intelligence Surveillance Act of 1978 which addresses the use of electronic surveillance to obtain foreign intelligence information is another significant legislative action by the Congress.

-- The Vietnam War--Whether you are a dove or a hawk, and I was a hawk, it must be recognized that this war ripped the fabric of American society. The years of protest and debate would enbroil the American intelligence community. It was an involvement that ultimately exacted an enormous price.

-- Watergate--The casualties of this catastrophe went far beyond the President and the President's men. It led to one of the most difficult and exhaustive series of congressional hearings any Executive Branch has ever sustained. A Secretary of State was threatened with a congressional contempt action, and the Legislative Branch nearly collided with the President in a confrontation over issues that would have raised profound Constitutional questions for the Courts to resolve. The intelligence agencies were subjected to one of the longest, most sustained and grueling examinations in the country's history. Some argue at a price of impairing their effectiveness.

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The fact the Congress was in the majority of another party, with the Executive Branch headed by a minority president, contributed to the ability of the Congress to pursue their investigative thrust.

Using the appropriations process and spending limitations which were so successful in winding down the Vietnam War, the Congress limited in 1974 covert operations by the Hughes-Ryan Amendment. Later they denied funding for covert operations in Angola, ironically, a limitation that was just lifted this week by the Senate.

To those who hail this new congressional era of involvement in the intelligence activities, there are caveats. First, there is the risk of breaking down compartmentalization by the collection in one place of various components of intelligence data which for security purposes are widely disbursed so that no single person is aware of all of the sources, methods or data involved.

Second, there is a danger of disclosure of sources and methods not by design but through inadvertence, carelessness or over-exposure, By sources and methods I refer to the names of individuals who cooperate with our agents, and by methods I refer to collection devices or techniques whereby certain information is obtained.

There has been a proliferation of the committees to whom sensitive operations must be reported. Some eight in all in both House and Senate. However, steps are underway to try to limit this disclosure.

With Congress involved, there will follow legislative responsiblitiy and accountability for mistakes and failures. These mistakes will be inevitable. However, accountability for them is a burden a Member of Congress may not want to assume.

-- Lack of disipline for the errant member is a problem. Under the Speech and Debate Clause of the Constitution, a member has immunity for what he might say on the floor of the House or the Senate. This raises problems for

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the intelligence community in a situation where a single member may feel so strongly as a matter of conscience against an operation in which he is briefed as to make a disclosure on the floor. This presents a situation where only the Congress can discipline its members. It is essential that the Congress establish its own rules in reference to disclosure. Rules which it enforces. Rule 11 of the House Rules has been a concern because in effect it says that any member of the House can be privy to any information made available to another member.

To those of us who think some of these concerns I mentioned are strained, I can assure you that in handling the President's relations with the Congress involving the intelligence investigation, each of the points I mentioned became questions of real concern.

You cannot overlook the fact that a privileged and highly sensitive report of a Select Committee of the Congress, general publication and distribution of which was expressly prohibited by a majority vote of the full House, was published in full in the Village Voice.

The doctrine of Executive Privilege came under severe attack with consequent erosion and more narrow interpretation of its application. The extent to which documents can be withheld from Congress has been sharply challenged.

In considering the role of intelligence operations in America, we must continually inject a note of realism. From a national investment standpoint, it is one of the least expensive methods of defense. In the decade ahead, we must have more, not less, foreign intelligence capability.

There is turbulence in the Third World. There we seek political stability with a system of government that provides their citizens individual freedom and economic well-being. It also is an area to which our future is linked by raw materials and resources vital to the Western economy. It behooves us to know what is happening there.

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Soviet military power continues to grow both quantitatively and qualitatively. It is being extended to the four corners of the globe. A blue water navy takes the hammer and sickle into ports where it has never been seen. Soviet secret police and the NKVD, the agents of their intelligence apparatus, have no problems in obtaining official "cover" and no qualms about their targets for surveillance, regardless of their citizenship or where or how they are surveilled.

-- Economic intelligence concerning the movement of grains, oil, ores, machinery, petro-dollars, crop yields--this is a new field for collection and evaluation of data. This is becoming as important as the location of missiles and submarines. However, it raises a new host of problems in reference to the collection process.

The role of Congress in the intelligence process will continue to change. Because of the vast scope of legislative affairs, Congress is likely to add to its oversight role that of a consumer seeking vital intelligence data to support legislative enactment. This will require a new cooperation and different standards and safeguards between the two branches. One that is not adversary in nature.

-- Terrorism is a frightening phenomenon of our era. It is the type violence that may escalate into broad conflicts. Knowledge of the terrorist, his methods, his targets, his sancturaries is essential not just because it produces stability but to preclude the suffering and misery that accompanies the terrorist's attacks.

What is the role of the Bar in all of this?

The role of the Bar is leadership in an area in which it has vested interest. To provide that leadership, the Bar must be informed and it must be educated on the issues.

In reference to charters and defining the intelligence operations of the national government, Chief Justice Marshall observed that "Congress,

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unquestionably, may prescribe the mode" through which executive power is exercised. It is up to the Executive Branch to develop the method and procedures within that mode that strikes an acceptable balance in a free society between national security issues and individual liberties. This will require the rule of law and the collective wisdom of the Bar.

The Bar must understand the realities of world power situations that create the need. From the standpoint of intelligence, the Bar must study the Constitution, particularly Article I and Article II provisions that relate to the mutual role of the President and the Congress, and the conduct of national defense and foreign affairs. This must be done in the context of the First and Fourth Amendments in order to establish their parameters as part of the "prescribed mode."

The Bar must stake out its position and become an advocate and defender of its handiwork. It must direct its voice

-- to the Executive Branch;
-- to the Congress;
-- to the Bar;
-- and, most importantly, to the people of the United States.

In less than a decade, we shall observe the two hundredth anniversary of the founding of the Republic. At a point in the deliberations of the Constitutional Convention, when all was in disarray, Washington assigned to the delegates their task with this charge: "Let us raise a standard to which the wise and honest can repair. The event is in the hands of God."

In the troubled days ahead, the Bar, which bears a special trust for the protection and perpetuation of that great document must raise a standard in this field, vital to our national survival.

Morris Leibman

Thank you very much, Jack. You know, it's easy to be Chairman of the Committee when you've got this kind of support. In the audience, I want you to

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know, Dick Ham was the correcter of the Van Deman thing. Dick's a long-time member of our Committee and now serves on the Advisory Committee as Jack referred to Team A and Team B. Bob Galvin's been with us since last night, and we'll look to his wise thoughts on his experience in PFIAB. As Jack mentioned electronics, I find that the more I hear about this thing, the more I realize that it cuts through all kinds of legal concepts and legal segments that we used to have, and it's a brave new world out there.

In describing the Committee's work, I told you about how fortunate we were to have the benefit of people like Ray Waldmann, Nino Scalia, and Mike Uhlmann, and in the work that we've done. In recent weeks and recent months, we had a number of our experts work intensively on the FBI Charter legislation and the Graymail legislation. Our efforts were reflected in the report of the House of Delegates and the resolutions adopted by the House. The Committee conducted a major workshop you heard about and is now, and you'll hear later about this from Ray, sponsoring a specific research project at Yale. The newsletter, for which Ray is Editor and of which Florence Bank is Associate Editor, has been a total success and a real contribution.

For many months Ray has also had a special task force that's devoting itself to the CIA charter legislation. That major report, which has had some circulation already, is continuously reviewed by the Committee and its experts and will be available for study by all. It's a monumental job and a great start in the area. Also, our experts are considering the various Executive Order possibilities, a reinstitution of PFIAB, for example, other quick fix steps that could be done beyond legislation, and I am sure Waldmann, Scalia, and the others will have something to say about that during the course of these discussions.

It's now going to be my privilege to turn the meeting over to my good friend, Ray Waldmann. Ray is a practicing lawyer, when he has time left over from his work here, with the wonderful firm of Schiff, Hardin and Waite in Washington and Chicago and was, as Jack told you, one of his great aids in the White House work on the entire intelligence community.

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I. OVERVIEW OF INTELLIGENCE CHARTERS

Moderator: Mr. Raymond J. Waldmann
Intelligence Consultant, ABA
Standing Committee,
Former Special Counsel for
Intelligence to President Ford

When we thought about planning this conference we looked at the subjects that have been discussed in recent months and years in the area of intelligence legislation, and the common thread running through all of those efforts seemed to be the determination, as Dean Casper put it, of a new framework for intelligence activities. Looking further, it was apparent that one of the main purposes of these legislative proposals was to define in new ways the relationship between the intelligence community and some of its publics. One of those publics is obviously the Congress and so we decided to have a panel which would look at the subject of congressional oversight and the relationship between the community and Congress.

Another public has developed over the last few years in a way which Ken Bass explained, I think, brilliantly at our December conference, and that is the Judiciary. The law has become more involved in intelligence and intelligence perforce has become subject to the rule of law in ways which are novel. And this brings with it a role for the Judiciary. So we decided we would look at the limits of that role and the appropriate nature of that relationship.

And finally, of course, there is the public itself. That relationship concerns the public's need to know and the concomitant responsibility of the intelligence community to operate in ways which are secret, efficient, and effective. We are not looking in this conference at internal organizational issues of the intelligence community or the relationship of the intelligence agencies to one another. Those were addressed in the Executive Order to which Jack referred. They were addressed in President Carter's own Executive Order and we will hear a little bit about them from Ken today in terms of the overview.

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Our first panel this morning is a view in more detail of some of the things which Jack touched on in his keynote address. We will first hear about the history of the charter legislation effort. We will then hear about the relationship of charter guidelines and other legislation to existing Executive Orders, Executive Guidelines and Procedures, and finally we will hear about alternatives to the current legislative approaches which might lead in the direction of improving the effectiveness of the intelligence community.

We will have three presentations and then there will be time for questions and answers before the next panel begins. Our first speaker comes to us from the Senate Intelligence Committee. He is Mr. William Miller, the Staff Director, who was educated at Williams, Oxford, and Harvard. He taught at Harvard before joining the Foreign Service where he served in the Middle East and in Iran, among other places. And you may recall, a few months ago in the first days of the Iranian hostage-taking, Mr. Miller was asked by the President to attempt to negotiate a solution on the basis of his experience and knowledge of the situation.

Mr. Miller served as a member of the delegation to the United Nations General Assembly and as a delegate to NATO meetings. He headed the staff of the Church Committee review of the intelligence agencies, and then became the first and only Director of the Senate Select Committee on Intelligence staff. With great pleasure, I give you Bill Miller.

William G. Miller
Staff Director, Senate Select
Committee on Intelligence

It's a pleasure to participate in this Bar Association and University of Chicago Conference on Intelligence Legislation. It's a very special pleasure for me to see the Law School under the aegis of my good friend Gerhard Casper who has been a great source of knowledge and inspiration to many of us who have worked on these very difficult questions. I was very pleased to hear the structure that he placed on this whole subject. I think he describes very accurately the informing principle that we really are seeking a legislative

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framework for an area of governmental activity that has long existed outside of our constitutional system.

There is, of course, no mention in the Constitution of intelligence activities, even though intelligencers and intelligence is as old as mankind itself. No doubt intelligence is a part of the human condition. But despite that, there is no mention of an intelligence system in the Constitution. Nor, indeed, is there any consideration of how secret activities on the part of the government would be governed. The Constitution does not deal with secret information, the hearing of secret evidence in the courts, or indeed the protection of secrets. There's a great deal of inferential suggestion, a lot of it stemming from the idea that espionage and intelligence is part of its human condition, but it is not in the Constitution. The framers of the Constitution had no conception, although they were practitioners, of the future role that a permanent intelligence system would have in the conduct of our government. And because of that intelligence gap, or secrecy gap, of necessity the approach taken by those of us who have been charged with coming up with a way to provide for the governance of intelligence activities is to try and create through statute analogies to the constitutional framework that have already been provided. So this is the basic premise on which the so-called intelligence statutory charter effort has been structured; namely, the belief that intelligence activities can be brought into the broad constitutional framework. We believe this must be done because the fundamental issue involved concerns the use and control of great power. It is clear from the experience of the past forty years, and this is the period in which the United States has had a large and pervasive intelligence system, that the various aspects of intelligence activities constitute an important, vital, and certainly awesome power in the hands of those who exercise it, and who have access to its means and to its results.

The application of power involved a range of activities, as we all know, from subtle analyses of complex information obtained from a variety of sources, some very primitive in their method of acquisition and as old as man itself, other methods most sophisticated, the kind of thing that Mr. Leibman referred to, the new frontiers of electronic technology. They also involve predictions of the future to some extent, so that foreign policy and defense can be planned, and

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they may involve paramilitary activities or all-out warfare. In order to channel the broad range of power that intelligence can convey, the charter effort has directed its attention to providing first the authorities for the exercise of power by the various intelligence agencies. By and large, the effort over the past four years has resulted in an agreement that has been worked out jointly between the practitioners of intelligence in the various intelligence departments and agencies and the leaders of several administrations, including Jack Marsh who spoke so well just a few minutes ago, and the Legislature on the broad scope of missions, duties, and purposes of intelligence.

The broad purpose of intelligence for the United States is contained in the latest version of the charter, and I'd like to read that because it's a brief statement of what all this effort is for. First, to authorize the intelligence activities necessary for the conduct of foreign relations and the protection of the national security of the United States; to ensure that the intelligence activities of the United States are conducted in a manner consistent with United States defense and foreign policy interests and are properly and effectively directed, regulated, coordinated, and administered; and to ensure that the government of the United States is provided in the most efficient manner with accurate, relevant, and timely information and analysis so that sound and informed decisions may be made by both branches regarding the security and vital interests of the United States. And so that the United States may be protected against foreign intelligence activities, terrorist activities, and other forms of hostile action by foreign powers, organizations, or their agents or by international terrorists directed against the United States. And finally, to ensure that the entities of the intelligence community are accountable to the President, the Congress, and the people of the United States, and that the intelligence activities of the United States are conducted in a manner consistent with the Constitution and the laws of the United States. "That's the essence of the charter effort. It is not a crude list of "dos" and "don'ts." It is aimed at embracing this vital, integral part of our national security activity into our constitutional system.

In addition to agreeing upon what intelligence should be asked to do for the United States, the intelligence agencies, two successive administrations, and the

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Legislature have come to an agreement on the nature and structure of the various entities that make up the intelligence community. There was a great turf battle in recent years about who would control this or that entity. Fortunately, those issues have been resolved for the time being. These kinds of issues will arise in the future; they will be settled in bureaucratic battles. As in the past, the strongest lance will occupy the most turf. Usually the Commander-in-Chief decides who will be given the strongest lance.

There's a recognition then that from time to time it may be necessary to modify that structure and we have suggested a legislative means to make those changes. But clearly the most difficult and controversial areas that remain to be resolved concern those activities which by their nature might adversely affect or might infringe in some way on the rights of Americans guaranteed by the Constitution. There's a recognition that the necessity to protect the nation from great harm or danger might from time to time come into conflict with the guarantees of the Constitution protecting individual citizens. The circumstances when the needs of the State should override the protection of individuals remain the area of greatest controversy. But progress has been made through the following approach. In our view, the Fourth Amendment provides an appropriate analogy for dealing with these questions. We have established (and when I say "we," it's both branches) the presumption that it is the primary duty of the intelligence agencies to protect the rights of citizens and, of course, groups. However, the facts and circumstances of some issue may be such, and the need to defend the State may be of such gravity that a right must be set aside. There are paths to follow here. One is to require the application for something analogous to a warrant, to an appropriate body details the facts and circumstances requiring that a protection be set aside. The key elements are a certification of necessity for so doing, accompanied by the reasons for setting it aside, the ability to review such a certification by an appropriate body; in some cases the court; in other cases, the intelligence oversight committees; in still other cases, internal oversight bodies.

Another approach is also under consideration now. It would grant that there may be rare extraordinary cases which would require the assertion of constitutional authority by the President in order to defend the nation against

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grave foreign dangers. A statutory endorsement of that power is, of course, unnecessary. But whatever approach, or combination of approaches, is adopted, the principle is the presumption of protection of individual rights, the requirement for high level certification of necessity, the requirement for a paper trail of accountability, and review by appropriate bodies outside of the Executive Branch. I think, by and large, these have been accepted as a valid way to go. This is a significant advance, in my view, after four years of negotiation with two Presidents, several Attorneys General, several Secretaries of State, National Security Advisers, a whole turnover of intelligence agency heads, and other officials of distinction and experience, and of course with the oversight committees; and the burden of going through, in these four years, mountains of drafts ranging in size from 300 pages to 65 and, in one case, to 4 pages; hundreds of meetings at all levels; fourteen meetings with the President, for example; and you multiply that number up as the rank goes down.

The duties, authorities, and the protections required in the governing statute affecting the activities of agents, and of agencies that employ tens of thousands of people, that cost many billions of dollars annually, have been tested against the projected from the actual practice of the intelligence agencies. They have profited from the actual efficacy of the Executive Orders 11905 and 12036 that were jointly drafted by the Executive and the Legislature. This is a unique phenomenon. The governing Executive Orders for intelligence were drafted jointly by the Legislature and the Executive, even though they're issued by the President. The pattern, established by Jack Marsh of involving all the key parties, has been a marvelous precedent. Our Committee was heavily involved in the drafting of the superseding order, Executive Order 12036, and it's proved to be a great aid in furthering the whole process of working towards a nonpartisan consensus solution. But, as members of this conference know, the legislative charter effort has been set aside and put on the shelf until the elections have been completed, and that's for obvious reasons. It's our expectation, however, that with the convening of the new Congress, the charter legislation effort will proceed forward for action.

What we seek to do in the beginning of the next session is to provide an affirmative legislative standard for the intelligence activities of the United

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States in order to fulfill the expectations that the Congress and people of the country have that the legislation to provide the means for the best possible intelligence system with necessary organizational flexibility will, in fact, be enacted. We also wish to provide explicit, legal authority for what had been agreed upon as necessary clandestine activities. The FBI and other agencies do not now have express legal authority to carry out counterintelligence and other necessary intelligence activities. Further, high risk clandestine activities (including covert action, or what are now called "special activities" because of their potentially great risks, expenditures, because of the resources sometimes required, and of course because of the particularly grave consequences involved), demand carefully balanced legislation to assure that such special activities are undertaken only after due deliberation and rigorous evaluation of the risks and benefits to the Nation's well-being.

Standards also need to be set in statute for the activities that affect the rights of Americans, but basically in two areas: the exercise of the counter-intelligence function and the collection of foreign intelligence information. I have spoken of the agenda that remainded. But how far have we come? We have proceeded thus far in an effort to achieve a nonpartisan consensus. We have sought to follow insofar as possible the framework of the Constitution, in some cases by analogy. And we have learned over the four years of effort to encompass a very wide spectrum of views, the requirement to sift through vast mountains of draft language, and the entanglements of very complicated provisions in Executive Orders, and of course the directives. From all of this, we have learned to eliminate unnecessary detail. The difficulty of passing even one provision has proven that a statute will not be passed if it is overly complicated. But it's our hope and expectation that we'll be able to achieve a consensus that will provide a clear and simple formula of guidance, flexibility, accountability, and protection.

What's been accomplished so far? We provided interim governance through Executive Orders. A surveillance act for domestic wiretaps in foreign intelligence matters has been provided; this has proven to be a very effective instrument and perhaps provides some guidelines for resolving the issues that affect the rights of Americans that remain. Both houses want fully empowered

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permanent oversight committees, and they've worked together to see that that will take place. On June 3, the Senate passed by a vote of 89 to 1 the Intelligence Oversight Act of 1980. The House Intelligence Committee has just reported out a similar measure. The purpose of the Oversight Act of 1980 was to provide the framework of checks and balances and shared responsibility necessary for the exercise of effective oversight of the intelligence agencies in the United States. The language of the bill was worked out in close consultation with the Executive Branch. Every word has been agreed to by the Executive Branch. The process of consultation included the President himself, the Vice President, his chief advisers (many of the people in this room). The language of the report explaining the purposes of the Act was written jointly, every single word. There are still a few minor issues that remain and will be resolved. Both sides have agreed to work it out, and it's not beyond their ability to do so.

We're seeking to meet the standard called for by James Madison who, in his discussions concerning the separation of powers and checks and balances said, "We are seeking to provide a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands." We seek to do this by enabling the respective branches, "to be so far connected and blended as to give each a constitutional control over the others."

I'd like to close by saying that the effort to legislate an effective means of oversight for secret intelligence activities that will serve as a constitutional means of checks and balances, and shared responsibility, has, not unexpectedly, met with resistance along the way. It has not been easy, and it's understandable that the problems that arise in framing authority for effective oversight and involve the interaction of powers conferred by the Constitution of the respective branches will create controversy. But, in almost every case that we've come across, the powers and duties of the two branches come into contact; they sometimes collide, and on rare occasions they are in confrontation. But, recognizing this, we have sought to respect the authorities, the powers, the duties and obligations of both branches; to look at it from the other branches' point of view, and to devise ways in which solutions can be obtained rather than create the certainty of confrontations. One can draft laws in a way that assures confrontation; what we're trying to do is to draft words which will lead to solutions.

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Working under authorities very similar to those contained in the Intelligence Oversight Act of 1980 has been the pattern of the past four years. The Senate and House Committees have been able to carry out their duties with full access to information. When the Committees have requested information, it has been supplied, and in almost every case, in the degree of detail requested. One mark of the success of this joint aspect of oversight is the fact that in the four years of the Committee's existence, we have yet to have had even to suggest a subpoena. We have been able to work out difficulties through negotiation. It's therefore imperative to assure that this proven means to work out solutions becomes law, because we know in the area of intelligence we are going to have difficulties and disputes down the road. Clearly, the law has to be framed in such a way to encourage negotiation and resolution of disputes between the branches.

A recent court case--United States v. American Telephone--which was decided in 1977, is, in essence, the approach that the Committee has taken to deal with conflicts of authority that might arise. There are many instances in that case that apply to the issue of intelligence oversight. I'd like to quote two passages from it, because I think they are models of constitutional reasoning and have a tone that sounds very much like Madison to me. The first passage is, "The framers, rather than attempting to define and allocate all governmental power in minute detail, rely, we believe, on the expectation that where conflicts of scope of authority arose between the coordinate branches a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in the efficient functioning of our governmental system. Under this view the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation. This aspect of our constitutional scheme avoids the mischief of polarization of disputes." In my view when you're forced to a subpoena, you have failed.

Another passage of relevance, "The course of negotiations reflects something of greater moment than the mere degree to which ordinary parties are

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willing to compromise. Given our perception that it was a deliberate feature of the constitutional scheme to leave the allocation of powers unclear in certain situations, the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive modus vivendi which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme." The language of the Oversight Act was written with these thoughts in mind to try and avoid the mischief of polarization of disputes and to create the most favorable circumstances for working out conflicts.

I'd like to express a note of gratitude to Mr. Leibman, to the members of the Bar Association, and to the members of the faculty of the University of Chicago for sharing their learning, wisdom, and advice during the past four or five years. Their words are reflected in the drafts, the mountains of material, and I hope a few of the words that will pass. Speaking for myself, despite the frustrations that are involved in a process like this, and at times they're unbelievably difficult, I can think of no greater privilege than to have had the opportunity to work on such a fundamental constitutional question. Thank you.

Raymond Waldmann

Thank you very much, Bill. It was an excellent presentation of the legislative perspective. I might mention in passing that copies of the full text of the Huddleston bill, S. 2284, as introduced, are available in Classroom Two along with the other materials, and the Intelligence Oversight Act of 1980, as passed by the Senate, is found in the most recent newsletter of our Committee. Copies are available outside.

We'll now turn to a spokesman from the Executive Branch, Mr. Ken Bass, who is Counsel for Intelligence Policy at the Department of Justice. Ken is a graduate of Duke University and Yale Law School. He clerked for Justice Black after finishing his legal studies. He worked on the Hill, in private practice in Washington, and then in September of 1977 joined the Department of Justice, I believe, in the Office of Legal Counsel. In May of 1979, he became the first

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Counsel for Intelligence Policy in the Department of Justice and thus is intimately involved in the negotiations and the deliberations to which Mr. Miller referred. I give you Ken Bass.

Mr. Kenneth C. Bass, III
Counsel for Intelligence Policy
Department of Justice

Thank you. It's a pleasure to be with many of you again and some of you for the first time, I hope not the last time, to discuss these issues. Jack Marsh gave us an excellent overview of the history of the profession of intelligence. I want to give a short overview of the history of intelligence law. From my private practice experience and my limited but full-time government experience over the past few years, I've come to recognize that intelligence law is clearly a growth industry insofar as lawyers are concerned. And there's some striking parallels between what we're experiencing now and what we experienced when intelligence law in the United States had its beginnings in 1947.

The first intelligence law, the National Security Act of 1947, was driven by what was perceived as an intelligence failure--Pearl Harbor--the absence of warning. It led to a statute with a good deal of conscious ambiguity as to roles, powers, and authorizations, but a basic congressional recognition, embodiment, and endorsement of the fact that there would be a permanent intelligence structure in the United States. It was not simply a wartime reaction to tactical problems, but it was continuing in the world as we would see it.

Our current charter effort and the exponential growth of law in the area is driven by what I think was perceived as the second intelligence failure, a failure of the intelligence community to recognize where the lines were between collection of foreign intelligence and political rights of Americans. It's important that we not lose sight of the fact that that failure was not by any means unique to the intelligence community. It reflected a failure of the American governmental system, if you will--congressional, executive, and judicial--to deal with the problems of the Vietnam War and the domestic opposition to that war. The intelligence community was not the only rogue

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elephant running around, as some saw, trampling on Americans' rights. Exactly the same thing happened to the IRS; exactly the same thing happened to the Justice Department. There were prosecutions initiated for what some saw as political motivations. And there were strains in the system. There were pressures that pushed well-meaning governmental officials to do things that in hindsight and in the light of full exposure appeared to be wrong and needed correction.

In other areas of failure as a result of the crisis of the war, we really haven't moved for charters; we haven't moved for reforms; we haven't moved for legislation. Why is it then that in intelligence we have? I think for a number of reasons. One is that the shock was greater in the intelligence area because less was known about it, and once exposed (and properly so and constructively so), it led to a stronger reaction towards establishing a rule of law. The second is that there was a paucity of law, if you will, and a paucity of congressional, formal acknowledgment of the role of intelligence, the purposes of intelligence, and the balance between rights of Americans and the foreign intelligence process.

So what we saw since the Church Committee Reports was an exponential growth curve in intelligence law, started by what still remains as the cornerstone of the whole area of administrative law, and that is President Ford's Executive Order on which Jack and others worked so extensively, that Attorney General Levi worked so extensively on, and that Nino Scalia was a driving force behind. It basically set the key principles in terms of rights of Americans and intelligence activities. It remained at the core of Executive Order 12036 and it remains as the driving principle behind the now increasing volume of Executive Branch regulations that are on top of 12036.

This growth of law has taken the form of something that is not common in the American legal process. And it is an increasingly complex volume of Executive Branch regulations that do not start from a statute, but start from, as Bill has described, joint Executive Orders developed with parts of Congress but not with the totality of Congress. Most federal administrative regulations follow after Congress has identified a problem, passed a statute, maybe created an agency like the FTC, or the SEC, and given some basic general guidance that has

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to be filled in interstitially with Executive rule making. That's not true here. There's another aspect in which this area of the law, from my perspective, differs from most areas that I've ever had anything to do with as a lawyer. Law traditionally in our system when it comes to legislation or rule making has been the end of the process, not the beginning of the process. We seem to have turned it upside down in the intelligence world. We are proceeding on a theory of instant wisdom and have injected an awful lot of legal thinking and legal drafting into a process at a comparatively early point in the resolution of the problems in that process. Think for a moment and compare what we're doing in the intelligence world with the growth of common law in the civil law area towards contracts or anything of that nature. The common law started off centuries ago as conflict resolution on a case-by-case basis going to some form of adjudicator, be it a parish priest, the head of the estate, or some official in power who was neutral and could by force of either persuasion or monetary wealth or physical arms resolve an issue. That process continued through case-by-case judicial decisionmaking over centuries. Eventually we wound up with some inconsistencies in decisions and people realized that it wasn't done in northern England the same way it was done in southern England and that didn't make good sense because they were all good Englishmen. So Parliament would come in and pass a statute to resolve the differences and to make sure that the rule of law applied even-handedly to everyone. But in intelligence law we don't have that. We don't have any tradition of case-by-case adjudication of controversies with the freedom and the creativity of the common law, the trial and error method of going through and trying it, and getting a lot of different decision makers focusing on what over the centuries become the same sets of facts and then seeing where wisdom lies.

Instead, we were forced by the crisis of the Vietnam War, Watergate, COINTELPRO, CHAOS, and all of the words that have become so common to us in designing a system immediately to meet a very real problem. And we're still struggling to get that system in place.

In the development of the law in the area we have almost, but not quite, completed the current phase of Executive Branch rule making with congressional input--12036 and its predecessor 11905--Executive Orders have been on the books

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now for four years. The Executive Order of President Carter required promulgation of rules designed to ensure that intelligence activities could function with an appropriate balance between national security needs and civil liberties, privacy interests. The first edition of those rules has been completed for all of the agencies. We're now working on the second edition. At least with the FBI, it seems to go in two-year cycles. Attorney General Levi put out his rules and regulations for the FBI in 1976. Judge Bell added a few and put out his version in 1978; and Attorney General Civiletti put out his version in 1980, so I guess we're due for a fourth round in another two years. And that part of the process has been very difficult; trying to come up with words that are meaningful, that have content, but that allow for sufficient adjustment that we don't wind up shooting ourselves in the foot on either side of the issue as we do it.

The growth phase that we're into now is one of interpretation, adjudication, and application of those rules to specific fact circumstances and seeing whether its right, wrong, whether we made a mistake, whether we need changes, and trying to keep sight of the basic principles, the First and Fourth Amendment values that underlie all of the rules.

Where do intelligence charters come in? I think they come in in a way which, while it is framework legislation as Dean Casper mentioned, it is also something that isn't unique but is comparatively rare in the American legislative process. It is vital from my perspective that Congress pass comprehensive intelligence charters to ratify, to legitimate the intelligence process and to get the second great intelligence failure behind us so that we can all get on with the job and not continually argue about basic right and wrong issues. If you look at other intelligence law and Congress' role, I think we've seen the Congress has performed precisely that function in two pieces of legislation--the Safe Streets Act in 1968, and the Foreign Intelligence Surveillance Act in 1978. Both of those laws not only created a legal structure and a new judicial involvement in previously Executive Branch areas; they also expressed a popular democratic consensus that electronic surveillance was right in certain cases, that there was a balance that could be struck, and that it was lawful. And the very difficult contentious debates that properly were engaged in for decades about wiretapping

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largely have gone behind us in the national security electronics surveillance field. The intelligence charter process can and must do the same thing for certain issues that are not behind us yet; we're still in the midst of them. One of them is the one that Bill referred to in terms of the Executive--congressional balance--the information-sharing problems. How do we appropriately set up under a rule of law, a system that guarantees that Congress can, without forcing itself and the Executive to the wall, get the information that is needed to inform itself to participate in this important secret function? And how can we at the same time maintain the necessary compartmentation, security secrecy, sources and methods protection that ensures that we get the information in the first place so that we can share it? They are difficult problems, but I agree with Bill; they're not insolvable by any means and we're very close to getting them solved. This part of the charter, the Oversight Act of 1980, will hopefully lay that issue to rest. Get it behind us and get a blessing from the democratic elected body. But we still have in front of us what I think is the next major unresolved issue. And if you want to put it in a shorthand phrase, it's the issue of the innocent American. And it's really the core issue that drove the intelligence crisis that led to the charter's activity now.

What is the proper role of the government in acquiring private information about foreign powers in the possession of an innocent American? The intelligence processs is not a process of spying on Americans, finding out what Americans are doing or maintaining an internal security program. Certainly in the area of counterintelligence there are aspects that inevitably involve investigations of Americans. But the whole thrust of intelligence is a protection from foreign threats. What we have yet to resolve in terms of a congressionally endorsed consensus is whether and under what circumstances the need to get information about foreign threats can overcome the strong presumption and right of Americans to be let alone and not to be intruded upon.

In areas outside of intelligence, the government coerces information out of innocent Americans all the time. You have to fill out a census form or you have to fill out tax returns. You have to provide a lot of governmental coerced information. And while there are occasional people who will say that that's illegal, I think most of the legal establishment regards arguments against tax or

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census forms in terms of First Amendment or privacy values as lunacy. We accept that the government has to have that information and that it's right and proper that it do so. And we try to protect it by statutes to ensure the privacy of census forms by the Privacy Act and by a number of things. But in the intelligence field, we haven't accepted that yet and there's a good reason why it hasn't been accepted yet; and that is that in all these other areas, it's not a secret process. Americans know what they're giving up, when they're giving it up, and to whom they're giving it up. And there's the great dilemma in intelligence activities driven by the secrecy that the information that you're acquiring about your adversaries may be good only if you know it and they don't know you know it, and that means it has to come without compromising the fact that we have it. And that need will, on rare occasions, mean that in practice the needs of the government to acquire information about foreign powers will be seen to override the right of the American to be let alone or to be told when we are extracting information from them.

I don't know how that debate is going to wind up. With the intelligence committees, I think we've reached a consensus and the consensus was reflected in the latest versions of S. 2284. But that consensus is not one that I sense has become a congressional consensus. Whether it will become a congressional consensus after this election is a very open question. Whether it will become a consensus beyond Congress in the public is a very open question. It's an issue on which I trust we can get more, not less, debate as time goes on, an issue which we can get some attention focused by the legal community and by the academic community. What are the rights? What are the privileges? How do you solve the dilemma? Are there absolutes? We have tended over the past several years, in the development of the intelligence law process, to drift away from absolutes. There are very few absolutes in S. 2284 as it stands now because we were not able to reach agreement on what the absolutes should be. I think we all learned as we worked through the process that we really didn't know enough about what we were doing to set down absolutes. When you get to a process that is as difficult as legislation is in twentieth century America, as time-consuming and as lengthy a process as it is to get something through Congress regardless of the amount of controversy involved, I think you begin to stand somewhat in awe of

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saying we know exactly what we ought to do now and putting it in permanent statute. There is that problem with Executive regulations too, but we think that we can more easily change Executive regulations than we can statutes and to a certain degree we can.

One of the big absences of input into the growth of law in this area has thus far been the third branch--the courts--and the public for whom all the branches work. We have a Foreign Intelligence Surveillance Court. It is unfortunate but necessary that it works in secret. I say unfortunate, because that means that its growth and development in the area of law does not become the source of public commentary. The congressional oversight committees know about it; we have continuing dialogue with the oversight committees, in terms of how the statute is being developed as every statute is into a body of judicial precedents, and that's a very constructive process. One of these days we're going to get into the public. One of these days we're inevitably going to have some sort of litigation over something the Foreign Intelligence Court has done. One of these days somebody is going to be a criminal defendant in a case where there has been a FISA surveillance, and at that time we're going to begin to get the healthy growth and development of judicial review in a contested proceeding in an area of the law that right now is accurately, I think, portrayed by some as all too similar to a Court of Star Chamber.

What we need before that, I think, is more of an impact and input from the Bar and from the academic community. A large volume of the Executive Branch rules and regulations are available to you in unclassified, published form. FOI is there. And we've had surprisingly few requests for or expressions of interest in getting the rules and regulations out. When we've gotten them out, they have met with resounding silence. Since the 12036 rules and regulations were approved by the Attorney General, I don't think we've had comments from anyone other than the intelligence committees. No one has said whether the regulations are right, wrong, indifferent, or what they are. I guess we've done our jobs right. Maybe that's why there's an absence of comment. But I don't really believe that. I think what's happened is that there has been a necessary attention focused on the charters which has been a time-consuming process, and you can't do everything at once. There's been comparatively little attention directed at the Executive rules and regulations.

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The Bar and the academic community have a window between now and whenever Congress reconvenes in 1981, to take a hard look at the Executive Branch regulations. Give us the benefit of your learning and your thoughts of what we've done so that when we resume the charter process next year, we'll have a better information base and perhaps a wider consensus on what we should be doing. Conferences like this are going to help, and it is important that we continue them. It's important, I hope, that we can get to some specific workshops on some specific narrow proposals. It's important that we get the casebooks out, and important that we ensure that lawyers stay in the process. It's a point of controversy. Should there be a specialty of intelligence law? I submit to you that there has to be until we get the consensus formed and until we get history behind us and get on into the future with the practice. But it's going to end one of these days. This is not a growth curve that doesn't have a top to it. It's going to top out sometime in the next few years, level off, and then get back down to being regularized like other areas of the law. I think it's going to be a fascinating process to see it grow over those years and what we can learn from analogous areas. Thank you very much.

Raymond Waldmann

Thank you very much, Ken. I'm glad you're helping to set the agenda, not only our committee but for the Bar as a whole, because I think these are very useful suggestions. I believe that we have already accepted your point that we need more attention and more debate in this field and the Standing Committee is quite interested in hosting conferences and seminars of this nature. As Morry mentioned in passing, we are planning something later this year at Yale University which will narrowly focus on one of the areas--the First Amendment and its relationship to intelligence activities.

Turning now from the law for a moment, I'd like to introduce our third speaker who is not a lawyer but a political scientist. He came to the intelligence field by way of labor, international relations, and international affairs. He is a professor at Georgetown University, and is also the coordinator of the Consortium for the Study of Intelligence, a group of academics from both the legal profession and the legal community as well as from the political science

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and other communities. Roy has studied the intelligence area with a great deal of attention over the last year or so and has published in the field. (I believe we have some of your books here.) It's with great pleasure I give you Professor Roy Godson.

Professor Roy Godson
Georgetown University and Coordinator
Consortium for the Study of Intelligence

Thank you. I hope but do not assume all in this room share two objectives. I don't think these objectives are shared throughout the whole country, but I hope those of us here want to have a first-class, "full-service" intelligence capability. We want an intelligence service that is excellent, that can engage in analysis, in collection, and in counterintelligence to protect the collection and to ensure that the analysis is correct. We also want a capability to engage in those "special activities" that have to remain secret and which are necessary for the foreign policy and national security of the United States. I assume also we simply don't want to allow those things to happen; we want to ensure that we have a first-class capability to do these things, rather than just permitting these things in law.

I assume, secondly, that we believe our own intelligence services should not transgress the civil liberties of our own citizens. The purpose of intelligence, as I see it, is to enhance the civil liberties and the happiness of the American citizen; we don't want that undermined. Those are two objectives, but as I said I don't think they're entirely shared in this country and I think the fact that they haven't been shared has played a role in the intelligence debate, particularly in the last ten years. But let's start from these two objectives and then proceed from there.

Now it seems to me that one can draw a distinction between three stages, three approaches and the stages and approaches happen to move rather nicely in this triad. I don't say that because I come from a school that is interested in triads, but I'd like to try to put this into a triad although some of you may object to my classification. But let me try to characterize the three stages, or, if you

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will, three stages and approaches to charters, to laws to regulate intelligence to achieve the objectives I just specified.

The first period I see begins roughly in '46, '47, '48, in that period, which I characterize as a period in which the laws came into existence, the laws which enabled the intelligence service of the United States to operate a full service intelligence capability. I call this a laissez faire type of law. The law allowed intelligence to operate. There are a number of people in this room who were party to that and who know a great deal about that period, and I'm sure if I mischaracterize that period they'll speak up about it. The approach then was to provide for the laws and the National Security Act of '47 and subsequent amendments to allow for Executive Orders gradually to develop within that framework.

That continued from the late forties on until, I would say, the late sixties. Then we get what I would consider to be a second stage in the development of law or approaches to law regarding the achievement of intelligence objectives. This second stage embodies what I would call a restrictive approach to intelligence law and regulation. That is to say, it was concluded that the efforts to achieve a full-service capability and the laissez faire legal system, although it wasn't completely laissez faire, it was a legal system which allowed for activities to take place. But, it was argued, that period had allowed things to get out of hand. There were failures and civil liberties were somehow transgressed. The intelligence community had gone out of control in some way and had to be brought back under control, and a whole series of rules had to be passed to bring the intelligence community under control.

Look at the congressional investigations. We have a number of people here who were in the intelligence community at that time, and I would hope that they would comment on this. People like Ray Wannall, Sam Halpern, and others who testified and participated in those hearings. I think the whole thrust of those congressional hearings, and I would say the thrust of a lot of the legal groups' activities that took place, all tried to use legal mechanisms to restrict the activities of intelligence which they felt were violating or transgressing upon our second major objective, that is, maintenance of civil liberties.

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I would argue that in this whole period, let's say from the early 1970s up until very recently, we've seen the introduction of two major charters. And, as I said again, we have some of the principal authors here. One charter is approximately 200-odd pages long with a lot of "dos" and "don'ts." Some "don'ts" were very explicit. Pages sometimes of what you weren't allowed to do directly and sometimes there were pages and pages on procedural limitations on activities. And I must say as a nonlawyer I found some of those things really incomprehensible. That was in the first draft of S. 2525, which was introduced in 1978. The second draft introduced early this year, S. 2284, is only about 40 pages of very, very small print but really it comes to about 160 pages of regular text. Again, it is basically a list of absolute restrictions on activities and a list of procedural restrictions on activities. Some of these procedural restrictions are extremely complicated. I remember testifying on this legislation at the request of the House Intelligence Committee where I heard Chairman Boland ask members of the intelligence community to explain some of these procedural limitations and the members of the intelligence community testifying they couldn't do this. Finally, I think somebody asked Boland whether, in fact, the Russians would gain anything from being able to study the charter legislation. Would it tell them what we were and were not doing? Boland said he didn't think it would. They wouldn't be able to understand it and it would confuse them as well as us. I underline this point because I couldn't understand many of the procedural limitations but I thought it was because I wasn't a lawyer. And it occurred to me, therefore, that if the Russians can't understand it, the Administration can't understand it, Boland can't understand it, one would have to really pity the people in the field that would have to implement these rules if they were adopted.

These were the kinds of charters that were introduced by the leadership of the Senate Intelligence Committee in the last few years. One in 1978 and another in 1980, neither of those, I'm glad to say, have gotten very far. And I think it marks the end of the period, of what I would consider to be the restrictive phase or restrictive approach to charters; absolute restrictions and procedural restrictions which in fact produce almost the same result. I and others have spent a lot of time with members of the Association of Former Intelligence Officers who testified quite extensively on these kinds of restrictions and how, in fact, they would serve as impediments.

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I would also add I find some of these restrictions still also present in the Executive Orders, first 11095 and then its successor 12036. And the fact that the Executive Branch and some in Congress have agreed on it doesn't necessarily make me feel much better about the fact that they've agreed on those restrictions or that restrictive approach. It doesn't make me feel that much better if one is concerned with a full-service, first class, intelligence capability.

Now, I suggest that we are beginning to enter into what I consider to be a third stage, a third phase I hope of approaches to a charter and rules governing the intelligence community. I think the restrictive phase has run its course. There are now people getting together discussing alternative approaches, approaches which I consider to be innovative and which will provide an incentive for performance at the same time that they, I think, will protect the civil liberties of American citizens. And it's really this third approach that I'd like to turn to for a few minutes. I wouldn't say that everybody knows the answers. We don't have a complete set of rules that we would like to introduce, I think, at this stage. However, at least one version of a new charter will be introduced in the near future. I must say this charter appeals to me. It's about 25 pages long. We've gone from 250 to 150, and now we're down to 25. That strikes me as a positive development. I'm afraid as a Democrat I'm a little concerned because most of the people who are working on this approach are Republicans, and I don't want to yield to them the innovative approach, especially to the people who are supposed to be conservatives. But, in any event, let me if I may just sketch out some of the principles that I consider to be involved in this innovative approach without getting into the specifics that have been proposed so far.

There are perhaps three key ingredients in this. First is a statement of mission and organizational arrangements. One does have to state, it seems to me, at this stage that the country does want a full-service intelligence capability. We do expect it to be able to do all of these things. In the charters that have been so far introduced there have been relatively brief and weak statements about what it is that we expect our intelligence services to actually accomplish. So it seems to me, once established, the standard that we would expect to be met by the intelligence community, and if anybody wants to hear it, I sort of myself have put a pen to paper on some of these statements, a kind of a

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statement of mission and organizational arrangements to achieve capability for covert action, collection, counterintelligence, and analysis.

Second is a procedure for reporting or checking on the achievements of the mission. This seems to me extremely important. In the previous patterns there were no real procedures established in the proposed charter law (in the framework law, if you will), for reporting or checking on the achievement of the mission. There were a few things that were done; for example, the establishment of the President's Foreign Intelligence Advisory Board which did, I think, check on whether the government was achieving what it was supposed to in terms of analytical capability. I'm afraid the Board concluded sometimes that we weren't. However, that Board has of course been abolished by President Carter. We're now absent that particular method of achieving our objectives. The idea would be to establish procedures within the Executive Branch and between the Executive Branch and the Congress to ensure that the country is in fact doing what it has to do to promote its policy. I would propose, and I think a lot of people who are thinking in terms of this innovative approach would propose, that first the Executive Branch report to itself what it is doing. For example, in the area of national estimates, the government gets together, prepares an estimate and sends it to the President. But in the area of counterintelligence up until, I think, this year, we have never had national counterintelligence estimates. I must say that was called for in the President's Executive Order 12036, an innovation on the Ford Executive Order and I found that a rather positive approach. Somebody in the United States should have the responsibility of bringing together the entire threat, counterintelligence threat to the United States, in one place rather than leaving it to the CIA to worry about its counter-intelligence problems, the Army to worry about its counterintelligence problems, the Navy to worry about its counterintelligence problems, the Air Force its, and NSA, and so on without anybody bringing this whole thing together. And again, I could expand this at considerable length if anybody wants to go into it.

I'm saying we would have within the Executive Branch procedural checks to make sure that in fact the whole intelligence threat and opportunity was considered. Also I would propose that the Executive Branch report to the Congress what it was doing to achieve the statement of mission which would be

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enunciated in the first part of the charter. I would suggest that the DCI or whatever is the head of the intelligence community, report to the Congress what the Executive Branch is doing to achieve American foreign policy objectives, let's say in the area of covert action, once a year or maybe twice a year. He would also tell the Congress what we are not doing and why. At the moment, he's only required to report the specific actions that he's about to do or in some circumstances that he has just done. But he doesn't have to say what he is not doing. In other words, there's no incentive for him to actually do anything. I'm suggesting that this innovative approach would provide an incentive, at least, for him to consider a full range of conditions in the world; what it is that we are doing or not doing covertly to influence those conditions.

And finally, I think we would have to have provisions for guidelines, Executive Branch guidelines, and institutions, to ensure that there were no violations of American civil liberties. I would suggest that the Executive Branch draw up its own guidelines, most of which would, I'm afraid, have to remain classified. As a scholar, I wish I could get them all. I'd like to get everything, as a matter of fact, but I recognize that the Administration will have to keep some things secret. But the Executive Branch would draw up its own guidelines; the guidelines would not involve the quasi use of the criminal standard which has been the major characteristic of the current guidelines. (I assume they are going to be discussed quite a lot here as you have some of the principal authors of those guidelines here for this conference.) And the guidelines would be reported to the Congress. In other words, you wouldn't have restrictions put into law, either absolute restrictions or procedural restrictions, which have the effect of absolute restrictions. What I'm suggesting here is that you want Executive Branch guidelines prepared by the Executive Branch but reported to the Congress. The Congress then would oversee these guidelines, would be constantly monitoring them, but you wouldn't have in statute restrictions which have been the characteristic, I would suggest, of the charter efforts so far.

In conclusion, I would suggest that in the United States we have moved from a laissez faire legal system which allowed for activity, into a period of restrictions which have dampened down and damaged intelligence activities. Recently I have been interviewing American intelligence officers, people who

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served in the 1970s, 1960s, 1950s and tried to make comparisons. I also interviewed a number of retired foreign intelligence officers who also will testify to the fact that American performance in many places around the world has gone down, to the detriment of Western security interests. To move again from this period of restrictions to a more innovative phase, is going to require considerable thought and creativity. However, within the last year, a number of very prominent academics and other specialists have begun to turn their attention to the subject and, already, there has been considerable progress.

Again, it's really a pleasure and a privilege to be able to participate in the deliberations of this committee, and I hope it will be the first of many.

QUESTION PERIOD

The question period following included discussions whether in fact top quality people are being recruited for "intelligence careers" by the United States or retained after recruitment and why the Church and Pike committees dealt only with possible intelligence abuses and ignored the threat to our national security.

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II. THE ROLE OF THE JUDICIARY AND THE STANDARDS TO BE APPLIED TO INTELLIGENCE OPERATIONS

Moderator: Professor Antonin Scalia
University of Chicago Law School
Intelligence Consultant, Standing Committee, ABA
Former Assistant Attorney General,
Office of Legal Counsel

The subject of the panel this morning is the role of the Judiciary in the intelligence process. To set the stage for it, I'd like to make a few remarks about where we are and how we've gotten here. The attitude with regard to involvement of the Judiciary as recently as 1948 was set forth in the famous Waterman Steamship Corporation case that's cited by the Justice Department in virtually any suit involving presidential powers. For those of you who have forgotten the language that the Supreme Court used, it went like this: "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. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative."

Well, needless to say, that language is, to borrow a phrase once popular in the Executive Branch, no longer operative--because in fact the courts do sit in camera to be taken into Executive confidences. The first development in that direction was the 1974 amendment of the Freedom of Information Act. Prior to that time, the Supreme Court had held in the Mink case that judicial review of the propriety of invoking disclosure exemption (b) (1) under the Freedom of Information Act required the court to determine only whether a document had been stamped "Classified." If it was stamped, the Supreme Court said, that was an end of the matter; the court could not inquire into whether the classification

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was proper. The '74 amendments to the Freedom of Information Act, which took effect in '75, required that the court determine not only that the stamp "Classified" was on the document, but also that such classification was correct. That was not as large a step as one might think, because all it required was that the court determine that subordinates of the President properly applied the Presidential Executive Order specifying what should be classified. It still left it up to the President (under the applicable statutes) to say what should be classified.

The next major development was the 1978 Foreign Intelligence Surveillance Act, which applies to electronic surveillance within the United States. Briefly, the major judicial involvement under that legislation is the requirement that the court determine on its own that the target of electronic surveillance is a foreign power or an agent of a foreign power, and that each of the facilities or places at which the electronic surveillance is directed is being used or about to be used by a foreign power or agent of a foreign power. The court must determine all that on its own. Beyond that, the court simply accepts the certification of Executive Branch officials as to other matters--as to whether the information sought is foreign intelligence information, as to whether it's necessary or essential to the national interest. It accepts those certifications unless they are clearly erroneous. A relatively limited judicial involvement, but a real judicial involvement in any case.

S. 2284, not in its current bobtailed version but as originally introduced in February of this year, also provides for a judicial involvement with respect to "extraordinary techniques"--not just electronic surveillance but also physical searches, or any other searches that would require a warrant if conducted for domestic law enforcement purposes (a category which, as you know, covers a multitude of not only sins but also uncertainties). For all of those "extraordinary techniques," the judicial involvement prescribed by the proposed legislation is that the court itself would not merely accept Executive certification but would have to determine for itself that the information sought is foreign intelligence; and for counterintelligence operations it would have to determine for itself that the counterintelligence information likely to be obtained is "significant." In these and other respects, the legislation proposes a much higher degree of judicial involvement.

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With those introductory remarks to set the stage for the subject matter of this panel discussion, I would like to introduce our first discussant. Morton Halperin has a B.A. from Columbia, a Ph.D. in political science from Yale. He is proud of the fact that he never received a law degree. He taught at Harvard both in the college and in the law school. He served in the Department of Defense as Deputy Assistant Secretary from 1966 to '69. He was on the staff of the National Security Council in '69. He is currently the Director of the Center for National Security Studies and one of the most prominent advocates of greater public, congressional and, where necessary, judicial review of intelligence activities. Mr. Halperin.

Morton Halperin
Director
Center for National Security Studies

Thank you very much. It's a pleasure to be here. It's particularly a pleasure for me to share a panel with Attorney General Levi. We all owe him an enormous debt of gratitude in this area for the stand that he took when he was Attorney General in breaking through a log jam of years of Justice Department and Executive Branch opposition to providing a role for the courts in supervising intelligence surveillance and endorsing what finally became the Foreign Intelligence Surveillance Act.

What I want to do in the interest of time and also in the interest of provoking discussion, if not this morning, at least during the conference, is to lay out a set of propositions affecting the proper role of the courts in supervising intelligence matters. My assertion is that this is the law as the Supreme Court has defined it, not as I would like it to be. There are a set of propositions which can be derived from the cases, that there is very little conflict in those cases, and that those propositions really determine the parameters of the options that we have in dealing with surveillance in areas protected by the Fourth Amendment.

I would begin with the assertion that the Fourth Amendment protects the privacy of persons regardless of the purpose for which the government seeks to intrude on the zone of protected privacy. It does not matter that there is no

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intention to use the information to indict somebody. It does not matter that the person may be suspected of being an agent from a foreign power. And it does not matter that the government believes that the information is important for national security purposes.

If the government is interested in information which is stored or communicated in ways that are protected by the Fourth Amendment, that is stored on private premises, sent through first class mail or sent through telephone or cable channels, then the only choices that the federal government has if it wants to seize that information is either to use the normal criminal investigative procedures and search warrant processes or to conform to Fourth Amendment requirements under special national security procedures established by the Congress in legislation; or, not to get the information. I would submit that the fourth alternative that is often discussed, and which I suspect will be put before you in a few minutes, namely, of proceeding to gather that information from these places in the absence of a judicial warrant on the authority of the Executive Branch, is not only unconstitutional but dangerous. We have a record of the danger that came from permitting this activity to go on. I would also submit, and I may be biased by my own personal experience, that requiring high level approval, even requiring Presidential approval, before one permits warrantless intrusion into these areas is simply not an adequate form of protection.

The Fourth Amendment creates a number of requirements for the conduct of searches and not simply the requirement of a warrant; these other requirements apply whether or not a warrant is required. The first requirement, of course, is the warrant, in the absence of exigent circumstances. And I think exigent circumstances mean that it is not possible to secure a warrant without the evidence being destroyed in the meantime. The doctrine applies only when in all other respects the government is entitled to seize the information and could get a warrant if there were time to do so. Exigent circumstances does not mean that the government official wanting to seize the information does not want the person from whom it is seized to know that the information is being seized.

There is also a requirement of reasonableness, that it not be a general search. There is a requirement of notice that a person from whom information

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or documents are seized is informed that a search occurred and is informed of what was seized. And there is at least, in the case of homes, a requirement of knocking before there is an entry, an announcement that one has a warrant and intends to enter premises.

In 1967 when the Supreme Court brought electronic surveillance into the Fourth Amendment, the Court did not, as I think some have suggested, lower the standards which already applied to the protection of individuals from physical searches. I would argue that what the Court did in bringing electronic surveillance under the Fourth Amendment was to fashion a set of new procedures which would make it possible on the one hand to bring the electronic surveillance under the Fourth Amendment and on the other to permit the government to engage in electronic surveillance at least in some circumstances. But there is nothing in the Katz decision or anything that follows to suggest that the Court intended to reduce the protection which we already had against searches and seizures of physical premises. The Court, of course, had to fashion a different reasonableness requirement, because by its nature a bug or a wiretap is a general search; and, therefore, we've had the introduction of minimization procedures of various kinds which are intended to compensate for the ability to seize everything which moves on the wire.

The courts have abandoned the knock procedure in saying that you can plant a bug, precisely because there is no way to plant the bug if you knock on the door first and say, "I intend to come in and plant a bug in your room so that we can hear what you have to say." And the Court has said that notice requirements could be delayed, not avoided but delayed, since again you could not give notice in advance or at the time you were seizing conversations and have the conversations still be seized.

At the same time that the Court was putting wiretaps and electronic surveillance under the Fourth Amendment, it suggested--it did not decide--that there might be a national security exception for the warrant requirement of the Fourth Amendment in the case of national security electronic surveillance. But that decision, leaving that question open, and of course several circuit courts have decided in favor of there being such an exception, did not suggest at all that

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the other Fourth Amendment requirement did not apply to national security electronic surveillances. The Court said we do not decide whether the warrant requirement of the Fourth Amendment applies; not whether the Fourth Amendment applies. There was nothing in that decision and nothing in any subsequent decision, except for one district court decision, suggesting that there was an exception for physical searches, that the Court was intending to suggest or imply that it was reopening the question, which it appeared to have settled in many other cases, that in the case of physical searches there was no national security exception to the warrant requirement.

The Constitution provides protection for Americans abroad from the actions of the U.S. government. The Fourth Amendment applies abroad, although it is possible and I think unsettled the degree to which the standards and procedures might be different to take account of the different circumstances abroad. This leads me finally and very briefly to some conclusions about the issues raised by S. 2284.

First, I would argue that if the government wants to seize information from these protected areas, the courts must be involved and warrants must be secured for all such searchs. What the Executive Order calls situations in which warrants would be required for criminal investigation is a phrase that has too many words in it. If the situation requires a warrant, it requires a warrant, period. The only alternative choice if one does not want to involve the courts is to forego the searches. The Foreign Intelligence Surveillance Act should be applied abroad to electronic surveillance in essentially the same way as it applies at home, although there are some technical problems around the margin.

I would argue that physical searches are also appropriate under the standards of the Foreign Intelligence Surveillance Act, both at home and abroad, but only if the requirements of knock and notice, which I think are required in the case of physical searches, particularly physical searches of the home, are applied. And if the position of the intelligence agency is that it does not want to let the person know that he is under investigation, then I think the only alternative is to leave the home alone. I do not think that the founders and the drafters of the Fourth Amendment thought that if the British government had only labeled the people in

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the colonies who it wanted to search as agents of the French, it would have been all right to go in and seize their property without a warrant, nor do I believe that the Fourth Amendment could be overcome by any president simply by labeling his enemies agents of a foreign power as most of our presidents have done to most of their political opponents. It just defies everything that was intended in the history of that Amendment. I would argue that the current purported authority in the Executive Order to permit secret searches in homes by the Attorney General signing a piece of paper saying that he finds probable cause to believe that the person is an agent of a foreign power is clearly unconstitutional and that any effort to permit a warrant which would not require knock and notice would be also unconstitutional.

And finally, I would argue that the proposal in the original 2284 to permit electronic surveillance and physical searches abroad, against what Ken Bass described to us as the innocent American who has no connection with a foreign power but who happens to possess information that the government wants, clearly violates the intent and the letter of the Fourth Amendment.

Professor Scalia

Thank you, Mr. Halperin. Our next speaker is Michael Uhlmann. Mr. Uhlmann has a B.A. from Yale and a Ph.D. in political science from Clairemont. Unlike Mr. Halperin, he then made the mistake of going to law school, receiving an LL.B. from the University of Virginia. He has had experience in the Congress, as Minority Staff Director of the Senate Select Committee on Equal Educational Opportunity and as legislative counsel to Senator James Buckley; and in the Executive Branch as Assistant General Counsel of the Federal Trade Commission, and finally as Assistant Attorney General for Legislative Affairs in the Justice Department from 1975 to 1977. He is now in private practice in the District of Columbia. Mr. Uhlmann.

Well, as you can see from Nino's introduction, but contrary to your brochures, I am not now, nor have I ever been Robert Bork. It's very difficult to be Robert Bork. Indeed, if the truth be told, even Bob Bork has trouble being Bob Bork. You came expecting Cherries Jubilee, and you're going to end up with

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peanut-butter-and-jelly. I accepted this task of standing in for Bob a couple of days ago on a number of explicit conditions, the first of which was that I wouldn't have to prepare a paper. The second was that I wouldn't be held responsible for engaging in any sins of omission or commission. I agreed, moreover, only with a good deal of trepidation, because I am surrounded by three gentlemen who have devoted a goodly portion of their lives to the study and elucidation of this subject. In this business I am a rank amateur. I think I can best perform my role this morning by reraising a couple of questions that have hovered around the issue for the past four or five years, but which have not received, in my view at least, all the attention they deserve. I do so on the supposition that a couple of well-asked questions are worth a couple of thousand bad answers to other questions.

My first question has to do with the validity, in the constitutional sense, of the judicial role in issuing warrants under the Foreign Intelligence Surveillance Act (F.I.S.A.). The second has to do with the propriety of the judicial role--that is, assuming the constitutional question to be moot or settled (for good or ill), is it nevertheless a good idea to involve the judiciary in this matter in the way in which F.I.S.A. involves it?

The constitutional issue is raised by the hoary question of whether the issues presented to a judge in a typical F.I.S.A. proceeding constitute a "case or controversy" within the meaning of Article III. There is some attenuated but I think on the whole aberrational authority for the proposition that F.I.S.A. proceedings are cases or controversies within the traditional meaning of the term. I'm not sure that the issue has been explored with all the care that it deserves.

The spirit of the case or controversy requirement, it seems to me, derives from two distinct sources, one having to do with a concern over judicial economy, the other going to the more substantial concern of separation of powers. As far as judicial economy is concerned, the case or controversy requirement is designed to preclude the exercise of judicial power over merely hypothetical conflicts. The conflict must be "real", so the hornbooks say, in the sense that the parties before the court must be in some state of genuine

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adversity requiring judicial resolution. The courts should not be in the business of issuing mere "advisory opinions." The quite distinct separation-of-powers question is whether and to what extent the judiciary may be intruding upon prerogatives or discretionary authority vested by the Constitution in the political branches.

On both points, I think substantial questions may be raised about whether the judiciary under F.I.S.A. is presented with a genuine case or controversy. Now those who supported the legislation originally, and those who support it now, have been sufficiently troubled by this issue (in private at least) to try to bring F.I.S.A.'s standards very close to those of Title III of the Omnibus Crime Control and Safe Streets Act (which governs the issuance of electronic surveillance warrants in normal criminal cases). That is to say, the effort has been made to convert a typical F.I.S.A. proceeding into a kind of mock criminal procedure. This for a number of reasons. One is to assuage the concerns of civil libertarians, who like the "probable cause" standard of Title III, and who believe that its application to foreign intelligence surveillance will prevent abuses of the sort that occurred in the past. The second reason is that in seeking to apply the standards used in one body of law (criminal) to another (foreign intelligence), one tends to obscure the novelty of what it is that judges are being called upon to do in a F.I.S.A. proceeding. A third and related reason is that the analogy to Title III tends to make judges feel comfortable: they (and we) are led to believe that they are standing on the more or less familiar terra firma of criminal procedure. In short, under F.I.S.A., the question of whether a genuine case or controversy exists is "fudged." It is deemed to exist by analogy only.

But despite the effort to analogize F.I.S.A. proceedings to ordinary criminal proceedings, I'm not altogether sure that we are not creating a cure worse than the disease. The analogy tends to break down because the purpose of F.I.S.A. proceeding is different from the purpose of a Title III proceeding. In both instances, it is true, the warrant is issued ex parte, but in the criminal case as opposed to the foreign intelligence case, it is intended or at least understood that at some point the judge's ruling will be reviewed in open court. The defendant in the criminal case will always have the right to challenge, if you like, the reasonableness of the judge's determination of the reasonableness of the warrant.

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But in the typical F.I.S.A case, unless it is one of those rare instances in which it is the government's intention to proceed to trial, the "defendant" may never be able to mount such a challenge. But the role of the defendant, it seems to me, is what gives "bite" to the case or controversy requirement: unless it is intended that the defendant will either now or in the future be able to challenge the government, is there a distinctly judicial role to be performed? The judge in the F.I.S.A. proceeding acts, as it were, in loco parentis for a "defendant" who will seldom, if ever, be a defendant in fact. Now it will be said that it is a good idea to have someone standing between the Executive Branch and the issuance of its foreign intelligence warrants, but that is different from saying that the case or controversy requirement has been properly met. To repeat: is there anything distinctly "judicial" about the judgment that a F.I.S.A. judge is typically called upon to make? Or does it simply make everyone "feel" better that someone in a black robe is making the judgment?

Passing for the moment the formalistic point about the case or controversy requirement, I think we could all profit by being more candid than we have been about what is actually involved in the F.I.S.A. procedure. As Nino suggested in his introduction, the F.I.S.A. machinery may be part of a pattern, beginning with the 1974 amendments to the Freedom of Information Act, which involves the judiciary more and more in the exercise of discretionary authority that traditionally was thought to lie wholly within the prerogative of the Executive. Now if one confines the judicial role under F.I.S.A, as Nino does, to one of fact-finding, one tends to insulate the Act from certain kinds of assaults that might be made upon it. But I'm not sure that Nino's reading of the Act would necessarily be agreed to by a number of people who sponsored that Act and who now support it. I have encountered certain interpretations of the Act which tend to celebrate a rather more substantial judicial role than that envisaged by Professor Scalia. What these others would like to see is something akin to the assumption of law-making authority indulged by Judge Wright in the Zweibon case. There is reason to believe in our time that once the judicial nose gets under the tent, the hump and all the rest will not be long in following. And that is the point at which one has to take seriously the question of whether the judiciary is not intruding into matters that are best left within the province of the Executive. Even if one reads the Act's mandate to the judiciary narrowly, as

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Nino would, it would be hard to describe the judicial role under F.I.S.A. other than by saying that judges are now being called upon to act as an administrative arm of the Executive. And if the judicial mandate is read more broadly, as I suspect it will be, you have the potential for judicial interference in an area that judges, by training, experience, and custom are not particularly well qualified to judge.

How the Act is working in practice, I do not know. You don't know. Well, a few people in this room presumably know, but the general public does not know, indeed may never know. What we have here is a secret body of law secretly arrived at. F.I.S.A. has the peculiar characteristic of virtually requiring a breach of national security before its wisdom or constitutionality can be tested. That troubles me. I think it should trouble all civil libertarians. If it is argued that machinery like this is necessary or desirable in order to guard against the possibility of Executive abuse, it doesn't follow that the mechanism ought to be celebrated as a triumph of civil liberties.

I share, I suspect with everybody in this room, the desire to prevent abuse of Executive discretion. It may be necessary to create some sort of new body to double-check the execution of foreign-intelligence surveillance warrants. But I don't think it necessarily follows that the judiciary, for constitutional as well as policy reasons, is the best body to perform that function. F.I.S.A. is almost limitless in its faith in the neutrality of judges, and I suppose what troubles me is that my own faith is not quite so limitless. Judges are not immune from the ordinary laws of human nature. They suffer from the same vices and virtues as the rest of us, as do members of Congress and the Executive Branch. Given that this is a secret body of law secretly arrived at, given that the judiciary is isolated from public opinion and the affairs of state in the international arena, we may well rue the day that so extraordinary and novel an authority was vested in judges. What one does about it at this point, I don't know. There are alternative remedies. The McClory bill, which Mort Halperin alluded to a few minutes ago, would have vested a kind of reviewing authority in Congress without involving the judiciary. That approach has problems of its own, but from a civil liberties perspective it was not necessarily any less desirable than the F.I.S.A. procedure as adoped.

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The rise in the esteem for the judiciary as the last and best defender of civil liberties is a fairly recent phenomenon. Whether it will be a long-standing phenomenon or not, I don't know. But if I were Mort Halperin reviewing the recent pronouncements of the Supreme Court on the exclusionary rule, handed down in the closing weeks of this term, I would begin to have my doubts about whether I should want F.I.S.A. authority vested permanently in the judiciary without further review by some politically responsible body. What does one do if the judiciary goes askew, either by knee-jerkily approving draconian surveillance orders proposed by the intelligence community, or, in the alternative, by denying to the Executive the rightful ability to undertake surveillance deemed necessary to the protection of the national interest?

Which gets me to my final point. One critical difference between F.I.S.A. as drafted and submitted during the Ford Administration and F.I.S.A. as enacted is the disappearance of the language which reserved, in constitutional theory at least, the right of the President to undertake warrantless surveillance under at least some (unspecified) circumstances. Some would read that reserve clause language as being "merely" declaratory or symbolic. Nevertheless, I consider it a "symbol" of the very greatest importance. F.I.S.A., as I read it, purports to establish the exclusive means (along with Title III in appropriate cases) by which electronic surveillance may be licitly conducted within the United States. Theoretically, no mere Act of Congress can remove from a president a reserve constitutional power. Nonetheless, F.I.S.A. on its face implicitly, if not explicitly, denies the existence of such a power to conduct surveillance save in terms spelled out by the Act, and one is reminded of Justice Jackson's opinion in the Steel Seizure case to the effect that, if there be a reserve power, it is at its absolute lowest ebb when it is set against an Act of Congress to the contrary. A judge disposed to rule against a president would have no difficulty combining a theory of express or implied waiver with the legislative history of F.I.S.A. to deny a president a right that every president since at least Franklin Roosevelt understood to be a necessary and useful ingredient of his Commander-in-Chief authority.

I don't have sufficient faith in the drafting skills of lawyers, whatever their intentions, to say that there is no legitimate circumstance under which a

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president might be permitted to conduct warrantless foreign intelligence surveillance. The contingent circumstance of foreign affairs is simply too multitudinous, too unpredictable to permit the belief that the entire universe of possibilities is adequately covered by F.I.S.A. I am greatly troubled by the disappearance of the reserve clause language from F.I.S.A. as enacted, and I think it puts the President of the United States in one helluva position should an unanticipated exigent circumstance arise in the future.

Professor Scalia

Thank you, Mike. We greatly appreciate your coming in at a late date to sub for Bob Bork, and it was a fine job.

If you had any doubts, ladies and gentlemen, about why S. 2284 ran into rough sledding, you must know now. We've heard from two speakers, one of whom opposes the legislation because he thinks that judicial approval of the extraordinary techniques cannot validate them; the other of whom opposes the legislation because he thinks judicial approval is not necessary and would be counterproductive. Our third speaker--who knows?--may be in the middle.

Edward Levi is well known to everyone here. There is no way he could have avoided being on this program. He is a Counselor to one of its sponsors, the Standing Committee on Law and National Security of the ABA. As for the other sponsor, he is a former Dean of this law school, a former President of this university, and a current faculty member of this law school. And finally, if that weren't enough to get him on the program, he is of course a former Attorney General of the United States, and, I think it's fair to say, the first Attorney General to have to wrestle with the problem of clearly defining the regime that governs intelligence collection activities. Professor Levi.

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Honorable Edward Levi
Former Attorney General of the U.S.
Distinguished Service Professor,
University of Chicago Law School

I think I shall be brief. I say I think I will because I don't know what I'm going to say. I start where I think we all start. One place I start from is the agreement that it is essential that this country have a strong intelligence activity. I must say that when we talk about the history of it I'm always reminded particularly in legal circles that history is constantly being remade and reformulated and pretended. To say, for example, that it was not until the last few years that there was a reporting to Congress on counterintelligence activities makes one wonder what J. Edgar Hoover was doing when he was reporting to Congress, which he frequently did, and when he was in charge by presidential authority of counterintelligence activities. This is just a reminder that there is a long and turbulent history, starting around 1930; one could go before that, to the development of the relationship between the law and intelligence activities where where there has been a great need for intelligence activities. With that, of course, there has been the requirement of protecting individual rights.

Now it seems to me that one approaching this in a governmental way has to see this subject in a much larger setting. It is not good for the foreign intelligence community to be operating in an area which is constantly under the risk of domestic attack. It is not good for American companies, for example, to cooperate with intelligence activities in one year, requested to do so by presidents and what not, and then some years later to be racked up and down by the congressional committees for their outrageous cooperation. It is not good for people, government employees in the intelligence agencies, to be told to do one thing one year and some years later to be informed, either through congressional reports or footnotes to congressional reports, that what they did was illegal; not only unconstitutional, but immoral. And if one says does that have an effect on the morale of agencies, it rather sounds like a silly question. Of course it does.

So the question is how does one approach as a government matter that kind of problem? What we're dealing with here is the problem of a country which

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attempts to run itself with a separation of powers idea. The whole surveillance area is an extraordinary example of those problems. It's an unlovely example but an extraordinary one in which the various parts of the government have at various times behaved as though they were not responsible for what the government was doing or at least they were not responsible for what other parts of the government were doing. So that you have had at times a kind of equilibrium in which Congress has taken the position in effect that it knew that certain activities had to be carried on. It did not wish to pass a statute saying they shouldn't. It wished to be free to deny that it knew that these activities were being carried on, and sometimes there was a political element.

Beyond that, we have to think of what kind of a form of government our country really has, and now I'm going to the problem of the judiciary. It's quite interesting to hear Mike Uhlmann imply the existence of Hayburn's case. Hayburn's case isn't going to keep the courts from doing what they want to do; namely, to insist on warrants in an ever-increasing area. An argument based on Hayburn's case doesn't really involve the case or controversy element in the same way anyway. Hayburn's case really indicated that the court wanted to be able to tell the Executive what to do. It didn't want the Executive to tell the courts what to do. And Hayburn's case was a good prophecy, because the superintendence of American society is in the hands of the courts. In that sense, the courts are the most powerful branch among the three branches of government in the United States. One can have an interesting discussion as to whether it is appropriate to have courts in this area, but the courts have no doubt about it and they're the ones who are deciding the question.

It is also interesting to have a debate as to whether there should be a charter or rules writing of government character determining what should be done in this area and whether the courts should be involved in that, because at the present time and before the Foreign Electronic Surveillance Act we did have such a charter, we did have such writing. The trouble was that it was in about fifty-seven, and that's a minimum number, of Supreme Court cases. That is really not a perfect shape for the law. If one thinks, as was suggested earlier this morning, that two hundred plus pages is an awful lot for a code, well try reading fifty-seven Supreme Court cases and I assure you the pages are much

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more difficult to follow, and much more hazardous. If the suggestion is that this is a violation of what courts ought to be doing because they should not be giving advisory opinions, I would rather suggest that perhaps we ought to change our minds about that and say that since courts are exercising a superintendence of American society which they never exercised before, they ought to be giving advisory opinions.

I don't want to use too much hyperbole about it but starting with the creation of a legend from James Otis in the Writs of Assistance case and the Boyd case, there has been a rewriting of history with the creation of great heroes, civil liberties. I would say an almost intentional misreading of the Fourth Amendment, if you mean by that in its historical meaning.

Now where does that put the Executive Branch of the government and where does it put the Legislature? It seems to me that there is a strong responsibility for those in government who are interested to have the situation clarified, and the kind of clarification cannot be one which says, "Well if you have the power, and we won't tell you whether you do or not, you may exercise it." That really was the form of the first wiretapping statute. That is a complete evasion of responsibility by the Legislative Branch. As a personal little footnote, which is probably not terribly interesting, that when the Church Committee came out with one of its subcommittee reports which said that it doubted that the Executive had the power to have warrantless foreign electronic surveillance, I discussed that interesting observation with a leading senator, whose name I will not give, but one whose stature was enormous, whose knowledge and stature were enormous. He had signed that report. And I said to him, "Well now I am the Attorney General and I want to know what this sentence from the Legislative Branch means. Does it mean that I should now not any longer authorize such foreign electronic surveillances?" And he said, "Why you know more law than we do. Don't worry about it." And I said, "Oh come now. First I don't, and secondly you know that's not an appropriate answer when the Legislative Branch has said something like this. I want to know what you think my responsibility is." He said, "Of course you have to sign them." Well, that is a very interesting form of government and it does show an inability to draw things together. It seemed to me in the first place that the intelligence agencies were entitled to the best kind

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of written instructions that could be given. Protecting them, protecting the public. It was also required that there be legislation. Now the legislation could say this is a matter for the Executive Branch. I don't find such legislation. Or the legislation could try, as these acts and bills try to do, to indicate what the problem areas are and how they are to be settled. And I suppose there could be legislation which would say quite clearly the courts are to stay out of this.

What area of life do the courts stay out of? They run schools. They run hospitals. They run prisons. They determine what should be taught. They determine what should be done in housing projects. They tell you when you can have an abortion. What is it that they stay out of? And I'm not sure that I want my remarks to be taken as critical, because governments do evolve and our government has evolved, and it's very hard I think for us to see what is there. As I would say, you don't see what is there by looking at Hayburn's case. When you look to see what is there, you see a pyramid. A pyramid in which everyone is supposed to be engaging in activities which involve rights and duties, which may be abused, which have to be reviewed in some way, and certainly a final review is therefore possible by the Supreme Court of the United States.

QUESTION PERIOD

The question period following included discussions of if and under what circumstances the President might go beyond the Foreign Intelligence Surveillance Act to engage in warrantless activities, what the Congress intended to authorize or proscribe in that Act, and whether wartime or terrorist exigencies would authorize a disregard of some of its provisions.

Morris Leibman

My bosses have made me put away my twenty-page introduction of Judge Webster and to review his distinguished career. May I just say that it's with great pride that in this setting an American Bar committee has the privilege of introducing as its main speaker a truly distinguished lawyer who has brought all of the great characteristics of what we hope the Bar represents, has brought it to government at a very trying time. His experience on the bench and in many other activities is too well-known for me to review but we're just delighted that he was able to make it to be with us today. Judge Webster.

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Honorable William Webster
Director, Federal Bureau of Investigation

It's a pleasure to be with you this afternoon. I would like to take this occasion to discuss the FBI's role as an intelligence agency. First, what does the public expect of the FBI? Second, what is the proper role for Congress in this country's intelligence effort? Finally, what balance should be struck between powers the intelligence community needs to be effective and restrictions that are necessary to protect individual rights?

In the last decade, many events have drawn attention to the intelligence community and its activities. The Church Committee hearings were perhaps the most important of these events. They raised a number of controversial issues and prompted serious efforts to enact an intelligence charter. In addition, they were partially responsible for the current system of Attorney General guidelines and congressional oversight, which has helped to diminish some of the suspicions generated by the hearings.

Congressional consideration of an intelligence charter has provoked considerable thought within the intelligence community about the individual roles of the various agencies and about their relationships with one another. It has also sparked public debate over the need for intelligence--a debate that we believe identified the importance of our counterintelligence effort. Finally, it has forced both intelligence agencies and the Congress to balance the need for intelligence against the rights of individuals affected by our intelligence gathering activity. Through these debates, the public has been given a better understanding of this previously closely held activity of government.

Occasionally, the public hears directly and in some detail about our work. For example, the FBI's response to the recent influx of Cuban refugees was highly publicized. We had the special challenge of identifying hostile intelligence elements among more than 100,000 refugees, most of whom arrived in a two-month period. We identified some individuals of counterintelligence interest, but of course, there is no assurance we identified all of them. Our work, therefore, must continue.

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Thankfully, we don't often have thousands of refugees from hostile countries suddenly descending upon us. We must, however, deal with thousands of visits by citizens of such countries. Last year, for example, more than 81,000 persons from Soviet and Soviet-bloc countries--seamen, tourists, trade mission personnel, students, and diplomats--entered the United States.

Although most are legitimate visitors, we know that there are intelligence agents among them, and we have a responsibility--just as we did with the Cuban refugees--to identify them and to prevent their engaging in acts harmful to the national interest.

In sum, as a result of congressional hearings and debate on the proposed intelligence charter and other intelligence legislation, and, for example, the publicity surrounding the FBI's mission during the influx of Cuban refugees, the public has become more aware of the purpose and the need for counter-intelligence activities.

The need for counterintelligence is well recognized. But, as this year's debate over the Hughes-Ryan amendment demonstrates, the degree of congressional oversight of this country's intelligence effort remains controversial.

For years, the Bureau conducted its intelligence and counterintelligence work under presidential mandates based on and justified by the President's inherent constitutional powers. The courts were reluctant to intervene in matters that were thought to be assigned exclusively to the Executive Branch. Congress, too, respected the separation of powers and involved itself only to the extent necessary to provide funding.

The days of a passive Congress, and a passive Judiciary, are over. In the Foreign Counterintelligence Surveillance Act, Congress established a special court and new standards to control the use of electronic surveillance in counterintelligence cases. This Act properly addressed the Fourth Amendment concerns inherent in those electronic surveillances. While, initially, I had reservations about the Foreign Intelligence Surveillance Act, I can say, on the basis of our experience, that it works well--and has not had a deleterious effect

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on our counterintelligence effort. Incidentally, I have supported, in the charter context, an amendment to the Foreign Intelligence Surveillance Act which would have the courts address physical searches in the same way as electronic surveillance.

The Intelligence Oversight Act, passed this month by the Senate, seeks to firmly establish and delineate the congressional oversight function. The bill provides for congressional oversight of intelligence activities of all intelligence agencies while modifying the Hughes-Ryan provisions that require reporting special activities to numerous congressional committees.

The debate over the Foreign Intelligence Surveillance Act, the Intelligence Charter, and the Hughes-Ryan amendment concerns the scope of congressional oversight of intelligence activities. From the FBI's point of view, whether there should be a legislative charter and oversight of our activities has been largely settled: we think participation by the legislature in defining the FBI's powers and responsibilities in intelligence and counterintelligence is appropriate. We accept the principle of a charter and for the most part supported the charter provisions applying to us in the proposed National Intelligence Act of 1980. One important benefit from this kind of legislation is that we could proceed with our work, confident that we would be acting within a defined, publicly approved framework.

We also accept the need for oversight. Congress should be able to monitor whether we are meeting the responsibilities assigned to us and how funds allotted to us are used. I believe our relationship with the two congressional intelligence committees is good, and I foresee no change in this relationship.

The third issue I want to mention this afternoon concerns the delicate balance between the authority intelligence agencies like the FBI need in order to be effective and the limitations we must shoulder in order to preserve the individual liberties of American citizens. Inevitably, there is some tension between these two important goals. For a number of reasons, however, we believe that these two principles can and, indeed, are being accommodated.

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First, the FBI operates under Executive Order 12036. This Presidential Order provides that intelligence activities "should be responsive to legitimate governmental needs and must be conducted in a manner that preserves and respects established concepts of privacy and civil liberties." This principle is realized in specific provisions requiring checks and controls on the use of sensitive investigative techniques. We have found these controls entirely workable.

Second, our agents operate under the Attorney General's foreign counter-intelligence guidelines, which govern the manner in which we may conduct investigations. Changing these guidelines requires both approval by the Attorney General and review by the congressional oversight committees. But even with these procedural safeguards in place, the guidelines' framework provides enough flexibility to ensure operational effectiveness. If amendments are necessary, they will occur. Thus, just this spring, the guidelines were revised and updated to meet current intelligence needs and problems, particularly with respect to the operation of double agents.

Third, when changes are made--including restrictions on our authority--we ensure that they are followed by our foreign counterintelligence personnel. Regularly, our agents return to Washington to discuss new legislation and revisions in policy or guidelines that affect foreign counterintelligence work.

The FBI well understands the potential tension between individual rights and effective counterintelligence, and we will respect controls designed to preserve a proper balance between those interests. Our experience in criminal investigations, which have long been conducted within court-defined boundaries, enables us to adjust to controls in the intelligence area without sacrificing the ability to do the job the people expect. In 1975, former Attorney General Levi, who is here today, cited this as a reason why counterintelligence responsibilities should be left in our hands rather than with an agency with only an intelligence assignment. I believe our record under the Attorney General's guidelines, the Executive Order, and the Foreign Intelligence Surveillance Act strongly justifies his position.

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Finally, I would like to address a few of the issues raised during the congressional debate over the proposed National Intelligence act of 1980--the so-called Intelligence Charter. But before I begin, I must state one caveat. The prognosis for passage of the intelligence charter in this session is, as you well know, unpromising. Nevertheless, since the oversight bill that was passed by the Senate did not resolve many of the controversial issues raised during the Charter debate and since those issues are still important and still unresolved, I will discuss them briefly here.

One crucial unresolved issue arising out of Charter discussions is the threshold that must be met before the FBI may investigate Americans possibly involved in clandestine foreign intelligence activities. Our view is that counterintelligence investigations should be permitted when there are facts or circumstances to indicate clandestine intelligence activity by an individual in behalf of a foreign power or an international terrorist organization. Notice that this standard is triggered by clandestine intelligence activity rather than an identifiable criminal act. This is because counterintelligence, by definition, is the detection and prevention of espionage and other clandestine activities of foreign powers. Since, initially, many foreign intelligence activities may not involve violations of law, detection of foreign intelligence efforts often requires relatively broad investigations. Thus, although the proposed FBI charter for criminal investigations requires a specific violation of law, or at least reasonable potential for such a violation, before an investigation may be commenced, such a threshold for the initiation of a counterintelligence investigation is unacceptable. Of course, we agree that there must be a higher standard for the use of a highly intrusive technique, such as electronic surveillance, against an American citizen.

Another unresolved issue is whether the FBI should initiate an investigation of an individual, such as a lobbyist, who acts legitimately as an agent of a foreign power. The lobbyist may be involved in protected political activity. Should we collect information about this activity in order to investigate suspected clandestine intelligence efforts? The charter addresses this issue by establishing a higher degree of Department of Justice oversight. We would be required to report to the Attorney General the likelihood of a significant intrusion into political or religious activity in any such investigation.

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A third, very difficult issue is whether we should investigate persons who have been targeted by a foreign intelligence service. On the one hand, such an inquiry of an individual whom we believe is a target may enable us to determine the interests and intentions of the foreign power. On the other hand, one could argue that any intrusion is too great when we are dealing with an innocent person. I believe that it is necessary for the FBI to have the authority to conduct an inquiry to determine the nature of the interest of a foreign power in an American. Provisions similar to those in the proposed Intelligence Charter, which permit such an inquiry, but subject it to Attorney General oversight, should be sufficient to assure the American public that our actions are both necessary and proper.

Another unresolved issue is whether the FBI should have authority to investigate past activities of foreign intelligence services. Some of the drafts of the proposed charter did not make allowances for such investigations. Our experience is that investigation of these foreign intelligence operations can be important in determining both the extent of damage to the United States and the nature of foreign intelligence operations. We would like to see this ability included when this legislation is next introduced.

Another controversial and important issue is the need for amendments to the disclosure requirements of the Freedom of Information Act. Today, citizens of hostile foreign countries are entitled to request and receive materials under the Act. As a result, foreign intelligence agencies are using the Freedom of Information Act to obtain information about the United States.

Of course, there are provisions in the law permitting information to be withheld--classified documents and data which directly disclose the identity of an informant, for example. Unfortunately, however, a knowledgeable reviewer--and foreign intelligence agents tend to be knowledgeable--can deduce highly classified government secrets from seemingly innocuous information.

In June 1979, I furnished to members of congressional oversight committees who indicated an interest suggestions for amendments to the Freedom of Information Act. Changes I proposed included: (1) making permissive rather

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than mandatory, Freedom of Information Act disclosure to felons and foreign citizens; (2) exempting from disclosure requirements records relating to foreign intelligence or counterintelligence; and (3) protecting certain specified sources of information, such as cooperating friendly foreign governments. These and other proposals are being studied by the Department of Justice, which is preparing administration amendments to the Freedom of Information Act.

Many of these issues and others, such as the use of academics, clergymen, and journalists to collect information, will be debated in Congress again. When they are, discussion will almost certainly focus on how to balance civil liberties against the need for intelligence gathering. Obviously, the FBI believes intelligence gathering is indispensable. We believe our counterintelligence program is critical to the national security. We also understand, however, the importance of protecting the privacy and civil liberties of our citizens. In deciding how our counterintelligence program should be run, these principles may collide, and difficult choices will have to be made.

The public should be aware of what these choices are. They also should have a full and realistic appreciation of the validity and importance of each. The dialogue and discussion about intelligence work begun several years ago and continued here today can contribute to this understanding. I am confident that, as a Nation, we are capable of making decisions about intelligence and counterintelligence that serve both our interest in national security and in civil liberty.

Morris Leibman

Judge, its that kind of talk and your kind of integrity that gives us hope and confidence in the future. Before we adjourn to the courtroom, I want to pay special thanks ot your people who have been very helpful and cooperative with us over the last year and a half and have helped educate me. Ken Bass, who helped get me started in part of this is here, and also Spencer Kimball is here from the American Bar Foundation. Spencer helped us do some of our original research. Thanks to you all and thank you again, Judge.

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III. THE CONGRESSIONAL ROLE

Welcome: Morris Leibman
Chairman, Standing Committee
on Law and National Security, ABA

The thing I deeply resent is people who frequently make remarks about substitutions. We don't have any substitutions. Mike Uhlmann was not a substitute for Bob Bork. Mike Uhlmann is one of our regular consultants. Bob Bork is a member of the Committee, has worked very faithfully and is only not here because of personal problems. So we always have surrogates who are in the wings but are really part of the operation from the beginning. And in today's situation we have several of those last minute changes. One of them is we finally got Phil Kurland to come here. I used to have time, before I was Chairman of this Committee, to lunch with Phil about once a month and keep up to date with the law. But my duties and his extensive duties have interfered, so we're delighted to have you here, Phil.

I want to say a special word, before Charlie does all the introductions, to Congressman Mazzoli who worked on the markup on the bill until about five o'clock last evening and then flew in on the Redeye Special to be with us, and we particularly appreciate it. Charlie Ablard has been one of our great supporters, a great help to me over many years and particularly to the Department of the Army. He was the General Counsel of the Army. He also served with the Department of Justice. He is today a member of the International Broadcasting Board, Radio Free Europe, and Radio Liberty. He's a distinguished private practitioner, one of our great supporters, and you're in his hands for the rest of the afternoon.

Moderator: Mr. Charles Ablard
Member, International Broadcasting Board

This afternoon's topic is really what we've been talking about, I think, since last night's after dinner talk by Frank Carlucci; it's the congressional role and, to put it in military terms, the roles and missions of the Congress in this problem.

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No one has told a story yet today, and I'll tell a brief one because I think it illustrates some of the difficulties in certitude. We saw an example of the lack of certitude, I think, in the last panel's questions and answers in the last few minutes. This is one of my favorite stories about H. L. Mencken, my favorite author.

Mencken was apparently covering the 1920 Democratic Convention in New York, the great long one, as you remember, that went to 102 ballots. And on the last evening he filed a story with the Baltimore Sun from New York which concluded with the statement: "Of one thing we can be certain--John W. Davis will not be the nominee of this convention." Well, as you remember, about three o'clock that morning John W. Davis was nominated. Whereupon Mencken, realizing that the papers were about to hit the streets in Baltimore, turned to one of his colleagues and said, "I hope those jackasses in Baltimore have sense enough to strike the not." That also, I think, illustrates the need to have a few post hoc corrective devices.

Congressman Ashbrook could not be with us here this afternoon but has asked Herb Romerstein, who is a staff member of the Select Committee, to present some remarks which he wanted especially to have for this group. And I'd like to ask Herb if he would come forward at this point and do that before we get directly into the panel and I think this will have some great relevance toward the consideration of the panel this afternoon. Herb is a staff member of the Select Committee and was formerly also a staff member of the Internal Security Committee.

Herb Romerstein
Staff Member, Select Committee

Ladies and gentlemen, this is indeed an appropriate time to discuss the congressional role in the intelligence process, because really it has changed substantially in the past decade. If you look back ten years ago or twenty or thirty years ago, you would see basically the same thing--an intelligence community responsive to the President of the United States, a few chairmen of congressional committees having whispered in their ear some interesting tidbits but no real oversight of intelligence activities.

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Beginning in the early 1970s, revelations of intelligence activities became more and more frequent, culminating in the establishment of House and Senate committees to investigate the activities of the intelligence agencies. Some of the information revealed abuses. Such things as drug experimentation. But for the most part the allegations were blown out of context; minor matters became opportunities for press and congressional hysteria. Senator Frank Church, Chairman of the Senate Intelligence Committee, accused the CIA of being a rogue elephant; presumably it was out of control. In fact, it was the opposite of that. It was an agency run by the President of the United States and responsive to his needs and instructions. If they did anything wrong, they did the wrong, if it was wrong, on the instructions of the President. They were certainly not rogue elephants. And unfortunately there was no opportunity for Congress to pay any substantial amount of attention to the activites of the intelligence agencies and to determine for themselves whether these activities were right, wrong, or indifferent.

Unfortunately, Congress' entry into the intelligence oversight field resulted in headline hunting, leaked highly classified information, and caused a substantial amount of damage. For example, in the foreign field, the area of CIA responsibility, damage was done to the collection capabilities of CIA in the area of human intelligence, the information provided by human beings in various parts of the world. Foreign nationals who supplied information to the CIA were reluctant to supply it if their identities might be known or if a leak would identify them and endanger their lives or their safety. Foreign intelligence services that cooperated with the CIA were reluctant to continue to cooperate if that relationship might become known or if the information that could be picked up every day in the major newspapers might identify their sources and endanger them. CIA personnel who had worked for years building relationships with foreign services and with foreign individuals to provide them with information resigned or retired because they saw the work of so many years collapsing around them. And this is not to downgrade in any way the importance of technical collection systems. But it's become a truism to say that a technical collection system can tell you the adversary's capability but only a human being can tell you what he intends to do with that capability.

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And within the United States the same kind of a problem developed. As a result of the activities conducted against the Federal Bureau of Investigation, the human beings who provided the FBI with information--both in the counter-intelligence field and in the domestic security field--began losing confidence in the ability of the FBI to protect them. An extensive report was provided the Congress, as mentioned by Director Webster before, on case after case of people, some of them informants, some of them people who were being interviewed by the FBI, who refused to provide information because they felt that their identities could not be kept secret. In this case, the Director was talking about problems with the Freedom of Information Act. But certainly the leaks and other such problems contributed to the perception that if you're going to risk your life giving information to the FBI, you had better take some serious precautions.

As a matter of fact, Congress has now perhaps a different attitude towards our intelligence agencies. There is more interest in rebuilding the agencies, in giving them the tools that they need to do their job. There's more attention being paid to the mission of the agencies instead of paying attention to the real or fancied abuses of the past. For example, the House Intelligence Committee in its authorization report this year, all of the members agreed (and I give you a direct quote), they called attention to the "continued reduction in the number of informants that are vital to the prevention and neutralization of terrorist activities." And the Committee recommended that the FBI place increased emphasis on the counterterrorism program in fiscal year 1981 and to report to the Committee any problems it may be facing that could hamper the program's effectiveness.

In additional views by two of the Committee members, Congressman Ashbrook and Congressman McClory, they specifically pointed to the Attorney General's domestic security guidelines of 1976 as one of the factors hampering the development of an effective FBI counterterrorism program. The number of informants has decreased from a thousand to a handful.

As hostile intelligence services in the past have utilized individuals in the United States who were involved in subversive or violence prone groups, either

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for collection purposes or for terrorism, the decline of the FBI's domestic security program has also had some impact on the FBI's foreign counter-intelligence program. This is not to say that the FBI is not doing a remarkable job with the resources available to it. The Hermann case that Director Webster referred to before is a very, very significant breakthrough where the FBI identified and made an American agent out of a Soviet deep cover agent who had an assignment as a "sleeper agent." He was supposed to take over Soviet intelligence operations here, if they lost the ability to utilize the intelligence officers that have their cover in the embassies and at the Soviet U.N. mission. This man was identified, turned by the FBI, and run by the FBI against the Soviet intelligence service and was a very, very remarkable achievement by the Bureau. It was downplayed by the press, unfortunately.

What is Congress doing now, is really the next question; and Congress is doing a number of things. One is the widespread desire in Congress to reduce the number of committees that the CIA has to report covert actions to from eight committees to two. This is so widely agreed to in Congress that, when there was a vote a few weeks ago on the Zablocki amendment, the vote was 325 to 50 for Mr. Zablocki's amendment to reduce the reporting to two committees. There are some disagreements within Congress as to how that should take place or to what extent prior notice has to be given to the Congress for these activities. But certainly there is almost, I couldn't say unanimous if fifty voted against it, but there is very, very widespread agreement that this must be done.

There is widespread agreement that we need a names of agents bill. Now what we're talking about here is a law that will punish those who release or reveal the identities of American intelligence officers, agents, assets, informants and of course this has been called colloquially "the Agee bill" for Philip Agee. There is strong feeling that it should cover much more than just Agee, a renegade CIA officer; it should also cover those who specifically wish to do harm to the American intelligence agencies by identifying the officers and the agents of American intelligence. There is discussion in Congress again--this is not as widespread or agreed to as widespread as the other things--of amending the Freedom of Information Act to protect that information which the CIA would not be turning over under FOIA anyway but which they now have to search the files

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for, put together in one place, and perhaps give a judge the opportunity to look at and determine whether it should be released. This is information that's protected under the law or should be protected under the law in any event.

So there are these things happening in Congress. There is much more desire to do something to rebuild the intelligence community than there is to tear it down. But this doesn't mean that Congress is not going to want to take a long, hard look at the things that the CIA and that the FBI do. They should be able to. We don't want the situation as in the past where a few people have the information and this is not passed on to the rest of Congress.

Let me just conclude by saying that yesterday the House Intelligence Committee marked up an oversight bill. That bill requires more reporting to Congress than some of our members agreed to. The report was reported out as an 8 to 6. The six that voted against the bill were the five Republicans and one Democrat, Mr. Zablocki, but everybody in the room agreed that the next step is the names of agents bill. We must protect the identity of the sources and the intelligence officers overseas and I think that we're going to be proceeding with that as the next point on the agenda. Thank you very much.

Charles Ablard

Thank you very much, Herb, for delivering those views from Congressman Ashbrook. Now from that same committee, the Select Committee on Intelligence, we are very privileged to have with us Congressman Ron Mazzoli, who is an eight-year veteran of the Congress representing the district surrounding Louisville in Kentucky, and we're very pleased to have him with us today. He is a graduate of Notre Dame and the University of Louisville Law School. Congressman Mazzoli.

Representative Ron Mazzoli
House Permanent Select Committee
on Intelligence

Thank you very much, Charlie, and ladies and gentlemen. Thank you very much for the introduction and permitting me to take part in these meetings. I have sat here during the morning and I feel, and I think probably rightly,

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somewhat intimidated by the quality of the people. I think that this is a situation where it's been once said, I have a great deal to be modest about in view of modest talents. By whatever stroke of fate or fortune, I wound up on the Intelligence Committee and perhaps have had some opportunity to develop insights which I have gathered in my three years of service on that Committee, and my ten years of service in the Congress. I also serve on the Judiciary which has, of course, a connection with the Intelligence Committee.

Let me make mention of just a few things. I certainly did not have a chance to prepare the remarks which I would have with a little more advance notice, but let me give you some observations which perhaps I've gained from sitting in the audience this morning. One of our speakers this morning said that the activities which we're speaking about today, that is, the congressional oversight, have been driven primarily by intelligence failures. The speaker suggested that the 1947 Act was driven by the failures of intelligence to perceive the coming of Pearl Harbor and the activities in the seventies were driven by other types of revelations. That may be true, probably is true, and I think may be somewhat unfortunate. The problem we're seeing today--these shifting sands of public opinion and the erosion of support for certain aspects of congressional oversight--suggest something very important to me. If we who believe, and I do, in the proposition that there is a proper role for Congress in the oversight of the activities of the intelligence community, and if we are to proceed to draft the right kinds of legislation, then it seems to me that they have to be founded on something other than anger or outrage, however righteous that might be, with respect to past misdeeds. It has to be crafted on the basis of constitutional matters and, again, the panel this morning or both of them talked to the points in the Constitution. It seems to me if we're to have any opportunity to put the legislation on paper which will be correctly viewed and correctly applied it has to be based on the Constitution and not upon this feeling, however correctly derived, that there is something wrong about the intelligence communities. I think there is probably a relatively small number of people in the Congress who believe that there's something inherently wrong with covert action or believe that there ought not to be covert action. I think the majority of us feel that under certain circumstances there is a need for covert action and it's a question of how those actions will come to pass.

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I began on the Committee when it was formed by Speaker O'Neill, and I can tell you, on the basis of three years of observation on the inside of the Committee, that it is a serious-minded Committee which I think any of you and many have appeared before it would agree but, furthermore, I think there's been improvement in the relationship between the Committee. I think many of you who have appeared before it would agree. Furthermore, I think there's been an improvement in the relationship between the Committees, and I think by extension, between the Congress and the Executive Branch of government and the intelligence community. I've said many times that I'm sure it must have been extremely disquieting and concerning to members of the intelligence community to first walk into that room when the Committee was just formed and have to sit there and speak of these profound and dangerous and sensitive activities, and to speak about them in candid terms and to make these statements in rooms where people are walking in and out and phone calls and messages are being taken and distributed with the certain amount of chaos which attends even Executive Session meetings. I think at the same time that over this period of three years, most members of the intelligence community agree with the premise that those two committees at least have maintained the sensitivity and maintained the confidence of the information given them. There have been no leaks attributed to our two committees. Despite what sometimes appears to be a somewhat careless attitude just simply because there is a certain amount of movement in the room, the members of the Committee and the staff have done a good job in handling this kind of information.

One other thing that hasn't been mentioned much today, which I think ought to be mentioned, is that a considerable amount of the attention of our Committee and the Senate Committee has been the quality of the intelligence information. The question which was first discussed was not just how much should be revealed to us in regard to the covert actions and the other more sexy, I guess you'd call it, topics. But the question which was first discussed, I guess, by the Pike Committee, is now a considerable part of our work. That is, what is the quality of the intelligence estimates that we get? What is the quality of the appraisals of the enemy's activities? What is the cost effectiveness of our intelligence service? I think in the years ahead we'll see more of that kind of information and that sort of questioning coming from our two committees. And I

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think these questions reflect the nature of oversight in a more classical sense. Basically, how much is the taxpayer being asked to pay and how much is the taxpayer getting for that tax dollar spent.

As Mr. Romerstein said just a moment ago, the House Committee did report a version of the Hughes-Ryan and Oversight Bill which will go to the floor. The question, of course, was whether or not it should be attached to the names of agents bill or whether that should be left separate. The House Committee voted yesterday to make them separate bills rather than a singular bill. The same way with the FOIA. There was some tension yesterday. Probably for the first time, there was a certain amount of division on the Committee, but I believe that when we did adjourn yesterday, I think there was a resumption of the kind of good relationship which has existed from the time that that Committee was started, which is attributed really to Chairman Boland, and I think to the ranking member, Ken Robinson from the State of Virginia.

One last thing and then I'll turn it over, since I hope we do have time for questions and answers. This, I believe, would probably be interesting to the audience. Earlier today, Attorney General Levi made mention of the fact that he abhorred the vagueness which is in the congressional legislation and the fact that it is uncertain. We say one thing and maybe mean another, or that there are some loopholes or unclear areas. I would say only to the Attorney General that this, of course, is intended by Congress to suggest that it wants information. There are also areas within which the President as Commander-in-Chief as head of the Militia, and as the person who is charged with constitutional and profound responsiblitiy has to take action. I believe our bills are becoming more specific and, of course, that's causing as many problems as the vague messages which we have sent in the past. I don't know that there is any answer for this problem, but it does occur to me that Congress has been wise and I think restrained. I think it has been entirely proper and correct in trying not to unnecessarily tie the hands of the President. In the Senate version of Hughes-Ryan, in our version of Hughes-Ryan, there are specific mentions of the Constitution, sources and methods, areas within which we do believe the President has certain responsibilities as head of the Executive intelligence agencies. I would certainly sympathize with Attorney General Levi as a lawyer and as a trained jurist and as

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a teacher. I'm sure it must be very awkward to look at these words and find them ambiguous and wish that there could be more certainty as to at what point does the trap spring on the unsuspecting foot. But I think it has been done intentionally and I think it has been done correctly.

Let me lastly say that I congratulate the University of Chicago for giving the space over and the ABA Standing Committee on Law and National Security for having sponsored these meetings. I think they're very useful. This is my first opportunity and I hope it's not my last to participate. I think these are very fruitful. One very last word. Since a lot of compliments have been paid today to the University of Chicago and for a very good reason since it is an outstanding intellectual school, I'd like to pay tribute to my alma mater and to Mr. Galvin who is with us in the audience. He has been extremely helpful to the University of Notre Dame. Just so that all the plaudits don't go one way, I'd like to pay a couple of plaudits to him and Mrs. Galvin. Thank you very much.

Charles Ablard

Thank you very much, Congressman, for those insights from your Committee. Our next speaker brings a different perspective. Professor Ernie Gellhorn, who served as Senior Counsel to the Rockefeller Commission, is now a professor of Law at the University of Virginia Law School. He has also taught at Arizona State and Washington University in the State of Washington. He graduated from the University of Minnesota Law School. He has done extensive consulting in Washington on other matters, including the Administrative Conference of the United States, which Professor Scalia chaired for a number of years. We welcome you, Ernie Gellhorn.

Professor Ernest Gellhorn

University of Virginia Law School
Former Senior Counsel, Rockefeller Commission
on CIA Activities within the United States

Thank you very much, Charlie. I am in a somewhat awkward position, assigned as a spokesman on this panel for more intensive oversight by the Congress. My problem is that I too am often unimpressed by the work of

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Congress. Indeed, I am reminded of the comment made by Mark Twain who noted, "it could probably be shown by facts and figures that there is no distinctly native American criminal class, except for Congress." I am also concerned that not being involved with Congress on a daily basis or intimately familiar with the proposed legislation, I may either misinterpret it or miss many of the nuances in the current proposal and the debates. On the other hand, my participation despite these handicaps is at least no more incongruous than appearing on a program at the University of Chicago where we are being given two free lunches and a free dinner. Turning to the topic at hand--legislative oversight of the intelligence agencies--I propose to discuss three issues.

First, what are the values at stake in legislative oversight? Why is it desirable? Why might we want even more intensive oversight? Second, and correlatively, what are the dangers or mistakes we should be alert to? And third, applying these standards, how does the Intelligence Oversight Act of 1980 as proposed, Senate bill 2284, measure up.

The traditional function of legislative oversight, it seems to me, can be divided into two categories. At its simplest level, it is used to inform Congress in order that it may legislate effectively, appropriate funds wisely, assure that directives are being carried out and even to make basic policy reflecting the normative values of the voters. A second function is to inform the public in connection with the need for legislation or the need for no further legislation.

There are, however, special considerations applicable to intelligence oversight which suggest that a special standard be applied in determining the appropriate scope and reach of legislative review in this area. One issue is the problem of secrecy; another is the question of sensitivity. On secrecy, Congress must deal in the oversight area of intelligence away from the public forum. As a consequence, it must act often as a surrogate for the public; it cannot prudently air all its disagreements in public. In the same vein, note must be taken of the fact that the issues at stake involve delicate and significant questions of national security, foreign affairs, and defense.

The delicacy of the area of intelligence agency action imposes several constraints on effective legislative oversight. One is that the legislative ability

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to check on the performance of the Executive--on the reliability of the data as well as its utility--is perhaps even more limited than in other areas. On the other hand, there may as a consequence be a special value in legislative oversight that is otherwise overlooked--namely, its in terrorem effect. Merely having to report information to the Congress will, I suggest, affect the behavior of the agency. For that which cannot be justified will be difficult to report and therefore perhaps difficult to plan, engage in, and perform. As a related matter, the effectiveness of legislative oversight can be seen as perhaps checking the isolation of agencies which operate in a compartmentalized, secret manner. This great secrecy may be necessary because of the data with which they deal. But there is a tendency, as suggested by subsequent reviews of the Bay of Pigs adventure, that intelligence bureaus will persuade each other of the desirability and value of a particular project because of the lack of outside oversight. And here it seems to me that effective oversight by the Congress, and in particular by individual committees, can serve as a healthy check on the isolation necessarily imposed on those who participate in executing as well as designing policy. One final function of oversight, very useful to the agencies themselves, is that once information is reported to Congress and its oversight committees and they accept it, the Congress is then placed in the position of having approved it, of being on board as members of the team. This can be of inestimable value to the Executive agency; it also poses a danger to Congress.

Moving to the second area--the potential dangers or mistakes that can arise from increased legislative oversight--serious pitfalls are again present. It seems to me that they really fall into two categories. One problem would be the attempt by Congress to make policy even when not writing legislation. Here the temptation is very strong, and the history in Congress is that as soon as it develops expertise in an area, it also steps in to demonstrate its new-found knowledge. Questions of policy in intelligence are issues on which there are no certain answers. Thus, there will be strong pressure from the oversight committees to move beyond their appropriate role of acting as a check on Executive policy in seeking to develop that policy. This is, I believe, outside of the legislative role where policy making is both appropriate and necessary.

The second area is the problem of disclosure, of leaks. The harm here, it seems to me, is one that we have heard mentioned frequently today and

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yesterday evening, that we may endanger policy as well as national security, that individual agent's lives may be at stake, and that the ability to acquire intelligence will be impaired especially where it is dependent on the cooperation of other governments. It is difficult, of course, to estimate the significance of these dangers. By this I do not mean to suggest that they cannot be important. There is, however, a tendency to overstate them, particularly in connection with greater legislative oversight. The past evidence of possible abuse by Congress of the revelation of sensitive information provided to its committees is quite slim, particularly when compared with the leaks, intentional or otherwise, by the Executive Branch. We can all recall when the President of the United States, in private discussion with newspaper editors, informed them of efforts by the CIA and other agencies apparently to engage in foreign assassinations. That was not, it seemed at the time at least, to be a deliberate leak, but it was in any case a very damaging one. Still the danger is present and this illustration may suggest only that this is an area in which it takes the Executive Branch to make the Congress look good.

The next question is how the proposed intelligence act measures up to these concerns and questions. To assure that we all start from the same foundation, I will outline its provisions briefly. It consolidates the primary oversight responsibility into one committee for each House while retaining reporting responsibilities by the agencies to other committees. Second, it requires that information on intelligence activities, including significant activities which are as yet only anticipated, be given to these committees by timely reports except where the President determines that extraordinary circumstances affecting vital United States interests limit what should be reported. In the later case, the President is obliged to make a report to eight members of Congress, including the leadership of the House and the Senate as well as the ranking Majority and Minority members of the Senate and House intelligence committees. Full access to agency file information is to be given by the intelligence agencies to the Congress. Timely reports of illegal intelligence activity is separately required in order to inform Congress about covert actions not otherwise reported and to give reasons why advance notice was not provided. And finally, the Act admonishes the President and the committees to establish procedures for implementing this oversight for each House, and for each House to establish rules on unauthorized disclosure.

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Basically, it seems to me, that this proposal reflects a reasonable and realistic accommodation of both the desirability of legislative oversight and the inherent dangers presented by outside review in this particularly sensitive area. It includes a recognition of the special rules necessary for intelligence oversight. The act would limit the number of committees involved in oversight, a sensible reduction in the burden of making reports. It would require reports of information; this is primarily a codification of current practice. The act also recognizes that merely reporting information is not sufficient; and that access to information can be critical--not to rummage through the files of the agencies, but to get information so as to check on an agency's activities. And finally, the proposed act contains an express provision that Congress is not to approve or disapprove intelligence actions, but merely to be informed. There is, in other words, recognition of the proper limits of committee in contrast to congressional oversight (i.e., by legislation).

Despite these acknowledged strengths, I would contend that this legislation is not a perfect solution. Let me identify a few problems. The first is that the act would only provide a framework and thereby set an atmosphere; it would not assure cooperation. Thus, its effectiveness will ultimately depend, as others have indicated, on the President and the Congress and on their willingness to work together. Structure cannot overcome the adequacies or inadequacies of personnel. One other potential problem is the absence of any sanction in the bill for noncompliance. For example, no penalties are created to assure observance of reporting requirements, file access, or disclosure. This raises some doubts about the meaning of the legislation and its purpose. I would suggest that if there is a strong commitment by the Executive Branch, as indicated earlier today, as well as by the Congress to live with these provisions, then sanctions or enforcement mechanisms would be appropriate. Certainly there ought to be an enforcement mechanism in connection with unauthorized disclosure. The House and the Senate are, according to the legislation, to develop rules and procedures to ensure that information is not improperly disclosed. It seems to me that such protections should be included in the legislation or otherwise approved by each House in advance of any adoption of statutory disclosure requirements. These should be in place as active preconditions on the disclosure of sensitive information by the Executive to the Legislative Branch.

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Likewise, the issue of file access is not adequately defined or addressed by the bill. In the Executive department, the disclosure of sensitive information is normally made on a need-to-know basis. Applying that standard to the Legislative, however, would mean that everything in the Executive Branch potentially could be asked for by the Congress. That seems to me highly inappropriate, and I would suggest that there is a need here to develop a mechanism to shoot with a rifle. It might be useful, for example, to identify the kinds of information that would be appropriately revealed. Information of past activities, for example, should be more readily disclosed than information of future plans or information of ongoing operations.

Finally, in connection with the specifics of the legislation, I would suggest that the provision requiring the Executive to report on intelligence failures is, to be blunt, silly. It is a meaningless, unenforceable, inappropriate gesture. What is an intelligence failure to the Congress may be an intelligence success to the Executive. When General Westmoreland could describe the Tet Offensive a few years ago as a great success for the United States, and mean it, it seems to me that any intelligence operation could be described as a success. It is, in other words, one provision that is unlikely ever to be of value and to include it demeans the process; it does not inform Congress on what the purpose of this oversight is and does not aid its function. I am similarly skeptical about requiring the intelligence agencies to report illegal activities.

Despite the fact that I would urge intensive legislative oversight and a repair of provisions in the bill, I want to be clearly understood as suggesting that legislative oversight, particularly if done by committee, ought to be carefully limited to checking on the performance of the agency and to informing the Congress. Except by following the prescribed constitutional route, we should not increase the opportunities for the Legislative Branch to perform a policy-making role. Otherwise, we may be merely substituting error for chance. Thank you.

Charles Ablard

Thank you very much, Ernie, for that analysis. I should say that Ernie may have to leave before the meeting concludes this afternoon so be thinking of some questions to fire at him first when we get into the question period.

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Our next speaker brings the perspective from the Executive Branch, specifically from the CIA. Fred Hitz is the Legislative Counsel to CIA. Prior to that, when I first knew him, he was the Deputy Assistant Secretary of Defense for Legislative Matters handling the Senate, in which position he did a superb job. He has been at the CIA for the last four years. He also, I should add, is a neighbor of mine living on the same block with me and he goes to work early in the morning and gets home late at night. But he can be seen any time between five and six in the morning jogging around the block. I'm delighted to have Fred with us here today. He's a graduate of Princeton and the Harvard Law School; and practiced law before he went to the Defense Department. Fred, let's have the perspective from the CIA.

Mr. Frederick P. Hitz
Legislative Counsel
Central Intelligence Agency

Thanks, Charlie. I will repeat what all the other speakers have said, that it is a pleasure to be here and to participate in this program. I have just returned from a trip to Europe with our General Counsel, Dan Silver. Aside from absolute shock at the prices we encountered there for everything from food to transportation, it was good to be removed for several weeks from the atmosphere of Washington and from the daily to and fro of my job in Congressional Liaison. The respite allowed me to again focus on the fact that I have rather unique responsibilities in the world of intelligence. To put a fine point on it, in discussing with some friendly governments the function of legislative liaison for intelligence, eyebrows tilted to the ceiling and stares grew considerably sharper. I could also feel them asking, "Why on earth does a secret intelligence service or an Intelligence Community need legislative liaison?" Moving from this point of departure, let me try to pick up on some of the themes that I think Frank Carlucci presented in his remarks last night and which were also presented to a certain extent by Judge Webster in his remarks this noon. We must focus on the common objective of this exercise, which is the realization that the United States requires at this time in our history the best possible intelligence that we can gather, analyze, and disseminate. Our legislative efforts in crafting an Intelligence Oversight Act of 1980 must further this objective or our efforts are

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not worth a candle. Let me quickly add that the Administration, the Director of Central Intelligence, Stan Turner, and the CIA have taken a position in strong support of an Intelligence Oversight Act. I think we are on the way towards working out some of the few remaining problems. I certainly hope so, because I think it is critical that we establish in statute the relationship between the Executive Branch and the Congress as it concerns oversight of the Intelligence Community. The issues raised by the Church Committee in its investigations, final report and recommendations should be settled in statute so that we can get on to what I think are other critical aspects of the relations between the Intelligence Community, the Congress, th U.S. Government generally, and the American people.

Giving you an idea of some of the things which our office works on will bring us back to the statements of Herb Romerstein and Congressman Mazzoli. We are very anxious to encourage what I call the positive aspects of oversight. I think the Senate and House Intelligence Committees and the Senate and the House Appropriations Committees are going down this road to a greater degree each year. Let me give you some specific examples. Last year an educational travel benefit was included in the Intelligence Authorization Bill. It provides the same benefits for CIA personnel abroad that are already available to their State Department colleagues. Likewise, we hope that this year the Intelligence Authorization Bill will include a death gratuity provision (heaven forbid that it will be needed for any of our officers) which parallels the benefits that, once again, are already available to State Department officers serving abroad. It is also pretty clear to me at this juncture in the legislative process that the oversight and appropriations committees will add new positions needed by the CIA in some areas which, quite frankly, the President's budget did not include. In the wake of the Soviet Union's invasion of Afghanistan, these positions are required as the United States increases its need for, and its perception of its need for, intelligence.

My office, the Office of Legislative Counsel, also works in support of the National Foreign Intelligence Program budget. This, too, seemed to be rather a surprise for our allied interlocutors on this trip. They are used to submitting a budget for their needs and finding it pretty much fully funded. I welcome the

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situation that exists here since it requires us to do a thorough job if establishing our priorities and justifying our needs. I think by and large the Congress has been more interested in giving us resource support for intelligence in the last couple of years. Likewise, OMB has been more interested in approving our requests as well as those for defense. We appreciate the widespread recognition of the usefulness and importance of our function.

I might say that with respect to the finished intelligence product (a term we use to indicate analytical intelligence reports compiled from all sources of intelligence), the needs of certain congressional committees for these reports has never been greater. For example, we provided classified briefings to the Senate Energy Committee on the geopolitics of oil this year. These briefings dealt with the political situation in the Arabian peninsula and the Persian Gulf and gave the Committee some estimate as to future Soviet oil needs. This helped the Committee pull together its thinking as it confronts the problems of solving U.S. domestic energy requirements in the years ahead. I think we are going to see more requests from Committees for the kind of objective reporting and analysis we are known for. In this vein, the Director of Central Intelligence testified before the Senate Budget Committee this year. This was the first time a DCI has done so.

An additional function of the congressional oversight committees, which has also been referred to several times today, is a very helpful concern about the quality of our intelligence product and our effectiveness as an organization. I suggest that once we are able to settle the concerns which the Intelligence Oversight Act of 1980 is meant to allay, interest as to whether we have the resources to do our job and whether we are producing the intelligence which the United States needs, will become paramount. This will be very helpful to the Executive Branch.

I would say in response to Professor Gellhorn's concern as to whether in the context of the Intelligence Oversight Act there are any sanctions for misconstruing or disobeying any of the injunctions therein, one must not forget that the Congress has the ultimate power over the Executive Branch, the power of the purse. I can assure you that it is perfectly clear to us that if we are not

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forthcoming with the information Congress is interested in, that power of the purse may well be exercised.

I would like to finish by making two points with respect to the legislation the Congress is now considering. It is perfectly clear from my trip that two issues are uppermost in the minds of CIA personnel abroad--the protection of agent identities and leaks of classified information. It is just incomprehensible for CIA personnel to understand why the Congress either has not been able to act or will not act. The simple question: What is happening? Are the American people going to wait for another Welch assassination before they see the need to move? Some of the formulations for the proposed legislation to protect agent identities are controversial. We recognize that there are valid First Amendment questions. Nevertheless, we feel strongly that we, in participation with the oversight committees, have succeeded in drafting a bill that answers these questions and is not objectionable under the First Amendment. The fact that an individual must have the intent to "impede and impair" is a fundamental requirement before a criminal prosecution can be brought. The Justice Department's view, which is now the Administration's position, is also a perfectly acceptable formulation to us. It seems to me that no society can tolerate a situation where revealing the names of intelligence personnel is held out as a social good, which is the present contention of those who are revealing these names. We found unanimous feeling that protection ought to be forthcoming in this area quickly.

Intelligence officers in the field are extremely concerned as to what is going on in Washington with respect to leaks of classified information. Is there nothing that can be done to prevent this wholesale hemorrhaging of classified information which we have experienced over the past six months? It was very hard to explain why it is that the espionage statutes do not quite do the job, and why it is that the CIA cannot investigate these leaks. We are getting a great deal of encouragement from the Congress to more vigorously prosecute these cases.

Let me as my final comment talk about the question of Intelligence Charters. It seems to me that we have the clearest mandate possible to settle the law in this area. We have to make clear in statute what it is that we intend

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to be the rules and guidelines for intelligence collection and then get on with the business of collecting, analyzing, and disseminating intelligence. This period of uncertainty, this period of what will be the mood in the United States next year towards our Intelligence Community, has got to be brought to a salutary conclusion. There is no reluctance on the part of the Intelligence Community to contribute to meaningful legislation in this area. We have very strong views as to the parameters and as to the limits we should be operating under. We think this matter must be dealt with so that we can get on to the more important business of revitalizing, strengthening, and providing the resources needed for a healthy and effective Intelligence Community.

Charles Ablard

Thank you very much, Fred. Our last speaker is uniquely qualified to wrap up this panel's discussion. Professor Philip Kurland is a Professor of Law at this University. In addition to being a great constitutional law scholar and author, specifically within the field of constitutional law, he is one of the renowned experts, if not the leading expert, on separation of powers. He served for quite a time back in the mid-1970s, I believe, as Counsel to the Separation of Powers Subcommittee of the Senate Judiciary Committee. We're very pleased to have you join us here, Professor Kurland.

Professor Philip Kurland

Professor of Law
University of Chicago Law School

Thank you very much. This, I should say, is the only building in the entire country where I'm free to contradict Morry Leibman and I'm going to do so. First, I am hardly a surrogate for Congressman Ashbrook. He wouldn't appreciate it, nor do I. Second, the only reason I've been co-opted is that they had a chair to fill and they thought I could fill it adequately. There may be one other reason. I'm the only member of this faculty, with the exception of Edward Levi, who has ever been disgraced by working for the Congress as well as the Executive Branch of the government.

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While waiting to be sent for to come down here, my mail arrived and included two pieces of, I think, relevant material. The first was the 1980 revision of the Supreme Court rules about which it may be said that an immediate impact of the 1980 rule revisions concerns the length and color of the principal printed documents filed with the court. Reflecting an increased annoyance at having to read excessively long petitions and briefs, the Court has imposed page limitations for the first time in its history. And the reason that I think it's relevant is that it expresses an argument which is frequently made in the context with which we are concerned today, and that is, "Do as we say and not as we do." I'd like to pass a rule which might put a limit on the length of the opinions the Supreme Court is rendering.

The other item which appeared in the mail is more clearly appropriate. It's the report of the Committee on Federal Legislation of the Association of the Bar of the City of New York on the Charter for the Federal Bureau of Investigation. It opens by saying, "Over a year ago just before the 96th Congress opened, the last convicted Watergate conspirator was released from prison. This prompted the New York Times to editorialize. 'In one sense Watergate will end with his release; in another sense, the story is far from over. Development of charters for the CIA, FBI, and other agencies has begun. Some on Capitol Hill say the public has forgotten Watergate and that the pressure for reform has eased. A draft FBI charter is now said to be moving forward. If so, and if the spirit reasonable compromise continues, the end of Watergate may truly be in sight.' " Then the report adds, "In recent weeks the FBI has been prominently in the news again with a disclosure of the number of undercover operations such as the well-publicized ABSCAM. While it may be premature to draw final conclusions about these episodes until the facts are clearer, they raise a number of new questions which any FBI charter should address." The report concludes with a plea for congressional oversight. "Oversight by the other branches of the federal government is equally important. Thus, we have stressed our strong conviction that intrusive investigative techniques should be subject to a warrant requirement and that investigative demands if they are to remain in the charter be subject to court review as they are in the Financial Privacy Act. Congress and the General Accounting Office also have a role to play and one that we hope they will continue to take seriously. Congress cannot afford to resume acting as a

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rubber stamp of FBI actions as it so often did in the J. Edgar Hoover era." I think that the requirement for congressional oversight or the desirability of congressional oversight has not been denied. It's a question of its scope.

But the arguments that I have encountered seem to be in terms of which branch of government is more virtuous. So far as I'm concerned virtue is not a trait that I would associate with either branch of government, the Executive or the Legislative, and I might add a third. The point that I would like to make is that the issue is not whether Congress is more likely to leak than the Executive Branch. I don't know how you would measure that. Certainly history, including the reports on the President of the United States, might suggest that leaks are not a monopoly of Congress. Thus, I suggest it is not the essential issue that is being addressed by a bill which requires or provides for oversight of the FBI and the CIA. The essential issue is how to appropriately balance the necessity for national security, which nobody denies, against the necessity for maintaining the liberties of the individuals in this country which, again, nobody will deny.

The fact of the matter is that nothing epitomizes a totalitarian state more than a political police force. I do not suggest that either the CIA or the FBI is a political police force. But I think the primary function of the oversight of Congress is to be able to assure the American public that this will not be--neither of them will be--a political police force. The quotation from the Association of the Bar report opened with a suggestion that we are coming to the end of the Watergate era. I think we ought not to forget the fears that were raised by the revelations where the leaks or testimony about the behavior of certain parties, the FBI and more particularly the CIA, which gave rise to that kind of a fear. I would suggest that the function of the Congress here is to provide some guarantees against that danger with as little inhibition on, or as little adverse effect on, the provisions for national security that we need. Neither one nor the other of these values can be suggested as occupying the field.

I would close, because I have no expertise on the subject in spite of my colleague's strong arm that brought me down here, by a suggestion of shock at a statement by Professor Gellhorn and by Mr. Hitz which suggests that it is not the function of Congress to make policy in our government. Indeed, I have been

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brought up--and I have not yet been disabused of the notion that Congress is the policy-making body so far as our Constitution is concerned. And I would hope that the Congress does not surrender this power which was put in its hands as representatives of the people of the United States to oversee the policy of all of the agencies of the Executive Branch of government, not excluding the CIA and the FBI. Thank you.

QUESTION PERIOD

The question period following produced discussions including in what detail Congress should enact intelligence legislation in order to leave scope for the Executive to handle contingencies unforeseen by the Congress at the time of enactment, whether the Congress can direct "tactics" by legislation, the need for statutory authority to do intelligence work, the quality of CIA and FBI intelligence collection and analysis, and the necessity for and limits upon covert actions.

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IV. THE PUBLIC'S RIGHT TO KNOW AND THE NEED FOR OPERATIONAL SECRECY

Welcome: Morris Leibman, Chairman
Standing Committee on Law and
National Security, ABA

Welcome to the last panel discussion. I compliment you all for being so prompt on this day, and I see Admiral Gallery has joined us. Admiral, you're going to get two demerits because Maureen was here for dinner and I don't know about lunch but we missed you on both occasions. Welcome again this morning. We have a distinguished panel which will be moderated by Mike Uhlmann, whom you've heard of before in these discussions. Mike came out of Yale and Virginia, has been a Ford Foundation lecturer, was Minority Staff Director and Chief Counsel for the Senate Select Committee on Equal Education, has been Legislative Counsel in the Office of Senator Buckley, Assistant General Counsel to the FTC, Assistant Attorney General to the Justice Department, and now, thank goodness, we've got him back in the private practice of law temporarily. Mike.

Moderator: Mr. Michael Uhlmann
Former Assistant Attorney General

Well, the first thing you should know, Morry, is that nobody ever practices law temporarily. This morning we turn to the topic of the public's right to know and the need for operational secrecy, another one of those either/or connundrums to which these issues we looked at yesterday and today seem to lend themselves. We have a distinguished group of speakers for you this morning and my role is a very simple one as Moderator. I believe strongly in moderation in the pursuit of moderation with one exception, and that is when it comes to time. I've asked the speakers to limit themselves to roughly twenty minutes apiece, the injunction to which will be the theme that extremes in the pursuit of moderation will be no vice. At or about twenty minutes I will wink, nod, pass notes, nudge, and get obstreporous so that we can open it up to a little more free form.

The topic calls for three or four interrelated subtopics relating variously to disclosure of agent identities, Freedom of Information Act issues, protection of

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CIA sources and methods, and prepublication clearance agreements. There's a lot of meat there. The diversity among the speakers' views will become apparent to you shortly, and so I think without further ado we will begin.

Our first speaker is Daniel B. Silver, who is presently the General Counsel of the CIA.

Mr. Daniel B. Silver
General Counsel
Central Intelligence Agency

I have to apologize at the outset if my remarks are somewhat rambling. You have to remember that, in the wake of the Snepp decision, had I prepared a text I would have had to submit it to myself for review and then negotiate changes. I chose not to do that and I'm speaking more or less extemporaneously.

The subject matter of this panel covers a congeries of issues, most of which have been fairly prominent in the headlines recently, including the Freedom of Information Act, the so-called identities legislation, the Snepp decision itself, and certain legislative initiatives in the direction of possibly modifying the Agency's right to enforce its present contract. All of these allegedly pit something called "the public's right to know" against the need for operational secrecy. Indeed, that's the title the organizers have given to this session. Obviously, time isn't going to permit discussing each of these current legislative proposals in detail, and I think that's a stroke of good fortune for the audience. But I would like to make some general observations about points, at both the policy and legal analysis level, that apply across-the-board to all of these.

I think it's particularly appropriate for this organization to take up this subject matter. My observation is that the level of public discussion on each of these three issues has been distressingly poor. The subject has been infected with slogans, shibboleths, and a variety of distortions that do not aid a rational discussion of the issues. For example, I think any of you who have followed the congressional hearings on the various so-called identity bills--of which there is such a proliferation at present that it's a task just to keep track of their subtle

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variations--any of you who have followed that debate will have seen a variety of allusions to possible constitutional difficulties, putative chilling effects, constitutional doubts, and so forth and so on. Very few have been able to bring themselves to come out and forthrightly say that any given proposed provision is flat out unconstitutional or of unassailable constitutional validity. Well, this is a question that is susceptible of some more penetrating analysis than has been given so far; and I'm very happy about the indications Ray Waldmann gave yesterday that at some time in the near future the Committee is going to undertake a study project in this area. I think this is an example par excellence of a place where the Bar--bringing the talents of our profession, and, I would hope a spirit of rational and dispassionate examinations of the problem--can make a real contribution that so far has not been made.

Now, the second general point I would like to make is that most of the discussion (and obviously I'm referring in these critical comments to those who disagree with my position) that I hear takes place in a vacuum that ignores the events of the last five years. I'll return to this in some detail in a couple of moments. But I don't think that we can examine these legislative questions and questions of legal policy in this area without taking some cognizance of the profound changes in the organizational structure of the intelligence community. I'm thinking particularly about oversight, both internal and external, and the relationship of the intelligence agencies to the Congress. A debate, analysis, or discussion that proceeds entirely in a retrospective vein, I suggest to you, is not going to produce very useful results.

Three slogans or phrases seem to animate discussion in this area. They are, first of all, the "people's right to know"; secondly, "freedom of the press"; and thirdly, "freedom of information." I suggest to you that each of these ideas taken as an absolute without qualification is incompatible with the existence of secret intelligence organizations in our society. And if our society has, in fact, chosen, as I think it has through its elected representatives, to have secret intelligence organizations, the task is to find a way of accommodating these societal values with the needs of secret intelligence operations. The issue, if one wants to resort to slogans, could very well be turned around and posed this way: How do we preserve the people's right not to know? How do we attain freedom

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from the press? And how do we attain freedom from information in this area? And I can tell you from my perspective, these are three critical questions at the present time.

I take it that it's axiomatic to almost everyone here that the nature of the intelligence business depends on secrecy. Everyone pays lip service to that proposition, but it means very different things to different people. To the active FOIA litigators, the press, those who are assailing us with demands for great amounts of information, it means that there may be somewhere a real secret that needs to be preserved, but they are very few. And, indeed, some of the witnesses testifying on this matter and some of our eminent former intelligence officers who have taken to writing books have made that contention: that really the Agency has no secrets or has very few real secrets. I think those who are in the business and have to conduct the intelligence activities of the United States on a daily basis would argue--and I believe this very strongly myself--that not only does one have to preserve the real secrets, whatever they may be, but we have to preserve an aura of secrecy, an impression or confidence on the part of those with whom we deal that what they consider important will be kept secret. This is the so-called psychological aspect of secrecy. This is a perception problem we have. We have come in for a great deal of derision in the course of congressional debate on FOIA reform for claiming that there is a perception problem; derision from people who cannot possibly have any basis for making a judgment one way or the other, but who apparently feel that we have been derelict in not running a worldwide education campaign with our agents to instruct them in the intricacies of current jurisprudence in the FOIA area.

I'm reminded of a very interesting evening, courtesy of Mort Halperin and his Center, when we had a dinner debate on this and a very intense young man cornered me in the garden afterwards. He berated me at great length for the fact that I was going around saying that our sources of information perceived the Freedom of Information Act to create a climate in which they are nervous about cooperating with us. And he asked how many of these people I had visited, or had my lawyers visit, to explain to them the fact that ultimately, after years of litigation, we ordinarily prevail. I suggest to you that conducting that kind of dialogue via dead drops or in back alleys is not likely to be effective; and I have

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no embarrassment whatsoever that we have not embarked on a worldwide campaign to meet each of our agents and educate him in the likelihood--not the certainty, but the statistical likelihood--that we may prevail in FOIA litigation.

In any event, from our point of view, this psychological climate, the perception problem, is a very real one; and it is a legitimate concern for the intelligence agencies and for the public, if the public wants those intelligence agencies to function effectively. I think everyone recognizes intelligence is a virtually unique area in our national life, perhaps shared with certain secret military activities, in that the ordinary processes of public examination and public contribution to the development of policy based on a full range of information and knowledge cannot take place. It is an exercise in taking the watch apart to see how it runs when there is no earthly hope of putting it together again afterwards. Therefore, posed in stark terms, we either have to have a surrogate for public participation in the process or we have no process at all. I suggest to you that we do have that surrogate. We have it in the form of the constitutionally ordained structure of our government, an elected Congress, an elected Executive, and that the people have so far manifested their will through these organs in favor of having a strong and effective intelligence organization. And, indeed, when one forays beyond the Beltway into the rest of the country, as I have on several recent occasions, I think the overwhelming interest that one encounters in audiences and groups of citizens is whether or not the CIA is effective and not whether or not the CIA is infringing on their liberties in some fashion.

This area is peculiar because the minority is in a position, given access to information, not merely to engage in political debate about the validity or invalidity of the government's policies, but to thwart those policies as absolutely through the mechanism of exposure as a devoted enemy of the post office could thwart its operations by blowing up mailboxes. And I suggest to you that if one views the activities of some of the avowed enemies of the CIA in the perspective of blowing up mailboxes, while the situation is complicated by the fact that they necessarily use speech rather than explosives, the constitutional analysis makes a great deal more sense.

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Given that the people have chosen through our constitutional form of government to have an intelligence system, and that we have at the present time mechanisms of oversight through which the Congress as well as the Executive Branch know what that system is doing and why, I suggest to you that all of these problems should be approached or analyzed in terms of how can we preserve and strengthen the intelligence system to the degree necessary without, at the same time, compromising basic values or infringing unnecessarily on what I would concede exists, namely, a right of the public to know as much about the government's operations as is compatible with having a government that can function effectively. This leads to a series of propositions. The first is that we must have a strong congressional oversight system. Despite the flurry of contention surrounding the Intelligence Oversight Bill now working its way through the Congress, the Intelligence Community clearly supports strong congressional oversight. We have engaged in a successful and pervasive oversight relationship with our two committees over the last several years and my personal conviction is that that relationship has nothing whatsoever to do with legal texts. It will exist with or without a statute. It is a product of the amount of vigor and interest that the Congress is willing to invest in the relationship. At the present time, they invest a great deal in the relationship. As Fred indicated to you yesterday, they have the power of the purse which is the ultimate weapon on the side of the Legislature, and they have no need of additional statutory authority to gain access to information or to have a profound influence on the policies and activities of the intelligence agencies. But, in any event, no one is opposed to putting all this in suitable legislative language and everyone, to my knowledge, within the Community is in favor of continuing and strengthening this congressional oversight relationship.

Second, I think all of us would concede that in our society, given our unique form of government, there should be public exposure to the maximum degree possible of information about intelligence activities. And, indeed in this country, the public enjoys a degree of knowledge about this country's intelligence activities which is absolutely unprecedented anywhere on the face of the earth. In our sister democracies of the western world, the very existence of the foreign intelligence agencies is denied, although it's obviously an open secret. And the existence of the domestic equivalents of the FBI is acknowledged but nothing

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else is publicly known. Contrast that with the amount that was known about our intelligence activities even before the Church Committee and the contrast is striking. And if you take what the public knows today, which is almost everything, it's even more startling.

Third, and I think this is the key to the entire matter, the system of oversight and of disclosure of information controlled by the necessity of maintaining secrecy and a strong organization must substitute for direct oversight by the public through the normal mechanisms of access to information. And I include in this the Freedom of Information Act which I consider totally inappropriate to intelligence agencies.

Next, I think it is clear as a matter of constitutional law but I hope this will be elucidated later in the year by the activities of this group that the state, the government, constitutionally can, and I think as a matter of policy should, legislate against intentional destruction of intelligence agencies through the mechanism of exposure by those who are unable to gain their political ends through the normal process of discourse and political activity. And finally, on a parochial note, I would contend that it is entirely proper as a policy matter, and of course the Supreme Court has held it to be lawful as a matter of law, for the CIA to limit public discussion of classified information by employees and former employees and to do so, as was upheld in the Snepp decision, through a prepublication review of proposed disclosures. I know this is highly controversial, and I have already been hard at it over breakfast this morning; I would submit to you that whatever inequities in enforcement there may have been to date or may be perceived to have been, there is no adequate substitute in any of the current proposals for the system we have under the Agency's employment agreement.

Let me, if I have a little time left, briefly run through these three areas and make a few points about each. The Agent Identities Bill has engendered a great deal of lip service to the proposition that it's outrageous for the Covert Action Information Bulletin and similar publications, e.g., Counter Spy, deliberately to uncover and disclose the names of intelligence officers and agents who are under cover. And there are very few people who will forthrightly get up and say that (a) this is not a problem, or (b) if it is a problem, it's just too bad and there

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shouldn't be legislation. On the other hand, the testimony of many who have testified on these legislative proposals in my opinion surely covers an undisclosed desire that there be no effective legal remedy in this area because the proposals that have been made from many quarters would be totally ineffective. As far as we are concerned at CIA, this is a devastating problem, not only because of its direct effects--which are demonstrable, although most of the proof is classified--but also because of its indirect effects on the perceptions that our cooperating sources of information abroad have about the will of the United States to protect secrets. It is of absolutely no use to adopt a bill that purports to make this activity criminal if it cannot be enforced against those who are notoriously engaged in such disclosures. And I think that, within the limits of prudence and signaling one's intentions in the criminal prosecution field, the touchstone of discussion in this area should be: can this legislation be used effectively to prosecute the organizations such as Covert Action Information Bulletin, that are causing the problem. If it can't, it's not going to do the CIA any good; it's not going to do the American people any good; it's not going to do the cause of civil liberties any good to pass this legislation; and, indeed, in all candor, I would view it as disadvantageous because the passage of the bill will provide a space of some five or ten years in which no one will be willing to do anything about the problem on the theory that the Congress has already solved it.

Illusory legislation, in my view, is legislation which purports only to punish the government employee or former government employee who had access to classified information and disclosed such information in a manner that reveals the identity of an undercover agent. We don't need additional legislation to deal with that problem, according to the Justice Department. What we need is to overcome the mysterious obstacles that so far have cropped up every time the Justice Department has considered a possible prosecution. And obviously no act by the Congress, at least none devised so far, can overcome bureaucratic lethargy or ideological disinclination on the part of those charged with executing the laws to enforce a particular statute.

The second point is that in order to make this kind of legislation effective, we must be able to go after those who have clandestine relationships with unrevealed sources of classified information and use those relationships in order

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to accomplish the discovery and disclosure of classified identities. Now there are two ways, obviously, that one can go about this. We could, using present law or using very limited statutes such as the one that was proposed as part of S. 2525 which dealt only with current and former employees, apply normal techniques of criminal investigation, including infiltration of organizations by informants, electronic surveillance if that's appropriate, so forth and so on. I dare say that were the Justice Department to embark on the use of these techniques against Covert Action Information Bulletin or some other publication, there would be a storm of protest about this assault on civil liberties and about the chilling effect of that kind of government activity, although as far as I can perceive there are no constitutional or other impediments to such conduct. An alternative is to find some external measure of activity, narrowly limited, in an attempt to obviate the need for intrusive and possibly chilling criminal investigation of these publications. That, in my view, was the virtue of the bill introduced in the House Permanent Select Committee, H.R. 5615, although the Administration ultimately chose not to support it. I think, in considering this matter, there is a clear choice that has to be made between that kind of approach in which behavior and evidence of intent governs the nonemployee defendant as against one that will either fail of its purpose or require the use of intensive investigative techniques.

Finally, I see no justification, whatever law is adopted, or indeed if none is, to bar as would have the Intelligence Charter version, the use of the normal conspiracy and aiding and abetting statutes and the principles of law that have grown up under those statutes. Let me make one final remark on this because it's very distressing to me that the discussion of this statute has proceeded by way of hypothetical example in very large part. If one looks at the testimony given before the congressional committees, that testimony is replete with hypothetical examples and I think they are all incorrect. I'm sorry to take exception with Mr. Abrams' analysis of these statutes, but I can't for the life of me see how any of them would have applied to a newspaper or anyone else who mentioned the name of Gary Francis Powers after the U-2 was shot down. Similarly, I have examined the passage from Senator Moynihan's book referred to by Mort Halperin in his testimony in which Indira Ghandi is described as what you might call the bag person in an alleged transfer of funds to the Congress Party by

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the United States government. And, again, I don't see how any of these statutes could apply to that particular disclosure. Thirdly, there has been intense discussion of the problem of republication or repetition of things that appeared in the newspaper. It seems to me that's a problem that's very simply solved by minor adjustments of the legislative language and it should not be held up as a boogie man to make people believe that one of these statutes is going to involve the prosecution of citizens on the basis of their dinner table conversation. That's just plain ridiculous and it doesn't contribute, in my view, to rational dialogue.

Moving on to the FOIA, let me simply say that I think the entire discussion of the application of the Freedom of Information Act to the intelligence agencies has been misplaced. That discussion has preceded on an assumption that the intelligence agencies bear a burden of proving that they have been irreparably damaged by the FOIA and that any amendment of that Act should proceed on the narrowest possible basis within the limitations of this demonstrated damage. I think that it is simply ridiculous to apply to a secret intelligence organization a public disclosure statute. And although the agency has not so far adopted a posture of seeking more than a rather modest revision of the FOIA, expressing my personal opinion here and not speaking as a spokesman for the Central Intelligence Agency, the whole concept of public oversight simply will not work with respect to secret intelligence agencies. Proceeding from that premise, I suggest to you that analysis of what the FOIA did or did not reveal over the last five years about CIA activities is largely irrelevant. I saw quoted in the press the other day a statement made at some seminar in Texas that the FOIA was the tool by which the Church Committee uncovered its information. I trust that everyone here realizes that is totally inaccurate. The Congress does not depend on the FOIA to conduct its oversight activities. The Congress is the mechanism that should conduct oversight activities, and the whole concept of oversight by the public on a totally adventitious basis under this statute makes little sense.

Finally, there has been a certain amount of agitation in the media and in the Congress for a legislative overruling of the Supreme Court's Snepp decision, animated perhaps in part by distress at the unusual procedural posture in which the case was decided, but also to a very large degree bottomed on the notion there has been inequitable application of enforcement in this area. I don't deny

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that the enforcement of the Agency's secrecy agreement has been less thorough and far reaching than I would like. And it's unfortunate that the individual whose name is associated with the decision, (in fact its now become a verb in the parlance of the Agency and I've been asked to "Snepp" various potential defendants) is a somewhat pathetic case on the human level. That's distressing and unfortunate, but it is due to a variety of complex circumstances that need to be examined. Among them is an understandable reticence on the part of the Attorney General, on the part of several Attorneys General, to bring any further law suits while the Snepp decision was pending before the Court of Appeals and the Supreme Court. That's one reason why Mr. Stockwell was not sued until after the Court issued its opinion; and, in the meantime, managed to spend all the proceeds from his book so that there's nothing left for the government to recover. These are the vicissitudes of life, but I think that we should be judged, if we're to be judged at all, on what happens now that the law is clear and the enforceability of the agreement is clear. And, again, that depends on things that are outside of the Agency's control. I wish people would stop attributing all these decisions to the CIA which, in fact, gets to make very few decisions in the area of what you might call prosecutorial discretion.

All I can say is consider the alternative or the alternatives--actually, since there are two to consider. One is not having any control over publications by Agency employees who have been engaged in clandestine activities. I think that is simply unacceptable if we are going to have an intelligence system with any potential for surviving. And I'm perplexed that this is viewed as a major assault on the civil liberties of the entire populace. We are talking about a class of people who know what they are getting into when they decide to become secret intelligence agents. They give up many things. Presumably they get something in return, although it's increasingly difficult to discern what it is. Perhaps the satisfaction that they serve their country. And for the Agency, for the U.S. Government, to be unable to assure, and to be seen throughout the world as unable to assure, that a clandestine intelligence officer will not disclose everything he knows about his contacts, about the people whose lives are in his hands, is simply unworkable and unacceptable. That's one alternative that I think must be rejected. The other is a criminal statute which probably would never be enforced, but if we assume that the proponents are in good faith and anticipate

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that it would be enforced, I think it has formidable civil liberties implications far beyond the civil remedies possible under our employment. I urge you to consider that very carefully in deciding on the merits of such a proposal. Thank you very much.

Michael Uhlmann

Our next speaker, I think it is fair to say, will have a different point of view. He is to many of you well-known as a partner in Cahill, Gordon & Rhinedell in New York. He is among the best known litigators in the field of the First Amendment in general, and on free speech and free press matters in particular. In addition to his courtroom work, he writes and speaks often on this subject and we're delighted to have him with us this morning. Floyd Abrams.

Mr. Floyd Abrams
Media Counsel

Thank you. I have one advantage over Mr. Silver; that is that he spoke first, and so much of what I would like to say in the limited time that I have is by way of response. It is a rather general response to Mr. Silver's presentation and I shall get right to it. Let me say a few general things first about the observations that Mr. Silver made.

At the very outset he expressed, I thought, some disdain for the view of people that believed there were constitutional doubts--that there might be constitutional problems out there--with legislation relating, for example, to the disclosure of identities of intelligence agents. It is, I hope I need not say, not only those of us that happen to oppose certain portions of either the Administration's bill or what I will refer to as the CIA's proposal who have had these doubts. Just Wednesday, in front of the Senate Select Intelligence Committee, the Assistant Attorney General appeared on behalf of what I would think we would call the United States and, referring to some of the provisions which I gather Mr. Silver doesn't have much doubt as to, observed as follows: "Our reservations regarding Section 501(b), which is of the initial proposal, are based both on policy and constitutional uncertainty." And later on in the

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statement appears, "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." And it is indeed a sincere answer, but it is that type of sincerity which leaves me to suggest to you that a lot of the constitutional issues raised by legislation in this area are indeed far more difficult and surely far less certain than Mr. Silver would have you think.

He tells you, for example, that it is irrational for it to be maintained that a debate at a dinner table could possibly lead to prosecution under any of these proposals, certainly under the CIA proposal. But, again, on Wednesday, appearing on behalf of the United States, it was the testimony of the Assistant Attorney General that the prohibition of 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.

So I don't think it really serves much of a purpose, if I may say so, except that of advocacy perhaps, to suggest that these are feigned difficulties or made up doubts which people have. A lot of people have the doubts; some of them at least are serious people and some of us mean what we say about the doubts and we mean it only for constitutional reasons. Mr. Silver talks to you about things which he characterized as slogans or phrases, one of which is the freedom of the press. I had not thought that freedom of the press was so easily dismissed as a slogan or a phrase. And I would say to you that we deal with constitutional problems by looking at hypothetical examples. How else are we to do it? We look ahead. We look down the road and worse yet, and maybe Mr. Silver doesn't want us to do this, we assume a government which does not always act properly. Now I think that that is an appropriate First Amendment approach to take in situations like this. I think one must at least entertain the notion that a government armed with legislation which would permit it to stifle or punish certain types of speech, however reprehensible the speech may be, may misuse it. And at least we ought to examine the legislation very closely indeed to see what the potentials of misuse are.

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Now my own sense of what type of direction we should go in in this area is one which leads me to offer another general conclusion first. It is very interesting to me, and I think generally unremarked upon, that there is a rather significant growing consensus in this area of which the Central Intelligence Agency is not a part, but of which Mr. William Colby, for example, and I and even some of the people, if I must say "even," at the American Civil Liberties Union are. Mr. Colby testified on May 1, and I think very soundly and soberly analyzed the situation, both from a legal point of view and a pragmatic political point of view, and urged that certain narrow categories of information be made illegal to be disclosed by former agents or people with authorized access to that information. My own view is that at the very least that is the proper starting point. It is the proper starting point with respect to the question of what we are to do, with respect to the disclosure of names of agents; it is also in my view the proper starting point of what to do in Snepp-type situations. I think we really have to address, in each case, three questions. Who is it that we are saying shouldn't be allowed to say something? What is it they shouldn't be allowed to say? And under what circumstances, if any, may they say it?

I start with the proposition, and I start with it for constitutional reasons, that all of these categories ought to be as narrowly limited as possible, consistent if possible with achieving the ends that are sought. If it is not consistent with the ends which are sought, then it may well be, as Mr. Silver tells you, that we should have no legislation. We pay a lot of prices in our society. We let guilty people go free on the streets because of our commitment to the Fourth Amendment. Just like that. And it is not an awful lot to say or an awful lot to ask, that if we conclude that the First Amendment precludes certain types of legislation, we shouldn't have that kind of legislation, even if we would prefer the societal effects of the legislation.

Now my sense is that starting with "who" is that the who is pretty well defined in some of the legislation, and at least half the legislation that I think Mr. Silver favors. I would at least start with the notion that people who are in authorized possession of certain types of information--let's get to the types in a moment--shouldn't be allowed to reveal it. Or put differently, that it should be a crime for them to reveal it. I think the categories of information should be on

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the narrow side, and I think basically the definition, at least most of the definition in the legislation, isn't really bad. There is a definition in their legislation of covert agents and it seems to me that the main thrust of any legislation ought to be to ban the disclosure of that type of information. I don't want to focus too much on drafting language here but trying to generalize about it, I think that's the direction that we ought to try to go in. I think that we must make it clear in any legislation what the circumstances are, that the individuals, whoever they are, that can't say certain things, may or may not say them. And here is where I do indeed get hypothetical about it. In my testimony, for example, I urged upon the Senate Committee on Wednesday that I appeared before that, as I read the draft legislation proposed initially by Senator Moynihan, and indeed that part of it for which Senator Moynihan has withdrawn his support of First Amendment reasons and based on First Amendment considerations. And, indeed, the same part of the legislation, which the Department of Justice has opposed for the same reasons. As I read the legislation, and as I read the current proposals, given the fact that what is prohibited to be spoken is the identity of a covert agent so long as the information is still "classified" information, that indeed there could be prosecution of anyone who revealed the name of, and I used the name of Colonel Powers at the time of his capture by the Russians. I used that name because it was not the official policy of the Executive Branch of our government, and that is the definition which at least in litigations I have been involved in, every CIA Deputy Director testified was the relevant criteria, whether it had been officially revealed by the Executive Branch, not in front of some Congressman, certainly not in the press, revealed by the Executive Branch that the person was indeed a person in what I would call a covert agent position.

And so the fact is that if you read that draft piece of legislation as straight as I can it would indeed subject anyone to prosecution for repeating the name of Colonel Powers up until the time that the Executive Branch declassified his name. It doesn't help me, it doesn't help my clients, if I may put it that way in terms of being able to give them advice in advance, for there to be a portion of the draft legislation which says but you're only liable if you intend to impair or impede foreign intelligence gatherings. First of all, I think that there's a constitutional right to want to impair or impede intelligence operations. I think

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that the desire to do things like that has nothing to do with law at all. We may disagree with it. I suspect all of us in the room would disagree with it, but people have a perfect right to desire to do certain things. The question is what do they do? What may we prohibit them from doing? And under what circumstances? I assure you that in terms of giving advice in advance to a prospective publisher of any kind of information like this, that to tell him that there could be a prosecution but it's unlikely because either for political reasons or because I don't think that the government can demonstrate that there's a desire to impair or impede intelligence gathering operations, is just not a strong and persuasive thing to say.

There would be, to use an overused word that at least I don't use much, it doesn't get me much in the courts when I use it, there would indeed be a chilling effect on publication of certain types of information if the only thing that stands between a publisher and conviction is a jury's determination of his intention. Now let me say I was delighted to hear Mr. Silver say that this particular concern of mine is something which could be handled with just a little bit of drafting. I must tell you I have my doubts that either the Administration or the Agency, as I understand any of their positions, either public or private, would agree to a definition of classified information which is not the definition that I offered to you earlier. That is to say, that material is classified if it meets certain requirements and it stays classified until the Executive Branch declassifies it. If there is any inclination on their part as there was not in one case in which I was counsel, the Knopf v. Colby case, to say that if something is notorious enough, widely known enough, that it can be disclosed, I think that's a good first step.

More broadly, though, my view is that it is probably unconstitutional to apply this legislation, legislation of this sort, to people who are not or have not served within the government itself, at least in most circumstances that we have heard discussed today. It seems to me that once the information, whatever it is, leaves the government that there is a pretty clear and virtually absolute constitutional right to disseminate it. I think it's partially a practical matter. You can't rebottle the old secrets. But, as a legal matter, as a First Amendment matter, I think once information is out, it is out. And that means, for example, that if Mr. Agee provides information to someone else and the someone else

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publishes it, I think it would be indeed constitutional to prosecute Mr. Agee under appropriate legislation. And, indeed, under almost all of these proposed bills. But if Mr. Agee gets on a rostrum and makes a speech and names agents, and any of us go around and repeat it or any newspaper goes around and repeats it, I do not believe it is constitutional under the First Amendment to punish for that repetition. And, indeed, I do look forward, as does Mr. Silver, to any efforts of this body to look into that question. I think the law is pretty clear on that. I think the law is a lot less clear with respect to people who you might say are aiding and in concert with say Philip Agee, and there I think that's a lot closer question legally as to whether indeed it is appropriate to punish them.

But in the type of situation that I raised, the type of situation which is much more common from the point of view of the press, say, where information leaks and is then published, it seems to me that to permit prosecution simply because the information identifies a certain type of person and is classified, with or without requirements of intent of one sort or another, is likely to be unconstitutional. It's not a good idea, and I would say as well as a prudential matter, is not something which I would think the Administration or the Agency ought really to be urging.

I must confess that some of my views on this area were shaped a bit by my own role as counsel in the Knopf v. Colby case in which I came to take that position of the four then Deputy Directors of the Agency and of Mr. Colby, and came to learn, as I think each of them would agree, that the classification process is a discretionary one and that not everything which can be classified is in fact classified. And that the contours of what could be classified are very, very sweeping indeed. That's another reason why I think it essential for any kind of legislation not to be limited to classified information alone but to be honed down to classified information still classified, information not already known, information relating to certain types of entites or of individuals such as covert agents.

Let me turn briefly to the Snepp case because my time is almost up. I don't think that the media outcries, which Mr. Silver apparently felt sweep over him, are entirely the result of the sense, although it is a sense, that the Agency

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decided to go after Snepp and not others. I think that is part of it. I think it is much broader than that. We do have a general commitment to the proposition as a country that we don't have prior restraints on the disclosure of information--almost any kind of information. The Supreme Court has, to be sure, in the Snepp case upheld the issuance of prior restraints in the context of a former agent who signed a secrecy agreement. For better or worse, now we know that it is lawful for the Agency to enforce those agreements.

Whether it is prudent for all of us, not just the Agency as an institution and surely not just focusing on Mr. Snepp or the people that write the books, but for all of us as citizens, for the approach to be taken as being one of enforcement of secrecy agreements by judicial decree, judicial injunction, seems to me a very different question, indeed. I have some sense that I am too closely embracing my friend Bill Colby today, but I would like to read the last two lines of his testimony of May 1, which say what I would say very well. He said, "Mr. Chairman, we must take the protection of our intelligence sources seriously and punish those who reveal them. This is not a game of hide and seek between the government and covert publishers, nor should it rest on the squabble over royalties after the secrets are exposed." Well, I agree with every word of that, and I think the way to approach that is by the adoption of appropriate criminal legislation, making illegal the disclosure of certain information by people who, like Mr. Snepp, have held certain positions in the Agency or perhaps elsewhere in the government as well.

I must tell you that no legislation that I would favor would likely have prevailed against Mr. Snepp in light of the Agency's concession that nothing in Decent Interval was, in fact, classified. But if the Agency had taken the position or were in the future to take the position, say involving Decent Interval, that the material was classified it, seems to me that that would raise a very different type issue, indeed.

Let me conclude. These are hard constitutional issues, well worthy of consideration of this body, but hard because any time we talk about legislation which limits what people can say, even what people in positions of trust can say about almost anything, surely about governmental operations, we run into serious

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constitutional questions right away. I don't happen to be one that comes easily to the phrase "the people's right to know." I don't believe, for example, there is a constitutional right to know everything about what happens in the government; surely, not a right to know everything that happens within the CIA itself. I agree with Mr. Silver that if we're going to have a CIA much of it by definition is not within the realm of the people's right to know. I think the appropriate way to phrase it or at least to think of it is to think of it this way. Under what circumstances are we prepared as a people to say that the government for good ends can suppress or limit or punish certain types of speech? That's what this is all about. There's no question but that the CIA has a powerful argument on its side in terms of public policy, in terms of wanting to prevent disclosure of certain types of information. Now there are cases in which I think the public is well-served, not just by being able to repeat the name of Colonel Powers, for example. There are some case in which I think the public was indeed well served by disclosure of certain improper conduct to the extent that exists or may exist of CIA people. If, for example, evidence should ever develop about any relationship between the Agency and to take the worst imaginable, or I hope unimaginable, case, the Kennedy assassination, I would think that all of us would say that there's got to be a right to get that information out and that surely if someone knows the information, he has a First Amendment right to state it.

But these are painfully difficult questions, and I would simply urge on you that as you consider them and as you consider as a committee and in terms of your own views on these things, that you weigh a lot heavier than I think Mr. Silver has urged on you the constitutional commands, the constitutional requirements, and the reasons that we impose those commands and requirements. Thank you.

Michael Uhlmann

Thank you, Floyd. Our final speaker is not a political lawyer. He is a political scientist by training. In prior incarnations, he has been a teacher of political science and is the author, among other things, of a book on modern French history and politics. He now serves as a member of the professional staff of the Senate Select Committee on Intelligence, Angelo Codevilla.

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Dr. Angelo Codevilla
Senate Select Committee on Intelligence

Thank you. The privileges of a clean-up hitter are few and the burdens are many. One of them is that his thunder has been stolen by those who have preceded him. I find myself in complete agreement with Mr. Abrams on the Snepp case, and in complete agreement with Mr. Abrams that there is no such thing as the public's right to know. I would go further. No such right is to be found in any of the texts of political philosophy. It is not to be found certainly in the Constitution itself, and it is not to be found in American law.

I find myself, in agreement with Dan Silver's proposition that secrecy is the sine qua non of intelligence. I don't agree with the proposition of many in the intelligence community that secrecy is all there is to intelligence. As I will argue in the next few minutes, there's an awful lot more than that. But before I do, I'd like to make just two points.

First, Mr. Abrams' contention that once any information leaves the government there is an absolute constitutional right to publish it has no basis in the text or in common sense. I don't see that right anywhere in the Constitution. Second, it makes no sense to punish those who disclose names of agents and to give immunity to those who publish them. The distinction between disclosure and publication is a wholly artificial one. It's not there. He should not assume that the leakee is not in concert with the leaker. Whether or not the two parties are is a question for a court to decide. There is no reason, it seems to me, to punish the employee of an intelligence agency for a disclosure and not to punish the person who takes that information and brings it to the knowledge of those who are in a position to do harm to the United States. The employee who steals the information is most often not the most important person in that chain. He is most often not the malevolent party. To punish only the employee would be akin to saying that we would go after only the clandestine agents of foreign nations and not the case officers who run them. Moreover, what if Mr. Agee or any other leakee, furthermore, teaches the art of finding agents or finding other information to other people and they, the outsiders, let us say, use the skills to further grind out information? But that is another matter.

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I return to the proposition that there is no general right either in law or in common sense for everyone to know anything. The phrase "the right to know" is a very bad guide to us as we try to answer the question what does the public need to know about and by what means should it find out? I find myself in complete agreement with Dan Silver that the public's elected representatives are responsible for judging what the public should know about certain matters.

I will argue the following proposition: that the public should know enough about intelligence to be able to judge whether it's being well-served, that because of the special nature of intelligence if the public knows too much about intelligence the public surely will be badly served, that therefore the facts which reach the public must be heavily filtered, and that the peoples' elected representatives are the only ones who should do the filtering. I shall not argue that the powers of oversight are being well exercised now, but rather that in order for the public to be properly informed about intelligence the process of oversight must be much improved.

First, however, a few comments on how not to inform the public. In testimony before Congress, Mr. Abrams was quoted ... to the effect that the press should try to find out what it can and should publish what it knows. Thank goodness the statement is one man's opinion and not part of the Constitution. Just suppose for a moment that the press and the judicial system took that statement seriously. Each reporter would believe it proper to act no differently than a Soviet clandestine case officer. He would recruit agents by whatever means, and try to penetrate American intelligence as deeply as he could to find out the most sensitive information we had. Then he would probably publish it to the world--names of agents, frequencies, functions of technical means, everything. In war time such dutiful reporters would send untold numbers of their fellow citizens to their graves. The Justice Department and the courts, for their part, would just let it go on, because, after all, the press's job in a free society is to inform the public, isn't it? Well, I think all of that is very clearly nonsense.

We're not in such a strange situation yet. But we are approaching it a bit too closely. Enterprising American reporters have, in fact, ferreted out secrets from the intelligence agencies which the KGB's case officers were not

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themselves able to ferret out. Like it or not, as the Soviets would put it, the free press has made itself an objective ally of Soviet intelligence. I mean this is not an accusation of malevolence or anything of the kind. It's just a realization of the facts as they are after a careful reading of the New York Times. An awful lot can be found out from simply reading the New York Times. I sometimes find out more from the New York Times than I find out from the CIA. The Times sometimes proves to be a more direct line to the inner sanctum of intelligence than does our Committee's authorization. The Times reporters have better sources than I do.

So, unlike Mr. Abrams, I do not see the sense or the equity of proposing to jail an employee of an intelligence agency who acts as an agent by revealing certain secrets to unauthorized persons, and not jailing the person or persons who play the part of the case officer. The reason for all this inconsistency of legal preference is clearly the tremendous stake which the press has in leaks. But our society in general has no such stake. Leaks are a terrible way to have a public debate. By definition, leaks are partial, they are biased. By relying on leaks of classified information, the press is not serving the public but rather serving those factions in the government which are powerful enough themselves to leak with impunity; to leak and to shield themselves from investigation and reprisal. Administrative procedures and secrecy agreements are appropriate means for controlling leaks. Administrative sanctions amount to self-policing, and one can count on self-policing being applied unfairly. I think we have seen that potential realized in the Snepp case. Personally, I think a great injustice was done to Frank Snepp; not because his secrecy agreement should not have been enforced. I think it should have been enforced. The man promised to do something. He should have been held up to that promise. But the fact is that there are other people within the Agency and who have left the Agency who have published things far more serious than Mr. Snepp has published who have not been treated so harshly. One does not get out of that simply by saying that life is unfair. Our task here is to try to make it as fair as possible. After all, that's the task of legislators.

Legal procedures have also proved to be inadequate for informing the public. The Freedom of Information Act has brought millions of pages of classified

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information into the public domain. But who has benefited? Those who make requests for information under FOIA are usually looking for something that will help them make a point. They get what they want; they make their point; and in the process they leave huge piles of materials, sort of the tailings of a mine, which can be carefully scrutinized by our enemies' intelligence and counter-intelligence services. We have to ask whether those who have used FOIA have provided the public with the knowledge necessary to improve the public's lot. I doubt it. The press and other partial interests do a tolerable job of informing the public on matters which do not involve classified information, because anyone who wishes may check the accuracy or the completeness of any report. But both press and the requesters under the Freedom of Information Act have come to be in a position to decide what the public should be told about intelligence and what the public should not be told. As a matter of fact, it's been argued, and I think convincingly, that the press has taken upon itself the role of being the only real intelligence agency. I recall trying to get some information about terrorism from a well-known American journalist who operates in Europe, and asking that journalist to come to the Intelligence Committee and to tell us on the classified record about her sources, and about some matters of high interest to the United States. This journalist told us that she had consulted her sources and her sources would not allow that information to be put into any official American channels because of the belief that we could not protect them. However, they obviously believed that the journalist could protect them, and the journalist did a very good job of protecting them.

Well, it is simply not a healthy situation for persons who represent no one but themselves to play such a preeminent role in forming the public's mind on intelligence matters. Only the peoples' elected representatives have the authority to decide if the public should know one fact and not another. Now since the potential for abusing such power is obvious, it is right that such power be vested in the select committees representing all points of view in the Congress.

Now, what does the public want to know about intelligence? What should it know? Well, true, the public wants to be reassured that those whom it pays to act as its guardians are not abusing their secret prerogatives. But most people

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are chiefly and rightly interested to know whether the agencies are doing some good proportionate to the money that's being spent on them. The public rightly believes that the United States has enemies, both foreign and domestic, and wants to be sure that the intelligence agencies are protecting us against both. Now, the Congress' intelligence committees have been very thorough in investigating allegations that the intelligence agencies have violated U.S. laws, Executive Orders, and regulations. This is quite proper. But they have not been nearly so eager to look into shortcomings of performance. The CIA's involvement in the Chilean revolt against Allende was the subject of a full investigation and of a public report. But several senators still receive letters from one Mrs. Ewa Shadrin whose husband reportedly--this I learned from the New York Times--disappeared while being run as a double agent by the CIA. This lady wants to know whether her husband's life was thrown away. No report has been made public in any way. Now, both of these things are serious matters. The Chilean affair is a serious matter; the disappearance of Mr. Shadrin is a serious matter; the revelation of our role in Chile was not helpful to the United States; who knows that the revelation of what happened to Mr. Shadrin might not be helpful to the United States. But I perceive here a certain eagerness to get into one kind of matter and a certain reluctance to get into another kind of matter. By what criterion is it proper to assert the public's right to know about the former but not about the latter?

How then is the public to find out whether it is being well-served? Well, first of all, the public will learn nothing from statements such as, "I believe we've got the best intelligence system in the world," especially when the person making such statements never has spent time comparing American intelligence against the world's other intelligence systems, especially when the person making such statements has never measured American intelligence against the job that it has to do. Such statements invariably please the employees of the Central Intelligence Agency, and of the FBI; everyone likes to be praised. But such statements have a hollow ring, because nowadays the public sees lots of evidence that there is something drastically wrong with American intelligence. The public doesn't have to be privy to secret information to get that impression. For example, millions of Americans, even Jimmy Carter, are genuinely surprised these days to find out that the United States has become the world's number two

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military power, that the Soviet Union has become the number one military power. Unlike Mr. Carter, however, many people are asking why we were not warned this was coming about? I mean, after all, it took a long time for us to slip from being number one to being number two. In order to become number one, the Soviets had to build an awful lot of very large systems. They took a long time to do it. They had to mobilize enormous resources over many years. There was an awful lot of evidence about what they were doing and not nearly all of it was classified. Why didn't anybody warn us this was coming about? Where was the CIA? Well, as readers of the Washington Post know, the CIA has been right there, for more than a decade, reassuring the U.S. government that what was happening really, well, really wasn't happening, or failing that that what was happening really didn't matter. This raises certain legitimate questions in the public's mind.

Then, too, the American people watch as the Soviets or other enemies of the United States mount coups d'etat around the world and they wonder--where is the CIA? Can't we stop such things or maybe pull a few of our own to balance things a little? But time passes and enemies pile up successes. The number of regimes friendly to us dwindle down to a precious few. This raises certain other obvious questions.

Then, on occasion, people open their newspapers and they read about terrible squabbles within American intelligence. They read, for example, that a high CIA career officer, Mr. John Hart, went before the House Assassinations Committee public session and while the congressmen were trying to get information out of him regarding what Lee Harvey Oswald had been doing in the Soviet Union, Mr. Hart brushed them aside repeatedly and said, in effect, "No, no, I'm here to tell you about something else. I'm here to tell you about how bad the CIA was in handling a certain Soviet defector about a decade ago." In so doing Mr. Hart revealed all sorts of classified information about the CIA, all of which tended to cast discredit upon another former high official of the agency. What is the public to think except that the CIA is routinely in the business of leaking secrets to harm the influence of--well, the public can't figure it out. It seems as if the Agency is devouring itself. In fact, certain factions are in the business of leaking secrets to destroy the effectiveness of their bureaucratic adversaries. Can't something be done about such things?

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Also, recently, readers of newspapers have noted that the FBI has held press conferences to draw attention to its successes in the field of counterintelligence. Specifically, the case of two Soviet case officers who bit at the chance to take classified information from a Naval officer on the New Jersey Turnpike. The Naval officer was dangled before them. Also, the FBI held a much-publicized press conference on the case of Mr. Hermann who was the first Soviet illegal that we've stumbled upon in a number of years. Some might wonder why the FBI chose to ballyhoo these successes. In themselves, these successes are rather paltry. Besides, why arrest spies? The Soviets will only send over more. Shouldn't the counterintelligence service watch spies? Make it his business to learn about all agents working against us? Keep them under watch? How many other Soviet hostile agents are there? How many Cuban agents are there? Do we have a rough idea? What is the use of bragging about catching three? And then, of course, the scariest question of all: Could these published cases be the extent of our successes in recent years?

Well, for years the Congress has been talking about comprehensive legislation to cover the intelligence community. The public has not given its representatives any detailed guidance about the kind of legislation that they should enact. But the public has expressed one strong sentiment: don't do anything to weaken American intelligence. Strengthen it. Not surprisingly, in recent years even restrictive legislation has been presented to the public as measures to strengthen intelligence. The public's state of mind concerning intelligence is quite sound despite its lack of access and despite the flood of malevolent leaks. It is sound because over the long term it really is difficult to give the public the wrong impression about how well-served it is. The frequency of terrorist activity, the suddenness of our enemies' successes, the constant state of surprise of our leaders speak very loudly and clearly indeed. Of course it would be better if the public did not have to find out about our intelligence in such ways. What then should our legislators do? First, they should inform themselves on just how competent and how incompetent our intelligence agencies are. How do they measure up to their task and how do they stack up against their competition? Then these legislators will have to decide how much of their investigative results they can safely release. They must release some detail, however, because if they mean to propose major changes in the budget, in the

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structure of the agencies and the habits of our intelligence personnel, they will have to explain to the public why the new measures are needed.

Let me sum up. Events in the public domain are giving the public the impression that it is not being well-served by our intelligence. The public cannot search into the reasons why this is so. The press cannot and should not be relied upon to try. The public's elected representatives are responsible for finding out how well the public is being served, to improve that service, and to tell the public what it should know. They ought to get busy and do it. I think we can have a fruitful discussion on these matters. Thank you.

QUESTION PERIOD

The question period following produced discussions on the following subjects, among others: the severability of portions of classified documents to be more responsive to FOIA requests, whether there are any absolute First Amendment protections, whether a decision to publish can and should be based solely on a statute's uncertainty, whether and how newspapers can be prevented from printing leaked classified information, what responsibility (if any) journalists have to preclude publication of sensitive intelligence information, whether and under what conditions journalists might be guilty of conspiracy for their actions with leakers or leakees, and what form of legislation should we enact to protect covert agents' identities.

Morris Leibman

Ladies and gentlemen, my thanks to all of you. In closing, I want to pay particular thanks to the professionals on the panel and in the audience who have been so thoroughly cooperative. So many of you flew in Thursday night, so many flew in Friday and so many of you had the courage to stay here to the last minute. I think the most helpful thing the Committee has had since its entry into the field is the wonderful cooperation from the intelligence community. We are delighted that we had so much time for real discourse; and I think it's one of the highlights in the whole development in this field to see the kind of discussion and discourse the professionals have had among themselves. It really exceeded our fondest hopes and I want to thank you all again.

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Two small announcements. There has been so much emphasis this morning on people's right to know. Some months ago Hardy Dillard talked with Ray Waldmann and Nino, and we are going to do a research project in that field. The last thing I do want to say is to Dean Casper, to Nino, and to the faculty of the University of Chicago Law School for their wonderful cooperation, to Ray and Florence and the rest for making it such a great program. Thank you.

POST-CONFERENCE LUNCHEON

Morris Leibman

In introducing Frank Barnett formally, he's the President and Chairman of the National Strategy Information Center but, more than that, Frank has been one of the great students of international affairs and national security for many, many years. He's been my devoted friend, has been essential to the start of the Committee, and has been our educational consultant from its inception. He was one of the people who helped found the Georgetown Center for Strategic and International Studies. He also helped start the Foreign Policy Research Institute of Pennsylvania and numerous others. But today I just want to refer to one minor thing that Frank sometimes likes to forget, depending on what his view of a particular situation is. Some years ago a little known Harvard professor came to Frank and said, "You know, I'd like to start a series of programs for foreign students to come to the United States, and it's very difficult for me to do this at Harvard without any money. Could you give me a grant?" And that little professor was Henry Kissinger and Frank gave him his very first grant. Frank Barnett.

Mr. Frank Barnett
Director
National Strategy Information Center

That's the first and last time I had anything to do with policy making, even indirectly. Well, ladies and gentlemen, Morry Leibman and his colleagues have obviously offered a sumptuous intellectual smorgasbord for this gourmet audience, and you've already had the Oysters Rockefeller and the Iranian caviar and the Cherries Jubilee; now you have me as a dixie cup filled with Alka Seltzer. As almost all of you know, I am neither a lawyer nor an intelligence

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specialist. And I suppose that Morry asked me here really as an agent provocateur. I must say, as the alms seeker of a smallish research firm that deals with Soviet strategy and geopolitics, I have profited very greatly from your deliberations, I think, even when I haven't sometimes understood all of them. And I certainly would like to salute the American Bar Association for the constructive initiative of Morry's Committee in entering this important, albeit controversial, arena of discussion of intelligence legislation.

If I may reminisce just for a moment, I'm reminded that thirty years ago I flirted briefly with what might be called amateur, nonprofit, overt operations against the Soviet empire. On leave of absence from my post at little Wabash College teaching Elizabethan drama, I met a fellow named William J. Casey who, of course, went on to become head of the SEC and Chairman of the Ex-Im Bank and, as Morry said, is now Mr. Reagan's campaign manager. But in those days Bill Casey was a young lawyer who had just returned from Europe where he had been a very senior person with Bill Donovan in OSS. And Bill Casey and Mr. Donovan and several others had set up a little firm which had the strange title, "American Friends of Russian Freedom," and they asked me to become the Executive Director and to help raise money from foundations for our enterprise. And the enterprise was, believe it or not, to try and promote defection of Soviet soldiers from Vienna and Berlin at the high point of the Cold War. Well, we didn't promote very much defection but it was very gratifying to the ego to be denounced in Pravda as a cannibal. I should say there were lots of other defectors from behind the Curtain. Tens of thousands, literally, of Ukrainians and Poles. There was a fairly large collection of Polish officers still in London, the remnants of General Anders' group. And, of course, after the Communist coup in Czechoslovakia in 1948, a number of Czechs came out and there were rather large and significant numbers of Iron Curtain defectors, many of them of military age. And so it occurred to me to put together a little proposal to recruit cadres of Iron Curtain escapees to be formed into paramilitary units to be attached to NATO and a banker friend of mine, in all improbable places Evansville, Indiana, who happened to be a golfing partner of Eisenhower--Eisenhower was then back in SHAPE--carried the proposal to Ike. Ike approved it. I took a leave of absence and went to Washington and spent several months there talking to senators and congressmen. Mr. Allen Dulles was kind enough to phone Robert Taft and Paul Douglas of Illinois and we had a coalition involved in

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this and the upshot was that in 1951 Congress attached a rider to the Mutual Security Act which set aside $100 million to be used if the President so deemed to recruit a Legion of Freedom of Iron Curtain personnel who could be used in time of insurrection as volunteers for Cold War operations.

Well, the Legion was never formed and the only thing that that resulted in was that this time in Pravda I was called the "Arch Rasputin of the Military Industrial Complex." And the only utility that had was when my wife would complain occasionally that I wasn't involved in a respectable profession--banking, law, or business--I could remind her of the lonely eminence of being an "Arch Rasputin."

Well, that was my only connection, even indirectly, with semi-intelligence activities. My task today is to suggest the wider spectrum of protracted conflict wherein intelligence is a vital weapon, both for defense and potentially for offense. It's self-evident that if somebody asks the question: Do we need an annual 5 percent increase in the Defense budget?, it would be quixotic to attempt any sensible answer without reference to the specifics of the Soviet military build-up. Obviously, our own efforts should be prudently tailored and/or measured against the objective threat rather than, let's say, the Pentagon's abstract rationale for increasing weaponry per se. Similarly, the layman at least feels that the intelligence debate ought certainly to be clearly related to the matrix of danger in what seems to us an increasingly hostile world. Psychological warfare, covert operations, disinformation, insurgency, those twilight techniques so distasteful to the racquet club ethics system, actually are major weapons systems as we all know in the arsenal of the Soviets. And as we debate charters, alas the Soviet-Cuban-East German-PLO conflict consortium is gaining added momentum, even in the Caribbean. And I would be less than candid if I did not say to this distinguished group of lawyers that increasingly American citizens, admittedly laymen, are worried about the chilling effect not of a clause in the Intelligence Charter, but of the pay load of Soviet SS-18 missiles targeted on our own silos, the five Russian airborne armies that can be projected into Iran or perhaps even Saudi Arabia, the basing of Admiral Gorshkoff's warships in Cam Ranh Bay, clandestine operations in the Caribbean. In short, the urgency with which we approach intelligence reform it seems to laymen should be compatible

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with the objective power trends in a world of independent and still ornery nations, which still seems to be a neo-Hobsian environment.

We know that President Carter, following Moscow's Afghan gambit, said that he had changed his mind about 180 degrees on the nature and intentions of the military commissar complex in Moscow, and, hopefully, his change of mind may have some parallel among leadership in the private sector. I find that too many of my business friends persist in believing that the Russians are simply Slavic-speaking graduates of the Harvard Business School. They are not. They march to a different drummer. It is not the benign thump of a gavel in an Anglo Saxon law court, but more nearly a primordial beep and the cultural gap may be greater than the missile gap and has some relevance, at least in my view, to the intelligence debate.

I want to talk very briefly about five synergistic problems which make intelligence reform ever more urgent. One is the coming vulnerability of the U.S. nuclear deterrent in the early 1980s and the consequent opening of the Soviet window of military opportunity. Two is the growing military edge in conventional power of the Warsaw Pact over NATO, which is leading to subtle changes of attitude in Europe. Three is the darkening shadow of the Soviet Navy in the southern hemisphere from whence comes the oil and minerals that sustain the market economies of Europe, the U.S., and Japan. Four is the subject we've been discussing, the partial sidelining of the U.S. intelligence services in a world in which the KGB is altogether too alive and well and, if anything, escalating its covert operations throughout the world. A nuclear conflict may be unlikely but low intensity warfare, aided and abetted by propaganda, political warfare, and insurgency is in process right now. And manifestly we have diminished capability to cope. Those four threats in turn lead to a descending spiral of confidence among friends and allies in America's capacity and will to meet the full spectrum of challenge from the Soviet Union The Saudi royal family, as you know, is close to dismay, if not dispair, over Soviet success near their shores. The Japanese have quietly taken the decision to rearm but they are asking themselves in private if America is a reliable partner. I would think it imperative that as Japan rearms we bind Japan to us in the same hoops of steel with which we have bound Germany, rather than let Japan rearm as an independent force in the

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Pacific eventually acquiring nuclear weapons and then conceivably playing off Washington, Moscow, and Peking against each other in the classical mode of diplomacy. Even our staunch friends in Germany, where Bonn has been an extremely generous NATO partner, but even there Germans are reminding themselves that the Great Bismarck advised never entirely slam the door on St. Petersburg. Synergistic threats are leading to at least the discussion of accommodation or tilts towards Moscow on the part of heretofore very reliable allies.

Well, Saturday afternoon at the end of a strenuous two days of conferences is hardly the time to inflict another speech on this patient audience, so I'm just going to outline one aspect of these synergistic threats which seems to me has been insufficiently emphasized in defense literature and directly relates to intelligence capabilities including those that lap over into covert operations and insurgency. And if anybody wants what I hope is the backup data and analysis, I'll be very happy to give you a full copy of my treatment at the Naval War College on this subject. But here let me just outline the point.

True, the Soviets have caught up and possibly gone slightly ahead in nuclear weapons. True, they are somewhat substantially ahead on the central front in Europe in tanks, artillery, tactical aircraft, and what have you. But surely the essence of strategy is to achieve indirectly and at low risk what might cost you enormously more via the direct approach. And, if anything, the Russians have proven themselves to be cruel, calculating chess players who have avoided head-on confrontation and who must know something about the utility of the indirect approach. So I want to suggest the strategy by which the Russians may, in fact, be seeking to do us in.

The United States and her major trading partners, Europe and Japan, are increasingly becoming have-not nations, not only in terms of oil but in terms of metals and minerals which keep our industry going. Roughly speaking, the United States is between 40 and 50 percent dependent on materials that come out of the southern hemisphere: Europe about 75 percent dependent, Japan about 90 percent dependent. That would mean that if access to the metals, minerals, and energy of the southern hemisphere were severed, that the market economies of

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the northern hemisphere could be thrown into a 1929-style depression, if not worse. One could contemplate a scenario in which literally millions of unemployed in the streets of Europe would this time equal a tidal wave of Eurocommunism which neither NATO nor the Common Market could survive. Japan, incorporated, mighty engine that it is, would nevertheless be shut down almost completely. And while we could tighten our belt and endure, because we would still have access to the oil of Alaska, Texas, and Mexico, and the minerals inside our own continent, nevertheless, because our major trading partners in Europe and Japan were in a state of economic collapse, we would inevitably be dragged after them into a state of severe economic and therefore political distress.

What I am postulating, and again I think there is data to support this, but I give it to you only in outline form, what I am postulating is that the Soviets are engaged in an indirect, undeclared resource war. That while they hold aloft their mighty nuclear hammer, while they mask their tank armies on the central front in Europe, thus mesmerizing almost all of us, their main thrust in reality is with Admiral Gorshkoff and the Cuban Foreign Legions and the East Germans, because the East German security police are playing an important role in this. But that main thrust is aimed at severing and/or outflanking the resources of the southern hemisphere.

In the Persian Gulf roughly three-fifths of the world's estimated oil reserve is now nearly encircled by allies of the Soviet Union, whether South Yemen, Ethiopia, Syria, Iraq, and Afghanistan. The southern third of Africa from Zaire on down is to minerals what Saudi Arabia is to oil. That is, about one-quarter of the world's critical minerals so important for industrial health are in that southern third of Africa. Those minerals are being outflanked and/or are under seige by various forms of Marxist political warfare, insurgency, or guerilla operations. And, of course, even in our own Caribbean, the same arc of insurgency which has been drawn around the Persian Gulf is beginning to be drawn around the oil reserves of Mexico. The island of Granada is probably gone. A very large military strip is now being built there by Cuban workers and with Libyan money, large enough even to accommodate the Backfire. It doesn't mean the Soviets will bring the Backfire into the Caribbean but they would have the

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capability. Jamaica, as you know, is tilting. El Salvador may be simply the stepping stone to Nicaragua, or Nicaragua the stepping stone to El Savador and Guatemala. And one asks the question: Why bother with those smallish stepping stones unless ultimately some grand strategist is looking at the oil of Mexico and the oil of Venezuela.

In short, Soviet style geopolitics poses a very real raw materials threat to the industrialized states of the northern hemisphere and this is not only stemming from Gorshkoff's fleets and Soviet power projection, but for continuing Soviet versatility in political warfare and guerilla operations. Now from Moscow's point of view a resource war is low risk, low cost, low casualty, low visibility, almost beneath the threshold of Western response. Although, thank heaven, for La Belle France; France at least with her Foreign Legion and the Moroccan troops and the French security services saved Zaire from the incursion into Shaba Province, but as you all know, Zaire is still frightfully unstable and almost certainly second, third, and fourth attempts will be made to destabilize and take over that important area of the world. And I think we have to develop more capability at the lower end of the spectrum of conflict to cope with this problem.

In Khrushchev's day, it was sort of all or nothing for the Soviet Union. Khrushchev could rattle his rockets and then you could either call his bluff or back down. Khrushchev really did not have the capability to project limited power into all corners. But Admiral Gorshkoff can now behave like the Tsar married to Queen Victoria. He's got his Cuban Gurkhas and he can maneuver on virtually every square of the chess board.

So, having tried to set forth in brief a problem, let me just spend five minutes on what some people are trying to advance as a solution. For the past seven years, a group of defense specialists, and I might say lawyers and businessmen, retired military people from twenty different nations, have been meeting together annually in multinational conferences, whether in Asia or on the Continent or in Britain. In other words, delegates have been coming from nations which border on all of the Soviet's three fronts, whether the NATO front, the Gulf front, or the Asian Pacific front, and they have been meeting to see if

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some new design is needed on the part of the Free Market economies to stem the Soviet gambit of the resource war which, as I say, is a low visibility thrust that doesn't really get handled by the normal existing defense arrangements.

NATO, for example, because of a flaw in its charter, cannot defend its own mineral energy flank. I think all of you know that NATO cannot defend below the Mediterranean. And yet, of course, Europe is beholden for its minerals on southern Africa and its oil in the Persian Gulf. General DeGaulle, back in 1958 when France was still a part of NATO, proposed that this flaw be remedied, that a special executive committee be set up--France, Britain, and the United States--to deal with problems outside of NATO which nevertheless had an enormous economic impact on NATO's vital interest. We turned General DeGaulle down. Well, General DeGaulle's point is even more important today than it was then. In a sense, by analogy, NATO is a mighty fortress in the desert, and four hundred yards away is the water hole. And the NATO charter says we can defend the fort from a direct assault but we cannot defend the water hole. And it's extremely difficult to make any changes, because, as you know, all NATO decisions must be unanimous so that Iceland or Norway or Denmark can veto a proposal to create an intervention force for the Persian Gulf. And, indeed, when these conversations have been brought up prominently by General Al Haig during his years of tenure at NATO headquarters, the smaller countries of the north did veto the discussion.

The delegates from these twenty countries--Australia and Japan and almost all of NATO Europe, Britain, the United States--who have been meeting together now for six years are talking about a new naval alliance of the southern ocean. An alliance, in effect, would bring Japanese and Australian warships together with British and American and French, hopefully German, warships, into the Arabian Sea for the joint defense of the oil theater, for the joint and mutual defense of the lines going back through the Moluccan Straits to Japan and around the Cape to Europe and America. In fact, they are talking about a new trioceanic alliance of key states on the Pacific, Indian Ocean, and Atlantic to cope with the Soviet resource war gambit. And, of course, in addition to warships, one would need increased intelligence and paramilitary capabilities. But hopefully we would have at some stage the informal cooperation of the

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French Foreign Legion and the British Security Services and other intelligence agencies as well as our own.

At first blush this certainly seems like the impossible dream but I point out that thirty years ago our country did involve itself in two impossible dreams. One was the Marshall Plan and one was NATO. With the Marshall Plan we raised a shattered Europe out of rubble and ruin and with NATO we shielded it from Stalin's aggression. If one in the present context talks about a trioceanic alliance whose partners would be Japan and Saudi Arabia and Australia, and some day one would hope Brazil and Argentina, one is not talking about allies who are in rubble, ruin, and bankruptcy. One is talking about the Japanese yen and the German deutsche mark and the Saudi Eurodollar and the high technology of Germany and Japan. And I think a case can be made that for America to help catalyze a trioceanic alliance for the 1980s, an alliance to bridge the twentieth and twenty-first centuries, would take far less per capita commitment on the part of the United States in this context than did bringing forth the Marshall Plan and NATO when we largely had to do the job ourselves because our allies were in rubble.

I'm happy to tell you that this is not simply an American notion. There are committees in London now, in Paris, in Tokyo that are working on this sort of study for joint and combined naval power in the Indian Ocean and for concerting rapid deployment forces and possibly even special operations, and that there is some hope that this is not so much the impossible dream as recalling the wisdom of Winston Churchill who observed that to bring forth a new alliance may weigh more in the balance of history than winning a battle by oneself. And in all of this, it seems to me, again as a layman, the intelligence function, the recementing of trust with allied intelligence services, and the regirding of ourselves for special operations which might not be any more ominous than the same sort of transnational politics by which the German Social Democrats helped to save Portugal, by transferring funds and cadres to Lisbon at an hour of grave peril, that those things can move forward and we can move out of a climate of creeping defeatism about the accumulation of Soviet power across the board towards a path in which hopeful options and alternatives are put forward for serious discussion by professionals. And here, I think, is the great glory of what

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you've been involved with in this American Bar Association enterprise. Thank you very much, Mr. Chairman.

Morris Leibman

Well, there's no comment on Frank but he's always inspiring. I do want to express my deep thanks to Norm Nelson and all the people at the ABA for the services and the food and the efforts and also to those who have been responsible for all the recordings. Thank you very much.

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