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HALPERIN CONFIRMATION

CHARGES

AND

RESPONSES



UNCLASSIFIED
OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, DC 20301-2600



FAX TRANSMITTAL

TO: TODD STERN

ORG/ROOM: _____

OFFICE PHONE: 202-456-2702 FAX PHONE: 202-456-2215

FROM: OSD
PENTAGON, ROOM 4D822
WASHINGTON, DC 20301-2600

OFFICE PHONE: (703) 697-8101

SENT BY: MORTON HALPERIN

TIME: _____ DATE: 12/9/93

NUMBER OF PAGES INCLUDING COVER SHEET: 2

☐ URGENT ☒ PRIORITY ☐ IMPORTANT ☐ ROUTINE

REMARKS: _____

UNCLASSIFIED FAX 24 HRS/7 DAYS A WEEK: (703) 695-6306
CLASSIFIED FAX FROM 0700-1700 MON-FRI: (703) 695-4812

703-697-~~2680~~ 5992

UNCLASSIFIED

TALKING POINTS

1. The President and I are both personally committed to the nomination of Mort Halperin, as is Les Aspin. We would very much appreciate your public support now for the nomination.

2. I have known Mort for many years and consider him to be a pragmatic, middle of the road, foreign policy professional who would make a major contribution to our effort to think through what the U.S. role should be in the post cold war world. We are anxious to move this nomination along quickly.

3. We have carefully reviewed the various charges made against Mort and have concluded, as the Washington Post did in its editorial the other day, that there is no substance to any of the allegations.

4. I know that you have met with Mort and I understand that he has answered any questions that you and your staff had.

5. Senator Thurmond is trying to suggest that most, if not all, Republican Senators are against the nomination. While we believe that 3 or 4 Republican Senators on the Armed Services Committee are either leaning toward confirmation or are undecided, they are reluctant to challenge Thurmond publicly.

6. That is why your support would be so critical now. We believe it would lead other Republicans to speak out. We know that Senator Hatfield is ready to support the nomination.

7. Your support of other nominations has been noticed and appreciated. We hope that you will be willing to take the lead again in light of this effort at character assassination.

(Our understanding is that he is ready to support the nomination but wants some recognition from the Administration as well as an opportunity to discuss some aspects of telecommunications policy.)

HALPERIN NOMINATION
CHARGES AND RESPONSES

The nomination of Morton H. Halperin to be Assistant Secretary of Defense for Democracy and Peacekeeping has led to a series of documents leveling a number of over-lapping charges against the nominee.

First, several sets of charges were issued by Frank Gaffney and disseminated by him by fax and in the Washington Times which was the only newspaper to take them seriously. Later, Senator Thurmond distributed a minority staff report on Halperin and Senator Lott released a one page broadside.

Every newspaper and magazine, other than the Washington Times, which has examined the charges, found them to be baseless. (See Tab at end of book, "Favorable Commentaries on the Halperin Nomination.")

For example:

Conservative columnist Paul A. Gigot writing in the Wall Street Journal concluded that "some of the attacks on Mr. Halperin stretch the truth enough to look like a reverse 'Borking.'" He viewed the attacks as an effort to reargue the Vietnam War.

The New Republic concluded that Gaffney "quotes selectively and tendentiously-- when he's not actually misquoting."

An editorial in the Washington Post dismissed the charges by Senator Thurmond in these words: "The charges against the nominee are not worth dignifying by restatement: Each fresh one crumbles under scrutiny of the record."

Former Secretaries of Defense Robert McNamara and Elliot L. Richardson in an op-ed piece in the Washington Post wrote that the "case" against Mr. Halperin is "nothing more than a collection of false rumors, misapprehensions and distorted quotations."

The New York Times, in a news story, reached the following conclusion: "While Mr. Halperin's opponents have excerpted his published writings and public testimony to suggest that he is a dangerous leftist, a close study shows that those accusations are either demonstrably false or based on statements wrenched from their contexts."

This notebook permits the reader independently to assess the record. It contains a summary of the principal charges against Mr. Halperin, followed by a set of responses in bullet form. Then, there is a narrative that describes the charges and the response in greater detail. Key to the narratives are the accompanying documents that support them.

The book is organized around a set of subjects under which the charges are grouped:

1. Activities since Mr. Halperin began working in the Department of Defense.
2. Foreign policy issues.
3. Intelligence issues including disclosure of names of agents and views on covert actions.
4. Secrecy issues.
5. Associations with specific individuals and various organizations.
6. Miscellaneous Issues: Drug testing.

Under these key headings is a listing of charges as they are discussed in the book. The last tab contains a collection of favorable articles and statements in support of the nomination.

HALPERIN NOMINATION CHARGES AND RESPONSES

Halperin's Role in DoD

PRE-CONFIRMATION ACTIVITIES

GAYS IN THE MILITARY

JOULWAN TELEPHONE CALL

WHY DEMOCRACY AND PEACEKEEPING?

SOMALIA ARMOR REQUEST

Foreign Policy Views

SOVIET THREAT

OPPOSITION TO THE USE OF FORCE

EXTREME MULTI-LATERALISM

FOREIGN AFFAIRS BACKGROUND

Intelligence

VIEWS ON U.S. INTELLIGENCE ACTIVITIES

INTELLIGENCE LEGISLATION

DISCLOSURE OF NAMES OF COVERT AGENTS

COVERT ACTION

Secrecy

WHISTLE-BLOWER (PERSIAN GULF)

RELEASE OF CLASSIFIED MATERIALS

Associations

PHILIP AGEE

DAVID TRUONG

ELLSBERG (PENTAGON PAPERS)

AFFILIATIONS

NATIONAL SECURITY COMMUNITY

Miscellaneous

DRUG TESTING

FAVORABLE COMMENTARY

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PRE-CONFIRMATION ACTIVITIES

Divider Title: _____

PRE-CONFIRMATION ACTIVITIES

Talking Points

Charge: The Senate Armed Services Committee has expressed concern regarding the activities of nominees and prospective nominees prior to their confirmation.

Response:

-Prior to June 1993 Halperin, along with other officials awaiting confirmation in the Office of Policy (and since confirmed), did engage in actions that might be viewed as presuming confirmation.

-Halperin has been very careful to abide by the Secretary's guidance as provided in a June 2, 1993 memorandum written by the Deputy Secretary and a May 29, 1993 memorandum from the General Counsel and to limit his actions accordingly.

-Halperin has adhered to all applicable laws and regulations governing conflict of interest.

Narrative

Earlier this year, the members of the Armed Services Committee expressed concerns about the role of unconfirmed nominees within the Department of Defense. Halperin was one of a number of nominees who were not as careful as they should have been to ensure that none of their actions could be viewed as inconsistent with Secretary Aspin's guidelines for unconfirmed nominees acting as consultants to the Department.

As a result of the Committee's concerns, both the General Counsel and the Deputy Secretary issued detailed guidelines to nominees acting as consultants to advise them on the proper scope of their duties and their limitations while awaiting confirmation. Halperin has been very careful to abide by this guidance as provided in a June 2, 1993 memorandum issued by Deputy Secretary Perry and a May 29, 1993 memorandum from the General Counsel, and has limited his actions accordingly.

In addition, the General Counsel was asked to review documents that had been approved, initialed, signed, or generated by unconfirmed nominees as of May 28, 1993, to determine whether any action of the Department required reversal or ratification because of the actions of unconfirmed nominees.

Halperin was among the nominees for whom such documents were collected. He, like a number of other unconfirmed nominees, had approved or initialed a number of documents that could be misconstrued as giving the appearance of violating Secretary Aspin's guidelines. The General Counsel's review of Halperin's actions confirmed that there was no need to reverse or ratify any departmental action because of Dr. Halperin's participation in any particular activity. These documents have been provided to the Senate Armed Services Committee.

As a Department of Defense unconfirmed nominee, Halperin is acting in the capacity of "Consultant to the Secretary and the Under Secretary for Policy and the Special Assistant to the Secretary." He, like all nominees, is required "to adhere to the applicable laws and regulations governing conflict of interest, and he is not allowed to formally make any authoritative decisions or provide authoritative guidance." As a consultant, he has not performed any personnel actions, including hiring, transferring, or terminating of DoD personnel. He has met with some potential candidates for positions and offered advice to the Counselor to the Secretary about persons with whom he spoke, in keeping with his role as a consultant.

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**GAYS IN THE
MILITARY**

Divider Title: _____

GAYS IN THE MILITARY

Talking Points

Charge: Morton Halperin represented himself as acting in an official DoD capacity in numerous contacts with Justice Department officials prior to his nomination.

Response:

- At the direction of the Special Assistant to the Secretary of Defense, Halperin provided advice and assistance on this issue.
- Halperin discussed this issue with officials of the Department of Justice at the direction of the Special Assistant.
- Halperin carried out these activities as a consultant to the Special Assistant and not as part of his activities in preparation for confirmation.
- Halperin will have no role on this issue if confirmed for his position.
- Halperin responded to this issue in the written Q's and A's from the Senate Armed Services Committee (TAB 1).

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1

Divider Title: _____

GAYS IN THE MILITARY

- 0 **Have you served as a point of contact, formal or informal, between the Department of Defense and outside parties, including Congressional staff, the American Civil Liberties Union, or the Campaign for Military Service?**

At the direction of the Special Assistant to the Secretary, I did on several occasions talk with members of Congress and congressional staffers and meet with officials of the Campaign for Military Service and other groups, including the ACLU, in connection with the Gays in the Military issue.

- 0 **What role, if any, have you had in the Defense Department with respect to planning decisions and/or deliberations on the policy related to gay men and lesbians serving in the military?**

At the request of the Secretary of Defense and his Special Assistant, I provided advice and assistance to the Special Assistant on this issue.

- 0 **Have you discussed this issue with personnel outside the Defense Department since you became a consultant in January?**

Yes.

- 0 **If so, with whom, and what were the circumstances and any recommendations you made?**

As indicated above, at the direction of the Special Assistant I discussed this issue with officials of the Department of Defense and with the Department of Justice and the White House as well as with outside groups and with congressional staffers and several Representatives. I gave advice to the Special Assistant with regard to the interim arrangement established at the start of the Administration. These activities were carried out as a consultant to the Special Assistant and not as part of my activities to prepare myself for my possible confirmation as Assistant Secretary of Defense for Democracy and Peacekeeping. I will have no role on this issue if confirmed as the Assistant Secretary of Defense for Democracy and Peacekeeping.

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**JOULWAN
PHONE CALL**

Divider Title: _____

JOULWAN TELEPHONE CALL

Talking Points

Charge: Halperin attempted to order CINCSOUTH General George Joulwan to cancel or curtail Fuertes Caminos military exercise in Guatemala.

Response:

-Halperin did call General Joulwan to obtain background information on the the Fuertes Caminos military exercise.

-Halperin did not order General Joulwan to cancel the Fuertes Caminos military exercise or even suggest that he do so.

-The call was and is fully consistent with the Defense Secretary's guidelines for consultants, which permit Halperin to gather information in order to be in a position to give advice to the Secretary.

-General Joulwan has no recollection of the call.

-The officer who wrote a memorandum indicating that Halperin had suggested cancelling the exercise reported the incident on the basis of an oral briefing he received from an officer who talked to the officer who was briefed by General Joulwan.

Narrative

In General George Joulwan's recent confirmation hearings, the General responded to inquiries from Senator Lott concerning a conversation between Halperin and General Joulwan about the Fuertes Caminos exercise in Guatemala.

Halperin first learned of the Fuertes Caminos exercise from a State Department official who contacted him to discuss whether the exercise should be canceled or curtailed in light of suspected Guatemalan military or government involvement in the escape of a Guatemalan convicted of murdering an American citizen. Halperin told the official that he would inquire into the facts. He then placed a call to General Joulwan to familiarize himself further with the issue. General Joulwan informed Halperin that the U.S. command had previously expressed concerns about the escape to the Guatemalan government. With regard to State's interest in canceling the Fuertes Caminos military exercise, the General told Halperin that the exercise was coming to an end.

General Joulwan did not initially remember this conversation. After speaking with members of his staff and with Halperin, he believes he did have an informal conversation with Halperin about the escaped convict and about the Fuertes Caminos military exercise.

The information paper in question was prepared by a lieutenant colonel on the Joint Staff who had a third- or fourth-hand description of the conversation.

Phone calls to gather information about DoD exercises fall clearly within Secretary Aspin's guidelines for unconfirmed nominees serving as DoD consultants. The phone call, therefore, did not in any way violate the rules in question. Consultants are generally permitted to consult within the Defense Department on current policy topics and to familiarize themselves with relevant issues.

Halperin did not discuss this issue with any Pentagon officials responsible for policy in this region.

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WHY DEMOCRACY & PEACEKEEPING?

Divider Title: _____

WHY DEMOCRACY AND PEACEKEEPING?

Talking Points

Charge: Wide spread concern exists over the U.S. role in international, multilateral peacekeeping operations. Questions have been asked about why the Department of Defense would elevate these operations, along with the concept of protecting and promoting democracy abroad, to its current status.

Response:

-The World has changed dramatically in the last several years and the Defense Department must be ready to respond to a variety of new challenges.

-The world will be characterized by regional instability and internal civil wars and other crises.

-The Department of Defense needs to develop broad policies for dealing with these new demands and needs to institute mechanisms to insure that there is a full vetting of proposed actions within the Office of the Secretary, with the Joint Staff and other agencies. There also needs to be appropriate consultation with the Congress.

-The Defense Department will be pressed by the President, the Congress and the public to undertake new missions, the DOD must be in a position to do it right and to know when to resist such missions.

-These new demands require that there be an Assistant Secretary of Defense with responsibility for developing policies and insuring appropriate coordination and action.

Narrative:

In DoD Directive 5111.4 (Tab 1) the Secretary of Defense established a new office of the Assistant Secretary of Defense for Democracy and Peacekeeping. This office was created to pull together and give high level policy direction to a variety of functions which the Department has been engaged in at increasing levels over the past several years. The growing importance of these activities arises from the end of the Cold War. In most cases the activities are undertaken in response to specific direction from the Congress.

In reorganizing the Office of the Under Secretary for Policy, the Secretary of Defense sought to group together activities related to the new dangers and opportunities facing the nation. Specifically the Office of Democracy and Peacekeeping has four functions. These are:

1.) Peacekeeping; The Administration remains determined to use military force unilaterally when its interests require it. At the same time, President Clinton has determined that in many situations American interests can be advanced by supporting and in some instances actively participating in U.N.-sanctioned peacekeeping and peace enforcement operations. The peacekeeping responsibilities of the office include coordinating responses to UN requests for assistance, representing the Secretary of Defense on interagency groups relating to peacekeeping, providing input to the Bottom Up Review and budget development relating to peacekeeping, and providing policy on reimbursement to the Services of costs of peacekeeping operations.

2.) Humanitarian and Refugee Affairs; This office has assumed the functions of the Office of Global Affairs which has been abolished. This office is responsible for policy direction for a variety of humanitarian and disaster relief programs mandated by the Congress including relief operations in Bosnia and aid to the Kurds in Iraq. It also provides policy guidance on refugee issues such as the DoD role in dealing with Haitian and Chinese aliens and represents OSD in interagency meetings on humanitarian and refugee matters.

3.) Democracy and Human Rights; The Secretary of Defense has identified threats to democracy as one of the new dangers of concern to the Department of Defense. This office is responsible for the development of policies which will permit the Department to play its role in helping to support democratic regimes around the world. It will provide policy direction to ongoing and new military to military programs. It will review and seek to improve training programs for American and foreign military officers as they relate to the proper role of the military in a constitutional democracy. The office will also provide policy guidance to ensure that DoD programs are conducted in a manner consistent with congressional restrictions related to the promotion of democracy and human rights.

4. Drug Policy; This office will serve as the DoD Drug Coordinator and perform the functions mandated by Congress in the area of drug policy. The decision to locate this office within the office of the Assistant Secretary of Defense for Democracy and Peacekeeping was based on the view of the CINC's that democracy and drug policy were closely related.

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Divider Title: _____



Department of Defense DIRECTIVE

July 6, 1993
NUMBER 5111.4

DA&M

SUBJECT: Assistant Secretary of Defense for Democracy and Peacekeeping
(ASD(D&P))

- References:
- (a) Title 10, United States Code
 - (b) DoD Directive 5149.1, "DoD Coordinator for Drug Enforcement Policy and Support," January 26, 1990 (hereby canceled)
 - (c) Title VIII of Public Law 102-183, "The David L. Boren National Security Education Act of 1991," December 4, 1991 (Section 1901 et seq. of Title 50, United States Code)
 - (d) DoD 5025.1-M, "DoD Directives System Procedures," December 1990, authorized by DoD Directive 5025.1, December 23, 1988
 - (e) DoD Directive 7750.5, "Management and Control of Information Requirements," August 7, 1986

A. PURPOSE

Under the authority vested in the Secretary of Defense by Sections 113 and 136 of reference (a), this Directive establishes the position of ASD(D&P) with the responsibilities, functions, relationships, and authorities, as prescribed herein, and replaces reference (b).

B. APPLICABILITY

This Directive applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Unified and Specified Combatant Commands, the Inspector General of the Department of Defense, the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as "the DoD Components").

C. RESPONSIBILITIES AND FUNCTIONS

1. The Assistant Secretary of Defense for Democracy and Peacekeeping is the principal staff assistant and advisor to the Under Secretary of Defense for Policy (USD(P)) and the Secretary of Defense on DoD policy and planning for the promotion of democracy and the defense of human rights throughout the world, U.S. participation in international peacekeeping and peace-enforcement activities, DoD provision of humanitarian assistance, refugee affairs, and U.S. international information programs. In these capacities, the ASD(D&P) shall:

a. Develop, coordinate, and oversee the implementation of policy and plans for matters related to:

(1) The promotion of democracy and democratic values, including the appropriate role of the military in constitutional democracies, the protection of democratic processes, and respect for human rights.

(2) The use of DoD resources to encourage the strengthening and development of democracy and respect for human rights throughout the world.

(3) The participation of U.S. Armed Forces and other DoD resources in United Nations and other international peacekeeping or peace-enforcement activities, including the development of policy related to creating, identifying, training, exercising, and committing military forces for such purposes.

(4) The use of DoD resources and Armed Forces to respond to humanitarian situations, including those involving refugees, throughout the world.

(5) DoD participation in international activities supporting U.S. international information programs.

b. Administer the National Security Education Program to provide scholarships, fellowships, and grants that improve the teaching and learning of subjects in the fields of foreign language, area studies and other international fields, pursuant to Pub. L. No. 102-183 (1991) (reference (c)).

2. The ASD(D&P) serves as the DoD Coordinator for Drug Enforcement Policy and Support and is the principal staff assistant and advisor to the Under Secretary of Defense (USD(P)) and the Secretary of Defense for drug control policy, requirements, priorities, systems, resources, and programs. In this capacity, the ASD(D&P) shall:

a. Develop policy, conduct analyses, provide advice, make recommendations, and issue guidance on DoD drug control plans and programs.

b. Develop systems and standards for the administration and management of approved DoD drug control plans and programs.

c. Promulgate plans, programs, actions, and taskings pertaining to the drug control program, consistent with the national drug control strategy and DoD drug control policy and objectives.

d. Review, evaluate, coordinate, and monitor DoD drug control plans and programs to ensure adherence to approved policy and standards.

e. Promote coordination, cooperation, and mutual understanding concerning DoD drug control activities within the Department of Defense and Congress, and between the Department of Defense and other Federal Agencies, State and local governments, and the civilian community.

f. Serve on boards, committees, and other groups pertaining to assigned drug control functions, and represent the USD(P) and Secretary of Defense on drug control matters outside the Department.

g. Serve as the DoD point of contact for the Office of the Director of National Drug Control Policy, and other Federal and State agencies as appropriate.

h. Participate in, oversee, and monitor planning, programming, and budgeting for the DoD counterdrug mission, in coordination with OSD officials, the Chairman of the Joint Chiefs of Staff, and appropriate DoD Components.

i. Coordinate and monitor DoD support to civilian drug law enforcement agencies.

j. Coordinate and monitor interagency efforts to promote the detection and monitoring of the maritime and aerial transit of illegal drugs into the United States.

k. Coordinate and monitor, in conjunction with the Assistant Secretary of Defense for Reserve Affairs, National Guard support to State drug law enforcement operations and to the Department of Defense, as required.

l. Coordinate and monitor, in conjunction with the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence, DoD intelligence and communications support to the Department of Defense and State drug law enforcement operations.

3. In so far as the exercise of ASD(D&P) responsibilities and functions defined in subsections C.1. and 2., above, uniquely affect or are conducted in specific geographic regions of the world, the ASD(D&P) shall exercise those responsibilities and functions in cooperation and association with the Assistant Secretary of Defense that is assigned responsibility for overall U.S. defense policy in that region.

4. Participate in those planning, programming, and budgeting activities that relate to assigned areas of responsibility.

5. Represent the USD(P) and the Secretary of Defense in interagency deliberations and international negotiations dealing with assigned areas of responsibility.

6. Perform such other functions as the USD(P) and the Secretary of Defense may prescribe.

D. RELATIONSHIPS

1. In the performance of assigned functions and responsibilities, the ASD(D&P) shall serve under the authority, direction, and control of the USD(P), and shall:

a. Report directly to the USD(P).

b. Coordinate and exchange information with other OSD officials, heads of the DoD Components, and other Federal officials having collateral or related functions.

c. Use existing facilities and services of the Department of Defense and other Federal Agencies, when practicable, to avoid duplication and to achieve maximum efficiency and economy.

2. Other OSD officials and heads of DoD Components shall coordinate with the ASD(D&P) on all matters related to the responsibilities and functions cited in section C., above.

E. AUTHORITIES

The ASD(D&P) is hereby delegated authority to:

1. Issue DoD Instructions, DoD publications, and one-time directive-type memoranda, consistent with DoD 5025.1-M (reference (d)), that implement policy approved by the Secretary of Defense in assigned fields of responsibility. Instructions to the Military Departments shall be issued through the Secretaries of those Departments. Instructions to Unified and Specified Combatant Commands shall be communicated through the Chairman of the Joint Chiefs of Staff.

2. Obtain reports, information, advice, and assistance, consistent with DoD Directive 7750.5 (reference (e)), as necessary to carry out assigned functions.

3. Communicate directly with the heads of the DoD Components. Communications to the Commanders of Unified and Specified Combatant Commands shall be transmitted through the Chairman of the Joint Chiefs of Staff

4. Communicate with other Government officials, representatives of the legislative branch, members of the public, and representatives of foreign governments, as appropriate, in carrying out assigned functions.

F. EFFECTIVE DATE

This Directive is effective immediately.


William J. Perry
Deputy Secretary of Defense

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SOMALIA ARMOR
REQUEST

Divider Title: _____

SOMALIA ARMOR REQUEST

Talking Points

Charge: The Washington Times has reported that Halperin was involved in Secretary Aspin's decision not to send additional armor to Somalia in September [The Washington Times, October 7, 1993, Tab 1]. Halperin, as a consultant at the Department of Defense whose Senate confirmation is still pending, is participating in decisions of gravity involving the commitment of American troops in a foreign country.

Response:

- Halperin did not participate in any discussions of this issue and was not involved in the decision.
- Halperin's participation in writing memoranda and discussing Somalia policy is fully consistent with the guidelines for consultants awaiting confirmation.

Narrative

Halperin did not participate in any discussions involving General Montgomery's request for additional troops and equipment to support U.S. military forces in Somalia. Halperin was not involved in Secretary Aspin's decision on this issue and has stated unequivocally that he did not discuss the issue with anyone. Department of Defense officials who were involved in the decision have been questioned and all confirm that they never discussed the issue with Halperin. Halperin was not even aware of the request for additional armor while it was under consideration.

Halperin did prepare two informal memoranda for Secretary Aspin on Somalia after the incident of October 3 [Somalia: Key Problems Memorandum by Morton Halperin, October 4, 1993, Tab 2] [Somalia Memorandum by Morton Halperin, October 5, 1993, Tab 3]. Halperin has also participated in discussions on Somalia within the office of the Undersecretary of Defense for Policy. The preparation of these memoranda and Halperin's participation in discussions is fully consistent with the guidelines for consultants awaiting confirmation.

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Divider Title: _____

Aspin under fire for saying no to earlier arms requests

By Bill Gertz
THE WASHINGTON TIMES

Gen. Colin Powell twice last month asked Defense Secretary Les Aspin for tanks and armored vehicles to protect U.S. forces in Somalia but was rebuffed for political reasons.

Defense officials close to the decision said yesterday that military leaders wanted to deploy the armor in early September but Pentagon civilians opposed it because they feared Congress' reaction.

"It was politics, pure and simple," said one official.

Meanwhile in Mogadishu, the Army major who is the chief spokesman for the U.N. mission in Somalia said U.S. forces have switched from peacekeeping to a "fugitive hunt" for Somali warlords — a job they are not trained for.

"We have this fugitive hunt — this is not a military operation," said Maj. David Stockwell. "So the military winds up taking casualties and looking inept. If there is a problem, maybe it is a problem with the mis-

sion."

In a telephone interview that echoed with the sound of automatic-weapon fire in the background, Maj. Stockwell said U.S. forces needed tanks and armored personnel

ASPIN...Pg. 16

ASPIN...from Pg. 1

nel carriers Sunday to speed up the rescue of two downed helicopters and 70 Army Rangers pinned down by Somali gunfire and rocket attacks.

"If U.S. forces had armor, they could have reacted more quickly, since they have common communications, training and tactics," the major said. Instead, they had to wait four hours for Pakistani and Malaysian armored vehicles.

On Capitol Hill yesterday, members of Congress criticized Mr. Aspin for not sending the armor. Sen. Alfonse M. D'Amato, New York Republican, called the inaction "unconscionable," while Rep. James T. Walsh, New York Republican, called on Mr. Aspin to resign.

Military officials close to the operation said Army Maj. Gen. Thomas M. Montgomery, deputy commander of U.N. forces and commander of U.S. forces in Somalia, sought tanks and armored vehicles for his troops in early September.

Gen. Montgomery sent the request to Gen. Joseph P. Hoar, commander of the Central Command, who relayed it to Gen. Powell.

Gen. Powell, who retired last week as chairman of the Joint Chiefs of Staff, appealed to Mr. Aspin that the tanks and armored vehicles were needed as part of force-protection operations, military officials said.

"Powell brought the request to As-

pin's attention on two separate occasions," one official said.

An Aspin spokesman declined comment yesterday.

Pentagon officials told reporters Tuesday that Mr. Aspin deferred a decision on the matter because he received conflicting advice from his advisers. Air Force Maj. Tom LaRock, a Pentagon spokesman, said deployment decisions "are classified and come to Secretary Aspin on a daily basis."

"He bases his decisions on the best military and diplomatic information available at the time," Maj. LaRock said.

But Pentagon sources said military leaders, including Gen. Powell, pressed for the armor.

An Army official said Pentagon civilians — including Deputy Undersecretary of Defense Frank Wisner, designated Assistant Defense Secretary Morton Halperin and other Aspin aides — opposed the military's request because they feared it "would appear too offensive-oriented."

"A month later you wonder why it wasn't already there," the official said. "General Montgomery obviously saw this coming."

Maj. Stockwell said that the first group of 14 armored vehicles began arriving in Mogadishu yesterday. Four tanks also will be sent.

He said the military's mission in

Somalia needs to be changed or clarified to avoid a repeat of Sunday's costly events.

Twelve U.S. soldiers were killed and 78 wounded in a Somali guerrilla attack. The remains of two soldiers are in Somali custody, and one U.S. helicopter pilot has been captured. At least six other soldiers are missing.

The U.N. spokesman's unusually blunt comments are likely to spur demands in Congress that the Clinton administration clarify its Somalia policy and set a deadline to bring troops home.

Maj. Stockwell said "we are undertaking efforts" to retrieve Army Chief Warrant Officer Michael Durant, a helicopter pilot captured by Somalis on Sunday. But no contacts with the Somalis holding him have been made. U.N. forces also are trying to recover the remains of the two soldiers displayed on videotape, he said.

Maj. Stockwell said a rescue force had to shoot its way into the site of the downed aircraft and stranded Rangers and it suffered a number of casualties in the process.

"The Rangers, who were pinned down, took most of their casualties early on and fended off fire that was unbelievably thick," Maj. Stockwell said. "We resupplied them with water, ammunition and food and supplied air cover. There must have

been several hundred militaries firing at 70 guys."

The Rangers had surrounded the downed helicopter and informed the U.S. commander that they did not require immediate evacuation from the scene, Maj. Stockwell said, adding that gave Gen. Montgomery time to organize the rescue force.

Maj. Stockwell, an Army Ranger, defended Gen. Montgomery's quick actions to mount the multinational operation that fought its way through Mogadishu for several hours to rescue U.S. servicemen.

Under the U.N. command structure, none of the multinational forces are required to take part in dangerous "quick reaction" missions and they cannot be ordered to do so, Maj. Stockwell said.

The U.N. forces have "all the responsibility but very little authority," he said.

Sunday's rescue force had to blast through Somali street barricades and overcome heavy fire from small arms, machine guns and grenade launchers en route to the two crashed helicopters.

The helicopters were shot down during a "search and seizure" operation to nab aides to Somali warlord Mohamed Farrah Aidid. Two of his top aides and 17 other Aidid guerrillas were captured.

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SOVIET THREAT

Divider Title: _____

SOVIET THREAT

Talking Points

Charge: Halperin's view of the west's "long twilight struggle" with the Soviet Union was fundamentally and consistently wrong. He excused the behavior of the USSR or Clients like Cuba, and often characterized Soviet actions or intentions as benign. His judgement on the Soviet Union and it's allies was consistently wrong, how can he be trusted to evaluate future conflicts?

Reponse:

- Several quotations from Halperin's writings have been taken out of context to create a distorted picture of his views.
- Halperin's 1973 writings offered an analysis of the strategic disadvantages that the Soviet Union faced in seeking to use force in Europe.
- His writings emphasized that the Soviet Union was seeking to use military force to accomplish its objectives and that unreliable support for the USSR within Soviet-occupied countries prompted a defensive Soviet military posture.
- Halperin has consistently argued against the withdrawal of U.S. troops from Europe. Moreover, His observations about the weakness in popular support for Soviet occupation by Eastern Europe have been proven correct by history.
- Halperin has not described Soviet intentions as benign.

Narrative

Halperin's critics have taken several quotations from his writings from twenty years ago out of context to create a distorted picture of his views of the Soviet Union during the cold war era. In a passage of his 1973 text book often cited, Halperin offers an analysis of the strategic disadvantages the Soviet Union faced. It is important to read the entire section of the book that the quotes have been taken from so that they can be viewed in the original context for which they were intended.

In the text passage, Halperin characterizes the Soviet military posture in Western Europe as primarily defensive, not to imply that the Soviet leadership was benign, but to emphasize that the Soviets were plagued by unreliable support within the occupied countries of Eastern Europe and were strategically unable to mount the sort of attack that was widely feared in the West. This can be seen in the passage, in which Halperin, referring to the possibility of Soviet proliferation of Western Europe states "...the Soviets have probably been aware of the unreliability of the East European armies and populations and hence the vulnerability of their supply lines." [Halperin's 1973 Textbook Defense Strategies for the Seventies, at p. 59, Tab 1]

Halperin has consistently argued against the withdrawal of U.S. troops from Europe and never wavered in his support for the defense of Europe from the Soviet threat. In the text book passage, he asserts that "The basic Soviet aims in Europe have been to consolidate control over Eastern Europe,...Germany, and to drive the United States from Europe." Halperin goes on to state that the Soviets have used "a combination of military pressure and various political tactics...to accomplish these objectives." [Halperin's 1973 Textbook Defense Strategies for the Seventies, at p. 59, Tab 1]. Halperin suggests throughout the passage that it was the military balance and fear of atomic retaliation from the United States that had quelled any Soviet attack on Western Europe.

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Divider Title: _____

Defense Strategies

Robert H. Kohn **TOP SECRET**

Seventies

CHAPTER FIVE

SOVIET MILITARY STRATEGY

Throughout the postwar period the United States has viewed the Soviet Union as its chief military opponent. The main thrust of American policy has been toward the deterrence of military actions by the Soviet Union or its allies. In the 1960's attention focused on China as a separate potential military opponent. This chapter is a discussion of Soviet military doctrine, particularly as it relates to Soviet strategy in dealing with the American strategic nuclear threat and with Europe.

Before turning to the substance of Soviet military doctrine, we will consider briefly the nature of our sources of information about Soviet and Chinese military doctrine. Statements issued by the two governments are one source. The amount of literature from the Soviet Union is much greater than that from China, but both countries release statements of general foreign policy and, in the case of the Soviet Union, statements on military issues. The Soviets have released some books dealing specifically with military strategy, the most important of these was *Military Strategy*, edited by Soviet General Sokolovsky. This book, which purports to be a comprehensive statement of Soviet doctrine, has been widely analyzed in the West as a source of insight into Soviet military strategy. Much

material on Sino-Soviet military relations and the military strategy of the two countries has been revealed in the polemics of the Sino-Soviet dispute.

A second major source of data — one perhaps too little exploited — is the actions of the two countries. We should be able to learn much more about Sino-Soviet military doctrine from actions in Korea, Berlin, and Cuba than from articles in military journals.

Finally, the military-budget decisions and deployment decisions of the two countries can be examined. Both countries publish a single one-line item on defense in their annual budget but obviously spend a good deal more on defense. Much work has been done on the size and form of the Soviet defense budgets, some of it released by the Joint Economic Committee of Congress. Other material on the output of the two countries' defense budgets is available in an Institute for Strategic Studies annual pamphlet, *Military Balance*; in the American defense-budget hearings; and in such American publications as *Aviation Week*. Studies published by RAND Corporation are also available; authors of such studies have access to classified data.

In seeking to understand Soviet military doctrine, we need to keep in mind that the Soviet government, party, and bureaucracy do not have a single view of defense matters. Budget and deployment decisions are as much influenced by organizational constraints and by bureaucratic maneuvering and domestic political considerations as by doctrinal considerations.

Though our understanding of Soviet and Chinese military doctrine is more limited than our understanding of American doctrine, we do have a working knowledge of Soviet policy, at least for the early years of the postwar period. We can even say a great deal with some confidence about current Soviet doctrine.

Soviet General-War Strategy

The primary concern of the Soviet Union's military policy during the entire postwar period has been the deterrence of an American nuclear attack. In the period until the mid-1950's, the Soviet Union

was completely dependent for deterrence of an American attack on threats to retaliate against American allies rather than against the United States, because the Soviets had no significant capability to attack the American homeland. During this early period the major Soviet military deterrent was a large ground force capable of seizing and holding Western Europe. In addition to its large ground army, the Soviet Union placed great emphasis on air defense. The Soviets have continued up to the present time to spend a much greater percentage of their defense budget on active defense than the United States does. In the early 1960's the Soviet Union began to deploy a large air defense system known in the West as the Tallinn system. The system, which the Soviets were continuing to expand in 1970, was apparently designed against the B-70 bomber, which the United States considered deploying in the early 1960's. In the early stages of its deployment, some American intelligence analysts believed that Tallinn might be an ABM system. However, by 1970 there was agreement that this was not the case and that the only Soviet ABM was a small system centered around Moscow. The size and shape of the Soviet defensive forces seem to have been guided and influenced by bureaucratic tendencies as much as, or perhaps more than, by a positive strategic doctrine. The doctrine, insofar as it existed, apparently aimed at using active defense and passive civil defense in order to reduce the damage that the United States could do to the Soviet Union.

At the same time, immediately following World War II, the Soviet Union engaged in a crash program for the development of atomic weapons. The existence of the program demonstrates the danger of relying on writings from the Soviet Union, which, until after the death of Stalin, claimed no interest in atomic warfare. Rather, it was suggested that Stalin believed that "permanent operating factors" emphasizing the social and economic structure of the countries would determine the outcome of a war. In fact, decision-makers in the Soviet Union recognized the great importance of atomic weapons and the effect they would have on warfare and on diplomacy. In the postwar period the Soviet Union devel-

oped atomic weapons quickly and hydrogen bombs even more quickly, perhaps even before the United States. At the same time the Soviets launched a crash research and development program on delivery systems, including long-range bombers and intercontinental ballistic missiles.

The final part of the Soviet plan for deterrence was the adoption of a relatively moderate foreign policy designed to deter politically American overreaction. The Soviet leaders recognized that they were in a state of military weakness and, consequently, could not afford to press too far in attempting to expand the area under Communist control.

Soviet Intercontinental Capability. In the middle 1950's the Soviet Union began to develop some capability for attacking the United States with a small strategic bomber force. However, its strategic nuclear force was still substantially limited. The Soviet Union decided not to produce nearly as many strategic delivery vehicles — bombers in the 1950's and ICBMs in the late 1950's and early 1960's — as it could have. Thus in 1965 the Soviet Union remained substantially inferior to the United States in quantity and quality of strategic forces. The Soviets had tested a 100-megaton nuclear warhead and had built some large ICBMs capable of carrying multi-megaton weapons, but their total ICBM force was only several hundred, compared to the American force of 1,054 ICBMs. Soviet submarine firing missiles were primitive — each submarine carried only a few missiles and had to surface to fire. However, the Soviet leadership had decided a few years earlier to change this situation, and signs of a new posture began to emerge.

In 1970 the Soviet Union passed the United States in numbers of deployed ICBMs. The Soviet force then consisted of several types of missile. Most plentiful was a missile called in the West the SS-11, which was liquid fueled but otherwise closely resembled the *Minuteman*. The part of the force that created the most concern in the United States was the so-called SS-9, a large missile capable of

carrying a substantial payload. Concern had increased in 1969 when the Soviets began testing a Multiple Re-entry Vehicle of three warheads, which some American analysts feared could be targeted to destroy the *Minuteman* force. In the late 1960's the Soviets had begun to deploy a submarine that closely resembled the United States submarines that carry *Polaris* missiles. Each vessel of this so-called Y class had sixteen missile tubes, was nuclear powered, and could fire from under water.

The Soviet leaders clearly had determined to remove any impression of inferiority in strategic forces. When they would level off their buildup was far from certain in 1970.

Current Strategic Doctrine. Soviet statements and actions suggest that Soviet thinking about strategic questions closely parallels Western thought. The Soviets accept the critical importance of surprise and of the first strike in the early hours of a general nuclear war. They acknowledge also that the early stages of a war can be decisive, although they continue to discuss the phase of large-scale ground fighting that follows a strategic exchange (and seem to assume that they could invade and capture Western Europe). The most important items in their budget and in their policy statements relate to warfare in the early hours and the strategic nuclear exchange.

The Soviets are aware of the importance of developing strategic forces that are relatively invulnerable to a first strike. Their second-generation missiles appear to be smaller and better protected than the first-generation missiles; the Soviets are also building up a submarine-launched missile capability that is relatively invulnerable. They have always put great stress on the importance of command and control — for internal political reasons, tied up with their desire to ensure that the Soviet Army could never successfully challenge the Communist Party, as well as for strategic reasons.

In late 1957 the Soviets began to talk about the great destruction that would result on both sides from a general nuclear war. Premier Khrushchev publicly rejected what was identified as the Marxist-

Leninist notion of the inevitability of war and suggested instead that war could be avoided because there were reasonable men on both sides and that war had to be avoided because of the great destruction it would bring. The Soviets stressed the deterrence that would result from their threat to destroy cities with multimegaton weapons. In their polemics with the Chinese on the question of nuclear war, they accused the Chinese of not sufficiently understanding the destructive power of nuclear weapons. They pointed out that nuclear weapons do not observe class distinctions.

In 1969 the Soviet Union and the United States began Strategic Arms Limitation Talks, at which negotiators for the two countries engaged for the first time in serious discussions of strategic doctrine. During the preliminary round of talks in Helsinki, Finland, the Soviet delegate indicated that the Soviets shared the basic American position that deterrence was based on the ability of each side to inflict massive damage on the other after receiving a first strike. The Soviets agreed that if one side sought to take away the other's deterrent by substantially increasing its offensive or defensive capability the other side would respond to offset the advantage. Both at the conference and in public statements Soviet leaders implied that the Soviet goal was nuclear parity and not superiority, but they also warned that they would not permit the United States to regain the superiority it had in the 1960's.

The Soviets are undoubtedly concerned that the American MIRV and ABM programs would reestablish American superiority and would require them to invest additional large sums in devising new strategic capabilities. For this reason the Soviet leadership may consider its alternatives to be an agreed-to end to further escalation of the arms race and massive additional expenditures.

Soviet Strategy for Europe

One key element of Soviet strategy for Europe has already been mentioned — the notion that Western Europe can be used to deter the United States from attacking the Soviet Union.

The most blatant use of Soviet military power in the postwar

period has occurred in Eastern Europe. In the early postwar period the Soviet Army seized control in this area and put into power Communist governments that were then totally subservient to Moscow. The continued presence of the Soviet Army in Central Europe has discouraged countries from leaving the Soviet bloc, and, of course, the forces were actually used in East Germany, Hungary, and Czechoslovakia.

The Soviet Union apparently never even contemplated the overt use of military force against Western Europe. Evidence now suggests that the Soviet Union did not consider a march to the English Channel, the threat upon which NATO has concentrated. The Soviet fear of atomic retaliation by the United States was always present, as well as recognition of the problems that would ensue in trying to bring Western Europe under Communist control. Finally, the Soviets have probably been aware of the unreliability of the East European armies and populations and hence the vulnerability of their supply lines. However, even if the Soviets never contemplated a march to the channel, the relative military balance in Central Europe has influenced the political evolution of countries on both sides of the iron curtain.

The Soviet posture toward Western Europe has been, and continues to be, a defensive and deterrent one. The positioning of Soviet ground forces in Eastern Europe and the limited logistical capability of these forces suggests an orientation primarily toward defense against a Western attack. Perhaps for this reason the Soviet Army has produced in quantity fighters and surface-to-air missiles. The size of the Soviet Army in Europe has been a matter of some confusion in Western analyses. In the early postwar period the Soviets were credited with 175 divisions, a number that remained constant despite reorganizations of the Soviet Army and reductions in the number of ground troops. Recent estimates by the United States have been less than half that number, and it appears that the Soviet Union does not have now, and may never have had, overwhelming conventional superiority on the central front in Europe.

Apparently the Soviets have been no more successful than the West in developing a coherent doctrine for the employment of tactical nuclear weapons. Soviet forces are capable of fighting both conventionally and with tactical nuclear weapons; however, the Soviet tactical nuclear arsenal is much smaller and much less sophisticated than that of the United States. Not until the mid-1960's did the Soviets begin to introduce somewhat smaller tactical nuclear weapons into the operating arsenals of their ground troops. The Soviets seem to believe that if nuclear weapons were used, it would be over a large area and with relatively large warheads.

The major Soviet use of military force in Western Europe has been as a threat in order to accomplish specific political purposes. Much of this effort has centered on Berlin. The Soviets have attempted to use their conventional superiority in the local area to force the West out of the city or at least into accepting East German sovereignty over the access routes to Berlin. They have warned nations that have permitted American nuclear weapons to be stationed in their territory that they have left themselves open to the danger of Soviet nuclear attack. The most specific Soviet threats ensued in 1960, when the Soviets shot down an American U-2 reconnaissance plane over Soviet territory. The Soviets warned that they would destroy with a missile any base from which an American U-2 flying over the Soviet Union had taken off or landed.

The basic Soviet aims in Europe have been to consolidate control over Eastern Europe, to gain control over, or at least neutralize, Germany, and to drive the United States from Europe. A combination of military pressure and various political tactics including peace offensives have been used in order to accomplish these objectives. The importance of these goals has varied through the postwar period, but, in all cases, the Soviet military power has served as an important backdrop.

China

The Soviet Union signed a treaty of alliance with China in 1950. The treaty, which neither side has repudiated, commits the Soviet

Union to aid China if attacked by Japan or a country allied to Japan. During crises in East Asia on several occasions during the 1950's, Soviet leaders affirmed their determination to assist China in the event of an American attack on the Chinese mainland. However, what action they would have taken is far from clear.

During the 1960's the Soviet military began to be concerned with the possibility of a military clash with China. In the late 1960's there was a substantial buildup of Soviet forces on the Sino-Soviet border, and there were several border clashes between the two Communist giants. In 1969 the Soviets, by warning many governments of the danger of Chinese aggression, appeared to be laying the groundwork for justifying a preemptive strike against China's nuclear installations. The Chinese accused the Soviets of preparing to attack. The crisis was eased by the agreement of the two countries to open talks to resolve the border dispute, but there is no doubt that the Soviet leaders continue to view China as a potential military opponent.

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OPPOSITION TO THE USE OF FORCE

Divider Title: _____

OPPOSITION TO THE USE OF FORCE

Talking Points

Charge: Morton Halperin believes the U.S. should not militarily intervene anywhere save western Europe, Japan, Australia, New Zealand, and Israel without invitation. He opposed unilateral U.S. action taken in the national interest, including intervention in Panama and Grenada. Also, he believes the deployment of troops in Operation Desert Shield was unconstitutional.

Response: -The U.S. has the right to use military force unilaterally and should exercise that right when its vital interests are threatened.

-Halperin believes that in the post-cold war era the United States has the right to intervene wherever its interests are threatened and needs to consider a variety of factors in determining when to intervene.

-He believed that the U.S. needed to use military force to expel Iraq from Kuwait.

-Halperin believes that the Constitution requires the President to get the consent of Congress before using military forces in most circumstances.

Narrative

Morton Halperin believes that the United States has the right to and should use military force unilaterally when its vital interests are threatened. He does not believe that the President should order American forces into sustained armed combat unless the objectives are clear; force can accomplish the objectives in a reasonable period of time; and the American people and the Congress support the operation. He has suggested that the United States should be willing to give up the use of force to affect the internal affairs of other nations as part of an agreement under which the international community as a whole would protect democracy in nations which have established democratic regimes.

In an article published in Foreign Policy (Tab 1) and written just before he became a consultant to the Defense Department, Halperin suggested that in certain circumstances the United States should be willing to give up the right to intervene unilaterally in countries for the purpose of promoting democracy. He made this suggestion only in the context of an international agreement to use force, if necessary, to restore democracy. Halperin believes that we should use military force only when consistent with the U.N. Charter. This is consistent with the view of previous administrations. For example in Secretary of State George Schultz's testimony before the Senate, Schultz said that he "...affirm[s] that the United States recognizes and respects the prohibitions concerning the threat or use of force set forth in the Charter of the United Nations...." (Tab 2).

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GUARANTEEING DEMOCRACY

by Morton H. Halperin

With the collapse of the Soviet Union and the discrediting of communism as a rival model, more and more people are coming to view constitutional democracy as the only legitimate form of government. Around the globe, people are seeking to establish constitutional democracies. Many newly democratic governments are turning to the international community for support, and the international community is beginning to respond.¹ The new democracies face internal and external enemies who oppose progress toward constitutional democracy that undermines entrenched personal, institutional, and financial interests.

The United States should take the lead in promoting the trend toward democracy. Democratic governments are more peaceful and less given to provoking war or inciting violence. States that are constitutional democracies are less likely to go to war with the United States or other democracies, and are more likely to support limits on weapons trade, encourage peaceful resolution of disputes, and foster free trade. Thus, when a people attempts to hold free elections and establish a constitutional democracy, the United States and the international community should not only assist but should "guarantee" the result. Those measures should be institutionalized in organizations like the United Nations and the Organization of American States (OAS), which would be responsible for carrying out missions to ensure the success of constitutional democracy.

MORTON H. HALPERIN submitted this article as a senior associate of the Carnegie Endowment. President Bill Clinton has announced his intention to nominate him to be assistant secretary of defense for democracy and peacekeeping.

¹ This argument draws on analyses that appeared in Thomas Franck, "The Emerging Right to Democratic Governance," *The American Journal of International Law* 86 (January 1992): 46-91.

FOREIGN POLICY

The international community should establish a process that parallels the provision of the U.S. Constitution under which the federal government should be obliged to guarantee to each state what was in 1789 called a "republican" form of government. Although the Founding Fathers wrote the Guarantee Clause of the Constitution for the American federal government of the eighteenth century, the same principle has become valid for the international community of the twentieth century. Peace, security, and the establishment of a true world order require that all states, including the United States, work toward that goal by seeking to preserve democracy where it is being established. We are now at a historic crossroads; the opportunity to take a giant step toward universal constitutional democracy is here and should be seized.

There is no reason why American foreign policy should not reflect American values. Americans prefer to see other countries enjoy the same liberties they do. That desire is especially strong when other peoples show that they too want to decide their fate by democratic means—as the Soviet people did in August 1991. Further, if Americans saw that U.S. policymakers were promoting democracy around the globe, they would be more likely to support American policy with financial commitments and military action when necessary to accomplish those foreign policy objectives.

That is not to argue that the United States or the international community should try to impose constitutional democracy on those with different views. Our efforts ought to focus on situations in which a people aspire to constitutional democracy and request global support.

The essential elements of constitutional democracy derive from Western ideals. But they have become enshrined in agreements and resolutions that have garnered broad support from the international community in the post-Cold War era. Those tenets include free elections, the right of political dissent, limits on arbitrary police power, and an independent judiciary with the power to protect those rights. They find expression in the two key international documents laying out the basic rights of persons: the Universal Declaration of Human

Rights, adopted by the U.N. General Assembly in 1948, and the International Covenant on Civil and Political Rights.

The cornerstone of democratic governance is the right to conduct free and fair elections. The Universal Declaration of Human Rights states that "the will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage, and shall be held by secret vote."

More recently, the General Assembly adopted a resolution establishing procedures to authorize the monitoring and certification of "genuine elections" when requested by member states. U.N. supervision of elections is crucial to the trend toward constitutional democracy because in order to be considered "free and genuine," elections must meet certain criteria.

In addition to universal franchise, elections should be open to multiple parties, use a secret ballot, and be free of fraud or intimidation. The winning party should be able to form a government capable of fulfilling its mandate. It should also be willing to relinquish power if subsequent election results require it. An elected government should be forbidden to alter basic constitutional provisions in an effort to seize extra-constitutional powers or stop new elections.

The growing importance of elections as the only way of validating governance is clear: More than 110 governments are now legally committed to permitting open, multiparty, secret-ballot elections with universal franchise. Many have made that commitment within the last several years.

The final essential element of constitutional democracy—respect for minority rights—was buried as an international legal concern during the Cold War in order to discourage claims for self-determination and to encourage assimilation of minority groups. The end of the Cold War, however, has changed the political climate. States are more willing to adhere to documents that protect minority rights, albeit within the confines of noninterference. A working group of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities has prepared a draft Declaration on

the Rights of Minorities. The draft affirms protection of minority rights as elemental to stability within multi-ethnic states.

The Conference on Security and Cooperation in Europe (CSCE) also renewed its interest in minority rights at its June 1990 Conference on the Human Dimension in Copenhagen. Further, the Charter of Paris for a New Europe, signed by all CSCE members in 1990, declared that "the rights of persons belonging to national minorities must be fully respected as part of universal human rights."

When a meeting of experts on national minority problems convened in Geneva in 1991 under CSCE auspices, it linked minority protections to constitutional democracy and called for the elimination of noninterference principles for that particular issue:

Issues concerning national minorities, as well as compliance with international obligations and commitments concerning the rights of persons belonging to them, are matters of legitimate international concern and consequently do not constitute exclusively an internal affair of the respective state.

Thus, an international consensus is emerging not just about words like "democracy" and "free elections," but about their real operational meaning and the minimal requirements of a constitutional democracy: free elections, right of political dissent, rule of law, and protection of minority rights, all enforced by an independent judiciary.

Challenging Noninterference

The notion that the international community should guarantee those rights in specific situations is gaining strength, too. Though an "international guarantee clause" has not yet been articulated, a series of recent episodes reveal that the international community is moving in that direction.

During the Cold War, the United States and the international community responded hesitantly, if at all, to national self-determination movements. Apart from supporting European decolonization, the United States had no clear policy. Often, policymakers decided on support for such movements by assessing their potential impact on the worldwide struggle with the

Soviet Union. Most independence movements were labeled part of the communists' grand scheme. Meanwhile, the rest of the world, aware of the perils of redrawing arbitrarily constituted borders—especially in Africa—was reluctant to act. Self-determination movements outside the colonial context were supported only on exceptional occasions.

It was not until the disintegration of the Soviet Union and Yugoslavia that the United States formulated specific criteria that linked the recognition of new republics to their commitment to constitutional democracy. For the first time, the United States made adherence to democratic norms a precondition of recognition. Yet the United States offered no means to enforce or guarantee those rights.

The August 1991 Soviet coup attempt did more than hasten the breakup of the Soviet empire. That country's dissolution was a catalyst for basic changes in the international system. Once the international community fixed on the consequences of a new hardline regime, it strongly backed Mikhail Gorbachev and the democratic reforms—however sketchy—that he had introduced to the once monolithic Soviet state. The world community had unequivocally joined ranks with domestic forces opposed to the coup. That change in attitude helped galvanize support for democracy in the Soviet Union, a drama played out before our eyes, courtesy of CNN.

The U.S. government at first offered only a guarded response to the coup. That reaction was consistent with America's conditioned attitude toward internal change in the post-World War II era. President George Bush, in his first public remarks after the crisis began, outlined the traditional criteria that had determined U.S. recognition of post-coup governments. Bush described the test for accepting a new government: Was it in control and would it "live up fully to its international obligations" to other states? He noted that though events in Moscow were "disturbing" and the West "was not going to retreat from its principles of reform, openness, [and] commitment to democracy," for the time being the United States would wait for the situation to unfold before deciding on recognition.

A few hours later, the Bush administration enunciated a new position: The coup makers would not be recognized as the new Soviet leaders. Effective control and adherence to international commitments were no longer sufficient to ensure recognition of the new regime. The U.S. position was now clearly focused on internal developments and the international community's obligations to the Soviet people. The United States declared that the coup was a "misguided and illegitimate effort [that] bypasses both Soviet law and the will of the Soviet peoples." Bush referred to the "unconstitutional seizure of power" as "an affront to the goals and aspirations that the Soviet peoples have been nurturing over the past years." He also asserted that the coup put the Soviet Union at odds with the world community, which had come to expect its liberalization.

The White House statements specifically referred to commitments to domestic reforms made by the Soviet Union under the CSCE's Paris Charter and Helsinki Final Act. U.S. policy would be based on Moscow's progress in democratization, the existence of constitutionally elected leaders, and the commitment to free speech and basic human rights. The United States was no longer just a bystander; it would actively help defeat the coup. Several factors contributed to the swift change in policy. One was the determined resistance of Boris Yeltsin and others in Moscow and their calls for help. A second was the American public's revulsion to the coup. A third was the reaction of many other governments. Bush quickly realized that American and world attitudes had fundamentally changed. The coup attempt exposed the new consensus.

Without realizing it, the United States reaffirmed in an international context the premise that drove the Founding Fathers to include a guarantee clause in the American Constitution. The White House press secretary announced that the United States would avoid "in every possible way actions that would lend legitimacy or support to this coup effort" and declared that the United States had "no interest in a new Cold War or in the exacerbation of East-West tensions." That statement alludes to the

belief that a constitutional republic is less likely to wage war than a totalitarian (non-republican) government. The United States had taken into account the will of the Soviet people to resist a reversion to authoritarian rule. And it implicitly rejected the notion that issues related to the evolution to constitutional democracy were less important than a government's willingness to meet its international obligations.

The response of the European Community (EC) was similar to that of the United States. Hans van den Broek, the Dutch foreign minister who at the time held the Community's rotating six-month presidency and spoke on behalf of the EC, called the coup a "flagrant violation" of the Soviet Union's international pledges to move toward democracy. The EC also condemned the new leadership's suspension of democratically elected bodies and of the free media. French foreign minister Roland Dumas declared that "European Community aid to the Soviet Union must henceforth depend on respect for the principles of reform, democratic freedom and respect for human rights." Much like the United States, the EC feared a resurgence of Soviet aggression under leaders of the putsch; thus the EC also linked a more secure international peace to continued evolution toward constitutional democracy.

Thus, as the firm response to the attempted coup demonstrates, international acceptance of a government requires more than government control of domestic institutions and respect for its external obligations. Where a people have established a constitutional democracy, or, as with the Soviet Union in August 1991, are moving in that direction, the United States and much of the world community will resist internal efforts to undermine democracy. It will do so in large part because it recognizes that a peaceful world is more likely if states are constitutional democracies.

It is not surprising that Russian leaders have been more explicit than any other government officials in stating their view of the international community's obligation to help protect democracy. Russian foreign minister Andrei Kozyrev wrote forcefully in the spring 1992 *Foreign Affairs*:

Wherever threats to democracy and human rights occur, let alone violations thereof, the international community can and must contribute to their removal. Such measures are regarded today not as interference in internal affairs but as assistance and cooperation in ensuring everywhere a "most favored regime" for the life of the peoples—one consistent with each state's human rights commitments under the U.N. Charter, international covenants and other relevant instruments.

The world's progress toward an international guarantee clause is also evident in recent actions of the OAS. Like other international institutions during the Cold War, the OAS regarded nonintervention as a sacrosanct principle of inter-American relations. Each member state saw interference in its domestic affairs as highly provocative and inappropriate.

The first erosion of the noninterference priority came in 1985 with the Protocol of Cartagena, which amended the original OAS charter. Passed at a time when democracy was taking root in Latin America, the protocol made reference to the organization's additional responsibility "to promote and consolidate representative democracy, with due respect for the principle of non-intervention." Five years later, in 1990, the OAS General Assembly requested the establishment of a democracy promotion unit in order to advise and assist governments in electoral matters by providing research, training, and support.

Those actions helped pave the way for a new approach, which in this context undermines the doctrine of noninterference. In June 1991 in Santiago, Chile, the OAS General Assembly unanimously adopted Resolution 1080 on representative democracy. In essence, it recognized that the solidarity of the American states required that each member be a "representative democracy" and that the OAS be proactive in its efforts to preserve such republicanism. That ground-breaking resolution called for an urgent meeting of the Permanent Council "in the event of any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional processes or of the legitimate exercise of power by the democratically elected government in any of the Organization's member states."

The Permanent Council was also granted the

authority to call an ad hoc meeting of the foreign ministers or a special session of the OAS General Assembly to "look into the events collectively and adopt any decisions deemed appropriate, in accordance with the Charter and international law." Resolution 1080 thus transformed the OAS into an organization for which democracy is a condition of membership and an objective according to its charter. Recently, the OAS has gone even further. On December 14, 1992, the OAS amended its charter to allow the suspension of a member by a two-thirds vote in the General Assembly if that state's "democratically constituted government has been overthrown by force." The rationale was that while democracy cannot be externally imposed on any country, citizens living under democratic governance have the right to count on international action against threats to their republican rule.

That new norm in international relations challenges traditional notions of nonintervention. A point the United States acknowledged in a statement by then deputy secretary of state Lawrence Eagleburger when that charter amendment was adopted:

Our challenges are clear. First, we must consolidate democracy and be prepared, where necessary, to defend democracy against its enemies. This Organization of American States must confront and isolate those who seek to thwart the right of the people of the Americas to determine democratically their own political destinies.

The first test of the hemisphere's resolve in defending democracy came less than four months after Resolution 1080 was approved. On September 30, 1991, a bloody coup ousted the democratically elected president of Haiti, Jean-Bertrand Aristide. Haiti had been the first United Nations member country to request that its elections, in July 1990, be monitored by the United Nations, and the OAS had participated in that mission. But barely a year later, Haiti had regressed to its old mode of governance, repressive dictatorship.

Just days after the coup, a meeting of OAS foreign ministers declared, in accordance with the Santiago Commitment to Democracy, that events in Haiti constituted "an abrupt, violent, and irregular disruption of the legitimate exer-

cise of power by the democratic government." In a show of solidarity on behalf of democracy in the hemisphere, the OAS refused to recognize the new Haitian regime and backed a trade embargo. Under the embargo, Venezuela suspended oil deliveries, while the United States, Haiti's largest trading partner, froze Haiti's assets in the United States and prohibited most trade. Washington also warned wealthy Haitian citizens that if they used assets in the United States to help the new regime, their accounts could be frozen.

Currently, the military regime remains in power despite its international isolation. Yet, despite the failure of those efforts thus far to restore Aristide, the international community's commitment to the people of Haiti and the restoration of democracy bodes well for the future. Steadfast in their condemnation of the unconstitutional coup, the OAS and the United States have made it clear that coups overthrowing democratically elected governments will not be recognized even if order is established and international obligations accepted.

When a people attempts to hold free elections and establish a constitutional democracy, the United States and the international community should not only assist but should "guarantee" the result.

The second test for the OAS came in April 1992 when the democratically elected president of Peru, Alberto Fujimori, dissolved the country's congress, suspended its constitution, closed down the judiciary, and arrested prominent opposition members and journalists. The OAS foreign ministers, who met under the Santiago accord, expressed their displeasure and appealed for "the immediate reestablishment of democratic institutional order in Peru." The statement demonstrated that, to the OAS, it was not sufficient that an elected president remain in power when other elements of a constitutional democracy are shed: Fujimori's actions violated Peru's commitment to constitutional democracy as surely as a military coup would have, promp-

ting the OAS to take firm action against his usurpation of power.

In fact, the engineers of the *autogolpe* (self-coup) underestimated international resolve to resist violations of democratic governance. Seven days after the coup, then U.S. secretary of state James Baker argued in an address before the OAS that

the actions taken by President Fujimori, whatever the justification given, are unjustified. They represent an assault on democracy that cannot and will not be supported by the United States of America....We will continue to [withhold all economic and military assistance] until constitutional democracy is restored.

In an unprecedented move responding not to a coup but to a suspension of democratic norms by an elected leader, the United States immediately cut off economic and military aid to Peru and persuaded Japan to follow suit. Spain and Germany, other important donors to Peru, also suspended economic aid. In addition, a crucial \$1.4 billion aid package that had been negotiated with the International Monetary Fund and World Bank to restore Peru's credit was suspended.

Afraid of exacerbating Peru's severe economic problems and driving more supporters into the arms of the Maoist guerrilla group *Sendero Luminoso* (Shining Path), Fujimori responded to international pressure by attending an OAS gathering in Nassau, Bahamas, where he promised to hold parliamentary elections rather than a plebiscite. The OAS-monitored elections proceeded without incident in November 1992 and the elected parliament was seated. Though the future of Peruvian politics remains unclear, the undemocratic forces in Peru have witnessed the strength of the international community's commitment to preserving democracy there.

That new trend in the OAS has elicited strong support in the diplomatic and academic communities, and most agree that the collective will of the Western Hemisphere helped restore a certain measure of democracy to Peru. But questions about the outcome, nature, and method of action or intervention continue to be hotly debated. As a 1992 report by the Inter-American Dialogue notes, "the appropriateness of any specific course must be evaluated not

only on its immediate prospects of success, but also on whether it can be sustained if it does not produce quick results and on what precedents it sets for future actions."

Only time will determine the success of OAS efforts in preserving democracy. The historic obligation it has embraced by adopting Resolution 1080 needs to be bolstered with specific procedures for actions to protect democratic regimes. Nevertheless, the OAS is on the right track. It has taken the first step in establishing a hemisphere-wide guarantee clause to prevent an outbreak of authoritarianism that would not only destabilize neighboring countries, but also violate the explicit promise of constitutional democracy that governments have made to their peoples and the region.

Europe is also moving in the direction of adopting an international guarantee clause for constitutional democracy. In November 1990, the CSCE countries, including the Soviet Union, signed the Charter of Paris, establishing a small, though permanent, secretariat in Prague, a conflict prevention center in Vienna, and an Office for Free Elections in Warsaw. Through the charter, members agreed to "co-operate and support each other with the aim of making democratic gains irreversible," thus strengthening and institutionalizing the conference. In addition, the charter directed member states to develop their commitment to democracy at the 1991 Moscow Meeting of the Conference on the Human Dimension of the CSCE.

The Moscow meeting resulted in a document affirming that participating states would "support vigorously, in accordance with the Charter of the United Nations, in case of overthrow or attempted overthrow of a legitimately elected government...by undemocratic means, the legitimate organs of that State upholding human rights, democracy and the rule of law." The Moscow document also expressed the international community's growing sense of jurisdiction over how governments treat their own people by declaring that "commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the

State concerned." Finally, the document called for an independent judiciary, due process, freedom of expression, and all the other elements of constitutional democracy outlined above. The CSCE is furthering the trend toward recognizing that a country's people are the ultimate beneficiaries of international agreements protecting human rights.

An international guarantee clause will be credible only if key countries, including the United States, commit to using force to restore or establish constitutional democracy.

The United Nations, no longer a prisoner of Cold War politics, has also become more active in advocating democracy. The General Assembly in 1991 passed a resolution entitled "Enhancing the effectiveness of the principle of periodic and genuine elections." The resolution was prompted by frequent demands from member countries for monitoring elections and certifying the results. It also endorsed the secretary-general's view that a senior official be assigned to coordinate and ensure fair consideration of any such requests.

However, the U.N.'s commitment to constitutional democracy goes beyond resolutions. In particular, two recent U.N. missions represent the most forceful and persistent efforts to implement the principles of constitutional democracy. The peace processes in Cambodia and El Salvador were designed specifically to establish constitutional democracy in those war-torn countries. The extensive deployment of both peacekeeping "blue helmets" and human rights monitors and administrators is evidence of the U.N.'s recognition of its obligation to guarantee not just "peace" but also constitutional democracy. It is a model for action under an international guarantee clause.

The Cambodian peace process is the most ambitious the U.N. has ever undertaken. Signed in Paris in October 1991, the accord established the United Nations Transitional Authority in Cambodia (UNTAC), the umbrella organization for peacekeeping and administration until the first elections, scheduled for May

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1993, are held. Currently, UNTAC is using blue helmets to police the country, protect the right of all political parties to campaign for election, ensure freedom of speech and the press, and conduct and certify elections.

The Paris accord's most striking feature is that all factions to the conflict signed on to cooperate with the U.N. in rebuilding the political infrastructure in Cambodia. The Khmer Rouge's subsequent violations of the accord notwithstanding, all the Cambodian factions agreed to create "a system of liberal democracy, on the basis of pluralism," which is in essence a constitutional democracy. The Paris accord cites all the elements necessary for a constitutional democracy: periodic and genuine elections; freedom of assembly and association including that for political parties; due process and equality before the law; and an independent judiciary. Further, the agreement clearly makes it both a right and an obligation for outside contracting powers to guarantee human rights should abuses occur. In the event of violations, the powers agreed to consult immediately and to take appropriate steps. Specifically, "they will call upon the United Nations" to take steps to prevent human rights violations.

The peace accord undercuts the argument that constitutional democracy is a Western notion, not applicable beyond Europe and perhaps the Western Hemisphere. Though many would argue that the Cambodians would not accept the principles of constitutional democracy, all the parties at the negotiating table explicitly agreed to a peace plan that requires them to eventually establish a constitutional democracy. The factions could have negotiated some kind of power-sharing arrangement instead, but they went further. The Cambodia accord is, in essence, a contractual obligation between external powers and internal factions.

As of April 1993, the U.N. operation remained in place, though the surd Khmer Rouge were refusing to cooperate with the international mandate to lay down their arms and accept a cease-fire. While the outcome of the accord hung in the balance, the international commitment to work to establish

constitutional democracy in Cambodia remained solid, although its willingness to use major force to enforce that objective is not clear.

The U.N.-sponsored peace process in El Salvador is similar in many respects to that in Cambodia. The National Commission for the Consolidation of Peace (COPAZ) is operating parallel to the U.N.'s Observer Mission in El Salvador. COPAZ, like the Cambodian Supreme National Council, comprises representatives from all interested parties: the National Assembly, the leftist Farabundo Martí National Liberation Front (FMLN), and the military. Significantly, the passage of Security Council Resolution 693 in 1991, which created the Salvadoran observer operation, was a landmark for the United Nations; it was the first time the organization had constructed a mission with three component divisions—human rights, military, and police—to verify a peace settlement by parties to an internal conflict.

With difficulties, the Salvadoran peace process has progressed over the last three years. Most important for the international community, both the government and the FMLN have pledged formally to cooperate in establishing a constitutional democracy. They have agreed to reform the electoral system and the judiciary as well as establish the Office of the National Counsel for the Defence of Human Rights, which will direct special attention to the parties' observance of the rights to life, integrity, and security of the person, due process of law, personal liberty, and freedom of expression and association—rights outlined in the 1990 San José Agreement on Human Rights and enforced by the U.N. observers. Regrettably, no outside power explicitly guaranteed the outcome of the peace process, but Mexico, Spain, the United States, and Venezuela all have actively pushed it forward.

Intervention Rules

Democratization has an undeniable momentum in countries around the world today. Within multinational organizations a parallel movement toward international guarantees to protect budding constitutional democracies is also gaining force. Those trends are strongly in

the American interest. The next step for U.S. policy is to actively support, even push, the development of such trends. First, the United States must unequivocally declare its willingness to help fledgling democracies persevere against internal and external enemies. Still, that commitment cannot be unqualified; the United States should offer such guarantees only upon the request of a state and should not try to impose its will or its own version of government on people who do not ask for assistance. For its commitment to democracy to be credible, the United States must also make it clear that any assistance to a government, economic or otherwise, will be withdrawn if the process of democratization is interrupted.

Second, the United States should explicitly surrender the right to intervene unilaterally in the internal affairs of other countries by overt military means or by covert operations. Such self-restraint would bar interventions like those in Grenada and Panama, unless the United States first gained the explicit consent of the international community acting through the Security Council or a regional organization. The United States would, however, retain the right granted under Article 51 of the U.N. Charter to act unilaterally if necessary to meet threats to international peace and security involving aggression across borders (such as those in Kuwait and in Bosnia-Herzegovina).

Third, the United States should work closely with other powers—including the permanent members of the Security Council, Germany, Japan, and Mexico—to develop norms and procedures for international guarantees to support constitutional democracy. We need a consensus on when to offer such guarantees, how to determine if there is a disruption of the democratic process, and how the international community should decide on steps to counter the disruption. For example, the United States and other guarantors might respond following requests from a country's political factions that wish to craft a peace plan, or after requests by a government to the U.N. or a regional organization to monitor or conduct elections. The international community should also respond when a group struggling for self-determination seeks international recognition. The United

States should consider recognition and provide assistance only if the group makes a firm commitment to constitutional democracy.

In all such cases, the United States, the United Nations, and regional organizations should insist on a guarantee clause by which they ensure the maintenance of constitutional democracy. An international guarantee clause will be credible only if key countries, including the United States, commit to using force if necessary to restore or establish constitutional democracy. Force should be employed only after nonviolent actions, including condemnation and isolation through economic boycotts and blockades, have been tried.

An international guarantee clause would also require standard procedures for authorizing intervention including any combination of the following: a U.N. Security Council resolution, a resolution of a regional organization, or the consensus of a group of guaranteeing powers designated in an agreement with a particular country. The next step would involve establishing in the country a monitoring presence of indefinite duration with broad rights of access, as happened in El Salvador. Though it could be argued that an open-ended presence is not politically or financially feasible, the lack of such a presence would be much more costly. Breaches of democracy can initiate mass migrations, internal violence, or a further collapse of democracy in an unstable neighboring country. Coup attempts in Venezuela might have succeeded, for example, if Fujimori's coup in Peru had not been challenged. Then, if requested, a permanent or open-ended presence of an international police force ought to be provided to keep the peace and to prevent police abuse or even a military coup.

Those who find the idea of an international guarantee clause utopian should be reminded that a Southerner at the time of the American Constitutional Convention might have had the same reaction to the U.S. Guarantee Clause. The two-century-old promise to defend a republican form of government within each state, and thus to ensure peace and stability among the states of the union, has become a model for the international community today. In fact, the pursuit of American values, if done with

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pragmatism and respect for the opinions of humankind, can combine the best of American idealism and realism to yield a position that is truly in the national interest. Today, the effort to guarantee democracy, at least to people who have it and want to keep it, is just such a policy. Americans should strive for no less.

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Divider Title: _____

Communist totalitarian internal rule have been described fully in the past several weeks. The current visit by Nicaraguan President Ortega to Moscow underscores this disturbing trend. The recent rejection by Nicaragua of my peace initiative, viewed in the light of the constantly rising pressure that Nicaragua's military buildup places on the democratic nations of the region, makes clear the urgent threat the Nicaragua's activities represent to the security of the region and, therefore, to the security and foreign policy of the United States. The activities of Nicaragua, supported by the Soviet Union and its allies, are incompatible with normal commercial relations.

2. In taking these steps, I note that during this month's debate on U.S. policy toward Nicaragua, many Members of Congress, both supporters and opponents of my proposals, called for the early application of economic sanctions.

3. I have long made clear that changes in Sandinista behavior must occur if peace is to be achieved in Central America. At this time, I again call on the Government of Nicaragua:

To halt its export of armed insurrection, terrorism, and subversion in neighboring countries;

To end its extensive military relationship with Cuba and the Soviet Bloc and remove their military and security personnel;

To stop its massive arms buildup and help restore the regional military balance; and

To respect, in law and in practice, democratic pluralism and observance of full political and human rights in Nicaragua.

4. U.S. application of these sanctions should be seen by the Government of Nicaragua, and by those who abet it, as unmistakable evidence that we take seriously the obligation to protect our security interests and those of our friends. I ask the Government of Nicaragua to address seriously the concerns of its neighbors and its own opposition and to honor its solemn commitments to non-interference, non-alignment, respect for democracy, and peace. Failure to do so will only diminish the prospects for a peaceful settlement in Central America.

RONALD REAGAN.

THE WHITE HOUSE.

AFFIDAVIT OF GEORGE P. SHULTZ

1. I, George P. Shultz, hereby declare and state as follows: I am Secretary of State of the United States of America. I have held this office since July 16, 1982. As Secretary of State, I am responsible, pursuant to the guidance of the President of the United States, for the formulation and execution of the foreign policy of the United States.

2. As Secretary of State and as a member of the National Security Council, I have access to the entire range of diplomatic and intelligence information available to the Government of the United States.

3. The information available to the Government of the United States through diplomatic channels and intelligence means, and in many instances confirmed by publicly available information, establishes that the Government of Nicaragua has, since shortly after its assumption of power in 1979, engaged in a consistent pattern of armed aggression against its neighbors. Other responsible officials of the United States Government, including the President and the responsible Committees of the United States Congress having access to such information, share this view. In addition, responsible officials of other States in the region have reached a similar conclusion based on their own sources of information.

4. The United States has abundant evidence that the Government of Nicaragua has actively supported armed groups engaged in military and paramilitary activities in and against El Salvador, providing such groups with sites in Nicaragua for communications facilities, command and control headquarters, training and logistics support. The Government of Nicaragua is directly engaged with these armed groups in planning ongoing military and paramilitary activities conducted in and against El Salvador. The Government of Nicaragua also participates directly in the procurement, and transshipment through Nicaraguan territory, of large quantities of ammunition, supplies and weapons for the armed groups conducting military and paramilitary activities in and against El Salvador.

5. In addition to this support for armed groups operating in and against El Salvador, the Government of Nicaragua has engaged in similar support, albeit on a smaller scale, for armed groups engaged, or which have sought to engage, in military or paramilitary activities in and against the Republic of Costa Rica, the Republic of Honduras, and the Republic of Guatemala. The regular military forces of Nicaragua have engaged in several direct attacks on Honduran and Costa Rican territory, causing casualties among the armed forces and civilian populations of those States.

6. I am aware of the allegation made by the Republic of Nicaragua in its Application to the International Court of Justice dated April 9, 1984, that the United States is engaged in an unlawful armed attack against Nicaragua, conducted by means of "mercenary" forces employed and directed by the United States, which has as its objective the overthrow of the Government of Nicaragua. I am further aware that the Government of Nicaragua has sought to characterize the current dispute between the Republic of Nicaragua and the United States as exclusively the product of United States opposition towards the domestic and foreign political orientation of the Government of Nicaragua.

7. I hereby affirm that the United States recognizes and respects the prohibitions concerning the threat or use of force set forth in the Charter of the United Nations, and that the United States considers its policies and activities in Central America, and with respect to Nicaragua in particular, to be in full accord with the provisions of the Charter of the United Nations. Pursuant to the inherent right of collective self-defense, and in accord with its obligations under the Inter-American Treaty of Reciprocal Assistance, the United States has provided support for military activities against forces directed or supported by Nicaragua as a necessary and proportionate means of resisting and deterring Nicaraguan military and paramilitary acts against its neighbors, pending a peaceful settlement of the conflict. I further affirm that the overthrow of the Government of Nicaragua is not the object nor the purpose of United States policy in the region. Our position in this respect is clear and public. As President Reagan stated in a published letter to Senator Baker of April 4, 1984:

"The United States does not seek to destabilize or overthrow the Government of Nicaragua; nor to impose or compel any particular form of government there.

"We are trying, among other things, to bring the Sandinistas into meaningful negotiations and constructive, verifiable agreements with their neighbors on peace in the region.

"We believe that a pre-condition to any

successful negotiations in these regards is that the Government of Nicaragua cease to involve itself in the internal or external affairs of its neighbors, as required of member nations of the OAS."

8. I am aware of the diplomatic efforts made by the Central American States, other hemispheric nations including particularly the "Contadora Group" of Colombia, Panama, Mexico, and Venezuela, the United Nations Security Council, the Organization of American States, and the United States over the past five years to resolve the conflict in Central America. In this regard, I have personally engaged in a dialogue with the Nicaraguan leadership, as well as with the leaders of the other nations in the region. There has been widespread recognition that, despite Nicaragua's efforts to portray the conflict as a bilateral issue between itself and the United States, the scope of the conflict is far broader, involving not only cross-border attacks and State support for armed groups within various nations of the region, but also indigenous armed opposition groups within countries of the region. It has been further recognized that under these circumstances, efforts to stop the fighting in the region would likely be fruitless and ineffective absent measures to address the legitimate economic, social and political grievances of the peoples of the region which have given rise to such indigenous armed opposition.

9. In this regard, States in the region, including the Contadora Group, the United States, the leadership of the Catholic Church in both El Salvador and Nicaragua, and others have called for a dialogue between the respective governments and their armed opponents aimed at achieving internal reconciliation. The Government of El Salvador has called for a dialogue with the armed groups in that country and has offered them the opportunity to lay down their arms and participate in free elections. The United States has supported and facilitated these efforts at reconciliation, including meetings between United States representatives and members of the Salvadoran opposition. The armed opposition within Nicaragua is a manifestation of dissatisfaction with the failure of the Government of Nicaragua to carry out the commitment to broadly representative democratic government that it made to the Organization of American States and the Nicaraguan people prior to its assumption of power. The armed opposition groups in Nicaragua have offered to lay down their arms if given an opportunity to participate in free and fair elections. The Government of Nicaragua has thus far refused this offer, and has condemned, *inter alia*, the leadership of the Catholic Church for suggesting a dialogue. The leaders of the armed opposition in Nicaragua were allies of the members of the current government during the Nicaragua revolution and many were senior officials of the current government prior to going into opposition. It is my judgment that these groups would continue their acts of opposition against the Government of Nicaragua, regardless of any arrangements made between Nicaragua and other States that failed to address their legitimate grievances.

10. The need for internal reconciliation as well as inter-State arrangements is reflected in the defined objectives of the dispute settlement process established under the auspices of the Contadora Group and endorsed by the United Nations Security Council, the Organization of American States and the United States. These objectives—agreed upon by each of the Central American

Communist totalitarian internal rule have been described fully in the past several weeks. The current visit by Nicaraguan President Ortega to Moscow underscores this disturbing trend. The recent rejection by Nicaragua of my peace initiative, viewed in the light of the constantly rising pressure that Nicaragua's military buildup places on the democratic nations of the region, makes clear the urgent threat the Nicaragua's activities represent to the security of the region and, therefore, to the security and foreign policy of the United States. The activities of Nicaragua, supported by the Soviet Union and its allies, are incompatible with normal commercial relations.

2. In taking these steps, I note that during this month's debate on U.S. policy toward Nicaragua, many Members of Congress, both supporters and opponents of my proposals, called for the early application of economic sanctions.

3. I have long made clear that changes in Sandinista behavior must occur if peace is to be achieved in Central America. At this time, I again call on the Government of Nicaragua:

To halt its export of armed insurrection, terrorism, and subversion in neighboring countries;

To end its extensive military relationship with Cuba and the Soviet Bloc and remove their military and security personnel;

To stop its massive arms buildup and help restore the regional military balance; and

To respect, in law and in practice, democratic pluralism and observance of full political and human rights in Nicaragua.

4. U.S. application of these sanctions should be seen by the Government of Nicaragua, and by those who abet it, as unmistakable evidence that we take seriously the obligation to protect our security interests and those of our friends. I ask the Government of Nicaragua to address seriously the concerns of its neighbors and its own opposition and to honor its solemn commitments to non-interference, non-alignment, respect for democracy, and peace. Failure to do so will only diminish the prospects for a peaceful settlement in Central America.

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5. In addition to this support for armed groups operating in and against El Salvador, the Government of Nicaragua has engaged in similar support, albeit on a smaller scale, for armed groups engaged, or which have sought to engage, in military or paramilitary activities in and against the Republic of Costa Rica, the Republic of Honduras, and the Republic of Guatemala. The regular military forces of Nicaragua have engaged in several direct attacks on Honduran and Costa Rican territory, causing casualties among the armed forces and civilian populations of those States.

6. I am aware of the allegation made by the Republic of Nicaragua in its Application to the International Court of Justice dated April 9, 1984, that the United States is engaged in an unlawful armed attack against Nicaragua, conducted by means of "mercenary" forces employed and directed by the United States, which has as its objective the overthrow of the Government of Nicaragua. I am further aware that the Government of Nicaragua has sought to characterize the current dispute between the Republic of Nicaragua and the United States as exclusively the product of United States opposition towards the domestic and foreign political orientation of the Government of Nicaragua.

7. I hereby affirm that the United States recognizes and respects the prohibitions concerning the threat or use of force set forth in the Charter of the United Nations, and that the United States considers its policies and activities in Central America, and with respect to Nicaragua in particular, to be in full accord with the provisions of the Charter of the United Nations. Pursuant to the inherent right of collective self-defense, and in accord with its obligations under the Inter-American Treaty of Reciprocal Assistance, the United States has provided support for military activities against forces directed or supported by Nicaragua as a necessary and proportionate means of resisting and deterring Nicaraguan military and paramilitary acts against its neighbors, pending a peaceful settlement of the conflict. I further affirm that the overthrow of the Government of Nicaragua is not the object nor the purpose of United States policy in the region. Our position in this respect is clear and public. As President Reagan stated in a published letter to Senator Baker of April 4, 1984:

"The United States does not seek to destabilize or overthrow the Government of Nicaragua; nor to impose or compel any particular form of government there.

"We are trying, among other things, to bring the Sandinistas into meaningful negotiations and constructive, verifiable agreements with their neighbors on peace in the region.

"We believe that a pre-condition to any

successful negotiations in these regards is that the Government of Nicaragua cease to involve itself in the internal or external affairs of its neighbors, as required of member nations of the OAS."

8. I am aware of the diplomatic effort made by the Central American States, other hemispheric nations including particularly the "Contadora Group" of Colombia, Panama, Mexico, and Venezuela, the United Nations Security Council, the Organization of American States, and the United States over the past five years to resolve the conflict in Central America. In this regard, I have personally engaged in a dialogue with the Nicaraguan leadership, as well as with the leaders of the other nations in the region. There has been widespread recognition that, despite Nicaragua's efforts to portray the conflict as a bilateral issue between itself and the United States, the scope of the conflict is far broader, involving not only cross-border attacks and State support for armed groups within various nations of the region, but also indigenous armed opposition groups within countries of the region. It has been further recognized that under these circumstances, efforts to stop the fighting in the region would likely be fruitless and ineffective absent measures to address the legitimate economic, social and political grievances of the peoples of the region which have given rise to such indigenous armed opposition.

9. In this regard, States in the region, including the Contadora Group, the United States, the leadership of the Catholic Church in both El Salvador and Nicaragua, and others have called for a dialogue between the respective governments and their armed opponents aimed at achieving internal reconciliation. The Government of El Salvador has called for a dialogue with the armed groups in that country and has offered them the opportunity to lay down their arms and participate in free elections. The United States has supported and facilitated these efforts at reconciliation, including meetings between United States representatives and members of the Salvadoran opposition. The armed opposition within Nicaragua is a manifestation of dissatisfaction with the failure of the Government of Nicaragua to carry out the commitment to broadly representative democratic government that it made to the Organization of American States and the Nicaraguan people prior to its assumption of power. The armed opposition groups in Nicaragua have offered to lay down their arms if given an opportunity to participate in free and fair elections. The Government of Nicaragua has thus far refused this offer, and has condemned, *inter alia*, the leadership of the Catholic Church for suggesting a dialogue. The leaders of the armed opposition in Nicaragua were allies of the members of the current government during the Nicaragua revolution and many were senior officials of the current government prior to going into opposition. It is my judgment that these groups would continue their acts of opposition against the Government of Nicaragua, regardless of any arrangements made between Nicaragua and other States that failed to address their legitimate grievances.

10. The need for internal reconciliation as well as inter-State arrangements is reflected in the defined objectives of the dispute settlement process established under the auspices of the Contadora Group and endorsed by the United Nations Security Council, the Organization of American States and the United States. These objectives—agreed upon by each of the Central American

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EXTREME MULTI-LATERALISM

Divider Title: _____

ELLSBERG (PENTAGON PAPERS)

Talking Points

Charge: In opposing America's role in Vietnam, Halperin formed a close association with Daniel Ellsberg; and was implicated at one point in Ellsberg's illegal release of the classified material known as the Pentagon Papers. Halperin's denials of playing any part in the disclosure of the Pentagon Papers are not totally convincing. He was intimately involved in the subsequent defense of Daniel Ellsberg and his defense was political and public, not legal.

Response:

- Halperin neither participated in nor assisted in Daniel Ellsberg's release of the Pentagon Papers. Halperin had no knowledge of Ellsberg's unauthorized disclosure until contacted by the New York Times just before publication.
- Halperin did assist Ellsberg's lawyers in his defense. He believes that every accused person is entitled to the best possible advocacy from his lawyers. This includes the assistance of experts with relevant knowledge.

Narrative

The minority staff position paper accuses Halperin of assisting Daniel Ellsberg in his unlawful release of the Pentagon Papers. It further asserts that Halperin's involvement in Ellsberg's legal defense amounted to support for Ellsberg's release of the Papers.

In making the accusation against Halperin, the minority staff points to three inconclusive and unsubstantiated facts: first, that he and Ellsberg were close associates in their opposition to the Vietnam war; second, that he was implicated at one point in the release of the papers; and third, that providing expert testimony on Ellsberg's behalf amounted to a de facto admittance that he supported Ellsberg's act.

In response to the first, neither opposition to the war nor being friends with Ellsberg is illegal or justification for accusations of complicity. Halperin and Ellsberg became friends in the early 1960s when Ellsberg worked for the RAND Corporation and Halperin was a consultant to RAND. At the time, both were supporters of U.S. policy and American involvement in Vietnam. Halperin did not form any association with Ellsberg in his opposition to the war.

The second point is made with no factual support and bears no relation to the established facts. The minority staff position paper states that Halperin "was implicated at one point in Ellsberg's illegal release of the classified material known as the Pentagon Papers," but that does not explain who implicated Halperin, on what basis, or whether there was any truth to the implication. In fact, Halperin neither participated in nor assisted in Ellsberg's release of the Pentagon Papers. The facts, which are reflected in an article by Paul Gigot, a Wall Street Journal columnist (Tab 1) are these: Halperin was a part of the process by which Ellsberg lawfully obtained access to the Pentagon Papers. However, Henry Rowen, then President of RAND, made the decision to give Ellsberg access to the Papers. Ellsberg was, at the time, a full time employee of the RAND Corporation with a Top Secret clearance. He was working on a classified study for DoD of lessons of the Vietnam war. Halperin did not know that Ellsberg had made unauthorized disclosure of the Pentagon Papers until he was contacted by the New York Times just prior to their publication of the Papers.

Dr. Halperin was involved in the legal defense of Daniel Ellsberg. He participated at the request of the lawyers for the accused person and served as a consultant to the lawyers and as an expert witness. He did so because he believes in the constitutional right that an accused person is entitled to the best possible advocacy by his lawyers.

This includes, in Dr. Halperin's view, the assistance of experts with relevant knowledge and experience.

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GUARANTEEING DEMOCRACY

by Morton H. Halperin

With the collapse of the Soviet Union and the discrediting of communism as a rival model, more and more people are coming to view constitutional democracy as the only legitimate form of government. Around the globe, people are seeking to establish constitutional democracies. Many newly democratic governments are turning to the international community for support, and the international community is beginning to respond.¹ The new democracies face internal and external enemies who oppose progress toward constitutional democracy that undermines entrenched personal, institutional, and financial interests.

The United States should take the lead in promoting the trend toward democracy. Democratic governments are more peaceful and less given to provoking war or inciting violence. States that are constitutional democracies are less likely to go to war with the United States or other democracies, and are more likely to support limits on weapons trade, encourage peaceful resolution of disputes, and foster free trade. Thus, when a people attempts to hold free elections and establish a constitutional democracy, the United States and the international community should not only assist but should "guarantee" the result. Those measures should be institutionalized in organizations like the United Nations and the Organization of American States (OAS), which would be responsible for carrying out missions to ensure the success of constitutional democracy.

MORTON H. HALPERIN submitted this article as a senior associate of the Carnegie Endowment. President Bill Clinton has announced his intention to nominate him to be assistant secretary of defense for democracy and peacekeeping.

¹ This argument draws on analyses that appeared in Thomas Franck, "The Emerging Right to Democratic Governance," *The American Journal of International Law* 86 (January 1992): 46-91.

The international community should establish a process that parallels the provision of the U.S. Constitution under which the federal government should be obliged to guarantee to each state what was in 1789 called a "republican" form of government. Although the Founding Fathers wrote the Guarantee Clause of the Constitution for the American federal government of the eighteenth century, the same principle has become valid for the international community of the twentieth century. Peace, security, and the establishment of a true world order require that all states, including the United States, work toward that goal by seeking to preserve democracy where it is being established. We are now at a historic crossroads; the opportunity to take a giant step toward universal constitutional democracy is here and should be seized.

There is no reason why American foreign policy should not reflect American values. Americans prefer to see other countries enjoy the same liberties they do. That desire is especially strong when other peoples show that they too want to decide their fate by democratic means—as the Soviet people did in August 1991. Further, if Americans saw that U.S. policymakers were promoting democracy around the globe, they would be more likely to support American policy with financial commitments and military action when necessary to accomplish those foreign policy objectives.

That is not to argue that the United States or the international community should try to impose constitutional democracy on those with different views. Our efforts ought to focus on situations in which a people aspire to constitutional democracy and request global support.

The essential elements of constitutional democracy derive from Western ideals. But they have become enshrined in agreements and resolutions that have garnered broad support from the international community in the post-Cold War era. Those tenets include free elections, the right of political dissent, limits on arbitrary police power, and an independent judiciary with the power to protect those rights. They find expression in the two key international documents laying out the basic rights of persons: the Universal Declaration of Human

Rights, adopted by the U.N. General Assembly in 1948, and the International Covenant on Civil and Political Rights.

The cornerstone of democratic governance is the right to conduct free and fair elections. The Universal Declaration of Human Rights states that "the will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage, and shall be held by secret vote."

More recently, the General Assembly adopted a resolution establishing procedures to authorize the monitoring and certification of "genuine elections" when requested by member states. U.N. supervision of elections is crucial to the trend toward constitutional democracy because in order to be considered "free and genuine," elections must meet certain criteria.

In addition to universal franchise, elections should be open to multiple parties, use a secret ballot, and be free of fraud or intimidation. The winning party should be able to form a government capable of fulfilling its mandate. It should also be willing to relinquish power if subsequent election results require it. An elected government should be forbidden to alter basic constitutional provisions in an effort to seize extra-constitutional powers or stop new elections.

The growing importance of elections as the only way of validating governance is clear: More than 110 governments are now legally committed to permitting open, multiparty, secret-ballot elections with universal franchise. Many have made that commitment within the last several years.

The final essential element of constitutional democracy—respect for minority rights—was buried as an international legal concern during the Cold War in order to discourage claims for self-determination and to encourage assimilation of minority groups. The end of the Cold War, however, has changed the political climate. States are more willing to adhere to documents that protect minority rights, albeit within the confines of noninterference. A working group of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities has prepared a draft Declaration on

the Rights of Minorities. The draft affirms protection of minority rights as elemental to stability within multi-ethnic states.

The Conference on Security and Cooperation in Europe (CSCE) also renewed its interest in minority rights at its June 1990 Conference on the Human Dimension in Copenhagen. Further, the Charter of Paris for a New Europe, signed by all CSCE members in 1990, declared that "the rights of persons belonging to national minorities must be fully respected as part of universal human rights."

When a meeting of experts on national minority problems convened in Geneva in 1991 under CSCE auspices, it linked minority protections to constitutional democracy and called for the elimination of noninterference principles for that particular issue:

Issues concerning national minorities, as well as compliance with international obligations and commitments concerning the rights of persons belonging to them, are matters of legitimate international concern and consequently do not constitute exclusively an internal affair of the respective state.

Thus, an international consensus is emerging not just about words like "democracy" and "free elections," but about their real operational meaning and the minimal requirements of a constitutional democracy: free elections, right of political dissent, rule of law, and protection of minority rights, all enforced by an independent judiciary.

Challenging Noninterference

The notion that the international community should guarantee those rights in specific situations is gaining strength, too. Though an "international guarantee clause" has not yet been articulated, a series of recent episodes reveal that the international community is moving in that direction.

During the Cold War, the United States and the international community responded hesitantly, if at all, to national self-determination movements. Apart from supporting European decolonization, the United States had no clear policy. Often, policymakers decided on support for such movements by assessing their potential impact on the worldwide struggle with the

Soviet Union. Most independence movements were labeled part of the communists' grand scheme. Meanwhile, the rest of the world, aware of the perils of redrawing arbitrarily constituted borders—especially in Africa—was reluctant to act. Self-determination movements outside the colonial context were supported only on exceptional occasions.

It was not until the disintegration of the Soviet Union and Yugoslavia that the United States formulated specific criteria that linked the recognition of new republics to their commitment to constitutional democracy. For the first time, the United States made adherence to democratic norms a precondition of recognition. Yet the United States offered no means to enforce or guarantee those rights.

The August 1991 Soviet coup attempt did more than hasten the breakup of the Soviet empire. That country's dissolution was a catalyst for basic changes in the international system. Once the international community fixed on the consequences of a new hardline regime, it strongly backed Mikhail Gorbachev and the democratic reforms—however sketchy—that he had introduced to the once monolithic Soviet state. The world community had unequivocally joined ranks with domestic forces opposed to the coup. That change in attitude helped galvanize support for democracy in the Soviet Union, a drama played out before our eyes, courtesy of CNN.

The U.S. government at first offered only a guarded response to the coup. That reaction was consistent with America's conditioned attitude toward internal change in the post-World War II era. President George Bush, in his first public remarks after the crisis began, outlined the traditional criteria that had determined U.S. recognition of post-coup governments. Bush described the test for accepting a new government: Was it in control and would it "live up fully to its international obligations" to other states? He noted that though events in Moscow were "disturbing" and the West "was not going to retreat from its principles of reform, openness, [and] commitment to democracy," for the time being the United States would wait for the situation to unfold before deciding on recognition.

A few hours later, the Bush administration enunciated a new position: The coup makers would not be recognized as the new Soviet leaders. Effective control and adherence to international commitments were no longer sufficient to ensure recognition of the new regime. The U.S. position was now clearly focused on internal developments and the international community's obligations to the Soviet people. The United States declared that the coup was a "misguided and illegitimate effort [that] bypasses both Soviet law and the will of the Soviet peoples." Bush referred to the "unconstitutional seizure of power" as "an affront to the goals and aspirations that the Soviet peoples have been nurturing over the past years." He also asserted that the coup put the Soviet Union at odds with the world community, which had come to expect its liberalization.

The White House statements specifically referred to commitments to domestic reforms made by the Soviet Union under the CSCE's Paris Charter and Helsinki Final Act. U.S. policy would be based on Moscow's progress in democratization, the existence of constitutionally elected leaders, and the commitment to free speech and basic human rights. The United States was no longer just a bystander; it would actively help defeat the coup. Several factors contributed to the swift change in policy. One was the determined resistance of Boris Yeltsin and others in Moscow and their calls for help. A second was the American public's revulsion to the coup. A third was the reaction of many other governments. Bush quickly realized that American and world attitudes had fundamentally changed. The coup attempt exposed the new consensus.

Without realizing it, the United States reaffirmed in an international context the premise that drove the Founding Fathers to include a guarantee clause in the American Constitution. The White House press secretary announced that the United States would avoid "in every possible way actions that would lend legitimacy or support to this coup effort" and declared that the United States had "no interest in a new Cold War or in the exacerbation of East-West tensions." That statement alludes to the

belief that a constitutional republic is less likely to wage war than a totalitarian (non-republican) government. The United States had taken into account the will of the Soviet people to resist a reversion to authoritarian rule. And it implicitly rejected the notion that issues related to the evolution to constitutional democracy were less important than a government's willingness to meet its international obligations.

The response of the European Community (EC) was similar to that of the United States. Hans van den Broek, the Dutch foreign minister who at the time held the Community's rotating six-month presidency and spoke on behalf of the EC, called the coup a "flagrant violation" of the Soviet Union's international pledges to move toward democracy. The EC also condemned the new leadership's suspension of democratically elected bodies and of the free media. French foreign minister Roland Dumas declared that "European Community aid to the Soviet Union must henceforth depend on respect for the principles of reform, democratic freedom and respect for human rights." Much like the United States, the EC feared a resurgence of Soviet aggression under leaders of the putsch; thus the EC also linked a more secure international peace to continued evolution toward constitutional democracy.

Thus, as the firm response to the attempted coup demonstrates, international acceptance of a government requires more than government control of domestic institutions and respect for its external obligations. Where a people have established a constitutional democracy, or, as with the Soviet Union in August 1991, are moving in that direction, the United States and much of the world community will resist internal efforts to undermine democracy. It will do so in large part because it recognizes that a peaceful world is more likely if states are constitutional democracies.

It is not surprising that Russian leaders have been more explicit than any other government officials in stating their view of the international community's obligation to help protect democracy. Russian foreign minister Andrei Kozyrev wrote forcefully in the spring 1992 *Foreign Affairs*:

Wherever threats to democracy and human rights occur, let alone violations thereof, the international community can and must contribute to their removal. Such measures are regarded today not as interference in internal affairs but as assistance and cooperation in ensuring everywhere a "most favored regime" for the life of the peoples—one consistent with each state's human rights commitments under the U.N. Charter, international covenants and other relevant instruments.

The world's progress toward an international guarantee clause is also evident in recent actions of the OAS. Like other international institutions during the Cold War, the OAS regarded nonintervention as a sacrosanct principle of inter-American relations. Each member state saw interference in its domestic affairs as highly provocative and inappropriate.

The first erosion of the noninterference priority came in 1985 with the Protocol of Cartagena, which amended the original OAS charter. Passed at a time when democracy was taking root in Latin America, the protocol made reference to the organization's additional responsibility "to promote and consolidate representative democracy, with due respect for the principle of non-intervention." Five years later, in 1990, the OAS General Assembly requested the establishment of a democracy promotion unit in order to advise and assist governments in electoral matters by providing research, training, and support.

Those actions helped pave the way for a new approach, which in this context undermines the doctrine of noninterference. In June 1991 in Santiago, Chile, the OAS General Assembly unanimously adopted Resolution 1080 on representative democracy. In essence, it recognized that the solidarity of the American states required that each member be a "representative democracy" and that the OAS be proactive in its efforts to preserve such republicanism. That ground-breaking resolution called for an urgent meeting of the Permanent Council "in the event of any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional processes or of the legitimate exercise of power by the democratically elected government in any of the Organization's member states."

The Permanent Council was also granted the

authority to call an ad hoc meeting of the foreign ministers or a special session of the OAS General Assembly to "look into the events collectively and adopt any decisions deemed appropriate, in accordance with the Charter and international law." Resolution 1080 thus transformed the OAS into an organization for which democracy is a condition of membership and an objective according to its charter. Recently, the OAS has gone even further. On December 14, 1992, the OAS amended its charter to allow the suspension of a member by a two-thirds vote in the General Assembly if that state's "democratically constituted government has been overthrown by force." The rationale was that while democracy cannot be externally imposed on any country, citizens living under democratic governance have the right to count on international action against threats to their republican rule.

That new norm in international relations challenges traditional notions of nonintervention, a point the United States acknowledged in a statement by then deputy secretary of state Lawrence Eagleburger when that charter amendment was adopted:

Our challenges are clear. First, we must consolidate democracy and be prepared, where necessary, to defend democracy against its enemies.... This Organization of American States must confront and isolate those who seek to thwart the right of the people of the Americas to determine democratically their own political destinies.

The first test of the hemisphere's resolve in defending democracy came less than four months after Resolution 1080 was approved. On September 30, 1991, a bloody coup ousted the democratically elected president of Haiti, Jean-Bertrand Aristide. Haiti had been the first United Nations member country to request that its elections, in July 1990, be monitored by the United Nations, and the OAS had participated in that mission. But barely a year later, Haiti had regressed to its old mode of governance, repressive dictatorship.

Just days after the coup, a meeting of OAS foreign ministers declared, in accordance with the Santiago Commitment to Democracy, that events in Haiti constituted "an abrupt, violent, and irregular disruption of the legitimate exer-

cise of power by the democratic government." In a show of solidarity on behalf of democracy in the hemisphere, the OAS refused to recognize the new Haitian regime and backed a trade embargo. Under the embargo, Venezuela suspended oil deliveries, while the United States, Haiti's largest trading partner, froze Haiti's assets in the United States and prohibited most trade. Washington also warned wealthy Haitian citizens that if they used assets in the United States to help the new regime, their accounts could be frozen.

Currently, the military regime remains in power despite its international isolation. Yet, despite the failure of those efforts thus far to restore Aristide, the international community's commitment to the people of Haiti and the restoration of democracy bodes well for the future. Steadfast in their condemnation of the unconstitutional coup, the OAS and the United States have made it clear that coups overthrowing democratically elected governments will not be recognized even if order is established and international obligations accepted.

When a people attempts to hold free elections and establish a constitutional democracy, the United States and the international community should not only assist but should "guarantee" the result.

The second test for the OAS came in April 1992 when the democratically elected president of Peru, Alberto Fujimori, dissolved the country's congress, suspended its constitution, closed down the judiciary, and arrested prominent opposition members and journalists. The OAS foreign ministers, who met under the Santiago accord, expressed their displeasure and appealed for "the immediate reestablishment of democratic institutional order in Peru." The statement demonstrated that, to the OAS, it was not sufficient that an elected president remain in power when other elements of a constitutional democracy are shed; Fujimori's actions violated Peru's commitment to constitutional democracy as surely as a military coup would have, promp-

ting the OAS to take firm action against his usurpation of power.

In fact, the engineers of the *autogolpe* (self-coup) underestimated international resolve to resist violations of democratic governance. Seven days after the coup, then U.S. secretary of state James Baker argued in an address before the OAS that

the actions taken by President Fujimori, whatever the justification given, are unjustified. They represent an assault on democracy that cannot and will not be supported by the United States of America....We will continue to [withhold all economic and military assistance] until constitutional democracy is restored.

In an unprecedented move responding not to a coup but to a suspension of democratic norms by an elected leader, the United States immediately cut off economic and military aid to Peru and persuaded Japan to follow suit. Spain and Germany, other important donors to Peru, also suspended economic aid. In addition, a crucial \$1.4 billion aid package that had been negotiated with the International Monetary Fund and World Bank to restore Peru's credit was suspended.

Afraid of exacerbating Peru's severe economic problems and driving more supporters into the arms of the Maoist guerrilla group *Sendero Luminoso* (Shining Path), Fujimori responded to international pressure by attending an OAS gathering in Nassau, Bahamas, where he promised to hold parliamentary elections rather than a plebiscite. The OAS-monitored elections proceeded without incident in November 1992 and the elected parliament was seated. Though the future of Peruvian politics remains unclear, the undemocratic forces in Peru have witnessed the strength of the international community's commitment to preserving democracy there.

That new trend in the OAS has elicited strong support in the diplomatic and academic communities, and most agree that the collective will of the Western Hemisphere helped restore a certain measure of democracy to Peru. But questions about the outcome, nature, and method of action or intervention continue to be hotly debated. As a 1992 report by the Inter-American Dialogue notes, "the appropriateness of any specific course must be evaluated not

only on its immediate prospects of success, but also on whether it can be sustained if it does not produce quick results and on what precedents it sets for future actions."

Only time will determine the success of OAS efforts in preserving democracy. The historic obligation it has embraced by adopting Resolution 1080 needs to be bolstered with specific procedures for actions to protect democratic regimes. Nevertheless, the OAS is on the right track. It has taken the first step in establishing a hemisphere-wide guarantee clause to prevent an outbreak of authoritarianism that would not only destabilize neighboring countries, but also violate the explicit promise of constitutional democracy that governments have made to their peoples and the region.

Europe is also moving in the direction of adopting an international guarantee clause for constitutional democracy. In November 1990, the CSCE countries, including the Soviet Union, signed the Charter of Paris, establishing a small, though permanent, secretariat in Prague, a conflict prevention center in Vienna, and an Office for Free Elections in Warsaw. Through the charter, members agreed to "co-operate and support each other with the aim of making democratic gains irreversible," thus strengthening and institutionalizing the conference. In addition, the charter directed member states to develop their commitment to democracy at the 1991 Moscow Meeting of the Conference on the Human Dimension of the CSCE.

The Moscow meeting resulted in a document affirming that participating states would "support vigorously, in accordance with the Charter of the United Nations, in case of overthrow or attempted overthrow of a legitimately elected government...by undemocratic means, the legitimate organs of that State upholding human rights, democracy and the rule of law." The Moscow document also expressed the international community's growing sense of jurisdiction over how governments treat their own people by declaring that "commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the

State concerned." Finally, the document called for an independent judiciary, due process, freedom of expression, and all the other elements of constitutional democracy outlined above. The CSCE is furthering the trend toward recognizing that a country's people are the ultimate beneficiaries of international agreements protecting human rights.

An international guarantee clause will be credible only if key countries, including the United States, commit to using force to restore or establish constitutional democracy.

The United Nations, no longer a prisoner of Cold War politics, has also become more active in advocating democracy. The General Assembly in 1991 passed a resolution entitled "Enhancing the effectiveness of the principle of periodic and genuine elections." The resolution was prompted by frequent demands from member countries for monitoring elections and certifying the results. It also endorsed the secretary-general's view that a senior official be assigned to coordinate and ensure fair consideration of any such requests.

However, the U.N.'s commitment to constitutional democracy goes beyond resolutions. In particular, two recent U.N. missions represent the most forceful and persistent efforts to implement the principles of constitutional democracy. The peace processes in Cambodia and El Salvador were designed specifically to establish constitutional democracy in those war-torn countries. The extensive deployment of both peacekeeping "blue helmets" and human rights monitors and administrators is evidence of the U.N.'s recognition of its obligation to guarantee not just "peace" but also constitutional democracy. It is a model for action under an international guarantee clause.

The Cambodian peace process is the most ambitious the U.N. has ever undertaken. Signed in Paris in October 1991, the accord established the United Nations Transitional Authority in Cambodia (UNTAC), the umbrella organization for peacekeeping and administration until the first elections, scheduled for May

1993, are held. Currently, UNTAC is using blue helmets to police the country, protect the right of all political parties to campaign for election, ensure freedom of speech and the press, and conduct and certify elections.

The Paris accord's most striking feature is that all factions to the conflict signed on to cooperate with the U.N. in rebuilding the political infrastructure in Cambodia. The Khmer Rouge's subsequent violations of the accord notwithstanding, all the Cambodian factions agreed to create "a system of liberal democracy, on the basis of pluralism," which is in essence a constitutional democracy. The Paris accord cites all the elements necessary for a constitutional democracy: periodic and genuine elections; freedom of assembly and association including that for political parties; due process and equality before the law; and an independent judiciary. Further, the agreement clearly makes it both a right and an obligation for outside contracting powers to guarantee human rights should abuses occur. In the event of violations, the powers agreed to consult immediately and to take appropriate steps. Specifically, "they will call upon the United Nations" to take steps to prevent human rights violations.

The peace accord undercuts the argument that constitutional democracy is a Western notion, not applicable beyond Europe and perhaps the Western Hemisphere. Though many would argue that the Cambodians would not accept the principles of constitutional democracy, all the parties at the negotiating table explicitly agreed to a peace plan that requires them to eventually establish a constitutional democracy. The factions could have negotiated some kind of power-sharing arrangement instead, but they went further. The Cambodia accord is, in essence, a contractual obligation between external powers and internal factions.

As of April 1993, the U.N. operation remained in place, though the strident Khmer Rouge were refusing to cooperate with the international mandate to lay down their arms and accept a cease-fire. While the outcome of the accord hung in the balance, the international commitment to work to establish

constitutional democracy in Cambodia remained solid, although its willingness to use major force to enforce that objective is not clear.

The U.N.-sponsored peace process in El Salvador is similar in many respects to that in Cambodia. The National Commission for the Consolidation of Peace (COPAZ) is operating parallel to the U.N.'s Observer Mission in El Salvador. COPAZ, like the Cambodian Supreme National Council, comprises representatives from all interested parties: the National Assembly, the leftist Farabundo Martí National Liberation Front (FMLN), and the military. Significantly, the passage of Security Council Resolution 693 in 1991, which created the Salvadoran observer operation, was a landmark for the United Nations; it was the first time the organization had constructed a mission with three component divisions—human rights, military, and police—to verify a peace settlement by parties to an internal conflict.

With difficulties, the Salvadoran peace process has progressed over the last three years. Most important for the international community, both the government and the FMLN have pledged formally to cooperate in establishing a constitutional democracy. They have agreed to reform the electoral system and the judiciary as well as establish the Office of the National Counsel for the Defence of Human Rights, which will direct special attention to the parties' observance of the rights to life, integrity, and security of the person, due process of law, personal liberty, and freedom of expression and association—rights outlined in the 1990 San José Agreement on Human Rights and enforced by the U.N. observers. Regrettably, no outside power explicitly guaranteed the outcome of the peace process, but Mexico, Spain, the United States, and Venezuela all have actively pushed it forward.

Intervention Rules

Democratization has an undeniable momentum in countries around the world today. Within multinational organizations a parallel movement toward international guarantees to protect budding constitutional democracies is also gaining force. Those trends are strongly in

FOREIGN POLICY

pragmatism and respect for the opinions of humankind, can combine the best of American idealism and realism to yield a position that is truly in the national interest. Today, the effort to guarantee democracy, at least to people who have it and want to keep it, is just such a policy. Americans should strive for no less.

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FOREIGN AFFAIRS BACKGROUND

Divider Title: _____

FOREIGN AFFAIRS BACKGROUND

Talking Points

Charge:

Morton Halperin is not properly qualified to assume the position of Assistant Secretary of Defense for Democracy and Peacekeeping. Halperin has no special qualifications which would qualify him to take over this office, which will assume a great deal of influence over foreign and national security policy decisions.

Response:

-President Clinton and Secretary Aspin believe Halperin is ideally suited for the position.

-Halperin served as the Deputy Assistant Secretary of Defense (ISA) for Policy Planning and Arms Control (1967-69) and was on the Senior Staff of the National Security Council in the Nixon Administration (1969).

-Over the past 35 years Halperin has written about and studied extensively foreign and national security policy.

-Halperin's work with the ACLU deeply involved him in issues related to maintenance of democracy and civil liberties. He has drawn on this experience in advising people on issues for newly emerging democracies and in writings on the promotion and protection of democracy abroad.

-Halperin has studied and written about issues related to American policy towards the third world and emerging democracies.

Narrative

Questions have been raised regarding Morton Halperin's qualifications for the position of Assistant Secretary of Defense for Democracy and Peacekeeping. The minority staff position paper and a number of press reports have alleged that Halperin does not possess the depth of knowledge and experience needed to assume a position which will greatly influence foreign and national security policy decisions.

Halperin maintains a wealth of knowledge and experience in foreign and national security affairs. Over the past 35 years Morton Halperin has held positions in both the government and non-profit sectors where he has dealt with national security matters.

Beginning in 1961, Halperin was a consultant to the Office of the Secretary of Defense in what was then the International Security Affairs office. This office is now known as the Office of the Under Secretary of Defense for Policy. From 1966 to 1969, Halperin served as a full-time employee of the department, ultimately serving as the Deputy Assistant Secretary of Defense for Policy Planning and Arms Control. In this final position, Halperin was responsible for NSC affairs, arms control and policy planning under the Assistant Secretary of Defense (International Security Affairs).

In 1969, Halperin served on the Senior Staff of the National Security Council as a key assistant to the Assistant to the President for National Security Affairs. The responsibilities of this position involved oversight of the functioning of the NSC system as well as policy planning.

During the 20 years Halperin worked with the American Civil Liberties Union, Halperin directed a project designed to reconcile claims of national security with those of civil liberties. During the last six years of that period, Halperin directed the national legislative program of the ACLU. In that capacity, Halperin gained valuable knowledge relevant to the efforts of newly emerging democracies to establish a balance between national security requirements and the protection of individual rights and democratic norms.

There have been several accusations against Morton Halperin alleging that he has no background in third world issues and thus is not qualified for the position of ASD for Democracy and Peacekeeping, a position where the principal must know and understand the challenges facing the third world. Halperin has studied and written about issues relating to American policy towards the third world in the post-cold war period, most recently as co-author, with David Sceffer, of Self-Determination in the New World Order (Washington, DC: Carnegie Endowment for International Peace, 1992).

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VIEWS ON U.S. INTELL ACTIVITIES

Divider Title: _____

VIEWS ON U.S. INTELLIGENCE ACTIVITY

Talking Points

Charge: Morton Halperin has consistently opposed U.S. intelligence operations, especially counter-intelligence in the U.S., and steadfastly fought covert operations abroad. He believes that all U.S. covert activity should be illegal and the FBI should be prohibited from all counter espionage efforts.

Response: -Halperin supports counter-intelligence in the US. He has however objected to the surveillance of lawful political activity under the guise of counter-intelligence.

-He believes that counter-intelligence activity should focus on the protection of information the unauthorized disclosure of which would cause harm to national security, and that the FBI should conduct rigorous counter-espionage efforts.

-Dr. Halperin believes that covert activity conducted pursuant to the 1991 Intelligence Oversight Act is lawful and appropriate because the Act requires that such activity be consistent with American foreign policy and be reported to the Congress.

Narrative

Dr. Morton Halperin supports counter-intelligence conducted in the interests of national security and consistent with the Constitution. He promotes national security policies that meet U.S. intelligence needs without sacrificing constitutional values.

Since 1976, Dr. Halperin has worked with Congressional intelligence committees to change the structure for approving covert actions in order to solve the constitutional problems. In articles published prior to his nomination, Dr. Halperin stated that American secret activities in support of groups fighting in Nicaragua, Angola, and Afghanistan to overthrow the governments of those countries were consistent with the Constitution because they were conducted in support of a congressionally approved policy. Furthermore, he publicly supported the enactment of the 1991 Intelligence Oversight Act, which requires prior or prompt notice to Congress of all covert operations and a presidential finding that the activity is consistent with the foreign policy of the United States.

It has been suggested by the Minority staff paper and a number of press reports that Dr. Halperin believes the FBI should be prohibited from all counter-espionage efforts. The minority staff position paper cited reports by the Los Angeles Times, July 8, 1985, that "Halperin called on Congress to reject anti-espionage proposals as unconstitutional," was an attempt to block amendments to the 1986 National Defense Authorization Bill to beef up U.S. anti-espionage efforts. The staff also cited The Boston Globe, January 31, 1988 which states that Halperin strongly opposed a presidential executive order signed in 1981 which authorized the FBI to step up its counter-espionage efforts against several communist front groups. The flaw in these assertions is that the items quoted from newspaper stories, not Halperin's testimony or writings, simply do not support the sweeping statement. Rather, they assert that Halperin opposed specific proposals to increase the authority of the FBI to conduct counter-intelligence operations directed at American citizens.

Dr. Halperin has objected to the surveillance of lawful political activity under the guise of counter-intelligence and has urged that counter-intelligence activity focus on the protection of information the unauthorized disclosure of which would cause harm to the national security. Halperin's views on counter-intelligence were spelled out in great detail in testimony which he presented before the Senate

Intelligence Committee in 1990 (Hearing on S. 2726,
Improving U.S. Counter-intelligence, Senate Intelligence
Committee, July 12, 1990 at Tab 1) as part of its review of
the Jacobs' Panel Report.

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1

Divider Title: _____

**S. 2726 TO IMPROVE U.S. COUNTERINTELLIGENCE
MEASURES**

HEARINGS
BEFORE THE
SELECT COMMITTEE ON INTELLIGENCE
OF THE
UNITED STATES SENATE
ONE HUNDRED FIRST CONGRESS
SECOND SESSION
ON
S. 2726 TO AMEND THE NATIONAL SECURITY ACT OF 1947 TO IMPROVE
U.S. COUNTERINTELLIGENCE MEASURES

WEDNESDAY, MAY 23, AND THURSDAY, JULY 12, 1990

Printed for the use of the Select Committee on Intelligence



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States as a member of a group engaged in international terrorism or activities in preparation therefor." 50 U.S.C. §§ 1801(b)(1)(A) & 1801(a)(4). This definition applies only to persons within the United States who are neither citizens nor permanent residents. As explained above, these persons are nevertheless entitled to constitutional protections. This definition on its face is overbroad and unconstitutional because it covers mere membership in an organization with both lawful and unlawful ends without being limited to membership with the specific intent to further the organizations unlawful ends. For example, the definition would permit surveillance of persons within the United States simply on the basis of mere membership in the PLO or the FMLN. Again, as explained above, such surveillance would violate both the First and Fourth Amendments.

The overbreadth of these portions of the definition of "agent of a foreign power" is a problem that Congress rather than the courts may have to remedy. Our concern is that individuals subject to unlawful surveillance will be unable to challenge the lawfulness of the surveillance in court. Such persons will likely never be notified that they have been subject to surveillance. Even if they are notified, they probably will not be allowed to examine the surveillance application, order, or even the fruits, because the Attorney General in almost all cases files a claim of privilege covering such documents pursuant to 50 U.S.C. § 1806(f). As a consequence, no adversarial challenge in court is possible and thus the usual judicial check on and enforcement of these constitutional guarantees do not exist.

TESTIMONY OF MORTON H. HALPERIN, DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

Mr. HALPERIN. When we start to prepare testimony in my office, the computer automatically produces a sentence which begins with the words, "I very much appreciate." But I want to say in this case that it is not merely rote. We do very much appreciate the fact that this Committee has recognized that these matters involve balancing civil liberties concerns against national security concerns and has sought our views on these issues and on other matters over the years.

What I would like to do is to focus on the comments that are contained in the introductory part of my statement which deal generally with the approach and basic principles that seem to us to underlie the Jacobs Panel and our own views on this subject. I want to make just a few comments at the end about a few of the specific recommendations, but since you have those in our prepared statement, I think it might be more useful to respond to any questions that you may have about our recommendations.

Since 1985, the ACLU has been making clear its belief that the counterintelligence activities of the United States can and should be reformed to deal more effectively with the real problems of counterintelligence. And it is our view, and continues to be our view, that that can be done without jeopardizing civil liberties.

And so we were encouraged by the formation of the Jacobs Panel and find much to commend in its approach and its activities. And we recognize that they did seek to strike a balance between national security and civil liberties. At the same time, perhaps because they did not choose to consult with us, we do not think they struck precisely the right balance. While there are many things in the report that we can support, there are some items which we cannot accept. There are others which we think are more appropriately a part of a more balanced set of proposals which we think and would urge the Committee to adopt. So let me just then touch on some of the basic principles that are in the report and with which we agree.

The first fundamental insight relates to why people spy and when they decide to spy. It is economic motives and job dissatisfaction and not ideology which seems now to lead people to espionage. Moreover, people become spies generally after they have obtained a clearance and they do not decide to spy and then try to get into the Government in order to be able to spy.

Thus, the focus should be on economic incentives and job dissatisfaction and not on ideology or other extraneous factors. And the present system which focuses the great bulk of its resources on the preliminary decision to give a clearance needs to be altered so that you give equal emphasis to the periodic review of people who are in particularly targeted positions. Those are common grounds on which I think we agree with the Committee—with the Panel's recommendations.

We think the Panel does a good job of telling the Intelligence Community where it ought to go. What it does not do is to tell the Committee where it ought not to go. We think it is necessary to do that for two reasons. First, we think there continue to be serious civil liberties violations arising out of the fact that the counterintelligence effort continues to be devoted to the wrong areas. And second, we think that if you are going to redirect the bureaucracy, which is a very difficult thing to do, you need not only to tell them what you want them to do, you need to also tell them what you do not want them to do. We think that, therefore, the legislation ought to redirect the energy towards greed or job dissatisfaction and away from two areas where it continues to be focused for reasons which, whether they ever made any sense, no longer do.

One is so-called left political ideology. The Government has gone back to asking people whether they are members of the Communist party. Although what "Communist party" and what "Communist" now means is of course becoming increasingly difficult to understand.

The Intelligence Community continues to be focused in areas that we think are inappropriate on gay men and lesbians. We do not think that questions like that should be asked. Now that does not mean that we don't think in a particular case you should be allowed to ask people what organizations they belong to or what kind of sexual practices they have. But we think you should not single out left orientation rather than right or heterosexual activity from homosexual activity. Rather the question should investigate only if there is a nexus between political beliefs and possible spying or between sexual behavior and possible blackmail and possible spying.

A second issue that is raised by the Panel where again we agree with their basic thrust is that you cannot focus the counterintelligence effort on everybody with a security clearance. Too much information is classified. Too many people have security clearances for that to work. And while we agree with Senator Metzenbaum's observation that we ought to try to find a way to cut back on both the amount of information and on the number of clearances, we don't think you should wait to do that before you move forward with this effort.

So we think again that they go in the right direction. But we don't think that they go far enough. Because the number of people with TOP SECRET clearances is simply too large and too unfo-

cused to be the basis for this. So what we suggest is to limit it to those designated special compartmentalized intelligence clearances where the head of that program thinks that the people in his program or her program are likely to be targets of these counterintelligence efforts. This would obviously include people in communications and intelligence activities. It might not in some other special access programs.

There is also the question of whether anybody who just has a TOP SECRET clearance should be covered. What we suggest is that that should be done only in exceptional circumstances where the head of the agency determines that particular individuals who have just TOP SECRET clearances are likely to be, for special reasons, targets of a counterintelligence investigation.

I also might add that, as Mr. deGraffenreid notes in his testimony, there is a more fundamental problem. The Government does not do strategic risk assessment. It does not ask which of all the information that we keep secret is likely to be targets; who has access to that information; and what are the particular vulnerabilities of those people: is it physical security, is it communications security, is it recruitment, is it some other problem? That kind of risk assessment I think badly needs to be made. I have been advocating that in a number of things that I have written. And it is a very difficult thing to make the bureaucracy do. But it is something it seems to me that is absolutely essential.

Now, we agree with the Panel that the end of the Cold War abroad does not mean the end of the need for intelligence. Indeed, we think the case can be made that the intelligence budget ought not to decline proportionally with the defense budget. And that leads us, by the way, to believe that you ought to consider making the intelligence budget public. Because if it is kept secret, it's going to be cut proportionally because they are going to be cutting programs not knowing it's the intelligence budget. We have long advocated making the budget public, but I do think that the time has come to consider doing that.

More generally, we think that as the Cold War ends abroad, and the President announced that the Cold War was over, that we need to consider whether a variety of different restrictions that Americans accepted in the past in the name of national security before the Cold War, because of the Cold War, are still necessary and appropriate. And we think one of those areas is, as I've said, the question of whether so much information needs to be classified and so many people need security clearances.

As Senator Specter has brought out, our view is that people who are denied security clearances are entitled to appropriate due process. We are concerned that a previous draft of an administration executive order, I guess the last Administration and not this one, took away due process standards. And we would urge the Committee to include those in legislation while recognizing that there may be need for a deviation in extraordinary circumstances in particular agencies.

There's one assumption of the Panel, Mr. Chairman, with which we profoundly disagree, at least insofar as I understand what they are recommending, and that's the emphasis on future economic and industrial espionage. We recognize that economic intelligence

has become more important and we have no difficulty with the Intelligence Community being tasked to collect more economic intelligence information. But we do have two sets of problems. One has to do with the danger that if you task the Intelligence Community to collect foreign intelligence information, they will seek it where the light is good, where it is easy to do. And that is from American business firms rather than from foreign governments. Since many American business firms have a lot of information about foreign business that they do not desire to share with the American Government—and we think have a right not to share with the American Government—I think there is a real danger that if you turn the Intelligence Community loose and say find out what you can about foreign business, they will start or expand spying on American business because that is the best way to find it out.

We are also concerned with the notion that somehow these procedures ought to be used to protect information that American business has as against foreign intelligence services. We do not think it is the business of the American Government except for providing secure communications systems—which sometimes we don't do for other reasons related to NSA's concerns—but except for that, we do not think that the U.S. Government ought to be in the business of using security clearance procedures and counterintelligence investigations to protect the business secrets of private industry.

Chairman BOREN. Let me interrupt you on that point so I understand what you are saying.

Let us assume that you have a private American company that has included in its production some very, very sensitive, highly technical item that only exists in that company and only in the United States. And we learn that, not a foreign company, but a foreign country's intelligence service is engaged in practicing espionage against that American company. Are you saying that we should take no action if we—

Mr. HALPERIN. No. You certainly should tell them. And of course there are many cases in which it would be appropriate to classify the information. And indeed as you know, there are even procedures which we think should be used only sparingly to classify information that isn't developed with Government funds.

What we don't think should happen is that this should become a focus of activity of the Intelligence Community. So that you start requiring security clearances from people in private industry.

Chairman BOREN. No, I understand. But you wouldn't object to us, for example, using our intelligence sources in other countries to learn about the fact that a government of a foreign power was spying upon an American business.

Mr. HALPERIN. No, not at all. But as you know, Mr. Chairman, in fact, Senator Moynihan has complained many times publicly that the Government does just the opposite. That when we learn about such spying, we don't tell the business firms about it because we are trying to protect intelligence sources and methods.

So, I think that's more likely to be the problem and our view is that you should tell them if you find out. If the American Government knows that a country is intercepting the telephone conversations or TELEX messages of an American business firm, we cer-

tainly think the Government should tell them that. The problem as I say is that it doesn't tell them that now, not that it does, but we are concerned about providing a rationale for a whole new set of investigations.

Chairman BOREN. I understand what you are saying.

Mr. HALPERIN. And, therefore, we would urge this Committee to look very closely at this process. Just one more point on that. We do think that the only information you ought to protect is information relating to national defense.

Let me just take two specific comments on the specific proposals and then I'll be done.

One, on the financial records. Let me just point out, the distinction that we try to make between the reasonable suspicion standard and the probable cause standard, the probable cause standard does not relate to the person whose phone number the Government doesn't know. What it relates to is the person who has made the call to that phone number.

And what we are saying is that you should not be able to get the phone number of the unlisted person unless the person who, as we say in the testimony, the foreign agent who called is involved in clandestine intelligence activities or international terrorism activities.

Chairman BOREN. I see. So in other words, if they call an officer at the Embassy who is not suspected of being a spy but is simply the passport control officer, the visa granter or a commercial officer who really is a commercial officer, that's where you would apply the probable cause.

Mr. HALPERIN. Right. But we are concerned not only about the commercial attache. The Government, for example, at one time as you know was conducting a counterintelligence investigation of CISPES.

Chairman BOREN. Yes.

Mr. HALPERIN. Now, as we understand the language that the Government is asking for, if somebody in CISPES called somebody else who had an unlisted number, the Government under the reasonable suspicion standard of their definition of agent of a foreign power could then get the unlisted number of the second person. And that's the concern that we have. We are saying that they should have probable cause that the target they are investigating is engaged in clandestine intelligence activities or terrorism, not the broader definition of agent of a foreign power before you can get the second one.

Let me just say about secret searches because that is the only area in which I think we have a fundamental disagreement with both the Jacobs Panel and with the Administration. Our view is that it is unconstitutional to do searches of—take the easiest case, the homes of Americans without probable cause to believe that they have committed a crime, without knocking on the door, without presenting a warrant, and without leaving a list of what you seized.

Now I think the easiest way I can describe it, Mr. Chairman, is to suggest to you that the American Revolution did not occur because the Attorney General to King George did not write himself a note saying that the American Revolutionaries are agents of the

French. But in fact that is what the current system suggests. It suggests that the general warrants which were one of the main causes of the American Revolution would have been OK if King George's Attorney General had written himself a note, which would have been as plausible as many of the judgments raised today about foreign power, that the Revolutionaries were agents of the French. We don't think that's what they had in mind. We do not think that there is a national security exception to the Fourth Amendment.

Now it is true that the Supreme Court when it brought wiretaps under the Fourth Amendment dropped a footnote which suggested that it did not decide the issue of whether a warrant was required, not the Fourth Amendment, but a warrant was required in national security cases. And out of that has grown this exception, national security treated differently for electronic surveillance. It is true there is the one *Trung* case in which physical searches were upheld by a single court. We think that decision was profoundly wrong. And our view is that this Committee far from legitimating these kinds of searches ought to tell the President of the United States and the Attorney General that the homes of Americans, the offices of Americans, and the sealed packages of Americans cannot be subjected to a secret search which the American never finds out about unless the Government decides to tell him.

Let me say, again, we appreciate very much the opportunity to testify. I'll be glad to answer your questions. And we'd be pleased to have an opportunity to work with the staff of the Committee to try to fashion a bill which we can support. We would very much like to be in a position to support legislation that deals with what we think is a real and urgent problem.

Chairman BOREN. Well, thank you very much. Let me say, I think you've raised some excellent, excellent points. And we appreciate very much the time you've already spent, you and your colleagues working with our staff, making suggestions in a very constructive way. And it's our desire in this Committee, and I know it will be the same in the Judiciary Committee, that we try to strike this balance in the right way.

I certainly agree with many of the comments you've made and in the focus, the misdirection of a lot of our clearance procedures at the present time and the fact that we also have too many clearances, too much classified information. And that in light of the shifts in the world, the way we target our resources should certainly be dramatically changed.

Let me ask, on the last point you made about warrantless or secret searches as opposed to warrantless searches. Of course, what we are proposing here is that the practice of the Administration now be changed. At the current time, they do have a secret search electronically but it has to be approved by a court. They assert the right, as you know, to make a totally warrantless search, secret search, physical search. And, so in a sense, we would be constraining what they now claim they have the right to do by saying no you can't have any secret search, physical or electronic, without a court order.

But I gather your point of view would be that you would rather be able to take on that question of the constitutionality of their

point of view on physical searches rather than have us in a sense tighten it up but still allow secret search even with a court order. Is that a correct interpretation?

Mr. HALPERIN. That's right. We've been frankly looking for a client for this case. And we'll test that one of these days.

But our view is that what the Administration is prepared to accept is in our view so clearly unconstitutional that even though, as you say, it would put some limits on what is now being done, we think it just doesn't pass muster.

Chairman BOREN. Right.

Mr. HALPERIN. And we say that reluctantly because we should like to put some limits on this. But we just don't think that what they propose is anywhere near—

Chairman BOREN. You'd rather continue to leave that in an area where you are doing battle with them on the constitutional point? At least for now.

Mr. HALPERIN. We continue to hope that we will persuade the Congress that you ought to stop it which will then get the Administration in here in a serious negotiation.

Chairman BOREN. What about the question of the uniform standards? I gather you really don't have a problem with the concept of uniform standards?

Mr. HALPERIN. No we're for them. We support legislated uniform standards.

Chairman BOREN. But you think that in terms of some of these provisions, it should be limited only to those most sensitive and not all TOP SECRET clearances. We, by various estimates have seven or eight hundred thousand people with TOP SECRET clearances. What if it ends up we have three hundred thousand people in compartmented programs. Does that create a problem for you?

Mr. HALPERIN. What I suggest in the testimony is not all of them either. I would leave it to the head of each one of those programs to decide whether the reason there is a special compartmented program is one that is likely to make them in fact a target for the investigation.

It is also, at least when I had such clearances, which was a very long time ago, there were sub-categories within each of those and one could have easily imagined some people who had special compartmentalized intelligence to read the product of a particular collection system were unlikely to be targets as compared to the people who had access to the procedures for collecting.

Mr. Kampiles, for example, must have had access not only to the first level of clearances related to satellite communications, but to the second or third level because he had that manual. I never saw that manual.

So that I would say not everybody who has a particular special compartmentalized clearance is likely to be designated by the head of that program as a likely target of a counterintelligence investigation.

Chairman BOREN. Right. I think that you are right in terms of constraining it. It's not only a matter of trying to hold to a minimum interference with personal privacy but it's also a very practical matter that you only have so many resources. You can only target your attention on so many people and it would be better to

constrain the number of people and do an effective job with those that are really and truly in sensitive positions.

Mr. HALPERIN. It's really for both reasons. I mean because we are concerned with trying to catch the spies as well.

I think the point is, if you focus this on the people who are really likely to be the targets, and I think to really do that you need to do what's been suggested in the testimony that you are about to hear—you really need to do a more fundamental estimate than the sort of crude method which the Panel suggested and which I've suggested an elaboration on.

But the point is you want to have people in this program really be people who people think might be the target so that they take their work seriously. Which nobody does now.

Chairman BOREN. Your concept of some sort of risk assessment in advance is a very interesting concept to me as well.

On the due process question, could you make a different case for those who are already Government employees? Is there a stronger reason to give due process? For somebody who is already an employee, working professionally and who is now suddenly terminated because they are denied a clearance as opposed to those that are attempting to get a clearance on the first entry.

Mr. HALPERIN. You can. I mean and our view is there ought to be some due process rights and some hearing rights in both cases. Although we certainly agree that if you are taking somebody's clearances away, the rights are much stronger and the process ought to be more elaborate.

Chairman BOREN. I noticed in your statement you mentioned the problem with the way the intent requirement is written in terms of the possession of espionage equipment. I wonder if you might just spell that out a little bit more in terms of the problem as you see it.

Mr. HALPERIN. It may be that it is OK. But I mean our sense is that it needs to be made very clear that the Government has to prove that the purpose that one had in having this equipment is to commit espionage. And our reading of that section did not satisfy us that that was completely clear.

Chairman BOREN. Well, we'd welcome any thoughts and specific suggestions you might give us in terms of how we might tighten that up even further. We do want to write that as narrowly as we possibly can and do the job.

I notice also on the question of stockpiling information at home or someplace else. As you know, some people have used it for various reasons as an insurance policy or maybe just an idea that well, I'm going to retire. I'll take this all home and if I run short of money later on, I can sell something. Some do it to protect themselves against historians miswriting what happened in a certain period or perhaps whistle-blowers use it.

You talked about making sure we do not cover those that are giving information; for example, whistle-blowers giving information to the press. It is sort of a delicate area. We do talk about sales of information as opposed to just simply transmitting information. That's meant to constrain this somewhat. But you seem to say you wanted a two week period maybe of unauthorized duration of holding documents at some insecure place. A non-authorized place.

Would this get the Committee in the problem of approving by implication, well, that's just fine for you to take TOP SECRET information or highly sensitive information and give it to the press. I'm very aware of the fact that often Government cloaks and sometimes even classifies information—when it doesn't have the national security reason—for the very purpose of preventing discovery or accountability to the press. I certainly feel that's always a danger that the national security cloak is wrapped around all sorts of skullduggery in an effort to keep it out of the hands of the press. But on the other hand there are sometimes situations where there's a very legitimate national security interest for preventing something from going forward. Very often the press exercises its own restraint, but occasionally you could have a situation where you have an irresponsible press given information that really is highly sensitive in the national security nature that they publish.

Mr. HALPERIN. Mr. Chairman, my recollection of this section is that it is not limited to cases where you sell the information but is simply taking the information and keeping it at home. Because, remember, the person has not yet formed an intent possibly to do it.

I think those are legitimate concerns. The problem is that as the Jacobs Panel recognized, if you start getting in the area of what kind of penalties you want to put on the disclosure of information to the press, that's a very different and very complicated set of problems. It's one that this Committee dealt with in the Agents Identities Protection Act and just that one narrow piece required many years.

And as I mentioned in our testimony, we did not oppose the section of that bill that related to the release by Government employees of the identities of covert agents. We objected very strongly to the part relating to people gathering information from public documents and publishing it.

But we were concerned that the definition of what had to be released be very narrowly drawn and that the press be protected against conspiracy indictments and so on.

So that if you are going to start getting into the area of leaks, I think you are into a whole set of very complicated questions. On the other hand, I think your point is right. You don't want to pass a statute that seems to suggest it's OK to take stuff home if you are going to give it to the press.

I also think that you have Mary Lawton's point that this puts lesser penalties on TOP SECRET information than on other information. I guess my view on reflection is that there's no way to write this that it's not going to raise so many different problems that it isn't worth it. And that whatever minor additional possibilities there might be of legitimate prosecutions, that this is going to raise so many different problems that I think I'd leave it out.

Chairman BOREN. Well, let us work with you on that because I understand exactly what you are saying. I'm not sure though that there aren't situations where this practice does not become so widespread. And very often people take things for commercial possibilities, particularly if they are leaving Government employ.

Mr. HALPERIN. But as you know, there are provisions that enable you to take that material but at least if you are a Presidential ap-

pointee, put it into the Archives of the United States and then have access to it.

Chairman BOREN. But of course that's not what people are doing. We are trying to cover a situation where they don't put it in some—

Mr. HALPERIN. No. I understand that.

Chairman BOREN. Where they are taking it home and may be using it as a savings account for future sale.

Mr. HALPERIN. Well, they are sometimes using it, and I must say, I've been involved in these situations where you get attacked by people after you've left for what they claim you said in the Government.

Chairman BOREN. I think if you can do that through an Archive access or something, that would be a—

Mr. HALPERIN. You can except the Government sometimes ends up telling you that you are not entitled to see your own material in the Archives.

Chairman BOREN. Maybe we can work around with these various—

Mr. HALPERIN. They've done that to me.

Chairman BOREN. Maybe we can work around with these various procedures. Maybe something positive on that end—

Mr. HALPERIN. We would be pleased to work with you on this. But I do think one piece of it which would be helpful is to extend to non-Presidential appointees, this ability to put your stuff away and then get access to it.

Chairman BOREN. Being able to defend yourself with it later.

Mr. HALPERIN. If you needed to defend yourself.

Chairman BOREN. I think that's a very valid point.

We have a problem. There's a vote on the floor and they are now down to about 4 minutes. I'm going to have to run over there and vote.

Senator Specter is coming back. Do you know if Senator Specter wants to ask questions of Mr. Halperin?

OK, if you wouldn't mind just waiting, then he will resume the questioning and then I'll be back. We're trying to stagger our voting but I will be right back, and he should be here just momentarily.

[A brief recess was taken from 3:52 pm. until 4:09 pm.]

Senator SPECTER. The hearing will resume.

We regret the interruption.

Mr. Halperin, I join my colleague, the Chairman, Senator Boren, in thanking you for appearing today. And I may cover some of the same ground which Senator Boren covered because I was not here during the entirety of his dialogue with you.

Let me begin with the issue of the warrantless searches, and ask for your opinion as to whether warrantless searches ought to be covered in the Foreign Intelligence Surveillance Act.

Mr. HALPERIN. We think that Congress should prohibit warrantless physical searches. We think they are unconstitutional.

But we think that in the case of a physical search, especially of a home and especially of a home of an American, that the requirements of knock, of notice, and of leaving behind a list of what was seized are essential components of the Fourth Amendment require-

ments. And therefore we think that any bringing of physical searches under the FISA procedures ought to add those elements to the requirements.

Senator SPECTER. Well, as you know, the requirements under the Electronic Surveillance Act to give notice to someone who has been the subject of a wiretap were not included in the Foreign Intelligence Surveillance Act, because of the national security interests.

So, it is candidly doubtful that those provisions would be met. I'm not certain about it, but there would be those policy considerations against it.

Considering the likelihood of those, of that same policy being carried forward in the search and seizure issue, would you think that it at least provides some additional protection by requiring a warrant?

Mr. HALPERIN. Well, the problem we have is that if Congress does that, it is then authorizing those searches. And we think those searches are unconstitutional. And we do not think Congress should be in the business of granting authority to the Government to break into people's houses when they are not at home, search their papers, and leave no evidence behind that they've done so simply because they conclude that the person is an agent of a foreign power.

As you recall, in the prosecution of Colonel Abel, who as an agent of a foreign power if there ever was one, the Supreme Court was unanimous in its view that he was entitled to the full protection of the Fourth Amendment. And we simply don't think that the tradeoff of having the additional protection of a warrant is worth it for the Congress to be giving its authorization to this.

Senator SPECTER. Do you think Congress should stay out of it entirely, even though—

Mr. HALPERIN. No, we think you should prohibit it. We think you should prohibit searches unless there is knock and notice.

Senator SPECTER. Well, if we don't prohibit searches, would you prefer us to stay out of requiring judicial approval if we don't go as far as you would like us to go?

Mr. HALPERIN. Yes. We—this is not an answer I give you lightly. We have thought a lot about it and that is our firm and clear position.

Senator SPECTER. Why take a position which deprives at least one additional level of protection for the privacy interest?

Mr. HALPERIN. Because we think that there—that when we get the right case in court, and I mentioned to Senator Boren before, we have been looking for the right case—we think that the court is going to find it unconstitutional and we think there is some chance that the court's decision would be effected by the fact that Congress had made the decision to authorize those searches.

Senator SPECTER. So you think if the Congress provides for judicial review that might save the constitutionality?

Mr. HALPERIN. Yes.

Senator SPECTER. Isn't that a pretty good reason for the Congress to act?

Mr. HALPERIN. Well, yes. We think you ought to act to protect the Constitution. And we also, as I said to Senator Boren, we don't

despair in persuading you that you ought to prohibit these searches.

Senator SPECTER. Well, of course we should act to protect the Constitution. The only question that leaves open is how do you act to protect the Constitution? But when you say that with the Congressional enactment that might save the constitutionality of the warrant searches even though it does not provide the provisions you want.

Mr. HALPERIN. No I didn't—excuse me, what I said was the court might uphold it. And, as you know, Senator, the ACLU's view of what is constitutional does not depend on what the court says. Our view is that those searches would be unconstitutional. And we think a way needs to be found to stop them and that Congress should not be in the business of authorizing them.

Senator SPECTER. Well, I understand that the ACLU may not change its view of what the Constitution means just because the Supreme Court says so. There are a lot of other people who don't change their views on the other side, a lot of law enforcement officials who are unhappy with the Miranda decision. But the Supreme Court, under our system, of course makes the last statement on the subject.

Let me—that is, absent a Constitutional amendment. We haven't had any of those in this field.

Mr. HALPERIN. But also Congress, as of course you know, can provide greater protections than the court says is necessary under the Fourth Amendment. And it has done so, for example, in the Bank Privacy area where when the court said you can seize bank records, the Congress said no. You did the same thing with secret searches of news rooms. The court said it was OK. And the Congress, in our view, properly said even if the Constitution permits it, good sound public policy does not do so.

Senator SPECTER. Well, we were talking of course about what the purview of the Constitutional protection was. Of course, Congress can strengthen rights of privacy beyond what the Constitution requires. But in considering to have judicial supervision on a warrant, we are considering taking a step beyond what is now required. And I understand that you don't think it goes far enough. And that you would prefer that it not be enacted even though it is an additional protection of privacy. I'm still not quite sure why you come to that conclusion.

But let me move on to one final question because—

Mr. HALPERIN. Could I make just one point about that?

We think that the Government, the Executive branch, will do it much more often if Congress has authorized a warrant system, because they will then feel that they have the protection of that warrant against the possibility of both damage actions and other kinds of procedures. So we think the practical consequences will be that there will be more secret searches of the homes of Americans.

Senator SPECTER. I'm not sure you're right about that. The witnesses representing the Government today asserted very forcefully that they feel it is a matter of presidential authority, constitutional authority. They look to the same document you do, the Constitution, to find additional Executive power as opposed to rights under the 4th Amendment.

As I was starting to say, Senator Boren would like to conclude in just a minute or two, because we have an additional witness who has an early plane, and I would like to just touch on one other subject and that is the question of the death penalty. And I know the ACLU views generally, but let me just ask why we shouldn't have the death penalty where you have espionage, and you have an increasing trend of espionage cases for pay. In this application of the death penalty you do not have the kinds of concerns which have troubled the Supreme Court in *Furman versus Georgia*, for example, on discriminatory application. You don't have the question of unfair treatment for minorities as opposed to non-minority members. Here you have danger to an entire country that could result in many, many deaths. Why not provide for the death penalty, especially in espionage cases? Or the possibility of the death penalty.

Mr. HALPERIN. There are several problems. First of all, as you know, Senator, the ACLU believes that in all circumstances the death penalty is cruel and unusual punishment and should be unconstitutional. Second, we think there are specific problems of applying the death penalty in cases where there isn't a homicide, where there isn't a murder committed, where there is no death. But third and I think at a more practical level, people who commit espionage think they are not going to get caught. Nobody commits espionage thinking the worst penalty that I can suffer is life in prison. And as you know, several of these people have been sentenced to life in prison and several successive sentences so there is no possibility of parole. I don't believe that Mr. Boyce or Mr. Kampiles committed espionage because they said to themselves, the worst that can happen is three consecutive life sentences, but I can never get the death penalty. I think what they said to themselves is, this system is so loose and so sloppy that I am not going to get caught, and so I am going to sell these things and get some money.

So I would say that rather than get into what is a divisive and emotional issue for our society of the death penalty, the urgent task, and one that I commend the Committee for moving forward on, is to figure out ways to change the system so that when a Boyce or Kampiles thinks about selling a document, he says to himself, I am going to get caught, or there's a 25% chance I am going to get caught, and if I get caught I am going to get three consecutive life sentences. If he thinks he is going to get caught, I don't think he is going to do it. And the fact that you add the additional item of the death penalty I think is very marginal.

Moreover, unlike people who commit espionage for ideological reasons and who might conceivably go to their death rather than talk, I think it is absolutely clear that anybody who does it for money is going to agree to cooperate with the Government at some point, and one of the conditions of that is going to be that the death penalty is off the table. So I think as a practical matter it would not happen.

But I would say the most important point is that it is certainty or very high likelihood of being caught that deters here and not the theoretical possibility that you might get the death penalty.

Senator SPECTER. Well, just a final statement because I know the Chairman wants to move on. I agree with you about the swiftness and the certainty as a deterrent, but I respectfully do not agree

with you about people not thinking about the death penalty. I think especially now as we see espionage motivated by ideological reasons to monetary ones, my own experience is that people do think about the consequences, and especially people who want to make crime pay and want to make espionage pay. And where you don't have a specific murder involved, I do not think that that line of cases is applicable here at all. There you are talking about no murder for rape, or no murder for a remote accessory in a felony murder. But where you subject many people to the risk of death and have a very prime societal interest as you do in espionage, I do believe that the constitutionality would be upheld. But I agree that we are not going to settle this today.

Thank you very much, Mr. Halperin. Thank you, Mr. Chairman.

Chairman BOREN. Thank you very much. Thank you, Senator Specter, for continuing on and thank you, Mr. Halperin, for some very, very helpful testimony.

Mr. HALPERIN. Thank you, Mr. Chairman. I very much appreciate it.

Chairman BOREN. Thank you.

Our next witness is Kenneth E. deGraffenreid who served as Director for Intelligence Programs at the National Security Council under the Reagan Administration. In this capacity he was responsible for developing and coordinating the counterintelligence and security policies for the Administration. As I mentioned earlier, since he left the White House, he has been affiliated with the National Strategy Information Center and has written extensively concerning improvements in counterintelligence capabilities.

And I know, Mr. deGraffenreid, that you need to be out of here in about 15 minutes, and so what I would like for you to do if you can is summarize, hit the highlights of your testimony. We'll put your entire testimony in the record. And then we will try to constrain our questions as much as possible to get you out in time to catch your plane. I apologize we have gone on so long, but it has been because of the interest in this subject and the caliber of the testimony we have received. We very much appreciate your inconveniencing yourself to come and take the time to be with us today.

[The prepared statement of Mr. deGraffenreid follows:]

PREPARED STATEMENT OF KENNETH E. DEGRAFFENREID

Mr. Chairman, it is an honor and pleasure to have this opportunity to speak with you today on the recommendations on security and counterintelligence made to you by the Eli Jacobs Panel and on S. 2726, the "Counterintelligence Improvements Act of 1990."

As one who began working on security and counterintelligence policy issues as a staff member on this Committee in the late 1970's (as Senator Chafee's designee) and who had responsibility for pushing security and counterintelligence reforms as director of intelligence programs on the NSC staff at the White House for most of the 1980's, I know firsthand how this Committee has carried the torch in this vital area of protecting the national security from the foreign intelligence threat. Over these years, the Committee has consistently kept energy and attention focused on reforming and improving the Nation's security, countermeasures, and counterintelligence capabilities. The Committee's interest has remained steadfast even when, on occasion, interest and attention has flagged within some quarters of the Executive branch.

While substantial progress has been made in improving these capabilities, this area of Government has proven particularly resistant to reform and to change, even in the face of a decade of strategically damaging espionage disasters. There is a seri-

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INTELLIGENCE LEGISLATION

Divider Title: _____

INTELLIGENCE LEGISLATION

Talking Points

Charge: Morton Halperin has a long record of hostility to the U.S. intelligence community. He has "...campaigned for the dismantling of U.S. intelligence capabilities and agencies." [The Washington Times, Editorial by Frank Gaffney of June 8, 1993, Tab 1]

Response: -Morton Halperin has spent a greater portion of the last twenty years helping to craft legislation that would not only make U.S. intelligence collection adhere to the constitutional rights of individuals, but also create laws criminalizing the disclosure of classified information.

Narrative

Halperin believes that the requirements of national security and of civil liberties can be satisfied at the same time if one takes both seriously. While working for the ACLU he practiced these beliefs by regularly engaging in discussions with members of Congress and their staffs and officials of the Executive branch. The result was a series of bills which Halperin supported on behalf of the ACLU and which also had the support of the intelligence community.

The legislation that Halperin helped to craft includes: (1) the Foreign Intelligence Surveillance Act, which established procedures for national security wiretaps; (2) the Classified Information Procedures Act, which dealt with the problem of grey mail by government officials seeking to escape criminal prosecution by threatening to release classified information; (3) the Central Intelligence Agency Information Act, which exempted the CIA from certain procedures of the Freedom of the Freedom of Information Act; and (4) the Intelligence Oversight Act, which reduced the number of committees to which covert operations needed to be reported while clarifying the oversight powers of the intelligence committees. In each case Halperin was criticized for supporting bills that furthered the agenda of the intelligence community. Senator David Boren has recently placed a statement in the Congressional Record applauding Halperin for these actions and in general for his cooperation with the intelligence committees ["Nomination of Dr. Morton H. Halperin" by Senator Boren, Congressional Record-Senate, July 1, 1993, Tab 2].

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1

Divider Title: _____

Lani's finale . . . a new act to follow

Waiting in the wings

President Clinton's decision to abandon his nominee to the position of Assistant Attorney General for Civil Rights, Lani Guinier, is a prudent move that will save his floundering presidency considerable grief. More importantly, it may even save his presidency if it establishes personnel standards and recruitment practices that are applied elsewhere in his administration.

In announcing his withdrawal of Ms. Guinier's nomination on June 3, Mr. Clinton said, "Had I reviewed her writings before I had nominated her, I would not have nominated her." This was so, he maintained, because his belated examination of her numerous published law review articles persuaded him that he would have been obliged in the predicted, bruising Senate confirmation fight to support ideas "that I can't myself defend."

Of course, a president of the United States cannot be expected to read all the published works of every nominee for senior positions in his administration. He has to rely on those to whom he has entrusted the job of identifying and screening potential officeholders. Hence, the first lesson President Clinton should take away from the Guinier experience: He has been poorly served by those — including his wife and her coterie of unaccountable but ever-so-politically-correct friends — who have to date wielded immense influence over personnel decisions, including that of Ms. Guinier. They should not be allowed to do so in the future.

The second lesson is that the president had better be careful to establish that those he would have serve in his administration share the values and positions to which he himself subscribes. Presumably, the latter are the same ones that he portrayed to the American people in the course of the campaign, and that earned him his job.

As the appointment of David Gergen to the position of counselor to the president has helpfully reminded everyone, such values and positions were centrist — if not conservative — in most respects. The umbrella term Candidate Clinton used to describe them was "New Democrat," which he shamefully con-

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left-wing "Old Democrat" ideology personified by Lani Guinier and the people who nearly foisted her on his Justice Department.

The third lesson should be that, had Mr. Clinton made the mistake of sticking with the Guinier nomination, the least of his problems would have been with her confirmation fight. As the old line goes, people are policy: people bent on pursuing their own agenda rather than the president's will cause him no end of grief.

President Clinton and Mr. Gergen would do well now to apply these lessons to another individual, Morton Halperin, in line for a top appointment. Mr. Halperin is expected to be nominated for the new Pentagon po-

sition of assistant defense secretary for democracy and human rights.

Importantly, Mr. Halperin has not held government office since he left government in the early 1970s after playing a role in the unauthorized publication of classified documents that became known as "the Pentagon Papers." In the intervening period, Mr. Halperin became the bete noire of the national security community and the darling of the radical left. From vantage points like the Institute for Policy Studies and American Civil Liberties Union, he held forth about the need to end all government security classification and campaigned for the dismantling of U.S. intelligence capabilities and agencies.

Mr. Halperin actually went so far as to aid and abet Philip Agee and others in their efforts to reveal publicly the identities of American covert operatives. As a direct result, these individuals' lives were jeopardized — and in at least one case sacrificed. At a minimum, missions on behalf of the national security were compromised by Mr. Halperin and his friends.

It seems inconceivable that President Clinton could be aware of — let alone have read — the writings and views of Morton Halperin. Indeed, Mr. Halperin's collected works would be anathema to any bona fide "New Democrat." They are certainly sufficiently indefensible to assure that his confirmation battle would make Lani Guinier's difficulties with the Senate look like a love-in.

This prospect may explain why Mr. Halperin's nomination has not

yet been formally transmitted from the White House to the Senate. It does not, however, explain why such an individual has been permitted to operate now in the Pentagon for several months, to obtain a Top Secret security clearance and access to some of the nation's most sensitive secrets and to play an important role in defense policy-making — all without the Senate's blessing.

The national interest demands that the Senate Armed Services Committee (which exercises jurisdiction over the Pentagon's presidential nominees) now render a service to the president and the country comparable to that performed in recent days on the Guinier nomination by the Judiciary Committee. It must bring to his attention Morton Halperin's unacceptability as a candidate for high office in the Defense Department and the need to terminate the activities he is presently, and presumptuously, engaged in without the Senate's approval — or even a formal presidential nomination.

If members of the Senate continue to value their constitutional prerogatives (something of an open question in light of the Senate's rubber-stamping of START I and other recent arms control agreements), they had best help Mr. Clinton come to grips with key personnel decisions at the Defense Department. These are, after all, decisions that may ultimately prove to be far larger problems for the national interest, to say nothing of the Clinton presidency, than the Guinier nomination ever was.

Frank J. Gaffney Jr. is the director of the Center for Security Policy, the host of public television's "The World This Week," and a columnist for The Washington Times.

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2

Divider Title: _____

NOMINATION OF DR. MORTON H. HALPERIN

• Mr. BOREN. Mr. President, I understand that the Senate will shortly be receiving from President Clinton the nomination of Dr. Morton H. Halperin to be Assistant Secretary of Defense for Democracy and Peacekeeping. I welcome this impending nomination. I hope and expect that Dr. Halperin will be swiftly confirmed by the Senate, and look forward to working with him.

Dr. Halperin, a former Defense Department and National Security Council official, is currently a senior associate at the Carnegie Endowment for International Peace. As many of my colleagues know, Dr. Halperin was for many years an official of the American Civil Liberties Union responsible for their work on issues at the intersection between national security and civil liberties.

In that capacity, Dr. Halperin worked closely with the Senate Intelligence Committee, which I chaired from 1987 through the beginning of this year. During my period as chairman, our committee and staff were in regular contact with Dr. Halperin and his colleagues. We found that he brought to the issues a determination to solve difficult problems in a nonideological manner that reflected commitments not only to the defense of individual liberty but also the requirements of national security.

Over the years, Dr. Halperin has worked with the intelligence oversight committees and with Republican and Democratic administrations in support of critical intelligence legislation including the Foreign Intelligence Surveillance Act, the Classified Information Procedures Act, the Central Intelligence Agency Information Act, and

the Intelligence Oversight Act. In each of these cases, with the active involvement of Dr. Halperin, legislation was crafted which had the support of both the intelligence agencies and champions of individuals' rights. He gained not only my respect and that of other committee members, but also the respect of many executive branch officials with responsibility for intelligence law and policy.

Dr. Halperin is a graduate of Columbia College and Yale University. He has taught at both of those institutions, as well as at Harvard, MIT, and the George Washington University.

Dr. Halperin is a person of strong integrity as well as intellect. I believe he would bring to the post of Assistant Secretary for Democracy and Peacekeeping these qualities as well as a commitment to look in an open-minded way for fresh solutions to defense policy issues. •

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DISCLOSURE OF NAMES OF COVERT AGENTS

Divider Title: _____

DISCLOSURE OF NAMES OF COVERT AGENTS

Talking Points

Charge: Morton Halperin believes that CIA operatives abroad should be publicly identified. He has testified before House and Senate Committees that "any restriction on publication of names of CIA Station Chiefs was an unreasonable restriction on free speech." Halperin is believed to have "...aided and abetted Philip Agee and others in their efforts to reveal publicly the identities of American covert operatives..."

Response: -Morton Halperin believes that CIA operatives abroad should not be publicly identified. Government officials and former government officials who reveal such identities should be subject to criminal penalties.

-He has never testified that "any restriction on publication of names of CIA Station Chiefs was an unreasonable restriction on free speech."

--In fact, he testified that former government officials such as Philip Agee had no First Amendment right to disclose identities and that "we want to draft a constitutional statute that would punish Mr. Agee's conduct in revealing the names of agents."

-Halperin did nothing to aid and abet Philip Agee and others in their efforts to reveal the identities of covert agents and has testified before the Judiciary Committee that he does "not condone the practice of naming names..." [Hearings, Senate Judiciary Committee, May 8, 1981 at p. 73, Tab 1]

Narrative

Morton Halperin believes that CIA operatives abroad should not be publicly identified and that government officials and former government officials who reveal such identities should be subject to criminal penalties. Halperin has always believed that the identities of covert agents should be protected. For example, in a book published in 1977, he wrote that "[t]he identity of particular spies, or other information compromising to ongoing lawful operations, would of course be appropriate matters for secrecy as well." [Top Secret (Tab 2)]

Halperin's stand on legislation to protect the identities of covert agents is a matter of public record. He supported the Agents Identities Protection Act as it related to current and former government officials. In his testimony Halperin stated, "We do not condone the practice of naming names and we fully understand Congress' desire to do what it can to provide meaningful protection to those intelligence agents serving abroad, often in situations of danger." [Hearings, Senate Judiciary Committee, May 8, 1981 at p. 73, Tab 1]

His critics have asserted that he repeatedly testified before House and Senate Committees after Richard Welch's assassination that any restriction on publication of names of CIA chiefs was an unreasonable restriction on free speech. Halperin has never testified that "any restriction on publication of names of CIA chiefs was an unreasonable restriction on free speech". On the contrary, as stated above, Halperin, on behalf of the ACLU, consistently testified that there was no First Amendment objection to this part of the legislation and that the ACLU did not oppose it. [Hearings, Senate Judiciary Committee, May 8, 1981 at p. 73, Tab 1]

Halperin did not support the portion of the Agents Identities Protection Act relating to private individuals who were simply drawing inferences from unclassified documents published by the U.S. government. In Halperin's view and that of many others, including prominent news and publishing organizations and First Amendment Scholars, the First Amendment does not permit the government to punish a private citizen for drawing conclusions from information published by the government. More importantly, the bill, as drafted, would have covered not only those in the business of naming names of agents, but also newspapers that published a single name as part of a news story or an organization that exposed one of its members as working for an intelligence agency in violation of its rules. Halperin never supported publishing lists of agents names as several publications were doing and testified that such practices did not merit First Amendment protection.

Halperin did nothing to aid and abet Philip Agee and others in their efforts to reveal the identities of American covert operatives. In fact, Halperin testified to the House Intelligence Committee in 1980 that "We want to draft a constitutional statute which would punish Mr. Agee's conduct in revealing the names of agents."

The only time Halperin can be said to have assisted Agee was in 1975 when he travelled to England, at the request of Agee's ACLU lawyer, to testify at his deportation hearing. The hearing was before a panel of private citizens appointed to review the finding that Agee should be deported from the United Kingdom. Halperin in his testimony did not discuss Agee's conduct. Rather, he simply urged the panel to go beyond the claim that British national security required that Agee be deported to assure itself there was a valid reason.

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Divider Title: _____

**INTELLIGENCE IDENTITIES PROTECTION ACT
OF 1981—S. 391**

**HEARING
BEFORE THE
SUBCOMMITTEE ON SECURITY AND TERRORISM
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-SEVENTH CONGRESS
FIRST SESSION
ON
S. 391**

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

MAY 8, 1981

Serial No. J-97-28

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...involving the defendant's activities, and that his actions sufficiently evidenced a design to identify the classified identities of covert agents.

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

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

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

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

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

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

Mr. HALPERIN. Thank you, Mr. Chairman.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Chairman:

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

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

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

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

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

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

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

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

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

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

because of the disclosure of sensitive information based on privileged access and made by faithless government employees with the purpose of damaging U.S. intelligence efforts...the public has become aware of indicators in these documents that can sometimes be used to distinguish CIA officers. 3/

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

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

counterterrorism investigation);

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

In all of these stories, the press or an author made the decision that the name was essential to tell the story or to give it credibility. All of the stories involve "covert agents" as defined in S. 911, even though in none of these cases is it arguable that the narrow purpose of the bill is being served: the protection of Americans serving abroad in circumstances which place their lives in jeopardy.

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

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

However, we believe this describes the activities of the press, researchers, and scholars. The very act of investigative reporting to uncover CIA involvement in foreign assassination plots or illegal FBI COINTELPRO activities is a "pattern of activities intended to identify and expose covert agents..." And the Justice Department testified that³ "a single act of disclosure" meets the disclosure element of the bill.⁷⁷

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

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

Given the definition of covert agent, the absence of bad purpose, and the fact that investigative reporters may engage in a "pattern of activities intended to identify and expose covert agents," S. 601 as introduced could reach the following scenarios.

- 1. A reporter suspects that the Administration in its eagerness to give aid and assistance to the Savimbi-led effort in Angola has interpreted the Clark Amendment to permit aid which is used for other than military purposes. He investigates, discovers, and exposes the fact that the CIA is giving such aid to Savimbi. He reports also that the intelligence committees were not notified of the aid, in apparent violation of the oversight provisions of the National Security Act as amended last year.
- 2. A reporter suspects that a terrorist group made up of Cuban exiles in Florida is controlled by persons who were former sources of operational assistance to the CIA. She investigates, uncovers the past CIA relationships, and publishes the story, giving their identities.

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

The Constitutional Issue

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

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

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

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

Perhaps the case most directly on point is the widely quoted opinion of Judge Learned Hand in United States v. Heine, 151 F. 2d 811 (1945). Heine engaged in an activity very similar to that which appears to have given rise to section 601(c) of S. 911. In overturning this conviction for espionage, Judge Hand stated:

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

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

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

In proposing a section of such breadth, S. 2216 marches overboldly, we think, into a difficult area of political, as opposed to scientific, 'born classified' information, in a context that will often border on areas of important public policy debate...A speaker's statements about covert activities could be punished even though they are not based on access to classified information, do not use inside methodology acquired by the speaker in government service, and are unimbued with any special authority from former government service...^{8/}

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

A mainstream journalist who occasionally writes stories based on public information concerning

which foreign leaders are thought to have intelligence relationships with the United States may fear that any other stories by him critical of the CIA will be taken as evidence of an intent to impede foreign intelligence activities.

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

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

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

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

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

Conclusion

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

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

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

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

We urge you not to pass S. 191's section 601(c). However, if you are going to proceed, we ask you to explore ways to narrow the reach of the bill. For example, the definition of covert agent should be narrowed to include only those U.S. officers or employees serving overseas. Foreign leaders and FBI agents at home should be excluded from the definition. At the same time, the bill should substitute a bad purpose, perhaps along the lines of the espionage statutes, in place of the objective "reason to believe" standard. (We submit that both intent and reason to believe present similar prosecution proof and graymail problems and should not be the basis for choosing one or the other formulation). Finally, we believe that a "justification" defense, which professor Robert Bork implies, 10/ should be spelled out in the bill, so that it will not apply if the disclosure involves illegal or unauthorized intelligence activities.

We again thank you for the opportunity to testify today on

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FOOTNOTES

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

2. Intelligence Identities Protection Act, Report of the House Committee on the Judiciary to Accompany H.R. 5615, p. 3 (Rept. 96-1219, Part 2, 96th Cong. 2d Sess. 1980).

3. Ibid.

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

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

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

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

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

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

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

FIRST AMENDMENT PROTECTION

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

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

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

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

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

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

Senator DENTON. Nonprofit, nonpartisan?

Mr. BERMAN. Yes. It is a—

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

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

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

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

Senator DENTON. Thank you, sir.

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

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

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

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

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

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

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

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

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

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

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

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

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

strike a balance between national security and civil liberties concerns.

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

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

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

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

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

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

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

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

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

[Recess.]

Senator DENTON. The hearing will resume.

I will refer now to Senator East for any questions he might have.
 Senator EAST. Thank you, Mr. Chairman.

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

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

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

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

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

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

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

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