

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

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

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

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

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

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

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

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

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

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

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

Senator DENTON. You are well within your time.

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

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

Mr. HALPERIN. Yes. I think that is—

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

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

Mr. BERMAN. It is not in the bill.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator EAST. Yes.

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

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

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

Senator EAST. Well—

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

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

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

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

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

Senator DENTON. Thank you, Senator East.

Senator Biden?

Senator BIDEN. Thank you.

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

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

Mr. BERMAN. We do not oppose that bill.

Senator BIDEN. That concept, you do not oppose?

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. HALPERIN. Yes; I have.

Senator BIDEN. In what capacities and for whom?

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

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

Mr. HALPERIN. Yes; I did.

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

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

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

Mr. HALPERIN. That is correct.

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

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

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

The story says:

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

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

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

Are they prosecutable under this law?

Mr. HALPERIN. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

And the disclosure was made with reason to believe that the activity would impair or impede intelligence activities. You would

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

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

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

Do you have an opinion on that specific question?

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

Senator BIDEN. Thank you, very much.

Thank you, Mr. Chairman.

Senator DENTON. Thank you, Senator Biden.

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

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

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

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

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

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

Senator DENTON. No; one more.

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

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

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

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

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

Would you care to make an opening statement, sir?

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

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

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

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

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

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

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

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undertaking. However, it would not be inappropriate to place an obligation upon any official of the executive branch who learns of unlawful activities to make the information public. For example, under an amendment to the Foreign Assistance Act passed in 1974, Congress prohibited the conduct of covert operations in foreign countries "other than those intended solely for obtaining intelligence," unless the President approved the operation and reported the fact of such operations to the appropriate committees of Congress.¹² An official learning of a covert operation designed for a purpose other than intelligence, which had not been approved by the President or reported to Congress, would be obligated to make the information public.

The categories listed above represent an attempt to specify the most critical types of information needed by Congress and the public in order to participate intelligently in vital decisions on foreign policy and national defense. Upon examination, it appears certain that the release of these kinds of information would not have any serious detrimental impact on national security. It is rarely possible—or even advantageous—to conceal such information from potential enemies. In the past, as we have shown, the secrecy system has largely operated with reference to domestic audiences. Any adverse effects of increased disclosure to foreign governments will be far outweighed by the value of having this information available to Congress and the public.

Presumptive Secrecy

In addition to legislating categories for mandatory disclosure, Congress should designate certain kinds of information as presumptively secret, because they are not in general important for public debate, while their release could have detrimental effects on national security. This information should, however, be available to Congress on a secret basis; and in any particular case the presumption of secrecy might be overcome if responsible officials are satisfied that there is a strong need for the information for public debate on a major issue.¹³

Categories of sensitive information that should be presumptively secret because of their limited use to the public include the following:¹⁴

Weapons systems: details of advanced weapons systems design and operational characteristics. One category of such information is already required to be kept secret by the Atomic Energy Act, which specifies that information useful in the manufacture of atomic weapons and other atomic explosive devices should be classified as "restricted data."

Technical characteristics of many nonnuclear weapons systems are quite sensibly kept secret. Secrecy makes it harder for other countries to manufacture these weapons, to counteract them, or to exploit their vulnerabilities. Such secrecy need not interfere with the necessary public debate on appropriations measures, provided that enough information is disclosed to establish the cost and the benefits of the system.¹⁵ Likewise, secrecy need not and should not interfere with appropriate public participation in the effort to institute arms control agreements. Like other strategic issues, arms control proposals involve a complex mixture of technical and political questions. While official experts inevitably play a leading role, their progress should not be entirely insulated from public evaluation.

Details of plans for military operations. Our scheme would require the United States to reveal that it was engaging, or about to engage, in military operations against another country. But the public and Congress need not know the precise operational details in order to debate the wisdom of planned or current operations. Such information could be of great value to a potential opponent.

Ongoing diplomatic negotiations. Diplomatic negotiations cannot, in many cases, be carried on successfully if one or both countries continuously make public the negotiating positions of both sides. Public negotiations very quickly turn into propaganda sessions; the real negotiations, if they survive, occur quietly behind

the facade of the formal ones, as in the 1968-1972 Vietnam peace negotiations in Paris. On the other hand, the Pentagon Papers episode illustrates that the competence and sincerity of the negotiating performance of American officials may be a legitimate public concern. While the fact of negotiations should be announced, the positions put forward in the negotiations may properly be kept secret during the period when the negotiations are under way. The door should be left open, however, for a subsequent public evaluation of the transaction.

Intelligence methods: codes, technology, and spies. Specific details of American information gathering activities should be kept secret. That the United States manufactures codes for use in its diplomatic and military operations is, of course, no secret. The United States government officially denies its interception of messages and its attempts to break codes. This "secret" would be a casualty of our scheme, in that the functions of the National Security Agency would have to be made public. There is, however, no reason why the details of the manufacture of codes, the procedures used to break codes, or the fact that any particular code has been broken should be made public.

We have discussed the need for such disclosures about intelligence gathering organizations as will enable the expenditure of public funds to be evaluated and controlled. There is no need for the public or Congress to know the precise operational details of such programs as satellite reconnaissance or foreign governmental communications interception. The latter information is presently protected by statutes against unauthorized disclosure.

The identity of particular spies, or other information compromising to ongoing lawful operations, would of course be appropriate matter for secrecy as well.

The Middle Category: Balancing

These efforts to specify categories of information that must be released and those that should be kept secret do not pretend to cover

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COVERT ACTION

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COVERT ACTION

Talking Points

Charge: Morton Halperin believes that all covert activity should be illegal.

Response: -Morton 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.

-Halperin in the past criticized covert action because it was a substitute for policy and was conducted without adequate congressional oversight.

Narrative

Halperin's critics accuse him of opposing the use of covert action to further U.S. interests. Their accusations distort his writings on this subject. In short, Halperin has criticized covert operations conducted unlawfully or without the support of Congress or the public and to further objectives that are not consistent with the public policies of the United States. He supports covert actions when conducted in support of public U.S. foreign policy goals. 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.

Halperin's opposition to covert action in the past was in reaction to particular covert operations conducted as a means to avoid congressional oversight or public debate. In 1974, in response to revelations of the Senate Intelligence Committee regarding improper covert activities, Halperin advocated that Congress prohibit covert operations because they were being conducted as a substitute for policy. He also called for the abolition of the covert side of the CIA, a position he abandoned in 1976 in favor of a proposal that the CIA be divided into two parts: an analytic agency and an operational agency to conduct clandestine human intelligence collection, counter-intelligence abroad, and covert activities to the degree authorized by law.

Halperin in his writings and testimony has made clear that his objection is to operations which are not consistent with the public policy of the United States. Thus he would support the operations carried on "covertly" to aid the Afgan rebels because they were conducted pursuant to a congressional resolution. He would support activities designed to aid the opposition in Iraq because they are consistent with the public policies of the government.

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**WHISTLE-BLOWER
(PERSIAN GULF)**

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WHISTLE-BLOWER (PERSIAN GULF)

Talking Points

Charge:

Halperin urged federal employees to disclose information about their actions in the Persian Gulf if they disagreed with the policy.

Response:

-Halperin reminded government employees of their rights under the whistleblower statutes to inform Congress if it was being misled by Administration witnesses. Halperin stated that any information should be disclosed through **classified** channels unless the material was unclassified and could be disclosed publicly.

-Halperin does not advocate the right of a government official to release classified information if he or she disagrees with a policy.

Narrative

The minority staff position paper and a number of press reports have accused Halperin of asking federal employees to release any information, including classified materials about the Gulf War, if they disagreed with the policy.

In a statement on behalf of the ACLU, Halperin did urge any federal employee who believed the Congress was being deceived to report that information to Congress through **classified** channels (Tab 1). In this statement, he noted that in the past, information had been withheld from Congress as it considered the Gulf of Tonkin Resolution. Reminding government employees of their rights under the whistleblower statutes, Halperin stated disclosure of such information should be done through properly **classified** channels, or if the information was unclassified, publicly.

It should be noted that Halperin has never supported the unauthorized release of classified information. Dr. Halperin has never advocated the right of a government official to release classified information if he or she disagrees with a policy. In fact, he has testified that the government employees should be denied clearance or dismissed if they fail to respect the nature of classified materials (Tab 2).

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1

Divider Title: _____

**FEDERAL POLYGRAPH LIMITATION AND
ANTI-CENSORSHIP ACT OF 1984**

HEARINGS

BEFORE THE
SUBCOMMITTEE ON CIVIL SERVICE
OF THE

COMMITTEE ON
POST OFFICE AND CIVIL SERVICE
HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

H.R. 4681

A BILL RELATING TO THE ADMINISTRATION OF POLYGRAPH EXAMINA-
TIONS AND PREPUBLICATION REVIEW REQUIREMENTS BY FEDERAL
AGENCIES

FEBRUARY 29, 1984

Serial No. 98-39

Printed for the use of the Committee on Post Office and Civil Service



Mrs. SCHROEDER. Again, I apologize for how much we have to do and how short a time we have to do it in.

The next witness we have this morning is Morton Halperin, who is the Director for the Center of National Security Studies.

We welcome you as a friend of the committee. We are glad to have you back. We will put your statement in the record and be happy to hear what you have to say.

STATEMENT OF MORTON H. HALPERIN, DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES

Mr. HALPERIN. Madam Chairman, I appreciate the opportunity to appear here on behalf of the American Civil Liberties Union. Our position is that any prepublication review of the writings of any government official is a violation of the first amendment.

I want to just make three points, since I know time is very short. First, as to the current status of the situation, or what the situation will be like on April 15 if Congress does not act again, I think it should be clear that the withdrawal of the directive, if the President is in fact withdrawing it or suspended it—and I am not sure I understand what those words mean—that the withdrawal simply would withdraw, if it was withdrawn, the Presidential requirement that agencies have a prepublication review system. It would not eliminate the authority of the agencies to establish the identical system on their own authority.

Indeed, it is important to remember that the CIA established its prepublication review procedures without any Presidential authority at all. The Government never alleged in the litigation over the *Snepp* case or the *Marchetti* case that the CIA was operating under a Presidential directive and, yet, the Supreme Court upheld the validity of the prepublication review agreement.

So I think it ought to be clear to the Congress that, in the absence of legislation, or an affirmative Presidential directive prohibiting prepublication review, each of the agencies will be free to go ahead and implement that Justice Department draft contract, including the Justice Department, even if the President continues to suspend or withdraw, or whatever it is that he has done to that agreement.

Of course, as I understand the situation, there would be nothing to stop the President, say, after November or some other date, to reissue the agreement again or to withdraw the suspension of the agreement.

The second point I want to make has to do with the CIA censorship system that has already been in effect.

It is sometimes said that the system can work because it works in the CIA. I think it is important to understand that it doesn't work well in the CIA, that various people, including Admiral Turner, have said that the CIA is seeking to prohibit them from publishing things that they think they have a right to publish. I think the committee has already heard from former CIA officials who have gone through that process.

The fact that the CIA has excised material from documents that it submitted to it, in my view, proves nothing about the validity or the value of prepublication review. First of all, I think the record is

hear that the CIA often censors sentences that are not in fact classified. So the fact that they take out sentences may simply prove that the system isn't working rather than it is.

Second, I think the requirement for prepublication review has the effect on people of saying let's put the sentences in and see whether the agency takes them out. So if you have to submit the document anyway, you might as well put in the things that you think may be classified and let the agency decide whether to take them out. The fact that sentences are put in which are later excluded by the CIA doesn't indicate that the same people would publish those sentences on their own if they did not have to submit them.

Finally, I want to make a comment about the attempt to apply this system to senior officials of the Government, because that, I think, raises wholly different problems than are raised by a censorship system imposed on career officials of intelligence agencies— which I want to emphasize again we object to as well.

That is, first of all, because former senior officials write a great deal more, and many more of them write, and many more of them write things that are very time urgent. In my prepared statement, I have the example of the "Starwars" speech and the comments by two senior Pentagon officials. The fact that they could not have appeared that weekend to give the public and the Congress some understanding that people with equal access thought the President's speech was absurd was, I think, a very serious challenge and threat to the first amendment.

Moreover, I think it is important to understand that the censorship of senior officials can only be done by other senior officials. Junior bureaucrats are not going to censor writings of former Secretaries of Defense or former Assistant Secretaries of Defense, in part because they recognize those people may be once again Assistant Secretaries of Defense, but also because they simply don't know what is classified. A lot of the judgments about what is classified in the writings of various senior officials has to do with access to information and judgments about the response of foreign governments, and so on, which junior officials simply don't have access to.

So what I think will happen if former senior officials are forced to submit their writings is that those decisions as to what to let them write will get bucked up to senior officials in the current administration. They will not have the time to look at them and, therefore, there will be delays.

Moreover, all senior officials of the Government have the view that everything is classified unless they decide it ought not to be classified, and that is what they would call a policy judgment rather than a technical judgment. If you ask senior officials to give you the definition of "confidential" in the Executive order, you will find that almost none of them know what it is or think it relevant. The judgment about what to make public is viewed as a political judgment about what information the American public should have to understand the President's policies or the agencies policies. To give those officials the right to censor the writings of former officials is, in my view, to pose a very serious threat not only to the first amendment in principle, but also to the system the way it now operates.

Finally, I think one ought to understand, as George Reedy suggested, that there are a lot of people who simply will not go in the Government if they have to sign such agreements.

But even more, I think there are a great many other people who will not become consultants. One of the things that improves public policy is the widespread use by the Government of consultants to take on temporary assignments for the Pentagon, the State Department or for the White House, often those involve access to sensitive compartmentalized information. If consultants have to sign prepublication review agreements, as they would under this directive, I think many fewer people would undertake those kinds of activities for the Government.

I would argue, even if you left aside the first amendment and simply looked at the functioning of the national security establishment, that this directive would have very serious adverse consequences. And when you look at the way it would function in the real world, in light of the reliance that we all place on former officials to comment on current national security issues, I think it deserves what people have said about it that, namely, it is the most single most serious threat to the first amendment by this administration. Given all of the things they have done, that is no easy contest.

Therefore, I want to commend this committee again for moving forward on this, and would urge you on behalf of the ACLU to move forward to the enactment of legislation.

Thank you.

[The statement of Mr. Haiperin follows:]

STATEMENT OF
MORTON E. HALPERIN
DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES

I appreciate the opportunity to appear before this subcommittee to present the views of the American Civil Liberties Union on President Reagan's National Security Decision Directive 34. The ACLU, as you know is a nonpartisan organization of over 250,000 members dedicated to defending the Bill of Rights.

Full disclosure requires that I reveal that I am a former government official who has had access to SCI information and that I have not foreclosed the possibility of once again assuming such a position. Since I left the government in 1969 I have devoted considerable time to the study of government secrecy.

My view is that implementation of this Directive would have very serious adverse consequences for the possibilities of free and full public debate on national security matters, with no offsetting gains for the protection of legitimate secrets.

That the Directive's pre-publication review requirements simply do not address a real problem has now become very clear. There are few, if any, cases of the inclusion of classified information in the writings of former officials. Former officials, like current officials, provide information to the press on background. If they want to reveal serious secrets they do so in such conversations. No system of pre-publication review of the writings of present or former officials can deal with this problem. Indeed, the requirement of pre-publication review of

written material would simply encourage former officials to continue the practices they learned while in government of providing information not on the record or in on the record question and answer sessions.

The obligation not to reveal classified information even when one leaves the government exists now and would not be affected by the implementation of these new rules. Perhaps it would be wise to systematically remind senior officials of this obligation when they leave the government and urge them to voluntarily submit material if they have any doubt as to whether it is classified.

Let me now try to explain briefly why going beyond that to a pre-publication review system for the writings of former senior officials would be disastrous.

There can be no doubt that we are dependent on the writings and testimony of former government officials for the information and authoritative alternative points of view which make serious debate on major national security issues possible. Since many questions central to important policy questions turn on detailed information, it is imperative that former officials be free to enter the debate not only with factual information but also with the authority that comes from having had access to the most sensitive information.

The adverse consequences of the Directive can be illustrated by examining the Washington Post's reaction to

President Reagan's speech proposing an increase in research designed to lead to an effective defense against ballistic missiles. The Post asked a senior Defense Department official (Deputy Undersecretary of Defense for Policy, Fred Ikle) and two former senior Defense Department officials (former Secretary of Defense, Harold Brown and former Undersecretary of Defense, William J. Perry) to prepare op-ed pieces which it ran together on the back page of its opinion section on the following Sunday. These pieces -- which I would like to submit with my statement, are reproduced as they appeared, with the text of each on the following pages -- provided readers with a balanced and informed discussion of the issue. 1 [Retained in subcommittee file.]

If the proposed order had been in effect when Harold Brown and William Perry served in the Pentagon in the Carter Administration, this timely debate would not have been possible. Brown and Perry would have had to submit what they had written to the Defense Department for review, probably by Ikle himself. The Defense Department would have had 30 days to respond and the current administration would have been able to decide what Brown and Perry could say about the technical situation.

In reviewing the Brown and Perry pieces and comparable materials for possible release senior officials would be affected by the general belief that their authority to classify and de-classify information is essentially a matter of pure discretion. Senior officials of the government are not acutely

aware of the standards in the Executive Order that governs classification. They tend to consider all of the information with which they deal as "classified" unless they decide to make it public. They release information not because they decide that it is not properly classified, but because they conclude, on balance, that release of the information would advance their objectives or those of the administration.

Reviewing the writings of their opponents, they would have no difficulty reaching the conclusion that release of information would adversely affect the national interest and that the information was properly classified.

Moreover the system would inevitably bog down with writings being bucked to higher levels for review. Junior officials would not be willing to censor the writings of former senior officials (for one thing given another turn of the wheel they may once again be senior officials) nor would they be willing to sign off on its release for fear that current senior officials would complain when the information was used against them.

The result would be that many distinguished and highly qualified people would simply refuse to accept positions in the government. Those who did would be people with no interest in participating in the public debate when they leave the government. The public service would suffer and so would the public debate on vital national security matters.

This is surely not a partisan matter. As the senior officials of this administration appear to have noticed, they would be the first to suffer under this order and to be required to submit to the censorship of the next Democratic administration whenever it may come. Those who cherish the First Amendment and the robust public debate that it promises want Weinberger and Shultz along with Haig, Vance and Brown to be able to participate fully in that debate.

The Congress must find a way to remove this sword of Damocles which hangs over the right of full and free debate and insure that individuals can enter and leave the public service secure in the knowledge that the only constraint on what they can say is their own sense of duty and obligation not to reveal information which threatens our security or only serves to advance the interests of our opponents.

On behalf of the ACLU, I am pleased to commend the committee for what it has done and to urge you to move forward.

Mrs. SCHROEDER. Mr. Halperin, we thank you very much. I think you added an awful lot.

I think your comments about the fact of how technical the areas in defense are and how easy it is for the people in the Pentagon to control that debate anyway, that if you can effectively shut off anybody who is on the outside from being able to get in the debate—we in America had to stand up and say, "I don't know anything about it, but I just have this gut feeling that it is crazy," and nobody is going to print that. I think that really concerns me about the prepublication review. I think you are exactly right.

Let me say that one of the things that has concerned this committee in these top secret briefings that we have had has been there are two pools of players, there are the professionals in the Government—in Defense, in State, in CIA—the professionals who have this access and will really be burdened very heavily by the lie detector tests and prepublication review; and then there are the politicals in the White House, and so forth, who also have access by direction of the President.

We were able to ask in the top secret briefings—but, of course, all the answers were top secret—as to which of these two pools tended to be the most serious group of leakers. From your experience in Government, which of these two pools tend to be the most serious leakers?

Mr. HALPERIN. I think there is no question that—I think it was James Reston who said a long time ago that the American ship of state is the only one that leaks from the top.

It is clear, I think, that most of the serious leaks—and my own view is there are some things that should be kept secret and some things have been revealed that should not have been—but that almost always comes from senior officials. But it comes not from former senior officials writing articles or memoirs, it comes from current senior officials providing information to the press on what is called background or deep background or deep, deep background. Of course, none of that would be affected at all by this directive. Insofar as there is a problem of unauthorized disclosure—I think there is one—it is a very narrow one, and it is one that would be totally unaffected by the provisions of this directive.

Indeed, as I suggest in my statement, the consequences might be perverse, because what this directive does is to force a former senior official, if he or she wants to reveal information, to either do it on background or do it on an extemporaneous interview, rather than write it out and think carefully about it. Once you write it out, you then, under this directive, are required to submit it. So it will encourage people to speak off the cuff and to do extemporaneous live interviews on television, rather than write out and think about what they want to say.

Mrs. SCHROEDER. But let's go back to people who are currently in office. I can understand why anyone currently in office would like to seal off debate by others who could hold themselves up to saying we had access, too, and came out with different conclusion—so we understand the political implications.

If someone currently in office, a high political appointee—say, a Secretary of State or a Secretary of Defense—were to casually leak

some of this, do you ever think that any punishment would ever be taken?

Mr. HALPERIN. No. It happens all the time, and nothing is—

Mrs. SCHROEDER. Were you at our top secret briefing?

Mr. HALPERIN. No. But I was in the Government when it happened often, and there is nothing to be done about it. I mean, Presidents often are the most serious violators from the point of view of the intelligence agencies. They make things public that the intelligence agencies consider highly classified.

Mrs. SCHROEDER. And they have the right to reclassify it if anyone ever came after them, right?

Mr. HALPERIN. It is a little late to reclassify it when you say it on national television.

But, again, there is nothing. I think, that can be done about that. When the Justice Department says they want to discuss with the Congress what to do about the problem of leaks, I think they have an obligation—not to do what they have done, which is to identify a problem and then a solution, but the solution has nothing to do with the problem—they have an obligation to come up with a solution. I think that if they came up with a solution to the problem of senior officials on background revealing information that is properly classified, the Congress ought to look seriously at that solution. But as far as I am aware, nobody has any idea what to do about that problem.

Mrs. SCHROEDER. I hate to summarize what I heard in so flip a manner, and I don't mean it to sound flip, but it really occurs to me that a lot of what the problem is is that we have politicians running the government—obviously, we always have had—and politicians talk. They are always able to overcome their innate shyness. And one of the big problems is trying to get them to engage brain before starting mouth, to put it in more mechanical terms.

So, if you really want to go to the solution, you have to have the administration taking their own people in tow and make them understand how serious it is to start engaging brain before starting mouth, whether it is in background, on television, or wherever. It is not so much the professionals. The professionals are much more aware of that, and they are not so verbal, and they do not have the podium and the platforms to be that verbal. So, the solution doesn't fit the problem. Nobody is saying there isn't a problem, but the question is, does the solution fit the problem? That is one of the frustrations we have been having. I am pleased to hear that I think you are in concurrence.

Mr. HALPERIN. I think there is a problem, but there is no solution to it. This proposal is not a solution to the problem.

Mrs. SCHROEDER. Again, thank you very, very much for being here this morning.

I am going to have the next four people come forward as a distinguished group. I think they are all people very concerned about journalism and the first amendment, and I really would like to have all of them sit at the table together, because I think just their unified presence will help.

First we have Mr. Townsend Hoopes, the president of the Association of American Publishers; we have Mr. Jim Hampton, who is the very distinguished editor of the Miami Herald, and for the

American Association of Newspaper Editors; Robert Lewis, national secretary of the Society of Professional Journalists, Sigma Delta Chi; and we have Mr. Jack Landau, executive director of Reporters Committee for Freedom of the Press.

I am doing this because I think it is very interesting to have publishers, editors, journalists, and reporters all at the same table.

You have all been in here all morning being subjected to all sorts of intensive testimony. We are going to put all your written statements in the record, and I think it would be great for all of you to kind of summarize your statement. Maybe you even want to respond to some of the things you heard, because I think that would be helpful to the committee as it all unfolds, if there is anything that triggered some response in you.

Mr. LANDAU. Excuse me, Madam Chairperson.

Mrs. SCHROEDER. Yes.

Mr. LANDAU. I have a point of order.

Elaine English, who is a lawyer with our committee, may we have permission to have her sit here?

Mrs. SCHROEDER. Certainly.

Mr. LANDAU. She is the director of the FOI Service Center.

Mrs. SCHROEDER. That is wonderful. It is our first indication of affirmative action we have had all morning. We are delighted to have her.

Mr. LANDAU. She just took the Bar yesterday, so she may not be as acute as usual.

Mrs. SCHROEDER. I know your feeling. I didn't take the Bar, but we took New Hampshire, which is the same thing.

Why don't we start with you. Since you started out with the point of order and had the wisdom to bring a young woman, we will let you fire off.

For the record, it would be helpful if each of you gave your name as you started. Then we will have questions back and forth in an informal way.

STATEMENTS OF JACK LANDAU, EXECUTIVE DIRECTOR, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ACCOMPANIED BY ELAINE ENGLISH, DIRECTOR, FREEDOM OF INFORMATION SERVICE CENTER, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; JACK HAMPTON, EDITOR, MIAMI HERALD, ON BEHALF OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS; TOWNSEND HOOPES, PRESIDENT, ASSOCIATION OF AMERICAN PUBLISHERS, INC.; AND ROBERT LEWIS, NATIONAL SECRETARY, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI

Mr. LANDAU. My name is Jack Landau. I am the executive director of the Reporters Committee, which is a public interest defense fund for the press.

I am accompanied by Elaine English, who is the director of the FOI Service Center, which is a project of our committee's. We have so many people here. I don't know how you want to conduct this.

I think, from the point of view of many people in the press, this bill is more important than just its specific provisions, which we think could be tightened a little bit. We think perhaps the time has

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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

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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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RELEASE OF CLASSIFIED MATERIALS

Divider Title: _____

RELEASE OF CLASSIFIED MATERIALS

Talking Points

Charge: Morton Halperin is a security risk. During the Persian Gulf War, he publicly encouraged DoD employees to leak classified information; during the Vietnam War, he was investigated for leaking National Security Council Documents on Cambodia; when he left DoD in September 1969 he took with him documents marked "Top Secret;" he publicly defended David Truong, a convicted North Vietnam spy, who had turned over classified documents.

Response:

- Halperin was recently granted Top Secret clearance after a thorough DoD background check by career officials.
- Halperin believes that no government employee has the right to unilaterally decide what information should be classified or what information should be made public.
- Halperin reminded DoD employees that they could disclose, to Congress, through classified channels, any evidence that Congress was being deceived by Executive branch officials.
- Despite extensive wiretaps, no evidence was ever found linking Halperin to NSC leaks.
- Halperin arranged for Top Secret documents to be transferred to a secure facility at RAND in accordance with acceptable procedures.
- Halperin was an expert witness, not a public defender, at Truong's trial.

Narrative

Halperin is accused of being a security risk because of charges that he participated in, assisted in, or supported the release of classified material. While no one charge is accurate or substantiated, the perception is that if enough charges are leveled, there must be some truth to them.

Halperin has recently been granted Top Secret security clearance by the Department of Defense. This clearance was granted in the routine manner by career officials after a thorough investigation by the Defense Investigative Service. Additionally, before President Clinton nominated him for the position, there was an extensive FBI background inquiry.

Halperin has never supported the unauthorized release of classified materials. He has criticized the excessive classification of information that does not warrant such protection on the basis that over-classification leads to relaxed security which in turn undermines the protection of genuine secrets. Halperin, however, has stated that no individual has the right to unilaterally decide what should be classified or to reveal classified materials. He believes that the government can punish those who leak classified information by denying clearances or terminating government employment and further supports the government's right to enforce criminal sanctions for the release of narrowly drawn categories of information such as the identities of covert agents.

Halperin has never encouraged DoD employees to leak classified information. In the build-up to the Persian Gulf War, Halperin, on behalf of the ACLU, informed all government employees that they could, under the whistle blower statutes, report to Congress through classified channels, any evidence that they had that Executive Branch Officials had lied at a Congressional hearing (Tab 1).

Halperin's accusers have said that "he is a former Nixon administration official who had his phone tapped by the FBI because he was suspected of leaking information to the press about the secret bombing of Cambodia in 1969." This is in fact true. What his accusers neglect to say is that after 21 months of FBI surveillance, no evidence was found to indicate that Dr. Halperin had leaked information about the bombing or any other matter.

Halperin's attackers also accuse him of disclosing classified information when he took documents marked Top Secret upon leaving the DoD in September 1969. Halperin admits taking the documents in question. He testified at the Pentagon Papers trial that he had arranged the transfer of his private papers from his government service to a secure facility at the RAND Corporation. The materials were

stored by RAND in a safe authorized for the storage of Top Secret material and made available only to those with a clearance and the need to know.

The minority staff position paper also criticizes Halperin for participating in the legal defense of David Truong, who was convicted for disclosing classified government documents. At the request of Truong's lawyers, Halperin provided expert testimony at Truong's trial. Halperin believes that every person is entitled to the best possible advocacy from his lawyers, including the assistance of experts with relevant knowledge. Truong's lawyers asked Halperin to review the material that Truong turned over to give an expert opinion on whether the material fit the standard required by law. He reached the view that none of the material was properly classified and so testified at the trial. His testimony was limited to that issue. Halperin has stated time and again that he does not support the right of any individual to unilaterally decide what information should be made public.

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Divider Title: _____

Federal Times

The Independent Newspaper
For Those in Public Service

Vol. 26, No. 43

December 24, 1990

©1990 Times Journal

A Call To All Persons To Ensure That Congress Is Kept Fully Informed About What The Administration Is Doing In The Persian Gulf



All of us expect the Bush Administration to honor its constitutional obligations to address questions from Congress about the Persian Gulf situation with honesty and forthrightness.

Recent history, however, demonstrates that officials in other administrations have lied to or misled Congress concerning controversial foreign policy issues such as the Gulf of Tonkin resolution and adherence to the "letter and spirit" of the Boland Amendment.

As a result of these and numerous other deceptions, Congress has been significantly hampered in performing its necessary functions. Given this history, the American Civil Liberties Union calls upon all persons to ensure that this does not happen again and that Congress is kept fully informed about what the Administration is doing in the Persian Gulf.

It can be a federal crime to mislead the Congress, such as by making false statements to Congress, obstructing the proceedings of Congress, or refusing to answer questions from Congress.

Accordingly, persons who have knowledge that Congress has been misled by government officials about Administration actions or plans in the Persian Gulf have the legal right and a political responsibility to act to ensure that Congress has the information it needs to perform its Constitutional functions.

Government employees who report information, including classified information, regarding government misconduct to Congress are breaking no law and should not be subject to administrative sanction. Nevertheless, although there are no criminal penalties for giving classified information to Congress, there is a practical risk that an unauthorized disclosure even of illegal conduct could result in informal, and possibly even formal, administrative sanctions.

It may also be appropriate to give information regarding unlawful conduct to the press. Such a disclosure, however, could result in administrative sanctions, and even a criminal indictment for espionage or theft of government property. (The ACLU does not believe that such disclosures violate the law; however, one person has been convicted for disclosing classified information to the press.)

Any government employee who knows that Congress has been misled in an open or closed session about Administration actions or plans with regard to Iraq may contact the American Civil Liberties Union (at 202-675-2319) to discuss his or her legal rights, obligations, and responsibilities regarding how to set the record straight. The ACLU will attempt to assist such persons in getting their information to the proper congressional officials. ■

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PHILIP AGEE

Divider Title: _____

PHILIP AGEE

Talking Points

Charge: Morton Halperin was an open defender of renegade CIA agent Philip Agee. He has defended Philip Agee's publication of the names of U.S. intelligence operatives and believes that CIA operatives abroad should be publicly identified. Halperin has a long relationship with Agee and traveled to England to fight against his deportation. He defended Agee from CIA charges by counter-charging that the Agency was engaging in "disinformation" against Agee. A review written by Halperin praises Agee's book, Inside the Company: CIA Diary, and advocates that we "dissolve the CIA covert career service and bar the CIA from...developing and allied nations."

Reponse:

- 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 defended Agee's disclosure of the identity of covert agents.
- Halperin has not had a long relationship with Philip Agee. He did testify at Agee's deportation hearing in England, but, his testimony at the hearing was solely to urge the independent citizens panel to make its own inquiry into the facts.
- Halperin's review of Agee's book did suggest the need to abolish the career covert service, however, Halperin abandoned this view shortly after the review was published.
- Halperin's article on CIA "disinformation" sought to examine CIA concealment of relevant information and not to defend Philip Agee.

Narrative

Morton Halperin's association with Philip Agee has raised questions as to the extent of his involvement with the former CIA agent. Agee is the author of a book that exposes the names of U.S. intelligence operatives.

The minority staff position paper and a number of press reports have accused Halperin of defending Philip Agee's publication of the names of U.S. intelligence operatives.

Halperin has never supported Agee's publication of these names. He believes that officials who reveal such identities should be subject to criminal penalties. Halperin's stand on legislation to protect the identities is a matter of public record. In fact, in testimony before Congressional committees, Halperin made it clear that former government officials such as Agee had no First Amendment right to disclose the identities of covert agents and stated that the ACLU did not oppose those portions of the Agents Identities Protection Act that related to covert agents [Hearings, Senate Judiciary Committee, May 8, 1981, at p. 74, Tab 1].

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]

It has been suggested that Halperin has a longstanding relationship with Philip Agee, and that his testimony at Agee's deportation hearing in England was to defend Mr. Agee's position. This is not true. Halperin went to England at the request of Agee's lawyer to provide expert testimony before the review panel. The British government was seeking to deport Agee from England on the grounds that his presence there was a threat to British security. Halperin did not offer any testimony on Agee's conduct in England or any view on whether Agee's presence might be harming British security. He simply urged the review panel to look beyond the government's assertion of harm to British security if Agee was allowed to remain in England in order to determine the actual reasons for the government's position on Agee's deportation. Halperin provided the panel with unclassified examples of instances where intelligence services had exaggerated harm to security. He then indicated that the British government would have the right to deport Agee if his actions were in fact harming British security.

Halperin wrote a review of Philip Agee's book, Inside the Company: CIA Diary, after it was published in 1974. The review drew on the book's description of the CIA's covert activities to suggest the need to abolish the career covert service. However, Halperin abandoned this position in an article he wrote two years later. In that article, Halperin advocated breaking the CIA into two parts: an analytic agency and an operational agency to conduct clandestine collection and covert operations. He has adhered to that position ever since.

Several articles on Halperin's nomination have linked the murder of Athens station chief Richard Welch to disclosures made by Philip Agee and asserted that Halperin defended these disclosures. After Welch's murder, Halperin wrote an article suggesting that officials of the CIA, when reporting on the death, had concealed important information on how Welch's identity became public. This article did not defend the practice of publishing names of covert agents -- a practice which Halperin deplors. Moreover, the article did not mention Agee.

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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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stances surrounding the defendant's actions to determine if his actions sufficiently evidenced a determination 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. A jury could conclude that a substantial step toward fulfillment of the crime had been undertaken by this employee.

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

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

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

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

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

Mr. HALPERIN. Thank you, Mr. Chairman.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PREPARED STATEMENT OF JERRY J. HERMAN 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(b)(1)) is unconstitutional on its face. While

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

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

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

a reburial 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. 991, even though in none of these cases is it arguable that the narrow purpose of the bill is being served--the protection of Americans serving abroad in circumstances which place their lives in jeopardy.

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

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

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

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

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

Given the definition of covert agent, the defense 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.

-- 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.

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

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

The Constitutional Issue

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

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

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

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

Perhaps the case most directly on point is the widely quoted opinion of Judge Learned Hand in United States v. Heine, 151 F. 2d 813 (1945). Heine engaged in an activity very similar to that which appears to have given rise to section 601(b) of S. 901. 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 saved the constitutionality of the espionage statute by excluding analysis of published information even if undertaken to aid a hostile foreign nation. In this regard, it should be pointed out that the Justice Department last year cited Helme 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) interpreting the espionage statute's "intent or reason to believe that (information) will be used to the injury of the United States or to the advantage of a foreign nation" to require bad faith on the part of the defendant. See also Letter from Professor Philip B. Kurland to Senator Edward Kennedy, September 25, 1980:

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

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

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

Conclusion

Mr. Chairman, S. 391 is unprecedented legislation. Only twice in our history has Congress legislated a prohibition on the right of the press to publish classified information, a narrow prohibition on publishing codes, 18 U.S.C. § 798 and highly sensitive atomic energy information, 42 U.S.C. § 2274. Both involve highly technical information which minimally 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(c) can seriously impact on speech³ and communication concerning important intelligence and foreign policy matters. It is opposed on policy and constitutional grounds by almost every major press organization, by leading newspapers including the New York Times, the Washington Post, and Chicago Tribune, and by over 60 law professors and constitutional experts. Even most constitutional experts who favor this legislation, oppose the Senate version.

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

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

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

We again thank you for the opportunity to testify today on 191.

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. 14.

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. JAHN. 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.

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

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

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

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

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

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

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

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

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

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

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

Senator DENTON. You are well within your time.

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

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

Mr. HALPERIN. Yes. I think that is—

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

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

Mr. BERMAN. It is not in the bill.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator EAST. Yes.

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

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

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

Senator EAST. Well—

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

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

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

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

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

Senator DENTON. Thank you, Senator East.

Senator Biden?

Senator BIDEN. Thank you.

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

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

Mr. BERMAN. We do not oppose that bill.

Senator BIDEN. That concept, you do not oppose?

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. HALPERIN. Yes; I have.

Senator BIDEN. In what capacities and for whom?

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

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

Mr. HALPERIN. Yes; I did.

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

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

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

Mr. HALPERIN. That is correct.

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

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

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

The story says:

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

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

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

Are they prosecutable under this law?

Mr. HALPERIN. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

And the disclosure was made with reason to believe that the activity would impair or impede intelligence activities. You would

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

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

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

Do you have an opinion on that specific question?

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

Senator BIDEN. Thank you, very much.

Thank you, Mr. Chairman.

Senator DENTON. Thank you, Senator Biden.

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

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

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

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

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

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

Senator DENTON. No; one more.

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

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

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

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

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

Would you care to make an opening statement, sir?

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

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

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

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

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

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

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

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DAVID TRUONG

Divider Title: _____

DAVID TRUONG

Talking Points

Charge: Morton Halperin was an open defender of convicted North Vietnamese spy David Truong. Truong was convicted of disclosing classified government documents. Halperin's public defense of Truong stated that the information stolen should not have been classified in the first place.

Response:

-Morton Halperin did not publicly defend Truong

-He was asked by Truong's lawyers to provide expert testimony at the trial. His testimony was limited to the issue of classification of documents. Halperin reviewed the material which Ronald Humphrey, a USIA official, had given to Truong and concluded that none of the material was properly classified.

-Halperin does not advocate the right of a government official to release classified information if he disagrees with a policy.

-During his association with the ACLU, Halperin provided legal assistance to individuals across the political spectrum (including Samuel Morrison, Lyn Nofziger and Oliver North) either directly or through amicus briefs.

Narrative

Morton Halperin's testimony at the trial of David Truong has raised questions as to the extent of his involvement with Truong. Truong and former USIA official Ronald Humphrey were sentenced to fifteen years for espionage.

The minority staff position paper and a number of press reports have accused Halperin of publicly defending Mr. Truong, a convicted spy, and advocating a need to end government security classification.

Halperin did not publicly defend the actions of David Truong. As an expert witness in the Truong trial, Halperin was asked to examine the documents given to Mr. Truong by Mr. Humphrey and testify as to the classification of these documents. Halperin concluded these documents were not properly classified.

It should be noted that the ACLU National Security Project, which Halperin directed, gave legal assistance to individuals across the political (including Samuel Morison, Lyn Nofziger and Oliver North) spectrum either directly or by amicus briefs .

Halperin has never supported the unauthorized release of classified information. He has, however, criticized the excessive classification of information that does not warrant such protection, believing that overclassification can lead to a relaxation of security measures, which undermines the protection of genuine secrets. Furthermore, Halperin has never advocated the right of a government official to release classified information if he or she disagrees with a policy. In fact, Halperin has stated that the government has the right to deny clearance or dismiss employees who have this view or act upon it. In testimony before the House Post Office and Civil Service Committee, Subcommittee on Civil Service, Halperin stated, "Perhaps it would be wise to systematically remind senior officials of this obligation [not to reveal classified information] when they leave government and urge them to voluntarily submit material if they have any doubt as to whether it is classified." (Testimony Tab 1)

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Divider Title: _____

**FEDERAL POLYGRAPH LIMITATION AND
ANTI-CENSORSHIP ACT OF 1984**

HEARINGS
BEFORE THE
SUBCOMMITTEE ON CIVIL SERVICE
OF THE
COMMITTEE ON
POST OFFICE AND CIVIL SERVICE
HOUSE OF REPRESENTATIVES
NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

H.R. 4681

A BILL RELATING TO THE ADMINISTRATION OF POLYGRAPH EXAMINA-
TIONS AND PREPUBLICATION REVIEW REQUIREMENTS BY FEDERAL
AGENCIES

FEBRUARY 29, 1984

Serial No. 98-39

Printed for the use of the Committee on Post Office and Civil Service



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Mrs. SCHROEDER. Again, I apologize for how much we have to do and how short a time we have to do it in.

The next witness we have this morning is Morton Halperin, who is the Director for the Center of National Security Studies.

We welcome you as a friend of the committee. We are glad to have you back. We will put your statement in the record and be happy to hear what you have to say.

STATEMENT OF MORTON H. HALPERIN, DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES

Mr. HALPERIN. Madam Chairman, I appreciate the opportunity to appear here on behalf of the American Civil Liberties Union. Our position is that any prepublication review of the writings of any government official is a violation of the first amendment.

I want to just make three points, since I know time is very short.

First, as to the current status of the situation, or what the situation will be like on April 15 if Congress does not act again, I think it should be clear that the withdrawal of the directive, if the President is in fact withdrawing it or suspended it—and I am not sure I understand what those words mean—that the withdrawal simply would withdraw, if it was withdrawn, the Presidential requirement that agencies have a prepublication review system. It would not eliminate the authority of the agencies to establish the identical system on their own authority.

Indeed, it is important to remember that the CIA established its prepublication review procedures without any Presidential authority at all. The Government never alleged in the litigation over the *Snepp* case or the *Marchetti* case that the CIA was operating under a Presidential directive and, yet, the Supreme Court upheld the validity of the prepublication review agreement.

So I think it ought to be clear to the Congress that, in the absence of legislation, or an affirmative Presidential directive prohibiting prepublication review, each of the agencies will be free to go ahead and implement that Justice Department draft contract, including the Justice Department, even if the President continues to suspend or withdraw, or whatever it is that he has done to that agreement.

Of course, as I understand the situation, there would be nothing to stop the President, say, after November or some other date, to reissue the agreement again or to withdraw the suspension of the agreement.

The second point I want to make has to do with the CIA censorship system that has already been in effect.

It is sometimes said that the system can work because it works in the CIA. I think it is important to understand that it doesn't work well in the CIA, that various people, including Admiral Turner, have said that the CIA is seeking to prohibit them from publishing things that they think they have a right to publish. I think the committee has already heard from former CIA officials who have gone through that process.

The fact that the CIA has excised material from documents that it submitted to it, in my view, proves nothing about the validity or the value of prepublication review. First of all, I think the record is

hear that the CIA often censors sentences that are not in fact classified. So the fact that they take out sentences may simply prove that the system isn't working rather than it is.

Second, I think the requirement for prepublication review has the effect on people of saying let's put the sentences in and see whether the agency takes them out. So if you have to submit the document anyway, you might as well put in the things that you think may be classified and let the agency decide whether to take them out. The fact that sentences are put in which are later excised by the CIA doesn't indicate that the same people would publish those sentences on their own if they did not have to submit them.

Finally, I want to make a comment about the attempt to apply this system to senior officials of the Government, because that, I think, raises wholly different problems than are raised by a censorship system imposed on career officials of intelligence agencies— which I want to emphasize again we object to as well.

That is, first of all, because former senior officials write a great deal more, and many more of them write, and many more of them write things that are very time urgent. In my prepared statement, I have the example of the "Starwars" speech and the comments by two senior Pentagon officials. The fact that they could not have appeared that weekend to give the public and the Congress some understanding that people with equal access thought the President's speech was absurd was, I think, a very serious challenge and threat to the first amendment.

Moreover, I think it is important to understand that the censorship of senior officials can only be done by other senior officials. Junior bureaucrats are not going to censor writings of former Secretaries of Defense or former Assistant Secretaries of Defense, in part because they recognize those people may be once again Assistant Secretaries of Defense, but also because they simply don't know what is classified. A lot of the judgments about what is classified in the writings of various senior officials has to do with access to information and judgments about the response of foreign governments, and so on, which junior officials simply don't have access to.

So what I think will happen if former senior officials are forced to submit their writings is that those decisions as to what to let them write will get bucked up to senior officials in the current administration. They will not have the time to look at them and, therefore, there will be delays.

Moreover, all senior officials of the Government have the view that everything is classified unless they decide it ought not to be classified, and that is what they would call a policy judgment rather than a technical judgment. If you ask senior officials to give you the definition of "confidential" in the Executive order, you will find that almost none of them know what it is or think it relevant. The judgment about what to make public is viewed as a political judgment about what information the American public should have to understand the President's policies or the agencies policies. To give those officials the right to censor the writings of former officials is, in my view, to pose a very serious threat not only to the first amendment in principle, but also to the system the way it now operates.

Finally, I think one ought to understand, as George Reedy suggested, that there are a lot of people who simply will not go in the Government if they have to sign such agreements.

But even more, I think there are a great many other people who will not become consultants. One of the things that improves public policy is the widespread use by the Government of consultants to take on temporary assignments for the Pentagon, the State Department or for the White House, often those involve access to sensitive compartmentalized information. If consultants have to sign prepublication review agreements, as they would under this directive, I think many fewer people would undertake those kinds of activities for the Government.

I would argue, even if you left aside the first amendment and simply looked at the functioning of the national security establishment, that this directive would have very serious adverse consequences. And when you look at the way it would function in the real world, in light of the reliance that we all place on former officials to comment on current national security issues, I think it deserves what people have said about it that, namely, it is the most single most serious threat to the first amendment by this administration. Given all of the things they have done, that is no easy contest.

Therefore, I want to commend this committee again for moving forward on this, and would urge you on behalf of the ACLU to move forward to the enactment of legislation.

Thank you.

[The statement of Mr. Halperin follows:]

STATEMENT OF
MORTON E. HALPERIN
DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES

I appreciate the opportunity to appear before this subcommittee to present the views of the American Civil Liberties Union on President Reagan's National Security Decision Directive 34. The ACLU, as you know is a nonpartisan organization of over 250,000 members dedicated to defending the Bill of Rights.

Full disclosure requires that I reveal that I am a former government official who has had access to SCI Information and that I have not foreclosed the possibility of once again assuming such a position. Since I left the government in 1969 I have devoted considerable time to the study of government secrecy.

My view is that implementation of this Directive would have very serious adverse consequences for the possibilities of free and full public debate on national security matters, with no offsetting gains for the protection of legitimate secrets.

That the Directive's pre-publication review requirements simply do not address a real problem has now become very clear. There are few, if any, cases of the inclusion of classified information in the writings of former officials. Former officials, like current officials, provide information to the press on background. If they want to reveal serious secrets they do so in such conversations. No system of pre-publication review of the writings of present or former officials can deal with this problem. Indeed, the requirement of pre-publication review of

written material would simply encourage former officials to continue the practices they learned while in government of providing information not on the record or in on the record question and answer sessions.

The obligation not to reveal classified information even when one leaves the government exists now and would not be affected by the implementation of these new rules. Perhaps it would be wise to systematically remind senior officials of this obligation when they leave the government and urge them to voluntarily submit material if they have any doubt as to whether it is classified.

Let me now try to explain briefly why going beyond that to a pre-publication review system for the writings of former senior officials would be disastrous.

There can be no doubt that we are dependent on the writings and testimony of former government officials for the information and authoritative alternative points of view which make serious debate on major national security issues possible. Since many questions central to important policy questions turn on detailed information, it is imperative that former officials be free to enter the debate not only with factual information but also with the authority that comes from having had access to the most sensitive information.

The adverse consequences of the Directive can be illustrated by examining the Washington Post's reaction to

President Reagan's speech proposing an increase in research designed to lead to an effective defense against ballistic missiles. The Post asked a senior Defense Department official (Deputy Undersecretary of Defense for Policy, Fred Ikle) and two former senior Defense Department officials (former Secretary of Defense, Harold Brown and former Undersecretary of Defense, William J. Perry) to prepare op-ed pieces which it ran together on the back page of its opinion section on the following Sunday. These pieces -- which I would like to submit with my statement, are reproduced as they appeared, with the text of each on the following pages -- provided readers with a balanced and informed discussion of the issue. [Retained in subcommittee file.]

If the proposed order had been in effect when Harold Brown and William Perry served in the Pentagon in the Carter Administration, this timely debate would not have been possible. Brown and Perry would have had to submit what they had written to the Defense Department for review, probably by Ikle himself. The Defense Department would have had 30 days to respond and the current administration would have been able to decide what Brown and Perry could say about the technical situation.

In reviewing the Brown and Perry pieces and comparable materials for possible release senior officials would be affected by the general belief that their authority to classify and de-classify information is essentially a matter of pure discretion. Senior officials of the government are not acutely

aware of the standards in the Executive Order that governs classification. They tend to consider all of the information with which they deal as "classified" unless they decide to make it public. They release information not because they decide that it is not properly classified, but because they conclude, on balance, that release of the information would advance their objectives or those of the administration.

Reviewing the writings of their opponents, they would have no difficulty reaching the conclusion that release of information would adversely affect the national interest and that the information was properly classified.

Moreover the system would inevitably bog down with writings being bucked to higher levels for review. Junior officials would not be willing to censor the writings of former senior officials (for one thing given another turn of the wheel they may once again be senior officials) nor would they be willing to sign off on its release for fear that current senior officials would complain when the information was used against them.

The result would be that many distinguished and highly qualified people would simply refuse to accept positions in the government. Those who did would be people with no interest in participating in the public debate when they leave the government. The public service would suffer and so would the public debate on vital national security matters.

This is surely not a partisan matter. As the senior officials of this administration appear to have noticed, they would be the first to suffer under this order and to be required to submit to the censorship of the next Democratic administration whenever it may come. Those who cherish the First Amendment and the robust public debate that it promises want Weinberger and Shultz along with Haig, Vance and Brown to be able to participate fully in that debate.

The Congress must find a way to remove this sword of Damocles which hangs over the right of full and free debate and insure that individuals can enter and leave the public service secure in the knowledge that the only constraint on what they can say is their own sense of duty and obligation not to reveal information which threatens our security or only serves to advance the interests of our opponents.

On behalf of the ACLU, I am pleased to commend the committee for what it has done and to urge you to move forward.

Mrs. SCHROEDER. Mr. Halperin, we thank you very much. I think you added an awful lot.

I think your comments about the fact of how technical the areas in defense are and how easy it is for the people in the Pentagon to control that debate anyway, that if you can effectively shut off anybody who is on the outside from being able to get in the debate—we in America had to stand up and say, "I don't know anything about it, but I just have this gut feeling that it is crazy," and nobody is going to print that. I think that really concerns me about the prepublication review. I think you are exactly right.

Let me say that one of the things that has concerned this committee in these top secret briefings that we have had has been there are two pools of players, there are the professionals in the Government—in Defense, in State, in CIA—the professionals who have this access and will really be burdened very heavily by the lie detector tests and prepublication review; and then there are the politicals in the White House, and so forth, who also have access by direction of the President.

We were able to ask in the top secret briefings—but, of course, all the answers were top secret—as to which of these two pools tended to be the most serious group of leakers. From your experience in Government, which of these two pools tend to be the most serious leakers?

Mr. HALPERIN. I think there is no question that—I think it was James Reston who said a long time ago that the American ship of state is the only one that leaks from the top.

It is clear, I think, that most of the serious leaks—and my own view is there are some things that should be kept secret and some things have been revealed that should not have been—but that almost always comes from senior officials. But it comes not from former senior officials writing articles or memoirs, it comes from current senior officials providing information to the press on what is called background or deep background or deep, deep background. Of course, none of that would be affected at all by this directive. Insofar as there is a problem of unauthorized disclosure—I think there is one—it is a very narrow one, and it is one that would be totally unaffected by the provisions of this directive.

Indeed, as I suggest in my statement, the consequences might be perverse, because what this directive does is to force a former senior official, if he or she wants to reveal information, to either do it on background or do it on an extemporaneous interview, rather than write it out and think carefully about it. Once you write it out, you then, under this directive, are required to submit it. So, it will encourage people to speak off the cuff and to do extemporaneous live interviews on television, rather than write out and think about what they want to say.

Mrs. SCHROEDER. But let's go back to people who are currently in office. I can understand why anyone currently in office would like to seal off debate by others who could hold themselves up to saying we had access, too, and came out with different conclusion—so we understand the political implications.

If someone currently in office, a high political appointee—say, a Secretary of State or a Secretary of Defense—were to casually leak

some of this, do you ever think that any punishment would ever be taken?

Mr. HALPERIN. No. It happens all the time, and nothing is—

Mrs. SCHROEDER. Were you at our top secret briefing?

Mr. HALPERIN. No. But I was in the Government when it happened often, and there is nothing to be done about it. I mean, Presidents often are the most serious violators from the point of view of the intelligence agencies. They make things public that the intelligence agencies consider highly classified.

Mrs. SCHROEDER. And they have the right to reclassify it if anyone ever came after them, right?

Mr. HALPERIN. It is a little late to reclassify it when you say it on national television.

But, again, there is nothing, I think, that can be done about that. When the Justice Department says they want to discuss with the Congress what to do about the problem of leaks, I think they have an obligation—not to do what they have done, which is to identify a problem and then a solution, but the solution has nothing to do with the problem—they have an obligation to come up with a solution. I think that if they came up with a solution to the problem of senior officials on background revealing information that is properly classified, the Congress ought to look seriously at that solution. But as far as I am aware, nobody has any idea what to do about what that problem.

Mrs. SCHROEDER. I hate to summarize what I heard in so flip a manner, and I don't mean it to sound flip, but it really occurs to me that a lot of what the problem is is that we have politicians running the government—obviously, we always have had—and politicians talk. They are always able to overcome their innate shyness. And one of the big problems is trying to get them to engage brain before starting mouth, to put it in more mechanical terms.

So, if you really want to go to the solution, you have to have the administration taking their own people in tow and make them understand how serious it is to start engaging brain before starting mouth, whether it is in background, on television, or wherever. It is not so much the professionals. The professionals are much more aware of that, and they are not so verbal, and they do not have the podium and the platforms to be that verbal. So, the solution doesn't fit the problem. Nobody is saying there isn't a problem, but the question is, does the solution fit the problem? That is one of the frustrations we have been having. I am pleased to hear that I think you are in concurrence.

Mr. HALPERIN. I think there is a problem, but there is no solution to it. This proposal is not a solution to the problem.

Mrs. SCHROEDER. Again, thank you very, very much for being here this morning.

I am going to have the next four people come forward as a distinguished group. I think they are all people very concerned about journalism and the first amendment, and I really would like to have all of them sit at the table together, because I think just their unified presence will help.

First we have Mr. Townsend Hoopes, the president of the Association of American Publishers; we have Mr. Jim Hampton, who is the very distinguished editor of the Miami Herald, and for the

American Association of Newspaper Editors; Robert Lewis, national secretary of the Society of Professional Journalists, Sigma Delta Chi; and we have Mr. Jack Landau, executive director of Reporters Committee for Freedom of the Press.

I am doing this because I think it is very interesting to have publishers, editors, journalists, and reporters all at the same table.

You have all been in here all morning being subjected to all sorts of intensive testimony. We are going to put all your written statements in the record, and I think it would be great for all of you to kind of summarize your statement. Maybe you even want to respond to some of the things you heard, because I think that would be helpful to the committee as it all unfolds, if there is anything that triggered some response in you.

Mr. LANDAU. Excuse me, Madam Chairperson.

Mrs. SCHROEDER. Yes.

Mr. LANDAU. I have a point of order.

Elaine English, who is a lawyer with our committee, may we have permission to have her sit here?

Mrs. SCHROEDER. Certainly.

Mr. LANDAU. She is the director of the FOI Service Center.

Mrs. SCHROEDER. That is wonderful. It is our first indication of affirmative action we have had all morning. We are delighted to have her.

Mr. LANDAU. She just took the Bar yesterday, so she may not be as acute as usual.

Mrs. SCHROEDER. I know your feeling. I didn't take the Bar, but we took New Hampshire, which is the same thing.

Why don't we start with you. Since you started out with the point of order and had the wisdom to bring a young woman, we will let you fire off.

For the record, it would be helpful if each of you gave your name as you started. Then we will have questions back and forth in an informal way.

STATEMENTS OF JACK LANDAU, EXECUTIVE DIRECTOR, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ACCOMPANIED BY ELAINE ENGLISH, DIRECTOR, FREEDOM OF INFORMATION SERVICE CENTER, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; JACK HAMPTON, EDITOR, MIAMI HERALD, ON BEHALF OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS; TOWNSEND HOOPES, PRESIDENT, ASSOCIATION OF AMERICAN PUBLISHERS, INC.; AND ROBERT LEWIS, NATIONAL SECRETARY, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI

Mr. LANDAU. My name is Jack Landau. I am the executive director of the Reporters Committee, which is a public interest defense fund for the press.

I am accompanied by Elaine English, who is the director of the FOI Service Center, which is a project of our committee's. We have so many people here, I don't know how you want to conduct this.

I think, from the point of view of many people in the press, this bill is more important than just its specific provisions, which we think could be tightened a little bit. We think perhaps the time has

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**ELLSBERG
(PENTAGON PAPERS)**

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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1

Divider Title: _____

Defense Fight: GOP Shouldn't Sink to 'Borking'

A dozen Americans have died fighting for muddled purposes in Somalia. Another 25,000 Yanks may soon leave to "enforce" a "peace" in Bosnia. And the Egyptian civil servant who runs the United Nations has been given a veto over NATO air strikes around Sarajevo.

Yet Washington is about to have a debate over... Vietnam?

So it seems from the way some Republicans are staging their next confirmation brawl with President Clinton. Most GOP members of the Senate Armed Services Committee are locked and loaded for Morton Halperin, a defense activist nominated to the new Pentagon post for "democracy and peacekeeping." They think they've found a Lani Guinier for foreign policy in Mr. Halperin's neon paper trail. But in describing what sometimes becomes a Cold War caricature, Republicans may miss a chance for a much-needed debate over Mr. Clinton's foreign policy, if policy is the word for it.

Certainly Mr. Halperin is an inviting target. Unlike many establishment voices, he hasn't shunned controversy. For eight years starting in 1985 he headed the Washington office of the American Civil Liberties Union, in which role he was often a left-liberal spearthrower.

Mr. Halperin moved left with Vietnam (quitting Henry Kissinger's National Security Council staff). He later turned wildly naive on most issues of the Cold War, too, especially in perceiving a "defensive" Soviet Union. Of course, he was joined by most Democrats at the time, which is one reason voters didn't put a liberal in the White House from 1968 until the Soviet Union collapsed.

But Republicans—and especially conservatives, who are too often dismissed as "out of the mainstream" in Washington—

Potomac Watch

By Paul A. Gigot

may want to ask if being wrong about the Soviet Union and Vietnam is a lifetime disqualification for public office. Voters don't seem to think so, or they wouldn't have put an Oxford war veteran in the White House.

Which may be why some of the attacks on Mr. Halperin stretch the truth enough to look like a reverse "Borking." He's been accused, for example, of helping Daniel Ellsberg leak the then-classified "Pentagon Papers" from the RAND think tank. Yet an FBI investigation at the time turned up no such evidence. And Henry Rowen, RAND's then-president and the man who gave Mr. Ellsberg access to research the papers, says, "I don't recall Halperin having anything to do with that."

Another charge that slides into distortion is that Mr. Halperin "aided and abetted" Philip Agee, a genuine scoundrel who leaked names of CIA agents in the 1970s. It's true Mr. Halperin showed bad judgment in testifying in Britain that more evidence should be heard before Agee was deported (which he was anyway).

But his error seems rooted in the libertarian zealot's mistrust of all secrecy. He has always said that leaking agent names is wrong, and while he opposed all covert actions for a time in the 1970s, in the 1980s he helped strike a deal with then-CIA Director William Casey that made such disclosures a crime. Unlike Lani Guinier, whose extremism is current, Mr. Halperin has modified some of his views over the years.

He has also stuck to his libertarian principles enough to defend even partisan enemies. At the ACLU, he protested the unfair treatment of such Republicans as Lyn Nofziger, Oliver North and the conservative student writers at the Dartmouth Review. As for the charge of super-dovishness, former Rep. Stephen Solarz says Mr. Halperin told him at the time that he supported the Gulf War, though the ACLU took no public position.

One irony here is that Mr. Halperin's chief tormentor has been Frank Gaffney (once even on this page), precisely the sort of forthright conservative whom liberals would try to torch if he were ever nominated. Another irony is that Mr. Halperin is more Defense Secretary Les Aspin's nomination than he is Bill Clinton's. He and Mr. Aspin, who is the most hawkish of the main Clinton security advisers,



Morton Halperin

are old friends from the McNamara Pentagon in the 1960s. Mr. Clinton barely knew of him.

None of which means Mr. Halperin shouldn't be inspected for his current views, especially on the confusion that now passes for Clinton foreign policy. To the extent there is a policy, it seems to be what Jeane Kirkpatrick has summed up as "doing what the U.N. calls on us to do."

Thus the U.S. remains in Somalia not out of national interest but to prop up an incompetent U.N. But on Bosnia the same U.N. becomes an excuse for doing nothing. This is the sort of mindless multilateralism that undermines public support for the useful kind (NATO, the Gulf coalition). It plays right into the hands of isolationists who don't want America to intervene anywhere.

As the Pentagon official in charge of "peacekeeping," Mr. Halperin would be knee-deep in these issues. His nomination is a perfect time for Republicans—and such skeptical Democrats as Georgia's Sam Nunn—to begin instructing voters about the stakes of all this. This is also more fertile, and certainly higher, political ground than refighting the Cold War.

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AFFILIATIONS

Divider Title: _____

AFFILIATIONS

Talking Points

Charge: Throughout the 1970's and 1980's Morton Halperin was active in a number of groups which strongly opposed US national security measures such as Committee for Public Justice, Center for National Security Studies and Campaign to Stop Government Spying. Halperin's activities suggest a belief that US intelligence operations are a greater threat to freedom than outside aggression.

Response:

-Halperin supports counter-intelligence conducted in the interests of national security and consistent with the Constitution.

-Halperin's involvement with these groups is consistent with his desire to promote national security policies that meet US intelligence needs without sacrificing constitutional values.

-Halperin has regularly testified before Congress and negotiated with members and staffs of the intelligence committees to find solutions to constitutional problems related to counter-intelligence activities.

-The Committee for Public Justice was a group of distinguished Americans concerned about the abuse of power by the FBI. The Committee did not object to investigations of persons engaged in illegal activity, including terrorism.

-The purpose of the CNSS was to find solutions to problems to satisfy both the needs of the intelligence community and the requirements of the Constitution.

-Objectives for the Campaign to Stop Government Spying were to end covert operation abroad and spying on lawful political activity in the U.S. and to reduce government secrecy.

Narrative

Morton Halperin's involvement with various groups has raised questions as to his relationship with and understanding of the intelligence and national security communities.

The minority position paper alleges that Halperin's involvement with these groups is consistent with a view that the US intelligence operations are a greater threat to freedom than the aggression and subversion of the Soviet Union. The opposition goes so far as to suggest that one of the groups, the Committee for Public Justice, worked towards restrictions on the FBI and Justice Department which impeded their surveillance techniques and ability to properly investigate events leading up to the bombing of the World Trade Center.

The Committee for Public Justice is a group which objects to abuses of FBI power, such as unwarranted surveillance of individuals engaged in political activity. Suggestions that this group objects to investigations of persons engaged in illegal or terrorist activities is absurd. The FBI can operate within the requirements of the law and with respect for the privacy of law-abiding citizens, as the Committee urged, without compromising its ability to investigate suspected terrorists.

Another group mentioned, The Center for National Security Studies, is dedicated to developing national security policies that satisfy both the needs of the intelligence community and the requirements of the Constitution.

Finally, The Campaign to Stop Government Spying was a coalition Halperin helped to organize of groups whose objectives were to end covert operations abroad and spying on lawful political activity in the US and to reduce government secrecy. Halperin did not ascribe to all the positions of any of the organizations in the coalition.

Halperin supports counter-intelligence conducted in the interests of national security and consistent with the Constitution. He has promoted national security policies that meet US intelligence needs without sacrificing constitutional values. He objects to surveillance of lawful political activity under the guise of counter-intelligence. Halperin advocates the protection of information of which unauthorized disclosure would cause harm to national security.

In testimony before the Senate Select Committee on Intelligence Halperin made it clear that counterintelligence activities of the United States should be reformed to deal effectively with the real problems of counterintelligence. Halperin stated:

"Now, we agree with the panel that the end of the Cold War

does not mean the end of the need for intelligence. Indeed, we think that the case can be made that the intelligence budget ought not to decline proportionally with the defense budget."

The text of this testimony can be found at Tab 1.

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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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(III)

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.

engaged in international terrorism or activities in violation of §§ 1801(b)(1)(A) & 1801(a)(4). This definition of States who are neither citizens nor persons of the United States are nevertheless entitled to the same protection on its face is overbroad and unconstitutional in an organization with both lawful and unlawful membership with the specific intent to further the purposes of the organization. For example, the definition would permit surveillance of States simply on the basis of mere membership. As explained above, such surveillance would be unconstitutional.

The definition of "agent of a foreign power" which the courts may have to remedy. Our concern is that surveillance will be unable to challenge the constitutionality of such persons will likely never be notified of the surveillance. Even if they are notified, they probably will not challenge the surveillance application, order, or even the surveillance itself. In almost all cases files a claim of privilege under U.S.C. § 1806(f). As a consequence, no adversarial check on and on the part of the courts do not exist.

ALPERIN, DIRECTOR, WASHINGTON CIVIL LIBERTIES UNION

I am preparing testimony in my office, which produces a sentence which begins with "I want to say in this case" but I much appreciate the fact that these matters involve balancing national security concerns against these issues and on other matters over

focus on the comments that are contained in my statement which deal with general principles that seem to us to underlie our own views on this subject. I want to end about a few of the specific issues that we have in our prepared statement and to respond to any questions or recommendations.

When making clear its belief that the United States can and should deal effectively with the real problems of our view, and continues to be our most important civil liberties.

By the formation of the Jacobs Panel to strike a balance between national security and its activities. And at the same time, perhaps because of our view, we do not think they struck a balance while there are many things in the report which we cannot do. We think are more appropriately a balance between proposals which we think and would let me just then touch on some of the issues in the report and with which we

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

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has become more important and we have no difficulty with the In-
 telligence Community being tasked to collect more economic intelli-
 gence 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 Gov-
 ernment—and we think have a right not to share with the Ameri-
 can 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 Ameri-
 can business because that is the best way to find it out.

We are also concerned with the notion that somehow these pro-
 cedures 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 counterin-
 telligence investigations to protect the business secrets of private
 industry.

Chairman BOREN. Let me interrupt you on that point so I under-
 stand 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 fore-
 eign country's intelligence service is engaged in practicing espio-
 nage 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 proce-
 dures which we think should be used only sparingly to classify in-
 formation 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 Govern-
 ment knows that a country is intercepting the telephone conversa-
 tions 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

tell them that. The problem as it now, not that it does, but we have a rationale for a whole new set of

what you are saying.

I would urge this Committee to make one more point on that. We think you ought to protect is information

on the specific proposals

Let me just point out, the distinction between the reasonable suspicion standard, the probable cause standard, and the phone number the Government has on the person who has made the

you should not be able to get the name unless the person who, as we know, the agent who called is involved in international terrorism activities

In other words, if they call an officer and he says he is a spy but is simply a commercial officer, that's where you would be concerned not only about the investigation, for example, at one time as a counterintelligence investigation of

understand the language that the body in CISPES called somebody the Government under the redefinition of agent of a foreign number of the second person. I have. We are saying that they target they are investigating is activities or terrorism, not the foreign power before you can get

searches because that is the only fundamental disagreement with the Administration. Our view is searches of—take the easiest case, probable cause to believe that without knocking on the door, without leaving a list of what you

can describe it, Mr. Chairman, is that the American Revolution did not occur because George did not write himself a list of 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

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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-

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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 Govern-
 ment.

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 vari-
 ous—

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 momen-
 tarily.

[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 warrant-
 less 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 require-
 ments 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

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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 Con-
gressional 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 offi-
cials who are unhappy with the Miranda decision. But the Su-
preme 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 pro-
vide 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 Con-
gress, 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 re-
quires. But in considering to have judicial supervision on a war-
rant, we are considering taking a step beyond what is now re-
quired. 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, be-
cause they will then feel that they have the protection of that war-
rant 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 wit-
nesses 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 Constitu-
tion, 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

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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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NATIONAL SECURITY COMMUNITY

Divider Title: _____

NATIONAL SECURITY COMMUNITY

Talking Points

Charge: Halperin is widely disliked in the national service community -- both in the armed services and the intelligence community. His presence in such a high visibility role would be a source of friction between serving personnel and the civilian leadership, and cause unnecessary morale problems.

Response:

- There is no evidence to support this assertion.
- Halperin has wide support within the current administration starting with the Commander in Chief.
- Halperin is widely supported by past DoD officials including former Secretaries Elliot Richardson, Robert McNamara, Clark Clifford, and Harold Brown, and former Deputy Secretary Paul Nitze.
- He has the support of many other former government and national security officials including former CIA Directors William Colby and Stansfield Turner and former Secretaries of State Edmund Muskie and Cyrus Vance.

Narrative

The minority staff position paper has asserted without proof that Halperin is disliked and mistrusted by the national security community.

The Department has complete confidence in Dr. Halperin's trustworthiness. Halperin was recently granted a Top Secret security clearance by the Department of Defense after a routine but thorough investigation by career officials of the Defense Investigative Services. This followed another in depth investigation by the FBI.

Halperin has wide support not only within the current Administration, but from many past DoD officials who have worked with him. This list includes former Secretaries Robert McNamara, Clark Clifford, and Harold Brown and former Deputy Secretary Paul Nitze. (TAB 1) In addition, former National Security Advisor Henry Kissinger and General William Y. Smith have endorsed Halperin's abilities and praised his service to the country.

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1

Divider Title: _____

Alton Frye, Arnold Kanter and Jeremy J. Stone
307 Massachusetts Avenue, NE Washington, DC 20002
Tel: (202) 546-3300 Fax: (202) 675-1010

Members of the Defense and Intelligence Communities Who Have Endorsed Morton H. Halperin include:

Former Secretaries of State:

Cyrus Vance
Edmund P. Muskie

Former Secretaries of Defense:

Robert S. McNamara
Clark Clifford
Elliot Richardson
Harold Brown

Former Deputy Secretary of Defense and Ambassador Paul H. Nitze

Former Directors of Central Intelligence:

William E. Colby
Admiral Stansfield Turner (USN Ret)

Former Deputy Director of CIA for Intelligence (and former Director of the Department of State Policy Planning Staff) Robert R. Bowie

Former Special Assistant to the President for National Security Affairs McGeorge Bundy

Former Deputy Special Assistants to the President for National Security Affairs:

Carl Kaysen
Francis M. Bator

Former Head of the Institute for Defense Analyses General W. Y. Smith (USAF Ret)

Lieutenant General Robert E. Pursley (USAF Ret)

Former Ambassadors:

Raymond Garthoff (to Bulgaria)
Donald F. McHenry (to the United Nations)
James F. Leonard (to the United Nations)
Ralph Earle II (to Salt II and Director of ACDA)
Arthur Hartman (to the Soviet Union)
Jonathan Dean (to MBFR Talks)

(continued on next page)

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Congressman Howard L. Berman (Chairman, Subcommittee on International Operations of the Committee on Foreign Affairs)

Former Congressman Stephen Solarz

Former Undersecretary of the Navy David E. McGiffert

Former Undersecretary of the Air Force (and Deputy Assistant Secretary of ISA in DoD)
Townsend Hoopes

Former Assistant Secretaries of Defense:

Lawrence J. Korb

Ambassador Paul C. Warnke (and Director of US ACDA)

Former Deputy Assistant Secretaries of Defense:

Richard C. Steadman

Laurence S. Finkelstein

Former Deputy Director, US ACDA, Spurgeon M. Keeny, Jr.

Former Assistant Director of the US ACDA (and Chairman of the Board, The Henry L. Stimson Center) Barry Blechman

Former Senior Staff Member, National Security Council, Jan M. Lodal

Editor, Foreign Policy Magazine, Charles William Maynes

President, The Henry L. Stimson Center, Michael Krepon

Professor, U S Naval Academy, George Quester

(9/22/93)

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**DRUG
TESTING**

Divider Title: _____

DRUG TESTING

Talking Points

Charge: Halperin believes that drug testing for military personnel is unconstitutional.

Response:

-Halperin has, in fact, expressed opposition to drug testing for non-military personnel in many situations.

-Halperin believes that drug testing for military personnel is constitutional.

-The need of military to be ready to fight at all times creates a unique situation where there is a sufficient governmental interest to limit people's freedoms and test them for drugs.

Narrative

Halperin's previously expressed opposition to drug testing as a constitutionally impermissible invasion of privacy has raised fears that he would be opposed to the testing of military personnel. In fact, Halperin had never addressed the specific issue of drug testing of military personnel before responding to the Senate Armed Services Committee questionnaire submitted to him in connection with his nomination.

As he wrote there, Halperin believes that drug testing in the military can be justified because of special circumstances. Halperin has always believed that a person should be judged by his or her ability to handle the duties of the job. Because the military is always on call to protect the nation, Halperin believes that impairment of military personnel at any time amounts to impairment on the job. The exceptional requirements of military service therefore justify drug testing.

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FAVORABLE COMMENTARY

Divider Title: _____

The Washington Post

AN INDEPENDENT NEWSPAPER

The Halperin Nomination

THE ATTACK on Morton Halperin's Pentagon nomination keeps getting nastier. From selective and distorted citations of his past statements and positions, the pack has now moved on to the recent American deaths in Somalia. A nameless source accuses Mr. Halperin, the designated assistant secretary of defense for democracy and peace-keeping, of helping overrule the military on the question of whether tanks should have been sent to American peacekeepers a month ago. No evidence is presented for this charge. Mr. Halperin says it is false. But Sen. Strom Thurmond, leader of a partisan hit squad, is pursuing the matter with thunder and bile.

From the bolts of character assassination being hurled at Mr. Halperin, you would think he is coming from deep left field. In fact, he is coming from previous posts in the Pentagon and the National Security Council in the service of both Republican and Democratic administrations. From the very beginning of a notable 30-year career, he has gained regard for his contributions to national security policy. For some years he headed up the Washington office of the ACLU. This is presumably the service for which one

critic darkly said he was running an organization "dedicated . . . to ensuring that U.S. intelligence agencies operated within the framework of the Constitution." A bipartisan clutch of former secretaries of defense and directors of central intelligence, not to speak of Henry Kissinger, whom he served and then sued for wiretaps, now provide the sort of lavish character references for which the average nominee would kill.

It is idle to try to imagine what may be on the minds of Sen. Thurmond and others who are baying after Mr. Halperin. If they are stirred by anything more than a nostalgia for the good old days of witch hunting, it is well hidden. The charges against the nominee are not worth dignifying by restatement: Each fresh one crumbles under scrutiny of the record.

The post to which President Clinton has nominated Mr. Halperin is focused on the post-Cold War tasks of planning peace-keeping operations, conducting military-to-military contacts to convey democratic practices, fighting the anti-drug war and providing disaster relief. In the absence of serious and proven charges against him, the Senate Armed Services Committee has no good reason not to confirm his nomination and let him get on with the job.

Abroad at Home

ANTHONY LEWIS

*Politics
By
Smear*

BOSTON

Joe McCarthy is long dead. But McCarthyism is alive and well in Washington, its evil undiminished.

That is clear from the case of Morton Halperin, President Clinton's nominee to be Assistant Secretary of Defense for Democracy and Peacekeeping. The extreme right is running a campaign of smears to block his confirmation, even to deny him a hearing. And the campaign is ruthless enough to succeed — unless the President speaks up for his nominee.

Mr. Halperin served in the Pentagon in the Johnson Administration. He was an assistant to Henry Kissinger in the Nixon White House, until he and others on the staff left over the invasion of Cambodia. Then he headed the Center for National Security Studies and the Washington office of the American Civil Liberties Union.

No one can doubt his ability, his broad knowledge of national security issues or his toughness. He has never been infected by Washington waffle.

The attack on him portrays him as unpatriotic. Its method is innuendo and lies.

A "position paper" by the Republican staff of the Senate Armed Services Committee says Mr. Halperin "was implicated at one point in Daniel Ellsberg's illegal release of the classified material known as the Pentagon Papers."

Mr. Halperin, in fact, had nothing to do with the conveying of the papers to The New York Times, which published excerpts from them. In any event publication did no damage, as the Government's lawyer in the Supreme Court case over the papers, Erwin N. Griswold, later conceded. The papers enabled the public to learn how this country had slipped into the Vietnam War.

The "position paper" attacks Mr. Halperin for helping the legal defense of Mr. Ellsberg and others it dislikes. The critics do not accept the American principle that you can defend someone's legal rights without agreeing with him. The A.C.L.U. at Mr. Halperin's direction also defended Oliver North and Lyn Nofziger when they faced criminal charges.

The attackers denounced Mr. Halperin for opposing covert U.S. military operations abroad. Many others have taken the same stand, including former Secretary of Defense Clark Clifford. The Church Committee,

**The right-wing
attack
on Morton
Halperin.**

which investigated C.I.A. covert actions, concluded that many had gone wrong and that they should be limited to extraordinary occasions when the country's survival is at stake.

Underlying such criticism, I believe, is the notion that intelligence activities should not be subject to the Constitution and laws. Mr. Halperin has taken the opposite view. Which is the un-American position?

In foreign affairs, the attackers are critical of the fact that Mr. Halperin opposed the U.S. invasions of Grenada and Panama. So did many other reasonable people.

What I hear in those criticisms is a hangover of old cold war hates. The people who are attacking Mr. Halperin are some of the same ones who opposed arms control and said President Nixon was selling out the country in his policy of détente with the Soviet Union. With the cold war over, these people have to find a devil somewhere.

Joe McCarthy used to say, "I have in my hand" a list of Communists. Republicans on the Armed Services Committee said the C.I.A. had files on suspicious meetings Mr. Halperin had overseas. The C.I.A. looked and found nothing.

Virtually nobody in the Senate believes the rubbish used in the attack on Mr. Halperin. But the campaign against him, in its viciousness, has evidently intimidated people of reason and moderation.

Senator Sam Nunn, chairman of the Armed Services Committee, has not yet even scheduled a hearing. He may be waiting to see whether President Clinton is going to stand by this nominee. So far Mr. Clinton has said not a word.

The President could turn this situation around easily. All he has to do is to say out loud that he fully supports Mr. Halperin and intends to stick with him, that he is entitled to a hearing and that, after one, the Senate will confirm him.

Perhaps Mr. Clinton thinks this is some far-off battle that cannot harm him. But it could. In the case of Morton Halperin a handful of right-wing extremists are using their old methods to cripple the system. To let them succeed would be a blow to Bill Clinton's Presidency — and to decency in our civic life.

WASHINGTON POST
Nov. 5, 1993
Pg. 27

*Robert S. McNamara
And Elliot L. Richardson*

Stop the Innuendo

*Let Morton Halperin
face his critics.*

President Clinton's choice to be assistant secretary of defense for democracy and peacekeeping is Morton Halperin. He is a highly intelligent, capable and moral man. He has served the national interest for more than 30 years in Democratic and Republican administrations as well as outside government. He is widely respected and has been endorsed for the post by a vast array of former government officials, including former secretaries of state Cyrus Vance and Edmund Muskie, former defense secretary Harold Brown, former CIA directors William Colby and Stansfield Turner, top Reagan adviser Paul Nitze and retired four-star general W. Y. Smith.

But in a shocking turn of events, Halperin's nomination and reputation are on the verge of being wrecked by a smear campaign.

By tradition, the nominee is not allowed to defend himself publicly. There is only one way to restore rationality and fairness to the process: Give the man a hearing.

Both of us have known and worked with Halperin for decades, and we believe that the

"case" against him is nothing more than a collection of false rumors, misapprehensions and distorted quotations. The Senate Armed Services Committee can continue to allow this dispute to be waged in the press, where Halperin foes have been aided by leaks that twist the facts. Or Chairman Sam Nunn (D-Ga.) can call a hearing where both sides can present and test the evidence.

Opponents brand Halperin as a collaborator and sympathizer with radical leftists. This is nonsense. Halperin, as a longtime defender of free speech and other constitutional protections, has simply acted to protect the rights of individuals without regard to their substantive views. When he was an official of the American Civil Liberties Union, he defended the constitutional freedoms not only of left-wing government critics but also of conservative Reagan officials like Lyn Nofziger and Oliver North. Instead of scoffing at the distinction, critics should test their suspicions—at a hearing. If opponents truly believe that a principled advocate of constitutional liberties is per se disqualified from service at the Defense Department, let them make that case.

Opponents imply that Halperin cannot be trusted with the nation's secrets—even though Pentagon investigators this year found nothing to disqualify Halperin from holding a top security clearance. If anyone has been scrutinized for trustworthiness and discretion, it is Halperin. The Nixon administration wiretapped his telephone for almost two years and sought to tar him with scandal. As our friend Henry Kissinger later admitted in apologizing for the tap, these efforts revealed no improper conduct on Halperin's part. Opponents continue to try to prove that he is a leaker, but they have found nothing. If they have anything other than innuendo, let them confront Hal-

perin with it in a Senate hearing room.

Opponents say Halperin has intentionally tried to weaken U.S. defenses by calling for limits on CIA covert activities. But Halperin's concerns about clandestine action stem directly from his belief that, under our system of government, the people are sovereign. He recognizes the necessity for some covert activity but has worked to ensure that secret programs are consistent with our publicly declared foreign policies and that Congress is fully informed. Indeed, no one has tried harder than Halperin to fairly and effectively balance the competing requirements of national security and democratic government. Sen. David Boren (D-Okla.), who served six years as chairman of the Senate Intelligence Committee, has praised Halperin on this very score.

Opponents also contend that Halperin is a proponent of a radical multilateralism that would place U.S. troops under United Nations control. This is a total distortion of his views. Halperin has written thoughtfully about creating a new international structure to promote peace and democracy, but his views on peacekeeping and multilateral action in today's world are measured and cautious. We can hardly think of a person better suited to engage in serious public discussion on these matters and to do so persuasively.

Now opponents are reportedly attempting to tie Halperin to unspecified shady dealings in some foreign country. They search for an alleged CIA document, apparently the sole basis for the claim, but CIA can find no such record. Instead of focusing on an elusive document, why not question Halperin publicly? Why not question his accuser publicly?

The writers are former secretaries of defense.

It Takes a Peacekeeping Nominee To Show the Cold War's Still Burning

By TIM WEINER

Special to The New York Times

WASHINGTON, Nov. 5 — Morton H. Halperin, President Clinton's nominee for Assistant Secretary of Defense for peacekeeping issues, was supposed to have spent this year fighting policy battles over Somalia, the former Yugoslavia and Haiti. Instead, he finds himself under fire on the battlefields of the cold war.

In tones reminiscent of 1950's national security hearings, conservative members of Congress have branded Mr. Halperin an enemy of American soldiers, a threat to national security and a traitor.

Senator Strom Thurmond of South Carolina, the ranking Republican on the Armed Services Committee, says Mr. Halperin is "dangerous to our national defense" and accuses him of having "aided individuals engaged in undermining the nation's security at the height of the cold war."

Move to Obtain Files

Mr. Thurmond and his Republican allies on the Armed Services Committee have ordered the Central Intelligence Agency to produce files on Mr. Halperin, hinting that a secret dossier will disclose his subversive activities abroad.

The agency swears that no such documents exist, though the senators wear that. Their staff members have told colleagues that Mr. Halperin unmasked C.I.A. officers working undercover overseas, leading to their assassination by foreign intelligence agents. According to Congressional staff members who say they have heard those accusations, the words "traitor" and "killer" have been used.

In many ways, Mr. Halperin is an easy target for conservative rage. A former Republican, he is a veteran Washington national security intellectual who has worked in administrations of both parties. His published works show him to be politically moderate, said Arnold Kanter, Under Secretary of State for political affairs in the Bush Administration.

"His writing on national security, peacekeeping and multilateralism is conventional, mainstream, right down the middle," said Mr. Kanter, "and that comes from someone who served four years under President Bush."

Mr. Kanter said the newly created peacekeeping post for which Mr. Halperin was nominated was partly responsible for the attacks on him.

The deaths of American soldiers and Somalis in what began as a humanitarian mission, and the continuing carnage in Bosnia and Herzegovina have made it clear that no one knows exactly how American armed forces are supposed to make peace and build democracy. Many conservatives believe that role, and in particular a role subordinate to the United Nations, may be inappropriate for the world's sole superpower.

But what seems to have struck a rawer nerve is Mr. Halperin's involvement on what conservatives view as the wrong side of a variety of

cold war issues and organizations: the Vietnam War, the Pentagon Papers, Watergate, the American Civil Liberties Union. Conservatives have cast him as a symbol of the political forces that vexed the two leading conservative Presidents of his age: Richard M. Nixon and Ronald Reagan.

"This is a strained attempt to extract revenge for disagreements over the cold war," said Alton Frye, national director of the Council on Foreign Relations.

In the meantime, Mr. Halperin waits for a hearing, serving as a Pentagon consultant. Under the protocol for pending nominees, he must remain silent. Friends say he finds his situation Kafkaesque, a death by a thousand paper cuts. Two years ago, he published a paper with proposals for "ending the cold war at home," but his nomination seems to suggest his ideas have not fully taken root.

Mr. Halperin, 55, is in many ways a creature of the cold war. In addition to once being a card-carrying member of the Republican Party, he headed a Students for Eisenhower group as a sophomore at Columbia College. In 1961, he joined the faculty of Harvard University. At early demonstrations against the Vietnam War at Harvard, he spoke out in favor of American involvement.

He was neither hawk nor dove but something of an owl on military issues, one of those serious crewcut men who in the 1950's and 1960's spent a great deal of time thinking about strategies for Armageddon. At the age of 29 he was asked to join the Defense Department, and he oversaw a group that compiled a secret history of the Vietnam War, later known as the Pentagon Papers.

Praise From Kissinger

In 1969 he joined Mr. Nixon's National Security Council, and in the words of his boss, former Secretary of State Henry A. Kissinger, he was "one who served his country well." But he turned against the war, and he left the Government in 1970.

From May 1969 to February 1971, his home telephone was wiretapped at the direction either of President Nixon, according to Mr. Kissinger, or of Mr. Kissinger, according to Mr. Nixon. The wiretap, intended to stop the flow of disclosures to journalists, turned up nothing incriminating. But the illegal surveillance of Mr. Halperin and other citizens became one of the articles of impeachment against Mr. Nixon before his resignation in August 1974.

Galvanized by Watergate-era disclosures of extensive spying on American citizens by American intelligence agencies, Mr. Halperin wrote and spoke out against such practices. As Washington director of the American Civil Liberties Union from 1985 to 1992, he defended people across the ideological spectrum on the common ground of the Bill of Rights.

The chairman of the Senate Select Committee on Intelligence from 1988 to 1993, David L. Boren, Democrat of Oklahoma, said Mr. Halperin worked closely with the committee to help

draw up legislation supported by both national security officers and civil libertarians.

Mr. Halperin's supporters, who include four former Secretaries of Defense, two former Directors of Central Intelligence and two former Secretaries of State, call the accusations against him outrageous.

They say the ghost of Senator Joseph R. McCarthy, the Republican from Wisconsin whose false accusations of Communist subversion set off witch hunts in the 1950's, is haunting the Senate. They attribute the tone and tenor of the attacks in part to Senator Thurmond's chief of staff,

Robert J. Short. In the 1970's, Mr. Short investigated suspected subversives for the Senate Subcommittee on Internal Security, the counterpart of the House Committee on Un-American Activities.

Mr. Short did not respond to a request for an interview.

Burden of Proof

Paul H. Nitze, President Reagan's arms-control negotiator, says rumor has supplanted debate on the nomination. "The Administration should get the benefit of the doubt on this," said Mr. Nitze, who supports Mr. Halperin's nomination. "The burden of proof is on those who object."

Mr. Frye said Mr. Halperin was being subjected to "Chinese water torture, and worse than that."

"These are inaccurate, distorted, outrageous attacks," he said. "At what point do his accusers lose the presumption that their accusations have any substance?"

Today, eight months after Mr. Halperin's nomination was announced, Sam Nunn, the Georgia Democrat who heads the Senate Armed Services Committee, tentatively scheduled hearings for mid-November. Through those eight months, as the attacks on Mr. Halperin grew in intensity, the White House did not speak out in his defense.

While Mr. Halperin's opponents have excerpted his published writing 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.

For example, Mr. Halperin's opponents took a phrase from a textbook he wrote in 1973 — "The Soviet Union never even contemplated the overt use of force against Western Europe" — to depict him as a pro-Soviet apologist. The context of the sentence as written was the late 1940's, in the immediate aftermath of World War II, not the entire cold war, as strongly implied in letters and memorandums circulated in the Senate.

A memorandum by the staff of Senator Trent Lott, Republican of Mississippi, under a caricature of Mr. Halperin sporting a beard and pony tail (he has neither), called him "a security risk," saying he believed that "C.I.A. operatives abroad should be publicly identified."

Testimony in Deportation Case

These accusations appear to have been based on the fact that Mr. Halperin was asked by lawyers for Philip Agee, a renegade C.I.A. officer, to testify as an expert witness at a deportation hearing brought by the British Government against Mr. Agee in 1975. Mr. Agee published a book and magazine articles identifying C.I.A. officers abroad, and one of them, Richard Welch, the station chief in Athens, was assassinated in 1977.

In 1977, Mr. Halperin wrote that "the identity of particular spies, or other information compromising ongoing lawful operations, would, of course, be appropriate matters for secrecy." The Congressional Record shows he testified in 1981 in favor of a law making such an unmasking a felony, saying that Mr. Agee had no right to disclose the identities of covert agents.

The memorandum published by Mr. Lott's office went on to say that "Halperin is opposed to all covert intelligence collection." Mr. Halperin wrote in 1976, "The C.I.A. should be broken up into two separate organizations: one an intelligence-evaluation organization and the other a small unit engaging in covert operations."

A similar proposal was made last year by the chairmen of the Senate and House committees overseeing intelligence agencies.

As a measure of the depth of the feelings, Mr. Thurmond and his allies blocked passage of the \$28 billion spending bill for all intelligence agencies until Thursday, when they won a promise from the C.I.A. that the agency would renew its search for incriminating documents on Mr. Halperin.

Morton H. Halperin

BORN June 13, 1938

HOMETOWN Washington

EDUCATION Lafayette H.S., Brooklyn, N.Y.; B.A., government, Columbia University, 1958; M.S. Yale University, International relations 1959; Ph.D., international relations, Yale University, 1961.

CAREER HIGHLIGHTS Deputy Assistant Secretary of Defense for International Security Affairs, 1967-68; senior staff member, National Security Council, 1969; Washington director, American Civil Liberties Union, 1985-1992.

FAMILY wife, Carol Pitchersky; three sons, David, Mark, Gary.

HOBIES Reading about neurophysiology; theater, contemporary art.

Defense Fight: GOP Shouldn't Sink to 'Borking'

A dozen Americans have died fighting for muddled purposes in Somalia. Another 25,000 Yanks may soon leave to "enforce" a "peace" in Bosnia. And the Egyptian civil servant who runs the United Nations has been given a veto over NATO air strikes around Sarajevo.

Yet Washington is about to have a debate over . . . Vietnam?

So it seems from the way some Republicans are staging their next confirmation brawl with President Clinton. Most GOP members of the Senate Armed Services Committee are locked and loaded for Morton Halperin, a defense activist nominated to the new Pentagon post for "democracy and peacekeeping." They think they've found a Lani Guinier for foreign policy in Mr. Halperin's neon paper trail. But in describing what sometimes becomes a Cold War caricature, Republicans may miss a chance for a much-needed debate over Mr. Clinton's foreign policy, if policy is the word for it.

Certainly Mr. Halperin is an inviting target. Unlike many establishment voices, he hasn't shunned controversy. For eight years starting in 1985 he headed the Washington office of the American Civil Liberties Union, in which role he was often a left-liberal spearthrower.

Mr. Halperin moved left with Vietnam (quitting Henry Kissinger's National Security Council staff). He later turned wildly naive on most issues of the Cold War, too, especially in perceiving a "defensive" Soviet Union. Of course, he was joined by most Democrats at the time, which is one reason voters didn't put a liberal in the White House from 1968 until the Soviet Union collapsed.

But Republicans—and especially conservatives, who are too often dismissed as "out of the mainstream" in Washington—

Potomac Watch

By Paul A. Gigot

may want to ask if being wrong about the Soviet Union and Vietnam is a lifetime disqualification for public office. Voters don't seem to think so, or they wouldn't have put an Oxford war veteran in the White House.

Which may be why some of the attacks on Mr. Halperin stretch the truth enough to look like a reverse "Borking." He's been accused, for example, of helping Daniel Ellsberg leak the then-classified "Pentagon Papers" from the RAND think tank. Yet an FBI investigation at the time turned up no such evidence. And Henry Rowen, RAND's then-president and the man who gave Mr. Ellsberg access to research the papers, says, "I don't recall Halperin having anything to do with that."

Another charge that slides into distortion is that Mr. Halperin "aided and abetted" Philip Agee, a genuine scoundrel who leaked names of CIA agents in the 1970s. It's true Mr. Halperin showed bad judgment in testifying in Britain that more evidence should be heard before Agee was deported (which he was anyway).

But his error seems rooted in the libertarian zealot's mistrust of all secrecy. He has always said that leaking agent names is wrong, and while he opposed all covert actions for a time in the 1970s, in the 1980s he helped strike a deal with then-CIA Director William Casey that made such disclosures a crime. Unlike Lani Guinier, whose extremism is current, Mr. Halperin has modified some of his views over the years.

He has also stuck to his libertarian principles enough to defend even partisan enemies. At the ACLU, he protested the unfair treatment of such Republicans as Lyn Nofziger, Oliver North and the conservative student writers at the Dartmouth Review. As for the charge of super-dovishness, former Rep. Stephen Solarz says Mr. Halperin told him at the time that he supported the Gulf War, though the ACLU took the opposite position.

One irony here is that Mr. Halperin's chief tormentor has been Frank Gaffney (once even on this page), precisely the sort of forthright conservative whom liberals would try to torch if he were ever nominated. Another irony is that Mr. Halperin is more Defense Secretary Les Aspin's nomination than he is Bill Clinton's. He and Mr. Aspin, who is the most hawkish of the main Clinton security advisers,



Morton Halperin

are old friends from the McNamara Pentagon in the 1960s. Mr. Clinton barely knew of him.

None of which means Mr. Halperin shouldn't be inspected for his current views, especially on the confusion that now passes for Clinton foreign policy. To the extent there is a policy, it seems to be what Jeane Kirkpatrick has summed up as "doing what the U.N. calls on us to do."

Thus the U.S. remains in Somalia not out of national interest but to prop up an incompetent U.N. But on Bosnia the same U.N. becomes an excuse for doing nothing. This is the sort of mindless multilateralism that undermines public support for the useful kind (NATO, the Gulf coalition). It plays right into the hands of isolationists who don't want America to intervene anywhere.

As the Pentagon official in charge of "peacekeeping," Mr. Halperin would be knee-deep in these issues. His nomination is a perfect time for Republicans—and such skeptical Democrats as Georgia's Sam Nunn—to begin instructing voters about the stakes of all this. This is also more fertile, and certainly higher, political ground than refighting the Cold War.

Smearing of Morton Halperin.

MORTIFICATION

By Jacob Weisberg

Now that he's back from his vacation, Bill Clinton can expect confirmation trouble once again. This time the fuss is over Morton Halperin, nominated to fill the new position of assistant secretary of defense for democracy and peacekeeping. Conservatives, sensing Borkability, are gearing up for a fight they hope will damage the president, regardless of the outcome. But unlike Lani Guinier, against whom there was a substantive case, or Sheldon Hackney, against whom there was at least a plausible one, Halperin bears no resemblance to the portrait of a dangerous subversive his enemies have constructed.

In Washington all it takes sometimes is a single fax machine. And the accusations against Halperin have emanated entirely from the very busy fax machine of Frank Gaffney. Gaffney has characterized Halperin's views on national security as "bizarre," "extreme" and "associated with the radical left's agendas." This is wildly erroneous and, coming from one whose own views are somewhat bizarre and certainly extreme, a little amusing. Halperin is a distinguished defense intellectual who worked during the Vietnam War in Robert McNamara's Pentagon and Henry Kissinger's National Security Council. A civil libertarian, he headed the Washington office of the ACLU for eight years. He has written much on strategic subjects, on the conflict between government secrecy and individual freedom and on how to strike a balance between the two. (Some of his writings have appeared in *TNR*.) Halperin also supported the use of American force against Iraq (though as a director of the ACLU he did not take a public stand), and has argued—to the chagrin of the left—that covert aid to the contras in Nicaragua and the mujaheddin in Afghanistan was constitutional once it was approved by Congress.

In *The Washington Times*, Gaffney writes that 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. This is a multiple dishonesty. As a Defense Department official, Halperin supervised the government's internal production of the Pentagon papers. It was Halperin's copy, on deposit at the RAND Corporation, where he was a consultant, that was leaked by Daniel Ellsberg, an employee with top-secret clearance. But it was Henry Rowen, RAND's president, who granted Ellsberg access to the

document, not Halperin. Gaffney adds innuendo to false statement by implying that Halperin's hiatus from the government was somehow related to all this. In a subsequent op-ed in *The Wall Street Journal*, Gaffney notes that "Henry Kissinger suspected Mr. Halperin of leaking sensitive information to the press and even had his phone tapped." What Gaffney doesn't mention is that Kissinger later testified that nothing from the wiretap cast doubt on Halperin's loyalty (or that of Anthony Lake, whom Kissinger also bugged), and that the former secretary of state has publicly apologized to Halperin.

In another preposterous charge, Gaffney asserts that Halperin has "went so far as to aid and abet Philip Agee and others in their efforts to reveal publicly the identities of American covert operatives." This is nonsense. While Halperin has argued that it violates the First Amendment to prohibit private citizens from disclosing the identities of secret agents, he has always said that doing so is wrong; and, more to Gaffney's point, he has said in the same breath that former government officials like Agee have no such right to do so. Indeed, he has angered many on the old left by stating that the government can punish officials who reveal secrets, and by helping to negotiate the legislation that made such disclosures a crime. Gaffney even goes so far as to claim Halperin wants "to end all government security classification." Halperin contends the government classifies too much (so does Senator Daniel Patrick Moynihan), but he believes that the government has the right (and the need) to classify, and that some information is even "presumptively classified."

Gaffney has more to say, but it's all at this level. He quotes selectively and tendentiously—when he's not actually misquoting—to impute dovish notions that are not Halperin's. He holds Halperin responsible for the views of people defended by the ACLU, but never mentions that under Halperin the organization defended the rights of Oliver North, John Poindexter and Lyn Nofziger too. Nor does he mention that Halperin has been a force of good judgment within the ACLU, arguing that it had no business endorsing the nuclear freeze, for example, even though he personally supported it. Halperin has played a similar role within other liberal groups; he resigned from the board of American Friends of Peace Now when it sided with George Bush on linking loan guarantees for Russian immigrants to ending Israeli settlements in the occupied territories.

Gaffney's propaganda has been disseminated by *National Review* and *Commentary*, among other publications. It has also been picked up by Republican senators on the Armed Services Committee, including Trent Lott and Strom Thurmond. This committee, which will hold hearings on the Halperin nomination in the fall, is the last one a Clinton nominee would care to face. Its Republicans are legendarily right-wing. And its nominal 12-10 Democratic majority is offset by the presence of Sam Nunn and Richard Shelby, two members of the president's party who enjoy nothing so much as seeing him humiliated. These senators have every right to dislike Bill Clinton, but in this instance they have no good reason to fault his choice of a nominee. *

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. •

October 28, 1993

Interestingly, the second brief makes no reference to the first brief's different view and does not acknowledge the flip-flop. But I hope the Supreme Court will notice and that the Justices will not be fooled.

The key holding of the third circuit is that, under Federal law, "clothed exhibitions of the genitalia are proscribed" when "a photographer unnaturally focuses on a minor child's clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles." That is exactly what the facts show happened in this case.

This is how the video tapes involved in this case were described by the Justice Department in its first brief:

The tapes showed various females between the ages of 10 and 17 dressed in bathing suits, leotards, underwear and other similar attire. The children struck provocative poses, apparently at the direction of someone off-camera. The camera would typically zoom in on the children's pubic and genital areas and display a closeup of that area for an extended time. The tapes themselves and the promotional materials . . . showed that the tapes were designed to pander to pedophiles.

An advertising catalog for these tapes included the breathless description of—I am quoting—"bathing suits on girls as young as 15 that are so revealing it's almost like seeing them naked (some say even better)."

President, I am, like the vast majority of Americans, outraged by child pornography. I was one of the original Senate sponsors of antichild-pornography legislation with some of my efforts dating back to 1977. I took an active role in the passage of the 1984 Child Protection Act. In 1986, after a 2-year probe, which I directed, the Permanent Subcommittee on Investigations issued a report on the relationship between child pornography and the sexual abuse of children. The key findings of the investigation were that child pornography plays a central role in child molestations by pedophiles. Child pornography is used by pedophiles to justify their own conduct, to assist them in seducing their child victims, and sometimes as a means to blackmail the children they have molested in order to prevent exposure. One pedophile testified before our subcommittee that he used child pornography to overcome the resistance of his child victims and that he traded photographs of his child victims with other pedophiles. As a result of these hearings, I introduced, and the Congress passed, legislation to outlaw advertising of child pornography.

I know what Congress meant when we passed antichild-pornography legislation. We meant to stamp out the use of child pornography in this country and to stop the sexual exploitation of our children by pornographers and pedophiles. The legislation and enforcement efforts have been remarkably successful. But now the Clinton Justice Department's brief represents a major setback to these efforts.

The Justice Department brief is an outrage. I am deeply disappointed that Attorney General Reno, who has expressed such concern for the welfare of children, would allow her Department to file such a brief—a brief that will, in effect, legalize a substantial amount of child pornography in this country. Is this what the Clinton campaign meant by change? I certainly hope not.

I intend to do whatever is necessary to reverse the Department's position in this case and to ensure that the Department's arguments do not prevail.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. BIDEN. Madam President, parliamentary inquiry, are we in morning business?

The PRESIDING OFFICER. That is correct.

Mr. BIDEN. Need I seek unanimous consent to speak in morning business for 10 minutes?

The PRESIDING OFFICER. Without objection, it is so ordered.

MORTON HALPERIN

Mr. BIDEN. Madam President, it would appear that the thaw in cold-war thinking and cold-war rhetoric has not yet reached the floor of the U.S. Senate.

I am at a loss to explain otherwise the criticism directed at the nomination of Morton H. Halperin as Assistant Secretary of Defense for Democracy and Peacekeeping.

Mort Halperin has served the national security of this country with great distinction for 30 years; he is widely and justly admired as a principled, patriotic public servant and it is hard to believe that in this instance he is serving as anything other than a target of convenience for critics who do not know, or do not wish to admit, that the cold war is over.

With the disunion of the Soviet Union and the collapse of the Communist movement, we cannot serve the national interest of the United States today if we remain mired in a slush of cold-war paranoia and resentment.

We cannot promote peace and the progress of democracy around the world if we permit the nomination of a man who has dedicated his life to those values to be held hostage to past policy differences among those for whom the national security has been a common lifelong concern.

The United States of America was conceived as a nation where citizens could differ significantly but with dignity, where differences of opinion could be aired safely within a framework of civility and where the resolution of those differences could not be subjected to ex post facto judgments.

And it is no exaggeration to say that it has been in large measure, our character as such a nation that has enabled us to survive and prevail over the Communist threat.

To depart from that tradition today, to impeach our own character as a Sen-

ate and as a nation that embodies the very values the world most admires and wishes to emulate, would pose a very real and present threat to the national security. Dr. Halperin's critics profess to protect.

It would be hard to imagine a nominee better qualified than Mort Halperin to serve as Assistant Secretary of Defense for Democracy and Peacekeeping.

As head of the Washington office of the American Civil Liberties Union for a number of years and more recently as a senior associate at the Carnegie Endowment for International Peace and Baker professor at the Elliot School of International Affairs at George Washington University, he has been noted for the vigor and the effectiveness of his commitment to those values this Nation stands for.

He has been for more than 20 years a highly valued contributor to national security policy, having served in the Pentagon and the National Security Council under both Republican and Democratic administrations.

And it is a mark of both his patriotism and the professional quality of his work that his nomination has gained the bipartisan endorsement of former Secretaries of Defense and Directors of Central Intelligence who have known him well, not to mention the endorsement of Henry Kissinger, whom he sued successfully for wiretapping his phone.

Let me repeat that. Remember the celebrated case where Dr. Kissinger was sued as Secretary of State and as National Security Adviser for having ordered the wiretapping of the phone of Dr. Halperin? The very man who was sued, Dr. Kissinger, the Secretary of State, endorses Mort Halperin for this post along with Republican and Democratic Secretaries of Defense and Directors of Central Intelligence.

Dr. Kissinger, obviously, sees Mort Halperin's nomination not as an occasion for controversy but as an opportunity to advance American national interests in the post-cold-war world.

Precisely, Mr. President as I believe the Senate should view the Halperin nomination.

The Senate does nothing to fulfill its responsibility to advise and consent on Presidential nominations, and does nothing to enhance its reputation as the world's greatest deliberative body by entertaining a long and disagreeable litany of past policy disagreements nor by entertaining anonymous and probably false allegations, such as the rumor, and Mr. President it is no better than that, that Dr. Halperin shared in overruling the military request for tanks in Somalia only recently.

Not only has Dr. Halperin denied that rumor, but Secretary Aspin has also denied it.

In fact, as the Secretary informs me by letter, an investigation of the allegation has found that Dr. Halperin not only played no role in making the decision, but was in fact not even aware that anyone had requested the tanks.

But, Madam President, as the Washington Post said in a recent editorial:

The charges against the nominee are not worth dignifying by restatement. Each fresh one crumbles under the scrutiny of the record.

Morton Halperin's record of distinguished public service and scrupulous stewardship over our national security has been unblemished for three turbulent decades. As I said of him in this Chamber last year when he joined the Carnegie Endowment and George Washington University, I would like to say again and I quote from that statement:

He is that truly rare creature, especially in Washington, perhaps, but certainly not only in Washington—he is one of those rare people for whom there is never any conflict between principle and practice. He has never sacrificed his principles and he has left the political air fresher everywhere he has passed.

That is the Mort Halperin that I know, and that I think all the Senators who have worked with him over the years know. His nomination to a vitally important post for which he is magnificently well-qualified should not be sullied in this body by an urge—an urge—to lick old wounds that should have been healed long since in the brighter light and before the increasing challenges of the post-cold war world.

Madam President, I ask unanimous consent that the Secretary's letter that I referred to be printed in the RECORD, as well as the Washington Post editorial and my remarks from last year be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

THE SECRETARY OF DEFENSE,

Washington, DC, October 27, 1993.

Hon. JOSEPH BIDEN,
Russell Senate Office Building, Washington DC.

DEAR SENATOR BIDEN: Thank you for your October 27 letter concerning the alleged participation of Dr. Morton H. Halperin in decisions related to General Montgomery's request for additional support for U.S. military forces in Somalia. This is a serious allegation which must be answered fully and forthrightly.

I can tell you directly that I have had no discussions whatsoever with Dr. Halperin concerning General Montgomery's request for additional support and he sent me no memoranda or other documents related to this matter.

To answer your question about whether Dr. Halperin gave anyone else in the Pentagon advice on this matter, I asked a senior officer to interview others who had knowledge of the Montgomery request. Without exception, they all have stated that they had no discussions on this matter with Dr. Halperin. Indeed, there is no evidence that Dr. Halperin had any knowledge of the request. Accordingly, there are no documents, transcripts, or notes relating to any discussion of Dr. Halperin's involvement in this issue.

Dr. Halperin made a similar statement that he had no knowledge of the request from General Montgomery before the press reports; that accordingly he played no role and had nothing to do with this matter; and therefore there are no related documents or notes.

I hope you find this response helpful and that we can put this unfounded allegation to rest. Dr. Halperin is a very talented and patriotic American who I want to be on my

team at Defense. I hope the Senate will be able to move ahead promptly with favorable consideration of his nomination.

Sincerely,

LES ASPIN.

(From the Washington Post, Oct. 11, 1993)

THE HALPERIN NOMINATION

The Attack on Morton Halperin's Pentagon nomination keeps getting nastier. From selective and distorted citations of his past statements and positions, the pack has now moved on to the recent American deaths in Somalia. A nameless source accuses Mr. Halperin, the designated assistant secretary of defense for democracy and peace-keeping, of helping overrule the military on the question of whether tanks should have been sent to American peace-keepers a month ago. No evidence is presented for this charge. Mr. Halperin says it is false. But Sen. Strom Thurmond, leader of a partisan hit squad, is pursuing the matter with thunder and bile.

From the bolts of character assassination being hurled at Mr. Halperin, you would think he is coming from deep left field. In fact, he is coming from previous posts in the Pentagon and the National Security Council in the service of both Republican and Democratic administrations. From the very beginning of a notable 30-year career, he has gained regard for his contributions to national security policy. For some years he headed up the Washington office of the ACLU. This is presumable the service for which one critic darkly said he was running an organization "dedicated . . . to ensuring that U.S. intelligence agencies operated within the framework of the Constitution." A bipartisan clutch of former secretaries of defense and directors of central intelligence, not to speak of Henry Kissinger, whom he served and then sued for wiretaps, now provide the sort of lavish character references for which the average nominee would kill.

It is idle to try to imagine what may be on the minds of Sen. Thurmond and others who are baying after Mr. Halperin. If they are stirred by anything more than a nostalgia for the good old days of witch hunting, it is well hidden. The charges against the nominee are not worth dignifying by restatement: Each fresh one crumbles under scrutiny of the record.

The post to which President Clinton has nominated Mr. Halperin is focused on the post-Cold War tasks of planning peace-keeping operations, conducting military-to-military contacts to convey democratic practices, fighting the anti-drug war and providing disaster relief. In the absence of serious and proven charges against him, the Senate Armed Services Committee has no good reason not to confirm his nomination and let him get on with the job.

(From the CONGRESSIONAL RECORD, Sept. 30, 1992)

TRIBUTE TO MORTON H. HALPERIN

Mr. BIDEN, Mr. President, at the end of this month the American Civil Liberties Union will be saying goodbye to an outstanding American with a distinguished record of service to this country's great tradition of protecting civil rights and civil liberties of all individuals. At that time, Morton H. Halperin will leave the ACLU to accept a position with the Carnegie Endowment for International Peace, as well as a position as Baker professor in the Elliot School of International Affairs at George Washington University.

I am sure that we have not seen the last of Mort Halperin here in the Congress—he will remain as dedicated and as passionate in his championing of the causes of civil rights and individual liberties in his new position as he

has been in the past—but this transition makes a highly suitable time to note his tremendous contributions to those causes.

Mort Halperin has made an indelible impression on the lives of many, including myself. He is that truly rare creature—especially rare in Washington, perhaps, but certainly not only here—for whom there is never any conflict between principle and practice.

This is not because he is ever prepared to sacrifice his principles, but because he is never prepared to hold his principles aloof from the hurly-burly that so often surrounds civil rights. He is never content with principles as a pose, but only content with a principled and practical conclusion to any negotiation in which he participates.

Fortunately, for him and for us, he has a reflexive, instinctive ability to reach that kind of conclusion, time after time, to some of the knottiest controversies any of us ever encountered. And he does it without falling into the habits that too often snare those who take up civil liberties as moral trophy-hunters—

He is never content to be simply a cheerleader working the crowd from the sidelines without taking any risks himself.

He is never satisfied to simply bloody the other side with a blunt instrument without gaining any ground.

And he always wants something more than to leave the other guy guilt-ridden but still in possession of the field.

When the chips are down, what works is what Mort does—as long, of course, as what works is right. And how he gets things done is as unusual in this town as what he gets done. In a place where shouts often substitute for arguments, Mort never raises his voice, and while it is obvious he has an absolute passion for civil liberties, when he speaks it is always with the voice of reason.

He would rather persuade you than overwhelm you—not least, of course, because he understands very well that when you have come round to his point of view, you will be mightily impressed with the originality of your own thinking, and you will defend that idea as vigorously as you would defend anything else that belongs to you.

Given his abilities and his achievements among us, I used to wonder why Mort has not become a lawyer.

But I realized, finally, that he is a bit like the famous Professor Kittridge of Harvard. When a student asked Kittridge why he had never taken a Ph.D. in his field of English literature, the professor simply smiled and said, "But who would have examined me?"

None of us, certainly, would relish trying to examine the Halperin intellect or its command of civil-rights law. But there's nothing pointy-headed about the way Mort pursues his work. There's nobody in Washington smarter than he is, but there is equally nobody more down to earth in pursuing a goal, and he has all the tools for that kind of work.

He is, very simply, a man of good judgment, about both principles and people, and he has a first-rate command of the political process that aims at blending those two elements into results that are both desirable and workable.

He knows all the angles, and he plays them all, but he plays them straight. None of us has ever known a more honest man—but neither has any of us ever known a man more clearly focused on his goals or more clever at achieving them.

For Mort is, above all, a master tactician of the moral realm, and his preeminent skill is winning the big battles, outflanking and outmaneuvering the apparently unbeatable foe at the head of small, ragtag, apparently hopeless armies—for, as we have all learned,

that "apparently" can be a formidable weapon in the highly skilled hands of a Mort Halperin.

I have no doubt there are people all over this town who are still trying to figure out how they lost a fight against such "apparently" insignificant opposition.

It is simply beyond imagination that anyone could have done more than Mort for civil liberties. It has been our good fortune, as well as the great good luck of the American people, to have had Mort Halperin as our "Horatio at the Bridge" for civil liberties.

It has been our good fortune to have found in Mort Halperin the Humanitarian, but supremely practical, man once described by the writer Aldous Huxley—

"A man may have strong humanitarian and democratic principles," Huxley said, "But if he happens to have been brought up as a bath-taking, shirtchanging lover of fresh air, he will have to overcome certain physical repugnances before he can bring himself to put these principles into practice."

I have no doubt that Mort has had to wrinkle his nose more than once as he has made his way through the political stockyards here in Washington, but he never avoided the occasion, no matter how aromatic he may have found it; he never hesitated to get his hands dirty, even as he never sacrificed his principles; and he has left the political air forever fresher everywhere he has passed.

He has been my friend, and he has been the best friend to civil liberties in our time.

And so, I am sure, he will remain.

Mr. BIDEN. I thank the distinguished occupant of the chair for listening. I thank her for the time. I yield the floor. I see one of my colleagues wishes to speak, so I will not suggest the absence of a quorum.

Mr. CRAIG. Madam President, I ask unanimous consent to proceed as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

MANAGEMENT OF PUBLIC LAND

Mr. CRAIG. Madam President, today we had once again a very significant vote that is being used to attempt to establish a new public policy in this country as it relates to this Government's management of public land resources and the relationship this Government has with its citizenry. I am talking about the cloture vote on the Interior Appropriations Committee conference report as relates to the funding of that agency.

Those who have watched and participated in this discussion and debate have called it the grazing fee fight. I would like for a few moments this evening to broaden that argument just beyond grazing fees to what is really a good deal more important and why I mention that it is really the discussion of, or an attempt by some, to significantly change the relationship that our Government has had in the management of public lands with the citizens of our country in primarily 14 Western States where a great deal of the lands of those States are still retained in the ownership of the Federal Government. My State of Idaho happens to be one of those.

What kind of a relationship am I talking about? Our Founding Fathers were wise in many ways, but one of the things they said very clearly was that the Federal Government ought to be limited and all other nonenumerated rights would reside with the States. And for well over a century, this body and the other one defended in a strong way that concept.

Starting in 1913, no longer were Senators appointed by State legislatures but, in fact, elected by the populace through a change in our Constitution, we began to see a significant change in the relationship that the legislative body of our Government and, therefore, our Government through the policies crafted by the legislative bodies of our Government, had with State governments. Slowly but surely we saw the Federal Government beginning to say, "State governments, you will, you shall," instead of, "You may," or instead of, more importantly, requesting from them their advice. Because up until that time, and as it relates to public land policy, whether it was the Taylor Grazing Act or whether it was NEPA of decades of separation, there still remained a belief that State governments, even though they were speaking to or about public land held by the Federal Government, had a great deal of authority in how it ought to be managed. And, therefore, out of the Taylor Grazing Act that established the BLM and gave some control to the management of the nontimbered lands of our Nation came a principle that citizens ought to participate.

One of those ways of participating was to establish what was known as advisory boards. They had only the effect of advising. They did not have the power of law, but they could advise district directors of BLM. We had for a time small groups that advised supervisors of national forests as to relationships between State and the Federal entity. All of that was part of the process.

Did it give considerable control to the States? No, not really. The laws were specific. This body controlled the public policy that governed our Federal lands. But those citizens out there who were directly affected by those policies had some say in suggesting how all of that was to come about.

But as policy changed and, as I say, through the decades of the sixties and seventies, the National Environmental Policy Act—a variety of others—we saw progressively the pulling, if you will, of that relationship that once was stronger with the States away from the States toward a central Federal Government. All of the laws of the seventies and the eighties clearly show that.

So what I believe, based on those 174 to 18 pages of substantive law change that are embodied in the REID amendment to the Senate appropriations bill is, once again, an argument about that relationship. Should it be dictated down from the Federal Government or should there be a cooperative relation-

ship on how States and their citizens react to and with the Federal Government on the management of these resources in large public land States. I am one of those who believes that State relationship remains very important.

That is why today and over the last several days you have seen Western Senators on this floor who represent those public land States, loudly, and sometimes with an element of anger in their voice, or at least frustration, trying to express why this legislation should not pass. You have heard time and time again, it is not the fee that we are worried about, and that is absolutely true. The fee only establishes how much it cost to have a relationship with the Federal Government over their public land. It does not define the relationship.

But what those other 17 pages or 18 pages do is define the relationship. For example, it says where there used to be tenure, and that is a term that says if you have leased the public land for grazing and you have maintained it properly, then you have a right to renew the lease, and because that right has been ongoing now for well over 50 years, those who held the right to renew the lease could take it to their local bank and it became an economic entity. It became a part of a financial relationship. In fact, the IRS said, yes, it has value and it has value to the holder of the lease, and if you sell it or if you sell your ranch, there is value in a State taxation.

So even the IRS recognized that relationship. The Secretary of the Interior, Bruce Babbitt, said that relationship ought to be discontinued. And that, if it is to become law, if that is to become the new public policy of this country about that relationship between a citizen who held a lease and his Government or her Government on the use of the resource, it would significantly change the economics of the West. Let me give you an example.

Let us say I am a rancher and I run 500 head of cows. I own 640 acres of property, fee simple property, deeded property, but I lease this Federal ground around me to graze these cattle.

Now, today, a 500-head cow operation, as we call it out West, if you were to put it on the market and sell it, would probably be worth \$750,000. Is the 640 acres deeded, fee simple property worth \$750,000?

No. It is probably worth less than \$100,000. But that 640 acres tied with the right to graze creates an economic unit known as a cattle ranch, and that tied together has value. That value has been established by an ongoing policy of our Federal Government since the days of the Taylor Grazing Act.

Now, if the Government or if the Senate or if the Congress or if the Secretary of Interior says no longer does tenure exist, and therefore every 3 years that right is terminated and you have to go into the open market and

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September 22, 1993

The Honorable Sam Nunn
Chairman, Committee on Armed Services, U.S. Senate

By Hand

Dear Mr. Chairman:

As you know from our letter of August 23, we have been concerned that unwarranted attacks upon the character and integrity of Morton H. Halperin might do an injustice to him and to the Administration.

Accordingly, we solicited references for Dr. Halperin from persons, especially in the defense and intelligence community, whom we had some reason to believe might have had sufficient personal contact with him and his work to be in a position to express a view of his qualifications for the position for which he has been nominated.

We have the honor now to convey to you signed endorsements of Dr. Halperin for the position of Assistant Secretary for Democracy and Peacekeeping from nine of the most distinguished leaders of those communities —

Secretaries of State:

Cyrus Vance
Edmund P. Muskie

Secretaries of Defense:

Robert S. McNamara
Clark Clifford
Elliot Richardson

Deputy Secretary of Defense and Ambassador: Paul H. Nitze

Directors of Central Intelligence:

William E. Colby
Stansfield Turner (Adm USN Ret)

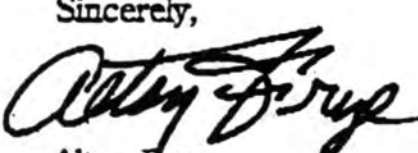
National Security Adviser to the President:

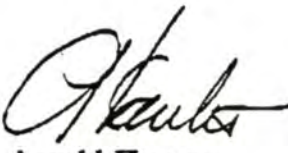
McGeorge Bundy

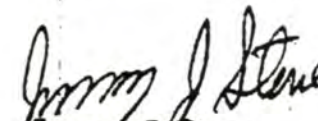
A fourth former Secretary of Defense, Dr. Harold Brown, has advised us that he independently endorsed Morton Halperin in conversation with you, and to the press.

Enclosed is a more complete list of those who endorse Dr. Halperin. We hope you find this information helpful.

Sincerely,


Alton Frye


Arnold Kanter


Jeremy J. Stone

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Members of the Defense and Intelligence Communities Who Have Endorsed Morton H. Halperin include:

Former Secretaries of State:

Cyrus Vance
Edmund P. Muskie

Former Secretaries of Defense:

Robert S. McNamara
Clark Clifford
Elliot Richardson
Harold Brown

Former Deputy Secretary of Defense and Ambassador Paul H. Nitze

Former Directors of Central Intelligence:

William E. Colby
Admiral Stansfield Turner (USN Ret)

Former Deputy Director of CIA for Intelligence (and former Director of the Department of State Policy Planning Staff) Robert R. Bowie

Former Special Assistant to the President for National Security Affairs McGeorge Bundy

Former Deputy Special Assistants to the President for National Security Affairs:

Carl Kaysen
Francis M. Bator

Former Head of the Institute for Defense Analyses General W. Y. Smith (USAF Ret)

Lieutenant General Robert E. Pursley (USAF Ret)

Former Ambassadors:

Raymond Garthoff (to Bulgaria)
Donald F. McHenry (to the United Nations)
James F. Leonard (to the United Nations)
Ralph Earle II (to Salt II and Director of ACDA)
Arthur Hartman (to the Soviet Union)
Jonathan Dean (to MBFR Talks)

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Congressman Howard L. Berman (Chairman, Subcommittee on International Operations of the Committee on Foreign Affairs)

Former Congressman Stephen Solarz

Former Undersecretary of the Navy David E. McGiffert

Former Undersecretary of the Air Force (and Deputy Assistant Secretary of ISA in DoD) Townsend Hoopes

Former Assistant Secretaries of Defense:

Lawrence J. Korb

Ambassador Paul C. Warnke (and Director of US ACDA)

Former Deputy Assistant Secretaries of Defense:

Richard C. Steadman

Laurence S. Finkelstein

Former Deputy Director, US ACDA, Spurgeon M. Keeny, Jr.

Former Assistant Director of the US ACDA (and Chairman of the Board, The Henry L. Stimson Center) Barry Blechman

Former Senior Staff Member, National Security Council, Jan M. Lodal

Editor, Foreign Policy Magazine, Charles William Maynes

President, The Henry L. Stimson Center, Michael Krepon

Professor, U S Naval Academy, George Quester

(9/22/93)