

Subcommittee on Security and Terrorism
of the
COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

HEARING ON

S. 391

INTELLIGENCE IDENTITIES PROTECTION ACT OF 1981

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21 John S. Warner,	
22 Legal Advisor, AFIO	
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1 leadership I look daily, my distinguished colleague from
2 South Carolina, Senator Strom Thurmond.

3 Senator Thurmond: Thank you very much, Mr. Chairman,
4 for your kind words.

5 Mr. Chairman, I would like to commend you for the
6 expeditious manner in which you have handled setting up this
7 hearing.

8 As a co-sponsor of this necessary piece of legislation,
9 I believe it is imperative that we act quickly but
10 effectively to see that this matter is given a full and fair
11 hearing. It is also necessary that parties with special
12 concerns be heard and their views weighed by the
13 subcommittee.

14 We must, however, keep in mind the special needs of the
15 brave and unsung employees of the intelligence agencies of
16 this Country. We must remember, too, that uninformed
17 policymakers cannot properly serve the people, and without
18 the information these employees provide, policy will suffer.

19 This bill aims at protecting the identities of those
20 individuals whose anonymity serves the interest of the
21 Country. Moreover, this legislation would ensure an
22 appropriate balance between individual rights and the
23 absolute necessity for secrecy in intelligence collection
24 vital to the Nation's security.

25 Mr. Chairman, I shall not be able to stay throughout

1 the whole hearing, as I have a bill coming up in the Senate
2 in a few minutes; but I want to take this opportunity to
3 welcome the head of the CIA here this morning, Mr. Casey,
4 who is an experienced, well-versed man on intelligence
5 matters.

6 I would also like to join in welcoming to this
7 committee the distinguished Senator from Rhode Island, my
8 good friend Senator Chafee.

9 Thank you, Mr. Chairman.

10 Senator Denton: Thank you very much, Mr. Chairman. I
11 know how busy you are as President Pro Tem of the Senate,
12 and with the many bills you are managing in the Senate.

13 We would like to welcome my distinguished colleague,
14 Senator Leahy, who has a great deal of background in this
15 subject and has in his experience with the Select Committee
16 and other committees on which we happen to serve together
17 shown me how much he is going to help us in the future as he
18 has in the past. After I welcome the witnesses, I will ask
19 you for anything you care to say, sir.

20 Our witnesses I will introduce one at a time, and then
21 ask them to take their positions. First, we already have in
22 the witness chair the Honorable John H. Chafee, Senator from
23 Rhode Island, who actually sponsored this bill and who has
24 urged us not to waste any time in getting to it; and I
25 assure you, John, that we have not. We have had a

1 Department of Justice review of the bill in which certain
2 things were questioned, and we have gotten to it as quickly
3 as we could.

4 We have William J. Casey, the Director of the Central
5 Intelligence Agency; Richard K. Willard, Counsel for
6 Intelligence Policy, Department of Justice; Morton H.
7 Halperin, Director, Center for National Security Studies,
8 American Civil Liberties Union; Jerry J. Berman, Legislative
9 Counsel, American Civil Liberties Union; and John M. Maury,
10 President, Association of Former Intelligence Officers.

11 You will be seeing them one at a time as they come up.
12 Welcome to you all, gentlemen.

13 I will make my opening statement, and then proceed.

14 In this subcommittee's previous hearing on Friday,
15 April 24, 1981, which was devoted to the origins,
16 directions, and support of terrorism, all of the witnesses
17 testified regarding past and present Soviet and surrogate
18 support for international terrorism. It is relevant to see
19 the expulsion of the Lybian Embassy personnel which took
20 place only yesterday.

21 In reviewing the media coverage which ensued after our
22 last hearing, I was disappointed, to say the least, that
23 some of those journalists covering the hearing seemed to
24 miss the central thrust of the testimony. They tended to
25 focus on an apparent lack of evidence of Soviet

1 masterminding of international terrorism, a point of view to
2 which no one connected with this hearing has ever subscribed.

3 That I should have been described as "surprised" or
4 "disappointed" by a lack of evidence showing Soviet
5 masterminding of this pernicious activity is to misrepresent
6 my views, which I have repeatedly articulated. And it seems
7 curious that that alleged "disappointment" for many
8 reporters was the number one news "fact," which was reported.

9 Since my personal views have been so variously reported
10 in the press, I feel compelled to state again for the record
11 that it is the intention of the subcommittee to hold
12 hearings to examine judiciously the extent to which
13 terrorism poses a threat to the security of the United
14 States. We have not prejudged this matter. We are and we
15 will remain sensitive to the need to search out the evidence
16 and to deal with it responsibly.

17 There were many elements of the media that reported the
18 hearings objectively, but superficial report of this type is
19 sufficiently widespread to cause me concern that the
20 American people are not being well informed.

21 I am convinced by my own experiences that there is an
22 irrefutable link between terrorism and national security.
23 This has been demonstrated time and again in those countries
24 whose survival is crucial to our own security. Turkey, the
25 Federal Republic of Germany, South Korea, and South Africa

1 are current examples. Similarly, the protection of covert
2 sources has a direct bearing on our own national security
3 through our ability to monitor terrorist and other
4 activities worldwide.

5 Therefore, with this in mind, the Subcommittee on
6 Security and Terrorism today undertakes a most important
7 task: An examination of provisions of S. 391 which is a
8 bill to amend the National Security Act of 1947 to prohibit
9 the unauthorized disclosure of information identifying
10 certain United States intelligence officers, agents,
11 informants, and sources; and to direct the President to
12 establish procedures to protect the secrecy of these
13 intelligence relationships.

14 Events transpiring in the world continue to demonstrate
15 that it is absolutely essential that our country maintain a
16 strong and effective intelligence apparatus in order to
17 ensure that our national security is maintained unimpaired.
18 Human collection sources of intelligence are of vital
19 importance to the success of this overall effort. It would
20 follow, therefore, that unauthorized disclosures of
21 information identifying individuals engaged in, or assisting
22 in our Country's foreign intelligence activities, are
23 undermining the intelligence community's human source
24 collection capabilities and exposing to needless dangers the
25 lives of our intelligence officers in the field.

1 The disclosure of the identity of a covert agent is an
2 immoral act which cannot be tolerated. It has no relation
3 whatsoever to speaking out against government programs which
4 are wasteful. It in no way bears a relationship to the
5 whistle-blower who seeks to enhance his government's ability
6 to perform more efficiently by bringing to the attention of
7 those in responsible positions deficiencies such as fraud or
8 waste in the agency in which the whistle-blower serves.

9 No. The reprehensible activities, the commission of
10 which this bill is designed to criminalize, have repeatedly
11 exposed honorable public servants to personal peril and
12 vastly reduced their effectiveness in pursuing their
13 endeavors. The insensitivity and moral degeneracy on the
14 part of those who seek to undermine the effectiveness of our
15 intelligence capability is so inimical to our American
16 democratic system that it seems, to me at least, that much
17 of what we are prepared to do today should be totally
18 unnecessary; and it is indeed unfortunate that this is not
19 the case.

20 While in a free society we must welcome public debate
21 concerning the role of the intelligence community as well as
22 that of other components of our government, the
23 irresponsible and indiscriminate disclosure of names and
24 cover identifies of covert agents serves no salutary purpose
25 whatsoever.

1 As elected public officials, we have a duty consistent
2 with our oaths of office to uphold the Constitution and to
3 demonstrate our support for the men and women of the United
4 States intelligence service who perform duties on behalf of
5 their country, often at great personal risk and sacrifice, a
6 service vital to our national defense.

7 Extensive hearings before the House and Senate
8 Intelligence Committees have documented these pernicious
9 effects. The underlying basic issue is our ability to
10 continue to recruit and retain human sources of intelligence
11 whose information may be crucial to the Nation's survival in
12 an increasingly dangerous world.

13 No existing law clearly and specifically makes the
14 unauthorized disclosure of clandestine intelligence agents'
15 identities a criminal offense. Therefore, as matters now
16 stand the impunity with which unauthorized disclosures of
17 intelligence identities can be made implies a governmental
18 position of neutrality in the matter. It suggests that the
19 U.S. intelligence officers are "fair game" for those members
20 of their own society who take issue with the existence of a
21 CIA or find other perverse motives for making these
22 unauthorized disclosures.

23 In the area of identities' protection, we must steer a
24 course carefully calculated between enormous interests: On
25 the one side we have the protection of a constitutional

1 right of free speech; and on the other, the vital need to
2 protect the effectiveness of U.S. intelligence-gathering
3 around the world.

4 Today we will hear from six witnesses with varying
5 viewpoints who can enlighten us in this important area.

6 Senator Leahy, before the questioning begins, would you
7 care to make an opening statement?

8 Senator Leahy: Thank you, Mr. Chairman.

9 I would like to make a brief one, and I compliment the
10 Chair on having hearings on what I think is an extremely
11 important subject. I am delighted to see our colleague from
12 New England -- Southern New England -- Senator Chafee, who
13 has done yoman's service in this field in the Intelligence
14 Committee and on the Floor of the Senate.

15 Mr. Chairman, few Americans are ever going to be in a
16 position to assess the full extent of the extraordinary
17 contribution of our intelligence officers to the security of
18 our Nation. Perhaps because of the nature of their work--
19 well, in fact, it is because of the nature of their work
20 that we will never be in a position to fully access it.
21 There can be no doubt, however, that the naming of names has
22 resulted in the diminished effectiveness of our intelligence
23 efforts, and the loss of life.

24 The legislation before this committee effectively deals
25 with the violations of oath and good judgment by those who

1 have had authorized access to classified information about
2 covert agents. There is no First Amendment purpose to be
3 served in assuring the rights of agents to violate their
4 professional duties -- and I give these provisions my
5 strongest support.

6 Mr. Chairman, Section 601(c) of the bill tries to deal
7 with information that has gotten beyond the perimeter of the
8 intelligence community, beyond the hands of those whose
9 silence we may require as a matter of contract. We do have
10 a legitimate interest in protecting the security and
11 effectiveness of the intelligence agents even where
12 compromising information is in the hands of agency
13 outsiders. But the standards cannot be standards growing
14 out of the notions of contract and duties; rather, standards
15 that examine the purpose of and intent of disclosure and
16 define "prohibited activity" with care.

17 The bill that does not clearly separate legitimate
18 discussion of the intelligence function in this country from
19 the purposeful and malicious naming of names could mean the
20 effective end of all meaningful discourse about
21 intelligence. The First Amendment has always been a very
22 down-to-earth concept for me. It means writing or speaking
23 without fear. And nothing would dampen honest expression
24 faster than confusion about the legal limits of that
25 expression.

1 If we adopt legislation that makes it perilous to write
2 about the CIA, or if the bill is so vague that the only safe
3 course of action is to write nothing, not only is the public
4 the loser but I think our intelligence agencies are the
5 losers, also. What is true of other government agencies is
6 true of the intelligence agencies, they have to operate
7 poorly in a permanent vacuum.

8 There has been concern about the constitutionality of
9 Section 601(c) because it limits the use of information in
10 the public domain. While I share that concern, I recognize
11 that there will be instances where information in the public
12 domain but not widely circulated can become dangerous to our
13 security if circulated with notoriety.

14 So let us try to identify those instances and define
15 them with such precision that misunderstanding of the law's
16 intent would be difficult. Let us also recognize that this
17 bill will not by itself cure intelligence leaks. If the
18 identity of agents has come into the public domain,
19 somewhere the system has broken down. Our first job is not
20 to tamper with the First Amendment, but to fix the system
21 and make sure that the leaks do not occur in the first
22 place.

23 Resting on a strong system for ensuring adequate cover
24 for our intelligence agents, a bill like S. 391, carefully
25 drafted, can immeasurably improve both the quality and the

1 security of our intelligence services. Unless carefully
2 done, however, the bill might fall short of the enforceable
3 protection we need, and yet weaken legitimate expression in
4 an area where the need for continuing dialogue has been
5 clearly demonstrated.

6 I bear no truck with those who feel that they must and,
7 under the guise of whistle-blowing, run out and hold a press
8 conference and endanger the lives of agents either currently
9 fellow agents or previously fellow agents to get their point
10 across, now that we have provided legitimate areas for
11 whistle-blowers -- not only in legislation that I have
12 drafted that has been passed by previous Congresses, but in
13 the Senate, in this body at least, in the Senate Select
14 Committee on Intelligence, there is an easy, immediately
15 available area for people within any of the intelligence
16 agencies with legitimate gripes to come to us, and they will
17 be heard by a bi-partisan forum on relatively short notice
18 in as complete detail as they want.

19 That is a proper and appropriate forum for those people
20 who have been entrusted with the greatest and most delicate
21 secrets of our Nation. That is the proper and appropriate
22 method to take. I think that within our intelligence
23 community steps should be taken to ensure that that is the
24 way it is done.

25 In saying that, however, we should also be aware as a

1 Nation that when steps are taken otherwise and people do
2 violate their oath of office, and when people do violate any
3 contractual obligations that they have undertaken, and
4 matters come before the public domain, we also as a Nation
5 have an absolute duty to protect the First Amendment rights
6 involved when something is out in the public domain.

7 Let us continue to make everybody within the
8 intelligence agencies aware of the fact that we do have
9 legitimate areas for legitimate gripes to be aired without
10 steps that sometimes have to be seen really as
11 grandstanding, steps that may well endanger our whole system
12 and our whole Country.

13 Thank you, Mr. Chairman.

14 Senator Denton: Thank you, Senator Leahy.

15 Senator Leahy: I should also comment, Mr. Chairman,
16 that I am on another committee, Senator Helms' committee,
17 that has been having a markup of the farm bill for two weeks
18 now, and at some point this morning I will have to leave for
19 ~~that~~ that. I do this so that I can still with a straight face
20 say periodically, "being just a small-town boy, a country
21 lawyer," that I will go back to the Agriculture Committee.
22 So I just want the chair to know that I at some point will
23 have to be leaving.

24 Senator Denton: We are all familiar with that problem,
25 and we appreciate your presence here this morning for the

1 time you are able to devote to it, Senator Leahy.

2 Senator Chafee, would you offer your opening statement,
3 please, sir?

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1 STATEMENT OF THE HONORABLE JOHN H. CHAFEE, A UNITED
2 STATES SENATOR FROM THE STATE OF RHODE ISLAND

3 Senator Chafee: Thank you, Mr. Chairman, and Members
4 of the Committee:

5 First I want to say that I appreciate a great deal, Mr.
6 Chairman and Members, that you have moved expeditiously with
7 this piece of legislation that I consider of great
8 importance.

9 Mr. Chairman, S. 391 is essentially the same as S. 2216
10 as it was reported from the Senate Intelligence Committee in
11 August of last year by a vote of 13 to 1. The only changes
12 are the numbering of the title and the paragraphs.

13 The purpose of the Intelligence Identities Protection
14 Act is to strengthen the intelligence capabilities of the
15 United States by prohibiting the unauthorized disclosure of
16 information identifying certain American intelligence
17 officers, agents, and sources of information. In short, the
18 bill places criminal penalties on those enemies of the
19 American intelligence community engaged in the pernicious
20 activity of naming names.

21 In my judgment, the governmental protection of the
22 identities of American intelligence officers is an idea
23 whose time has come and indeed it is long overdue. As has
24 been mentioned in previous remarks, others have made efforts
25 in this field. My colleague, Senator Bentsen, introduced

1 bills which would accomplish this purpose in 1976, 1977,
2 following the tragic murder of Richard Welch in Athens in
3 December of 1975.

4 I might say, Mr. Chairman, that Richard Welch was born
5 and raised in Providence, Rhode Island. So I have a deep
6 personal, as well as an official interest in preventing the
7 reoccurrence of events such as that.

8 In 1979, Representative Boland, Chairman of the House
9 Intelligence Committee, introduced a House bill which was
10 the predecessor of H.R. 4, which has been introduced this
11 year. In January of last year, S. 2216, the bill I
12 previously referred to, was introduced on the Senate side,
13 and its subsequent refinement and alteration is this bill we
14 are considering today, namely S. 391.

15 Extensive hearings have been held on the issue of
16 intelligence identities protection in both the House and the
17 Senate Intelligence Committees, and before the Judiciary
18 Committee. The issues which this legislation involves have
19 been heard in detail, and the wording of S. 391 has been
20 carefully amended and refined in its current state.

21 The point I am making, Mr. Chairman and Members of the
22 Committee, is: This is no draft bill that we are submitting
23 that has been conjured out of thin air. This is the result
24 of a long, definite effort covering many years with hearings
25 in the Intelligence Committees in the House and the Senate

1 on this subject.

2 The Republican Party platform in 1981 contained a plank
3 supporting legislation "to invoke criminal sanctions against
4 anyone who discloses the identities of U.S. intelligence
5 officers." Mr. William Casey and Admiral Turner have both
6 publicly expressed their support for intelligence identities
7 protection, and of course I am delighted that Mr. Casey will
8 be testifying this morning.

9 Our bill, this one we are considering today, is the
10 only one to receive the endorsement of both the Reagan and
11 the Carter Administrations' Justice Departments. Support
12 for this legislation also comes from a broad, bi-partisan
13 base of Senators with extensive knowledge and experience in
14 intelligence and national security affairs.

15 This bill has currently 40 co-sponsors from both sides
16 of the aisle, 10 of whom are committee chairmen, and 30 of
17 whom chair subcommittees. I am particularly pleased that
18 the distinguished Majority Leader, Senator Baker, is also an
19 original co-sponsor of this bill, as well as Chairman
20 Thurmond and Chairman Goldwater of the Senate Intelligence
21 Committee.

22 Mr. Chairman, the expeditious passage of this
23 legislation in my judgment is vital to the lives and safety
24 of those Americans who serve this Congress and this Nation
25 on difficult and dangerous missions abroad.

1 Now, Mr. Chairman, opponents of this legislation
2 prevented its coming to the Floor of the Senate last year in
3 the closing hours. As a result, the 96th Congress completed
4 its business without offering us the opportunity for free
5 debate and vote. Since that time, I am told that the Covert
6 Action Information Bulletin has published additional names
7 of alleged covert agents, and their editors have traveled
8 abroad to pursue this pernicious activity. As a
9 consequence, six Americans were expelled from Mozambique
10 recently following charges of engaging in espionage there.

11 A great deal of debate has centered on the
12 constitutional issues of intelligence identities
13 legislation. The American Civil Liberties Union, for
14 example, recently referred to this sort of legislation as "a
15 violation of the First Amendment." And I am pleased that
16 they will be testifying this morning before this
17 subcommittee.

18 The section of the First Amendment to the Constitution
19 that pertains to our discussion states that, "Congress shall
20 make no law ... abridging the freedom of speech, or of the
21 press ...". The first point that I wish to make with regard
22 to this amendment is the provisions of the Bill of Rights
23 cannot be applied with absolute literalness; but are subject
24 to exceptions.

25 It has long been recognized that the free speech clause

1 of the Constitution cannot wipe out common law regarding
2 obscenity, profanity, and the defamation of individuals.
3 This point was reiterated by Justice Oliver Wendell Holmes
4 in the classic Espionage Act decisions in 1919 when he
5 stated:

6 "The First Amendment ... obviously was not intended to
7 give immunity for every possible use of language... . The
8 most stringent protection of free speech would not protect a
9 man in falsely shouting fire in a theater and causing a
10 panic."

11 A second and equally important point is that if
12 unlimited speech interferes with the legitimate purposes of
13 government, there must be some point at which the government
14 can step in. My uncle, Zechariah Chafee, who was the
15 leading defender of free speech during his 37 years at the
16 Harvard Law School, wrote in his book entitled Free Speech
17 in the United States as follows:

18 "The true meaning of freedom of speech seems to be
19 this. One of the most important purposes of society and
20 government is the discovery and spreadh of truth on subjects
21 of general concern. This is possible only through
22 absolutely unlimited discussion... . Nevertheless, there
23 are other purposes of government, such as order, the
24 training of the young, protection against external
25 aggression. Unlimited discussion sometimes interferes with

1 these purposes, which must be balanced against freedom of
2 speech.

3 "Or to put the matter another way, it is useless to
4 define free speech by talk about rights. '... Your right to
5 swing your arms ends just where the other man's nose
6 begins.'

7 "The true boundary line of the First Amendment can be
8 fixed only when Congress and the courts realize that the
9 principle on which speech is classified as lawful or
10 unlawful involves the balancing against each other of two
11 very important social interests, in public safety and in the
12 search for truth.

13 "Thus, our problem of locating the boundary line of
14 free speech is solved. It is fixed close to the point where
15 words will give rise to unlawful acts."

16 It is evident, Mr. Chairman, that the activity of
17 "naming names" has given rise to unlawful acts, and that it
18 has endangered the lives and safety of American citizens
19 abroad. I have already mentioned the murder of Richard
20 Welch in Greece. I am sure you also know of the series of
21 assassination attempts in Kingston, Jamaica, following the
22 Covert Action Information Bulletin's publication of the
23 names of 15 alleged CIA officers there last year. What you
24 may not know -- and I think this is very important, Mr.
25 Chairman and Members of the Committee -- is how terribly

1 those events have affected the lives of the American
2 officials involved, their wives, and their children.

3 Mrs. Richard Kinsman, who wrote to me last year on this
4 issue and whose house was shot up as perhaps you know, in
5 Jamaica, in that instance, and whose letter I would like to
6 insert into the record, has since stated that her life has
7 been "terribly disrupted" by the assassination attempt on
8 her husband and her family. Her children, one of whose
9 bedrooms was riddled by machine gun bullets, "did not
10 understand why anyone would want to hurt them."

11 The family has been forced to move several times for
12 reasons of their own personal safety, required to give up
13 jobs, sever friendships, withdraw from and re-enter schools,
14 and suffer long periods of separation. They also wonder
15 whether they will ever travel abroad again for any purpose.

16 I understand that another wife whose home was also the
17 target of an assassination attempt in Jamaica last year was
18 hospitalized for stress disorders following the incident.
19 They have also left Jamaica. It is clear, then, that the
20 personal safety and missions of those named have been placed
21 in jeopardy by "naming names."

22 In the balancing of two important social interests,
23 public safety and the search for truth, it is clear that the
24 protection of the lives of our agents overseas far outweighs
25 a pattern of activities which identifies and discloses the

1 names of those agents. And I use the term "pattern of
2 activity," Mr. Chairman, because that is the language in
3 Section 601(c) of the Act.

4 In this regard, Mr. Chairman, I think it is essential,
5 and it is important to stress, that this bill would not
6 prevent Mr. Philip Agee from publishing the articles
7 contained in his publications, obnoxious though they might
8 be. This bill would only restrain his publication of the
9 names of persons he claims are covert agents.

10 By the same token, there is nothing in this bill which
11 would prevent Louis Wolf from continuing to publish his
12 Covert Action Information Bulletin which does contain
13 articles purporting to be based on "research" into U.S.
14 intelligence operations at home and abroad. I wish to
15 stress this: This Bulletin can continue to be published.
16 The only impact of this legislation would be on the section
17 of the Bulletin entitled "Naming Names." And here, Mr.
18 Chairman (indicating), is an example, "Naming Names." It
19 sets forth the names of alleged agents serving this Nation
20 abroad and serving this Congress abroad.

21 I hope that this brief review of the constitutional
22 questions will show that the First Amendment does not
23 provide absolute protection for all speech; and that the
24 Government can in certain circumstances intervene in the
25 exercise of free speech in the interest of public safety

1 without jeopardizing the search for truth.

2 As the Attorney General stated last year on this
3 subject, "our proper concern for individual liberties must
4 be balanced with a concern for the safety of those who serve
5 the Nation in difficult times and under dangerous
6 conditions."

7 It goes without saying that these important
8 constitutional considerations were very much in our minds
9 when my colleagues and I worked up the final draft of the
10 Intelligence Identities Protection Act. We are not
11 challenging the Constitution. We are working with it. In
12 my judgment, we have worked well within its limits. We have
13 successfully followed what my uncle called the "boundary
14 line of free speech."

15 Mr. Chairman, I will not take the time this morning to
16 discuss the specific provisions of S. 391, or to point out
17 in detail how this formulation reflects our proper concern
18 for First Amendment rights. This has been the subject of
19 previous testimony, and others will testify this morning,
20 and it is part of the extensive record on this issue. I
21 recommend the Intelligence Committee's Report on this
22 subject, as well as the published hearing record of both the
23 Intelligence and the Judiciary Committees.

24 However, there is one additional issue which I believe
25 must be addressed before I conclude my remarks, because

1 there has been so much confusion surrounding it. During the
2 long debate on this issue, and in the hearings before the
3 Senate Intelligence Committee, I have heard it suggested or
4 implied that it should be acceptable for people to disclose
5 the names of covert agents if this information derives from
6 unclassified sources.

7 The implication of this view is that there exists
8 somewhere in this government an official but unclassified
9 list of covert agents; and that those who have found this
10 list should be free to publish the names thereon.

11 Mr. Chairman, I have studied the matter of covert
12 agents within the Senate Intelligence Committee, and have
13 even held a series of detailed hearings on the subject.
14 Without going into specifics in this session, I can assure
15 you that there is no such list. What we have found are
16 unclassified official or semi-official documents which
17 contain the names of covert agents in among the names of
18 other officials of the U.S. Government. The covert agents
19 are not identified. The very purpose of these documents is
20 to cover or to hide the true identity of the covert agents
21 named thereon, and in no case is an identification
22 explicitly made.

23 However, to say that the government has never published
24 an unclassified list of covert agents as such does not mean
25 that certain persons, employing basic principles of

1 counter-espionage, and after considerable effort, cannot
2 determine identities of covert agents with some degree of
3 accuracy. It is possible.

4 It is the purpose of S. 391 to punish the publication
5 of names acquired through these techniques, regardless of
6 whether the identification was made with reference to
7 classified or unclassified material. And I might say that
8 this is not a punishment of a one-shot publication. Section
9 601(c) refers to the course of a "pattern of activity" to
10 disclose the names. It is not the mechanism of
11 identification which places people's lives in jeopardy or
12 threatens our intelligence capabilities; it is the actual
13 publication of the names as "covert agents" that does so.
14 It is the "pattern of activity" involved in the pernicious
15 business of "naming names" that we want primarily to
16 prevent.

17 In closing, Mr. Chairman, I would like to make a
18 special appeal to you and to my colleagues on your committee
19 to report S. 391 intact so that the interminable delays
20 which seem to follow any change to a bill might be avoided.
21 You have my assurance, in turn, that I will do whatever I
22 can to see that this vital bill is moved with the deliberate
23 speed it deserves.

24 Over the past five years, more than 2000 names of
25 alleged CIA officers have been identified and published by a

1 small group of individuals whose stated purpose is to expose
2 U.S. intelligence operations. I think it is time we
3 legislated an end to this pernicious vendetta against the
4 American intelligence community. The naming of names, not
5 the publication of a bulletin and the railing against the
6 U.S. intelligence service.

7 Mr. Chairman, we send fellow Americans, we in the U.S.
8 Congress, members of the U.S. Government abroad on dangerous
9 missions. We owe it to them to do our utmost to protect
10 their lives as we go about our business.

11 Finally, Mr. Chairman, it has been my privilege as a
12 member of the Intelligence Committee to have traveled
13 somewhat in different sections of the world. In doing so, I
14 make an attempt to meet with our intelligence agent station
15 chiefs and converse with them, discuss with them their
16 problems, what we might do in the United States Senate as
17 members of the Senate, as members of the Intelligence
18 Committee, to be more helpful to them in discharging their
19 duties.

20 I can say, Mr. Chairman, that everywhere I go, without
21 question, unanimously the question is raised that the most
22 disconcerting activity that takes place, the most
23 demoralizing activity, is the publication of names in
24 bulletins such as this (indicating). Our agents find it
25 difficult to understand why nothing can be done about this.

1 Mr. Chairman, I have a deep personal interest in
2 seeing-- and I know this concern is shared by members of the
3 Committee here and members of the Senate throughout-- to do
4 the best we can to protect the lives of our agents and their
5 families abroad.

6 Thank you, Mr. Chairman. I would be glad to answer any
7 questions that you might have.

8 Senator Denton: Thank you very much, Senator Chafee.
9 Your Uncle Zachariah has spoken very well, and he shall
10 become one of my valuable sources of quotations. We do have
11 the letter from Mrs. Kinsman. I have read it and been much
12 impressed by what that lady had to say.

13 I will have no questions of our colleague. Would you,
14 Senator Leahy?

15 Senator Leahy: I wonder if I just might, Mr. Chairman,
16 with your indulgence, ask a couple of questions. I have
17 been singularly impressed over the past several years that I
18 have been on the Intelligence Committee with how often we as
19 a committee act with complete unanimity. I would say in the
20 vast majority of things, certainly far, far more than any
21 other committee in the United States Senate.

22 It is interesting, too, because the membership is made
23 up with a very real effort to have a broad ideological,
24 geographical, every other kind of mix in there so it can be
25 truly representative of the United States Senate. I know of

1 no issue where the Intelligence Committee has spoken with
2 stronger unanimity than our great concern over the release
3 of the names of our agents worldwide.

4 The people who serve us in the intelligence agencies
5 around the world -- certainly all the ones I have met, and I
6 have done the same thing as you in visiting our people
7 abroad-- they are dedicated. They are hardworking. Many
8 times they are operating under serious disadvantages,
9 personal disadvantages to their family, themselves, in the
10 way they are living and working. Many certainly do not fit
11 into the idea of a "John Le Carre" spy novel. They are many
12 times people who carry out what appear to be fairly mundane
13 things, but very necessary; certainly not the type who
14 should be expecting or anticipating being put in great
15 personal danger, and yet they are when their names are
16 bandied about as being the lead person for some American
17 worldwide intelligence apparatus.

18 The person may well be working on economic issues or
19 something like that, but suddenly find that they are going
20 to have to defend their lives, and just as badly, defend the
21 lives of their spouses and children.

22 So there is no question that we want to put an end to
23 the pernicious practice of naming names of our cover
24 intelligence personnel, especially in the case of the Covert
25 Action Information Bulletin where it is being done purposely

1 to impede foreign intelligence activities in the United
2 States.

3 What I am concerned about, though, we all agree
4 absolutely that that has to stop. What I am concerned about
5 is how we do it. The issues of the constitutionality of
6 Section 601(c) have been raised. Philip Heymann has
7 suggested different language, and so on.

8 Maybe it is a philosophical question, John, that I have
9 more than anything else. Do we run a great risk -- even a
10 greater risk in some ways -- if we passed the bill, and if
11 Section 601(c) were to be found unconstitutionally broad?
12 In some ways, is that not a greater risk? Does that not
13 almost look like we have opened the floodgates, and it would
14 take years to restore any sense of security not only to our
15 own personnel but to those that may act against them?

16 A number of constitutional scholars have said it would
17 not be constitutional unless it contained an element of
18 malicious intent or bad purpose. Do you think we should
19 adopt that approach?

20 Senator Chafee: First, Mr. Chairman and Senator Leahy,
21 I want to pay tribute to the work you have done on the
22 Senate Intelligence Committee, a very valuable member and
23 you have as great concern in this area as any one member of
24 the committee. I know that you have worked extremely hard
25 to devise an approach in which we might solve this problem

1 which bedevils all of us.

2 This Section 601(c) has had support from the Justice
3 Department, as you recall, when started, and indeed the
4 version that is in the House is somewhat different in that
5 it has an "intent" section of what the Justice Department
6 calls a "subjective form of intent," whereas you will notice
7 on line 4 in the bill where it uses the word "intended" in
8 connection with the "course of activities," that is
9 described as an "objective standard of intent," one that is
10 not something in the mindset but can be weighed objectively.

11 So in answer to your specific question, it seems to me
12 that what we have done here is said that the "course of
13 activities" -- mind you, it is not one publication; it is
14 not The New York Times stumbling on the name of an agent and
15 publishing it once; it has to be a "pattern of activity"
16 which is a series of publications -- and that that in itself
17 is the offense.

18 I do not think it has to be with any malicious intent,
19 because we have described the action. It is like -- I
20 suppose analogies are always dangerous -- but shooting
21 somebody. You shoot them, and whether you do it with
22 "intent" or not to murder them, it is a "killing" and it is
23 punishable.

24 So we what we have done in the "crime" here is this
25 "pattern of activity" exposing the agents with the intent to

1 expose. So I do not believe that a standard of
2 maliciousness, which I think would be -- well, whether we
3 could ever get into the proof of such a thing, the defendant
4 would say it is not malicious, "I am out to do something for
5 the good of the United States."

6 Senator Leahy: But you do recognize philosophically
7 the problem that we would face? That if we were to pass one
8 part of the statute and have it held unconstitutional, that
9 it would be almost like we were opening the barn door and
10 saying: Unleash the herd?

11 Senator Chafee: Well, I do not think so, because I do
12 not think that if this were found unconstitutional-- I am
13 not accepting the assumption-- but if it were found
14 unconstitutional, I just do not think responsible American
15 citizens are going to go out and say: Three cheers! We can
16 now publish all the names of all the agents we can discover,
17 and we will do it freely.

18 I mean, I do not believe that the mass majority of
19 Americans are going to do this. There is a limited group
20 that is doing it now. But it is enough to cause damage.

21 Senator Leahy: Well, let me take Mr. Agee and Mr.
22 Wolf's activities. Would those not fall clearly within that
23 "bad purposes" test, the test suggested by Mr. Heymann, and
24 suggested possibly by the House language?

25 Senator Chafee: I am not sure I get your question.

1 Senator Leahy: Well, would not the kind of thing that
2 we seem to be zeroing in on, would not that fall under the
3 more restrictive language that has been suggested by the
4 Department of Justice and suggested by the House bill?

5 Senator Chafee: Well, the Department of Justice
6 approves this language.

7 Senator Denton: If you would yield, sir?

8 Senator Leahy: Sure.

9 Senator Denton: The delay which I mentioned was due to
10 their consideration of the wording, and the ultimate
11 judgment was in favor. There is total confidence that it is
12 constitutional.

13 Senator Leahy: Let me go to another question. How
14 does this affect those things that seem to pervade all
15 administrations, Republicans and Democrats, since I have
16 been paying attention, of the so-called "authorized leak"?
17 So I will not appear to be partisan, I will just take the
18 last four years. There was one person at a high level in
19 the Administration who it appeared that he virtually had a
20 member of one of the larger newspapers in this country on
21 his payroll with the way leaks would flow through to him.
22 We sometimes had to hurriedly schedule meetings of our
23 intelligence committees so that we could be briefed by the
24 intelligence community prior to -- or at least within a few
25 days of having read the same material on the front page of

1 that particular newspaper. Does it involve that sort of
2 thing?

3 Senator Chafee: This solely deals with "names." That
4 activity that went on that we were dealing with I do not
5 recall involved names. So this is solely, both (a), (b),
6 and (c).

7 Senator Leahy: Then let me just ask you one last
8 question, because I understand that the "pattern" could be a
9 series of events leading up to just one publication; it does
10 not necessarily mean by a "pattern" a series of
11 publications, but a series of events, rather, that may lead
12 to just one publication.

13 We heard testimony here on the origins and support of
14 international terrorism in this subcommittee recently. We
15 had Claire Sterling, the journalist Michael Ladine, and
16 Arnold Deborshgrave. Now all of these authors have named a
17 source who could fall under the definition of "covert agent"
18 contained in the bill. They used that to make their case
19 that the Soviet Union was supporting international terrorism.

20 Now I do not believe by any stretch of the imagination
21 that any of these authors wrote with the intent of impairing
22 or impeding the effectiveness of the foreign intelligence
23 activities of the United States. But they were all told, as
24 I understand it, by the U.S. Government sources that they
25 were wrong in their conclusion.

1 Now could the objective standard of "with reason to
2 believe that such activities would impair or impede the
3 foreign intelligence activities in the United States" have
4 had a chilling effect on their ability to use and name a
5 high-caliber source to prove a point which the U.S.
6 Government continues to deny?

7 Senator Chafee: Well, I do not know the facts of that
8 exact case, but there are a whole series of hurdles that
9 have got to be overcome before you can achieve a successful
10 prosecution under this Section 601(c). There are six of
11 them.

12 First, that there was an intentional disclosure which
13 did in fact identify a covert agent.

14 Second, that the disclosure was made to an individual
15 not authorized to receive classified information.

16 Third, that the person who made the disclosure knew the
17 information identified a covert agent.

18 Fourth, that the person who made the disclosure knew
19 that the United States was taking affirmative measures to
20 conceal the agent's classified intelligence affiliation.

21 Fifth, that the disclosure was made in the course of a
22 pattern of activities.

23 And sixth, that the person making the disclosure had
24 reason to believe that his activities would impair or impede
25 the foreign intelligence activities of the United States.

1 Now those are pretty big hurdles to jump.

2 Senator Leahy: I understand. I can think of things I
3 have read -- well, to be totally bi-partisan about it --
4 things I have read in the last six years since I have been
5 in the Senate, based on the knowledge that I had first in
6 the Armed Services Committee and then on the Intelligence
7 Committee, material that has gone from high Administration
8 officials, both Republican and Democratic Administrations,
9 directly to members of leading news media in this country
10 that would fall under every one of those tests, and were
11 published in the newspapers or within the electronic media.
12 The leaks came directly by high officials of both Republican
13 and Democratic Administrations that fall directly under
14 that.

15 Senator Chafee: With the names? I think that is
16 probably the difference.

17 Senator Leahy: Well, the definition of "names," if you
18 use a source that could only be one conceivable person that
19 it could come from, or one conceivable place that it could
20 come from, that is the same as the name.

21 Senator Denton: If the Senator would yield, I do have
22 two specific pieces of answers to two previous questions he
23 made reference to.

24 One is the mentioning of names by Messrs. Deborgrave
25 and Ledine and Mrs. Sterling. In every case which we know

1 of, the names named were all taken from foreign sources,
2 meaning that the agencies inimical to our interests already
3 had the names. This Department of Justice ruling was dated
4 25 February. We did not get it until about the last part of
5 March. But one sentence which does directly address your
6 question about "with reason to believe" -- that is, the
7 constitutionality or advisability of that -- the relevant
8 quote says: "The Department supports Section 601(3)(c)'s
9 requirement that an individual must act 'with reason to
10 believe that such activities would impair or impede the
11 foreign intelligence activities of the United States." They
12 go on to say that: "This is preferable to the House
13 version of the bill, H.R. 4, which requires that an
14 individual must act with the "intent to impair or impede the
15 foreign intelligence activities of the United States."

16 For what it is worth, those are the closest responses I
17 can make to those two questions.

18 With regard to the high officials leaking names, if
19 that is what we are getting into I am personally interested
20 in trying to tighten up the punitive measures which might
21 deter such leaks when they are against the security of the
22 United States.

23 Senator Leahy: Unfortunately, Administrations have for
24 years leaked what they think is within their benefit. We
25 usually catch hell for it up here, because people start

1 talking about all the leaks from Congress. I know in the
2 Intelligence Committee at least I know of no leak that has
3 ever come out of that committee; but I know of an awful lot
4 of hours of frustration that both Senator Chafee and I have
5 expressed at leaks that have come elsewhere.

6 I realize, Mr. Chairman, that you have an awful lot of
7 other witnesses, and I will forego any other questions. I
8 simply want to establish the fact that there is certainly
9 unanimity within the Senate on the desire to protect the
10 names of agents. We do not want our agents' names bandied
11 about. They are operating under enough problems as it is;
12 their own safety, the safety of their families is going to
13 become more and more difficult, and is already becoming more
14 and more difficult to recruit good men and women for a job
15 that is absolutely essential to the security of the United
16 States. I think that good intelligence, properly used, is
17 one of the best guarantees of freedom in the world, and one
18 of the best guarantees that we do not stumble into such
19 things as what would be the worst case, of course, an
20 accidental nuclear war.

21 So we must have it, and we must protect the identity
22 and the safety of those agents. But I also want to make
23 sure, however, that in doing it we do not infringe, number
24 one, on the basic constitutional rights that we are
25 ultimately trying to protect for all of us. And secondly,

1 that we do not pass legislation which may ultimately be
2 overturned, for whatever reason; because I think that that
3 would exacerbate the situation even greater.

4 So we are all striving for the same end, and I raise
5 the questions to make sure that when we finally come out
6 with a bill it will be the best one possible. And I just
7 compliment Senator Chafee on this. I think in the
8 Intelligence Committee he has been a yoeman in the work that
9 he has done in trying to educate all the rest of us, Mr.
10 Chairman, in working with us and in trying to bring together
11 the disparate views on the whole subject.

12 Thank you.

13 Senator Chafee: Well, thank you, Senator Leahy.
14 Again, I appreciate the efforts that you are making, along
15 with all the rest of us, to arrive at a successful solution
16 to this problem.

17 I would just conclude by making two brief points.
18 First, the whistle-blower problem is taken care of on page 4
19 of Section 601(c) where it does provide that it is perfectly
20 permissible to go to the Intelligence Committees, as you
21 pointed out.

22 Secondly, in some of the testimony we had last year the
23 point was made by opponents to this Act that there have been
24 all of these publications of names -- and I think I
25 mentioned in my testimony some 2000 names -- and only one

1 person has been murdered, and only one agent has been
2 murdered, and only one house or a few houses have been shot
3 up, so why bother passing legislation?

4 To me, Mr. Chairman, I do not buy that argument. First
5 of all, I do not think anybody should be murdered or
6 endangered. But secondly, and I am sure you can adduce this
7 from the testimony of the Director, the effect of these
8 names on our ability to function has been severe.
9 Regardless of whether it is a murder of an agent or not, or
10 the shooting up of a home, the deliterious effect on our
11 intelligence operations has been severe.

12 So I just hope that no one succumbs to the argument
13 that there have been 2000 names, and only one person
14 murdered, so why bother?

15 Senator Leahy: I do not think anybody is going to buy
16 that argument here.

17 Senator Chafee: I do not think any of us will take
18 that argument.

19 Senator Denton: And we recognize that, aside from the
20 loss of life or the injury to individuals, the
21 neutralization of their function of the names which are
22 revealed is a deliterious effect on our security.

23 Thank you very much, Senator Chafee, for your testimony
24 here this morning.

25 Senator Chafee: Thank you, Mr. Chairman. I appreciate

1 it.

2 Senator Denton: Mr. Casey has a Cabinet meeting at
3 11:30, and we are going to try to expedite our questions so
4 that he will be prompt in making that meeting.

5 We will ask William J. Casey, the Director of the
6 Central Intelligence Agency, to come forward. Would you
7 wish, Mr. Casey, your two colleagues to accompany you? John
8 Stein, Acting Deputy Director of Operations, and Mr. Fred
9 Hitz, Legislative Counsel for the CIA.

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1 STATEMENT OF WILLIAM J. CASEY, DIRECTOR, UNITED STATES
2 CENTRAL INTELLIGENCE AGENCY; ACCOMPANIED BY JOHN H. STEIN,
3 ASSOCIATE DEPUTY DIRECTOR FOR OPERATIONS, CIA; AND FRED
4 HITZ, LEGISLATIVE COUNSEL, CIA

5 Mr. Casey: I am pleased to be here, and I would ask
6 that my prepared statement be inserted in the record, and I
7 will give you the gist of my statement orally.

8 Senator Denton: It shall be done, sir.

9 Mr. Casey: Early last month I appeared before the
10 House Intelligence Committee on legislation and testified on
11 the House version of this bill. With both Chambers
12 considering this legislation, I am very hopeful that we will
13 soon see enactment of a measure that will finally put an end
14 to the pernicious and damaging unauthorized disclosures of
15 intelligence identities.

16 We need criminal penalties as soon as possible on the
17 unauthorized disclosure of information identifying certain
18 individuals engaged or assisting in the foreign intelligence
19 activities of the United States. This Administration
20 believes that the passage of the Intelligence Identities
21 Protection Act is essential to the maintenance of a strong
22 and effective intelligence apparatus. Enactment of this
23 legislation is vital to President Reagan's determination and
24 commitment to enhance the Nation's intelligence capabilities.

25 Mr. Chairman, there exists a tiny group of Americans

1 who openly proclaim themselves to be devoted to the
2 destruction of the Nation's foreign intelligence agencies.
3 This group has engaged in activities avowedly aimed at
4 undermining the Nation's intelligence capability through the
5 identification and exposure of undercover intelligence
6 officers.

7 Those perpetrating these disclosures understand
8 correctly that secrecy is the lifeblood of an intelligence
9 organization, and that disclosure of the individuals engaged
10 in that activity and whose identity is deliberately
11 concealed will disrupt, discredit, and they hope ultimately
12 destroy an agency such as the CIA.

13 Some of the persons engaged in this activity have
14 actually traveled to foreign countries with the aim of
15 stirring up local antagonism to U.S. officials through
16 thinly veiled incitements to violence.

17 Mr. Chairman, I might say that since taking the post of
18 Director of the Central Intelligence Agency only a few
19 months ago, I can confirm that these disclosures have
20 resulted in untold damage and, if not stopped, will result
21 in further damage to the effectiveness of our intelligence
22 apparatus and to the Nation itself.

23 I am appalled at the degree to which concerted activity
24 is being carried out around the world to destroy the
25 capacity which is critical to our national security, and

1 which has been painstakingly developed over many years with
2 the full participation and support of the Congress and an
3 investment of many billions of dollars.

4 The tragic results of these unauthorized disclosures
5 have been reviewed by Senator Chafee so well that I will not
6 take your time to go into all the details, except to say
7 that just a few weeks ago six Americans were expelled from
8 Mozambique following charges of engaging in espionage.
9 These expulsions followed and were directly attributable to
10 visits to that country by members of the Cuban Intelligence
11 Service and the editors of the Covert Action Information
12 Bulletin.

13 So this is a continuing threat that hangs over our
14 heads which can result in serious damage, increasing
15 discouragement, and retirements of people engaged in this
16 activity who have developed years of experience which is
17 enormously valuable to our national security.

18 Mr. Chairman, I do not think it necessary to go into
19 great detail about the adverse effects that these
20 disclosures are having. Simply put: The credibility of our
21 Country and its relationship with foreign intelligence
22 services and individual human sources, the lives of
23 patriotic Americans serving their Country, and the
24 effectiveness of our entire intelligence apparatus are being
25 placed in jeopardy daily.

1 Extensive hearings before the House and Senate
2 Intelligence and Judiciary Committees have documented these
3 damaging effects. The underlying basic issue is a fact that
4 our ability to continue to recruit and retain human sources
5 of intelligence whose information could be crucial to the
6 Nation's survival in an increasingly dangerous world, our
7 equally important relations with the intelligence services
8 of other nations, are in continuing jeopardy as long as we
9 are exposed to this threat.

10 It is important to understand what legislation in this
11 area seeks to accomplish. It seeks to protect the secrecy
12 of the participation or cooperation of certain persons in
13 the Foreign Intelligence Service of the United States.
14 These are activities which have been authorized by the
15 Congress, activities which we as a Nation have determined to
16 be essential. Secrecy is essential to the safety and
17 effectiveness of the case officers and the agents, without
18 which no intelligence service can operate. It is essential
19 to get individuals to undertake this delicate, demanding,
20 and frequently dangerous work.

21 No existing statute clearly and specifically makes the
22 unauthorized disclosures of intelligence identities a
23 criminal offense. As matters now stand, the impunity with
24 which unauthorized disclosures of intelligence identities
25 can be made implies a government position of neutrality of

1 not caring about the matter. It suggests that U.S.
2 intelligence officers are fair game by those members of our
3 own society who take issue with the existence of the CIA, or
4 find other perverse motives for making these unauthorized
5 disclosures.

6 I might say that other intelligence services around the
7 world, and other nations, the leaders of other nations,
8 witness this continuing spectre where the United States
9 leaves its people who have undertaken this work exposed to
10 this kind of risk and look at it with amazement. You hear
11 it wherever you go.

12 I believe it is important to emphasize that the
13 legislation which you are considering today is not an
14 assault on the First Amendment. It would not inhibit public
15 discussion and debate about U.S. foreign policy or
16 intelligence activities. It would not operate to prevent
17 the exposure of allegedly illegal activities or abuses of
18 authority. It is carefully crafted and narrowly drawn to
19 deal with conduct which serves no useful informing function
20 whatsoever. It is not related to alleged abuses. It does
21 not bring clarity to issues of national policy. It does not
22 enlighten public debate. It does not contribute to an
23 enlightened and informed electorate.

24 Mr. Chairman, there is virtually no serious
25 disagreement over those provisions of this legislation which

1 impose criminal penalties on the unauthorized disclosure of
2 intelligence identities by those individuals who have had
3 authorized access to classified information. Controversy
4 has centered on Subsection 601(c) of S. 391 which imposes
5 criminal penalties on the disclosure of information
6 identifying a covert action by anyone under certain
7 specified conditions.

8 Disclosure of intelligence identities by persons who
9 have not had authorized access to classified information
10 will be punishable only under certain specified conditions
11 which have been carefully crafted and narrowly drawn so as
12 to encompass persons only engaged in an effort or pattern of
13 activities designed to identify and expose intelligence
14 personnel and impair our intelligence capabilities thereby.

15 The proposed legislation also contains offenses and
16 exceptions which reinforce this narrow construction. It is
17 instructive in this regard to look at the elements of proof
18 that would be required in a prosecution under this section,
19 keeping in mind that the government would have to prove each
20 of these elements beyond a reasonable doubt.

21 The government would have to show that there was an
22 intentional disclosure of information which did in fact
23 identify a cover action;

24 That the disclosure was made to an individual not
25 authorized to receive classified information;

1 The the person who made the disclosure knew that the
2 information disclosed did in fact identify a covert action;

3 That the person who made the disclosure knew that the
4 United States was taking affirmative measures to conceal the
5 covert agent's classified intelligence affiliation;

6 That the individual making the disclosure did so in the
7 course of a "pattern of activity intended to identify and
8 expose covert action;

9 And that the disclosure was made "with reason to
10 believe that such activities would impair or impede the
11 foreign intelligence activities of the United States.

12 Because of these strict conditions which narrowly
13 define the prohibited conduct, I believe it is clear that
14 this subsection is directed at conduct which the Congress
15 has the authority and power to proscribe consistent with the
16 First Amendment, and that this bill does so in a
17 constitutional manner.

18 Mr. Chairman, I understand that the Department of
19 Justice believes that the Senate version of the bill better
20 captures the concerted nature of the activity which is
21 "intended to be proscribed than does the House bill, and that
22 there are prosecutorial and evidentiary advantages to the
23 Senate language. I believe the Department's witness will
24 speak to this matter.

25 Mr. Chairman, S. 391 will deal with a clear and

1 immediate danger which currently each and every day
2 endangers our intelligence activities, our staff officers,
3 and the lives of those who are cooperating with our Nation
4 abroad.

5 I want to express my gratitude and appreciation to the
6 subcommittee for so promptly bringing this legislation
7 forward, and to reiterate the hope that it will be enacted
8 into law as quickly as possible so that this intolerable
9 situation is remedied and no longer permitted to exist.

10 I will be happy, Mr. Chairman, to answer any questions
11 that you or anybody else may have.

12 [The complete statement of Mr. Casey follows:]

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1 Senator Denton: Thank you, Mr. Casey, for your most
2 expert and helpful testimony. I will be very brief in my
3 questioning in view of your time constraints.

4 Let me say at the outset that, while you have evinced
5 your sense of being appalled at the situation which we are
6 now addressing with such incredible tardiness, from my own
7 background I can assure us all that from personal contact
8 with high-ranking communists that they too are amazed,
9 amused, and highly pleased that such a situation at which
10 you are appalled exists.

11 I did hear you say, sir, that there is no existing
12 legislation which adequately deals with the problems of
13 disclosure which S. 391 is formulated to address. May I ask
14 what steps, if any, the CIA may have taken to tighten up its
15 security practices and cover for its own agents and
16 sources? And would the Agency develop standards for cover
17 sufficient to protect its covert employees from
18 identification, if this bill is passed and prosecuted
19 properly?

20 Mr. Casey: Well, we take extensive precautions to
21 equip our agents, and indeed our case officers with cover
22 and identities which facilitates the conduct of their task
23 that is assigned to them, and to protect them from both
24 disclosure of identification by foreign intelligence
25 services, and disclosure and violence from any source.

1 Senator Denton: Can Congressional oversight and
2 legitimate official and unofficial scrutiny of intelligence
3 activities take place without the likely revelation of
4 intelligence identity?

5 Mr. Casey: Well, our experience with Congressional
6 oversight and the informing of the relevant committees about
7 our proposed and actual operations has not resulted in any
8 serious disclosure at all, as far as I know. Much of the
9 conversation which takes place with the committees generally
10 describes what we intend to do and the risks and other
11 things that may be involved that seem relevant to the
12 adequate understanding and proper oversight, and very
13 unusually does it take us into identifying the particular
14 individuals who will undertake the particular mission. So I
15 do not see any risk there at all for the oversight process.

16 Senator Denton: My final question, sir: I am not even
17 a lawyer, but I cannot help but be somewhat impressed that
18 the offense which we are trying to establish as culpable
19 would result in a punishment of a fine not to exceed \$15,000
20 and imprisonment of not more than three years or both,
21 considering the deaths which have resulted and the harm to
22 our national security which can be translated in terms of
23 peacetime terroristic activities or wartime situations into
24 deaths.

25 In your opinion, are the penalties provided in S. 391

1 sufficient or severe enough for the proscribed activities
2 mentioned in the bill?

3 Mr. Casey: Well, I would not be opposed to more severe
4 penalties. I believe, however, the fundamental requirement
5 is that we establish the illegality of this action, the
6 criminal nature of this activity, and that we do that as
7 promptly as possible. So I would not be inclined to
8 encourage the imposition of more severe penalties if that
9 were to result in a delay in the enactment of the
10 legislation.

11 Senator Denton: I entirely agree, sir.

12 Senator Leahy?

13 Senator Leahy: Thank you, Mr. Chairman.

14 Mr. Casey, I am always delighted to see you before any
15 of our committees. I would also want to commend your
16 department for some help that they provided for me and my
17 staff during the past few weeks. It was extremely well done
18 and very professionally done, and I appreciate it.

19 Mr. Casey: Your visits were very helpful to the morale
20 and spirit of our people.

21 Senator Leahy: Thank you, sir.

22 I found an interesting thing in preparing for this that
23 the American Civil Liberties Union and the Heritage
24 Foundation in what was probably an historic moment held
25 hands on one major item; that they feel that the issue is

1 not so much disclosure made by the press or public, but the
2 question of adequate cover for intelligence officers abroad,
3 something touched on by the Chairman earlier.

4 I am concerned on that, as I know you are and I know
5 others here, I see Mr. Maury in the audience, and others who
6 have expressed the same concern in one regard or another. I
7 know that many agents' identities have been uncovered
8 through the use of the State Department's Biographic
9 Register, I must admit an item that I was not aware of until
10 I got on the committee and started looking through a copy of
11 it. I understand that Register is no longer in general
12 circulation, but it is still published as an unclassified
13 document.

14 Have you discussed the problem this might create with
15 Secretary Haig?

16 Mr. Casey: Yes, I have, Senator. I think generally
17 speaking we are getting a high degree of cooperation on the
18 provision of official cover. There has been sort of a
19 resuming of the publication of the State Department's
20 Biographical Register, and that is under discussion now, the
21 impact it would have or might have on protecting cover. I
22 think we will get full cooperation in the Executive Branch
23 with respect to all steps necessary to provide maximum
24 cover.

25 Senator Leahy: It occurs to me that both the ACLU and

1 the Heritage Foundation are correct in suggesting that no
2 matter what kind of laws we might have, if we do not have
3 adequate cover there is always going to be somebody, for one
4 reason or other, who is just going to go into something
5 relatively easy to decipher and make a big thing out of
6 just passing them out, no matter what their motivation might
7 be.

8 Mr. Casey: Even the State Department's Biographic
9 Register took a certain amount of interpretation. It was
10 not always accurate; but with the nature of this kind of
11 activity, it does not really matter too much whether it is
12 accurate or inaccurate, insofar as the damage it imposes and
13 the disrespect and impairment of morale it creates. So the
14 publication of false information is almost as damaging as
15 the publication of the correct information.

16 It is really the "pattern of activity" that I think the
17 legislation will address, and the thing that needs to be
18 proscribed.

19 Senator Leahy: Do you know, or has your office come
20 across cases where the names of agents were disclosed with
21 reason to believe that that disclosure would impair or
22 impede the foreign intelligence activities of the United
23 States, but at the same time felt that the person did so
24 without any intent of neutralizing the agent or impairing
25 our intelligence activities?

1 Mr. Casey: Well, I think that there has been
2 occasional publication in the press which divulged the name
3 in the course of writing an article intended to generally
4 inform the public; yes. I do not believe that that kind of
5 a one-shot publication would be reached by this legislation,
6 which it is clearly not designed to reach.

7 This bill goes to the active use of the information for
8 a particular purpose in a particular way. As Senator
9 Chafee's distinguished Uncle put it: It is not the swinging
10 of the arm that is proscribed; it is the smashing of the
11 nose.

12 Senator Leahy: But you also agreed, however, that
13 under this law we could be dealing simply with one
14 publication, but a series of events leading up to it.

15 Mr. Casey: Well, we could be; yes. There you have got
16 "acted in the course of a pattern of activities intended to
17 identify and expose". Unless the primary purpose is to
18 divulge a single agent's name, I do not think it would be
19 reached. You have to have a course or a pattern of
20 activities intended to identify."

21 Senator Leahy: But it could be one disclosure, but a
22 pattern of activities leading up to one disclosure.

23 Mr. Casey: The disclosure I think would have to be
24 part of a pattern of activities.

25 Senator Leahy: But it could be a single exposure.

1 Mr. Casey: It could be a single publication.

2 Senator Leahy: I may have other questions, Mr.

3 Chairman, but I will submit them for the record. I know the
4 Director has to go to a Cabinet meeting.

5 Senator Denton: Thank you.

6 And I think I should communicate here that Senator
7 Biden is delayed because of a train accident, all the trains
8 being held up. He will be here as soon as possible.

9 We would like to thank you very much, Mr. Casey, and
10 hope that you get to your Cabinet meeting on time, sir.

11 Mr. Casey: I appreciate it very much. Thank you.

12 Senator Denton: Our next witness is Richard K.
13 Willard, Counsel for Intelligence Policy, Department of
14 Justice.

15 Good morning, Mr. Willard, and welcome.

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1 STATEMENT OF RICHARD K. WILLARD, ESQ., COUNSEL FOR
2 INTELLIGENCE POLICY, UNITED STATES DEPARTMENT OF JUSTICE

3 Mr. Willard: Thank you, Mr. Chairman.

4 It is a pleasure for me to appear before you on behalf
5 of the Attorney General today to express the views of the
6 Department of Justice regarding S. 391. With your
7 permission, Mr. Chairman, I would like to simply make a few
8 brief remarks at the outset, and submit my prepared
9 statement for the record without reading it in its entirety
10 at this time.

11 Senator Denton: Surely; permission granted, sir.

12 Mr. Willard: I would like to emphasize at the outset
13 that the Department of Justice strongly supports the
14 enactment of this legislation to protect the identities of
15 the clandestine intelligence officers, agents, and sources
16 who serve this Country.

17 Senator Chafee and Director Casey have spoken
18 eloquently today of the need for this legislation, and we
19 fully agree with their views in this regard. It has been
20 the position of the Department that the knowing disclosure
21 of the classified identity of a clandestine officer, agent,
22 or source of an intelligence agency could constitute a
23 violation of certain sections of the existing espionage
24 laws; nevertheless, we agree that additional and more
25 specific legislation would facilitate prosecution of those

1 who seeks to make these disclosures, and thus neutralize the
2 intelligence agencies who serve our country.

3 I would like to turn specifically to the provisions of
4 S. 391 which are now under consideration after having been
5 introduced in this Congress by Senator Chafee on behalf of
6 himself and a number of other distinguished Senators.

7 This bill would prohibit the disclosure of information
8 identifying a covert agent which is a defined term covering
9 a range of government employees, agents, informants, and
10 sources. Varying penalties would be applied to three
11 different categories of persons who may be involved in the
12 unauthorized disclosure of such information.

13 The first two categories provided in this bill have not
14 been controversial. These provisions add substantial
15 protection against disclosure by current and former
16 government employees and contractors who have had authorized
17 access to classified information and the identities of
18 covert agents. The fact that these persons have had access
19 to such classified information lends an aura of credibility
20 to disclosures by them, and may provide them with a degree
21 of expertise regarding how covert identities are concealed
22 and the means for piercing such concealment measures.

23 We have one suggestion with regard to these provisions,
24 which are Section 601(a) and Section 601(b) of S. 391.
25 Neither section now includes a provision that would

1 criminalize attempts to commit the proscribed actions. An
2 attempts' provision would specifically authorize the
3 government to initiate the prosecution of any person who
4 meets the standards of these two sections, and who has taken
5 a substantial step forward, but has not completed the
6 disclosure of the identity of covert agents.

7 Such undertaking should be deterred subject to
8 punishment without forcing the government to delay until the
9 identities have actually been disclosed to the public and
10 the harm already done. We believe the penalty for a
11 violation of an attempts' provision should be somewhat less
12 than for an actual disclosure.

13 The third and final category of persons covered by the
14 bill is described in Section 601(c), and this section has
15 attracted the most attention. This provision includes
16 persons who have not had authorized access to classified
17 information that identifies or results in learning the
18 identities of covert agents.

19 The provision would penalize a person in this category
20 who knowingly discloses the identity of a covert agent in
21 the course of a "pattern of activities intended to identify
22 and expose covert agents and with reason to believe that
23 such activities would impair or impeded the foreign
24 intelligence activities of the United States."

25 This provision would provide a criminal penalty for any

1 person, including those who have never had authorized access
2 to classified material, who disclose information identifying
3 a covert agent with the requisite state of mind, even if the
4 information is derived entirely from public sources.

5 It has been argued that the principles of the First
6 Amendment are done violence when the government seeks to
7 punish actions based on information that is made available
8 to the public. We do not believe this argument has any
9 merit. As Senator Chafee pointed out, the First Amendment
10 is not absolute; and we are totally confident that a
11 carefully drafted bill such as S. 391 is constitutional.

12 Congressional hearings over the past two years have
13 well documented the serious harm to the national defense
14 caused by the actions this statute is intended to prevent.
15 When compared with the extremely limited burden on speech,
16 we believe that this serious harm justifies the proposed
17 legislation.

18 We also believe that the objective standard of "intent"
19 in Section 601(c) would pass constitutional muster under a
20 First Amendment or due process challenge. We believe that
21 this standard is preferable to the specific "intent"
22 standard contained in the current House version of this
23 legislation, Section 601(c) of H.R. 4.

24 A question has been raised by various Congressmen
25 analyzing the analogous House bill whether it is appropriate

1 to exclude cover FBI agents, sources, and informants in the
2 scope of this legislation. Two arguments have been raised
3 for excluding FBI covert agents.

4 One is that FBI personnel operate domestically rather
5 than abroad, and hence are better protected from the risk of
6 physical harm.

7 The second argument is that there is no empirical
8 record of FBI covert intelligence agents being exposed. We
9 disagree, however, with both of these contentions.

10 It is inaccurate to state that FBI covert agents are
11 insulated from a risk of physical harm, or that they operate
12 exclusively in the United States. We note, for example,
13 that people have attempted to use the Freedom of Information
14 Act to determine the identities of FBI informants in a
15 law-enforcement context.

16 In addition, there are many instances where FBI
17 undercover agents must travel abroad in the course of a
18 counterintelligence or counterterrorism investigation.

19 Moreover, even when an FBI agent operates domestically,
20 he may be operating undercover in a violence-prone terrorist
21 group. In this situation, his safety cannot be assured if
22 his FBI affiliation is revealed.

23 More significantly, however, the argument against
24 including FBI agents in this legislation appears to
25 underestimate the harmful effects such a disclosure would

1 have on the government's ability to maintain effective
2 counterintelligence and counterterrorism operations. These
3 operations are critical to our ability to monitor and
4 prevent damaging penetrations of hostile intelligence
5 services. If compromised by public disclosure of our covert
6 agents' identities, serious damage to our national security
7 could result.

8 Mr. Chairman, it is our belief that this bill will
9 strike the proper balance among the various competing
10 interests we must consider. Legislation of this nature is
11 critical to the morale and confidence of our intelligence
12 officers and their sources. The Justice Department strongly
13 recommends that it be reported out of this subcommittee with
14 a favorable recommendation for enactment by this Congress.

15 I would be happy to address any questions you may have
16 at this time.

17 [The complete statement of Mr. Willard follows:]

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1 Senator Denton: Thank you very much, Mr. Willard.

2 Does the DOJ feel that the authorized disclosures that
3 S. 391 addresses can be effectively prosecuted under its
4 provisions?

5 Mr. Willard: Yes, sir, Mr. Chairman, we do. These
6 provisions have been developed in consultation with the
7 lawyers who prosecute crimes of this nature, and they
8 believe that this statute is both constitutional and
9 enforceable.

10 Senator Denton: Do you foresee any problems with the
11 various burdens of proof which it must meet in prosecuting
12 violations under S. 391?

13 Mr. Willard: Well, Mr. Chairman, we have to say that
14 Section 601(c) imposes a very heavy burden on the
15 government. There are six separate elements to this
16 offense, and it will not be easy to prove a violation; but
17 we believe that in the serious kinds of disclosures that
18 this committee has been concerned with, prosecution is
19 possible and the bill is drafted for that purpose.

20 Senator Denton: What would you see as the impact on
21 addressing the problem of unauthorized disclosures if
22 Section 601(c) were removed from the bill?

23 Mr. Willard: Well, this would we think seriously
24 endanger the effectiveness of the bill. The kinds of
25 unauthorized disclosure that this committee and other

1 committees in the Congress have been concerned with have
2 frequently occurred from people who cannot be shown to have
3 had direct access to classified information. Therefore, we
4 believe it is essential to have a provision like this if we
5 want to eliminate the harms the committee is concerned
6 with.

7 Senator Denton: The Department of Justice has stated
8 in the past that it feels wrongful disclosure of classified
9 information concerning an agent's identity constitutes a
10 violation of the existing espionage statutes, 18 USC 793(d)
11 and (e), and 18 USC 794.

12 How many prosecutions have there been under these
13 statutes for offenses addressed by S. 391? That is, the
14 revealing of identities of intelligence officers and sources?

15 Mr. Willard: To my knowledge, Mr. Chairman, there have
16 been none.

17 Senator Denton: Do the present espionage statutes
18 cover activity proscribed by Section 601(c) of S. 391 such
19 as publication or republication?

20 Mr. Willard: Section 601(c) is a different kind of
21 statute, more broadly drafted, and we think it will be more
22 useful in prosecuting these kinds of activities than the
23 existing espionage law.

24 Senator Denton: I would like to take time to recognize
25 the presence of my distinguished colleague from North

1 Carolina who is the Chairman of the Subcommittee on
2 Separation of Powers on this Committee. I serve with him on
3 that subcommittee, and unfortunately we are often having
4 hearings at the same time.

5 For the record, I would like to submit my feeling of
6 great admiration for him as a Senator, and for his
7 conscientious efforts in his current hearings.

8 Welcome, Senator East.

9 Senator East: Thank you, sir.

10 Senator Denton: To date, FBI secret identities of
11 agents who travel abroad have not been revealed. Would it
12 have an adverse effect if identities were revealed, as has
13 happened to CIA agents?

14 Mr. Willard: Yes, Mr. Chairman. We do not think that
15 the good record of the FBI in this regard should be held
16 against us and used to deny FBI agents the kind of
17 protection that would be very helpful to them in the future.

18 Senator Denton: Have the problems encountered by the
19 CIA impacted on the FBI's ability to conduct foreign
20 intelligence, foreign counterintelligence, and foreign
21 counterterrorism activities? And if so, how?

22 Mr. Willard: Mr. Chairman, I think that the climate
23 created by the problems that this committee has addressed
24 has an effect on the activities of all the intelligence
25 services in a general way. I am not prepared at this point

1 in open session to discuss specific ways they have impacted
2 on FBI counterintelligence or counterterrorism operations,
3 but I think that the Bureau would be happy to provide that
4 information in classified form to this committee.

5 Senator Denton: We would look forward to receiving
6 that, sir.

7 I would like to welcome Senator Biden who has survived
8 some train difficulties. He informs us that, regrettably,
9 one person was killed in the train ahead of his.

10 Welcome, Senator Biden, and again I want to acknowledge
11 your tremendous experience in this field, and your most
12 effective efforts in the past.

13 Senator Biden: Thank you, Mr. Chairman.

14 Mr. Chairman, for the record, there was no one in the
15 train that I was riding who was killed, but a northbound
16 Metro Liner going through the Baltimore tunnel struck a
17 flagman who was supposed to be the one warning of the train
18 coming that killed him, blocking the tunnel for an hour. So
19 I apologize to the witnesses who have already gone, and to
20 those of you who are here, for being late. It does not
21 evidence a lack of interest in this topic on my part.

22 Thank you, Mr. Chairman.

23 Senator Denton: Thank you, Senator Biden.

24 I would pause here and ask Senator East, first, if he
25 cares to make any statement due to perhaps the transiency of

1 appearance here, because of overriding requirements
2 somewhere else?

3 Senator East: Senator, I thank you for the
4 opportunity. I am pleased to be here. I am sorry that
5 because of other conflicts I have not been able to be with
6 you from the beginning, but as a great admirer of your
7 service in Vietnam and of the great contribution you are now
8 making as a United States Senator, it is a pleasure to be
9 associated with you on this subcommittee.

10 I am a co-sponsor of this bill, so my sentiments and
11 commitments are well known there, and I will not then delay
12 the hearings with any further comment, except to say
13 publicly, which I would like to say, my great admiration for
14 you as a person as one of America's truly national heroes
15 and the great honor I consider it as a freshman senator to
16 be a part of your class and to serve under your leadership
17 here on this subcommittee.

18 Thank you, Mr. Chairman.

19 Senator Denton: Thank you, Senator East.

20 I would invite Senator Biden to make any remarks he
21 might choose to at this point.

22 Senator Biden: Mr. Chairman, I will be brief. I have
23 an opening statement which I intended on delivering prior to
24 any witnesses being heard, but I think it is worth my making
25 it at this point for the remaining witnesses to have a

1 framework within which to understand my questions that will
2 follow their testimony.

3 Mr. Chairman, through today's hearings we are involved
4 in a thorough and open analysis of the extremely important
5 piece of legislation. This legislation to protect
6 Americans, covert agents abroad, had its origin in a
7 terrible tragedy, the brutal murder of Mr. Richard Welch in
8 front of his home in Greece within a month after he was
9 publicly identified as the CIA Station Chief in Athens, and
10 the attempt on the lives of American Embassy officials and
11 their families in Jamaica following publication of their
12 names, addresses, license plate numbers, and phone numbers
13 along with the allegations that they were CIA officials.

14 A civilized society, Mr. Chairman, cannot ignore
15 systematic efforts to cripple its intelligence agencies by
16 hampering its foreign covert activities. The systematic
17 identification of persons as CIA officials has caused
18 further harm, because it interferes with the relationship
19 between the United States and foreign sources of
20 intelligence.

21 It is no surprise that sources in other countries are
22 somewhat reluctant to assist the United States when they
23 fear for their safety through exposure. In the last
24 Congress, the Intelligence Committee of which I have been a
25 charter member since its inception, and the Judiciary

1 Committee, laid the groundwork for legislation to protect
2 covert agents. The bill before the subcommittee, S. 391, is
3 the product of that effort of the Intelligence Committee,
4 and it provides a valuable vehicle by which this
5 subcommittee can begin its analysis of the Intelligence
6 Identities Protection Act.

7 Although I voted against the Intelligence Committee's
8 bill, and I guess I was the only one, or one of few in the
9 Intelligence Committee last year, and I filed dissenting
10 views, I have supported legislation in this area in the
11 past. As I noted in the Committee Report on a related
12 issue, the Grey-Mail legislation, limited further protection
13 of intelligence sources especially in the identity of
14 foreign agents appears to be very necessary. We reached
15 that conclusion the better part of two years ago as a
16 consequence of our efforts in the Grey-Mail area.

17 The Intelligence Identities Protection Act before this
18 subcommittee, as I see it, has three parts.

19 The first two parts create a federal offense with stiff
20 penalties for persons who have authorized access to
21 classified information, and use that information to disclose
22 the identity of covert agent. I have absolutely no problem
23 with those first two portions, and I do not think anyone
24 really does have much of a problem with those.

25 The third part of the bill also creates a new offense.

1 According to our Intelligence Committee Report, and I quote,
2 "It encompasses only individuals whose intentional will
3 evidenced by a course of conduct involves, first, a pattern
4 of activities; second, those activities intended to identify
5 and expose covert agents; and third, with reason to believe
6 that such course of conduct would impair or impede U.S.
7 foreign intelligence activities."

8 The purpose of this section, again according to the
9 Intelligence Committee Report, is to "apply criminal
10 sanctions only in very limited circumstances to deter those
11 who make it their business to ferret out and publish
12 identities of agents."

13 The report further states, "It does not affect the
14 First Amendment rights of those who disclose the identity of
15 agents as an integral part of another enterprise such as
16 news media reporting of intelligence failures or abuses,
17 academic studies of U.S. Government policies and programs;
18 or private organizations in the enforcement of internal
19 rules."

20 I question whether the bill accomplishes this end,
21 these goals, although we all agree the should. The language
22 of that provision, Section 601(c), is at best ambiguous in
23 my opinion, and at worst, as a number of constitutional
24 scholars have argued, unconstitutional.

25 The ambiguity in the language has led more than one

1 legal scholar to conclude that Section 601(c), although
2 having a very laudable goal, would prohibit the use of
3 unclassified material by private citizens who disclose
4 willful conduct by intelligence agencies themselves. This
5 committee should, and I am sure will, place a great deal of
6 emphasis on this concern since we have already seen the
7 value of thorough investigative authors such as Claire
8 Sterling, whom you have had before this committee, on
9 questions of intelligence agencies.

10 This subcommittee must also give weight to the concern
11 that Section 601(c) is unconstitutional. In fact, Professor
12 Kirkland, Philip B. Kirkland, Professor of Law at the
13 University of Chicago, one of the Nation's leading
14 constitutional scholars, reviewed Section 601(c) and stated
15 matter of factly that he "had little doubt that it is
16 unconstitutional." Kirkland went on in some great detail to
17 explain why.

18 Now, Mr. Chairman, I look forward to reviewing the
19 testimony already given by the witnesses thus far, and the
20 witnesses to come, on the concerns I have raised and hope
21 that they will assist us in this subcommittee in finding an
22 effective but more acceptable means to protect the names of
23 agents, which we all wish to do.

24 Finally, I would like to point out that this bill is no
25 substitute for an effective cover for foreign agents. We

1 have had, as you know, in the Intelligence Committee
2 numerous hearings on the inability and the lack of vigilance
3 in my opinion on the part of the Agency themselves to
4 protect the identities of their own people in ways that
5 would require not a great deal more imagination.

6 So one of the things we have to do, we even had to go
7 so far in the Intelligence Committee to instruct the
8 intelligence agencies to "take affirmative measures to
9 conceal the identities of agents."

10 So I think that we have a two-fold purpose here. I
11 think your effort in expediting this legislation is not only
12 noteworthy, it is very important, and you have my full
13 support in that effort.

14 Let me conclude by reading the text of what I was going
15 to ask Mr. Casey, and I will now read it so you all know
16 what I am going to pursue with regard to the
17 constitutionality of this. Philip Kirkland said:

18 "I can frame my opinin on the constitutionality of this
19 section very precisely. I have little doubt that it is
20 unconstitutional. I cannot see how a law that inhibits the
21 publication without malicious intent of information that is
22 in the public domain and previously published can be valid.
23 Although I recognize an inconsistency in Supreme Court
24 decisions, I should be very much surprised if that Court,
25 not to speak of the lower Federal Courts, would legitimize

1 what is for me 'the clearest violation of the First
2 Amendment attempted by the Congress in this era.'

3 "With all good wishes, Philip Kirkland."

4 I wish he had a strong opinion on this subject --

5 (Laughter.)

6 Senator Biden: But the point is, I plan to work with
7 you, Mr. Chairman, to see to it that we get a bill. We must
8 stop the Agee's. We must find a way to do it. It is
9 outrageous and reprehensible what they do. But I do not
10 want to stop publications of books like The Spike. I do not
11 want to stop publications of books like The Terrorist
12 Network. I do not want to stop publications of books that
13 we all think are important to be kept forward. And whether
14 or not they would fall within the purview of this is a real
15 question.

16 I am not being facetious. I am being serious about
17 that. So thank you very much. I apologize for the delay
18 and the ability to make an opening statement midway into the
19 questioning.

20 Senator Denton: Well, thank you, Senator Biden. I too
21 would not be interested in stopping publications of books
22 like The Spike or The Terrorist Network. The Spike was a
23 novel with fictional characters, and I do not want to so
24 abruptly take a difference with you, because I want to
25 express first my admiration for you in this field,

1 especially in your invaluable leadership in the Drug
2 Enforcement Administration area in which we share activity.
3 But I do believe that The Spike, being a novel, and The
4 Terrorist Network, which contained information on identities
5 derived from foreign services, do not really constitute
6 arguments against the passage of this bill -- at least that
7 is my persuasion.

8 Senator Biden: They may not, Mr. Chairman. I am
9 anxious to see.

10 Senator Denton: Well, then, why do we not just ask him
11 outright if you think this bill is going to be
12 unconstitutional?

13 Mr. Willard: Mr. Chairman, it is our position that the
14 bill is constitutional, and we do not have any doubt that it
15 will be sustained as drafted, S. 391.

16 Senator Denton: That of course was in the letter which
17 was sent from the Department of Justice to the Chairman of
18 the Committee on the Judiciary. So we did have that
19 information ahead of time, but I am glad to get it on the
20 record during this hearing.

21 I have only one more question and then I will turn the
22 questioning over to Senator East, and then Senator Biden.

23 Mr. Willard, do you have any suggested amendments to S.
24 391 to render it more effective in the prosecution of
25 unauthorized disclosures of the identities of agents and

1 sources?

2 Mr. Willard: Yes, Mr. Chairman. I mentioned briefly
3 in my prepared statement the addition of an attempts'
4 provision for Section 601(a) and (c). We believe that such
5 provisions are common in the criminal law, and that these
6 Sections 601(a) and (b) not being controversial, it would be
7 appropriate to include an attempts' provision in those
8 sections.

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1 We have submitted suggested language for such a
2 provision to the House Intelligence Committee in response to
3 their request, and we would make that available to this
4 committee, as well. We also suggested the addition, at
5 least in the legislative history, of a definition of
6 "foreign intelligence activities." There would be no doubt
7 that this bill is intended to cover the full range of those
8 activities, and is not limited for example to one facet.

9 Senator Denton: So your amendments would not include
10 any increase in severity of penalties, for example?

11 Mr. Willard: No, Mr. Chairman, we have not considered
12 the severity of the penalties. I think we agree with
13 Director Casey that the important thing is swift and certain
14 punishment for criminal offenses; and the actual length of
15 the sentences and the amount of the fine is not as important
16 to us.

17 Senator Denton: Senator East?

18 Senator East: Thank you, Mr. Chairman.

19 I would just like to take a moment to make an
20 observation on the distinguished Senator Biden's comment on
21 this matter of constitutionality, so I really am not
22 directing my question at Mr. Willard. That is, I do agree
23 with his -- personally, my own agreement would be that the
24 Act as it stands is constitutional.

25 The trouble I have is that if we constantly assume that

1 this expert or that, that their voice is determinative of
2 the matter, then in effect you would never really draft any
3 legislation, it occurs to me.

4 Now Mr. Kirkland is a distinguished constitutional
5 scholar, but of course there are many others. As we all
6 know, in the study of constitutional law, reasonable-minded,
7 fair-minded, well-intentioned scholars can differ over
8 constitutionality. In terms of Mr. Kirkland, I would
9 suggest that his opinion could be "a" factor that one might
10 wish to weigh in determining constitutionality, but it
11 certainly ought not to be determinative and decisive.

12 The particular section here in question that Senator
13 Biden was directing his comments to, the Section (c), I
14 would contend -- not suggesting I am in the same league as
15 Mr. Kirkland, but as a lawyer and as a holder of a Ph.D. in
16 Political Science, I will just throw in my two cents'
17 worth. I think it is constitutional.

18 So one can run through that gamut. I think it is all
19 very valuable to get comments on constitutionality, but
20 ultimately of course the tribunal that would determine that
21 would be the United States Supreme Court. And as one who is
22 greatly covetous of protecting the idea of separation of
23 power, I would just as soon have the Supreme Court
24 ultimately make that determination, as opposed to Professor
25 Kirkland at the Law School at the University of Chicago.

1 One other comment if I might, Mr. Chairman. I am very
2 solicitous of the very perceptive remarks Senator Biden
3 makes, and I am not suggesting that one might not come up
4 with some alternative to this; but the trouble I have, there
5 seems to be a general consensus among all of us that we need
6 to do something. I am just concerned that we do something
7 effective; that we not say: Yes, there is a genuine need.
8 And then in describing it in statutory language, we simply
9 define any remedy out of existence; that we make it so
10 difficult to apply or to enforce, that it not have any teeth
11 in it so it would give us a false sense of security.

12 We thought we were protecting our intelligence agents,
13 and in fact we were not, because of the nature of the
14 language. To me, this language in (c) is straightforward.
15 It is clear. It involves intent. It has all of the
16 characteristics that we associate with the criminal law:
17 intent, action, conduct designed to accomplish ends contrary
18 to the well being and to the best interests of the United
19 States.

20 Since we all agree that there is a great need for it, I
21 wholeheartedly commend this language to all members of the
22 subcommittee, and ultimately to the Judiciary Committee of
23 the United States Senate.

24 There is a demonstrated need to protect our agents. As
25 we see the growth of the pattern of terrorism, as we see the

1 growth of the pattern of subversion in the world as an
2 instrument to further national and ideological aims, there
3 is an enormous responsibility on the part of this Congress,
4 this Senate, this Judiciary Committee, and this subcommittee
5 to try to come up with a bill that is going to protect those
6 people that we put out on the front line and ask to try to
7 do the job of protecting us, and anticipating threats to our
8 internal security.

9 Was it not Justice Jackson who said one time that the
10 Bill of Rights is not a suicide pact? Indicating that we of
11 course want to protect First Amendment rights. It is like
12 any good thing in the area of political theory: You have
13 many things to balance.

14 We not only want to protect the right of freedom of
15 speech, but also society certainly has the right to protect
16 itself against genuine threats to its internal security. I
17 would contend that the greatest threat to freedom of speech
18 today in America comes from the use of internal subversion
19 and the threat to civil liberties through the use of
20 terror. And certainly fair-minded and reasonable-minded
21 people ought to be able to find a way of protecting
22 themselves from that kind of thing.

23 I look upon this as an integral part of the effort to
24 do that. I would like to feel, when we are finished with
25 all of this hearing, if you put it in balance and weigh all

1 the things we are trying to do -- protect First Amendment
2 rights, protect security, and so on and so forth -- that we
3 would come down on the side of: This is a good bill; this
4 is a strong bill; it is a solid bill; it is well thought out
5 and it clearly defines the conduct to be forbidden. In
6 short, it is not vague and hence unconstitutional.

7 So I would support Mr. Willard in his testimony, and do
8 feel very strongly we are on the right track, Mr. Chairman.
9 Thank you.

10 Senator Denton: Thank you, Senator East. That is
11 particularly valuable coming from a political scientist who
12 has expressed himself so well.

13 Senator Biden?

14 Senator Biden: Thank you, Mr. Chairman.

15 I concur with the elements that Senator East has laid
16 out, Mr. Willard, and I would like to question you about
17 them a little bit. That is, I concur that we have to do
18 something. The issue is: Can we do something effective?

19 My concern about the constitutionality is that I can
20 think of nothing worse than passing a bill that may be
21 unconstitutional on its face, having the court rule it is
22 unconstitutional, having been given a false sense of
23 security the American people and the intelligence community
24 can further undermine the credibility of the entire judicial
25 and political system by demonstrating that we not know how

1 to draft a bill to protect them.

2 So "effectiveness" is the issue; not whether or not we
3 need a bill. I will get right to the point. The Professor
4 pointed out that this has all the elements. The first
5 element, that he "knowingly set out" is the most essential
6 element in a criminal offense, "intent." He specifically
7 stated, "intent."

8 My question is: Our bill differs from the House bill.
9 The House bill uses the words "with intent." Our bill says
10 "with reason to believe". I would like to pursue that with
11 ~~the House~~. I would move that we amend it to say "with intent"
12 like the House bill, exactly like the Senator says we
13 should. Now he did not say that we should amend it, but
14 that "intent" is an important element.

15 I think that we should be clear. I think we should be
16 clear, like we try to do in all our legislation now. We
17 want to be crisp and clear so there is no misunderstanding.
18 Any reasonable person has little difficulty understanding
19 the phrase "with intent". Reasonable women and men could
20 disagree about the phrase "with reason to believe".

21 So would you support the stronger language of "with
22 intent" as opposed to the language "with reason to believe"?

23 Mr. Willard: Senator, as I testified before the House
24 Intelligence Committee, the Department of Justice would
25 support either bill. We have a preference for the wording

1 of S. 391 as it stands now. We think either bill would be a
2 great improvement over the present situation, and both bills
3 would be held constitutional and would be enforceable.

4 Senator Biden: You would not object to my moving to
5 amend this bill to conform with the house bill to use the
6 phrase "with intent", then? Is that correct?

7 Mr. Willard: Well, we have reservations about that.
8 We have a preference for the Senate version as it stands
9 now. We think it would be more easily enforceable.

10 Senator Biden: Why?

11 Mr. Willard: Well, we think there could be some
12 confusion on sort of subjective-intent test; that a
13 defendant who is prosecuted under this section might be,
14 "Well, my intent really was not to impair and impede
15 intelligence activities; my intent was to promote public
16 dialogue on these issues," or "to expose wrongdoing." And
17 so, "Although I knew good and well that it was going to
18 impair and impede intelligence activities, in my heart of
19 hearts I really intended something else to happen."

20 Senator Biden: Well, is that not the same kind of
21 standard we have on almost every other criminal offense?
22 There are some that we do not, but by and large people come
23 before juries and they say: I knew I was shooting Cock
24 Robin, but I did it in self-defense. In my heart, I had no
25 intention to kill him.

1 Prosecutors deal with that every day. For example, it
2 seems to me that the "with reason to believe" standard
3 really imposes an additional burden on the government. In
4 the view of all the publicity surrounding this issue that it
5 has had already, will have, and should have, will not
6 everyone possess a "reason to believe" that foreign
7 intelligence activities will be impeded if anything is
8 disclosed?

9 I mean, is that not going to be an argument that is
10 even fuzzier to make? Will you not be able to stand up and
11 say -- I can picture, having been a trial lawyer handling
12 criminal cases, someone standing before a jury saying:
13 Ladies and gentlemen of the jury, if you have read -- and
14 take out the last two years' newspapers -- every one in
15 America knows our intelligence agency is under siege.
16 Everyone knows that. Any reasonable person would have
17 "reason to believe". They would have to be stupid. "Did
18 you not read the newspaper the last 12 years?"

19 I mean, that becomes a fuzzier standard. Why do we not
20 get tough? Why do we not have the tough, clear, precise
21 standard of intent?

22 Mr. Willard: Well, Senator, I would like to first
23 point out that there is an "intent" standard in the Senate
24 bill as it is drafted now. What we are talking about is not
25 "should there be an intent standard?" But, should there be

1 two intent standards?

2 Senator Denton: Exactly right.

3 Mr. Willard: That is what the House bill contains.

4 Senator Biden: Because there are two separate things
5 we are going after; two separate items. As I tried to
6 explain, this bill essentially has two parts. It is
7 essentially broken down into three elements. The first two
8 elements, there is no question. The question is where
9 somebody signs up as an agent and says: Hey I sign on. In
10 return for -- every American can understand this -- in
11 return for access to this information, because now I am
12 going to be given access, I get a "classified" clearance; I
13 am making a promise, and I promise that if I ever reveal any
14 of this, you all can hang me.

15 That is very different than somebody who is no part of
16 an agency, has no clearance, has no access, goes out and
17 compiles from other information, rightly or wrongly,
18 information. The reason why there are two intent standards
19 is to make it clear that we are dealing with two different
20 situations, fundamentally different. Fundamentally
21 different, whether a reporter writes an article that exposes
22 an agent, and whether a CIA agent goes off and sells to the
23 foreign government access and/or just flat-out publishes it,
24 like Mr. Agee.

25 I do not think anybody has any doubt about Mr. Agee.

1 We should lock, slam him away, in my opinion. The question
2 is: Are we going to have, as they say, "a chilling
3 effect"? Why not make intent clear? We make intent clear
4 there.

5 So even though there are two separate parts of the
6 bill, we are not setting up two "intent" standards. There
7 "ain't no such thing." You cannot have double "intent."
8 You either intend; or you do not intend.

9 So for example, would not republication in the United
10 States of the names of our covert agents which had been
11 ~~previously~~ previously published overseas constitute a violation of this
12 bill? Let us say there is an article in Le Monde; a French
13 newspaper person publishes the names of our agents. Somehow
14 he gets ahold of them. Obviously we cannot punish the
15 editor-in-chief of Le Monde; but, The New York Times reads
16 Le Monde and reprints the article. Are they guilty of a
17 criminal offense under this bill?

18 Mr. Willard: Well, Senator Biden, I think your
19 hypothetical illustrates the advantages of a "reason to
20 believe" standard. Under that standard, if the identities
21 have already been widely published, no reasonable person
22 would believe that an additional publication would impair or
23 impede intelligence activities.

24 Senator Biden: Oh, do you want to bet? I will bet we
25 have 50 reasonable people here in the Congress that would do

1 it right off the bat.

2 (Laughter.)

3 Senator Biden: No. Really and truly, as a famous
4 American once said: In your heart, you know I am right
5 about that.

6 (Laughter.)

7 Senator Biden: You really do. Seriously. I mean this
8 sincerely. You know darn well that if The New York Times
9 republished an article that appeared in a French newspaper,
10 or a Cuban newspaper, or a Venezuelan newspaper, that reveal
11 the names of agents, there would be people on the Floor of
12 the United States Senate and the House of Representatives
13 who would be saying that that was reprehensible action on
14 the part of The New York Times and we should do something
15 about that.

16 Mr. Willard: Under certain circumstances, it could be
17 reprehensible.

18 Senator Biden: Right. If they had the intent.
19 Right? If they had the intent. How do you prove they had
20 reason to know, in that case?

21 Mr. Willard: I respectfully disagree, Senator. I
22 think that the test should be the relatively objective one
23 of whether the Venezuelan publication had been so widely
24 circulated that it would be reasonable to believe that an
25 additional publication would or would not be harmful.

1 Senator Biden: For example, let us assume you could
2 prove it had only been published in Venezuela. Would there
3 be reason to believe that republication in the United States
4 would be a violation of this law?

5 Mr. Willard: I think it might depend on where the
6 agent was stationed, whether he was stationed in Venezuela
7 or in China.

8 Senator Biden: Let us say he was stationed in China.
9 Let us say he was stationed in Canada -- not that we have
10 any there. I mean, pick someplace close, other than
11 Venezuela. Seriously.

12 Mr. Willard: If the original publication had only
13 limited circulation in a foreign country in a foreign
14 language, then I think it would be reasonable to believe
15 that the republication by a major publication in the United
16 States in English would be harmful to American intelligence
17 activities. But it would not turn on whether The New York
18 Times was critical of the government, or what their hidden
19 motivations were.

20 Senator Biden: That is right.

21 Mr. Willard: It would turn on the objective standard
22 of whether a reasonable person would think that intelligence
23 activities would be impaired or impeded.

24 Senator Biden: So let us carry that a little further.
25 Picture the situation in the editorial room of The New York

1 Times. They have a Venezuelan paper in front of them. What
2 do they do, then? Is their affirmative obligation to send
3 an investigative reporter to Venezuela to determine how
4 widely the paper is circulated, how many people have read
5 it, whether or not it has access in other countries? I am
6 not being facetious. I am being serious. Would they then
7 have that affirmative obligation?

8 Mr. Willard: I think that anyone who would otherwise
9 meet the elements of the statute who would consider
10 publishing the identity of a covert agent will have to
11 consider whether or not that would be harmful or will impair
12 or impede the foreign intelligence activities of the United
13 States.

14 Senator Biden: How do they make that judgment? In
15 other words, see, you are putting on them the judgment of
16 whether or not -- how do they have "reason to believe"? I
17 mean, you just said that one of the things it would depend
18 on is whether or not the agent is in Venezuela, or whether
19 it is in China.

20 I mean, how does the newspaper make that decision?
21 Seriously. What sort of manual can we give them to say:
22 You do not publish this one; but you can publish other ones,
23 or reprint other ones?

24 Mr. Willard: Well, we think that by using an objective
25 standard for this kind of test it is less insidious in some

1 ways than a standard that would turn on their specific
2 intent, like draw into question evidence such as whether
3 they were pro-CIA or anti-CIA, for example. That would not
4 be relevant. Under a specific intent standard, prying into
5 the political views of the defendant might occur in a
6 trial. And that is one reason why the Justice Department in
7 the past expressed a preference for the Senate version of
8 this standard rather than the House version.

9 I would like to, if I could, go back and correct
10 something that I think I may have misstated.

11 Senator Biden: Sure.

12 Mr. Willard: When I mentioned two "intent standards,"
13 there are two intent standards contained in Section 601(c)
14 of its counterpart in the House.

15 As the Senate bill now reads, it provides: "Whoever in
16 the course of a pattern of activities intended to identify
17 and expose covert agents"; so there is one intent standard
18 that is still in there.

19 Senator Denton: Which has to be proved.

20 Mr. Willard: The question, then, is whether there
21 should be a second intent standard regarding the effect of
22 the activities on foreign intelligence activities in the
23 United States.

24 So again what we are talking about here, even in
25 Section 601(c), is whether we should have one intent

1 standard or two intent standards.

2 Senator Biden: Well, let me ask it another way, then.
3 Why would it not be more consistent to eliminate the first
4 intent standard? Why would we not say, then, to be
5 consistent, for all the reasons you just said, "have reason
6 to believe"?

7 Senator Denton: Because, if the Senator would yield, I
8 am not a lawyer, but I am not bad at logic. It says --

9 Senator Biden: Well, being a lawyer does not help with
10 that.

11 Senator Denton: It is more libertarian to have it this
12 way, "in the course of a pattern of activities intended to
13 identify and expose covert agents." You must prove the
14 intent there, and you must prove the nature of the course of
15 the pattern of activities. So it is more liberal to have it
16 in that way.

17 Senator Biden: Well, I am for it being liberal
18 throughout; but let me move on to another section, if I
19 may. I have more questions.

20 I appreciate your explanation, sir, but let me be sure
21 I understand. You would not oppose -- you would support
22 either version. You prefer the Senate version, but you
23 would support either version? Is that correct?

24 Mr. Willard: That is correct, Senator.

25 Senator Biden: With regard to -- bear with me just a

1 second here, Mr. Chairman -- the issue of, as I understand
2 it, the Sterling book, The Terrorist Network, if she
3 published information about hostile terrorist groups that
4 she gained from a U.S. official, not to disclose the name of
5 the official or CIA groups, but if she found through her
6 contacts with CIA agents the fact that there was a terrorist
7 group operating out of any part of this country within this
8 country, and then went on from there to substantiate that
9 and wrote a book exposing the terrorist network, not
10 exposing the agent, and she gained that, and it was known,
11 she knew and a reasonable person would know that the hostile
12 group could figure out where she got that information, she
13 would have "reason to believe" that by publishing the
14 information about the terrorist network that she would be
15 exposing the source without naming the source, would she be
16 guilty of a violation under this section?

17 Senator Denton: Would you believe that she was engaged
18 in the course of a pattern of activities intended to
19 identify and expose covert agents? I would not.

20 Senator Biden: With all due respect, Mr. Chairman, I
21 know your view. I am curious at what the Justice
22 Department's view is. I think I know your view.

23 Mr. Willard: I think I would have to agree with
24 Senator Denton that this statute includes multiple
25 elements. So the fact that someone might be seemingly

1 engaged in benign activity might satisfy one or two of these
2 elements does not mean that a prosecution would be
3 possible. I think that is why the drafters of this
4 legislation put in so many elements. It makes it fairly
5 difficult to put together a case.

6 Senator Biden: Now let us assume -- the next step.
7 Let us assume that someone were to publish an article or
8 write a book that had the dual intent of exposing a
9 terrorist network and an agent in this country who that
10 person believed was part of the terrorist network, a
11 "mole." The pattern of activity was designed to go after
12 people who were double agents, to uncover people in our
13 intelligence community who were double agents. In doing so,
14 she wrote an article or a book identifying someone as an
15 American agent for the express purpose of making the case
16 that they were a double agent. Would she be guilty of
17 violating this law?

18 Mr. Willard: Well, it is difficult of course to deal
19 with hypotheticals. The one you pose immediately raises the
20 question of whether one would have reason to believe that
21 activity would impair or impede the foreign intelligence
22 activities.

23 Senator Biden: Well, I guess it would, though, would
24 it not? Is there not reason to believe that if you were
25 able to name someone who is deep cover, if you had access to

1 naming that, would that not have a chilling effect? Is that
2 not what happens now? Does it not have a chilling effect,
3 to say the least, upon the British intelligence or the
4 French intelligence, even if it was for a purpose that was a
5 laudable one? Would they not ask -- I can guarantee you,
6 being on the Intelligence Committee, they would ask: I
7 wonder how she got the name in the first place?

8 Mr. Willard: Well, I would also like to point out that
9 under Section 601(c), someone who has valuable information
10 of that sort can communicate it to the House and Senate
11 Intelligence Committees.

12 Senator Biden: I understand that, and I think they
13 should. I am just asking the question. I am not saying
14 that they should not be prosecuted, I am trying to hone in
15 on this so we do not pass a bad law.

16 If she did it, if someone -- forget Ms. Sterling; let
17 us not talk about her -- if a newspaper person for the
18 express purpose of exposing corruption "and/or" a double
19 agent within our intelligence network published the name of
20 that agent or other agents working with that agent for the
21 purpose of pointing out that they were a Mr. Philbee, would
22 they be guilty under this law?

23 Senator Denton: Although the Senate may know my views,
24 as a Senator I am qualified to offer them.

25 Senator Biden: I know that, Senator.

1 Senator Denton: I do not know how it could be fitted
2 into a pattern of activities intended to identify and expose
3 covert agents if the overall impact of her thrust or his
4 thrust were to help rather than impede or impair foreign
5 intelligence activities in the United States. In that case,
6 I think it would, and since there would be no pattern of
7 activity intended to identify and expose covert agents, per
8 se, I would say that neither of those specifications are met.

9 Senator Biden: Well, I am delighted to hear that, Mr.
10 Chairman. Now maybe I could rephrase it again for our
11 witness. Maybe what I should do is direct each question to
12 you, first, and then to the witness.

13 (Laughter.)

14 Senator Denton: No, but we are getting short on time.
15 Normally we have a 10-minute limit. We are trying to get
16 through at 12:30.

17 Senator Biden: Fine. I will yield my time back now
18 and wait for my next round for 10 minutes. I yield to you,
19 Mr. Chairman, because I have exceeded 10 minutes, and I will
20 wait until your 10 minutes is up, and Senator East's, and
21 then I will ask mine again.

22 Senator Denton: Well, the point is that we do have
23 witnesses from the American Civil Liberties Union, and one
24 from the Association of Former Intelligence Officers, at
25 which time if we are not satisfied, we will recess rather

1 than extend this hearing beyond the time at which our
2 participation in the voting and so forth and other
3 activities would preclude questions that you or others would
4 like to ask.

5 Senator Biden: But I assume we would be able to have
6 another day of hearing, Mr. Chairman, like we always did in
7 the past when we ran this committee and anyone sought, not
8 for the purpose of impeding, to seek information.

9 I wonder, it may help if I just ask you the questions,
10 sir, and you answer the question, and then we would not be
11 taking out of my time as much. Let me ask it again:

12 If a newspaper person sets out in a pattern of activity
13 to expose double agents within, that they believe to be
14 double agents, a pattern of activity, they spend the next
15 three years of their life doing nothing but devoting
16 themselves to finding agents they do not believe are good
17 ones, finding agents they believe are on the payroll of
18 somebody else, and in the process of that effort they were
19 to write articles and/or books that specifically name agents
20 who they then allege are double agents, would or would not
21 they be guilty under the law, knowing that by exposing the
22 names they would reveal that they had access into the inner
23 sanctum of, or they would not get the name if they did not
24 have access, would not that put them in a position of being
25 subject to the "reason to believe it would impair"?

1 Mr. Willard: I am not sure that I can agree that I
2 would not have some reservations --

3 Senator Biden: Would you believe that it is possible
4 that it could be?

5 Mr. Willard: It would seem to me that the exposing of
6 communist double agents in the ranks of the CIA would assist
7 American intelligence activities and not impair or impede
8 them.

9 Senator Biden: It surely would. But do you think it
10 would assist? Why do you think it is, if I may ask you
11 specifically, why do you think it is that we in the
12 Intelligence Committee and in the intelligence community do
13 not expose agents who are double agents? Why do you think
14 we do not do that? Do you realize that we do not do that?
15 Do you realize that when we find out there is something awry
16 within the community, if by naming the person as a double
17 agent we will in fact jeopardize an operation, we will in
18 fact somehow blow the cover of other people, that we do not
19 do it? Do you realize we do not do that?

20 Mr. Willard: Well, then, I would suggest that the
21 journalist whom you have hypothesized should take advantage
22 of the provisions of Section 601(c) and inform the committee
23 of these double agents.

24 Senator Biden: I agree. The question I have is: If
25 they do not, are they guilty of a crime? That is all I am

1 trying to find out.

2 Mr. Willard: I think the "reason to believe" standard
3 is one that has to consider all the facts and
4 circumstances. It is hard to predict from such a bare
5 hypothetical exactly how it would apply.

6 Senator Biden: Would you acknowledge that it would at
7 least raise a question?

8 Mr. Willard: I think, Senator Biden, you have raised a
9 question.

10 Senator Biden: Thank you.

11 (Laughter.)

12 Senator Biden: Thank you very much. I have no more
13 questions for this witness, Mr. Chairman. Thank you for
14 your indulgence.

15 Senator Denton: Senator East?

16 Senator East: Mr. Chairman, I think we have exhausted
17 this subject. I appreciate that you have other witnesses,
18 and I do not wish to unduly impose upon their time, so I
19 would like to propose that we proceed with our next
20 witnesses.

21 Senator Denton: Thank you. And as usual, we will hold
22 the record open for written questions to be submitted to the
23 witnesses.

24 Thank you very much, Mr. Willard, for your helpful
25 testimony this morning.

1 Mr. Willard: Thank you for your courtesy, Mr.

2 Chairman.

3 Senator Biden: Thank you, Mr. Willard; it was a tough
4 job.

5 Senator Denton: I would like to welcome Mr. Morton H.
6 Halperin, Director, Center for National Security Studies,
7 American Civil Liberties Union; and Mr. Jerry J. Berman,
8 Legislative Counsel, American Civil Liberties Union, and ask
9 them if they would summarize their statement as the last
10 witness did in the interest of time. Your entire statement
11 ~~will~~ be in the record, gentlemen.

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

5 Mr. Berman: Thank you, Mr. Chairman, and Members of
6 the Committee.

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

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

20 (Laughter.)

21 Mr. Halperin: Thank you, Mr. Chairman.

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

24 First, as Senator Leahy noted before, there is a real
25 question in our view, and one which seems to be shared by

1 the Heritage Foundation, about whether the real problem here
2 is the action of individuals who publish names, or whether
3 the real problem is not the fact that the CIA and the United
4 States Government has put information in the public domain
5 which while, as Senator Chafee notes, does not say these
6 people are CIA agents, does enable people as the CIA has
7 said again in its testimony today with a high degree of
8 accuracy to identify who are the CIA agents serving abroad
9 under light cover.

10 The fact is that if those names can be identified with
11 a high degree of accuracy by a small number of Americans
12 working in the United States, they can equally be identified
13 with a high degree of accuracy by foreign groups who would
14 propose to do harm to those individuals by threatening their
15 lives, or doing physical harm to them, or disrupting their
16 activities.

17 We think the primary focus should be on taking steps
18 which make it impossible for foreign terrorist groups or
19 American citizens with a high degree of accuracy, with not a
20 substantial amount of effort, to identify covert agents. We
21 would suggest that this legislation is almost entirely
22 symbolic in that it is, as the testimony has said,
23 suggesting that the Congress of the United States does not
24 approve of naming names; but we suggest that legislation
25 which impinges on the First Amendment should not be passed

1 for a symbolic purpose; that such legislation should only be
2 passed if it can have some real effect on protecting lives.

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

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

18 This bill would make it a crime for the press to
19 publish information which it lawfully acquires, whether it
20 acquires that information from foreign intelligence sources,
21 from foreign governments, from foreign newspapers, from
22 official publications of the United States Government, it
23 would be a crime for a reporter or a scholar to engage in an
24 effort to mine those sources to learn the identities of
25 agents and to publish, for any purpose, even to ferret out

1 corruption or illegal activities. We think that the
2 Constitution as it has been defined by the Supreme Court--
3 not simply in the judgment of the American Civil Liberties
4 Union-- prohibits the Congress from passing a law that
5 punishes private citizens who analyze publicly available
6 information and who draw conclusions from it and publish
7 that information.

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

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

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

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

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

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

25

1 Senator Denton: Thank you very much, Mr. Halperin.

2 Either of you gentlemen may respond to these
3 questions: Do you believe that First Amendment protection
4 should ever give way to national security interests? And if
5 so, under what circumstances?

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

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

19 Senator Denton: Would you describe the nature of the
20 American Civil Liberties Union as an organization, its
21 purposes and so forth?

22 Mr. Berman: I think I said that at the start.

23 Senator Denton: "Nonprofit," "nonpartisan"?

24 Mr. Berman: Yes. It is a --

25 Senator Denton: I did not hear any tittering when we

1 said "nonpartisan." I am hearing a lot of tittering on
2 other statements.

3 Mr. Berman: I do not hear any tittering, Senator.

4 Senator Denton: No, I do not in this audience, but I
5 think I would out in the hinterlands.

6 Mr. Berman: Well, I stand that we are a nonprofit,
7 nonpartisan organization dedicated to the defense of the
8 Bill of Rights. You only have to look at the caseload of
9 the American Civil Liberties Union to know that we have
10 cases in the First Amendment area and in other areas where
11 the Bill of Rights is affected which cross the political
12 spectrum. I could list some of those cases for you, if that
13 is your wish.

14 Senator Denton: Thank you, sir.

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

21 Mr. Berman: Yes, Senator. The American Civil
22 Liberties Union -- the Center for National Security Studies
23 is a project of the American Civil Liberties Union
24 Foundation.

25 Senator Denton: It may be relevant, then, in this

1 hearing to note that among other things that memorandum
2 stated that it was the position of the ACLU and the CNSS not
3 to support covert action or espionage activities abroad in
4 "peacetime" and this is a continuation of the quote, "i.e.,
5 absent any congressional declaration of war."

6 It would seem to me that since that is not the position
7 of the United States Government, that we might have a
8 conflict of interest here. Is this still the position of
9 the ACLU and the CNSS?

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

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

21 Senator Denton: It does strike me as curious that a
22 group containing men as intellectual as you would not
23 realize that every other major power, and indeed every minor
24 power I can think of, does engage in such activities and
25 that it would not be in our interests for self-protection to

1 do the same. Do you know of any major power that does not
2 engage in these activities in "peacetime"?

3 Mr. Berman: No, Senator, we do not.

4 Senator Denton: Does the ACLU and the CNSS believe
5 that American decisionmakers should be kept informed? And
6 how can this be done without intelligence collection?

7 Mr. Berman: I think we do need intelligence
8 collection, sir.

9 Senator Denton: But, then, not covert action or
10 espionage activities abroad in peacetime?

11 Mr. Berman: I think the heart of our position goes to
12 covert operations abroad, Senator. The position on
13 espionage, I think there is room for disagreement within the
14 ACLU. I just want to recall that it was not surprising, I
15 think, for the policy statement at that time, given the
16 record of revelations of how intelligence collection and
17 covert operations had gotten involved in dubious operations
18 abroad, the conduct of secret foreign policy, when our
19 commitment is to open government, and a record compiled by a
20 number of committees before this Congress of illegal and
21 unconstitutional activities directed at American citizens in
22 the United States arising from the same cover capabilities
23 of the United States. The visceral reaction of the American
24 Civil Liberties Union is to protect the Bill of Rights, and
25 to give the widest latitude to the First Amendment and to an

1 open society.

2 We realize the tensions between a national security
3 state and the First Amendment. We try to, within the
4 Congress, to accept the dimensions of the debate and to
5 argue for the widest latitude, and also have supported
6 legislation which attempts, we believe, to strike a balance
7 between national security and civil liberties' concerns.

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

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

25 The fact is that most of the information, if not all of

1 the information which we rely on to monitor weapons'
2 deployment of our potential adversaries, is collected by
3 technical means of intelligence, as you know. The ACLU
4 position clearly distinguishes between that and what has
5 been referred to as "human espionage." It supports the
6 technical collection of intelligence by various means. It
7 supports the analysis of that information and the provision
8 of intelligence information to the President and to senior
9 officials.

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

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

20 Senator Denton: Well, none of us, especially myself,
21 is exempt from questioning regarding the philosophy from
22 which we come and how that might color or explain positions
23 that we take. The ACLU and CNSS cannot support the SALT
24 treaty -- I mean, I am sure you have a view on that. How
25 you can support such treaties when we do not have

1 verification unless we conduct covert activities is
2 something that escapes me. And I believe, were you to
3 extend-- this is a personal belief -- were you to extend
4 your efforts on behalf of what I believe to be a true love
5 of liberty and get into that field, you would change your
6 position.

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

9 Senator Denton: No, I do not mean about the SALT
10 Treaty. I mean about the necessity for covert intelligence
11 overseas against which you have taken a position in
12 general.

13 We have a vote pending. We will recess for fifteen
14 minutes now and come back after we register our vote.

15 [Recess.]

16 Senator Denton: The hearing will resume.

17 I will defer now to Senator East for any questions he
18 might have.

19 Senator East: Thank you, Mr. Chairman.

20 I will try to make my remarks very brief, because I
21 know of the great time constraints under which we are all
22 working. I am somewhat troubled with the ACLU's position on
23 this matter of protection of internal security. I do not
24 mean to make the philosophy of the ACLU the center point of
25 our discussion, because I appreciate that that would be an

1 interesting subject for another forum and you are not here
2 to discuss that, but as commendable as ACLU's efforts are I
3 think in many areas, and you frequently have taken a very
4 unpopular cause on the far left and on the far right and
5 many things in between -- I am just trying to work up to
6 this point:

7 One thing that is sometimes troubling to the ACLU is
8 not their devotion to the cause of civil liberties or to our
9 freedoms under the Constitution or the First Amendment, but
10 sometimes an insensitivity to the fact that in the real
11 world of politics we have many things to balance. You have
12 the problem of freedom; you have the problem of security.
13 It reminds me of Thomas Hobbs, the famous Englishman.

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

23 Now it occurs to me that if you take the concept of the
24 individual's freedom, intellectual and in every other way in
25 the broadest scope of the word under the First Amendment and

1 the entire constitution, and you elevate that to your first
2 principle of politics and you exclude everything else, you
3 get some perverse results, in the sense that it seems to
4 preclude a really genuinely effective policy of national
5 security.

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

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

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

23 I admired your courage in defending the Nazis marching
24 in the Jewish community in Skokie, yet I felt at the time
25 that perhaps Nazis ought not to be parading in Skokie. The

1 purpose was to provoke. The purpose was not really to make
2 any legitimate, fundamental point of communication under the
3 First Amendment.

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

19 I am just concerned here -- and then I shall be
20 silent-- whether your objections, as commendable as they
21 are, ultimately if you strip it down and probe it to its
22 deepest level of rationalization, there really is not
23 anything we could effectively do in this area in terms of
24 protecting CIA agents or other agents from being exposed by
25 private citizens or others, destroying their effectiveness,

1 imperiling their lives and thereby imperiling the national
2 security of the United States?

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

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

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

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

22 One of the suggestions we have made is that you include
23 a "bad purpose." Of the view that that is required by the
24 Constitution is a view that Professor Staliere has put
25 forward, that Professor Kurland has put forward, and neither

1 of them have ever been accused of being single-mindedly
2 dedicated simply to civil liberties. But I think both of
3 them are people who have a deserved reputation for balancing
4 the kinds of considerations which we have talked about.

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

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

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

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

3 Senator Denton: You are well within your time.

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

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

17 Mr. Halperin: Yes. I think that is --

18 Senator Biden: You do not disagree with that, do you?

19 Mr. Halperin: I agree that that is a bad purpose. It
20 is just not in the bill.

21 Mr. Berman: It is not in the bill.

22 Mr. Halperin: And that is what we are urging you to
23 put in the bill.

24 Senator East: Well, to me, when you say it is not in
25 the bill, it is niggling. You could say that about any kind

1 of criminal definition. You mean you want the words "bad
2 purpose" in there?

3 Mr. Halperin: No. We want the purpose of "intent to
4 disrupt" by the act --

5 Senator East: Well, I would simply contend that it is
6 there; that the notion -- maybe it blends in with Senator
7 Biden's remark. You do not find "intention" in here, you
8 say. You do not find "bad purpose". I do. Intent to do
9 certain things with the ultimate end of weakening the
10 security gathering, the data gathering, intelligence
11 gathering effectiveness of the United States Government.

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

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

21 What we have urged upon this committee is language
22 which the Justice Department says will meet the purposes of
23 the bill, which is to require this "bad purpose" of
24 disrupting or neutralizing the activities of the
25 intelligence agencies by the act of disclosure.

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

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

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

20 Mr. Halperin: Senator, we think it can be enforced,
21 and so does the Justice Department. I would refer you to
22 Mr. Willard's testimony on behalf of the Justice Department
23 and the Attorney General in which he says: While there is a
24 preference for the Senate bill, that it is the judgment of
25 the Justice Department that both versions -- that is, the

1 House bill which has a "bad purpose", as well as the Senate
2 version -- can be effectively used to prosecute to cover the
3 range of cases that the Congress is concerned about.

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

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

12 Mr. Berman: They said that they would prefer the
13 Senate version of the bill.

14 Senator East: Yes.

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

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

22 Mr. Berman: But they are not taking the position which
23 you have articulated that it is impossible to prosecute
24 under the House bill.

25 Senator East: Well --

1 Mr. Berman: Just one other point, Senator, in response
2 to your question. It seems that unless it is a part of the
3 elements of proof in the trial whether there is a bad
4 purpose or not, then all of the avowals of Senators and
5 report language surrounding this bill that it cannot reach
6 the legitimate communication of news about intelligence
7 matters, foreign policy, but only people with a bad purpose
8 is eviscerated, because you have to take that. It has to be
9 a part of the element of bill for that report language and
10 that intent to stand up not to reach those cases.

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

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

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

1 I yield to the Chairman.

2 Senator Denton: Thank you, Senator East.

3 Senator Biden?

4 Senator Biden: Thank you.

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

9 Mr. Halperin: We would not oppose the bill which
10 contained that.

11 Mr. Berman: We do not oppose that bill.

12 Senator Biden: That concept, you do not oppose?

13 Mr. Berman: We state on page one that we do not
14 condone the practice of naming names which place our agents'
15 lives in jeopardy.

16 Senator Biden: Do you acknowledge the right of a
17 government, the right of our government under our system of
18 laws to protect itself against subversion, espionage, and
19 terrorism?

20 Mr. Berman: Defined as "criminal acts," Senator, yes.

21 Senator Biden: I thought that we were discussing -- I
22 think we are discussing two bills, essentially, a House bill
23 which will work according to the Justice Department, and a
24 Senate bill which they will think more easily. Both will
25 work.

1 Along those lines -- that is, deciding how well they
2 work -- balancing again whether or not the working of one
3 will impact upon another element of the competing interests
4 of any government and a free people, I would like to read to
5 you some language and question whether or not you would
6 think it would be acceptable, or preferable to either the
7 Senate language that pertains to this section, or the House
8 language.

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

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

1 covert agent's intelligence relationship to the United
2 States, shall be fined not more than \$15,000 and not
3 imprisoned more than three years."

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

6 Mr. Halperin: Yes. We have seen that language. Our
7 understanding is that Mr. Heymann sent the letter to Mr.
8 Boland, the Chairman of the House Intelligence Committee, on
9 behalf of himself and Mr. Scalia and Floyd Abrams, who were
10 the three witnesses on constitutionality who testified
11 before the House Committee, expressing the view that that
12 language, better than even the House or the Senate bill or
13 anything else they had seen, was likely to survive
14 constitutional muster.

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

23 Senator Biden: The ACLU's purpose, credibility,
24 inclination, intent, if you will, has been raised here this
25 morning.

1 Mr. Halperin, I would like to ask you specifically:

2 Have you ever worked for the Federal Government?

3 Mr. Halperin: Yes, I have.

4 Senator Biden: In what capacities and for whom?

5 Mr. Halperin: I served as a Deputy Assistant Secretary
6 of Defense in the Johnson Administration; and as a member of
7 the Staff of the National Security Council in the Nixon
8 Administration.

9 Senator Biden: So you have dealt with intelligence
10 matters as a government official in the Nixon
11 Administration?

12 Mr. Halperin: Yes, I did.

13 Senator Biden: I would like to pursue one other
14 point. In your legal judgment -- I am not asking for your
15 preference, now, I am asking for your legal judgment which
16 may reflect your preference; I hope not; try to give me as
17 dispassionate a view as you can -- Mr. Phillip Agee who
18 makes it his business to publish the names of agents
19 whenever he has an opportunity, and whom I personally would
20 like to see put out of business, would Mr. Phillip Agee fall
21 under Sections (a), (b), (c), or all three, of the Senate
22 version of the bill? If you were going to prosecute him and
23 this bill were law, which section would you prosecute him
24 under based on the activity we know of thus far without
25 reciting all of what it is?

1 Mr. Halperin: He would fall under Section (a) as
2 having had authorized access to classified information that
3 identifies a covert agent.

4 Senator Biden: So Mr. Agee, we would not even have
5 to-- the debate that is going on here, since the three of we
6 Senators who disagree much in philosophy I suspect, but
7 agree that Sections (a) and (b) are fine as they are; I am
8 not asking your position; we believe they are fine -- Mr.
9 Agee would not even rise to the level of being subject to
10 the debate because we would be able to prosecute him under
11 the first section, would we not?

12 Mr. Halperin: That is correct.

13 Senator Biden: Now let me ask you a hypothetical, a
14 situation where we do not have a former employee or present
15 employee or agent of the Federal Government, a person who
16 never had access to classified information, but by whatever
17 means either by paying for it, by having it leaked to them,
18 or by republishing it were to find themselves in the
19 following situation:

20 There have been a number of books and articles written
21 in recent years suggesting that our intelligence agencies
22 have been fooled by Soviet disinformation agents --
23 "disinformation" -- and indeed some journalists and authors
24 contend that our intelligence agencies have been penetrated
25 by the KGB, and that a so-called "mole," is ensconced high

1 up in the CIA. One set of allegations surrounding a number
2 of Soviet defectors came over around the time of the Kennedy
3 assassination with conflicting stories about the Soviet
4 relationship with Lee Harvey Oswald was a certain set of
5 allegations. It is further alleged by some journalists that
6 this information from these defectors was kept from the
7 Warren Commission, or at least that the Commission was also
8 fooled by the defectors.

9 Now assume for the moment that a journalist had this
10 information, this information from defectors, early in '64
11 and, after failing to convince the intelligence agencies or
12 the Warren Commission of its validity, and knowing that it
13 might compromise a source, and having warned the agency of
14 its intent to disclose the information so that they might
15 protect their source, their agent, proceeds with a story.

16 The story says: A defector named Smith -- so I will
17 not get into any existing cases -- a defector named Smith
18 has told the intelligence community that the Soviets
19 financed and trained Lee Harvey Oswald to assassinate
20 President Kennedy.

21 The journalist tells that to the agency, says "I know
22 that; do something about it." They choose not to. Tells
23 the Warren Commission of this, and they choose not to print
24 it, because they believe it is disinformation. The
25 intelligence community concludes that it is disinformation

1 they are being given.

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

5 Are they prosecutable under this law?

6 Mr. Halperin: Yes.

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

15 I am concerned that there is infiltration. I know of
16 no intelligence community in the world that has not been
17 infiltrated. Those concern me. And I worry that we might
18 very well find ourselves in the position of people who lack
19 intent, specified intent, who want to try to go out to
20 prevent that kind of thing, expose it, being prosecuted for
21 their efforts to try to be good Americans.

22 The example that I used earlier with Mr. Willard, and I
23 will cease in a moment, Mr. Chairman, was one where I said:
24 What happens if the reporter goes out and, in a pattern of
25 activity -- and by the way, is a "pattern" one time, or two,

1 or three? Or is a "pattern" established by the
2 investigation and only one article? Can there be a pattern
3 if there is only one article written?

4 Mr. Halperin: In the testimony of all the witnesses in
5 support of this legislation both in the last Congress and
6 this Congress, that one disclosure was enough if it followed
7 a pattern of effort to uncover.

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

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

21 So here we have an American citizen who goes out, and
22 what is the standard? What happens if they disclose the
23 name of an agent? I mean, are they prosecutable under
24 this? What is the test?

25 Mr. Halperin: There are -- and I may have

1 misunderstood the Chairman, but I understood him to be
2 suggesting that if the names were gotten from foreign
3 intelligence sources that they would not be covered by the
4 bill; and I see nothing in the bill that would exclude
5 penalties for republishing names that came from foreign
6 intelligence sources, or from U.S. intelligence sources, or
7 from public data. But to go through the six hurdles that
8 Mr. Casey listed in his testimony that the government has to
9 follow:

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

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

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

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

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

9 And the disclosure was made with reason to believe that
10 the activity would impair or impede intelligence
11 activities. You would get that "reason to believe" by doing
12 what most journalists would do, which is to go to the CIA
13 and say: I am about to publish this story; should I do it?
14 Do you have any comment? The agency would say: Publishing
15 that story would injure the intelligence activities of the
16 United States. And, having been warned of that, you would
17 have great difficulty persuading a jury that you did not
18 have that "reason to believe."

19 Senator Biden: One last question, Mr. Chairman. I can
20 see you are getting up and getting ready here. One quick
21 one: That is, I think that there is a reasonable argument
22 that the language I am suggesting requiring intent might
23 very well have a more chilling effect on the media than the
24 language that exists in the Senate bill.

25 Now they argue that, as you know, and it was argued

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

7 Do you have an opinion on that specific question?

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

13 Senator Biden: Thank you, very much.

14 Thank you, Mr. Chairman.

15 Senator Denton: Thank you, Senator Biden.

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

22 A previous statement in 1975, December 5th, by you, Mr.
23 Halperin, I would like to know, since it was before the
24 Senate Select Committee, whether or not you still hold to
25 the view that the United States should no longer maintain a

1 career service for the purpose of conducting covert
2 operations and covert intelligence collection by human
3 means? I left out -- there was no reference to "abroad" or
4 anything in that statement, so I wondered if that is still
5 your current view?

6 Mr. Halperin: The implication of that statement was
7 "abroad," but it is not still my current view.

8 Senator Denton: Thank you, sir. Frankly, I am very
9 glad to hear that.

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

13 Senator Biden: Mr. Chairman, before you adjourn, I
14 have no questions for the witnesses -- these are our last
15 witnesses?

16 Senator Denton: No, one more.

17 Senator Biden: Oh, okay. Good. Thank you.

18 Senator Denton: We will call on Mr. John M. Maury,
19 President of the Association of Former Intelligence Officers.

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1 STATEMENT OF JOHN M. MAURY, PRESIDENT, THE ASSOCIATION
2 OF FORMER INTELLIGENCE OFFICERS; ACCOMPANIED BY JOHN S.
3 WARNER, LEGAL ADVISOR, AFIO.

4 Mr. Maury: Mr. Chairman, with your permission I would
5 like to have Mr. John Warner, the Legal Advisor of the
6 Association, and former General Counsel of the Central
7 Intelligence Agency, with me here to perhaps field questions.

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

13 Would you care to make an opening statement, sir?

14 Mr. Maury: Sir, I will submit for the record the
15 statement which I believe your staff has. I will make a few
16 very brief, general remarks.

17 First of all, I am the President of some 3000 former
18 intelligence officers from the Armed Services, the FBI, the
19 State Department, and the CIA, and appear in that capacity.
20 I am, like my predecessors I believe, a completely impartial
21 witness. As Admiral Turner I am sure will testify, I have
22 been just as critical of the CIA on some points as Mr.
23 Halperin has, I think.

24 But I do feel very strongly in the importance in this
25 day and age of an effective intelligence service as the

1 first line of defense against subversion and surprise, and
2 the best hope for peace in our time. As a wise colleague on
3 the NSC Staff once remarked, perhaps the greatest danger to
4 peace in our time would be an ill-informed American
5 President. I think in this day and age, that is more
6 important than ever.

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

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

23 So all that they can get in the way of compensation for
24 their work is a feeling that their work is valued and
25 appreciated. It is awfully hard for them to feel that it is

1 valued and appreciated by the government unless the
2 government can provide them some protection for the
3 effectiveness of their job, and for their lives and that of
4 their families.

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

11 I speak with some personal involvement in the Welch
12 case. It has been said of my friend, Dick Welch, who was my
13 successor as Station Chief in Athens, that the KGB of course
14 knew who he was, and that the fact that his name was
15 published by Counterspy and then was picked up by the Greek
16 press and sensationalized, in no way contributed to his
17 death.

18 Well, I happened to be visiting Dick and Kika Welch in
19 Athens during Thanksgiving just before his death, and his
20 name had just appeared on the front pages of several Athens'
21 newspapers. We talked about this, and he said: Of course
22 most people around here could find out who I am; I operate
23 in a NATO government where I am dealing with a lot of local
24 officials, and so on, but the important thing is that I am
25 not a celebrity. Once I become a celebrity, then I am a

1 prime target for action by the terrorists that were then
2 operating in that part of the world.

3 Recall the assassinations of the Munich athletes at the
4 Olympic Games. They were not intelligence agents, but they
5 were prominent personalities. So what I am saying, sir, is
6 that the argument that these identities can sometimes be
7 devined by skillful research is not the only damage that
8 their revelation does. The real damage in large measure
9 comes from the widespread publication of their identities
10 which has two effects:

11 One, it does make them attractive targets for
12 assassination or violence;

13 Second, it creates an impression throughout the world
14 that the United States Government is unable or unwilling to
15 get serious about its intelligence work, and presumably even
16 its national security interests, if it cannot or will not
17 protect the people I speak of by adequate legislation.

18 As a former KGB officer once said to me: Our primary
19 objective has always been to put out the eyes of our
20 adversary by discrediting and demoralizing and disrupting
21 his intelligence service.

22 Another KGB officer is quoted as saying: We never
23 dreamed that we could do as much damage to the United States
24 security as you people have done to it yourself by your
25 revelations and irresponsibilities.

1 Now putting those two things together, Mr. Chairman, I
2 do not think that anything can do more to contribute to
3 these Soviet objectives than the continued uninhibited
4 publication of the identities of our most sensitive
5 intelligence personnel in dangerous and difficult
6 assignments.

7 Thank you very much for your attention, sir.

8 [The complete statement of Mr. Maury follows:]

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1 Senator Denton: Thank you very much, Mr. Maury.

2 I will have only two questions, since your opening
3 statement answered the remainder of them. Does the
4 Association and its membership feel that S. 391 will be
5 effective in reducing the dangers engendered by the
6 unauthorized disclosures of identities of intelligence
7 officers and their family members?

8 Mr. Maury: Mr. Chairman, I think it will contribute a
9 great deal. I do not think there is ever a perfect solution
10 to this problem in a free society, but I think S. 391 will
11 make a great contribution not only to the practical results,
12 but also to the morale of the troops in the field.

13 Senator Denton: Do you have any suggestions as to how
14 this bill could be rendered more effective, not necessarily
15 in amending now, but perhaps later in addressing the problem
16 of unauthorized disclosures?

17 Mr. Maury: Mr. Chairman, I think time is of the
18 essence, and therefore I would urge prompt action on this
19 bill. There may be refinements that could come later, but
20 it is far better I think that we move quickly on this bill,
21 rather than delay in the interest of polishing it further.

22 Senator Denton: Thank you, sir.

23 Senator East?

24 Senator East: Mr. Chairman, I will keep my remarks
25 brief. I found the statement very valuable, and it will be

1 of course, I know, a part of the record. I do agree,
2 obviously -- or perhaps not so obviously -- with the general
3 concern that Mr. Maury raises, and I appreciate hearing what
4 the professionals think about the problem.

5 They do think this Act would fill a gap here that needs
6 to be filled, and that simply enhances my support for the
7 measure. I appreciate his coming and making the effort to
8 be a part of these hearings. Since we would be in basic
9 agreement, I shall not proceed to waste any further time,
10 but my lack of comment should not be interpreted as a lack
11 of enthusiasm for his statement and his personal presence
12 here.

13 Thank you, Mr. Chairman.

14 Senator Denton: Thank you, Senator East.

15 Senator Biden?

16 Senator Biden: Thank you also for your statement,
17 sir. It may come as a surprise to you that I do not
18 disagree with your statement, either. The fact of the
19 matter is that I think you are absolutely right,
20 particularly as it relates to the morale, but more
21 importantly as it relates to the single greatest instrument
22 for peace we have at our disposal in this government, a
23 functioning, well-ordered, and good intelligence community.
24 To that degree, if you go back, and you know if you were
25 there, that I have been exceedingly supportive of budget

1 requests and matters that would relate to strengthening that
2 agency. As a matter of fact, I have been the prime mover
3 most of the time in those issues on that committee.

4 So we have no disagreement at all in terms of both the
5 philosophy of the need for the agency, in my opinion the
6 need for covert activities, in my opinion the need for the--
7 I, like you, reject the argument that merely because a KGB
8 agent does not sanction a CIA agent who has been exposed,
9 that therefore there is no harm to the agent.

10 We all are not worried about the KGB agent blowing you
11 away. That is a worry, but not related to this. There is
12 no doubt that they know who the station chief in every
13 station in the world is, just like I know we know
14 conversely. But that is not the point.

15 You are absolutely right, and I want to reiterate your
16 point on the record, that both the demoralizing effect and
17 the physical danger created as a consequence of exposing
18 agents in foreign lands, that the KGB already knows about,
19 still is very, very damaging both to the physical safety and
20 to the morale of the agency -- and it does not make us look
21 good, either, as a Nation. So I concur with you
22 completely.

23 I have one question for you: Do you believe that the
24 House bill -- I have two questions actually -- Do you
25 believe that the House bill that differs only in the

1 argument that you have heard take place here today, the
2 question of "reason to believe" or "intent," do you believe
3 that the House bill would prevent us from accomplishing the
4 goals of further protecting those CIA agents? Is the House
5 bill a positive move? I know you prefer the Senate bill,
6 but is the House bill positive? Does it help?

7 Mr. Maury: Sir, I would defer to Mr. Warner, our Legal
8 Advisory, on that if I may?

9 Senator Biden: Surely.

10 Mr. Warner: Mr. Biden, we have studied both of these
11 bills very carefully and, somewhat like the Department of
12 Justice, we would urge passage of either one. We feel that
13 they both clearly stand constitutional muster. I believe
14 that the House bill would make prosecution somewhat more
15 difficult, having engaged in many cases in discussion of
16 "shall we prosecute this case, or that case?" I believe
17 that the House bill would be slightly tougher to prosecute.

18 Senator Biden: I appreciate your answer.

19 Mr. Warner: But either bill.

20 Senator Biden: Because I just want to make it clear
21 that, from my point of view, although I do not share the
22 same philosophic view of my colleagues on a number of
23 issues, on this issue, the issue for me, Joe Biden, one
24 Senator, the ranking member of this Full Committee and this
25 subcommittee, is simply the latter point.

1 There is no disagreement. There is no disagreement on
2 the need for action in this area. Your answer is crystal
3 clear.

4 The second question I want to ask you, if I may, and I
5 may address this to our principal witness: That is, can you
6 explain to me and my colleagues, or can you think of from
7 your past experience, not a hypothetical but past
8 experience, as you have cited past experience to us by
9 making reference to KGB agents you have know, et cetera,
10 which is all very helpful, can you cite from past experience
11 examples where the disclosure of the name of an agent who
12 was a double agent would be something that would not be the
13 desire of the agency?

14 Mr. Maury: Yes, sir.

15 Senator Biden: Sometimes it makes sense for us to have
16 double agents who are working against our interest continue
17 to be double agents as long as we know it? Right?

18 Mr. Maury: Very valuable.

19 Senator Biden: Very valuable. Now the second point on
20 that second question that I would like to make -- and I
21 promised I would be finished on 1:30, and there are 3-1/2
22 minutes left. That is, I found in what turned out to be the
23 first effort, with the cooperation of your agency, your
24 former agency, to the best of my knowledge I am the first
25 person to ever have access to all the damage assessment

1 reports for the past 10 years in the Agency. For my
2 colleagues who may not know the term of art, and they may
3 also, when something goes wrong you all write a damage
4 assessment: How much did it hurt us?

5 As we went back to try to figure out why were not you
6 fellows and the Justice Department prosecuting these guys,
7 we found out that one of the reasons why you did not
8 prosecute was not because you were un-American, but because
9 in order to prosecute under our system it required you to
10 disclose more than you would gain by the prosecution.

11 So we worked together and we came up with the Grey-Mail
12 bill which, according to Justice, according to the
13 prosecutions that have taken place since then, and according
14 to the Agency, has had a significant impact on allowing you
15 a mechanism to go get those folks and punish them without
16 having to reveal more than you wanted to. There are still
17 some cases you cannot go forward with, because to go after
18 it you would reveal too much.

19 Now having said that, what are the other valuable means
20 beyond us passing either this House bill or the Senate bill
21 that you believe as a qualified and experienced agent are
22 needed to protect the identities of CIA agents?

23 Mr. Maury: One suggestion, sir, would be to the
24 Executive Branch. That would be a new policy with the new
25 Executive Orders on who can and should be available for duty

1 for, or perhaps providing cover for intelligence officers
2 throughout the Executive establishment. That could be very
3 useful in certain circumstances.

4 I think we have unilaterally disarmed, in a number of
5 cases, by deliberately putting --

6 Senator Biden: Making it so clear who we have as cover
7 by acknowledging them.

8 Mr. Maury: We have identified so many people that we
9 say that we are not using -- and I do not think anybody
10 abroad ever believes us; but still we have done it to
11 ourselves at home. So we have shot ourselves in the foot in
12 that respect. That would be one comment.

13 Maybe Mr. Warner could add to that.

14 Senator Biden: Well, on that point -- let me follow
15 up, since my time is running -- would it not be useful, or
16 is it not the case that unless we do take that kind of
17 action, that even if newspaper people do not publish this
18 stuff, and the Agees of the world do not publish these
19 identities, that these terrorist organizations are getting
20 sophisticated enough to figure it out themselves, are they
21 not? They are not the KGB, but they are getting more
22 sophisticated, are they not?

23 Mr. Maury: No doubt; no doubt about it.

24 Senator Biden: So even with this law, whichever one we
25 pass, we have to do more, do we not?

1 Mr. Maury: I think so. And I might add, sir, that I
2 think there should be some restrictions and revisions in the
3 Freedom of Information Act, and the Foreign Intelligence
4 Surveillance Act.

5 Senator Biden: I am anxious to hear what you have to
6 say, Mr. Warner, but with the permission of the Chairman, I
7 would ask permission that we leave the record open to give
8 you time to add to, in more detail if you would like, some
9 of the other things beyond this kind of legislation that you
10 think is useful, but it is up to the Chairman in terms of
11 time whether he wants to hear it now, or have it in writing.

12 Mr. Warner: I can do it very briefly, Mr. Chairman.

13 Senator Denton: Go ahead, Mr. Warner.

14 Mr. Warner: I think one of the measures in S. 391
15 itself is highly desirable. That is, requiring the
16 President to issue an Executive Order dealing with the
17 procedures under which cover will be provided. Because
18 while, from time to time, various departments are
19 cooperative, at other times the policymaker in charge is not
20 so cooperative, nor are the procedures standardized. And it
21 is a very complex business, putting a person under cover and
22 keeping him under cover. It is very complex. I think a
23 central direction from the President will be of material
24 assistance.

25 Senator Biden: I personally thank you for your

1 concise, dispassionate, and honest responses to my
2 questions. Thank you.

3 Senator Denton: I would like to confirm that the only
4 difference that appears to exist between the Minority
5 Members and the Majority Members on this committee relates
6 to the efficacy or lack thereof of the statement regarding
7 "intent" between the House and Senate version.

8 I can confirm that Senator Biden, in my experience and
9 before my experience here, has been a veritable bird dog in
10 promoting intelligence, not only in the sense in which we
11 are discussing here, but he made quite a point with the Drug
12 Enforcement Administration hearing the other day of
13 insisting that the Director give adequate attention to the
14 intelligence gathering facility of that organization.

15 So I have no qualms whatever about acknowledging that,
16 Senator Biden.

17 Senator Biden: Thank you, Mr. Chairman. I may have to
18 use that some day.

19 (Laughter.)

20 Senator Denton: Thank you, Senator East, for your not
21 only political science background here, but your legal
22 background. You are one of the versatile men here, and one
23 of the finest men here, in my opinion.

24 I want to thank the witnesses, Mr. Maury and Mr.
25 Warner. We will hold the record open until next Wednesday,

1 13 May, for the submission of written questions by any
2 Senators here or absent who wish to do so. This hearing
3 stands in recess, subject to the call of the Chair.

4 [Whereupon, at 1:33 p.m., the hearing was recessed,
5 subject to the call of the Chair.]

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