1. An Ivy League elitism in the press which is more and more influenced by attitudes genuinely hostile to American society and American government.

2. A growing acceptance by the press of the simplistic notion of the near-omnipotence of the president and the feeling that he has only himself to blame if things go wrong.

3. An increasing reliance by the press on information from dissidents in the civil service bureaucracy who often take up the cudgel against the president in their own interests.

4. A tendency to report nonevents and spurious charges against the government in the name of objective coverage of the news:

5. The absence in the press "of a professional tradition of self-correction."

Moynihan is not the first to observe an elitism in the press that increasingly is separating it from support for middle class values and opening up a credibility gap between it and the general public.

Nor is he the first to note that the press, in its questioning of the President and his executive department heads, often seems to be more interested in a scalp than a scoop, more concerned about showing up the White House than in getting facts to report about it.

While the earliest criticism of the Vietnam war came from the uncensored Saigon press corps, some of the critics lacked the credentials to do more than surface reporting since since they knew little about the background of the country, the people or even U.S. participation in the war.

Moynihan agrees the relationship between the presidency has grown more troubled as a result of the war in Vietnam. But he contends it has been a matter of concern ever since the cold war began.

"At the close of World War II official press censorship was removed but the kinds of circumstances in which any responsible government might feel that events have to be concealed from the public did not go away," Moynihan writes

"The result was a contradiction impossible to resolve. The public interest was at once served and disserved by secrecy; at once served and disserved by openness. Whatever the case, distrust of government grew."

At any rate, Moynihan feels that as a result of these conditions, it is hard for the government to succeed and just as hard for government to appear to have succeeded when it has done so.

More important, he feels that this consistently negative picture of government is not good for democracy and that it is becoming a matter of national morale, or what Nathan Glazer has called a "loss of confidence and nerve."

Moynihan has little to prescribe in the way of correction but he does suggest the need for improved reporting, more thought by owners and editors and reporters as to what is good and bad about the country and what might be done to make things better, and also more concern by the press as to just how much elitist criticism is good for democracy.

On a more specific level, he recommends that the press do a better job of correcting its own errors and of keeping a critical eye on itself. He also urges that the government respond in specific terms to what it believes to be errors or mistaken emphasis in press coverage of its activities.

If these comments reflected only the fears of one former public official, even a highly intelligent one who has served three presidents, two Democratic and one Republican, newsmen and the public could dismiss them as stemming from the annoyance of a frustrated bureaucrat. But, unfortunately, criticism of this kind has become more common not only among the intelligentsia but among average readers.

Some of the criticism no doubt stems from the traditional antagonism toward the bearer of bad tidings and the feeling among large segments of the public that the press stresses bad news rather than good.

Some of it arises from mistakes by the press and the fact that a better educated, more literate public now is more aware of the errors made by the press.

But some of it also is prompted by the fact that the press exercises a great deal more freedom these days in reporting news about such controversial matters as pornography, abortion, church reforms, sexual issues and other matters that once were swept under the rug insofar as press coverage was concerned.

To some extent, critics who complain about the openness of the press in reporting such controversial matters are raising the same objections Moynihan does. They see the press as a negative force in society and one which often is out of touch with the average reader.

Many newspapermen, including this one, agree there is substance to these criticisms, especially the sneering at American institutions and accomplishments. This attitude of disparagement stems, in part, at least from a tendency to measure American institutions and accomplishments against the ideal of a perfect world rather than against the realities of an imperfect world.

But will the press in this country have to mute its criticism of democracy in order to save it, as Moynihan seems to be asking? Is there some solution other than the self-discipline that Moynihan and others suggest?

If a free press is curbed, in the name of protecting democracy, who then will serve as the public's eyes and ears in reporting the activities of the government's elected and appointed officials? And who, indeed, then will become the bulwark of our democratic system which requires an informed electorate if it is to function properly?

Unfortunately, Moynihan doesn't really try to answer those questions.

ERVIN HEARINGS ON PRIVACY—V: TESTIMONY OF ALEXANDER POLIKOFF

Mr. ERVIN. Mr. President, in continuation of my plan to put the more important and frequently requested statements from our hearings in the CONGRESSIONAL RECORD, I would like to enter today the statement of Mr. Alexander Polikoff.

Mr. Polikoff appeared before the Subcommittee on Constitutional Rights primarily to discuss the trial in Chicago of the lawsuit brought as a result of John M. O'Brien's December disclosures of Army intelligence activities in Illinois. Mr. Polikoff acted as counsel for the plaintiffs in American Civil Liberties Union against Laird. This case was dismissed after 5 days of evidentiary hearings and is presently on appeal.

At our hearings on Federal Data Banks, computer and the bill of rights Mr. Polikoff first summarized the testimony given by the witnesses in the Chicago trial. Then he analyzed for the subcommittee the legal principles applicable to the issues raised by military surveillance.

Mr. President, I think that in both aspects of his testimony Mr. Polikoff made valuable contributions to our understanding of the problem involved in Government data collection. I ask unanimous consent that his statement be printed in the RECORD at this point.

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

STATEMENT OF ALEXANDER POLIKOFF BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY, FEBRUARY 24, 1971

Mr. Chairman, it is a privilege to appear before the Subcommittee on Constitutional Rights, and I thank you for the opportunity to do so.

My name is Alexander Polikoff. Since April, 1970, I have been the full-time Executive Director of Businessmen for the Public Interest, a not-for-profit corporation in Chicago. For 17 years before that I was an associate and then a general partner with a large Chicago law firm.

On a volunteer basis I am one of the general counsel of the Illinois Division of the American Civil Liberties Union. In that capacity I acted as counsel for plaintiffs in the law suit entitled *American Civil Liberties Union, et al.*, v. *Laird, et al.*, in the Federal District Court in Chicago (No. 70 C 3191). That law suit, as you may know, concerned the Army's domestic civil disturbance intelligence activities. After five days of evidentiary hearings, from December 28, 1970 to January 5, 1971, Judge Richard B. Austin dismissed the suit. The dismissal order is now on appeal.

My principal purpose in being here today is to summarize for you some of the sworn testimony in the Chicago trial. Among the Army witnesses were Thomas Filkins, a civilian employee of the Army, who was the immediate superior of John O'Brien, the former Army military intelligence agent from whom you will also hear this morning. In addition, Ralph Stein and Richard Stahl, former Army military intelligence agents, testified for the plaintiffs. There were other witnesses, of course, but these are the principal ones whose testimony I will summarize, although I will be happy to answer questions about others.

I am going to refer hardly at all to John O'Brien's testimony. Partly, of course, the reason is that he is here to testify himself. More importantly, however, it is to give you an understanding of the Army's own testimony and of the uncontradicted testimony of some of its former agents other than O'Brien. Some effort has been made, at least in the press, to make it appear that there is a significant issue of credibility between Mr. Filkins and Mr. O'Brien. Indeed, some stories have suggested that there is a serious factual controversy about whether the Army carried on at all intelligence activities of the sort O'Brien described.

I hope, by telling you this morning of the testimony of the Army's own witness, to make it plain that this is not the case. The fact is that through Mr. Filkins the Army has substantially admitted practically everything Mr. O'Brien ever said about the nature of the Army's civil disturbance intelligence activities. The widely publicized differences over Senator Stevenson and Congressman Mikva are only partial differences, and in any event are differences of detail. The fundamental nature and extent of the Army's civil disturbance intelligence activities in the Chicago area was agreed to by witnesses from both sides.

I wish to make one preliminary observa-Much of the Army's intelligence activity consists of background investigations of civilian or military personnel for security clearance purposes. In the Chicago area these investigative activities were conducted by separate branches of the intelligence command called "PSI", Personnel Security Investigations, and, in certain specially sensitive cases, "SIB", Special Investigations Branch. Such investigative activities were separate and distinct from the civil disturbance intelligence activities and were carried out by different personnel. The trial in Chicago did not con-

cern PSI or SIB at all. No question was raised about the propriety of those investigative activities, and the testimony I am going to summarize for you relates exclusively to the civil disturbance area, and not at all to background personnel investigations.

I will divide my statement this morning into two parts, first a summary of the evidence given in Chicago, and second a brief statement of what I believe to be the law applicable to that evidence. With the Chairman's permission, Mr. O'Brien will testify at the end of the factual portion, after which we will both be happy to answer questions on the facts before I turn to my brief remarks on the law. In the written statement I have submitted to the Subcommittee Counsel, the numbers in parenthesis are page references to the transcript of the Chicago trial.

ORGANIZATION OF REGION I OF THE 113TH MILITARY INTELLIGENCE GROUP

The 113th Military Intelligence Group, headquartered at Fort Sheridan, Illinois, covers a sizeable portion of the midwest and plains states. It is divided organizationally into Regions. One of these, Region I, to which both Mr. Filkins and Mr. O'Brien were assigned, covers the entire state of Illinois, except the East St. Louis area, and is headquartered in Evanston, Illinois, which immediately adjoins Chicago on the North.

Region I is divided into a number of branches or sections. Two of these I have already mentioned, Personnel Security Investigations and the Special Investigations Branch. Two other branches or sections were called, respectively, Special Operations and CONUS/Liaison, and they were the sections which carried on the civil disturbance intelligence activities at Region I. Special Operations engaged primarily in covert or undercover operations; CONUS/Liaison's intelligence gathering activities were primarily overt. Mr. Filkins was in charge of the Special Operations Section, to which Mr. O'Brien was also assigned, and a Mr. Richard Norusis was in charge of CONUS/Liaison. The two sections worked closely together and were physically located in immediately adjoining portions of the Region I Headquarters building.

Mr. Filkins was assigned to Region I in September, 1968 and had been there continuously since that time. He was a highly trained intelligence operations specialist. (517.) He had served for three years with the Army Security Agency (683), then attended the Area Studies Course at the Army's Intelligence Command Center at Fort Holabird, Maryland. (518.) Mr. Filkins then served for approximately 6 years (689) with military intelligence in Korea (518), after which he returned to Fort Holabird where he took the Military Intelligence Counter-Intelligence Specialist Course. (518). Mr. Filkins said that without permission from the National Security Agency he could not describe the activities of the Army Security Agency, or his own duties with it (684), that he could not divulge the nature of the Area Studies Course without trenching upon classified material (687), and that he could not divulge the nature of his work in Korea, although he did acknowledge it was intelligence activity. (689.) Nonetheless, it seems clear that Mr. Filkins was a highly trained and experienced intelligence specialist.

Mr. O'Brien, incidentally, was assigned to the Special Operations Section in June, 1969, and served directly under Mr. Filkins for about six months. He too, as you will hear from him directly, was a well trained, experienced intelligence agent.

I now propose to summarize the testimony principally from Mr. Filkins, concerning the quantity of civil disturbance intelligence formation collected by the Special Operations and CONUS Sections of Region I, the nature of the material collected, the manner in which it was collected and, finally, what was done with it.

QUANTITY OF CIVIL DISTURBANCE INTELLIGENCE COLLECTED BY REGION I

First, in the files maintained by the CONUS section at Region I there were approximately 800 dossiers, so-called, on individuals and organizations. (849.) The figure of approximately 800 was first mentioned by Mr. O'Brien and then confirmed by Mr. Filkins in a written report he wrote to the commanding officer of the 113th Military Intelligence Group. (Ex. 1, ¶M.) A dossier was described by Mr. Filkins as "a large voluminous file that contained all details on a person's life, background and history." (620.)

These files included, according to Mr. Filkins, reports on virtually every organization in the Chicago area. (845–46.) This was so, he went on, because under the Intelligence Collection Plan, the document pursuant to which Mr. Filkins said Special Operations and CONUS civil disturbance intelligence activities were conducted, CONUS was obliged to maintain coverage of and keep files on any organizations "intertwined either officially or unofficially" with groups which had engaged in violence and "related activities." (847.) To illustrate what this meant, Mr. Filkins said that if a "perfectly legitimate and peaceful organization like the American Friends Service Committee" co-sponsored a demonstration or other activity with another organization which had engaged in violence and "related activities," a file would be maintained on the American Friends Service Committee. (847–48.) Mr. Filkins also said that if an organization made a public statement in defense of a person who had engaged in violent activities or defended such a person legally, a file was established on such organization. (758.)

As to individuals, Mr. Filkins said that "any person who we had reason to believe was in a leadership position in a group that was or could be or reasonably expected to be involved in civil disturbance, he was then put in a file." (619.)

These various files, which were housed in roughly nine file cabinets (870), were exclusively CONUS files. In addition to and separate from the CONUS files materials were generated by the Special Operations Section. These were in the form of so-called agent reports, which were written reports of operations conducted by military intelligence undercover agents. (639–40.) A Special Operations Section file was prepared for each such individual undercover operation (639) consisting of one or more agent reports (640), and the file terminated with the termination of the specific operation. (640.)

The Special Operations Section at Region I had about seven persons engaged in undercover operations. (810.) Mr. Filkins was asked about the volume of reports generated by these undercover persons and he said that for the 6 month period during which Mr. O'Brien was assigned to Special Operations, that is, from June to December, 1969, an average of 15 such reports per month was generated. (888.) He said, incidentally, that although he could not remember, the volume of agent reports generated by the CONUS Section was "certainly more" than that. (885.)

Mr. Filkins said that when an undercover operation was completed the file was sealed and sent to Group Headquarters and that this was done within three to six months, "Depending on the situation," after completion of the operation. (883–84.) Accordingly, at any point in time the Special Operations files at Region I represented only current or recently concluded operations. (884.) Mr. Filkins said that at June, 1970, there were about 175 Special Operations files at Region I. (642.)

NATURE OF CIVIL DISTURBANCE INTELLIGENCE COLLECTED BY REGION I

Let me turn to the nature of the material included in these Special Operations and CONUS files. I have already referred to Mr. Filkins' testimony that the CONUS dossiers contained "all details of a person's life, background and history." (620.) Ralph Stein, from whom you will hear a little later, and to whom details included such personal matters as financial condition and sexual conduct. (446–47.)

The sources of this information were various. One was the undercover operations of the Special Operations Section. Reports of these operations made up the Special Operations files, as already noted, but in addition the reports were sent to Group Headquarters (654–55) where extracts were prepared which were then placed in the CONUS files. (657.) Secondly, reports were received from other investigative agencies, including the FBI, the Secret Service, the Illinois State Police, the so-called Red Squad or subversives investigations unit of the Chicago Police Department, the Gang Intelligence Unit of the Chicago Police Department, suburban police departments, and, as Mr. Filkins put it, "almost any law enforcement agency in this area." (650–51.) Where such reports were of interest to the Army, copies were made for the CONUS files. (651.) Where the report was not of interest it was sent "forward" (presumably to Group Headquarters) with the recommendation either for retention or dispatching to Fort Holabird (651.)

A third source of the information contained in CONUS files was the newspapers. The newspaper article, or a xerox copy, was normally mounted and attached to an exhibit cover sheet, which was in turn attached to an agent report written about the article on an official agent report form. (673–74.) The agent report included a brief synopsis of the information in the article and, if an individual on whom CONUS was reporting was mentioned in the article, identifying data on the individual, including the date and place of birth, social security number, and any previous involvement in civil disorders or disruptions. (675.)

These were the three basic sources of information contained in the Special Operations and CONUS files. Special Operations reports were all classified "confidential," and some but not all of the CONUS files were so classified. (670.)

NATURE OF CIVIL DISTURBANCE INTELLIGENCE COLLECTION ACTIVITIES AT REGION I

Next, mention should be made of the nature of the intelligence collection activities in the Special Operations Section at Region I. The newspaper clipping activity and receipt of investigative reports from other agencies speak for themselves; "special operations" perhaps does not.

Mr. Filkins defined an undercover operation at Region I as an operation "where a person is assuming an identity or a background or a raison d'etre, a reason for existence, other than the truth for the purpose of obtaining information" (646)—where "he misrepresents who he is" (646) and has "artificial, contrived or bogus" credentials. (646–48). Undercover agents were utilized who were assigned to other branches of the military service (648–49), though Mr. Filkins could not say what other branches because that was classified. (648.) The agents, including Mr. O'Brien, used "cover" names. (694). Both Mr. Filkins and Mr. O'Brien engaged in undercover operations, separately and together. (771.) Filkins and O'Brien went out on undercover operations together perhaps once each week. (771.) They also met undercover agents acting under supervision at pre-arranged meeting places (692–93), kept records of all such meetings (693), and prepared written re-

ports of the information imparted by the agent. (656–57.)

Although both Mr. Filkins and the commanding officer of the 113th Military Intelligence Group, Colonel Joseph Walker, declined to disclose the nature of special operations activities at Region I because they said such information was classified (118, 589), Mr. Filkins did testify to coverage of demonstrations (891) and, so far as his own personal activities were concerned, of a peaceful debate on a college campus (892), surveillance of a meeting in a private home (560), following cars and taking down license numbers (893). Persons assigned to other sections in the Region I Headquarters were aware of the existence of Special Operations, Mr. Filkins said, but they were not authorized to know the details of Special Operations activities. (614.)

PERSONS AS TO WHOM CIVIL DISTURBANCE FILES WERE MAINTAINED AT REGION I

Since, as previously noted, Mr. Filkins acknowledged that CONUS files were maintained on virtually every organization in the Chicago area, no effort was made in the trial to have Mr. Filkins recall their names. Neither was Mr. Filkins asked for his recollection of all the individuals as to whom files were maintained. He did say that files were maintained on each of the individual plaintiffs, who were Jay Miller, the Executive Director of the Illinois Division of the American Civil Liberties Union (531), Jesse Jackson, the national director of the Operation Breadbasket arm of the Southern Christian Leadership Conference (538), two Chicago Aldermen, A. A. Rayner and William Cousins (537, 540), Gordon Sherman, a member and former chairman of Business Executives Move for Vietnam Peace (535), and Henry de Zutter, a Chicago newspaperman. (533–34).

During his testimony Mr. O'Brien was asked by the United States Attorney to recall names of persons in various occupational categories, such as clergymen, business leaders, university professors and newsmen, as to whom files were maintained. (258 et seq.) He did so, and his recollection was confirmed in the great majority of instances by Mr. Filkins. (531–68.) (Mr. Filkins also acknowledged (821–22) that CONUS files might have existed on a particular individual without his knowing it.) Two celebrated exceptions are Senator Adlai Stevenson III and Representative Abner Mikva. As to Senator Stevenson, Mr. Filkins said that no file was established (669) but he did testify that on an occasion when Senator Stevenson addressed a rally in Chicago "a notation was made of that fact in a spot report that was sent out to the Army Intelligence Commander at Fort Holabird." (667.) He also said that it was "feasible" that additional information on Senator Stevenson may have been collected by CONUS/Liaison without it coming to his attention. (668.) Similarly, although Mr. Filkins said that to his knowledge there was no file on Representative Mikva (821–22), he said that a CONUS spot report "may well have" noted that Representative Mikva had addressed a Chicago rally (822–23), and that there could have been a file on Representative Mikva without his knowing it. (822).

DISTRIBUTION OF CIVIL DISTURBANCE INTELLIGENCE

This completes my summary of the civil disturbance intelligence activities at Region I as testified to at the trial. I wish to emphasize that it is taken exclusively, except where I have explicitly noted otherwise, from Mr. Filkins' testimony. I have not summarized for you the testimony of John O'Brien or of other former military intelligence agents. I might note, however, that Richard Stahl, another former Region I agent, testified that he too engaged in civil disturbance intelligence gathering activities, including personal surveillance of such notables as Ralph Abernathy (1059) and Governor Lester Maddox (1060), as well as the entire Georgia Delegation at the 1968 Democratic National Convention. (1060.)

I wish now to turn briefly to what was done with the information thus collected in Special Operations and CONUS files. Here I leave Mr. Filkins, and turn principally to Mr. Ralph Stein, a military intelligence specialist who served for over a year from late 1967 to late 1968 in the counter-intelligence analysis branch of the office of the Assistant Chief of Staff for Intelligence. (434.) Prior to his service with CIAB, as it was called, Mr. Stein had graduated from the Military Intelligence Specialist Course at Fort Holabird (433) and then served for 13 months with military intelligence in Korea. (434.) Upon his discharge from the Army Mr. Stein was awarded a certificate stating that he "displayed exceptional ability as a counter-intelligence analyst while assigned to the domestic section of the Counter-Intelligence Analysis Branch," as well as many other nice things it would be immodest to repeat. (431.) Following Mr. Stein's direct testimony at the Chicago trial the United States Attorney chose not to cross examine, so Mr. Stein's testimony stands uncontradicted and unimpeached.

Mr. Stein testified that CIAB served as the analytical arm of the Assistant Chief of Staff for Intelligence, that it provided him with reports, briefed members of his staff and himself, and was responsible for receiving and analyzing incoming intelligence information. (435.) He said that CIAB was divided into sections, each of which was responsible for a particular area, and that he was assigned to the domestic intelligence section whose area of responsibility was the entire United States. (435.) The other sections were Latin America, Afro-Asian, International and Administrative. (436.)

Mr. Stein said his particular responsibility was left-wing activities (436) and that he was placed in charge of a so-called "left-wing desk" (438) with the responsibility for becoming thoroughly conversant with left-wing activity in the United States (438) and particularly with the information coming to CIAB from both its covert and overt sources. (439.) One of these sources was the military intelligence groups of the United States Army. (422.)

The information which flowed across his desk, Mr. Stein said, fell roughly into three categories. (444.) The first was information on individuals, including leaders of left-wing and anti-war groups but also individuals of no prominence who had attended meetings of such groups. (444–45.) Most of this information was in the form of Army agent reports on form number DA341 (446), the same form number Mr. Filkins testified was used at Region I. (673.) The reports contained information relating to political activities, thoughts, associations, travels, finances and other background data (444), and sometimes included information relating to extremely personal areas, such as sexual conduct and checking account balances. (446–47.)

The second category of information was data on organizations (448), and the third category was "incident" reports, that is, reports of particular events, "anything ranging from a massive nationally covered demonstration to a number of elderly people lighting candles in a vigil for peace in New England." (449.)

Mr. Stein said that, discounting newspaper articles, there were never fewer than one hundred reports per day crossing his desk and on some days the total was substantially higher. (451.) The material was screened, coded, placed in a microfilmed data bank, and, with particularly important material, maintained in a "hard copy" file at CIAB. (452.) Material not so retained was sent to Fort Holabird. (453.)

Mr. Stein said that CIAB prepared a book called the "Compendium"—the official name was Counter-Intelligence Research Project on Persons and Organizations of Civil Disturbance Interest (455)—which was an encyclopedic reference work of civil disturbance information for the use of units in the field. (456.) About 375 copies were sent to military intelligence groups for distribution to the regional level, as well as to other federal investigative agencies. (457.)

Mr. Stein said that a computerized index to the microfilm data bank was revised and updated every month. (457.) He said that the vast majority of the files maintained at CIAB consisted of reports from Army Intelligence Command agencies containing information not generally available to the public, which he illustrated by referring to the CIAB file on Jesse Jackson. (514–15.) This file, Mr. Stein said, contained a great deal of specific information on the conversations between Jackson and other members of the Southern Christian Leadership Conference. (515.) He said that the wording of the report made it obvious that the information was obtained by someone who was in the confidence of Mr. Jackson or other members of the SCLC.

AUTHORITY FOR CIVIL DISTURBANCE INTELLIGENCE ACTIVITIES

Let me now turn briefly to a last subject about which Mr. Filkins testified—the authority pursuant to which the Special Operations and CONUS activities were carried on.

Mr. Filkins said that the basic authority for opening, maintaining and distributing information from the CONUS files was the Intelligence Collection Plan I have referred to earlier. (622–23, 626.) This Plan did not, however, apply to Special Operations (626), and Special Operations files were opened only pursuant to directions from Fort Holabird. (626–27.)

Mr. Filkins said that in early 1969 Special Operations personnel were ordered not to go on the street to observe legal peaceful demonstrations. (889–90.) He said that a similar order was given with respect to CONUS approximately a year later, in about March, 1970. (890) Then, in mid-spring, 1970, Mr. Filkins said, CONUS was ordered to limit its reporting of civil disturbance information to incidents which might be beyond the capability of local and state authorities to control. (893–94.) Special Operations was not so ordered and was still authorized to report civil disturbance incidents which were within the control capability of local and State authorities. (895). Mr. Filkins said he recalled no order prior to June, 1970, to end the covert infiltration of civilian protests groups. (885–86.)

Mr. Filkins said that in June 1970 the Intelligence Collection Plan was rescinded and a directive was issued to destroy all files that did not have a "direct and clear bearing on the mission of the United States Army." (568.) He said that such files were destroyed (848–49) except that three or four files were sent to Fort Holabird to determine whether the destruction order applied to them (849), and that the file on Students for a Democratic Society was turned over to the Chicago Police Department. (850.) Under the new order, Mr. Filkins said, files continued to be maintained on the two Chicago aldermen who are plaintiffs in the Chicago case (537, 540) and on Gordon Sherman. (536.)

It may be relevant, as a final point, to note briefly the testimony of a newspaperman, Jared Stout, about a personal, on-the-record interview with Army General Counsel Robert Jordan, III, on December 4, 1970. (389.) According to Mr. Stout, Mr. Jordan said that he had inquired of the Commanding General of Intelligence as to the existence of computer data banks with respect to civil disturbance activities and had been

told that such data bank did not exist. (396.) Mr. Jordan said he then went to Fort Holabird himself where he discovered that two such data banks in fact existed. (397.) Of the Commanding General of whom he had made the initial inquiry, Mr. Jordan said, "But I don't think he lied to me. I don't think he knew." (396.) Mr. Jordan also said that material relating to some aspects of the computer banks was not authorized by any Army regulations or directives of which he was aware (397), and that he later found two additional unauthorized data banks. (397–98.)

Finally, according to Mr. Stout, Mr. Jordan said he thought that information in individuals or groups associated with disorders was beyond the need of the Army (400–01), and that in February, 1969, then Undersecretary of the Army David E. McGiffert had issued a memorandum which, had it been followed, would have ended the surveillance of civilians. (401). He said that Mr. McGiffert had never imagined that the Army would collect the kind of data it was discovered to be collecting (401–02), and that the McGiffert memorandum of February, 1969, had ordered an end to all covert infiltration of civilian protest groups and to all direct observations of lawful demonstrations. (404–05.)

You may recall that Mr. Filkins said no such order as to covert infiltration was received prior to June, 1970, well over a year after the McGiffert memorandum, and that although Special Operations had been ordered to cease its observations of lawful demonstrations in early 1969, shortly after the date of the McGiffert memorandum, CONUS was not so ordered until a year later.

The final documentary item of evidence introduced in the case was a copy of the letter, dated February 25, 1970, from Mr. Jordan to the Chairman, Senator Ervin, with which I am sure the members of the Subcommittee are familiar. The letter is printed in the Congressional Record for March 2, 1970, and says, among other things,

"The Army's present policy is that reporting of civil disturbance information is limited to incidents which may be beyond the capability of local and state authorities to control and may require the deployment of Federal troops."

This completes my summary of some of the evidence given in the Chicago trial, exclusive as I indicated earlier of John O'Brien's testimony. I have a brief statement on the law to submit as well, but perhaps Mr. Chairman, before I turn to that, you would prefer to hear from Mr. O'Brien and then have any interrogation there may be on the factual aspects of the trial.

A VIEW OF THE APPLICABLE LAW

I turn to the subject of the law with some trepidation. Any discussion of First Amendment questions by a witness before a subcommittee chaired by Senator Ervin smacks of carrying coals to Newcastle. Nonetheless, since I have been asked to do so, I will briefly discuss what I think are the applicable legal principles.

It will be helpful to begin by posing the issue in a slightly hypothetical way. You know, of course, that the intelligence activities I have been discussing are rested on a statutory base—10 U.S.C. §§ 331, 332 and 333. These statutes say in effect that in stated circumstances the President shall use the Army to suppress domestic violence. Suppose the intelligence activities carried on by the Army, as disclosed by the Chicago testmony, were expressly authorized by those statutes. Suppose, in other words, that the statutes said that to prepare itself to respond to the President's call the Army should acquire all the information it could about possible domestic violence, such as where it was likely to occur, who was likely to foment it, and the like, and that in aid of that task the Army should collect and maintain extensive dossiers on individuals and organizations containing all sort of information, including as to individuals information relating to political activities, thoughts, associations, travels, finances and sexual conduct. Suppose also that the statutes authorized the collection of this information by "coverage" of lawful demonstrations and other public gatherings, surveillance of individuals attending such gatherings, infiltration of civilian protest groups, and the like. In short, suppose the statutes we are talking about expressly authorized the entire range of CONUS and Special Operations activities which Mr. Filkins described. Would such statues be constitutional?

I think the principles applicable to such a hypothetical law are set forth in a Supreme Court case decided in 1967, *United States* v. *Robel*, 389 U.S. 258. The *Robel* case dealt with a statute (§ 5(a)(1))(D) of the Subversive Activities Control Act of 1950) that prohibited a member of a so-called Communist-action organization from working in a "defense facility." *Robel* was a member of such an organization and worked in such a facility, but he argued that mere membership couldn't constitutionally be made a reason for prohibiting him from retaining his job. He said that he might be a mere passive or inactive member, not an active, knowing, member possessing the specific intent of furthering the unlawful goals of his organization, and that therefore there was no showing of possible harm to the country if he were to retain his defense facility job. Absent such a showing, the argument went, the statute would be unconstitutional because it indirectly affected Robel's First Amendment right of freedom of association, and a statute which trenches upon First Amendment rights must be very narrowly drawn to achieve only its legitimate objective. The *Robel* statute, it was argued, was too broad because it covered any type of membership.

The Supreme Court agreed and held the statute unconstitutional. "[P]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms," it said. And it added, "It is precisely because that statute sweeps indiscriminately across all types of association with Communist-action groups, without regard to the quality and degree of membership, that it runs afoul of the First Amendment." (389 U.S. at 265, 262.)

The Government argued that the legitimate interest it had in protecting defense facilities was very great, that there was a risk of internal subversion in plants on which the national defense depended, and that the statute was therefore based on the important and pervasive war power.

The Court responded that these considerations were insufficient to save the statute.

"[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.'" (389 U.S. at 263-64.)

"[T]his concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile." (389 U.S. 264.)

The *Robel* statute, which the Court said "cut deeply into the right of association" (389 U.S. at 264), was a very narrow statute. It singled out a limited category of persons, members of Communist-action organizations, and it imposed a limited disability on them, namely, they they couldn't be employed in certain kinds of defense plants.

Here we are talking about a hypothetical statute that does not define narrowly the category of persons to whom it relates and does not impose a limited disability. Rather it covers very nearly all of the activities of an open-ended group of persons.

And so I think, in principle, our hypothetical statute should fare no better than the statute in *Robel*. Indeed, ours would be what the lawyers call an *a fortioriri* case.

There are some differences, of course. *Robel* involved a criminal statute, and if we come back to the real world, we are not in the Army case talking about a statute at all, let alone a criminal statute—only about what I will call administrative activity. Nonetheless, I think the deterrent effect on the exercise of the freedom of association is clear, and the fact that the government activity takes the form of administrative activity rather than a criminal statute would not, I think, save the activity from being viewed as running afoul of the First Amendment.

I am reminded of a 1965 case, *Lamont* v. *Postmaster General of the United States*, 381 U.S. 301, in which the Supreme Court held that a statute unconstitutionally abridged the First Amendment right of free speech because it required recipients of a certain kind of mail—so called "communist political propaganda"—to request in writing that it be delivered. The abridgment of a First Amendment freedom there took the form, as it does here in the Army situation, of an administrative activity which had only an indirect impact on the right of free speech.

Lamont is an interesting and relevant case on the issue of impact as well. There it was argued that since an addressee taking the trouble to return a card would receive the publication named in it, only inconvenience and not an abridgment of First Amendment rights was involved, and that the Post Office procedure did not control the content of speech but only incidentally limited its unfettered exercise. (This view is analogous to Judge Austin's view in the Chicago trial that the Army's surveillance activities did not bear directly on the plaintiffs' first amendment rights and that they had no reason to be fearful or deterred in their exercise.) The *Lamont* court said:

"This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials, like school teachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'" (381 U.S. at 307.)

Since his view that the Army's activities were no real threat to any First Amendment right was one of the two principle threats in Judge Austin's decision in the Chicago case, perhaps an additional word on the subject of threat or impact would be appropriate. One commentator has put very succinctly and well a common theme of some recent Supreme Court cases, namely, that a regulation "may run afoul of the Constitution not because it is aimed directly at free speech, but because in operation it may trigger a set of behavioral consequences which amount in effect to people censoring themselves in order to avoid trouble with the law." (Kalven, A Note on Free Speech and the Warren Court, 67 Mich. L.R. 289, 297.) Three illustrations were given. In *Speiser* v. *Randall*, 357 U.S. 513, the Court invalidated a state statute requiring affi-

davits on non-Communist affiliation as a condition for tax exemption because, fearful that he might otherwise prejudice his ability to bear his burden of persuasion, the taxpayer would restrict his own utterances. The Court said, "[T]his procedural device . . . can only result in a deterrence of speech which the Constitution makes free." (357 U.S. at 526.)

In *Smith* v. *California,* 361 U.S. 147, the Court struck down a statute which imposed strict criminal liability on sellers of obscene books, because "if the bookseller is criminally liable without knowledge of the contents . . . he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." (361 U.S. at 153.) The Court concluded,

"The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered." (361 U.S. at 154.)

Finally, in *Time, Inc.,* v. *Hill,* 385 U.S. 374, the Court held that Life Magazine could not be required to pay a libel judgment for a false story on a matter of public interest absent proof that it had knowledge of the falsity or published in reckless disregard of the truth. The reason was again the self-censorship concern—

"Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even the fear of expense involved in their defense, must inevitably cause publishers 'to steer . . . wider of the unlawful zone . . .'"

The principle at work in *Speiser, Smith* and *Time, Inc.* seems to me equally applicable in the Army situation. Paraphrasing *Lamont,* anyone is likely to feel some inhibition in attending certain meetings or joining certain organizations if as a result the military arm of the government will compile and maintain an extensive dossier concerning his activities. The full and free exercise of the First Amendment right of freedom of association is likely to be the loser.

This is not to say, of course, that no surveillance of anyone under any circumstances is permissible. It is only to say that since surveillance is likely to have a restrictive effect upon First Amendment freedoms, the government's legitimate interests must be pursued by means which are not needlessly wasteful, as Professor Kalven has put it, of First Amendment values. In *Shelton* v. *Tucker,* 364 U.S. 479, a statute was voided which required each schoolteacher, as a condition of employment, to file annually an affidavit listing every organization to which he had belonged or contributed in the preceding five years. The Court said that although the state had a legitimate interest in the organizational commitments of its teachers, the statute overshot its target.

"[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can more narrowly be achieved." (364 U.S. at 488.)

And in the concurring opinion in *Lamont,* Justice Brennan said, "In the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose." (381 U.S. at 310.)

Given Mr. Jordan's admission that the Army has no need of much of the information which it has been collecting, it seems to me almost beyond argument that these principles are applicable to the facts as disclosed by the testimony in the Chicago trial.

Once again, Mr. Chairman, I thank you for the opportunity to appear here today.

CONSUMER PRODUCT WARRANTY AND FEDERAL TRADE COMMISSION IMPROVEMENTS

Mr. COOK. Mr. President, currently before the Consumer Subcommittee is S. 986, the Consumer Product Warranty and Federal Trade Commission Improvements Act of 1971. As the ranking minority member of the subcommittee, I have been very much involved both in the hearings held on the bill, and in the recent executive sessions.

Basically, the bill would accomplish two things. Title I would establish Federal standards regarding the presentation, offer and fulfillment of warranties and warranty obligations. Title II would greatly expand the FTC's authority granting it legislative rulemaking authority which would give it unprecedented power.

As expected, the bill has aroused considerable controversy among consumer groups and industry representatives, as well as Members of Congress.

Recently, there appeared in the May 30 Louisville Courier Journal a story reportedly covering my alleged activities and feelings in regard to this legislation. To portray this article as merely misleading or an oversimplification of the proposed bill, and the facts surrounding it, would be a compliment that it unjustly deserves.

Because such inaccuracies should not go unanswered, I am taking the liberty of pointing out the most obvious errors.

Just as vehemently . . . he [Cook] opposes . . . fines, for any unfair or deceptive practices.

Those who have been seriously following this legislation must know that I support an increase in the maximum civil penalty from $5,000 to $10,000 per violation.

With one of the sweeping legalistic judgments . . . Cook declares the provision is unconstitutional and that it represents another abdication by Congress of its legislative role.

I do not apologize for being a lawyer. Title II of S. 986 gives to the FTC more authority than any executive agency has ever possessed. It would give this five-man appointed Commission the power to issue legislative rules. Article I of the Constitution clearly states that—

All legislative powers herein granted shall be vested in a Congress of the United States . . . (emphasis added).

It is bewildering in this era of congressional reassertion of authority that there should be a clamor for the Congress to delegate any more of its constitutional functions.

Furthermore, these industrywide rules would be issued after an informal procedure that does not even guarantee the right of cross-examination.

Title II would also permit the FTC, when it deems necessary, to order specific consumer redress in the form of ancillary remedial orders entered in the Federal district courts. I have very serious reservations as to whether there are sufficient checks on the Commission's authority in this area.

Cook's delaying tactics—seeking time for more witnesses, asking for postponements, failing to show up for meetings—have helped stall subcommittee action on the bill.

Of the several misrepresentations and erroneous allegations, this is the easiest to refute. Anyone who did not have sufficient interest to follow the hearings may have solicited the committee records to ascertain the correct facts.

I have never asked for a delay or a postponement of any meeting or hearing, except for a 1 day delay of an executive session scheduled for May 20, at 9:30 a.m., which request was prompted due to the fact that the Senate was in session until 11:29 p.m. on May 19. No objection was heard to this suggestion; it was readily accepted by the chairman.

I have never missed any meetings and thus delayed action because of a lack of a quorum. In fact, the Commerce record will show that I have not missed a single hearing day or executive session in regard to this legislation. Furthermore, I have chaired the hearings on one occasion when the chairman could not be present. This is certainly not the track record of an obstructionist.

The actual reason for the delay has been the heavy schedule of the Commerce Committee, which has considered S. 986, consumer class action legislation, "no fault" insurance legislation and campaign reform legislation, and several other matters all within the past 3 months.

I ask unanimous consent to insert in the RECORD at this point a letter from Fred Lordan, staff director of the Senate Commerce Committee, certifying my attendance in regard to meetings and hearings on S. 986. I also ask that a letter, disputing the Courier Journal article and signed by every member of the subcommittee, be inserted at this point.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

JUNE 4, 1971.

Hon. MARLOW W. COOK,
U.S. Senate,
Washington, D.C.

S. 986: March 9—hearing—you did attend.
March 15—hearing—you did attend.
March 16—hearing—You did attend and preside.
March 22—hearing—you did attend.
May 21—executive session—you did attend.
June 2—executive session—you did attend.

Sincerely,

FREDERICK J. LORDAN,
Staff Director.

Enclosures: Front pages of all hearings on said bills.

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C., June 7, 1971.

Hon. MARLOW W. COOK,
Old Senate Office Building,
Washington, D.C.

DEAR MARLOWE: We, as members of the Consumer Subcommittee of the Committee on Commerce, have become aware of the Sunday, May 30, article in the Louisville Courier Journal entitled, "Marlow Cook draws the Fire of Consumer Groups."

This article makes several misrepresentations concerning your activities in your capacity as ranking minority member of this Subcommittee.

In particular, the article alleges that you have, by involving parliamentary and procedural rules, delayed and forestalled action on S. 986, "The Consumer Product Warranty and Federal Trade Commission Improvements Acts of 1971." As your colleagues we disapprove of and disagree with the erroneous allegations set forth in the article.

We are writing this letter to clarify the misimpressions created by this story. For the record:

(1) The article claims that you have been responsible for numerous and prolonged delays in the consideration of S. 986. To our knowledge you have never asked for a delay or a postponement of any meeting or hearing except for a one day delay of an executive session scheduled for May 20, at 9:30 a.m., which request was prompted due to the fact that the Senate was in session until midnight on May 19.

(2) The article alleges that you have intentionally missed meetings and thus delayed action because you created the lack of a quorum. In fact we know you have not missed a single hearing day or executive session in regard to this legislation; and that you chaired the hearing on one occasion when the Chairman could not be present.

(3) The article attributes the delays in action on S. 986 (over two months) to your activities, when the actual reason for the delay has been the heavy schedule of the Commerce Committee, which has considered S. 986, consumer class action legislation, "no fault" insurance legislation and campaign reform legislation, and several other matters all within the past three months.

(4) The article claims that several members of the Subcommittee are displeased with your supposed delay tactics. None of us have ever made such a statement or such a suggestion.

With best wishes.

Sincerely,

Frank E. Moss, Chairman, John O. Pastore, Daniel K. Inouye, William B. Spong, Philip A. Hart, Vice Chairman, Vance Hartke, James B. Pearson, Mark O. Hatfield, Ted Stevens, Norris Cotton.

Mr. COOK. Mr. President:

Knowledgeable sources report that Pearson—a close personal friend of the Kentuckian—lectured Cook that he was making a "bad mistake" by attempting to stymie consumer legislation, and that such tactics could cost Republican politicians votes.

Again, by an unknown "source," a very serious allegation concerning my activities on consumer legislation was stated in the article. Once again, I can merely say that I have never attempted to "stymie" any consumer legislation. The so-called lecture by my good friend and distinguished colleague from Kansas was merely a talk in which he expressed concern that I might be unjustly labeled anticonsumer by various groups. How prophetic he turned out to be. Once again, I ask unanimous consent to insert at this point a letter of reply from Senator PEARSON.

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

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C., June 8, 1971.

Hon. MARLOW W. COOK,
Senate Office Building,
Washington, D.C.

DEAR MARLOW: I have read with great interest the May 30 article in the Louisville *Courier Journal* concerning my alleged remarks about your views on many pending consumer proposals. To set the record straight, I must state that I never had any concern that you would "stymie" consumer legislation.

However, I was worried then, as I am now, that your interest in obtaining more effective consumer laws and your tendency to ask the hard question, would put you in the position of being labeled unjustly as anti-consumer by some groups.

As a matter of fact, your active and knowledgeable participation in shaping S. 986 reveals your great interest in the problems of the consuming public.

Sincerely yours,

JAMES B. PEARSON,
U.S. Senator.

Mr. COOK. Mr. President:

This bill has been heard now for 2 years . . . Any conscientious Congressman can vote on it today—all the consumer wants is for the Members of Congress to stand up and be counted.

This last quote is neither particularly important nor relevant. I merely quote it as an excellent example of journalistic innuendo designed to characterize one as "anti."

The period of time that a bill is before the Congress has, in fact, very little to do with its merits. In my brief 2½ years in the Senate, I have seen poor legislation become law quickly; likewise, many good measures have been pending for years without any committee consideration.

Title II of S. 986 which grants sweeping legislative rulemaking authority to the FTC is similar to title II of S. 3201 of a year ago. This proposal has been around for only 1 year as it was added by the Commerce Committee to S. 3201 in a closed and secret executive session after public hearings were closed. Actually, legislative rulemaking was substantially different in S. 3201 of the 91st Congress than S. 986 of this year. Every witness, including the bill's sponsor, at the hearings on S. 986 have testified to this material difference in the rulemaking proposal.

Thus, the demand that Congress stand up and be counted is one that in effect asks that Congress act hastily on new and far-reaching legislation.

Mr. President, as the only member of the subcommittee who has attended every hearing and every executive session in regard to this legislation; and as a member of the two committees, Commerce and Judiciary, which considered similar legislation in the last Congress, I feel I have a good understanding of the intent and the potential effects of this legislation.

Unfortunately, many consumer advocates have created the impression that any opposition to any provision of S. 986 is sufficient grounds to accuse the objector as anticonsumer.

However, I should like to point out that unlike many I do support a change in the present law increasing the FTC's authority to matters "affecting" commerce as well as "in commerce." I also firmly support the proposal allowing the Federal Trade Commission to seek a preliminary injunction or a temporary restraining order against an unfair or deceptive practice. I believe these changes are absolutely necessary to correct consumer abuses. I have always supported these proposals; I will continue to support them regardless of the position of any industry group.

I have been relatively outspoken, both in the hearings and executive session, in criticizing certain provisions of the bill. I have not attempted to hide behind closed doors the views that I hold. These criticisms have not been intended to deny needed protection to the consumer. Rather, I feel strongly that S. 986, as introduced, did not provide adequate protection to the consumer, and in some cases could actually work to his detriment. For example, certain provisions of title I would have placed requirements on industry that would probably have forced some small businesses to forgo the offering of warranties on their products. This was not the intent of the legislation. The intent was to allow the Federal Trade Commission to establish standards for warranties, not to force manufacturers to warrant. As a matter of fact, by forcing many companies out of business, the consumer will have his freedom of choice in the marketplace restricted. Monopolization will not benefit the consumers.

Recognizing these faults, I suggested several changes which have been accepted by the members of the subcommittee, and also by bill's sponsor, Senator Moss, the chairman of the subcommittee.

As a matter of fact, every change that I have proposed in title I has been accepted. I believe this is ample evidence that all members of the subcommittee are vitally interested in producing a significant and effective bill in this area. I feel that title I of S. 986, now represents such a piece of legislation.

Mr. President, in spite of such ill-founded attacks, such as appeared in this article, I pledge to continue my efforts to enact truly effective consumer legislation.

ANSWER TO THE MAJOR OBJECTIONS TO THE GENOCIDE CONVENTION

Mr. PROXMIRE. Mr. President, Arthur Goldberg is an ardent supporter of the International Convention on the Prevention and Punishment of the Crime of Genocide. He has served this Nation in many capacities. His terms on the Supreme Court and as Ambassador to the United Nations qualify him as an expert on both constitutional and international law.

The Senate ought to consider the arguments made by Arthur Goldberg in testimony before the ad hoc subcommittee on the Genocide Treaty. The Senate ought to ratify the Convention so stanchly supported by Mr. Goldberg.

I ask unanimous consent to have an excerpt of Mr. Goldberg's testimony printed at this point in the RECORD.

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

Let me comment on the arguments that have been given particular prominence by the opponents of ratification:

1. The contention that the Constitution