The Director
Central Intelligence Agency

Washington, D.C. 20505

29 April 1981

Honorable Edward P. Boland, Chairman
Permanent Select Committee on Intelligence
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

During the course of the recent hearings on the proposed "Intelligence Identities Protection Act" before the Subcommittee on Legislation, the following requests were made of me:

-- Representative Ashbrook asked, as a drafting service, that we provide him with language for a "false identification" provision that would meet constitutional muster;

-- Representative Fowler asked for the Agency's official views on the Senate version of subsection 501(c) and the so-called "Kennedy Compromise" suggested in the closing days of the 96th Congress.

As to Representative Ashbrooks's request, one such version is presently found in subsection 800(d) of H.R. 133, the "Intelligence Officer Identity Protection Act of 1981," introduced by Representative Charles E. Bennett (D., FL). Mr. Bennett's formulation contains a harm standard, that is, prejudice to the safety or well-being of any officer, employee, or citizen of the U.S. or adverse impact on the foreign affairs functions of the United States. The Bennett formulation provides a readily available solution. The formulation that appears in H.R. 133 is as follows:

> "Whoever falsely asserts, publishes, or otherwise claims that any individual is an officer or employee of a department or agency of the United States engaged in foreign intelligence or counterintelligence activities, where such assertion, publication, or claim prejudices the safety or well-being of any officer, employee, or citizen of the United States or adversely affects the foreign affairs functions of the United States, shall be imprisoned for not more than five years or fined not more than $50,000, or both."

In the course of the testimony by Richard K. Willard, the Attorney General's Counsel for Intelligence Policy stated that, in his opinion, a "false identification" provision containing a "life endangerment" element would be both enforceable and constitutional. I would stress, however, that such a physical harm standard would not be suitable for the sections of the Bill which cover correct identifications of intelligence personnel. The physical safety of our people is, of course, a matter of grave concern, but the Identities legislation is designed to deal primarily with the damage to our intelligence capabilities which is caused by unauthorized disclosures of identities, whether or not a particular officer or source is physically jeopardized in each individual case.

As to the first question posed by Mr. Fowler, i.e., the Agency's views on the Senate's version of subsection 501(c), we start from the basic premise that H.R. 4 and S. 391 are essentially similar. Both are carefully and narrowly crafted Bills which could effectively remedy the problems posed by the unauthorized disclosures of intelligence identities, and withstand challenge on constitutional grounds. Thus, the CIA would support enactment of either H.R. 4 or S. 391. As you know, the Bills do differ with respect to the standard of proof that would apply to individuals who have not had authorized access to classified information, and which would criminalize their disclosures of identities even if these disclosures cannot be shown to have come from classified sources. This has been the most controversial part of Identities legislation, and it is also the key provision from the standpoint of the legislation's potential effectiveness in deterring unauthorized disclosures. We have concluded that the objective standard of proof contained in S. 391 (i.e., "reason to believe that such activities would impair or impede...") is preferable to the subjective standard set forth in H.R. 4 (i.e., "with the intent to impair or impede..."). This preference is based upon a number of factors, including prospects for successful prosecutions under the differing formulations. We have discussed this matter at great length with the Department of Justice, and we believe that our preference for S. 391 is in accord with the Department's views.

Mr. Fowler's second question goes to the issue of the so-called "Kennedy Compromise," printed in the 30 September 1980 Congressional Record and set forth herein below:

> "Whoever, in the course of a pattern of activities undertaken for the purpose of uncovering the identities of covert agents and exposing such identities (1) in order to impair or impede the effectiveness of covert agents or the activities in which

> they are engaged by the fact of such uncovering and exposure, or (2) with reckless disregard for the safety of covert agents discloses any information that identifies an individual not authorized to receive classified information, knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both."

This formulation appears to raise the same kinds of problems of proof of intent which the Department of Justice believes are present in the current formulation of the subsection 501(c) offense in H.R. 4, since the Government would have to show that the disclosure was made "in order to" impair or impede the effectiveness of covert agents or their activities. A defendant could assert that his activities and his disclosures were done "in order to" accomplish some other purpose. Inclusion of the alternative "reckless disregard" standard in any 501(c) type provision would be of doubtful value. It is difficult to understand what is meant by "reckless disregard" in the context of the Identities Bill, since Congress, by enacting Identities legislation is in effect making a finding that unauthorized disclosures of identities do in fact threaten the personal safety of intelligence personnel. A reckless disregard standard would apparently mean that the Government would have to make an additional showing of physical endangerment in each particular case. This, from a deterrent perspective, would appear to be inadvisable.

Additionally, the Committee may wish to consider one technical amendment to H.R. 4, not mentioned in the course of the recent Identities hearings, but nonetheless dictated by enactment in the 96th Congress of S. 1790, the "Privacy Protection Act of 1980," legislation signed into law by President Carter on 14 October 1980 and designed to modify the Supreme Court's decision in Zurcher v. Stanford Daily. The enactment of this legislation has a bearing on our efforts to secure passage of Identities legislation. The Identities legislation should include a provision amending subsections 101(a)(1) and 101(b)(1) of the Privacy Protection Act so as to include the proposed new title of the National Security Act of 1947 among the "receipt, possession, or communication" of national security information offenses with regard to which searches and seizures may be conducted under the exceptions provided in those subsections.

Should you have any questions concerning the views expressed in this letter, please do not hesitate to contact my Legislative Counsel directly. We look forward to working with the Committee to ensure prompt enactment of Identities legislation.

Sincerely,

SIGNED

William J. Casey