the enormous potential for error and miscalculation. The SALT process has been worth the effort. For example, through SALT both sides have avoided the general deployment of antiballistic missile systems. But the fact of the matter is that during the last 12 years, the strategic forces of the two superpowers have continued to grow in both quality and quantity. If present trends continue—even if both sides continue to abide by the provisions of SALT II unilaterally—the number of warheads deployed will have almost quadrupled since the beginning of the SALT process 12 years ago. Greater throw weights and accuracy on both sides continue to destabilize and erode mutual confidence. The risk of preemptive action is feared.

Both sides have increased the development of scenarios based on such extremely dangerous concepts as "winnable" and "limited" nuclear wars. In my view, any thought of "winning" a nuclear war is, on its face, insane. One cannot read the literature which describes the effects of detonating thousands of megatons of nuclear explosives without concluding that winning or limiting a nuclear exchange is a concept without a basis in fact. Setting aside the unacceptable annihilation which would be imposed on combatants, the global effects of nuclear war would be stunning. Among other things, the world would experience alteration of the climate, destruction of the ozone layer, destruction of the remaining human gene pool, global epidemics and damage to fundamental parts of the food chain. In a full scale nuclear holocaust, extinction of mankind and the devastation of Earth as a place where living things can grow is a virtual certainty.

Insofar as the uses of "limited" weapons like the neutron bomb or counterforce missiles are concerned, war planners assume a kind of discipline of thought that loses credibility when one considers the circumstances which would have had to be present in the first place to result in the use of such awful weapons. Robert McNamara called the use of tactical weapons in the defense of Europe "a vast unknown." I agree.

The 20th century poet Dylan Thomas wrote, "Do not go gentle into that good night, rage rage against the dying of the light." A nuclear holocaust would extinguish the light throughout the world. We are in danger of blowing ourselves into oblivion.

The Senate is a great deliberative body. We debate many moral issues here on this floor. But dealing with the economy or national defense or energy is a meaningless exercise if we are going to destroy the creation.

Some suggest that there is no solution to this problem, because the nuclear genie is out of the bottle. I refuse to accept that suggestion. We must not go gentle into that good night. We owe it to our children and our children's children to rage rage against the dying of the light.

I do not have any ready answers. Certainly, our strategic negotiations need to be invigorated. In addition, we need to begin talking about this problem. We need to confront it, to face up to it. The extinction of the world, whether it be merely a remote possibility or a near certainty, is the greatest moral challenge in the history of humanity. The fact that we avoid talking about it, the fact that we do not look upon our strategic negotiations with the Soviets as the single most important responsibility of our Government, the fact that we allow our allies to spread dangerous nuclear materials around the globe like so much ordinary chattel is the mark of a society that is shirking its most solemn and important responsibility. We must get our best minds and our ablest people mobilized to deal with this problem and we must accept the burden of this urgent moral commitment for as long as we have a world in which to live.

LEV AND NADYA OVSISCHER

Mr. PERCY. Mr. President, the plight of Soviet Jews denied the right to emigrate is always on our minds. We learn the names of these individuals from their relatives and friends and from others concerned about the denial of their rights. I wish to draw the attention of my colleagues today to the case of Lev and Nadya Ovsischer.

Eleven years have elapsed since Lev Ovsischer and his wife Nadya first applied to emigrate to Israel. Since then they have been continually harassed by the KGB, their telephone has been disconnected and correspondence has been stopped from reaching their home. Colonel Ovsischer, a highly decorated fighter squadron commander in World War II, has been stripped of his military rank and deprived of his pension.

Lev and Nadya Ovsischer simply seek permission to emigrate to Israel where they can join their daughter, live freely and practice their religious faith. The Soviet Government claims that Lev Ovsischer possesses military secrets. However, he is 20 years removed from service in the army and therefore this claim is ludicrous.

Thirty-nine years ago, on March 5, the Nazi occupiers murdered 5,000 Jewish residents of Minsk, the same city in which Lev and Nadya Ovsischer now live. Eleven years ago, also on March 5, the Ovsischers applied for exit visas. Families in six American cities and five other countries are planning to take special note of the anniversary this year. In remembering the genocide of the past, we must also note that basic human rights are tragically denied by the Soviets at present.

I urge my colleagues to join me in appealing to the Soviet authorities to observe the right of family reunification guaranteed in the Helsinki accords, a right denied to Lev and Nadya Ovsischer and to so many others like them.

Mr. BAKER. Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. CHAFEE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Morning business is closed.

INTELLIGENCE IDENTITIES PROTECTION ACT OF 1981

The ACTING PRESIDENT pro tempore. The Senate will now resume consideration of S. 391, which the clerk will state.

The assistant legislative clerk read as follows:

A bill (S. 391) to amend the National Security Act of 1947 to prohibit the unauthorized disclosure of information identifying certain United States intelligence officers, agents, informants, and sources and to direct the President to establish procedures to protect the secrecy of these intelligence relationships.

The ACTING PRESIDENT pro tempore. The Senator from Alabama is recognized.

Mr. DENTON. Mr. President, I notice that the Senator from Delaware is here and we have, with his permission, one more statement at this time by the Senator from North Carolina (Mr. EAST), who is on the floor. I should like to turn the floor over to the Senator from North Carolina.

The ACTING PRESIDENT pro tempore. The Senator from North Carolina is recognized.

Mr. EAST. Thank you, Mr. President.

I shall be brief this morning. I wish to take a few minutes to speak on behalf of the amendment that our distinguished colleague from Rhode Island (Mr. CHAFEE) is offering to S. 391. Before turning to that task, I should like publicly to congratulate and thank Senator CHAFEE for the great leadership he has shown in this whole bill. He has shown great energy and great patience over a long period of time and we are all indebted to him for that effort.

I should also like publicly to compliment Senator DENTON, who chaired the subcommittee hearings on this matter, for his excellent leadership. And, of course, we are all indebted to Senator THURMOND, chairman of the Committee on the Judiciary, for the leadership he has given us in getting this measure out of committee and now onto the Senate floor.

We have many colleagues who have supported us in this effort, Democrats and Republicans—it is not a partisan effort—so there are many people who deserve to be publicly commended for their effort on behalf of this legislation. I simply wanted at the moment to note the great contribution of those Senators.

Mr. President, there is general agreement that this legislation, S. 391, is needed to provide protection for CIA agents involved, of course, in covert activity, not to allow them to be identified and to impair and impede the foreign intelligence activities of the United States which certainly is pernicious and unconstitutional action. Needless to say, it has jeopardized the lives of the agents involved. I repeat, there is a general acknowledgment of the need to do something to protect these agents and thereby to protect the best interests of the United States in the very difficult kind of world in which we live. Again, it was the foresight of Senator CHAFEE which pressed this matter to final fruition here.

The nub of our problem, Mr. President, is not over whether to have legislation. There is general agreement that we ought to have it. The nub of the problem is what kind of language we ought to use on page 3 of the statute or, more particularly, title 6, section 601(c). That is the focus of this debate at the moment and that is the essence of the so-called Chafee-Jackson amendment.

Let me try to explain why I think it is critical that we follow the lead of Senator CHAFEE in this very important matter. It may seem to those who have covered this matter casually that there is not much of a distinction here, it is not important that we pick one over the other. I feel very strongly that Senator CHAFEE and those supporting him, cosponsoring this bill, are correct, that there is a fundamental difference here. We ought to address ourselves to it and we ought to support him in this effort to amend S. 391.

The language that is currently in the measure that Senator CHAFEE seeks to change says:

Whoever, in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure, discloses to any individual not authorized to receive classified information, any information that identifies an individual as a covert agent, 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.

The critical language here in question is "with the intent to impair or impede the foreign intelligence activities of the United States."

The change that would come about by the Chafee amendment is that, in lieu of "with intent to impair or impede the foreign intelligence activities of the United States," it would read, "Whoever, in the course of the pattern of activities intended to identify and expose covert agents and with reasons to believe that such activities would impair or impede the foreign activities of the United States," and so forth.

The critical language here is whether you have the "intent to impair or impede" language or the language that reads "with reason to believe."

Why make the distinction? Is it fundamental? Is it important? I submit it is. Why?

Mr. President, I feel we run the risk of aborting the effectiveness of this legislation if we do not make the standard the reason-to-believe standard. Why so? If you put in the intent standard, very likely this is the scenario you will get in a criminal prosecution under this legislation:

The defendant will contend, among other things, that his intent in revealing the name of an agent—in meeting all the other requirements under the act for criminal prosecution and conviction—he will very likely contend through innovative lawyers, of which there are many in this country in terms of defense attorneys, that his intent was not to impair or to impede the foreign intelligence activities of the United States but was in fact designed to assist, aid or abet it by revealing the incompetence of an agent, for example, or by revealing that he was engaged in certain kinds of practices that, according to the informant, he should not have been.

Then you force the court, the jury, and the judge to get into this very difficult area of determining what the subjective state of mind, what was the intent.

It would be a great tragedy to let this legislation be passed, meeting a need we all agree needs to be met, and then have it fail in the courts of this country of confusion of language. The intent standard will cause that kind of confusion.

If you have the reason-to-believe standard, it is a reasonable man's standard. It is a good standard. It is a standard that has been used previously in legislation. It is a standard that has been upheld by the U.S. Supreme Court. There is not any question as to its constitutionality; and if there is, we can always argue this up one side of the road and down the other, as regards whether I think it is constitutional or someone else does not.

Ultimately, of course, the courts will determine it. But based upon what the courts have done already in this area and based upon the previous legislative record, this is solid language. It is good language. It is constitutional language. What it will do is allow the court, the jury, and the judge to look at all the circumstances and to determine if a reasonable man would conclude that in doing what this informant did, the purpose was, again, to impair or impede the foreign intelligence activities of the United States.

There is a minimal risk, then, that this important legislation will be rendered ineffectual in the courts. That is the essence of this debate over the nature of the language that we ought to be including here.

So, I strongly urge my colleagues to support the amendment of Senator CHAFEE, Senator JACKSON, and others who have cosponsored it. It is soundly conceived. It deals with a genuine weakness in the current legislation.

Let me try to simplify it and make it as concise as I can, as I understand the problem.

First, as I have indicated, there is a genuine need, in terms of national security, to stop this insidious, pernicious practice of the Philip Agees and others of taking the names of covert agents, revealing them to the public, and then watching these people shot down or shot at or harmed, and not only killing these very dedicated Americans but also jeopardizing the national security interests of the United States.

I repeat: It is conceded across the political spectrum here, across party lines, that there is a genuine need. The problem is that if you adopt the language that is currently in the bill before the Senate and do not accept the Chafee amendment, there is a very strong risk that the bill will be rendered, as I have said, ineffectual. You will fall short. It will be a sense of false security. We will think we have provided protection for these gentlemen and for the national security interests of the United States, but in fact we will not have done that.

I submit, Mr. President, that we ought to err on the side of protecting these gentlemen and protecting the national security interests. A fundamental way we do that is by adopting the language of the Chafee amendment.

So, I implore my colleagues—I promised to keep this brief—to support Senator CHAFEE on this matter. I often feel, in trying to evaluate the worth of a measure, that you consider the gentleman who has been actively supporting this entire measure all along—again, Senator CHAFEE.

Senator CHAFEE has a great personal and professional background in this area, formerly having served with great distinction as Secretary of the Navy. He understands the importance of gathering foreign intelligence. He understands in a firsthand way the role of the CIA in foreign intelligence activities.

Second, he has served with great distinction in the U.S. Senate. I do not think Senator CHAFEE needs to yield to anyone in his great concern about the status of civil rights in this country. No one is attempting to deny the civil rights of anyone in terms of freedom

of speech or press. As I believe Justice Jackson said one time,

> The first amendment is not a suicide pact; it means we can take reasonable measures to serve important national interests.

There is no national interest of greater importance than national security. Whatever intrusion there may be upon first amendment rights here, they are modest and gentle and consistent with the overriding need to protect the great national security interests.

Because of my great confidence in Senator CHAFEE, I was eager, early on, to support this particular amendment. He, of course, has attracted to his cause, which he invariably does, distinguished bipartisan support, Senator JACKSON of course, being a key figure in this, as well as many others.

As I have said, it is not a partisan issue. It is not an idealogical issue. It is a fundamental question of the legitimate need of national security.

So, I urge my colleagues to support it because, again, of the great integrity of Senator CHAFEE, who is behind it, and his great expertise in this area.

I also point out to my colleagues that the House of Representatives has already passed a measure that has the Chafee language in it. If we proceed and accept it now through his amendment, we will have a bill precisely like the House bill. We will not have to go to conference. The President has already indicated that he would sign this measure. He is very enthusiastic for it.

If we will accept the Chafee amendment, we can get this act through. The House has already passed it. We can then get on with the very important task of providing protection for our CIA agents, our foreign intelligence apparatus, and thereby contributing immeasurably to the national security interests of the United States.

In conclusion, Mr. President, in addition to the distinguished gentlemen I have already referred to who are supporting this measure, I offer this long list of those who are supporting the Chafee language: the current administration, the current Justice Department, the CIA, the FBI, the House of Representatives, former President Carter, and the Carter administration. Again, there is broad and deep bipartisan support for the Chafee amendment. I urge my colleagues to seriously consider it, and I do implore them to accept it.

I have no further remarks, Mr. President.

Mr. BIDEN. Mr. President, I should like to know if the Senator from North Carolina would yield for a couple of questions.

Mr. EAST. Mr. President, I will be happy to yield to the Senator.

The PRESIDING OFFICER (Mr. BOSCHWITZ). The Senator from Delaware.

Mr. BIDEN. The Senator makes a very reasoned argument for his position, and I compliment him for that. Throughout his brief discussion of the issue today, he used the assertion that there is a strong risk that the bill would fall short of its stated purpose; that is, to get those folks who are just out to uncover, expose, and damage our intelligence apparatus—if we had the intent language which is in the bill now, rather than the reason-to-believe standard.

I wonder if the Senator could tell me why the intent language would fall short. Can he give me an example of how he believes having the word "intent" in the language, the intent to impair or impede would cause the bill to fall short of its objective? That is a very important point. If he is right about that and can convince me, I would have to vote with the Senator from Rhode Island.

Mr. EAST. The distinguished Senator from Delaware raises an excellent point and always, as is the case with him, he goes to the essence of the problem.

Let me try to respond in this fashion: First, before turning directly to his excellent point, let me say that in section (c), with the inclusion of the Chafee language, I submit very strenously we do have in effect an intent standard overall. For example, it would say, "Whoever in the course of a pattern of activities intended to identify," and then later on it says "knowing that the information disclosed so indentifies." Certainly section (c), as it reads now, would require a mind set of a conscious desire to identify and expose.

Then we come to the very important point the Senator raises. Why not say "with the intent to impair or impede the foreign intelligence activities of the United States" rather than "reason-to-believe that such activities," because it would leave us with this very difficult position in the court and before the jury?

I can see now the kind of people who reveal these names with an innovative lawyer would come up with this kind of rationale:

> My purpose in doing all of this, my intent was not to impede or impair the foreign intelligence activities of the United States, but actually my intent was a noble one. It was by identifying these people I would be revealing their incompetence or the poor way in which they carried on their activities. So my intention would not be to impair or to impede, but my intention would be in the near and long term to further intelligence gathering.

That is clever, novel, and innovative, and they would do it. And the court would have no alternative but to so instruct the jury.

So I think with the reason-to-believe standard, what it would give is it gives us a more objective standard whereby the jury and the judge could look at the whole and not have to get into the impossible task of judging this elusive state of mind of the informant in this case. As to the Philip Agees and their lawyers, never underestimate the furtiveness of their legal ingenuity.

I want to put these people in a box where if they knowingly reveal these names and they intended to identify, and so on and so forth, and that a reasonable person looking at the whole would conclude clearly notwithstanding their very subjective intent that what they really intended to do was to impede or impair. I want effective legislation in short, and I think the Chafee language would give it.

Mr. BIDEN. I appreciate the answer. I assumed that was the Senator's position.

Let me respond, if I may, to the answer just given. First of all, I think it is important for our colleagues to be aware that although the reason-to-believe standard, as the Senator from North Carolina says, appears to be an intent standard, the intent mentioned in the reason-to-believe language—and let me take a moment to read it once again so we are talking about the same language. It says: "Whoever in the course of a pattern of activities intended to identify or expose." The intent goes to the question of identifying or exposing.

The intent does not go to the motivation for the exposure or identification.

Then it goes on to say—and I realize this is somewhat esoterical unless one really concentrates on it—all that needs to be done to establish the name. That was not accidental. When they published the name Joe Doaks' they meant to put Joe Doaks, name in it.

Then it goes on to say that that intended exposure was done with the reason to believe that such activities would impair or impede.

So there are two different standards. Intend goes to the question of the exposure. It does not go to the question of motivation. That is an important distinction.

The second point I wish to make is that the Senator makes a very eloquent plea, as was made on Friday, that the reason-to-believe standard puts people—the jury in this case—in the position to be able to look at the totality of the circumstance and that a reasonable-man standard really would be applied.

So we ask the jury: "Do you have reason to believe from all that has been said here that it was the desire of this fellow Philip Agee, or whoever, to hurt U.S. intelligence operations; that is, to impair or impede?"

Now, that is true. They can look at the totality of the circumstance. But my point is that when we say that we are led to believe by the Senator from North Carolina—and he believes it—and others, that if you have an intent standard, the jury is not able to look at the totality of the circumstance. They imply. The opposition to the intent language says that if in fact you have an intent standard, saying that the prosecutor has to prove that John Doe intended to impair or impede

rather than have reason to believe it would impair or impede, what they would do is to allow skillful lawyers to instruct their clients or allow defendants without instruction to say:

Why I didn't intend to hurt. I intended to help and when I named Joe Doaks as the CIA agent I was doing it to help purify the agency, to better our intelligence-gathering capabilities and thereby put America in a stronger position and not impair or impede.

That is true. They can make that argument, but I suggest that the same argument can be made with the reason-to-believe standard. I am going to be that sharp lawyer who is advising my client Joe Doaks under the reason-to-believe standard, and Joe Doaks gets up on the stand and I ask him on direct examination, I say: "Now, Joe, did you have reason to believe that you were impairing or impeding the intelligence apparatus of the United States of America?"

And Joe Doaks will look me straight in the eye and say: "Oh, no, counselor, no, ladies and gentlemen of the jury, I didn't mean to impair or impede. I had reason to believe that what I was doing would help America. I had reason to believe by pointing out that Charlie Smith was an agent that I was doing it to uncover a mole within the agency or any reasonable man could understand that I had reason to believe that I was helping."

The point I am trying to make to you is what is sauce for the goose is sauce for the gander. It is a red herring to suggest that if you have an intent standard it allows the defendant to argue he intended to help. If the defendant would argue that he intended to help America under the intent standard, he will also argue he intended to help America under the reason-to-believe standard. It is irrelevant, quite frankly, whether or not there is an intent or reason-to-believe standard as it relates to what argument the defense will make. The defense will be equally ingenious under both standards.

My problem is: With the reason-to-believe standard we put ourselves in a position that we jeopardize convictions, in my opinion, because we are clear, the courts are clear, that the reason-to-believe standard makes it easier for judges to set aside jury verdicts than with the intent standard. The reason-to-believe is an objective standard which is generally more reviewable by judges than something subjective like the defendant's intent.

Also an area that I will not yield to any man or woman in this Senate, since I know as much about it as anybody, is in the whole area of greymail. The greymail occurs when former agents, present agents who have access to information, and/or people who gain access to information from outside the intelligence community reveal information that hurts America's interests.

When they are about to be prosecuted, they say: "Let me tell you something, Mr. Prosecutor, Mr. U.S. Attorney, if you prosecute me for telling the Russians the secret to that satellite you are going to have to prove that I had reason to believe that that would hurt America, and since that is an objective standard, I want to tell you right now what I am going to do. I am going to, during that trial, reveal every other secret I know because it will be admissible in open court, because we are trying to find an objective standard, and I will be able to, in order to justifiably bring forward my defense, reveal every other secret I know about the Government to prove that an objective person with a series of circumstances relating to the intelligence community would have concluded as I did, which was: Knowing all I know, they would have reason to believe that the final action I took of publishing Joe Doaks' name was done to better America rather than hurt America's intelligence capabilities."

When you have an objective standard, the court is obliged as a matter of law to go beyond what I intended, to go to the totality of the circumstances. However, if there were an intent standard, the evidence would be inadmissible because it would be irrelevant.

So my well-intended colleagues, who want to nail down these guys who are the bad guys we all want to get, are inadvertently putting a standard into the law that is unusual at best, makes it more difficult to maintain a prosecution, and subjects the Justice Department in certain circumstances to being blackmailed or as we call it greymailed, because if they know they are going to have to allow thorough discovery—a legal term all the lawyers in this body know about, thorough discovery—including evidence of other classified information. They are going to have to sit back and ponder, as they have in all the other greymail cases:

Wait a minute, is it worth it in order to convict Charlie Smith to reveal even more of our secrets which, under our legal system, we have to do?

They get blackmailed into dropping the case.

Why do you think they did not prosecute Mr. Helms and a number of other espionage and leak cases beyond what was done?

Why do you think they have not prosecuted all the folks? Not because they have liked them, or liked what they have done, but under our system of law under an objective standard they are allowed to go in court and introduce in evidence by discovery—that is, ask the prosecution to put in the record—material that is even more damaging to our national security than that which they exposed.

But when you are talking about intent, you do not have the problem of greymail. The court says:

When Charlie Smith revealed the name of that agent did he intend to hurt the interests of the United States of America? Did he intend to impair or impede?

In the same way when we say in a criminal trial:

When John pulled out the gun and shot Cock Robin did he intend to kill Cock Robin?

John can argue:

I didn't know the gun was loaded.

He can argue self-defense, he can argue that he had taken leave of his senses, he did not intend it, he can argue all those things, but the fact of the matter is that the jury looks at all the circumstances and says:

Did he intend to do it?

To prove intent you do not have to have the defendant say, "Yes, I intended it." The totality of the person's conduct is sufficient to establish intent. It can be inferred.

The press had better be concerned if this reason to believe language is adopted. I would like to know from my colleagues who support the reason to believe standard, the answers to the following questions:

A February 18, 1977, Washington Post article by Bob Woodward disclosed that the CIA had made secret payments to King Hussein of Jordan for the past 20 years. A subsequent story by New York Times reporter David Binder on February 19, 1977, named 14 additional foreign leaders or officials who had received CIA payments.

Will they go to jail if we adopt a reason to believe standard? I would like to know whether they will or not. Is that the intent of the language, to put Binder and Woodward in jail?

A report of an extensive investigation by John Crewdson into CIA propaganda efforts and ties with the media appeared in the New York Times on December 25, 26, and 27, 1977. In it were identified over 25 CIA officials, agents, and sources of assistance.

Does that person go to jail for publishing that information? Is that the type of publication we are trying to punish? Carl Bernstein's article, "The CIA and the Media" (Rolling Stone, Oct. 20, 1977, pp. 55-67) claimed that over a 25-year period, 400 American journalists maintained secret relationships with the CIA, and included the names of 11 journalists who were informants or sources of assistance.

Is Bernstein going to jail under the reason to believe standard?

A January 23, 1976, New Times article by Frances FitzGerald on CIA campus recruitment disclosed the identity of a Chicago-based CIA recruiting agent. Are we trying to put FitzGerald in jail? Will FitzGerald go to jail under the reason to believe standard? I have a list of something on the order of 100 or so similar articles. These are not idle questions. It is not just something we should shirk off.

I will yield because one of my colleagues would like to speak to this issue and he has other business off the floor—but let me point out that there are three elements to the reason to be-

lieve standard: First, a pattern of activity; second, with an intent to identify or expose; and, third, with a reason to believe the activity would impair or impede the foreign intelligence activities of the United States.

I want to emphasize for the record once again that the testimony is thorough, encompassing over 2 years, first, that a pattern of activities is established by the publication of a single name if, in fact, you went out and talked to a bunch of people to get to that one name. Second, in the intent to identify or expose, the intent goes to the identification not the motivation; and, third, reason to believe is an objective standard which I firmly believe, as do over 100 constitutional scholars believe, to be unconstitutional. But even if it is not, it makes it more difficult to get a prosecution and not easier.

I will amplify that point as the afternoon goes on, but in deference to my colleague from Missouri I will yield the floor.

Mr. CHAFEE. Mr. President, last Thursday in the discussion we had between the distinguished Senator from Delaware and myself, the Senator from Delaware submitted for the RECORD a letter dated September 25, 1980, from Philip B. Kurland, and a series of names of 100 law professors which were, I believe, part of that letter.

In any event, my question is directed to the Senator from Delaware regarding that list of law professors. The reason that the list of law professors was submitted was to show that they indicated disapproval of the so-called Chafee-Jackson amendment.

As I read the RECORD, I read as follows, and this is a preface to the signatures by the 100 professors:

> We believe that sections 601(c) of S. 391 and 501(c) of H.R. 4, which would punish the disclsoure of covert CIA and FBI agents derived solely from unclassified information, violate the first amendment and urge that they be deleted.

Mr. President, my question of the Senator from Delaware is as follows: These 100 professors are not against the Chafee language; they are against the Chafee language and they are against the Biden language, both.

Is that not so? If it is not so, how is it that they urge that the entire section 601(c), to which they refer as dealing with unclassified information, forbidding the disclosure, be deleted? Why do they so refer if they are not against both?

Mr. BIDEN. The reference that was made was to what was then the Chafee language. The bill to which they referred and at the point of time in which they were writing, section 601(c) was the language Senator CHAFEE is attempting to reinstate in the bill. In all candor, although they did not directly speak to the question of whether or not "intent" clarifies that constitutional question, I suspect that they are not supportive of that language either. I think the Senator is correct.

To be precise, the language at the time at which they were writing is the language Senator CHAFEE is attempting to put back into the bill. As the Senator will recall, we have a situation where the original language contained in the bill was the language the Senator wishes to put in now. That was amended out of the bill in the Judiciary Committee so that the bill before us now has the intent standard.

But I think the Senator is right, that there is a very serious question as to whether or not any disclosure of any name of any agent that could be found from public records is in fact able to be proscribed under the Constitution.

Mr. CHAFEE. I think that is very important, Mr. President, because we do not want to sail under any false colors around here. Concerning the list of these 100 professors—and by the mere fact that they are professors we will call them distinguished professors, giving them the benefit of the doubt—there is nothing that can be used successfully by the Senator from Delaware to further his case because these professors are against the entire section, and they urge that it be deleted.

There is nothing about amending. They are opposed to the whole concept, as they say, of disclosures based upon unclassified information.

Furthermore, the Senator from Delaware submitted a letter from a professor at the Harvard Law School—at least he has a Harvard Law School heading on his letter—Laurence H. Tribe, dated September 8, 1980, directed to Senator KENNEDY. Mr. Tribe goes through a long discussion and he ends up by saying:

> I believe that section 501(c) would violate the first amendment if enacted. Accordingly, I recommend that at least this provision of section 501 be deleted from S. 2216.

Again, this is a question of deletion. There is no question of amendment.

As we all know here, the Senator from Delaware voted for this legislation when it came out of committee, and it came out unanimously from the Judiciary Committee. Am I not correct?

Mr. BIDEN. Yes; but let me make it clear——

Mr. CHAFEE. Let me finish. The Senator voted for the legislation when it came out of committee after it had been amended pursuant to the Senator's amendment?

Mr. BIDEN. Correct.

Mr. CHAFEE. So you are supporting language which merits an indictment based upon disclosure of identities derived from unclassified information. That is what your 601(c) is all about. There in no question about that. No one will argue with that.

Mr. BIDEN. That is correct.

Mr. CHAFEE. Yet you are citing, presumably to support your case, 100 law professors who object to the whole concept.

Mr. BIDEN. That is not correct. If the Senator will permit me, let me read from the letter.

Mr. CHAFEE. I think that can be well gathered. As you admitted in our little colloquy, there is nothing to substantiate the view that these gentlemen and ladies, professors, distinguished professors, are for your version of the bill.

Mr. BIDEN. One thing leads me to that conclusion. Let me read from Philip Kurland's letter, the letter that preceded the submission of the 100 or so distinguished professors. He says:

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

I think it is fair to infer from that statement that having an intent standard in that section would, in fact, remedy the constitutional dilemma. Let me read it again:

> I have little doubt that it is unconstitutional. I cannot see how a law that inhibits the publication, without malicious intent—

So what he is specifically referring to is the reason to believe standard.

Let me make it clear, there are many in this country who believe we should not have any laws at all on this issue as a matter of policy. We are talking about the limited questions of whether or not it is constitutional. The 100 professors say that the only thing submitted to them, the only thing before them, was the language of 601(c) as it is now being proposed in Senator CHAFEE's amendment. That is, a reason to believe standard.

Mr. CHAFEE. Mr. President, may I make another point here?

Mr. BIDEN. Surely.

Mr. CHAFEE. It is not clear whether those 100 names were included with the Kurland letter, or where they came from. That is certainly not clear.

Mr. BIDEN. The Senator is correct, it is unclear. Keep in mind that when these professors signed the letter to suggest 601(c) of S. 391 was not constitutional, there was no other alternative. I was unable to get anyone to agree to intent language or anything else.

The reason I came up with the intent language was to get around what was the opposition of many of these professors. Although the Senator is precisely and technically correct that the letter does not speak to the intent language, by implication, from the testimony which we are now gathering—it can be inferred from their testimony and also from the letter of Professor Kurland, that the main deficiency they saw in there was not an intent standard. That is how I came up with the intent standard. That is

how I came up with an alternative for reason-to-believe.

But the Senator is correct that they did not speak to the intent language because it was not even on the horizon. It was not an issue at the time. It was not an alternative.

Mr. RUDMAN assumed the Chair.

Mr. CHAFEE. Mr. President, I think we want to put this whole thing in perspective here. What the Senator from Delaware is relying on is a series of letters written in 1980, 1½ years ago. As he pointed out, what we were discussing then, and indeed, we had presented under the original legislation a section 501(c) that did involve an intent somewhat like the Senator's language. But we worked that around because there seemed to be problems. The original legislation introduced by Senator MOYNIHAN, Senator JACKSON, and myself in January 1980, over 2 years ago, dealt with language quite similar to the language that the Senator from Delaware is now espousing. These professors are against the whole idea. There is no question about that.

I refer now to a telegram dated September 2, 1980, right in that same period when these lists were being assembled. This is a telegram that is signed by many of those who are also on the list of 100 names. This is the telegram they sent to Senator KENNEDY on September 2, 1980.

We believe that section 501(c) of H.R. 5651 and S. 2216, which would punish disclosure of the identity of covert CIA and FBI agents derived solely from unclassified information, violates the first amendment and urge that it be deleted as recommended by the House Judiciary Subcommittee on Civil and Constitutional Rights.

So I think these 100 names represent a weak reed for the Senator from Delaware to rely upon. These named, as I say, are opposed to the whole concept that the Senator himself voted for.

After all, what we are discussing here is section 601(c). There is no other argument against this legislation. These gentlemen and ladies, distinguished law professors, are opposed to it all, however. I think that this is pretty clear.

Mr. President, just to show that, as one can with economists, as one can with accountants, and as one can with Senators, one can with lawyers and law professors find divergence over what is constitutional and what is not. I therefore submit for the RECORD a lengthy letter from Robert Bork, professor of law at Yale University, in which he says that either language is constitutional—the amendment language, so-called Chafee-Jackson language, or the committee language. We go on quality around here, Mr. President, of course, not numbers. We do not go by quantity. I believe that I am correct in saying that Professor Bork is now a member of the judiciary of the United States. I believe he serves on the circuit court, but it might be the district court. In any event he is qualified to speak to these issues, and I believe his letter is valuable to us.

The PRESIDING OFFICER. Is the Senator requesting unanimous consent?

Mr. CHAFEE. I ask unanimous consent that that letter from Mr. Bork be printed in the RECORD.

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

SEPTEMBER 2, 1980.

Hon. PETER W. RODINO,
House Judiciary Committee,
Washington, D.C.

DEAR CONGRESSMAN RODINO: I am writing to you in support of the passage of the Intelligence Identities Protection Act of 1980, and more particularly, to address some of the Constitutional issues which have arisen in the consideration of this bill.

I will not address the question of the need for such legislation. The Deputy Director of the Central Intelligence Agency and others from the Administration have testified on this point before various Congressional committees. I will merely reiterate my own view that such protection is needed and that the record appears to demonstrate that agents' lives have been placed in jeopardy and intelligence operations have been adversely affected by unauthorized and unwarranted disclosures of agent identities.

I would like to address instead three issues relating to the constitutionality of the various bills before Congress. These proposals include H.R. 5615, S. 2216, and various versions as amended in committee mark-up. I will concentrate on Section 501(c), the most discussed section. I am basing my analysis on the House and Senate reports on these two Acts, dated August 1, 1980 and August 18, 1980, respectively. I have also reviewed the statements of Director Carlucci before the Senate Committee on Intelligence on June 26, the statement of Assoicate Deputy Attorney General Robert Keuch before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives on August 19, and the statement of Frederick T. Hitz, Legislative Counsel of the CIA before the same committee on the same date.

The first important step for legislation to take, if it is to pass Constitutional scrutiny, is to narrow the definition of those persons who may be considered offenders under the Act. Both the House and Senate bills do so, but through different mechanisms. The House bill includes a so-called "dual intent standard" in 501(c), which says "whoever, in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States, discloses, with the intent to impede the foreign intelligence activities of the United States, to any individual not authorized to receive classified information, any information that identifies a covert agent. . . ." Such a dual intent standard would obviously place significant burdens of proof on any prosecution. In doing so, it would therefore narrow the possibilities of abuse and avoid problems of impermissible vaguenss of definition of those who are subject to its terms.

The Senate version of this provision, also Section 501(c), requires that "whoever, in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede foreign intelligence activities of the United States, discloses . . .." As an alternative formulation, the imposition of a judicial or jury finding of a "pattern of activities" imposes a separate but no less definable burden of proof upon the prosecutor. It should be clear that, either in the bill or the legislative history, the pattern of activities could not itself be used to show that the person had "reason to believe that such activities would impair or impede the foreign intelligence activities or the United States."

The Senate report, on page 15, recognizes that a statute affecting speech or publication "must not extend overbroadly." Furthermore, the report on page 18 indicates that the harm the bill seeks to prevent is most likely to result from disclosure of identities in the course of a pattern of activities rather than a single isolated incident. The report goes on to state "At the same time, it does not affect the First Amendment rights of those who disclose the identities of agents as an integral part of another enterprise such as news media reporting of intelligence failures or abuses, academic studies of U.S. government policies and programs, or a private organization's enforcement of its internal rules." (Page 18.) Thus, the Senate report has addressed the issue of constitutionality in terms of the scope of the coverage of the Act, and concludes that such a provision would be constitutional. The House version has an even narrower scope. Both versions seem to me constitutional.

The second issue I would like to address is the type of information which is covered by the Bill. It is quite clear that these bills deal only with information identifying or serving to identify intelligence agents, as variously defined in the bills. These bills do not cover the disclosure of all classified information or, in fact, any of the other types of intelligence information which ought to be protected.

On the other hand, these bills would not allow the prosecution of those concerned with policy, political or other more general questions. This fear has been raised, in my view, without justification. Again, the principle of specificity applies. To the extent that we are dealing with a narrow, well-defined class of information, the constitutionality of protections given to that information should be more certain.

In support I would refer to an earlier statement of Harold Edgar and Benno Schmidt, Jr., professors of law of Columbia, on January 25, 1979 before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence of the United States, House of Representatives. On page 16 of the statement, Edgar and Schmidt say "We believe this Congress should continue to accord high priority to public debate. Only very narrowly drawn categories of defense information of great security significance, and in most cases, little import for public debate, should be prohibited from public revelation. Information about cryptographic techniques, intelligence gathering operations, the design of secret and vital weapons systems, nuclear armaments, and perhaps other narrow and concrete categories of defense or intelligence information are appropriate subjects, in our opinion, for prohibitions on peacetime press disclosures." They go on to say that a justification defense, based on the importance of public debate, will be available under the First Amendment to those who are accused of unauthorized disclosure under any such provision.

I conclude, therefore, that the category of protected information is narrowly drawn, that it cannot be used for investigations into policy or political criticism, and that adequate, defenses exist under the First Amendment to the Constitution to allow

the exploration of these issues in specific cases.

The third issue I would like to address is the question of the liability, if any, of those who republish or otherwise distribute information after the initial disclosure. Given the fact that both the House and Senate versions require some intent findings, it is not possible to argue that the isolated or single disclosure, on the part of a say, reputable publication, would result in criminal liability. Indeed, the bills are drafted in such a way to allow this kind of reporting in the ordinary course of review of intelligence operations, foreign policy, and national defense. If, on the other hand, a reporter or newspaper were to act in a way which supplied the required second intent (House bill) or pattern of activities (Senate bill) then perhaps the conduct should be punishable. It should be clear that the isolated, unknowing or unwitting release of an agent's identity without the requisite intent would under no circumstances be punishable.

In this letter I have addressed the Constitutionality of the most troublesome provision of the two agent identities bills, Section 501(c). I conclude that the class of individuals liable under either bill is sufficiently narrow to survive a Constitutional challenge. In addition, the type of information which is protected is the type which deserves, and in fact requires, statutory protection, based on a significant Congessional finding of need. Finally, I believe that the scope of the bills, limiting the application to republication or isolated incidents, is consistent with the Constitutional mandates of the First Amendment in this area. Thus, I urge the Congress to give serious consideration to the inclusion of Section 501(c) in a reported bill.

Sincerely,

ROBERT BORK,
Professor of Law,
Yale University.

Mr. CHAFEE. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. LEAHY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. LEAHY. Mr. President, we have before us, as Senators know, extraordinary legislation that has been discussed at great lengths, both in the Senate and in the other body. It is also legislation that has probably had more misinformation—misinformation innocently—supplied than just about any that we have had here.

I say that with a certain amount of wonder, because we have the ability, either within the Halls of Congress or without, to completely obfuscate, with great regularity, legislation even of less significance than this, but this may be entitled to some kind of prize.

Part of it has resulted from a lack of understanding of some who have discussed it. Part of it has resulted from the fact that the administration, between the Justice Department and intelligence agencies, has taken different positions on it at different times, depending upon which committee they were talking to or even which of their many supporters they were talking to.

This has created a bit of a problem, of course, because everybody in the House and the Senate feels that the United States should have a strong intelligence service. It would be naive to think that any country as powerful as ours, both economically and militarily, would not have a strong intelligence service. We would like to feel that we have the best, and it is conceivable that we may. Certainly, many like myself, the distinguished Senator from Rhode Island, and others, have done our best to try to make sure that we do; because there is this broad-based support, ranging from conservatives to liberals to moderates like myself, regarding the intelligence agencies. There has been, inadvertently, I hope, a tendency on the part of some in the administration to perhaps shade their views one way or the other, depending upon to whom they speak.

I mention that only to assure everybody that there is strong bipartisan support for a good intelligence service, an effective intelligence service, one that can protect our Nation.

In regard to that, all of us—Republicans and Democrats, everybody concerned about the pernicious practice of naming names, the intentional blowing of cover of agents—are concerned, as we should be, with the names of our agents, especially agents abroad, being printed in the various publications.

Contrary to the views of a James Bond type of intelligence agent, karate-trained, armed to the teeth with special little devices put together by the armorer "Q," many of our intelligence people are rather innocuous, some as innocuous as Members of this august body and probably about as dangerous. I mean on a 1-on-1 physical basis, of course. They do not have the one-person-army attributes that we sometimes think of with intelligence people. They are more like the George Smileys of the world, the people who have not the "Circus" of John LeCarré novels.

If we have a person, for example, who may be an economist working for us in a country with perhaps all kinds of tensions and whose name is suddenly listed as a spy for the United States simply because he is employed by the CIA, that person's life may well be endangered. Yet, he is no more than a dedicated, hard-working, loyal, patriotic American performing a duty extremely necessary to our country. To suddenly see him and his family endangered for that reason, I feel, is totally unconscionable.

So, effective legislation to stop this naming names, the intentional blowing of cover, has to be enacted. I will support its enactment now, because naming names has resulted in the diminished effectiveness of our intelligence efforts and the loss of intelligence sources, the lowering of morale of our intelligence officers, and possibly the loss of life.

Since I have been a member of the Intelligence Committee, I have made it a point to visit our chiefs of station in a number of places around the world. I intend to do more this year. I know that this is a matter of great concern to them, as indeed it should be.

They are always concerned that they may pick up the newspaper that day and find their names listed. In some instances, our people are well known as intelligence agents. In fact, they are more effective because they are. In many other instances, of course, they are not. The naming of names has created real problems for them. It has created problems when the name has been simply listed by somebody who has done it with, oftentimes, extremely mean motives. It has hurt just as much when the U.S. Government has done it through its own carelessness or ineptness by listing it in a very obious way.

So it is crucial that we enact legislation with speed. By enacting that legislation we should not overlook one very important factor, and that is the United States has these intelligence agencies and our military might so that we can protect our country and in protecting our country protect the safeguards that we all have come to expect in this country.

The United States is burdened with an enormous defense budget. We do it quite frankly because we want to keep our country as free as it is, because we do feel that we enjoy constitutional rights in this country, rights that are not available to any other country.

One of those, of course, is our first amendment right.

So while it is crucial that we enact this legislation it is just as crucial that we enact it in a way that will pass constitutional muster.

That is why I urge the support of the version of section 601(c) of the bill which was adopted by the Judiciary Committee, adopted after weeks and months of hearings and debate. This section limits the use of information available in the public domain. It creates criminal liability for a person who, "in the course of an effort to identify and expose covert agents with the intent to impair or impede foreign intelligence activities of the United States by the fact of such identification and exposure discloses . . . any information that identifies an individual a covert agent."

In proscribing this activity, S. 391 requires that the person charged be proven to have a bad purpose in identifying covert agents through the use of public sources.

The amendment offered by my distinguished friend from Rhode Island, Senator CHAFEE, eliminates this bad-purpose test. Rather, it uses the objective "reason to believe" standard which the Justice Department describes in a May 8 letter to Congressman MAZZOLI as a negligence standard.

I ask unanimous consent to have printed in the RECORD that letter.

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

WASHINGTON, D.C., *May 8, 1981.*

Hon. ROMANO L. MAZZOLI,
Chairman, Subcommittee on Legislation, Permanent Select Committee on Intelligence, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: When I testified before the Subcommittee on April 7, 1981 concerning H.R. 4, I was asked to provide further information in response to various questions raised by you and other members of the Subcommittee. This letter contains my responses on behalf of the Department. The references are to the relevant pages of the transcript, which I also have corrected and enclose for your use.

I. (PAGES 66, 70, 81–82)

You and Congressman McClory requested that I provide the Subcommittee with proposed amendments to H.R. 4 that would accomplish the changes I suggested in my testimony. These included: (a) replacing the specific intent standard in section 501(c) with an objective intent standard; (b) adding an attempt provision to sections 501 (a) and (b); and (c) including a definition of "foreign intelligence activities" in the legislative history pertaining to section 501(c).

(a) Intent standard

The first suggestion could be accomplished by adopting language similar to that in section 601(c) of S. 391 (97th Congress). Section 501(c) would then provide as follows:

"Whoever, in the course of an effort intended to identify and expose covert agents and with *reason to believe* that such activities would impair or impede the foreign intelligence activities of the United States, discloses any information that identifies an individual as a covert agent to any 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. (Modified language in italic.)"

This revision would permit prosecution of an individual who discloses information with knowledge that it identifies a covert agent, while engaging in an effort intended to disclose such identities, when all the surrounding facts and circumstances would lead any reasonable person to believe that such activities would impair or impede the foreign intelligence activities of the United States. This section also requires that an individual specifically intend to engage in an effort to identify and expose the identities of covert agents with knowledge that the identities are classified and being protected by the U.S. Government.

The "reason to believe" standard would permit prosecution of an individual who can be shown either to have known of and disregarded the risk of harm or to have been negligent in overlooking the evident consequences of his actions for U.S. foreign intelligence activities. In view of the specific intent and knowledge elements contained elsewhere in section 501(c), we believe this objective intent standard would be sustained by the courts and would permit a more effective prosecution of the type of harmful disclosures that concern this Committee.

(b) Attempt provision

An attempt provision can be added to sections 501(a) and (b) by simply inserting the phrase "or attempts to disclose" after the term "discloses" in both sections. A lesser penalty for attempts can be included by inserting the phrase "and for an attempt, shall be fined not more than $15,000 or imprisoned not more than three years or both" at the end of each section.

At the April 7 hearing, the suggestion that an "attempt" provision be added to sections 501(a) and (b) was questioned by several members of the Subcommittee. Specifically, Congressmen McClory and Fowler requested that we study this matter further and provide examples of situations in which an attempt provision would apply. It should be remembered that we have suggested adding an "attempt" provision only to the two sections involving government employees or contractors who have occupied positions of special trust and who have been provided access to classified information in the course of their official duties. The mere fortuity that a disclosure by these persons is somehow aborted does not, to my mind, eliminate their culpability. Of course, the criminal law of attempts punishes only a person who has taken a substantial step toward commission of the crime and whose activities reflect an intent to carry out the proscribed action.

The type of conduct required to prove an attempted disclosure will vary with the circumstances of a particular case. Certainly, where an employee having access to classified information that identifies a covert agent mails or delivers a list of covert agents to a person believed to be an unauthorized person, and that person turns out to be an undercover agent of the U.S. Government, a jury could conclude that a substantial step toward fulfillment of the crime had been undertaken by the defendant. Also, such a substantial step could be evidenced by the convening of a press conference with the stated purpose of disclosing covert agents' identities. In this case, a jury would be required to consider all the circumstances surrounding the defendant's actions (*e.g.*, Did he have a written list at the podium? Had he told other "authorized" persons the substance of his planned remarks?) to determine if his actions sufficiently evidenced a design unlawfully to disclose the classified identities of covert agents.

Attempt provisions are by no means uncommon in the criminal code. Significantly, the two espionage statute provisions which the Department of Justice contends apply to the unauthorized disclosure of covert agents' identities, 18 U.S.C. § 793(d) and (e) contain attempt provisions. *See also* 18 U.S.C. § 794 (gathering or delivering defense information to aid a foreign government); Proposed Criminal Code, S. 1722, 96th Cong., 1st Sess., § 1001 (1980) (setting forth a general criminal attempt provision). Such provisions also are contained in numerous other criminal statutes. *E.g.*, 18 U.S.C. §§ 32 (destruction of aircraft or aircraft facilities), 33 (destruction of motor vehicles or motor vehicle facilities), 224 (bribery in sporting contests), 231(a)(3) (civil disorders), 245(b) (interference with federally protected activities). We believe an attempt provision is justified for inclusion in sections 501(a) and (b) and would be sustained by the courts in proper cases.

(c) Definition of foreign intelligence activities

The third suggestion was to include in the legislative history pertaining to section 501(c) a definition or description of the term "foreign intelligence activities". The following language would satisfy our concern: "The term 'foreign intelligence activities' as used in § 601(c) of the bill is intented to include the collection of foreign intelligence, foreign counterintelligence, and foreign counterterrorism intelligence; special activities (covert action); and support for these activities. However, activities conducted solely for civil or criminal law enforcement purposes within the United States are not included."

If the Subcommittee deems it necessary or advisable, additional language concerning the meaning of the terms "foreign intelligence," "counterintelligence" and "special activity" could be added modeled upon the definitions now in Executive Order 12036. We see no compelling need to do this, however, and not doing so would provide additional flexibility as the meaning of these terms may shift slightly over time.

II. (PAGES 72–73, 74)

Congressmen McClory and Fowler inquired whether there was a real need to include protection for FBI agents, sources and informants and whether an FBI covert agent had been identified in the recent past in connection with a disclosure in Chicago. According to the FBI, the identity of an FBI double agent who had been involved in an investigation of the activities of the Polish Intelligence Service in the Chicago area was disclosed when a sealed court record in a Freedom of Information Act case on appeal to the Seventh Circuit was leaked. However, the FBI has been unable to discover who leaked the court records or for what reason.

As you requested during the hearing, I have asked Director Webster to communicate directly to this Subcommittee the views of the FBI concerning whether this legislation should continue to include the Bureau.

III. (PAGE 73)

Congressman Fowler requested the Department's opinion of the so-called "Kennedy compromise" to replace the current section 501(c). That proposal states:

"(c) 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 effectivenss 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 as a covert agent to any 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."

Subsection (c)(1) of this proposal would criminalize the disclosure of a covert agent's identity only if done in the course of a pattern of activities undertaken for the specific and deliberate purpose of compromising particular covert agents or their operations in a foreign country. Especially in conjunction with the proposed legislative history for this subsection, this constitutes a specific intent standard that could be interpreted very narrowly. 126 Cong. Rec. S13,839 (daily ed. Sept. 30, 1980). For example, it would not penalized a person who willfully engages in a pattern of activities to disclose covert identities and knows that the exposed agents and their operations will be rendered ineffective by his disclosure, so long as his underlying purpose is to stimulate congressional or public review of their activities. The damage to the U.S. and the

potential harm to those identified under such circumstances is still significant, however. Moreover, the Kennedy language would invite potential defendants to assert an "underlying purpose" of reforming U.S. policy in every case and thus frustrate enforcement of the statute.

As I testified at the Subcommittee hearing, we believe an objective intent standard, rather than a specific intent standard, is preferable to facilitate prosecutions of the harmful disclosures identified by this Subcommittee. The Kennedy compromise, especially with its descriptive legislative history, unacceptably narrows the scope of persons subject to prosecution and provides a potential safe haven for those who engage in these activities.

We have much less difficulty with subsection (c)(2) of the Kennedy compromise, although we believe it does not go far enough. It would permit prosecution of individuals who engage in a pattern of activities to expose covert agents and makes such disclosures with reckless disregard for their safety. This subsection is not, however, sufficiently broad in that it would not apply to disclosures by persons who should reasonably have foreseen that their disclosures would lead to harm for either the covert agents or the intelligence operations in which they are involved. As stated earlier, we believe that a "reason to believe" standard is more appropriate to be included in this legislation.

I trust this additional information will be useful to the Subcommittee as it deliberates further the provisions of H.R. 4.

Very truly yours,

RICHARD K. WILLARD,
Counsel for Intelligence Policy,
Office of Intelligence Policy and Review.

Mr. LEAHY. In eliminating a bad purpose requirement, this amendment may well go beyond the first amendment limits set out by the Supreme Court under the Espionage Act in Gorin against United States.

In Gorin, as I am sure all my colleagues will recall, the Court examined the constitutionality of the espionage statutes, and the Court stated:

If this were the language, . . .

Referring to no intent.

"It would need to be tested by the inquiry as to whether it had double meaning or forced anyone, at his peril, to speculate as to whether certain actions violated the statute. This Court has frequently held criminal laws deemed to violate these tests invalid.

Let us to back to Gorin, a 1941 case:

The Court held the espionage statutes constitutional precisely because they went beyond requiring a person to speculate, at this peril, of whether his action violated the law. The Court validated the statutes because they required the Government to prove an element of bad faith, of scienter.

In adopting what the Justice Department admits is a negligence standard, the Chafee language eliminates the bad faith test, so pivotal to the Gorin decision upholding the Espionage Act.

That is precisely the reason that a broad range of constitutional scholars have questioned the constitutionality of the Chafee language and opposed its inclusion in agents' identities legislation.

I might say in this regard that both Senator CHAFEE and I are of a mind. We want this naming of names to stop. We want to be able to hold sacrosanct the identify of our agents abroad. We want to have an intelligence service not made ineffective by the constant fear that their names will be disclosed.

But I must admit that I take a fairly objective look at this and I place myself in the position of one who might have to prosecute under this statute.

While I never prosecuted someone under a statute involving espionage, I have prosecuted thousands of cases prior to coming to the Senate. I look at any criminal statute as what makes sense from a prosecutor's point of view.

The language passed by the Judiciary Committee fulfills the two things that we would want in this: Constitutionality with its protection of our first amendment rights, in my mind the most cherished of our constitutional rights. Of all our constitutional rights none stands out as more important to me than the first amendment rights. But second, it fullfills the other criteria that we want, and that is a statute that one can prosecute under, one that not only makes sense to a prosecutor but also does not make the prosecutor sit there all the way through and wonder if he is going to have a constitutional issue raised.

Professor Kurland of the University of Chicago put it most succinctly when he said in a letter to the committee concerning identical language last year:

I cannot see how a law that inhibits the publication, without malicious intent, of information that is in the public domain and previously published, can be valid.

Even the recent Supreme Court case of Haig against Agee, which involved no criminal sanctions, relied heavily on Mr. Agee's bad purpose when it dismissed his first amendment claims. In upholding the revocation of Mr. Agee's passport, the Court stated:

Agee's disclosures, among other things, have the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel. They are clearly not protected by the Constitution. The mere fact that Agee is also engaged in criticism of the government does not render his conduct beyond the reach of the law.

Yet this amendment is attempting to enact a criminal statute which would make it a criminal act for a newspaper reporter to negligently disclose the identity of a covert agent which he discovered only through the use of public sources.

Mr. President, I feel a chill, a chill on our first amendment rights when you hear the amendment described that way.

All of us in our attempts to keep America strong, to keep our defense strong, to keep our intelligence agencies strong, do it for one reason. We do it so that we can protect America and protect the rights of all Americans, so that we can maintain a country which abides by its constitutional principles, that abides by its constitutional history.

Do we accomplish anything if in protecting America for Americans, in protecting our constitutional rights for ourselves, we have to nibble away at those constitutional rights? What have we protected? What have we gained?

We will not be helping the foreign intelligence activities of the United States by voting out a bill which runs afoul of the first amendment. We will not be aiding our foreign intelligence operatives overseas by enacting legislation which then will be rejected by the courts.

Imagine aside from the first amendment rights, imagine aside from the question of whether we are nibbling away at our first amendment protections, imagine that we were to pass this law and then suppose, as would most likely happen, the law was struck down as unconstitutional by the courts. What kind of a signal does that send? Does not that create a far greater moral problem? Does that not create far more problems than we face now? Might it not be better to take a more conservatively drawn law, one that is carefully crafted to meet the constitutional requirements, one that we know will stand up in the courts and pass that, so that each member of our intelligence community know they stand protected by a law that will stand up?

Following the vote in the House to eliminate the intent language, I asked the Director of the CIA, Mr. Casey, whether or not enacting legislation designed to deal with this problem which ended up being held unconstitutional by the courts might cause greater harm than not having the legislation in the first place.

Mr. Casey replied:

Yes, yes. I think if we had legislation that was struck down by the Court, that would set us back to where we were, maybe even set us back further.

This issue is too serious to afford this Senate the luxury of seeing just how close to a constitutional limit we can go without crossing over the line. Indeed, we have an obligation to enact legislation which does not abridge important first amendment rights and we can do so without losing any support for the bill.

The CIA and the Department of Justice, while preferring the Chafee language, are satisifed that the committee language will be effective in prosecuting the kinds of activities which this legislation is designed to stop. Indeed, the CIA suggested this language as an acceptable alternative to language originally proposed by Congressman MAZZOLI.

Even following the House vote, CIA Director Casey reiterated in a hearing before the Judiciary Committee that

the language of the Judiciary bill "would perform the job of properly stigmatizing and criminalizing the activity of disclosing the identity of agents who are under cover."

Let us look at some of our own precedents here.

Let me say that I find it ironic that 3 weeks before the Senate began considering this language, it moved unanimously to amend the Foreign Corrupt Practices Act to eliminate the section which makes U.S. corporations liable for the bribes of their foreign agents where they have "reason to know" that their foreign agents are involved in offering bribes. The stated reason for the amendment is that this language has had a chilling effect on U.S. export activity because of the confusion which the standard has generated for U.S. businessmen.

Yet we talk about putting basically that same confusing language standard into the law.

Let me quote from a couple of business publications which argued for eliminating the reason to know standard from the Foreign Corrupt Practices Act. The American Enterprise Institute's analysis entitled, "Proposed Revisions of the Foreign Corrupt Practices Act" stated:

> The broad reason-to-know provision was identified in the 1980 executive branch study of trade disincentives as the matter of greatest concern to businesses. The GAO found in its survey of business that firms were uncertain about whether they could insulate themselves from liability for the activities of agents by instituting control procedures or whether they would be liable for payments made by agents even after such control procedures had been instituted . . . Large firms may use hundreds or thousands of such agents, and it is unrealistic to impose liability . . . under a reason-to-know standard.

In a publication entitled, "The Price of Ambiguity: More Than Three Years Under the Foreign Corrupt Practices Act," the U.S. Chamber of Commerce stated:

> The "knowing or having reason to know" language in the FCPA has probably created more uncertainty for U.S. concerns than any other part of the Act. Neither the Act nor the legislative history provide an indication as to what procedures a company must go through to be sure that it does not have reason to know that an agent over whom it has little control engages in corrupt political payments.

Are we saying that reporters in this country who cover foreign intelligence activities are endowed with greater reason than men and women doing business overseas or are we saying if you have a commercial interest at stake then that is far more important than if the only thing at stake is to try to fulfill the first amendment constitutional rights of a free press that this country has?

I am very much in favor of our business people being able to do business overseas and here. But, quite frankly, I must admit, Mr. President, if it comes down to an issue of what is more important to be protected, a number of companies' commercial interests or the first amendment rights of all Americans, there should be no question about the choice whatsoever. When we look at the standards there should be no question whatsoever about what we should do.

Let us be realistic about some of the things that have happened. I am extremely proud of our country, very proud to be an American. My grandparents came to this country from Italy, and they did it by choice. My paternal great, great grandparents came to this country from Ireland, and they did it by choice.

Those Italian and Irish immigrants stayed in the United States, predominantly in Vermont where they first settled, and they did so notwithstanding the history of moving from one country to another. They did it because of what we have all found, all of the Leahys, all of the Zambons have found, a country so protective of the rights of individuals that it is unmatched anywhere in the world.

I stated—and this has been my feeling as a schoolboy, as a lawyer, as a prosecutor, as a U.S. Senator—that of all our constitutional rights, the first amendment is by and away the most important. No other country in the world begins to match the United States in its protection of first amendment rights, in its freedom of speech, no other country in the world, Mr. President.

When we, as all of us do, and again on both sides of the aisle, give bipartisan support to our country, obviously there are 100 patriots in the U.S. Senate, there are 100 people who want to see America strong. There are 100 people in favor of a strong and effective national defense for our country. There are 100 people in this body who want to see a good, effective intelligence service.

But each of us realizes there are times when our Government has made mistakes, as other governments have, and we are aware that it is not always and has not always been the Members of Congress, elected representatives of the people, who have found those mistakes, but rather quite often it has been a free press in a free country which has found most mistakes. It has been a free press in a free country that has alerted the people of this country when mistakes have been made. It has been a free people in a free country working through their freely elected representatives who have tried to correct those mistakes, tried to make this a better country, and that is why I think we are the oldest existing democracy in the world today, because we have those freedoms, we have the freedom to say not only when we are on the right track but also the freedom for people to stand up and say when we are on the wrong track.

Mr. President, a few weeks ago I spent some time in two very troubled countries in Central America. I have seen the country of Nicaragua where a newspaper which has spoken out has been closed down by a ruling junta five or six times in the past few months.

I see the country of El Salvador where one element of the government can determine what will and when it will be printed, and I see what happens when you do not have the freedoms.

I recall one person whom I was criticizing strongly during that visit because of repressive activities, and I said to that person:

> You ought to realize your activities and your unwillingness to speak out do not make you very popular in my country. You ought to take some time to talk to some American reporters and tell them how you feel.

He said, "Well, I have talked to them, but they will not print what I want them to print." I said, "Funny thing about that, that sometimes happens in our country." That is the difference. That is what we protect here.

Mr. President, I have been asked to yield to the distinguished Senator from New Jersey (Mr. BRADLEY). I yield to the distinguished Senator from New Jersey.

Mr. DENTON addressed the Chair.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. DENTON. Mr. President, I will yield in a very short time to the Senator from New Jersey.

Mr. LEAHY. Parliamentary inquiry, Mr. President.

The PRESIDING OFFICER. The Seantor will state it.

Mr. LEAHY. Mr. President, who has the floor?

The PRESIDING OFFICER. The Senator from Vermont is advised that under the precedents of the Senate, the Senator from Alabama is the floor manager of the bill at this time. Under that precedent, under a situation in which two Senators are seeking recognition at the same time, the Senator from Alabama is entitled to recognition.

Mr. LEAHY. Further parliamentary inquiry. Does that mean the Senator from Vermont, when he has the floor, that he could not yield it to a particular Senator?

The PRESIDING OFFICER. The Senator from Vermont, of course, could yield for a question if he still had the floor, but for no other purpose.

Mr. LEAHY. So my yielding to the Senator from New Jersey, does that mean that I was unable to yield to the Senator from New Jersey for whatever purpose he wanted? He asked me to yield to him. I could not yield to him at least long enough to find out if it was for a question or what it was?

The PRESIDING OFFICER. Under normal procedure, I believe it would have to be stated. If the Chair is incorrect, the Senator from Vermont would please so state.

Mr. DENTON. Mr. President, I assure the Senator if I am granted the floor I will not take more than 3 minutes.

Mr. LEAHY. I simply wanted to make the parliamentary inquiry, Mr. President. Thank you.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. DENTON. Mr. President, I have listened to three or four speeches against the amendment. I have held my peace. But Senator CHAFEE, who offered the amendment, is at the White House at the moment and I want to take a brief opportunity to respond to some of the points which, I think, unless responded to in a timely manner, may be overlooked after he returns.

We have had the question of realism introduced by the last speaker. One piece of realism is that the KGB-DGI combination of intelligence agents probably outnumber our intelligence agents 100 to 1. That is a conservative estimate.

I chaired a hearing of the Subcommittee on Security and Terrorism on Friday which received testimony from a DGI defector which confirmed that there are approximately 300 illegals in the Miami area alone operating in an intelligence capacity for the Cuban DGI, which is run and controlled by the Soviet KGB. Many of these DGI illegals act as decoys thus distracting the few FBI agents who might be in that area from the activities of the real agents. This is the reality of the problem in terms of intelligence.

It must be kept in mind that both the Carter administration, with Benjamin Civiletti as the Attorney General, and the Reagan administration with William French Smith, as the Attorney General, desire and support the Chafee amendment language in order to better protect our intelligence agents.

We have many in this body who are qualified lawyers. I am not. But there are a great many more qualified lawyers in the executive branch of our Government, specifically the Justice Department, who have a background in this area of the law and who have studied and researched this issue thoroughly, who are firmly of the opionion that the Chafee amendment is needed for the protection of our agents. The Chafee amendment is more in line with, and, indeed, more liberal in terms of the first amendment as opposed to the intent provision that would require a witch-hunt type of approach. Under the Biden intent language, there would be a great temptation to establish the state of mind of the accused individual in order to prove what his intent is.

There is, I think, a curious intermingling between those termed "liberals" and those termed "conservatives" on this particular issue. I note an interesting mixture of both on each side of the issue.

The President of the United States today has asked that we bring this bill up and do something with it quickly. I heartily support that request.

The Senator from Vermont brought up the argument that "reason to believe" effectively constitutes negligence. I would have to disagree with that contention. Examination of all the elements of proof required under section 601(c), which is indeed the issue, makes clear that reason to believe does not mean that a negligent disclosure of an identity would be a criminal offense.

First of all, the individual making the disclosure must know that the information he discloses does, in fact, identify a covert agent.

The person making the disclosure must also know that the United States is taking affirmative measures to conceal the covert agent's classified intelligence affiliation. Moreover, the disclosure must be in the course of a pattern of activities intended to identify and expose covert agents.

And, finally, the person making the disclosure must have reason to believe that his activities would impair or impede foreign intelligence activities in the United States.

All these elements must be proved, Mr. President. An individual making an unauthorized disclosure under the circumstances can hardly claim negligence. Subsection 601(c) cannot be fairly evaluated incrementally. It must be evaluated as a whole. It is completely fallacious to argue that standing alone reason to believe is the same as negligence, because reason to believe does not stand alone in subsection 601(c); it is preceded by five other elements, all of which must be proven beyond a reasonable doubt.

In conclusion, there are nine other statutes in the intelligence-related area which employ the reason to believe standard.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. LEAHY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. LEAHY. Mr. President, I will be unavoidably absent this afternoon, but I would hope that those offering the amendment might address themselves to a couple of issues that concern me.

On the reason to believe line in section 601(c), it strikes me in my own review that it is more of a negligence standard than an objective standard. If that is so, I have not found a Supreme Court decision that has upheld a criminal statute in the first amendment area where a negligence standard was the only criminal intent required by the statute.

I would be interested to know whether indeed this is a negligence standard and, if so, how the proponents would get around the lack of any Supreme Court case upholding such a criminal statute.

The amendment requires that the Government prove that the defendant be engaged in a pattern of activities intended to identify and expose covert agents.

I would like to know what distinction is drawn between the intent to identify and the intent to expose a covert agent. Random House dictionary defines the word "expose" as to "lay open to danger, attack, and harm." That implies an element of bad purpose. Is there built into this amendment a bad purpose by requiring that the person have the intent to identify as well as an intent to expose?

I am also concerned with the reason-to-believe standard. In addition to being potentially unconstitutional, it may create some serious gray mail problems. Would a defendant charged with this section of the act be able to question the Government with regard to its methods of providing cover for covert agents?

I do not raise that as simply a hypothetical idea. We have had a recent case where, because of the gray mail aspects, we have not been able to go forward with what I thought was an appropriate prosecution.

These are considerations and I hope they are going to be raised and debated during this debate.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. HELMS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. GORTON). Without objection, it is so ordered.

BALANCE IN HUMAN RIGHTS

Mr. HELMS. Mr. President, this morning, the Subcommittee on the Western Hemisphere of the Committee on Foreign Relations heard testimony from the U.S. Ambassador to the United Nations, Jeane Kirkpatrick, about a situation so serious that freedom house has called it one of the most egregious violations of human rights in this hemisphere in recent memory.

Mr. President, Mrs. Kirkpatrick's opening statement to the committee is especialy enlightening in its articulation of the policy of the United States concerning basic human freedoms, and I ask unanimous consent that it be printed at this point in the RECORD.

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

Mr. Fagoth Mueller described for us how one woman, giving birth to twins, was burned in her house because she could not rise and move with the people of her town, which was set afire by the Sandinistas. She was burned in her own home, along with her babies, one born, one yet to be delivered.

Her husband buried her at the foot of the steps of the burned-down church, and then escaped to a refugee camp in Honduras.

Will someone from the news media tell me today that they will try to find him there, and ask him if this is true? Will you make that one small step for man's right to know the truth?

Mr. President, I await an answer to that question and I thank the Chair.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. JACKSON. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

INTELLIGENCE IDENTITIES PROTECTION ACT OF 1981

The Senate continued with the consideration of the bill (S. 391).

Mr. JACKSON. Mr. President, there is wide agreement on the importance of the measure we are considering, the Intelligence Identities Protection Act.

At long last, we have before us the means to protect our national foreign intelligence capabilities from a serious threat. There are active today a few people who make business of exposing the identities of American covert agents. These people are not pursuing historical or academic research, correcting abuses, investigating possible scandals or illegal activities, or pursuing any other salutary public activity. Instead, they are in the business of "naming names."

These malefactors, notably Louis Wolf and Philip Agee, have persisted in risking the lives of courageous public servants and threatening our vital foreign intelligence activities. Among their other activities, for example, those two visited Greece, Jamaica, and Mozambique, where they alleged a CIA relationship for several American Government personnel working in those countries. In so doing, Agee and Wolf placed the individuals they named in serious peril. In Mozambique, the peril was harassment and expulsion. In Jamaica, the peril was attempted assassination. In Athens, it was murder.

This threat continues today. Just last fall, in October 1981, Agee traveled in Nicaragua, where a strident anti-United States campaign was under way. On November 6, the pro-Sandinist newspaper, Nuevo Diario, published the names of 13 alleged CIA officers assigned to the U.S. Embassy in Managua. U.S. officials there believe the publication of those names was linked with Agee's visit. Several of the individuals named in the list soon received death threats, and the families of all these American officials were evacuated for their personal safety.

There also followed four incidents in which single female employees of the U.S. Embassy in Managua were accosted and/or had their homes entered.

In the first of these incidents, three men armed with pistols entered the home of an Embassy employee who was absent at the time. The men tied up the employee's gardener and searched the woman's home, taking a few items and disabling the telephone.

In the second incident, individuals believed to be the same three men forced their way onto the grounds of the home of another employee, tied up the guard, and waited 7 hours for the employee to return home. The intruders then tied up the employee, threw her into a closet, took her car, money, and some belongings, and departed. The intruders told the guard that the employee was a CIA agent.

In the third incident, the home of an employee was entered by force. The guard was tied up and the employee was accosted and threatened. The men were overheard to discuss among themselves whether or not the employee's name was "on the list."

The fourth incident involved the same employee who was the target of the first. The men involved hid on the grounds of the employee's residence. When she returned home, the men stopped the car in which she was riding and, at gunpoint, took her, a Nicaraguan acquaintance, her maid, and a guard prisoner. After tying, gagging, and blindfolding them, the men proceeded to empty the apartment of all its contents and again disabled the telephone. During the course of these activities, the Nicaraguan acquaintance was beaten. The assailants are quoted by the maid as having said, "We are doing this so that CIA personnel will have to leave," and that they were doing this so that "all Americans will have to leave." Just before leaving the apartment, one of the men said, "You are CIA and our hands are itching to kill you."

AGREEMENT IN CONGRESS

Mr. President, because of incidents like these, and because of the way in which Wolf-Agee-style activities can injure our national foreign intelligence capabilities, the need for legislation dealing with this matter is not in doubt. There is widespread agreement, not just in the Senate but throughout Congress and the Government generally, on the need for legislation to protect those who serve our country in such hazardous circumstances.

The activities of people like Agee have been condemned in the press and in the courts. For example, the Supreme Court majority opinion on June 29, 1981, in the case of Haig against Agee, said in part:

> Agee's disclosures, among other things, have the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel. They are clearly not protected by the Constitution. The mere fact that Agee is also engaged in criticism of the government does not render his conduct beyond the reach of the law.

There is also widespread agreement that we must act now—indeed that we have delayed too long already. It was early in July 1980 that the assassination attempt on Mr. Kinsman occurred in Jamaica, followed 3 days later by an apparent attempt to assassinate another of the Embassy personnel named by Wolf. The following day, Mr. Frank Carlucci, then Deputy Director of Central Intelligence, wrote to one of my colleagues on the Intelligence Committee about these events. He said:

> I further believe we can ill afford to wait until another member of a U.S. overseas mission comes home in a casket before Congress addresses this pressing problem.

How right he was—and that line was written before the attacks in Mozambique and Nicaragua.

We also find general agreement on all provisions of the bill before us now, save for one section. That section concerns provisions dealing with people who have never had access to classified material, section 601(c) of S. 391.

And even on most parts of this section, we are agreed.

We are agreed that we must legislate to correct grave abuses. We are agreed that we must legislate carefully, to avoid infringing on or chilling the exercise of civil liberties. We are striving to craft a law that will delimit narrowly the specific abuses that would be prohibited. To that end, we agree that we must protect individual rights by imposing a burden on those who would be prosecuting others under this law—a burden of six elements that must each be proven beyond reasonable doubt.

We are agreed, moreover, on five of those six elements. Specifically, the law would require, whether in the version as it came to the floor or as amended in the way that Senator CHAFEE and I, with several others, have urged, that the prosecution prove that a person accused under this law must have:

Acted in the course of an effort or pattern of activities intended to identify and expose covert agents.

Intentionally disclosed information that did, in fact, identify a covert agent.

Made disclosure to an individual not authorized to receive classified information.

Known that the information disclosed did, in fact, identify a covert agent.

Known that the Government was "taking affirmative measures to conceal such individual's classified intelli-

gence relationship to the United States."

SUPPORT FOR THE OBJECTIVE STANDARD

Where there is disagreement, Mr. President, is the sixth element required for the prosecution to prove. The bill, as it came to the floor, employs an "intent" standard for prosecution, which would require that a defendant's state of mind and purity of purpose be examined. That is, in the bill as it came to the floor, the sixth element required for a successful prosecution would be that the person making the disclosure of identity did so with the intent of impairing or impeding the foreign intelligence activities of the United States.

This language concerned me, chiefly for reasons of civil liberties. We must exercise great care to protect the exercise of our political freedoms. We should be very cautious about writing laws that would permit or even require examination and trial of a person's lawful exercise of political beliefs, actions, and associations. The free exercise of public scrutiny and debate is central to our democratic institutions, and we should avoid creating laws that might chill these activities by inducing a fear that a spirited criticism made today will tomorrow be adduced as evidence of impure intent.

Consequently, I joined Senator CHAFEE and several other cosponsors in proposing an amendment to the bill which which would restore the original language of the bill. Our amendment would replace the subjective intent standard with an objective standard, according to which the prosecution would have to prove that the accused has reason to believe that he would impair or impede foreign intelligence activities of the United States.

The language proposed in our amendment has been strongly supported by both the Carter and Reagan administrations. It is the language that was endorsed by the Senate Intelligence Committee in 1980, that was in the bill when it was originally submitted to the Senate during this Congress, and that was overwhelmingly adopted by the House of Representatives early last fall.

The key advantage of this language, I believe, is effectiveness. The Chafee-Jackson language will be more effective in protecting both our foreign intelligence capabilities and our individual civil liberties. With this language, the legitimate scope for governmental investigation would be limited. Being an objective standard of evidence, the reason to believe element makes irrelevant an individual's political beliefs, associations, and other public activities. At the same time, malefactors will not be able to avoid punishment under this law by claiming that they had a benign intent for their actions, however, much they endangered national security and imperiled individual lives.

The reason-to-believe standard is effective in a technical sense, as well. It is consistent with the body of statutory and case law that has been developed concerning espionage activities. And it has passed constitutional muster in a number of important cases.

Finally, it is important to remember that we have been addressing just one element—the objective versus the subjective standard of proof. Whichever version is supported by the Senate will be only one of six elements, each of which must be proven. Moreover, in case a court might require further guidance in applying this law, its legislative history makes absolutely clear that the legislative purpose is to "get the bad guys," not to chill debate over issues of public policy.

Mr. President, the amendment we have proposed will help protect our civil freedoms and the lives of courageous public servants—who are also vital to preserving our freedoms.

Mr. President, I urge prompt adoption of the amendment.

Mr. BIDEN. Mr. President, I welcome the comments made by the distinguished Senator from the State of Washington. I shall attempt to rebut some of the assertions that he made.

He has been a leader in this area for some time. His knowledge of the area is without question. But I wish to clarify a couple things. The Senator says, as do many have who support his position, that having the reason to believe language in the legislation would avoid the argument that there was a benign intent; that is, that the person making the statement of disclosing the name would not be able to argue: "I really didn't mean to hurt the intelligence capability of the United States; I meant to help it."

I cannot for the life of me understand how the Senator and others can continue to make that argument when in fact the same argument applies to reason to believe. Why would a defendant in a case not just as easily be able to say before a jury, "Ladies and gentlemen, I did not have reason to believe that I was hurting the United States of America; I had reason to believe I was helping the United States of America by disclosing the name of John Doe who I believe to be a mole in the CIA."

If the argument applies to the intent language it applies with equal and I think in fact increasing validity to those who suggest the reason to believe language should be there.

I wonder if the Senator wishes to respond to that.

Mr. JACKSON. I am glad to respond.

Having been a prosecuting attorney myself once upon a time, handling cases from speeding to murder in the first degree and having sent them to the gallows, so to speak, I can say as a former prosecutor that the task here without the Chafee-Jackson amendment is going to be very difficult when you apply a subjective standard.

The key point is that the test should be objective and not subjective, that a person knew or should have known that the result of this course of conduct would lead to such-and-such. That is what we are really talking about.

Without this amendment, the elements of proof will be troublesome to a jury and a U.S. attorney.

Mr. BIDEN. With all due respect, having also tried a number of murder cases, having tried rape cases, having tried cases of equal consequence I respectfully suggest and maybe having tried them even at a more recent date than the Senator from Washington, I respectfully argue he is not correct. I respectfully argue that when one walks into a court to try to apply in a criminal case a reason-to-believe standard that is essentially a civil standard by and large it is more difficult to make that case than it is to make the case of intent.

For example, in the celebrated case we have been reading for several months of Wayne Williams in Atlanta, there was an intent requirement. The prosecuting attorney had to prove that Wayne Williams intended to kill those people. There are no eye witnesses who said, "I saw him kill those young men."

There were no eye witnesses to suggest that he ever at any time said he intended to do anything. There was never any proof in the literal sense. I know the Senator from Washington and others of my distinguished colleagues used the phrase "pure intent." There is no such thing as pure intent. No court in the world requires pure intent, whatever that means. Intent can and always is inferred unless one can establish it directly by either the defendant acknowledging that he had the intent to do that. All the rest of it is inferred. So, this idea that somehow we are out here searching like Diogenes for the truth and pure intent is a bit of a red herring. There is no such thing as pure intent required to be proven. It can be inferred.

Mr. PERCY. Mr. President, will the Senator yield?

Mr. BIDEN. I will not yet at this point because it is a very important point. I want to hear the Senator's response. I will yield in 30 seconds because I do not think the response will take much longer than that.

Mr. JACKSON. As you know, reason to believe language appears in most of the basic espionage statutes. I ask my colleague, am I right or wrong?

Mr. BIDEN. You are right, but you are applying it incorrectly.

Let me respond directly to the Senator from Washington. My distinguished colleague, Senator CHAFEE, has cited in the debate on Firday several espionage statutes. As a matter of fact, he cites two espionage statutes that included the reason to believe language, and I would argue before the distinguished court here that they are not cases in point.

He starts off when he cites 18 U.S.C. 793, subsection (e), and this is a general espionage statute which makes it a crime to disclose material related to the national defense to a person not entitled to receive it, and it adds an additional requirement of "reason to believe that this information could be used to the injury of the United States" only for oral statements as opposed to documents.

Senator CHAFEE confirms that this statute contains far less protection than section 391, but the reason it does is that this statute is not intended to apply to publications of information but only to the secret transfer to foreign powers.

This analysis is spelled out in an article in columbia Law Review in 1973 by Edgar and Schmidt. The Justice Department asserts that this is not the case and argues the reason to believe statute is as the Senator suggests. But there is not any case of which I am aware in the espionage statutes, not a single conviction for the publication of information, not a single, solitary one under the reason to believe standard and the reason why is with publication the reason to believe standard would be unconstitutional unless intent is implied.

Mr. JACKSON. I do not believe we have a provision in the code at the present time similar to this one involving publication. We have the statutes relating to classified material. But as to the situation we are dealing with here, we have not had that problem presented in this way.

My colleague also mentioned intent in murder. Of course, in first degree murder it is not just intent, it has to be premeditated intent which, as my colleague knows from his experience, having tried murder cases—I have as a prosecutor, and do not know whether he has in either defending or prosecuting——

Mr. BIDEN. I was defending.

Mr. JACKSON. It is a tough question, and the point I want to make here is that to be required to prove specific intent and to establish that as one of the six elements poses real problems in prosecuting. The accused can say:

I had no intention of doing anything here other than to divulge a scandal or whatever is going on.

I think we have a duty and a responsiblity of saying that that individual, a reasonable person, a reasonable man, if you please, knew or should have known, Mr. President, that the consequences of his act or her act would lead to such and such. That is what I am saying here, to sum it all up.

(Mr. HATCH assumed the chair.)

Mr. BIDEN. Let me respond by pointing out the Senator makes a very eloquent rebuttal for his own point about why the espionage——

Mr. JACKSON. That is my purpose—for my own point.

Mr. BIDEN. Rebuttal of your own point by the Senator's pointing out that the espionage statutes are not applicable, they are not cases in point, because you pointed out, Senator, the reason why there have not been prosecutions for publication is there are not any statutes that, in fact, make punishable publication under the reason-to-believe standard, and the point is the Senator from Rhode Island and the Senator from Washington and others have often used that it is evidence of the fact that the reason-to-believe standard would be constitutional is simply not applicable when the issue is publication.

The second point I would like to make to the Senator from Washington on premeditation, premeditated intent to establish first-degree murder can be inferred. It does not have to be proven in the sense that you have somebody having to leap into the person's mind. It can be inferred from their acts. That is how we convict people.

Mr. JACKSON. But the Senator would not want the RECORD to stand here and say it does not have to be proven. The judge instructs the jury that the accused must have the charges against them proven beyond a reasonable doubt both as to intent and premeditated intent.

Mr. BIDEN. Right.

Mr. JACKSON. I agree with the Senator that the overall circumstances, the pause, the time, and what not, are matters that can be adjudged by the jury as evidence of premeditation.

Let me just say when I referred to the espionage statutes and pointed out that language is similar in those statutes and they have been upheld by the courts, that we are dealing now with a situation which we have not had to address in the past in a statutory manner, and I submit that the precedents here confirm the position that the Intelligence Committee took and that was adopted by the overwhelming vote by the House on this issue.

We can go on and on, but I must say that the standard that makes sense to me is the prudent standard, and that is whether the individual knew or as a reasonable person should have known that the consequences of his act would lead to this kind of harm to the security of the Nation.

Someone could travel around saying:

I was just down in such and such a country checking over the lists in the Embassy, and having served in the CIA I thought it ought to be known who is working for the CIA. It is a great organization, but I think it all ought to be made public.

What does one do? Yet we know that a reasonable person would come to the conclusion that that person, regardless of his defense and his protestations, was indeed harming the security of this country.

Mr. BIDEN. I think that is a very valid point the Senator makes. Let me ask him now a specific question. A reporter for the Washington Post, Bob Woodward, disclosed that the CIA made secret payments to King Hussein of Jordan for the past 20 years, and there was a subsequent story in the New York Times by David Binder on February 19, 1977, who named four additional foreign leaders who received that money.

Under the reason to believe standard I believe it is fair to say anybody who did that, in this case Woodward and Binder, should have reason to believe that would have hurt our efforts, is that not correct?

Mr. JACKSON. I think you would have reason to believe that the King of Jordan did not look so good. He did not harm any of our people.

Mr. BIDEN. I see.

Mr. JACKSON. We are here to protect the good name and the integrity of the intelligence system of our country. Other countries protect theirs in a pretty rough manner.

Mr. BIDEN. So neither of those people——

Mr. JACKSON. My colleague is being very modest. He has done a lot of outstanding work on the Intelligence Committee, and he knows that other countries are really tough on those who violate the code. The British, who have a reasonable system, through the centuries of freedom have been the toughest, and the Israelis are even tougher.

Mr. BIDEN Well, I understand that. I am concerned about what it means in this country. If the Senator is right, I could vote with him.

For example, an article by Jeff Gerth on December 6, 1981, in the New York Times reveals that many former CIA station chiefs have gone into private business in countless countries around the world. He goes on to identify seven former CIA officials who have used contacts they have made, while they were in Government, uncovering the agent's name. One of the standards is that the Government is taking affirmative action to prevent their disclosure. The Government took affirmative action to prevent the disclosure of these names. He published them. Under the reason to believe standard, is it likely he will go to jail if he were tried?

Mr. JACKSON. No.

Mr. BIDEN. Why not?

Mr. JACKSON. No, because we are talking about former agents who were no longer in the CIA. We are talking about a totally different situation.

Mr. BIDEN. So, as the Senator understands our overall statute here then, if anyone, including Agee, can go out and disclose, even though it is based on prior information that he had as an agent, he could go out and disclose the names of former agents who were no longer agents, is that right?

Mr. JACKSON. Well, you have to prove, as you know, all six elements.

Mr. BIDEN. I understand. But I want to make sure we are talking about the same thing. Because the Senator just said the reason why this

fellow Gerth would not go to jail was because these people were former agents. Does that mean it is all right to disclose the names of former agents?

Mr. JACKSON. My specific amendment, the Chafee-Jackson amendment, relates to those who are on active duty in the CIA. There is another section in the bill that addresses former employees of the agency.

Mr. BIDEN. All right. We have a couple of articles by current employees, where the names of current agents have been published by the United States or by publications in the United States. Let me give you a few examples.

David Shipler, reported in 1978 in the New York Times that the Soviet paper Izvestia had identified four alleged CIA officers in the U.S. Embassy in Moscow who were then active agents in the area. He published those names. He published them because he said that Izvestia had identified them as agents.

Now, it would seem to me, in the reason to believe standard, that all the standards were met. First, he did publish the name of agents. He disclosed it and he knew they were agents. Second, he used the pattern of activities to disclose it, because he went around and interviewed a whole bunch of people to establish whether or not they were agents. Third, he had the intent to disclose those names by the fact of disclosure. Fourth, the Government was taking affirmative action to prevent, in fact, their names from being disclosed. And then we get down to the last standard, should he not have—since the Government said, "We do not want you publishing those names. We are taking efforts to keep these from being disclosed. You, in fact, are engaged in the business of finding out who they are," and so on—should he not have, under the Senator's standard, reason to believe that that would harm the United States of America? I do not know how you avoid that.

Mr. JACKSON. First, regarding the previous case, I want to make clear that the Senate bill does not cover the situation that my good friend referred to. That is, the disclosure of a covert agent who is no longer in the employ of the Government is not protected by the Senate bill. The House bill provides, as it was passed and sent over here, for a 5-year hiatus; that is, for 5 years after having left the intelligence community, anyone who discloses information as indicated in the general bill would be in violation. But my amendment, the Chafee-Jackson amendment, addresses only those on active duty.

Mr. BIDEN. I think that is important to make clear.

Mr. JACKSON. My colleague, I know from our work together on the committee on so many matters that we cannot even discuss on this floor, has played an outstanding role in enhancing and in strengthening our intelligence system. I know he wants to do what we all want to do, and that is to protect those who are taking great risks for our country. We all want to do the same thing. I do believe that unless we have language of this nature we are simply not going to get the convictions when the chips are down. That is my sole reason for offering the amendment with Senator CHAFEE and other colleagues.

Mr. BIDEN. I do not want to put the Senator on a spot or get us in a position where we are arguing——

Mr. JACKSON. Neither one of us is on the spot.

Mr. BIDEN. What I mean is arguing about the number of angels on a head of a pin or anything like that. I do not want to get into any of those kinds of esoteric arguments.

I have very practical concerns, as the Senator does.

For example, Robert Pear described in the December 20, 1979, New York Times a lawsuit involving current and former CIA employees assigned to South Korea. One of the officers told the Times that the CIA had been aware of South Korean influence buying in the U.S. Congress years before the Koreagate affair became public but had concealed the information from the Justice Department.

Now, Pear comes along and discloses the names of current employees, employees that the agency is trying to protect their names. They are saying that we do not want those names disclosed, employees that, in fact, are involved in the CIA today; employees, when he publishes their names, that meet, as a consequence of his publication, five of the six standards set out; that is, he intended to publish their names, he knew they were agents, he intended to disclose what their names were, he, in fact, knew that they were agents working for the agency, and so on, and he had reason to believe—no one could doubt, it seems to me, that if you publish the name of an agent operating in South Korea that you are not jeopardizing that agent. But he did it for a reason totally unrelated to disclosing or hurting the national security. He did it for the reason to uncover Koreagate in the U.S. Congress. Now, would he be subject to going to jail under your law?

Mr. JACKSON. My offhand judgment is no. You would have to first establish that he acted in the course of an effort or pattern of activity and intended to identify and expose covert agents.

Mr. BIDEN. If the Senator will stop there, he clearly did that. It is beyond question he did that. I will tell you how he did it, if you give me just a moment.

Mr. JACKSON. His purpose was not to expose covert agents.

Mr. BIDEN. Sure it was. His purpose was to disclose those agents by the mere act—all of our testimony is replete in the Judiciary Committee and in the Intelligence Committee that the intent provision is met by the mere fact of disclosure. Otherwise, why would he have disclosed unless he intended to disclose? There is no question about that.

The pattern of activity by the Justice Department testifying before our committee is established not by a series of publications but by a series of activities that involve the investigative process of determining whether or not the person is an agent. So he went around and asked a whole bunch of people, "Is this guy an agent? What is he involved in?" And so on. That establishes the pattern of activity. There is not any question about that.

Mr. JACKSON. Clearly, you cannot in one breath turn around and say that it was his sole purpose to uproot corruption and then that his real purpose was to disclose agent identities. That is what a jury would have to decide on the basis of all six elements that would have to be proved—whether it was his purpose to uproot corruption to disclose the identity of individuals as covert agents.

Mr. BIDEN. You see, that is the point. You are saying in effect we should apply an intent standard. You say the reason to believe standard allows a prosecutor to introduce in evidence the following evidence: I say, "Did you not ask the Agency whether or not this would impair or impede?," and he said "Yes, I went out and asked the Agency: 'What happens if I publish the name of Joe Doaks, an agent in Korea?' "

Surely, what the Agency says is, "You will be impairing or impeding." And the defendant comes back and says, "But that is not my intent. My intent is, do you not realize these guys are involved in bribery, in bluffing the Congress? These guys are involved in" so on and so forth.

Mr. JACKSON. I think the jury could determine, certainly, his objective, which is certainly different from the Agency. He is not an investigative journalist. His objective was to uproot corruption, and certainly you would not have difficulty proving that.

If, incidentally, it turns out that the individual involved is a covert employee of the intelligence community, you have not proven a case against him.

Mr. BIDEN. With all due respect, that is not what they have to prove. All they have to prove is that he intended to disrupt, impair, or impede.

The intent provision in your language only goes to disclosure. All they have to prove once you get beyond that, the prosecution, and that is why the press are so worried about this—all they have to prove once you get beyond that is that such disclosure would impede, whether or not intended, and there is no question it would impede, even if you have a good purpose.

It is clear that it will impede, disclosing the name of four agents in Korea.

It is going to impede the efforts of the CIA in Korea. There is no question about that.

Mr. JACKSON. I just do not agree with that conclusion because the whole thrust of it in the suppositious or hypothetical case you presented——

Mr. BIDEN. Senator, that happened.

Mr. JACKSON. Was he prosecuted?

Mr. BIDEN. No, because there was not a law like you are suggesting.

Mr. JACKSON. You mean, the amendment I have suggested. You are not disagreeing with the law as a whole?

Mr. BIDEN. No, just on the reason to believe standard.

Mr. JACKSON. Bear in mind that you have to prove that he acted first of all in the course of an effort or pattern of activities intended to identify and expose covert agents simply for the purpose——

Mr. BIDEN. You are adding "simply for the purpose." That is not what it says. That is your language. That is not what the statute says. You have to stop where you said to "expose covert agents," "a pattern of activities intended to identify and expose covert agents."

Mr. JACKSON. That is what I said.

Mr. BIDEN. You said "sole purpose." Then you go on and read the qualifying language and it says "and."

You have established the first part, he intended to disclose their name, because he did it. He had a pattern of activity. He went around and asked 50 people, "Do you know Joe Doaks is an agent of the CIA?" And so on. That is clearly establishing the pattern. The prosecutor established that. Now he has disclosed the names.

I say to you he disclosed that.

"You knew they were agents. Didn't you intend to disclose the name of an agent?"

Of course he has to say, "Yes." There is no rebuttal.

Then the language comes into play that you and I argue about. That is that it then says, "And, in addition, with reason to believe that such activity would impair."

Mr. JACKSON. May I say that my answer is that a jury would have to prove that he did it intending to identify and expose covert agents. What he is intending to do is to expose corruption, and I do not agree with the press' interpretation of this amendment or that example. I understand what this hassle is all about, but I also understand, too, that leaving a loophole here can indeed make it almost impossible to handle any of these cases.

Mr. BIDEN. I am not sure how fruitful it is to continue in terms of asking questions, but let me emphasize again for the record, for my colleagues in the Senate. The intent provision clearly, unequivocally, without question, applies to the issue of identification. That is the first thing that has to be met—the second, actually, with the pattern. That is easy to prove by the mere fact that you have, in fact, named the names. You are estopped from saying you did not intend to name the names. So the intent provision is in fact met.

Then you move to the second stage. Did you, when you published that name, have reason to believe that it would hurt, impede, foreign intelligence activities?

It is almost impossible to argue because a jury cannot decide what your real intent was. We are saying they cannot look at your intent. We are looking at what they had reason to believe. They have to acknowledge that reason to believe.

When I expose the name of an agent in another country, operating covertly in an area that is important to us, when I do that, obviously it does not help the effort in that country, even if the reason I did it was to expose a mole, to expose a triple agent, to expose the Koreagate, a greater purpose.

It is impossible to argue under the reason-to-believe standard that the defense lawyer for that newspaperman would say, "Look, ladies and gentlemen of the jury, we acknowledge this hurt, we acknowledge this impeded, but you have to look beyond that. You have to look to the greater good."

The prosecutor can stand up and say, "Your Honor, I object. That is irrelevant."

The judge will have to say, "You are right, Mr. Prosecutor, it is not relevant that this man uncovered a triple agent, that this man was going after Koreagate, that this man was doing something which, in fact, in the long run benefits the U.S. intelligence process. That is not admissible."

So what happens? As the defense attorney for that newspaperman, what do I do? I say, "I will visit you in jail. I will bring you lunch. I will go by and say hello to your children."

It is clear that he has to have reason to believe that it would hurt. There is no question it hurts, but is that what we are after here?

What happens in the case of our distinguished colleagues, former agents and present agents, who are involved with these guys, Wilson and Terpil? What are those guys all about?

Were it not for the vigilant press, where would we be? I did not hear anybody in the Agency come and tell us, "Hey, by the way, Wilson and Terpil are bad guys. They are talking to Libya."

I did not hear anybody in this Congress uncover those guys. It was the press that did it. It greatly benefited the United States of American intelligence-gathering apparatus. It put us on the alert as to what we had to be worrying about.

So what happens? What happens if those folks are still in the business, still on that payroll, and a newspaperman discloses that?

Look, I am going to yield to Senator BRADLEY in a second, but I want to make it clear for those of you back in the offices listening on the squawk box and those of you who will be voting on this thing.

First of all, a pattern of activity, I will read into the record before the day is over from the record before the Judiciary Committee a series of agents' names being disclosed. It is a series of agents and activities on the part of a single investigative reporter looking for a single name. That establishes a pattern of activity.

Now you have the first element of proof.

The second element of proof is that the person, the investigative reporter, intended to publish the name.

Obviously, if they published it and they knew it was a CIA agent, the second element of proof is met. They intended to publish the name.

Now we move from intent—that no longer is an element in the crime—to reason to believe.

You have established the pattern, you have established the intent to publish the name, and now all the prosecution has to do is to say, "Ladies and gentlemen of the jury, did not David Binder, did not Robert Woodward, would not any reasonable man," to use the phrase of my colleagues, "know that by publishing this information they are going to hurt the intelligence-gathering capability of the United States of America?"

Of course they know that.

Now I stand up as the defense counsel for either of those two gentlemen, and I say, "Ladies and gentlemen of the jury, of course we knew it would hurt, but that is not the issue here. The issue is they did not intend to hurt the overall gathering capability. What they were going after here is the fact that there is a mole in the CIA that works for the Kremlin, that is on the payroll of the KGB, and that is what they were going after. They could not expose that and make their case absent the exposure of the other person."

And then the prosecution stands up and says, "Ladies and gentlemen of the jury, that is irrelevant. You do not have a right to look beyond what to a reasonable man would appear to be the case on its face."

The fact that Bob Woodward was trying to expose a mole is irrelevant. And the court will have to sustain that.

First of all, the court will not sustain this at all. It will be declared unconstitutional. But assume it were not. The court has to sustain it. So that is not a defense. That is why intent is so important.

Granted, Mr. President, anyone you prosecute under this law is going to come back and say, "I did not really intend to hurt. My effort to pull down the CIA was done in the best interest of America."

Well, they can make the same argument on reason to believe. They can

stand before the jury and say, "Oh, it is true, I published that name. It is true that I know that that person is operating in Korea or Afghanistan or any other place in the world. It is true—but I had reason to believe it would help America, not hurt America."

That is a question for the jury to decide, just as it is in intent. There is nothing special or unique about the intent provision as being somehow immune from that counterargument. That is where "reasonable men" on the jury and "reasonable women" on the jury make that judgement as to whether they are lying or telling the truth.

But, folks, this is not a matter of semantics. This is not a minor point.

The last point I shall make is—and then I shall yield to the Senator from New Jersey, or whoever is seeking recognition—let us assume for the sake of argument that the Senator from the great State of Washington was correct a moment ago when he said the cases I read to him would be matters for the jury to decide. That, in and of itself, should be reason enough to make us not go along with the reason-to-believe standard, because talk about a chilling effect. Do you want to be the editor of a newspaper in America when your reporter comes to you and says, "Hey, look, I have the biggest case of the decade. I can blow the KGB operation in America wide open. I found out who the mole is in the CIA."

Instead of the editor's asking the question,"Can you corroborate that, what are your sources, how did you get it?" the editor is going to have to ask the following question: "By the way, when you expose that mole, are you going to have to expose anybody else in the Agency?"

"Well, of course, I am going to have to mention four other agents who are now operating in another country."

The editor is going to have to say, "Wait a minute, will that hurt the operation in the other country?"

"Well, yes, it is going to hurt overall, but think what it is going to mean to the country to expose this mole."

Then the editor is going to be saying, "Wait a minute, now, I want to make sure. Is this first happening on your watch, not on mine?

"Second, what would a reasonable person think? Would a reasonable person think this is good or bad? Would a reasonable person think this will impede or impair?

"Regardless of what your intent is, you and I are both certain, John Doe Reporter, that we have no intent to harm America. But what will a reasonable person think?"

I do not want to be the editor having to make that judgment. I do not want to be the reporter having to make that judgment. In spite of the fact that our press is noble and wonderful, I find in times of crisis, they are not ready to throw themselves upon a sword. They tend to be as cowardly as the rest of us. They are like everyone else in America: When the heat is on, they do not like to jump in, like the rest of us. So, instead of taking a chance, I suspect that in some cases, there will be a chilling effect. And that is not good for America.

Forget the press; forget the first amendment. That is not good for basic, flat-out, old-fashioned Americans, whose security is at stake. Absent the ability of a third party to look in an objective way as to whether or not the agency is functioning, we are at peril and at risk. And I might respectfully suggest, so is the agency.

It is helpful to them, not harmful. But I sure do not want to be the Senator who votes on a piece of legislation, assuming it can sustain constitutional muster, which I do not believe it can, that results in long debates in the editorial board rooms of the newspapers of America as to whether or not they go forward with exposing a Wilson or a Terpil or anybody else. Especially when they mean sincerely and deeply to enhance the capabilities of the intelligence community, to enhance U.S. security, to enhance our national interest, and have to debate whether a reasonable man would or would not think they should go to jail for this effort.

Why not do in this statute what we do in other criminal statutes and say you are required to have knowledge in what you are doing that you intend to hurt—not intend to publish the name, intend to hurt.

That is a matter for the jury to decide. That is a matter that prosecutors can make an argument for. That is a matter that is constantly argued before juries in every criminal case, in every court, in every State, at every trial. And it can be inferred just as it is in the Wayne Williams case. It was inferred that he had a premeditated intent to kill. The jury did not have to have it set out for them, Wayne Williams saying, "Yes, I intended," or someone else saying, "I heard him say he intended."

It is the same in this case. Why not err on the side of the Constitution? Why not err on the side of the first amendment? Why not err on the side of security? Why not err on the side that everybody, including the agency, says will get the job done?

If you notice, folks, you will hear throughout this entire debate that there is nobody in the agency who has said before any of the committees, "If you adopt the Biden language, we cannot get the job done." They are saying, "We can get the job done with it." They are saying, "We like the other language better, but we can put away all the Agees in the world under Biden's language." It is a piece of cake—that is my characterization, "piece of cake," not theirs.

So why not err on the side of maintaining what is a standard that has been in our Anglo-Saxon jurisprudential thought for the past 800 years? It is called intent. Nothing magic about it. It need not be pure, it can be impure. It need not be perfect, it can be imperfect. It need not be shown beyond anything beyond having to infer it. Why not stick with that standard?

Mr. President, I can tell by the looks on my colleagues' faces they are thinking why do I not sit down now? So I will sit down. I yield the floor.

The PRESIDING OFFICER (Mr. SIMPSON). The Senator from California is recognized.

Mr. HAYAKAWA. Mr. President, I implore the distinguished Senator from Delaware, who has defined the problem before us as a matter of semantics, to leave that determination to me, since I have written five books on the subject of semantics.

Mr. BIDEN. If the Senator will yield on that point, I often wonder about that comment with regard to generals, "Is war not too important to be left to generals," if it would not apply here: Is semantics not too important to be left to those who wrote books about it? But I yield to the Senator.

Mr. HAYAKAWA. Mr. President, I am fascinated by the argument of the distinguished Senator from Delaware. I have not heard such academic hairsplitting since I was a graduate student caught in the middle of conflicting theories of literary interpretation as applied to a poem by William Butler Yeats. I am grateful to the distinguished Senator from Delaware for reminding me of those dear dead days when I was working on my Ph. D.

Mr. President, it seems as though we in the United States sometimes have a naive view of how our Nation is perceived abroad.

After all, our country seeks peace. As President Reagan noted last year in his worldwide address on nuclear disarmament, the United States is not an aggressor. Immediately following World War II, we alone possessed the atom bomb, and yet we sought world stability, not world domination.

And our people are charitable. In countless disasters around the world, the American people and their Government have come to the aid of the afflicted.

So, Mr. President, it is not surprising that, so often, we cannot comprehend the hostility our Nation encounters abroad. Our Embassies are bombed, our officials kidnaped, and our policies attacked.

In this increasingly tense international atmosphere, thousands of our citizens are courageously serving their country in the intelligence-gathering operations so important to our national security. These Government employees were aware of the personal dangers confronting them when they elected to engage in intelligence activities. But they now find themselves threatened not only from the front, but from behind as well; threatened by their fellow citizens.

In 1975, American Philip Agee's Counterspy magazine identified Richard S. Welch as CIA station chief in Athens, Greece. Richard Welch was murdered 1 month after the information was disclosed in the Athens Daily News.

In 1980 another American citizen, Louis Wolf, revealed the names of 15 alleged CIA agents in Jamaica. Within a week assassination attempts were made on 2 of the 15.

Mr. President, we are now approaching the seventh anniversary of the death of Richard Welch, and still there are no laws to prohibit the type of despicable act that led to his murder. Those citizens who would destroy our intelligence gathering capabilities are still trotting around the globe naming names and endangering the lives of conscientious Americans.

I have cosponsored S. 391, the Intelligence Identities Protection Act, so that we can at last bring an end to this type of activity. The bill prohibits the unauthorized disclosure of intelligence agents and directs the President to take steps to insure the secrecy of intelligence relationships.

Section 601 (a) and (b) of the act set stiff penalties for those who misuse their authorized access to classified information by disclosing the identities of covert agents.

Section 601(c) targets those who engage in patterns of activity to identify and expose covert agents. The language originally proposed by Senator CHAFEE and approved overwhelmingly by the House would penalize such persons who have reason to believe that their activities would harm U.S. intelligence activities.

The Senate Judiciary Committee, however, decided narrowly to change the reason to believe requirement to one of intent. The Government would have to prove, not that an individual engaged in naming names had reason to believe that his activities were harmful, but that he intended them to damage American intelligence operations.

I favor the language originally proposed by Senator CHAFEE and supported by both the Carter and Reagan adminstrations. The intent standard would be difficult to prove and would allow an individual to claim that his anti-intelligence actions were intended, not to impair U.S. intelligence efforts, but to expose certain activities that were improper and worthy of public discussion. In other words, whatever the results, the individual could claim that his intention was good—indeed, he could say he was acting from highest motive of patriotism.

Senator CHAFEE's "reason to believe" standard would deal more effectively with those who threaten our national security, while preserving constitutional rights. To convict, the Government would have to prove not only that an individual had reason to believe that his activities imperiled foreign intelligence operations, but that beyond a reasonable doubt: First, there was an intentional disclosure of information which identified a covert agent; second, the disclosure was made to someone not authorized to receive classified information; third, the person who made he disclosure knew that the information disclosed identified a covert agent; fourth, the person who made the disclosure was aware that the United States was taking affirmative measures to conceal the convert agent's classified intelligence affiliation; and fifth, the disclosure was made in the course of a pattern of activities intended to identify and expose covert agents.

This language will enable the Government to convict the guilty, while continuing to allow legal scrutiny of Government activity. A reporter who, in the course of an investigation, revealed an agent's identity could not be guilty under the act, because he would not meet its pattern of activities requirement.

Mr. President, I commend the Senator from Rhode Island for introducing this legislation and for continuing to press for the best possible language. Like him, I recognize that if we are to deter effectively those who would destroy legitimate American activities, we must have an effective law.

Mr. BRADLEY. Mr. President, the bill we are presently debating is one of the most important pieces of legislation to come before Congress. It deals with the national security and the constitutional rights of all Americans. The issues the bill raises merit reasoned debate. And they deserve the careful scrutiny of every Senator.

This bill is responsive to a grave problem the U.S. intelligence community faces in fulfilling its foreign intelligence responsibilities. In recent years a small number of Americans, including some former CIA employees, have been engaged in a systematic effort to undermine our clandestine intelligence operations by disclosing the names of agents. Yet so far, none of the people responsible for these disclosures has been indicted under the expionage laws or any other law.

The failure to prevent these wanton acts underscores the need for a new law that specifically addresses this problem. Until we pass such a law, our intelligence agents will become less and less effective while at the same time they will be exposed to increasing danger. In addition, our relations with foreign sources of intelligence will continue to deteriorate because of the fear these sources feel for their own safety. Unless we can protect U.S. agents and their foreign sources from malicious disclosure, our foreign intelligence activities will be severely impaired. And because we will have diminishing access to intelligence information that is timely and accurate, our national security will suffer.

Accordingly, I support the bill that the Judiciary Committee has reported. This bill makes criminal the disclosure of intelligence identities in certain specified circumstances. It applies to three well-defined and limited classes of individuals. The first consists of those who have had authorized access to classified information identifying undercover agents. These are primarily U.S. Government officials who have a need to know the identity of CIA operatives. Because their access of the identities of covert agents derives from a position of trust, the bill penalizes their disclosure of this information most heavily.

The second class also consists of individuals who have had authorized access to classified information, but not necessarily information directly identifying covert agents. In order for members of this class to be penalized under the bill, it must be shown that they learned an agent's identity as a result of their access to classified information.

The third class of individuals affected by the bill are those who may have never had authorized access to classified information but who, in the course of an effort to expose covert agents and with an intent to impair or impede the foreign intelligence activities of the United States, disclose information to unauthorized persons that identifies an individual as a clandestine agent.

I believe the bill as reported has been carefully considered and skillfully drafted. It affords appropriate protection to intelligence agents by making criminal those disclosures which clearly represent a conscious and pernicious effort to identify and expose covert agents with the intent to damage the national security.

At the same time, the bill avoids infringing the constitutional rights of innocent Americans and unduly impeding the public's right to know. In particular, it is drafted so that casual discussion, political debate, the legitimate activities of journalists, or the disclosure of illegality or impropriety in Government will not be inhibited by enactment of this legislation.

Mr. President, it is essential that this last feature of the bill be preserved. There is no doubt that we need effective prohibitions on malicious disclosures of the identity of intelligence agents. But there is similarly no doubt that we must preserve the fundamental right of free speech guaranteed all Americans by the first amendment. And we must jealously guard the important role played by the press in exposing the truth.

S. 391 as reported strikes a proper balance between protecting the men and women who risk their lives as covert agents and guarding the interest all of us have in freedom of speech and a free press.

Substituting language from the House-passed bill as proposed in the Chafee amendment would upset this balance and I must oppose it.

In the case of individuals who may never have had access to classified information, the Chafee language requires only proof of reason to believe that disclosures would impair or impede intelligence activities.

The bill before us requires "intent." I am concerned that substituting the "reason to believe" for the "intent" test would chill significant public debate on Government activities even where the purpose of the debate was to expose serious impropriety.

The reason to believe standard also risks imposing criminal sanctions on those who disclose information of a purely factual nature which they believe the public has a right and a need to know. The penalty would apply to situations in which the identification derives entirely from published U.S. Government documents and where the disclosure would not place any lives in jeopardy. Finally, the House bill would impose criminal sanctions not only on those in the business of naming names, but also on publishing activities fully protected by the first amendment.

Mr. President, there is no need for us to substitute "reason to believe" for "intent." The administration is on record as stating either version of the bill is acceptable and will be enforceable. In a letter to Chairman BOLAND of the House Intelligence Committee, CIA Director Casey stated he could support the Senate Judiciary Committee version. The Justice Department has indicated their agreement with Mr. Casey's position and the hearing record on this bill fully confirms that either version will do the job.

If both versions are acceptable to the agencies they are intended to protect, why then should we risk needlessly infringing on freedom of speech and freedom of the press?

Proponents of the reason-to-believe test tell us that their version affords ample protection for the press because of the other protections of the bill. In fact, these other conditions simply describe the activities of an investigative journalist.

Senator BIDEN has gone over this point in some detail but let us go through it once more and perhaps the proponents of the amendment could concretize this for us by responding to a few questions that are directed at specific newspaper articles.

First, let us consider "pattern of activities." This requirement is supposed to provide protection for those who argue for the reason to believe standard as opposed to the intent standard. Instead, "pattern of activities" is simply a definition of exactly what an investigative reporter does when on a story such as the current New York Times effort to find out whether any CIA officials worked with former intelligence agents Wilson and Terpil in recruiting and training Americans and foreign nationals for terrorist activities.

A second requirement is that the individual disclosing the agent's identity have reason to believe that the disclosure will harm U.S. intelligence activities. But the CIA asserts that whenever a covert agent is identified it becomes harder to recruit new agents. Based on the CIA position, a reasonable person would have to conclude that any disclosure of a possible CIA operative would harm U.S. intelligence activities. Moreover, most journalists would check with the CIA before publishing a story and would invariably be told that disclosure would cause injury to the agency. Hence, it is difficult to imagine a situation in which this condition would not be met.

The third criterion for liability under the Chafee language is that the individual discloses information that identifies an individual as a covert agent. This simply requires that a story be factual—a condition that the media itself imposes on investigative reporting.

The fourth criterion is that the disclosure be unauthorized. Repeating the name of an agent to an editor or printer would constitute such disclosure.

The fifth requirement is that the individual knew that a covert agent was being identified. This condition would be met by the story that the individual was an undercover CIA agent.

Finally there is the requirement that the individual knew that the United States is taking affirmative measures to conceal the agent's identity. Any reporter would know that the CIA wants to conceal the identity of all covert agents. Again, it is hard to conceive of circumstances where a piece of investigative journalism about an intelligence operative would not satisfy this condition.

In sum, the reason-to-believe standard would cover virtually all disclosures by an investigative reporter involving intelligence agents.

Proponents of the reason-to-believe version assert that it is not necessary to name names, that responsible journalists do not name names. That is simply not the case. I have here articles and books by responsible journalists and authors which include names of covert agents as defined in the bill. I would like the proponents of the Chafee amendment to explain to me whether the authors of these articles, which seem to respond to legitimate concerns of the public and their right to know, would be criminally liable under the terms of this amendment. Specifically I would like to know:

Do they believe that the article or book should have been published with the names included?

Do they believe that the publication would be covered by S. 391 with the reason-to-believe standard? If not, why not?

Mr. President, if I could have the attention of the floor manager of the Chafee amendment, I wish to pose these questions to him and have him respond only to clarify the Record as to what his intent is in proposing the reason-to-believe amendment.

I have with me today fewer articles than I did the last time we discussed this situation on the floor. I now have only 10 articles with me and I wish to ask the Senator to answer a couple of questions about each of these articles so that we might clarify the intent of his amendment. The questions are:

Does the Senator believe that the article or book should have been published with the names included and does he believe that the publication would be covered by S. 391 with the reason-to-believe standard? If not, why not?

I can provide the Senator with a copy of each of the articles or I would be pleased to read the article to him or read a summary of the article, but I would like to get this clarified for the Record. Which would the Senator prefer to do?

Mr. CHAFEE. Why do we not have a look at the article? I am not at all familiar with what the Senator is discussing. And why does he not send it over or let me take a look at it if I could, please?

Mr. BRADLEY. I have 10 articles from the New York Times, the Washington Star, and the Washington Post, each written by a journalist and the question is: Does the Senator believe that the article or book should have been published with the names included? Does he believe that its publication would be covered by S. 391 with the reason to believe standard? While I am waiting for them to be Xeroxed, let me summarize the first article:

It is a New York Times article dated December 6, 1981.

The PRESIDING OFFICER. If the Senator from Rhode Island——

Mr. CHAFEE. Mr. President, if I could interject one question, if I might, I would be interested in the Senator's viewpoint as to whether it would be covered by the intent statute since the Senator has indicated he is for the intent statute, and he is obviously familiar with that. I would appreciate it if he would give his views as to whether it was covered, and answer the same question as to intent that he is asking of me with regard to reason to believe.

Mr. BRADLEY. I would be pleased to respond. We will go article by article. The first article, as I say, is an article in the New York Times of December 6, 1981. This article details how many former U.S. intelligence operatives have entered into profitable business arrangements in other countries.

According to the author, Jeff Gerth, their success is derived from their special secret access to foreign officials and to the sensitive information they gained in their Government service. It names several people the author characterizes as former agents and describes their present business activities.

Now, to the Senator the questions are: Do you belive the article or books should have been published with the names included?

Second, do you believe the publication would be covered under the reason-to-believe standard?

Mr. CHAFEE. That one is easy. As the Senator knows, the statute only covers covert agents. It does not cover former covert agents.

Let us have the next one.

Mr. BRADLEY. So that the author in this case would not be subject to the law, is that right?

Mr. CHAFEE. That is true under either statute.

Mr. BRADLEY. The reason to believe——

Mr. CHAFEE. Or the version that came out of committee.

Mr. BRADLEY. Very well.

The second article is a New York Times article dated September 14, 1981. This is an article by Phil Taubman which discuss weaknesses in U.S. laws and policies governing the transfer of American arms and technology abroad, the lack of prohibitions on the training of Terrorists or the sale of arms or explosives by U.S. citizens.

The article names several former CIA officials whom the author identifies as possibly involved in such activities, including Edwin Wilson.

The question to the Senator is: Do you or do you not believe the article or book, this article, should have been published with the names included? Do you believe the publication would be covered by the reason to believe statute? If the Senator would prefer to wait until the articles are Xeroxed——

Mr. CHAFEE. I would prefer to answer them as the articles came off.

I would prefer if the Senator from New Jersey would refer to the definitions in the committee bill, by the way, so that his questions are not really directed against the so-called Chafee amendment. Then he would see that they are directed against the bill itself.

If you will note on a copy of the legislation in section 606 it goes into definitions. It states:

> The term "covert agent" means an officer or employee of an intelligence agency or a member of the Armed Forces assigned to duty with an intelligence agency.

So by definition the article he was reading does not deal with an officer or employee of an intelligence agency. He himself said "a former agent of the CIA." So clearly that example does not apply.

The news stories of the Wilson and Terpil cases have been constantly cited as being imperiled by passage of this legislation. That is absolute nonsense. The people who say this have not read the legislation. Wilson and Terpil were former agents, and disclosure of their names would not be penalized under this bill.

Mr. BRADLEY. The third article, New York Times, November 1, 1981, is an article again by Phil Taubman in which he details how again former U.S. intelligence agents assisted Libya's intervention in Chad.

The PRESIDING OFFICER. May I interject to the participants and remind the participants, even though it may not be necessary, that the Senators in debate under the rule should address the Presiding Officer and not individual Members of the Senate. The Senators should address their questions to another Senator through the Chair.

Mr. CHAFEE addressed the Chair.

The PRESIDING OFFICER. The Senator from Rhode Island.

Mr. CHAFEE. Mr. President, in answer to the question posed by the Senator from New Jersey, again the answer is in the question itself where the Senator from New Jersey referred to a former employee of the CIA. That case, of course, is covered by the definition which we previously discussed in section 606, with the definition of the term "covert agent."

Mr. BRADLEY. A fourth article, Mr. President, I would pose the question, this is from the New York Times of October 24, 1981, an article by Stuart Taylor which identifies an additional actor in the Wilson-Terpil investigations.

The PRESIDING OFFICER. The Senator from Rhode Island.

Mr. CHAFEE. Mr. President, I am not clear on whether that is the completion of the question. Obviously the question is covered, as we say, as I have stated several times here, by the definitions in the act. This act only applies to active officers or employees of an agency in the case the Senator from New Jersey cited.

Mr. BRADLEY. Mr. President, the fifth article is from the New York Times of December 4, 1981. This is a story by William Schmidt. It identifies Eugene Tafoya, accused of murdering a Libyan national, as a self-styled covert agent. Does the Senator believe that this article should have been published with the name included, and does he believe the publication will be covered under the Chafee amendment?

Mr. CHAFEE. Apparently this individual claims to be a covert agent of some type. Anyway there is no suggestion that this individual is now an agent of the CIA. But as the distinguished Senator from New Jersey knows, if perchance this individual should be on active duty or an employee of an intelligence agency, this does not by itself mean the disclosure of that name subjects the discloser to the punishment in the act. There are other elements to be proved.

Mr. BRADLEY. In this particular article let me read the paragraph that I am especially interested in knowing the Senator's opinion about. The author of the article says:

> Mr. Tafoya testified that not only did he shoot Mr. Zagallai in self-defense in a struggle, but that he also believed at the time he was on secret assignment from the CIA.

Does the Senator believe, Mr. President, that the publication of this article by William Schmidt is covered by S. 391 with the reason to believe standard?

Mr. CHAFEE. This individual is not an employee of the CIA, so his case is not relevant.

Mr. BRADLEY. So the Senator is saying that this article would not violate the reason to believe test because the named CIA official is, in fact, not a member of the CIA, is that correct?

Mr. CHAFEE. Not so. But that is the easiest and quickest exception to the various standards of proof that have to be met. In other words, if the person is not an employee of the CIA, then he is out. That does not mean if he is an employee of the CIA that whoever wrote the article can be prosecuted. There are the other issues that we mentioned before.

Mr. BRADLEY. Such as pattern of activities.

Mr. CHAFEE. Mr. President, I am confused as to the question, which does not seem to be coming through the chair.

Mr. BRADLEY. Mr. President, let us go to the sixth article from the Washington Star, August 17, 1978. This article is by Leonard Curry. He states that the former chief of station in Saudi Arabia, Raymond Close, went into business with Kamal Adham a former CIA connection in Riyadh. According to the author, the joint business venture between a former station chief and a top foreign government spy is the first known case of its type. The story also quotes a former U.S. Ambassdor as saying he questions whether CIA agents ever really break their ties with the agency.

Now, the question is: Does the Senator believe that this publication would be covered under the reason to believe standard?

Mr. CHAFEE. Mr. President, the distinguished Senator from New Jersey is making a mistake in suggesting that there is a different standard of proof, as far as these particular matters go, under either the reason to believe or the intent standards. Under either statute, that is the statute which includes the committee language or the statute which would include the amendment language, there can be no prosecution of a disclosure of a name of someone who is not an employee of the CIA or of an intelligence agency. So this Mr. Raymond H. Close, in the article I believe the Senator is referring to, which was published in August of 1978 had retired or stepped down 8 months previous to his name appearing in print. So, again, according to the definitions, this disclosure would not be covered under the statute, whether it is the intent statute or the reason to believe statute.

Mr. BRADLEY. Mr. President, I ask the Senator to further clarify what he means by an active agent.

Mr. CHAFEE. Mr. President, it is not what I mean by an active agent, it is what the statute says. The statute has a definition which we have referred to several times. A covert agent means "an officer or employee of an intelligence agency." An officer or employee. Those are words of art. They are not vague. You are employed. You are in the employ of an intelligence agency.

Then it further goes on to say:

(i) whose identity as such an officer, employee, or member is classified information, and

(ii) who is serving outside the United States or has within the last five years served outside the United States.

So those are not the definitions of the Senator from Rhode Island. Those are the definitions in the statute.

Mr. BRADLEY. Mr. President, I would just ask one further clarification. The article I have quoted by Mr. Leonard Curry quotes an Ambassador as saying he questions whether agents ever really break their ties with the agency. If an agent is no longer an employee, per se, but has an arrangement with the agency whereby he receives any type of compensation, would he come under the definition of officer or employee?

Mr. CHAFEE. The description that somebody never breaks their ties, I suppose, can be applied to anybody. I suppose distinguished graduates from Princeton never break their ties with Nassau Hall. They are there. But hardly would the person be referred to as a student of Princeton or an employee of that great university. They have ties of sentiment and ties of nostalgia, but not necessarily ties of employment. The statute is clear. Covert agent means an employee. And an employee is a legal term, which I do not think we have to go into all the facets of here, but it can be determined by statute and by regulation.

Mr. BRADLEY. Mr. President, one further clarification: Is an employee or officer someone receiving a pension?

Mr. CHAFEE. Well, Mr. President, I think again that is very clear. That is very clear in all law that someone receiving a pension is not an employee. He is entitled to that pension whether he shows up for work or not. He is not even expected to show up for work. So there is no question. I do not think there is any serious question whether a pensioner is an employee of a firm, company, the U.S. Government, or whatever it might be.

Mr. BRADLEY. Mr. President, I thank the Senator. One last clarification on the definition of covert agent. The bill lays out three major headings under the section defining "covert agent." The third heading, and I would like to read it and ask the Senator to explain his understanding of it, says:

The term covert agent means—

"(C) an individual, other than a United States citizen, whose past or present intelligence relationship to the United States is classified information and who is a present or former agent of, or a present or former informant or source of operational assistance to, an intelligence agency.

Now the Senator has said that former agents are not included. I do not understand the third definition of covert agent if that is so. I hope the Senator can explain that for me.

Mr. CHAFEE. Mr. President, we are now dealing with a whole new class of individual that was not in the previous groups that were discussed by the Senator from New Jersey. Those were U.S. citizens and these, as it makes clear, are not U.S. citizens. These are recruited agents, not necessarily employees, of an intelligence agency. So this is a distant group that falls under a separate classification.

Mr. BRADLEY. I would again cite the article by Mr. Leonard Curry, in which he refers to a Sheik Kamal Adham. Adham is reportedly a CIA connection in Saudi Arabia. Under the third definition of covert agent, if it was revealed Adham is no longer but he was formerly an agent, would the author of this article be subject to prosecution under the reason-to-believe standard? Mr. President, I hope my colleague would comment on my question.

Mr. CHAFEE. I wonder if the Senator would repeat his question?

Mr. BRADLEY. Of course.

Mr. President, under section (c), the third definition of covert agent, as the Senator correctly points out, applies to other than U.S. citizens and says that a covert agent means someone who presently or formerly had an intelligence relationship with the United States.

This article in the Washington Star of August 17 identifies the former Chief of Station in Saudi Arabia, Raymond Close, and states that he went into business with Sheik Kamal Adham. The article says that Adham reportedly was a CIA connection in Saudi Arabia.

The question is, assuming Adham was formerly or is presently connected with the CIA, "Is the author liable under the Chafee amendment?"

Mr. CHAFEE. The thrust of the article that the Senator from New Jersey is referring to, as I have read it, deals with Mr. Close, who is a U.S. citizen but no longer an employee of the Agency. So we are clear on him. He is not covered under the bill.

Now, in the course of the article, which was written some 3 years ago, it refers to another gentleman who, it alleges, is a Mr. Adham. The article says he is reportedly a former CIA agent in Saudi Arabia.

The Senator from New Jersey asks, Does the disclosure of his name subject the author to a penalty? The answer to that, of course, depends on a whole series of factors.

First, was this gentleman engaged in a past or present intelligence relationship with the United States and was his name classified information? I do not know. That would have to be ascertained.

Second, you have to go through the other elements of the proof required, which the Senator from New Jersey listed earlier, the so-called six elements of proof. One of those elements of proof evolves around a pattern of activity to identify and expose covert agents.

If Mr. Leonard Curry had written a whole series of articles dealing with probing and the disclosure of the names of agents and they were indeed agents, active agents, or had been agents, foreign agents, as this gentleman here, whom we do not know, then it is possible he could come under the provisions of our bill. That presents a possibility. That well could be. But we do not know.

As I say, we have to ascertain whether the elements, the six elements of proof, have been met, including this particular one I referred to as regards whether he ever was an agent of the Intelligence Agency of the United States.

Mr. BRADLEY. Mr. President, I would ask one more question of the distinguished Senator from Rhode Island. Assume that Adham was an agent. Assume the reporter asked 20 people and ascertained that he was an agent. Would Mr. Leonard Curry be in violation of the law under the reason-to-believe standard?

Mr CHAFEE. Mr. President, if you take hypothetical cases, they all get difficult. I think an easier case would be a series of articles disclosing the names of a series of agents. That would be a clearer cut case, assuming that the six elements of proof had been met.

Indeed, they might well be met not just under the reason to believe, but under the intent standard, which is the committee language.

So I cannot definitely say yes or no in answering the question regarding the investigative work that Mr. Curry might have undertaken to ascertain Mr. Adham's intelligence connection. First of all you would have to find out whether he was ever an agent—maybe he was not.

Mr. BRADLEY. Mr. President, I think I have heard something that is new to me. Maybe the Senator did not mean to inject it. Did I hear the Senator imply or say that there can never be an isolated article, one isolated article, that would violate the reason-to-believe standard, that there has to be a series of articles identifying a series of agents? Those were the Senator's words, if I recall.

Mr. CHAFEE. No, Mr. President, I think if the Senator from New Jersey studies the Record, I did not say that there could never be a single article. I said an easier case would be one which involved a series of articles disclosing the names of a series of agents. In other words, I will refer the Senator

from New Jersey again to the definitions in which it states:

The term pattern of activities requires a series of acts with a common purpose or objective.

Let us take a single situation, where a reporter engaged in a series of acts such as following a suspected agent to work, seeking his telephone number, making a whole series of background checks on him, checking his prior activities in the United States, where he took his training, and so forth. If one went through an elaborate process like that, and, indeed, knew that the person involved was an agent, then disclosing it as a part of this series of acts would violate the provisions of this bill.

Mr. BRADLEY. Mr. President, this does not refer to a U.S. agent. This refers to a non-U.S. citizen who once had a relationship with the CIA. Does the Senator think personally that if Mr. Adham was an agent that this article violates the reason to believe standard?

Mr. CHAFEE. Mr. President, the answer to the Senator from New Jersey cannot be given by me on the basis of what I see here.

We previously discarded all the other cases presented by the Senator from New Jersey because in none of them was the individual identified as an employee of the CIA.

Here we are dealing with a category where the individual is not a U.S. citizen and might possibly had a past connection with the CIA. That is unknown.

So, first of all, we have to ascertain that fact. Even if that were so, and let us assume it for the sake of argument, that he was a former employee of the CIA, then you would have to find out what kind of a pattern of activities Mr. Curry followed in writing this article. If he stumbled on a name and wrote it up without a whole series of checks to find out what he was, then that would be one act. But here he does not even allege flatly that he had a CIA connection. He says reportedly, so presumably he does not know and has not done that extensive background checking. On this basis, I do not believe Mr. Curry is covered under our bill.

Mr. BRADLEY. Mr. President, this is precisely the kind of question which has troubled me. This is the kind of information that I believe the public does have a right to know. However, I will not discuss this article at greater length.

Mr. President, I would like to go on to a Washington Post article of July 11, 1979.

Mr. CHAFEE. Mr. President, might I interject? If the Senator is troubled by this situation, his troubles are not confined, Mr. President, to the language of the Chafee amendment.

He is troubled by the whole bill because, under the intent provision, what he claims is true as well. The definitions I am reading from are not from the Chafee amendment, they are from the legislation that was reported out by the Judiciary Committee. It may well be that the Senator has trouble, as I say, with the whole bill. If so, let him say so and let the world know it. But let him not direct his objections to the reason to believe section alone. If he is troubled by the whole bill, then he is troubled with trying to get at the very problem we are trying to solve, which is the disclosure of agents' identities.

Mr. BIDEN. Will the Senator yield for a question?

Mr. BRADLEY. Mr. President, I do not think the Senator from Rhode Island had heard my entire speech. I said unequivocally that legislation of this type is necessary. I said it is my intent to protect our agents abroad, but that we have to balance on protecting our agents with preserving free speech and a free press, and it is, indeed, the bill that came out of the Judiciary Committee that I support without the Senator's amendment. It is that bill that has the support of the Justice Department and the Agency. So, I think it is incorrect for the Senator to imply that I do not strongly support the protection of our agents.

I have posed a series of very specific questions trying to clarify what the Senator means, in real terms, by the reason to believe standard. I frankly do not know any effective way to do that other than to give specific examples and have the proponent of the reason to believe standard say whether he thinks it applies or not. That is the whole purpose of this exercise.

Mr. CHAFEE. Mr. President, no one was challenging the Senator's concern about protecting the agents. All I am saying is that he has indicated he has trouble with the response that I gave to the article he produced by Mr. Leonard Curry in the Washington Star of August 19, 1978. My answer was that if he has trouble, his trouble does not revolve around the reason to believe language. That is not what presents the trouble for the Senator, as I see it. It is the language of the statute itself. Whether you take the intent or whether you take the reason to believe, the same difficulties arise.

Mr. BIDEN. Will the Senator from New Jersey yield for a question?

Mr. BRADLEY. I am pleased to yield for a question.

Mr. BIDEN. Mr. President, the Senator from New Jersey has just been rebutted on the grounds that the problem does not relate to reason to believe versus intent. Is it not true, in the cases he has put forward, that the reporter reporting those incidents could have intended in fact to help, not hurt, move forward, not impede, the national intelligence capability of this country?

Mr. BRADLEY. Yes, Mr. President.

Mr. BIDEN. They could have and should have had reason to believe that it would, in some aspect of it, have been detrimental. They could have reason to believe that by identifying the name of an agent, present or former, it would in fact hurt that person or hurt that particular effort but may very well, in the total scheme of things, be incredibly helpful.

Mr. BRADLEY. Mr. President, the Senator is correct. That is exactly the situation with the former Saudi agent this article refers to.

Mr. BIDEN. So there is a distinct, real difference. The Senator could very well have trouble with reason to believe in these cases and not at all have trouble with the intent provision. That is what this is all about.

I thank the Senator for yielding.

Mr. BRADLEY. Mr. President, while I am sympathetic to the desires of my colleagues to afford maximum protection to our covert intelligence personnel, I remain unpersuaded of the need for the reason-to-believe standard. It does not provide additional protection to agents, but it will have a chilling effect on public debate.

If this legislation passes with this amendment, many Americans committed to preserving freedom of speech and a free press will resist its enforcement and challenge its constitutionality in the courts.

In the final analysis, therefore, the Chafee substitute language will provide less-effective protection to our agents than the version reported out of the Judiciary Committee with the Biden amendment. Thus, Mr. President, I urge my colleagues to support S. 391 as reported with the intent standard.

Mr. CHAFEE. Mr. President, I should like briefly to reply before we engage in a colloquy.

The distinguished Senator from New Jersey and the Senator from Delaware and, I understand, the Senator from Vermont, although it was not my privilege to be here during his remarks because of a prior commitment, insist that the language that came out of the Judiciary Committee, affords better protection for our agents than the language of the so-called Chafee-Jackson amendment. They may have many, many reasons for opposing the Chafee language but for them to choose the particular reason that it affords greater protection to our agents just does not bear up. Distinguished though these gentlemen are, and I understand the Senator from Vermont has prosecuted thousands of cases, we have on the opposite side of the ledger those whose business it is to prosecute such cases: The assistant attorneys general and the Attorney General of the United States. They are the chief prosecutorial officers of this Government. They are not just from this administration but from the prior administration. They have said that the language that is embodied in the Chafee-Jackson amendment is the better language from their point of view.

So I say to them, please, gentlemen, let us not come forward with the sug-

gestion that you are supporting language that better protects covert agents. Perhaps your language will give some protection to agents. I am not disputing that.

Later these gentlemen quote a letter from Mr. Casey to the House Intelligence Committee that says that their language would be adequate. But they do not go on to say that, in a further part of the letter from Mr. Casey, the administration would far prefer the Chafee language and has so testified. It is all in the RECORD. This is nothing new we are producing here. The former head of the CIA for President Carter, Adm. Stansfield Turner, and the members of the Justice Department have all said the Chafee-Jackson language is easier to prosecute. It is clear. So these gentlemen ought to discard immediately the argument that their language permits the easier prosecution of those who reveal names and that it provides better protection for our agents. It simply is not so.

Mr. BRADLEY. Mr. President, let me read into the record at this point one or two sentences from the letter from the Director of the CIA, Mr. Casey, in which he says:

I must emphasize, however, that the administration's preference for S. 391, the Senate version of the identities bill, remains unchanged.

I do not see any language here that says it is far more preferable.

Mr. HEFLIN. Mr. President, I wonder if the distinguished Senator from Rhode Island would enter into a colloquy with me pertaining to some questions that I have in regard to language in this bill.

I notice that the term "covert agent" is used in each of the three substantive criminal provisions in the bill—subsection 601 (a), (b), and (c)—and that it is specifically defined in subsection 606(4). I ask the distinguished Senator from Rhode Island whether use of this term to refer to those whose identities are being protected implies that these individuals must be involved in a particular covert action before the protective scope of the bill would apply.

Mr. CHAFEE. I thank the distinguished jurist from Alabama for his very astute question, indicating the seriousness which has characterized his review of the bill we are considering today.

The answer to the Senator's question is no; choice of the term "covert agent" in no way is to be construed as limiting protection afforded under the terms of the legislation to those actually engaged in a particular covert action. The legislation is designed to cover all individuals engaged or assisting in foreign intelligence activities whose identity is classified and with regard to whom, at the time of the disclosure, the United States is taking affirmative measures to conceal such individual's classified intelligence relationship. No distinction is drawn as to whether the individual at the time of the disclosure was engaged in collecting intelligence, as opposed to being engaged in covert action, or "special activities," as it is called and defined in section 3.4(h) of Executive Order 12333.

Mr. HEFLIN. I thank the Senator. He made mention in his response of "affirmative measures"—that is, those actions which the United States takes to conceal a covert agent's classified intelligence relationship. Unlike the term "covert agent," the term "affirmative measures" is undefined, even though it is used in each of the three substantive criminal provisions. I should like the Senator to explain just what is meant by the use of the term "affirmative measures."

Mr. CHAFEE. The Senator from Alabama is correct. The term "affirmative measures" is not defined in the bill. However, the legislative history of the bill speaks to this question. Both the Senate Intelligence Committee report from the last Congress and more recently the Senate Judiciary Committee report of this Congress indicate that the reference to "affirmative measures" is intended to confine the effect of the bill to relationships that are deliberately concealed by the United States. "Affirmative measures" could include the use of such techniques as, for example, the creation of a "cover" identity, such as a set of fictitious characteristics and relationships, to conceal the individual's true identity and relationship to an intelligence agency, or the use of clandestine means of communication to conceal the individual's relationship with U.S. Government personnel, or the restricting of any mention of the individual's true identity or intelligence relationship to classified documents and channels.

Mr. HEFLIN. Does that, then, mean that the Government will have to prove knowledge on the part of the defendant of each "affirmative measure" undertaken by the United States with regard to a covert agent whose identity the defendant has disclosed?

Mr. CHAFEE. No. In no way do we intend to impose such a burden on the prosecution. Under the terms of this legislation as drafted, the prosecution has a heavy burden in meeting six elements of proof without imposing what might be impossible to prove—that is, a defendant's knowledge of specific affirmative measures being taken with regard to a specific covert agent or even the fact that all affirmative measures possible with regard to a particular covert agent were being taken at the time of the disclosure. The Government need only show a defendant's knowledge that the U.S. Government at the time of the disclosure was taking some steps to conceal an intelligence relationship. Just as the "affirmative measures" used for one covert agent may vary from those used for another, depending on circumstances, so, too, proof of knowledge that the United States is taking affirmative measures to conceal an intelligence relationship will depend upon the facts and circumstances of each case. Such proof could be demonstrated by showing that a current or former employment or other relationship of the defendant with the United States required or gave him such knowledge. It could also be demonstrated by statements made in connection with the disclosure or by previous statements evidencing such knowledge.

Mr. HEFLIN. I thank the Senator. His response evokes one final question: Under the terms of the definition of "covert agent," the identity or the intelligence relationship of those who the bill aims to protect must be classified. Why, then, is there a need for the prosecution to prove defendant's knowledge of "affirmative measures" undertaken? Does this not render the prosecution's job virtually impossible?

Mr. CHAFEE. I assure the Senator that the language of the legislation we are considering today has been carefully crafted. It has been subjected to the scrutiny of some of the finest legal minds within the intelligence community, and the Justice Departments of both the Carter and Reagan administrations have studied this language and are of the opinion that the language strikes a proper balance between the need to protect civil and constitutional rights, while at the same time providing the Government with a statute that is effective and enforceable. Since we are dealing with our most fundamental freedom, that of speech, I do not feel that the burden placed on the United States is too difficult. We have deliberately made it difficult in terms of elements of proof so as to insure protection of that fundamental freedom.

Classification alone would not provide the kind of insulation required. The mere fact that an intelligence relationship appears in a classified document does not necessarily constitute evidence that the United States is taking affirmative measures to conceal the relationship. It could mean that or it could not. For instance, the document could be classified because of other information it contains. Proof of the existence of a classified relationship would not be enough. The Government must show in addition, that the person who made the disclosure knew that the United States was taking affirmative measures to conceal the covert agent's classified intelligence relationship.

Mr. HEFLIN. Mr. President, I appreciate the indulgence and assistance of the distinguished Senator from Rhode Island in clarifying some of my concerns in regard to this most vital legislation.

I am supportive of the goals of this legislation and wholeheartedly commend Chairman THURMOND; the ranking minority member of the Senate Judiciary Committee, Senator BIDEN;

Senator DENTON, and Senator CHAFEE, for their efforts in this vital area of legislation and its appropriate and necessary goals.

Although, I am very concerned as to whether the objectives of this legislation will be met by its present language. I do not profess to be an expert in the area of intelligence, nor the interworkings of the Central Intelligence Agency. I must defer to my colleagues on the Select Committee on Intelligence for guidance in this area of legislation. But, as a lawyer, I look at an almost insurmountable burden that a prosecutor would have to meet in order to achieve a conviction under this legislation.

The language, in my opinion, in both the House and the Senate versions of section 601(c), is potentially cumbersome, repetitive, and counterproductive, and I seriously question if its intended purpose, as a deterrent to the exposure of our intelligence agents throughout the world, will be accomplished. I have spent a great deal of time in reviewing this legislation and discussing it with colleagues, representatives of the Central Intelligence Agency, individuals concerned with its first amendment ramifications, and many other interested individuals. Unfortunately, like most legislation, this bill is a result of compromise, which rarely produces law in its best language. As I have indicated previously, I support the objectives of this legislation and will vote in favor of final passage of this legislation, but I have serious reservations as to the value and effectiveness of this bill.

I hope that my initial analysis of this concept, in its present form, is inaccurate, and that this will be a true deterrent to the vicious and heinous disclosures of the identity of our agents and will achieve the goals that the administration, the U.S. Senate, and the proponents of this legislation seek to accomplish.

In describing committee efforts to achieve a proposed goal, it is often cited "that the camel was the product of a committee whose purpose was to design a horse." I hope that we are creating a horse and not a camel.

Mr. BIDEN. Mr. President, I rise to read into the RECORD the floor statement by Senator INOUYE who strongly supports the language that is in the bill now and does not support the amendment of the Senator from Rhode Island. He is unable to be here. As we all know, he is deeply involved in preparations for a most distasteful matter we are about to take up in the Senate.

Let me read Senator INOUYE's floor statement so my colleagues may hear it:

S. 391 is a significant departure from previous statutes passed by the Congress to punish disclosure of information in the national security field. It would not only punish publication of information obtained from access to classified information, but would also punish the publication of information derived entirely from open, publicly available sources. This is something the Congress has never done before, except during wartime.

When the problem of deliberately exposing the names of agents arose several years ago, it seemed to result mainly from renegade former agents like Philip Agee who used information they had obtained while employed by the CIA. The first bills introduced to deal with this problem focused on the breach of trust by government employees and former employees who used their access to classified information to identify and expose U.S. intelligence agents. The main issue at that time was whether to include in those bills criminal penalties for outsiders who conspired with, or aided and abetted, employees and former employees like Agee.

Unfortunately, experience has shown that the problem was not confined to the Agees and their collaborators, but that it also resulted from determined efforts to sift through public source information to identify agents. The techniques for identifying agents from open sources are not perfect, and mistakes are often made. But the efforts of those who seek, by these means, to destroy the CIA's effectiveness abroad have gained enough credibility overseas to pose a significant danger to the security of the United States and the physical safety of individuals in the service of this country.

The task, therefore, has been to develop statutory language that would deter these activities without sweeping so broadly as to inhibit news media reporting, and the rights of citizens to discuss questions of foreign affairs and intelligence policy. S. 391 as reported by the Judiciary Committee attempts to meet these criteria through adoption of an "intent" standard. Thus, under the Judiciary bill, disclosure of the names of agents is criminalized only if done so with an "intent to impair or impede intelligence activities."

The language proposed by Senator Chafee would adopt a lesser reason to believe standard. Undoubtedly Senator Chafee's language would make it easier to prosecute journalists who disclose the names of agents. I am concerned, however, that without a requirement to prove intent to impair or impede U.S. intelligence activities, this legislation will place journalists under too great a jeopardy of criminal prosecution for legitimate news reporting.

It is important to understand that there can be situations where investigative reporting that results in the publication of agent's identities may serve legitimate public interests. For example, during consideration of this legislation last year, the Justice Department was asked whether Senator Chafee's language would cover an investigative journalist's reporting the identities of CIA employees engaged in a scheme to defraud the government by misusing funds intended for covert operations. The response was, in effect, that prosecutorial discretion would protect the newsmen in such cases, and that the Justice Department would not bring charges even if the facts technically fit the law. This is precisely why the intent standard in S. 391, as reported by the Judiciary Committee, is so essential. We must insure a "government of laws, not of men" as the guarantee for freedom of the press; reliance on the exercise of prosecutorial discretion is simply unacceptable.

It has been suggested that the legislative history of this legislation can make clear the meaning of the language, so that legitimate news reporting will not be deterred. Neither, in my view, is this an acceptable solution. A requirement to prove intent to impair or impede U.S. intelligence activities is necessary to insure protection for a vigorous free press. If it is necessary to have a criminal statute to deter the "naming of names" by a handful of malefactors bent upon destroying the CIA, it must be framed in a way most likely to achieve that very specific objective, without unnecessarily risking interference with the freedom of the press.

I strongly urge my colleagues to support S. 391 as reported by the Judiciary Committee.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The Clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. WALLOP. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. WALLOP. Mr. President, today, thanks to Senator CHAFEE, the Senate will take another step toward giving the men and women who work as clandestine collectors of intelligence for the United States the legal protection they have thus far lacked. Today the United States is the only country in the world where someone can wantonly disclose the identity of a clandestine agent and get away with it. It is a tribute to our country that, until recent years, we did not need laws to proscribe such behavior. Americans just did not set up private intelligence services with the purpose of "blowing the cover" of the intelligence agencies of the U.S. Government. In recent years, however, precisely that has happened. A few dozen individuals, in consultation with our country's foreign enemies, have published lists of people purported to be undercover agents of American intelligence.

In some instances they hit their mark; in some instances they implicated people with absolutely no connection to American intelligence. But in all cases they did harm. They endangered individual lives and careers. Above all, they harmed the security of every man, woman, and child in the United States by weakening our intelligence agencies' ability to gather vital information abroad. In effect these disclosures of agents' identities have done much to plug up the eyes and ears on which we depend to warn of coming danger. It matters little how they got those names. They got them and have used them to do harm. This we must stop. We must not just give the appearance of stopping it, we must actually have an enforceable law to stop it.

That is why I am opposed to section 601(c) of the bill as amended by the Judiciary Committee. As one of the original authors of the bill, I once considered writing the provision like this. But, for goodness' sake, with 601(c) like this, the prosecution would have to prove six elements of the crime simultaneously, beyond a reasonable doubt:

First, that there was an intentional disclosure of information which did in fact identify a covert agent;

Second, that the disclosure was made to an individual not authorized to receive classified information;

Third, that the person who made the disclosure knew that the information disclosed did in fact identify and disclose a covert agent;

Fourth, that the person who made the disclosure knew that the United States was taking affirmative measures to conceal the covert agent's classified intelligence affiliation;

Fifth, that the disclosure was made in the course of an effort to identify and expose covert agents; and

Sixth, that the person making the disclosure did so with the intent of impairing or impeding the foreign intelligence activities of the United States.

To pass the bill in this form would be to pay lip service to protecting agent identities while knowing well that no one would probably ever be convicted.

The bill's original intention is that someone ought to go to jail if he has disclosed the identities of agents "in the course of a pattern of activities intended to identify and expose covert agents, and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States." In other words, to be convicted the suspect has to have disclosed the identity or identities not accidentally, but as part of an objective pattern of activities of his, and has to have done it with reason to believe that it would hurt his country. Who will argue that such a person should not be in jail? Even the Carter administration, not very sanguine about this sort of thing, argued that if anyone ran afoul of that standard he should go to jail.

The legalistic objections to Senator CHAFEE's efforts to restore the bill are a mask for a much more fundamental position, which we in the Intelligence Committee have been arguing against for years. According to this position, although it may be permissible to punish people with official access to agents' identities who disclose those identities, it is not permissible to punish people who do not have official access but who do the same thing. That, in turn, is based on the pseudo-constitutional contention that once any information leaves the Government, there is an absolute constitutional right to publish it. But this contention has no basis in the text of the Constitution or in commonsense. I do not see such right anywhere in the Constitution. If anyone sees it, let him point to the text. Such a so-called right has even less basis in commonsense.

It makes no sense to punish those who disclose names of agents and to give immunity to those who publish them. The distinction between disclosure and publication is a wholly artificial one. Even when the person who learns the identity of an agent is different from the person who discloses it to foreign enemies, we are compelled to note that both contribute to the process by which harm is done. Both do harm—both should go to jail. Besides, the leakee is usually in concert with the leaker. Whether or not the two parties are in league with one another is a question for a court to decide.

There is no reason, it seems to me, to punish the employee of an intelligence agency for a disclosure and not to punish the person who takes that information and brings it to the knowledge of those who are in a position to do harm to the United States. The employee who steals the information is most often not the most important person in that chain. He is most often not the most malevolent party. To punish only the employee would be akin to saying that we would go after only the clandestine agents of foreign nations and not the case officers who run them.

Moreover, what if Mr. Agee or any other leaker teaches the art of finding agents or finding other information to other people and they, the outsiders, use the skills to further grind out information harmful to the United States? Apparently this is precisely what happened. We now have people who have never been employees of the U.S. Government who have set up what amount to be their own intelligence service. They use open sources and they try to find sources within the U.S. Government. Their purpose is to find out about the activities of U.S. intelligence agencies and to put a stop to those activities by exposing them.

Why should the American people put up with that?

Some of the witnesses against this provision have argued that there is an absolute constitutional right for private citizens to learn what they can about our intelligence agencies and to do what they will with that knowledge. The first amendment's guarantee of freedom of the press, so goes the argument, allows the press to find out what it can and publish what it knows. Thank goodness this is just wild talk and not part of the Constitution. Otherwise the Constitution really would be a suicide pact. Just suppose for a moment that the press and the judicial system took that statement seriously. Each reporter would believe it proper to act no differently than a Soviet clandestine case officer. He would recruit agents by whatever means, and try to penetrate American intelligence as deeply as he could to find out the most sensitive information we had. Then he would probably publish it to the world—names of agents, frequencies, functions of technical means, everything. In war time such dutiful reporters would send untold numbers of their fellow citizens to their graves. The Justice Department and the courts, for their part, would just let it go on, because, after all, the press' job in a free society is to inform the public, is it not? Well, I think all of that is very clearly nonsense.

Those who oppose this provision on the ground that it would muzzle legitimate journalists do a disservice to legitimate journalism. They maintain perforce that there is no objective criterion for distinguishing between the enterpirse of journalism and the work of private intelligence services working to impair or impede U.S. intelligence. Journalists should feel insulted by the comparison: I think that the difference between legitimate journalists and the likes of Louis Wolf is obvious, and that the language which Senator CHAFEE is trying to restore to the bill is a good, sound legal test of that difference and a test which I suggest, Mr. President, more than just passing, is critical to the future of this great Constitution.

Mr. President, I yield the floor.

Mr. CHAFEE. Mr. President, I thank the distinguished Senator from Wyoming for that outstanding statement. I personally want to express my appreciation to him for that fine statement and for his support. We are very grateful. He is an influential Member of this body and held in the highest respect. The fact that he has chosen to endorse the amendment that I am supporting gives us a big boost.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. CHAFEE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. CHAFEE. Mr. President, I ask unanimous consent that we temporarily lay aside the amendment which we are presently considering, and take up my amendment to delete section 603 of this bill.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

SECTION 603 OF S. 391

Mr. CRANSTON. I am concerned about the implications for the conference situation of the motion of the Senator from Rhode Island (Mr. CHAFEE) to strike section 603 from the bill as reported. As the Senator knows, the Judiciary Committee, on a strong bipartisan vote of 11 to 7, specifically amended the intelligence-agent-cover requirement in section 603 to exclude the Peace Corps. In agreeing to that amendment offered by the Senator from Montana (Mr. BAUCUS), the committee was clearly ratifying and proposing to codify into law the 20-year-old executive branch policy of complete separation of the Peace Corps from intelligence activities. I worked very closely with the Senator from Montana, with the ranking minority

member of the committee (Mr. BIDEN), and other Senators on the committee with regard to the need for this exception. In fact, earlier this year, I personally wrote each committee member as well as the author of the bill (Mr. CHAFEE) and spoke to many of them in support of such an amendment.

Mr. President, I ask unanimous consent that several of these letters be printed in the RECORD at this point.

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

UNIVERSITY OF GEORGIA,
SCHOOL OF LAW,
Athens, Ga., May 4, 1981.

Hon. JEREMIAH DENTON,
Chairman, Subcommittee on Security and Terrorism, Committee on the Judiciary, U.S. Senate, Washington, D.C.
Hon. JOSEPH R. BIDEN,
Ranking Minority Member, Subcommittee on Security and Terrorism, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATORS DENTON AND BIDEN: I am writing in connection with S. 391, the proposed Intelligence Identities Protection Act of 1981. I understand that last year, in connection with a similar bill which ultimately was not enacted, the Committee on the Judiciary voted, in accordance with the twenty year old policy of absolute separation between the Peace Corps and United States intelligence, to except the Peace Corps from a statutory requirement that United States Government agencies provide assistance to maintain secrecy of the identity of officers or employees of intelligence agencies. As Secretary of State when that policy was adopted, I would like to explain its genesis and, in my opinion, continuing vitality.

The Peace Corps, as conceived and maintained, expresses the idealism and humanity of the United States in its relations to other countries, particularly those of the Third World. More than 80,000 Americans, mainly young, have now served overseas, often under conditions of hardship, to help meet the need of Third World countries for skilled manpower.

To permit the Peace Corps to be used as cover for United States intelligence would be inconsistent with this conception of the Peace Corps. If people in foreign countries thought it was being so used, whether their belief was true or false, foreign countries would not accept Peace Corps volunteers, and, equally important, many highly motivated Americans would not volunteer for Peace Corps service.

Those who reject the separation policy proceed, I suppose, from the premise that if the United States is to carry out intelligence activities as it must, those activities require cover. If the United States excepts the Peace Corps from any obligation to provide cover, then where does one draw the line.

First, the United States has repeatedly stated and assured foreign governments that the Peace Corps was not and would not be so used. So far as I know, this distinguished it from any other United States government agency.

Secondly, any effort to use the Peace Corps as cover would likely be vigorously opposed by Peace Corps volunteers and staff and would, therefore, not be feasible.

The argument has also been made that formal legislation should not legally circumscribe the President's discretion. The problem is that on its face proposed Section 603 of the National Security Act of 1947 could be interpreted as changing the historic policy of absolute separation between the Peace Corps and United States intelligence, because proposed Section 603 does not except the Peace Corps. Moreover, in my opinion any action that suggests that the United States has modified the policy of absolute separation between the Peace Corps and intelligence would also increase the danger to Peace Corps volunteers and staff. During the last twenty years there have been countless examples of volunteers continuing to perform their duties despite civil strife. Indeed, they have many times been protected by the ordinary citizens with whom they live and work from any harm. Instability and terrorism have already substantially increased the dangers to Americans abroad. These dangers Peace Corps volunteers necessarily assume. The United States should do nothing to increase these risks.

Thus, I hope your subcommittee will, as the Judiciary Committee did last year, adopt an amendment to the proposed Section 603 of the National Security Act of 1947 to confirm the separation between the Peace Corps and Intelligence.

In closing, I would point out that when the Peace Corps was born it was very clear that it would not only refrain from any activities of an intelligence nature but that it would be separate from any role as an instrument of American foreign policy and would not become an instrument for use by our embassies abroad or by the Department of State. It was felt that it was vital that it be recognized as an organization solely concerned with the purposes for which the Congress established it and would have no other role whatever. The substance of the recommendation for an amendment to Section 603 has been discussed with former Secretaries Cyrus Vance and Edmund Muskie who endorse it fully.

Respectfully submitted.

DEAN RUSK.

JUNE 3, 1981.

Hon. MAX BAUCUS,
U.S. Senate,
Washington, D.C.

DEAR MAX: Attached is a letter to the Judiciary Committee Subcommittee on Security and Terrorism from Dean Rusk regarding S. 391, the proposed "Intelligence Identities Protection Act of 1981". I think it's an excellent letter, and I hope you'll read it fully. It makes the case most persuasively, I think, for exempting the Peace Corps from the requirement to be added in proposed section 603 by the bill that each Federal agency designated by the President provide all possible cover to U.S. intelligence activities.

Last year the Judiciary Committee approved on a 7-6 vote such an exception to the predecessor of S. 391 (S. 2216)—also including AID in the exception.

I urge that you support a Peace Corps exception to section 603. According to the Additional Views of Senators Thurmond, Laxalt, Hatch, Dole, and Simpson in last year's report, they fully supported the traditional view that "the Peace Corps has never provided—and should never provide—such cover *and it has been effectively precluded from doing so by statute.* . . . We do not wish to revoke the *Peace Corps statutory exemption.* . . . But we do not wish to establish any further exemptions. . . ." S. Rept. No. 96-990, page 39. (Emphasis mine.)

Thus, the opposition in the Judiciary Committee to an exception for the Peace Corps last year was based on the predicate that it already had a statutory exemption. But that is a mistake. There is not and never has been any such exemption in law. There is a long-standing Executive Branch policy to this effect, but it is a policy that could be altered at any time unilaterally by the Executive and one that would seem to be drawn into serious question by the subsequent enactment of this new cover-giving obligation.

Although a President could choose to continue the exemption after enactment of the bill, the critical point to note here relates to the perception overseas—which lies at the very heart of the policy to begin with. As the Committee report stated at page 20 last year:

"The rationale for baring such use of the Peace Corps has been acknowledged by every President since its formation. Because of the vital importance of Peace Corps Volunteers and staff being able to fulfill their essential purpose of building links between the United States and the peoples of developing countries at the grassroots level, of providing practical and humanitarian assistance on a voluntary basis and of demonstrating through the personal commitment of the volunteers the interest of American citizens in the welfare of individuals in developing countries, the Peace Corps also has been substantially separate from the formal day-to-day official relations of governments. It is, has been, and must continue to be completely and absolutely separated from all intelligence activities. For that reason, the Peace Corps specifically bars individuals with any intelligence background from volunteer or employee positions with the Peace Corps. In addition to being barred from using Peace Corps volunteers as cover, under current Presidential policy directives, the intelligence community also has been barred from contacting, questioning or in any other way of seeking to use volunteers as intelligence sources. *To insure that section 503 is not perceived as altering the independence of the Peace Corps, the Committee adopted this amendment excluding that agency from the provisions of this section.*" (Emphasis added.)

I'd very much appreciate an opportunity to discuss this matter with you after you've reviewed this material and before you cast your vote in Committee. I consider such a statutory exception indispensable to the integrity of the Peace Corps, the safety of its workers overseas, and the future effectiveness of this very worthwhile program.

Cordially,

ALAN CRANSTON.

JUNE 3, 1981.

Hon. JOHN H. CHAFEE,
U.S. Senate,
Washington, D.C.

DEAR JOHN: Attached is a letter to the Judiciary Committee Subcommittee on Security and Terrorism from Dean Rusk regarding S. 391, the proposed "Intelligence Identities Protection Act of 1981". I think it's an excellent letter, and I hope you'll read it fully. It makes the case most persuasively, I think, for exempting the Peace Corps from the requirement to be added in proposed section 603 by the bill that each Federal agency designated by the President provide all possible cover to U.S. intelligence activities.

Last year the Judiciary Committee approved on a 7-6 vote such an exception to your predecessor bill to S. 391 (S. 2216)—also including AID in the exception.

When you reintroduced your bill this year, you did not include such an exception. I urge you to reconsider and support a Peace Corps exception. According to the Additional Views of Senators Thurmond, Laxalt, Hatch, Dole, and Simpson in last year's report, they fully supported the traditional view that "the Peace Corps has never provided—and should never provide—such

cover *and it has been effectively precluded from doing so by statute* . . . . We do not wish to revoke the *Peace Corps statutory exemption* . . . . But we do not wish to establish any further exemptions . . . ." S. Rept. No. 96-990, page 39. (Emphasis mine.)

Thus, the opposition in the Judiciary Committee to an exception for the Peace Corps last year was based on the predicate that it already had a statutory exemption. But that is a mistake. There is not and never has been any such exemption in law. There is a long-standing Executive Branch policy to this effect, but it is a policy that could be altered at any time unilaterally by the Executive and one that would seem to be drawn into serious question by the subsequent enactment of this new cover-giving obligation.

Although a President could choose to continue the exemption after enactment of the bill, the critical point to note here relates to the perception overseas—which lies at the very heart of the policy to begin with. As the Committee report stated at page 20 last year:

"The rationale for barring such use of the Peace Corps has been acknowledged by every President since its formation. Because of the vital importance of Peace Corps Volunteers and staff being able to fulfill their essential purpose of building links between the United States and the peoples of developing countries at the grassroots level, of providing practical and humanitarian assistance on a voluntary basis and of demonstrating through the personal commitment of the volunteers the interest of American citizens in the welfare of individuals in developing countries, the Peace Corps also has been substantially separate from the formal day-to-day official relations of governments. It is, has been, and must continue to be completely and absolutely separated from all intelligence activities. For that reason, the Peace Corps specifically bars individuals with any intelligence background from volunteer or employee positions with the Peace Corps. In addition to being barred from using Peace Corps volunteers as cover, under current Presidential policy directives, the intelligence community also has been barred from contacting, questioning or in any other way of seeking to use volunteers as intelligence sources. *To insure that section 503 is not perceived as altering the independence of the Peace Corps, the Committee adopted this amendment excluding that agency from the provisions of this section.*" (Emphasis added.)

I'd very much appreciate an opportunity to discuss this matter with you after you've reviewed this material. I consider such a statutory exception indispensable to the integrity of the Peace Corps, the safety of its workers overseas, and the future effectiveness of this very worthwhile program, and I hope you will agree and, if so, will urge the Judiciary Committee to except the Peace Corps.

Cordially,

ALAN CRANSTON.

Mr. CRANSTON. Mr. President, thus, I was extremely gratified by the fine leadership of the Senator from Montana (Mr. BAUCUS) on this issue and the committee's action in adopting the amendment.

However, Mr. President, as I said, the pending amendment by the bill's author, the Senator from Rhode Island (Mr. CHAFEE), is a matter of concern because of the situation that would obtain in conference with the House which has passed H.R. 4 with section 603 and no Peace Corps exception. I would, therefore, like to ask the Senator from Rhode Island several questions about this conference situation.

Mr. BAUCUS. Mr. President, will the Senator from California yield?

Mr. CRANSTON. I am delighted to yield.

Mr. BAUCUS. I have discussed this matter with the Senator from California and very much share his concerns. I believe it needs to be very clearly understood in consideration of this matter that the Senate's position is to be strongly in support of an explicit statutory exception for the Peace Corps if any legislation is to be enacted with an intelligence-agent-cover requirement along the lines of section 603 in H.R. 4 as passed by the House.

Mr. TSONGAS. Mr. President, as a former Peace Corps volunteer, I would say that I very much share these concerns, as I know does my colleague from Connecticut (Mr. DODD), who also served as a Peace Corps volunteer.

Mr. CRANSTON. I thank the Senators for their good words and ask the Senator from Rhode Island whether he agrees with the statement of the Senator from Montana with respect to the very clear will of the Senate on the question of the need for an "explicit statutory exception" if an intelligence-agent-cover provision like section 603 is in the bill?

Mr. CHAFEE. I do agree. In fact, I wish to make very clear that in offering this amendment, I am not in any way disagreeing with the critical importance of maintaining the historic total separation of the Peace Corps from intelligence activities. Indeed, I fully support that policy. As I explained to the Senator from California (Mr. CRANSTON) in my letter to him earlier this year, section 603 of S. 391 would require departments and agencies of the Government designated by the President to provide assistance for intelligence cover arrangements. The section does not require the Peace Corps or any other agency to provide cover. Nor does it designate any specific agency for this purpose. All that the section does is to provide that cover be effective.

In my judgment, it is unnecessary and unwise to put into any bill a listing of agencies which are not to provide cover for intelligence personnel. This sort of listing would not be believed by people overseas—in fact, it might tend to highlight the suspected relationship between the Peace Corps and the intelligence community. At the same time, it could focus the attention of terrorists and other parties on the representatives of other, unlisted Federal agencies who have people serving abroad.

Recently the Director of Central Intelligence wrote to the Director of the Peace Corps on just this issue and said:

Let me personally emphasize that I do not advocate and would indeed firmly oppose any designation of the Peace Corps for cover support. I can assure you that I have no intention of seeking to use the Peace Corps to provide cover for clandestine intelligence collection, and I certainly do not intend to change the longstanding CIA policy barring such use of the Peace Corps. It is not the intent of subsection 603(a) to foster secret directives at odds with this publicly stated policy, which has been in effect since 1961, the same year the Peace Corps was established.

It is my understanding that Director Casey's statement represents the position of this administration, and that this administration has no intention of departing from this policy in the future.

In spite of all these assurances, however, the perception still seems to exist in some minds that this section of S. 391 adversely affects the Peace Corps. On this basis, I am prepared to drop section 603 from the bill altogether as this appears to be the best solution to the problem. I will support this position in conference as well.

Mr. President, I ask unanimous consent that my letter to Senator CRANSTON, and Director Casey's letters on this matter, be inserted into the RECORD.

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

ATTACHMENT 2 (CHAFEE)

U.S. SENATE,
Washington, D.C. June 22, 1981.

Hon. ALAN CRANSTON,
Russell Senate Office Building, U.S. Senate, Washington, D.C.

DEAR ALAN: Thank you for contacting me regarding the Intelligence Identities Protection Act of 1981 (S.391), and your interest in a "Peace Corps" amendment to this bill.

As you recall, the Senate Committee on the Judiciary last year added such an amendment to S. 2216, my predecessor to S. 391, when it reported the bill. In reintroducing the legislation this year, I did not include a Peace Corps provision for several reasons.

First, S. 391 requires the President to establish procedures to ensure that undercover intelligence officers and employees receive effective cover. This provision of the bill does not, however, stipulate which element of government shall provide assistance, or what that assistance will be. In other words, as currently drafted, S. 391 does not require the Peace Corps, or any other agency, to provide cover at all. It simply requires that cover be effective.

Second, in my judgment, it is unnecessary and unwise to put into any bill a listing of agencies which are not to provide cover for intelligence personnel. this sort of listing would probably not be believed by people overseas—in fact, it might tend to highlight the suspected Peace Corps/intelligence relationship. Moreover, it would automatically focus the attention of foreign governments, terrorists and others on the representatives of other unlisted federal agencies who have people serving abroad.

Third, to my knowledge, the intelligence community never has, and never will, use the Peace Corps for intelligence purposes. This is due in part to the special nature of the Peace Corps, which every administration has understood and respected. But it is also due to the fact that representatives of the Peace Corps do not have the sort of access overseas which would provide the in-

telligence community with the sort of information they need. Thus, I see no need to legislate against something which is not now a problem, and which shows no likelihood of becoming a problem.

I realize that the Pauken nomination has tended to focus Congressional attention on the special role of the Peace Corps, and I appreciate your concern that this special status be maintained. I believe strongly, however, that this is not a real issue with regard to S. 391. I also believe that an effort to legislate an exemption for the Peace Corps in this case will do more harm than good.

Once again, thank you for raising this issue with me. I appreciate your interest in S. 391.

Warm regards.

Sincerely,

JOHN H. CHAFEE.

CENTRAL INTELLIGENCE AGENCY,
Washington, D.C., July 15, 1981.

Hon. LORET MILLER RUPPE,
Director, Peace Corps,
Washington, D.C.

DEAR MRS. RUPPE: Your letter of June 25, 1981, requested my views regarding policies governing cover relationships between CIA and the Peace Corps in connection with S. 391, the Intelligence Identities Protection Act, which will be considered by the Senate Judiciary Committee soon. Companion legislation, H.R. 4, is also pending in the House.

I understand that you are concerned with a provision in that proposed legislation that would require departments and agencies of the government designated by the President to provide assistance for cover arrangements to provide whatever assistance the President deems necessary to effectively maintain the secrecy of intelligence officers and employees. This language does not mandate that the Peace Corps or any other particular agency provide cover for intelligence personnel. Moreover, I do not advocate and would oppose any designation of the Peace Corps as an agency required to provide cover support. For these reasons, I am sure that you will agree that there is no need for a specific statutory exclusion of the Peace Corps from the cover provision of the proposed bill. Moreover, such a proposed amendment would be misleading for it would suggest that CIA desires to change its policy in this regard.

I can assure you that I have no intention of seeking to use the Peace Corps to provide cover for clandestine intelligence collection conducted by Central Inteliigence Agency personnel. I certainly do not intend to change the long-standing CIA policy barring such use of the Peace Corps, which is reflected in existing regulations.

Thank you for the opportunity to express my views. I hope that I have reassured you regarding CIA intentions. If you have any specific questions whatsoever regarding our policies, my General Counsel, Mr. Stanley Sporkin, will be happy to answer them. I look forward to an amicable relationship with you in the future.

Sincerely,

WILLIAM J. CASEY,
Director of Central Intelligence.

PEACE CORPS,
Washington, D.C., June 25, 1981.

Hon. WILLIAM J. CASEY,
Director, Central Intelligence Agency, Washington, D.C.

DEAR MR. CASEY: As we both begin our work with the new Administration, I write to you about a matter of mutual concern to our agencies. Specifically, I would like to bring to your attention the bill S. 391, the Intelligence Identities Protection Act which will be considered by the Senate Judiciary Committee soon. As you know, throughout the 20 year history of the Peace Corps, there has been a deliberate effort to keep separate our volunteers from any intelligence-gathering role. In connection with that policy, we have evolved our intelligence policy which bars former CIA employees, and others who have been in the intelligence-gathering business since less than 10-years prior to their application, from serving in the Peace Corps.

As you know, this policy has been in effect for the past twenty years and was last reaffirmed by our predecessors in 1978. I understand that your agency has very recently expressed the position that you have no intention of deviating from your current regulations prohibiting cover arrangements involving the Peace Corps and that it is not your intention to foster secret regulations at odds with those regulations which have been in effect for the past twenty years.

I look forward to hearing from you directly as to the CIA position on this matter. I think that it would be to our mutual benefit to share this correspondence with appropriate members of Congress, so that there will be no mistake as to the Peace Corps' total separation from the function of intelligence-gathering.

Sincerely,

LORET MILLER RUPPE,
Director.

CENTRAL INTELLIGENCE AGENCY,
Washington, D.C., September 14, 1981.

Hon. STROM H. THURMOND,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I am writing to you because of concerns about Central Intelligence Agency and the Peace Corps which several Senators have expressed to me in connection with S. 391, the Intelligence Indentities Protection Act, which the Senate Judiciary Committee will consider on Tuesday, 15 September.

Subsection 603(a) of the Bill would require departments and agencies of the government designated by the President to provide assistance for intelligence cover arrangements. The language of this provision does not require the Peace Corps or any other agency to provide cover for intelligence personnel. The authority to designate which agencies shall provide such cover is left where it currently resides and should remain, that is, with the President.

Let me personally emphasize that I do not advocate and would indeed firmly oppose any designation of the Peace Corps for cover support. I can assure you that I have no intention of seeking to use the Peace Corps to provide cover for clandestine intelligence collection, and I certainly do not intend to change the long-standing CIA policy barring such use of the Peace Corps. It is not the intent of subsection 603(a) to foster secret directives at odds with this publicly stated policy, which has been in effect since 1961, the the same year the Peace Corps was established.

It would be unwise, however, to put into the Identities legislation a listing of agencies which are not to provide cover for intelligence personnel. Such a listing would not be believed overseas. It would serve only to focus foreign intelligence services, violence-prone individuals, and terrorist groups in the overseas personnel of Federal agencies not included in the listing.

For these reasons, I am sure that you will agree that there is no need for a specific exclusion of the Peace Corps from the cover-related provision of the Identities Bill. I trust I have reassured you regarding CIA intentions. I am enclosing for your information recent correspondence to the same effect between the CIA and the Peace Corps.

Sincerely,

WILLIAM J. CASEY,
Director of Central Intelligence.

Enclosures.

Mr. CRANSTON. Do the distinguished floor managers, the Senator from Alabama (Mr. DENTON) and the Senator from Delaware (Mr. BIDEN), also agree with the Senators from Rhode Island and Montana that in dropping section 603 it will be the very clear will of the Senate that if there is to be a section 603 in the bill, it must contain an exception for the Peace Corps?

Mr. DENTON. Yes.

Mr. BIDEN. Very much so. That is the Senate's clear will.

Mr. CRANSTON. I thank the Senators. Thus, would they also agree that should the Chafee amendment be adopted—and I will support it—and the Senate turns out to be unable to convince the other body in conference to delete section 603 from the conference agreement, then the Senate conferees must insist that section 603 can stay in the conference report only if the Peace Corps exception as reported from our Judiciary Committee is added, and that the Senate conferees will be unyielding on this point?

Mr. CHAFEE. Mr. President, I agree with the analysis of the Senator from California and assure him that that will be my position if I am named a conferee.

Mr. DENTON. Mr. President, I agree also and will in conference certainly forcefully advocate the Senate position on this, as the Senator from California and the Senator from Rhode Island have described it.

Mr. BIDEN. Mr. President, I also will be adamant on this point in the conference: Either strike section 603 entirely or amend it to insert the specific Peace Corps exception.

Mr. CRANSTON. Mr. President, I thank the Senators very much, and greatly appreciate their cooperation in clarifying this matter so very important to the future integrity and effectiveness of the Peace Corps.

Mr. BAUCUS. Mr. President, I concur with my colleague from California and thank my fellow committee members and the bill's author, Senator CHAFEE.

Mr. CRANSTON. Finally, Mr. President, whether or not there is section 603 in the conference report, does the author of the bill agree that the conferees should be urged to state that the provisions of section 1.6(a) of the recently issued Executive Order No. 12333, relating to cooperation of Federal agencies with the Director of Central Intelligence, should not be construed as altering in any way the historic policy of complete separation of the Peace Corps from intelligence activities?

Mr. CHAFEE. I agree.

Mr. BIDEN. I share that view as well.

Mr. LEAHY. Mr. President, I have listened to this discussion with great interest and note that, as a member of the judiciary subcommittee that handled this bill and a strong supporter of the Peace Corps, I share fully the concerns of the Senators from California, Montana, Massachusetts, and Connecticut, and endorse completely the agreement with the bill's author and floor managers as to both the Senate's clear will on this matter and the position of the Senate conferees in conference.

UP AMENDMENT NO. 823

(Purpose: To strike out section 603 relating to procedures for establishing cover for intelligence officers and employees.)

Mr. CHAFEE. Mr. President, I send an unprinted amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Rhode Island (Mr. CHAFEE) proposes an unprinted amendment numbered 823.

Mr. CHAFEE. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

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

The amendment is as follows:

On page 5, strike out lines 4 through 23.

On page 6, line 2, strike out "SEC. 604." and insert in lieu thereof "SEC. 603.".

On page 6, line 9, strike out "SEC. 605." and insert in lieu thereof "SEC. 604.".

On page 6, line 13, strike out "SEC. 606." and insert in lieu thereof "SEC. 605.".

On page 9, immediately after line 10, amend the table of contents to read as follows:

"TITLE VI—PROTECTION OF CERTAIN NATIONAL SECURITY INFORMATION

"Sec. 601. Protection of identities of certain United States undercover intelligence officers, agents, informants, and sources.
"Sec. 602. Defenses and exceptions.
"Sec. 603. Extraterritorial jurisdiction.
"Sec. 604. Providing information to Congress.
"Sec. 605. Definitions.".

Mr. CHAFEE. Mr. President, I move the adoption of the amendment.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from Rhode Island (Mr. CHAFEE.)

The amendment (UP No. 823) was agreed to.

Mr. BIDEN. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. CHAFEE. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

AMENDMENT NO. 1256

Mr. CHAFEE. Mr. President, I ask that we now return to the consideration of the amendment which was the business before the Senate prior to the disposition of the last amendment.

The PRESIDING OFFICER. The Senate will not return to its consideration.

Mr. CHAFEE. Mr. President, I suggest the absence of a quorum.

Mr. BIDEN. Mr. President, will the Senator withhold that for a moment?

Mr. CHAFEE. Yes.

Mr. BIDEN. Mr. President, we are winding down. My understanding is that we are going to be closing up fairly soon on this issue for today. Senator DURENBERGER, Senator GORTON, Senator SPECTER, and several other Senators have an interest in speaking on this bill. I have discussed this with the Senator from Rhode Island. He is also anxious for them to have their opportunity to discuss this.

Although we have not agreed on a time certain to vote on this measure tomorrow, we have all been operating under the assumption that we would vote tomorrow.

I want to ask the Senator from Rhode Island if his understanding is the same as mine, that if we do vote tomorrow, or before we vote, whether it is tomorrow or whenever, that we will have an opportunity to hear from those Senators I have mentioned, and possibly several others who would wish to add to this debate, and that also each of us will have an opportunity to spend 15 minutes or so summarizing our position.

Is that what he understands the leadership position to be generally?

Mr. CHAFEE. Yes, Mr. President, definitely.

As I understand the proceedings tomorrow, as soon as we come in, we move immediately to the Department of Justice authorizations bill. There will be some votes on that at around 2 o'clock.

The PRESIDING OFFICER. If the Senator from Rhode Island will indulge the Chair, he will refer to the order which is pending. The present order reads as follows:

Ordered, That at 9:30 a.m. on Tuesday, Mar. 2, 1982, the Senate resume consideration of S. 951, a bill to authorize appropriations for the purpose of carrying out the activities of the Department of Justice for fiscal year 1982, and for other purposes and at that time there be not to exceed 2 hours of debate, to be equally divided and controlled, on the Johnston amendment No. 1252, and that upon the disposition thereof, the Senate proceed without debate, motion, point of order, or appeal, to the disposition of the Heflin amendment No. 1235.

Ordered further, That these two amendments be the only amendments in order.

Ordered further, That upon the disposition thereof, without intervening debate, motion, point of order, or appeal, third reading occur, to be followed immediately without intervening debate, motion, or point of order by final passage of S. 951, as amended, and that no debate be permitted on a motion to reconsider. (Feb. 25, 1982.)

Let me inquire of the Parliamentarian.

The Chair will note that there is no time limit on the amendment of the Senator from Alabama, amendment No. 1235. The Chair is now informed that there is no time limit at all.

Mr. CHAFEE. Mr. President, I want to assure the Senator from Delaware that the Senators he referred to will have an opportunity to be heard. There is no question about that. There is no time limit, actually, on this bill which is before us. So they will be heard.

It would be my understanding that probably their discussions would take place tomorrow afternoon, following the votes which have been ordered, but that we would not proceed to any votes on this matter tomorrow.

Mr. BIDEN. If the Senator will yield, I obviously do not object. There has been a good deal of comity between the Senator and myself on this issue. I just want to make sure that our colleagues, when they read the RECORD, will know what is likely to happen tomorrow.

We have been operating under the assumption, though there has been no time agreement, that we would be voting on this tomorrow. At least now it looks like there is a possibility we will not be voting on it tomorrow. The Senator from Delaware is prepared, once those few Senators speak, to go forward, but I understand there may be other exigencies which would make it difficult for us to vote.

I did not intend to pin the Senator down. I wanted a sense of where we are going. That answers my question and I do not have a further question on that issue.

Mr. CHAFEE. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BAKER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. BAKER. Mr. President, S. 391, the Intelligence Identities Protection Act, is now before the Senate, and I want to take this opportunity to commend the distinguished Senator from Rhode Island, Senator CHAFEE, and the distinguished manager of the bill, Senator DENTON. Their patience and dedication has been most appreciated, and their efforts on behalf of U.S. security interests have been crucial to the development of this important legislation.

As President Reagan wrote in a letter to me last month,

Legislation to make criminal the unauthorized disclosure of the names of our intelligence officers remains the cornerstone for the improvement of our intelligence capabilities. Nothing has been more damaging to this effort than the pernicious disclosures of the names of officers whom we send abroad on dangerous and difficult assignments.

Mr. President, I support this legislation, and I urge my colleagues to do the same. This is a matter whose importance cannot be overemphasized.

● Mr. METZENBAUM. Mr. President, I rise in opposition to the amendment that would permit criminal prodecution for disclosing intelligence agents' identities without a showing of an intent to impair U.S. foreign intelligence activities. I want to commend the distinguished Senator from Delaware, Senator BIDEN, for the admirable job he has performed in handling this most difficult issue.

Mr. President, we are ligislating in an extremely difficult area here. Unquestionably we have an obligation to safeguard the lives of agents engaged in activities which protect our national security. We must condemn any actions that intentionally endanger the lives of intelligence agents in order to distrupt our foreign intelligence activities. At the same time, however, we have no more urgent mission than the protection of the press' freedom to investigate and report on matters that are in the public interest. For 200 years the maintenance of a free press has been the core of our constitutional way of government. To the maximum extent possible, we must continue to permit the press to function without encumbrance.

The legislation before us today, Mr. President, attempts to balance these two very delicate matters. As my good friend from Delaware well knows, that is not an easy task.

The Judiciary Committee, after extensive consideration of the issue, arrived at a reasonable method for protecting our national security and the safety of individual intelligence agents without compromising the freedom of the press to report on matters in the public interest. By requiring proof of an intent to impair or impede our foreign intelligence activities, the bill as reported by the Judiciary Committee adequately protects against the kinds of identity disclosure which all of us condemn. At the same time it protects members of the press who have a legitimate interest in investigating and reporting on corrupt, illegal, improper, or questionable intelligence activities under circumstances where the identities of covert agents are necessary to the story. The bill as reported by the Judiciary Committee represents a proper balancing of these two competing concerns.

The proposed amendment to substitute a reason-to-believe standard would, however, tip the balance against legitimate reporting in the intelligence area. It would have a chilling effect on the kind of journalistic endeavors which the first amendment is meant to protect.

Moreover, there is no need to tip the balance in this fashion. It is my understanding that both the CIA and the Department of Justice have indicated their satisfaction with the bill as reported by the Judiciary Committee. If these clearly self-interested parties are satisfied that the bill with the intent language adequately safeguards agents' identities, then why should we enact legislation that has an even greater chilling effect on legitimate press activities?

More than 140 constitution scholars, including some of our leading first amendment experts, have stated unequivocally that the reason-to-believe standard will not pass constitution muster. Why then should we enact such a standard, especially if the intelligence agencies themselves do not believe it is essential?

A free press in this country is too precious a right to impair in this manner. I urge my colleagues to join me in opposing this amendment.●

● Mr. HAYAKAWA. Mr. President, it seems as though we in the United States sometimes have a naive view of how our Nation is perceived abroad.

After all, our country seeks peace. As President Reagan noted last year in his worldwide address on nuclear disarmament, the United States is not an aggressor. Immediately following World War II, we alone possessed the atom bomb, and yet we sought world stability, not world domination.

Our people are charitable. In countless disasters around the world, the American people and their Government have come to the aid of the afflicted.

So, Mr. President, it is not surprising that, so often, we cannot comprehend the hostility our Nation encounters abroad. Our embassies are bombed, our officials kidnapped, and our policies attacked.

In this increasingly tense international atmosphere, thousands of our citizens are courageously serving their country in the intelligence gathering operations so important to our national security. These Government employees were aware of the personal dangers confronting them when they elected to engage in intelligence activities. But they now find themselves threatened not only from the front, but from behind as well; threatened by their fellow citizens.

In 1975 American Philip Agee's Counterspy magazine identified Richard S. Welch as CIA station chief in Athens, Greece. Richard Welch was murdered 1 month after the information was disclosed in the Athens Daily News.

In 1980 another American citizen, Louis Wolf, revealed the names of 15 alleged CIA agents in Jamaica. Within a week assassination attempts were made on 2 of the 15.

Mr. President, we are now approaching the seventh anniversary of the death of Richard Welch, and still there are no laws to prohibit the type of despicable act that led to his murder. Those citizens who would destroy our intelligence-gathering capabilities are still trotting around the globe "naming names" and endangering the lives of conscientious Americans.

I have cosponsored S. 391, the Intelligence Identities Protection Act, so that we can at last bring an end to this type of activity. The bill prohibits the unauthorized disclosure of intelligence agents and directs the President to take steps to insure the secrecy of intelligence relationships.

Section 601(a) and (b) of the act set stiff penalties for those who misuse their authorized access to classified information by disclosing the identities of covert agents.

Section 601(c) targets those who engage in patterns of activity to identify and expose covert agents. The language originally proposed by Senator CHAFEE and approved overwhelmingly by the House would penalize such persons who have "reason to believe" that their activities would harm U.S. intelligence activities.

The Senate Judiciary Committee, however, decided narrowly to change the "reason to believe" requirement to one of "intent." The Government would have to prove, not that an individual engaged in "naming names" had reason to believe that his activities were harmful, but that he intended them to damage American intelligence operations.

I favor the language originally proposed by Senator CHAFEE and supported by both the Carter and Reagan administrations. The intent standard would be difficult to prove and would allow an individual to claim that his anti-intelligence actions were intended not to impair U.S. intelligence efforts, but to expose certain activities that were improper and worthy of public discussion. In other words, whatever the results, the intention was good.

Senator CHAFEE'S "reason to believe" standard would deal more effectively with those who threaten our national security, while preserving constitutional rights. To convict, the Government would have to prove not only that an individual had reason to believe that his activities imperiled foreign intelligence operations, but that beyond a reasonable doubt: First, there was an intentional disclosure of information which identified a covert agent; Second, the disclosure was made to someone not authorized to receive classified information; Third, the person who made the disclosure knew that the information disclosed identified a covert agent; Fourth, the person who made the disclosure was aware that the United States was taking affirmative measures to conceal the covert agent's classified intelligence affiliation; and Fifth, the disclosure was made in the course of a pattern of activities intended to identify and expose covert agents.

This language will enable the Government to convict the guilty, while continuing to allow legal scrutiny of government activity. A reporter who, in the course of an investigation, revealed an agent's identity would not be guilty under the act, because he would not meet its "pattern of activities" requirement.

Mr. President, I commend the Senator from Rhode Island for introducing this legislation and for continuing to press for the best possible language. Like him, I recognize that if we are to deter effectively those who would destroy legitimate American activities, we must have an effective law.●

ROUTINE MORNING BUSINESS

Mr. BAKER. Mr. President, I ask unanimous consent that there now be a brief period for the transaction of routine morning business, extending not more than 10 minutes in length, in which Senators may speak for not more than 3 minutes each.

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

APPOINTMENT BY THE VICE PRESIDENT

The PRESIDING OFFICER. The Chair, on behalf of the Vice President, pursuant to Public Law 84-944, appoints the Senator from Washington (Mr. GORTON) to the Senate Office Building Commission.

S. 2148—TO PROTECT UNBORN HUMAN BEINGS

Mr. HELMS. Mr. President, I introduce today a bill whose purpose is to protect unborn human beings from the violence of abortion. Many of us in this body, including a number elected in 1980, have made a public commitment to seek legal protection for the unborn. The end of the 97th Congress is but months away, and we have not yet been able to act on this crucial commitment.

With tens of thousands of unborn babies being killed by abortions every week, I suggest to my distinguished colleagues in the Senate that the time is now.

The bill I introduce today, Mr. President, can be divided into four basic parts. Part I—section 1—contains findings from treaties, international bodies, American history, and Senate hearings concerning the unborn and the right to life.

Part II—sections 2 through 6—gets the Federal Government totally out of the abortion business. Instead of tying up Congress every year during the appropriations process over the Hyde amendment, part II would make Hyde permanent law. Among other things, it also contains a freedom-of-conscience clause to protect medical personnel from discrimination because of their prolife convictions.

Part III—sections 7 through 9—applies the bill's findings to constitutional protections over which Congress has enforcement powers. This part also provides for certain expedited Supreme Court review. Part IV—section 10—is a severability clause which should assure maximum support within Congress from those approaching the abortion subject with different legal concerns.

Mr. President, in concluding my comments on this bill I call my colleagues' attention to the January 11, 1982, edition of Newsweek magazine. On the cover of that issue was a picture of an 8-week old unborn baby. I challenge any honest observer to study that picture and the nature of prenatal development, and then try to refute the fact that the unborn, just like those of us who have been born, are living individual human beings. Newsweek knows when human life begins and, I submit, this Congress knows. It is time for us to act and to protect that precious gift which we all share, that precious divine gift—individual human life.

Mr. President, today marks the beginning of March and both Houses of the Congress are preparing for a prolonged debate over the Federal budget and the levels of appropriation for the various Federal departments and agencies. Before we embark on that, it is necessary that we begin with the consideration of this issue in a timely fashion that will permit consideration of it also in the House of Representatives. Therefore, I am introducing this legislation today and objecting to its being referred to committee. It is my intent that the Senate proceed to the consideration of this bill at the earliest possible date. Two subcommittees of the Judiciary Committee have held extensive hearings on this subject. It is a subject which has been extensively debated by the Senate and the time for action is now.

Mr. President, I ask unanimous consent that the full text of the bill be printed in the RECORD.

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

S. 2148

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 42 of the United States Code shall be amended at the end thereof by adding the following new chapter:

"CHAPTER 101

"SECTION 1. The Congress finds that—

(a) The American Convention on Human Rights of the Organization of American States in 1969 affirmed that every person has the right to have his life protected by law from the moment of conception and that no one shall be arbitrarily deprived of life;

(b) The Declaration of Human Rights of the United Nations in 1959 affirmed that every child needs appropriate legal protection before as well as after birth;

(c) The Nuremburg International Military Tribunal for the trial of war criminals declared the promotion of abortion among minority populations, especially the denial of the protection of the law to the unborn children of Russian and Polish women, as a crime against humanity;

(d) The Federal Constitutional Court of the Federal Republic of Germany in 1975 ruled that the life which is developing itself in the womb of the mother is an independent legal value which enjoys the protection of the constitution and the state's duty to protect human life before birth forbids not only direct state attacks, but also requires the state to protect this life from other persons;

(e) The Declaration of Independence affirmed that all human beings are endowed by their Creator with certain unalienable rights among which is the right to life.

(f) As early as 1857 the American medical profession affirmed the independent and actual existence of the child before birth as a living being and condemned the practice of abortion at every period of gestation as the destruction of human life;

(g) Before 1973, each of the several states had enacted laws to restrict the performance of abortion;

(h) Agencies of the United States continue to protect human life before birth from workingplace hazards, the effects of dangerous pharmaceuticals, and other hazardous substances;

(i) It is a fundamental principle of American law to recognize and affirm the intrinsic value of all human life; and

(j) Scientific evidence demonstates the life of each human being begins at conception.

SEC. 2. No agency of the United States shall perform abortions, except when the life of the mother would be endangered if the child were carried to term.

SEC. 3. No funds appropriated by Congress shall be used directly or indirectly to perform abortions, to reimburse or pay for abortions, or to refer for abortions, except when the life of the mother would be endangered if the child were carried to term.

SEC. 4. No funds appropriated by Congress shall be used to give training in the techniques for performing abortions, to finance research related to abortion, or to finance experimentation on aborted children.

SEC. 5. The United States shall not enter into any contract for insurance that provides, directly or indirectly, for payment or reimbursement for abortions other than when the life of the mother would be endangered if the child were carried to term.

SEC. 6. No institution that receives federal financial assistance shall discriminate against any employee, applicant for employment, student, or applicant for admission as a student, on the basis of that person's opposition to abortion or refusal to counsel or assist in the performance of abortions.

SEC. 7. Upon the basis of the findings herein, and in the exercise of the powers of Congress, including its power under section 5 of the Fourteenth Amendment to the Constitution of the United States, the Congress hereby recognizes that for the purpose of enforcing the obligation of the States under the Fourteenth Amendment not to deprive persons of life without due process of law, each human life exists from conception, without regard to race, sex, age, health, defect, or condition of dependency, and for this purpose "person" includes all human beings.

SEC. 8. Congress further recognizes that each State has a compelling interest, independent of the status of unborn children under the Fourteenth Amendment, in protecting the lives of those within the State's jurisdiction whom the State rationally regards as human beings.

SEC. 9. Any party may appeal to the Supreme Court of the United States from an interlocutory or final judgment, decree, or order of any court of the United States regarding the enforcement of this Act, or of any State law or municipal ordinance based on this Act, or which adjudicates the constitutionality of this Act, or of any such law or ordinance. Any party to such case shall have a right to direct appeal to the Supreme Court of the United States on the same terms as govern appeals pursuant to 28