Upon his retirement in 1972, Mr. Dunlap was named honorary chairman of Nationwide and he has continued to maintain an active interest in his companies. According to the present general chairman, John Fisher:

Its a very good thing that George Dunlap has been looking over our shoulders all these years. If he hadn't been doing that, I'm not sure that we'd be where we are today.

George Dunlap has clearly given dedicated leadership to the cooperative movement and organizations at all levels from his home county to the international scene where he has served as a delegate to many congresses of the International Cooperative Alliance (ICA) and its central committee, headquartered in London, England.

In addition to his leadership in the cooperative community, George Dunlap has given great support to the education of others through his service on local school boards and as a longtime trustee of Otterbein College in Westerville, Ohio, which has honored him with an honorary doctor of laws degree.

According to John Fisher at Nationwide:

When you couple Mr. Dunlap's ability to master and analyze all forms of information with his ability to work with people and to understand them, you have the qualities of a leader.

Mr. President, it is an honor for me to recognize the outstanding abilities and leadership given by this citizen of the State of Ohio. I hope my colleagues will join me in wishing him congratulations on the dedication of the facilities in Washington in his honor this morning and continued good health and best wishes for the future.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

INTELLIGENCE IDENTITIES PROTECTION ACT OF 1981

The PRESIDING OFFICER. Under the previous order, the hour of 11 a.m. having arrived, the Senate will now resume consideration of the pending business, S. 391, which the clerk will report.

The legislative clerk read as follows:

A bill (S. 391) to amend the National Security Act of 1941 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.

Mr. DENTON. 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. DENTON. 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 President, I ask unanimous consent that the order for the quorum call be rescinded.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. DENTON. I yield to the distinguished Senator from Texas.

The PRESIDING OFFICER. The Senator from Texas.

Mr. TOWER. Mr. President, I will be brief. I want to express my strong support for S. 391 and for the amendment proposed by the distinguished Senator from Rhode Island, Mr. CHAFEE. Having had years of experience and associating with the intelligence-gathering community, particularly in my capacity as vice chairman of the first Select Committee to Investigate the Intelligence Community, I have come to the conclusion that it is imperative that we protect the intelligence-gathering capability of the United States of America.

We already operate at a substantial disadvantage in this connection in competing with the Soviet Union. The Soviet Union is a closed society, with a vastly greater intelligence network than that possessed by the United States. It is proscribed by no rules and by no moral standards.

Now, we would certainly not want to trade our situation for that of the Soviet Union. We prefer an open society, whatever its disadvantages may be.

But it seems to me that we can take reasonable steps to protect our intelligence-gathering capability, considering the fact the Soviet Union, in addition to its enormous intelligence networks, maintains a clandestine infrastructure in virtually every country in the world. In the Third World, they are, for the most part, well organized, well disciplined, well funded, and, too often, well armed. Sometimes they are not so clandestine. We must have some capability to counter the threat that is posed by this enormous Soviet capability.

So I think it is essential that this legislation pass. I think without it we will find it increasingly difficult to fulfill the intelligence needs of the United States. We will find it difficult to get the support of the intelligence services of friendly countries that, in fact, as a result of our investigation, in the midseventies, in many instances, diminished their cooperation with the United States for fear that our passion for doing so many things in the open and forbear the operations, that sometimes the sources and methods of our intelligence-gathering community might compromise their own intelligence-gathering efforts.

I think it is important in our effort to provide leadership in the free world to provide a hedge against enormous global ambitions of the Soviet Union in order to deter the military and political ventures that they engage in throughout the world. We must have the most effective possible intelligence-gathering community. This is reasonable legislation and a step in the right direction. I strongly urge its passage and the passage of the Chafee amendment.

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

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

RECESS UNTIL 2 P.M.

The PRESIDING OFFICER. Under the previous order, the hour of 12 noon having arrived, the Senate will now stand in recess until 2 p.m.

At 12 noon, the Senate recessed until 2 p.m.; whereupon, the Senate reassembled when called to order by the Presiding Officer (Mr. LUGAR).

APPOINTMENTS BY THE VICE PRESIDENT

The PRESIDING OFFICER. The Chair, on behalf of the Vice President, pursuant to 10 U.S.C. 9355(a), appoints the following Senators to the Board of Visitors to the U.S. Air Force Academy: the Senator from Alaska (Mr. STEVENS), Appropriations; the Senator from Louisiana (Mr. JOHNSTON), Appropriations; the Senator from Arizona (Mr. GOLDWATER), Armed Services; and the Senator from Colorado (Mr. HART), at-large.

The Chair, on behalf of the Vice President, pursuant to 10 U.S.C. 6968(a), appoints the following Senators to the Board of Visitors to the U.S. Naval Academy: the Senator from Idaho (Mr. MCCLURE), Appropriations; the Senator from Iowa (Mr. JEPSEN), Armed Services; the Senator from South Carolina (Mr. HOLLINGS), Appropriations; and the Senator from Maryland (Mr. SARBANES), at-large.

The Chair, on behalf of the Vice President, pursuant to title 46, section 1126(c), of the United States Code, appoints the Senator from New York (Mr. MOYNIHAN) to the Board of Visitors to the U.S. Merchant Marine Academy; and the Chair announces, on behalf of the chairman of the Committee on Commerce, Science, and Transportation (Mr PACKWOOD), his appointments of the Senator from Washington (Mr. GORTON) and the Senator from Hawaii (Mr. INOUYE) as members of the same Board of Visitors.

Mr. MOYNIHAN. Mr. President, I wish to thank the Chair and the Vice President for the distinction they have graciously conferred in appointing me a member of the Board of Visitors of the U.S. Merchant Marine Academy, an honor which I very much cherish and of which I hope to be worthy.

The PRESIDING OFFICER. The Chair, on behalf of the Vice President, pursuant to title 14, section 194(a), of

the United States Code, appoints the Senator from Connecticut (Mr. DODD) to the Board of Visitors to the U.S. Coast Guard Academy; and the Chair announces, on behalf of the chairman of the Committee on Commerce, Science, and Transportation (Mr. PACKWOOD), his appointments of the Senator from Alaska (Mr. STEVENS) and the Senator from South Carolina (Mr. HOLLINGS) as members of the same Board of Visitors.

INTELLIGENCE IDENTITIES PROTECTION ACT OF 1981

The Senate continued with the consideration of S. 391.

Mr. MOYNIHAN. Mr. President, I rise to support S. 391, the Intelligence Identities Protection Act of 1981, as reported by the Committee on the Judiciary.

On January 24, 1980, I introduced the Intelligence Reform Act of 1980, one of whose sections was similar to the Intelligence Identities Protection Act we are considering today.

At that time, I explained the purpose of the relevant section as follows:

> In order to provide greater security for those who undertake intelligence work, our proposal will make criminally liable any individual who discloses the name of an intelligence operative, if he has learned the name as a result of his authorized access to such information, or if he discloses it with the intent of impairing or impeding the foreign intelligence activities of the United States.

At the time the Intelligence Reform Act was introduced, the cosponsors and I recognized that the part of the bill which dealt with disclosures by outsiders—which is to say, by those who had not had authorized access to the identifying information—posed a substantial constitutional problem.

The bill had to be drafted so as to be respectful of the freedom of the press enshrined in the first amendment, and, at the same time, to be usable against those who, in effect, had set up private counterintelligence operations for the purpose of identifying and exposing U.S. intelligence operatives, and clearly thereby impairing or impeding the foreign intelligence activities of the United States.

During the past 2 years, the Select Committee on Intelligence, on which I now serve as vice chairman, and the Committee on the Judiciary have wrestled with this problem, which presents ambiguities and difficulties to all of us in this Chamber.

Some have tried to argue that this problem is insoluble and that Congress has no choice but to allow persons such as the publishers of the Covert Action Information Bulletin to continue their private intelligence operations against the United States and to continue their practice, as they put it, of "naming names," for the explicit purpose of impeding our intelligence capabilities.

I recongnize the weight of this argument and certainly acknowledge its historical antecedents and the full sincerity of those who propound it; yet, I dispute it.

In taking this position, I rely in part on the majority opinion in Haig against Agee, which was decided by the Supreme Court on June 29 of last year. In commenting on the activities of Philip Agee—activities which also would be banned by the bill presently under consideration, Agee having had authorized access—the Court said:

> 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 law.

Nevertheless, the process of striking a balance between the Government's legitimate need to protect its intelligence activities and the right of the press to report what it is able to learn of the workings of Government has been a long and difficult one.

I believe that the Judiciary Committee has struck a proper balance, surely the best balance available to us, and that its version of the bill should be accepted by the Senate.

As reported by the committee, S. 391 would impose a criminal penalty on persons who disclose a covert agent's identity in the "course of an effort to identify and expose covert agents with intent to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure."

An amendment offered by my distinguished colleague and friend, the Senator from Rhode Island, would strike the specific intent element and substitute what in the judgment of the Senator from New York is the less stringent requirement of proof of reason to believe that the conduct would cause harm to U.S. intelligence activities.

Here, Mr. President, I believe we speak from a large and ancient corpus of common law, statutory law, and case law that reason to believe requires a lesser standard of proof than intent.

It is the general case, as I understand, and I do not speak here as a legal scholar, that in matters of large consequence intent is the characteristic standard against which proof must be offered by the State in criminal trials.

The amendment offered by the Senator from Rhode Island also contains a course of conduct requirement, called a "pattern of activities", which is essentially the same as a "course of effort".

The purposes sought by the several versions over the past several years have remained the same. Each successive change has represented an attempt to be more precise in codifying these purposes in the most satisfactory legal language given the constitutional dilemma which I described at the outset of these remarks.

In reporting the Intelligence Reform Act 2 years ago, the Select Committee on Intelligence explained its legislative purpose. The report stated:

> It is the purpose of the committee * * * to preclude the inference and exclude the possibility that casual discussion, political debate, the journalistic pursuit of a story on intelligence or the disclosure of illegality or impropriety in Government will be chilled by the enactment of the bill.

I grant that it is one thing for a committee to say this and another thing to insure that it will be the case. But it is in any event within our power to do more than to say we have no intent to chill, we have no intent in any way to inhibit the legitimate activities of the press and the necessary and traditional purposes of political debate.

And the committee went on to state:

> The standard adopted * * * applies criminal penalties only in very limited circumstances to deter those who make it their business to ferret out and publish the identities of agents. 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.

The specific intent standard adopted by the Judiciary Committee constitutes in my judgment, constituted then and constitutes now, a more accurate statutory expression of the Intelligence Committee's objectives. In addition, it is acceptable to the administration. This surely must be a matter that carries weight in this Chamber, as we are engaged in an effort to support the objectives of this administration as we were the objectives of the preceding one.

In this regard, in April 1981, the Director of Central Intelligence, the Honorable William J. Casey, wrote to the House Permanent Select Committee on Intelligence that the Central Intelligence Agency "would support enactment" of either version. Now I would hope it would be attended to in this Chamber that the present Director of Central Intelligence has stated in writing that either version is acceptable, that either version would be supported. It is then our responsibility to choose the better of the two.

In May 1981, before the Subcommittee on Security and Terrorism of the Senate Committee on the Judiciary, Richard Willard, then counsel to the Attorney General for intelligence policy, testified that the Department of Justice would support either version and that both "would be a great improvement over the present situation and both would be held constitutional and would be enforceable."

I emphasize that latter point. The Department of Justice, the counsel to the Attorney General for intelligence policy, says both would be a great improvement over the present situation,

both would be held constitutional, and both would be enforceable.

While the administration continues to support both alternatives, let me concede that it has expressed "a preference" for the "reason-to-believe" language in the amendment of the Senator from Rhode Island on the ground that it will more likely lead to effective prosecution.

There appears to be general agreement that the specific intent standard would put the Government to a more exacting standard of proof, and surely we acknowledge, those of us who support the report of the committee, that we do intend to put the Government to an exacting standard of proof.

This is an unusual exercise by our Government and our Congress.

We have not, in the last 35 years, if memory holds, that the Central Intelligence Agency has existed, had any criminal statute dealing with protecting the identities of covert agents. Indeed in the history of the United States, after a rather too precipitate beginning in the 1798's when we adopted all manner of sedition laws—some directed at the not overly ominous activites of Quaker gentlemen who sought to negotiate peace here and there in the world—with a degree of concern for treason and espionage which was rather characteristic of that time, we did very little in the subsequent century. We passed the Espionage Act of 1917 in the height of a war fever and to our credit, we have wisely left it on the books ever since. So we come to this matter with only intermittent, spare, and cautious acts in our own time.

We are proposing an act which could bring journalists before the courts to be prosecuted by their Government for their journalistic activity. To require a more exacting standard of proof of government is hardly an imprudent or unwise course, because it reasonably reflects the traditional judgment of this Nation that our interests in preserving free speech and a free press transcend in importance the value of prosecutorial convenience.

We are not enacting this bill to ease the burdens of the U.S. attorneys. We are enacting this bill to protect the national security of the United States in the face of a new phenomenon, the deliberate effort on the part, in some cases, of previous members of the intelligence community, and in other instances, persons altogether outside, to harass, to impede, to impair the foreign intelligence activities of the United States.

This is new. This is not a decade old in our experience, and just as it is new in our experience, so ought we to be cautious in our response.

This standard of proof, which we propound, properly takes into account that the chief characteristic, which distinguishes a person who engages in the business of naming covert agents as against a journalist who reveals agents' names as part of a legitimate news story, is the intent with which each acts.

At the risk of being repetitious, Mr. President, may I repeat that the standard of proof which we propose takes into account that the distinguishing characteristic between a person who engages in the business of naming covert agents and a journalist who reveals names as part of a legitimate news story is the intent with which each acts.

The namer of names intends to expose the identity of agents with the ultimate purpose of disrupting intelligence operations. The journalist's purpose in disclosing the identity of an agent is not to disrupt intelligence activities in the large, in general, but to inform readers of things a journalist feels the reader has a right to know, not the least, the possibility of abuse or wrongdoing.

We have had in the interval since these matters have come before our committees and this Chamber an example of the disclosure by journalists of activities of former members of the intelligence community on behalf of avowed adversaries of the United States. This disclosure, it surely would be agreed today—any Member of this Chamber would agree—was very much in the interests of the intelligence community and the national security of the United States, and in no way intended to impair or impede intelligence activities. Yet it involved the disclosure of names which had at least heretofore not been public property.

The reason-to-believe standard is simply not an adequate statutory expression of the purpose of its supporters to protect press freedom. May I be most explicit in that regard? I have not the least question of the purpose of the supporters of the reason-to-believe standard—I do not, at least, deny that their purpose is to protect press freedom. We ask does their standard do this as well as the standard which we propose? Contrary to the suggestions made by some of my colleagues, the specific-intent standard would not make the statute ineffective as a prosecutorial tool against persons who assume the trappings of the journalistic profession for the purpose of disclosing the identities of covert agents. We have the testimony of Mr. Willard of the Justice Department to that effect.

One should be confident that prosecutors and juries will be able to detect those who assume the mantle of journalism for illegitimate purposes, just as they infer an illegitimate intent in other cases in the criminal law where convictions require proof of specific intent. This is a familiar standard in criminal jurisprudence, one which has served us well in the widest range of instances, and will also serve us well here.

May I emphasize that the Department of Justice has stated that this standard would indeed be enforceable. That is their word, "enforceable," and I would also refer my colleagues to the statement in the RECORD of March 4 of the junior Senator from Pennsylvania (Mr. SPECTER), drawing upon his distinguished service as a prosecutor. The Senator strongly confirmed the judgment of the Department of Justice that an intent standard would not be a barrier to effective enforcement. The criminal code is replete with intent standards which have been enforced for as long as common law and statutory law have existed.

I recognize that the reason-to-believe version may be interpreted to achieve substantially similar results as a specific-intent standard. For example, the Intelligence Committee's report on the Intelligence Reform Act of 1980 indicated in effect that the Government would be required to prove that a person who engaged in the prohibited pattern of activities had as his principal purpose the exposure of covert agents.

Referring to that report in a colloquy on March 3 with the Senator from Minnesota (Mr. DURENBERGER) the Senator from Rhode Island (Mr. CHAFEE) indicated that journalists need not fear prosecution if they disclose an agent's name as an anticipated incidental side effect of a news story intended to expose wrongdoing or report on some other controversial issue or, in other words, if the main direction of their efforts is not exposure of covert agents.

This is a helpful interpretation of the intent requirement in the pattern-of-activities clause but it gives too much latitude to prosecutors and to juries to determine the line of demarcation between prohibited conduct and protected press activities.

As I indicated, the key distinction should not be whether the disclosure of an agent's name was or was not an incidental side effect. Indeed, where the disclosure of an agent's name is central to the news story a journalist would be hard pressed to deny that he did not intend to expose the agent's identity. He would proceed at his peril that a prosecutor and a jury might find that his principal purpose was to expose covert agents.

To say that again, in slightly different words, a journalist, aware that certain names are central to the matter about which he is writing, could hardly deny that he intended to make the name public and, in doing so, he would put himself in peril that a prosecutor and a jury could find that this was his principal purpose. The only effective way to draw the line is in respect to the defendant's mental state as to whether he did or did not intend to harm the U.S. intelligence operations.

The only effective way to draw that line is on the question of intent. Did you intend to cause harm? The reason-to-believe standard draws this line at much too low a place and, as a consequence, it would encroach upon the

province of press freedom. It would, Mr. President, encroach on the province of press freedom. It would permit a prosecutor to seek an indictment and a jury to convict on the basis of proof that damage to intelligence operations was the reasonably foreseeable consequence of the journalist's disclosure of names, when, indeed, it was a foreseeable consequence of the journalist's action, but not his intent.

The proponents of the amendment before us state that the reason-to-believe standard establishes an objective standard which, in effect, would permit the prosecutor and the jury to make a judgment of what damage a defendant reasonably foresaw in the light of what they, the prosecutor and jury, think most reasonable men would foresee in the same circumstances. In other words, it could potentially allow conviction even if the jury found that the defendant's bona fide conscious purpose was not to harm intelligence activities but to expose wrongdoing or to report on other important issues.

I put this matter again: Under the reason-to-believe standard a jury could find that a defendant's bona fide conscious purpose was not to harm intelligence activities but rather to expose wrongdoing or achieve other legitimate purposes, and yet still, his actions having had the probable consequence in the jury's judgment of impairing or impeding, it could find such a person guilty.

This would profoundly subvert the purposes of our legislation.

I understand the desire of the proponents that the reason-to-believe test would facilitate prosecution of those who engage in the business of naming the names of our Nation's covert agents.

There are not that many. They literally could be counted on the fingers of one hand. This is not a large industry in the United States. It might be in the Kremlin; I am sure it is. But we recognize we deal with only a very few cases, and I would hope we would deal with even fewer as the Nation comes to its senses in these matters.

Even so, this vague standard would vest far too much discretion in the hands of prosecutors which would undermine the stated objective of the statute which is that it not be used to chill legitimate journalism.

The word "chill" is in itself an inexact term, and yet it refers to a real phenomenon, the prospect of embroilment with the Government, and of being faced with charges which cannot but cause concern to anyone against whom they are brought, no matter what the outcome of the action.

There can be such events. There are. In some cases we have statutes intended to chill certain behavior because we wish to do that. We do not wish that here. We are dealing with constitutional rights, and we are dealing with an American interest in a free and inquiring and, if need be, cantankerous press.

Consider for a moment how a prosecutor might employ the reason-to-believe standard. In his October 6, 1981, testimony before the Subcommittee on Security and Terrorism of the Judiciary Committee, the Counsel to the Attorney General for Intelligence Policy, Mr. Willard, explained the administration's preference for the standard.

The problem, Mr. Willard said, is that:

> Senator Biden's (specific intent) approach would invite evasion of the will because people . . . like [the publisher of Covert Action Information Bulletin] and others would say, "Well, my intent was to help intelligence activities by disclosing unsavory activities," and that would give them a defense that they would seek to use. That is why we felt the objective reason to believe standard which Senator Chafee introduced to be better.

Listen to that. The implication of this analysis must be disconcerting to this body. The arm of Government, the Department of Justice, which will enforce this law seems to be saying that it wishes to minimize the possibility of a successful defense based on a claim that the person was intending to inform the public of wrongdoing or abuse by intelligence agencies.

Can we go over this once more? Mr. Willard, counsel to the Attorney General, said, If we have this intent standard, anyone we bring into court can simply say, "My intentions were credible," and this could prove a successful defense.

That very proposition reversed says that the Justice Department would wish to minimize the possibility of a successful defense based on a claim that the disclosure was intended to inform the public about wrongdoing or abuse by substituting the reason to believe standard for the intent standard.

Under the "preferred" standard, you might say, the prosecutors would seek, and the court might well issue, instructions to the jury that they could convict should they find that such harm was the reasonably foreseeable consequence of the defendant's conduct, even if the defendant did not intend that result.

I have even had responsible editors in our country say to me, "In the name of all that is holy, can you not conceive a situation where indeed we would publish names of covert agents knowing that it would impair or impede intelligency activities in order to inform the public of conduct we judged to be profoundly against the interests of the United States?"

I am vaguely aware from the Sunday morning book reviews that the newest blockbuster novel out of Washington has to do with a former CIA man who is advised the President is going crazy, or is himself going crazy, or in any event someone is about to start a third world war.

Suppose this case were noticed by the Associated Press. Would it not be wise and salutary for the Associated Press to so inform us? Alas, there are few things that can be imagined by novelists that do not happen in Washington, and fewer and fewer that can be imagined that have not, in fact, already happened.

It is disconcerting to have the Justice Department suggest that it wanted a standard which would make convictions easier and would make convictions possible where intent to harm did not exist, but only a reason to foresee harm did exist.

To be sure, this standard would make it easier to impose criminal penalties on the persons in the business of naming names, but it also places at greater risk of prosecution the legitimate journalist who discloses identities of covert agents in order to expose wrongdoing, in order to do his duty as it would be understood in his profession and as it is protected by the Constitution.

Not for nothing was the First Amendment to the Constitution directed to this freedom for all of us.

I also find disquieting the Justice Department's suggestion that the reason to believe standard constitutes a "negligence" standard.

On May 8, 1981, Mr. Willard, speaking for the Department, wrote a letter to the House Intelligence Committee which stated that the reason to believe language would permit prosecution of a person who "can be shown either to have known of, or disregarded, the risk of harm, or to have been negligent in overlooking the evident consequences of his actions for U.S. foreign intelligence activities."

When have we begun to consider it reasonable to send a journalist to prison because he or she was negligent? Negligent? What are the standards for negligence? It is a vague term and it is usually employed with respect to misdemeanors and small matters.

But in espionage matters, where the U.S. Government declares that a person has damaged the security of this country, should it be able to obtain a conviction on the grounds that he was negligent with respect to the spelling of names or the checking of dates or the handicraft of journalism? Espionage is not a matter to turn on negligence and neither is its near cousin with which we deal. To send someone to prison for having been negligent with regard to these matters would be an abuse of power by the Executive and to make it possible would be a great failing in legislation by the Senate.

With an interpretation so expansive as to include even negligence, it is no wonder the Attorney General prefers the reason to believe standard, and all the more reason for us to reject it. While it is admittedly unclear what specific meaning the proponents of the amendment would impart to the reason to believe standard, I do not believe they would agree with the De-

partment of Justice. I note that, in support of his amendment, the Senator from Rhode Island, my good friend and colleague on the Intelligence Committee, cited Gorin against United States. That case held that reason to believe, when used in the espionage statutes which prohibit the gathering and communicating of national defense information with intent or reason to believe that it is to be used to injure the United States or give advantage to a foreign nation, requires a showing of bad faith, or, in the language of lawyers, scienter, which is to say guilty knowledge, a much higher standard than negligence.

However, the Gorin case deals with statutes which are considered by leading constitutional scholars to be inapplicable to information gathering, public speech, and publication which is pursuant to a good faith purpose to criticize Government policy or to inform the public.

Another espionage provision with a reason to believe standard which was cited by the distinguished Senator from Rhode Island was held by the district court decision in the Pentagon papers case to be inapplicable to publication activities. This is in United States against New York Times Co.

I repeat, Mr. President, the espionage statutes which the courts have held to require only guilty knowledge of the consequence of events have been held not applicable to publications. In contrast to the espionage laws, which focus on the clandestine transfer of our Nation's secrets to foreign nations, the provisions of the bill we are now considering would expressly criminalize the publication of information which may be drawn entirely from unclassified sources. We make it possible for information drawn from unclassified sources to be the cause of criminal sanctions.

In addition, Mr. President, this information concerns not sensitive technical secrets or policy secrets, if there are such, but the identities of persons who are the instruments for carrying out such policies. Their conduct and, at times, their identities may be of importance to public debate. I submit that a reason to believe standard has no place in such a law. Even if this standard were interpreted to require scienter or guilty knowledge, as it were, or knowledge of probable damage to intelligence activities, it could still permit prosecution and conviction of a journalist who disclosed agent identities for the bona fide purpose of disclosing wrongdoing or discussing other issues of public importance. I suggest to my colleagues that this standard could easily be turned into an instrument of mischief or worse by a government which may seek to suppress any news stories in which covert agents are identified, however innocent or even laudatory the intentions.

Mr. President, I do not believe it is the desire of anybody in this body, least of all the sponsors of the amendment before us, to penalize or discourage the kind of news reporting that occurred in the Wilson-Terpil case. But again, the Department of Justice would give no comfort to a newsman who wishes to pursue that kind of story, if it involved, as it well might, current undercover employees of the Central Intelligence Agency.

During the hearing on May 8, 1981, before the Committee on Security and Terrorism, Senator BIDEN—Senator BIDEN, here on the floor, valiant and indefatigable in these matters as always—asked Mr. Willard of the Department of Justice whether a journalist who engages for 3 years in a pattern of activity intended to identify double agents or moles in the CIA, and writes articles naming such person or persons, would have reason to believe that his activities would impair intelligence activities. He is informing the public that there is a spy in the CIA who is on the CIA payroll.

Suppose that, by some happy circumstance of diligence or good fortune or overheard conversation, a newspaperman learns of that spy and reports it. Senator BIDEN asked, would that indicate reason to believe that his activities would impair intelligence performance, perhaps because it would give the agency a less-than-complete reputation for security?

Mr. Willard equivocated. He equivocated. He did not say, "No, of course not."

He suggested, on the one hand, that exposing double agents might assist American intelligence, but on the other hand, it is "hard to predict from such a bare hypothesis exactly how the standard would be applied." But he acknowledged that there is at least a "question" whether a crime would have been committed. But here we are, Mr. President, already the Department of Justice is saying, "Let us see, is there a question here that a crime has been committed?" When, up until the day of this testimony, I do not think there was an American alive who would have thought such an act might be a crime.

May I ask, Mr. President, if, prior to May 8, 1981, anyone would have thought for a moment that it was a crime for a journalist to report that there was a KGB agent in the employ of the National Security Agency? Why, you would say, in such matters Pulitzer Prizes are won and the public's thanks are deeply forthcoming.

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

Mr. MOYNIHAN. I am happy to yield.

Mr. BIDEN. If the Justice Department, Mr. Willard in particular, a man schooled in the law, helping to write the law in this case, was not sure whether or not the reporter in that hypothetical case would, in fact, be guilty of a crime, what does the Senator from New York think the editor of the New York Times would have to do when he sat down with that reporter to determine whether or not the New York Times should have reason to believe that this would, in fact, impair or impede the intelligence activities of the United States of America?

Mr. MOYNIHAN. I think the editor of the New York Times would ask him himself whether that reporter was married and how many children he had.

Mr. BIDEN. I think the Senator is probably right and I think that is what we call in the business a chilling effect.

Mr. MOYNIHAN. I think that would be a chilling factor.

The Senator has visited nuclear establishments where one may be exposed to some radiation. He is familiar with that little badge you get when you go in and, as you go out, they check that little badge and see if you have had a dose of radiation above an acceptable level while you are in the plant. I can see, in newsrooms at the end of the day, they will check whether you might have committed a crime that day. And maybe they will say, "We'll allow you a certain level of dosage over the year. You must not acquire more than five probable crimes or you are risking causing the legal department too much expense."

After all, even the New York Times can only afford to defend so many reporters in a year. It costs money. The U.S. Government can destroy a newspaper by suing it.

I say this to the Senator: The U.S. Government has endless resources in the courtrooms. They are the U.S. Government's courtrooms, as a matter of fact. They can destroy a journal by suing it.

Only a few newspapers in this country can sustain the kinds of costs the New York Times incurred in New Jersey when a journalist refused to show notes in a murder case—hundreds of thousands of dollars were involved. Not many newspapers could afford that. And none can indefinitely.

First, you sue the newspaperman, then you sue the copy editor, then you sue the city night editor, then you sue the linotypers—just consider what a government intent on impairing or impeding the freedom of the press could do with the standard Mr. Willard suggests.

Mr. President, I have talked long enough in this matter. But I want to conclude with a simple, final reference.

Mr. President, one of our colleagues, I regret to say—because he knows of my high personal regard for him—has not shared my concerns at all in this matter. The distinguished Senator from North Carolina expressed his opinion as follows:

There is no national interest of greater importance than national security. Whatever intrusion there may be upon first amendment rights here—

I interpolate now: as the result of the amendment before the Senate.

They are modest and gentle and consistent with the overriding need to protect the great national security interests.

Mr. President, in the hysteria of wartime, we have made mistakes in this Chamber, but we never pronounced them to be intrusions upon constitutional rights. In the hysteria of wartime, it may be that we have intruded on constitutional rights, or in the hysteria of the cold war, it may be that we have intruded on constitutional rights. But we have never knowingly and avowedly done so.

I inquire: What is a gentle intrusion, a modest intrusion?

I am reminded of Dr. Swift's modest proposal for resolving the difficulties of the then troubled state of Ireland, as we approach the "Patron's Day."

It will be recalled that there was much famine in the land. There was much hunger. There was great dissatisfaction and distress, as well as overpopulation.

Dean Swift, in a volume entitled "A Modest Proposal"—it was hardly more than a pamphlet—said, "Why not butcher the babies and eat them?" He suggested fricaseeing, baking, roasting, frying. He was not sufficiently advanced to be aware of all the vitamins, nutrients, and proteins that could be gained thereby; but he thought that a modest amount of cannibalism would be conducive to the well-being of the people of Ireland.

Are we to suggest that we will have only a modest intrusion into constitutional rights? I think not.

Mr. President, I respectfully suggest that we cannot blithely dismiss this amendment as only a modest and gentle intrusion on the first amendment rights of the press.

When the first amendment is threatened, so indeed is our national security.

The late and beloved Judge Murray Gurfein reminded us of this in his 1971 decision denying the Government an order enjoining the publication of the Pentagon papers. I read from his decision:

The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, an ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know.

I cannot suppose there could be any finer summation of this argument save perhaps the words of Thomas Jefferson, who wrote:

The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate to prefer the latter.

Thus, in the spirit of the courts and the spirit of Thomas Jefferson I plead with my colleagues not to accept the amendment before us but to abide by the wise counsel and decision of the Committee on the Judiciary.

Mr. President, I thank the Chair for its great patience during this lengthy discourse.

Mr. CHAFEE. Mr. President, that was an extremely eloquent speech by the distinguished Senator from New York. It obviously incorporated considerable thought and conviction on the part of the Senator, who has devoted many years to the areas he addressed. As he mentioned, he is a member of the Senate Intelligence Committee. He is the vice chairman, and he has acted as chairman when the distinguished chairman Senator GOLDWATER, was having a hip operation.

The only problem I have with the presentation of the Senator from New York, particularly in his final quotations, is that a listener cannot help but conclude that there should be no legislation in this field.

It is true that both versions are considered unconstitutional and objectionable by those who profess to be principally concerned with the protection of the press.

For example, the New York Times, which the distinguished Senator mentioned frequently, has consistently editorialized against both versions. They do say that, faced by the possibility of one or the other, they would prefer the committee versions. But this preference is totally unenthusiastic.

I read now from an article in the New York Times, in which the columnist, Mr. Stuart Taylor, Jr., wrote:

More than 100 scholars signed a letter in the fall of 1980 denouncing the Chafee version of the bill as unconstitutional.

He goes on to say, in discussing both bills:

Both bills would permit prosecution of journalists and others . . .

The article concludes:

"Because there is a steamroller to pass a bill, we are asking the Senators to pass the least damaging bill," Jerry Berman, legislative counsel for the American Civil Liberties Union, said today. But he added that "we are prepared to challenge this bill in court," whether or not it includes the "intent" language.

So, editorial after editorial in the press—and we have submitted them for the record—has little to say in favor of any legislation. In other words, the view of the press is that it is unfortunate these publications, such as the "Covert Action Information Bulletin" are "naming names," but that is one of the prices of a free society. Maybe Richard Welch is murdered on assignment in Athens. Maybe the Kinsman home is shot up in Jamaica. Maybe the careers of agents or alleged agents of the CIA throughout the world are ruined. But that is life. We cannot help that in a free society, and we should not have any type of legislation such as that proposed—subsection 601(c)—in both bills.

I know that the Senator from Washington has been waiting patiently, since December 16, to speak, so I will be brief.

The Senator from New York spoke of both versions being acceptable to the CIA. That is true. However, Mr. Casey has made it very clear, in letters to this committee, to me, and to various Senators, that he believes that the best version is the so-called Chafee-Jackson version. This will best accomplish the job according to Mr. Casey.

I refer to a letter to me dated March 12 of this year, from Mr. Casey, in which he wrote:

I believe it is important that you have the benefit of my position. Certainly the Judiciary Committee version of the Bill would be preferable to no legislation at all—

No legislation—which is the position of the news media.

but is should be clear that the Intelligence Community firmly supports the Attorney General and the President in their belief that the version of subsection 601(c) passed by the House of Representatives and embodied in the Chafee-Jackson amendment to S. 391 is, as President Reagan put it in his letter of 3 February 1982 to the Majority and Minority Leaders of the Senate, "far more likely to result in an effective law." I believe Senator Specter fully understands that this is my position.

Sincerely,

WILLIAM J. CASEY.

The next point that the Senator made dealt with the subject of negligence, and it was his suggestion that what we have adopted in this legislation is a negligence standard. He is horrified or astonished that for the first time, as he indicates, one can be prosecuted criminally for something that is considered negligence.

I wish to discuss that from the point of view of the markup that took place in the Senate Judiciary Committee last October, October 6, in which this issue of negligence was raised by the Senator from Vermont (Mr. LEAHY). He directed his question to Richard Willard, the Attorney General's counsel for intelligence policy.

Senator LEAHY said, "Can you tell us, is this or is this not a negligence standard?"

The response by Mr. Willard, who I mentioned was the Justice Department's expert, was as follows:

If the reason to believe standard stood by itself, if you only had the reason to believe standard and it were the only element of this offense I believe you are correct, that it would in many ways resemble negligence. However, as Senator Heflin pointed out there are so many elements of proof in this section as it exists that there is no way someone could accidentally or negligently violate the law. It would be very difficult to prosecute. There are other elements, including one of specific intent, intended to identify or expose covert agents which exist in Senator Chafee's bill. Therefore, while that one provision taken in isolation would be sort of a negligence standard, it is accompanied by five other elements which involve actual knowledge and specific intent.

So I believe the negligence argument is demolished.

I briefly wish to address the matter of intent. Is the intent standard the best one? Is the intent standard the standard that will most likely protect those inadvertent disclosures in the press that the Senator from New York was concerned about?

What we address now are the statements of Mr. Keuch. Mr. Keuch was the Associate Deputy Attorney General under the prior administration. This is what he said about the specific intent language, the language that is in the committee version before us now.

By the way, in that version it was 501(b); now it is 601(c):

Section 501(b)'s specific intent requirement that an individual must have acted with "intent to impair or impede the foreign intelligence activities of the United States" and that such intent cannot be inferred from the act of disclosure alone is not a fully adequate way of narrowing the provision, either in serving First Amendment values or in facilitating effective prosecutions.

The specific intent requirement may itself have the effect of additionally chilling legitimate critique and debate on CIA policy because general criticism of the intelligence community could seem to corroborate an intent to impair or impede.

The point Mr. Keuch is stressing there is when you have an overall criticism of the intelligence community after which you name a name, intent is inferred. You meant to be critical of the agency and disclosed in order to impair or impede intelligence activities.

Mr. Keuch goes on:

A mainstream journalist who occasionally writes stories based on public information concerning which foreign leaders are thought to have intelligence relationships with the United States may fear that and other stories by him critical of the CIA will be taken as evidence of an intent to impede foreign intelligence activities.

Speculation and debate concerning intelligence activity and actors would be seemingly more hazardous if one had ever taken a general position critical of the conduct of our covert foreign intelligence policy.

Taking the problem from the other direction—

Mr. Keuch continues:

since any past or present criticism of the CIA might provide the something extra beyond the act of disclosure to prove specific intent, citizens may be unwilling to hazard a speculative discussion of covert intelligence policy for fear they will unwittingly name an intelligence source correctly.

What Mr. Keuch is saying here is that your overall criticism of the intelligence community and then your inadvertent disclosure of a name may be used to infer intent that you are out to impair and impede the intelligence activities of the United States.

Mr. Keuch's statement I commend to each of you, and I will briefly quote a little more here:

The specific intent requirement . . .

Mr. Keuch continues:

. . . also can hamper effective enforcement . . .

Now he is on the other side of the coin. He is looking at it from the enforcement side—

. . . by creating a difficult jury question. Any person willing to gamble on the outcome of a prosecution can claim to a jury that his intent was to inform the American people of intelligence activities he believed to be improper or unnecessary rather than to disrupt successful intelligence gathering; the government may often find it difficult to convince a jury beyond a reasonable doubt that there was intent to impede in light of such a claim.

Mr. President, I shall address that very point because it seemed to me that the Senator from New York was dismissing as ridiculous the fact that the publishers of bulletins such as Covert Action Information Bulletin could in any way ever claim that it was their intent to improve the intelligence activities of the United States. Yet let us turn to the testimony before the House Select Committee on Intelligence last year by an editor of the Covert Action Information Bulletin, Mr. William Schaap. Now this is what he said. This is what apparently he strongly believes. Obviously this would be his defense if accused:

Our publication . . . is devoted to exposing what we view as the abuses of the Western intelligence agencies primarily though not exclusively the CIA, and to expose the people responsible for those abuses.

We believe the best thing for the security and well being of the United States would be to limit severely, if not abolish the CIA.

This is his view.

And then he goes on:

Our intent . . .

This is his intent—

. . . both in exposing the abuses of intelligence agencies and in exposing the people responsible for those abuses is to increase the moral force of this Nation, not to lessen it.

That the CIA would assume our intent is simply to impair or impede their foreign intelligence also seems likely. Patriotism is to some extent in the eyes of the beholder.

This is their defense.

And so to suggest that it is preposterous that such a claim could be made is in my judgment obvious. This is not in my judgment alone but in the burden of proof here, in the statements of those handful of people, as the Senator from New York discussed, in their very view this is what they believed. This is their intent.

The Senator also suggested that the reason to believe standard which exists in current statutes in section 18 of the code does not apply to speech or publication.

That is not entirely accurate.

As we pointed out yesterday, in title 18, United States Code, and in title 42, United States Code, there are a series of acts which are forbidden in which the proof of the Government is based upon the reason to believe standard.

Now let us see if any of them apply to speech. I refer you to 42 U.S.C. 2274 dealing with communication of restricted data. It talks about anyone who communicates, transmits, or discloses. Disclosing obviously covers speech or publication.

In section (b) it goes on to say, "attempts or conspires to do any of the foregoing, with reason to believe."

So there it seems to me is an obvious case where reason to believe applies to a disclosure, be it by publication or by speech offense.

Finally, Mr. President, I refer to the mole argument. That is an argument that Senator BIDEN has raised, the distinguished Senator from Delaware, several times. The question is, Under my language, could you disclose the existence of a mole in the CIA?

First of all, the mole, a mole within the CIA would not necessarily be a covert agent within the definition of the term as we have it in the act. The famous moles who have existed, such as Mr. Philby in England, worked for the intelligence community. Everyone knew this. He was overt.

If one of those employees of our CIA was involved, he might also be an overt CIA employee. If we do not know he existed, and he was a covert agent, it might well be that we would have to display caution. This is not because of the danger of prosecution but because in many of the situations the so-called mole has been doubled.

For those who indicate the despair over the effect of this act, let me just say that in nearly every instance—the Wilson case, the Terpil case, the clear-cut cases where they were not covert agents—these men were not employees of the CIA. That is acknowledged. That was acknowledged by the CIA. They are no longer employees. They are former employees.

For someone to suggest that disclosures of their wrongdoing could not take place is really to drag a red herring across a very important discussion that should be devoted to the merits of the legislation before us.

So, Mr. President, this is not something the Republicans have dredged up. This legislation has the support not only of this administration, of the current Director of the CIA, but of the prior Director of the CIA, the prior Attorney General, the prior Justice Department, under a completely different administration of a completely different party.

Both of those administrations, both of those Attorneys General of the Department of Justice, both of those Directors of the CIA have pleaded with us to pass the amendment that is on the floor of the Senate today and up for consideration. They all want the Chafee-Jackson language.

So, Mr. President, I do hope my colleagues will support the amendment that is before us.

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

The PRESIDING OFFICER (Mr. TOWER). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. BIDEN. Mr. President, while we are waiting for one of our colleagues to come to speak on this Chafee amendment, I would like to raise a couple of points and hopefully clarify the record. These are not major issues but they do, in a cumulative sense, impact upon some of the arguments made thus far on this names of agents bill and particularly the Chafee amendment.

One of the points which has been made by my distinguished colleague from Rhode Island concerns the intent language, presently in the Senate bill, which Senator CHAFEE is attempting to remove. It is that if that language passes the Senate it will be used as an excuse for a delay and a conference will never be called by the House side. The House has already passed a bill which incorporates the direction of the Senator from Rhode Island. If the version I am supporting passes the Senate, the Senator from Rhode Island, though not saying straight out, implies, in effect, that we will not have a bill or it will be hard to get a bill.

I wish to read into the RECORD at this point a letter from the chairman of the House Permanent Select Committee on Intelligence, Mr. EDWARD P. BOLAND.

It reads:

MARCH 15, 1982.

Hon. JOSEPH R. BIDEN,
Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR BIDEN: I understand that it has been suggested that, depending on the outcome of the Chafee Amendnent in the Senate, the House might elect not to seek a Conference to resolve the differences between H.R. 4 and S. 391.

Let me assure you that insofar as I am able to influence the decision, the House would seek a Conference with the Senate on the differences between the two bodies on the issue of the protection of intelligence identities—regardless of the outcome of the vote on the Chafee Amendment.

With every good wish, I am,
Sincerely yours,
EDWARD P. BOLAND,
Chairman.

I would note further for the RECORD that we have spoken with the chairman's office on the House side and he not only suggested there would not be a delay but also that he would promptly move for a conference to resolve the differences.

The second point that I would like to raise is that during this debate, Senator CHAFEE indicated that the reason to believe standard is more effective than the intent standard and he relies on the testimony of Richard K. Willard, Counsel to the Attorney General for Intelligence Policy, who is in the record identified as a Democratic holdover.

I am not sure if it is important that he is a Democratic holdover or not. However, Mr. Willard came to the Justice Department, I am told he is not a Democratic holdover but a Reagan appointee at the Department of Justice.

Second, the best testimony to the greater effectiveness of the intent language is Senator SPECTER, who, I would argue, has more prosecutorial experience than Mr. Willard does, who happens to work for the Department of Justice. Although Mr. SPECTER is a Senator now, for years he was a prosecutor.

We use Mr. Willard constantly as justification for which standard is better because he is an "expert," and he is with the Justice Department.

The third point that I would like to make is that Senator CHAFEE argues that there are a number of statutes and cases where the standard of reason to believe can be used to convict someone under the espionage statutes. There are a number of statutes that do have the reason to believe standard, but none of them involve publication or at least none have ever been used to prosecute someone for publication. Therefore, I do not believe they involve the direct first amendment issue of free speech and publication and they involve usually covert communications or clandestine collections and distribution to the enemy, which does not involve the protected interest inherent in the first amendment.

It is one thing to publish a name and be subject to the standard of reason to believe. It can be published in an American newspaper. I think we can all argue that at least the first amendment can be debated, whether or not it comes into play. It is another thing to publish it in a memorandum to the KGB. I do not see where the first amendment issue really comes forward there. There may be some reason to believe standard in an espionage statute where if I identify the name of an agent or an activity of the Federal Government that is involved, or a covert action that is under way, and I, in fact, communicate that to a hostile power, that is not the same as to whether or not the first amendment comes into play even though there is a publication. It is a publication in another country's internal files and memoranda used for purposes of damaging the U.S. interests.

My point is that there is not a direct corollary between the reason to believe language and the espionage statutes' and the reason to believe language as it applies to the first amendment.

Also, Mr. President, proponents of the bill as drafted make light of the argument I have made that there is really no difference between reason to believe and intent vis-a-vis the ability to argue that he had the benevolent intent. We hear time and again on this floor from those who support Senator CHAFEE's position, and from Senator CHAFEE, that the real reason why they are concerned about the adoption of the Senate version of the bill as before the Senate, the real reason they are afraid of the intent language, is that it will be able to be skirted; it will, in effect, be so difficult to prosecute someone and to prove intent that we will, in effect, not be able to protect our agents.

They go on further to say, time and time—I will bet you the following assertion appears 30 times in the RECORD—"Philip Agee and/or anyone else who publishes the name of an agent in an effort to name names, as the saying goes, if that person is required to be found guilty under an intent statute all they have to do is waltz into the courtroom, get up on the stand, and on direct examination from the defense counsel turn and look to the jury and say, 'Ladies and gentlemen of the jury, I didn't intend to hurt anyone. I did not intend to hurt the United States of America, I didn't intend to impair or impede. And because I said I did not intend to, you must accept that. Therefore, I cannot be found guilty of intending to impair or impede.'"

Well, that sounds good. It sounds pretty nice. But the fact of the matter is, that is not how the system works. The Senator from Pennsylvania (Mr. SPECTER) a long-time prosecutor, one of the most successful prosecutors in the country in one of the largest jurisdictions in the country, Philadelphia, pointed out very well why the intent standard would be easier under our system of justice to prosecute and find someone guilty of a reason to believe. Let me quote from his statement. He says:

> In our system of justice, criminal cases have traditionally required proof of criminal intent. That practice, which has been generally followed in this country for nearly 200 years, has proven to be both realistic and fair. The practice is workable even though we cannot get inside the accused's head—

Let me digress for a moment. Keep in mind, you have heard that phrase a number of times on the floor. We have heard it said by my opposition, if we have an intent standard, then we really have to get inside the head of the person who published the name of the agent in order to be able to find him guilty, the implication being that unless they say, "Yes, I intended to hurt," you are not going to be able to find them guilty.

Back to the Statement of the Senator from Pennsylvania:

> to examine his intentions because of two well established legal doctrines. First, the accused is deemed to intend the "natural and probable consequences" of his actions. Second, his intent need not be proved by direct evidence, such as his statements, but may be inferred from his actions. Juries are instructed by the court that specific intent "may be determined from all the facts and circumstances surrounding the case." Even where the accused proclaims that his intent was innocent, juries often discount such statements and infer the requisite intent. On the basis of considerable personal expe-

rience in such cases, I know that the doctrine of inferred intent works and works well.

That is the end of the quote from the statement by Senator SPECTER. The fact of the matter is that the notion that if we have an intent standard, we will allow the Philip Agees to slide out from under prosecution because we cannot get into their heads is a specious argument. When we were in law school, we used to call it a red herring. If does not relate to the debate here at all.

I have said this before and it bears saying again: I believe if a defendant can walk into a courtroom and say, "I did not intend to impair or impede," they can make the same argument with the standard that the Senator from Rhode Island insists we put into the bill, which says "reason to believe." Why cannot a defendant walk in and say, "Yes, I published the name. Yes, I knew it was the name of an agent. Yes, I did that. But I did not have any reason to believe that I was impairing or impeding. I had reason to believe I was helping," and then go through the same arguments that the Senator from Rhode Island uses all the time when he is making his assault on the intent language? The fact of the matter is, whether it is reason to believe or intent language in the bill, juries are going to look and weigh the evidence and infer from the natural consequence of the actions of the defendant whether or not they meant to do it or did not mean to do it.

Mr. President, I really hope we stop all this talk about whether or not intent would allow people to slide out from under prosecution merely by saying, "I did not intend to do anything wrong."

I was on the other side of those legal cases as a lawyer when I practiced. I was not a prosecutor; I was a defense attorney. Let me give a specific case. This actually happened.

I was defending a fellow who was arrested for purse snatching, but he was charged with robbery. There is a difference between purse snatching and robbery. Robbery is a more violent crime and you put the person from whom you are taking possession in fear of or give reason to believe they are in danger. That has a more severe punishment than someone who snatches something from you and you do not even know it is gone. It is like the difference between a pickpocket and someone holding a gun on you. But he was charged with robbery.

The robbery was related to having been found as he turned the corner at a very brisk pace with a woman's pocketbook under his arm. He literally banged into a policeman as he turned this corner around this diner. This is an actual case I happened to defend. He smashed into a policeman. The policeman fell down.

Not many men in Delaware carry purses. The policeman thought he probably took it from somebody. So the policeman stood up, took out his gun and said, "Sir, will you stand up and let me see your purse?" Coming down the hill toward the same diner is a lady, mildly hysterical, who just had her purse snatched from her.

I had the dubious distinction of being appointed by the court to defend this noble young man. I went out to prison to meet with him, and I sat on the table you see in rooms when you visit in prisons and you are a lawyer. This happened to be a very tall young gentleman, about 6 feet 5. I said, "Look, you are charged with robbery. People convicted of robbery get an average sentence—this was 1971—of 9 years. I would strongly recommend that you acknowledge that you took this purse and plead guilty and we may be able to get it reduced" to what I think it really was, a purse-snatching case. This would not carry with it an 8- or 9-year sentence."

He said, "I didn't do it."

I said, "What do you mean, you didn't do it? You had the purse. The police officer literally, within 20 seconds of your taking it from the woman on the other street, as you turned the corner from Concord Avenue onto Market Street, bumped into you while you were running. You had it in your hand. How do you expect me to go into court and defend you?"

He said, "You don't understand."

I said, "I don't. Explain it to me." Mr. President, this is an actual case, I promise you.

He got up from the chair, there was a little skinny table like those in front. He said, "Man, take a look at me."

I looked.

He said, "You see how I got these long arms?"

He did have particularly long arms. I said, "Yes."

He said, "Man, when I run, I run like this, my arms swing back and forth."

This is the truth, I promise you.

He said, "My arms swing back and forth. This is my style of running."

He said, "I was running down Concord Avenue to catch the bus and," he said, "I was going full speed and as I turned the corner, I looked up and, my God, that purse was right on my arm. The only thing I can figure is as I passed that woman, my arm got caught in her arm and her purse came off onto my arm."

I said, "You are kidding. You want me to go into court and tell people that?"

He said, "You're my lawyer, aren't you, Jack?"

I said, "I am your lawyer, I was appointed to represent you. But I don't believe you. I have to believe you to defend you when you walk into court."

He said, and he was a better lawyer than I am, "The way I understand it, you just call me up to the stand and I will explain it."

I said, "OK, it is your neck."

He got up and said to the jury, "I did not intend to take that lady's purse. I didn't intend to do it. My arms flap when I run and I was going to catch the bus."

Coincidentally, there was a bus coming as the police officer and he banged into one another. He cited that as evidence.

And guess what? We summed up. My summation was, "You heard my client. Thank you." That was about my summation. The jury then retired to the jury room.

This is a case where it was required, under the laws of the State of Delaware, for the prosecution to prove beyond a reasonable doubt that the defendant intended to take that lady's purse. He stood there and told them, "I didn't intend it. It was an accident."

Guess what, Mr. President? The people of the State of Delaware, 12 jurors tried and true, walked into the jury room, which was off courtroom 6, did not even bother to take their seats, looked at one another and said, "Anybody believe it?" the foreman said, "No, we do not believe it."

Within 2 minutes, there was a knock on the door. "Your Honor, we have a verdict."

The judge said, "Are you sure?" He had not even gotten off the stand, to go back to his office.

Guess what. The jury did not believe the intent argument, that he did not intend it.

You probably all think I am just being facetious in reciting this. It is a bit of a humorous story and it did really happen. But the fact of the matter is that juries every day can infer intent from one's actions.

There was an action here. The action was the purse somehow got from the lady's arm to his arm. Somehow, he had been running down the street. Somehow, he banged into a police officer. And somehow, the lady came down and said, "he took my purse."

Now, that is what happens in all our criminal justice system.

We had a fellow named Wayne Williams down in Georgia, accused of murdering children, and specifically accused of murdering two in that trial, if I am not mistaken. They did not get inside his head. The jury did not establish, did not have established for them Wayne Williams' saying, "Yes, I did it." They did not have anybody else saying, "Wayne Williams told me he did it." They did not have any Wayne Williams cell mate coming in and saying, "Wayne Williams did it because I heard him talk in his sleep and say he did it."

Wayne Williams, throughout the trial, said, "I didn't do it." The prosecution introduced a great deal of circumstantial evidence. Yet, guess what? The jury was able to determine beyond a reasonable doubt that Wayne Williams had the intent—the mens rea to kill and, in fact, did kill at least two young men.

Wayne Williams is in serious trouble. He was convicted. I expect, from

what I know of the case, and I do not pretend to be an expert on it, that that is likely to be upheld. Wayne Williams may very well depart this world in a consequence of inferred intent.

That is the way the system works. It has worked that way for 800 years in our English jurisprudence system.

So I hope my colleagues will disabuse themselves of the notion that when you have a requirement in the statute for specific intent, that raises a standard that is difficult for presecutors to meet. It is not. It is done every day in the courtrooms of this country, day in and day out.

I thought the basic standard of criminality in this country was to establish guilt. What is so special about the reason to believe standard? There is a little difference here.

The reason to believe standard, as my colleague acknowledges, is an objective standard. What does that mean, as opposed to a subjective standard?

A subjective standard for criminality—whether I go to jail—is what is in my head, so to speak, as is the phrase used by those who oppose this bill. Did I mean to do it, or did I not mean to do it?

The objective standard, to be a little more graphic, is that I can have an intent not to do anything wrong. But if my four colleagues who are in the Chamber, from the four States represented, think that I should have had reason to believe that something was right or wrong, even though I did not intend to do anything wrong, even though I thought I was doing something right, even though I thought I was being a patriotic American, they are going to imply to me a negligence standard, a civil standard. That is a standard, I respectfully suggest, which should be kept to negligence cases, civil cases, not criminal cases.

I see that my distinguished colleague from the great State of Washington has arrived. I now yield to the Senator from Washington (Mr. GORTON).

The PRESIDING OFFICER. The Senator from Washington is recognized.

Mr. GORTON. I thank the Senator from Delaware.

Mr. President, when the motion to proceed to the consideration of this bill was laid before the Senate last December, I briefly addressed certain concerns I had with the differences between the two contending sides over appropriate provisions designed to prohibit the disclosure of the identity of covert agents of the United States. At that time, I suggested an approach which I believed could be the basis for a possible compromise.

As my colleagues are well aware, their differences concern the standard of proof which will be required in prosecutions pursuant to section 601(c) of the act. The bill, as introduced, required, to support a conviction, only that an individual have "reason to believe that the disclosure would impair or impede the intelligence activities of the United States." The bill as reported, however, requires that an individual have the "intent to impair or impede the intelligence activities of the United States." It is generally agreed that, as reported, the bill would require proof of specific intent, the criminal standard most difficult for a prosecutor to meet. I understand that those who advocate the specific intent standard do so, in part, because of the potentially expansive scope that could be given to the "reason to believe" language.

I believe that there is merit in both approaches as well as merit in the criticism each side has for the other's proposal. It is for this reason that I believe a compromise to be in order.

I would like briefly to share with my colleagues a bit of the frustration I have felt in the past several months in attempting to suggest a compromise which would address many of the concerns I have heard raised.

CHRONOLOGY OF COMPROMISE ATTEMPTS

My first attempt to find a compromise was offered on the floor during the debate on December 16, 1981. This approach would accept the structure of the intent standard as adopted by the Senate Judiciary Committee. But it would go on to include the following language in the way of defining intent:

For purposes of this subsection, proof of intent to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure:

(1) May be established by proof of specific intent; or

(2) May be inferred from the fact of such identification and exposure where the foreign intelligence activities of the United States have been impaired or impeded, and the impairment or impediment is a natural and probable consequence of such identification and exposure.

The purpose underlying this proposal was to offer a standard somewhere between the intent and "reason to believe" approaches. I was—and I remain—concerned that the House language may be so broad or vague that it would cause a chilling effect upon the exercise of protected first amendment rights; but the Senate Judiciary Committee language, in requiring proof of specific intent, may mandate such an arduous burden of proof that the act will be very difficult to enforce. My proposal sought the middle ground by allowing conviction upon proof of specific intent, but also, in circumstances in which specific, rather than generic, harm to the intelligence activities of the United States did occur, conviction could be obtained by a showing of general intent. This latter standard is less strict thant the specific intent requirement, and could be inferred where the court found the harm to have been the natural and probable consequence of the exposure of the agent's indentity.

This proposal was misunderstood. Some believed it would adopt the specific intent standard, but would allow circumstantial proof of specific intent only where harm occurred. I did not intend to suggest that either type of intent could be proved only with direct evidence. The distinction my proposal made was between specific intent and general intent, either of which always could be established with circumstantial evidence, but which differ significantly with regard to the degree of proof required.

Others objected to this initial proposal on the ground that the language would imply that harm to the intelligence activities of the United States would not occur in all cases in which the identities of covert agents were exposed—and that this implication was objectionable since proof of harm would require intelligence agencies to reveal sensitive classified information.

In any case, it became clear that my first effort could not be the basis for an agreed compromise amendment. My next attempt followed the opinion of the Supreme Court in *Gorin* v. *United States* (312 U.S. 19 (1941)). In that case the Supreme Court interpreted language in the Espionage Act of 1917 punishing certain activities accomplished "with intent or reason to believe that the information obtained is to be used to the injury of the United States, or to the advantage of any foreign nation." The Court said that this statute—

[R]equires those prosecuted to have acted in bad faith. The sanctions apply only when scienter is established. (312 U.S.C. at 28.)

In hearings before the House Permanent Select Committee on Intelligence, Richard K. Willard, counsel for the U.S. Department of Justice, Office of Intelligence Policy and Review, testified that he believed that the Gorin interpretation may not apply to the "reason to believe" standard in the context of the Intelligence Identities Protection Act. He suggested that the "reason to believe" language in this context might impose merely a negligence standard which would not necessarily even require an actual appreciation of the risk or a "reckless disregard" standard. Hearings before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence, House of Representatives, 97th Congress, 1st session, regarding H.R. 4, pages 36, 38, and 40 (April 7 and 8, 1981).

My second effort to find a workable compromise was simply to try to find acceptable language which would clarify in the statute itself that the Gorin doctrine would apply to the "reason to believe" language in the context of S. 391—that at least some bad faith requirement would be involved. I was frustrated once again in finding specific language which both sides would accept.

My next try at finding the elusive middle ground involved a proposed colloquy between the distinguished Senator from Minnesota (Mr. DURENBERGER) and the distinguished Senator from Rhode Island (Mr. CHAFEE). In

that exchange, the Senator from Rhode Island stated that the language of his amendment should be interpreted to mean that the scope of the "reason to believe" language is in fact limited in a way that the plain language of his proposal does not in itself suggest—at least to me. Mr. CHAFEE indicated that under his amendment the only class of persons who could be prosecuted would be those in the business of naming names of covert agents. Newspaper reporters, gadflies, and even radicals engaged in investigations of the CIA in which the exposure of covert agents was an "anticipated side effect" rather than "the main direction" of their efforts, could not be prosecuted since in such case the requisite "pattern of activities intended to identify and expose covert agents" would not exist.

I am not certain that this means of limiting the statute's scope is preferable to that inherent in my initial proposal of December 16, 1981. In fact, I prefer the latter. Nevertheless, I do believe that it could provide an acceptable means of resolving concerns about the chilling effect of Mr. CHAFEE's proposal on first amendment rights. As I indicated, however, the language of the amendment itself is not as narrow on its face as the colloquy suggests the intent of the drafters to have been. It does not say explicitly that the intent to identify agents must be the sole or primary focus of the "pattern of activities." The colloquy is helpful and thoughtfully and carefully prepared, but, of course, it is not binding. I am afraid, in fact, that it might even add to the potential constitutional problems which we have been discussing during the course of this debate.

In any case, it would be far preferable to incorporate into the language of the statute itself words limiting the statute to the scope described by the colloquy. I floated a number of draft proposals designed to accomplish that end, including one which would have simply provided that the "pattern of activities" must be "primarily intended to identify and expose covert agents." Meeting stubborn resistance once again, I finally settled upon what seemed to be the least intrusive possible language which would still add meaningful clarification to the statute. I suggested simply taking some of the language from the colloquy itself and adding it to the definition of "pattern of activities" which currently appears on page 9 of S. 391. This last proposal would provide, "[t]he main direction of said pattern of activities must be to identify and expose covert agents." Even this simple proposal was rejected as a basis for an agreed compromise even though it was stated by Mr. CHAFEE to be the meaning of the language of his amendment. I simply do not understand the rationale for that rejection.

I am faced, therefore, with the prospect of voting for the bill as reported or the bill as modified by the Chafee amendment. Before I do so, however, I would like to engage the principals of these proposals in a discussion.

It seems to me that in order to determine which of these proposals is preferable, there are some basic questions for which we all ought to have the same answers or at least an understanding that the disputants disagree and precisely how they do so. For the record, I would like briefly to pose some questions which kept occurring to me in the course of my attempts to offer a compromise, if only because it was clear that there was no agreement as to the answers.

First—from a rhetorical point of view before I get to the specifics—what is the danger against which we are attempting to protect? What activity creates the threat of that danger? Is it necessary to regulate all activity that creates the threat or only some of that activity? What method will we choose to regulate that activity? And, does the regulation of the activity inhibit or restrict the exercise of any constitutional right?

I wish to take this opportunity to question both the distinguished Senator from Rhode Island and his opponent, the distinguished Senator from Delaware, in order to clarify the answers to these questions for myself and for the entire Senate as they apply to their respective proposals.

If they will do so I will start with the first one by referring to page 11 of the committee report, committee finding No. 3. That finding states:

> The disclosure of such relationships to unauthorized persons is detrimental to the successful and efficient conduct of foreign intelligence, counterintelligence, and counter-terrorism activities of the United States.

My question for both Senator CHAFEE and for Senator BIDEN is: Did the committee by that finding intend to find that every disclosure causes a harm sufficient for Congress to regulate the disclosure, that is, does this finding recognize a generic harm on the part of such disclosures?

Mr. BIDEN. Will the Senator repeat the last part of the question?

Mr. GORTON. Did the Judiciary Committee in connection with this claim, that is, disclosure of such relationships to unauthorized persons is detrimental to successful and efficient conduct of various intelligence activities, intend to find every disclosure causes a harm sufficient for Congress to regulate the disclosure?

Mr. BIDEN. No. What we are trying to get at there, is the fact that there are certain disclosures which in fact are very detrimental to the conduct of the foreign intelligence activities of this Nation and were the disclosure of those relationships made known it would render the activity useless and/or harmful. It would thwart the legitimate intelligence activities of the Government.

Mr. GORTON. Only some such disclosures and not all disclosures?

Mr. BIDEN. The judgment would be made obviously by the agency in conjunction with the Justice Department to determine whether or not to pursue a certain disclosure as opposed to other disclosures. For example, there are certain people who are CIA agents who may not be working in any field, that is, they may be analysts out at Langley. They may be about to retire. They may be bookkeepers, et cetera. The name of that agent—he is still a CIA agent—he still works for CIA—disclosure of that name may be judged by the agency and the Justice Department not to have something that impaired or impeded or in this case the language talked about would negatively affect the efficient conduct of the various intelligence activities.

Mr. GORTON. I take it the Senator from Rhode Island agrees that the committee in his own amendment does not intend to prohibit every such disclosure but only some.

Mr. CHAFEE. Let me say the Senator asked two questions. The Senator asked first a question whether there is a generic finding that disclosure is harmful and did we intend to regulate every disclosure. So we have to answer both questions.

The answer is, yes, Congress made a generic finding that the disclosure of any covert agent's status is harmful, but Congress did not regulate every disclosure because of the awareness that the first amendment must be protected.

That is why we find in section 601(c) two additional elements, that are not found in sections 601(a) or 601(b). There is a total of six elements the Government has to prove beyond a reasonable doubt before the defendant can be found guilty under 601(c). In other words, it is not just the disclosure that is required. There is also the pattern of activities and a reason to believe that this disclosure would be harmful.

Mr. GORTON. I think my next question then would be only for the Senator from Rhode Island. Since his answer to the first half of my question as he interpreted it was yes, that there was a finding that all such disclosures were harmful, how does that square with his statement in the course of his colloquy with the Senator from Minnesota that in any prosecution brought pursuant to section 601(c) the defendant could contest the logic of the Government's assertion that a given disclosure would cause harm if Congress has in fact already found that every such disclosure would cause harm?

Mr. CHAFEE. I just went through the six elements that must be proven.

Mr. GORTON. So the defendant is not bound by this congressional finding?

Mr. CHAFEE. There are six elements of proof that must be met. The

Government has to prove them beyond a reasonable doubt. We are not setting them up as defenses that the defendant has to raise. They are the six elements of proof the Government has to prove and, absent them, the case is dismissed as the Senator from Washington knows from his vast experience as a prosecutor.

The Government has to prove as one of the elements that the defendant had reason to believe his activities would impair or impede the foreign intelligence activities of the United States.

Mr. GORTON. But if I may point out to the Senator from Rhode Island, none of those six elements which the Government has to prove is that there was harm caused to its intelligence activities. Given that the Senator has asserted at one point that we are making a finding here that harm takes place under the circumstances of every disclosure, but he told Senator DURENBERGER that the defendant could contest the logic of the Government's assertion that a given disclosure would cause harm; but that is not going to be a defense, I take it. So why would he contest it?

Mr. CHAFEE. Give me the question again.

Mr. GORTON. We went through the six elements which the Government must prove. In those six elements, I take it, we do not include proof that harm resulted from the disclosure. The Senator has stated that it is the finding or the basis both of the committee's proposal, and I take it of his own, that harm does result from every such disclosure. Yet the Senator has told Senator DURENBERGER in a colloquy in which he engaged with him that the defendant could contest any assertion that the given disclosure caused harm; but now he is saying the Government does not have to prove harm anyway, so the proof that it would not cause harm on the part of the defendant would not be a defense and would do him no good, is that not correct?

Mr. CHAFEE. I will go through those six elements. First, the Government has to prove that there was an intentional disclosure of the information which indeed did identify a covert agent and, second, the Government has to prove that the individual who received the information was not authorized to receive classified information. Next, the Government has to prove that the person making the disclosure knew the information disclosed did identify a covert agent, and fourth, the Government has to prove that the United States was taking affirmative measures to conceal the covert agent's classified intelligence affiliation.

And then the last two elements are the ones I already mentioned, namely, there was a pattern of activities intended to expose agents' identities and that the person making the disclosure had reason to believe his activities would impare or impede the foreign intelligence activities of the United States.

Mr. GORTON. But there is no requirement of proof that harm resulted from the disclosure?

Mr. BIDEN. If I may interrupt, the Senator is absolutely correct, there is no requirement.

Mr. GORTON. I go on then to my next question and I will ask perhaps for an answer from both Senators. If in fact the committee found, and Senator CHAFEE agrees, that harm does result from every disclosure, why do we not have a bill before us which prohibits every disclosure?

Mr. CHAFEE. The answer to that is we are balancing two interests. We are balancing the first amendment against the national security and that is the whole careful exercise we are going through. We have not said that it is an offense every time to disclose the name of an agent. That is why we have these elements of proof which I have gone through before with the Senator.

Mr. BIDEN. I assume the Senator also wants me to respond to that. The Senator's first question was very incisive in pointing out what we are moving toward which, as I understand it, is whether or not there is a requirement of showing harm. There is no requirement of showing harm. Every disclosure is assumed to be harmful, assuming one other thing, the crime only comes into effect if, in fact, you intended to harm. The harm portion in the terms of the jury determining whether or not there was any harm done goes on its face to the mere disclosure of the name which, in this bill, is in fact the reason through which the Federal Government can move to prosecute. They then have to beyond that prove that you intended to do harm.

Really what we are trying to establish—maybe I will just stick to the question.

Mr. GORTON. Perhaps this brings me to my next question of the Senator from Rhode Island, and I am back again to his colloquy with the Senator from Minnesota.

My understanding in that respect was that one of the the distinctions which the Senator from Rhode Island regarded as quite important was that the primary intent of the disclosure did have to be directed at same kind of harm to the United States before you wish to have criminal penalties adhere; is that correct?

Mr. CHAFEE. I think you should quote from the colloquy that you are suggesting.

Mr. GORTON. I think that is a good idea.

Mr. CHAFEE. If you would, I would appreciate it.

Mr. GORTON. In the course of the colloquy, Senator CHAFEE, at the end of one of Mr. DURENBERGER's questions was this statement:

> This crucial distinction between the main direction of one's conduct and the side-effects that one anticipates but allows to occur, because of one's other goals, forms an important safeguard for civil liberties. The amendment before us would bring that safeguard into play, would it not?

The answer from Mr. CHAFEE:

> Yes, it would, Senator Durenberger.

Now that seems to me fairly to conclude that the primary intent of the conduct must be the disclosure of the names of the agents. If I may, I will go on to the bottom line of this proposal which is if that is in fact, the case, given your answer——

Mr. CHAFEE. Let us finish this part.

Mr. GORTON. All right.

Mr. CHAFEE. I am not prepared to concede the very point you are making and that you are suggesting.

Senator DURENBERGER, in his question ends up:

> A newspaper reporter, then, would rarely have engaged in a pattern of activities with the requisite intent "to identify and expose covert agents." Instead, such a result would ordinarily be "the (anticipated) side effect of his conduct."

This is dealing with the pattern of activities which we discussed, this crucial distinction between the main direction of one's conduct and side effects that one anticipates but allows to occur—is this where you are?

Mr. GORTON. This is exactly where I am.

Mr. CHAFEE. "Forms an important safeguard for civil liberties. The amendment before us would bring that safeguard into play, would it not?" The answer is:

> Yes it would, Senator Durenberger, and that is one reason why I believe that my version is actually better for civil liberties than the bill as reported out of committee.

That has nothing to do with harm to the United States. That has to do with the disclosure of the name of an agent.

Mr. GORTON. But it certainly does have to do with the primary intent underlyins the pattern of activities, does it not? If, in fact, that is the thrust of your proposal. My question is why not include language in your proposal which points out that fact in the body of the provision rather than simply in this colloquy?

Mr. CHAFEE. Well, it seems to me you are heading in two directions. It seems to me you started off this afternoon by suggesting that there had to be harm to the United States, and that that was a defense. Both the Senator from Delaware and I have pointed out that that is not one of the elements of proof. Either it has to be with an intent to impair the intelligence activities of the United States or, my language, which is reason to believe.

But now you are taking this other language and somehow suggesting that in the colloquy I had with Senator DURENBERGER this is what I said. And that is not what I said at all.

Mr. GORTON. Mr. CHAFEE, the first proposal that I made to you and to

Mr. BIDEN did have an alternate method of proof which included harm, although it also left the specific intent standard, which does not require harm.

Our last suggestion, however, was simply that the definition of the term "pattern of activities" which you use in your statute, have added to it, and I quote, "the main direction of said pattern of activities must be to identify and expose covert agents." That does not include any test or implication of actual harm whatsoever. It seems to me that it is totally consistent with your answer to Senator DURENBERGER. My question is, therefore, why do you oppose its inclusion in that definition?

Mr. CHAFEE. The language you have proposed deals with and uses words that are not statutory words. Was not the language you proposed "main direction"?

Mr. GORTON. It is.

Mr. CHAFEE. That is just as nebulous, and it is on that basis we thought that was inappropriate.

Mr. GORTON. But it is taken from the Senator's colloquy. Was it nebulous there? Is the colloquy going to be used in court? If it is not nebulous there, why is it nebulous as a part of the statute?

Mr. CHAFEE. Because in the colloquy, one is setting forth the background, making a record, as it were, which is different from the specific language one uses in a statute. In the statute we used a word which has been discussed here to a considerable extent today; namely, "intent" to identify and expose covert agents.

Mr. GORTON. At this point I am not asking a question about intent at all. I am simply dealing with the definition in the statute of the term "pattern of activities," which "requires a series of acts with a common purpose or objective," and then asking why that should not be further clarified by adding the language, "The main direction of said pattern of activities must be to identify and expose covert agents."

I think that is totally consistent with your colloquy with Senator DURENBERGER. I do not believe that you have disagreed with me in that respect.

Is your only reason for opposing the amendment that you think the language which you used yourself in the colloquy is too vague?

Mr. CHAFEE. Pardon? The last words you said were what?

Mr. GORTON. Is the only reason you disagree with adding that kind of an amendment the fact that you think the language in your colloquy is too vague to be included in the statute?

Mr. CHAFEE. Yes. There is no history of the use of such language. Furthermore, the problem is you do not like my answers, but I cannot go any further with you.

The language, the intent, which we have included is sufficient, in my judgment. The language that you seek does not have a judicial history to it.

Mr. GORTON. Does Senator BIDEN have any reaction to that?

Mr. BIDEN. It seems to me it makes a lot of sense on the point. It seems to me you are right about the pattern of activities. A pattern of activities, by the way, to take it a step further, need not be established in testimony, need not be a pattern of disclosure. It needs to be only a pattern of activities which resulted in disclosure.

I do not see how your suggestion of clarification is harmful. It is consistent with what I think the Senator set out today—what Senator CHAFEE said it would do.

I would like to at some point to go back to your first point about the question of harm. I am not sure you want to do that now. I think when we get to that I can show you that is all the more reason why you need a tougher standard, an intent standard, rather than a reason to believe standard. If, in fact, the Government does not have to show there is actual harm done, then, in fact, it seems to me the burden should be greater upon the Government to show that you intended to do harm. But I am not sure you want to get to that right now.

(Mr. EAST assumed the chair.)

Mr. GORTON. I note in the opening statement of Senator CHAFEE on February 25 of this year, he stated "The pattern of activity includes more than one disclosure." By that does the Senator mean a disclosure of more than one name or the disclosure of a single name more than once, or both?

Mr. CHAFEE. Let me quote the language in the report of the Select Committee on Intelligence. That might be helpful. I will quote from page 22:

> A journalist writing stories about the CIA would not be engaged in the requisite "pattern of activities," even if the stories he wrote included the names of one or more covert agents, unless the government proved that there was intent to identify and expose agents and that this effort was undertaken with reason to believe it would impair or impede foreign intelligence activities. The fact that a journalist had written articles critical of the CIA which did not identify covert agents could not be used as evidence that the purpose was to identify and expose covert agents. To meet the standard of the bill, a discloser must be engged in a purposeful enterprise of revealing names—he must, in short, be in the business of "naming names."

Then there are some illustrations that are given in this report language. There it is. I do not know what more I can give you, along with the definition that we have in the act itself.

Mr. GORTON. I was not referring to the report language. I was referring to the statement the Senator made in his opening salvo, in his argument on the floor. I think my question was fairly simple and is not answered by the report language. It involves proof of a pattern of activity. You say this requires more than one disclosure. But that is somewhat imprecise. I simply wanted to know whether the Senator meant by that the disclosure of more than one name or the disclosure of a single name more than once. If there is any implication in your answer by reading from the committee report, it may be that it was a disclosure of a name more than once. Am I correct on that or not?

Mr. CHAFEE. Well, go back and look at my statement. The Senator is taking the statement I made. Let me just say this: It appears to me that the Senator has misunderstood that. I did not say a pattern of activity necessarily includes more than one disclosure. I said the pattern of activity requires a series of acts with a common purpose and objective. It is not necessarily one disclosure. It is a pattern of activities to impair or impede U.S. foreign intelligence activities.

Thus, there must be proof not only with regard to a particular disclosure but also with respect to a pattern of activities in which the disclosure occurs.

The evidence must show that such activities were undertaken both to identify and to expose covert agents. That was the quote that I gave in my statement.

In other words, one disclosure, plus a series of acts leading to that disclosure, could be a pattern of activities. Many disclosures could also be a pattern of activities. However, it is important to state that this pattern of activities must be done with the required intent. I do not think you can brush that aside.

We are looking at this act without considering the six elements of proof which I have time and time again stressed. The pattern of activities must be done without the intent to identify and expose. In order words, you have to have a pattern of activities and you have to have the intent to expose.

Mr. BIDEN. Will the Senator yield?

Mr. CHAFEE. Let me just say one other thing. I think it is clear from the language of the bill and the accompanying legialative history that an individual could be liable for a single disclosure of a single name under either of these versions, either under the Biden language or under the language that I have proposed.

But it is also clear that the other elements would have to be proved as well.

Mr. GORTON. With that statement I certainly agree. Did Senator BIDEN wish to respond?

Mr. BIDEN. Yes, I would like to respond. Do not get carried away with the language in the report which talks about revealing or being in the business of naming names. You do not have to name names. You only have to name one name, No. 1.

No. 2, the Justice Department testimony before our committee was that their interpretation of a pattern of activity would mean that a single reporter going out and identifying a single

name, if he or she in the course of trying to find out that name contacted several people, establishes a pattern. A pattern can be established by, literally, if I am a reporter, going to see the intelligence committee spokesperson and saying, "Is John Smith an agent?" They say, "No comment."

Then they go over and look in some old military records to see if John Smith had ever been in intelligence. That is another thing they have done. Then they go out to Langley.

They have established a pattern by that. The pattern of activity that Senator CHAFEE keeps talking about as one of the six protections is in fact no protection at all. There is not any protection.

He is quite correct, under the intent provision we do not require that there be a pattern of activity. The term pattern of activity just requires a common purpose or objective. The common purpose is established if you can show that the pattern was designed and activity undertaken to disclose a name. That is, again, all the more reason why there is a need for the "additional standard protection of requiring intent."

The pattern of activity is not any protection.

Mr. CHAFEE. The case that the Senator from Delaware cited in support of his language seems to me does not lie. It is clear, under his definition, that someone seeking to track down the name of an agent and who gets the name of an agent and publishes it after going through this effort, would be guilty under the Biden language. I do not see what defense the reporter would have in that instance.

Mr. GORTON. Both Senator BIDEN and I agree on that.

Mr. BIDEN. That is my point.

The point I am trying to make is that Senator CHAFEE and those who support his position constantly refer to the establishment of a pattern of activity as one of the six sacred safeguards. "The Government has to prove six elements here and one is a pattern of activity."

Well, that is not much of a hurdle to overcome. A pattern of activity can be easily established and because it can be, and because, further, there is not a requirement for the Government to prove that harm was done to the Government—neither of those requirements exist—that is all the more reason why we have to err on the side of sticking to the time-honored jurisprudential standard of requiring intent.

Mr. GORTON. In this colloquy, I am still not totally persuaded, I will say to the Senator from Delaware, about that point in its entirety. It certainly leads to my next question of the Senator from Rhode Island. Under the Chafee amendment, to support a conviction must the primary intent of the defendant have been to disclose the identity of agents as opposed to the disclosure simply being a side effect of the pattern of activities?

Mr. CHAFEE. Would the Senator restate the question?

Mr. GORTON. Let me repeat it.

Under the Chafee amendment, in order to support a conviction must the primary intent of the defendant have been to disclose the identity of an agent or agents as opposed to that disclosure being a mere side effect of a pattern of activities?

Mr. CHAFEE. Mr. President, I disagree with the point that the Senator from Delaware stresses. He seems to be taking over the definitions that come from our act and describing them as the pattern of activities and the intent being the same standard. I do not believe so at all. Nor are they meant to be.

The pattern of activities is as defined. That is something quite different from the intent to disclose.

Mr. BIDEN. Mr. President, I am not suggesting they are synonymous.

Mr. CHAFEE. Mr. President, I shall handle my section of the bill and the Senator can handle his.

Mr. BIDEN. Fair enough.

Mr. CHAFEE. In response to these questions of the Senator from Washington, in his very question, he proposes that the intent is part of the pattern of activities. That is not so. The intent to disclose an agent is an element. Indeed, an individual might have an intent to disclose the name of an agent, but the question remains—was this a part of a pattern of activities? It could well be that it was not and the absence of a pattern of activities would be a successful defense.

Mr. BIDEN. Mr. President, is it permissible for me to respond to that, because I think the Senators are making a very, very important point?

The reason for the notion of whether or not it was a primary intent or a side effect in the disclosure is that the pattern of activity which took place resulted in the disclosure of an agent. For example, someone could be out writing a book about how the CIA works and be trying to establish a particular point. In the process, as a side effect, he discloses a name. It is very difficult to determine whether or not it is primary purpose or secondary purpose or side effect. That is why we, those who took my position, abandoned that whole attempt to establish intent as it relates to disclosure. It is a nonwinning game. It is hard to pin down how that relates to disclosure.

Intent relates to the question of disclosure of a name in the Chafee bill. We abandoned that in our bill and intent goes to the question of whether or not there was an intent to do harm, not to disclose a name or not disclose a name.

The Senator from Washington is making, whether he intended it or not, a perfect case why the intent provision as it appears in the Chafee language is meaningless.

Mr. GORTON. Mr. President, I am frustrated by this exchange because, in fact, I read the Durenberger colloquy as being a very constructive step forward.

Mr. BIDEN. If that is what it really means.

Mr. GORTON. One which would have persuaded me to vote for the Chafee amendment were I persuaded that the courts would interpret "reason to believe" as the Senator from Rhode Island explained it to Mr. DURENBERGER. I have been trying to get an answer from the Senator from Rhode Island which would allow me to do that. I do not think my last question was a trick. I think that the way I read his colloquy with Senator DURENBERGER, when a disclosure is a mere side effect of the pattern of activities, there is not a sufficient degree of proof to sustain a conviction under the Chafee amendment. It must be the primary intent of the defendant to disclose the identity of agents.

I think that is what the Senator from Rhode Island told the Senator from Minnesota. My frustration comes from the fact that I do not think that, standing alone, his language leads to that conclusion. I simply wanted to propose a change, not from "reason to believe" to Senator BIDEN's "intent," but simply to put into the statute itself what the Senator from Rhode Island said his amendment meant.

Mr. BIDEN. Believe it or not, Mr. President——

Mr. CHAFEE. Wait a minute, Mr. President. If I am going to defend my amendment, I want to do the defending.

Mr. BIDEN. I think that is a good idea.

Mr. CHAFEE. If the Senator from Delaware wants to address a matter, he is perfectly free to do so. But I do not want him describing my amendment. I am perfectly capable of undertaking that by myself.

If he has a question, the Senator from Washington should go ahead and ask it. But in all fairness, he has been against this amendment right along, so I do not know what has changed all of a sudden that made it palatable to him. If it can be made palatable, I certainly would be delighted to do so within the realm of what is legal language and would hold up in court.

Mr. GORTON. Mr. President, I may say I cannot speak, of course, for the Senator from Delaware. I can, however, speak for the Senator from Washington, and I can only repeat that I felt that I had reached a point at which I could support the Senator from Rhode Island when I read his colloquy with Senator DURENBERGER. This was true, except for the fact that, as a cautious lawyer, I did not feel that what I understood from the colloquy was apparent simply from the plain meaning of the "reason to believe" language in the amendment itself.

It is for that reason that I suggested the softest possible amendment, an amendment which did not change the "reason to believe" standard of the Senator from Rhode Island, but which simply attempted to take the words out of his own colloquy with Senator DURENBERGER by adding to the definition of a "pattern of activity," the language, "The main direction of the pattern of activities must be to identify or expose covert agents."

I believe the Senator from Rhode Island has said that in fact is an accurate reading of what he said and meant in his colloquy with Senator DURENBERGER. My frustration stems from the fact that he is unwilling to put it in the statute.

It is just as simple as that, Mr. President. I would like to vote for the Chafee amendment.

Mr. CHAFEE. And, Mr. President, I would like to have him vote for it.

Mr. GORTON. Then why can we not add that language to the Chafee amendment? I suspect it would also secure the votes of a number of people who prefer the intent language.

Mr. CHAFEE. Mr. President, I do not know what else we can do. The Senator wants the changes made. The language which we have in here—we are plowing old ground now—deals with an intent to identify and expose agents. Why is that not clear enough? What does the Senator want?

Mr. GORTON. I do not propose to change that language, Mr. President. I do not propose to change a single word in that language. I simply propose to change the definition of "pattern of activities" to incorporate in it the explanation of that term which the Senator from Rhode Island accepted in his colloquy with Senator DURENBURGER.

Mr. CHAFEE. Mr. President, we have gone over this before and we can repeat it. Obviously, in a colloquy, one is not using exact, specific legal terms. A colloquy, history of the act, a report, all go into the makeup. But the specific language the Senator was seeking, I believe, is something different. Can he repeat his language, the main thrust, as it were?

Mr. GORTON. I can, President, and I shall be even more specific. The language in the bill is on page 9, subsection 10. That subsection says this:

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

That is the entire definition as the bill appears now. I would add to that:

The main direction of said patterns of activities must be to indenify and expose covert agents.

I believe that this language—I do not mean to try to mislead the Senator from Rhode Island in any respect whatsoever—is the precise thrust of what he said that term "pattern of activities" did mean in answering questions of Senator DURENBERGER early in the course of this debate.

If I may say so—

Mr. CHAFEE. Let me just answer the Senator from Washington. He is an experienced lawyer, formerly attorney general of his State. What does he think of language that has words like "main direction?"

Mr. GORTON. I would suppose——

Mr. CHAFEE. Has he ever seen it?

Mr. GORTON [continuing]. That if I were a judge and I were dealing with a prosecution under this act and I had to give a jury instruction as to what the term "pattern of activities" means, and I were referred by either the prosecuting attorney or by the defense counsel to the debate over this in Congress because I was attempting to find out what it means, and I read the Chafee-Durenberger colloquy, I might very well make an instruction read that the term "pattern of activities" requires a series of acts with common purpose or objective, and the main direction of said pattern of activities must be to identify or expose covert agents.

I think I might very well take that right out of the debate over this bill. In my view, to a juror, that would be quite meaningful. That is plain, simple English; it is not even a particularly long sentence. Under those circumstances, why make the judge guess at making that instruction?

Mr. President, I do not think this language is vague or general, anymore than anything else in this proposal is. It is not something new. It is not in a foreign language. They are simple words.

I suppose that the reason that I bring this up is that it seems to me to consolidate and strengthen the position of the Senator from Rhode Island in this entire debate. If provides the great strengthening from his colloquy with Senator DURENBERGER by putting into the statute language which clarifies what he says it means.

Mr. CHAFEE. Mr. President, would the Senator remove the word "intent" on line 8, page 3, subsection (c)?

Mr. GORTON. I am sorry, Mr. President. Would the Senator repeat that?

Mr. CHAFEE. Would the Senator then remove the word "intent" in 601(c), where we say, "Whoever, in the course of a pattern of activities, intended to identify and expose * * *"?

Mr. GORTON. I do not think so. I was not proposing to make any changes there.

I was not proposing to strike anything from the Senator's amendment or from the bill. I was simply proposing to clarify the meaning of the term "pattern of activities."

Mr. CHAFEE. In the language we have, the pattern of activities has to have the intent. It has to be a pattern of activities, and it has to have the intent.

It seems to me that what the Senator from Washington is proposing is what we have in there. In the colloquy with Senator DURENBERGER—and I remember it—we put considerable stress on the very point of the intent.

Mr. GORTON. I believe that is so. A fair question in the colloquy with Senator DURENBERGER was whether or not we were dealing with what might be called the primary intent of the pattern of activities rather than a secondary or merely incidental intent. It was to clarify that question that the Senator from Rhode Island both set up the colloquy and answered as he did.

So, no, I do not think I would want to remove the word "intent" from the other portion in the statute. We probably could reach the same goal by simply putting "primary" before the word "intent" earlier in the act. However, I understood the Senator to object to that as being too drastic. I think this is a less drastic method of doing the same thing.

Mr. CHAFEE. Let us take it under consideration. Why does the Senator not move on, if he has other questions?

Mr. GORTON. No. As a matter of fact, since this is the central point in my colloquy with the Senator from Rhode Island, and since I intend to vote for the amendment of the Senator from Rhode Island if he accepts this proposal, the only conclusion I have here in my speech depends on what his answer is to my question.

Mr. CHAFEE. I shall have to consider that. We are not through yet. Obviously, we will be on this measure tomorrow.

Mr. GORTON. I am more than happy to have the Senator consider this proposition overnight and to obtain an answer later. At that point, I may have something further to say to Senator BIDEN.

Mr. CHAFEE. All right. By "all right," I mean that I heard the Senator, and I appreciate his suggestion.

Since the Senator has indicated that he is going to vote against me, anyway, I can only go up with regard to conforming to his wishes and, perhaps securing his vote.

Mr. GORTON. I thank the Senator from Rhode Island.

(Mr. ABDNOR assumed the chair.)

Mr. QUAYLE. Mr. President, I wish to respond to the debate of yesterday concerning the statement I made on January 25 of this year with respect to two fundamental points.

One, the appropriate element for a criminal statute, the issue there being the "reason to believe" standard versus the "intent" standard; and two, the question of gray mail.

Mr. President, the distinguished Senator from Rhode Island yesterday made some observations to which I should like to respond.

First, the fact that "reason to believe" language implies a negligence standard is well-founded throughout the legal community and by interpretation in the courts. The Senator from Rhode Island points out, with testimony from the Justice Department on October 6 of last year that:

If the "reason to believe" standard stood by itself and were the only element of this offense, . . . it would in many ways resemble negligence.

So the Justice Department said, in response to a question by Senator LEAHY, that just by itself, yes, "reason to believe" language would be a negligence standard. Then the Justice Department goes on and is quoted in the RECORD as follows:

Therefore, while that one provision, taken in isolation, would be sort of a negligence standard, it is accompanied by five other elements which involve actual knowledge and specific intent.

Mr. President, "intent" is the standard for a criminal statute. "Reason to believe" is the standard for a negligence statute.

I find it very interesting that the conclusion of the Justice Department goes to the actual knowledge and specific intent we are debating here today. I hope this body will view the debate in that context—that even the Justice Department is saying actual knowledge and specific intent are elements of the crime. Yet, we are going to be asked to vote on the Chafee amendment to insert "reason to believe."

The second point that my good friend and distinguished colleague brings up concerns the very important debate on the issue of gray mail, and the possibility that what the Chafee amendment would promote has been misunderstood. I do not believe that the arguments are complex, but it seems to me that, nonetheless, they are easily confused.

It has been suggested that the Chafee amendment would pose no problem of gray mail. With all due respect, I must disagree. The Senator from Rhode Island said yesterday:

The "reason to believe" standard avoids this problem by focusing on overt acts rather than on some subjective state of mind.

I ask this: What other evidence, beside exposure of these overt acts, can be used to establish proof of guilt in such cases? What other evidence, beside exposure of such overt acts, would be thrown up as a defense?

I go back to the March 15 statement in the RECORD, where again the Justice Department is called upon to provide us with wisdom in correcting any uncertainties we may have. I read from the RECORD, page S 2079, quoting Mr. Robert Keuch, Assistant Deputy Attorney General in the Carter administration:

The Justice Department is concerned that the specific intent element will facilitate gray mail efforts to dissuade the Federal Government from prosecuting offenders.

What the Justice Department does not tell us is what the "reason to believe" standard will do to facilitate gray mail efforts to dissuade the Federal Government from prosecuting offenders.

Mr. President, this issue is much simpler than it is given credit for being. Obviously, the intent standard is more narrow; it is more difficult to prove. The "reason to believe" standard is broader in its context; it is more encompassing. Therefore, by logical sense, the "intent" standard in discovery elements will be more restricted, and the "reason to believe" standard in discovery will be expanded. That is the case we are arguing. That is the issue of gray mail.

Mr. President, I believe we will have to ask ourselves one very fundamental question, and it is this: Given a criminal statute, do we want a criminal standard? If the answer is yes, then the Judiciary Committee's language should stand. If the answer is no, then I suppose it would be advisable for those willing not to have a criminal standard to vote for the Chafee language.

Finally, I should like to comment on the recent colloquy I heard between the junior Senator from Washington and the Senator from Rhode Island. The colloquy left me with the understanding that the Senator from Rhode Island would be willing to consider the proposition put forth by the Senator from Washington. The Senator from Rhode Island did not give us any indication of what that consideration would be, but at least the discussion left me with the impression that he would be openminded with respect to the Gorton amendment, which keeps the basic principles of the Chafee amendment intact but does not agree with the precise language that was passed by the House of Representatives.

I find very disturbing what could happen here.

We have the "intent" and "reason to believe" language adopted by the House Committee on the Judiciary and overturned on the floor of the House of Representatives. We have the "reason to believe" or the "intent" language adopted by the Senate Judiciary Committee and a chance of being overturned on the floor of the Senate. We have two committees in both Houses which have paid far more attention to this issue than 90 percent of the Members of the House of Representatives or 90 percent of the Members of the Senate. That is the way the committee system works.

If we adopt the Chafee language without the amendment or without the suggestions from the Senator from Washington, we are not going to have a conference on this disputed language. There will be no middle ground. And we will in fact have both Houses overturning committees on a very important and substantive issue.

Speculation is that the vote is going to be reasonably close. I would say to those who are listening and to those who are not here today that, if there is a question in their minds on whether the Chafee amendment is the proper language, they vote against the Chafee amendment, unless Senator CHAFEE is willing to consider the proposition put forth by the Senator from Washington.

Otherwise, we will be doing something that ultimately we could be sorry for.

Deliberations have taken place in both committees, the House of Representatives and the Senate, and there is a chance now that those committees will be overturned.

Not even looking at the merits, but just looking at the simple process of overturning the committees and thus not having that item conferenceable, I believe would be a serious mistake in the legislative process that we so fervorishly support.

Mr. CHAFEE. Mr. President, I wish to address the last point of the distinguished Senator from Indiana and then I will address the others. The point he seems to be making here is that when committees have considered language, woe betide the rest of us on the floor of the Senate should we consider changing that. I just cannot believe that that is the thrust of his argument.

First of all, if we want to follow that through. If he accords such significant consideration in the committees to the language that therefore we are bound to follow it here on the floor at great risk if we do not do so, certainly is plowing a new path in senatorial conduct.

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

Mr. CHAFEE. If I may finish, he will recall that this matter was set before and was considered in the subcommittee of the Judiciary Committee for something like 4 months and there the subcommittee approved the Chafee language. Then it came to the full committee in a rather short time. They overturned it by vote of 9 to 8. Is it your suggestion that based on that narrow vote which indeed-reversed the vote of the subcommittee—and if you want to allocate time considered I would suspect the subcommittee devoted more hours than were devoted to the amendment in the full committee. Then the matter came to the floor where this is hardly being rushed through. We first considered it in December 1981, and it has been pending since then. We have debated it here 4 hours today and 3½ hours yesterday and there is plenty of time remaining. We stopped only because no one else wanted to speak or be heard on the matter.

So if that is the thrust of the Senator's argument, that we should not overturn a 9–8 vote in a senatorial committee, because we do not know the substance of this measure, that is an argument I really would have to reject, even though the man propounding it——

Mr. QUAYLE. Will the Senator yield before he has to reject the proposal?

Mr. CHAFEE. The man proponding the argument is such a knowledgeable person that his mere suggestion of it

brings great weight to the argument. But even considering the meritorious factors that go with the proponent of this argument, the junior Senator from Indiana, I really have to say it does not seem to me to have much weight, contrary to most of the arguments he presents.

Mr. QUAYLE. Will the Senator yield for a weighty question?

Mr. CHAFEE. I yield.

Mr. QUAYLE. I wonder in the Senator's astute participation and observance of the legislative process over these years if whether in fact he can recall such action being taken where both Houses of Congress are going to in fact overturn committee decisions. I am not going to say and do not mean to say or to leave the impression that this body certainly does not have the right to do it. This body certainly has been deliberate. I only point out to the distinguished Senator from Rhode Island that there are a total of, let us see, three Senators on the floor at this particular time listening to this debate. There obviously is a question of whether the Chafee amendment is right. We have had a very prolonged debate. There is going to be consideration of the Gorton amendment. What I am suggesting to those who may not be completely comfortable at this time accepting the Chafee amendment is that they should vote against it with the anticipation of getting a compromise between the reason to believe standard and the intent standard.

What I am saying and warning this body is if in fact we adopt the Chafee amendment, there is no time left for negotiation on an in-between position on "reason to believe" and "intent." That is the thrust of my argument. I am not doing any kind of violence to this process, or casting any kind of question upon the deliberate body of the Senate. But I do want to caution those waivering Senators that they might find it convenient in the search of a compromise which many like to see to not vote for the Chafee language because we are not going to get a compromise if the Chafee amendment prevails.

Mr. CHAFEE. Let me respond to that.

First of all, can I cite a situation where an amendment—not the whole act, but an amendment—has been adopted in such a fashion in both Houses? I do not know. I am certainly sure that it is because the full bodies frequently go against the committees themselves.

Second, this amendment has been thoroughly considered. It is not as though we stumbled into it. We cannot observe only the fact there are three Senators on the floor. Obviously, there are Senators listening on their listening boxes in their offices. Indeed, this is a measure that has seen Senators from both sides proselytized by the newspaper association, by the ACLU, by a host of different organizations, including those interested in the intelligence agencies of our country. So it is not something that has just popped up and is being adopted in rapid fire fashion.

So, as to the question of compromise, this is not something that lends itself to compromise. There are two different approaches: Approach A and approach B. We cannot have an approach C that blends them both. I mean there is a difference here. When the Senator talks as though there is some magic way of weaving both forms of language in the amendment, it is not possible because the problem is this: Even though the United States Code has examples of statutes which state a person can have either "intent or reason to believe," the opponents of my amendment are objecting to the reason to believe standard. And so a compromise, for example, that went along with those statutes I have cited previously in 18 United States Code where we have a choice of both standards would be acceptable.

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

Mr. CHAFEE. I yield.

Mr. QUAYLE. It is my understanding that there is a compromise floating around in the nature of the Gorton amendment, and if I heard the colloquy correctly, that you left the impression—and I tried to write it down here—that you would consider the proposition that has been put forth. You did not give us an answer one way or another, but certainly you would consider it, keep an open mind, because there is not a difference between A and B, that there could be a logical and preferable path, and that would be C.

So what we are going to be forced to do though if we adopt the Chafee language is to cut off any kind of a compromise, which would be the C element and not A and B as the Senator describes.

Mr. CHAFEE. Well, let me just say this: I do not think even Senator GORTON would suggest that his proposal is a C as opposed to an A or B.

He had various proposals for the modification of 601(c), the language which is the crucial element which we are debating here. But he withdrew those and now his proposal solely goes to adding a few words, something like six words, to the definition of "pattern of activities," which exist in section 606 of the act.

It is under the definition portion rather than under the crucial section 601(c).

Mr. QUAYLE. Mr. President, will the Senator yield? I would like to just read a March 11, 1982, letter from the Senator from Washington, the first paragraph:

It seems to me that a compromise is nonetheless still a possibility if the bill proceeds to a conference on this issue. That will not happen, of course, if the Chafee amendment is adopted. Thus, even though I (Senator GORTON) am a cosponsor of the bill in the Chafee form I will vote against the Chafee amendment and hope the conference will work out a suitable compromise in light of this debate.

That is what we are talking about. This is not compromise if the Chafee amendment is passed.

Mr. CHAFEE. Well, you heard the proposal of the Senator from Washington. He suggested we added to the definition of "pattern of activities" words that would be acceptable to him.

I do not think anyone looking at this act would say that that goes to—changes the very heart of either my amendment or the committee bill that is on the floor here this afternoon.

I think one other point we should make is there are many of us who are deeply disturbed over the currently existing situation with regard to the disclosure of the names of our agents. One of the many virtues in voting for the Chafee amendment is that with the adoption of the Chafee amendment I am confident that the act will pass here. We then would be confident of swiftly having a bill, and thus the protection would be afforded rather quickly for our agents.

I know that early in the day the distinguished Senator from Delaware introduced a letter from the chairman of the Intelligence Committee in the House in which he said:

As far as I am able to influence the decision, the House would seek a conference regardless of the outcome.

I believe that was followed up by not only would they seek a conference but also I think the Senator from Delaware repeated a telephone conversation in which he said that the chairman of the House Intelligence Committee would swiftly seek a conference. That may be. That is splendid.

But as the junior Senator from Indiana knows so well, having been experienced in the House, these things just do not happen that quickly. They do not get conferences that fast. You may have a conference, you may have it swiftly if the vacations can coincide and the times can be worked out. But in addition to that I have sat on conferences, and undoubtedly you have sat on conferences, that never came to a conclusion. Nothing happened.

We had an Economic Development Administration conference with the House in which neither side gave, and we never had a bill.

So one of the virtues in voting for the Chafee amendment is we know we will have a bill.

Mr. BIDEN. Mr. President, if the Senator will yield on that one point, we will have to have a conference anyway, let us make that clear, no matter what. If the Chafee language is adopted—and I will stand corrected if I am wrong—it is my clear understanding that we have to have a conference anyway. There are other differences in the bill, not as fundamental as the intent difference, on which there will have to be a conference.

But the Senator from Indiana is correct, there will be no compromise on what we agree on if the Chafee language is adopted here. The relevant portion is the same as what is in the House language, and there will not be any chance to compromise on that.

But the notion that a conference will not be called swiftly or if that language is passed there is no need for a conference should be disabused. We have to have a conference anyway.

Mr. CHAFEE. Let me say, in response to that, if I might, yes, there would be differences. If the Chafee amendment is adopted there will be differences in the languages. The Senator is quite correct when he said they were not major but minor. I believe they are minor. I believe the House still has the language pertaining to cover provisions. But that is a kind of matter that indeed can probably be worked out. I think we have seen examples of where you never even actually go to conference, it is worked out without meeting.

Mr. BIDEN. The point I want to make is you made reference to holidays and times, and whatever, as if that was an impediment.

Mr. CHAFEE. The difference is that when you do not have matters of substance, sometimes they can be worked out, really, without a conference. The two chairmen get together and that is it. But I think the crucial point is if the Senator from Indiana is suggesting that there is some magic compromise that is possible, he should know that the Senator from Delaware and I have been working on this matter for some time. There has never been a compromise suggested. I mean this is language that——

Mr. BIDEN. I am prepared to accept the compromise. I am prepared to consider this language and, quite frankly, the Gorton language which adds:

The main direction of said pattern of activities must be to identify and expose covert agents.

I think that does go to the heart of the issue on which we have a disagreement. It is one I do not like as much as the intent language, but it is one I am willing to consider, and if we can get a compromise on it it is better than the language that exists. It is a significant change. I am willing to do that, I am willing to go into that.

But I do not discard that out of hand because it really does make a significant difference. The additional language added by Senator GORTON is very critical, for example. The whole thing would read then:

The term "pattern of activities" would require a series of acts with a common purpose or objective. The main direction of said pattern of activities must be to identify and expose covert agents.

It thus requires the courts to go back to the language in which the reason to believe standard is contained, and if those six elements are approved that the Senator from Rhode Island constantly refers to, which have some real teeth in them, in order to establish a pattern of activities, you have to show that it would be the burden on the State to prove that the main direction of the pattern was to identify and to expose.

Therefore, a logical defense would be "My main direction was not to expose the name of Charlie Smith, the agent. My main direction was to uncover a mole in the agency."

Then, in effect, the Gorton language is not quite as strong as "intent" but the Government essentially has to prove intent. So it is substantive, it is real. It is a compromise I would consider. But I do not think the Senator from Rhode Island can disagree with the effect of the Gorton compromise.

Mr. QUAYLE. The Senator from Delaware is saying there is a potential for compromise. The Gorton language does not suite the distinguished Senator from Delaware in all manners, but it is certainly preferable than leaving it as is.

I believe that we are in this posture, as was first brought out by the Senator from Washington, further advanced by the Senator from Delaware, that there is a potential of compromise. Well, certainly there is not going to be any magic wand waved to get a compromise between the two distinguished Senators from Rhode Island and Delaware. They have been working too long and too hard on this issue. But, at the final hour, as we come down to and prepare to vote for this, the Senator from Washington has put forth what appears to be a reasonable compromise. At least one element of this friendly confrontation that has been going on for months is willing to accede to the fact that it is a reasonable compromise.

Mr. BIDEN. I would add, if the Senator would yield, it is not merely that it is reasonable, it is a substantive change in both positions. Keep in mind the reason to believe standard would then be modified by a definition of the pattern of activity that essentially required proof of an intent to do something other than to write a story about uncovering a mole in the agency. The Government would have to be able to prove, under the Gorton language, that the main direction, the primary purpose of the activity that the writer engaged in was to expose an agent.

If, in turn, that writer, that newspaper person, could come into court and defend and say, "No, I can establish by the following 27 witnesses—ask my editor, ask my wife, ask the CIA agent I went to, they all know the reason I was going after this, I didn't care about John Smith's name, I wanted to know whether or not there was an illegality going on."

They can offer that proof as a defense and it has to be rebutted by the State. The State would then have to say, "No, no. The main direction of your pattern was to disclose it."

That is an additional safeguard. That is substantive. That is real. I do not think it goes as far as my intent language, which I prefer, but it is not cosmetic. It is real.

Mr. QUAYLE. Mr. President, I think we have made progress here.

Mr. CHAFEE. Let me just say this in response to what the Senator from Delaware is saying. When we get into the very problem that has been testified to by representatives of two separate administrations, you get into this business of the defense saying, "No, no. That wasn't my main direction. Ask my wife, ask my publisher, ask my adviser. My main direction was really to write a terrific book about the operations of the U.S. Government. My secondary direction was to identify and expose agents, but that wasn't my principal reason."

That is why you found me having such reluctance in connection with this suggestion of Senator GORTON and, indeed, my refusal to accept it here.

Mr. BIDEN. I guess the Senator does not like the Gorton language, is that what he is trying to say?

Mr. QUAYLE. Will the Senator yield?

Mr. BIDEN. Yes.

Mr. QUAYLE. Mr. President, I think I heard the Senator from Rhode Island, in response to the Senator from Washington, say that he would certainly take this language, consider this proposition of the Senator from Washington. So we now have one-half of the debaters saying, "Well, it is a compromise. I don't particularly like it, but I will support it." We have the other half saying, "I am going to take it under advisement."

I would say we are moving toward a resolution on this issue. All of us want an agent identities bill, at least this Senator does. There may be some Senators that do not. I do not believe by opposing the Chafee amendment that anyone ought to be put in the category of not wanting to see this bill passed as fast as possible. I want to see it pass for the very reasons that the Senator from Rhode Island has been working on this for how long? Two years, three years?

Mr. CHAFEE. Two and a half years.

Mr. QUAYLE. Two and a half years of his distinguished career in the U.S. Senate has been contributed toward this legislation.

I want to see it pass, but I also want to see it in the best language possible. I think we have the makings of a compromise, at least we are moving in that direction.

Mr. CHAFEE. We are not moving far in that direction.

Mr. QUAYLE. Let us move a little further.

Mr. CHAFEE. This Senator, this administration, the prior administration, both Justice Departments, both U.S. attorneys, and both heads of the CIA want legislation that protects first

amendment rights and prohibits these activities that have gone on. So, as I said, I would consider it. But that does not mean I will take it.

Mr. BIDEN. I think that is a good place to end the discussion.

Mr. CHAFEE. I think that is a splendid place. But I do not want anybody walking out of here, or I do not want any newspaper reporters to say this is a magnificent solution that is going to settle all problems. We will review it. We are always open to reviewing anything.

● Mr. BAUCUS. Mr. President, the activities of those who intentionally and maliciously expose the identities of this Nation's intelligence agents must be stopped. Those who disclose the names of these agents with the express intent of jeopardizing the agents' positions should be held accountable for their actions. Recent, well publicized examples of such reprehensible conduct have resulted in at least one tragedy as well as the endangerment of the lives of countless numbers of our intelligence agents and their families.

It is absolutely essential for our Nation to have intelligence information which is timely and accurate. The United States can collect this vital intelligence only through the operations officers of its intelligence agencies. But the identities of these loyal Americans has been shown by the recent turn of events to be in need of more stringent protection, particularly from those who make it their business to be in the business of naming names.

In an effort to protect our national security and to stop this reprehensible conduct, the Senate Judiciary Committee has reported S. 391, the Intelligence Identities Protection Act of 1981.

While I strongly support the intent of this legislation, as we draft the specific provisions we must be mindful of the protections provided to individuals by the Constitution. Any attempt to prohibit the dissemination of information must be balanced with the Constitutional guarantees of free speech and freedom of the press. This issue before us is not whether we should protect the CIA. Rather the issue is whether we should draft legislation to protect the CIA that is careful not to impinge upon constitutional guarantees.

The language of 601c, as currently written in the bill, both protects the constitutional guarantees of free speech and sufficiently penalizes those who undertake to identify covert agents "with the intent to impair or impede the foreign intelligence activities of the United States."

The basic rule of constitutional law, as written by Justice Holmes in 1919 is "whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils that Congress has a right to prevent." *Schenck* v. *United States* 249 U.S. 47 (1919). In other words, Congress can only place restrictions on speech where the damage from speech is imminent, where the danger outweighs the need for free expression and where the means chosen to restrict speech are not overbroad.

And that brings us to the crux of the matter: The means chosen which will least burden that constitutional guarantee of free speech. The Supreme Court has defined Congress limits in *Broadrick* v. *Oklahoma*, 413 U.S. 601, 607 (1972) when it is said:

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has given way to other compelling needs of society.

I believe the intent standard currently in this legislation will satisfy this requirement and withstand subsequent judicial scrutiny. The standard adopted in section 601(c) applies criminal penalties only to deter those who make it their business to ferret out and publish the identities of agents. 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.

The bill erects a number of hurdles against prosecution to protect the journalist and intelligence critic. The Government would have to prove each of the following elements 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.

A newspaper reporter, acting in a professional capacity is not likely to have engaged in disclosing information with the requisite intent "to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure." Instead, such a result would ordinarily be the side effect of his conduct and thus outside the scope of this legislation.

In my view, the "reason-to-believe" standard being proposed by the Senator from Rhode Island does not strike the correct balance between criminalizing the conduct we all agree should be stopped while at the same time preserving important press protections. More than 100 constitutional law experts share this perspective and believe the Chafee standard to be unconstitutional. The "reason-to-believe" standard is simply too broad to fall within the limit defined in Broadrick against Oklahoma. It would have a chilling effect on the press.

It is this chilling effect that the intent standard in the committee bill will effectively avoid, while preserving much needed sanctions for those who represent a very real threat to our national security. I therefore oppose the Chafee amendment, but strongly support S. 391, as reported by the Judiciary Committee.●

● Mr. GRASSLEY. Mr. President, earlier this year, as a member of the Senate Judiciary Committee, I voted in favor of S. 391, as originally introduced. I intend to reaffirm my strong support for the bill here today and I hope that we can restore the bill to its original form.

In this bill, as in other bills that the Judiciary Committee has studied in this and the prior session, we have been asked to balance first amendment rights against the Government's ability to suppress information necessary to protect the men and women of the intelligence community, whose secret work is vital to the Nation's security.

Some have opposed this legislation. The opposition states that the bill undermines first amendment rights. But, overwhelmingly, it has been viewed and it should be viewed as an attempt to bolster or protect our covert intelligence and counterintelligence agents.

Controversy over this legislation has focused on the specific intent requirements of the bill. The intent standard in the Chafee amendment "to identify and expose covert agents," rather than an intent "to impair or impede the foreign intelligence activities of the United States" establishes an objective standard that the defendant must be engaged in a conscious plan to seek out and expose undercover intelligence operatives where such conduct would impair U.S. intelligence efforts.

I have been convinced beyond a reasonable doubt that this legislation is needed to prohibit the systematic exposure of agents' identities under circumstances that pose a clear threat to intelligence activities vital to the Nation's defense. I am also convinced that this bill goes to great lengths to distinguish between the ghoulish business of furnishing the enemies of the United States with information that invites and facilitates violence against its agents and mere reporting. I am satisfied with the terms of this bill and the protection that it affords. I

encourage all of my colleagues to support this bill and its goals.●

Mr. DECONCINI. Mr. President, S. 391, the Intelligence Identities Protection Act of 1981, is an extremely important bill, and I have been noting its progress, along with the progress of its counterpart in the other Chamber, H.R. 4, with great interest. I strongly support this bill because I believe that it is essential that we provide adequate protection to our intelligence agents.

The pernicious practice of naming names of U.S. intelligence agents must be brought to a halt. This practice has a negative impact on our intelligence gathering system in two ways; not only does it compromise the interests of the United States by hampering the effectiveness of our intelligence activities, it also has the more immediate and tragic effect of placing the lives and freedom of our individual agents in the field in danger.

There are, however, other interests which we must take into account, and it is one such additional interest which has led me to support Senator BIDEN's language, which is currently a part of S. 391, over the language proposed by Senator CHAFEE. The difference between these two proposals involves the standard of proof necessary to obtain a conviction under section 601(c) of the bill. Senator CHAFEE's language would eliminate the requirement that, to be guilty of a crime under the bill, a person must have specific intent "to impair or impede intelligence activities by the fact of identification and exposure" of agents. The amendment would substitute "reason to believe" for "specific intent," thereby reaching any investigative reporter who writes an article which identifies a covert agent. The individual's lack of purpose to impair or impede intelligence activities, and even his lack of knowledge that such a result would occur, would be irrelevant. Thus, the "reason to believe" standard would be the equivalent of a negligence standard.

I feel that such a standard would have a substantial chilling effect on the legitimate activities of the Nation's newspapers and news media, an effect that could well bring the law into direct conflict with the first amendment. Indeed, I have recently conferred with several representatives of the new media from my home State of Arizona, and they indicated to me that the language authored by Senator BIDEN would grant them the constitutionally requisite freedom of action in this area of press activity. I believe that S. 391, with Senator BIDEN's language intact, will allow us to stop the purposeful revelation of our agents' identities which currently threaten our intelligence activities, while at the same time allowing this Nation's news media to continue their legitimate reporting and investigatory activities as envisioned by the Bill of Rights.

I am certain that this bill will meet the concerns that were expressed by the Director of the Central Intelligence Agency to the Committee on the Judiciary, and that it will raise morale significantly within that agency. I urge the active support of my colleagues for this bill so that we may enact it into law as quickly as possible.

EXECUTIVE SESSION

Mr. STEVENS. Mr. President, I ask unanimous consent that the Senate go into executive session for the purpose of considering the protocol to the North Atlantic Treaty on accession of Spain; that the treaty be advanced through its various parliamentary stages, up to and including the resolution of ratification; and, that, on the resolution of ratification, there be the following time agreement: 1 hour, to be equally divided between the chairman of the Foreign Relations Committee and the ranking minority member or their designees; and that no reservations, amendments, declarations, or understandings be in order; and that, following conclusion of that treaty, the Senate turn to the nomination of Max L. Friedersdorf, of Florida to be consular officer and secretary in the Diplomatic Service of the United States, under a time agreement as follows: 30 minutes to be equally divided between the chairman of the Foreign Relations Committee and the ranking minority member or their designees and that, following that, the Senate turn to the confirmation of Calendar Nos. 616 and 667.

Mr. ROBERT C. BYRD. Mr. President, reserving the right to object, I shall not object. I am authorized by Mr. PELL to proceed on the basis of the time agreements that have been stated by the distinguished assistant Republican leader, so there is no objection on this side.

Mr. STEVENS. Is the time agreement agreed to, Mr. President?

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

PROTOCOL TO THE NORTH ATLANTIC TREATY ON THE ACCESSION OF SPAIN

Mr. STEVENS. Mr. President, I now ask that the Senate go into executive session pursuant to that agreement and that the Senate turn to the consideration of the protocol under the agreement.

The PRESIDING OFFICER. Without objection, it is so ordered; and without objection, the treaty will be considered as having passed through its various parliamentary stages up to and including the presentation of the resolution of ratification, which the clerk will state.

The assistant legislative clerk read as follows:

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Protocol to the North Atlantic Treaty on the Accession of Spain, signed in Brussels on December 10, 1981, on behalf of the United States and the other parties to the North Atlantic Treaty.

Mr. PERCY. Mr. President, I see in the Chamber the distinguished Senator from Rhode Island (Mr. PELL), the ranking minority member of the Foreign Relations Committee, and today, with a great sense of personal pleasure and privilege, I call upon the Senate to discharge a very significant responsibility.

In these time when we all spend our days grappling with international crises and intractable domestic economic problems, it is a lift to the spirits to turn to the business of Senate advise and consent to the ratification of the protocol to the North Atlantic Treaty on the accession of Spain.

On November 26, 1981, the Spanish Senate authorized the Government of Spain to seek an invitation to join NATO. In Brussels, on December 10, 1981, the Foreign Ministers of NATO members signed the protocol of Spanish accession to the North Atlantic Treaty. President Reagan on January 26, 1982, transmitted the protocol to the Senate for its advise and consent to ratification, calling Spain's rededication to the values and purposes underlying the North Atlantic Treaty and her decision to seek full partnership in NATO "historic developments and a source of inspiration in these troubles times." The Committee on Foreign Relations considered the protocol, reporting it to the full Senate favorably and without reservation on March 9, recommending that the Senate give its advise and consent to ratification. Today we have a unique opportunity to show our support for the new Spanish democracy, significantly strengthen the North Atlantic Alliance, and demonstrate the vitality of common Western values and institutions.

Spain's transition to democracy is an example of what a people determined to control its own destiny can accomplish. The death of General Franco in 1975 signaled the beginning of a new era in Spanish history. Since that time, Spain has made extraordinary progress in the restoration and strengthening of her democratic institutions. Senate endorsement of Spanish entry into NATO would confirm American support for this process.

U.S. relations with Spain have, for many years, been characterized by a deep mutual respect and understanding. The United States places great importance on continuing this climate of cooperation. Since 1953, the United States and Spain have enjoyed a close bilateral military relationship, and Spain has made important contributions to Western security. Spanish NATO membership will broaden this bilateral cooperation and, at the same time, substantially enhance Western unity and security.