Calendar No. 1103

96TH CONGRESS, 2d Session | SENATE | REPORT No. 96-990

INTELLIGENCE IDENTITIES PROTECTION ACT OF 1980

SEPTEMBER 24 (legislative day, JUNE 12), 1980.—Ordered to be printed

Mr. KENNEDY, for the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 2216]

The Committee on the Judiciary, to which was referred the bill (S. 2216) to improve the intelligence system of the United States, and for other purposes, having considered the same, reports favorably thereon with amendments, and recommends that the bill, as amended, do pass.

AMENDMENTS [1]

(1) On page 12, line 2, strike out "intended to identify and expose covert agents and" and insert in lieu thereof "undertaken for the purpose of uncovering the identities of covert agents and exposing such identities".

(2) On page 13, lines 4 and 5, strike out "intended to identify and expose covert agents and" insert in lieu thereof "undertaken for the purpose of uncovering the identities of covert agents and exposing such identities"; and following line 15, insert the following:

> (e) It shall not be an offense under subsection (c) of 501 if the disclosure of the information described in such subsection is an integral part of another activity such as news reporting of intelligence failures or abuses, academic study of government policies and programs, enforcement by a private orga-

[1] The amendments are to the amendment in the nature of a substitute bill reported by the Select Committee on Intelligence on Aug. 13, 1980 (S. Rept. 96-896).

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nization of its internal rules and regulations, or other activity protected by the First Amendment to the Constitution.

(3) On page 14, line 2, following the word "agency" insert ", other than the Peace Corps, the Agency for International Development, or their respective successor agencies,".

(4) On page 17, line 20, strike out "of objective." and insert in lieu thereof "or objective."; and following line 20 insert the following:

JUDICIAL REVIEW

SEC. 507. (a) Any interested party, including any news organization or any person who intends to disclose any information identifying an individual as a cover agent to any individual not authorized to receive classified information, may institute in the United States District Court for the district in which the defendant has his principal place of business, or in the case of a newspaper or magazine, in the district in which its principal editorial offices are located, such actions as may be appropriate, including an action for declaratory judgment, to construe the constitutionality of any provision of this title or to rule upon the constitutionality of such provision on its face or as applied. The district court shall immediately certify all questions of constitutionality of this title to the United States Court of Appeals for the appropriate circuit, which shall hear the matter sitting en banc.

(b) Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

(c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section.

SEVERABILITY OF PROVISIONS

SEC. 508. If any provision of this title or the application thereof to any person or circumstance is held invalid, the remainder of this title and the application of such provision to any other person or circumstance shall not be affected thereby.

PURPOSE OF THE BILL AS AMENDED

The purpose of S. 2216, as reported, is to strengthen the intelligence capabilities of the United States by prohibiting the unauthorized disclosure of information identifying certain United States intelligence officers, agents, and sources of information and operational assistance, and by directing the President to establish procedures to protect the secrecy of these intelligence relationships. The purpose of the Committee amendments is to narrow the scope of the bill to prevent undue encroachment on constitutional rights under the First Amendment

and to provide expeditious judicial review when such rights are involved.

History of the Bill

Numerous proposals have been made for a criminal statute to punish systematic efforts to uncover and expose the identities of intelligence agents. Senator Bentsen introduced identities protection proposals in the 94th and 95th Congresses but no action was taken. On October 17, 1979, Representative Boland, Chairman of the House Intelligence Committee, introduced H.R. 5615, the Intelligence Identities Protection Act, which was co-sponsored by all other members of that Committee. Identical provisions were included in S. 2216, introduced on January 24, 1980, as the Intelligence Reform Act of 1980, by Senator Moynihan. The bill was co-sponored by Senators Wallop, Jackson and Chafee of the Select Committee on Intelligence, by Senators Domenici, Nunn and Danforth, and later by Senators Hollings, Schmitt, Simpson and Armstrong.

Provisions for intelligence identities protection similar to Senator Bentsen's proposal were contained in S. 2284, which was introduced on February 8, 1980, as the National Intelligence Act of 1980 by Senator Huddleston. This bill was co-sponsored by Senator Mathias and by Senator Bayh and Senator Goldwater, Chairman and Vice Chairman of the Select Committee. An earlier version of this bill, S. 2525, introduced by Senator Huddleston and other Committee members in the 95th Congress, also included provisions for intelligence identities protection.

Hearings on S. 2284 before the Select Committee on Intelligence began on February 21, 1980, and addressed among other issues the provisions for intelligence identities protection. The provisions of S. 2284 imposed criminal penalties for the disclosure of identities of intelligence agents by persons who had authorized access to such information. During the hearings on S. 2284, the Administration proposed an additional provision which would impose criminal penalties for such discolsure by any person based on classified information. Some witnesses, including former intelligence officials, testified in favor of an alternative provision contained in S. 2216 which imposed criminal penalties for such disclosure by any person with the intent to impair or impede the foreign intelligence activities of the United States. Other witnesses, including representatives of the news media and civil liberties groups, opposed any such additional provision and raised questions about the penalties for disclosure by persons who had authorized access.

The Select Committee held further hearings on June 24 and 25 which focused specifically on the intelligence identities protection provisions of S. 2216. Those hearings also considered other proposals on the subject, including S. 191 introduced by Senator Bentsen on January 23, 1979.

Administration witnesses reiterated their proposal of criminal penalties for disclosure of intelligence agents' identities by any person based on classified information. However, Deputy CIA Director Carlucci testified that this proposal "could cover the most egregious cases, such as the disclosures by 'Covert Action Information Bulletin,' . . .

only if the use of criminal investigative techniques provided sufficient proof that the disclosures were based on classified information." Other witnesses expressed a wide range of views favoring and opposing the provisions of S. 2216.

In early July, 1980, attacks against American embassy officials in Jamaica took place shortly after the disclosure of the names, addresses, phone numbers, and automobile license numbers of 15 alleged CIA officers. The disclosures were made by an editor of the Covert Action Information Bulletin at a press conference in Kingston, Jamaica. These incidents documented the need for remedial legislation to protect agent identities from unauthorized disclosure.

On July 25, 1980, The House Intelligence Committee unanimously approved H.R. 5615, the Intelligence Identities Protection Act, with amendments. The Select Committee met on July 29, 1980, to consider S. 2216. An amendment in the nature of a substitute was offered by Senator Chafee which differed from H.R. 5615, as approved by the House Committee, on only one issue. The House Committee had approved the following standard for criminal penalties if the disclosure of an agent's identity is made by a person who did not learn that identity as a result of having authorized access to classified information:

> Whoever, in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States, discloses, with the intent to impair or impede the foreign intelligence activities of the United States to any individual not authorized to receive classified information, any information that identifies a covert agent knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both.

The Chafee Amendment proposed the following standard:

> Whoever, in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States, discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both.

After several other minor amendments were adopted, the substitute, as amended, was approved by the Select Committee as the Intelligence Identities Protection Act, with a recommendation for favorable action by a vote of 11–1. The bill was reported on August 13, 1980.

On August 22, 1980, S. 2216, as reported by the Select Committee was referred to the Committee on the Judiciary under the provisions

of Senate Resolution 400 for a period not to exceed 20 days that the Senate was in session. The Committee held hearings on September 5, 1980, at which representatives of the Department of Justice, the Central Intelligence Agency, the Federal Bureau of Investigation, media organizations and civil liberties groups testified. Written statements were also solicited from law professors and constitutional scholars by Senator Edward M. Kennedy, the chairman of the Committee.

During the hearings, the Committee was told by Administration witnesses and the bill's chief sponsor, Senator Chafee, that the bill was intended "to stop those engaged in the business of 'naming names' " and was not intended to apply to members of the press or others engaged in protected First Amendment activities. Other witnesses testified, however, that whatever the intent of the drafters of the bill, section 501(c) could be interpreted to criminalize activity protected by the First Amendment and that the bill was therefore unconstitutional. That view was supported by communications from most of the scholars and law professors who submitted comments regarding this section of the bill.

After the Committee adopted a number of amendments, it ordered the bill to be reported favorably by a vote of 13 to 0 on September 17, 1980.

Summary of Legislation

This bill makes criminal the disclosure of intelligence identities only in certain specified circumstances.

The bill applies to three well defined and limited classes of individuals. The first consists of those who have had authorized access to classified information identifying undercover operatives, or "covert agents", as they are termed by the bill. This class would include only those individuals—principally government workers or supervisory officials—who would have had a need to know the identity of an undercover officer or an agent. This class therefore includes only those who obtain or receive documents or information which name or directly identify covert agents in the course of their duties. It is their occupation of a position of trust which results in access to the identities of covert agents, and disclosures of the identities they learned in this fashion are the most heavily penalized by the bill.

The second class also encompasses individuals who have or have had access to classified information, but not necessarily that which explicitly identifies covert agents. For a member of this class, however, it must be shown that as a result of that access to classified information he learned an intelligence identity. This class would include those in government whose jobs place them in a position to learn the identities of covert agents indirectly. Although the government need not be able to prove that individuals in this class have had officially approved access to the actual identities of covert agents, it must show that as a result of the position which they held they learned such identities. Within certain circles of government such circumstances are not uncommon. Since individuals in this class have also had positions of trust, they are believed by the Committee to have a duty of care parallel to, but less than, that of individuals included in the first class. Thus, disclosures by the second class are penalized less severely than those of the first class but still more severely than the third class.

The third and last class of individuals affected by the bill are those who have never had authorized access to classified information with its accompanying duty of care, but who engage in a deliberate pattern of activities whose purpose is to uncover the identities of covert agents and expose such identities with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States. Since this class potentially includes any discloser of an undercover intelligence identity, the Committee has paid particular attention to limiting its reach to those whose clear, evidenced plan and practice involves a series of acts with a common purpose or objective undertaken to uncover the identities of and expose covert agents in circumstances where a reasonable man would know such activities would disrupt a legitimate and highly valuable function of government.

In sum, it encompasses only individuals whose intentional, well evidenced course of conduct involves (1) a pattern of activities (2) whose purpose is to uncover and expose covert agents (3) with reason to believe such course of conduct would impair or impede U.S. foreign intelligence activities.

GENERAL STATEMENT

The Committee, conscious of its special responsibility to protect the constitutional rights of Americans, carefully considered alternative ways to deal with the serious constitutional objections to the bill. Its deliberations resulted in a redrafting of section 501(c) and the addition of a clause making clear that disclosures which were an integral part of an activity protected by the First Amendment are not covered by the statute. In making these changes, the Committee does not believe that it deviates from the intent of the Select Committee. Indeed much of the language which the Committee added to the bill was taken verbatim from the Select Committee's Report.

It is the purpose of the Committee in amending the language as reported by the Select Committee and adding section 502(e) 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. Further, the bill also provides that no prosecutions for conspiracy, aiding or abetting, or misprision in the commission of an offense by a member of any of the three classes of individuals affected by the bill can occur unless the individual accused also acts in the course of such a pattern of activities which were undertaken for the purpose of uncovering and exposing the identities of covert agents and with reason to believe such activities would impair or impede the foreign intelligence activities of the United States. Those who "cause" a felony (aiders and abettors and accessories before the fact, as described in section 2 of title 18, U.S.C.), those who fail to report a felony (misprisioners as described in section 4 of title 18, U.S.C.), or those who conspire (section 371 of title 18, U.S.C.) could be reached if they demonstrated the requisite pattern of activities were undertaken for the purpose of uncovering the identities of covert agents and exposing such identities with reason to believe such activities would impair or impede the foreign intelligence activities of the United States.

The Committee believes that the Select Committee has considered and drafted the provisions of S. 2216 with care. The principal thrust of this effort has been to make criminal disclosures which clearly represent a conscious and pernicious effort to expose agents where such exposure damages the capability to conduct intelligence operations and where such disclosures are not an integral part of another activity such as news reporting of intelligence failures and abuses, academic study of government policies and programs, enforcement by a private organization of its enternal rules and regulations, or other activities protected by the First Amendment to the Constitution. Secion 501(c), read in connection with the new section 502(e), is intended to cover only a very narrow class of individuals who are in the business of "naming names".

The pattern of activities in which such individuals are engaged must have as its purpose the uncovering and identifying of covert agents. The disclosure must not be an integral part of an activity protected by the First Amendment such as news reporting or academic studies designed to contribute to robust public discussion or debate. Rather its purpose must be to expose agents' identities in a manner that impairs their effectiveness through the very act of exposure. The individual must be taking the law into his own hands by posing a direct and immediate obstruction to the exposed agent's effectiveness. In effect, he makes himself a "self-appointed counterspy". Thus the bill as reported by this Committee has the same scope as the bill as reported by the Senate Intelligence Committee. Its Report stated the necessary pattern would not be demonstrated by one who discloses

> identities of undercover employees 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.[2]

The Committee also recognizes that there are other aspects of this problem of protection which require different solutions. One is the strengthening of cover itself. Although a full discussion of cover for intelligence operatives abroad is inappropriate in the context of this public report, the alias and other provisions for the concealment of intelligence operatives are not fully adequate. Accordingly, the Committee has included a provision requiring the President to promulgate procedures that will help to rectify this situation. These procedures are to ensure that intelligence cover arrangements are effective. They are to provide that departments and agencies of government designated by the President are to afford all appropriate assistance—determined by the President—to this end.

These procedures do not address the relationships between intelligence agencies and private organizations and institutions. Nor does this section stipulate which elements of government shall provide assistance or what that assistance must be. The bill requires only that the President of the United States review these questions and determine the appropriate interest of the United States. In so doing, the provision

[2] S. Rep. No. 96–896, 96th Cong., 2d sess. 18 (1980).

recognizes that it is the responsibility of the President to study these questions and order improvements which will result in the adequate provision of cover to undercover intelligence operatives. However, this Committee amended the bill to provide that the President may not direct the Peace Corps or the Agency for International Development to provide such assistance. This provision is a clear congressional mandate to strengthen cover arrangements, while protecting the special situation of the Peace Corps and the Agency for International Development.

CONSTITUTIONALITY OF THE BILL

In framing S. 2216, the Committee took care to ensure that the bill met the requirements of the Constitution. While the courts will make their own determination of the constitutionality, the Congress has a responsibility to make its best judgment. However, because of the serious constitutional questions which a number of scholars have raised, the Committee provided both authority and procedures for an expedited judicial review of this bill. Without such a review, this legislation could have a chilling effect on legitimate First Amendment expression for a lengthy period of time until the Supreme Court decides the issue.

There appears to be little doubt as to the constitutionality of the criminal penalties in sections 501(a) and (b) for persons who disclose the identities of covert agents they learned as a result of having authorized access to classified information. However, constitutional questions were raised in the hearings with respect to criminal penalties for the publication of covert agents' identities by persons who have not had that access. It is the conclusion of the Committee that section 501(c), as amended and read in conjunction with section 502(e) which was added by the Committee, which imposes such penalties in certain narrowly-limited circumstances, does not infringe freedom of speech and freedom of the press guaranteed by the Constitution.

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." In Interpreting the First Amendment, Justice Holmes wrote, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a crowded theatre and causing a panic. . . . The question in every case 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 addition, a statute affecting speech or publication must not extend overbroadly. Legitimate legislative goals cannot, according to the Supreme Court, "be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U.S. 478, 488 (1960); cf., *Elfbrandt* v. *Russell*, 348 U.S. 11, 18 (1966). The Court has also 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." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 607 (1972).

These are the principles that have guided the Committee in considering the constitutionality of S. 2216. The findings of the Committee have been spelled out clearly, and the language of the bill has been framed insofar as possible to deal with a specific, serious harm in the circumstances where that harm is most likely to occur, and to exclude disclosures which are an integral part of an activity protected by the First Amendment.

The gravamen of the offense being proscribed is action: a pattern of activities whose purpose is to uncover identities which the U.S. Government is actively seeking to conceal for reasons supported by weighty considerations of national security. The fact that part of the activity involves disclosing information does not mean that the activity as a whole is protected by the First Amendment and cannot be proscribed for a compelling state interest. As Chief Justice Earl Warren wrote in upholding international travel restriction:

> There are few restrictions on action which could not be clothed by ingenious arguments in the garb of decreased data flow. . . . The right to speak out and to publish does not carry with it the unrestrained right to gather information—*Zemel* v. *Rusk*, 381 U.S. 1, 11–18 (1965).

The Committee's amendment to section 501(c) and the addition of section 502(e) were undertaken with this principle in mind. The statute is aimed at conduct which seeks to ferret out identities which the government is actively seeking to keep concealed. To ensure that such conduct is not "clothed by ingenious argument" in the garb of protected speech, the Committee insisted that, in order for a disclosure to be protected, it must be an integral part of the protected activity. However, a course of conduct that involves a pattern of activities undertaken for the purpose of uncovering and exposing covert agents is not, in and of itself, protected activity.

(a) Disclosure not based on classified information

Even though section 501(c) punishes disclosure that is not based on classified information, the government must prove that the information disclosed by the defendant identified an individual as a covert agent and that the defendant knew the information so identified such individual. The definition of "covert agent" is specifically limited to an individual whose identity as an intelligence agency employee "is classified information" and to agents, informants, and sources "whose intelligence relationship to the United States is classified information." In addition, the government must prove that, at the time of the disclosure, the defendant knew that the United States was taking affirmative measures to conceal such individual's classified intelligence relationship to the United States. There is also a defense if the United States had already "publicly acknowledged or revealed" that relationship. Taken together, these provisions ensure that criminal penalties can be imposed under section 501(c) only when the defendant has knowingly disclosed information that, in terms of its specificity, its

sensitivity, and the effort expended to maintain its secrecy, is virtually the equivalent of classified information.

(b) Scope of protected information

Apart from the issue of classification, the Committee has carefully considered the definition of "covert agent" and has included only those identities which it has determined to be absolutely necessary to protect for reasons of imminent danger to life or significant interference with vital intelligence activities. Undercover officers and employees overseas may be in special danger when their identities are revealed, as recent events indicate. In addition, U.S. intelligence activities can be disrupted severely when the identity of an officer in the clandestine service is disclosed. Overseas agents and informants who are not United States citizens may expect instant retribution when their relationship to the United States is exposed. If they reside in the United States their relatives abroad may be endangered. In both instances, important sources of information or assistance may be denied by disclosure, and possible future sources may be less forthcoming.

Where the danger are less, however, the Committee has sought to avoid an inhibition on public criticism or debate concerning intelligence activities. Because the revelation of their relationship could expose them to immediate and serious danger, U.S. citizens who serve as informants or sources are included in the "covert agent" definition if they reside and act outside the United States. However, the physical danger element is much less within the United States. Furthermore, U.S. citizens residing within the United States who assist intelligence agencies may be employees of colleges, churches, the media, or political organizations. The degree of involvement of these groups with intelligence agencies is a legitimate subject of national debate and intra-group discourse. Therefore, the definition includes U.S. citizens residing within the United States only if they are agents or informants of the foreign counterintelligence or foreign counterterrorism components of the FBI. As noted above, these individuals are exposed to special hazards.

The principal criterion adopted by the Committee in framing the categories of the "covert agent" definition has been physical danger or a reasonable possibility thereof. As a result, the criminal penalties in section 501(c) apply only to disclosure of a narrow class of information that requires special protection not only to meet the needs of the United States for an effective intelligence service, but also to ensure the safety of individuals serving this nation in hazardous circumstances.

(c) Course of conduct requirements

The Committee has concluded that in addition to the narrow definition of "covert agent", and the provisions requiring the government to prove that the defendant knowingly disclosed virtually the equivalent of classified information, further provisions may be needed to ensure that the bill meets First Amendment requirements when criminal penalties are imposed on persons who do not disclose agent identities they learned as a result of having authorized access to classified information. Therefore, the Committee has required additional

proof that the disclosure was made "in the course of a pattern of activities undertaken for the purpose of identifying and exposing covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States."

The Committee substituted the phrase "undertaken for the purpose of uncovering the identities of covert agents and exposing such identities" for the phrase "to identify and expose covert agents." [3] This was done to make clear the intended meaning of the language. The person must be engaged in an enterprise whose purpose he or she knows and intends to be the uncovering of the identities of covert agents for its own sake. An uncovering that is part of another activity and incidental to that activity is not included nor intended to be made criminal.

Moreover the individual must ferret out the names by a process of deliberate and systematic search. If the individual's pattern of disclosures involves the republication or the repetition of information readily available to the person, then the individual is not engaged in the necessary pattern of activities whose purpose is to uncover identities which the government is seeking to conceal. The pattern of activities must amount to an effort to ferret out information which the government is making efforts to conceal by employing techniques such as surveillance of American officials, unauthorized access to classified information, or the piecing together of clues from multiple published sources. In addition in some cases, a name might be "uncovered" by being read in a journal of limited circulation or being revealed in a conversation. However, an individual would not be engaged in the necessary "pattern of activities" unless he read the journal or engaged in the conversation as part of a systematic effort to uncover identities which the government is seeking to conceal.

The individual whose identity is disclosed must be one whose identity was learned in the course of the necessary pattern of activities. This standard reflects "a considered legislative judgment that a particular mode of expression" must give way "to other compelling needs of society," as the Supreme Court has described the constitutional test.

The record indicates that the harm this bill seeks to prevent is most likely to result from disclosure of a covert agents identity in the course of a pattern of activities involving a series of acts having a common purpose or objective and designed, first, to make a systematic effort at uncovering covert agents and, second to expose such agents publicly. The gratuitous listing of agents' names in certain publications goes far beyond information that might contribute to informed public debate on foreign policy or foreign intelligence activities. That effort to uncover the identities of covert agents by overcoming government efforts to conceal the identities of U.S. intelligence officers and agents in countries throughout the world and to expose their identities repeatedly, time and time again, serves no legitimate purpose. Such conduct is not protected by the First Amendment. Instead, it reflects a total disregard for the consequences that may jeopardize the lives and safety of individuals and damage the ability of the United States to safeguard the national defense and conduct an effective foreign policy.

[3] The Administration indicated in a letter to the Committee that it had no objections to the substitution. Letter from Deputy Attorney General Charles B. Renfrew to Senator Edward M. Kennedy, Sept. 17, 1980.

The standard adopted in section 501(c) 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, as the bar to prosecution in section 502(e) makes doubly clear, it does not affect the First Amendment rights of those who disclose the identities of agents as an integral part of other activities such as news media reporing of intelligence failures or abuses, academic studies of U.S. Government policies and programs, or a private organizations enforcement of its internal rules, which are protected by the First Amendment.

The Committee shares the objectives expressed by the Attorney General when he wrote to the Intelligence Committee to emphasize "the great importance" of this legislation.

While we must welcome public debate about the role of the intelligence community as well as other components of our government, the wanton and indiscriminate disclosure of the names and cover identities of covert agents serves no salutory purpose whatsoever. As public officials, we have a duty, consistent with our oath to uphold the Constitution, to show our support for the men and women of the United States intelligence service who perform duties on behalf of their country, often at great personal risk and sacrifice.

The Attorney General added that the legislation should carefully establish "effective prohibitions on egregious disclosures of identities of intelligence agents, while recognizing essential rights of free speech guaranteed to us all by the First Amendment and the important role played by the press in exposing the truth." [4]

As the Attorney General advised, S. 2216 concentrates on "wanton and indiscriminate disclosure" where such activities serve "no salutory purpose whatsoever," and it draws a distinction between such "egregious disclosures" and other modes of publication which are an integral part of activity protected by the First Amendment so as to maintain and respect "the important role played by the press in exposing the truth.

Some believe deeply that any legislation punishing the publication of information about government activities would be unconstitutional. Others assert that the Constitution would allow punishing any unauthorized disclosure of a covert agent's identity, regardless of the circumstances. The Committee believes, however, that S. 2216 strikes a proper and constitutional balance between the needs of a free society for information that might contribute to informed debate on public policy issues and the compelling concerns of the men and women who serve our nation's intelligence agencies at great risk and sacrifice.

Section-by-Section Analysis

SECTION 501—DISCLOSURE OF IDENTITIES

Section 501 establishes three distinct criminal offenses for the intentional disclosure to unauthorized persons of information identifying covert agents. The distinction among the offenses is based on the de-

[4] Letter from Attorney General Benjamin R. Civiletti to the Chairman of the Senate Select Committee on Intelligence, June 23, 1980.

fendant's authorized access to classified information, or lack thereof. The greater the degree of such access, the greater is the duty of trust assumed by the defendant and the greater is the penalty for breach of such duty. In addition, the elements of proof are fewer against defendants with authorized access to classified information.

Section 501(a) applies to those individuals who have been given authorized access to classified information which identifies a covert agent. Such individuals, usually employees of the United States with the most sensitive security clearances, have undertaken a duty of nondisclosure of the nation's most sensitive secrets. It is appropriate, in the Committee's view, to impose severe penalties for the breach of this duty and to hold individuals in this category to stricter standards of liability. Therefore, an individual who has had authorized access to classified information identifying a covert agent would be subject to a fine of $50,000 or imprisonment for ten years, or both, if he—

> Intentionally discloses, to any individual not authorized to receive classified information, any information identifying such agent,
>
> Knowing that the information disclosed identifies such agent, and
>
> Knowing that the United States is taking affirmative measures to conceal the agent's intelligence relationship to the United States.

The word "intentionally" was carefully chosen to reflect the Committee's intent to require that the government prove the most exacting state of mind element in connection with section 501 offenses.[5]

It should be evident, but the Committee wishes to make clear, that the words "identifies", "identifying", and "identity", which are used throughout section 501 are intended to connote a correct status as a covert agent. To identify someone incorrectly as a covert agent is not a crime under this bill.

The reference to "affirmative measures" is intended to confine the effect of the bill to relationships that are deliberately concealed by the United States. These "affirmative measures" could include the use of such techniques as, for example, the creation of a "cover" identity (a set of fictitious characteristics and relationships) to conceal the individual's true identity and relationship to an intelligence agency, the use of clandestine means of communication to conceal the individual's relationship with United States Government personnel and the restricting of any mention of the individual's true identity or intelligence relationship to classified documents and channels. Proof of knowledge that the United States is taking affirmative measures to conceal an intelligence relationship will depend upon the facts and circumstances of each case. It could be demonstrated by showing that the discloser's current or former employment or other relationship with the United States required or gave him such knowledge. It could also be demonstrated by statements made in connection with the disclosure or by previous statements evidencing such knowledge.

The mere fact that an intelligence relationship appears in a document which is classified does not constitute evidence that the United

[5] Lesser degrees of mental culpability are knowing, reckless, and negligent. See S. Rept. 96-553, pages 62-69 (Criminal Code Reform Act of 1979. Report of the Committee on the Judiciary, United States Senate, to accompany S. 1722.)

States is taking affirmative measures to conceal the relationship. For instance, the document could be classified because of other information it contains. Similarly, the fact that the United States has not publicly acknowledged or revealed the relationship does not by itself satisfy the "affirmative measures" requirement.

It also is to be emphasized that though the identity disclosed must be classified (see section 506(4)), the actual information disclosed need not be. For example, the phone number, address, or automobile license number of a CIA station chief is not classified information; the disclosure of such information in a manner which identifies the holder as the CIA station chief is an offense under the bill. However, the connection between the information disclosed and the correct identity of the covert agent must be direct, and the information must point at a particular individual.

Finally, in connection with section 501(a), it should be noted that the identity of a covert agent which is disclosed and which is the subject of the prosecution must be an identity to which the offender, through authorized access to classified information, was specifically given access.

Section 501(b) applies to those who learn the identity of a covert agent "as a result of having authorized access to classified information". Basicilly, it covers those whose security clearance places them in a position from which the identity of a covert agent becomes known or is made known. The distinction between this category of offenders, and the category covered by section 501(a), is under section 501(a) the offender must have had authorized access to specific classified information which identifies the covert agent whose disclosure is the basis for the prosecution. Section 501(b), on the other hand, requires that the identity be learned only "as a result" of authorized access to classified information in general.

As with those covered by section 501(a), those in the 501(b) category have placed themselves in a special position of trust vis-a-vis the United States Government. Therefore, it is proper to levy stiffer penalties and require fewer elements to be proved than for those who have never had any authorized access to classified information (see section 501(c)). However, the Committee recognizes that there is a subtle but significant difference in the position of trust assumed between an offender within the section 501(a) category and an offender in the section 501(b) category. Therefore, the penalty for a conviction under section 501(b) is a fine of $25,000 or five years imprisonment, or both.

With the two exceptions discussed above—the relationship of the offender to classified information and the penalty for conviction—the two offenses, and the elements of proof thereof are the same.

Section 501(c) applies to any person who discloses the identity of a covert agent.

As is required by subsections (a) and (b), the government must prove that the disclosure was intentional and that the relationship disclosed was classified. The government must also prove that the offender knew that the government was taking affirmative measures to conceal the classified intelligence relationship of the covert agent. As is also the case with subsections (a) and (b), the actual information disclosed does not have to be classified. However, the government

must prove that the defendant knew that he was disclosing a classified relationship the government seeks to conceal by affirmative measures.

Unlike the previous two sections, authorized access to classified information is not a prerequisite to a conviction under section 501(c). An offender under this section has not voluntarily agreed to protect any government information nor is he necessarily in a position of trust. Therefore, section 501(c) establishes three elements of proof not found in sections 501(a) or (b). The United States must prove—

> That the disclosure was made in the course of a pattern of activities, i.e., a series of acts having a common purpose or objective;
>
> That the purpose of the pattern of activities was to uncover and expose covert agents; and
>
> That there was reason to believe such activities would impair or impede the foreign intelligence activities of the United States.

These requirements make it clear that the defendant must be engaged in a conscious plan to seek out undercover intelligence operatives and expose them in circumstances where such conduct would impair U.S. intelligence efforts.

It is important to note that the pattern of activities must be for the purpose of uncovering and exposing such agents. Most laws do not require intentional acts, but merely knowing ones. The difference between knowing and intentional acts was explained as follows in the Senate Judiciary Committee report on the Criminal Code Reform Act of 1980.

> As the National Commission's consultant on this subject put it, "it seems reasonable that the law should distinguish between a man who wills that a particular act or result take place and another who is merely willing that it should take place. The distinction is drawn between the main direction of a man's conduct and the (anticipated) side effects of his conduct." For example, the owner who burns down his tenement for the purpose of collecting insurance proceeds does not desire the death of his tenants, but he is substantially certain (i.e., knows) it will occur.

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

Under the definition of "pattern of activities," there must be a series of acts with a common purpose or objective. A discloser must, in other words, be in the business, or have made it his practice, to ferret out and then expose undercover officers or agents where the reasonably foreseeable result would be to damage an intelligence agency's effectiveness.

The process of "uncovering" covert agents must involve a substantial effort to ferret out names which the government is seeking to keep secret. This process of uncovering names must involve much more than merely restating that which is in the public domain. The process of uncovering names must include techniques like: (1) seeking unauthorized access to classified information, (2) a comprehensive counter-

intelligence effort by engaging in physical surveillance, electronic surveillance abroad and other techniques of espionage directed at undercover intelligence employees, or (3) collating information from multiple documentary sources. CIA Deputy Director Carlucci in describing the activities of a particular group illustrated what the Committee intends by the term "uncover":

[T]hey are engaged in an elaborate and sophisticated operation involving the collating of information from multiple documentary sources and the penetration of U.S. official establishments. There is no reason why, in addition to cultivating sources in the State Department, embassies and consulates, they cannot engage in physical surveillance, electronic surveillance abroad or any other form of investigative technique. Unlike the intelligence agencies, they have no legal constraints on the use of physical surveillance and no constraints on any investigation they may conduct of U.S. persons abroad. Basically what is described in "Dirty Work II" is very little different from the kind of counterintelligence operations that one might expect a hostile intelligence service to mount against us.

> . . . the activities that these bills attempt to deal with are a systematic, purposeful job of uncovering identities [6]

The Committee intends that section 501(c) and section 502(e) be read to make it clear that:

> . . . § 501(c) does not seek to prohibit discussion generally, but is directed at the individual who takes it upon himself to bring intelligence activity to a halt and who does this, not by urging a change in public law or policy, but by ferreting out the identities of individuals who are involved in intelligence activities and by disclosing those identities with the intent the intelligence functions will be disrupted by the disclosure itself.[7]

Such an individual does not offer information or ideas for "uninhibited, robust, and wide-open" public debate or discussion. *New York Times Co.* v. *Sullivan*, 377 U.S. 255, 270 (1964). Instead, he deliberately uses the disclosure of names, the intentional "blowing of cover", to engage in guerrilla warfare in order to prevent or disrupt activities of which he disapproves. He is, in effect, a counter-intelligence agent who uses the disclosure of names as an act of sabotage.

The Committee believes that section 502(e) is fully consistent with the following comments of the chief sponsor of the bill, Senator Chafee, when testifying before the Committee:

> This is an intolerable situation. As legislators, I believe that we have a responsibility to draft a bill which places criminal penalties on those who are in the business of exposing our agents, and, which, at the same time, does not threaten the critic of intelligence policy or the journalist who might reveal the name of an agent in the course of a news report.

* * * * * * *

[6] Statement of Frank C. Carlucci, Deputy Director of Central Intelligence, on S. 2216, before the Senate Committee on the Judiciary, Sept. 5, 1980, p. 8.
[7] Statement of Robert L. Keuch, Associate Deputy Attorney General, on S. 2216, before the Senate Committee on the Judiciary, Sept. 5, 1980, p. 7.

> We have carefully differentiated between the journalist who may reveal the name of an agent in a news article and the person who has made it his purpose and business to reveal the names of agents, and has engaged in a pattern of activities intended to do so. Clearly, the legitimate journalist would not be engaged in such a pattern of activities.[8]

To meet the standard of the bill, a discloser must be engaged in a purposeful enterprise of revealing names—he must, in short, be in the business of "naming names."

The following are illustrations of activities which would not be covered:

An effort by a newspaper to uncover CIA connections with it, including learning the names of its employees who worked for the CIA.

An effort by a university or a church to learn if any of its employees had worked for the CIA. (These are activities intended to enforce the internal rules of the organization and not identify and expose CIA agents.)

An investigation by a newspaper of possible CIA connections with the Watergate burglaries. (This would be an activity undertaken to learn about the agency's connections with the burglaries and not to identify and expose CIA agents.)

An investigation by a scholar or a reporter of the Phoenix program in Vietnam. (This would be an activity intended to investigate a controversial program, not to reveal names.)

The government, of course, has the burden of demonstrating that the pattern of activities was with the requisite intent to uncover and expose covert agents and that the disclosure was not an integral part of an activity protected by the First Amendment. The government's proof could be rebutted by demonstrating some alternative purpose other than identification and exposure of agents or that the disclosure was an integral part of an activity protected by the First Amendment. The government must also show that the discloser had reason to believe that the activities would impair or impede the foreign intelligence activities of the United States. For example, a discloser could show that by printing a name of someone generally known as a CIA officer, he could not reasonably have expected that such disclosure would impair or impede the foreign intelligence activities of the United States.

SECTION 502—DEFENSE AND EXCEPTIONS

Section 502(a) states that "it is a defense to a prosecution under section 501 that before the commission of the offense with which the defendant is charged, the United States had publicly acknowledged or revealed the intelligence relationship to the United States of the individual the disclosure of whose intelligence relationship to the United States is the basis for the prosecution." The words "publicly acknowledged" are intended to encompass such public activities as official publications of the United States, or official statements or press releases made by those acting on behalf of the United States, which

[8] Statement of Senator John H. Chafee on S. 2216, before the Senate Committee on the Judiciary, Sept. 5, 1980, pp. 2 and 7.

specifically acknowledge an intelligence relationship. The United States has "revealed" an intelligence relationship if it has disclosed information which names, or leads directly to the identification of, an individual as a covert agent. Information does not lead directly to such an identification if the identification can be made only after an effort to seek out and compare, cross-reference, and collate information from several publications or sources which in themselves evidence an effort by the United States to conceal this identity.

Section 502(b)(1) and (2) ensure that a prosecution cannot be maintained under section 501(a), (b), or (c), upon theories of aiding and abetting, misprison of a felony, or conspiracy, against an individual who does not actually disclose information unless the government can prove the "pattern of activities" and the purpose and "reason to believe" elements which are part of the substantive offense of section 501(c). A reporter to whom is disclosed, illegally, the identity of a covert agent by a person prosecutable under section 501(a) or (b) would most likely not be engaging in the requisite course of conduct, because he would not likely be engaged in a pattern of activities intended to identify and expose covert agents.

Section 502(c) is intended to make clear that disclosures made directly to the House or Senate Intelligence Committees are not criminal offenses.

Section 502(d) states that "it shall not be an offense under section 501 for an individual to disclose information that solely identifies himself as a covert agent." The word "solely" is intended to make clear that such an individual cannot be subject to the penalties of section 501 simply on the grounds that he revealed his own identity as a covert agent.

Section 502(e). The Committee devoted considerable attention to the drafting of section 502(e), the major addition which it made to the bill as reported by the Select Committee. In adding this provision, the Committee did not intend in any way to alter the coverage of the bill from that which it understands to be the intent of the Select Committee. It added this section solely to ensure that the bill would not be facially unconstitutional on grounds of either vagueness or overbreadth.

The "void for vagueness" doctrine, which is rooted in the due process requirement of the Fifth Amendment, requires that a statute be drawn with sufficient specificity to give the public fair warning of what conduct is proscribed and what is not. *Collauttie* v. *Franklin*, 99 S.Ct. 675 (1979), *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972). The Committee was concerned that those engaged in activity protected by the First Amendment, such as reporting or scholarly analysis, would be uncertain whether a disclosure which was an integral part of such activity would be proscribed by the statute. The Select Committee's Report stated that such disclosure would not be proscribed, but the language of the statute itself contained no such clear-cut statement. The Committee felt that it was necessary to place this bar to prosecution in the statute in order to cure the vagueness problem and also to ensure that the statute would not be held unconstitutional on overbreadth grounds. Even if a statute is unambiguous it could still be unconstitutional if it prohibits or substantially deters

activity protected by the First Amendment. *Graynard*, *supra* at 115; *U.S.* v. *Robel*, 389 U.S. 258, 265–66 (1967).

The Committee believes that the statute could be held to be unconstitutionally overboard without section 502(e). In reaching this conclusion, the Committee was influenced by the many communications it received from academic experts and press groups and the many editorials in newspapers throughout the country which argued that the statute could chill protected First Amendment activity. The flood of alarm from the press is itself objective evidence of the chilling effect of the bill without section 502(e). The Committee is confident that the addition of this section will remove all such fears by making clear that any disclosure which was an integral part of newsgathering, reporting and publishing would be beyond the reach of the statute.

The Committee uses the phrase "integral part"—taken from the Select Committee report where its meaning is not discussed—to ensure that the prohibited activity is not artificially grafted onto another activity in order to avoid prosecution. For example, an individual who was in the "business of naming names" could not avoid prosecution for publishing a list of names by inserting a paragraph at the head of the list asserting that the list was being published in order to criticize the government.

The Committee intends that the "integral part" test follow the reasoning of the Supreme Court in considering whether pictures which might themselves constitute obscenity are protected if included in a news article. The Court held that since the article was not "a mere vehicle" for the publication of the pictures but rather the publication of the pictures was "relevant to the theme of the article" and "rationally related" to the article the publication of the pictures was protected. *KOIS* v. *Wisconsin*, 408 U.S. 229, 231 (1971).

However, the phrase is not intended to permit the courts to second guess a reporter or editor about whether it was "necessary" to publish the information. As the Supreme Court has repeatedly made clear, the First Amendment does not permit courts to exercise judgment as to what the press needs to print in order to give a story credibility or advance the political purposes of the writer. Chief Justice Warren Burger writing for the Court in *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976) put the point this way:

> We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficient-sounding the purposes of controlling the press might be, we . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.

Id. at 560–61, quoting *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 259 (1974) (White, concurring), *see also Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 496 (1975); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269–283 (1964). "For better or worse, editing is what editors are for; and editing is selection and choice of material." *Columbia Broadcasting Systems, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 124 (1973).

The illustrations included in section 502(e) by the Committee are merely examples of the kinds of activities which are protected by the First Amendment and are not intended to be an exclusive list. By including the words "or other activities protected by the First Amendment", the Committee meant to indicate that a disclosure which was an integral part of any activity protected by the First Amendment would be protected. In most cases it will be clear whether an activity is protected by the First Amendment; where it is not clear, it will be a matter for the courts to decide.

SECTION 503—PROCEDURES FOR ESTABLISHING COVER FOR INTELLIGENCE OFFICERS AND EMPLOYEES

Section 503 requires the President to establish procedures to ensure that undercover intelligence officers and employees receive effective cover. To this end, the section also stipulates that the procedures shall provide that those departments and agencies of the government designated by the President to provide assistance for cover arrangements shall provide whatever assistance the President deems necessary to effectively maintain the secrecy of such officers and employees.

The Committee, to ensure that there would be no alteration in current procedures, provided specific statutory exception to this mandate for the Peace Corps and the Agency for International Development (AID). There was no intent by the Senate Intelligence Committee to alter the current Executive Branch prohibitions against CIA use of these agencies for cover. While there was no thought that the CIA might alter these arrangements in response to this section, the Committee provided a statutory exception to prevent any public perception that these agencies might be used in the future as cover for agents.

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

Similarly, in not desiring to alter current Executive Branch prohibitions against the use of the Agency for International Development

(AID) as cover for intelligence agents, the Committee felt a statutory exception for AID also was desirable. The development role of AID, with its substantial involvement at the community level in people-to-people projects, also makes its separation from any intelligence role essential. There was no intent to distinguish between AID and the newly established International Development Cooperation Agency (IDCA), including its components, which coordinates the development functions of the Executive Branch. Development assistance programs under IDCA are designed to promote basic human needs and aid to the neediest in the developing world.

The Committee action was also not intended to alter in any way existing understandings exempting other agencies such as the International Communication Agency. This agency serves a vital function in explaining to foreign audiences the values and strengths of our political, social and economic system. ICA sponsors exhibits and libraries, sends nearly two thousand speakers overseas each year, brings thousand of international visitors and scholars to the United States, conducts seminars and conferences in which ideas are freely exchanged, and is the parent agency of the Voice of America which broadcasts in 39 languages to audiences worldwide. As stated by ICA Director John E. Reinhardt in a letter dated September 18, 1980 to the Chairman:

> If this Agency is to maintain its credibility and effectiveness as the agency of the United States dedicated to public diplomacy, it is vitally important that no suspicion ever come to rest that its Fulbright scholars, exchange grantees or Agency personnel are covert intelligence officers. President Carter, in his memorandum to me of March 13, 1978, stated categorically that "the Agency will undertake no activities which are covert, manipulative or propagandistic."

SECTION 504—EXTRATERRITORIAL JURISDICTION

This section is intended to remove any doubt of the Congress' intent to authorize the federal government to prosecute a United States citizen or permanent resident alien for an offense under section 501 committed outside of the United States.[9]

SECTION 505—PROVIDING INFORMATION TO CONGRESS

This section is intended to make clear that no provision of the legislation authorizes the Executive branch to withhold information from the Congress.

SECTION 506—DEFINITIONS

Section 506(1) defines "classified information." It means identifiable information or material which has been given protection from unauthorized disclosure for reasons of national security pursuant to the provisions of a statute or executive order.

Section 506(2) defines "authorized." When used with respect to access to classified information it means having authority, right, or

[9] For discussion of Congress's power to authorize such prosecution, see Notes. Extraterritorial Jurisdiction—Criminal Law 13 Harv. Int. Law Journal 347: Extraterritorial Application of Penal Legislation, 64 Mich. Law Rev. 609; and Working Papers of the National Commission on Reform of Federal Criminal Laws. Vol. 1, p. 69 (1970).

permission pursuant to the provisions of a statute, executive order, directive of the head of any department or agency engaged in foreign intelligence or foreign counterintelligence activities, order of any United States court, or the provisions of any rule of the House of Representatives or resolution of the Senate which assigns responsibility within the respective House of Congress for the oversight of intelligence activities.

Thus, the bill would not impose criminal penalties for disclosure made pursuant to a federal court order or to either of the intelligence oversight committees, or for disclosures otherwise authorized by statute, executive order, or departmental directive.

Section 506(3) defines "disclose." It means to communicate, provide, impart, transmit, transfer, convey, publish or otherwise make available.

Section 506(4) defines "covert agent." The term encompasses three distinct groups. In the first group are officers or employees of (or members of the Armed Forces assigned to) an intelligence agency whose identities are classified and who are serving outside the United States at the time of the disclosure or have so served within the previous five years.

In the second group are U.S. citizens in the United States who are agents or informants of the foreign counterintelligence or foreign counterterrorism components of the FBI, or U.S. citizens outside the U.S. who are agents of, or informants or sources of operational assistance to an intelligence agency. In each instance the intelligence relationship must be classified. Domestic agents and informants of the CIA or the Department of Defense are not included within the definition.

In the third group are present or former agents of an intelligence agency and informants or sources of operational assistance to an intelligence agency whose identities are classified and who are not U.S. citizens.

The Committee intends the term "agent" to be construed according to traditional agency law. Essentially, an agent is a non-employee over whom is exercised a degree of direction and control. A "source of operational assistance", on the other hand, is a non-employee who is not necessarily subject to direction and control, but who supports or provides assistance to activities which are under direction and control.

Section 506(5) defines "intelligence agency." It means the Central Intelligence Agency, any foreign intelligence component of the Department of Defense, or the foreign counterintelligence or foreign counterterrorism components of the FBI.

Section 506(6) defines "informant." It means any individual who furnishes information to an intelligence agency in the course of a confidential relationshp protecting the identity of such individual from public disclosure. This definition, along with that of "covert agent", ensures that the term "informant" does not include all possible sources of assistance or information, but is narrowly defined to bring within it a limited number of individuals whose identity is classified and whose relationships with an agency are or have been part of an

established foreign intelligence, foreign counterintelligence, or foreign counterterrorism collection operation or programs.

Section 506(7) defines "officer" and "employee" with the definition given such terms by section 2104 and 2105, respectively, of title 5, United States Code.

Section 506(8) defines "Armed Forces" to mean the Army, Navy, Air Force, Marine Corps, and Coast Guard.

Section 506(9) defines "United States." When used in a geographic sense it means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.

Section 506(10) states that "the term 'pattern of activities' requires a series of acts with a common purpose or objective." This ensures, among other things, that an isolated disclosure not part of a pattern of activities intended to identify and expose is not subject to the penalties in section 501(c). A pattern of activities cannot be random acts, but must be part of a systematic effort to identify and expose identities of covert agents.

Section 5067. Although the Committee is convinced that the bill, as amended, is constitutional, it added a provision providing for standing and expedited appeal. In adding this provision, the Committee did not intend to suggest that a newspaper contemplating the disclosure of an identity should first seek judicial review.

Section 508. This section provides for severability so that if one section of the Act is found to be unconstitutional, the rest of the Act will be unaffected.

COST ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., September 22, 1980.

Hon. EDWARD M. KENNEDY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 2216, the Intelligence Identities Protection Act, as ordered reported by the Senate Committee on the Judiciary, September 17, 1980.

The bill establishes fines of $15,000 to $50,000 for intentional disclosure of information identifying covert agents, and directs the President to establish procedures to ensure that these identities are effectively concealed. The bill also specifies procedures by which interested parties may seek immediate action to determine the constitutionality of any provision of this bill or how it was applied.

Based on information from the Central Intelligence Agency and the Department of Justice, it is expected that no significant additional costs to the federal government will be incurred as a result of this legislation. While it is not possible to estimate the potential revenues from fines, it is expected that few violations of this act will occur and no significant revenues will be received.

Sincerely,

ALICE M. RIVLIN, *Director.*

Evaluation of Regulatory Impact

In accordance with rule XXIX of the Standing Rules of the Senate, the Committee finds that, with the possible exception of section 503(a), no regulatory impact will be incurred in implementing the provisions of this legislation.

In accordance with rule XXIX(a)(2) of the Standing Rules of the Senate, the Committee finds that it is impracticable to comply with the requirement for an evaluation of the regulatory impact of section 503(a) of this legislation for the following reasons:

(1) Section 503(a), concerning "Procedures for Establishing Cover for Intelligence Officers and Employees," provides that the President shall establish such procedures as the President determines are necessary to provide effective cover for intelligence officers and employees. The provision itself neither establishes such procedures nor requires the President to change existing procedures. Thus it is not possible for the Committee to determine whether the President will in fact establish new procedures for cover, or, in the event new procedures are established, what the regulatory impact of such new procedures might be.

(2) The Committee is therefore unable to evaluate the impact of the provision in terms of the number of individuals who may be affected, the economic impact of any new procedures, the impact on the personal privacy of the individuals concerned, or the additional paperwork which might result from new procedures.

Committee Votes

On September 17, 1980, the Committee met to mark up S. 2216, as reported by the Select Committee, and amendments to this bill were adopted by the following votes:

(1) amendment no. 1, amending the standard of section 501(c) by a vote of 10–6;

(2) amendment no. 3, inserting a new section 502(e) by a vote of 8–6;

(3) amendment no. 4A, exempting Peace Corps and the Agency for International Development from section 503 by a vote of 7–6; and

(4) amendment no. 5, providing procedures for expedited judicial determination of the constitutionality of the bill by an unanimous voice vote.

The Committee voted to report the bill, as amended, by a vote of 13 yeas to 0 nays.

Changes in Existing Law

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic, and existing law in which no change is proposed is printed in roman):

(61 Stat. 497) Chapter 343

AN ACT To promote the national security by providing for a Secretary of Defense; for a National Military Establishment; for a Department of the

Army, a Department of the Navy, and a Department of the Air Force; and for the coordination of the activities of the National Military Establishment with other departments and agencies of the Government concerned with the national security

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

That this Act may be cited as the "National Security Act of 1947."

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TITLE V—PROTECTION OF CERTAIN NATIONAL SECURITY INFORMATION

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TITLE V—PROTECTION OF CERTAIN NATIONAL SECURITY INFORMATION

PROTECTION OF IDENTITIES OF CERTAIN UNITED STATES UNDERCOVER INTELLIGENCE OFFICERS, AGENTS, INFORMANTS AND SOURCES

SEC. 501. (a) However, having or having had authorized access to classified information that identifies a covert agent, intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $50,000 or imprisoned not more than ten years, or both.

(b) Whoever, as a result of having authorized access to classified information, learns the identity of a covert agent and intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $25,000 or imprisoned not more than five years, or both.

(c) Whoever, in the course of a pattern of activities undertaken for the purpose of uncovering the identities of covert agents and exposing such identities with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States, discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information,

knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both.

DEFENSES AND EXCEPTIONS

SEC. 502. (a) It is a defense to a prosecution under section 501 that before the commission of the offense with which the defendant is charged, the United States had publicly acknowledged or revealed the intelligence relationship to the United States of the individual the disclosure of whose intelligence relationship to the United States is the basis for the prosecution.

(b) (1) Subject to paragraph (2), no person other than a person committing an offense under section 501 shall be subject to prosecution under such section by virtue of section 2 or 4 of title 18, United States Code, or shall be subject to prosecution for conspiracy to commit an offense under such section.

(2) Paragraph (1) shall not apply in the case of a person who acted in the course of a pattern of activities undertaken for the purpose of uncovering the identities of covert agents and exposing such identities with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States.

(c) It shall not be an offense under section 501 to transmit information described in such section directly to the Select Committee on Intelligence of the Senate or to the Permanent Select Committee on Intelligence of the House of Representatives.

(d) It shall not be an offense under section 501 for an individual to disclose information that solely identifies himself as a covert agent.

(e) It shall not be an offense under subsection (c) of section 501 if the disclosure of the information described in such subsection is an integral part of another activity such as news reporting of intelligence failures or abuses, academic study of government policies and programs, enforcement by a private organization of its internal rules and regulations, or other activity protected by the First Amendment to the Constitution.

PROCEDURES FOR ESTABLISHING COVER FOR INTELLIGENCE OFFICERS AND EMPLOYEES

SEC. 503. (a) The President shall establish procedures to ensure that any individual who is an officer or employee of an intelligence agency, or a member of the Armed Forces assigned to duty with an intelligence agency, whose identity as such an officer, employee, or member is classified information and which the United States takes affirmative measures to conceal is afforded all appropriate assistance to ensure that the identity of such individual as such an officer, employee, or member is effectively concealed. Such procedures shall provide that any department or agency, other than the Peace Corps, the Agency for International Development, or their respective successor agencies, designated by the President for the purposes of this section shall provide such assistance as may be determined by the President to be necessary in order to establish and effectively maintain the secrecy of the identity of such individual as such an officer, employee, or member.

(b) Procedures established by the President pursuant to subsection (a) shall be exempt from any requirement for publication or disclosure.

EXTRATERRITORIAL JURISDICTION

SEC. 504. There is jurisdiction over an offense under section 501 committed outside the United States if the individual committing the offense is a citizen of the United States or an alien lawfully admitted to the United States for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act).

PROVIDING INFORMATION TO CONGRESS

SEC. 505. Nothing in this title shall be construed as authority to withhold information from Congress or from a committee of either House of Congress.

DEFINITIONS

SEC. 506. For the purposes of this title:

(1) The term "classified information" means information or material designated and clearly marked or clearly represented, pursuant to the provisions of a statute or Executive order (or a regulation or order issued pursuant to a statute or Executive order), as requiring a specific degree of protection against unauthorized disclosure for reasons of national security.

(2) The term "authorized", when used with respect to access to classified information, means having authority, right, or permission pursuant to the provisions of a statute, Executive order, directive of the head of any department or agency engaged in foreign intelligence or counterintelligence activities, order of any United States court, or provisions or any Rule of the House of Representatives or resolution of the Senate which assigns responsibility within the respective House of Congress for the oversight of intelligence activities.

(3) The term "disclose" means to communicate, provide, impart, transmit, transfer, convey, publish, or otherwise make available.

(4) The term "covert agent" means—

(A) an officer or employee of an intelligence agency or a member of the Armed Forces assigned to duty with an intelligence agency,

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

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

(B) a United States citizen whose intelligence relationship to the United States is classified information and

(i) who resides and acts outside the United States as an agent of, or informant or source of operational assistance to, an intelligence agency, or

(ii) who is at the time of the disclosure acting as an agent of, or informant to, the foreign counterintelligence or foreign counterterrorism components of the Federal Bureau of Investigation; or

(C) an individual, other than a United States citizen, whose past or present intelligence relationship to the United States is classified information and who is a present or former

agent of, or a present or former informant or source of operational assistance to, an intelligence agency.

(5) The term "intelligence agency" means the Central Intelligence Agency, a foreign intelligence component of the Department of Defense, or the foreign counterintelligence or foreign counterterrorism components of the Federal Bureau of Investigation.

(6) The term "informant" means any individual who furnishes information to an intelligence agency in the course of a confidential relationship protecting the identity of such individual from public disclosure.

(7) The terms "officer" and "employee" have the meanings given such terms by section 2104 and 5015, respectively, of title 5, United States Code.

(8) The term "Armed Forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

(9) The term "United States", when used in a geographic sense, means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.

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

JUDICIAL REVIEW

SEC. 507. (a) Any interested party, including any news organization or any person who intends to disclose any information identifying an individual as a covert agent to any individual not authorized to receive classified information, may institute in the United States District Court for the district in which the defendant has his principal place of business, or in the case of a newspaper or magazine, in the district in which its principal editorial offices are located, such actions as may be appropriate, including an action for declaratory judgment, to construe the constitutionality of any provision of this title or to rule upon the constitutionality of such provision on its face or as applied. The district court shall immediately certify all questions of constitutionality of this title to the United States Court of Appeals for the appropriate circuit, which shall hear the matter sitting en banc.

(b) Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

(c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section.

SEVERABILITY OF PROVISIONS

SEC. 508. If any provision of this title or the application thereof to any person or circumstance is held invalid, the remainder of this title and the application of such provision to any other person or circumstance shall not be affected thereby.

ADDITIONAL VIEWS OF SENATOR EDWARD M. KENNEDY

The need to protect the nation against external threats and to safeguard the Bill of Rights imposes the difficult but necessary task to ensure this legislation fairly achieves both goals. Our task is especially important when proposals are made to punish speech because the national security is said to demand such action. This is why I felt it imperative to ask that S. 2216 be referred to the Judiciary Committee, and why we gave the most careful consideration to whether and how the bill should be amended to ensure that it was constitutional and that it would not chill debate on intelligence issues.

The United States needs an effective intelligence service, and in order for an intelligence service to operate effectively it must be able to prevent individuals from taking the law into their own hands by engaging in the business of naming names of intelligence agents. At the same time, I am persuaded that we must have as free and robust a debate on intelligence matters as is needed on other public policy issues. In any case, regardless of our belief, the Constitution protects such discussion and prohibits Congress from enacting statutes designed to limit public debate.

I am persuaded that, with the changes which the Committee has made, the bill represents a reasonable and defensible effort to meet constitutional objections without fatally compromising the legitimate purposes of the measure. Equally important, I am persuaded that it is sound policy, and I hope that the bill will be quickly enacted into law. At the same time, I believe the bill as reported by the Intelligence Committee is not sufficiently precise to pass constitutional muster. Although I fully subscribe to the report of the Select Committee, the importance of the constitutional issues and the great controversy that has surrounded the bill have led me to add this additional set of remarks on the constitutional question.

In making an assessment of the constitutionality of the proposed legislation, I found it useful to begin by reviewing what restrictions Congress has in the past put on the publication of information in order to protect national security interests. Because S. 2216 deviates in very significant ways from all of the current espionage laws, I found them to be of only very limited relevance in assessing the constitutionality of the bill.

All of the existing espionage laws, which can apply to those without authorized access to classified information, require that an individual be engaged in an activity whose purpose is to injure the United States or give advantage to a foreign power.[1] The individual must either intend such a result or have reason to know that it is the purpose of the transaction. It was this requirement of "intent" that led the Supreme Court to uphold the general espionage laws which punish disclosure of

[1] 18 U.S.C. 793; 18 U.S.C. 794; 18 U.S.C. 798; 42 U.S.C. 2274.

information related to the national defense.[2] Some of the espionage laws are limited to those who currently have or have had authorized access to classified information.[3]

I do not believe that these statutes or sections 501(a) and (b) of S. 2116 raise any serious constitutional questions, but neither do they shed any real light on the much more difficult question of punishing the press or others who have not had authorized access to classified information.

Congress has enacted two statutes which do apply to those without authorized access and which seek to punish publication as well as other unauthorized disclosure of national security information.[4] Upon examination, however, these statutes turn out to be very different from S. 2216. They deal only with highly technical information relating to atomic energy and communications intelligence; the information which is disclosed must have been obtained from classified sources; and the transaction must have as its purpose, or as its reasonably foreseeable result, injury to the United States or advantage to a foreign power.

S. 2216 in contrast requires no illicit purpose at all and only a reasonable expectation that injury will result to specific programs of the government, namely, those related to intelligence activity. The contrast between the expectation of such injury and the intent or knowledge that there will be injury to the United States is so great that prior statutes—and the limited court interpretation of them—provide little guidance for assessing the constitutionality of S. 2216. Moreover, these statutes appear to require that one obtain the information from classified sources while section 501(c) of S. 2216 does not.

In seeking to justify its constitutionality, supporters of section 501 (c) have not in fact cited the existing espionage laws. Rather they have sought to rely on the line of cases holding that the First Amendment permits limitations on speech when the speech poses a clear and present danger to vital interests of the Nation. A careful reading of those cases, however, indicates that they are simply not on point. Cases such as *Debs*, *Abrams*, and *Schenck* upheld the constitutionality of statutes which made it a crime to incite others to engage in illegal actions such as declining to accept induction into the Armed Forces. These statutes overcame constitutional challenge because the words spoken are intended to have the direct and immediate effect of leading people to act, and to act in ways which were illegal.[5]

S. 2216 requires no such intent. The individual making the disclosure may be punished with no proof of purpose at all. He commits a crime if he makes a disclosure as part of a pattern of activities whose purpose is to uncover and expose. The exposure need not be aimed at a particular course of action by others, and it need not result or even have any likelihood that it would result in any action by anyone else, let alone action in violation of the laws of the United States.

The cases cited would be of relevance if this statute required proof that the disclosure was made with the intent to incite others to injure or kill the covert agents who are identified or to take illegal actions to impair or impede lawful intelligence activities. One way to deal with

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[2] *Gorin* v. *U.S.*, 312 U.S.C. 19 (1941).
[3] 18 U.S.C. 952; 50 U.S.C. 783(b); 42 U.S.C. 2277.
[4] 18 U.S.C. 798; 42 U.S.C. 2274.
[5] *Abrams* v. *U.S.*, 250 U.S. 616 (1919); *Bradenburg* v. *Ohio*, 395 U.S. 444 (1969); *Debs* v. *U.S.*, 249 U.S. 211 (1919); *Schenck* v. *U.S.*, 240 U.S. 48 (1919).

the constitutional problem would be to limit the statute to disclosures which are intended to incite illegal actions which threaten the lives of agents or impair or impede lawful intelligence activities. Arguably, a statute which punishes disclosures made with a reasonable belief that they would place a life in jeopardy would also, by analogy, be constitutional. Such changes were proposed and were rejected. Without them, these cases provide no basis for asserting that S. 2216 is constitutional.

Some supporters of the bill have suggested that it is constitutional because it applies only to certain individuals and not to others who are referred to as "mainstream journalists". I reject this approach for a simple and fundamental reason. The First Amendment was not adopted simply to protect the rights of "mainstream journalists"—even if one could define what that term meant. The First Amendment was meant to protect the free exchange of ideas and viewpoints. I would reject any suggestion that the First Amendment provides greater protection for "objective" newsreporting than it does for advocacy. It certainly cannot be constitutional because it excludes those who only report the news while covering those who seek to influence policy.

For the same reason I must reject any suggestion that what is involved here is a limitation on symbolic speech upon which limits may be placed in circumstances that would not support limits on verbal speech. The statutes deal not with symbolic speech, but rather, in so far as they deal with communication at all, with verbal communication. In addition, restrictions on symbolic speech can be upheld only if they are unrelated to the suppression of free expression of ideas; the limitations must not be related to the content of the ideas being expressed.[6]

In discussions of this legislation, much has been made of the fact that an individual can be punished under section 501(c) for disclosing information gleaned from public sources. The more general argument that conduct should not be made criminal unless it involves access to classified information proves both too much and too little. I do not believe that, if the statute were otherwise unconstitutional, the difficulty could be cured by limiting it to those whose disclosures were based on access to classified information, through what is known as "leaks". I am disturbed at some of the leaks which have occurred over the past years, but I believe that efforts to deal with this problem should focus on the officials who leak and not on the press.

I do not believe, however, that an otherwise constitutional statute is rendered unconstitutional merely because the person making the disclosure did not gain access to classified information.[7] The prece-

[6] *U.S.* v. *O'Brian*, 391 U.S. 367 (1968).

[7] Five cases are generally cited for this proposition. One of them related to information which is available directly from the public records and involved printing names from the record. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 495 (1975) (information contained in official court records open to public inspection). A second related to information heard in open court, *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308, 311 (1971) (members of the press present in court and heard a name). In two other cases, the Supreme Court suggested that a more compelling state interest in preventing wide distribution could justify punishing publication of lawfully acquired information. *Landmark Communications* v. *Commonwealth of Virginia*, 435 U.S. 829, 838 (1978) ("we conclude that the publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom."); *Smith* v. *Daily Mail*, 443 U.S. 97, 194 (1979) ("If the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to further an interest more substantial than is present here.") The fifth case is one in which the Supreme Court declined to find in the First Amendment a right by the press of access to prisons. *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 10 (1970).

dents do not definitely decide the question of whether disclosures based on public sources can be penalized. The only relevant case on national security information is *U.S.* v. *Heine*, in which Judge Learned Hand overturned the conviction of a German agent who assembled information which was publicly available to prepare reports for the German Government.[8] In interpreting the language of the statute in that case, Judge Hand said that the military services must be trusted to know what must be kept secret, and it cannot be a crime to disclose what they make public. In S. 2216, by contrast, the CIA is seeking to keep identities secret, and the individual who makes the disclosure commits a crime only if he discloses a name which he knows the government is seeking to keep secret.

The other cases cited in footnote 7 relate to criminal proceedings and leave open the possibility that more compelling state interests could justify the imposition of criminal penalties for disclosure of lawfully obtained information. What can make this statute constitutional in our view is that it punishes a pattern of conduct which has very serious adverse consequences for the national security of the United States and that it punishes that course of conduct only when it is not carried out as an integral part of an activity protected by the First Amendment to the Constitution. The Supreme Court in *U.S.* v. *Robel* held that the government could proscribe conduct only if it drew a distinct line between conduct which was punishable and activity protected by the First Amendment.[9] That is what the Committee has done by adding section 502(e).

It is obvious that the conduct described in section 501(c) can be made criminal if it is not part of an activity protected by the First Amendment. The Congress of the United States annually authorizes the conduct of clandestine intelligence gathering and covert operations by the CIA. In order to fulfill these goals in support of national policies vital to the survival of the nation, the intelligence agencies send Americans abroad under various forms of cover. The success of their activities and, in some cases at least, their safety require that their identities not be publicly revealed and publicized. Because many of these individuals are stationed in American embassies and enjoy the protection of diplomatic immunity, it is very difficult to keep their identities completely hidden.

Moreover, these Americans seek to live as normal a life as possible not only to contribute to their cover, but because they have families and private lives. This means that they can be followed home from embassies, trailed about the city in which they are working, and even have their phones tapped by other Americans. I do not believe that the First Amendment—or any other part of the Constitution—prohibits the Congress from passing a statute which makes it a crime for an individual or groups of individuals to set about to pierce the veil of secrecy which they know the United States is seeking to put around the identities of its covert agents, to systematically uncover the names of as many such agents as they can, and to use the information which they gain from this process for whatever purposes they choose.

[8] 151 F.2d 813 (1945).
[9] *U.S.* v. *Robel*, 389 U.S. 258, 268 n. 20 (1967).

The only individuals who would be caught by the statute, as amended by section 502(e), are those engaged in a systematic effort to learn and expose identities which the government is striving to keep secret, and to disclose them for exposure's sake or for the sake of injuring intelligence efforts through the very fact of exposure. It would not apply to those who reveal names as an integral part of an activity protected by the First Amendment. For example, if the names were disclosed to a hostile intelligence service or made public only for the purpose of transmitting the names to would-be assassins with the intent or expectation that the information would be used to bring about the killing of the agent identified, the statute would no more raise First Amendment problems than would a statute punishing an extortion effort carried out by placing advertisements in a newspaper.

An additional constitutional difficulty arises from the fact that the pattern of activities described in section 501(c), even with the changes made by the Judiciary Committee, is still sufficiently general that it can be read to describe the activities and normal work habits of a journalist, a scholar or a pamphleteer. The Justice Department suggested that this difficulty could be cured by leaving the matter to prosecutorial discretion. However, the Supreme Court has rejected this approach by making clear that when a statute can reach activity protected by the First Amendment it is the duty of the legislature to provide precise standards and not to leave the matter to the discretion of prosecutors.[10]

One way to solve the problem is to rewrite section 501(c) to define a more precise course of conduct. This might, for example, require a showing that the individual was seeking unauthorized access to classified information or conducting surveillance of American employees abroad using unlawful techniques. The Committee decided instead to amend section 501(c) only slightly and to add the new section 502(e). This addition simply and clearly bars a prosecution when the disclosure is an integral part of an activity protected by the First Amendment, regardless of how the information was obtained.

The Committee's report makes clear that in certain cases it will be for the court to decide if a particular activity is protected by the First Amendment. But there can be no question that, for example, essays critical of the intelligence community and news reporting on intelligence agencies are protected activities. The Committee used the word "integral" to describe the relationship between the disclosure and the First Amendment activity to make clear that no subterfuge could be used to artificially link the proscribed activity to First Amendment conduct. The standard which we believe should be applied is that which the Supreme Court described in asserting that something which was obscene could not be rendered non-obscene simply by printing a quotation from Voltaire on the fly leaf. The Court indicated that the standard to be applied was whether the challenged material was "relevant to the theme of the article" and "rationally related" to its purpose.[11]

I emphasize, as does the report of the Committee, that any effort to read into the language of section 502(e) an invitation to the judge or

[10] *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974).
[11] *Kois* v. *Wisconsin*, 408 U.S. 229, 231 (1971).

the jury to second guess the discloser about whether the disclosure of names was "necessary" or even "important" for the First Amendment activity would run contrary to a fundamental principle of the First Amendment and render the bill unconstitutional.[12]

CONCLUSION

For these reasons, I feel that the amendments which the Committee on the Judiciary has approved are essential if the constitutional challenges are to be resolved.

[12] *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 560–561 (1976); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 496 (1975); *Columbia Broadcasting Systems, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 124 (1973); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269–283 (1964).

ADDITIONAL VIEWS OF SENATOR BAYH

The Committee on the Judiciary and the Select Committee on Intelligence have addressed in this bill a serious problem that confronts the U.S. intelligence community. In recent years a small number of Americans have made concerted efforts to destroy the effectiveness of lawfully authorized U.S. intelligence activities by systematically identifying and exposing the names of individuals who serve our country as intelligence agents sometimes at great risk and sacrifice. They have acted without regard for the physical dangers that United States intelligence agents confront in countries around the world. I am convinced that legislation must be passed to deter and punish such activities, and it is vital that this bill be enacted into law without delay. It is also of equal importance to ensure that the bill achieves its intended result without violating constitutional rights, especially as embodied in the First Amendment to the Constitution.

If such a law is not carefully written to meet constitutional requirements, it could have a chilling effect on legitimate public debate and news reporting. Freedom of expression is the bedrock of a democratic society and any law written to deal with the First Amendment must be carefully drafted. And if the courts declare the statute unconstitutional, the deterrent effect would be lost altogether. For these reasons, both the Intelligence and Judiciary Committee have attempted to strike the delicate balance between the need to punish the most damaging activities and the protection of constitutional rights.

The framers of the Bill of Rights adopted, as the first amendment to the Constitution of the United States, a prohibition against Congress making any law abridging the freedom of speech, or of the press. For nearly two centuries our nation has grown and prospered, and struggled for survival in an often hostile world, with the First Amendment as the bulwark of our freedom. There have been periods in our history when the freedom of speech, or freedom of the press, have been in jeopardy because waves of hysteria swept over the land. Over the full sweep of our national life, however, the movement has been constantly toward the fulfillment of the highest ideals of the founding fathers.

When legislation is proposed that could affect freedom of speech and freedom of the press, our traditions as a free people committed to constitutional guarantees of liberty compel us to consider any such proposal with the utmost care. The right to engage in vigorous public debate on the policies of government and the conduct of government officials is crucial to the system of popular self-government for which our country has stood since the Declaration of Independence. The role of the press in exposing the truth is essential if the people are to be able to judge the wisdom and correctness of their government's actions.

Nevertheless, the First Amendment is not absolute. Punishing someone who falsely shouts "fire" in a crowded theater and causes a panic does not abridge the freedom of speech.The imposition of civil damages for the publication of malicious falsehood that damages reputations does not abridge the freedom of the press. There are compelling needs of the society that can justify restrictions on speech or publication, so long as the interests are truly compelling and the restriction is narrowly framed to ensure that it respects the fundamental values that the First Amendment is designed to safeguard. In order for the Congress to impose restrictions on the First Amendment however, the Supreme Court has said ". . . the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished . . . The danger must not be remote or even probable; it must immediately imperil . . ." [1] In addition, it is the clear obligation of the Congress to see to it that the language of the statute meets these standards. The Supreme Court has held that "the task of writing legislation which will stay within . . . the bounds imposed by the Constitution . . . has been committed to Congress." The Court has refused to go so far as "judicially rewriting" a statute "to save it against constitutional attack." [2]

In considering this bill, the Select Committee on Intelligence sought to meet First Amendment requirements by providing criminal penalties in section 501(c) only for a narrow class of individuals whose intentional, well-evidenced course of conduct involves (1) a pattern of activities (2) intended to identify and expose covert agents, (3) with reason to believe that such course of conduct would harm the ability of the United States to carry on legitimate and necessary foreign intelligence activities. This language was adopted to make clear that the principal intent of the enterprise must be to actively identify covert agents and to expose those identities, thereby excluding disclosures that are an integral part of another activity where the principal intent is clearly something else. It was the view of the Intelligence Committee that this definition of the offense would resolve the concerns as to the constitutionality of the bill.

After S. 2216 was referred to the Judiciary Committee, new questions were raised about its potential effects on the exercise of First Amendment rights. In order to respond to those questions, I joined with other members of the committee in an effort to reaffirm the intent of the Intelligence Committee and the Judiciary Committee by an amendment based upon the language of the Intelligence Committee's report. There was a clear understanding, set forth by the Chairman of the Judiciary Committee before he offered this amendment, that further efforts would be made to ensure that the final language of the bill would take into account the requirements of proper statutory form. Given the need to act quickly upon the measure and to eliminate widespread misunderstanding about its purpose and effect, the Judiciary Committee's amendment to add section 502(e) was necessary in order to move towards a consensus without which passage of S. 2216 would be difficult if not impossible.

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[1] *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1977).
[2] *United States* v. *Robel*, 389 U.S. 258, 267 (1967); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964).

Immediately after the Judiciary Committee voted to report S. 2216 with its amendments, representatives of both the Intelligence and Judiciary Committees met to carry forward the necessary efforts to revise the language with a view to the widest possible agreement. There followed a meeting of representatives of the two committees with officials of the Department of Justice and the Central Intelligence Agency to review their concerns. Additional discussions between the committees' representatives have brought to bear the full range of views on these deliberations. It is my belief that the commitment to work out these differences is of paramount importance.

I supported the Judiciary Committee amendment as part of this urgent process of achieving a consensus to facilitate prompt enactment of the bill.

The amendment as presently drafted raises real questions about the probabilities of effective prosecution. As it stands now, a defendant may assert that his conduct is "news reporting" or "academic study" and thereby seek an exemption from the statute. This statutory formulation is likely to result in conflicting legal interpretations and court decisions on what are (and what are not) the proper bounds of "news reporting" or "academic study."

Other difficulties arise from the term "intelligence failures or abuses." For example, the "graymail" danger might compel dropping the prosecution. While appropriate for an explanation of the bill in legislative history, this particular language formulation in the statute tends to raise more questions than it answers.

The central point of the effort to allay misgivings about the bill is to make clear that the statute must not be used to abridge First Amendment rights and that its specific purpose is to punish only those whose conduct is akin to shouting fire in a crowded theater when there is no fire. I believe this point can be made without language that creates serious obstacles to the ability of the courts to determine whether or not a particular course of conduct is an offense under the statute.

While the issues raised in the Judiciary Committee were not specifically raised in such formulation in the Select Committee, they were touched upon in that committee's discussions of constitutional rights. At that time, I had concerns that perhaps we had not adequately dealt with some important constitutional problems. When the further opportunity arise to participate in the process which would delineate and refine certain constitutional questions, I participated in the Judiciary Committee's efforts with my express concern being to craft statutory language which would better reflect the intent of both the Intelligence and Judiciary Committees.

Nonetheless, I must reiterate that if compromise language cannot be agreed to during this process, I have no hesitation in supporting S. 2216 as reported by the Select Committee. This bill is important to the effectiveness and security of our intelligence officers who serve our nation's interests and should be passed quickly and expeditiously.

BIRCH BAYH.

ADDITIONAL VIEWS OF SENATORS THURMOND, LAXALT, HATCH, DOLE AND SIMPSON

We are concerned to note that the four substantive amendments adopted by the Judiciary Committee could well gut the effectiveness of this legislation which was originally drafted to prevent the flagrant and intentional exposure of the identities of covert intelligence employees and agents by individuals whose only possible purpose in doing so was to destroy our nation's intelligence capabilities.

Section 501(c) of the bill was carefully crafted to protect legitimate publishing activities and to prosecute the obvious and flagrant exposures of intelligence identities—the "naming of names"—that is intended to cripple the ability of our intelligence agencies to undertake the essential clandestine collection of intelligence information. As amended by the Judiciary Committee, Sec. 501(c) now precludes any possibility of prosecution for flagrant exposures as long as the individual or organization publishing such information can effectively claim any prior publication—no matter how obscure the source and limited the distribution or where the prior publication took place. Consequently, those irresponsible publishers who would violate the spirit of this legislation have only to enlist the cooperation of an obscure foreign periodical in order to continue their exposures of the identities of this nation's covert intelligence employees and agents. Although such cooperative efforts may arguably be an illegal conspiratorial activity, it would be an extremely difficult task to discover and prove the existence of such a conspiracy.

The Committee has also adopted by amendment a new Subsection (e) to Sec. 502 that makes it a defense to prosecution if exposures, however flagrant, are "... an integral part of another activity such as news reporting of intelligence failures or abuses, academic study of government policies and programs, enforcement by a private organization of its internal rules and regulations, or other activities protected by the First Amendment to the Constitution". Arguments were made that the amendment was intended only to guarantee First Amendment rights for the specific activities noted—news reporting, academic studies and private organization activities—and any other activity construed to be protected by the First Amendment. As our colleague on the Judiciary Committee, Howell Heflin (D-AL), stated, "How do you legislate what's included in the considerations of the First Amendment?" That's a good question and should give anyone serious reservations. Senator Simpson offered a modification to the amendment which would simply have eliminated the specific enumerations as follows: "(e) It shall not be an offense under subsection (c) of section 501 if the disclosure of the information described in such subsection is protected by the first amendment to the Constitution".

Why make any specific exceptions? Activities are either covered by the First Amendment to the Constitution or they are not. That's for the courts to decide—not for the Congress. This amendment is a total distortion of any previous conception of First Amendment considerations.

All of these amendments are apparently creations of the fertile minds of overzealous staff members of the American Civil Liberties Union. They serve no purpose other than to undermine this legislation with loopholes under the guise of an expressed concern for First Amendment rights. Such rights are already guaranteed and no legislative efforts we undertake in that regard will have any effect.

The Committee also adopted an amendment that would exclude the Peace Corps and the Agency for International Development from the list of agencies of the Federal Government that are available to provide "official cover" to undercover employees of our intelligence agencies. Traditionally, the Peace Corps has never provided—and should not provide—such cover and it is effectively precluded from doing so by statute. The Agency for International Development has not provided cover in the past few years but is not precluded by statute from doing so. We object to the specific statutory exemption of any Federal agency from being able to provide cover for intelligence agency employees for two reasons: (1) it makes it easier for unauthorized personnel to determine which overseas United States employees are intelligence employees, thus making their cover virtually transparent; and (2) it unnecessarily reduces the flexibility which must be available to the President in the conduct of foreign intelligence information gathering. In certain circumstances, the use of cover within a specific agency may well be essential to the collection of some type of foreign intelligence information, and the President should always have the power to authorize the use of such cover when necessary. We do not wish to revoke the Peace Corps statutory exemption, since the number of Peace Corps volunteers and employees are so few and their access to foreign sources of worthwhile intelligence information is so very limited. But we do not wish to establish any further exemptions that will only make the problems associated with adequate intelligence cover that much more difficult to overcome.

Additionally, the "Judicial Review" amendment adopted by the Committee is far too broadly written and it can only result in an endless flurry of court cases. All manner of individuals or institutions, regardless of standing, will be able to initiate "such actions as may be appropriate" in construing the constitutionality of any provision in this bill. We believe that such an expedited review procedure can and should be accomplished within the context of each actual case in controversy, and it is neither necessary nor an advisable provision to have in this legislation.

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