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96TH CONGRESS, 2d Session } SENATE { REPORT No. 96-896

INTELLIGENCE IDENTITIES PROTECTION ACT

AUGUST 13, 1980.—Ordered to be printed
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Mr. CHAFEE (for Mr. BAYH), for the Select Committee on Intelligence, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 2216]

The Select Committee on Intelligence, 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.

PURPOSE

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.

AMENDMENTS

Strike all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Intelligence Identities Protection Act of 1980".

SEC. 2 (a) The National Security Act of 1947 is amended by adding at the end thereof the following new title:

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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) Whoever, 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 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.

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 Unitel 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 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.

(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.

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 identify of such individual as such an officer, employee, or member is effectively concealed. Such procedures shall provide that any department or agency 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 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 2105, 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.

(b) The table of contents at the beginning of such Act is amended by adding at the end thereof the following:

TITLE V— PROTECTION OF CERTAIN NATIONAL SECURITY INFORMATION

Amend the title so as to read:

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

History of the Bill

In recent years, members of the House and Senate Intelligence Committees, along with other colleagues in the Congress, have become increasingly concerned about the systematic effort by a small group of Americans, including some former intelligence agency employees, to disclose the names of covert intelligence agents. Numerous proposals have been made in this Congress for a criminal statute to punish such disclosure of the identities of intelligence agents.

Senator Bentsen introduced indentities 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-sponsored 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 Bensten'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 disclosure 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.

S. 2284 was considered by the Select Committee on May 6 and 8, 1980, and the Committee decided to limit that bill to repeal of the Hughes-Ryan Amendment and congressional oversight provisions. At the meeting on May 8, the Committee decided to pursue intelligence identities protection using S. 2216 as the vehicle for further consideration of this issue, as proposed by Senator Chafee. The 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. Senator Bentsen testified in favor of his proposal for penalizing exposure of CIA agents' identities by persons who had authorized access to such identities. Senator Simpson testified in support of Amendment No. 1682 to S. 1722 (the criminal code revision bill), which he introduced on March 6, 1980, and which proposed extending penalties similar to S. 2216 to disclosure of the identities of law enforcement agents and informants.

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.

The Select Committee met in closed session on July 22, 1980, to confer with representatives of the CIA and the Department of Justice on ways to meet this problem. Committee staff were instructed to work with staff of the House Permanent Select Committee on Intelligence and the Administration to reach agreement on bill language that would resolve differences and facilitate prompt action. On July 25, 1980, the House 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. Senator Chafee offered an amendment in the nature of a substitute 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.

Based on Department of Justice testimony which suggested that the intent standard contained in the House version could well focus on the political opinion of the accused, Senator Chafee 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.

This language has the support of CIA and the Justice Department. Senator Bayh proposed an amendment that included the following different language:

> Whoever, in the course of a pattern of activities intended to impair or impede the foreign intelligence activities of the United States by identifying and exposing covert agents, discloses, with reason to believe that such disclosure would impair or impede the foreign intelligence activities of the United States, any information....

After lengthy discussion, Senator Bayh's amendment was defeated 9–3 with one abstention. Two other amendments to Senator Chafee's substitute were then adopted unanimously by voice vote. An amendment offered by Senator Huddleston added a definition of "pattern of activities", and an amendment by Senator Bayh provided that it shall not be an offense under the bill for an individual to disclose information that solely identifies himself as a covert agent. Senator Chafee's substitute, as amended, was then adopted 11–1. S. 2216, as amended by Senator Chafee's substitute, was approved by the Committee as the Intelligence Identities Protection Act, with a recommendation for favorable action.

Position of the Administration

The Administration supports S. 2216, as reported by the Select Committee on Intelligence with amendments. Deputy Attorney General Charles B. Renfrew, in a letter to the Committee on July 29, 1980, stated with respect to the basic 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:

> This formulation substantially alleviates the constitutional and practical concerns expressed by the Justice Department with regard to earlier versions of this bill that included a requirement that prohibited disclosures be made with a specific "intent to impair or impede" U.S. intelligence activities.
>
> Because of the significance of this matter . . . , it has been our view from the beginning that such legislation as is enacted must be fair, effective and enforceable. Our position has been and remains that the absence of an intent element in this legislation will accomplish this goal.

General Statement

I. INTRODUCTION AND BACKGROUND

The Committee considered and approved this bill because, in recent years, the United States intelligence community has been faced with an unprecedented problem in its attempt to fulfill its responsibilities. A small number of Americans, including some former intelligence agency employees, have been engaged in a systematic effort to destroy the ability of our intelligence agencies to operate clandestinely by disclosing the names of intelligence agents.

Foremost among them has been Philip Agee, two of whose books—"Dirty Work: The CIA in Western Europe" and "Dirty Work 2: The CIA in Africa"— have revealed the names of over 1,000 alleged CIA officers. Louis Wolf, co-editor of the Covert Action Information Bulletin which contains a special section titled "Naming Names", claims that he has revealed the names of over 2,000 CIA officers in recent years.

In December 1975, Richard S. Welch, CIA Station Chief in Athens, Greece, was murdered in front of his home. His assassination occurred within a month of the time that he was identified as CIA Station Chief in the Athens Daily News. The information for this story came from Philip Agee's Counterspy magazine.

On July 4, 1980, an American Embassy official—Mr. Richard Kinsman—posted in Kingston, Jamaica, was the target of an assassination attempt following a published allegation that he was a CIA operative. Although Mr. Kinsman and his family were not injured in the attack, his house and grounds were extensively damaged by submachinegun fire and an explosive device. Less than 48 hours before the attack, Louis Wolf had publicly alleged that Richard Kinsman and 14 other U.S. Embassy officials in Jamaica were working for the CIA. In addition to names, Wolf also provided the officials' addresses and telephone numbers, and the license plate numbers and colors of their automobiles. On July 7, 1980, another Embassy official named by Wolf was the target of an apparent assassination attempt.

Over the years none of the people involved has been indicted under the espionage laws or any other law for these malicious disclosures. This is effective testimony for the proposition that, if these wanton disclosures are to be stopped, a new law is needed. Until a new law is

passed, undercover work for the United States will continue to become ever less effective and ever more hazardous, while those doing harm to the United States by exposing American undercover agents will continue their activities without penalty.

The Committee addressed only the problems posed by the disclosure of undercover employees and agents of American intellignece. It specifically decided not to address itself to the wider problems posed by various kinds of disclosure of classified information. While deploring all "leaks" of classified intelligence information, the Committee specifically decided not to try to delineate the proper bounds of free speech concerning American intelligence. Rather, the Committee decided to accomplish a single, narrow purpose: to punish the unauthorized disclosure of the identity of undercover employees or agents in certain circumstances. The Committee's focus is further defined and narrowed by its decision to protect the identitities of undercover personnel only when the U.S. Government is taking affirmative measures to conceal them. Because of this focus, the Committee decided to penalize disclosures in the course of a pattern of activities undertaken for the purpose of identifying and exposing such agents, regardless of whether these disclosures were based on classified information. Thus the Committee's action is not an affirmation of the value of classification. It is not a partial Official Secrets Act. It is a definitive affirmation that the U.S. Government is right to have undercover employees and agents for foreign intelligence purposes, that the Government is right to take measures to keep such undercover arrangements secret, and that anyone who engages in a pattern of activities that would thwart this legitimate Governmental interest by unauhorized disclosure of the identities of such personnel should be punished.

The Committee seeks to penalize any person, regardless of his status, who engages in "a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States." In the Committee's view the First Amendment is not a license for allowing such a private intelligence organization to operate under the label "press." The Committee is not seeking to penalize political opinion, or journalistic expression. Rather, the Committee believes that patterns of activities intended to identify and expose covert agents with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States would be neither political opinion nor journalism, but rather ought to be punishable as a felony.

Security considerations preclude confirming or denying the accuracy of specific attempts at identifying U.S. intelligence personnel. There have, however, been many such disclosures, and not all of them are wide of the mark. The destructive effects of these disclosures have been varied and wide-ranging; the Select Committee is aware of numerous examples of such effects on U.S. intelligence operations which cannot be addressed in a public report.

Many of these disclosures can place intelligence personnel and their families in physical danger from terrorist or violence-prone organizations. Furthermore, the professional effectiveness of officers who have been compromised is substantially and some times irreparably damaged. They must reduce or break contact with sensitive covert sources

and continued contact must be coupled with increased defensive measures that are inevitably more costly and time-consuming. Some officers must be removed from their assignments and returned from overseas at substantial cost, and years of irreplaceable area experience and linguistic skill are lost. Since the ability to reassign the compromised officer is impaired, the pool of experienced CIA officers who can serve abroad is being reduced. Replacement of officers thus compromised is difficult and, in some cases, impossible. Such disclosures also sensitize hostile security services to CIA presence and influence foreign populations, making operations far more difficult.

In addition, relations with foreign sources of intelligence have been impaired. Sources have evidenced increased concern for their own safety. Some active sources, and individuals contemplating cooperation with the United States, have terminated or reduced their contact with our intelligence agencies. Sources have questioned how the United States government can expect its friends to provide information in view of continuing disclosures that may jeopardize their careers, liberty and lives. The result of this has been a chilling effect on these relationships which are vital to high-quality U.S. intelligence. These disclosures have contributed to a perception among foreign intelligence services that U.S. intelligence agencies are unable to preserve important confidences. This perception has led and may lead these services to undertake reviews of their liaison relationships, which have resulted in reduction of contact and reduced passage of information. In taking these actions, some foreign services have explicitly cited disclosures of intelligence identities.[1]

The Committee noted that the current laws concerning espionage were written long before these activities commenced and are inadequate to prevent the harm they cause. As Attorney General Benjamin R. Civiletti has said:

> Existing law provides inadequate protections to the men and women who serve our nation as intelligence officers. They need—and deserve—better protection against those who would intentionally disclose their secret mission and jeopardize their personal safety by disclosing their identities.[2]

The Committee took note of the fact that the identities of American undercover intelligence personnel are not as well hidden as they might be. Indeed part of the Committee's bill is designed to improve their cover. But the Committee rejected the contention that the identities of imperfectly covered intelligence personnel are thereby part of the public record. They are not. Those seeking to learn them without the use of classified information must frequently engage in physical surveillance, in search of personnel records, in interviews with neighbors and former colleagues. All of this amounts to a comprehensive counterintelligence effort. It may be true that one does not have to be or to have been an intelligence officer in order to learn and reveal the identities of American undercover agents. But in that case one must often behave as a counterintelligence officer, using systematic

[1] See testimony of Frank C. Carlucci, Deputy Director of Central Intelligence, before the Senate Select Committee on Intelligence, June 24, 1980.

[2] Address of Attorney General Benjamin R. Civiletti, "Intelligence and the Law: Conflict or Compatibility?" 10th Annual Sonnett Memorial Lecture, Fordham University School of Law, Jan. 15, 1980.

investigative techniques, against the United States. The Committee has decided that certain identities should be protected both against betrayal of classified information and against such self-appointed counterspies.

The Committee also chose to direct the President to establish procedures to ensure that all departments and agencies of the U.S. government designated by the President to do so shall provide whatever assistance is necessary to establish and maintain effective cover for intelligence personnel. The Committee realized that the President has always had the power to order any part of the Executive Branch to provide effective cover. But the Committee is aware that intelligence officers have not been provided with credentials and working conditions indistinguishable from certain other departments. The President heretofore has not effectively exercised his power to cause executive departments to provide adequate cover. However, it is the plain intent of the bill that the President establish procedures which shall result in effective cover.

II. FINDINGS

Since its creation in the 94th Congress, the Select Committee on Intelligence has examined in open hearings and inexecutive session United States activities to collect information from human sources abroad. The Committee has concluded that it is absolutely essential that our nation have intelligence information that is timely and accurate. Further, the Committee believes that informed policymaking by officials of the Executive and Legislative branches requires that the United States collect such intelligence from human sources, for that particular kind of intelligence provides insight into the intentions of foreign powers. The United States can collect the vital human intelligence it needs only through the operations officers of its intelligence agencies. Without effective cover for U.S. intelligence officers abroad and without assurance of anonymity for intelligence sources, the United States cannot collect the human intelligence which it must have to conduct an effective foreign and national defense policy. Moreover, as the United States seeks to implement its foreign policy objectives, it requires in unusual and important situations the capability to use clandestine operators to complement its overt policy initiatives.

The United States programs for the collection of human intelligence have been severely impaired by the efforts of certain individuals to disclose the identities of our undercover intelligence officers and our sources of information. The loss of vital human intelligence which our policymakers need, the great cost to the American taxpayer of replacing intelligence resources lost due to such disclosures, and the greatly increased risk of harm which continuing disclosures force intelligence officers and sources to endure, are the intolerable, direct results of the efforts of those individuals to disclose intelligence identities.

The Committee hereby makes the following findings:

(1) Successful and efficiently conducted foreign intelligence and counterintelligence activities are vital to the national security of the United States.

(2) Successful and efficient foreign intelligence and counterintelligence activities require concealment of relationships between components of the United States Government that carry out those activities and certain of their employees and sources of information and assistance.

(3) The disclosure of such relationships to unauthorized persons is detrimental to the successful and efficient conduct of foreign intelligence and counterintelligence activities of the United States.

(4) Individuals who have a concealed relationship with foreign intelligence or counterintelligence components of the United States Government may be exposed to physical danger if their identities are disclosed to unauthorized persons.

(5) Organizations of determined individuals may be able to identify and expose U.S. Government employees who have concealed intelligence relationships by means of standard espionage techniques without access to classified documents.

(6) Current law has proved inadequate to prevent such efforts.

(7) The policies, arrangements and procedures used by the Executive branch to provide for U.S. intelligence officers, agents and sources must be strengthened and fully supported.

Therefore, to improve intelligence efforts of the U.S. and to protect intelligence officers and sources from harm, the Committee reports S. 2216 to the Senate with a recommendation for favorable action thereon.

III. SUMMARY OF LEGISLATION

This bill makes criminal the disclosure of intelligence identities. The Committee has concluded that such disclosures can seriously harm the nation's ability to conduct foreign policy and provide for the common defense and can place in jeopardy the safety and lives of the dedicated and loyal men and women who serve this country in a difficult and dangerous profession.

However, while the Committee condemns all disclosures of undercover intelligence identities, it has not sought to make criminal such acts in every context. The Committee has limited the scope of this bill in order to make criminal only those disclosures which proceed in violation of an express duty of care assumed by the discloser or where the disclosure occurs in the context of a pattern or practice of identification and disclosures which could reasonably be expected to impair U.S. intelligence capabilities.

Thus, 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, although they may never have had authorized access to classified information with its accompanying duty of care, engage in a deliberate pattern of activities intended to identify and expose covert agents 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 identify 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) intended to identify and expose covert agents (3) with reason to believe such course of conduct would impair or impede U.S. foreign intelligence activities.

It is the purpose of the Committee in carefully specifying the above class to thereby 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 intended to identify and expose 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 accesories 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), or those who conspire (18 U.S.C., sec. 371) could be reached if they demonstrated the requisite pattern of activities intended to identify and expose covert agents with reason to believe such activities would impair or impede the foreign intelligence actvities of the United States.

Beyond its concern for narrowing the application of the bill to those whose duty of care, or pattern of activities, render disclosures of this sort particularly damaging, the Committee devoted great care to limiting the scope of intelligence identities whose disclosure would be made criminal. First, it required that the protected intelligence relationships be those that the United States is taking affirmative measures to conceal; these measures include, but are not limited to, classification. Second, those who identities are protected are those who would be in the greatest danger from foreign intelligence services or terrorist groups should their identities be disclosed. Finally, the Committee has sought to protect the future safety and intelligence effectiveness of intelligence employees, agents and sources.

Using these criteria, the Committee has fashioned the definitions of protected identities to include only covert agents of the CIA, foreign intelligence components of the Department of Defense, and the foreign counterintelligence and foreign counterterrorism components of the Federal Bureau of Investigation. In essence, these are the only intelligence agencies whose officers or agents operate overseas.

The Committee has defined the term covert agent to include only three categories of individuals. The first group consists of present officers or employees of (or members of the Armed Services assigned to) the above named agencies currently serving outside the United States or whose professional involvement in clandestine operations will result in their serving overseas again. Such individuals all serve under cover, e.g., using an alias or serving in ostensibly non-intelligence positions. Serving overseas, they cannot claim the protection of the police power of the government, or, at present, of U.S. law. Exposure abroad or within five years from last returning abroad (a provision calculated to include those who are home in the U.S. for a tour or a visit or whose foreign associations and contacts are still fresh) could—as it has already—result in heightened danger for these individuals or their families. Clearly, it would diminish their effectiveness as clandestine intelligence personnel and could seriously impair present and future U.S. intelligence operations.

The second category includes U.S. citizens who are agents or informants of the FBI's foreign counterintelligence or foreign counterterrorism units and U.S. citizens who reside and act outside the U.S. as agents, informants or sources of operational assistance to the other intelligence agencies. These individuals are those who, because of their service overseas (not necessarily continuous) or their involvement in the dangerous fields of counterintelligence or counterterrorism, could suffer adversely because of public identification with a U.S. intelligence agency. In the case of the FBI's agents or informants, even though they may be present in the U.S., the nature of the individuals and groups with which they come into contact suggests strongly the possibility of physical danger from foreign based intelligence or terrorist organizations.

The identity of each such individual in this second category must be classified. This group of individuals is one whose importance to U.S. intelligence operations is clear and vital. The category has been defined in such a way as to exclude those U.S. citizens residing in the United States whose relationship with an intelligence agency may be concealed but who may suffer only embarrassment from the dis-

closure of this relationship. The Committee believes that physical danger or a reasonable possibility thereof serves as a good criterion in shaping this and other categories of covert agents. Such a criterion serves to exclude relationships which public policy may wish to conceal but which are not significant enough to warrant the protection of criminal sanctions.

The last category of covert agent consists of all aliens who serve, or who have served, as agents, informants or sources of operational assistance of intelligence agencies. To be included, their present or former relationship with an intelligence agency must remain classified. The Committee feels that this more broadly defined group also reflects the realities of life for an alien who has assisted a U.S. intelligence agency and who remains overseas or ever hopes to return to his country. Without some assurance of protection for their present or past relationship with the U.S. government, such individuals would not continue the association. The further ramifications of a public disclosure could include reprisals against family and friends, imprisonment or death.

In addition to the care with which the classes of individuals affected by the bill and those whose identities are to be protected have been defined, the Committee has also devoted care to the other elements of the offenses established by S.2216. All disclosures made criminal by the bill must be intentional, i.e., the defendant must have consciously and deliberately willed the act of disclosure. Further, the government must prove that he knew that the sum of his acts was the disclosure of a protected intelligence identity which he knew the government was taking affirmative steps to conceal.

The bill additionally creates an affirmative defense to the effect that no offense has been committed where the defendant can show that the government has publicly acknowledged or revealed the intelligence identity the disclosure of which is the subject of prosecution. The bill also exempts an individual who discloses information that solely identifies himself as a covert agent.

The Committee believes that it has considered and crafted the provisions of S.2216 with care. The principle thrust of this effort has been to make criminal those disclosures which clearly represent a conscious and pernicious effort to expose agents where such exposure damages the capability to conduct intelligence operations. Yet 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. It 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 recognizes the fact that only the President has the authority to truly resolve these questions and only he can determine which improvements will result in the adequate provision of cover to undercover intelligence operatives. However, this provision is a clear congressional mandate to strengthen cover arrangements.

IV. CONSTITUTIONALITY OF THE BILL

In framing S. 2216, the Committee took care to ensure that the bill met the requirements of the Constitution. Although the courts will make their own determination of constitutionality, the Congress has a responsibility to make its best judgment. 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), 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*, 384 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.

(*a*) *Disclosure not based on classified information*

The proposal advanced by the Administration would have punished the disclosure of agents' identities by private citizens—as opposed to present or former government employees who had authorized access to classified information—only if such disclosure was based on classified information. Representing the Administration's view, the Department of Justice stated that the "focus on inside access" would "seem to be the courts more carefully fitted to the harm the Government is seeking to avoid, and far less burdensome on the right of the general public to discuss policy questions concerning foreign affairs and intelligence activities." The Department warned against marching "over-boldly" into the "difficult area of political, as opposed to scientific, 'born classified' information, in a context that will often border on areas of important public policy debate." [3]

The legislative judgment of the Committee is that the Administration's proposed standard, by requiring proof that disclosure is based on classified information, raises both practical and constitutional problems. The "particular mode of expression" that seems most likely to harm U.S. intelligence and endanger the safety of individuals is that exhibited only by certain publications. These publications claim that their disclosures of agents' identities are not based on classified information, but rather on an effort to seek out and compare, cross-reference, and collate information from unclassified sources including investigations conducted abroad. The danger posed by their disclosures may not, therefore, depend upon their having inside access to classified information. While an intrusive investigation might uncover evidence of the use of classified information, such an investigation of persons engaged in both activities protected by the First Amendment and possible illegal conduct woudl itself raise constitutional concerns. Moreover, the Administration's standard would have encompassed all types of disclosure of agents' identities based on classified information, including publication in newspaper stories on intelligence failures and abuses or in scholarly studies of U.S. foreign and military policies. The record does not indicate that such disclosures pose a danger that requires deterrence by criminal penalties, and thus it was felt that such penalties would place an unnecessary burden on the exercise of First Amendment rights.

While rejecting the Administration's proposal, the Committee has nevertheless taken into account the concerns it represents. 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 addi-

[3] Testimony of Associate Deputy Attorney General Robert L. Keuch, June 24, 1980. The Justice Department cited as a "skeptical source" on this question the decision of Judge Learned Hand in the *Heine* case. The court in that case reversed an espionage conviction that was based on evidence of clandestine transmission to Nazi Germany of information from "sources that were lawfully accessible to anyone who was willing to take pains to find, sift and collate it." Judge Hand's opinion was not expressly based on constitutional grounds. *United States* v. *Heine*, 151 F. 2d 813 (2d Cir., 1945), cert. denied, 328 U.S. 833 (1946).

tion, 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.[4]

(*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 any inhibition on public criticism or debate concerning intelligence activities. Because the revelation of their relationshp 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

[4] In the *Heine* case the government had made no effort to conceal the information about airplane production that the defendant obtained. Judge Hand noted that "no public authorities, naval, military or other, had ordered, or indeed suggested, that the manufacturers of airplanes—even those made for the services—should withhold any facts which they were personally willing to give out." 151 F.2d, at 815.

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 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." 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 agent's 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 identifying 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 identify 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. 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.

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, it does not affect the First Amendment rights of those who disclose the identities of agents as an integral part of another enterprise such as news media reporting of intelligence failures or abuses, academic studies of U.S. government policies and programs, or a private organization's enforcement of its internal rules.

The Committee shares the objectives expressed by the Attorney General when he wrote to the 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." [5]

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 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 consttiutional 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 defendant'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.

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

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.[6]

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 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 inself 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". Basically, 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,

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[6] 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.)

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 pattern of activities was intended to identify 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.

S. 2216, as introduced, required that to be criminal the disclosure made by those with no access to classified information would have to be made "with the intent to impair or impede the foreign intelligence activities of the United States."

The bill, as reported, replaces this intent standard with a more objective standard which requires that the disclosure must be "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 and impede the foreign intelligence activities of the United States." This requirement makes 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 intended to identify and expose 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 identify 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. Those who republish previous disclosures and critics of U.S. intelligence would all stand beyond the reach of the law if they did not engage in a pattern of activities intended to identify and expose covert agents.

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

The government, of course, has the burden of demonstrating that the pattern of activities was with the requisite intent to identify and expose covert agents. The government's proof could be rebutted by demonstrating some alternative intent other than identification and exposure of covert agents. 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 reporter could show that by printing a name of someone commonly 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 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 intent 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 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.

This provision of the bill does not stipulate which elements of government shall provide assistance or what that assistance must be. Such procedures are exempted from any requirement for publication or disclosure. The Committee is not addressing in this provision the relationships between intelligence agencies and private organizations or institutions.

SECTION 504—EXTRATERRITORIAL JURISDICTION

This section is intended to remove any doubt of the Congress's 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.[7]

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 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 disclosures made pursuant to a federal court order or to either of the intelligence

[7] 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).

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 relationship 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 program.

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.

COST ESTIMATE OF CONGRESSIONAL BUDGET OFFICE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., August 1, 1980.

Hon. BIRCH BAYH,
Chairman, Select Committee on Intelligence,
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 Select Intelligence Committee on July 29, 1980.

S. 2216 amends the National Security Act of 1947 to prohibit the unauthorized disclosure of information identifying certain United States intelligence officers, agents, informants, and sources. It is expected that no additional cost to the government will be incurred as a result of enactment of this legislation.

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.

CHANGES IN EXISTING LAW MADE BY THE BILL

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in the 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 shown 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 is Act may be cited as the "National Security Act of 1947."

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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 dis-

closes 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 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 an 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 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.

(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.

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 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 2105, 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.

ADDITIONAL VIEWS OF SENATOR BIDEN

S. 2216, the Intelligence Identities Protection Act of 1980, aims at a most desirable objective, the cessation of the irresponsible, wholesale disclosure of the identities of covert agents involved in the intelligence activities of the United States Government. These intelligence activities make an essential contribution to the security of the United States and the conduct of its foreign policy. They should not be deterred by the actions of individuals endlessly attributing sinister schemes to the United States, thereby disrupting intelligence activities and endangering individuals' lives.

I join in the condemnation of these destructive actions and support the effort of my colleagues on the Intelligence Committee to examine what the Congress might do about them. I think that S. 2216 could supply an effective and constitutional, statutory basis for punishing individuals who mount the equivalent of a private, hostile intelligence offensive detrimental to the interests of the United States. Certainly this report shows that the Committee is sensitive to the fact that in legislating in this area it contfronts formidable First Amendment issues.

This report clearly indicates that the Committee neither wants nor intends to penalize those journalists or other citizens who exercise their constitutional right of critizing the intelligence activities of the United States. This report, further, puts the Committee on record as acknowledging that in the course of exercising this constitutionally guaranteed right, of exposing governmental wrongdoing, or of contributing to informed, democratic debate it might, at times, be necessary to identify covert agents. Contrary to some of the criticism advanced against this bill, the Committee has carefully labored to compile a record making it difficult to interpret S. 2216 as threatening to attach criminal liability to the exercise of First Amendment rights. The Committee wants only to criminalize those systematic, blatantly hostile activities intended to identify covert agents in circumstances likely to damage the interests of the United States.

Having said all this, I felt compelled to vote against this bill in Committee. It appears that there are several constitutional questions regarding this bill that still need to be answered, or at a minimum better explored, before it should be approved. No matter how strongly or unanimously the Congress might want to prohibit the sorts of disclosures that this bill targets, it is not yet manifest that the Constitution allows us to do so.

The first matter that we need further to examine is the constitutionality of criminalizing any disclosures whatsoever, no matter how reprehensible, if they are based on publicly available information. Furthermore, the Congress must consider, even more closely than the Committee has already done, the possibility that this bill is still overbroad and, therefore, potentially unconstitutional. Although to the current members of the Intelligence Committee the intent of this bill

is straightforward and narrow, is it feasible that at some time in the future less cautious officials could level a similar statute at a broad class of individuals, many acting within the Constitution?

It is quite possible that were these issues to be further addressed, S. 2216 would pass careful constitutional inspection. I hope this bill will stand up under such additional constitutional scrutiny. If so, it will receive my support on the Senate floor. The clear need now then is that there be further vigorous examination of these constitutional issues before a final vote is taken.

JOE BIDEN.

STATEMENT BY SENATOR JOHN H. CHAFEE

Mr. Chairman, almost five years ago, Richard S. Welch was brutally murdered in front of his home as he returned from a Christmas party at the American Ambassador's resident. Welch's assassination occurred within a month of the time that he was publically identified as CIA station chief in the Athens Daily News. The information for the News story came from Philip Agee's Counterspy magazine.

At the time of the Welch assassination, Counterspy magazine claimed that they had leaked the names of 225 alleged CIA agents. Now, five years later, Louis Wolf of the Covert Action Information Bulletin, the successor of Counterspy, can boast that he has disclosed the names of more than 2,000 alleged American intelligence officers stationed around the world.

This same Louis Wolf was responsible for revealing the names of 15 alleged CIA officers in Kingston, Jamaica, this month. He also revealed their addresses, telephone numbers, license plate numbers and the colors of the cars they drove. Within 48 hours of this announcement, the home of one of the men named, Mr. Richard Kinsman of the U.S. Embassy, was fired upon with submarine guns and an explosive device. The bedroom of Kinsman's 12 year old daughter was riddled with bullets in the attack. A few days later, another assassination attempt was made—this time on Jesse Jones of the U.S. Agency for International Development, who had also been named by Wolf.

When Louis Wolf returned from his "work" in Jamaica, the Washington Post referred to him as one of the a "few despicable Americans," while the New York Times said he and his ilk were "the most contemptible scoundrels." A caller on Eyewitness News went one step further, and accused Wolf of treason, to which he responded, "Everything I do is totally legal. If it wasn't you can be sure I'd be sitting in jail at this moment."

Mr. Chairman, I think that this situation is intolerable, where American citizens posted overseas to perform the duly authorized business of this Government are repeatedly subject to the vicious and irresponsible allegations of a Philip Agee or a Louis Wolf. This "naming names" is not a recent phenomenon. It has been going on for over five years, and it has resulted in the assassination or near assassination of a number of American officials. It has disrupted the lives and the work of countless others.

As Louis Wolf so cavalierly gloats, there is no law under which he and his henchmen can prosecuted for this treasonable business, and I think it is time for us here today to produce and to perfect one.

The bill that we have before us is a substitute for the intelligence identities provision of S. 2216. It is the result of numerous drafts and revisions. It incorporates the thinking of most of the members of this Committee as well as of other Senators and Representatives. This bill reflects the judgments of days of hearings, and weeks of consultation.

In my view, this bill addresses the immediate problem of placing a price on the treasonable activity of "naming names," while, at the same time, providing a series of defenses against prosecution for journalists and citizens who wish to exercise their First Amendment rights. In most respects, this bill is identical to H.R. 5615, the House version, which passed the House Intelligence Committee by unanimous vote last Friday, July 25, 1980.

Mr. Chairman, I will not take any additional time to explain each of the provisions of this bill. We can do this in a few minutes when we markup this bill. However, it is important to emphasize that a tremendous amount of effiort has been expended to ensure that this legislation resolves any constitutional concerns raised by the original S. 2216. The language of this bill makes it clear that the defendant must be engaged in a conscious plan to seek out undercover intelligence operatives and to expose them in the course of a series of related activities thhat have a common purpose. In short, he or she must be in the busines of "naming names."

I think it is time we put an end to this business. In the words of Chairman Boland of the House Intelligence Committee, "it benefits no one but our adversaries."

I thank the Chairman.

JOHN H. CHAFEE.

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