TESTIMONY

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On Behalf of the Union of American Hebrew Congregations

BEFORE THE

SUBCOMMITTEE ON CIVIL SERVICE

OF

THE HOUSE COMMITTEE ON POST OFFICE AND CIVIL SERVICE

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I would like to thank this Subcommittee and its Chairperson, Rep. Patricia Schroeder, for the opportunity to testify at this important hearing. My name is Rabbi David Saperstein, and I am Co-Director and Counsel of the Religious Action Center of Reform Judaism. With me today is Albert Vorspan, the vice-president of the Union of American Hebrew Congregations. We are here on behalf of the Union of American Hebrew Congregations (UAHC), which represents over one million Reform Jews throughout the United States and Canada.

We are here because the issues of personal privacy and government secrecy are important concerns for the members of our movement's more than 800 congregations. The Jewish tradition regards the right to privacy as an inalienable extension of the inherent dignity of each human being, a right enjoyed by all those who have been created "in the image of God." Judaism has also posited the fundamental notion that governments and societies exist to serve the people -- and not vice versa. Such governmental purposes are strengthened by a citizenry that is both vigilant and informed. America shares these values. At stake are those freedoms, liberties and rights which are the essence of this great American experiment. We are here because of our conviction that the struggle to perpetuate and strengthen our democracy is a primary responsibility of all Americans. And we believe that the Presidential Directive on Safeguarding National Security Information of March 11, 1983, threatens to undermine those freedoms.

One central difference between a democracy and a dictatorship is that in a dictatorship the workings of the government are closed to the people and the lives of the people are open to the government. In a democracy, the workings of the government are open to the people and the lives of the people are closed to the government. Thus, in authoritarian systems such as the Soviet Union, the workings of the Politburo are carried on in strict secrecy. On the other hand, the Soviet citizenry is subjected to thorough surveillance. In liberal democratic societies, individuals enjoy privacy in order to form public consensus, resolve conflicts, and promote the expression of independent ideas. The debate in the public forums of America is enriched by an open and accessible government.

In the wake of Watergate, a number of legislative reforms significantly improved protections of the right to privacy of American citizens and opened up the workings of the government to the American people. During the past three years that trend has been decisively reversed. The National Security Decision Directive is part of an ongoing effort of this Administration to restrict the workings of the government from the scrutiny of the people while opening up the lives of its citizens (without suspicion of criminal activity or the existence of a clear and present danger to national security) to the surveillance of the government.

The specific issue being addressed by this hearing must be seen against this backdrop of Administration actions including:

* Efforts to restrict access to government information under the Freedom of Information Act (FOIA);

* Efforts to exempt whole agencies, such as the CIA and Secret Service, as well as certain governmental regulatory processes, from the FOIA;

* Efforts to extend greatly the use of lie detectors to prevent leaks of information to the press;

* Significant expansion of the scope and duration of governmental information which could be classified;

* Cutbacks in funding for government publications and archival work;

* Efforts to establish governmental copyright claims over vast amounts of government information;

* Restrictions on press access to crucial U.S. actions such as the invasion of Grenada.

Against this background, the Administration proposes, through a draconian mechanism, to impose secrecy for life on an exceedingly broad range of government employees. It would greatly expand polygraph usage to stop real or potential information leaks.

Under the directive's censorship proposals, precisely those people who have extensive experience and expertise on matters of foreign, domestic, military and diplomatic affairs -- those who have served the government in the past -- will be severely constrained in their freedom of expression.

It is the American people and the American government who will lose if these proposals become law. Over 100,000 government officials will be subject to these censorship provisions. These people, who have a unique and invaluable contribution to make to public debate on current and future policies, will be silenced or sharply curtailed in the exercise of their first amendment rights. Such rights do not stop at the gates of the Justice Department, the State Department, or the White House. Potential civil servants will be deterred from entering government service lest their long-term academic or employment opportunities be severely restricted because of these limitations. And we will face the specter of former government officials submitting class lectures, newspaper columns, books, and scholarly articles for review and possible censorship by those very officials who have replaced them and who may be the subject of criticism in the writings being reviewed.

The vague and open-ended nature of the directive will have a corrosive impact on the participation of former government officials in public policy debates. There is almost nothing of a poltical nature which a former official could say which would not fall under this directive -- particularly as the amount of classified material multiplies so rapidly. Recent studies have shown abuses of the classification system to be rampant. Not only has the amount of material which is classified multiplied, but the instances of misclassification have been found to be extensive. And all too frequently what is classified with a national security restriction turns out to be nothing more than factual information which is vital to a robust public debate on American policy. In fact, under the proposed prepublication contracts, not only does prepublication review apply to materials which were classified when a person worked for the government, but refers also to "classifiable" material, i.e., material which might be classified later. "Later" could mean, for example, while a book is being reviewed by an agency which is being criticized in it.

Despite the Justice Department's protestations that materials which consist of personal views, opinions or judgments in the form of public speeches or articles do not require prepublication review, the sweeping language of the directive calls this contention into question. Even when classified facts are "implied," they are subject to review. As the Justice Department's explanatory notes state: "Of course in some circumstances the expression of opinion may imply facts and must be of such a character as to require prior review." How could informed opinions of former officials not imply certain facts which would require review? Prepublication censorship agreements, such as the ones that would be imposed by this directive, strike at the heart of the first amendment and must be repudiated and rejected by the American people and their elected officials.

The lie detector provisions are equally odious to those who cherish the right to privacy and the freedoms protected by the first amendment. According to the GAO, four million government employees or government contractors would potentially be subject to these tests. If used arbitrarily, unrelated to probable cause of suspected criminal activity or to a clear and present danger to national security, lie detectors, tools of questionable accuracy, will be used to infringe broadly on the privacy rights of our citizenry. Such usage is the act of an authoritarian regime, not a government which cherishes civil liberties.

There is simply no need for this directive. Under current law, when there is probable cause for suspicion of criminal activity, government infringement of a suspected criminal's privacy rights must be authorized by a court. Where the government shows that publication of material would cause direct, immediate and irreparable injury to the national security, prepublication restrictions will be enforced [New York Times v. U.S., 403 U.S. 713 (1971)]. But the burden of establishing in court the presence of conditions requiring censorship rests on the government. This directive will reverse that burden. It will allow censorship by administrative action and would require the affected individual to go to court to show that publication would cause harm. When the burden of establishing a case is on the government, it will act sparingly and with restraint. When the government is permitted to act arbitrarily it will tend to act arbitrarily.

Experience with the FOIA and with existing censorship agreements shows that weeks, months -- even years -- can go by before all clearances are completed. Imagine the bureaucracy which would have to be created to implement the provisions of this directive. Imagine the burden on our Administration in reviewing the writings of tens or hundreds of thousands of employees. Delays will proliferate; writings will no longer be timely; and costly appeals of decisions to censor materials will multiply. The proposed system is not only constitutionally flawed and morally wrong, it is conceptually dysfunctional.

Excessive government surveillance and government secrecy creates the kind of suspicion and fear which distorts and intimidates political debate. Such fear chills political dissent. And the chilling of dissent cracks the foundations of a democratic society.

Our national security rests primarily on the traditions of civil liberties and respect for human dignity which have illuminated American society. We note that the Administration is having second thoughts about this proposed experiment on our liberties. Nevertheless, we believe that in the context of

the Administration's previous ill-considered zeal, only continued Congressional action will serve to guard these liberties from further experimentation.

At the Biennial Convention of the Union of American Hebrew Congregations held this past November, over 3500 delegates from congregations from across this country expressed their concern on this issue. On February 14, 1984, the Union of American Hebrew Congregations Executive Committee voted unanimously to condemn this directive, to praise the Congress for having enacted legislation delaying its implementation, and to call on the Congress to ban its implementation permanently. The Board explicitly cited Rep. Brooks' bill, H.R. 4681, as one effective approach to implement such a ban. [See the attached resolution.]

We believe that the legislation before this Subcommittee would significantly help to prevent the abuses we have described. While we concur with the legislation's provisions regarding prepublication review, we do have certain suggestions for strengthening the bill's protections against the abuses inherent in the use of polygraph tests. Although we recognize that the bill's provisions reflect an effort to balance the investigatory role of governmental bodies against the protection of the rights of employees, we would advocate a complete ban on the use of polygraph tests until the reliability of such examinations has been established. So long as the use of such tests are sanctioned, the failure to "voluntarily" take a test will always cast doubt on the validity of the employee's contentions. Furthermore, there is no way to prevent the imposition of sanctions on an employee who refuses to take such a test. Despite the admirable intent of the bill to prohibit such sanctions, they will manifest themselves in subtle but pervasive ways.

Such issues are not dissimilar to those issues surrounding the use of the fifth amendment. The unreliability of confessions and the negative implications of refusing to testify are considerations similar to those raised by the use of lie detector tests. The Jewish tradition resolved these problems regarding self-incrimination by imposing a complete ban on its use. So, too, we would urge that the bill's concern with the unreliability of polygraph tests and the negative inferences drawn from a refusal to take them requires a complete polygraph ban.

There are two other aspects to the controversy over the directive which need to be explored, but which were only touched on in prior hearings. We must not lose sight of the basic questions regarding the nature of government and the nature of human rights which are at stake here. Reflected in the directive and in other efforts to restrict information from the American people is an alarming tendency to view the government as an entity divorced from the American people. This tendency finds expression in the claim which the government has been making that it has a proprietary ownership or copyright claim on government information -- a claim which prevents the access of citizens to information vital to a healthy democracy. Ours must remain a government of the people, by the people, and for the people. The founders of this nation established a government based on the belief that informed, open debate was the cornerstone of a democracy that could best serve to protect the inalienable rights of all its people. It is the function of government to disseminate information so as to strengthen such debate. This Administration has reversed the course of former administrations by radically restricting this flow of information.

Furthermore, this claim to ownership must be viewed in the context of a long-standing debate over privacy. To point out that the legal history (embodied in cases like Wheaton v. Peters [33 U.S. 591 (1834)], the 1909 Copyright Act, and the 1976 Copyright Act) clearly indicates that the government cannot assert such rights only provides a partial response to this claim. For what is at stake in the Administration's contention is the very nature of privacy rights in America.

Until 1967 (and sporadically since then), the Supreme Court maintained that privacy rights reflected property rights, i.e., so long as one's property rights were not infringed, one's privacy rights were not infringed. [See Olmstead v. United States, 277 U.S. 438 (1928)]. Since 1967, [in United States v. Katz, 389 U.S. 347 (1967)], the Supreme Court has increasingly relied on a notion of privacy divorced from property rights and rooted in what Professor Edward Bloustein calls "the inviolate personality" of each human being. This view of privacy sees privacy rights as inherent in the very nature of each human being. And this notion led to an expanded and invigorated right to privacy which has manifested itself in a broad range of constitutional rulings.

The Jewish tradition is clear about its view of privacy. Privacy is a reflection of the inherent freedom and dignity which every human being enjoys. The Jewish concept of privacy is rooted in the theological belief that God both reveals Himself to humanity, yet also remains hidden from us. As we are created "in the image of God", so we, too, possess both that which, by its essence, is to be known and that which is to remain private. To seek to know the unknown in God is considered an intrusion upon the divine dignity (Kavod) of God (Haggai 2:1). So, too, invasion of the privacy of the individual is an affront to the inherent dignity of man. Thus, it is the inherent nature of the individual, as reflected in the concept of "created in the image of God" which is the source of privacy. So important is this perception that there is a special prayer said: Blessed is God who alone descerneth secrets; for the mind of each is different from that of the other. (Talmud, Berakhot 58A).

In 1971, the Biennial Convention of the UAHC declared: "Each person has the right to determine for himself how much of his complex beliefs, attitudes and actions he chooses to disclose. To the individual, this data is more than just statistics. It is the data of judgment that can affect his schooling, employment possibilities, promotion or role in the community. If all our actions are documented... it would be a tyranny over mind and destiny. It would crush privacy, civil liberties and human dignity."

If the right to privacy, to determine which aspects of our lives are to be made known to others -- a right called by Justice Louis D. Brandeis "the most comprehensive of rights, the right most valued by civilized men" -- is to be preserved, it requires an informed and vigilant citizenry. It is in this context that we urge the Congress to ban the implementation of the National Security Decision Directive, to reverse the infringements on the Freedom of Information Act, and to enact more stringent legislation protecting the financial, legal and medical records in which American citizens have a vital privacy interest.

PRIVACY AND NATIONAL SECURITY

adopted by the UAHC Board of Trustees Executive Committee, February 6, 1984.

Background:

We note with concern recent governmental actions and technological developments in the areas of privacy and government secrecy. In the context of the Reagan Administration's efforts to curtail the Freedom of Information Act and expand the amount of classified government information, we are particularly concerned about the national security directive of March 11, 1982 (the National Security Decision directive). This directive would impose lifetime censorship on a broad range of government employees and would institute widespread use of lie detector tests.

According to the Government Accounting Office, the directive would allow the government to subject four million employees of the government and of government contractors to lie detector tests. If the censorship provisions had been in effect under prior administrations, lifetime gags would have been placed on men and women such as Mondale, Kissinger, Vance, Carter and Nixon. Everything they said and wrote publicly which pertained to areas of national concern, in which they had access to classified material (which would cover almost every aspect of the current political scene), would have been subject to prior clearance by the White House. The House Committee on Government Operations recently found that the directive was unjustified and would significantly erode the constitutional rights of American citizens.

At the same time, major technological developments in the area of computer recordkeeping make vast amounts of information about our lives accessible to the government, as well as to private parties. Existing privacy legislation is quickly becoming outdated and major changes are required.

These recent trends threaten the foundation of our democratic society. Excessive government surveillance creates the kind of suspicion and fear which has a chilling effect on political debate and dissent. This right to privacy, called "the most comprehensive of rights and the right most valued by civilized men," by Justice Louis D. Brandeis, can be preserved only by an informed and vigilant citizenry.

Resolution:

The Executive Committee of the Union of American Hebrew Congregations, meeting in New York, New York, on February 6, 1984:

1. Calls on the President to rescind the National Security Decision directive;

2. Commends the Congress of the United States for freezing the implementation of the directive until April 15, 1984;

3. Calls upon the Congress to implement legislatively the findings of the House Committee on Government Operations (that the directive was unjustified and would result in a major erosion of constitutional rights) by supporting legislation (such as H.R. 4681) which would permanently prohibit the implementation of the directive.

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4. Calls upon the Administration to cease efforts to restrict the Freedom of Information Act or, failing that, upon the Congress to prevent such restrictions legislatively; and

5. Urges the Congress to enact legislation which would protect financial, legal, medical and other records in which American citizens have a right to privacy.

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27. (Canadian films) Required film distributed by film board of Canada to carry notice of "political propoganda" when shown in this country. Films were on pollution and nuclear disarmaments. Done under Foreign Agents Registration Act which has exemption for info not primarily benefiting foreign govenment. Act also requires names of all American groups who seek to see film. Date 02/83.

28. (Now wants pre publication agreement for all persons who have access to classified info in Defense, State, Dept. of Justice, Treasury, etc.) Announced that would require pre publication agreements for broad category of persons in interest of national security. Date 03/83.

29. (Establish Royalty Fees For Use of Government Information) The Administration supported a bill introduced by Sen. Orrin Hatch which would have, for the first time, imposed fees for the "commercial" value of government information obtained under the FOI Act. Act said "technological information" but David Gergen, Director of White House Office of Communications used as one example "training manuals" of the Department of Defense. Seems fair to conclude here this would first step in establishing government copyright. Date: 10/81 This information specified was "technical" information. The example given by David Gergen at the National Press Club was army training manuals. If army training manuals can be subject in effect to government copyright, what is next? Dept. of Treasury reports (they have commercial value, etc.).

30. (Sealing of all information on military aircraft accidents resulting from the air safety investigation.) Department of Defense attempts to include a provision in the MX defense appropriations bill that would seal all information from the press and the public resulting from the air safety investigation conducted by the military.

31. (Excludes American News Media from Covering U.S. Invasion of Granada.) During the invasion of Granada, the Administration:

a. Excluded American reporters from covering the invasion while allowing foreign reporters to remain;

b. Brought in their own Department of Defense news service to provide favorable coverage of the invasion;

c. Detained three American reporters who were already on the island during the invasion;

d. Threatened to shoot at any reporters who attempted to reach the island on their own.