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House-Senate Conference Agrees On H.R. 4, Agents' Identities Bill

On May 17, the House-Senate Committee of Conference on H.R. 4, the Intelligence Identities Protection Act, released a report reconciling the several differences between H.R. 4 as passed by the House in October 1981 and the same bill as amended by the Senate in March 1982. The House and Senate versions agreed on all fundamentals; the differences were minor, but significant enough to require careful consideration.

Particularly interesting to those who followed the legislation will be the discussion of 601(c), the section which deals with disclosure of agent identities by those with no access to classified information. There was no difference between the House and Senate versions on this point, but a number of witnesses and committee members on both the House and Senate sides expressed the belief the language of 601(c), as adopted, would restrict the freedom of the press to expose wrongdoings by members of the intelligence community. The report seeks to set these fears to rest.

We reproduce below extensive excerpts from the report of the Committee of Conference because of its importance in establishing the legislative intent of H.R. 4, and because we believe our readers would prefer to have the original text to a paraphrased text.

Although the Senate amendments to H.R. 4 did not affect the language of section 601(c) adopted by the House, the Committee of Conference believes it important and appropriate to discuss that section in this Joint Explanatory Statement because debate in both Houses centered upon its meaning.

Background of 601(c)

H.R. 4 as reported from the House Permanent Select Committee on Intelligence and S. 391 as reported from the Senate Committee on the Judiciary in 1981 both required that to be criminal the disclosure made by those with no access to classified information would have to be made "in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure."

H.R. 4 as passed in the House in 1981 and in the Senate in 1982, 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 or impede the foreign intelligence activities of the United States."

In adopting this amendment neither House intended to change the scope of the conduct which the Act

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Litigating National Security Issues: Workshop at ABA Annual Meeting

The Standing Committee on Law and National Security will present a workshop at the ABA Annual Meeting in San Francisco. Entitled Litigating National Security Issues, it will be held on Monday, August 9, from 2 to 5 p.m. at the Holiday Inn-Union Square.

The program will address the difficult legal and practical issues that a national security issue presents in both civil and criminal litigation – typically when a party attempts to obtain classified information in discovery or to introduce such information into evidence. Issues of this kind have arisen in several celebrated criminal cases in recent years and have given rise to federal legislation, the Classified Information Procedures Act of 1980 (the "Greymail" Act). The workshop will evaluate the usefulness of the Act and will consider whether similar legislation would be useful to

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Editor: William C. Mott. Associate Editor: David Martin. Standing Committee on Law and National Security, ABA, 1155 East 60th Street, Chicago, Ill. 60637.

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seeks to proscribe. Rather, the change was made to deal with elements of proof at trial. The language as adopted makes it clear that the defendant must be engaged in a conscious plan to seek out undercover intelligence operatives and expose them with reason to believe such conduct would impair U. S. intelligence efforts.

The language of section 601(c) was considered by the House as a result of an amendment offered on the floor by Representative Ashbrook. The amendment was adopted by a vote of 226 to 181. The same language was considered by the Senate as a result of an amendment offered on the floor by Senators Chafee and Jackson. This amendment was adopted by a vote of 55 to 39. The bill containing the amended section 601(c) language was adopted by the House by a vote of 354 to 56 and by the Senate by a vote of 90 to 6. Thus, the following language appears in section 601(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.

The record indicates that the harm this bill seeks to prevent is most likely to result from disclosure of covert agents' identities in such a course designed, first, to make an 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. It does not alert to abuses; it does not further civil liberties; it does not enlighten public debate; and it does not contribute one iota to the goal of an educated and informed electorate. 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 601(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.

Section 601(c) applies to any person who discloses the identity of a covert agent. As is required by sections 601(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 sections 601(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 601(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 601(c) establishes three elements of proof not found in sections 601(a) or (b). The United States must prove:

1. 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;
2. That the pattern of activities was intended to identify and expose covert agents; and
3. That there was reason to believe that such activities would impair or impede the foreign intelligence activities of the United States.

Pattern of Activities

"Pattern of activities" is defined as a "series of acts with a common purpose or objective." It is important to note that the pattern of activities must be intended to identify and expose covert agents. The process of identifying such agents must involve a substantial effort to ferret out names which the government is seeking to keep secret. This pattern of activities must involve much more than merely restating that which is in the public domain. The process of uncovering names could include, for example, techniques such as: (1) seeking unauthorized access to classified information, (2) a comprehensive counterintelligence effort of engaging in physical surveillance, electronic surveil-

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Protecting Against Terrorism: Conference Examines Problem

The complex problem of protecting diplomats and diplomatic premises against terrorist attack was examined in depth at a conference which took place in Bellagio, Italy, this past March 8-12. The article that follows was excerpted from the much longer report prepared by Professor John F. Murphy of the Department of International Law, University of Kansas, who was a participant in the conference. Professor Murphy serves as a consultant with the American Bar Association's Standing Committee on Law and National Security.

From March 8 to March 12 the University of South Carolina's James F. Byrnes Center on International Relations was host for an international conference on the protection of diplomatic premises and personnel, held at the Rockefeller Foundation Study and Conference Center located in Bellagio on Lake Como, Italy. As envisaged by the sponsors, the primary purpose of the conference was to get together governmental representatives of the five permanent members of the United Nations Security Council (United Kingdom, France, United States, U.S.S.R., and People's Republic of China) in order to discuss their common problem in protecting their diplomats and diplomatic facilities against terrorist attack and other manifestations of political violence. The premise was that, despite the deep ideological differences between some of the permanent members, they all held a strong common interest in ensuring the continuation of diplomatic intercourse.

At first it appeared that both the People's Republic of China and the U.S.S.R. would be represented at the conference. Indeed, both had indicated their acceptance of the University of South Carolina's invitation to attend. However, shortly before the conference was to begin, both the U.S.S.R. and the People's Republic of China informed the sponsors that they would be unable to attend. Although it is not clear why the acceptances of the invitations were withdrawn, it appears that the reasons are grounded in the current tense relations between the U.S.S.R. and the People's Republic of China and between the United States and the U.S.S.R.

Nonetheless, the conference did have substantial governmental representation from the United States, the United Kingdom, the Federal Republic of Germany and Italy, as well as nongovernmental representatives from Israel and Yugoslavia.

The Scope of the Problem

With respect to trends in terrorist attacks against diplomats and diplomatic premises, it was noted that the last two years have seen a dramatic surge, a sixty percent increase over the previous two-year period, with a wider range of targets and geographical scope. Often these attacks have been connected with warfare, for example, the conflict between Iran and Iraq and the civil wars in Central America. In these areas there seems to be no such thing as a "local war." Bombings have been the most prevalent form of attack, while assassinations have tripled. Kidnappings, by contrast, have not increased. There has also been a substantial increase in the take-over of embassies; more than 50 have been seized since 1970. However, the seizing of embassies appears to be losing popularity, since seldom have demands been met, and 1981 saw a decline in this manifestation of terrorist attack.

American diplomats have been the most popular target for terrorists. Reasons for this include (1) the ubiquity of American diplomats; (2) the predominant U. S. role in international affairs; (3) the negative image of the United States promoted by adversary propagandists. Terrorists tend to exaggerate the leverage they will have if they are able to seize an American diplomat. Turkish diplomats have been the second most popular target, with Yugoslav diplomats third.

The high cost of protecting embassies was noted. For example, ten percent of the Guatemalan Army is engaged in guard duty attempting to protect diplomatic premises in Guatamala City. The expense there amounts to approximately one to two million dollars per embassy. Even these extraordinary precautions may not be sufficient to protect more than the diplomatic premises themselves or the person of the ambassador. Terrorists, in such event, may simply target lower ranking diplomatic personnel.

There are, roughly speaking, five basic categories of terrorist activity that may be directed towards diplomats and that raise distinctive problems of prevention and punishment. The first and largest category is guerrilla warfare by indigenous groups. Since the local government is the real target, it is pleased to cooperate in combatting such terrorist activity.

The second and the second largest category of general terrorist activity is attacks by ethnic groups, e.g., Armenians or Croatians. In this case also, the local government is anxious to prosecute, but apprehension may be an exceedingly difficult problem.

The third is worldwide attacks by groups connected with local groups, for example, the PLO and the IRA. Here one finds arising major political problems regarding extradition and prosecution.

The fourth is isolated terrorist attacks to protest the actions of local governments. An example would be the bombing of the French Embassy in Peru to protest nuclear tests in the Pacific.

The fifth, and the most recent, type of activity is the use of terrorism by governments. Examples would include the Iranian government's use of assassins to

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attack Iraqi diplomats and Libya's well documented hit teams against United States diplomats in Italy. In these instances the local government wants to cooperate, but often can't do so very effectively. It has also been extremely difficult to substantiate terrorist activity directed by governments.

As to possible trends in general terrorist activity, several commentators were of the opinion that the antinuclear movement, Islamic fundamentalism, frustrated reactions by blacks, and increased activity by the PLO might well lead to a sharp increase in terrorist activity over the next decade. There are also disturbing signs that the use of terrorism as surrogate warfare may increase over the next few years.

U. S. Policy Towards Terrorism, Embassy Protection

In reporting on U. S. policy, Ambassador Robert Sayre suggested that the primary goal was to ensure effective implementation of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. With respect to the threat, Ambassador Sayre reported that Latin America has traditionally been the most troublesome area but Western Europe has now taken first place in this regard. Most terrorists are Marxist-Leninist in political orientation; even the Armenians have close connections with Marxist groups in Lebanon. In his opinion, these terrorist groups are not controlled by or directed from the U.S.S.R., but they do get training and logistical support from the Soviet Union, and the United States and its allies are the primary targets. What these terrorists are doing is helpful to the Soviet Union, the Soviet Union is benefitted by their activities, and the Soviet Union has not been helpful in cooperating to combat the terrorist threat.

Ambassador Sayre identified the following as the primary problems the U. S. faces in combatting terrorism against diplomats and diplomatic premises: (1) Lack of resources. Ten to 14 percent of the State Department's budget, or approximately 100 to 140 million dollars annually, is allocated to security. The costs of adequate security throughout Western Europe and other areas of high risk are prohibitive. (2) The nature of diplomatic premises. Most embassy buildings were not acquired with security in mind. Over the next decade, it will cost at least 200 million dollars to remedy this situation, and more costs will be involved in efforts to provide security to the residences of U. S. diplomats. (3) Attitudes of personnel. Many U. S. diplomats have simply not understood the nature and magnitude of the terrorist threat against them. For example, General Dozier had been informed he was on a terrorist hit list, yet neither he nor his staff knew what to do about this and, as a consequence, did nothing. The size of the U. S. diplomatic presence has been reduced continuously in various areas, but the United States cannot trim its diplomatic personnel too much without the effect of surrendering to terrorist threats.

At home, the United States has done reasonably well to carry out its obligations under the Vienna Convention on Diplomatic Relations. The Secret Service has been effective in protecting foreign diplomats in New York and in Washington. However, the United States has faced graver difficulties with respect to consular officials. The United States has just submitted to Congress legislation designed to implement the Vienna Convention on Consular Relations. Before this, responsibility for implementation had, in effect, been left to the individual states of the union.

Ambassador Sayre noted that, on a bilateral basis, cooperation between the United States and its allies has been good. He cited the Dozier case as a recent example. However, he reported that efforts toward more multilateral cooperation have been unsuccessful. The United States has not been involved in such efforts among Western European states, and NATO has recently ruled out cooperation with respect to combatting international terrorism on the ground that it is a police rather than a military matter. Ambassador Sayre seconded Senator Franco Calamanderi's (Rome, Italy) suggestion regarding the Council of Europe as a possible forum, but noted that even there difficulties arise.

Current International Law

In introducing his remarks, John Lawrence Hargrove (Washington, D. C.) referred participants to the substantial discussion paper he had prepared for purposes of this meeting and highlighted a few salient points. He noted that state complicity in international terrorism is governed by general international law norms. That is, a state's use of individual terrorists to attack another state's diplomats, or to commit other forms of terrorist acts, violates Article 2(4) of the United Nations Charter and gives rise to a right on the part of the target state to engage in measures of self-defense proportionate and necessary to meet the threat posed. These could, in certain circumstances, include utilization of armed force. Also, he noted, depending upon the level of military activity, the laws of armed conflict may become applicable. If so, attacks on non-combatants or the taking of hostages could be characterized as war crimes. He suggested that the international law specifically pertinent to the protection of diplomats was probably more or less adequate to the task, provided that states are willing to implement it. This law included, in addition to possible rules of customary international law, the Vienna Convention

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Senate Committee Reviews FOIA Amendments Bill

At a mark-up session on May 20, the Senate Judiciary Committee agreed, 15 to 0, to support a new and milder version of S. 1730, a bill containing numerous amendments to the Freedom of Information Act (FOIA). The new version dilutes the changes in several subjects, including national security, compared to the stronger subcommittee bill of last December. That bill, a blending of Senator Hatch's own FOIA proposals and the administration's, had provided that federal courts would protect classified defense and foreign relations documents from disclosure under FOIA unless the court found the classification to be "arbitrary and capricious."

The new May 20th version has no provision to limit the present broad scope of judicial review where a FOIA suit challenges the national security classification of a record. In addition, the new version contains no additional exemption to protect foreign intelligence or most other types of national security information. However, as discussed below, there is a new exemption for certain government-owned technical data, and there are several other provisions offering relatively minor improvements in the present protection of national security information.

The new version is the result of months of negotiations since the beginning of this year, largely between Senators Hatch and Leahy. During this period, the news media gave much critical attention to the pending proposal to amend FOIA, and a number of Congressmen and Senators were critical of recent revisions in the executive order on classified national security information.

The Judiciary Committee's action apparently restores momentum to the lagging progress of the FOIA amendments. The committee's changes were promptly praised by *The Washington Post* and by an ACLU spokesman as relieving their fears that the earlier proposals would seriously cripple FOIA. But it is not clear how fast the legislation will now move to the Senate floor and to the House. Nor is it clear whether further changes are likely, or what direction such changes might take.

During the mark-up session, however, one question was clearly noted for further consideration. Senator Leahy indicated that an effort will be made soon to add the Durenberger bill (S.2452) to the bill just approved by the Judiciary Committee, an action which would further weaken the committee bill in the area of national security.

The Durenberger bill, of which Senators Leahy, Biden, Huddleston, and Moynihan are cosponsors, is a reaction against President Reagan's April 2 executive order (12356) revising and tightening the rules for national security classification of defense and foreign policy documents. The rules in such an executive order are, in effect, part of FOIA, because FOIA Exemption One applies to matters classified under such an order.

Senator Durenberger's bill would strike at two deletions made by President Reagan's order of wording in President Carter's order. President Carter had inserted this wording into the previous (Nixon) order. In the first of these deletions, President Reagan removed the word "identifiable" which President Carter had inserted as an added requirement for the "damage to the national security" which is the basis for classifying and withholding information. Second, President Reagan removed the public interest "balancing" provision in the Carter order under which officials, in deciding whether to classify information, were to balance any public interest favoring disclosure against damage of disclosure to the national security. Both deletions were made chiefly because the provisions in question were felt to increase the risks during litigation of compromising the information in dispute.

The Durenberger bill would put the word "identifiable" into FOIA Exemption One as a requirement for protecting classified information—the government would have to prove that its disclosure "could reasonably be expected to cause *identifiable* damage to national security" (emphasis added)—thereby writing the Carter order provision on this point into the statute. The Durenberger bill would also write the "balancing" test into Exemption One; classified information would not be exempt unless "the need to protect the information outweighs the public interest in disclosure." However, on this last issue, the Durenberger bill also provides that court review of such balancing "shall be limited to ascertaining whether the agency withholding such records made the determination" that the need to protect outweighs the public interest in disclosure, in order to prevent courts from doing their own balancing on that issue.

Several provisions of the Judiciary Committee's FOIA bill offer improvements for national security information. The added protection ranges from probably very slight to probably substantial. Thus, under Section 8 of the bill, instructions to negotiators would be clearly exempt; this would include negotiators operating in national-security-sensitive areas. Under Section 11 of the bill, the exemption for law enforcement investigatory records is strengthened in several ways, including greater protection for ongoing investigations and for confidential sources. These added protections for law enforcement should benefit national security, for example, in counterintelligence and in background national security investigations. Under Sections 12 and 17 of the bill, there is a new

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exemption for government-owned "technical data" that cannot be lawfully exported without a license. Under Section 13, the bill would amend FOIA's "reasonably segregable" clause, which requires disclosure of most non-exempt parts of a document containing exempt information, to enable an agency to consider the "mosaic" effect in processing requests for classified records, i.e., situations where the requester may know so much about the subject of the record that releasing apparently innocuous portions of it may actually give him, when these portions are fitted together with information already available, what amounts to a damaging disclosure of protectable information. The bill also will create some obstacles to the making of FOIA requests by most aliens and incarcerated felons. In addition, the bill amends the present provisions on fees and time limits in various ways which, taken together, should tend to facilitate more careful work by agencies in reviewing requested records for possible release, which in turn may reduce the risks of inadvertent disclosures of national security information.

In summary, the Senate Judiciary Committee's May 20 mark-up of S.1730, viewed from the standpoint of better protection for sensitive national security information, (a) is disappointing in failing to make any change at all in the present FOIA judicial review provisions for classified information (which directs federal judges to make their own independent judgments on whether or not to protect classified defense and foreign affairs information, judgments which may differ from the judgment of those officially responsible for conducting defense and foreign affairs); (b) is beneficial in varying degrees in the several particulars outlined above; and (c) is subject to possible further weakening if the provisions of the Durenberger bill discussed above were to be attached to the committee's bill.

Robert L. Saloschin

Workshop Honors Dean Rusk

The Standing Committee on Law and National Security and the University of Georgia Law School cosponsored a Law Professor Workshop, "Coping with Internal Conflicts: Dilemmas in International Law," at Athens, Georgia, on May 7-8, to honor former Secretary of State Dean Rusk for his public service and his contribution to the study and understanding of international law and international relations. The workshop considered the need for international involvement in internal conflicts which, under the concepts of sovereignty, self-determination and nonintervention, traditionally have been considered the exclusive concern of the territorial states. Dean Rusk stated the issue succinctly as follows:

> Older distinctions between internal and international wars seem to be melting away because of the direct or indirect involvement of other nations in internal conflicts. Just as human rights are now no longer a purely internal affair, it may be that internal wars must become a matter of concern to the community of nations because they so frequently affect the possibilities of organizing a durable peace.

To explore the possibilities, the workshop covered (i) the obligations of other states in cases of internal conflict; (ii) the applicability of humanitarian law in internal conflicts; and (iii) the role of international and regional organizations in internal conflicts. With respect to each, the focus was on current international legal principles and the desirability of effecting changes to reduce the adverse impacts of destabilizing internal conflicts.

The workshop "faculty" consisted of distinguished specialists, both foreign and domestic, and present and former government officials. Their presentations were well received by the workshop participants who were stimulated by the exercise in international norm building. The highlight of the workshop was the period devoted to the "reflections" of Dean Rusk who shared his perceptions of the current state of world order with special emphasis on the problem of internal conflicts.

Among the congratulatory messages sent to Dean Rusk were those of George Ball:

> Some Americans in public life, diligent in advancing their own interests, receive far more adulation than is due; others, out of a modesty derived from a larger perspective and a deeper understanding of world forces, are less concerned with the capricious assessments of the moment. They decline to manipulate the judgment of history because they do not fear it. Dean Rusk is one of that small elite.

and Henry Kissinger:

> It is not only because we will both go down in history as Secretaries of State who spoke with funny accents. It is also because I have known you – before, during and after my own tenure in government – as a pillar of strength and decency and integrity. Intellectual fashions come and go, but the basic values of character and patriotism endure. In your work as a teacher of international law and a wise Counsellor to the ABA Standing Committee on Law and National Security, you have shown that public service is not limited to government service.

Bernard Ramundo

Supreme Court Reverses D. C. Circuit Court of Appeals

The Supreme Court on May 17 unanimously reversed a decision of the Circuit Court of Appeals of the District of Columbia involving whether, under FOIA, *The Washington Post* was entitled to know whether two persons in Iran were United States citizens (see May *Intelligence Report*). The State Department had refused to release this information on the basis that the physical safety, if not the lives, of the persons involved would be jeopardized.

The Supreme Court in its opinion stated that a FOIA exemption from release of information found in personnel and medical files was broad enough to authorize a determination in this case by the State Department that release of the information could be a clearly unwarranted invasion of privacy.

The Reporters Committee for Freedom of the Press immediately issued a statement calling the decision "a major defeat" for the principles of the Freedom of Information Act.

Larry Williams

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lance abroad, and other techniques of espionage directed at covert agents, or (3) systematically collecting, collating and analyzing information from documentary sources for the purpose of identifying the names of agents. The process of exposing covert agents must involve the deliberate exposure of information identifying them, the intentional "blowing" of intelligence identities.

It should, of course, be clear that "pattern of activities" does not necessarily mean a pattern of disclosures; a single, first disclosure of information identifying a covert agent is punishable under section 601(c) if the requisite pattern of activities and the other elements of the offense are proved beyond a reasonable doubt.

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.

A newspaper reporter 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."

Of course, the fact that a defendant claims one or more intents additional to the intent to identify and expose does not absolve him from guilt. It is only necessary that the prosecution prove the requisite intent to identify and expose covert agents.

This crucial distinction between the main direction of one's conduct and the side effects that one anticipates but allows to occur forms an important safeguard for civil liberties. Because the intent standard in section 601(c) is an intent "to identify and expose covert agents" rather than an intent to "impair or impede the foreign intelligence activities of the United States," it is clear that 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 intent standard was met.

In order to fit within the definition of "pattern of activities," a discloser must 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 an intent to identify and expose agents. To meet the standard of the bill, a discloser must be engaged in a purposeful enterprise of revealing identities—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 intended 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.)

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

The reporters who have investigated the activities of Wilson and Terpil, former CIA employees who allegedly supplied explosives and terrorist training to Libya, would not be covered even if they revealed the identity of covert agents if their pattern of activities was intended to investigate illegal or controversial activities, and not to identify covert agents. Similarly, David Garrow would not be within the scope of the statute even though he purported to give the identity of covert agents in his book, *The FBI and Martin Luther King, Jr.: from "Solo" to Memphis*. His intent presumably was to explain what drove the FBI to wiretap Martin Luther King and not to identify and expose covert agents.

Reason to Believe

The government must also show that the discloser had reason to believe that the pattern of activities in which he was engaged would impair or impede the foreign intelligence activities of the United States. The "reason to believe" standard is met when the surrounding facts and circumstances would lead a reasonable person to believe that the pattern of activities would impair or impede the foreign intelligence activities of the United States.... Among the objective facts to be weighed by the jury in determining what a reasonable person would believe would certainly be the ease with which the name of a covert agent was identified and the extent to which it was widely and publicly known.

The conferees expect that the Department of Justice and the federal courts will limit the application of section 601(c) to those engaged in the pernicious business of naming names as that conduct is described in the legislative history of this Act.

Section 603

The House bill contained section 603 which deals with procedures for establishing cover for intelligence officers and employees. This section required the president to establish procedures to ensure the protection of the identities of covert agents. Such procedures were to include provision for any federal department or agency designated by the president to assist in maintaining the secrecy of such identities.

The Senate struck section 603 by unanimous consent.

The conference report contains a substitute section 603 requiring an annual report from the president on measures to protect the identities of covert agents. The conferees expect such report to include an assessment of the adequacy of affirmative measures taken by the United States to conceal the identities of covert agents.

The conferees stress, however, as was made clear during consideration of this measure in both bodies, that nothing in this provision or any other provision of H.R. 4 or in any other statute or executive order affecting U. S. intelligence activities in any way diminishes the 20-year-old Congressionally sanctioned executive branch policy of maintaining the total separation of the Peace Corps from intelligence activities. The importance to the effectiveness of the Peace Corps of maintaining this policy and its essential components was spelled out in detail in the reports of the Senate Judiciary Committee and the House Permanent Select Committee on Intelligence and in the debate on this measure in both bodies, and the conferees wish to reemphasize this point and call attention to the strong views of both bodies as set forth in that legislative history.

Section 606(4)

Senate amendment 13 struck from the definition of "covert agent" certain former intelligence officers and certain other U. S. citizens who formerly were intelligence agents, informants, or sources of operational assistance. The conferees agreed to the Senate amendment.

In adopting the Senate amendment, the conferees note that the definition of "covert agent" and thus the scope of possible prosecution is closely tied to the concept of classified information. This connection is of utmost importance in insuring that, as it applies to those who are not undercover intelligence agency employees, the definition of covert agent does not include those private citizens who might provide information to the CIA or FBI, but whose public identification, though causing personal embarrassment, would not damage the national security.

It is to be noted that after House passage of H.R. 4 and Senate passage of S. 391, the president promulgated a new executive order on classification. The Committee of Conference understands that the changes contained therein, particularly the elimination of the concept of "identifiable" damage, the addition of the category of "confidential source," and the addition of a presumption of classification for "intelligence sources and methods," were not intended to affect, and will not affect, a decision on whether an individual is or is not a "covert agent." The Committee of Conference expects the executive branch to exercise the utmost care in making classification decisions in this area.

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on Diplomatic Relations, the Vienna Convention on Consular Relations, the United Nations Convention on the Protection of Internationally Protected Persons, an OAS convention along similar lines, the European Convention on the Suppression of Terrorism, and the UN Convention Against the Taking of Hostages. This complex of conventions, Hargrove suggested, made it more difficult for a state to claim the political offense exception and tightened the obligation to prosecute, and the emerging political consensus reflected by adoption of these conventions could evolve into pertinent rules of customary international law. He noted, however, that these conventions did contain certain weaknesses. First, a state can avoid the extradite or prosecute obligation if it is so inclined, especially since prosecutorial discretion under the conventions is fully reserved. In this respect, the regional conventions are weaker than the UN conventions. Second, there is still an inadequate number of states parties to these conventions and hence a great need for more ratifications. Third, none of these conventions establishes a system of collective sanctions. In addition, there is a need for greater efforts to be taken at the national level to bring domestic law into accord with the obligations contained in these conventions.

Sir Ian Sinclair (London, England) noted parenthetically that the basic principle of diplomatic inviolability is recognized in Islamic law as well as in conventional and customary international law. He suggested that the experience under the anti-aircraft hijacking and sabotage conventions was an encouraging precedent in that the number of ratifications to these conventions has increased dramatically in the last few years. In this connection, he noted that the reasons for nonratification by states varies. In some instances there is a deliberate decision of state policy not to ratify. In many more instances, however, the foreign offices of states simply do not have the expertise to act rapidly on these and on a variety of other international conventions on their docket.

With respect to the question of prosecution of terrorists, Mr. Sinclair noted that, even if a state is willing to prosecute, it may have difficulty getting evidence sufficient for conviction under its law. Mutual judicial assistance is at best at a rudimentary stage, and differences of view regarding admissibility of evidence and cross examination of witnesses between common law and civil law jurisdictions greatly hamper international cooperation in this area. Moreover, diplomats are often unwilling to testify as to the facts of cases involving terrorist attacks. Problems of classification, secrecy and security also hinder the gathering of sufficient evidence. In the United States, at least in the European view, the media may obtain information that foreign states would not wish disclosed.

On the subject of abuse of diplomatic immunities, Sinclair noted that use of the diplomatic bag to transport arms is increasing. There is an item currently on the agenda of the International Law Commission to consider this practice and whether steps might be taken to qualify the immunity of the diplomatic bag, at least to the extent of permitting it to be x-rayed.

John F. Murphy

Recent FOIA Appeals Cases

In a recent FOIA case *(Weberman v. National Security Agency,* 668 F. 2d 676 (2d Cir. 1982)), an author sought to use the National Security Agency to establish a link between Cuba and President Kennedy's assassination.

Weberman alleged that Jack Ruby's brother, Earl Ruby, had sent a telegram to Cuba prior to the assassination of President Kennedy by Lee Harvey Oswald and Oswald's being killed by Jack Ruby. He claimed that NSA had intercepted this telegram, and was refusing disclosure to him of the telegram. NSA contended that whether the telegram was or was not intercepted remains a matter of national security and exempt under a specific FOIA provision. Acting under prior instructions from this court (see 646 F. 2d 563 (2d Cir. 1980)), the federal district judge reviewed, *in camera* and *ex parte,* a top secret NSA affidavit as to why the existence or non-existence of such an intercept was classified and why the fact of interception or non-interception was exempt under FOIA. The lower court dismissed the complaint.

The Second Circuit Court of Appeals held that the lower court could review the affidavit *in camera* and *ex parte,* and that plaintiff's counsel had no right to be present during such review. Accordingly, it affirmed the lower court's decision. As no appeal was taken to the Supreme Court, the matter is now concluded.

The May *Intelligence Report* carried an account of the efforts under FOIA of Abramson, a journalist, to obtain from the FBI copies of documents sent by it to the White House in 1969 concerning various public figures. The Circuit Court of Appeals for the District of Columbia had decided to return the case to the lower court to decide whether the documents sought had been created for law enforcement purposes. The FBI appealed that decision to the Supreme Court.

The Supreme Court, on May 24 (slip opinion), ruled that, although the documents sent to the White House had not in fact been created for law enforcement pur-

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Recent FOIA Appeals Cases

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poses, they were summarizations of such documents and hence did not lose their exempt status (under Exemption 7(c)) by such summarization. The four dissenting justices took the position that only documents or records created for law enforcement purposes can be exempt under Exemption 7(c), and that new documents containing summarizations of them, but which were not created for law enforcement purposes, are not exempt.

The Supreme Court, on May 17, denied certiorari in a FOIA case involving the *Founding Church of Scientology of Washington, D.C.* The plaintiff's request had been denied below (670 F. 2d 1158 (CADC 1981)). What the Church wanted were certain Interpol documents once held by the United States National Central Bureau (the U.S. agency member of Interpol) but now in Paris at Interpol. The records were alleged to be able to be retrieved by the Bureau.

The Circuit Court of Appeals for the District of Columbia determined that the defendants were correct on all three bases of their refusal: (1) A confidential source need not be an individual but can be an institution (such as Interpol) and hence an exemption based upon "revelation of a confidential source" was applicable. (2) It found that Exemption 7(d) is applicable to law enforcement proceeding documents even when no proceedings are under way or contemplated. (3) Courts can not command agencies to acquire possession or control of documents the agencies do not have even though they could acquire (or reacquire) them, as FOIA only prevents withholding of held records.

In a petition to the Supreme Court on March 30 (on which no action has as yet been taken), Victor S. Navasky, editor of *Nation*, requested the overturning of the decision of the United States Court of Appeals for the Second Circuit (____ F. 2d ____ (CA2 1981)) denying his FOIA request for a list of titles of books subsidized for publication abroad by the CIA, some without the author's knowledge of the subsidization. That court had affirmed a lower court (____ F. Supp. ____ (S.D.N.Y. 1981)) that such disclosures, even many years later, could be expected to "cause identifiable damage to the national security in the field of foreign relations," and hence are exempt under FOIA.

Larry Williams

Litigating National Security Issues

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cover civil litigation. In addition, the workshop will survey the range of practical and legal problems raised by the Act, the State Secrets privilege and similar doctrines and by the conflicting dictates of secrecy and normal judicial procedures.

The workshop will consist of two panels, made up of knowledgeable experts from both government and the private bar. They are:

The Criminal Case

Thomas Kennelly
Partner, Duiguid, Kennelly & Epstein
Washington, D.C.
(Defense attorney in Felt-Miller case)

Mark Richard
Deputy Assistant Attorney General
Criminal Division
U.S. Department of Justice

Earl Silbert
Partner, Schwalb, Donnenfeld, Bray & Silbert
Washington, D.C.
(Formerly U.S. Attorney for the District of Columbia)

Stanley Sporkin
General Counsel
Central Intelligence Agency

The Civil Case

Jon Anderson
General Counsel
National Security Agency

Mark Lynch
ACLU Project on National Security
(Counsel in numerous cases involving classified information)

Ernest Mayerfeld
Deputy General Counsel
Central Intelligence Agency

Daniel B. Silver
Partner, Cleary, Gottlieb, Steen & Hamilton
Washington, D.C.
(Formerly General Counsel, Central Intelligence Agency and National Security Agency)

Richard Willard
Deputy Assistant Attorney General
Civil Division
U.S. Department of Justice

Daniel B. Silver

For further information contact: William C. Mott, Suite 709
1730 Rhode Island Avenue N.W., Washington, D.C. 20036