LAW, INTELLIGENCE AND NATIONAL SECURITY WORKSHOP

December 11-12, 1979

Shoreham Americana Hotel
Washington, D.C.

Sponsored by

The American Bar Association
Standing Committee on
Law and National Security

LAW, INTELLIGENCE AND NATIONAL SECURITY WORKSHOP

AMERICAN BAR ASSOCIATION

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FOREWORD

The ABA Standing Committee's workshop was held on December 11 and 12 in Washington, D.C., and was considered to be successful and important by both participants and attendees. Approximately 200 persons, including present and former government officials, Congressional staff members, law professors, private practitioners, American Civil Liberties Union officials, diplomats, and other members of the intelligence community attended. Critical issues were examined in depth, including the need for legislation to authorize foreign and domestic intelligence activities, while also guaranteeing individual privacy.

This workshop brought together, as stated above, not only a wide variety of persons but also a wide variety of views. It grappled with the protection of individuals from intrusive (and possibly illegal) actions by government officials, on the one hand, while at the same time protecting state secrets from being laid open to our enemies by naive or deliberate actions by those entrusted with such secrets. There was an introduction to the basic question of national security needs, in view of the threats in the real world and the tactics and strategy of our enemies. There was a surprising unanimity on a number of issues, which were reflected in our reports to and action by the House of Delegates of the American Bar Association.

The written proceedings of the meeting, which are reproduced largely verbatim (and hence are subject to the disjointedness that the spontaneous spoken word frequently has), do not convey, of course, the inflections, the nuances, the gestures, and the passions that accompanied their oral delivery. Nevertheless, the substance of the proceedings was of compelling interest to those in attendance and should be equally so to all lawyers, and indeed to all Americans.

Morris I. Leibman
Chairman, Standing Committee
on Law and National Security, ABA

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Welcome and Introduction: Mr. Morris I. Leibman
Chairman, Standing Committee on Law and National Security, ABA

We're delighted to have you and it is a privilege to welcome you here on behalf of the American Bar Association Standing Committee on Law and National Security.

This is our first workshop on intelligence. Heretofore for some years we've sponsored programs of education on current foreign policy issues at teachers' institutes on college campuses and workshops for law professors at law schools. This we've done in conjunction with the International Law section and I am delighted to see that some of our law professors are here with us on this occasion.

Several years ago we recognized that the organized bar had not played an active role in national security legislation beginning with the Act of 1947 and subsequent developments. The explosion of problems in the intelligence field in the last two years moved us to begin an examination of this area of national security. Our preliminary research indicated that a whole new field of law was developing.

We obtained Professor Antonin Scalia, whom many of you have met and will meet during this conference, of the University of Chicago Law School to prepare a casebook of text in this new field. Mr. Raymond Waldmann, whom you've also met and you will see during this program, was engaged as the consultant to the

Committee to advise us on the growing developments, including the legislative thrusts. We also concluded that rather than having a series of programs on specific aspects of "intelligence," we would begin with a workshop with an overview appeal and thus bring together a number of the experts, who are present here today, to comment and make suggestions for our future program.

Now, with respect to your workshop. We may have included too many topics and too many speakers but we wanted to cover as much as possible as soon as possible. We look to you for your understanding and cooperation with the time factor limitations. Many contributors could not be heard and others may have been overlooked, but we look to you for suggestions for future developments and we hope you will submit your ideas on issues, materials and personnel. We particularly want you to have the opportunity to join the workshops on Wednesday and look forward to your suggestions across the board on that occasion and as we have time before then.

Let me say a word or two about the American Bar Association's position. Since we first planned this workshop, the proposed legislation has increased in importance, particularly for us, because the American Bar Association will probably be asked to state its official position on the FBI charter and the Gray-mail legislation. I want to clarify the ABA posture. The American Bar Association speaks officially only through its officers, the Board of Governors and the House of Delegates. No committee or section speaks for the Association; neither our Standing Committee nor any other committee or section. At this time it would appear that the Section on Criminal Justice and our Standing Committee will report their respective recommendations through channels for formal action by the Bar and that will be taken formally by the House of Delegates.

We recognize our emphasis on law in this first workshop does not immediately face the issues of the need for intelligence collection, the reality of the threat of the enemies' operations, the importance of counterintelligence and covert activities, and other factors on which the law ought to be based. Rest assured that we understand these aspects and that future programs will be

devoted to such particular topics. It is appropriate that we begin with the law for as the intelligence function has to be exercised in the real world, where life is often nasty, dangerous, solitary, brutish and short, so also does it have to be exercised by us in a manner consistent with the rule of law. The central challenge before our Committee is to assist in the formulation of rules for intelligence functions which at once protect the vital interests of the United States and the Constitution upon which it is founded.

It is my privilege at this time to introduce a dear friend and colleague who will be the moderator for this morning's program. Len Theberge is a distinguished lawyer and is the current Chairman of the International Law Section of the ABA. It is my privilege to give you Len Theberge, your moderator for this morning.

I. THE ROLE OF INTELLIGENCE IN NATIONAL SECURITY

Moderator: Mr. Leonard J. Theberge
Chairman: International Law Section, ABA

Thank you very much, Morry. Good morning ladies and gentlemen. I'll be brief because the program is an excellent one and we're looking forward to getting right into it. We don't have all the time we'd like but I think we'll have sufficient time to develop the themes and to provide time for answers and questions.

Recent world events make this conference a particularly timely one. Faced with a continuing challenge and offensive forces hostile to our national interest, we certainly need accurate and effective intelligence as never before. Intelligence information is the one indispensable commodity for decisionmakers faced with political, military or economic undertakings. Survival in a contracting, interdependent world is maintained by means of a delicate, international balance of power and in this world, where national success stems more from cautious action on the basis of dispassionately calculated facts than from the bold stroke of the past, intelligence is the key. Rather than gamble on the high risks of military confrontation, we are certainly using our economic might to attain national goals and here the role of foreign intelligence collection is supremely important, especially when one considers that continued and future economic strength hinges, perhaps as never before, on increasingly vulnerable energy resources and raw materials overseas.

We can see, also, besides the economic conflict, that the upsurge of terrorism on a grand scale makes further demands upon our intelligence apparatus. The problem here is not frustrating or capturing a handful of terrorists who may be bent on kidnapping our officials, or assassinating them, or sabotaging our installations; this can be done with relative ease once we have the intelligence. The tough job is finding out terrorists' schemes ahead of time.

In addition to dealing with terrorism this morning, we must draw attention to the problems of conducting successful intelligence programs within a free and open society whose preservation is, after all, their justification. These problems are both obvious and complex and lend themselves to easy exploitation by our totalitarian enemies. Totalitarian societies face no such challenges and problems. Their intelligence networks operate with a degree of impunity and callous license which defies all previous historical experience and which presents us with an unprecedented challenge which we must solve constructively.

Our first panel this morning is on the role of intelligence in a free society. We are indeed extremely fortunate to have with us Mr. Leo Cherne, the Executive Director of the Research Institute of America but, more importantly, the former Chairman of the President's Foreign Intelligence Advisory Board. Without further ado I'd like to introduce Mr. Cherne.

A. MODERN INTELLIGENCE NEEDS OF A FREE SOCIETY

Mr. Leo Cherne

Executive Director, Research Institute of America
Former Chairman, President's Foreign Intelligence
Advisory Board

I find it difficult to address the group assembled in this room. There are those of you who are very serious students of intelligence but whose exposure to the actual operations and some of the arcane realities of intelligence is either limited or has been shaped by the sensationalist press of recent years. There are others in this room who lead to much greater hesitation on my part because their knowledge, their intimate contact, including present contact with the operations of intelligence, is so extensive and more current. During the period of time when I was a member, and then Chairman, of the President's Foreign Intelligence Advisory Board, I paid particular attention to various aspects of economic intelligence. I came to regard, with special admiration, the work of Hans Heymann, who still remains, fortunately, a key figure in the estimating process in the NIO operation as the NIO at-large, a billet wider than his previous job, the NIO for political economy.

The United States needs an intelligence capability which is, to be as compressed as I will compress everything else, appropriate to the reality of Soviet power. That intelligence capability must also be appropriate to the great dangers which flow from the instability in the Islamic crescent of crisis; the pressures among the new nations of Africa; the turbulent recently de-colonialized Caribbean; the chronically unstable nations of Central and South America.

The increase in the size and significance of Soviet power and increase in its sophistication, perhaps most importantly the dynamic reach of that power in ways, directions and places continually appears to catch us by surprise. And when we are caught by surprise, we are often found without an adequate response. That may not be a failure of intelligence. That may not even be a failure of policy. It may simply be painful reality.

It is vital that the public understand that intelligence is indispensable to the maintenance of peace, to any possibility for further arms limitation, to the monitoring of international agreements, to the existence of an adequate program to protect the national security, to avert terrorism. Your Chairman referred to the means by which terrorists may be apprehended before their acts present us with crisis. There was at least one instance in which a very serious terrorist threat to an important political figure visiting the United States and about to attend the United Nations was in fact averted within the twenty-four hours prior to that attack by access to information no longer available and by the use of means no longer permissible. Therefore, we must ask ourselves whether or not (and I have been distant from this process for three years) there are alternate "legal" means which have the same potential for averting what would have been a very tragic circumstance, as well as one which would have significantly affected world affairs.

The public must have a far more adequate appreciation of the role of the analyst in intelligence assessment and of the apex of that effort, the national security estimates. If those national security estimates are wrong, our foreign, diplomatic, economic and military policies relating to the Soviet Union or other

adversary situations, and sometimes those which are adversary but involve friends--those policies are likely to be wrong. Erroneous national estimates might portray a paranoid view of Soviet directions, policies and capabilities. If so, our policies in consequence could well be more provocative, risking belligerency to a greater degree than the realities require or could just as easily be unwisely and unnecessarily submissive. But if the estimates are overly optimistic in underestimating Soviet capability and purposes, they provide an intellectual orientation for a succession of foreign positions which virtually assure that we will be surprised by a sequence of unhappy developments. If the entire analytic process, including the formulation of national estimates, tends, whether consciously or unconsciously, to simply reflect the foreign policy of any administration at any given time, it can be less than worthless. It can be dangerous. And yet, I think it fair to say that the pressure toward exactly that outcome is always very substantial. Pressures of career, pressures of colleague support, pressures of rewards, pressures which flow from the fact that people like to be liked, all operate to affect conformity. I said it could be dangerous because it would then provide a sense of security about the correctness of our policy, re-enforcing what we wish to see, not what intelligence must be pressed to provide, an accurate knowledge of what is really occurring and is likely to result from present actions and positions.

So much of the problem we face today long predates Vietnam, Watergate, or the several years of preoccupation with intelligence behavior. There has always been an American disposition, confident as we are about our peaceful purposes, to see a reflection of those purposes among those who, at the moment, are not nice to us or appear to be doing unpleasant things elsewhere in the world. Systematic optimism has pervaded our foreign policy and the intelligence estimates which contribute to the formulation of that policy. Analytic intelligence did for years, for example, substantially underestimate the size of the Soviet military budget and build-up. Let me illustrate what this traditional American predisposition is producing at this moment.

Overwhelming evidence has existed from the very beginning that the food being delivered into Cambodia by the various international and voluntary

agencies is piling up in warehouses and is, in an inadequate amount, reaching the desperately hungry people for whom it is intended. There is, in addition, no way of knowing how much of that food is being used to feed the occupying Vietnamese army or even being rerouted to meet the food shortage which exists in Vietnam. Nevertheless, a number of excuses have been repeatedly offered by those providing the needed help that have the effect of relieving the Vietnamese and their puppets in Phnom Penh of any malign responsibility. Most significantly, among these oft-cited explanations, is that the situation would improve markedly if only the U.S. would recognize Vietnam. The premise is that, if we showed our good will, the Vietnamese and their proxies in Cambodia would behave quite differently. What makes this especially irrelevant is that 90 percent of the deliveries of food into Cambodia are carried out by international, not U.S., agencies. No one bothers to explain why the international agencies are being penalized, or the wretched survivors in Cambodia denied available food, simply because the U.S. persists in being nasty to Vietnam.

It is now thirty years since Henry Wallace articulated the principle that if we would only be generous and responsive to those who harbor ill will toward us and victimize other peoples, warmth and compassion would replace the malevolence and repression which exists. This curious phenomenon carries over into the field of national security.

There has been a tendency to assume that the Soviet Union shares our preoccupations and purposes. It is assumed by many that the Soviet Union has the same view we do of nuclear warfare, of nuclear deterrence, of the utility of civil defense. Soviet doctrine is, in fact, quite explicit in the acceptance of the possibility, perhaps even the desirability, of a nuclear first strike. Linked to this is the explicit intention on their part to achieve qualitative and quantitative superiority of strategic weapons. They are quite frankly determined to fight a nuclear war if need be, and to win such a war if it were to occur.

There is another tendency among otherwise highly informed people. It is assumed that, because Soviet housing is dreadful, Soviet crops are deficient, Soviet civilian manufacture is shoddy and uncompetitive, that, therefore, the

Soviets are likely to prove deficient in all they undertake. We have underestimated and undervalued that portion of the Soviet effort devoted to military capability, military technology and scientific eminence, and their ability to achieve extremely sophisticated military breakthroughs.

The KGB invades our civil privacy to an extent which dwarfs U.S. intrusion on the rights of privacy of U.S. citizens at the very peak of those abuses which did occur. Indeed, nothing the "plumbers" ever contemplated was a fraction as extensive as the routine, daily violation by the Soviet Union of the communications of U.S. individuals, companies and institutions. Has there been any media outrage about this Soviet intelligence invasion of our privacy? I am not aware that the American Civil Liberties Union has sought to institute an action to protect the American citizen from the daily intrusion by the KGB in very significant areas of American life.

These facts, and others too sensitive to detail, raise the most serious questions about the counterintelligence capability and effectiveness of the CIA and especially the FBI which is paramount in the field. As a nation, we tend to disbelieve or discount the reality of Soviet espionage while we focus on real or imagined excesses of our own. In all fairness, there is not a one of these areas to which the intelligence community has not given very substantial thought and it may well be that what I have described as "failure" may, at this time, be less so. I am not privy to that which has been done during the last three years. Unless Soviet capabilities are understood as real and present by the American people, their concern about the health of the American intelligence capability will reflect an entirely different set of weights than those which must be applied.

We have failed to examine and evaluate the Soviet effort to create a disinformation capability, a concealment capability, and deception capability. These are not exotic intelligence functions, nor are they uniquely Soviet. Without major efforts in these directions, our OSS could not have performed its vital role in World War II. Our knowing whether the Soviet Union is, in fact, using these capabilities is essential to our view of the Soviet Union's purposes as well as to our efforts to further curtail strategic weapons in reliance on mutually observed and agreed upon limitations.

When I, as a newspaper reader, saw documents which students were holding aloft in Teheran, documents which were taken from embassy files alleging that three of the individuals among the fifty they hold hostage were in fact undercover members of the U.S. intelligence agencies, I was not surprised. It is certainly not extraordinary, in an embassy of the size we maintained in Teheran, that there may have been three members of one or another of our intelligence agencies. Nevertheless, one has to ask, because of the speed with which those documents appeared, whether we were here too dealing with manufactured information. It is often easier to forge a useful political response than it is to hunt through files and find the real one. I, therefore, raise the question whether we, who do not emphasize deception, are sufficiently acute in our awareness of what our adversaries are doing.

We are now so enamored of technology that we consistently and unwisely assume that our intelligence technology provides sufficient protection to our national security. Gee, how marvelous are those satellites! And, indeed, they are. But since we are enamored of technology, time and again we undervalue the irreplaceable role, in the vital effort to know and not be misled or misdirected, the urgent effort of the human being. Our over-reliance on technology contributed to the kind of war we fought in Vietnam, contributed to the outcome of that war, contributed to the destructive excesses that kind of reliance involved and, in my view, has now for some years contributed to the attrition of the human contribution to effective intelligence.

An effort to improve our critical analytical capability by experimenting with a competitive approach to the formulation of national estimates was made and was jettisoned. There is not, to my knowledge, any current effort more than marginal to use those not in the employ of the U.S. government independently to test and improve the estimating process and diminish the force of inevitable in-house pressures to which no intelligence bureaucracy can be altogether immune.

I have grave doubt that we have adequate economic intelligence, a field which is relatively new to us. I must add that, when I had contact with the work in this field, I had considerable appreciation for the hard and significant work

which was being done, nowhere more so than in the field of petroleum intelligence. I, nevertheless, doubt that we have economic intelligence adequate to a world where economic factors shape policy and power more than in any previous period.

We are in the midst of a crisis, the outcome of which cannot be known, and I am not now talking about what will happen to the fifty hostages. I am talking about what will happen to the whole variety of interrelated political events which will unfold in the months ahead. We know that every one of these still-to-occur "surprises" have inherently within them the greatest potential for economic danger. Consequently, it is absolutely vital that our policymakers be aided by the very best of economic intelligence.

Economic intelligence must help us understand the pressure points, the weak points of the Soviet and Warsaw Pact system of power. It is a question of policy whether you exploit those weak points. It is the function of intelligence to know them. If we had devoted a fraction of the effort in these recent years to the quality of our intelligence that we have devoted to misbehavior and impropriety within our intelligence community, ours would now be the intelligence capability without peer in the world.

To the distinguished group here or represented in this room, all of these elements have a very special focus. There is hardly a one of those to which I referred which do not involve questions of law. Many of those to which I have referred--these needs, these absolute urgencies of a modern intelligence establishment--not only involve elements of law but elements of such novelty that one must ask whether the law which is applied was intended to meet clear and present dangers.

One of the great strengths of our law is the respect which is paid to precedent. Precedent does not, however, adjust to the world as it is. Among the democratic nations of the West, U.S. intelligence is quite unique in the contumely which has been heaped on it, and the restraints which have been imposed upon it. The world as it is is both anarchic and dangerous. The threats

to national survival have not diminished. Indeed, they have become more complex and sophisticated. The problems which must be met include some easy to state and difficult to avert. They include the necessity in the U.S. to protect a visiting head of state from unseen and unidentified enemies. That world includes the possibility that a small quantity of colorless and available chemical introduced in our water supplies can threaten a city. One country has already faced a terrorist threat to commercial aircraft by portable surface to air missiles. In the one instance to which I refer, tragedy was averted by effective police work completed at the very last moment.

Today's reality also includes circumstances which are essentially undramatic but very dangerous. The financial page in today's New York Times contains a story headlined: "OPEC Cash Glut Called Bank Peril." The Senior Vice President of Morgan Guaranty warns that Western commercial banks may be unable to handle the huge increase in OPEC assets that is likely to result from the dramatic price boosts in exported oil. He estimates the total foreign investments in cash assets of the oil exporting nations are likely to rise to $300 billion in 1980 and $160 billion at the end of last year. He expects those assets to be more than $500 billion by the end of 1983, even if OPEC price increases merely reflect continuing inflation. He warns that private banks can no longer be relied upon to recycle OPEC surplus funds to oil importing countries which require those funds to pay their oil bills. Many developing countries of the Third World are already heavily in debt; banks cannot afford to keep lending to them. Some of the nations are spending as much as half their GNP in order to meet the carrying charges on the loans which Western banks have been eager to extend to them in recent years. The huge build-up of OPEC's liquid reserves, said Morgan Guaranty's Mr. deVries, also threatens to create havoc in foreign exchange markets because the oil exporting countries may seek to switch from dollars to other currencies.

Had I been a clergyman, I would have selected this one newspaper story as my text to illustrate many of the new intelligence needs of a modern society. How adequate is our intelligence capability to meet each of the different dangers contained in those undramatically advanced expectations? Do our intelligence methods enable us to be alerted in time? Will we find ourselves surprised and quite helpless? Thank you.

Len Theberge

Thank you very much. That was marvelous. I must say there are many moral lessons in that dissertation, certainly primarily the one of being able rationally and properly to assess the intentions of those who may not have good feelings towards us. But I think really a tragedy of our own society is being unable rationally and intelligently to assess our own intentions. The corrosive wearing down of confidence in all of our institutions over the past fifteen years, which James Reston commented on recently in The Times, has had a telling effect on our ability to judge and evaluate our own intentions.

I might say that, before we start with the second panel, I think the situation in Iran, certainly in the way President Carter has acted, has been a source of inspiration to many of us. I know that many people feel that he should be taking more decisive and bold strokes; and recently down in Texas there was quite a discussion and some of the more active and belligerent Texans wanted to move quickly and precipitously. One old farmer told the story of a blindman who was walking down the street with a seeing eye dog and, all of a sudden, the dog stopped in the middle of the street, lifted up his leg, and discharged all over the blindman's trousers. The blindman reached into his pocket, took out a piece of candy, gave it to the dog, and then patted him on the head. A passerby watched this remarkable scene and said, "That's one of the noblest things I've ever seen anyone do." The blindman said, "Don't misinterpret my intentions; I'm just trying to find his head so I can stick my boot in his rear."

I'd like to invite two more participants on the later part of the panel to step up here; Mr. Allen and Mr. Casey, if you'd like to join us here at the head table. They just came in.

Morris Leibman

If I may be permitted to interject, now you have someone who truly understands economic intelligence, my colleague and friend, Mr. Casey.

Len Theberge

The second portion of our program is on Modern Transnational Terrorism. It's broken up into two parts. We're going to ask Professor John Murphy to address the legal aspects. John is a visiting professor at Cornell and is working on this area for the American Society of International Law. John.

B. MODERN TRANS-NATIONAL TERRORISM

Professor John F. Murphy

Co-Director, Research Project on the
Legal Aspects of International Terrorism,
American Society of International Law

Thank you very much, Len. Mr. Cherne indicated he was somewhat apprehensive about speaking to a group with so many experts in the field of intelligence. I must say that his apprehension does not come close to mine, because here I am, an international lawyer, speaking to a group of constitutional lawyers, criminal lawyers, and law enforcement officials with substantially more expertise in the area of intelligence than I have. Indeed, I am reminded of the story of the Harvard law student who was taking an exam on International Law, and the question asked the student to comment on a fisheries dispute between the United States and Great Britain in the North Atlantic from the perspective of the parties to the dispute. The student answered that he didn't really understand much about the perspective of the United States on this dispute, nor did he understand very much about the perspective of Great Britain; consequently, he would consider the matter from the perspective of the fish.

Let me, nonetheless, take a few minutes--and I'll try to adhere as well as Mr. Cherne did to the time limitations--to consider some legal dimensions of the gathering and dissemination of intelligence as it relates to the problem of modern transnational or international terrorism. At the outset I suppose it would be appropriate for me to define this term "transnational" or "international terrorism." A primary problem at the international level is that there is no

generally agreed upon definition of international terrorism. For its particular purposes, however, the Foreign Intelligence Surveillance Act defines international terrorism as "activities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any state or that would be a criminal violation if committed within the jurisdiction of the United States or of any state." In order to distinguish international terrorism from a great variety of other crimes, the definition goes on to require that these acts "appear to be intended (a) to intimidate or coerce a civilian population, (b) to influence the policy of a government by intimidation or coercion, or (c) to affect the conduct of a government by assassination or kidnapping." The current situation in Iran is an excellent example of kidnapping intended to affect the conduct of a government.

The third part of this definition requires that "the acts occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum." This part of the definition is intended to cover acts of "trans-national terrorism"; for example, a domestic terrorism group kidnaps a foreign official in the United States in order to affect the conduct of the foreign official's government, or a U.S. terrorist group places a bomb in a foreign airplane or receives directions or substantial support from a foreign government or from a foreign terrorist group.

The Foreign Intelligence Surveillance Act also defines "foreign intelligence information" in part as "information that relates to, and if concerning a United States citizen is necessary to, the ability of the United States to protect against . . . sabotage or international terrorism by a foreign power or an agent of a foreign power."

With these definitions of international terrorism before us, I should like to turn your attention to the importance of intelligence information in combatting international terrorism. To some extent this has already been alluded to this morning, but I think it's worth reemphasis.

Intelligence information is particularly important to effective prevention and interception of terrorist activities. Once a hostage has been taken or a bomb planted, all a law enforcement officer can do is attempt to limit the amount of damage suffered. On the other hand, effective intelligence, as Mr. Cherne indicated, can prevent the assassination of a Chief-of-State or perhaps some especially disastrous incident of technological terrorism, such as the use of nuclear materials or chemical or biological weapons, or attacks on electrical power stations and power grids, chemical manufacturing plants, liquefied natural gas facilities, and computer network systems.

Such interception is impossible, however, without the effective collection, analysis and dissemination of information. The Foreign Intelligence Surveillance Act deals primarily with the collection of intelligence by electronic surveillance of persons in the United States participating in or preparing for international terrorist activities and requires a judicial warrant for all electronic surveillance for foreign intelligence purposes with certain limited exceptions.

The first exception is that the President, through the Attorney General, may authorize electronic surveillance for up to one year without a warrant if the Attorney General certifies under oath that the surveillance will be directed exclusively at communications between foreign powers, defined under the Act to include a group engaged in international terrorism or activities in preparation therefor. However, this surveillance must be conducted in such a way that there is no substantial likelihood that the communication intercepted will be one to which a United States citizen is a party and in accordance with constitutional minimization procedures spelled out in the statute.

The second exception under the Foreign Intelligence Surveillance Act to the requirement that the government obtain a warrant before engaging in electronic surveillance is also relevant to international terrorism. That is, there can be electronic surveillance under certain emergency circumstances but within twenty-four hours thereafter a warrant must be obtained.

In the absence of one or the other of these two exceptions, or one other that we need not consider for present purposes, a warrant must be obtained from one

of seven District Court judges specially designated by the Chief Justice of the United States as having jurisdiction to hear applications for and to grant orders approving electronic surveillance anywhere in the United States. Appeal from denial of an application may be taken to a three-judge panel selected by the Chief Justice from the district courts or the courts of appeal.

The application for an order approving electronic surveillance must be in writing upon oath and contain, among other things, the identity, if known, or a description of the target of the electronic surveillance; a statement that the target of the electronic surveillance is a foreign power, or the agent of a foreign power, defined under the Act as including any person, including U.S. citizens as well as aliens, who "knowingly engages in sabotage or international terrorism or preparatory activities for a foreign power." The application must also certify that the information sought cannot reasonably be obtained by other means.

It should be noted that the Foreign Intelligence Surveillance Act covers only electronic surveillance of persons within the United States. Restrictions on electronic surveillance by U.S. officials outside of the United States have been the subject of hearings in Congress but no legislation on this subject has yet been adopted.

I should now like to turn to the issue of the dissemination of intelligence information in combatting international terrorism. The Foreign Intelligence Surveillance Act requires the Attorney General to develop "Minimization Procedures," that is, specific procedures designed to minimize the acquisition and retention and prohibit the dissemination of nonpublicly available information regarding unconsenting United States persons, consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information. Unfortunately, ambiguities in applicable provisions of law leave unclear the scope of the authority of officials in the United States to disseminate this information. For example, the Privacy Act of 1974 raises issues whether information regarding terrorist activities can be disseminated to foreign governments or to law enforcement agencies not within the United States such as Scotland Yard.

Another problem in this area of dissemination is the protection of sources. Here the issue is whether the State Department and other U.S. agencies have the capacity to protect from disclosure, under the Freedom of Information Act, confidential information received by the United States government from foreign government agencies, especially foreign government agencies below the level of a national agency; for example, a municipal agency such as the Stockholm police department. There is also an issue whether the State Department can be considered a criminal law enforcement authority or to be conducting a criminal investigation or a lawful national security intelligence investigation, concepts and terms inadequately defined by the Freedom of Information Act.

Before taking up the question of international cooperation among national intelligence agencies and police organizations, I should like to note by way of transition a particular problem of coordination among U.S. intelligence agencies. As you know, the coordinating function currently resides with the National Security Council. However, there has not been, to my knowledge, any centralizing of intelligence data, no creation of a centralized data base. This creates the risk that information which taken together would be recognized as significant will not be recognized as such when it is dispersed among a variety of government agencies. Also, the proliferation of data bases among several agencies may make the control of intelligence operations more difficult in terms of oversight.

You are all familiar, of course, with the International Criminal Police Organization or Interpol. Unfortunately, that organization appears to be of somewhat limited usefulness in combatting international terrorism. Article III of Interpol's Constitution provides, "It is strictly forbidden for the organization to undertake any intervention or activities of a political, military, religious or racial character." As a result of this limitation in its constitution on political activities, Interpol will not involve itself in intelligence activities aimed at preventing terrorist acts, although it will help in apprehending terrorists after the crime has been committed. Interpol also includes within its files only the names of individuals directly implicated in a terrorist crime. Those persons only suspected of terrorist activity are excluded, but it is difficult to determine the dividing line between suspects and persons who might be classified as co-conspirators or as accessories.

On the other hand, many law enforcement officials are reported as opposing the establishment of an Interpol-type agency focused solely on terrorism, because police agencies are particularly sensitive to the political variability of governmental attitudes towards anti-terrorist enforcement actions. They oppose developing elaborate institutional structures that may be built on shifting political sand.

In contrast, there has been some support for the concept of an international working group of police and national security officers. There are already such groups organized on ad hoc, informal bases, as well as groups organized along somewhat more formal lines within the European community context. The question is whether these efforts are too narrow in scope and in the number of nations participating. Law enforcement officials differ as to the need for and desirability of a formal international working group, but most agree there is a substantial need for greater cooperative efforts in sharing intelligence.

The process of obtaining, analyzing, and disseminating foreign intelligence information necessarily requires a delicate balance between law enforcement on the one hand and the protection of individual rights on the other. With respect to combatting international terrorism, a primary difficulty is that current law is ambiguous concerning the scope of authority of law enforcement officials. However much or little we decide to limit the activities of law enforcement officials in the area of intelligence, we should draw, in our legislation and in our implementing regulations, clear guidelines for them. We also need to improve cooperative efforts toward gathering and storing intelligent information, while protecting the sources of such information and safeguarding individual rights and civil liberties. Thank you.

Len Theberge

Thank you very much. After that perspective on some of the legal issues that are involved in attempting to deal with Modern Trans-national Terrorism, perhaps we'll be able to hear now from Professor Jonah Alexander who will give us a broader view of some of the recent developments, an overview, and also a

perspective on what terrorism does to society's destabilization. Then after, if you don't mind, sir, we'll take a five-minute break before we go on to our next panel. I thought that would break up the morning, and give us all an opportunity to stretch.

I had the pleasure last night of sitting with Professor Alexander and his charming wife and I relayed to her that on a business trip to Israel in, I think it was December of 1972, I arrived in Tel Aviv the day that some Japanese terrorist group had seized the Israeli Embassy in, I believe, Thailand. The airport was completely mobilized in the event there was going to be another attack on the airport in Tel Aviv. And it was interesting in talking to our hosts, we were there licensing some technology, how they responded to it. At that time, in my own way, I thought it was a very strong stand. They simply said that they were really prepared to sacrifice the people in their embassy in order to prevent future attacks on the other Israeli embassies and missions around the world. As an American, I must say my emotions got the better of my intelligence, because they're absolutely right. Israel has no alternative but to resist any negotiations with people who attack their embassies around the world because their survival is at stake. But coming from the United States, I must say I was shocked, wrongly so, but a deep sense of--"Gosh that's an awful hard way to approach things." But after spending ten days in Israel and traveling around the country seeing how small it is and how vulnerable they are, it gave me a deeper appreciation of their attitude and their actions.

With no further introduction then, I ask Professor Alexander to step up to the podium. As you can see from the program, he is the Director of the Institute for International Study of Terrorism and Senior Advisor at the Center for Strategic and International Studies.

Comments: Professor Jonah Alexander
Director, Institute for International
Study of Terrorism; Senior Advisor,
Center for Strategic and International
Study, Georgetown University

Mr. Chairman, ladies and gentlemen. There was a dramatic takeover of the U.S. Embassy in Tehran--38 days ago. Once again it focused our attention on the problem of modern terrorism. Unlike their historical counterparts, present-day

terrorists have introduced into contemporary life a new breed of violence in terms of technology, in terms of threat, victimization, and response. The globalization of modern violence makes it very clear that we've entered the unique age of terrorism with all its frightening ramifications. There are many reasons for this condition, but may I briefly cite ten factors encouraging terrorism: (1) disagreement about "Who is a terrorist"; (2) lack of understanding of the root causes of terrorism; (3) role of the media; (4) regionalization of politics; (5) double standards (6) loss of resolve by governments to take appropriate action; (7) weak punishment of terrorists; (8) violations of international law; (9) existence of an international network of terrorism; and (10) support of terrorism by some states.

If I may for just one second deal with the ten points. I think it is becoming increasingly clear that ideological and political violence is still a power for its cause, a continuation of war by other means for the purpose of compelling an adversary to submit to specific or general demands. It is not surprising, therefore, that the strategic thinking of the communist states, as illustrated by the Soviet Union's policies and actions, calls for the manipulation of terrorism as a suitable substitute for traditional warfare, because open warfare becomes too expensive and too dangerous to be waged on the battlefield. And by overtly and covertly resorting to nonmilitary techniques and exploiting low intensity operations around the world, the Soviet Union is capable of continuing its revolutionary process against the democratic pluralism of the free world as well as against the wider target area.

Now, if we may look at the recent situation, I think of particular concern is the fact that of the 6,294 domestic and international terrorist incidents recorded from January 1970 to March 1979, over 60 percent have taken place within the past three years. Pragmatic and symbolic terrorist acts have already killed, maimed, and otherwise victimized over 14,000 innocent civilians. Although thus far, at least, no catastrophic casualties have resulted from a single terrorist attack, it is suggested by experts that future incidents could be much more costly.

First, there is the problem, and this is a very difficult problem, of protecting people and property. The security of a state depends on the good will of the people within its borders. The terrorist, however, has the advantage of surprise. The police and the citizens cannot check everyone and every place. Second, new technology is creating new dangers. Today, conventional weapons are used by the terrorists; in the future, the results are the likely possibility that these groups will have access to chemical, biological, and nuclear instruments of massive death potential. It is generally recognized that terrorism imposes many threats to contemporary society and is likely to have a serious impact on the quality of life and on orderly civilized existence. And perhaps the most significant dangers are those relating to the safety, welfare, and rights of ordinary people, the stability of the state system, economic development, and expansion or even the survival of democracy.

Now I would like to say one word about the threat to democracy. I think democracy, seriously threatened by terrorists, unlike dictatorships they are both physically and emotionally conditioned to deal with the physical forces; we find that the democratic society generally makes it possible for terrorist groups to organize although not necessarily to achieve popular political support. When the challenge of terrorism is met with repression by the government, democracy weakens considerably and I'm sure that all of us remember the example of democratic Uruguay which was subject to guerilla warfare. In 1972, the government granted wide powers to the police and to the army and, of course, the guerillas were vanquished, but democracy has not been reestablished in this Latin American country.

Now, while the United States has been relatively free of terrorism, it is likely to become more of a target in the future for several reasons. First, the terrorists may be looking for new and important areas of penetration as to make a greater impact. Because the United States at the present time is not overly concerned with terrorism due to its low level of activity and due to more immediate problems of inflation, oil, unemployment, environment, taxes, etc. and international issues such as SALT, it is therefore largely unprepared to deal with terrorism. Also, the people's confidence in the United States government to

resolve these pressing issues is low which is an invitation to terrorists to take action, as the people doubt that the government could cope with them. For example, as we're discussing here today how to conquer terrorism, the government must strengthen intelligence. Intelligence is the first line of defense, and local and national police organizations should be allowed to increase wiretaps, hire paid informers, and infiltrate suspected terrorist organizations. However, as all of us know, United States Congressional action has been moving to weaken rather than to strengthen the FBI and the CIA legislative restrictions at the time when the dangers of terrorism are increasing. In brief, the conditions are emerging and taking root that could lead to more explosive forms of terrorist activity by individuals, groups, or class interests, especially in response to future crises such as uncontrolled inflation, a deep recession, or a serious military challenge abroad, possibly from a more expansionist Soviet Union. If any of this occurs, terrorists in the social fabric could provide perhaps unprecedented challenges to the stability of our society, economy, and political system. It is especially difficult for a free society to cope with such situations without violating fundamental principles and values, and Americans have become less tolerant of extra legal intrusions and constraints since the Vietnam War and the Watergate crisis.

Now, faced with the dangers of contemporary terrorism, democratic states would have to ask themselves what price they ought to be prepared to pay in terms of expenditure and in terms of civil liberties. Although precise answers are very difficult, may I suggest you take into account, the fundamental guidelines recommended at the 1978 Ditchley Conference on Terrorism: (1) Exceptional measures of law enforcement should be kept to the lowest necessary level. (2) All such measures should be specifically expressed as temporary deviation from the norm. They should be subject to review, renewal, and revision. (3) They should be tightly framed so as to ensure that the civil liberties of the people as a whole are affected as little as possible. The use of any special powers should be linked to a defined threat; such powers should not be available for the suppression of dissident opinion at large.

Not withstanding these considerations, if an actual emergency arises and if a choice had to be made between state survival and foregoing citizen civil liberties and fundamental freedoms, there is no doubt what a responsible government would do. Thank you.

Len Theberge

Ladies and gentlemen, we're going to break for five minutes and resume. We're reserving a question and answer period at the end of the panels to give you all an opportunity to address the questions you may have to the speakers and participants. Thank you.

* * *

This is the third segment of our morning program on the role of intelligence in national security with analysis of the Modern Economic Conflict. As Mr. Cherne earlier remarked, we are indeed fortunate to have with us a professional who is well known in the intelligence community for his work on economic intelligence. Let me say that at the end of this panel we will have a period for questions and answers--a discussion period. This is a small enough group, I believe, for people to stand up in the audience and direct questions to the participants. But if you would prefer to write your questions down, please feel free to do so and we'll circulate and pick them up. It is my pleasure now to introduce Mr. Hans Heymann, the National Intelligence Officer for Political Economy of the Central Intelligence Agency.

C. MODERN ECONOMIC CONFLICT

Mr. Hans Heymann
National Intelligence Officer for Political Economy
Central Intelligence Agency

Thank you, Mr. Theberge. I thought I would spend a few minutes in talking about Modern Economic Conflict, the subject assigned to me, to say a few words about the degree to which the intelligence community and particularly the CIA may have a comparative advantage in the sphere of economic analysis, and then share with you some of the key problems we face in improving our performance. It will give you an idea of what we are about.

First, to the question of Modern Economic Conflict. We face a real problem of balance between thinking about conflicts and the vast divergencies of interest that we find in the world, and thinking about the degree of cooperation and recognition of mutual interdependence that exists. They are two aspects of the same phenomenon--whether we lay stress on conflict or on cooperation depends on our outlook.

In the age of great grain robberies, critical vulnerabilities of the dollar in the international exchange market, frozen Iranian assets, Rhodesian embargoes, and an unprecedented global energy crisis, it is hardly necessary for me to make the point that international economics is a key element of our national security; that is self-evident; I won't dwell on it.

In the intelligence community we tend to stress the elements of conflict. After all, we have a warning function. Professionally we must "view with alarm," and this develops a mild form of paranoia about everything that's out there that could go wrong. The worst thing that can happen in intelligence is to be accused of a massive intelligence failure. Please note that intelligence failures are never anything but massive. We tend to overreact by stressing the worrisome.

I want to get away for a moment from the worrisome--precisely because Leo Cherne has so effectively held out for you visions of Armageddon and of "Apocalypse Now"--and turn up the other side of the coin, which is to me equally valid and really quite fascinating: the degree to which "interdependence" is now no longer a fatuous, academic slogan, but has come to be recognized by government upon government as being an inescapable reality. Within the OECD today, there is a profound understanding that no one can indulge any longer in the luxury of pursuing a nationally preferred set of domestic policies at the expense of other countries. It's not just abstaining from protectionism--or at least warning of the dangers of protectionism while you're practicing it--that is expected of us. It's more important than that. It's the recognition that the OECD countries must harmonize their individual domestic policies in order for all of them to survive; growth policies, inflation rates, interest rates, foreign

exchange rates, intervention in the foreign exchange markets, all of these factors are no longer merely domestic policy issues. They have become subjects of international negotiation and interdependent concern. Economic summitry has become institutionalized. People scoff at the annual pilgrimages of chiefs of State, meeting and conferring about common problems, and dismiss it as a carefully staged political ploy. They fail to realize that an enormous amount of negotiation and interaction takes place in the preparation of these summits and that is the real benefit of these interchanges.

Let me focus for a moment on OPEC. There is a widely shared view of OPEC as a monstrous cartel that seeks only to extract maximum revenue from the rest of the world and that is prepared to restrict output more and more so as to drive prices higher and higher. There is another side to OPEC's view of the world, however: increasingly members of OPEC are beginning to recognize that they, too, are dependent upon the international marketplace and the international system. And that is a very important consideration, as we look out to the future. Leo Cherne quoted the vision of Morgan Guaranty's Rimmer deVries, of the enormous surpluses that will be accumulated by OPEC by 1985. We are unlikely to reach these stratospheric heights because the international money market cannot tolerate it, and those who accumulate those revenues would themselves become the victims of such a process if it were to lead to monetary collapse. You cannot kill the goose that lays the golden eggs without losing the golden eggs. And that is bound to be recognized by the more responsible members of OPEC, and I find that both significant and somewhat reassuring.

There is another element to the international economy. I don't want to sound complacent, but I look back over the last thirty years and I marvel at the remarkable adjustment process through which the world economy has passed during those thirty golden years of unprecedented growth. In the course of those thirty years, we developed a system of institutions and codes of conduct that now make it far easier for those who influence the international marketplace to exercise that influence with restraint, with concern and with a degree of experience and wisdom. If you look back over those institutions and those codes of conduct, you cannot help but develop some appreciation of the possibility that

we will be able to weather the heavy seas we will encounter in the next several years. I am not perhaps as pessimistic as some of my colleagues. I am pessimistic in only one sense. Governments generally, and I don't mean just our government, tend to be inept at understanding the marketplace, and lacking in an appreciation of the workings of the marketplace. We sometimes forget that governmental policy impinges upon the market only at the margin. It can disrupt market forces, but can rarely improve on them. We do not display enough reverence for that marvelous institution--the market place--that is so often damned by those who occasionally suffer from its inconsiderate movements.

So much about the balance between fearsome spectres and reassurance. I see lots of problems ahead but I also see the beginnings of the institutions, the mechanisms and the cooperation that will make it possible to cope with them.

Let me skip now to my second issue: the comparative advantage that intelligence may enjoy as a participant in the larger community of economic intelligence. As you know, it is not only the CIA and other intelligence agencies that produce economic intelligence but the policy community itself engages in this activity. And there are others: the army of journalists, the innumerable economists in the academic community and sophisticated businessmen--all of these are engaged in one or another form of economic intelligence. Then why the CIA? I have three justifications, and I would pose them to you as both pluses and minuses.

First, we have no policymaking role. Unlike our colleagues on the policy side, we are not charged with recommending preferred policies. We serve as analysts and advisors; we do not recommend courses of action. Now there's an advantage to that in the sense that we are viewed as not having a particular policy axe to grind. We don't have a favored policy bias and therefore our analysis, our assessments, are viewed with less suspicion than those among our departmental colleagues on the policy side who may be arguing for preferred policies. On the other hand, since we are not policy proponents, we have somewhat less clout than our policy colleagues.

Second, there is competence. It is of course true that the CIA has access to some special information and, therefore, may be better equipped to understand what's going on out there. And, indeed, in some fields we have access to unique information; the sophisticated technical collection systems that are out there are ours, and nobody can compete with us in these areas. But in the nonmilitary areas such as economics, our information is only marginally richer than that available to others, and sometimes poorer. But where we do have the edge is in the luxury we enjoy of being able to develop our expertise steadily over long periods of time. Unlike our colleagues on the policy side who are almost totally distracted by their day-to-day decision-making pressures, we are one step removed from these pressures and can, therefore, devote a far greater part of our time to the serious, sustained analysis of issues. Our studies, hence, tend to be rather competently done. On the other hand, being one step removed from policy, we can easily become somewhat isolated and risk being viewed as "irrelevant" by the policy side--a risk that we work hard at guarding against.

Finally, we have no institutional axe to grind. Unlike most other departments of government, we have no special interests to serve, no parochial sensitivities to fret about. Like the President to whom we report, we can truly concern ourselves with the national interest. Thus, we can at least try to be objective and can afford to take a disinterested view. That is not to say that we are devoid of bias. We do have an institutional bias of sorts--to "view with alarm," as I said before. But that is our job.

Let me turn now to some of the key tasks we face in improving our performance. There are three that deserve special attention: (1) integrating political and economic analysis; (2) dealing explicitly with uncertainty; and (3) identifying important newly emerging trends. Let me explain with the help of examples.

It is by now a tired cliche to plead for analysis that cuts across the academic disciplines--most notably across the political-economic nexus. Unfortunately, modern economics tends to move us further and further away from seeing economic decision making as a political process and from understanding the

psychological underpinnings of market behavior. Modern economic conflict can only be understood and explained in a full awareness of its political and psychological well-springs. But we often fail in this.

A good example: the European Monetary System (EMS). When the EMS was first proposed, it was widely viewed in the U.S. as highly threatening to U.S. monetary interests. Looking at it only in technical economic terms, the EMS looked to many as a hostile act aimed at the stability of the dollar, and as threatening to undermine the role of the International Monetary Fund. Many in the U.S. government became very nervous about the enterprise. In fact, if they had looked at the politics of the EMS, they would have quickly realized that its creation was very much the act of two European statesmen: Helmut Schmidt and Giscard d'Estaing. Both, for powerful political reasons, found it useful and, indeed, indispensable to demonstrate their leadership by breathing new life into what had become a tired European unity movement, and to pursue a course that would help make Europe a more important force within the OECD community.

Politically, the EMS was largely a positive move toward strengthening European unity. A stronger European partnership in the Atlantic Alliance is very much in our interest and viewing it simply as a threat to the stability of the dollar was a trivializing perception. The EMS is now much better understood, but I think we were slow in recognizing the political dimension of this problem. Today, if we look at the European Monetary System only in technical, economic terms, we might conclude that it will not amount to very much for many years. But it's like the Federal Reserve System of 1913, nobody then believed that it could survive or that it would prosper. What would we do without it today? Don't answer that.

Let me move on to our second difficult task--responsible forecasting--the explicit treatment of uncertainty. As you well know, the policymaker wants nothing better than to be relieved of pervasive uncertainty. He lives in a world suffused with uncertainty and he is most grateful when we come to him and say, "We know the future." My favorite phrase--and it's not particularly popular with my colleagues--is that we are a <u>non-prophet</u> institution. And yet the problem is that the policymaker would like us to say, "It's going to be like this and like that" and with as few as possible codicils and modifiers attached.

Now I am not saying that it is not important to forecast. We are required to forecast all the time. But a forecast should not be thought of as an oracular prediction; a forecast is, at best, an analytic judgment based on clearly stated assumptions. If you do not state your assumptions, you are implicitly misleading, because every forecast must be based on certain constants, on certain beliefs that must be revealed.

A good example: Today we are faced with considerable uncertainty as to what the energy picture is going to look like in 1980. If you read the daily press and if you are inclined to nervousness, as you ought to be, you will say that all signs point to imminent disaster; Iran seems on the brink of civil war, the disappearance of its oil exports--which would occur if its oil facilities were sabotaged--would mean the loss of about two million barrels per day from the world market; Kuwait, Libya and several other OPEC countries are determined to cut production, some for technical reasons, some for political reasons, some because they believe that the less produced the more money you make. Saudi Arabia is nervously maintaining an output level of 9.5 million barrels per day, but would much prefer to cut back to 8.5. They have solid and respectable reasons: they would like to preserve that patrimony for their children, because they know it will take them at least fifty years to diversify their economy; they want to avoid jeopardizing the ultimate recoverability of the oil in the ground; and they want to avoid the kinds of social tensions from too rapid modernization that plunged Iran into chaos. The experience of Iran has run like a cold shudder down the back of every modernizing less developed country.

It is also quite possible, if all of these production slowdowns occur, and much of this output disappears from the market, that the long predicted recession in the U.S. still refuses to appear and that our oil demand remains high. In that event a sudden shortfall of oil exports would act as yet another enormous, what the Japanese call, "Shocku"; a shock to the system that would make us all reel.

But there is an alternative scenario which I don't find altogether implausible; namely, that production in the oil fields keeps chugging along at roughly the present level or a somewhat lower level and that demand plummets for a variety

of reasons. Namely, the enormous oil inventory building that we've had for the past six months will finally end because all the storage tanks are full, that by late 1980 the U.S. will experience negative growth, that OECD as a whole will have perhaps flat growth, and that, as a result, there will be a temporary glut. A glut, bear in mind, is one barrel per day more than the market needs. Now, I consider this second scenario actually more dangerous to the nation than the first. To the nation and to the international economy, because it could lead to a let down, a false sense of security, more cynicism about the much heralded era of oil stringencies, and people will further postpone making the unpopular adjustments.

We must recognize that, for the next five to ten years, the energy stringency in the world is going to impose a cap on growth, a ceiling. Any glut that may develop will be temporary. It will last only so long as we have slow growth. The minute we come out of the recession and start growing again, we're up against the cap. And that cap isn't going to be removed for somewhere between five to ten years; whether it's five years or ten may well depend upon whether we have another "Shocku" or not. The "Shocku" is an indispensable device for generating the political momentum for getting people to accept the unacceptable, such as that fifty cents a gallon tax on imported oil that is now so vigorously debated.

Let me move to my final problem--this may be the most difficult of all--how to identify newly emerging trends. It's a very complex world and there are thousands of mixed signals all the time. Being one step ahead of the conventional wisdom as to what is consequential in the universe of events is an important function, but a very difficult one. Since I've been upbeat for most of this presentation, let me end on another upbeat note just to sustain the high tone. One important new trend which should give us considerable encouragement is the fact that there is an increasing flow of foreign direct investment into the U.S. This has been going on for some time at a low level but, in recent years it's really taken off: European banks acquiring American banks; German and Japanese auto manufacturers setting up plants in the U.S.; foreign private investors buying up U.S. farms and agri-businesses. This is a new experience for Americans and it evokes considerable uneasiness. We've always done the investing all over the world but when they begin to reciprocate, it somehow looks bad. There's an emotional fear of "foreigners buying up America."

Actually, we ought to view it as a very favorable indicator of foreign confidence in the U.S. Their motivations are many and complex, but let me just cite a few. First, past dollar depreciation has made the dollar a good buy, probably the best buy among currencies because the dollar has been depreciated for political, psychological reasons; not for economic reasons. Now, as the dollar regains some of its lost value in the face of ever higher interest rates, the dollar looks even more inviting. Second, the U.S. growth rate has been higher than that of many other industrial countries. For a foreigner looking around at where it's propitious to invest, the U.S. looks awfully good. Third, labor discipline is awfully good in this country; wage rates have remained relatively low by comparison with what's happened to wage rates in the much vaunted, rapidly growing LDCs and in countries of Western Europe and Japan. Especially wage supplements have increased, multiplied in other countries. Fourth, the U.S. stock market looks most inviting. There isn't a better buy around. The low asset valuation mystifies people who look at price-earnings ratios. Fifth, the ability to repatriate profits from the U.S. is unlimited; that's a fairly rare thing these days.

And finally, there is something we never think about--political stability. Americans think about political instability as applying to other countries. But indeed a country that has survived a Watergate agony and a constitutional crisis of such magnitude and, only a few years later can respond with as much political cohesion as we seem able to display--that is quite a remarkable accomplishment.

In short, I would argue that foreigners making a long-term financial commitment to the U.S., far from being a threat to the United States, is a vote of confidence that should give us some encouragement. On that happy note, I conclude my remarks. Thank you.

Len Theberge

I think we could summarize Heymann's law, "it's a mild optimism for the future," as opposed to Murphy's Law, "if anything could possibly go wrong in the future, it certainly will." Not attributable to Professor Murphy, I might add. Our next speaker who will elaborate and comment on Modern Economic Conflict is Richard V. Allen, who is Chairman of the Advisory Council on National Security and International Affairs. Mr. Allen.

Comments: Mr. Richard V. Allen
Chairman, Advisory Council on
National Security and International
Affairs, Subcommittee on Intelligence,
Republican National Committee

Mr. Chairman, I have a "real" job as well as that of Chairman of the Subcommittee on Intelligence of the Republican National Committee. One can quickly conclude that this couldn't be a full-time job under any circumstances.

I'm pleased to comment on Hans Heymann's interesting presentation, and I do so with some trepidation. I'm overjoyed to note at the outset that there now exists a branch of political economy in the CIA, and despite his disclaimer that the CIA is not a policymaking organization, a title like that literally cries out for a political role in an agency that has been much, much maligned in the recent past.

With all due respect to Hans Heymann and to his obviously talented colleagues, I note that I have been a consumer of the information and analyses which the Central Intelligence Agency produces, and find the work of the Agency both interesting and stimulating--and with all due respect for the remarkable insights that the publications of the Agency and the other components of the intelligence community produce in the field of economic intelligence, there is nonetheless nothing too remarkably arcane about the field of economic intelligence.

There are, of course, the obvious covert capabilities which the Agency and the community at large possess, but they are miniscule in relationship to the enormous amount of information available to us from overt sources. One might reasonably expect to come to "classified" conclusions by the art of bulldozing, by consuming and analyzing carefully vast quantities of information. Today there is simply more information available than ever before. That huge volume of information is available courtesy of the marketplace. If one persists and spends enough time comparing and analyzing open sources, one comes to very interesting conclusions that contradict those produced with the assistance of covertly obtained information.

My intention is not to belittle the function and the importance of secret, classified or covert research and information gathering; rather, there is such an abundance of information that individuals, groups and organizations can be overwhelmed by the tremendous amount and detail available to us today, and rapidly available.

It seems to me that one of the basic tasks of the intelligence community, to enable sound decision making, would be to accumulate the data bases required to make sound, intelligent decisions. Remarkable, too, is the fact that only in recent years have our capabilities come abreast of our newly created (or newly discovered) interest in the field of international economic policy. Keep in mind that this nation is still without a central economic policymaking body in the field of international economic policy and that, therefore, foreign economic intelligence is a relatively new experience for us within the last seven or eight years. Given the absence of a long-range or a "grand" strategy for the United States, or something which passes for a grand strategy, economic intelligence and economic information has a hard time finding its proper place in the overall policymaking machinery of the United States.

In addition, there is an absence of adequate tools to formulate policies based on sound intelligence, however good that information may be, and, by implication, an absence of policies which would therefore lead to sound tactical and strategic decisions. As an example, I would cite the shortsightedness of the present Administration in disestablishing the President's Foreign Intelligence Advisory Board (PFIAB); this was a critical tool available to presidents and to the staffs of presidents to assess information coming from the Central Intelligence Agency and to assess decisions that were made by other components of the intelligence community.

Another example of shortsightedness was the abolition of the Council on International Economic Policy (CIEP), which had a shortlived existence from 1971 to 1976, a body created to provide the President international economic information of a quality similar to that received through the National Security Council process. CIEP was created as an economic partner for the NSC, which

was traditionally weak in the field of economic information and the assimilation of economic intelligence. I was amused by Hans Heymann's remark about it being very difficult for economists to go to bed with political scientists and to talk about important basic problems. I wonder if that indicates a view that if economists in the community get in bed with politicians, they get something more than a good night's sleep?

We now have the technical means, as we've never had them before, to collect and assimilate information regarding global economic developments. We need to know what our adversaries are doing. We need to know what our friends are doing. We need to know what the rest of the world that doesn't fall in either category is doing, and we need to know how world resources are utilized. All this must be the job of a vast complex of information-gathering machinery. The way that information flow is synthesized, distilled to assist in policymaking and eventually flows to the top is highly inadequate, and we still have not created mechanisms to render information useful to decision makers.

In addition, there is a strong adversary relationship between government and business in this country, and this weakens us unnecessarily. The United States is the only industrialized nation in the world not organized effectively to promote our economic interests. While we do have the tools within the Executive Branch of government to carry on that business, we don't.

Providing economic intelligence is certainly one of the most noncontroversial functions of the entire intelligence community, primarily because there are not many legal and other restrictions on the collection of such information. Thus, we need to beef up our capabilities today. One way to do it would be to strengthen our economic intelligence.

One point needing attention in a conference such as this is the subject of East-West trade in which the Central Intelligence Agency, the other components of the intelligence community and certainly the Commerce Department, the Defense Department and the State Department all have very important roles. Let us just briefly look back fifteen years or so to the approximate beginning of the detente as it developed in the wake of the Cuban Missile Crisis of October 1962.

During the mid-1960s, and beginning in the summer of 1963 after the conclusion of the limited test ban treaty between the United States and the Soviet Union, the notion of expanding East-West trade became widespread. Trade between the United States and the Soviet Union expanded substantially, and several schools of thought developed. One school of thought held that the expansion of trade with the Soviet Union and with the Eastern European countries could serve as a lever for change, ultimately moderating the behavior of the Soviet Union in ways that would be favorable to the United States. Another group, much smaller, believed that the Soviet Union would seek to utilize a protracted period of detente and the benefits it would bring to that country for the purpose of catching up with, and indeed surpassing, the United States in the race for strategic superiority.

As Hans Heymann accurately pointed out, a forecast is an analytic judgment based on clearly stated assumptions and, for a long period of time, fifteen years or more, a set of assumptions governed our understanding of the reasons for expanding East-West trade. I think these assumptions were fundamentally in error and are now being disproved completely by facts as the Soviet Union reaches for strategic proponderance over the United States.

During the period from 1971 to the present, that trade has undergone an unparallelled expansion, and we find that the total eastern bloc debt to the West is approximating $60 billion at the present time. The issues of trade and technology transfer are beginning to stir in the press again, and we're beginning to see these items move from the business pages up into the news pages. We now find that there are critical problems developing in our ability to control the end use of technologies transferred to the Soviet Union. What is disturbing is that this period of protracted "peaceful expansion of trade" may have contributed significantly to the strategic and conventional momentum the Soviet Union is now building. These are important problems and, while our inability to perceive the ultimate outcome of that expansion of trade may not be a massive intelligence failure, it certainly qualifies as a policy failure.

Among the questions we will have to answer is: How did we miscalculate Soviet and East European behavior over the past fifteen years? Questions such

as this fall naturally within the competence of the Central Intelligence Agency and the other components of our economic intelligence gathering apparatus, and we must have answers to them. The job of economic intelligence has to be as much predictive of the future as it is analytical of a past that has left us with a somewhat dubious legacy. Thank you.

Len Theberge

Thank you very much. Of course one of the problems of economics, particularly in today's world when inflation seems to grip us here at home, and one of great concern, is that the application of political solutions to what seems clear to most economists sometimes leaves us less than desirable results. As we heard commented on here today, one looks at the activities on Capitol Hill in face of a massive energy crisis; it starts penalizing the supply side and rewarding the consumption side. We have the lowest price of fuel in the western world simply because we don't have this massive tax that one finds in Europe which doubles the price of gasoline to about a little over two dollars a gallon.

The final speaker this morning is William J. Casey, who was a member of the President's Foreign Intelligence Advisory Board, former Under-Secretary of State for Economic Affairs, and who, like Mr. Allen, has a full-time job traveling back and forth between New York and Washington as an attorney. Mr. Casey.

Morris Leibman

Before Bill starts, I think we on the committee owe you the information that, since our moderator referred to Murphy's Law, in the Committee we think of Casey's law. Casey's Law is "Murphy was an optimist."

Comments: Mr. William J. Casey
Member, President's Foreign
Intelligence Advisory Board; Former
Under-Secretary of State

Well, I'm going to try to live up to that billing here. I share most of the views that Dick Allen has expressed and I think that we are being swamped and we have an ample supply of economic information. What we are deficient in is

sufficient analysis, understanding of the long-term implications where the economic facts that scream out at us from the financial pages every day are carrying us and the problems that they are creating for us in the future, and what we can do about them. It's a shocking thing to me that we have close to a complete absence of any real machinery or any place in the United States government to systematically look at the economic opportunities and threats in a long-term perspective, or any fixed responsibility for recommending or acting on the use of economic leverage, either offensively or defensively for strategic security purposes.

When one is asked what new intelligence requirements will emerge in the future, the first reaction is to think of additional information which should be acquired on facts which are lacking. And, except in a relative few areas, it appears that the economic information needed for policy formulation is openly available. There will, of course, always be targets of opportunity, there will always be fragments of information which will be useful but, except in matters relating on national security in a pressing manner, I don't consider these fragments or targets of opportunity terribly important. There are not many basic economic facts which do not emerge normally and openly in the process of development, finance, and trade. Where we are deficient is in the analysis of this information, in understanding relations, the objectives of others, the pressures being generated, and the implications for us.

What we don't have as far as I have been able to determine is a comprehensive economic analysis of the elements of economic strength in the modern world, particularly those of our adversaries, and how economic strength can be and is converted into military strength and political power. Just how does the acquisition of technology, the development of resources, the availability of financing, and efficiency in organization, in production, in marketing--just how do all these economic elements contribute to military strength and political power? Until we've done that analytical work to our satisfaction, we will not be able to sufficiently identify the economic and noneconomic, nonmilitary, technological intelligence we should be getting. We will not know how to evaluate and how to use the economic intelligence we have. Therefore, it

appears to me that the task of the intelligence community somewhere is to evaluate a nonmilitary technology, of resource developments, of financing and managerial services, or trade which our adversaries want and seek to acquire from us and our allies. This will identify the information needed to make the assessment and necessary analysis to implement whatever policy evolves from that assessment.

To make our intelligence system capable of responding to these requirements we need some kind of a forum where matters of economic intelligence are brought to be tested and thrashed out. We have this on weapons and on military matters in the National Security Council, the Tarification Committee, other committees and working groups. We just don't go about determining what is going on and what is happening on the economic front in long-range terms as we do on military matters and it is there to be done.

Now, in economic matters we seem to have more difficulty than usual in distinguishing between intelligence and policy. For example, during the Ford Administration I was naive enough to think I wasn't alone in that; that having members of the intelligence community sit in on the Economic Policy Board would help bring intelligence to economic policymaking and bring guidance to the production of useful economic intelligence. It didn't work at all. The Economic Policy Board was dealing in policy for the most part, making up its minds about what to do about currently pressing issues, whether to sign a tax bill or whether to impose countervailing duty on shoes, the kind of thing that was coming in a pressing way to the desk of policymakers.

The intelligence judgment needed by policymakers required careful, sustained deliberation and study, argument, and analysis over a substantial period of time. And we need the kind of framework for examining, not only economic factual relationships, but the perspectives of State and Defense, Treasury and Commerce, and others to get agreed concepts and agreed purposes that we now have to a substantial degree in domestic policy and military areas.

This machinery should be working on fundamental issues like evaluating the growth and the vigor of the Soviet economy and what the various contributions to

technology and other things that are made by the United States and its allies contribute to that figure in growth. Because we don't do that kind of thing in any solid and continuing way, our control over technology transfer or even military technology has, I believe, pretty much fallen apart.

In the absence of a solid view, issues are dismissed on some such generality as political benefits exceed any technological loss or, if they don't get them from us, they'll get them from somebody else. If we had a solid evaluation of the value of the technology transfers that are moving from west to east, we'd at least have a basis from which to push our allies to pursue a common policy.

As you get down to looking closely at the ingredients of economic intelligence in these long-term strategic terms, you discover the science of technology spoke very large. And there I have the distinct impression, I may be wrong, I hope I am wrong, that the science of technology resources of the intelligence community are focused so heavily on weapons and technical collection, that there's little left for the technological aspect of economic intelligence. This should be corrected in my view in some manner if, as I believe, policymakers will need and will want more economic intelligence on technological impacts to economic strength that will come increasingly to the fore. More and greater interdisciplinary efforts need to be made. The reevaluation of a few years ago of the size of the Soviet military effort in relation to the Soviet economy, twice as great as we thought it was, had obvious collateral implications on how we appraise the importance of western inputs on our judgments as to the capability of Soviet planning machinery. One response of the intelligence community at that time, as I understood it, was to put new data into the econometric model of the Soviet economy to measure some of these collateral consequences of this reevaluation of the scale of the Soviet military effort. That was all well and good and I hope it's been useful. But it seems to me that that kind of macroeconomic analysis is of doubtful value for policy purposes unless it's supplemented by the specific implications of the providing or withholding of financing, technology, and the managerial inputs to the Soviet economy.

Since machinery, production methods, and technology are so varied, and affect so many sections of that economy, what is needed is of course disciplinary

work between economists, engineers, and scientists in the government and executives and engineers in the western companies, Europe, the United States, Japan, while either doing business, submitting bids and specifications, or implementing scientific agreements. I don't think this task is as big as it may sound, and as far as I could find out a couple of years ago, and I suspect the situation is the same today, it's yet to be tackled.

Let me just itemize the kind of thing that I hope that today's policymakers are getting in the form of precise estimates, precise intelligence and estimates: information on the stability and vulnerability of the Soviet economy and its ability to carry the military burden placed upon it; the economic leverage we may have to induce the Soviets to scale down their military efforts; the significance of technological, financial, and organizational impacts provided by the West to the growth and vigor of the Soviet economy and its ability to sustain a high level of military effort; the economic vulnerability of Europe, Japan, and the less developed world, and the degree to which our adversaries are seeking to exploit those vulnerabilities to achieve political power or military advantage; how the arrangements arising from increasing efforts to coordinate economic policies for the advance of free economies are working and how well they're being adhered to; the interdependence we have, how widely it is recognized, how carefully we analyze the departures that other countries of the free world may make from that policy, I have my doubts.

Who is benefiting and what are the consequences formed from international agreements to establish commodity reserves and maintain prices? Here again, this is called for in an interest to the poor countries. A close analysis would indicate that the poorest countries, let's say Pakistan, Bangladesh, India, would get very little out of it, and a repricing of commodities would redound primarily to the benefit of the eastern European countries.

What are our political adversaries and economic competitors doing to make other important countries technologically dependent on them? What economic and political initiatives are other countries taking to secure special protection with respect to energy sources? We know that Japan has been extremely active

in tying up energy sources around the world. What imminent or likely technological breakthroughs could have serious impact on our economic position in the world? I know this is done, examined continuously and extensively in terms of military breakthroughs, technological breakthroughs of military implications. In the world, we are going into the future, breakthroughs in civilian technology could have just as great long-term importance of terms of power and leadership. There is no pretense that this is an exhaustive list. It's intended to illustrate the kind of broad possibilities to which policymakers should be continuously alerted.

I've not seen any analysis of the interplay between Soviet resources, Soviet agriculture, Soviet industry, and the western technology which the Soviets need to acquire. It may exist. I've tried to--when I had access to the work that was being done, I couldn't find it. We know the basic facts that Soviet agriculture is inefficient. The Soviets have to lay out large amounts of cash every year to feed themselves. They have the raw materials, and they have to sell their oil and gas and gold to get necessary cash unless we provide it for them. Soviet industry is inefficient. They have a difficult time managing it and finding enough people to man it, while they have to commit an unusually large portion of the population to farms and military service. They try to overcome this by importing western technology and organization. This places a need for huge amounts of cash to buy food, has put them heavily in debt and impaired their borrowing power for the first time a few years back. Thus, they can only acquire technology and productive equipment in the west on credit, which only the European and Japanese governments and American bankers will provide for them, and the American bankers have become gun-shy. So, we are in a position of our allies, by extending credits, making it possible for the Soviets to maintain a military establishment of a size which forces us to do the same thing against our will. To what extent could this be controlled by concerted action between the allied countries? This is something that certainly should be evaluated and be fed to policymakers on a continuing basis.

It seems to me that the mere recital of this range of interests shows that the need for economic intelligence, and not for more facts, but for continuing

analysis and for a framework which will provide policymakers with the same kind of continuing assessment and a forum to thrash out economic intelligence questions of this kind as now exists for intelligence on military forces, military strategies, military weapons. Much of the analysis needed to meet these economic intelligence needs for the future can be made available to public and private scholars. The intelligence community can accelerate and intensify its analysis and increase public acceptance by working with private scholars and private research on the range of questions I'm suggesting.

Finally, in my view, these needs will not be met unless we get to a broad understanding within the government that operating departments will not and probably cannot do, on their own, the kind of analysis and provide the kind of long-term perspective and continuing focus which is needed.

The militarily and outwardly oriented National Security Council, over the eight years of the Nixon/Ford Administrations, averaged no more than one economic staffer. Membership in the NSC would give an active Secretary of the Treasury the ability to establish and staff interdepartmental working parties to analyze long-range and strategic dangers and opportunities on the economic front.

The further recommendation of the Murphy Commission was to establish a coordinating interdepartmental council, the kind that Dick Allen mentioned, the Council on International Economic Policy, and a counterpart of the General Advisory Committee on Arms Control to bring to the President the perspectives of men experienced in the business and financial world. It would differ from the Council on International Economic Policy, which was government staffed, that would bring into the policymaking council the perspective of people who were there in the economic world which is particularly important to the economic area because so much of the relevant information and somewhat of the relevant experience is being assembled and accumulated every day in business and economic affairs.

Now, Mr. Heymann indicated that the CIA is doing a lot, the performance of this function can do a lot in the performance of a central evaluating function, a

central advisory function which, in my view, can't be done in the operating departments. But, in my view, to do it it will have to dig deeper, get more outside stimulus, and get a more serious input into policy than is apparent today. Thank you.

Len Theberge

Thank you, Mr. Casey. My job has been made extremely easy today by the speakers, all who kept to their time schedules and by the attentiveness of this audience today. I think now we have sufficient time to develop questions and answers from any of you. If you have written them down and would like to pass them up on a piece of paper, just raise your hand and Florence or Norm Nelson could pick them up. If you would like to just stand up and speak loud enough to be heard and address your question at a specific speaker, that's perfectly acceptable. Who would like to start off with the question and answer period?

Q. (Inaudible)

Mr. Heymann: I can square it very easily. One can make mistakes. One of the mistakes that was made was that we neglected the consistent pursuit of the analysis of Soviet weapon costs for a period of ten years. I don't find it at all difficult to admit to that because I wasn't in the Agency when that happened. We caught up quickly in the mid-seventies and discovered that the prices that we had slavishly adhered to, for something like ten years, had changed dramatically. Soviet military costs had risen much more than we realized, and when we began to review the bidding and looked at the new body of evidence that we acquired, plus some other peripheral information that we obtained, we finally had the courage to admit that we had greatly underestimated the real cost of Soviet weapon production. And then came the moment of great embarrassment of having to acknowledge that.

That is a notable case of a neglect of a consistent pursuit of research. I can only assure you that that particular failing has been eliminated. We have thrown enormous resources into the analysis of Soviet procurement costs, and in fact,

the whole Soviet military investment sphere. Now the danger is, because we are so convinced that we have a large body of evidence, that we actually believe the numbers. And one must maintain a considerable reserve about the meaningfulness of measuring Soviet defense costs or the size of the Soviet military effort by the currency equivalence of another country. The best we can do is to say that if the Soviet defense establishment were procured in the United States, measuring its costs in terms of U.S. scarcity relationships and U.S. market prices, it would cost us to reproduce or to replicate the Soviet defense establishment and to maintain and operate those forces so much. That's what those comparisons say. And that isn't really the question you want. You really would like to know what is the real cost over time to the Soviet system, rather than that equivalence.

Q. Don't you have to know that?

Mr. Heymann: You would like to know it.

Q. Well, don't you have to have an estimate of it?

Mr. Heymann: There is no way you can have that. There is no earthly way in which you can compare the defense effort or any other kind of effort of two countries without having to fall prey to the index number problem. You have to measure it either in the currencies of one or of the other country or of a third country which immediately transposes it into an artificiality. And that is a basic problem in this business.

People who have faith in the measurability of things should think twice. There are real problems in making comparisons either over time or over space that cannot be overcome by anything that man has devised. We do it by approximation. So even the current estimates, which are infinitely better than those of five years ago, are still subject to a very large margin of error. But I would add, if you're interested in the substance of this issue, it isn't the cost of the defense effort that matters, it is the efficacy of the defense establishment that you have created, and that has very little to do with cost.

We talk about the burden of Soviet defense. To the Soviet policymaker, it isn't necessarily a burden but a great asset. There is only one area in which the Soviet system can compete with the West, and that is in military prowess; and they value that accomplishment very highly politically and I have never heard a Soviet official talk about the burden of defense, although here and there they sometimes lament the possibilities that would be opened if they could shift resources. But that is very different.

Q. I don't know if you can hear me clearly now or not. To oversimplify the problem which we are now reviewing. But had it not been for the President's Foreign Intelligence Advisory Board establishing two independent teams to analyze the Soviet Union, I wouldn't like to call it defense . . . because it isn't that; over the years in which it has been consistently underestimated, we wouldn't know anything about it today. As far as I can see, it was the B-team, headed by Professor Pipes, to recognize the very clear intentions of it. Now, when the National Security Act of 1947 was enacted, there was indeed a very important provision in the law which did contemplate it. The problem has been that we have never had an adequate consensus, over the past 15 to 20 years or more, as to what our objectives are. And unless and until we and other nations come together and agree that we do have and can define our objectives, it is very difficult to make use of intelligence to serve an unstated objective.

Mr. Theberge: Thank you. That's not quite a question, but I think Mr. Cherne would like to address it.

Mr. Cherne: I have a particular admiration for Karl Bendetson, and I, with great reluctance, want to diminish the thrust of the very generous words that he said about PFIAB. I especially do not want to seem to suggest that the elimination of PFIAB was any other than a very, very serious impediment in the process. Nevertheless, in the interest of accuracy on the particular question which Hans Heymann responded to on, this error of the dollar magnitude, or ruble magnitude, and the respective magnitude in terms of national economic effort of the Soviet military investment in previous years, the correction of that one area of misjudgment did not owe anything very substantial, owed something, but did

not owe anything very substantial to the efforts of the President's Foreign Intelligence Advisory Board. Most important of all, that one was not part of the A-team/B-team competitive analysis. It did, however, play a role, that another long history of errors or miscalculations or underestimates, in leading PFIAB to suggest that there had better be a more effective method. And the method we urged then and continue to is competitive analysis, to make sure that myopia biases, organizational requirements, policy effects, and a variety of other forces not play as heavy a role in shaping the estimates.

Mr. Theberge: Thank you. I'd like to develop one question that both Professor Alexander and Mr. Cherne had raised, and that is the role of the media in contributing to the growth of terrorism. Professor Alexander, could you address that please?

Professor Alexander: Obviously this is a very vital subject. I don't believe that we in a democratic society can say that the media is the villain. Obviously, we have to keep in mind the First Amendment and the right of the people to know, and how we can bridge that gap between the right of the people to know and the role of free press in a free society, and then the strategy of the terrorists to exploit or manipulate the media in order to advance their causes. And I think the example that Leo gave in regard to Iran is a very significant one, and perhaps after the crisis is over we will have to study the lessons.

But if I may, I would like also to indicate that in Washington, D.C. during the Hanafi incident, we had a situation where the media actually provided intelligence to the terrorists. And, of course, we have other incidents when the media was helpful to the law enforcement capabilities; and therefore, I think we have to try to get the media together with the law enforcement of government agencies interested in this problem, and so forth, and see whether or not the media can independently provide some guidelines in order to protect the rights of the people to know, and at the same time to make sure that they don't jeopardize the role of law enforcement agencies.

Mr. Cherne: May I add, this is not simply a quixotic expectation or request on the media. In a much more tranquil day we used to observe the fact that

student riots, especially on campus, would simply not occur unless there were television cameras present and ended the very moment television cameras withdrew. This is a lesson the terrorists have learned extremely well. The various media are a major element in making terrorism possible. The reverse of that is not true. That doesn't mean, if there were no coverage, there would be no terrorists. I don't want to suggest that. But to take a past lesson, press and television, especially television, did finally learn during the day of the riots that they were, in fact, stimulating the fact of these riots and did impose a discipline upon themselves which had the effect of helping subdue and finally burn out that phenomenon. I do believe that similarly, internally within the journalistic profession, similar disciplines must be applied on two levels; not to permit the media to be the forum in which the war is conducted; and secondly, there must, it seems to me, be some restraint on media diplomacy, very different but closely linked phenomena.

Q. (Inaudible)

Mr. Heymann: I'll try and answer those questions, Mort. I don't claim to be in any sense an expert on legal aspects of intelligence collection. I will say that my office had virtually zero role in the evolution, the complex evolution of the Executive Order or the Attorney General's guidelines on this or other matters. Second, I believe that the denial of cooperative information from private Americans, businessmen, would be utterly fatal to the only real window that we have towards the expertise that resides within our American business community. Utterly fatal because being a government agency and, being very much involved with governmental policy, we are constantly subject to the illusion that government policy makes international relations. Government policy acts basically defensively against events beyond its control; very rarely initiates things in the world out there. A knowledge and understanding of the workings of the marketplace is indispensable to any decent economic analysis, whether it's done by the intelligence community or by anyone else.

Q. (Inaudible)

Mr. Heymann: I misunderstood that. That is an area in which I simply have no expertise so I really can't respond to that. It's just out of my domain. I am not involved in any involuntary acquisition of information. That's outside of my domain. Your last question, are there additional areas where we would like to have opportunities. My impression, from what I know of the ground rules under which we operate, is that they provide now, under the new rules, ample opportunities for obtaining the information that we need.

Q. (Inaudible)

A. Aside from the League of Nations Convention in 1937, I'm unaware of any multilateral general convention on terrorism or designed to combat terrorism. The United States attempted to introduce in 1972 in the United Nations a convention in response to the murders in Munich of the Israeli Olympic competitors. This, however, did not get very far, in part because it was regarded as an anti-Arab response, and the Arab countries, among others in the United Nations, lobbied very successfully against it. There have, however, been a number of more modestly drafted conventions in the U.S. context; conventions against the seizure, hijacking of airplanes. There is a United Nations convention on the protection of internationally protected persons, as they're now called, basically diplomats. There is about to be adopted it appears, in the United Nations, an international convention against the taking of hostages, which of course relates very particularly to the current situation. But it's an initiative which has been pending for some time, since 1976 when the Federal Republic of Germany introduced it.

There are also a number of bilateral and regional agreements. There is a European convention on terrorism which relates to extradition questions. There is an OAS convention that is somewhat similar to the U.N. convention for protection of diplomats, and there are some extradition treaties the United States has which relate to this terrorism problem.

Now, as to why it's been impossible to come up with a multilateral agreement of broad scope that would deal with the terrorism problem and its

various manifestations and succeed in having a number of countries ratify it. This involves a whole complex of questions. One of the major difficulties is, as I indicated in my remarks, there's been no definite agreed definition on terrorism. And indeed, because of this, as a result, often U.N. debates degenerate into charges and countercharges that catalog the grand history of man's inhumanity to man. And as a consequence, what success there has been, has been due to an attempt to focus on more limited areas. As a cynic would say, it's no great surprise that a bunch of diplomats in the U.N. would come up with an agreement designed to protect diplomats.

There is also a great variety of political factors involved. A number of Third World countries, in the Arab countries, have regarded the Western world's anti-terrorist actions as designed to put limitations on the efforts of the Palestinians to obtain their homeland or to put limitations on the efforts to force South Africa to abandon its policies of apartheid. So, what has happened so far is that such progress as has been made has been of an incremental nature and has involved a much more narrow focus than one ideally would hope for. There does seem to be some inclination, however, some encouraging signs on the part of countries to become more involved in anti-terrorist efforts. There have been increasingly large numbers of signatories to the aircraft hijacking conventions, and similar efforts are being made to increase the number of parties to the U.N. Convention on the Protection of Diplomats. Whether this trend will continue remains to be seen.

Len Theberge

Our time is now over. I'm sorry we don't have any more time for questions. I'd like to thank both our speakers and commentators and return the podium to Mr. Leibman. Thank you very much.

Morris Leibman

If the rest of the program has the quality of audience and speakers that we've had this morning, we'll be superbly delighted. Just a couple of simple

announcements. One, there's been some question raised by some of the participants about the distribution of materials and I emphasize the word "free" materials. We will have a table here after lunch and anybody that wants to bring materials for distribution to the participants is welcome to do so. Number two, the luncheon is in the Tudor Room which is up the stairs and straight ahead. We will return here for the Bork/Shattuck discussion at 1:00. Thank you.

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Morris Leibman

Many thanks for our staff for getting luncheon done. Again, our deep thanks to the speakers for their wonderful contribution this morning. I want to identify for the record on behalf of the committee the fact that Leo Cherne is a member of our Advisory committee, the Standing Committee on Law and National Security, and that Bill Casey is a member of that Advisory Committee and that Bork and Kampelman are both members of the Committee, active members of the Committee, and that Justice Dillard is one of our counselors and so we're very proud of having that kind of talent with us. At 1:00 we'll reconvene in the Tudor Room where we were earlier today and, until then, you're on your own. Thank you all.

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Morris Leibman

Ladies and gentlemen, it's my privilege to introduce as our moderator today, a distinguished lawyer, a community leader, both in domestic and international affairs, and an honored member of our Standing Committee, Mr. Max Kampelman of Washington, D.C.

Moderator: Mr. Max M. Kampelman
Standing Committee on Law and
National Security, ABA

And it's my privilege, ladies and gentlemen, to introduce to you the panel and to get started on the debate or the discussion on this central question which I'll read to you again from the program as "Limits on National Security Intelligence in a Free Society." I decided just now as I was sitting up here that it really makes no sense for me to attempt to define this subject further or to make any introductory comments of my own. I'm convinced, after having sat between these two gentlemen at lunch, that they can adequately perform both of those tasks.

The first speaker that we have is a very distinguished local attorney, Mr. John Shattuck, who is now the Director of the Washington Office of the American Civil Liberties Union. I had an opportunity to review Mr. Shattuck's curriculum vitae and I'm tremendously impressed with his scholarship, with his extensive writings, with his activity in this field dealing with questions of civil liberties and civil rights within the context of the national security framework. And I now introduce Mr. John Shattuck to you.

"Limits on National Security Intelligence in a Free Society"

Mr. John H. F. Shattuck
Director, Washington Legislative Office
American Civil Liberties Union

I would like to open my side of this discussion by clearing up what I think is a popular misconception. In the debate over intelligence activities you will find the American Civil Liberties Union, perhaps to your surprise, on the Right side of the political spectrum, acting as any responsible conservative should, to preserve what I think most people believe is the status quo in this area, against a variety of dangerous proposals.

Some of these proposals go under the name of legislative charters, while others are Executive Orders or agency regulations. But they all have one thing in

common: the expansion of intelligence activities directed at American citizens. In this respect I take issue with the first two sentences in the brochure announcing this workshop. They read: "During the past decade there has been a great public concern about the potential for abuse of government power in the conduct of national security activities. Most recently, however, there has come to be expressed a countervailing concern that newly imposed restrictions upon national security activities have impaired their effectiveness."

The truth is that in the past decade intelligence agency abuses of power have been thoroughly documented by Congress, by a Presidential commission, and by the courts. This record shows that programs such as the CIA's Operation CHAOS and the FBI's COINTELPRO--counterintelligence program--were more than "potential abuses"--they actually happened.

For example, it was under COINTELPRO that the FBI tried to discredit Martin Luther King by disseminating derogatory information about his private life, ostensibly to prevent violence by curtailing civil rights marches. The FBI also wiretapped King, ostensibly to find out whether he was being directed or influenced by a Communist Association. It was under Operation CHAOS that the CIA investigated tens of thousands of Vietnam War protesters in this country, ostensibly to find out whether their activities were being directed by foreign governments.

Now these are only two of the most prominent examples of an extensive record of actual intelligence agency abuses. On the other hand, one will search in vain to find any "newly imposed restrictions" in statute or executive order that bar the reinstatement of these programs. All that stands in the way are the good will and good sense of the current Administration and its FBI and CIA directors who, of course, could change at any time.

But that is not our greatest concern. What is even more disturbing is that the long debate over intelligence agency "charters" has recently taken a new turn. The issue now appears to be not whether restrictions should be imposed on the FBI and CIA, but whether--and how much--new explicit authority should be

given to these agencies to investigate Americans for foreign intelligence and counterintelligence purposes. This is like a Thermidor without a revolution.

The focal points of the intelligence debate are two documents--the Carter Administration's Executive Order 12036, issued in January 1978, and Senate Bill 2525, a 200-page intelligence charter which was drafted by the Senate Intelligence Committee last year. Now it's true that many people say the bill must be pretty good, since it was strongly opposed in Senate hearings by both the ACLU and Professor Bork. But I'm not sure you should feel comforted by our combined opposition, despite the conventional Washington wisdom that if a proposal is attacked from two sides it must be acceptable.

Both the Senate bill and the Executive Order are premised on a policy choice which threatens civil liberties. That choice is to permit broad counterintelligence and foreign intelligence investigations of Americans. According to the 1976 report of the Senate Select committee on Intelligence chaired by Senator Frank Church, this would represent a radical break from the traditional approach toward foreign and counterintelligence gathering. In the counterintelligence area, the Senate report points out that "the traditional CIA policy has been to monitor hostile intelligence services and then, only if it learn of their involvement with particular Americans, to investigate these Americans. . . . "Generally," the report continues, "the CIA has not tried to work backward from a surveillance of Americans who seemed likely prospects in order to see what kinds of connections could be found."

The whole thrust of this type of "backward working" investigation is to "prove a negative"--that the American target of the investigation is not under the influence of a foreign power. If no evidence is turned up at first, the investigation continues. This is what happened with the CIA's Operation CHAOS. According to the Church Committee, "CHAOS sought to sift through the centers and more active segments of the domestic protest movements in order to learn of travel and other contacts, and then to investigate the possibility that those Americans were supported or controlled by foreign powers." When the President kept asking for more information, the CIA had to demonstrate that it had "investigated all antiwar persons and all contacts between them and any foreign person."

While this approach may be the only way to prove a negative, it is far more sweeping and intrusive than traditional intelligence investigations aimed at foreign powers. In the case of Operation CHAOS, the result was the collection of intelligence information about the First Amendment activities of some 300,000 Americans.

Only three years ago this backward-working approach to counterintelligence gathering was regarded as dangerous and abusive. But today it is reflected in the policy choices made in the Senate bill and President Carter's Executive Order.

The main feature of the Executive Order is that it authorizes an intelligence investigation of any American suspected of acting on behalf of a foreign power. While that may be reasonable on its face, there is no definition in the Order of "acting on behalf of a foreign power." This means that the Order may permit the Attorney General to authorize the CIA, for example, to investigate U.S. corporations licensed to do business for a foreign government, or U.S. lawyers who represent foreign interests. Now, when we think of foreign agents, what generally comes to mind is someone who is financed and controlled by a foreign power--a diplomat or foreign politician, or someone paid by a hostile foreign intelligence service to engage in espionage or some other crime against the state. That, in fact, is the traditional information of foreign agents, and it can be found both in Supreme Court decisions and in the Foreign Intelligence Surveillance Act of 1978, which regulates national security wiretapping.

Even as defined in this traditional narrow way, foreign agents in the United States are covered by the Constitution. For example, the Supreme Court has held that the apartment of a foreign government employee suspected of espionage could not be searched without a judicial warrant based on probable cause, and under the Foreign Intelligence Surveillance Act such a person could not be wiretapped without a warrant.

The Executive Order cuts right through these restrictions. Under a claim of inherent presidential power, it authorizes warrantless physical searches, mail opening, and electronic surveillance abroad of anyone suspected by the Attorney

General of acting in any way on behalf of a foreign power. Now it is worth pausing to recall that a similarly sweeping claim was used to justify the notorious break in at Daniel Ellsberg's psychiatrist's office, and that it was flatly rejected by the courts. But this is only the beginning. Under the Senate bill the intelligence net can be cast even wider to cover Americans who are not suspected of being foreign agents nor of engaging in criminal conduct. One section of the bill authorizes the investigation of any person who "has contact" with another person "reasonably believed" to be engaged in "espionage or other clandestine intelligence activities." Since there is nothing in the bill to limit these "contact" investigations to secret meetings, they can reach social or political contacts and intrude severely on freedom of association.

Another section of the bill authorizes intelligence investigations against Americans who are "reasonably believed to be the object of a recruitment effort by the intelligence service of a foreign power." Obviously, foreign agents do try to recruit Americans--but as the Martin Luther King case demonstrates, the way to investigate these efforts without invading constitutional rights is to watch the foreign agent, not the American who might be the target of foreign influence.

Still another section of the bill would permit the same kind of investigation to be directed at an American "who is reasonably believed to be a potential source of foreign intelligence information." Millions of Americans who travel abroad, or are engaged in foreign business ventures, or are students of foreign cultures are potential sources of intelligence information under this broad language. The policy seems to regard them all as fair game.

This last authority is carried even further by the Executive Order. Under the Order intelligence agencies are authorized not only to investigate Americans who are potential sources of information, but also to take another step and actually obtain the information itself by covert means if the target of the investigation is a corporate entity. This so-called "positive foreign intelligence targeting standard" is the most far-reaching feature of the new intelligence policy. It is a clear illustration of the future course of foreign intelligence investigations. The targets are not political activists, but American businessmen

and lawyers. The Executive Order declares open season on the brief cases, hotel rooms, Telex cables, telephone conversations, and file cabinets of any American acting on behalf of a commercial organization. The only limit on this authority is that under the Foreign Intelligence Surveillance Act a court order must be obtained to conduct electronic surveillance of businessmen in the United States. Otherwise, nothing stands in the way of economic foreign intelligence gathering, and nothing remains of traditional Fourth Amendment protections in this area.

It is hard to imagine what authority is not claimed under the Executive Order. But there is one more step, and according to recent press reports, the Carter Administration is about to recommend that it be taken. As things now stand, the positive foreign intelligence targeting standard in the Executive Order extends only to Americans who are engaged in commercial activities. But apparently a new standard is being considered for a redrafted version of the Senate bill so that any American could be targeted for intrusive surveillance overseas if there were a likelihood that essential foreign intelligence information could be obtained. If this step were taken, the intelligence revolution, as it applies to Americans, would be complete.

Now, I'm not sure where Professor Bork stands on this revolution. As an honest conservative, he should be against it. But I suspect his position will be that if the President thinks he needs new authority for national security reasons, he should simply exercise it, and not ask Congress to give it to him, since Congress is likely to attach strings to it and maybe even ask the courts to supervise it, and thus cut into the President's inherent power to protect the national security against foreign threats.

There are two answers to this line of argument. First, there is no implied presidential power to override constitutional rights, even when the President is acting in the area of foreign affairs and national defense. The courts have consistently rejected such presidential claims, and the Supreme Court has said that both the judiciary and the Congress have the power to restrict presidential activities in this area. The decision blocking President Truman's seizure of the steel industry during the Korean War stands as a monument to judicial and political conservatism and a warning to presidents who act beyond their power in violation of constitutional rights.

Second, even apart from this constitutional consideration, there is no evidence that the new intelligence policy reflected in the Senate bill and the Executive Order is necessary to protect our national security. The voluminous evidence compiled by the Church Committee, by the Rockefeller Commission, and by the courts supports the opposite conclusion.

The ACLU supports the concept of a foreign intelligence charter but only if it limits intelligence investigations of Americans to persons suspected of crime, prohibits the disruption of First Amendment activities, and provides a reasonable civil remedy for persons whose rights are violated by abuses of the intelligence process. This was the approach that Congress took in enacting the national security wiretap bill last year, and it is the approach it is considering taking in the current debate over the proposed FBI charter. We see no reason why this approach should not also govern the foreign intelligence charter, particularly since there is no evidence on the public record to support the need for the sweeping powers claimed by the Executive Order--powers that would be ratified if Congress were to enact a bill like S. 2525.

There is no doubt that the world we live in is increasingly unstable, and that our intelligence needs are substantial. But it is the quality and analysis of intelligence that we lack, not quantity of information. The new policy of loosening restrictions on the investigation of Americans would do little to satisfy our intelligence needs, and would risk plunging agencies back into an era when the rights of Americans were routinely sacrificed on the altar of national security.

Alan Barth, the distinguished editorial writer for the Washington Post who died last month, wrote a book called The Loyalty of Free Men. It was published in 1951, during the dark days of civil liberties in this country. He concluded the book, and I will conclude my remarks, by saying: "The relation of the individual to the state--or of individual liberty to national security--is the crucial issue of our time. . . . The function of national security in a totalitarian society is to preserve the State, while the function of national security in a free society is to preserve freedom. . . . Individual freedom is an invaluable means toward national survival. But it is an end as well--the supreme end which the government of the United States was instituted to secure."

Max Kampelman

Thank you, Mr. Shattuck. We next hear from an honest conservative who looks truth directly in the eye. Robert Bork, who is now on the faculty once again of the Yale University School of Law, served as our Solicitor General and Acting Attorney General of the United States. Professor Bork.

Professor Robert H. Bork

Alexander M. Bickel Professor of Public Law
Yale University; Former Solicitor General
of the United States

I want to thank Mr. Shattuck for giving my talk and answering it. And thanks are due to him for other reasons as well. We agreed in advance that we really couldn't work up a debate in this format but that we ought to have a contrast, and I want to thank Mr. Shattuck for going out of his way and heroically taking a position he can't possibly believe in in order to provide a contrast here. I do in truth speak on behalf of Thermidor, and unlike Mr. Shattuck, I think there was a revolution against the intelligence community and that we need a Thermidor.

Now, I think there is no disagreement between Mr. Shattuck and myself, or I suppose among any of us in this room, on two propositions. And these are that a strong and effective intelligence organization is essential to our national security and hence to the preservation of individual freedoms. There are other threats to individual freedoms in the world than our own intelligence agencies. And so, secondly, that decency and a regard for the constitutional rights of individuals demand that there be understood limits to what intelligence organizations may do in the interests of national security. But putting the matter that way I mean to indicate that I do not intend to argue with the lunatic fringe, which seems to think that all American power is evil and that anything done in secret is particularly evil. Such people march under a banner, I think, that reads: "The price of liberty is eternal vigilance to make sure the CIA isn't doing anything."

But as Thomas Powers, who is hardly an uncritical admirer of the intelligence community, said in his book on Richard Helms, "Intelligence services do not exist in a vacuum. A nation with neither an army nor enemies does not have much need for spies. But once it has both, an intelligence service is bound to follow." We have both, and we have relearned recently that we have more enemies than we thought and less capacity to protect our interests or even our citizens than we need.

So I'm not going to address the question of whether we need a powerful intelligence service. I am going to address the question of how we go about putting limits upon it in ways that protect both individual freedoms and national security. It is here, I suspect, that Mr. Shattuck and I differ. I think his main objection to S. 2525 is that it is not rigid enough, not strong enough, not restrictive enough. His solution is law, lots of law, law in detail and at length, law which specifies authority and lays down prohibition, law that proclaims constitutional rights and preserves them, law that leaves little or nothing to the discretion of intelligence executives, the President, or the Administration's senior officials; law without end. This approach necessarily assumes that constitutional rights are fixed and unvarying, knowable in advance regardless of circumstances. That was much of the approach of S. 2525 and, as I say, if I understand him correctly, Mr. Shattuck would approve of S. 2525 if it had more restrictions upon what intelligence agencies may do. I have serious misgivings about the entire approach. Legislation of a kind I will describe in a moment may be useful or even necessary, but not legislation of that type.

While my misgivings are partly rooted in policy, a feeling that such a charter will make effective intelligence impossible, they also rise to the magnitude of constitutional objections. My concern about the heavy involvement of statutory law in this area, as I say, is not merely that it will make effective intelligence impossible. It is also that it will warp and deform constitutional institutions which we ought to take care to preserve. The difficulties with the charter approach of the sort represented by S. 2525, I think, are threefold. It attempts to control the details of intelligence activities which I do not think can be done. It introduces judges and warrant procedures into the conduct of surveillance.

And there is far too much reporting required to groups outside the Executive Branch. These, I suspect, are precisely the features of S. 2525 that commend themselves to Mr. Shattuck but I think they are features we can well do without.

First, the question of detailed control. The drafts we have seen in the past contain specific prohibitions of certain kinds of conduct, and I think that's unfortunate. As Clark Clifford put it, such prohibitions are inevitably either too specific to ensure that they cover everything intended, or too vague to provide guidance in concrete situations. As such, they can only be expected to give rise to future conflicts between the Executive and Legislative branches over whether a contemplated action did or did not comport with the law. Detailed judgments made now and in the abstract are likely to be wholly inappropriate tomorrow in a world that changes rapidly and unpredictably. It is impossible to write a code that both provides for all eventualities and that is also usable by the agencies. The variables are too many. I've tried at one point in my life to write such a code, and the only thing I can now analogize it to, given the variables that arise, is trying to control this field with something that looks like an Internal Revenue Code with a torrent of continuing regulations and rulings. That may be tolerable in business planning, but I don't like to think of trying to get it all onto a microdot that an agent can use when he's in doubt about what he may do next.

Broad strictures simply will not serve. S. 2525 had two provisions, for example, that I assume Mr. Shattuck liked; one I think he endorsed today. It tried to preserve civil liberties by saying that intelligence could be collected about a United States person believed to be engaged in espionage only when a violation of the U.S. Criminal Code was likely to be involved. It further provided that no intelligence activity could be directed against any United States person solely because of his exercise of any right protected by the Constitution. Those sound innocuous enough but I think they're not. Even though there is no violation of the U.S. Criminal Code in prospect, it may be important to know what foreign intelligence networks exist so that surveillance without violation of criminal law may be essential.

Secondly, as to the requirement that nobody be surveilled, if that's a word, because of his exercise of a constitutional right, it is now a constitutional right,

somewhat to my surprise, for a person to advocate the violent overthrow of the United States Government and the extermination of particular racial or ethnic groups even if that person who advocates these things is a member of an organized group with links to a foreign power. Now, does the fact that the government must let such a person speak also mean that American intelligence may not keep him and his group under some form of surveillance, however mild? These proscriptions are unwarrantably broad and crippling and yet any attempt to qualify them into usable form and to indicate all of the exceptions will produce an incomprehensible morass of provisos and details. It is rather similar, I think, to the attempt to control a field officer's work in the field in the army through a code written in advance.

But I think matters are worse than this. It's not merely unworkable. I think such a code is indeed unconstitutional. The conduct of intelligence activities is a part of the conduct of foreign relations and of the command of our military forces. It falls, therefore, under Article II of the Constitution within the President's constitutional powers. I do not mean to say that Congress is excluded from those areas. It certainly is not. But the role Congress may play is necessarily limited by its institutional capacities and limitations. And those institutional capacities and limitations are themselves created by the Constitution and constitutional values. The President is to lead in areas requiring managerial decisions and secrecy. The Congress leads in areas requiring collective deliberation and openness.

I think you can see the point by an analogy to the differing roles of the President and the Congress with respect to war. Congress clearly has the constitutional power to declare war or to refuse to declare it. It may not appropriate funds for the armed forces altogether and leave the Commander-in-Chief without a single platoon to maneuver. And yet, and this is the crucial point, because Congress has those large over-arching powers, it does not lawfully obtain tactical control of the armed forces. One could imagine in World War II, Congress could keep us in or out of that war. It has no power to provide in advance what tactics should be followed, whether the Doolittle raid should occur, whether people situated as they were at Bastogne in the Battle of the Bulge

should surrender. Congress is simply excluded from decisions of that type, and I think that is precisely the kind of decision that the charter legislation we've been looking at contemplates.

Given the close interdependence of nations and technologies, the conduct of intelligence in the modern age presents the same requirements as the conduct of war. That is, the need for central direction, for rapid action, for flexibility of judgment in response, for secrecy, and for the control of individual tactical decisions according to a general strategic plan to cope with a changing and often hostile environment. Most charter proposals, including S. 2525, and I take it what Mr. Shattuck would endorse, plunge Congress in advance into continuing tactical decisions about intelligence and in so doing trench impermissibly upon the constitutional role of the President. I think S. 2525 and the charter Mr. Shattuck would like to see are like the unconstitutional War Powers Act, in that they would prove practically impossible to test in court, would do irreparable harm to our security, and yet would provide a major political embarrassment to any president who tried to reassert his constitutional authority.

Secondly, I want to discuss briefly the introduction of warrant procedures and the judiciary into intelligence activities and surveillance because I think that constitutes a misuse of the judiciary. It is now taking place, as you know, under the Foreign Intelligence Surveillance Act. Article III requires the courts have before them a case or controversy. In fact, we now have people going before judges and getting warrants for foreign intelligence in which there is no case or controversy. And, in fact, the judges are assuming an administrative role in the area of foreign intelligence. They're engaged in secret proceedings, making secret law, law known to no one but the courts and the Executive Branch. And I think Mr. Shattuck, what was the phrase, as an honest, clear-eyed radical, ought to be quite concerned about that form of what looks to me like corruption of the judicial role.

In addition to that, we've got to worry about the fact that the intelligence agencies and the Executive Branch so badly want to bring judges into the intelligence process. I think the reason for that is that they want protection.

They will become in a sense less accountable if they have a judge's order. If they can get a judge, and I don't know what they can get a judge to do. Nobody outside that secret hearing can find that out. If they can get a judge to put his imprimatur on a particular action, there is no way the Executive Branch person can be held accountable for what takes place. Judges must under those circumstances either heavily involve themselves in the intelligence activity, which I think is corrupting to their function--in effect, become members of the intelligence community--or they must defer to the experts from the intelligence community which means they are not providing any protection for constitutional liberties at all. They merely seem to be providing it. They merely cool us down because we think something is taking place which is not.

Finally, the oversight function I won't say a great deal about. It seems to me there is so much oversight and so many reporting requirements in these matters to Congress that we are told, I don't know, we are told that foreign intelligence agencies no longer wish to give us certain kinds of information because we can't be trusted to hold it secret. Covert action is said to be all but impossible now because so many members of Congress would have to be involved.

It seems to me that that's a corruption of the congressional function. Congress becomes involved in the management of the intelligence enterprise which furthers a trend, we have seen, for Congress to usurp executive functions and to engage in day-to-day administration. I think it's clear then that this kind of approach, the restrictive charter approach that addresses substance, severely damages and in some respects cripples our intelligence efforts and that that poses in itself a very real threat to constitutional freedoms. And moreover, that this philosophy of control by law that we are following deforms the assigned constitutional role of all three branches of government: the presidency, the judiciary, and the legislature. Well, if not then, what I will now call the ACLU approach or perjorative effect, if not that approach, what then?

There can be no dispute that constitutional freedoms must be preserved, but there are ways of accomplishing that that are less threatening. One way, and I think a way that is foreign to those who think there must be a law about

everything, is the establishment of a strong tradition about the ways in which it is permissible or impermissible for an intelligence agency to behave. Such a tradition, a common understanding, leaves room for adjustment to all of the circumstances, needs, and crises of the future which rigid statutory rules cannot begin to anticipate. Now we've made a strong beginning in establishing just such a tradition through the investigation, the discussion, and the public airing of past behavior of the intelligence agencies. And I think the ACLU overlooks this. Because those things happened in the past, we have no reason to anticipate that they will happen again in the future. In fact, the uproar over them gives us stronger reason to believe they will not happen in the future. Presidents will never again feel as free to use the agencies that they once did. We're protected by more than the good will of the agencies or of presidents, as Mr. Shattuck would have it. We are protected by the fear of exposure, of damage to careers that the intelligence agencies learned can occur when these things are aired. It is not true, therefore, that we need a law for every instance of misconduct in the past.

And we also ought not overlook that those instances of misconduct, those past abuses, were uncovered and rectified without the detailed controls that a charter or the ACLU approach would entail. We did overtake those abuses and they were rectified. Now the force of tradition can be strengthened by Executive Branch guidelines that do not address substance, but do provide procedures and accountability, so that the particular officers who must authorize actions can be identified, so that internal reviews take place regularly, so that surveillances are minimized, and so that the use of information gathered is controlled and protected from abuse. That approach is sufficient, I think, to protect constitutional freedoms while allowing effective intelligence. We ought not to allow our commitment to civil liberty to harden into unreflective theological creed, which, while it may console its adherents, is actually damaging to civil liberty and to our constitutional forms of government. Thank you.

Max Kampelman

Thank you very much, Professor Bork. We'll now throw the session open for questions. We will ask the speakers to remain seated where they are in front of their microphones, and, if you wish to be recognized, just raise your hand and address to whomever you wish to address.

Admiral Mott: I think there was a greater mention, from what Mr. Shattuck said, about the surveillance of Martin Luther King. It was quite noticeable to me that he did not say that that surveillance was authorized by the Attorney General of the United States or Mr. Robert Kennedy. Mr. Hoover told me, and I have a witness who happens to be a quarterback for the Dallas Cowboys, Roger Staubach, who went in to see Mr. Hoover with me and he told us all about it. I've been talking to Hobart Taylor up front here; he also knew about it. So I do not think that the inferential criticism of the FBI and your accounting of this is justified.

Mr. Shattuck: I'd like to respond because I think that's a very important point that's just been brought out and, if I didn't bring it out adequately, let me amplify what the gentleman has just said. The identity of the officials who were responsible from time to time for what have now been characterized as abuses, the political identity and the personal identity, is irrelevant to my case. In fact, I'm delighted to have it brought out that it was Attorney General Robert Kennedy who was responsible for the wiretapping of Martin Luther King. What we're dealing with here, I think, is, from my point of view, a long-standing pathology, a political pathology which has affected Democratic and Republican administrations alike. In some respects, it probably affected Democratic administrations even more than Republican administrations. We just don't know about it. So, I am pleased that the gentleman has made the point, and I'm glad to adopt it as part of my own remarks.

Q. I'd like to address Mr. Shattuck. If you put this in a different context and would you have thought it would look proper for the FBI to be spying on the German American Bund in the late 1930s and early 1940s, would you consider

that kind of activity on the part of a clearly identified potential and be feeling the pro-Nazi groups . . . that kind of surveillance should not have taken place? Can you find some distinction between that and the current kind of situation?

Mr. Shattuck: I'm very sensitive on the subject of the rights of people who are espousing the cause, or say they are, of Nazism. The ACLU has, in the last two years, represented a group that called itself Nazis and sought to demonstrate in the town of Skokie, Illinois, where we successfully represented them and had all the courts up through the Supreme Court essentially validate the First Amendment claims that were made by that organization. I'd say if the German American Bund could have been identified in the narrow legal sense that I've spelled out as an agent of a foreign power, that is, foreign financed and controlled, and there was information already in existence to indicate that, then I would say an investigation might very well have been appropriate. But I think simply to take a group that was engaged in controversial activities even at the outset of the war, and to lower the boom on it because it was saying some of the same things that were being said overseas, I think is reminiscent of the investigaiton of the antiwar groups in this country during the waning period of the Vietnam War.

Q. How would you know that there was any control of the German American Bund by the foreign powers . . .?

Mr. Shattuck: My whole thesis is that you don't set out to prove a negative. If information comes to you, if there is a walk-in informant, or if there is some other information that is available to initiate an investigation, then you do it. But you don't identify a group based on its speech and attempt to prove the negative, that it is not engaged or is engaged in activities on behalf of a foreign power.

Mr. Kampelman: Well, we've had some provocation now, I can see.

Q. The first half of my question was already answered by the other gentleman. The second half of it is, how do you feel about the activities of the

foreign agent's registration section of the Department of Justice which reads the Washington Post and the New York Times and, very properly I believe, contacts people that put in ads on foreign policy issues and asks them, "Are you receiving money from foreign powers? Do you have any contact with a foreign government that is promoting the particular line that you're promoting? Do you think this is improper for such an investigation to be conducted?"

Mr. Shattuck: Of course, you're not talking about an intelligence investigation there. You're talking about an official going and asking people for information pertaining to their activities. If people want to provide that information, that's fine. The ACLU, and I'm sure I would get very few votes in this room for the position, has in the past taken the position that to be required to provide information about foreign registration raises Fifth Amendment questions. The Fifth Amendment, of course, being the right to protect yourself against self-incrimination. Let's look at the Foreign Agent's Registration Act in terms of what the courts have said. The courts have upheld the statute and I think that individuals can be required to provide information under that statute. So, I don't see this, the situation that you're proposing, as an intelligence investigation. It's going to the principals and asking them who they are.

Q. What I'm suggesting is that it is their First Amendment protected activities that was being watched by the government. And I'm suggesting that you say that the government has no right to watch First Amendment protected activities. And now you tell us that's okay, that you watch it. Can you ask the individual himself if they can do a further investigation?

Mr. Shattuck: That's public source information. Anything that is published in the newspaper, as far as I'm concerned, is a public record document. There are plenty of other public documents and public record pieces of information that can trigger an investigation if, in fact, they give rise to reasonable suspicion that somebody is engaged in activity.

Q. . . . that they are not permitted to collect public documents of organizations that are now under investigation by the FBI. Now, you would oppose that, I assume because you just said that you would like them to be able to collect public information.

Mr. Shattuck: I'm sorry. You said the FBI has taken the position. Would you state their position again?

Q. The FBI has testified that they cannot collect or even read the publications of organizations that are not under investigation by the FBI.

Mr. Shattuck: I've not heard of that kind of testimony. I can tell you in a case that I was involved in myself, Laird v. Tatum, which maybe some of you in this room know as a case involving a challenge to military surveillance activities of antiwar groups. The case went to the Supreme Court and by a vote of 5-4 the court held that, to the extent that coverage of newspapers and surveillance of public record information was at stake, there was no First Amendment claim that could be raised by the groups who were the subjects of those reports. I don't see that the FBI's claim there is one that they need to be making. They don't need to say that they can't conduct that kind of investigation because the court has held that they can, if they're going to public record material.

Q. I'd like to make one comment and ask one question. Professor Bork pointed out in connection with the abuses of the past that there's more than simply the fear or rather the displeasure of the administrative officials that are involved and that is the fear of public reactions or whatever . . . . Your permanent select committees are now very much a fact . . . were not so before. Now I'd like to ask my question. I seem to hear Mr. Shattuck say referring to the steel seizure case in support of the proposition that there's no inherent power of the President to collect foreign intelligence. I'd like Professor Bork to comment on that.

Professor Bork: I don't know how the steel seizure got into this nor do I think Laird against Tatum was just correctly described. But I'll restrain my desire to teach criminal law again. It's a very easily restrained desire, I might say. It seems to me that the form of rhetoric for which the ACLU is justly famous, which is that presidents have no right to override constitutional rights, doesn't get us anywhere because the question is never whether a president can deny you, or anybody else can deny you, your constitutional right. Of course they

can't. Only the court can do that. The question is in the circumstances, given the exigencies of the situation, and so forth, is there a constitutional right? And that's a much more difficult question that the ACLU chooses to discuss. And if I were in their position, I would choose not to discuss it too. Constitutional rights vary enormously according to circumstance, according to governmental need, according to safety, according to all kinds of things. And that is precisely the kind of thing you have to face case-by-case that comes up and which cannot be anticipated by a broad charter in advance. Indeed, if you could specify all constitutional rights in advance, we could tell the court to stop wasting its time listening to all these cases and just sit down and explain to us what the Constitution means in twenty volumes, and we would have it forever and we would know. You can't do that. And that's why I'm opposed to this kind of restrictive legislation which purports to describe what constitutional rights are under all circumstances.

Mr. Shattuck: Maybe I am just now protecting my own position and my salary but I think, to a large extent, constitutional rights are what are advocated in the area of constitutional protection that has already been identified by the courts. Constitutional rights have evolved over time. In fact, I think Professor Bork has made the point several times that what we're dealing with is a very flexible approach toward constitutional rights. And if it were not for the kind of advocacy of rights in the area of foreign intelligence protections or activities that my organization and others are engaged in, I think probably there would be no identifiable constitutional rights in this area. As it stands, there probably aren't a whole lot. See Laird v. Tatum.

Professor Bork: Larid v. Tatum was a "standing" case, I hasten to point out.

Q. Executive Order limits the targeting of so-called Fourth Amendment techniques, physical search, and electronic surveillance of Americans abroad to cases where the Attorney General finds that the American is an agent of a foreign power. It has been argued that the Constitution wouldn't limit the President's power to the surveillance of agents of a foreign power, especially in the absence of warrant requirement. And it's also been suggested that, if

Congress were to establish a legislative framework with a court or without a court, that it might be possible as a result of the joint action of the two branches, to expand the powers of the government to allow the targeting of Americans abroad who are not foreign agents in exceptional cases of where essential foreign intelligence is likely to be obtained. Could you address the constitutional issues involved in this debate, because this is at the heart of much of the current consideration of the . . . legislation.

Professor Bork: I don't quite understand what you want me to discuss except I take it you're picking up on Justice Jackson's concurring opinion in the steel seizure case.

Q. I'm referring to the court's opinion in the Keith case which held that warrantless surveillance of U.S. persons would be a possibility where foreign agents were involved, and that there was no recognition of any possibility of warrantless offense based on inherent power without a warrant where the American was not a foreign agent. And I'm asking whether that is a reasonable interpretation of what the Constitution does limit the President to. And second, whether Congress could let the President broaden the authority to conduct surveillance. . . . go beyond what appeared to be the current constitutional limitation which would foreclose the surveillance of an American abroad who was not a foreign agent.

Professor Bork: The reason I mention Justice Jackson's concurrence is he discusses the President's powers and says that they are strongest, of course, in that case where the President acts not alone but acts with the concurrence of Congress. And I think it is quite possible that with congressional concurrence the court might show greater deference to the kind of surveillance that you speak of. I think it's also quite possible that, given the proper facts, the court might allow it even without congressional concurrence. I don't know if I've answered your question or not.

Q. I think I'm asking is it reasonable to say that the Constitution today, based on the Keith opinion, does not permit the President, in the absence of a warrant, to authorize surveillance of an American who is not suspected of being a foreign agent?

Professor Bork: That's probably very likely true.

Q. (Inaudible)

Mr. Shattuck: Well, we don't support, we don't address a lot of things that have no clear civil liberties implications. In the case of the Hughes-Ryan amendment, I take it what you're referring to is the question of reporting requirements to six or seven committees that have been identified. We do not support the repeal of the Hughes-Ryan amendment. We think an essential feature of any effective mechanism for controlling the intelligence function is reporting to Congress. We don't have any particularly favorite committees that ought to be reported to, nor do we have any magical number of committees that ought to be reported to. But the principle of reporting is an essential one in the control of the intelligence process from our point of view.

Q. Mr. Shattuck, you seem to rely on a need for positive statutory law as an insurance against any kind of abuse. I think that was the reason that came up with the wiretap bill, while there was a history under the Executive Orders for surveillance . . . . I think that the laws by themselves, for instance, GSA scandals for largely stealing government property, it still went on with the individuals involved . . . . Why do you feel it is necessary to have public law explicitly laying out particular rules and regulations--why isn't it adequate instead to have executive guidelines which are classified and regulate activities with . . . ?

Mr. Shattuck: Well, I think the principal argument, in favor of legislation over executive guidelines, at least general legislation, I agree with Professor Bork. The principal argument is that guidelines can be changed overnight and, in fact, they frequently are. We have fortunately been living in the recent past under an administration, two administrations I might add, particularly with Attorney General Levi, where the guideline process generally was protective of civil liberties. But it is quite possible to look at the guideline process as an extension of the administration that is in power. Public law is just that; it is law that is adopted by the Congress and which will survive until it is repealed and, in

fact, the debate over the possible repeal of the Hughes-Ryan amendment is just such a, I mean that is the way in which public law is changed. But it is not changed by the stroke of a pen; it requires a vote in the Congress.

Let me also say that the ACLU does not favor legislation which lines both the President and the Congress up against what I have identified as the constitutional rights of citizens, albeit in some areas where Professor Bork would disagree that there are any rights at all. But if the Congress and the President gang up together through legislation, we're worse off than we are if the Congress does not pass legislation and guidelines continue, so long as the legislation that was under consideration was the kind of expansive approach that I outlined in my talk. So, we don't support legislation at all costs. There are many kinds of bills that we would clearly oppose because they expand the authority of the agencies to conduct certain kinds of intelligence gathering activities.

Q. Question for Professor Bork. In view of the gaps in our espionage statutes . . . and there are loopholes in the acts and other security laws. Would you care to address the subject of the criminal law as it applies to intelligence collection?

Professor Bork: I addressed that somewhat before and it's quite aside from the question of gaps, and there are gaps. If you have groups which are identifiable as potentially dangerous for a variety of reasons, but they are not now demonstrably violating the U.S. Criminal Code, I don't understand the position that you cannot look at them. Now, Mr. Shattuck sort of backed away from that position. He says if they print something in the paper you can look at them. Although I would think that's a First Amendment right, I don't see why equally if they say things in meetings why you can't look at them if what they're saying is "Given the chance, we would like to overthrow this government and wipe out the following racial groups." I don't see how we can't know that there are intelligence networks in place even if they're not presently or planning to or violating the U.S. Criminal Code. I don't like the criminal violation standard at all. It doesn't seem to me responsive to needs of intelligence or to make much sense in its own terms.

Q. (Inaudible)

Mr. Shattuck: I don't know what I can add to that. I'm sure that the identification of our violation of human rights abroad is something that we want to avoid at all costs through legislation or otherwise. The kind of charter that I'm advocating here does not spell out the very authority that you're proposing; doesn't say that espionage overseas is prohibited. But I'm talking about protecting the rights of Americans from their own government. Now, you could say that by implication that would mean that those overseas are going to have the book thrown at them. I don't think that that's necessarily implied. We enact statutes all the time in this country that don't apply overseas. That doesn't mean that we're authorizing certain activities to be engaged in overseas publicly.

Max Kampelman

I will have to end the public part of this by permitting one final question, because I see a hand up.

Q. Mr. Shattuck's interpretation of Laird v. Tatum is news to me also but I wonder if he agrees, if he does, he seems to me to be saying roughly as follows . . . and I would take this position too, it's the first time I've ever found myself trying to find out if I'm right. He said Laird v. Tatum said it's all right to watch a group based on its publications, presumably also one would think on its written or its spoken speech. It seems to me, as a reporter who's been out looking at extremist groups for at least three decades now, that there's an empirical basis for presuming in the twentieth century now that any group that gathers together and preaches hate targeting against a group, be it a racial group or an economic group or a religious group, i.e., "hate the jews," "hate the niggers," "hate the capitalist imperialist ruling class," is evolving in a natural history which is well matched in the twentieth century towards terrorism. The First Amendment is a right to peaceable assembly. It seems to me that any peace officer who is at all reasonably familiar with twentieth century history of hate groups has a probable cause to presume that this group should be watched. And to insert informants in it and to monitor its verbal and other output . . . . Is that your position?

Mr. Shattuck: Let's go into Laird v. Tatum here a little bit and I invite Professor Bork to put on his constitutional hat and rebut anything I might say about that. It was indeed a "standing" decision, as he said. It was a decision in which the standing of people who are claiming that the government was collecting information about primarily their public activities, it was violating their First Amendment rights. And the court held that they had not proved any specific or tangible injury and there was no intrusive surveillance. By that the court identified particular forms of surveillance such as insertion of undercover agents as beyond the pale of its opinion, but because there was no intrusive surveillance and there was no demonstration of injury, or even allegation of injury for that matter, the standing to the plaintiffs was denied. The court made a very clear distinction. The Chief Justice wrote the opinion between intrusive surveillance and coverage of public documents and public meetings and things of that kind, said that if there were to be a case involving the kind of intrusive surveillance that was not at issue in the complaint in Laird v. Tatum, the court's opinion would not apply. It didn't say that, in fact, that kind of intrusive surveillance would be illegal but it said that was not before it. So I don't take Larid v. Tatum to stand for the proposition that you can, based upon public record materials, insert undercover agents and engage in other kinds of intrusive surveillance activities.

Now, as for your other proposition, which has nothing to do with Laird v. Tatum, I think , and that is should one trigger a terrorist investigation based solely upon the speech of people who are saying things that the society finds abhorrent? I'm afraid I clearly part company with you on that subject. As I'm sure you expected that I would. In fact, if I didn't I suppose I would be fired on the spot from my position. I would have turned the microphone over to Professor Bork who could have then defended the First Amendment in a way that I hadn't. But perhaps he would like to comment on my analysis of Laird v. Tatum. I'll take his silence to mean that I'm accurate.

Q. Let me narrow the question to that point. If you're the police sergeant, who's probably only a high school graduate, in charge of the intelligence squad, which consists really of two people, in say Newark in 1966, and you hear these

groups persistently going out and leafletting, picketing, demonstrating, and preaching; don't you, in the light of our twentieth century history of extremist groups have a reasonable presumption of a sustained program to touch off violence in that community?

Mr. Shattuck: No. Let me just say that we offered to the Supreme Court in Laird v. Tatum empirical evidence that surveillance of First Amendment activities in fact did create a chill on other First Amendment activities and the court rejected it. So I think that both of us are not going to get very far with that kind of effort to inject empirical evidence into the First Amendment process.

Professor Bork: I don't know what to do with a statement that the groups that preach violence, and so forth, empirically have no connection with violence anymore than anybody else does. A statement like that seems to me to be, well I won't say that.

Max Kampelman

We're grateful to both of our participants this noon hour. The issues have indeed been clarified. I now turn the microphone over to our Chairman, Morris Leibman. I want to alert you that he did have a question earlier which I did not call upon him to ask and I suppose he may take the privilege now of asking it but I turn it over to him with that risk in mind.

Morris Leibman

My valuable question and comment will wait for another occasion. The Chair recognizes the next moderator, Professor Nino Scalia, and we won't take a break until later, so I'd appreciate it if you all stand by. Nino, will you take over?

II. THE CONTINUING TENSIONS BETWEEN SECRECY AND DISCLOSURE

Moderator: Professor Antonin Scalia
Intelligence Consultant, Standing Committee on Law and National Security, ABA;
Former Assistant Attorney General, Office of Legal Counsel

In the area of intelligence, as in a lot of other areas, the principal role of the law, its most important role perhaps, is to balance competing interests, each of which is desirable in itself. Here, the interests in question are, broadly speaking, national security on the one hand and personal liberty on the other. Ultimately, of course, there is no real conflict between those two goals since the final defense of our personal liberties is a secure, democratic, and constitutional government, and since the government that widely disregards personal liberties is not a government we want to be secure. There is a time of conflict between the measures that tend to promote national security and the measures that tend to promote personal liberty. And that conflict is fundamentally the subject of this whole conference.

The topic of our panel this afternoon is an element that has some ironic aspects to it in that it appears on both sides of the scale in this balancing of national security and personal liberty. This is the element of confidentiality. In its aspect of personal privacy, that element is a central part of what we consider personal liberty. And in its aspect of official secrecy, it is a central part of national security as well. That first aspect, personal privacy, will form a large part of our discussions tomorrow when we come to consider the proposed FBI and foreign intelligence charters. The second aspect, official secrecy, is what we want to talk about this afternoon, and we've divided that discussion into four parts. First, the Freedom of Information Act. Secondly, the Graymail problem. Thirdly, proposals for anti-disclosure legislation. And finally, a discussion of the media and intelligence secrets.

The format which we hope to follow is to allot approximately forty-five minutes for each of these four topics. We'll take a break after the first two; about twenty minutes or so for presentations by the panelists, and twenty-five minutes or so for discussion from the floor and among the panelists after each of the presentations.

The first presentation concerning the Freedom of Information Act and intelligence secrets will be divided into two parts, the first giving a general overview of the problem within the Federal Bureau of Investigation, in particular, and the second part looking with greater particularity at specific litigation. Our first presenter will be Mr. John Mintz. John is a graduate of Maryville College, the University of Chicago Law School. He's been in the FBI for about twenty years, as an agent for part of that time. Most recently, since 1973, as General Counsel of the Bureau. John,

A. FOIA AND INTELLIGENCE SECRETS

Mr. John A. Mintz
General Counsel
Federal Bureau of Investigation

Thank you very much, Nino. It's a pleasure to be here. I recognize some old friends and recognize in the discussion some old familiar topics that we've dealt with many times.

I would like to share with you some thoughts concerning the Freedom of Information Act and the protection of information affecting our national self-interest. My vantage is that of a general counsel called upon to address a wide range of issues in the several aspects of law that govern the work of the FBI. Among those matters are important and complex foreign counterintelligence and foreign intelligence concerns which arise form the work of the Intelligence Division of the FBI and are brought to my attention from time to time. Needless to say, policy decisions of the FBI in such matters require the final approval of Director Webster and support in terms of legal advice and authoritative legal determinations are available from the Attorney General and others in the Department of Justice.

With me today is Lynne Zusman, who has provided us counsel and representation as a member of the Civil Division's special staff for litigation of Freedom of Information lawsuits. Her expertise in those cases and my knowledge of her insight into the Freedom of Information Act generally led me to recommend that she address you from her perspective.

It is important to have a wide range of views when discussing the Freedom of Information Act and intelligence secrets because one's individual experience, or lack of experience, in such esoteric endeavors as combatting espionage or engaging in development of positive foreign intelligence information may readily lead to premature judgments as to necessity, value, and even the propriety of intelligence work. It is just as productive of error in such measurements for those having access to secrets to decline objective analysis as it is for those denied access to secrets to assume that the denial is ill-founded at best or that it represents sinister concealment. The history of our government indicates the desire of Americans for openness, for public debate on issues, and for participation in major national decisions whether the issue is taxation (without representation) or declaration of war. The Freedom of Information Act is consistent with this national heritage. It was characterized by the Supreme Court as follows: "The basic purpose of FOIA is to insure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."

However, the Freedom of Information Act presents what one court has called an "inherent conflict between a desire to promote disclosure of documents revealing how public business is conducted and a need to conduct the nation's foreign intelligence activities under cover." The strong policy of openness must be adapted to allow for secrecy in the interest of national survival. In an analogous situation, it was said that "A ranking of the various privileges recognized in our courts would be a delicate undertaking at best, but it is quite clear that the privilege to protect state secrets must head the list. The state secrets privilege is absolute."

Recent publicity has indicated that the perceived need for confidentiality in discharging a public trust is not limited to Executive Branch activities. A former

Supreme Court Justice is reported to have said he "feels there should be 'more openness' on the court's work." To the contrary, the President of the American Bar Association was quoted as saying, "Revelations, even long after a decision is made, 'will stultify the willingness of justices to be frank and open and to get to the bottom of an issue. They'll always have lurking in the bottom of their minds the thought that things could become public. It is a very chilling, chilling effect.' "

The Congress dealt with the problem of the competing interests providing an exception to the Freedom of Information Act. Title 5 U.S.C. Section 552(b)(1) provides: "This section does not apply to matters that are--(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order."

In interpreting the statutory exception, the courts generally have indicated full recognition of the substantive importance of the two national concerns and have avoided results harmful to the national self-interest. The generally favorable decisions should not be taken as an indication of judicial bias toward the government. Rather, the results indicate that the courts have responded properly with impartiality and fairness. They have found that the concern of the Congress to provide special protection in the Freedom of Informaton Act where needed for intelligence and related information has been joined by good judgment and self-restraint on the part of the intelligence agencies in marking for classification protection only that information requiring nondisclosure. Therefore, accommodation of the two policies has been successful.

The courts have maintained the notion that the principal responsibility for substantive decisions regarding the need for secrecy belongs to those in the intelligence business. Perhaps it is as one court expressed it: "The national security issue is necessarily speculative. Intelligence deals with possibilities. Our knowledge of the attitudes of and information held by opponents is uncertain. Determination of what is and what is not appropriately protected in the interests of national security involves an analysis where intuition must often control in the absence of hard evidence. This intuition develops from experience quite unlike that of most judges."

Currently, the classification standards and procedures required in Executive Order 12065 (issued in 1978) control the protection of intelligence information for purposes of the Freedom of Information Act exception. The order specifies the nature of information which may be classified by listing seven categories: (1) military plans, weapons, or operations; (2) foreign government information; (3) intelligence activities, sources, methods; (4) foreign relations or foreign activities of U.S.; (5) scientific, technological, or economic matters relating to the national security; (6) U.S. Government programs for safeguarding nuclear materials or facilities; (7) other categories of information which are related to national security and which require protection against unauthorized disclosure as determined by the President, a person designated by the President, or an agency head."

The test whether such information may be classified under the order is whether "unauthorized disclosure reasonably could be expected to cause at least identifiable damage to the national security." If disclosure reasonably could be expected to cause serious damage, the material may be classified "Secret." "Top Secret" may be used to protect information where disclosure reasonably could be expected to cause exceptionally grave damage to the national security.

Such language could provide the basis for endless debate as to what would constitute damage to the national security and whether national security might even be enhanced by public disclosure and discussion. Fortunately, the courts have not allowed themselves to become arbiters in political quarrels in disposing of Freedom of Information Act intelligence exemption cases. As stated by one court, where the information was properly classified, the statutory exemption protecting the information from disclosure must be applied ". . . despite the Court's impression that 'identifiable harm' of a different and more serious nature may later befall the national interest because the document has been withheld and despite possible disagreement as to identifiable harm threatened to the national interest by disclosure."

Another court noted that where there is no evidence classification decisions were made "corruptly, maliciously, or thoughtlessly" there would be no

justification for the court to substitute its own judgment for the informed judgment of an outside expert. The delicate balance between independent judgment by the court and court reliance upon the integrity and ability of intelligence officers who classify the information was summarized by the judge who wrote: "While Section 552(a)(4)(b) expressly authorizes an in camera inspection of documents and the court's determination of the matter de novo, the legislative history reflects Congress' expectation that the courts will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record. . . . The question of the court's proper role has been addressed in several cases of this sort, and it has been recognized that courts are often poorly equipped to evaluate intelligence information. Because in camera inspection is not mandated, the court should give the agency an opportunity to demonstrate by affidavit or otherwise that the documents are clearly exempt from disclosure."

The last phrase is the key to maintenance of a reasonable balance between the Freedom of Information Act plaintiff and his U.S. government adversary. The burden of proof is on the government agency resisting disclosure to establish that the classification was procedurally correct and in compliance with the Executive Order. It is through requirements of descriptions of withheld documents and detailed affidavits from agency representatives justifying the classifications that the courts control compliance with the Freedom of Information Act. This aspect of the litigation has presented us with perhaps the most difficult problem of all. Providing an adequate description of the document without compromising the substance of the information which must remain undisclosed may well be a nearly impossible task. We have not always succeeded and some courts have required more detailed statements, which have been provided.

Overall, it is my judgment that the efforts being made to accomplish the policy of openness in government while at the same time providing necessary protection to classified information are succeeding. While it is difficult to predict the future course of the development of the law in this complex area, recent events affecting the present and future security of our country reinforce the notion that secrecy is an essential element in the arsenal of defense. Thank you very much.

Nino Scalia

Thank you, John. Now for a few more remarks on the same subject of the Freedom of Information Act, Lynne Zusman. Lynne is a graduate of Bryn Mawr College and Yale Law School. She has been Chief of the Information and Privacy Section of the Civil Division in the Justice Department and Special Litigation Counsel for Freedom of Information Act and Privacy Act cases. She is now in the U.S. Attorney's Office in the District of Columbia. Lynne.

Mrs. Lynne K. Zusman

Special Litigation Counsel, Civil Division
Department of Justice

The view I'd like to share with you now is to really flesh out the day-to-day litigation consequences of the kind of tension that John and the other speakers today have been discussing with you. It is clear that in our society we have, among other major values, staked out two values as being of primary significance.

In our society today, openness in government, the ability to share with the citizenry what is going on behind government doors, is considered of paramount importance. There was widespread support for the Freedom of Information Act when it was originally enacted, and there was widespread support for its amendments at the end of 1974. It is true that the lobbying efforts on behalf of the statute derived mainly from the media and from various historical groups. On the other hand, it is clear that, as the problems of governing this country have been exposed over the last four or five or six years, that the public has more and more felt it is essential to have access to government records. The volume of Freedom of Information Act requests, and the volume of litigations as a result of unsatisfied requests, has not yet begun to diminish. I would anticipate that the opening up of government functioning through the Freedom of Information Act will continue to be a major trend for some time.

At the same time, of course, we are well aware of the need for protecting national security information. Indeed, much of the presentation that we heard

today has been in the area of the significance of this need. However, one of the results of the Freedom of Information Act is that federal district court judges around the country are faced, at any particular moment in time, with approximately twelve to thirteen hundred Freedom of Information Act lawsuits in which a considerable number involve classified information. I don't have any statistics on exactly what proportion it is, but my experience in litigating these cases over the last 3½ years has been that it is a significant amount. We have cases in which there are one or two classified documents. We have cases in which there are 8,000 classified documents.

The courts, I have appeared before approximately twenty judges in courts around the country as well as in the District of Columbia, and it seems quite clear to me that the courts are quite troubled with the extent of their responsibility under the statute. Because of the provision in the Freedom of Information Act that the federal district court judge has a responsibility to conduct a review of information that is being withheld by the government agency on a de novo review standard of evaluation. This means that the judge must himself or herself decide if the government agency has properly invoked one of the nine exemptions under the statute.

Superimposed on this general standard has been the additional recognition that where the B-1 exemption is invoked, which is the exemption that protects classified information, the courts shall give substantial weight to agency affidavits. In other words, they shall appreciate and give deference to the expertise of the Executive Branch in this area. However, it is also clear that in the last year and a half there have been judicial decisions pointing in the direction of some more restrictive view on the part of federal judges as to what the agency may present in court as evidence of properly classified material.

When I started litigating these cases several years ago, a case involving the B-1 exemption was generally thought to be one of the easiest cases to handle. Because a well-articulated affidavit from a government official that the documents had been reviewed carefully, that they contained information which seemed to fit within the categories of information that could be substantively

classified, and that indeed all of the procedural requirements of classification had been followed--this seemed to be enough to result in a favorable decision for the government by the court. However, we can no longer say that the B-1 case is the easiest case to defend. As a matter of fact, in the District of Columbia Circuit, I would say that any informed litigator would have to realize that a B-1 case is the most difficult to defend because of the confusion in the courts today.

At the end of August 1978, the D.C. Circuit Court of Appeals rendered a decision in the case called Rae v. Turner, in which the court simply said that the agency had not provided enough information to inform the court so that it could make a de novo determination of the classified material. The agency, in essence, was required to provide more detailed description in its submissions to the court in its building of a public record in its presentation through the affidavit form.

After the Rae decision, about six months later there was a decision in a Scientology case versus NSA in which the same Circuit Court of Appeals found that the affidavit of an NSA official, which had been filed several years before, was too vague in its statements, too conclusory and that more detailed description would have to be presented by the government before the district court judge could properly make a decision as to whether the government's invocation of the exemption was correct.

There was a third case shortly thereafter which involved affidavits from the FBI and in which the court again said there were problems in the way in which the government had presented its proof of the proper classification of documents. In that particular case the problem seemed to be that the government agency had provided a number of affidavits which had to be read in conjunction with each other. The attorney that argued the case felt quite clearly when he himself had difficulty in referring to the material in any particular document, that it was this difficulty on a very practical level of that judges having to put together information from six or seven affidavits going to each of the documents which had been withheld, which in fact caused the result of the Court of Appeals once more sending a case back to the district court and indicating that there would have to be a better and more precise affidavit supplied by the agency.

I don't want to picture a situation in which district court judges are about to wholesale release classified information. That certainly is not the case. On the other hand, it's abundantly clear that there has been a change from a former position that classified information was generally considered sacrosanct to a position by which federal judges feel that it is their responsibility when they have a Freedom of Information Act case to scrutinize the proper classification of that information. Indeed, in more recent months there have been two district court opinions, again in the District of Columbia, in which Judge Gerhard Gesell has ordered the release of information which, at the time he viewed the information in camera, was classified by the agency. In one of those cases, the government will probably not be seeking appeal.

In the other case there is a strong likelihood that the government will be asking the Solicitor General for authorization to appeal the decision which appears to be a case in which a district court judge has told an Executive Branch agency that its decision to maintain information as classified was indeed incorrect. That case is Holy Spirit Unification Association v. Central Intelligence Agency. And those of you who like to follow the chronology of litigation may be watching that case to see whether the government ultimately will go forward with it and also what arguments the government will be making.

Over the years there has been a suggestion in some quarters that the B-1 exemption in the statute does contain lurking a separation of powers constitutional issue, and the government has never argued this decision in court. It is a question which will have to be resolved if Holy Spirit is, in fact, briefed.

The Executive Order on classification, which became effective on December 1 of 1978, Executive Order 12065, contains in it a Section 3-303, entitled "Declassification Policy" which includes in it a balancing test indicating that a top official of an agency has the authority to make the determination that information which has already been properly classified in order to protect the national security may indeed be declassified and released to the public if in the judgment of that top agency official the need for openness in government and the public interest outweighs the need to protect the national security. This is an innovation. It is an Executive Order that was enacted after consultation with the

intelligence community extensively and also with the public interest sector and others. It was concluded that it was important to recognize and give authority to top agency officials to recognize that there may be a need for openness in government which outweighs even the need for national security.

I expect that over the coming years there will be litigation as to who is to perform the balancing test, whether any Freedom of Information Act requester can write into the agency and say that information which is classified needs to be reviewed and considered in light of the need for openness. And if the agency refuses to perform the balancing test under 3-303 and that disappointed requester then goes to the courts, then the issue will be whether a member of the public can require an executive agency to make this kind of review.

We have a couple in the District of Columbia that indicate that at least some judges think that it is appropriate and that they have the jurisdiction to do the balancing themselves. The District of Columbia has tended to be the lead circuit in FOIA litigation because of the large volume that is filed here, because the statute permits the filing of litigation here, and because of the generally liberal reputation of the circuit.

But, so you won't think that I am addressing a problem which is limited to the federal courts here in D.C., I'd like to bring to your attention a case called Corliss Lamont v. Justice, which is pending now in the Southern District of New York and in which the distinguished jurist Judge Edward Weinfeld ruled last July that, despite the fact that a magistrate reporting to him had carefully reviewed a very large amount of classified material and had been fully briefed on it, Judge Weinfeld felt, and wrote a lengthy opinion to the effect, that in conducting review under the Freedom of Information Act, a judge in performing de novo responsibility usually will have to look at the documents and make a determination himself as to whether the B-1 exemption has been invoked properly. He has ordered the production of those documents in camera, and we do not yet have a decision from him as to the substance.

In camera proceedings are one aspect of FOIA litigation which involve also a serious departure from overall adversarial process in the judicial system and in

which FOIA has again provided an innovative kind of development. Through the case law, and in reviewing the legislative history of Congress, it has become clear that an alternative for a court is conducting in camera review of the documents that are withheld. And, indeed, more than one judge has conducted what has been referred to as an ex parte, one-sided in camera proceeding in which, while reviewing the documents, the judge has determined that he needed the assistance or the explanation of a witness from the government agency involved and has requested and held a proceeding in his chambers without the benefit of participation of adversary counsel.

A number of the more prominent adversary lawyers, particularly Mark Lynch, who was connected with Mr. Halperin's National Security Center, and Jack Novick who was National Staff Counsel of the ACLU, also Mr. Ector, who has litigated here extensively, have all tried repeatedly, and so far unsuccessfully, to persuade courts that it is absolutely essential, in order for the rights of the plaintiff to be maintained, for the plaintiff's counsel to be permitted to participate under various protective orders in any kind of in camera proceeding. So far, as I've indicated, these attempts have been unsuccessful. I personally feel, being as intimately involved in the litigation as I have been, that we are coming very close to a time in which a federal judge will feel that this is indeed necessary.

The distortion of the adversarial process which already obtains from the fact that the subject of the litigation is totally within the control and knowledge of one party, the defendant government agency, and the plaintiff does not have access to it, is already a distortion of the normal judicial process. Then layered on top of that, if you have any kind of in camera examination, whether by the judge by himself or whether with participation of a government expert, which is indeed one step further down the road, the process becomes further away from the normal traditional American adversarial process. There has been some case law in which judges have said that having a judge review the documents is a substitution for an adversary having access to the material. But I think clearly this is a somewhat novel approach to the problem, and I do feel that in terms of trends over time, this is an area that is going to be hotly litigated. The issue of evidentiary hearings involving classified information will take place at some point, probably in the not too distant future.

I'd like to turn attention now to the process of litigation and the fact that there are claims that information which damages the national security does, in fact, inevitably expose the public just in the course of the actual litigation process. John referred to the preparation of an affidavit in which courts are dissatisfied with the amount of description of withheld information and require before ruling on the merits additional information.

I'm presently handling a case, which the ACLU participants in the audience may or may not be aware of, and without commenting in any way that I think would be a problem, I will simply mention what is on the public record, which is that a government agency has been required four separate times to produce additional affidavits for the court concerning classified information. The last affidavit that we filed in four installments numbers 1,700 pages. Plaintiff's counsel has pending a motion for sanctions on the government agency claiming that the FBI has still not complied with outstanding judge and magistrate orders concerning the amount of detail that should be required in order to comport with the requirements of the existing case law.

Our position, of course, is that we have done the very best that we can. We can go in camera at this point, we can provide classified affidavits at this point, if Judge Parker feels it's necessary. But we have filed an affidavit from an intelligence division agent indicating that, in his view of thirty-one years of foreign counterintelligence experience, he himself reviewed the information in the affidavits, and we had higher ranking intelligence officials review the affidavits too and the document, and conclude that no more information could be provided publicly without damaging national security.

It has been said, and since I'm not an intelligence expert myself I have no way really of evaluating the validity of this kind of claim, but I have spent enough time in being briefed on issues in specific cases where it seems to me that this claim does, at least, have some color which is that in producing additional description of withheld classified information, inevitably, if there is enough pressure to give information, something of a descriptive nature comes out that should not have been released. Indeed, I've had several cases in which there

has been a change of classification personnel over a period of time, and because classification is, of necessity, a very subjective kind of evaluation, I have had individuals with the same number of years experience and similar background say, "That never should have been released before," or what is of more interest, I think, to the problems we're facing here now, that information should not have been put in the affidavit. That should have been protected.

In addition, the courts do feel that discovery is appropriate in these cases just as in an ordinary civil law suit on another subject matter, and over the last couple of years there has been an increasing amount of discovery through the taking of oral depositions in which a government official had asked a series of questions concerning the application of the exemption to information that is being withheld. Clearly, where we're talking about classified information that has been withheld, the vulnerability of the government from exposing, inadvertently, information from this kind of a procedure is very great. And yet in my experience, the courts are not particularly sympathetic to this kind of an anxiety on the government's part.

Thirdly, I would just like to focus attention on the understanding of the substantive release problem which I'm sure is familiar to most of you in the audience. And that is basically the acceptance by the government of the concept that the whole is greater than the sum of its parts. In the area of intelligence information and in the area of law enforcement information, those individuals who are highly motivated, whether they be foreign intelligence analysts or whether they be U.S. citizens who have affiliations with large crime activities, there is enough of an incentive that through obtaining information that has been released over time, every additional incremental bit of information adds to an essence of putting together of a jigsaw puzzle. Therefore, it is simply impossible for the U.S. government now, under the Freedom of Information Act, to control in any meaningful way the amount of information that is flowing out to those individuals who want to put that information together.

For instance, you may have a request to the State Department, you may have a request to the CIA, you may have a request to the FBI, to NSA, and so on,

over a period of time involving a whole variety of subject matters. People who have access to the information that is released can then put together that information and come up with a great deal more information than the FOIA analysts, GS-5 or 6, who made the decision as to a particular document at one of those agencies at a particular moment in time, would have any way of being able to evaluate. There have been public statements made on this subject, primarily by Director Webster in some of his addressees nationally. It is unclear yet whether this kind of concern is going to be taken seriously by members of Congress.

I will briefly point out three other developments which I think should be of interest to this audience. One is the back-and-forth interplay of the Freedom of Information Act in information that is obtained through other sources of discovery. I saw it quite clearly in a case that is pending in California in which a large number of "Weather Underground" files are involved. The plaintiffs in the FOIA action had been indicted on State of California criminal conspiracy charges. Discovery was going on in the criminal proceeding. Through information obtained in the state criminal proceeding, the plaintiffs modified their FOIA requests through their counsel because of a large administrative burden on the Bureau in facing the prospect of producing an affadavit on roughly 250,000 pages of documents. The FBI was motivated to try and negotiate with opposing counsel to see if there could be some withdrawal of that request. In exchange, the FBI offered to, in essence, amend the FOIA request and give access to files that were not originally included in it. In this back-and-forth discussion, one of the requests that plaintiff's counsel made was for the security files of a source which had been identified in the criminal discovery document releases as such and such a source, number such and such, and, in essence, an FOIA request was being made simply for information from that source who, it had been revealed, had been an undercover agent for some period of time.

It seems to me that this kind of development was certainly not what was in the minds of Congress, and, indeed, of the media representatives and the historians and the researchers, and those members of the public who were concerned about secret agency law and what was going on behind the closed

doors of regulatory agencies, when the statute was enacted. However, the courts have been very reluctant to interpret the statute as anything other than a broad disclosure statute. The issue of discovery and usage of the act for discovery purposes as a perversion of the original intent of Congress has not been successful. The courts, even the Supreme Court, has given lip service to the fact the statute should not be used for discovery purposes. But there has never been a ruling denying withheld information to a plaintiff on the basis of the fact that it's clear from the record that the plaintiff wants the information for discovery either in litigation against the government or litigation against another party.

Secondly, there is a requirement in the statute that all reasonably segregable information be released. In other words, an exemption cannot be claimed for a number of sentences or a number of paragraphs if, in fact, somebody reviewing the document can segregate out information which makes sense and is coherent and does not need to be withheld under an exemption. Up until very recently, the government was not concerned about this requirement being applied to classified information. It has now become a matter of some concern. In cases that I know of, there has been a position taken that the paragraph-by-paragraph marking for classification, which is the policy generally followed throughout the government today, that is in reviewing documents for proper classification, that the government agency does not have to go to any lower denominator than a paragraph in its review. If there is one sentence in the paragraph, the release of which would harm the national security, the whole paragraph can be classified. That is the uniform policy today. Through FOIA litigation, that policy is now being questioned because the plaintiff's counsel is contending that the reasonably segregable requirement applies to classified information as well as nonclassified information, and that the government simply cannot stand on its paragraph-by-paragraph classification marking position.

Finally, there has been, and I think will continue to be, a flow back and forth from case decisions on the B-1 exemption under the Freedom of Information Act and case law that has developed concerning the state secrets privilege. Again, the previous case law over the years has been to the effect that the state secrets privilege is absolute. It has been a privilege which the government has invoked

very successfully. A discussion in the Houkin vs. Helms decision in the D.C. Circuit last year makes it clear that the Court of Appeals, in reaching a favorable decision for the government concerning the state secrets privilege, has looked to the recent FOIA case law for guidance. In this particular case the outcome was in the government's favor. The next time that may not be so. The standards under the FOIA B-1 are much broader and much more liberal to the nongovernment party. I do believe that over time there is going to be an erosion of the state secrets privilege as it becomes apparent that a plaintiff that wants information and cannot get it in a particular litigation can turn around and file a FOIA request and seek it through the FOIA process. That's what I have for you right now. I'll be glad ot answer questions later.

Nino Scalia

Thank you, Lynne. Thank you, John. Questions from the floor.

Q. (Inaudible)

Mrs. Zusman: When you say foreign government information exemption, there is no specific exemption in the statute which is designated for foreign governments. The way the information would be sought to be protected would be through this grander, broader B-1 exemption protecting classified information. So it would depend on information having been classified properly under the Executive Order. The new Executive Order 12065, I believe, does contain in it language to the effect that there is a presumption that information from a foreign government and so designated will be considered to be properly classified. But the way the U.S. agency would protect it would be by invoking the B-1 exemption.

Q. (Inaudible)

Mrs. Zusman: The working group on the executive order did involve a litigator, who happened to be me, in the process of discussing the likely outcome of inclusion in the balancing test. The intelligence community's position has been

that, at the time the language was drafted by the intelligence community, that it was understood by all involved in the process. That balancing test being a major exception to the overall order would only be relied on and used in very rare circumstances and Dr. Brzezinski, November 30, 1978, wrote a letter to that effect to the then existing ICRC Interagency Classification Review Committee, in essence, explaining what the position was when the information was drafted. And again, I don't want you to misunderstand my remarks; there has not been in the last twelve months an inundation in the courts of cases on this issue. It is beginning to be raised and I do foresee that over the next five years, for instance, it will be a very significant issue for the intelligence community.

Q. (Inaudible)

Mrs. Zusman: I don't know if it was deliberate on the part of the drafters. It has been discussed in the intelligence community since then. It is clear that the statute--one of the pecularities which I didn't happen to mention and I'm sure you all know, is that all members of the public are regarded on an equal footing under the statute and that the government agency is not supposed to be concerned with who the requester is, what the requester is, what the purpose of releasing the information is and so forth and so on.

I do believe that it is important that Congress, sometime in the near year or sooner than then, if possible, at any rate, that there be some concerned congressional review of the Freedom of Information Act. There have been a variety of legislative proposals being worked on in various parts of the Executive Branch. What ultimately will go to the Hill and when it will go to the Hill remains, at this point in time, a big question mark.

But it seems to me that in terms of responsibility for some of the problems that have developed under the statute, which perhaps no one could have foreseen, who knows; nevertheless, the time has come for Congress to play an important responsible role and undertake some kind of serious scrutiny of those issues which government agencies feel really are significant. And it would seem that the whole issue of national security information should receive some kind of serious attention.

Professor Scalia: The problem is not an unreal one. A story that I often tell is, when I was at the Justice Department, concern was expressed by NASA that it was receiving a regular series of requests from AMTORG, the Soviet trading company. And they asked the Justice Department was there anything they could do about it under the Freedom of Information Act and, of course, the answer was "no." The Act doesn't make any distinction with respect to citizens or aliens or foreign companies, so it's not an unreal problem but the Act was quite clearly drawn that way and intentionally so. I don't think it was an oversight.

Q. As I understand it, one of the basic purposes of the 1974 amendments to FOIA was to overcome. I'm interested in your view, Lynne's also, when you get a clear-cut case of a court saying under the law we substitute our judgment . . .

Mr. Mintz: I was going to ask the same question. Those amendments were vetoes by President Ford and his veto message relied largely upon--one of the major elements in it was the asserted unconstitutionality of the provision for de novo judicial review of classification decisions. The question being asked now is whether the Administration has given any indication of whether it still maintains that position.

A. I cannot answer the question with regards to the Administration although I do, for my own view of the thing John, suggest I think that there would be a significant constitutional issue drawn or if the judge were to decide to case that way. It seems to me that, my reading of the statute, my reading of the cases, is that it is very clearly not the role of the judge to decide the impact that the information would have upon the national security if it was released. Under the statute, his role is limited to determining whether or not the matters are properly covered by the Executive Order and whether they're properly classified under that Order. If he goes beyond that, he's clearly intruding into an area that's reserved for the Executive.

Q. Let me follow on this John, as I judge it, and I'll ask you for your views, and they don't want to get into the constitutional rights if they can avoid it so they're given various heavy weights to reject this decision. I'm looking towards

the day when the courts flatly say, "We don't want to agree with the Executives and we're going to release this information."

Mr. Mintz: Well, it has happened once. It happened twice and in one case the information was declassified and in the other case it has not yet been declassified and it's on appeal. So the day is not far in the future, it is upon us.

Q. (Inaudible)

Mrs. Zusman: That is the problem; that is exactly the problem.

Mr. Mintz: I think the cases we've had so far, and I'll defer to Lynne on this, but the cases that I know about so far, are cases where the court has said that the government's affidavit hasn't quite made the case for our claim, they haven't simply disagreed with the need for classification, but simply said that we haven't made the case for the client.

Nino Scalia: May I exert moderator's privilege to ask a question which is indeed suggested by some discussion we were having last night with John Rinelander, whom I don't see in the audience today, but all that the FOIA requires is that the court review the propriety of the classification under the Executive Order. But it doesn't place any restrictions on what the Executive Order says; and one is seriously worried about too much information getting out, one can simply amend the Executive Order, which is not constrained by the Freedom of Information Act. So instead of having the very broad six categories that John Mintz read to you, the Executive Order could be put much more specifically. I mean it might say no files of undercover agents shall be released, period. And there's nothing in the Freedom of Information Act which would restrict that. Now, has any thought been given to that?

Mrs. Zusman: As far as I know, I don't think that approach has been considered. I think the general view has been the recognition of the disclosure thrust of the statute and there has been a real reluctance for the government to

really come out and say that we think there's an area in which a tremendous mistake has been made, and we simply don't think Congress meant X, Y, and Z.

Mr. Warner, you are correct that the amendments passed at the end of 1974 that became effective in 1975, went to two major issues. One was a law enforcement file problem, the other was the Mink decision. The reading of the legislative history has been, and in the debates that went on concerning President Ford's veto and the override of the veto, it's clear from the debates that it was assumed that the courts would not generally intrude into this arena and that substantial weight, to use the buzz words, deference would be given to the judgment of the Executive, generally.

But it also seems, from a careful reading of the legislative history, and from the actual fact of the decision by Congress to overrule the Mink decision, that unless you want to view it as a total futile act, that the members of Congress intended something and it seems as though logically the only thing they could have intended is that if there was such an egregious case of information which appeared to have been improperly classified, either procedurally or substantively, that there would be perhaps some responsibility on a district court judge to do something about it.

Now the case that is the hardest law so far is the Halperin vs. State decision and Morry has his hands up and I imagine in a minute he certainly should be entitled to say something. But that was the case, if you'll recall, where it became clear through the discovery process, through the taking of deposition, that the State Department official who was responsible at the time for the classification of the document used criteria in making the classification decision that did not seem to be the same criteria that were required at that time in the governing Executive Order. And even in that case the Court of Appeals of the D.C. Circuit did not order that that document be declassified and released. It remanded back to the District Court with troubling language about the Near vs. Minnesota test and so forth.

So you've raised what really is the heart of the question of where we are. We would like to think that we don't have a problem but it seems to me that we

really do. You have also indicated in your statement, which I think is the concern, and where the Solicitor General's staff will have to make the ultimate decision. Any case that is appealed will, of course, have very, very significant ramifications for all government agencies.

So if we do go forward at some point in time with the constitutional argument, we would like it to be a very good case on the facts and that's where litigation changes the whole process of government decision-making in an area like intelligence. It's all well and good for us to talk all day about how this is expertise that only the intelligence community has, and we need to recognize that. But you get into a courtroom and other kinds of things happen, and in this case Congress has made some kind of a statement.

Nino Scalia: How can you have, to follow up on the question of amending the Executive Order, how can you have a good case on the facts to assert the unconstitutionality of the courts requiring disclosure of the information when, going into court, the court knows very well that all you have to do, if you really want to keep that information, is by a strike of the pen amend the Executive Order and thereby reclassify it. When the court knows that, and that the only thing that is stopping the President from taking that action is his unwillingness, presumably, to take the public heat. Is there any such thing as a good case?

Mrs. Zusman: It seems to me that what I consider a good case is the kind of case where it is clear that the Executive agency knew what it was doing. And if it had it to do over again, would do exactly the same thing based on its own evaluation of intelligence needs.

What is a bad case, and we can be frank because we're among friends, is that it has been said that there has been a tendency in government agencies to overclassify. I won't say whether that is a correct evaluation or not. But it has happened in Freedom of Information Act cases that a decision is made at a government agency initially to withhold documents that the information needs to be classified. Then, at the administrative appeal level, another official at the agency looks at the documents again and decides that two of the documents, one

sentence or one paragraph from each one, can be declassified because circumstances have changed. Then, six months later, that requester gets a hold of a lawyer and files a lawsuit. The complaint in the lawsuit is filed, more is released, and by the time you get to the agency having to do an affidavit where the resources of the agency are going to be spent on the God-forsaken task that really doesn't do anybody any good, you have another agency official looking at the material again.

So, I would say that while we would like to think that decisions on classification are made in heaven and are always correct, that it does not seem that all officials at government agencies share that perspective. A case that is a bad case, in my view, is a case where we suffer a District Court loss as in these two that I've spoken of. The one I have not mentioned is a case called Stephen-Zaneph vs. FBI and in which the government agency looking at the loss decides, for some reason, that it can live with it. That the particular sentence addressed perhaps was part of a much larger segment and was not the heart of the segment and that officials could differ as to whether it really needed to be classified.

Professor Scalia: You mention somebody, who's in Justice, ought to be allowed to speak.

Mrs. Zusman: No, he's in the justice business, but he's not the Justice Department.

Professor Scalia: Is that the very gentleman that has his hand up?

Mrs. Zusman: That's correct.

Statement: As to what Congress intended, it isn't all that serious because the Senate Judiciary Committee had reported out the amendment requiring that the courts could only decide whether a classification was reasonable or not, and the Senate, after extended debate, rejected that decision and clearly decided this was no longer true. The President vetoed the bill because he said the bill was unconstitutional because it provides for de novo review. As soon as the bill

passed, the Justice Department turned around and said "It doesn't apply to de novo review. It only provides circumstances reasonable." clearly is not what Congress intended.

To answer the question of constitutionality, the Supreme Court has spoken on that subject, the decision the Justice Department would like to pretend did not exist. It said explicitly in the Neiuk case that the Congress should require the Executive Branch to require a new standard or even to establish its own standard such as the one we said whatever the Executive privilege may limit. If Congress can require the Executive Branch to follow a standard that Congress enacts then it seems to be clear that it can say to the Court you simply should apply the standards of the Executive Branch. Now issuing a new Executive Order, that, I think, clearly encourages Congress to take up the invitation to enact legislative standard of classification. The Executive Branch which can get away from the standards is very minimal. It simply requires proof that to release this document you reasonably give. . . identifiable damage and comes up with a more liberal standard. Then I think Congress is going to enact legislation that imposes stricter standards. . .

Antonin Scalia:

We could go on at greater length on the Freedom of Information Act but time flies.

Our next speaker is Phil Lacovara. Phil is a graduate of Georgetown University College and Columbia Law School. He has been counsel to the Watergate Special Prosecutor and Deputy Solicitor General. He's currently a private practitioner here in Washington.

B. LITIGATION AND INTELLIGENCE SECRETS

Mr. Philip A. Lacovara
Former Counsel to the Watergate
Special Prosecutor and Deputy
Solicitor General of the
United States

Thank you, Nino. After that spirited debate we just heard about Freedom of Information Act, I think that my remarks at least will come as an anticlimax, but perhaps there will be some further interest in this subject.

My assigned topic is the graymail problem which is, in substance, the flip side of the problem that John Mintz and Lynne Zusman were just speaking about. In that situation, the FOIA context, a private citizen makes an application to obtain secret information from the government--takes the initiative. In the graymail problem, it's the government that wants to take the initiative in investigating and perhaps prosecuting a federal crime. A graymail problem arises when the intelligence agency and the Department of Justice consider what the impact on that proposed investigation and prosecution will be from the involvement of classified information. In short, the issue that has to be confronted is, will the public interest in proceeding with the attempt to uncover and to deal with the federal crime outweigh the danger to the national interest that would result from the disclosure of national security information.

The term "graymail" as many of you know, comes about by reason of a slight shift on the concept of blackmail. The concept here is that the person under investigation, or at the later stage the person under indictment, may take a position for tactical reasons in demanding information or threatening to disclose information that would involve a danger to the national security interest in order ostensibly to benefit his role in the trial, the defense of his case, but in actuality with the knowledge that the government will be put to an irreducible dilemma of either dismissing the prosecution or disclosing classified information. For that reason, the leverage that a person with a claim to classified information may assert is called graymail.

The problem arises at two distinct stages in the prosecutive process. It comes up first, of course, at the investigative stage where someone in the government has to make the decision whether it is worthwhile and feasible to proceed with an inquiry into allegations. The Judicial Code normally requires, rather explicitly, that any time an agency is aware of allegations of misconduct by its own employees, at least, it must report that information expeditiously to the Attorney General so that the Department of Justice can exercise its discretion whether to investigate and prosecute. That statute is 28 U.S. Code, Section 535(b).

Not long ago, however, it emerged that 25 years ago, in 1954, the Central Intelligence Agency and the Department of Justice had entered into an agreement under which the Department of Justice ceded away or delegated that responsibility and advised the Agency that if the Agency's view was that it would be frustrated if the Justice Department were to proceed with an investigation because the information that would be necessarily disclosed in the course of a resulting prosecution would be impermissibly grave, the Agency need not even bother to report to the Justice Department that allegations of criminal misconduct involving federal officials were within its ken. That agreement has now been substantially modified, and indeed I think it's fair to say turned around, so that under the 1978 protocol between the Agency and the Department of Justice, the Agency has the obligation of making a quick cut at what's involved in the allegations; and only if it concludes that there is no reasonable possibility that the crime has been committed may it bury the inquiry without reporting it to the Attorney General. Otherwise, according to the understanding, the Central Intelligence Agency is to report the allegations to the Department of Justice and is to provide its own assessment of what the significant national security information involved in the investigation is.

At least according to the formal arrangement, it is the Department of Justice acting through the Attorney General and the Criminal Division that will decide whether to proceed with the investigation applying normal prosecutive discretion criteria, and it is also guaranteed as far as anyone at this point can determine that the officers of the Department of Justice will be given all access

to classified information that they may need to make the determination whether the prosecution can go forward.

All of that, of course, sounds very nice and appears to deal with the threshhold problem of graymail. But there is the continuing tension between the intelligence community and the prosecutors over how to weigh the respective benefits of protecting classified information on the one hand and prosecuting federal crimes on the other. Mere access to the information doesn't help resolve the balance. There have been instances, including relatively recent instances, in which the apparent concern about the necessary disclosure of secret information has led to the aborting of what seemed otherwise to be substantial criminal prosecutions. The recent plea bargain that was accepted by the Department of Justice in negotiations with former CIA Director, former Ambassador to Iran, Richard Helms, was expressly justified by the Justice Department as necessary to avoid what were thought to be a tremendous impact on national security if the allegations that Director Helms had lied in congressional testimony had been brought forth to trial. There have been other cases in which the concern was weighed on the other side, and the Department of Justice has decided to press forward. In some of the cases that are still in court, I think it's fair to say that decisions are being made on a day-to-day basis and we have no guarantee which way the balance will ultimately be struck.

The trial evidence problem can manifest itself in any one of several ways. Most obviously in an espionage prosecution, the very elements of the crime that have to be proven may involve the disclosure of classified information not only a reiteration of the evidence, the information that the defendants illegally purloined according to the indictment, which evidence would have to be placed on the public record according to current proceedings, but the effort to prove the other elements of the offense. An intent to injure the United States, or likely grave damage to the interests of the United States, may also involve expanding the injury that the espionage itself already inflicted. In addition, the attempt to proceed with the espionage trial may confirm the importance of the information and thus provide more benefit to foreign intelligence agencies than the underlying act of espionage itself.

What to do about that problem--the problem of how to prosecute espionage in light of these inherent difficulties, is a subject that Tony Lapham, I think will deal with because it concerns the substantive elements of the restricted disclosure statutes. It's beyond the scope of my presentation this afternoon.

More significantly, in a problem of graymail, comes the problem of demands by the defense for additional information to be used at the trial. Now the defense demands can come under the Brady Principle, under which the defendant insists that infomration in the government's possession that may bear on the defendant's innocence be presented: That, of course, could include damage assessments that were made within the intelligence agency and that might indicate that an act of disclosure was not as severe as an indictment might allege. Or it might, as in some of the recent instances in which the, I think it's fair to say, the graymail tactic has been effective, it might involve insistence that the defendant be permitted to disclose the context in which his actions took place. And in that circumstance we have, I think, the Helms Case where, from all that one can tell from the outside at least, the explanation for what were allegedly false answers given to congressional investigating committees, was that the answers were necessary to protect intelligence sources and methods and operations that the person being questioned was aware of and that the disclosure of would necessarily compromise.

Beyond the Brady demand there is the demand for other statements by government witnesses under the Jencks Act. As you know, the Jencks Act provides that, after a government witness testifies, the defense is entitled to examine other statements that the witness made on the same subject. And that includes not only oral remarks that have been transcribed, but other memoranda that the defendant may have written on the same subject. There, too, arises the problem of expanding the scope of disclosure of classified information through the litigation process.

The other two mechanisms for defendants' efforts to extract classified information during the criminal process come through the normal modes of pretrial discovery and trial subpoenas. All of these various mechanisms can be

reduced to a single dilemma which has been called the "Disclose or Dismiss Dilemma." And in past years rather than confront this "dilemma" of aborting a criminal prosecution or disclosing classified information, a number of cases have not been brought that would otherwise have warranted federal criminal prosecution. In still other cases where there was an effort made to go forward with the prosecution, the result of these demands has been to force the prosecution to abandon the prosecution.

Quite recently, for example, when various efforts by the Department of Justice to obtain protective orders and to establish a mechanism for screening classified information were not accepted by the district judge here in the so-called "ITT perjury case," and where the Court of Appeals refused the government's application for writ of mandamus to direct the trial court to establish some screening procedure, the government ultimately was forced in its judgment to abandon the prosecution.

In another case, however, that is pending in the district court here, the government is attempting to avoid the disclose or dismiss dilemma by using some of the procedures that I would like to mention in a moment. That is the case involving prosecution of several former senior officials of the Federal Bureau of Investigation for allegedly violating civil rights of people in domestic surveillance or domestic security investigations. And there, the trial judge has imposed a number of protective orders and has established certain kinds of pretrial screening procedures that are designed to provide some protection for the defense in building its case, while, at the same time, protecting against the gratuitous disclosure of classified information.

In order to deal more comprehensively with this problem than individual federal judges have been able to address it, the Congress now has before it certain pieces of legislation that would attempt to provide a mechanism for dealing with the disclose or dismiss dilemma by using essentially two approaches: The first is a rather elementary one and it's one that I was involved in when I was in the Special Prosecutors Office. It involves an attempt to apply the rather elementary concept of relevance to avoid the disclose or dismiss dilemma by

insisting that the classified information that a defendant may demand largely for tactical reasons, is not truly relevant to any issue in the case.

By way of illustration, in the so-called Ellsburg Break-In prosecution that was being investigated by the Special Prosecutor's Office, you may recall the White House plumbers broke into the office of the psychiatrist who was treating Dr. Ellsburg. They were acting under official government sponsorship and there was, therefore, a question of 4th Amendment violation. In response to the investigation, various counsel for the suspects in the investigation said that if we proceeded with an indictment, the indictment would nevertheless have to be aborted because the defense would insist on producing information, or forcing the government to produce information, disclosing just how secret the material was to which Dr. Ellsburg had had access; for example, nuclear targeting plans. The purpose of that alleged disclosure, according to defense counsel, was to demonstrate the reasonableness of the actions taken by the people involved in the break-in. Our position was, in part acting out of ignorance as neophytes in the field of national security, that that issue to which the information was purportedly relevant, did not seem to us to be a material issue. In short, it did not seem to be a defense to a prosecution for violating constitutional civil rights to explain what information the secondary subject of a break-in had access to. Our position, therefore, was that we would proceed with an indictment as long as we concluded that the facts otherwise justified it and we would litigate in court the question of the relevance of the demand for secret information. That, in fact, was done; the trial judge, Judge Gesell, later upheld by the Court of Appeals, ruled that the secret information that the defendants had demanded was not indeed relevant to any issue in the case and that the requests for the information were properly denied.

The legislation that is now pending before the intelligence committees of both the House and the Senate would attempt to do essentially the same thing. It would provide a requirement that either the defendant or the government --if the intended disclosure of classified information was within the awareness of either side--either the defense or the prosecution could trigger a pretrial hearing at

which the court could establish a time schedule and a procedure for determining what types of classified information might be relevant to the trial. That would include not only the information that the government might have to offer as part of its case-in-chief, but would also involve screening of evidence that the defense would either demand from the prosecution by way of discovery, or that the defense itself would want to proffer as information within its possession through other channels.

The second basic mechanism, other than this testing for relevance before it becomes necessary actually to disclose the classified information, is an effort to construct some substitutes or alternatives for the disclosure of the raw information. This, in other words, is the second way of avoiding the disclose or dismiss dilemma. If after this preliminary screening has taken place, the court rules that the issue for which the defendant is seeking to offer some information is, in fact, material in the trial, the issue then becomes whether there is some alternative that will sufficiently protect the defendant's interests without requiring the disclosure of the raw information. This, too, is not a wholly novel approach. There are existing precedents dealing with the informer privilege; there are existing precedents in the Freedom of Information Act itself for screening of materials of this sort; there are existing precedents under the Federal Rules of Criminal Procedure for phased or alternative sanctions; and what the legislation would do would be to create a structure in which federal judges confronting cases that involve national security information, a structure in which the judges would apply the same sort of consistent approach to determining first, whether the information is relevant and secondly, whether some alternative to the disclosure of the raw information will be adequate.

The alternatives that would be measured by the judge applying this process would include unclassified summaries of what the information is all about. For example, in the Ellsburg case, if the court had ruled that it was relevant to show what information Mr. Ellsburg had had access to, rather than actually produce the physical documents showing the targets for U.S. nuclear missiles, it might have been just as adequate for the defendants to make their point to the jury for the government to concede the nature of the information. That there are such

plans, which would come as a small surprise, and that the secondary subject of the break-in had had access to them. So an unclassifed summary of the document might be one sanction short of disclosure of the raw material, and short of dismissal of the case in the event the government concluded the disclosure of the raw material could not properly be made.

Other sanctions, of course, could include a concession on the issue; in effect, a directed verdict on one issue. It's like a missing witness instruction. The jury is told to infer from the fact that something hasn't been produced, that if it had been produced, it would have supported the position that the defendant is asserting on that issue. That, too, would be a sanction short of actually dismissing the case outright.

The surprising thing about the legislation that has been offered in both the House and the Senate has been that there has been rather significant support for it from all spectrums of the community interested in this sort of thing. There have been some points of debate, however, and they are ones that I think, although for lack of time we can't get into this afternoon, might usefully be taken up in the workshops tomorrow. Principally, I think one should consider the extent to which it is constitutional or, assuming constitutional, at least appropriate to structure a criminal proceeding in which in camera and to some extent, ex parte, proceedings are a major part of a criminal prosecution. The legislative proposals that are now pending involve in camera and ex parte proceedings as a major feature of the attempt to protect the defendant's trial rights, his substantive rights, while at the same time guarding against unnecessary disclosure of classified information.

I've just enumerated in my notes about a dozen issues that are raised by this overall problem and by the legislation, and I'd like to run through those issues for you just to focus your attention for our colloquy this afternoon and perhaps more extensively for the workshop tomorrow.

First, of course, is the problem serious enough to warrant special legislation. There are relatively few cases, out of the thousands of federal criminal cases

that are brought each year, that involve classified information. And one may pertinently ask, should Congress be concerning itself with establishing a special code of procedures for classified information cases.

A related question, if there ought to be some new procedures established, should they be in a special code dealing with classified information cases, or should they be embraced within the Federal Rules of Evidence generally, or the Federal Rules of Criminal Procedure. There's a policy objection that this country ought not to go even a few feet down the road that some other countries have pursued in establishing special courts or special procedures in national security cases. Those mechanisms have been shown in other countries, at least, to be an instrument of repression, and perhaps it would be well if we stayed far afield from suggesting that national security cases should be handled wholly separately from traditional criminal cases.

Next, if these controversial, and to some extent questionable, procedures are going to be used, should each prosecutor in the field be permitted to trigger them or should there have to be some high level determination by the Attorney General or the Director of Centeral Intelligence that a matter is so serious that special statutory procedures or rules have to be involved. As I mentioned, perhaps the most grave constitutional question, especially in light of the reaction to the DePasqualle case a few months ago permitting certain kinds of pretrial proceedings in criminal cases to be closed to the public, there is the question whether it is constitutional or proper to create new procedures in this field, controversial as it is to begin with, that would allow judges to make determinations in secret when those determinations will have a substantial bearing on guilt or innocence.

A related question is as a practical matter, "Is it going to be feasible to devise alternatives or substitutes that will provide the defendant with at least as much protection as he would obtain through the availability of raw material?" There is great question raised by some in the defense bar that the judge, particularly if the judge is acting ex parte, is in no position to make the determination what is going to be adequate for the defendant's presentation.

Only the defendant and his counsel with access to the raw material can make the determination or indeed even present an argument about how his rights can best be protected in that trial.

The legislation that is pending provides for some reciprocal discovery by the defendant if the government has to be told what secret information the defendant wants to use. There is some resistance to providing anything akin to what I would consider full reciprocal discovery. There are various constitutional issues at stake on this issue as well, and at least, as a matter of fair law enforcement policy, one has to consider what price must be paid by the government for requiring the defendant prior to trial to announce his intention to use certain classified information as part of his defense.

The legislation that has been offered is designed to require the Justice Department to promulgate various standards to be applied in exercising prosecutorial discretion. There seems to be some skepticism about whether or not senior government officials have been improperly let off the hook or have been allowed to plea bargain, not legitimately for concerns about disclosure of classified information, but for wholly collateral reasons. Is it proper for the Congress, given the separation of powers in traditional independence of the prosecutive function, to require that the Justice Department promulgate standards governing the exercise of prosecutorial discretion? If so, should the Justice Department, as the bills currently provide, be required to report immediately to the oversight committees what decisions it makes to forego prosecution and to disclose all of the underlying memoranda on which those decisions are made?

There are other questions as well that will occur to you as well as to me, but these are the major ones that arise when one considers the problem of graymail and when one tries to formulate some structured, comprehensive solution to the problem. Thank you.

Nino Scalia

Thank you, Phil. You've certainly given us a good structure for a discussion of this in the workshop. I have two unpleasant decisions that I've arrived at in trying to keep this show on the road. The first is that I have cancelled your coffee break, but we will be tolerant of people getting up to take coffee. I think, to be sure that all of the speakers have a chance to present their views to us, let's alter the format, because we are running behind time, and have the other two presentations and then questions from the floor to any of the speakers and discussion among the panelists after the two final presentations.

Let me move on to the subject of proposed anti-disclosure legislation. The discussant on this topic is Tony Lapham. Tony is a Yale College graduate and Georgetown Law School, served in the United States Attorney's Office in the District of Columbia, served as an Enforcement Assistant in the Treasury Department, has been in private practice in Washington, has been General Counsel for the CIA from 1976 to 79 and is currently a special employee at the Justice Department working the H-bomb litigation involving publication of how to make your own bomb.

C. ANTI-DISCLOSURE LEGISLATIVE PROPOSALS

Mr. Anthony Lapham
Former General Counsel,
Central Intelligence Agency

Time is short, and I will be rather brief. That will be easy because I will touch upon, among other matters, the problem of leaks. That, of course, is a very straight forward and noncontroversial subject.

I would at the outset, however, Professor, like to make a courageous disclaimer. While it is true that I am at the moment a special employee of the Department of Justice, in no sense am I here in that capacity. My remarks have no official status at all. Indeed, any real resemblance between my views on these issues and those of the Department is purely coincidental. It is also unknown to me whether my views on this subject are currently the views of the CIA. Likewise, I have to say my discussion with various members of Congress and Congressional staffs have left me thinking that my views are not shared

broadly in the Congress either. I will go ahead and state my views anyway. Since I have pretty well spilled them out before in a number of occasions, therefore, it is very hard for me to impair my reputation in this particular regard.

My subject has to do with the disclosure of national security information with the scope and the adequacy of present law in that field and with the need for and proposals for legislative reform. I am not immediately concerned with the methods by which the handling and the exchange of this kind of information is controlled or regulated within the Executive Branch and not immediately concerned with the classification system or with the other array of internal security, controls or administrative controls and I am not either immediately concerned with, at least in CIA's case, the standard form entry on Duty Secrecy Agreement which, of course, is known and loved by my ACLU friends in this audience.

Rather, I am to deal with the existing criminal laws insofar as they apply to the disclosure of national security information. Let me begin with references that may at first blush seem to have relatively little to do with my subject. All of you, I think, know that last year a former Agency employee who had been briefly employed for a period of six or seven months, following his resignation from the Agency, sold to the Soviets a detailed manual describing the characteristics of a satellite reconnaissance system. I think you all also know that the year before, two young men on the West Coast, one a cleared employee of an Agency contractor, sold to the Soviets, among other things, contractual documents pertaining to another satellite system. The former employee involved in the first of those cases and both persons involved in the second including the cleared contractor employee, were tried for espionage and were convicted. You may well ask what bearing do they have on the need for new legislation in this field? I might say that in neither case was there any claim nor in my opinion could there have been any arguable that the conduct involved was protected by the first amendment, even though it is true that espionage does involve speech.

My first answer to my own question is this: The government had to carry trial burdens in those cases that at least in my judgment it ought not to have had

to shoulder. It had to demonstrate in both cases, in the open and in the public because that is the way criminal proceedings are conducted in this country, the true national security significance of the information that had been compromised, thereby magnifying the damage and making the trial itself an occasion for augmenting the damage which had already been done by the defendants. I am not quarreling here with the management of those cases or the conduct of those prosecutions. Those requirements were very real ones given the statutes that exist, and had those requirements not been met, the alternative could have been to dismiss, to abandon those prosecutions, and nobody wanted to see that happen.

The point that I would make, however, is that it seems to me that in dealing in these contexts in espionage settings involving clandestine dealings with foreign agents where there's no public debate of value at all, no contribution even arguably to be made to the public discussion; it ought to be enough to show that classified information is what is involved. It ought not to be required that the importance of that information be discussed and be verified in public criminal proceedings, and that is one reform, which I think could usefully be considered and may indeed be being considered.

The second answer to my own question is one in which I must ask you to allow me to alter the facts just a bit. Suppose that instead of having sold the satellite documents to the Soviets, the defendants in those cases had offered the same documents to a journalist, and they had then been taken and reproduced on the front page of an American newspaper. Let's say in one case with no editorial comment except for some explanation as to what the documents were, some identification of them, and in the other case with some longer editorial comment to the effect that it was necessary and important to the American public to have this information in order to more fully comprehend the SALT debate or the budget debate or for any other reason tied to informed public discussion of some national policy issue. Just for the sake of variety, assume with me for a moment that in one of these cases the documents had been sold to a reporter, whereas, in the other case they had just been surrendered or delivered without any kind of consideration being asked or received.

What I put to you is that nobody in this room, and I think nobody in this government, and I'm not talking about just this Administration because I think this has been true of all Administrations, and nobody can answer with any real confidence, whether on those facts, any crime was committed by anybody. Would a crime have been committed by the persons who gave the documents away to the journalist, and would it make any difference in making that particular judgment whether or not they were sold or given up without any compensation? Would a crime have been committed by the journalist? Would a crime have been committed by the newspaper, and would it matter in that connection, and, if so, how, would it matter and who would decide whether this information had some real utility or value for the purposes of public debate?

There are on all these questions a rather broad spectrum of opinions, some very firmly held opinions but it is my conviction that there are no short answers to any of these questions and why is that so? That is so, for two reasons, in my opinion. The first being there are virtually no judicial precedents to draw upon except for apart from a lot of unsatisfactory overstatements in the New York Times case. The second reason is that the laws we are dealing with here, if indeed there are any laws that apply, are again the espionage laws which exist today in much the same form as they were enacted back in 1917, although there have been occasional and some significant amendments to those laws.

As I have already said, even as these laws are applied to everyday garden-variety kind of espionage cases, the Camphelix cases, the Boise Lee case, they have drawbacks, one being the requirement which exists because of the elements of proof that the significance of the information compromised could be shown and proved in public. As they may be applied in other contexts, as for example in the kinds of cases I gave examples of a moment ago, by offering the facts in these espionage cases, their inadequacies become truly staggering. That is so because, well let me say first before I say why in my opinion that is so, that in the 60 years during which these laws have been on the books, they have not ever, with one exception of which I am aware, have never been applied in these kinds of contexts. The one exception being the Pentagon Papers prosecution in which Ellsberg and Russo were tried under these laws for various activities preparatory

to the publication of the Pentagon Papers, the Vietnam history volumes, in the New York Times and the Washington Post. That case, as you all know, ended without a verdict before it reached that point so that there is no history of use of these statutes in the kind of context in which I am now referring. While, of course, history won't tell you what the law is, it begins after 60 years to look finally as if the laws may not apply, may not be useful, may not be workable in these kinds of context.

The second reason why the laws are so inadequate in these respects has to do with their content and their phrasing. The relevant provisions with which you are dealing when you're talking about other than classic espionage are sections 793(d) and (e) of Title 18 of the Code. In sum, what those two sections do is to make it a crime to communicate information relating to the national defense to persons not entitled to receive it. They also make it a crime to retain such information and refuse to give it up to demand on the part of somebody authorized to ask for it.

Information relating to the national security is incredibly, in these statutes, not a statutorily defined term, although it has been given some rather sweepingly broad judicial interpretations. The temptation, of course, is to read "information" relating to the national defense, the statutory term as equating to classified information. The difficulty with that is that Congress has rejected time and time again in the last 60 years any efforts to put a criminal backing behind the entire classification system so that that interpretation of what these provisions mean is suspect at best.

Second, these statutes tell you nothing at all. There is no definition about what "not entitled to receive it" means. Again, the temptation is to read that term as being equated with the clearance feature of the classification system but for the same reason, namely, that the Congress has looked at proposals over the years to put criminal sanctions behind the classification system and consistently rejected them. That interpretation of that crucial phrase in the statute is also suspect.

Beyond that, the statutes have very vague culpability standards, cast in terms of reason to believe that the information might do damage or harm to the United States and secure an advantage to a foreign government. In some cases, the culpability standards are only willful. In some cases, they have to do with a more positive intent. Beyond all these drawbacks and undesirable, in my opinion, features of these laws, they make absolutely no distinctions as to within the class of persons that are covered and exposed to liability. They cover everybody, so that they would apply, at least on their face they apply, to current employees with access to classified information, current government employees with no access to classified information, former employees who have had access, former employees who have not had access, journalists and all other outsiders. All are mushed together and treated in the same fashion in these statutes, even though there are clear distinctions between the positions of these people, and there certainly are distinctions between the constitutional limits that exist as to the restrictions that can be placed upon the activities of these particular people.

As I've said, the courts have never spoken authoritatively at all as to what meaning these statutes have in context other than classic espionage. There are a scattering of statements and footnotes and otherwise in the New York Times case, in the several attorney opinions, suggesting that the statutes might apply, but my own judgment is that those particular statements are not really entitled to great weight. That isn't the case the court had before it at that particular time, and if it saw another case in which there was an intended application of these statutes in the kinds of context to which I am now referring, the outcome would in all likelihood, in my opinion, be different.

Now, what I'm saying is that I think we have been as a country poorly served by these laws for 60 years. Poorly served for two reasons. First, because they have not been an effective safeguard against the unauthorized disclosure of particular narrow categories of information that I think could legitimately be the object of criminal sanctions and secondly because, and just as importantly if not more importantly, I think they have not served us well because for all that I know and for all that anybody knows, they have had the effect of deterring entirely legitimate speech. I think if any of us were in a position of being a private

practitioner and we had the job of advising a client who wanted to know what his rights and liabilities and obligations were under these statutes, we would find ourselves unable to give that advice with any sort of assurance at all. The effect of that can only be, it seems to me, to spread around the obfuscation, and somewhere the effect of that has to be and probably has been that things which are entirely legitimate to say have not been said and these laws have an effect which has been unfortunate.

Now what to do, if my analysis of these laws is anywhere close to being right. One approach is to take on a sweeping overhaul of the espionage statutes. There's a great deal to be said for that sort of an approach. I generally tend to be skeptical about the wisdom of comprehensive legislative approaches to national problems; however, it's hard for me to conceive that the Congress could do worse in writing espionage laws than they did in 1917, and I think nothing would be lost if the laws were scrapped in toto and if a fresh start was made. So there is a great deal to be said for the idea of a new beginning when it comes to this area of legislation.

However, I must recognize that this idea of sweeping overhaul has not been popular or enthusiastically received in the Congress. It was a drag on S-1, it was a drag on S. 1400, it would have been a drag on 1437 had they chose to deal with it there. And when a subcommittee of the Senate Intelligence Committee, at least two of the staff members are in the audience now, took a look at this whole problem in 1978, they produced a report which doesn't call, except within very narrow limits, does not call for overhaul of the expionage statutes. Indeed, that Committee saw the root problem as being the nonenforcement of existing statutes because of graymail concerns, because of the kinds of problems which Lacovara has spoken about. The problem as I see it is not as the Committee saw it, the nonenforcement of existing statutes; it is the nonexistence of any applicable statute or any clearly applicable statute.

Nevertheless, that Committee did suggest the need for at least one narrowly drawn antidisclosure statute. A bill that implements that suggestion, H.R. 5165, has now been introduced in the House Intelligence Committee. It is a bill which deals with the unauthorized disclosure of the confidential relationships that exist between intelligence agencies and various people with whom intelligence

agencies maintain these relationships. It also has to do with the unauthorized disclosure of cover arrangements and so forth. I do not want to deal with the specifics of that legislation. It has many antecedents. Many, many bills have been introduced, this being the most current of a great many proposals that have been seen over the years on this particular topic.

What I do want to say is that this kind of legislation, it seems to me, is going in the right direction. What is happening is trading off, the very broad but largely, if not totally, false promise of espionage laws to regulate the disclosure of national security information for narrowly drawn, specifically directed, proposals that regulate only particularized categories of information. I don't suggest for a moment the confidential relationships of agency personnel, and so forth, is the only such category which could be appropriately the subject of new legislation. What I do say is that there is a need to legislate. There are, with respect to any narrow category of information that may be singled out for legislation, what is the definition and membership of the class who should be exposed to liability? Should it just be current employees who gain their information because of their access to classified information, or should it be more broadly cast than that to pick up, in some kind of an ordered sequence, former employees, other government employees who may or may not have had access, and the members of the public, particularly members of the press?

Now, we would all in this room, I suspect, come out differently on those questions, but it is a question that must be discussed because one feature of any antidisclosure must be a clear definition of the membership of the class of persons who are covered by it.

The second thing that any of these proposals must do, in my opinion, is to define with some clarity and exactness the body of information that is to be regulated. It cannot again have a statute like the espionage laws which have, as their central core concept, information relating to the national defense with no definition whatever given to that concept. And there must be in any law, in my opinion, a clear statement of what kind of acts are to be criminalized. That is to say what sort of communications are to be covered. If it is to include a publication, that is one issue that must be addressed; and who are the

unauthorized recipients and how is that concept going to be defined, that being another crucial concept in the espionage laws which has no statutory definition whatever. It could be nothing except a source of confusion. And, finally, any disclosure law must deal with culpability standards which will apply. Some decision must be made as to whether or not inadvertent disclosures are going to be covered, although I would assume any bill would not take care of that or would not seek to cover that, and then the decision must be made as to how high up the possible scale of intent definitions you want to go in framing new legislation.

My personal view, and I said it at the beginning and I must say it again, it is nothing more than that because most everybody that hears me disagrees with me--my personal view is that until the espionage laws and their inadequacies are confronted, no progress can be made in this field at all. And the reason that that is so is because so long as there is a hope that they have this kind of broad interpretation, everybody is covered, all classified information is covered, all acts of communication are covered. They act as a drag on any new legislative proposal because the answer is you don't need it. And the reason you don't need it is because you have already got it. It's right there in the espionage laws, and everything you want to cover is covered today. So long as that answer stands, and that argument stands, the Congress is never going to be convinced that there is a true need for finer judgments to be made as to what people are going to be made liable for what disclosures and under what circumstances. Now there are a myriad of other issues that are involved and mixed in here. I'll take question on them at any time, including tomorrow at the workshop.

Nino Scalia

Tony, thank you. Your subject leads neatly into the last subject on the agenda today which is the media and intelligence secrets. Professor Roche of Fletcher School has been disabled from attending by reason of the flu for which we're sorry, but we have been extraordinarily fortunate in inducing a man to replace him on the program. Don Sider who is Time Magazine's National Security Correspondent in which capacity he covers the Pentagon and the CIA, among other agencies. Mr. Sider has been a staff correspondent for Time since 1966. His assignments have included, among other places, Cambodia and Vietnam. He

has seen action in various capacities. On his resume, what I find of interest is that he is a graduate both of the Republic of Vietnam's and the United States Army's paratroops schools. We're very greatful to Mr. Sider for his undertaking on very short notice to address the subject of the media and intelligence secrets.

D. THE MEDIA AND INTELLIGENCE SECRETS

Mr. Don Sider
Time Magazine's
National Security Correspondent

Do you have any idea how intimidating it is for a layman to be in a room full of lawyers? It puts me at a mind of nothing so much as a conference I covered about six weeks ago in Brussels. The Belgian Foreign Minister's first job at that conference was to introduce Henry Kissinger and it was a fairly distinguished group that was out in the audience and he said, "I feel like a simple parish priest introducing the Pope to the College of Cardinals," to which Kissinger replied, "We all know the Pope is infallible but all men who are infallible are not the Pope. I know my limitations."

As long as I've got you going on Kissinger, let me throw one more at you. Somebody asked him why it was taking so long for that doorstop of a book of his to come out and he said, "The art of engraving in stone has been lost in the Western world." What follows will not be engraved in stone but I hope it will give you a small insight into how reporters, who deal on the periphery of classified matter all the time, try to survive in that atmosphere.

First off, we don't wallow in state secrets, although a lot of laymen we run into, and I suspect some of our news sources, think we do. We, I guess, have an awful lot of small disconnected facts in our memory banks but they're back in our passive memories mostly, and we use them mostly I guess to triangulate other information we get to make sure that our stories are correct. We tend to know a lot, I guess, but we use very little. We know almost nothing of sources and

methods, certainly less about American sources and methods than the KGB does. And that's for good reason because we don't have a need to know or a purpose to know--I guess some would say, a right to know--and so we don't tend to pursue those. Reporters are by nature curious but they are not compulsively curious about things that they really don't have to know about and might do some harm if they did know.

Occasionally, we'll be told something of an area such as sources and methods by a news source who's trying to just help us to understand how something works. I had a case like that about a year ago. I was talking with somebody about the MiG 23's that were in Cuba, a dozen or eighteen of them, that the Soviets had shipped into Cuba and the United States was gravely concerned, you'll recall, about whether those MiG 23's were capable of carrying nuclear weapons. And a source whom I had great faith in said, "We tried every way we could with satellites and offshore overflights and one thing and another to find out and there was no way we could because there was a very small valve that differentiated between the nuclear capable MiG 23's and the nonnuclear capable ones." He said, "Finally, we found a Cuban in our employ who could go in there with an instamatic camera and take a picture of his friend standing in front of the aircraft and we were able to find out what we needed." He said, "But you can't use that because that's a source and a method, and I'm just telling you to illustrate a larger point." Well, I waited about ten months and called him one time and asked him if we could use it. This was at the time of the Cuban Brigade, and he said, "Yeah, by now it's OK." (I can't remember exactly what the reason was but I think the other side had come onto it or the source and the method had become obsolete and we did use it.) That sort of thing happens from time to time, and I think that the people in my business tend to be pretty cooperative in that area.

I had a lunch a couple of years ago with a fellow named Joe Laitin, whom some of you might know, who had been the all-purpose public affairs guy in this town. He's been, I guess he's now the Treasury Department's public affairs guy, and we were talking about leaks and I said to Joe I bet about 95 percent of the leaks in this town come about not because the leaker wanted to be good to the

correspondent but because he had something to gain from it. Joe said no, no, you're wrong, and I thought old Joe had gone soft in the head and then he told me it was 99.5 percent. Well, I disagree with him a little bit. I think that people don't leak with a dire motive. I think that very often they do it because they want the reporter to understand a little bit more, as my friend had helped me to understand how we found out about the MiG's.

Rarely is really critical stuff given to us but an awful lot of small stuff is given to us to help us to understand and get the story straight and therefore perform our job which is informing people of this country on what is going on in their world. The CIA quite openly gives country briefings to legitimate news correspondents, on request, and will give situation briefings of a non-classified nature. The Defense Intelligence Agency will do the same thing and so will staffers at the Pentagon and I can call and go through the proper channels or call a guy I know because I've worked with him before, and find out an awful lot of things that he is reading to me or telling me out of a folder that's marked secret on the front and that secret classification is either there for administrative reasons which I don't understand or he is excerpting from that things that are not classified but he's helping me to help the American people to understand what's happening in the context of events. And I think that's quite important. I had a briefing on the Strait of Hormuz not too long ago because that's a very important thing to the American people right now and I don't think that my learning about it and being able to pass that on to our readers has done any damage to American security and I think it has helped American understanding.

Bruce Van Viorst, whose byline is appearing in Time right now out of Tehran who is our Mid-East senior correspondent, came back to this country not too long ago for a week of consultations and I took him around to talk with some people in the Pentagon who were interested in Iran, and he told them some things that he was currently seeing and they told him some things that they had known before which helped background him. And I think that that kind of honest trading between journalists and news sources, even though they may be tripping through the fields of some classified material, is all to the good for American democracy.

We do much better in terms of getting material that is perhaps classified or sensitive through sources other than the primary ones. We all know the Congress is a leaky sieve, members especially, staff a little bit less; ex-officials of agencies, scholars, people who have gathered information over the years are very helpful. We had a case that involved that sort of thing just this past week; it's in Time this week. I personally was very curious and a little bit bothered as an American by the fact that the "students" in the U.S. Embassy in Tehran were brandishing a "Roger channel" cable that had come from the embassy back to the State Department purporting to name a couple of members of the Central Intelligence Agency. And I talked to a lot of people around town and found out just why that sort of thing happens, why that kind of piece of paper can be found, and it seemed to me it was a very careless thing. I did a memo for the editors and they said well we ought to do a story on it, because this is proper that people know that these carelessness' happen. But we were very careful in our own way to say all through, we referred to that cable twice, as purported to have the names of CIA agents, and the reason we did not that was not to give any aid and comfort to these students when they put these guys on trial. We didn't want them to wave Time magazine and say this confirms that these guys do work for the Central Intelligence Agency, and I think any responsible news organization is going to work in just that way.

I will, if you don't mind, read a couple or three lines, some nonclassified, cabled from Time magazine to give you an idea of how news organizations work in this respect. This came from our news editors in New York last Friday: "We're wondering if in the light of disclosures by Iranian students today of additional secret documents and a forged passport, if we shouldn't expand our story on security," which was the little story that I've done. "Specifically, we would like to have the government's response to today's disclosure. Is there any explanation for Mr. H's passport? Does the CIA acknowledge him;" which is kind a naive question to be asking us. "What does the State Department say about him and the passport? Are any other disclosures of this kind likely? If you feel there is enough material here for a longer story, we would probably fold in something on past discoveries in Tehran, such as the counterfeit money, rubber stamps for stamping passports or visas that show legal entry into Iran. Are there other examples we could cite?"

Well, my response which I will read just a bit of was: "No one in the State Department or the CIA will give us any more on the passport matter or any other apparent irregularities at the embassy. This for two reasons: they never do concede these things, that it's just not done, and there is a grave danger here of providing evidence for the prosecution in the threatened trials. We should not do anything that will aid the captors in their effort to prove that some of the embassy personnel were more than routine diplomatic types. No matter how sure we may be that they have the goods on a couple of guys, we cannot endorse their evidence. The danger to two or fifty people it seems from here would be heightened and efforts to free them could possibly be jeopardized. At least we should not risk doing that."

Well I think it's perfectly proper for editors in New York to ask some very flatfooted, naive questions, and it's also only proper for correspondents to say, wait a minute, if we do know some things and we have confirmed some things, we're not going to put them in the public prints. And I submit that, with the exception of a very few renegade publications, no news organization goes ahead and tries to blow state secrets in this country.

I think there are some choices in the society that newsmen as citizens, and as newsmen, make all the time. George Wilson, a colleague of mine who covers the Pentagon for the Washington Post, likes to say what gives us the right to play God in declassifying material when we come across something that's classified. Well, I think that an awful lot of what's classified has no right to be. I think it's classified through carelessness or stupidity or a guy with a fast stamp or the desire to put something under a rug where nobody is going to find it. And if we come across something like that, I think we have not only the right but if we are certain that it's not going to do any harm to the national security, the obligation to personally declassify it ourselves.

With legitimate secrets, I have something that I do; when in doubt, I ask the guys I'm dealing with who are the guardians of those secrets. I say, will it do you any damage if we print so and so? And if the guy can convince me, and it doesn't take an awful lof of convincing, I think that journalists tend to be reasonable

people, that it would cause some harm, as in the case of the people who are being held in the embassy right now, okay, we'll back off. There's no problem there, there's no argument.

Journalists in this country, I think, are as idealistic and as imbued with the sense of being citizens of this country as any attorney or any government official and I'll put our record on that alongside anybody's. There's one other factor; we don't want to lose a good news source. The first time I burn a source, I'm not going to be able to go back to him again.

To give you an example of my great restraint as a journalist, I'll tell you a story, a small state secret which I have never published in Time magazine. I covered a trip that President Carter made to Atlanta about two years ago. It was his first return to Atlanta after his election and he was speaking at a $1,000 a plate Democratic dinner at the Omni but before that he appeared in a room about a third of the size of this one at which a couple of hundred members of the Peanut Brigade were there to greet him again. And Rosalyn Carter was there and Miss Lillian and Son Jack and daughter-in-law Judy and the President. And they all came up on a little dias in the front of the room and I just happened to be standing off to the side of it over here toward the back of it, and the President spoke for about fifteen minutes and thanked them all for what they had done and he had a warm personal bond with each one of them he said. Then and stood next to his mother, who put her right arm around his waist, and Rosalyn talked about the things that the people in that room meant to him and finally she said, "Isn't Jimmy a wonderful President?" And Miss Lillian dropped her hand down about six inches and went "rrrumph" just like that. And the President never changed his expression. He just held that smile all the way through. To me that says something about America. Could you imagine Mama Brezhnev or Mama Khomeini doing that sort of thing in public? This is an open society where reporters see an awful lot of things and for better or worse I think that we report some and don't report others, but in the long run I think the things tha we report are for the public good. I thank you.

Q. (Inaudible)

Mr. Sider: I'll leave the writing of laws to wiser and more experienced men than I, but it seems to me you don't tell secrets to people you're afraid are going to pass them on to your own harm. And that simple rule in life, I think, would apply to the people journalists deal with. And, very quickly, I think that news sources learn whom they can trust and whom they can't trust. We're not just talking about state secrets, we're talking about protecting the anonymity of the news force. Simple things like quoting a senior official traveling with the Secretary of State's party. OK, it's a very thin-veil but it's done for practical, diplomatic reasons. But the journalist who the next day refuses to do it, and says that Cyrus Vance is the guy who said this about the Iranians yesterday, is the guy who is going to be stiffed the next time Carter has a backgrounder. And by extension it can go on to telling sensitive material about the security of this country.

Q. I'd like to change the focus from individual journalists but I recognize we may have some awkward sense of having to defend them with subject matter. Do you know of any country in the world where a newspaper or a magazine would publish a diagram of where all that nation's intercontinental ballistic missiles are located, the dimensions, etc. or the racetrack plan about handling missiles? . . . to occur to a journalist or anyone else that this may be a matter of defense necessity to his country and . . .

Mr. Sider: Well let me address those things specifically. We are to the point now where there is no way in the world to hide a missile silo on either side. We're also at the point where in order to sell the racetrack plan to the Congress this Administration knows it must lay it out and get public opinion behind it because that's the nature of this country. And we aren't going to publish plans for the guidance system for that missile but I'll take it one step farther. Under SALT we are telling the Soviets exactly where those racetracks are so their missiles can track it because that's part of the mutual agreement under SALT. And I think maybe you make a very good point for me that the things that are making our defense work to a degree are based on the openness of this country.

And the agreements that have been drawn up with the Soviets in the SALT II talks involve a higher degree of openness to get their society to a degree to be as verifiable as ours in the area of missiles. And I'm glad I'm a journalist in the United States and not one in Czechoslovakia. But it seems to me that's a very basic part of why I am a journalist because I live in this society and I wouldn't trade it for anything.

Q. Yeah, but people that believe in the open approach, as you used as a justification for this thing, are not to be found in a lot of these countries and that we just accept the open approach and they're telling you it's true--what do you get? . . . How many times has that proved utterly false?

Mr. Sider: Well it makes it a little bit easier but I just cannot argue against an open American society and I think if I weren't in my profession, I still couldn't argue against it. And I don't know anybody at the Pentagon who argues against it. I surely don't. And I talked with an awful lot of people and they may be nettled from time to time by some very small points but they always get back to: "Well, that's our society, that's the kind of country we are."

Q. Some time ago in attempting to convince the American people that SALT was adequately verifiable, some from the New York Times . . . close the gap and opened up because of the loss of sites in Iran. That the U-2 plane would be used to occupy Turkey and gather some of the things . . . As a result of this plan, the Turkish government announced that they would not allow those overflights unless the Soviets agreed and, surprisingly enough, the Soviets would not agree. And one way the American people benefit from learning that the U-2 is contemplated and, in fact, . . . informed the American people by that New York Times story because now we have one less method of determining whether the Soviets . . . and therefore are threatening us even more than we know about.

Mr. Sider: I'll grant you that one. I think if I had been the reporter on that story and somebody had leaked it to me, I would have checked with some people to find out what damage it might cause, could I hang onto the thing until after they'd made their representation to the Turks and gotten the deal in the bag. But

you get into trouble with that sometimes. We had a case like that with the Glomar Explorer. Remember the Howard Hughes ship that was going to raise the Soviet submarine? We sat on that one but, again, in this open society it's very difficult to sit on something and it did come out and everybody had it.

Q. Jack Anderson wrote it.

Mr. Sider: You're right.

Q. I was going to ask you about the Glomar Explorer, because in fact I think and even another leak, the Norway alternative site, according to the New York Times, is another example on verification where the leak had seen damage both because of arms control and the capacity of their own government to cooperate with us secretly in having an alternate site. My question to you as journalists is how do you make the assessment about Glomar Explorer. How do you weigh the values of code books in the submarine, the value of warhead design information, the cooperation . . . intelligence activity . . . especially in the context that you don't want the opponent to know whether you know or not. How you go through that thought process? Can you give us an example where you've made a decision to say to disclose but you checked it out? Mr. Lapham, I'd like to ask you what's the answer to your two questions: who should be covered and what should be covered?

Mr. Sider: I can give you in about 20 seconds the Glomar case because I was news editor in the Washington Bureau at the time of that thing and Strobe Talbot who is our diplomatic correspondent was on to it and he called William Colby and said I've got something I want to talk to you about. And Colby said come on out and, as he did with several other journalists, laid the whole thing out because they had it and said I'm giving it all to you. Please don't use it for the national security. Strobe came back to the Bureau and sat down with Hugh Sidey our Bureau Chief, and with me and we talked it out and I said well I don't think we can hang onto the thing because everybody isn't going to keep quiet on it. And Hugh said well we've got to. Strobe said I guess we have to, and then he went up to New York and talked with the managing editor of Time and the editor

in chief of Time, Inc. It went that far and the decision was made there: we will keep quiet as long as everybody else does. We will not be the first to break it. But that was based purely on the appeal of a guy who, Colby in this case, was the keeper of the secret. And we do that to a lesser and less dramatic extent fairly frequently. I'll call a guy no the phone and say I want to come out and see you and he may be a lieutenant colonel in the Pentagon. He may not be the Director of Central Intelligence. And I'll say I've got the this and I just want to know what kind of problems it'll cause.

Q. Let's just say that that lieutenant colonel felt that that was a stupid project, $400 million half the submarine . . . Given the incentives of your profession where preemptive disclosure is the key to career success . . . wouldn't you be more comfortable . . . which defines areas of national security disclosure as crimes so that you wouldn't have to constantly raise . . . and your judgment is aided by some kind of authoritative mechanism?

Mr. Sider: No thank you.

Q. I'm not saying I'm for that, by the way.

Mr. Sider: Well, you don't go to a lieutenant colonel on the Glomar Explorer, you go to him on some very small point. On the Glomar Explorer, you talk over with Bill Colby.

Q. You have been telling us how you handle such situations. They sound very responsible. And I'm sure that the majority of our press is responsible. But the residual question is how do the responsible elements in the press control the less responsible elements of the press, of whom, regretably, there are many.

Mr. Sider: Well, it's been suggested and tried that we have press councils and self-policing organizations such as the bar and the medical associations have. And I think, to use one of your favorite expressions, the chilling effect is just much too great and I'd rather suffer the heat than the chill, to tell you the truth.

Professor Scalia: I think there was a question for Tony.

Mr. Lapham: There was a great big question put to me. It was who and what. I think obviously from what I've said already I favor the idea. The more narrowly you draw the bounds of the statute, that is to say, the narrower the category of information, it seems to me the broader you can make the class of people who are prohibited from disclosing it. From what I said you can infer, obviously, that I favor the idea of some legislation to regulate disclosures that have to do with cover arrangements or confidential relationships maintained by intelligence agencies. While a loyal alumnus of CIA, I wouldn't put it to you for a minute that the Agency is beyond public comment or criticism. Obviously it is. I have no problem with somebody saying or arguing that the Agency shouldn't be in the business of clandestine collection, if that's what they want to argue or that its covert action charter should be terminated, if that's what they want to argue or that it should be put out of business altogether if that's what they want to say. It's across the line in my opinion when you disclose cover arrangements and confidential relationships; those are necessities of that business. What you're trying to do there is destroy an agency and cripple the functioning of the agency that exists because you haven't been able to win the public debate as to whether or not it ought to exist. That is a category of information which I would definitely make the subject of a special piece of legislation. Who would I cover under that legislation is a much more difficult question.

You would certainly start with Agency employees, both present and former, who have obtained their information as a result of their employment. That's the beginning. It then gets harder and the questions are whether you're going to try and capture within the net people outside the intelligence community who have picked up the information either because they have had access to classified information in some fashion or another or because they have been able to put 2 and 2 together and basically assemble a conclusion from information that's in the public domain; that latter being the hardest question of all.

Other categories of information are obvious ones. It seems to me the design of weapons systems, technical intelligence systems are obvious candidates

for treatment by narrowly drawn legislation. Although you can imagine, I mean take the case that I put in my remarks, one in which instead of having sold these satellite documents to the Soviets, they've been turned over to the press and published. You can conceive of an argument. These now are technical documents. But you can still conceive of an argument that it was important for the public to have this information. Suppose, for example, there were a lot of false information abroad as to what could or couldn't be done with our satellite system, so that the public was receiving an erroneous impression on that subject. Well, I can imagine an argument being made that it was necessary to put out this information in order to clarify that particular issue. I don't say I would agree with that argument but I can certainly imagine it being made. You get all kinds of shadings of that sort; nevertheless, I would swallow that pill and that possibility and make that kind of information similarly subject to criminal sanctions and there probably are others.

Q. (Inaudible)

Mr. Lapham: No, I don't suppose anybody can give you advance assurance on that, John. My opinion would be, sure. He may be in a somewhat different position because he may be authorized to declassify the information, in which case you're dealing with a different problem. My answer to that would be, if you can declassify it, make them do it openly and on the record. But yes, leaving aside those kinds of considerations, I would treat him, I would hope the Justice Department would treat him, just as they would treat anybody else who was within the affected class.

Q. (Inaudible)

Q. It seems to me that as a tactical matter if the deal centers on fairness then those who already have so much ability to influence the critical process are able to use, you know, classified information . . . and yet those who have very little ability to influence public opinion . . . are the ones who are most likely to be the ones punished . . .

Mr. Lapham: There's no doubt that the public debate can be skewed in one direction by people making that kind of a selective leak and a terrible perception problem. If, on the other hand, the people who favored a different side of the debate are dragged through courtrooms for making the same kinds of disclosures, that's a devastating indictment of any sort of an enforcement scheme. The only way you can deal with it, it seems to me, is to draw the boundary lines very tightly around the information you want to control, the criminal sanctions, and then treat everybody in the circle the same way.

Q. Mr. Sider, you said you're bothered by what covert action information . . . They say that they get their information . . . from local sources. There's legislation pending in the House which would make that criminal . . . Do you still feel that based on your sources are you bothered by what they're doing and what do you think . . . criminal activities?

Mr. Sider: Let me answer the second half first. I would be bothered by making criminal their activities. But I'm nonetheless bothered by what they do because I think that any time you compile names and at the same time you're villifying people, I think that you are inciting somebody, sometime to do something that's going to do some harm. I really do. And although they can't prove the case in Athens is a direct result of those guys, and I suspect maybe it wasn't, at some point some crazy is going to take a copy of one of those publications and make use of it. I just think it's going to happen. So I'm very bothered by the things they do and I've talked to some of those folks asking them what the reason is they do it, and they just haven't been able to convince me or I haven't been able to be convinced that what they do is right. But again, I think that criminal sanctions against them are more damaging than the damage that they might do.

Nino Scalia

Well, I would like to thank our panelists once again: Mr. Mintz, Mrs. Zusman, Mr. Lacovara, Mr. Lapham, Mr. Sider, and I turn the program over to our Chairman, Mr. Leibman.

III. NATIONAL SECURITY INTELLIGENCE AUTHORIZATIONS AND RESTRICTIONS: CHARTERS AND GUIDELINES

A. DOMESTIC NATIONAL SECURITY INTELLIGENCE

Moderator: Honorable John O. Marsh, Jr.
Standing Committee on Law and National Security, ABA; Former Counselor to President Ford

Mr. Morris I. Leibman

Ladies and gentlemen, thank you again for the wonderful attendance and attention yesterday. Your moderator this morning is a distinguished Washington lawyer, a man of all seasons, former Congressman, former Counsel to the President, former public servant, private practitioner, and we're very proud that he's a member of our Standing Committee. John O. Marsh.

Honorable John O. Marsh, Jr.

Thank you very much, Morry. As Morry has indicated to you, we are running a little bit late. The program this morning for both sessions is a very heavy one with a number of participants and individuals who have a tremendous amount to offer, and in light of that, we'll try to move along and I will confine the introductions simply to the notation that appears by the individuals in the program. They are all, suffice it to say, very distinguished.

This morning's session relates to the area of National Security, Intelligence Authorizations and Restrictions, Charters and Guidelines with the first session devoted to the domestic scene: Domestic National Security Intelligence. Our format will be 50 minutes that will be allowed to the five participants who are shown on your program. Roughly 20-25 minute interchange between these individuals to develop the views that have been presented by them, concluded by a question and answer period of about 10-15 minutes. In that regard, in order to move the program along, we're going to ask Miss Lawton if she would go first because of her background and expertise in the field of charters and the efforts that she made in the drafting of charters.

It's interesting to note that the intelligence community until just recently operated largely under Executive Orders. In fact, I recall at the time that President Ford addressed a reorganization of the American intelligence community, I chaired the White House Task Force that worked on that endeavor, and it was a major area of discussion that required a presidential decision as to whether or not the reorganization in the intelligence community would be handled through an Executive Order that would be made public, because in the past many Executive Orders that related to the organization intelligence community were themselves classified and the decision was to make that presidential Executive Order a public document, and that would occur in the first part of 1976.

Since that time we see the enormous interest that has developed in this country in reference to the questions of charters and guidelines. That's the area of discussion today. It's a very critical one. The individuals we have are well-qualified to address it. I'll call first on Miss Mary Lawton, the former Deputy Attorney General, Office of Legal Counsel and former Chairman for the Committee on FBI Intelligence Guidelines. Miss Lawton, it's a real pleasure to have you here this morning.

Miss Mary C. Lawton

Former Deputy Assistant Attorney General
Office of Legal Counsel; Former Chairman,
Committee on FBI Intelligence Guidelines

What I was asked to do by some of my panelists was basically to start with the classic debater's definition of terms so that we're clear about what we're talking about at this particular session this morning. And I think that's appropriate because it was one of the major problems we had in doing the FBI guidelines and in drafting the charter, was to decide what it is we are talking about and equally important, what it is we are not talking about.

We looked to the intelligence operations and functions of the FBI and broke them down into a number of subcategories. Foreign intelligence, which we used to refer to as positive intelligence; foreign counterintelligence, what we called

domestic intelligence or domestic security; and criminal intelligence, largely in organized crime but not exclusively. In the domestic intelligence area, we had really a further breakdown between the purely homegrown terrorism and what we called, for lack of a better term, the American export of terrorism. By that I mean groups in the United Stated composed entirely, or at least in large part, of Americans whose activity is not confined to our national boundaries but may spill across to our neighbors. Not the foreign group acting on our soil but the homegrown group exporting violence into Canada, into Mexico, into the Caribbean, wherever. There is, of course, a problem of the import of terrorism as well; the foreign group committing actions here. But we felt then, and I still feel, that that properly belongs in the counterintelligence area. So what I think we are talking about today, at least what I view the topic to be today, is terrorism activity in the United States by Americans and possibly by Americans exported outside U.S. boundaries from a base within the United States. But homegrown, not foreign.

In that area the threshold question in connection with the charter is whether one is necessary at all. The activities we're talking about--bombings, assassination, kidnapping--are all crimes in any case. The general criminal jurisdiction of the United States and of the FBI in this particular instance cover that adequately. Is any charter needed at all? It is my own opinion that a charter is needed for two reasons. I see a difference between a straight criminal investigation, the normal type of which is who done it, after the fact. A crime has occurred, find, and prosecute the perpetrators. And the criminal intelligence type investigation which looks to a pattern of activity, which is criminal, and says: "This has occurred, what's going to happen next, how can we prevent it?" Not only by catching and arresting the perpetrators of the past crime but finding out who they are working with, what they are planning, what the full ramifications of their activity may be. That jurisdiction has never been laid out explicitly in a statute. Until recently, I think it was a consensus that it was implied in criminal jurisdiction. I'm not sure that consensus exists anymore. What we heard from the Congress in the variety of committees and variety of oversight functions was doubt that that sort of jurisdiction existed as an integral part of criminal jurisdiction. The charter is designed to leave no doubt on that score. To make it absolutely clear that that is a proper function of a law enforcement agency.

A very different reason that I think a charter is necessary, or some legislative activity, is the export problem. If the jurisdiction of the FBI is to investigate violations of federal criminal law, what then is the basis for investigating a group based in this country, composed of Americans whose target is in Canada? Kidnapping in Canada is not a violation of federal criminal law. Conspiracy, maybe. But conspiracy is a difficult thing to prove; it is not the core offense. We have neutrality laws; they are not worded in a fashion presently which makes it easy to justify that sort of investigation unless you are literally talking about gun-running. And I believe a proper jurisdictional base should be laid for the United States to investigate that sort of activity. If we are concerned about foreign terrorists plotting activity in this country, we have an international obligation to be concerned about American terrorists plotting activity abroad. Just as a matter of our foreign relations. But we need a jurisdictional base that makes it absolutely clear that that is a proper target of investigation, and I do not believe that base exists now. There are several ways to go about it. The charter is one and the charter does lay that jurisdictional base. An alternative would be to amend the neutrality laws. Quite frankly, just from a draftsman's point of view, it's easier to do a charter. Neutrality laws are so fouled up at this point it's very difficult to even know where to begin.

There are, I think, other reasons that suggest the appropriateness of a charter; not so much in the when investigation is proper, but in the tools necessary to conduct an investigation. As the process became judicialized between the Department of Justice main body and the FBI, and by that I mean questions being raised about a lot of very specific activity, it was brought to the Department's attention by the FBI that there are a number of laws of general applicability undoubtedly never intended to apply to the investigative process that by their terms do not exclude the investigative process. And if I just give you a few examples I think you'll understand the point that I want to make.

In any contract entered into, or a negotiated contract as distinguished from a bid contract, entered into by the United States, it is mandatory by statute to include a clause that no congressman has benefited by the granting of this contract. A clause that the GAO will audit the contract. And a clause that no

discrimination will be entered into by the contractor. Try that in an undercover contract or lease. There is a statute prohibiting leases in the District of Columbia by the government except through GAO. There are other contracts limiting leases anywhere to a single fiscal year. Now if you are investigating terrorism covertly, and I suggest that an overt investigation does very little good, and you must abide by all of those restrictions, how can you succeed? There's no way. But there is no exception in those statutes. There are statutes which forbid the deposit of federal funds in banks. Run an undercover operation with a treasury account and see how long it lasts. No exception in the statute and the statute is criminal.

Presently, those restrictions have been lifted by a temporary rider on the annual appropriation act for undercover investigation activities. But we are required annually to go back and get them renewed and they are substantive matters subject to a point of order by any single member at any time. I suggest that a charter is necessary to make clear as a matter of permanent law that those sorts of general procurement restrictions are not and were never intended to limit undercover or covert investigative activity. Without a charter, the FBI will be consistently hamstrung in attempting that type of investigation or will be obliged to go back and beg and scramble every year for exceptions in the appropriation act at the risk of a point of order.

Those are only two of the elements that are dealt with in the charter. The fundamental jurisdiction to do an intelligence-type investigation in the terrorist area and the tools to do it in an undercover capacity in the most effective way. There are far more provisions in the charter, as all of you know, but for those two reasons alone I think the charter is necessary. The details, of course, are subject to debate.

John Marsh

Thank you, Miss Lawton, for a very interesting and a very provocative presentation and particularly the area that you raised of how do you deal with existing statutory prohibitions that may impact adversely on intelligence

investigations. And I hope that other panelists will address the problem which Miss Lawton has raised which is a very real one.

Our next speaker, and I would like to also thank you for holding it to the time limit. We're trying to hold it to 10 minutes per speaker. Our next speaker is Mr. Raymond Wannall, a former Assistant Director for Domestic Intelligence of the Federal Bureau of Investigation, and an individual well-qualified to speak to this conference today. Ray.

Mr. W. Raymond Wannall

Former Assistant Director for Domestic
Intelligence, Federal Bureau of Investigation

Thank you. Mr. Chairman, ladies and gentlemen. I agree with Miss Lawton's comments as to the need for a charter and I think the presently proposed charter will be most beneficial to the FBI in providing the tools to support investigative operations of which she spoke. I would like to address my remarks more to the charter provisions with regard to the actual investigations of the FBI.

Since the conclusion of the Church and Pike committee hearings in the early part of 1976, there have been numerous suggestions regarding what the FBI should or should not be permitted to do, and these suggestions, of course, have varied with the political viewpoints or the ideological viewpoints of those making them. And so many, many of them have come from individuals who were described in a recent publication I read as opponents of effective U.S. intelligence. And I do think that S. 1612, the present bill relating to the FBI charter, contains provisions which would somewhat hamstring investigative activities. Now, if I may use a cliche, the bottom line is what the FBI should do is what the people want it to do--nothing more and nothing less. I subscribe to the concept of a charter, supplemented by Attorney General guidelines covering procedures and methods, and with appropriate congressional oversight.

In developing a charter, it must be recognized that in the national security field domestically the FBI is the principal investigative and intelligence-

gathering arm of our government. So the objective of the charter must be to enable the FBI to discharge these responsibilities while, of course, protecting the rights of the individuals and securing or assuring the security of the welfare of the nation and of all the people. Now in this regard I think there are some deficiencies in the charter. For example, I find no provision which would permit the FBI to gather information, intelligence if you will, to assist the Executive Branch in discharging its constitutional obligation to guarantee to every state protection against domestic violence before it occurs. By strict interpretation, which I think must often be applied in the judiciary process, S. 1612 would not permit the investigation of groups seeking to overthrow the government by violence until conduct in violation of the criminal statute was actual or imminent. Now I don't think this is consistent with the Supreme Court finding under the Smith Act in the Dennis v. U.S. case where the Court said if the government is aware that a group aiming at its overthrow is intending to indoctrinate its members and to commit them to a course whereby they will strike when leaders feel the circumstances permit, action by the government is required.

Another example, in which I think there may be a deficiency. There are three precise bases for the FBI to exercise the investigative responsibilities it has. None of these is sufficiently broad to permit an investigation of an organization, per se, if it violates a criminal law which does not relate either to racketeering or terrorist activities. Now the first of these three bases extends to individuals who are in violation of the law, and the other two relate to criminal enterprises described as two or more individuals or a group who may be in violation of a racketeering statute or may be engaged in terrorist activities. Thus, if a group conspired to violate, say, the presidential assassination statute or many, many others, an investigation of the group as such could not be sustained. Now this seems, in my judgment, effectively to eliminate conspiracy investigation including seditious conspiracy which has been a part of the law of our land since Civil War days, and I should think it may also immunize entities from investigations of laws--federal criminal laws--that they have violated.

Now since the 1975 hearings of the Church and Pike committeess we have experienced a breakdown of domestic intelligence in this country. And in the same period we've experienced a series of incidents which are not only lamentable, they're tragic, in that they have violated the most cherished civil right that we have--the right to live. Now I have reference to such incidents, as in 1976 the car bombing assassination of two diplomats, the following year the Hanafi muslem incident here in Washington, D.C. where one hostage was killed and another was paralyzed for life. Just last year the Jonestown-Guyana incident where over 900 United States citizens lost their lives. Just last month the killing of five civil rights marchers in Greensboro, North Carolina. And just this week the ambush murder of two American sailors in Puerto Rico. Now I cannot tell you that all these acts absolutely would have been prevented if we'd had an intelligence investigation. But I can tell you that investigations of this type in the past have prevented violence and they have also tracked the activities of groups seeking violent overthrow of the government. And if S. 1612 is passed in its present form, I think the investigative efforts of the FBI would be hampered with regard to coverage of terrorist groups and I think they would probably be eliminated in coverage of groups, nonterrorist by definition, but who nonetheless represent a potential threat to the nation's security.

There are other provisions in the charter which I think run along the same line. There's not time to go into all of them. I do have a paper analyzing some of the phases of the charter which you're welcome to have if you care to. Now one of the three stated purposes in S. 1612 is to establish procedures for the duties and responsibilities fixed upon the Bureau. Now the procedures set forth are designed basically as restrictions. They are restrictions on investigative procedures. Such things are physical surveillances, mail covers, record checks. It is the constitutional duty of the Executive Branch, I think, to develop procedures and methods, because it is the responsibility of the Chief Executive to take care that the laws be faithfully executed. Investigative restraints passed in legislation could result in impinging not only upon the President's authority to carry out this responsibility but, in fact, his capacity to meet threats which may now exist or threats of an unseen nature that may come up in the future.

The bill covers all of the investigative authority of the FBI. It relates to the techniques I have mentioned. Now the FBI is not the only federal investigative agency. There are many others having responsibilities relating to criminal matters, security matters, or both. The Civil Service Commission; Secret Service; Internal Revenue; Bureau of Alcohol, Tobacco, and Firearms; Drug Enforcement Administration; Immigration and Naturalization Service; many, many more. Now in this regard, in placing these restrictions on the FBI, I think the bill is illogical. It would shackle the principal federal investigative agency and denying to it procedures and methods which would still be available to all the others. If, and I say if, it is deemed necessary and proper to place restrictions, then I think that these should be applied across the board, perhaps through legislation such as the Wiretap Bill last year. I don't think singling out one agency for selective restriction is any less objectionable than the procedure of selective prosecution. And I really believe that even the staunchest civil libertarians would support this premise.

Now I have been notified I should sit down and I think it's about time, but there's one thing in my final paragraph that I'll say. There are legitimate concerns for civil rights and I certainly subscribe to it. I think they're our most precious rights of all under the first amendment. During the 1950s, when the United Kingdom was faced with a similar dilemma involving the conflict between the rights of the individual and the rights of society, as is normal in the U.K., a British royal commission was appointed. They made inquiries and investigation and may I read you their conclusion. "The freedom of the individual is quite valueless if he can be made the victim of the law-breaker. Every civilized society must have power to protect itself from wrongdoers. If these powers are properly and wisely exercised, it may be thought that they are in themselves aides to the maintenance of the true freedom of the individual." And this, ladies and gentlemen, I also believe. Thank you.

John Marsh

Ray, thank you very much for raising some of the serious questions that do occur when you begin to move in the charter field, particularly as it relates to

your former agency--the Bureau. It's interesting to note that there does seem to be at least a search for common ground between two people that have spoken thus far in reference to charters, and at this time we'll move up to the Hill and call on an individual associated with the legislative process which is not to be ignored. In fact, if you'll look at your program, you'll see a column and a half of legislative hearings in either the House or Senate which in an intelligence community would have been unheard of five years ago.

To discuss that aspect we have Michael J. O'Neil, Chief Counsel of the House Permanent Select Committee on Intelligence. Mr. O'Neil.

Mr. Michael J. O'Neil

Chief Counsel, House Permanent Select
Committee on Intelligence

Thank you. I should say in the beginning that I'm not the expert that the other members of this panel are and I'm honored to be here. Nonetheless, our committee does authorize the domestic security now called the Terrorism Program in the FBI, the one we're discussing this morning, which responded in the past to the needed increases that have been requested for that program, most recently because of the imminence of terrorist activity in the Pan Am games, the Winter Olympics. And it also takes cognizance of those activities which are conducted under that program. It concerns itself with their organization and the authorities under which they operate. And I'd say there's no significant disagreement within the community about the activities which are now conducted under that program. I suppose where disagreement occurs, it's on what they're not doing. And I should add also that the committee for which I work does not presently have the FBI charter. That's in the Committee on Judiciary.

Our committee is like its Senate counterpart, made up of a varied membership from four committees of the Congress. In particular: Appropriations, Armed Services, Judiciary, and Foreign Affairs. We also have three members that formerly served on the Pike Committee. So there are some strong

feelings on both sides within our committee as to the appropriateness of the Levi guidelines which is the predecessor and perhaps the forerunner of the FBI charter. And these strong feelings, I gather, go to the scope and the impact that these guidelines have had on our ability to prevent terrorist acts. There's some feeling among the committee that we're not doing enough here, that the present policies prohibit investigation of groups which openly plan violence, and that this inability also impacts the ability of the FBI to provide information on terrorist membership for security investigations under Executive Order 10450. There are others in the committee, I think the majority, who feel that the present policy is much clearer and much more firmly founded constitutionally than the previous program, and I would say that they would explain this along the lines that investigations today are premised on the actual use of force or violence by a group or by an individual or by the imminence of the use of force or violence in connection with advocacy or speech, directed at overthrowing the government of the United States or depriving others of their civil rights.

There was a recognition within that group, I think, that the previous domestic security investigations were overbroad in their scope, vague in their purpose, and impermissible in the use of some of the techniques which they employed. And, as has been indicated in two GAO reports on this program, nonproductive in great measure in identifying actual efforts to overthrow the government. Given these differences, which I might add again have not come to a head in terms of an actual debate within the committee, the question that arises is, is it appropriate or is it necessary to have an FBI charter? And I would think that all members of the committee would respond despite their differences on what to say in the affirmative. I think they would say that because the Bureau is an organization which is imbued with a sense of order, respect, and adheres to authority and a meticulous adherence to what is usually very extensive in total guidance. It is therefore an organization of purpose, of definite methodology, and it's very responsive to direction which is explicit and clearly formulated. Also, because of this FBI tradition, there's a very real uneasiness within the Bureau today, I think, about the liability--both personal and criminal--of agents who act or have acted officially in this area about which questions of legality have been raised. And in the words of one of our members,

"Those agents now stand naked in the halls of justice." They are uncertain of their situation and I think our committee would agree that that's an intolerable situation. So, I think there's a feeling that we need as clear as possible a definition of the FBI's jurisdiction and authority so that we can resolve the question of how operations ought to be conducted in areas where legality has been called into question in the past. This means a law, an executive order; congressional oversights will not provide that sort of assurance and authority. This law ought to be debated in public, in a public forum; that is, the Congress, so that we can have a public resolution of these issues. And it's, I think, a feeling that both these factors can restore confidence; confidence among the public in an institution which was once the most highly respected of our federal institutions, and confidence within the Bureau that it has a clear charter for its operations in the future.

In terms of satisfying those needs, I believe the charter proposal approach is a good one. It's clearly based on a criminal standard or a terrorism standard. The standards for investigations under the charter are broader than the guidelines in that the basis of investigation is no longer only the violation of federal law but can be on the basis of a pattern of violation of state law. It is changed in that there is no longer investigation of groups or individuals who seek to overthrow the government but the phraseology of the charter authorizing investigations of groups employing violence to influence or retaliate against policies or actions of the United States or of a state or of a foreign government seems to be as broad if not broader in that context.

Finally, although there are no longer investigations of groups which seek to deprive the civil or constitutional rights of American citizens, again intimidating or coercing the civil population may indeed be a broader standard in that area. The proposal also retains the concept of full investigations and preliminary investigations, although they're now called inquiries. The latter looks into allegations to determine whether there are facts or circumstances that reasonably indicate the existence of a terrorist pattern of activities. These are important in terms of their emphasis because investigations are to focus on criminal activities so as to protect, prevent, and prosecute crime. In other

words, to look towards concrete results and not to collect information which may be useful some day in some possible context. They're to be based, these investigations, on reviewable facts and circumstances and they are to be reviewed on a regular basis by the Department of Justice.

Lastly, the use of intrusive techniques is limited to those areas where their use is consistent with a need for information. When these so-called intrusive techniques are to be used, there's a higher authority within the Bureau that must approve them. Now these principles and standards set forth for the investigation of terrorism are clear. They seem to be objectively verifiable; they avoid the ambiguity that got the domestic security program into trouble in the past; and, if I'm correct about what the nature of the Bureau is and the clear direction that they need in this area, the charter can provide the clear authority under which the FBI agents can operate.

What they do not do, however, what the charter does not do is reassure those who believe that the FBI charter merely defines a way for the rest of the domestic security problem, that is, domestic groups who are violence prone or may somehow support violent groups without engaging themselves in violence. The concern that is felt, and certainly by some members of our committee and no doubt by some in this room, is that preventive action cannot be taken against terrorist acts because such groups can't be investigated before they actually perform such acts. However, given the past history of the Domestic Security Program, the investigations of groups without any clear involvement in criminal violence and given the decisions of the courts in these areas and the desire of Congress to clarify the FBI's role in guaranteeing the domestic tranquility to which we all have a great expectation, given all these factors, I don't know that these concerns can be met or satisfied by charter language which meets the same standards of clarity, objective verification, and protection of constitutional rights that I find in the FBI charter.

John Marsh

Thank you very much, Mike. Again, we move into the area of the difficulty of drafting language that would be necessary and we see also we're coming back

to this question of how do you address a problem that you think is going to occur but has not occurred. How do you deal with violence before it occurs, which has been an area that's been discussed here yesterday and has been raised again today.

Our next speaker is one who has devoted an enormous amount of time to this question, has raised serious questions about this whole field from his vantage point. It's a pleasure to present to you Mr. Jerry J. Berman, the Legislative Counsel for the American Civil Liberties Union. Jerry.

Mr. Jerry J. Berman
Lesiglative Counsel, American Civil LIberties Union

Thank you. As I have been participating in the conference I gather that there is I think a general consensus in this group that the pendulum has swung too far away from law enforcement and intelligence mandate in this country, and that that pendulum has to be brought back towards a more center position, more respect for law enforcement and its problems. We believe that that is an issue and we think that it can be resolved through a charter. So there's a unanimity in the sense that we are all up here supporting the enactment of an FBI charter. Mary has pointed out some of the law enforcement needs here, that there's a need to establish a clear terrorist jurisdiction which focuses on criminal terrorism, to solve the problem of export of terrorism abroad, to give legitimacy to a necessary undercover operation of the FBI, and so forth.

But there is a civil liberties side to the charter which is to ensure that the pendulum does not swing back all the way to the other side where we have a wide open, no-holds-barred FBI. This charter is drafted and must address the record of the Church committee and all of the investigations by the press through civil litigation, that the Bureau had gone far beyond criminal investigations, was focusing in the sixties and seventies on all of the scents, was engaged in illegal operations--COINTELPRO, mail openings, black bag jobs--and with very questionable law enforcement or intelligence payoffs for this country. The pendulum

has swung, I believe, because of this massive record. And the charter is an attempt, I think, to establish the legitimacy of the Bureau and to protect civil liberties at the same time.

I think that the charter, in terms of its standards, setting forth a terrorist jurisdiction, strikes a balance between law enforcement and civil liberties. It does not tie the hands of the Bureau, as some would feel, and nor does it have an open-ended jurisdiction to investigate all the scent. The standard calls for the Bureau to investigate, based on facts or circumstances that reasonably indicate that terrorist activity has been engaged in or that political aims are to be accomplished through terrorist activity. It's not a certainty standard; it's a reasonable suspicion standard. It does not limit the Bureau to solely investigating groups that have engaged in terrorism. It does allow them to get at a group without a track record.

But it strikes a balance by saying that in order to do that we have to have some activity, some focus on crime. We can't solely investigate first amendment activities. We can't cover all of the scents--all potential possibilities of terrorism. Now that is in the interest of civil liberties. But it's also in the interest of law enforcement, because if you look at the record of the Bureau when it had no restrictions on it, when there were no holds barred, when they were engaged in these illegal activities, we had civil disorders, capital bombing, SLA, 500,000 investigations of subversive activities--not one prosecution. A GAO audit of 22,000 investigations, no anticipation of violence. That's not in the interest of law enforcement and it's destructive to legitimacy of an institution. Why? I believe the Bureau was spread thin, so thin that it was gathering information about everyone without focusing on the real target which was criminal violence. The result was a distortion of that institution. It had a counterintelligence disaster in the sense that when the President turned to the FBI and said, "Is the antiwar movement supported by foreign powers?" The FBI said we have files, but it's just information. So the President turned to the CIA and that's where Operation CHAOS came from. Drawing these lines, defining what the Bureau can and cannot do, focusing it on criminal activity, is in the interests of law enforcement and civil liberties.

Where we have problems with the charter is not in terms of its standards, while we have amendments we would like to clarify certain activities in the charter, it's with nailing down certain principles and controls which make the charter enforceable. For one in terms of standards the ACLU and civil libertarians would like a flat ban on COINTELPRO. That is not a law enforcement function, that's vigilante policies. And that ought to be banned in the charter. If the Director and the Administration want a positive document to go forward into the future, fine. But this prohibition is essential, given the record of the Bureau in the past and particularly in terms of the fact that the charter does authorize preventive investigation and we want to make sure that preventive does not mean preventive action which the Bureau argued as its justification for many COINTELPRO activities.

Second of all, the charter gives the Bureau new authority, not only laying down a terrorist jurisdiction which does not exist in statutory law but it also gives them new tools. For example, the right to issue investigative demands for bank, credit, and insurance records of citizens in possession of third parties. We think that the Bureau needs those records, but that they ought to follow the Right to Financial Privacy Act of 1978 which required that, when you don't notify the subject of the record, you go to court and tell a judge that he will flee prosecution. Whether it would jeopardize your investigation, the Bureau would like for toll, credit, and insurance records to just tell the Attorney General. We think the judicial control as outlined by the Congress in 1978 should apply to the FBI.

Of particular concern to us in its authorization of investigative techniques and sensitive investigations is that there be some outside external check of the use of infiltration in sensitive investigations. The ACLU's position is that infiltration is analogous to wiretapping, the walking-talking bug; it was the most abused technique of the Bureau and we have often called for a judicial warrant. We are not going to get a warrant from the Congress but we are asking for a stepback, which is an audit mechanism within the Administration, some independent audit of sensitive investigative techniques such as exists in the foreign intelligence field where you have an intelligence oversight board,

something along those lines where there would be some scrutiny outside the Bureau of its application to these standards. The charter, in our estimation, is far too insulated. It establishes principles and standards but leaves most of the monitoring of the charter to the FBI. We do not have, as in the foreign intelligence field, to set up oversight committees to look at Bureau criminal investigation. That has to be done by the Judiciary Committee and arriving at that system is part of this charter enterprise.

Finally, we think the charter must be enforceable with civil remedies for citizens whose rights have been aggrieved by the Bureau. If this charter prohibits systematic investigation of groups solely on the basis of their first amendment activities or disruptive activities of citizens' first amendment rights, those ought to be compensable and citizens should have a right to enforce that in a civil court of law. The problem with current law is that you cannot leave the civil remedy unspoken to in the charter because under current law it is not certain whether citizens have a right of recovery for that kind of activity. To have the principle in the charter but to have it unenforceable in the courts is, in our estimation, wholly inadequate.

But I think that all of these issues do not go to the substance of the charter. They leave the policy judgment that the Bureau will focus on crime in the charter. We think they're a legitimate law enforcement and intelligence jurisdiction, we think that with these additional controls and a civil remedy and a ban on COINTELPRO that a balance will be struck in terms of civil liberties, and that the enterprise will be in the public interest, in the interest of the FBI, in the interest of legitimacy of our institutions, and in the interest of civil liberty. Thank you.

John Marsh

Jerry, thank you very much. I think you raised the heart, the age-old question of how do we balance the scales between national security and individual liberties. Perhaps by raising those questions we can strike the balance.

Now at this time to summarize on the presentations that we've heard from the four individuals, and to give us the benefit of his view on the area that we're discussing we're pleased that Herbert Romerstein of the staff of the House Committee on Intelligence can be here. Herb, if you could give us some of your views.

Comments: Mr. Herbert Romerstein
Professional Staff Member, House
Permanent Select Committee on
Intelligence

It was very clear from the discussion here this morning that everybody wants an FBI charter, whether they want it to restrict the FBI or permit the FBI to do its work--everybody agrees that a charter is necessary. This unanimity, of course, is not also present on the question of a CIA charter. But since the intelligence charter has not yet been handed down from Mt. Olympus, we have only the FBI charter to concentrate on. However, we have been told over and over again that the FBI charter will be a bellwether for intelligence charters. And I suggest we look in the dictionary for what a bellwether is. A bellwether is a castrated sheep that leads the others to slaughter. And, I suggest that while a charter is necessary in the FBI field, that we be very, very careful that we don't have a castrated FBI leading all of us to slaughter.

We can see the direction of the charter by examining the Attorney General's guidelines of 1976. These guidelines, which are after all at this point only Attorney General guidelines that could be changed overnight by an Attorney General who sees the situation differently, would be codified, would be set in concrete by the charter. And the basic provision of the guidelines, which would be codified, is the necessity for the FBI to show that a criminal act has taken place or is imminent before the FBI can investigate a group or individual. Now this concept sounds good. You don't want to investigate somebody who is not about to commit a crime. Well, real life sort of interferes with this wonderful concept, because in real life when a group is planning to commit a terrorist act or commit another act of violence, it doesn't invite people in the night before it does it. It plans it over a long period of time, and unless you have the informants

in place for a long period of time, there is no way that they're going to know that this particular act is going to take place.

There are a number of classic cases that we're familiar with. The 1964 plot to blow up the Statue of Liberty, which would have killed hundreds of innocent people, was planned in Cuba by an individual who went down there in 1963 with a group visiting Cuba. He came back, organized a group in New York to do this job. He had in Cuba made contact with the Canadian French-speaking separatists and they provided the dynamite to do the job. He went to Canada to pick it up. The only reason that the plot didn't succeed was that the New York City Police Department placed an undercover officer in the groups who were mouthing violent rhetoric. And one of the people in these groups, an official of the Socialist Workers party which is no longer under investigation by the FBI, brought the police department undercover officer in contact with Robert Collier, the ringleader of the bomb group. The SWP member then separated himself from the operation and was only present during the initial stages. So he was never convicted of the attempted terrorist act. But he was an unindicted co-conspirator in the indictment of those who were involved in planning to blow up the Statue of Liberty.

This whole basic concept--that you don't investigate for mere rhetoric--goes to the heart of whether the FBI is going to be able to do its job. John Shattuck told us yesterday that he believed that the courts had held that the FBI can read the publications of these groups, even if they are not under investigation. The FBI does not see it that way. They see the guidelines to mean that they cannot even read the publications of these groups. I'll read to you from the testimony of an FBI official before our committee on the question by Congressman Young. He asked whether they could collect the publications of groups not under investigation and was told no. What about the case of, say, a newspaper article? Are you permitted to collect that? The FBI official answered, "To peruse the newspaper and clip it? No sir, that's not done at this point." Mr. Young: "You say it is not done? Are you permitted to do it?" The FBI official: "I say based on the Department ruling and on one investigative case that was cited specifically by the Department, we would not do it and we do not do it." Mr. Young: "Are you allowed to read it and remember it?" The FBI official: "I would think that might be allowable in the private confines of one's house."

Now, that's what we're talking about. Not theory. We're talking about real life. The FBI is not looking at these organizations at all. And two examples that Congressman Young raised--one was the Progressive Labor Party, which the FBI testified that they did not have under surveillance and have not had since 1976, and Congressman Young showed the FBI official the publications of the organization. In one of them, the April-May 1978 issue of their official magazine Progressive Labor, they say: "Our strategy remains the armed struggle for working class state power. We must continue to rebuild our work in the armed forces." Now think about this for a minute. They want the violent overthrow of the government and to accomplish this they want to rebuild their work in the armed forces of the United States. The September-October 1978 edition of the same official theoretical organ of this organization says: "It is among those workers who have proven their inclination toward violence that the best revolutionary forces and cadre will emerge. Consequently, among those concepts that Communists should constantly keep up front within the ranks of the working class, is the need to resort to acts of violence. Not at some distant magical time but right now." And they reproduce on the back of the magazine their weekly newspaper challenge which has an article "Nazis Mauled by Communists" in which they say that they invaded a radio station where a group of Nazis were attempting to carry on their First Amendment protected right of making a speech. They went in and they prevented the Nazis from engaging in these constitutional rights. The same way that the Ku Klux Klan, on November 3, 1979, prevented a group of Communists in North Carolina from engaging in their First Amendment protected rights, and when the shooting ended five Communists were dead on the ground.

Now, the fact is that the FBI did not investigate the Ku Klux Klan, neither did they investigate the communists that were engaged in the violence against the Klan or against the Nazis. They are investigating very, very few groups. They do not know in advance what's going to happen because they are not watching. One other example is the Maryland Ku Klux Klan where the FBI opened the case for ninety days to see whether the Klan was about to engage in terrorist acts. The ninety days were up. Since they could not put an infiltrator into the group because that's forbidden by the guidelines under a preliminary

investigation, the FBI closed the case. Maryland State Police were not constrained in that way so they had Sgt. John Cook under cover in the Klan, and a few nights before they were planning to bomb the homes of Congressman Parren Mitchell and a number of other people, and a number of churches and synagogues, Sgt. Cook and his co-workers went in and rounded them up. They have since pleaded guilty and they are now in jail. Now, the FBI was unable to find out what was going to happen because of the restricted guidelines that are now going to be set in concrete by the charter.

Let me just end on this one note. Three of the people who participated in our discussions here yesterday and today--John Shattuck, Jerry Berman, and Mort Halperin--have an article in the current issue of First Principles, which was available yesterday in large numbers of copies. And they say this about the charter: "Read the charter in terms of its accompanying section-by-section analysis and listen to Bureau officials explain to outraged right-wingers on the Senate and House Judiciary Committee that under the proposed charter they could not investigate subversives or Puerto Rican nationalists who threaten possible violent activity or groups who call for future revolution, and it becomes clear that a fundamental turnabout from past practices could be achieved by this legislation if it is amended in certain critical ways." The particular discussion of the Puerto Rican nationalists was whether the FBI could watch the four Puerto Rican terrorists, some of whom shot up the Congress of the United States and one of whom was involved in the attempt to murder President Truman; whether now that they are out of jail and are preaching additional violence the FBI could watch them. And the FBI's answer was "No. That's mere rhetoric." Well, the associates of those people who listen to the mere rhetoric murdered two United States sailors when they ambushed a bus and shot it up. Now, this is incredible that the associates of those people should not be under surveillance. It just boggles the mind.

And the last section of this charter that is a problem is the fact that it removes the Federal Bureau of Investigation from its responsibilities in the Federal security program. So that when groups such as the Progressive Labor Party and the Ku Klux Klan, etc., intend to infiltrate the United States

Government, the FBI would not be available to do the investigation to prevent this. These are the two basic problems in the charter--the removal of the FBI from the security program and the criminal standard which makes it impossible for the FBI to know in advance that the crimes are going to be committed. Thank you.

John Marsh

Herb Romerstein has raised, by citing some specific instances, some of the problems that will occur and these are undoubtedly areas that we will want to get into as we have an exchange among the panelists. I'm going to limit the panelists' time in this area slightly in order to have a chance for questions from the audience, because I know there are many there.

To begin the panel discussion, I notice that several of the participants elaborated or cited terorism as being the real vehicle by which this charter would move from the standpoint of the Bureau. In light of that, I would like for them to address the question of whether terrorism is a hook or whether it's really believed that terrorism would cover the full sweep of the things that the Bureau might have to do in this area and my question would be: Is the terrorism approach sufficient to enable the FBI to undertake what would be its expected or normal duties under a domestic counterintelligence program? Would it cover the other areas that are classically within what we think about in counterintelligence?

Miss Lawton: I seem to have the question by default. The terrorism provisions, and they are rather elaborate definitions in the charter, I believe cover politically motivated violent action. Now that would be overthrow of the government again assuming violence; it would be your classic planned-type activity where violence is used to coerce and intimidate civil population. It would be broader than what is normally viewed as terrorism today, because largely we think of terrorism in the international sense. And here in the charter it is defined in a domestic sense. The charter does require focus on activity. It does not require that a crime first have occurred. Activity is stockpiling

weapons whether you've used them or not. Activity is pulling together a group of experts with the capability and intent of constructing a nuclear device whether or not they have in fact constructed it and detonated it. To that extent, I think that the charter does cover a broad range. It does not permit, as has been made clear, a focus on pure talk with no attendant activity to give the impression that the threat of the talk will be carried out. If that is a cutback, then yes the charter cuts back. The charter also does reduce, although that's in a separate area--the background investigation functions of the FBI--that may be related as Mr. Romerstein suggests. But it is background investigation. It is not terrorism investigations.

I think the charter adequately covers that which it is possible to do. It will not permit the FBI to prevent every crime of political motivation in this country. I suggest that it never could. That when you have something like the Hanafis, you have a man possibly unbalanced by a crime affecting him and triggered again into violent activity by a series of events that there is no way that can be predicted. The Secret Service has often said there is no protection against a nut with a gun. And I think that's true and I think it will always be true. I think it always has been true. Clearly, the more you monitor in theory, the more opportunity you have to prevent crime. But unless you put a one-to-one surveillance on every person in the United States, and we don't have the manpower for that, there is no way to prevent all crime--politically motivated or otherwise. There never will be; there never has been.

Q. Mary, can I ask a question that's been disturbing me since our discussions of yesterday. While I don't expect a complete answer today, I would appreciate if the panelists would write to me and the committee on two specific cases that arose here yesterday and today. Let's take the Ku Klux Klan and the Puerto Rican Nationals. Now Ku Klux Klan, and I want to talk about dynamics, we have the Mississippi incident. Once that happened isn't that within what John Shattuck referred to briefly about newspaper publicity? But doesn't that immediately put everybody on notice that there is a KKK group that is violent? Now the niceties of whether that's a subchapter six corporation or subchapter S corporation or a joint venture with the one in Maryland, etc., disturbs me as a

citizen. And I would expect some law enforcement agency to say this group is killing, has now put its plans out generally--we know what it's hatreds are--but once it's killing we've got to know what goes on. Why wouldn't the FBI have complete right in that thing to pursue it as far as we could, by infiltration or any other way, because they're active.

The second one to me is the Puerto Rican national case. We've got the history of presidential assassination attempts, you've got a number of developments of incidents and then one I saw in Chicago just before I took the plane here. A group, a disparate group--I don't know what it's particular name is but Puerto Rican--they announced it as such--and they interviewed several of the people marching. And they say, oh yes, we support violence. And we think this is part of a war and that violence ought to be supported. This looked like a nice little brouhaha. Now, they have not been very selective about their targets; they've picked on a number of "normal civilian targets." Isn't there enough notice there to say that that's in effect a grand jury investigation, ought to be continuous, and you ought to do all you can because the record is clear that that will continue? And I'm staying away from Gene Methvin's point, the broader point, which is can't you identify a lot of those. But here are two specific cases, and I wonder, is there a dispute about what the FBI's rights are in those two cases?

Jerry Berman: I would think that in terms of the Klan case that that would fit under this charter. That would meet the facts or circumstances reasonably indicating terrorist activity. There seems to be the sense that the charter says that an act has to occur. As I made clear, the charter does not say that. It allows for a preventive intelligence investigation based on facts and circumstances that a group will accomplish its aim through terrorist activities. So the Klan is covered and I think FALN, as Mr. Romerstein points out, he would say it's outrageous that the Bureau wouldn't be investigating FALN or I think it was the Puerto Rican army, but those groups have met the charter standard and presumably are under investigation. If the Bureau is not investigating them, that is not the fault of guidelines or charter, that's a problem with the FBI. They meet the standard. I think what the testimony went to, and what our article

went to, was the mere rhetoric question. And that is always going to be a judgment and line that has to be drawn. There will be circumstances, we can see, where rhetoric in the circumstances in which it is articulated, it's never solely speech. Solely speech involves a speaker, it involves a group, it involves time, place, manner. It involves information which you already have from groups under investigation. You cannot investigate solely on the basis of speech. It simply is a cautionary principle which says we cannot, either on the grounds of civil liberties or law enforcement, investigate everybody in this country who dissents or who might turn to violence.

Does George Wallace fit under the standard because he said: "Send those pointy heads down here and I'll run 'em over with my car." Does that start an investigation of Mr. Wallace in his presidential campaign? Do we go after anti-abortion groups because they say we're going to have to close down those abortion clinics in some speech that they give? Does it mean that every group opposed to nuclear power is a potential terrorist? That is, I think, the spreading of FBI resources so thin that, as in the past in the sixties, as I pointed out, they investigated everyone and missed all of the violent activity of that time. It is a disaster for civil liberties which has a fallback on law enforcement again. For example, the SLA kidnaps Patty Hearst and for two years stays underground. The Bureau obviously in the investigation chasing down the SLA can't get anyone on the political left to talk to them. In fact, they all end up helping to keep Patty Hearst to protect the SLA. In the late sixties, because of Bureau activity in the sense that it was investigating everyone, they had convinced the left that they were all under surveillance, made it easy for a crazy group, a terrorist group like the SLA to convince people that we're on your side. We're in the same boat. In fact, overindulgence in law enforcement leads to a climate in which terrorism is more possible, if you will, because it does create that climate and it plays into the hands of terrorists who want to say that the state is illegitimate, that it's not only interested in violence, it's interested in suppressing dissent. And so these judgment calls which involve speech versus activity, criminal activity, potential activity, that line has to be drawn both from a law enforcement and civil liberties point of view. And I think it's in the interests of law enforcement to narrow this focus and get away from Mr. Romerstein's and

Mr. Wannall's sense that what the charter is supposed to do is put the Bureau back in a no-holds barred investigative posture which I thought was counterproductive for law enforcement and civil liberties.

Mr. Romerstein: Well, I obviously didn't make my point too clear. I can't see that in devising a charter the Congress can pay too much heed to spreading the assets of the Bureau too thin. I think it should say what it wants the Bureau to do. Now Mr. Berman has referred to some 500,000 security investigations without any results. I assume he means prosecuted results. I wish he had told you that in 1950 the Congress of the United States passed the Internal Security Act of 1950 which had a provision relating to custodial detention which required that the government place itself in a position so that in the event of an emergency it would identify those persons who might commit acts of sabotage or espionage. There was no criminal prosecution anticipated. It was a preparatory act and these 500,000 cases that Mr. Berman is talking about so many, many of them came under that act which was repealed in 1971. And after repeal the the cases in the Domestic Intelligence Division went down from 21,414 to 4,868 in a 2½ year period. The guidelines were issued and they went down in the next 2½ year period from 4,868 to 56. Fifteen on organizations, forty-one on individuals.

Now, addressing the question of whether the attention to terrorist activities in the charter is sufficient. By definition, a terrorist is one who engages in violations or a violation of the law, often violent, designed to intimidate for political purposes, and their advocacy of violent overthrow of the government, saying bloodshed is going to be necessary and placing or urging the members to go into the armed services to be properly prepared. That is not an act designed to intimidate. It is an act designed to a future course of action looking toward the overthrow of the government. Now the statute says the FBI must concentrate only on conduct and then only such conduct as is prohibited by the criminal laws. The recruitment of individuals, the training of individuals looking toward violent overthrow is not a criminal act. The statute therefore would preclude tracking activities of a perfectly legitimate nature. It requires an assessment of the success of the activities.

Now, the former Associate Director of the FBI testified before the Kennedy Committee a year and a half ago and he spoke of an organization of some seventy members, and the Attorney General determined under the guidelines then in existence that this organization was working toward the overthrow of the government. But certain standards and rules were applied--immediacy and things of that sort--and as a result, no investigation was undertaken. And the former Associate Director said, now we will have no way of knowing, they are now engaged in recruiting and trying to form a program which will accomplish our purpose. He said we'll have no way of determining if that membership builds up from 70 to 70,000. He said, I'm not objecting but I just want the people of the country to know that the FBI is not in a position to guarantee in any respect that violence would not occur under circumstances such as this.

John Marsh

I wanted to throw this open to questions. Herb, you wanted to comment on this last remark.

Mr. Romerstein: Mr. Berman suggested that the reason that the political left in this country did not help the FBI find the Symbionese Liberation Army was because they're all upset that they're all being investigated. Well, they haven't been investigated for the past three years. There's been the Attorney General guidelines. Are we now getting cooperation from the political left? And say in the case of the FALN where a Grand Jury in New York attempted to interrogate those people who were peripherally involved with the FALN members and the political left in this country, including the ACLU, screamed and yelled that it was terrible that the Grand Jury should be questioning these people? There were demonstrations, there were leaflets, there were articles in their press, they were outraged that anybody should try to ask these people to help find the fugitive FALN members who have murdered five people in New York--four at Fraunce's Tavern and another one on 42nd Street. But the left certainly has not been helpful in apprehending them; in fact, when an FALN member was apprehended when he blew himself up in an apartment, somebody helped him escape from the prison ward of a hospital.

So, clearly, the political left is not helping the FBI. They're still helping the terrorists. Now the question arises, the question was raised: Is the present definition of terrorism and discussion of terrorist investigations sufficient? And I suggest that it's not. That in order to investigate terrorism you don't merely investigate the group itself that plants the bomb, you have to investigate the support organization that provides the safe houses, that provides the false identification, that provides the legal help when they get into trouble, that provides all those things that the terrorist organization needs. And under this charter and under the guideline, terrorist support organizations cannot be investigated.

The question was raised by Miss Lawton of the Hanafi Muslims. In fact, the Hanafis had been penetrated in Washington, D.C. by the Metropolitan Police Department. That informant was pulled out when the same kind of destruction of intelligence-gathering that's taken place on a federal level took place on local levels and there is no intelligence unit in the Metropolitan PD and they didn't have an informant present when the Hanafis went out to commit their terrorist act. The FBI was not watching the Hanafis and, at the time that the hostage situation was going on, the FBI wired their field offices asking for information on the Hanafis. One field office answered: "We have none. We used to have it but you told us not to investigate."

John Marsh

Thank you, Herb. We're going to throw it open. We have time for just a couple of questions from the floor.

Q. (Inaudible)

A. I agree with what you're saying. That's how I read the charter. I attended every hearing in which the Bureau and the Department of Justice were up there explaining the charter and that's what they were saying. And I think that that is going to create judgments that go on one side of the line versus another in a particular case. But that is what it's all about and we're not trying to prevent that. We just want them to make that kind of a judgment.

Mr. Wannall: I agree with you, Mr. Scalia, that the language is loose and I can interpret it entirely the other way, as I endeavored to during the course of my discussion. Yes, I agree the charter says conduct which not only has occurred but is imminent. Which will occur, not may, but which will occur in the future. And I don't think under the bases for investigation advocacy would be permissible. I think it would wipe out the Smith Act, quite frankly.

Q. I would just like to make one brief factual point. Mr. Berman, I agree with a lot of what you said in your most recent comments but I didn't read those GAO articles of 22,000 investigations as pointing out that there was no record of prevention. There are several cases in there, regardless of what GAO found, I can give you a number of cases. They're all public record, including the record of the Church Committee, one of which included a prevention of an assassination attempt of Emperor Hirohito when he came into New York in 1974.

Mr. Berman: I understand that there are cases in which prevention does occur. But I think the FBI submissions to the Church Committee and also of the GAO audit and everything that's come forward is that in 99 percent of those instances, it will be having targeted a group engaged in violent activity will lead to the prevention of some future acts by that group, FALN or Weather Underground. The Weather Underground was penetrated after it was engaged in violence, met the standards of the charter, and then an undercover agent went in and a future act was prevented out in California. It's that kind of trail. The big problem is how far do you go on the other side to engage in preventive intelligence aimed at groups who talk, have no track record, are dissenting, who may potentially engage in violence. That is the real problem area where I don't think that you're going to, even by intensive surveillance of those groups, prevent very much and at the same time you're going to really break the line between legitimate law enforcement and over zealous and over broad intelligence which does threaten civil liberties.

Miss Lawton: I think it's also important to point out that the GAO, while it said there were few cases that it could document, it did in fact document, as you

suggest, but further said that this indeed is probably not measurable by our traditional measures. They did not say that prevention was not legitimate and had not occurred. They said it wasn't measurable. And I would suggest that since their training and approach is normally the traditional audit approach, if it's not mathematical, they can't do it. And that's what they said. They did not say that prevention had not occurred.

Q. The ambiguity appears to lie in the interpretation of the existing language. Both sides, Berman and Wannall agree that advocacy of the violent overthrow should be investigated. Why don't you write it in the guidelines, then there would be no ambiguity. Yes or no?

Mr. Berman: It's in there.

Q. Wannall says it is and the gentleman back here says he can't tell. Let's make it clear that advocacy of violent overthrow can be investigated, then there is no ambiguity. Are you in favor of that? Yes or no?

Mr. Berman: Can be inquired of. There is another issue which hasn't been discussed yet.

Q. Let's not fool with another one.

Mr. Berman: No. It's part of the issue. Part of the issue is that the charter makes a distinction between inquiries and investigations. That its investigations focus on conduct but it can also conduct an inquiry to establish whether there is a basis for investigation. An investigation is a wide open use of all of the techniques listed in 533(b) of the charter. From infiltration, informants, and physical surveillance, and if you've got a warrant, wire tapping and the rest. But the inquiry authority is not spelled out in the charter and this may be where we can solve the problem. I would say that advocacy of violence in certain circumstances can be looked at by the reviewer. They can make that judgment but they cannot use every investigative technique simply to find out whether there is a basis for investigation. If they have facts or circumstances indicating a crime then they can conduct a full investigation. But I think that an inquiry, if it was limited to inquiry versus investigation, I would say advocacy is covered.

Q. (Inaudible)

Mr. O'Neil: The functions of the old Internal Security Committee, at least on the House side, now reside in the Committee on the Judiciary. And insofar as oversight today, the area we're talking about, what's referred to as domestic security or terrorism, there are two committees: the Permanent Select Committee on Intelligence for which Herb Romerstein and I work, and the Committee on the Judiciary.

Q. (Inaudible)

Mr. Romerstein: As the former minority chief investigator for the House Committee on Internal Security, I believe that we need a House committee on internal security. I think it's vitally necessary. The fact of the matter is that the Congress gave the responsibility to the Judiciary Committee, as my colleague Mike O'Neil says. They have not moved a muscle to do anything to investigate in that area. The Senate Subcommittee on Internal Security was abolished. The Senate Judiciary Committee is doing nothing in that area. The intelligence committees have the function of oversight of the intelligence agencies. An internal security committee has the function of oversight of the subversive and violent groups. So that laws can be suggested to cope with these kinds of problems. Those kinds of investigations can't be done by an intelligence committee.

John Marsh

Thank you, Herb. We have time for one more question and Morry says that this area will be developed further in the workshops this afternoon where you'll have an opportunity to pursue this further. I'm going to ask that the response to the question that we're going to get be limited to one minute.

Q. (Inaudible)

Miss Lawton: The short answer is that the existing law, which is the only charter the FBI has, states that the Attorney General shall appoint individuals to

detect and prosecute offenses against the United States. That's the statute under which it is obliged to operate and that's all it says.

John Marsh

Thank you, Mary. I would like to thank all of the participants here who took part in the program this morning and to you, Morry. Ironically, when I received a letter from you in reference to the notice of this meeting, it was delivered in a clear plastic envelope and when I opened the clear plastic envelope there was a notice in there from the Postmaster General that apologized for the fact that your letter was in such a charred and burned condition. It happened that it was on the American airliner that had a bomb in the baggage compartment. I don't know whether that's apocryphal or not. Thank you very much.

Morris Leibman

It can't be apocryphal if Jack Marsh got it that way. I assure you I didn't char it. Ladies and gentlemen, let me make a suggestion. Before we have our five-minute coffee break, I'd like to introduce Ray Waldmann to you. You've met Ray before. He will be your moderator. I have to leave for a short while for committee business so it isn't that I'm not interested in the next panel. Ray, if you'll step up here. Ray will give you your marching orders. In introducing Ray, I want to tell you that he's not only one of our consultants but we picked him because of his outstanding experience since Harvard Law School and that is as a member of the Department of State and as President Ford's Special Consultant on Intelligence Matters. Ray Waldmann.

B. FOREIGN NATIONAL SECURITY INTELLIGENCE

Moderator: Mr. Raymond J. Waldmann
Intelligence Consultant, Standing Committee
on Law and National Security, ABA:
Former Special Counsel for Intelligence
to President Ford

The second half of our morning program deals with the subject of "Foreign National Security: Intelligence, Charters, and Guidelines." As I'm sure everyone

in this room knows, this is an important subject these days as the Senate committee and the Executive finish work on their draft of a legislative charter. This is not a new issue, of course. In fact, in some sense the debate goes back over thirty years to the original charter, if you will, of the agency adopted in 1947. That charter, of course, is nothing like the current discussion and in the intervening thirty years there has been, in Bob Bork's terms, a tradition of direction and support to the intelligence community in the form of presidential directives and congressional acquiescence.

That tradition was challenged some five years ago by the revelations in the New York Times, in the Rockefeller, and in the Church and Pike committees, and that challenge led to President Ford's Executive Order in February 1976, which for the first time in public form, and in some detail, established guidelines for the intelligency agencies. At the same time, Congress adopted the Hughes--Ryan reporting amendments and shortly thereafter the Senate and House Select Committees on Intelligence were established. President Carter adopted his Executive Order on the foreign intelligence agencies in January of last year, and also last year the Senate committee produced its discussion draft, as it is now called, S.2525, which laid out in very specific language and in some detail a legislative charter for the Agency.

At the present time there is no public document for us to dissect the way we have a bill on the FBI charter in front of us. So I've asked the panelists this morning to really look at four questions. Is there a need today for a legislated, as opposed to Executive Order, charter? What should be the nature of any legislated charter? Can intelligence operations be brought within the realm of the law, and, if so, what are the appropriate limitations on legal and judicial involvement? And fourth, what is the appropriate role of Congress as a legislative and oversight body in dealing with foreign intelligence activities? The cliche is, of course, that the speakers need no introduction and that is particularly the case today. We have an outstanding panel. I've asked them to limit their opening remarks to fifteen minutes each and then the commentators will have an opportunity to react to the presentations. And if we're running short of time this morning, that is, if we do not finish by 12:30, at which time we are scheduled to break for lunch, we will carry over to the afternoon session and reconvene here at 1:30.

Our first speaker is Mr. William G. Miller, who is now Staff Director of the Senate Select Committee on Intelligence. Mr. Miller.

Mr. William G. Miller

Staff Director, Senate Select Committee on Intelligence

Thank you. The gestation period for a legislative charter for intelligence activities for the country has now surpassed the time of the elephant. And it shows every sign of setting a record. There's a story that's told in Iran--and Iran's very much in my mind and I suspect in many of your minds--concerning the world's longest pregnancy. A woman came to Iran's greatest doctor some months after she had expected a child and asked the doctor what she should do. The doctor examined her and found her normal in every respect and said, "Just be patient, your time will come." So year after year the woman returned and she got the same diagnosis and the same advice. And finally after sixty years it was decided that even Job, or in this case Job's wife, would have lost patience and the doctor decided that he would have to operate. So he called in all of Iran's most distinguished physicians and they made the incision, gathered around, and peered within and they saw two tiny white-bearded men bowing alternately to each other saying, "You before me."

This partially illustrates some of the difficulties in trying to arrive at a consensus. We have decided, when I say "we," it's all of those who are involved in trying to place intelligence activities within the proper sphere of governance, we have tried to understand that it requires an agreement, a substantial agreement between the Legislature, the Executive, and, of course, the people about how we should conduct intelligence activities. I'm not saying that all of those among us who have been involved in this process will end up with long white beards, and nor do I contend that radical surgery is the only answer in order to produce a birth. But it will require considerably more sustained effort before we're going to arrive at a product that we are proud of and that we think will bear the test of time. But despite the delay, I think the time has been well spent that we have been working over this question of charters. For we're dealing with the most

difficult area of public policy that faces our country. Certainly the most difficult area since the end of World War II. It plays an increasingly larger role in our daily lives. And, as a superpower, as the leader of nations, the United States has responsibilities and we've acquired problems that the framers of the Constitution could never have contemplated.

What's happened is that the United States has created as a part of its national government an enormous national security system which, of necessity, functions under conditions of secrecy. The national security system that we have involves large permanent military forces deployed all over the world, vast diplomatic and intelligence systems stationed throughout the world. The decisions that involve national security certainly occupy the largest proportion of time of our national leaders, as the Iran crisis now before us so aptly shows. So it's a basic premise of a majority of those who are working on this charter effort, both in the Legislature and the Executive and those outside who have been helping, that there is a need for a statutory charter to place the necessary--and it's agreed that they're necessary--and secret activities, largely secret activities, of our government within the constitutional framework. They are not simply, as we have come to realize, a temporary phenomenon that develops because of a war or some vast internal crisis. They are a permanent part of our national life.

So the effort to enact a legislative charter for intelligence activities is really only one part of a larger effort that has taken place, as many have suggested, over the past three decades. And that effort really has been aimed at placing what we have recognized as a necessity within our national constitutional system.

The first step, of course, was the National Security Act of 1947, and it was an important first step. This pioneering document laid the basic structure for the Executive Branch to deal with the problems of world leadership. The Department of Defense, the National Security Council, and, of course, the creation of the CIA. But the framers of that document, and one of them is right here beside me and there are others in the audience here, did not take account of the strains it would place upon the Constitution. Nor did the framers

contemplate the needs of the Legislative Branch. Nor was there any reason to expect that it could. The United States at that time embarked on activities on a scale and of a kind that it had never experienced before.

I mentioned that John Warner, one of the architects of that 1947 Act is here, and he can speak well to the history of those years. Another one of the architects, or certainly one of the legislative movers, was Clark Clifford and he has expressed a view very clearly that the 1947 Act, while it has served the nation well, is outmoded and requires recasting and that's what we're about.

There are some who believe that the 1947 Act is sufficient, that its very general authorities and in many cases no authorities at all, are sufficient. And there are those that think the abuses by the intelligence agencies so prominently publicized a few years ago have ceased and receded into the shadows of the past, and that there is really nothing more to be done except to get on with it. That is not the view of the present Administration nor is it of the present leadership of the intelligence community. They have all pressed for the completion of a charter and have urged early enactment on the grounds that the intelligence activities of the United States, which are so necessary for the security of our country, need legitimacy that the law can convey. They further believe that there are many good reasons to place in the law what the agencies are authorized to do and what they are prohibited from doing.

We've come a long way since the findings of the Church Committee. The intelligence activities of the United States have been governed in that interim period by new Executive Orders that were developed by several administrations: the Ford Executive Order and now the extensive revisions in the Carter Executive Order. In 1976, the Senate established a permanent oversight committee. That was one of the recommendations of the Church Committee. It was a recommendation that was fully concurred in by the Executive Branch. In 1977, the House created a counterpart committee. In the Ford Administration, internal guidelines for the agencies; that is, the FBI, the CIA, the NSA, and the other entities of the intelligence community, were reviewed very carefully by the Attorneys General: Levi, Bell, and now Civiletti. There is an annual

intelligence budget authorization act. The funds and programs which are to be given to the intelligence agencies are carefully scrutinized by the oversight committees before they are approved by a vote of the two houses. The figures are still kept secret.

For several years now the Congress, through its oversight committees primarily, carefully reviewed the intelligence activities of the United States and did so in a secure manner and in a way which comes close to meeting the constitutional requirements concerning the review of the expenditures of the United States. There are some who argue that it doesn't go far enough but that debate still goes on. In 1978, the first section of the Legislative charter was passed. That's the Foreign Intelligence Surveillance Act. This important part of the intelligence charter has already proven to be an effective and workable legislative means for governing the use of surveillance techniques in the United States. There's enough flexibility for the agencies, so the agencies tell us, and there is enough governance, at least in the view of the oversight committees.

The success of this portion of the charter is tangible evidence of the possibilities and the probable workability of an overall legislative charter. But it is clear that the time that has elapsed since the report of the Church Committee some years ago has allowed for a testing and examination of the recommendations in that report--recommendations that were made by the Rockefeller Commission--and, of course, it has given the opportunity to test the performance of the agencies and the interaction between oversight and intelligence activities. I think most people would agree that there is now a more balanced climate of opinion. That the dangers that some saw in over-reaction to abuses is not really any longer a fear, and that there has been, at least in the last two years, a focus on determining how best to authorize and govern necessary intelligence activities. The first step having been to decide what activities were vital to the country and what the country would expect to be necessary in the coming decades.

I think we can say that mutual confidence has developed between the intelligence agencies and the oversight committees. And this is largely because

of the daily interaction between the intelligence community and the oversight committees involved. We've been able to test the laundry list, as we like to call it, of S. 2525 to see in practical terms what these provisions would mean. We have a constant debate with the legal offices of all the agencies, with John Warner and his colleagues, with many interested parties throughout the country on what the proper balance should be. That is the purpose of the effort, to strike the proper balance between specificity and governance.

We've been able to test the Executive orders to see where they are too strict or too lenient or perhaps way off the mark in some cases. There's a recognition that a legislative charter can only accomplish a limited number of objectives. What can it do? It can provide clear authority for what the nation believes are necessary intelligence activities and replace the tenuous reliance on so-called presidential prerogatives, which was arguable and contested by many in the country, and thus strengthen the long-term legitimacy of such agreed upon activities.

Second, the charter can consolidate a greater proportion of congressional oversight into the two oversight committees and thereby reduce the risk of leaks without sacrificing effective oversight. It can ensure the accountability of the effectiveness of national intelligence programs by assigning responsibility for these programs to national intelligence leaders. The charter can clarify the jurisdictions of the FBI, the NSA, the CIA, and the other intelligence community entities so that they have the necessary legal authority to perform their necessary duties.

Finally, a charter can establish clear standards which protect the rights of Americans based upon the fundamental principles of the Constitution. While there are many things that a charter can do, clearly a charter cannot guarantee the quality of the work of the intelligence agencies, because that depends on the skill of the people who lead and staff those agencies. It cannot establish by law, nor should it attempt to, all the details of intelligence organization and procedure because we are convinced that may be a straightjacket. Nor can a charter impose absolute prohibitions on certain activities because it is very clear

that extraordinary circumstances may arise which may require exceptions to normal rules, particularly in that unpredictable area of national security or in some cases actions which threaten our very survival.

The major outstanding charter issues that we have left concerned activities which could affect law abiding citizens. Collecting information, it's that problem of to what extent is the government getting into the business of citizens who are minding their own business and obeying the law. The capacity to conjecture hypothetical situations where extraordinary action would seem to be desirable; not to mention a number of actual cases where extraordinary action in the past required setting aside what we would regard as normal guidelines--bespeak actions that were in the national interest. Both the hypotheticals and the actual cases argue against absolute prohibition. Over the past two years the Senate committee, and the House to some extent, and certainly the Executive Branch, have approached the problem of activities which could intrude upon the rights of Americans as a basis for framing statute or proposed statute analogies to the Fourth Amendment. We believe that there should be a presumption that an American should not be subject to intrusive investigation without a clear suspicion of wrongdoing and without compliance with constitutional safeguards. But we recognize that foreign policy and defense of the United States require an expectation of the unexpected. But if there are extraordinary and compelling circumstances--the reasonable man's standard--which requires an exception to protections, the reasons have to be given and the exceptions should be made by the highest responsible official through a regular and reviewable process. That's the price of setting aside guarantees. We think it's a reasonable price.

We're now in the final stages of discussion, we hope (it may be years before the last word is given) with the Executive Branch. A lot of things have intruded: Iran, SALT, and the fact that the balance is yet to be struck on some issues. The questions clearly that remain are those balancing questions. There's general agreement, I think, on the essentials. The arguments that remain are 5, 10, 15 percent on either side of the point and they're over the degree of specificity and the tone of certain provisions. The accusatory tones have dropped out. The approach to these questions is far more neutral than was the case in the past.

But it's our hope, in concluson, that the charter effort will result in a stable structure for governing what all agree are necessary intelligence activities, a structure that will allow for flexibility for the country to meet the many challenges that will undoubtedly confront it in the coming decades, but do so in a way that would respect the intent of the Constitution and the belief of our countrymen that the laws can apply to every field of public policy. Thank you.

Raymond Waldmann

Thank you very much, Bill, for that excellent presentation. Both for the history of the efforts and also the current thinking as to the need and the basis for a legislative charter. Our second speaker is the former Director of the Central Intelligence Agency and now an attorney in private practice in Washington, the Honorable William E.Colby.

Honorable William E. Colby

Former Director, Central Intelligence Agency

Thank you very much, Ray. It's a pleasure to be here in this Bar Association group and discuss this. I think Bill Miller may have pulled some of the thorns of some of the discussion by the air of sweet reason that he provided about this charter. I certainly hope that the new revision does have all the qualities that he says.

I think the historical perspective, of course, is that we did have a charter and that it did do a very important thing--it reflected an American consensus about intelligence dated 1947. And at that time there was no question about the support of the nation for giving us a very vague charter. Just go out and do what's necessary is just about what it said. And this was supported in the Congress and I think was supported in the people at large. Now it was based upon the concept of the spy business and the belief that that's what intelligence was all about. In the intervening years, of course, intelligence grew to a much different kind of an organization and function. And, as a result, it squeezed out beyond the limits that that first charter gave.

Now, we conducted a great revisionist effort against that charter and that concept in 1975 in the typical American way, at the top of our lungs and shouting at each other with great sensational headlines and spectacular TV theater. And we hurt ourselves, I think, in the process. Now we frightened a lot of people around the world about what the CIA was that we're still hearing of in the rantings of various demagogues around the globe. We also frightened a lot of our friends, that we really aren't a sober people about important things like intelligence and that they didn't dare to work with us.

Now, the question then is should we go back to that old idea of a charter that gives us a few general guidelines and nothing much else? And the answer, I think, is no. We do need a new charter. We need to express the American consensus today about what intelligence is and what it should be. Now there's several reasons for that. I think we need to give a signal to the world that we have a new American consensus about our intelligence agencies, that we have overcome that sensational period of turmoil and accusations, that we have come to a sober decision that we are going to have an intelligence system, that it is going to be disciplined, and that it is going to protect its secrets. It also, I think, is a vehicle that's necessary to convince some of those demagogues that they cannot get away with those false allegations about CIA being under every bed in the world. That, indeed, this new charter can give the signal of precisely the sober leadership that we need to give around the world.

There's another more parochial reason, I think, that we need a new charter and that's because of the ambiguities that showed up in the old one. Now those ambiguities led to some very agonizing decisions by responsible people at the time as to what that charter said. When the charter said that the Director of Central Intelligence should protect intelligence sources and methods, there was a very reasonable interpretation of that that it required him to go out and investigate exposures of intelligence sources and methods and to locate where they happened and why. And the fact that some of those activities of doing that investigating crossed certain other limits and other laws was an honest misinterpretation, I think, of the conflicts of those two provisions. Now, we've gone through an effort here in these new charter revisions to remove some of

those ambiguities and to make it a little bit clearer to the people in intelligence itself so that they won't be led into a situation of doing something they think is important for the security of their country under what they think is the clear provision of the law only to be subject to a witch hunt five or ten years later for having performed that service for their country.

So I think the charter can help the people in intelligence and avoid that kind of ambiguity and avoid that kind of revisionism. Now, with that I think the question is well what does the charter say? Bill a little bit surprised me by saying that it should have no absolutes in its prohibitions. I would think there are a few absolutes that are appropriate to our American philosophy of our lives and our world. The absolute, I think, which we've had, and I think it is a pretty general absolute, against assassination of foreign leaders. Except, and I would put the exception very clearly in there, at a time when our young men are shooting at another country's young men. I don't believe the leadership on either side should be immune from that kind of action. And in that situation I would have no hesitation in approving an action against a leader of a state whose soldiers are shooting at our soldiers.

Now this is a clear prohibition, however, against the adventurous elimination or believed elimination of some unfriendly leader with all the implications and all the chances of exposure and explosion that it contains. For instance, I have recommended that there be a rule, a flat prohibition against torture. I think it's repugnant to Americans and let's get rid of the allegations that CIA somehow is involved in torture. We know it hasn't been. The committee that looked into CIA, you'll notice in the volumes of reports, did not discuss this and I assure you that it wasn't that those committees were trying to cover something up. They didn't cover anything else up they found, and I think that they would have made quite an issue of that if they had actually found it.

But I think a few absolutes like this are appropriate to reflect our attitude today. I think we need to give a charter, however, for the functions as well, the function of intelligence-gathering, the function of discrete, secret assistance to friends of ours in other countries to so-called covert actions--political and

paramilitary. I think these are situations that we must face in the world today that we are not required to sit idly and watch a polarization occur between a brutal dictator on one side and a ruthless terrorist on the other, unwilling to support the dictator because of his brutality and unable to deal with the terrorist because of his hostility. I think in those situations it's quite appropriate that we reach out for some decent people who can give responsible leadership to some of those situations and forestall the problem of facing a hostility at the end which requires us to contemplate carrier task forces and marine landing forces.

I think that the other aspect of the charter needs to be the procedures under which the operations are conducted--the clear chain of responsibility. I think this is an American phenomenon that we insist upon in the rest of our government and it is appropriate in this part of our government. There is a question today as to who authorized, who hinted at, who approved, who silently suggested, who suggested the assassination efforts against Mr. Castro in the early sixties. The record is unclear. If there were a record I think it would be clear as to where the initiative for that activity started. But, today we cannot say that. Now, I think in the future we need that kind of clear responsibility under our American concept of how we organize things.

I think that the procedures, of course, should also require the consultation with the Congress, the clear indication of where Congress fits in. I certainly hope that the new version of this charter does not call for sixty annual reports to the Congress about various details of intelligence activities, because I think that they're kind of useless on the one hand and, secondly, that, if you really want to get a bureaucratic exercise without content, just require sixty reports on anything every year and you'll get an automatic piece of paper that nobody really pays very much attention to.

I think there are procedures that we can impose by which the Congress is required to perform its constitutional function of supervision and oversight and involvement in the responsibility for some of these activities, and that these are fairly easy to put in. Now I also think that this charter should also contain some very clear disciplines for intelligence, and I think the most important discipline is

the one that journalism applies to itself, which is that they produce the material but they protect their sources. I think this charter needs a provision in it which ensures that we Americans can protect our national sources. Our friends around the world are looking to us for this signal that we have gotten over this period of upheaval and that we are going to be responsible colleagues in intelligence and responsible people that they can work with. And that they don't have to fear that that young case officer who they worked with and trusted is somehow going to go out and write a book and expose their names in the future. We need to be able to punish that kind of officer, whether he gives the information to the Soviet Union or whether he puts it in the New York Times. I think this is an element of the charter that is absolutely essential.

Now one of the problems by which this charter is getting that long gray beard within the womb is the search for perfection. We have now been at it for about three years of reviewing various possibilities. We have the Executive Orders as a basis. They seem to be working. Now the idea of seeking a perfect charter is certainly an ideal situation but at the same time I doubt that we'll ever achieve it. I think the charter that we pass today will express the American consensus today and it won't be perfect and it will require changes in the future. And therefore I don't think we have to approach this charter as though it is actually engraved upon stone and brought down from the mountain to last for centuries. That, indeed, we have to make some compromises on both sides, on all sides. I think the resulting charter will be totally satisfactory to nobody, because everybody will find something in it that he doesn't like. But at the same time I think it can express a new consensus and primarily end this period of indecision, this period of confusion, and allow our intelligence people to get back to work.

Today, every new issue immediately raises the whole subject of what kind of intelligence service we want. I think we need to get to a situation where each new issue that arises raises a single problem, perhaps, but doesn't throw the whole thing up for grabs. Now, you don't hear much about Panama today in these days. We had a great national debate about Panama only a year ago and we had a very intense debate about it and very vigorous positions on all sides, and then we had a formal debate and then we voted. And now the issue is over and we're

going ahead with the decision made at that time. I think that's what we need to do about intelligence. We have had our period of investigation, we have had our period of dissent and confusion and discussion. Let us now have our debate, let us vote, and let us let the intelligence people get back to work. Thank you.

Raymond Waldmann

Thank you very much, Bill. You raise so many provocative points in that discussion that I hope we'll be able to address them as we go along. Perhaps none more important than the function of the charter effort to provide a signal to the world that we not only still have confidence in the intelligence agencies but that we expect them to do their job. I also think that by raising the possibility that the charter would go beyond the mere procedural aspects and into absolute prohibitions, into a description of the function, and to imposing a discipline on the community and on the rest of the world in dealing with the community, is a useful beginning to a discussion of the content.

I'd like now to turn to our next speaker who, as you have heard, was present at the legal creation, who was former General Counsel of the CIA, and is now in private practice again in Washington, Mr. John Warner.

Mr. John Warner

Former General Counsel
Central Intelligence AGency

Thank you very much. I'd like to first point out, as Bill Miller has said, there are others who try to participate in and help and get involved with the charter work other than the Congress and the Executive Branch. Some of those he referred to are the Association of Former Intelligence Officers. This is a group of people who banded together in 1973 in the light of the immediate disclosures and hysteria at that time. Their effort was to see to it that there was a general education of the American public of what the realities of intelligence were, what we were trying to do. That organization continues much healthier today and over continuing periods members of our field have tried to be of assistance to the

various congressional committees and members to view some of their drafts of legislation, to comment, to provide inputs. And I think we have provided a service. However, today I shall speak personally. I don't want to put all of this on AFIO.

First of all, I agree with much of what Bill Miller has said and much of what Bill Colby has said. I don't agree with everything. I never have agreed with everything Bill Colby said and he knows it. But I'd like to talk for a moment, is a charter necessary and do I believe we should have a charter? First of all, on balance, I think we should have a charter for many of the reasons that Bill Colby gave. But I think we should not have a charter for some of the wrong reasons. Some of those consist of, do we need a charter to prevent abuses? This was touched on yesterday when Bob Bork asserted that the memory of past events will remain and that there will be a fear in the present incumbents to steer away from some of these abuses. But there are other factors and other institutions that bear on this and I'd like to touch on a few.

First of all, the Carter Executive Order. It establishes an intelligence oversight panel, with three members from private life appointed by the President. They are to consider questions of legality and propriety within the intelligence community. They report periodically to the President and to the Attorney General. The Attorney General receives these reports and he in turn reports periodically to the President and is also to report periodically to the two intelligence committees. The heads of intelligence agencies are charged that all activities remain and are conducted consistent with law, regulations, and guidelines. Also, they are to ensure that Inspectors General and General Counsels will have access to all information necessary to perform their duties. Those duties of Inspectors General and General Counsels, among other things, are to report to the oversight board any activities that come to their attention that raise questions of legality or propriety. Further, they're required to report periodically to an intelligence operations board as to their findings concerning questionable activities. Further, those Inspector Generals and General Counsels are to report similarly to the two congressional oversight committees.

These are most worthwhile mechanisms, and while presidential and can be said that they can be removed by the wave of a pen, in this real world it simply won't happen. They will not wither away. They are a permanent part of the picture and they certainly will go far to eliminate abuses.

The next item or area that was touched on yesterday too, and that's the fact of two permanent select committees in the Congress. Their functions are both legislative and oversight. The value of these two committees cannot, in my opinion, be overemphasized. Many members of Congress have stated the proposition that the intelligence abuses of the past in large part can be laid to the failure of Congress to exercise oversight. In any event, they certainly share some of the fault and blame. From my personal experience, I can assure you that, prior to these two new committees, there was no effective congressional oversight of intelligence.

In my view, then, the case that you need statutory charter to prevent abuses is much diminished. I grant that there is room for that argument. But, if there is to be a charter, there is serious danger that unwise and ill-conceived provisions will be included without full awareness of the impact. Consider just a few that were in S. 2525 of the last Congress which had some twenty to thirty sponsors. Granted, it was referred to as a draft. And the first eighty-six pages that comprised Title I of that bill contain provisions for forty-four separate reports by intelligence to the Congress. A simple provision that the two intelligence committees be kept fully and currently informed by intelligence would have served the purpose. Just such a formula has worked well in other areas.

Next, prior to entering into any agreement of cooperation with a foreign intelligence service, a U.S. intelligence agency must report such an agreement to the two congressional committees. In most instances, services of other nations insist that their cooperation with U.S. intelligence will be held very closely within the confines of that agency involved.

Another provision will authorize the two committees to demand and get any information and any documents from intelligence, while still another provision

would give the two committees the authority to disclose or publish any information they deem appropriate. In other words, the committee could say: "Give me your most sensitive information and we will determine what we wish to publish." Now, we recognize that most committees will act with reason, but why pose this confrontation between authorities? This poses a very serious practical and constitutional problem. The far more preferable situation is the current one where the resolutions establishing the committees give authority to request and there is an accommodation to needs and desires to publish.

Just one more. The very heart of the ability of intelligence to conduct clandestine operations is the congressional grant of confidential funds, which has existed since the time of George Washington. S. 2525 effectively would have repealed all confidential funds authority. It may be said that S. 2525 died and these dangers are gone. But look at what happened with the Foreign Intelligence Surveillance Act of 1978. In the name of protecting the civil rights of Americans, that law requires the President to seek a court warrant in order to surveil electronically a foreign embassy or a foreign espionage agent operating in the United States. This is a usurpation of presidential powers and contributes nothing to the protection of constitutional rights of Americans.

Let's look at that law as it defines an agent of a foreign power. A person who is not a U.S. person and who acts for or on behalf of a foreign power which engages in clandestine intelligence activities contrary to the interest of the United States. In other words, the United States may not surveil a known intelligence agent of a foreign power unless there is a finding that the foreign power engages in clandestine intelligence activities contrary to U.S. interests. Surely, clandestine intelligence activities of a foreign power in the U.S. are not motivated by benevolence. Such ridiculous language should never be on the United States statute books. It has been reported that efforts are afoot to require judicial approval of electronic surveillance of Americans abroad. This causes grave concern. How, in conscience, can we in the United States pass a law authorizing a U.S. judge to approve a U.S. agency to conduct an activity abroad contrary to the law of the foreign country concerned? This is truly arrogant. Espionage is clandestine; let it remain so.

What I've been trying to say is that congressional consideration of a charter carries serious risk that disastrous language may be included. The needs of intelligence are dynamic and flexibility must be maintained. Let's not put intelligence in a legislative straightjacket or into legislative concrete. But this is one of the purposes of this workshop, to increase awareness of needs, risks, and hopefully to reach accommodation of views and finally to sharpen views. Thank you.

Raymond Waldmann

Thank you very much, John. I think you again brought out several points which we ought to keep in mind as we go into the discussions, and particularly the workshops this afternoon. I'm a little bit curious about the role of the Intelligence Oversight Board and how well the system seems to be working with the IG and General Counsel reports. I'm also a little bit interested in the question of what new factor reporting to the two intelligence committees brings into the community's activities and if they are not doing things that they ought to be because of some restraint or chilling effect. Of course, there is the problem of reporting, and you gave us some of the basic considerations that would go into any extensive reporting requirements.

For our fourth panelist this morning, we are fortunate to have with us the now Assistant General Counsel of the Department of Energy who had two principal roles during the recent period of investigation of the intelligence agencies. He was a principal staff member of the House Permanent Select Committee and a former attorney in the Office of Legal Counsel at the Department of Justice, Mr. William Funk. Bill.

Mr. William F. Funk

Former Principal Staff Member, Legislation Subcommittee
House Permanent Select Committee on Intelligence
Former Attorney, Office of Legal Counsel
Department of Justice

Thank you. Each of the speakers so far has talked about a charter and the need for a charter. I'd like to suggest that there is something besides a charter or a need for a charter. That there are needs for various pieces of legislation in the intelligence area. The needs differ, depending on the type of legislation and the type of matter under consideration. I'd like to sort of split it out by saying that there is the area general authorities which Bill Miller referred to as organizational responsibilities and clarifying the functions. There's also the area of specific authorities or the techniques that are utilized by intelligence agencies especially when they involve United States citizens or U.S. persons. The need in each of these areas, I think, is different. I would like to suggest consideration of what do we really need and when do we need it and when do we know what we need to know in order to legislate.

In 1947, when the CIA charter was enacted, it was the best wisdom of the time as to how to organize intelligence through a central intelligence agency with a coordinating function. The general understanding was that they might have some certain specific functions themselves but that this would be pretty minimal and essentially there'd be a coordinating function. This did not turn out to be the case. It was not the case for very long. And President Ford made his Executive Order. It was the current wisdom, it was the best thing at the time, and approximately two or three years later it changed to a new current wisdom. I am very leery, and I suggest that history demonstrates that we all should be leery of current wisdom in trying to define organizational responsibilities for intelligence. Every president has essentially organized his intelligence community to serve the needs as he perceives them, as well as the needs of the world that he finds himself in. The idea of creating any specificity in terms of organizational responsibilities I would suggest is doomed to failure as past efforts have indicated.

With respect to techniques, there's differing needs for legislation in this area because of different problems. When the Ford Administration supported, drafted, and created the real initiative behind the Foreign Intelligence Surveillance Act, without denigrating the Ford Administration commitment to civil liberties, there was another side of the coin. And that was it was felt it would actually improve intelligence collection. I would suggest that that was not mere whistling in the wind but the truth. Fortunate or not, the courts have become involved in intelligence collection, not through legislation but directly under the Constitution. Prior to the Foreign Intelligence Surveillance Act, there had been a number of court cases dealing with electronic surveillance of persons in the United States, in some cases United States citizens and in some cases known foreign agents. Now those cases generally upheld the power of the President to engage in warrantless surveillance of persons in the United States if they were agents of a foreign power. It went to the Supreme Court and essentially that was the way they held.

They didn't define what an agent of a foreign power was. They didn't give any real guidelines. They had a clear-cut agent of a foreign power okay, not you can't do it. And the result of this was to create both civil and criminal penalties for violation of this nebulous standard. Now the Executive Branch, in responding to these court directions, rightfully or wrongfully, felt that it had to bend over backwards to assure legality, especially given the climate in which it was operating at that time. And when you bend over backwards to be sure that you're legal, it means you may not collect intelligence that you otherwise would be able to collect lawfully that a consensus would support, because you just don't know how that court is later going to interpret agent of a foreign power. So there was a desire to, through legislation, achieve a consensus, perhaps expand the scope of the court's decision in one area by enlarging the class of people who could surveil by subjecting it to a warrant.

It had been clear in the court's case that in certain cases you had to get a warrant anyway. There was no statutory means to get a warrant, there was no assurance you could get a warrant absent legislation. So there was a real motivating factor behind that legislation not only to protect civil liberties in the

sense of creating more or less clear guidelines in terms of what was allowed and what was not allowed and the procedures by which you could do things, but also to improve intelligence collection by keeping the Executive Branch from having to bend over backwards to assure legality or running the risk of both civil and criminal penalties in a later court case or endangering prosecution.

Now, that legislation, that specific piece of legislation is passed and, according to the intelligence communities, works as well as any law ever works. It has a substantial degree of flexibility. It doesn't, as Mr. Warner suggests, require that someone be a known foreign agent before you can surveil on him. It's the same standard that is normally used in court proceedings which is probable cause. My understanding is there hasn't been a warrant turned down and so it's not as if the courts are being overly strict in this area and yet it imposes a discipline upon the Executive Branch itself in knowing that it's going to have to go before someone to show that there is a good reason to do what they're suggesting.

Moreover, the idea of who determines that a person is a known foreign agent or a suspected foreign agent; in the criminal area we don't leave to the police the idea of determining whether a person is a murderer, an assassin of the President. You can get electronic surveillance of a person who is suspected of assassination or attempted assassination only by going to a court, only by probable cause. That's understood. To lawyers, it's sort of accepted that that's the fundamental notion of the country. Well, ordinary espionage is usually less important than the assassination of a president and, when you're talking about just establishing a fact that can be described to a reasonable person, this indicates that a person is likely to be engaged in espionage. And if that's a standard, then it can be worked on. It can be utilized and, I think, has been utilized successfully.

Now this was a problem within the United States with respect to electronic surveillance. Electronic surveillance by the United States, of course, is not limited to within our country. We also engage in it overseas. That's no secret. Courts have made decisions with respect to United States electronic surveillance abroad and some courts have held that you cannot engage in electronic

surveillance overseas unless the person is an agent of a foreign power, without a warrant issued by a United States court. There is no statutory means by which any court in the United States can issue such a warrant. We have a constitutional requirement and yet no means by which such a warrant could be obtained, at least under statute. Perhaps a court could determine it has the inherent power to do so, although the Supreme Court ducked that in a nonintelligence related case, the question of whether the courts had ad hoc power to issue warrants absent statutory authority.

It's an area where there is a problem. And that is that, when the United States wants to target United States persons abroad for electronic surveillance, there is a legal question; not because of statutes but because of the Constitution itself. What are the standards? The standards are very nebulous, there are less court cases, less definition, and again the tendency is to lean over backwards to be sure that you're legal. That can diminish intelligence collection. Therefore, I would suggest that there is a need, although it's marginal because it's not like there is so great an amount of electronic surveillance of U.S. persons abroad, but there is a need to clarify this area so that we do not diminish our intelligence collection just to be sure that we're being right.

Another area of technique where again the law comes into play, whether we like it or not because of the Fourth Amendment, is in physical searches. We do not have a law in the United States that governs searches in the United States for intelligence purposes. We do not have it for searches abroad. Again, because we don't engage in so many searches of U.S. persons; it's a marginal problem but in individual cases it can be very, very important.

Then we turn to areas which there isn't a Fourth Amendment issue like physical surveillance. Courts have generally held that physical surveillance does not constitute a search under the Fourth Amendment and so the Fourth Amendment doesn't come into play. And yet there is a concern physical surveillance is intrusive even if it isn't necessarily under the Fourth Amendment. And yet there's a number of court cases now that have held that special types of aided physical surveillance through the use of binoculars or something of that

nature would require a warrant in the criminal context. If court cases dealing with intelligence or any other cases dealing with intelligence are any bellwether, this type of holding would apply in intelligence as well. So there's a problem in terms of whether physical surveillance by any sophisticated means might also be subject to Fourth Amendment requirements such that this might create a problem that would need addressing by statute. When I say addressing I mean to aid the intelligence community itself in terms of establishing more clearly when they can do it and perhaps even broadening it.

Whether you go for a warrant in a court or the statute says it goes to the Attorney General or the President, that can be negotiated. In some cases it might go to one, it might not go to another case. The situation that John Warner mentioned where you have to violate a foreign country's law that seemed particularly inappropriate for a court, but there are other cases where such violation of a foreign country's law would not occur.

Involvement with foreign services is a very touchy point. If you're engaged in a cooperative venture with a foreign service, the idea of going to a judge in the United States and saying oh we're involved with this foreign service is again a very touchy point. The foreign service doesn't like it; perhaps that's not appropriate for a judge. But there are other areas where we do have pretty much complete control that aren't in violation of the country's law, where perhaps you were targeting a U.S. person, you could go to a court.

And then you get into other techniques such as using reporters and clergy as intelligence personnel or the collection of data where you haven't targeted a person but you obtained information about it. And I'm trying to go down the scale in terms of the areas where I feel there is a need for legislation; where there have been conflicts that have caused conflicts for the intelligence community in the past as well as violations of civil liberties in the past. The greatest number of problems have occurred, I think, in electronic surveillance and we ought to think of that as a top priority.

Let's turn to a second oversight. Having played both side of the street, as it were, being in both the Executive Branch and reporting to Congress and having

been in Congress and being reported to, at least as a staff member, I'd like to say something about the nature of oversight and the way it works or doesn't work. In the House intelligence committee, and I think it's true for the Senate as well, the intelligence agencies have been extremely forthcoming. I don't believe they've ever withheld substantive information when asked for it when specifically requested. I don't think we ever specifically requested anything of an agent because we know that's a "no no." But you don't get a lot of volunteering from the intelligence agencies to come up and bare the breast. When there are problems, the Executive Branches respond, and I think it's appropriate to work it out essentially in house and to get a united front before you go and talk to Congress about it, even in secret. This can mean a lot of delay and it can mean that Congress is not kept abreast of what, in fact, real problems are in the intelligence agencies.

Now the committees have sources of information within the agencies, people who will talk to them. They read things in the newspaper and oftentimes you get a handle that way. But there perhaps needs to be a little bit more ability or willingness on the part of the Executive Branch to share with the intelligence committee in a secret forum problems that they are currently facing before they've actually been resolved by the Administration, to achieve a consensus which is not just an administration consensus but a consensus which has the surrogate of the public, that is the surrogate for the Congress--the intelligence committees. This can, I believe, eliminate possible problems that result when the administration gets a very solid view and then it finds that that is one that just does not meet the consensus of the intelligence committees. With that, I'd just like to close.

Raymond Waldmann

Thank you very much, Bill. Again, I think you've touched on another aspect of the issue. Not only the need for more public charters for reassurance or for conveying a signal but to clarify the law as it now stands in some very important areas. One of those important areas--electronic surveillance--we are indeed honored to have today as our first commenter who will react to the presentations

we've had so far, the General Counsel of the National Security Agency, Mr. Daniel Schwartz.

Comments: Mr. Daniel C. Schwartz
General Counsel, National
Security Agency

Thank you very much. I am, as many of you know, new to the National Security Agency and new to this process and I don't know how long this ploy is going to work but it does, I think, bring from my standpoint a new view on how the charter process has worked in the three years I haven't been there and some ideas, hopefully, on how it'll work in the future.

It was said this morning by one of the speakers that there has been a long time waiting for the new version of charter legislation to come down from Mt. Olympus. I'd suggest that the analogy perhaps might more properly be Mt. Sinai and the concern might be the difficulty of writing the Ten Commandments by the committee. That's really the problem. The problem of finding agreement between the various agencies on the one hand and the various affected interests in the Congress on the other.

I would agree with Bill Funk that it may be useful to consider the charter legislation from really two different standpoints: the one dealing with the concern about the functions and restrictions on the various entities involved in the intelligence community and the second dealing with the overall structure of the intelligence community, the process by which intelligence flows and is dealt with within the community and, of course, the congressional oversight interests.

With regard to the functions of the various entities from the standpoint of the National Security Agency, we have a strong interest in charter legislation. Not the least of which comes from the fact that there is in fact no specific statutory basis for the National Security Agency. It was said when I arrived at NSA that I was told that these initials stood for "No Such Agency." I was unaware how true and perhaps tenuous that all was. I think it is useful to

legitimize and set out clearly the functions of the agency, of each of the agencies in the intelligence community. And while I think it was useful to set out the structure by which intelligence flows and is dealt with within the Executive and dealt with as its relation as to Congress, this is clearly the much more difficult step. From my standpoint as a newcomer, I sense that the need is for a real effort at this point on the part of the various executive agencies, on the part of the various members and staff of Congress to make a real commitment to sit down, make the necessary compromises, and work through a proposal that can at least be acceptable to all the interested parties.

Now, obviously it's difficult these days to get everybody's attention. There are other things going on in the world and the same principals who are involved in questions of intelligence charter seem to be involved in those other things that are going on in the world. But it is necessary, I think, to get everyone to focus and push toward those sets of compromises or it's not going to happen. Let me make a final point. I would agree with the various comments that have been made here, including from Bill Miller that the relations with the congressional committees have been good, have been reasonably successful. I might add I came to NSA from the Federal Trade Commission so my views on how one relates to Congress are a tad bit warped but from any objective standard I think the relations have been good. But it is essential that the members of Congress, the members of the two committees, and the staff reach some kind of consensus as to what is needed and that the Executive agencies reach some kind of consensus as to what is needed. If that doesn't happen, there will not be meaningful charter legislation. Thank you.

Raymond Waldmann

I would like to call on our two final commenters at this point but also announce that I think given the schedule for this morning and also taking account of what we are planning to do this afternoon, that I would like to reconvene this session after the lunch period, say at 1:30 or whenever we finish the luncheon time, to explore with the panelists and with the commentators and with those of you who are interested in this subject some of these issues in more depth. So do not worry that you will not have a chance to ask questions from the floor if the commentators should run up to the 12:30 deadline now.

With that, I'd like to introduce to you the General Counsel of the CIA, Mr. Daniel Silver.

Comments: Mr. Daniel B. Silver
General Counsel, Central
Intelligence Agency

The charter process is the development of a consensus, which I think you can detect in very large degree from the comments of the speakers this morning. When this process started, when S. 2525 was introduced and the Administration organized itself to begin looking at the provisions of that bill, there was no consensus within the Administration and there was certainly no consensus between the Administration and the Congress. In that time at the level both of the intelligence charter's working group made up of the General Counsels of the various intelligence community agencies and of the Special Coordination Committee of the National Security Council which the principals prepare the positions for the eventual review and approval of the President, there has developed a much better, indeed, a remarkable understanding and cooperation among the agencies in the Executive Branch as to what the problems are and what the probable solutions are. At the same time we've had a very fruitful dialogue with the staff of the Senate Select Committee and I think that I would put the margin of difference lower than Bill Miller's 15 percent at this time. I think it's very close to zero. At least I don't see any problems that cannot be bridged.

Meanwhile, there are several hundred million other people in the country looking at this process. My occasional forays beyond the Potomac River suggest to me that most of them don't give a hoot about intelligence charters. But they have other priorities that need to be addressed. Before I get into those, let me make it abundantly clear that I am personally in favor of charters, very much hope that we can accomplish them at some time in the near future. I hope that sixty years of gestation will not be necessary. And secondly, that the intelligence community from the highest levels down to the working ranks I think very much support the concept of charters, of sensible and reasonable charters,

and are behind this effort. However, there are other problems and I think there is a certain sense of distress within the intelligence community that the other problems are getting lost in the shuffle. That we may be fiddling while Rome is burning. What is burning at present is, for example, a virtually unprecedented wave of leaks of sensitive intelligence information, and not just ultimate intelligence estimates or matters of political concerns, that details of human and technical collection systems some of which have been very seriously compromised. I cannot overemphasize the need if this nation is going to have a good, or continue to have a good and effective, intelligence system to send the signal of reassurance that Mr. Colby referred to to our own intelligence agencies and to the sources that we depend on abroad.

I think the people, from the contact I've had with public opinion outside the rather rarified atmosphere of Washington, what an effective intelligence system in the field that they may not have it or they may not have it much longer. We have problems under the Freedom of Information Act in which we engage in a senseless waste of resources, in my personal opinion, trying to protect intelligence source and method information such as names of agents or indicators thereto from a public disclosure that I cannot believe any thinking American wants to occur. We have an organized and dedicated coterie of individuals in the United States and abroad who want badly to destroy the intelligence agencies, particularly the CIA, by discovering and revealing the identities of agents and officers who are undercover.

I detect a consensus in the Congress and in the country that this is reprehensible behavior and that we should find a way to deal with it. We have problems with the inadequacy of our present espionage clause in dealing with leaks. This is a very difficult, perhaps intractable, problem because of the First Amendment implications but I think it's fair to say that we're not going ahead a great deal at the present time to confront it. There has been in reaction to Executive Branch enunciation of these problems, some tendency on the part of commentators in the press and on the hill to say that all these will be solved through the charter process. Well, first of all, I don't think we have useful solutions necessarily pending in the context of charters but, secondly, we really cannot wait for the extended gestation period that may be necessary.

Now, it's been suggested by previous speakers that we either are on a mountain top or in the womb at the present time in trying to develop charter legislation. I would vote for the womb. We do most of our negotiating in windowless rooms and I think we are still very much in the dark. And I mean that seriously in this sense. We now have had Executive Orders for several years. We have just completed a really overwhelming exercise under Executive Order 12036 of developing detailed agency-by-agency regulations for a variety of subjects to be ultimately approved by the Attorney General and then promulgated by the head of the agency. Now this was not required under the Ford Administration Order, this was an innovation under the Executive Order of the current Administration. It has been an extremely educational exercise and having these rules in place trying to work under them, has also been an educational exercise. In two years of development and analysis, we have made a lot of mistakes. That's perfectly reasonable and predictable and it's one of the problems that has infected the charter process in an attempt following the S. 2525 model to deal with every conceivable problem and cover every conceivable detail.

Everyone can agree on the broad principles but the minute you try and translate those, even the simple ones--assassination, torture, all the things that nobody is in favor of, that nobody is advocating we permit--we try and translate these in lawyer's language into prohibitions. You find that it's not that simple. When you get into the much more arcane and sophisticated questions of when should an agency be allowed to initiate collection of information concerning a United States person, one can disseminate it, trying to address all these rules in the statute I would submit to you is an impossible exercise. So that in my view I think that what we are going to come out with, if we come out with anything at the end of this process, is a statute that will sketch some broad principles and leave the development of detailed regulations to an evolving administrative process. I think we have a basic choice at this point. Either we have that kind of a charter or we have no charter at all until many more years have gone by to accumulate the necessary experience under Executive Branch regulations to determine what the rules and details should be. I would submit to you further that, since times change, we're probably shooting at a moving target if we try the latter approach. In other words, we need to build in a great deal of flexibility.

A few other points that I'd like to touch on with respect to this process, I think there are some misconceptions that we need to set aside or we will not succeed. The first is we need to purge this process of a backward-looking and punitive orientation which has fortunately been dissipating gradually over time but it's still there and it increases, I think, in inverse proportion to the individual's actual contact with the intelligence community today. Those like Bill Miller who work with the community every day, who have a broad insight based on oversight into what goes on in the community, I don't think nourish any backward looking or punitive motives. They're looking to the future to build a system that will work. But elsewhere I think there is still too much of: this happened ten years ago, it can never happen again, and so we will build a charter that circumscribes the abuses of the past. That's as futile as citing the war.

Secondly, I personally would like to see the word "innocent" totally proscribed from any discussion of charter issues having to do with collection of information or other activities that may impinge on United States persons. We are not in the law enforcement business, we should not be in the law enforcement business, but there is one overwhelmingly sound principle from the 1947 Act that should remain and be generalized throughout the community. It is that the Agency should not carry on law enforcement or internal security functions and therefore innocence or guilt in the traditional law enforcement context is just inapplicable for this activity. And trying to fit the standard for targeting information about or held by United States persons and retaining it and disseminating it, trying to fit all of that into the mold of a law enforcement system or of a law enforcement charter such as the FBI Domestic Charter, in my view, is unworkable.

Finally, there is one point that Bill Miller alluded to that I think we need to take into consideration, recognize, and deal with and that is the whole nature of the intelligence enterprise has evolved as Bill Colby also said from something very different at the inception of the National Security Act after the Second World War to what we have today. The intelligence needs of the country are vast and the people who feel that they need intelligence are much more numerous than before, and most prominent among them are the Congress. We cannot go

down a path of increased dissemination of intelligence information in all directions and to all comers without coming up against what I think we're suffering now, and that is the serious reduction in the security that we can afford in sources of intelligence and intelligence methods. I would submit to you that this, too, is an issue that should be grappled with and probably, in my view, should be given a high priority along with other intelligence source methods, perhaps even before we can come to grips with the hard civil liberties issues that are posed by the charter. Thank you.

Raymond Waldmann

Thank you very much, Dan. As our final speaker, and I hope within a five-minute compass Angelo will be able to say something of what he has to offer on this subject. We have a member of the Senate Select Committee on Intelligence staff who has dealt with this subject for several years and who I understand on reliable authority is a new father as of a day ago, Dr. Angelo Codevilla.

Comments: Dr. Angelo Codevilla
Senate Select Committee on Intelligence

All of this talk about wombs was perfectly relevant. But no, we are neither in the womb nor on a mountain; we are on the very verge of lunch. And so I will do my very best to keep my remarks very, very brief and a good summary.

A good case for legislation in the area of intelligence has been made by all of our speakers. I trust I'm not adding very much when I say that laws, far from being stone tablets, are instruments for dealing with today's problems in today's climate. Laws are not sacred. Laws get changed all the time. The 1947 Act was made for a certain time for a certain set of problems. Today's problems are different. We need today laws to specify things which once did not have to be specified by laws. We need laws today that embody purposes which once were taken for granted, which once lived in a more effective way within the agency.

I quite agree with Bill Miller's remark that the time we have spent in the last couple of years has been reasonably well spent. But I quite disagree that

work on charters is about over. It is not about over. It is, in my view, just beginning. That is because the questions before us are not concerning 5 or 10 percent movement in one direction or another; rather, the questions before us are ones of fundamental focus. They have, I'm afraid, a great deal to do with the interests of the parties involved in all of this. The lobbies yes, the agencies certainly. But we are learning, I think, in this time of gestation just how little relevance those interests have for our needs. We are learning how irrelevant is the focus of 12036, S. 2525 and, in my view, the Wiretap bill.

I think that the most important question we have to ask ourselves is what kind of performance we want from our intelligence agencies. It is unrealistic, in my view, to talk as if legislation does not affect performance. Of course it affects performance. This room is full of lawyers, most of whom I think realize that laws encourage some activity, laws encourage some attitudes, and discourage others. The term for this is the magisterial function of law. I don't mean to say the function of law is merely magisterial--it commands, it restricts certain things rather than others. We are not simply arguing, at least I trust we're not simply arguing, when we have these interminable go-rounds on charters, concerning whose ox will be gored. We're talking about what kinds of things we want done and what kinds of things we do not want done. And those things depend not so much on our wants but on, I think, our perception of what we need as a country.

Now, what do we need? Well, we can't really escape that question. I recall talking with a case officer who once said, and this is a deep dark secret: "We're good bureaucrats," he said. "We'll be anything you want us to be. Just tell us what you want us to be. Do you like things the way they are? We'll keep on doing this; we'll fill out forms for you." So, the question is truly an inescapable one.

Now, the real gift of the past several years, and it's been a painful gift, has been one of events which have pointed out to us certain requirements regarding performance. When one matches performance against events, one begins to get an idea of what needs to be done. Let me suggest just one requirement, a modest

proposal that the intelligence agencies be routinely able to tell policy makers at least as much as the newspapers tell them. It is not a great deal but perhaps it is. I know that the press, or parts thereof, if not full, was at least replete, with accounts of the People's Temple, before the slaughter. And yet the government was officially ignorant of the People's Temple. I know of a prominent person in the U.S. government who, after hearing a full intelligence briefing on the Iranian situation, said that he had found out much more about what was going on in Iran from television, more specifically about the Soviet role in Iran from watching the nightly news. Why? Because the reporters there were not prevented from drawing certain logical conclusions which appear to anyone with a minimal acquaintance with these things.

On terrorism I know of journalists who have sources on these matters which the agencies might not have. Why? Well, one reason is because, of course, they're allowed to keep them secret. And there are reasonable questions regarding what the agencies can and cannot keep secret. So, without giving prescriptions I simply point out to you here that a question of focus is involved and that the beginning of wisdom about all of this is that the United States is today in a kind of war. One does not have to study government documents to see that. One needs merely to look around. A war which the United States could very well lose, and this is the essential point. Any legislator or lawyer who does not recognize this fact risks irrelevance at least. So, I thank you all.

Raymond Waldmann

Thank you, Angelo, for keeping it well within the five minutes. At this point we will break for lunch. We will reconvene here. The panelists and commentators have agreed to come back and I hope you will too. Thank you.

Morris Leibman

Ladies and gentlemen, we're on schedule. Thank you for your cooperation. I hope you had a pleasant lunch. We're privileged to have as our luncheon speaker today Mr. Ken Bass who is Counsel for Intelligence Policy, Department of Justice. We have another speaker who clerked for Justice Black, practiced

privately here for some years, and joined the Office of Legal Counsel Department of Justice in 1977, and he's been constantly involved in intelligence matters but is the first, I think, official Counsel for Intelligence Policy. Ken.

Luncheon Speaker: Mr. Kenneth C. Bass, III
Counsel for Intelligence Policy
Department of Justice

I don't know if the title of this conference was intended to convey any secret meaning, but separating law from intelligence by a comma implies they are two separate subjects. It's somewhat like the commercial law section of the ABA convening a conference on "Law, Commerce and the National Economy." As lawyers, we refer to practitioners of commercial law, domestic relations law, securities law, banking law, and any of hundreds of other categories of law. But the phrase "Intelligence Law" does not roll easily off the tongue of lawyers, laymen, or intelligence officers. I'm here today to tell you that there is a definable field of specialization properly referred to as "Intelligence Law." There is a small but growing number of lawyers practicing that specialty, and like most other aspects of twentieth century American society, there is a government agency specifically created to deal with the issues and problems of intelligence law. I want to spend a little time discussing, in rather general terms, the nature, purpose and future of intelligence law. In the process I hope to give you some idea of the particular role of Department of Justice lawyers in the development of this field of law.

Any discussion requires establishing a common foundation. First, let's set the time frame. In the field of intelligence law we stand today almost at the end of the year 4 A.D. The intelligence law calendar begins at 29 B.C. with the enactment of the National Security Act of 1947, the first significant attempt to set forth in statutory law rules for the conduct of American intelligence activities. You will quickly note that the time line is a short one. The dividing point is 1976. I chose that date, and the customary B.C./A.D. terms of reference because of the central importance to intelligence law of the 1976 report of the Senate Select Committee to study Governmental Operations with respect to

Intelligence Activities. This ponderous title is more readily recognized at the Church Committee report and its popular name gives rise to the reference to the B.C. period--before Church. As for the A.D., that refers to "after disclosure" of the family jewels. History will perhaps look back on 1976 as a demarcation point in the development of law for intelligence activities. And, if Frank Church is not later seen as the John Marshall of intelligence law, he may at least been seen as our Hammurabi.

Second, we need to define the boundaries of intelligence law. That term refers to the rules, regulations, statutes and court decisions that affect the conduct of foreign intelligence and counterintelligence activities of the several agencies of the American intelligence community. The terms "foreign intelligence and counterintelligence" are defined in Executive Order 12036. "Foreign intelligence is information relating to the capabilities, intentions and activities of foreign powers, organizations or persons." "Counterintelligence is information gathered and activities conducted to protect against espionage and other clandestine intelligence activities, sabotage, international terrorist activities or assassinations conducted for or on behalf of foreign powers, organizations or persons."

Note the emphasis on <u>foreign</u> powers, organizations or persons. These words were deliberately chosen to draw a clear line between intelligence activities concerned with foreign powers and information-gathering activities relating to purely domestic events. There was a great deal of confusion between these two distinct areas of concern in the B.C. period. The Church Committee report covered both foreign and domestic intelligence abuses as part of "intelligence activities." The Executive Branch no longer combines these two concerns. We have attempted, through bureaucratic reorganization and the promulgation of rules, regulations and guidelines, to draw a sharp distinction. Thus, for example, the FBI was reorganized to place responsibility for all foreign intelligence and foreign counterintelligence investigations in the Intelligence Division and place responsibility for all purely domestic law enforcement inquiries in the Criminal Investigative Division. Similarly, Executive Order 12036--the "charter" of intelligence law--specifically provides that it does not apply to any authorized "criminal law enforcement activity."

The Executive Branch decision to separate intelligence from domestic law enforcement reflected the attitude of the courts as revealed in cases like Keith and Zweibon, but it reflects more than that. It also reflects a basic assumption that the goals and purposes of intelligence and counterintelligence are fundamentally different from the goals and purposes of law enforcement and must be regulated in a different manner. Law enforcement is intended to prevent, deter, discover and punish acts which the society deems to be unacceptable. Intelligence and counterintelligence activities are intended to acquire information so that the President and his foreign affairs, economic, and military advisors can make informed decisions in the conduct of international diplomacy. Law enforcement deals, essentially, with the internal relations of the United States Government and the people of the United States. Intelligence deals with the relations between the United States and other sovereign nations.

Sometimes the intelligence and law enforcement interests overlap, as occurs when we bring an espionage prosecution against foreign intelligence agents. But that is a rare event. Less than 1 percent of all counterintelligence cases are even considered as potential criminal prosecutions. Usually those cases are undertaken and continued for their intelligence value as double agent operations, deception operations, or simply keeping track of hostile intelligence agents. Some counterintelligence professionals argue against ever using criminal prosecution against hostile agents, contending that it is better to keep a known agent under surveillance than to have him replaced by another, unknown agent. Moreover, prosecution of an espionage case presents difficult problems akin to graymail. A hostile agent may have passed sensitive material to a foreign power, but a criminal prosecution may not only confirm the accuracy of that information, it will reveal at least some of the material to a far wider audience. The problems are not insurmountable, as the Kampiles trial demonstrates, but they are serious and they serve to distinguish espionage cases from other criminal prosecutions. My remarks are addressed only to intelligence activities as I've defined them. I will not be dealing with "domestic security" matters.

Over the past four years the role of the Department of Justice in intelligence matters has changed dramatically and exponentially. In the years

B.C. we rarely had contact with intelligence agencies other than the FBI. Legal issues relating to intelligence matters were handled within the intelligence agencies and the national security community. The Attorney General would occasionally participate in certain intelligence decisions, but not necessarily as a lawyer rather than a trusted Presidential advisor. Certainly there was no bureaucracy within Justice to deal with intelligence matters. When Bob Bork, Nino Scalia, and Bill Funk were at Justice and worked with Attorney General Levi, they did so on an ad hoc basis because they represented some of the best legal minds available, not because they had extensive personal experience or institutional competence in dealing with intelligence matters. The Department of Justice was reacting to the disclosures of the Watergate period. All were demanding that intelligence activities must be brought within the "Rule of Law." It was natural to turn to the Attorney General and the Justice Department to fill the void.

Attorney General Levi and Judge Bell each spent an enormous amount of their personal time dealing with intelligence matters. The Ford Administration worked on Executive Order 11905, the Carter Administration revised that order extensively and promulgated it as E.O. 12036. Under the Carter order the role of the Attorney General was expanded significantly. Previously, the Attorney General had been an "observer" in intelligence matters. Now he has become a full participant in some of the most sensitive intelligence matters considered by the President and the National Security Council. Under E.O. 11905 each intelligence agency was responsible for developing a set of regulations to implement the Order itself. Under E.O. 12036 the Attorney General was required to review and approve those procedures. This, in itself, is a rather unique development in the area of administrative law. Usually agency regulations are developed by the agency concerned and reviewed outside the agency in the context of litigation. Review and approval of one Executive agency's regulations by another is a rare event. In addition to their involvement in the development of intelligence regulations, Attorneys General Levi and Bell both were called on to render, with increasing frequency, legal advice concerning particular intelligence activities.

The volume of intelligence matters has not diminished under Attorney General Civiletti. Like his predecessors, he is repeatedly called on for legal advice in this area. Like his predecessors, he participates fully in the development of intelligence law. The volume led, naturally, to staff specialization within Justice. The result was the creation, in October of this year, of a new Office of Intelligence Policy and Review. Staffed by ten attorneys, the office exists within Justice as an independent office reporting to the Attorney General and dealing exclusively with legal and policy issues relationg to intelligence activities. The office is charged with the responsibility of preparing and filing all applications for surveillance under the Foreign Intelligence Surveillance Act of 1978, P.L. 95-511, assisting intelligence agencies in developing regulatory and legislative proposals, providing legal advice to government agencies on existing intelligence law, advising the Attorney General on intelligence matters, and representing the Department of Justice on interagency intelligence committees such as the National Foreign Intelligence Board.

The new office is intended to institute some regularity and "institutional memory" in the Department of Justice; it reflects an established fact of intelligence law in the A.D. years--lawyers, including lawyers outside the intelligence agencies, are now as much a part of the government's intelligence activities as any other aspect of the contemporary American government--or private--sector. This fundamental change in the extent to which the law and legal principles have become a part of the day-to-day management of U.S. intelligence activities does not mean that these activities have been conducted in the past without regard to, or in disregard of, the law.

There has been evidence of very few, if any, instances where decisions were made or activities pursued in the knowledge that to do so would constitute a clear violation of U.S. law. Indeed, the record contains many instances where officials in the intelligence community have expressed their concern that the legal basis of their actions was uncertain or that the authority on which intelligence programs were proceeding required amplification.

Rather, it was the case that law and legal principles which had developed without reference to the peculiar circumstances and requirements of intelligence activities could not easily be applied to those activities. In many cases, laws enacted for wholly different purposes would, if taken literally, have had the effect of obstructing or preventing intelligence activities that would be generally recognized as legitimate and necessary. Thus, in the absence of a body of specialized law and precedent, it was a simple matter to dismiss the broad range of laws and limitations that applied in other areas of governmental action on the assumption that intelligence was different or special and that different standards and exceptions had to be applied in this area. This tendency was strengthened by the indifference or special treatment that was accorded these activities for almost thirty years by the public, the press, the judiciary, the Congress, other parts of the Executive Branch, and various presidents and attorneys general.

Over the past few years this has all changed. Sometimes with great pain, sometimes with claims of damage to the intelligence capabilities of the United States, often with great internal debate and a weighing of significant, but competing, national interests, we have arrived at a time when, while there may continue to be some confusion about what the law is as to a particular matter, there can be no doubt in the minds of any individual associated with the intelligence and national security apparatus that intelligence activities are subject to definable legal standards. We are now in a position to look back and assess what has happened in the interim, as well as to look ahead to what course should most profitably be pursued in the next five years.

To begin with, President Ford promulgated Executive Order 11905 in February 1976 in an effort to erect a basic framework of authorizations and limitations for U.S. intelligence agencies and to reassure concerned portions of the public and the Congress that the most disturbing activities of the past would not be reenacted. That document proved to be an adequate, but incomplete, statement of standards. However hastily conceived and whatever the shortcomings of the Order, its issuance was a remarkable occurrence in that the Order represented the first public, official statement by any government in history of a set of coherent standards, authorizations and prohibitions to govern the practices

of its intelligence apparatus. No other country had done such a thing in the past, nor has any other country followed suit since that time. While various internal directives or ad hoc determinations may have existed as to various of the activities governed by 11905, it was the first comprehensive statement by the Executive of a body of "intelligence law."

Building upon almost two years of experience under 11905 and incorporating the intervening developments in the area of intelligence law, President Carter replaced that Order in January 1978 with Executive Order 12036. The new Order represented as significant a step ahead of 11905, as 11905 had represented over the absence of any Order at all. It elaborated on many of the subjects treated in 11905 and added significant new areas of control and new standards to those contained in 11905. As I noted, it required that multiple sets of procedures be developed and approved by the Attorney General to govern the complete range of collection and dissemination practices by all the intelligence entities with regard to U.S. persons. This compared to the 11905 requirement for such procedures only as to the FBI and intrusive techniques. The resulting development and proliferation of intelligence law has been significant in terms of substance and experience. It has bred a better understanding on the part of legal officers regarding the practices and problems of the intelligence business, and on the part of intelligence officers as to the dictates of the law. Both sides, I believe, have perceived that law and intelligence are not incompatible and that standards may be satisfactory from both perspectives.

The development and recent enactment and implementation of the Foreign Intelligence Surveillance Act mark other milestones in the continuing creation of a recognizable body of intelligence law. There was a time when it was argued that mere public consideration of such statutory requirements would undermine the very foundations of the U.S. intelligence apparatus. Nonetheless, the issues were met and resolved. There is now a functioning judicial mechanism that reviews and approves all intelligence-related electronic surveillance. And the Attorney General reviews and approves all certifications and applications before they are submitted to the court.

The development of comprehensive charter legislation also has represented an important step in the maturation of intelligence law as a substantive area of concern. The exercise has forced a thorough analysis, from both a legal and intelligence perspective, of the most fundamental and difficult issues relating to intelligence activities and underlying policies. The fruits of that effort have been enjoyed in the development of the procedures developed under Executive Order 12036 and will continue to be manifested in the future in a better understanding by reviewing officials of intelligence needs and practices. Our desire for a charter is the product of a perceived need for guidance and authority. If there is no charter in statute, that need will be filled by Executive Orders, procedures, and other policy directives.

There has, of course, been some degree of cost in these developments in terms of flexibility and ease of action by intelligence officials. However, the gains against which the reasonableness of that cost must be measured include the assurance of more lucid statements of authority and clear limitations for the benefit of those officials, and the heightened protection of individual liberties and the rights of Americans who might be the subjects of these activities. It is my judgment that there have been very few, if any, instances where no means has been found under the current standards to collect information of true significance to U.S. policymakers. If anything, the new standards institutionalize a careful review and a more precise answer to the question of whether a particular activity or collection effort is really necessary to reach a legitimate goal.

Our goal in developing law in this field is to balance the needs of the nation and those of our individual citizens. We must strive to assure the people that their intelligence agencies will not be turned against them. The potential dangers of intelligence activities were illustrated by the words of Sir Thomas Erskine May in his 1873 Constitutional History of England: "Men may be without restraints upon their liberty; they may pass to and fro at pleasure; but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators,--who shall say that they are free? Nothing is more revolting to Englishmen than the espionage which forms part of

the administrative system of continental despotisms. It haunts men like an evil genius, chills their gaiety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency."

Sir Thomas was, of course, referring to the dangers inherent in any spying by a government on its own citizens. He was not condemning an intelligence service directed against foreign powers. His view of the danger is one we must keep in mind as we strive to design a system of law in the intelligence field that reassures all American citizens that the intelligence agencies work for them, not against them.

In a real sense, we are all novices in this regard and the development of U.S. intelligence law is in its infancy. There can and will be refinements and elaborations and, often, anxious moments of attempting to determine how a particular case fits within a standard or procedure developed without such a case in mind. There will be a tedious educational process and the reshaping of old habits and ways of thinking. This will not be an easy or comfortable task. There will be mistakes on both sides and a continuing determination of cost versus benefit in the balancing of legal and intelligence needs. However, it must be done and there is no turning back to the old ways which appear to be no longer acceptable to the public at large.

As in so many other areas, America is conducting a social experiment in the full view of, and to the edification or bewilderment of, much of the rest of the world. To take an ancient activity, such as intelligence gathering, and mold it to conform to our political, moral, and legal principles rather than vice versa, is a uniquely American process. But we are engaged in the exercise because it is proper and necessary for us to do so. Looking back on the last several years, it is my judgment that effort has been worthwhile. Looking ahead to the next several years, I see more of the same.

Morris Leibman

Ken Bass is willing to take a few questions. We have about ten minutes before we go back. Are there any questions? Well now that you've initiated us to the beginning of the law and the final law, the infancy has reached maturity. We reconvene at two o'clock in the Paladian Room and I hope as many of you as can will stay for the group workshops and scribble out as much as you can between now and then about what your ideas and suggestions are.

Comment: Mr. Chairman, he might like to know that with the encouragement of this committee and under the aegis of one of its members the first casebook in national security intelligence is being developed at the University of Virginia so that when you go to teach the subject you'll have a casebook to use.

Mr. Bass: Let me make one comment. I'm delighted to see that's coming about. I've known about it in the past. One of the things that I didn't spend any time on in my remarks but we really ought to start focusing on I think is how can we get this field of law more subject to some of the traditional things that have made law the beauty that it is, particularly adversary process case-by-case determination. I don't like the fact that it's secret law. I don't like the fact that it's developed exclusively by experts in the field and it's not exposed to a lot of public analysis and commentary. I just don't think that's healthy for the development of the law. The casebook is a step towards that.

You know, we're good enough at coming out with hypotheticals and there are enough secrets that have been disclosed to the detriment of the intelligence community but you really can't discuss a lot of these legal issues in a public forum. And I hope through this committee and other groups we'll be able to more effectively debate in public intelligence law as it evolves.

Morris Leibman

I should say that the committee is watching a race between Professor Scalia's text and John Norton Moore's casebook and that will all come out through the committee, hopefully. Thank you all. See you in the Paladian Room.

Raymond Waldmann

Unfortunately, we did lose three of our panelists. Both Mr. Miller and Mr. Codevilla were called to the Hill on unexpected business and Mr. Schwartz did have to return to the agency for a meeting this afternoon. But I don't think that should in any way inhibit discussion or commentary from the floor with our remaining panelists who are certainly the qualified spokesmen for the different points of view which were brought out this morning.

Before we begin, let me add my thanks to Morry's to Ken Bass for an excellent summary of where we are and where we've been and perhaps where we're going. I think the whole purpose of this conference in some inchoate way was to put forward the proposition that in fact intelligence law does exist. And it was very useful to have that brilliant exposition of the status of the intelligence law as seen from the Justice Department. From my own experience in the process of drafting the first of those two Executive Orders, I know the conflicts and the problems and some of the intricacies about which he spoke. And I know that those are not perfect documents and I know that a charter will never be a perfect document if it's legislated in Congress. Yet, we do have that effort underway and it's up to us, I think, here today to shed whatever light we might on the workings in that windowless room or womb that we've heard a little bit about and perhaps lift a few of the veils of secrecy on the workings within that room.

Before I turn back to the floor for questions, I'd just like to give any of the panelists or commentators an opportunity to respond to anything they heard this morning before we broke for lunch, just as a way of making sure that we have the discussion picking up from where we left off. Mr. Colby, do you have any comments? John, do you have anything you'd like to say?

Mr. Warner: Not that I want to question the other panelists. I simply want to emphasize a point that Bill Colby made. It seems to me that the process of writing a charter for the intelligence agency is a real opportunity to help the intelligence community and in the area that Bill specifically touched on. We

have some thirty-five laws or more which make it a crime to disclose in an unauthorized fashion various categories of information: tax information, crop statistics, and so on. But it's no crime under today's law to give out on an unauthorized basis intelligence sources and methods. Let's give the intelligence community some tools. Thank you very much.

Raymond Waldmann

Bill, how about you? Dan? All right, well let's turn now to the floor. Admiral.

Q. My name is Mott, I'm Chairman of the Advisory Committee for the Committee that put on this seminar. I'm a former chairman of the Committee and I think you ought to know a little bit about the background panel, as to how this came about. Our beloved chairman, Morry Leibman was down in the sand at one of the keys, when I was asked would Nino Scalia and I go justify this program to the Board of Governors of the American Bar Association. I don't mind telling you when I got into the Board meeting that there were some deep doubts about our motives in holding this conference. The members of the Board thought that our Committee was trying to usurp the function of testifying on intelligence matters before all committees of Congress in the name of the American Bar Association. Nino and I quickly told them that the purpose of this meeting was to let it all hang out. As you can see, there's been a great deal that is hanging out here today from all segments of the community. Some day we may take a position but we felt the study ought to come first.

There's just one other point I want to make and that is that the chief architect of the National Security Council, with all due deference to my friend, John Warner, and to the absent Clark Clifford, was not either one of those gentlemen, it was the President of the United States--Mr. Harry Truman. And I wish to God he were alive today because some of the things that have happened he would not approve of at all. I was taking a walk with him one morning at six o'clock and I asked him, "Mr. President, why did you go to the Congress and ask for the National Security Act?" And he said, "Well, it's because my predecessor,

the man you used to work for in an intelligence capacity, Franklin D. Roosevelt, kept all of everything in the palm of his hand and he exercised his functions as Commander and Chief and the architect of foreign policy without letting anybody else know, including the Secretary of State, what he was doing. I am a creature of the Congress," he said, "and I felt that I should go to Congress and get a charter to do what? To advise me, the President of the United States, as to the decisions I had to make under the Constitution in both foreign policy and in the intelligence area as Commander and Chief." I think if Harry Truman were alive today he would say, "My God, all I asked the Congress for was a charter. I didn't ask them to be looking over my shoulder every time I tried to make a decision."

I hope that the members of the committee and members of the Congress will bear in mind that the National Security Act was formulated and passed in the first place to do what? To provide a vehicle to advise the President of the United States to carry out his constitutional functions. I think Harry Truman would recoil with horror at the idea of getting Federal judges in the act or having so many committees in Congress looking over his shoulder. So I just think we have to bear this in mind as we go along in this investigation.

Q. As the person responsible for taking the intelligence provisions of the Act of 1947 through the Congress . . . two wonderful legal guys . . . I think I want to try to say something. I was going to ask a question but the person I wanted to ask has disappeared. To change one or two misconceptions that dropped around this morning about what the Act of '47 did to the bill. The Act of '47 did not primarily deal with either espionage or coordination or one word you'll find in it and one you will not. What the Act of '47 said for the CIA to do in the interest of coordinating the intelligence activities of the government was to correlate and evaluate intelligence relating to the national security and provide for its appropriate dissemination. Now there's a coordinating function there, there's a substantive production approach in there, there is an evaluation function, there is a dissemination function. These all grew out of what I think the Congress would call at that time the Pearl Harbor syndrome.

Now what about espionage. The Congress did not want to put that dirty word into an American law. They thought there was something un American about putting it into the law although they knew CIA was doing it and CIA was to continue to do it. So they have blanketed in under this provision to perform for the benefit of the existing intelligence agency such additional services of common concern as the NSC determines can be more officially performed centrally. That's where the espionage function stands.

Now, what about covert action? It is not mentioned and it was not mentioned on the Hill in '47 because there wasn't any. The first time we mentioned what we then called unconventional warfare in a congressional hearing was in 1948 in connection with the CIA act in '49. Now, that at least gives you an idea of what was in the congressional mind. There were comments this morning about the mindset of the members of Congress on oversight. And I don't want to take a backseat to any of the speakers today who called for the importance of over congressional oversight. But we could not tell the Congress what it was they were to do. It was up to the Congress to tell us what they wanted to do and basically they wanted to leave us alone. And in 1955, I took a memorandum that I keep in my library to Allen Dulles urging him to try to get them to give us some more oversight but the senators involved said no way.

Now, with that National Security Act of 1947 having stood the test of time with a few amendments for thirty odd years, and I guess I better direct now the question to John Warner since he is the one who is also involved there.

John, wouldn't we be better off not to keep talking about charter as such but to follow along on the charter that we have; namely, the Security Act of '47, and amend it to take in the crucial things that some people feel we need such as strengthening the responsibility for protecting sources and methods, putting in the prohibition that they want: "Thou shalt not murder in time of peace," and a few of those thou shalt nots. But wouldn't we be better in staying with the framework of a working, existing Act rather than going through what had Bill Miller's Iranian doctor seeing when he opened up that poor girl would at best have been a stillborn S. 2525?

John Warner: I'm glad you raised this, Walter. The word "charter" is a much misused word. I used it myself. I said that I'm in favor of a charter. However, what I really mean is clarified statutory language dealing with the functions and the rest of it. To this end there is a group within the Association of Former Intelligence Officers which is working on a new charter. But their starting point is let's look at existing law and amend it, modify it, change it where necessary. Now there are a lot of advantages in this. As Walter has already said, a lot of the language is very good and very useful. Furthermore, a considerable amount of that language has been involved in numerous court cases and we have precedents derived from it that would be very harmful to simply throw away in the process of drafting a new charter which essentially is trying to say the same thing in a particular case but uses different language. We've lost the utility of language which courts have relied on and given guidance. So, I agree with you 100 percent, Walter, that the effort in our minds in any event is directed at taking existing law, changing it where it needs changing, adding to it where it needs changing, but not start from language such as in S. 2525. There is hereby established a central intelligence agency after thirty years.

Q. My recollection is that Harry Truman said that the 1947 Act was his biggest mistake as President. That's what I recall. My question, however, is to Mr. Silver. I'd like to know which nongovernment people are involved in the drafting of this charter.

Daniel Silver: I can't answer that question with respect to the congressional side. Our activity is within the Executive Branch. The formal decision-making process is quite properly confined to the Administration and people who are working for the Administration. There obviously are a variety of contacts, informal contacts throughout the community at large that each participant enjoys but there is no formal participation and I think this is the wrong time and the wrong kind of issue to attempt to bring in nongovernmental participants. There will certainly be a time for that when the bill is reintroduced in modified form and the committees move to hearings, as I suspect they will do some day.

Q. Mr. Silver, isn't there a tendency, though, particularly after the long gestation period where agreement has been reached between the agencies and

the committee at that point to say well, it's all been settled. Let's not open this can of worms again.

Daniel Silver: I suspect that there will be such a tendency but it arises in part out of the unique nature of this enterprise. This is one of the few, if not the only, attempt at comprehensive legislative treatment of a secret activity. And I hope there is general agreement that if in the process the activity is no longer secret we will have been counterproductive in our efforts. There is no way that I can think of to meaningfully analyze and discuss the impact of suggested statutory language such as appeared in S. 2525, at least at an initial stage in a public forum. If it requires an analysis of the impact of that language on activities that necessarily are and should remain secret, this is a dilemma and I don't know how we're going to get out of it except by developing among those in the Congress and in the Executive Branch over a course of time a sufficient consensus as to what the shape of the legislation should be so that it will command respect and acceptance in the country at large. I do not think we can get to this process by letting it all hang out in front of the public and having a national debate on our clandestine intelligence gathering activities.

Raymond Waldmann

I wonder if someone from the Senate Intelligence Committee would care to respond on behalf of the committee? Yes.

Comment: We had, after S. 2525 was introduced, a full year of hearings on . . . there was consultation with a wide range of groups that desire to express their views on S. 2525, which was from the very outset presented as an agenda of issues . . . And in addition to those witnesses who appeared before the committee there was additional consultation on the same issues that were addressed in the committee hearings. There was a large number of other people who desired to express . . . . All that consultation went on through 1978. The emphasis since the conclusion of those hearings has been consultation with the agencies and the testing of the Executive Order and S. 2525 and other approaches against the classified facts and needs and that has not involved outside

consultation. There has been no consultation by the committee or the staff with outsiders who were not there to receive this information. Of necessity, as Dan indicated, that kind of consultation has to go on between the committee and the Executive Branch. But we entered into that consultation after a whole year of consultation with outsiders in terms of general issues.

Q. I have a general question for the panel, primarily directed at Dan Silver. S. 2525 was called the Intelligence Reorganization in the format and we spoke a lot about the reform. What about the reorganization. . . . You've said that NSA doesn't have a statutory charter as such, but DIA I don't think has either and that's part of the Defense Department. INR is part of the State Department and I don't think that has any statutory charter. What in the charter is going to be really going to be reorganization other than at the top in the context of a director of national intelligence as opposed to DCI? What, if anything, do you see as the role of charter for giving specific functions to parts of what now is just the intelligence community?

Daniel Silver: One of the speakers this morning, I forget who it was, indicated that each president has put his own mark on the allocation of responsibilities in the intelligence community and that this should continue. My own feeling is that this will continue regardless of the organizational provisions of the charter and that therefore that part of the charter exercise is not overwhelmingly useful. The National Security Agency perceives needs for a legislative charter, for a legislative ratification or recognition of the legitimacy of its mission, and it perhaps perceives them more than the Defense Intelligence Agency or INR at the State Department because they are more in the public view, more likely to find themselves embroiled, for example, in litigation over the validity of their mission. That's a purpose, that is legitimizing their activity, that the charter can serve. There is a grab bag of miscellaneous powers, authorities, "neatenings" of existing law with respect to all three of the agencies covered by the charter that could just as well be handled in a variety of other legislative vehicles. As far as the Central Intelligence Agency is concerned we have in the '47 Act and in the '49 Act ample authority to exist, to conduct our daily business, and while we have a small wish list like any other government

agency there is nothing in the administrative arrangements area that is of overwhelming importance. That part of the charter is not really the issue in my view. The issue that we're confronting today and that the Administration and the Congress have been confronting for the last several years is an attempt to put intelligence activities under a comprehensive legal framework without regard to where they fall organizationally.

Raymond Waldmann

Bill, I think that was your point about the President's needs and organization. Do you have any further comments?

Bill Funk: Only to restate and to agree with Dan Silver that whatever we put in terms of organization, whether we call them a DNI or a DCI, will be fairly irrelevant over a period of years and if we're talking about laws which are supposed to establish a framework it's questionable whether we should establish laws that we know are sort of meaningless. The benefits are marginal, to say the least; the downside is that it could actually if strictly interpreted create inflexibility that would be harmful.

Q. Well, the Congress in setting up other agencies in the government sets a general structure in the organization if it sets up a new agency. I know that intelligence is somewhat different than other functions in the Executive Branch but in some ways it's the same and it still has mechanical matters to take care of, organizational ones. I think in setting up a legal framework for how these agencies ought to work that instead of going by the prescriptive approach that somehow enhance what the agencies could do . . . the product by giving them specific missions and that would be the organizational sense. I would hope that there would be a reorganization on the part of the charter legislation. I don't understand why only prescriptions--only what you can do and what you can't do--have to be opposed whether it's in the book or not.

Bill Funk: Really, if you look at charters, as it were, for other agencies I'm in the Department of Energy now. If you read our Department of Energy

Organization Act it essentially says that there'll be a head of an agency, there"ll be a deputy, there'll be a bunch of assistant secretaries. We are supposed to implement national policy and carry out the laws passed by Congress with respect to energy. It doesn't really say anything. You have to look at other laws, substantive laws to find out what any agency does. Law enforcement, if you look at the FBI and you look at the charter for FBI law enforcement it's virtually nonexistent other than to investigate crimes. If one wanted to say the Central Intelligence Agency shall, as the '47 Act does quite adequately, correlate and maybe collect intelligence and leave it at that, there's little harm. If you try and get substantively into programs where most agencies have programs which are fairly defined as separate laws apart from their charters, that's where you get into problems in intelligence both because of the secrecy aspect and because of the inflexibility.

Q. I wanted to ask in terms of Dan's listing of agencies the need of jurisdictional . . . the FBI. We've discussed the FBI's domestic law enforcement charter. The FBI's charter for foreign intelligence and counterintelligence is a very important part of the overall intelligence charter. In that area has been discussed . . . criminal law enforcement terms and because the FBI's counterintelligence mission is so . . . and extends to such a large number of investigations that touch within the United States, I think there's a general need . . . the Executive Branch and Congress that there must be a charter for FBI foreign intelligence and counterintelligence functions, so that the vital activities within the United States can be constantly up into concerns for civil liberties . . . Congress and the American people. I just wanted to make sure that you remembered that aspect.

Q. I'd like to address this very briefly from an historical standpoint. I was Chief of Army Intelligence a long time ago and Bill, I think, the question will sort of be pointed toward you. I want to see the armed forces protected in having, and maybe they do have, a good solid voice with respect to intelligence. Within the armed forces there are still . . . capabilities some of which have performed very well behind the Iron Curtain for now thirty years or more. They shouldn't be surrendered. However, there was unusual power concentrated in the CIA at the

time because of the . . . In the military we would get a six-month study or a four-month study on a Friday afternoon to vote on Monday morning. And after a four to six-month study I finally just plain refused to do it. I said I needed a week to do this. It had been months of preparation. When we would go up there . . . the U.S. Intelligence Board, the best the Army or the Navy or the Air Force ever came up with, except maybe 10 percent of the time, was a footnote to say that their position had been noted.

Now, I hope, I hope the position of the DIA, and now you have less military input in numbers than you nad before--it used to be the Army and the Navy and the Air Force--now it's only the Defense Intelligence Agency. So the voice of the military has been reduced as far as numbers are concerned. And I just want to be sure within the acts that are passed here or the internal security, the FBI side of it and in our intelligence, that the position of the military is properly appended because I think it's extremely important.

Bill Colby: I think it is, General. The fact is that the current arrangements for the Foreign Intelligence Board provide yes that the DIA speaks for the Defense Department. But it also provides that the Army, Navy, and Air Force be present at the meetings. And they are invited to comment. They are invited to talk. Secondly, you will find in most of the estimates made now that you not only will have a footnote--you may only have a footnote if you're the only single service that objects, maybe that's all you'll get--but if there's a substantial difference of opinion among the different participants in the estimate, then it frequently will be put in two or three paragraphs. Some of us think this or that. And then the Director says what he thinks because he's the one who's issuing the estimate. But they nonetheless, I think they get a pretty good--The best example is the Korean, the North Korean revision of forces about a year or so ago which, as my understanding, really started with the Army doing the homework, going over very carefully, and then coming up with some conclusions which I guess were scrubbed and looked at but essentially taking initiative and carrying it through and having the estimate changed. So I think that the military does have a very fair shake.

Q. If I was listening carefully enough this morning, I believe Mr. Colby stated that in his opinion that it would be desirable to legitimize through legislation not only clandestine intelligence gathering but covert action or Executive action or policy coordination or whatever you call it. My questions are: Was I listening correctly, is that Mr. Colby's position?

Bill Colby: That is my position clearly.

Q. And then my second question is: Does each other member of the panel agree with that opinion?

Daniel Silver: Absolutely, yes I do agree.

John Warner: I'd like to answer it but not so simply. Number one, I'd like to note that it's not legitimate today and that I disagree with. If there needs to be clarification that clandestine collection and covert action are properly legal functions, let's have it. But it's not something new.

Bill Funk: I'd like to make the distinction between legal and some other aspect. The Hughes-Ryan amendment sets out standards by which it becomes fairly clear whether covert action is authorized or not authorized under the law. It is a back-handed, to say the least, way of legitimizing covert action. Clandestine intelligence clearly is authorized, although it doesn't appear in such terms in statute. I don't believe it's important per se you have a statute that says these things are all right or approved or necessary, but if there's a question about it, if there is a legitimate question in the country about the validity of covert action as a means of national policy, carrying out national policy or clandestine intelligence collection--in fact, the American Civil Liberties Union has seriously to its own mind suggested that there should be no spies in peacetime by the United States. I don't know if that makes it a legitimate question but if there is a legitimate question, if there is some doubt in the American public's mind about the legitimacy of these actions, debating that in Congress and achieving a consensus, the end result being legislation, it's the consensus that's important. It's the stamp of approval by our democratic system that this is appropriate action that's important, not the legislation or the words in the statute per se.

William Colby: I would add two points. First, the Congress has legitimized it on several occasions by three to one votes rejecting proposals to bar it. Now that is, as you said, a back-hand way. There does have to be a major change in the Hughes-Ryan present provision, however, which is the clearest thing to a direct statement of it. The National Security Act has a rather broad phrase that you can run it under. And that is the nonsense, and that's the only word for it in my mind, of the Hughes-Ryan requirement that the CIA brief eight committees of the Congress. Now one such committee has said thanks, count me out. So it's down to a mere seven. That's only 150 congressmen and senators that have to be briefed. And there just isn't going to be any covert action of any moment as long as that kind of exposure continues. The two intelligence committees of the House and Senate have clearly indicated their ability to know the secrets and keep the secrets and keep the agencies under supervision. Those are enough. Those two committees ought to be able to supervise the covert action for the rest of the Senate and the House, and then I think we could undertake this. Until then, I'm afraid that the practicalities are that we are not able to do anything very substantial.

Q. Would the members of the panel care to comment on the idea that Hughes-Ryan might be an unconstitutional infringement on the President's power . . .

John Warner: I think, that it is an unconstitutional intrusion, particularly since it provides that notification shall be made prior to the action commencing. But there it is, and since the President signed the law of which Hughes-Ryan is a part, you've reduced it then to a political question and I do not really know of any forum in which you can raise this constitutional debate. It's an interesting one from a technical standpoint.

William Funk: When I was in the Justice Department, this was one of the questions we had. I don't think there's a serious question about the constitutionality of Hughes-Ryan. First of all, it doesn't require reporting to Congress before the action takes place. It requires a Presidential decision before the action takes place and then a report within a reasonable period of time,

which often may be beforehand depending on the lead time for the action. But to the extent that the President spends money in any covert action or any action whatsoever, it's money that's been appropriated by Congress. That's fundamental in the Constitution. And when Congress appropriates money, it has a certain right to oversee the way that money is spent. Inasmuch as Hughes-Ryan doesn't allow Congress to say no to any action the President has undertaken but merely says we have to know how you're spending our money, it seems fairly clear that that's within Congress' prerogative.

Q. As I understood it, one of the things the President could do in the BC days was to deny that a certain covert activity of the CIA had taken place. I was wondering if the present charter legislation takes that ability away from the President or from certain executive decisions and if it does then that's something valuable that we're losing.

William Colby: I don't think it affects it particularly. The basis of the covert action or secret activity is that it be secret and in theory remain secret. Not all of them have by a long shot, to make that clear. But the theory is then that it's secret. Now, in the theory of this area years ago the concept of plausible denial did exist. . . .

John Warner: . . . theoretically through a proprietary so that they were not government workers and that sort of thing. And that was a nice idea to protect the secrecy. It didn't have a separate status. The Hughes-Ryan Act does require the President to approve any act other than intelligence gathering abroad of this nature conducted by CIA, and in that sense he can't deny that he actually did it, of course. He can deny it publicly by saying it's still a secret and I'm not going to talk about it and I'm not going to admit it or say anything about it so he's still about in the same position he was, really.

Q. I just wanted to respond to Mr. Funk's comments a moment ago. I think the Justice Department, for example, would react very negatively to any suggestion that the Senate or House Judiciary Committee had a right to sit around and review what kinds of cases that the department files in controversial

areas like civil rights or antitrust laws or ask the Attorney General to come and tell the Congress after the fact what it did on the theory that Congress appropriate the money to run the Justice Department so that therefore it had the right to nitpick over every single case or every type of case that's being prosecuted. I think there would be a very strong constitutional argument if the Judiciary Committee was interfering with legitimate law enforcement. I think that same argument can or ought to be made against the Hughes-Ryan Act. That this is going far beyond congressional oversight. It's enough that Congress has approved the concept and refused to outlaw the concept of covert operations and that once you've decided to allow agencies to allow in that kind of conduct, that kind of program then you leave them alone and let them do their job. You can't have this kind of day-by-day management. Mr. Colby is absolutely right, once you've got a reporting requirement you've got no program. You can't do this and have . . . turned over. It's inherent to the operation that it must be kept secret especially from places that leak like a sieve like that.

William Funk: Well, I think Bill Colby will back me up. He's not suggesting that there be no reporting of covert actions to anyone in Congress. He's talking about seven or eight committees with which I wholly concur as being many too many. The question about whether Congress can review criminal investigations or criminal prosecution, they certainly do. The fact is all criminal prosecutions are on the public record. Judiciary committees do actively look and see what the Justice Department is doing and they make new laws or appeal old laws because they don't like what's being done, whether it's a no-knock law to create it or to appeal it. So, obviously you don't have day-to-day management but nothing in Hughes-Ryan has to do with management. It has to do with reporting. There is no approval mechanism, there's no veto mechanism by Congress; it's purely an information situation for something that otherwise they would have no way of finding out.

Q. I might add the question, before Hughes-Ryan what kind of reporting, if any, did the CIA engage in . . .?

William Colby: Before it the CIA would cover the subject in its annual budget presentations and would give a general idea of what it's doing. Would

respond to the appropriate committees, the oversight committees, on any questions they raised and the questions were practically nonexistent in the 1950s and became rather thorough by the early 1970s. Then the CIA, like any other department, would bring up a certain number of things and report to the Congress about them. But it wasn't a requirement that for each covert action there be a specific Presidential finding and that the committees be informed of that in a timely fashion, i.e., right away. That requirement didn't exist. You had the more general oversight which we do have in the other committees today. They look at the annual budget and decide whether there are enough prosecutors, and if they think there are too many they'll cut 'em back. If they think there are not enough, they'll hopefully add some more.

Mr. Romerstein: As Bill Funk indicated, Congress still has the purse strings. I'd like to address this to all of the members of the panel. Would you consider Congress to be usurping a Presidential power if a congressional committee told the CIA that they do not approve of the use of appropriated or authorized funds for a particular covert action?

A. I suppose that the mere saying of it doesn't usurp any Presidential prerogatives but an attempt by the Congress to translate that expression of disapproval into a prohibition on the conduct of the activity, I think does raise very serious separation of powers questions. The problem that one has with looking at this is that there's no bright line. The technique that's embodied in Hughes-Ryan is found elsewhere, I believe, in some of our laws. If it were carried to its logical extreme, it would eventually completely eradicate the separation of powers between the Congress and the Executive Branch, because you could just as well provide that no funds shall be used to pay the salary of any attorney in the Department of Justice unless his employment application has first been given to the Judiciary Committee and they've had a chance to interview him. And you could go on carrying this to absurd extremes but following that part you could erect a system in which there would be a parallel Executive Branch in the Congress which exists to receive these reports and by the mere virtue of its existence would come to exercise a large measure of executive power. I just think that's an idea that is at war with the inherent

nature of our system of government and that this is the wrong way to go about oversight. As you well know, the CIA's budget at the present time is examined in microscopic detail down to the molecular level every year in the budget process and it gets continual review by the oversight committees in a variety of other ways. There are so many windows into this area of activity that there is very little likelihood that Congress would go any appreciable amount of time without, in fact, being informed absent Hughes-Ryan of significant covert action that took place. This strikes me as using a blunderbuss to try and exterminate a flea.

A. I certainly agree with Mr. Silver on the wisdom of it. I really doubt that you have a constitutional problem, however, because the Congress does this every day. I mean, the Senate passed a bill calling for another nuclear carrier. There is a provision on the statutes that said no government funds will be paid for any foreign service personnel to negotiate with North Vietnam until something or else happened--I've forgotten what. These come through every day of the week, these kinds of restrictions. Now whether it's wise for Congress to do that is a different thing than whether it can, I think. That's the use of the powers at first. And the fact is they can call you up and say you go ahead and do that covert action if you want to but the committee just voted that if you do it and it costs $5 million you better subtract $25 million from next year's budget. I guarantee you that'll catch the Director's attention when they say it. And it's perfectly legitimate and legal for them to do it and it is what the separation of powers is all about.

John Warner: Well, I think Bill has expressed it well but there are other manifestations of it. For example, under the Hughes-Ryan amendment proposed covert action is reported. If any one member thinks that it shall not be conducted his access then is to the press. Therefore, it's no longer secret but therefore you don't have it. On the other hand, an oversight committee expressing strong terms to a Director, well you can do this but we don't think you should, is listened to very carefully. I don't think it's really a constitutional problem. I think it's a practical problem in the workings of our government, because, as has also been said, any congressional committee if it can get the rest of the Congress to go with it can deny funds to any agency to do whatever it

chooses to do. Now that could, in theory, result in wiping out an agency or wiping out a function or causing things to come to a halt. This just doesn't happen. Ours is a government of accommodation.

Q. Well, like everyone else who has spoken, I believe in some kind of guidelines . . . I've been very impressed by some of the presentations that have been made here, but it seems to me that there is one enormous . . . With the exception of . . . reference to the possibility . . . we have not had an in-depth presentation of the local problems we are up against. And this, it seems to me, should be the antithesis of the core of our entire discussions. The question we should be asking ourselves before we place certain restraints or prohibitions on our government's activities are these: What is the nature of the enemy we are up against? What are the scope of its activities, military and political? . . . What is the gravity of . . . confront over the coming years? What prohibitions does this enemy place upon its own activities in this country and elsewhere in the free world? I'm not going to go into any detailed presentation but I would like to offer the simple observation--that we are confronted with a ruthless enemy, whose activities are subject to no self limitations and that we shall in all probability over the coming years be confronted with a crisis of survival. And this perception of what the future years hold in store for the United States and the free world strongly argue in favor of a minimum of self limitation and a maximum of flexibility in considering guidelines and charters in building our intelligence activities.

Morris Leibman

David, if you'd been one of those lucky ticket-holders who could have squeezed in here yesterday morning to hear my deathless prose, you would have heard in the last thirty seconds of my thirty-minute presentation that we recognized the choice starting with the threat or starting with the law. Since this was our first public forum in this area, we thought it would be a major mistake not to recognize to the Bar and lawyers that there were a whole series of legal aspects, and I think Ken Bass did a great job for us at Noon to point out that this was a new field of law that we had to learn about. I also said that we

recognized that the intelligence community had said to us that we better get on with some of the threats and needs, et cetera and we look forward to doing that. But we made a choice and I think the success of this conference would indicate we start on the right foot. I'm sorry you missed it yesterday. It was magnificent, David.

Raymond Waldmann

I was just going to say, I couldn't think of a better way to end up this section of the panel, really, because what that does is bring us back to the fundamental purpose of not just this conference but the agencies we're talking about and on that note I was going to turn the program over to you and thank the panelists and the audience for the participation this afternoon. Thank you.

Comment: You may want to point out that that issue is in our next conference at Portland, Oregon.

Morris Leibman

Well, we'll have some announcements in our workshops. May I say this. You know, it's very easy for a chairman or moderator just to say how much we thank you all, but I think this has been a unique conference in that its efficiency and its quality has been largely due to the partnership--I use the word "partnership" advisedly--between the panelists and the audience. And you've done as much as we could have done in planning it to make it work. And from the bottom of our hearts we thank you for this wonderful partnership.

Now for the work part. In our workshops every now and then, particularly on substance subjects, we end up the second day's session with active workshops in different rooms with different leaders in a formalized kind of workshop. The main purpose of our workshops at this time is an experiment to make sure that people who hadn't been heard or people who had ideas or people who want to refer us to sources and to other experts would have an opportunity to do that.

IV. RESEARCH DISCUSSION WORKSHOPS

Four simultaneous workshops were held for the last two hours of the conference. A report is included for each.

The Foreign Intelligence Charters workshop had about 15 participants representing the Hill, the intelligence community, the ACLU, the law professor faculties, and the legal profession. The central issues debated were the definitions of covert action and clandestine activities, Fourth Amendment problems, and counterintelligence techniques. The basic problems of counter-intelligence and surveillance of Americans abroad in respect to foreign intelligence gathering and antiterrorist activities were reviewed. Questions were raised as to whether the U.S. government ought to open investigations on citizens with ongoing relationships with foreigners and how these could be conducted with a minimum of intrusiveness. The issue of the quality of intelligence estimates and the relationship between organizational arrangements and suppression of dissenting views were analyzed. There was also a discussion of covert action and congressional oversight of these activities. Further, requirements for protection of sensitive sources and methods were studied. Several participants noted that the provisions and effects of Executive Order 12036 should be studied further, as its implications are important for the future.

From Axel Kleiboemer:

The Domestic Intelligence Charters workshop had about 20 participants who joined in the discussion of the proposed FBI Charter. Comments concerning the pending legislation were by-and-large critical. Participants noted that the FBI Charter contains no definition of "domestic intelligence" although its major purpose is to regularize investigations concerning this subject. It was stated that preliminary "inquiries," which the Charter mandates in most instances before full scale investigations are permitted, are so limited in duration and investigative techniques as to be unproductive. Some persons suggested that the Charter be broadened beyond the FBI. The Charter was thought to be deficient by others in

failing to provide against COINTELPRO measures and in failing to provide for civil remedies for persons aggrieved by Charter violations. An apprehension was expressed that the proposed legislation is so imprecise that the FBI may be hampered in discharging its national security responsibilities and, conversely, that the Charter may not sufficiently protect the public against investigative overzealousness.

From Earl Silbert:

The workshop on Graymail Legislation was attended primarily by staff of various congressional committees which are considering the pending graymail legislation. These staff personnel asked the consultants to the Standing Committee, Anthony Lapham, former General Counsel for the Central Intelligence Agency, and Earl Silbert, former United States Attorney for the District of Columbia, a number of questions related to the following issues: the standard to be used by the court in determining whether to disclose to the defense, classified national security information, the use of in camera proceedings by the court based on ex parte submissions by the prosecution to apply this standard, the certification procedure by which the Department can request the court to invoke the proposed graymail procedures, the provisions for reciprocal discovery in some of the proposed bills, the proposed amendment to the Jencks Act in some of the bills, and the requirement in some of the bills that the Department of Justice report to various congressional committees every criminal investigation or prosecution aborted because of graymail problems. The discussion was lively and mutually beneficial. At the conclusion of the session, the Legislative Branch staff personnel present expressed interest in copies of the Committee report on graymail legislation and in having a representative testify at subsequent hearings to be held on the legislation.

From John Rhinelander

The workshop on Information Disclosure Policies discussed two subjects: the Freedom of Information Act (FOIA) and possible legislation covering unauthorized disclosure of information ("leaks"). The FOIA discussion focused on the

problems raised by Frank Carlucci, Deputy Director of the CIA, in his April 5, 1979 testimony before the House Select Committee. While the FOIA, or the CIA enabling Act, could be amended to preclude "operational information" from the search and access provisions of the FOIA, the working group unanimously agreed that the same results could be achieved by the President amending the current Executive Order (promulgated under the first exemption) to cover operational files. The discussion of a possible unauthorized disclosure statute ranged over the principal issues--the offense, intent, subject matters and persons covered--with much of the focus on the relative merits and problems of a broad or narrow statute, and the defenses available to a defendant. All agreed that this subject required extensive analysis, and the views of prosecutors, defense attorneys, and counsel familiar with the problems of particular intelligence agencies.