The Heritage Foundation Issue Bulletin

No. 70

The Heritage Foundation • 214 Massachusetts Avenue • N.E. • Washington, D.C. • (202) 546-4400

October 1, 1981

THE INTELLIGENCE IDENTITIES PROTECTION ACT

(S. 391, H.R. 4)

INTRODUCTION

One of the most important and controversial measures now before the 97th Congress is the Intelligence Identities Protection Act (S. 391, H.R. 4), also called the "Names of Agents" bill. It is designed to protect the lives of American intelligence officers and the operational integrity of American intelligence organizations. Similar legislation, never enacted into law, was introduced in preceding Congresses. Representative Edward P. Boland (D-Mass.), Chairman of the House Permanent Select Committee on Intelligence, introduced H.R. 5615, the predecessor to H.R. 4, in the 96th Congress on October 17, 1980. Hearings on H.R. 5615 were held by the Intelligence and Judiciary Committees of the 96th Congress, and these two Committees reported out an amended bill that was identical to H.R. 4 as introduced in the 97th Congress. Hearings on H.R. 4 were held in 1981, and on July 22, 1981 the full Permanent Select Committee on Intelligence of the House of Representatives reported out H.R. 4 as amended. On September 23, 1981, the House of Representatives passed H.R. 4 by a vote of 354 to 56, after substituting an amendment offered by Congressman John M. Ashbrook (R-Ohio) that made the House bill identical to the Senate version, S. 391.

In the Senate, S. 2216 was introduced in the 96th Congress by Senator Daniel P. Moynihan (D-NY), and hearings were held by the Senate Select Committee on Intelligence, which reported out S. 2216 as amended on July 29, 1980. S. 2216 as amended is identical to S. 391 in the present Congress. Senator John H. Chafee (R-RI) introduced S. 391 on February 3, 1981 with nineteen co-sponsors (at present it has almost fifty co-sponsors), and it was referred to the Senate Judiciary Committee. The Subcommittee on Security and Terrorism of the Senate Judiciary Committee held hearings on S. 391 on May 8, 1981 and reported it to the full Judiciary Committee without amendment on the same day. The full

Judiciary Committee is scheduled to consider S. 391 in executive session on October 6, 1981.

THE ISSUE

The longstanding interest in congressional legislation to protect the identities of intelligence agents is a response to a comparatively recent and almost universally condemned practice by certain individuals, organizations, and publications that specialize in exposing undercover operations of the U.S. intelligence community. The most notorious individual involved in such an activity has been Philip Agee, himself a former CIA officer. Agee is the author of two works, Dirty Work: The CIA in Western Europe, and Dirty Work 2: The CIA in Africa, that name over 2,000 alleged CIA officers. In 1975, Agee's magazine, Counterspy, identified Richard S. Welch as the CIA Chief of Station in Athens, Greece. This information was republished by the Athens Daily News on November 25, 1975, and on December 24, Welch was shot and killed by unidentified gunmen outside his home in Athens. The Washington Post commented on December 29 that "public identification of Richard Welch was tantamount to an open invitation to kill him."

In the summer of 1979, Agee founded a new magazine, Covert Action Information Bulletin (CAIB), in Havana, Cuba. On July 2, 1980, Louis Wolf, a co-editor of CAIB, revealed the names of fifteen alleged CIA officers in Jamaica at a press conference and claimed that Richard Kinsman, an American Embassy official in Kingston, Jamaica, was the CIA Chief of Station. Within forty-eight hours of Wolf's press conference, on July 4, Kinsman's home in Kingston was attacked by machine-guns and a small bomb, though Kinsman and his family escaped unharmed. Three days later, another official of the U.S. Embassy in Kingston was also the target of an assassination attempt. Louis Wolf himself has claimed that he has revealed the names of over 2,000 CIA officers in recent years.

The identities of CIA operatives engaged in undercover (clandestine or covert) activities are classified information. Although it is illegal for persons with access to classified information to reveal it to those without authorized access, none of the persons involved in the systematic exposure of intelligence identities has been prosecuted. In some cases these individuals may have sympathizers or collaborators in the government who reveal identities to them. In other cases, they may learn identities through collaboration with foreign intelligence services. In still other cases, they engage in clandestine surveillance of individuals to confirm their relationships to U.S. intelligence activities. Some so-called "revealed identities" are false, the product either of error or of deliberate fabrication.

Clandestine intelligence gathering and activities abroad by authorized U.S. government officials are legal, necessary, and

widely approved. These activities require that officials (and foreign nationals assisting them) disguise the nature and purposes of their work as well as their own identities as intelligence officers. To reveal these identities for the purpose of harming the intelligence activities in which they are engaged threatens the lives of the intelligence officials involved, the lives of their families and associates who are not involved in intelligence work, the lives of those foreign nationals who assist U.S. intelligence activities, and the careers of U.S. intelligence officials.

Once an intelligence officer has been identified publicly, he loses all professional field value to the intelligence community. He cannot work abroad in any clandestine role again. Thus, the exposure of intelligence identities, even when no physical harm ensues, damages the intelligence community and its mission. It must transfer and replace exposed officers and agents, and longstanding relationships must be reconstructed or abandoned. It is these dangers -- to human lives and careers and to the security of the U.S. intelligence community and to that of the United States itself -- that have led to the present broad support for the Intelligence Identities Protection Act.

PROVISIONS OF S. 391/H.R. 4

S. 391 and H.R. 4 are identical in all respects. As reported by the House Intelligence Committee, however, H.R. 4 contained language that was in some respects different from S. 391. The House of Representatives, in passing H.R. 4, rejected the Committee language and adopted instead the precise language of S. 391 by a vote of 276-181. However, it is likely that efforts will be made in the Senate Judiciary Committee or on the floor of the Senate to adopt the House Intelligence Committee language that was deleted by the House floor action. It is therefore useful to compare S. 391 and H.R. 4 in terms of the differences between them that existed as H.R. 4 was reported by the House Intelligence Committee. The provisions of S. 391 and H.R. 4 as reported by the Committee were as follows:

(1) They make it a criminal offense under federal law to reveal the identity of a "covert agent" (defined in the bill) in three cases:

(a) if the individual revealing the identity has or has had authorized access to classified information that identifies covert agents; this category of offender applies principally to intelligence officers who expose the identities of their colleagues.

(b) if the individual revealing the identity has or has had authorized access to classified information that does not directly identify a covert agent but through which it was possible to learn the identity of a covert agent who has been exposed; this category of

offender applies principally to government officials and employees who do not have authorized access to the identities of covert agents but who are able to infer those identities through other authorized access.

(c) if the individual revealing the identity falls into the category of offender defined in Section 601(c) of S. 391 and H.R. 4; this category, discussed below, is the most controversial part of the bill.

(2) The bills direct the President of the United States to establish procedures to ensure effective cover for U.S. intelligence personnel. Agencies of the U.S. government that have been designated by the President to provide cover for intelligence officers are directed to provide whatever assistance the President finds necessary to establish and protect effective cover.

(3) The bills establish defenses to prosecution. For example, no one can be prosecuted for revealing the identity of a covert agent if the United States government, its publications or official statements, have publicly revealed the identity of the covert agent; disclosures of identities to the House or Senate Intelligence Committees cannot be prosecuted as criminal offenses; an individual cannot be prosecuted for revealing himself as a covert agent.

(4) "Covert agent," as defined in these bills, is limited to:

(a) professional officers and employees of the U.S. intelligence community and military officers assigned to a U.S. intelligence agency;

(b) a U.S. citizen who works for or with the intelligence community outside the U.S. or one who works with or for the FBI counter-terrorism or counter-intelligence activities in the U.S.;

(c) foreign nationals who work or have in the past five years worked with or for the U.S. intelligence community.

In all these cases, the relationship to the U.S. intelligence community must be classified information.

CONTROVERSY OVER INTELLIGENCE IDENTITIES PROTECTION

The provisions of S. 391 and H.R. 4 have enjoyed remarkably wide support on both Republican and Democrat sides of the aisle. Support for legislation to protect the identities of U.S. intelligence officers was part of the 1980 Republican Platform, and the Carter and the Reagan Administrations, the Department of Justice,

the Central Intelligence Agency, and the Federal Bureau of Investigation have expressed strong support for a new act of Congress and for these bills in particular. The public, moreover, generally supports the fundamental purposes and goal of this legislation. What is controversial is the language of the two bills, particularly on two matters. One of these concerns the Peace Corps and the other deals with the precise wording of a category of offender under the law.

PEACE CORPS AMENDMENT

Section 603 of S. 391 and H.R. 4 directs the President to establish effective cover for U.S. intelligence personnel through designated agencies of the U.S. government. Some have argued that because this section enables the President to designate any agency of the government to provide cover, it violates the traditional exemption of the U.S. Peace Corps from providing cover for the CIA. Therefore, it is argued, S. 391/H.R. 4 should be amended to exempt the Peace Corps. This exemption is thought necessary to protect the credibility of the Peace Corps as a humanitarian service agency and to protect the employees of the Peace Corps, who are often young and serve in remote areas where communications and physical protection are difficult.

There also are strong objections to the Peace Corps Amendment. Critics point out that no provision of the bill requires the President to use the Peace Corps for intelligence cover; the House Intelligence Committee Report on H.R. 4 (Report No. 97-221, p. 18) states that the bill "does not stipulate which elements of government shall provide assistance or what that assistance must be." Furthermore, William J. Casey, Director of the CIA, has specifically denied that the CIA desires to use the Peace Corps for cover. As Casey wrote to Loret M. Ruppe, Director of the Peace Corps, on July 15, 1981, "I do not advocate and would oppose any designation of the Peace Corps as an agency required to provide cover support." (ibid., p. 19).

Opponents of the Peace Corps Amendment to S. 391/H.R. 4 also point out that incorporation of this amendment would do little to persuade hostile foreign powers that the CIA was not using the Peace Corps; indeed, the amendment would merely call undue attention to the Peace Corps and would probably lead to charges that the amendment was only a device to camouflage the actual use of the Peace Corps by the CIA. By this argument, then, the Peace Corps Amendment would not protect the credibility of the Peace Corps or the physical safety of its employees, but would actually endanger them.

Perhaps the strongest argument against the Peace Corps Amendment, and the basic reason for the opposition of the intelligence community to its adoption, is that the statutory exemption of the Peace Corps from providing cover would lead other semi-independent agencies (e.g., AID, ICA) to make similar demands for

themselves. There would be little reason to deny such an exemption to these agencies if the Peace Corps already enjoyed one. Yet the exemption of other agencies would severely reduce the potential cover available to U.S. intelligence officers. They would in fact be limited to the Foreign Service and military attaches as available cover, and their identities would be fairly easily discovered by hostile foreign intelligence services.

For these reasons, the House Intelligence Committee stated its conviction that "the President will not suggest any change in the traditional distance which has separated the Peace Corps and intelligence operations" and that any such change would constitute a "'significant anticipated intelligence activity' which must, under law, be reported to the Committee before it is implemented." Thus, the House Intelligence Committee did not incorporate a Peace Corps Amendment to H.R. 4 before reporting it out, although such an amendment may be offered in the mark-up in the Senate Judiciary Committee or on the floor of the Senate during debate.

DELIBERATELY IMPEDING INTELLIGENCE ACTIVITIES

The most significant major controversy surrounding the Intelligence Identities Protection Act involves Section 601(c) of S. 391 and H.R. 4. Section 601(c) of S. 391 defines the third category of offender under the Act as follows:

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

The corresponding section of H.R. 4 as amended and reported by the House Intelligence Committee is identical to the Senate version except that it replaces the phrase "with reason to believe that such activities would" with "with the intent" to impair or impede. Furthermore, H.R. 4 stipulates that the intent to impair or impede must be shown "by the fact of such identification and exposure" of covert agents. This latter phrase is absent from the Senate bill, S. 391. It was this language of H.R. 4, as reported by the House Intelligence Committee, that the full House voted to reject by 226-181, adopting the language of S. 391 at the same time by a vote of 354-56.

The significance of these two differences in wording is considerable, and it is likely that efforts will be made in the Senate to restore the House Committee language and that such efforts will be strenously resisted by the sponsors of S. 391.

"Reason to Believe" vs. "Intent"

Those who support the substitution of "intent" for "reason to believe" include the American Civil Liberties Union (ACLU) and the Center for National Security Studies (CNSS) as well as Senate liberals. They argue for the "intent standard" on essentially two grounds: (1) the adoption of the intent standard will ensure the constitutionality of S. 391; the "reason to believe" standard is constitutionally open to doubt on grounds of vagueness; (2) because of the alleged vagueness of "reason to believe," S. 391 could be used to prosecute or intimidate legitimate journalistic or historical investigation of the intelligence community, its abuses, and intelligence policy. "Reason to believe" thus would have a "chilling effect" on the exercise of First Amendment rights, which adds doubt to the constitutionality of the bill and which would harm public discussion and understanding of U.S. intelligence policy. Thus, Morton H. Halperin, Director of the Center for National Security Studies, in testifying against S. 391 before the Senate Subcommittee on Security and Terrorism on May 8, 1981, stated:

> This bill would make it a crime for the press to publish information which it lawfully acquires, whether it acquires that information from foreign intelligence sources, from foreign governments, from foreign newspapers, from official publications of the United States Government, it would be a crime for a reporter or a scholar to engage in an effort to mine those sources to learn the identities of agents and to publish, for any purpose, even to ferret out corruption or illegal activities. We think the Constitution as it has been defined by the Supreme Court...prohibits the Congress from passing a law that punishes private citizens who analyze publicly available information and who draw conclusions from it and publish that information.

However, those who defend the "reason to believe" standard of the present bill -- which include almost fifty co-sponsors in the Senate, a majority of the House of Representatives, the CIA and FBI, the Carter and Reagan Administrations, the Department of Justice, and the Association of Former Intelligence Officers (AFIO) -- strongly dispute the validity of these arguments.

Allegations of Vagueness

Section 601(c) of S. 391 as currently written would make it illegal for a person to reveal the identity of a covert agent if that person

(1) knows that the persons to whom he reveals the information are "not authorized to receive classified information";

(2) knows that the information revealed in fact identifies a covert agent ("knowing that the information disclosed so identifies such individual");

(3) intends to disclose information that identifies a covert agent (he must engage in "a pattern of activities intended to identify and expose covert agents");

(4) knows that the U.S. government "is taking affirmative measures to conceal" the identity of the covert agent;

(5) engages in "a pattern of activities intended to identify and expose covert agents"; and

(6) has reason to believe that such activities would impair or impede U.S. foreign intelligence activities.

In sum, before a person can be prosecuted under the present language of "reason to believe," the prosecution must prove all five elements in addition to "reason to believe" -- a total of six elements. Also, the sections establishing defenses and exceptions to prosecution for engaging in the "pattern of activities intended to identify and expose covert agents" specifically require the prosecution to prove that this pattern of activities was engaged in by the defendant, thereby preventing the prosecution of reporters and others to whom illegal disclosures may have been made but who have not actually engaged in the "pattern of activities." Moreover, one of the elements required for prosecution is already an intent standard. To add another intent standard, advocates of the present language argue, would make prosecution under the Act too difficult to be effective.

The "reason to believe" standard thus would not have a chilling effect on the exercise of First Amendment rights, nor would it intimidate or punish legitimate discussion of intelligence activities. Only persons against whom all six elements of proof could be proved could be prosecuted. On the other hand, the "reason to believe" standard offers a dual advantage: first, it makes prosecution of harmful, dangerous, and illegitimate disclosure easier, and secondly it protects the civil liberties of defendants.

"Reason to believe" makes prosecution easier because the prosecutor need not prove intent; that is, he need not present as evidence the public and private statements of the defendant, information pertaining to his specific motives and political beliefs, and other information necessary to prove intent. To prove the element of "reason to believe," the prosecution must show merely that any reasonable man would regard the activities in which he has engaged as tending to impair or impede. Thus, to

take an extreme hypothetical case, one would have reason to believe that the exposure of the identities of covert agents who allegedly are engaged in assassination plots in Jamaica would harm U.S. foreign intelligence activities in Jamaica and lead to harm for the covert agents and their friends and families, regardless of the need to correct the abuse of assassination.

If a journalist or investigator learns that the CIA is involved in assassination plots or other abuses, he has many ways to expose or correct them other than revealing the identities of the covert agents. He can report his findings to the Director of the CIA, the Department of Justice, or the Intelligence Committees of the House or Senate. He can publish his findings if he does not identify the covert agents involved, or he can even identify them if he also is not guilty of the five other elements necessary for conviction.

Moreover, under an intent standard, if a defendant has not confessed or does not openly admit his intent to impair or impede, and if he claims that his intent was not to impair or impede but to help U.S. intelligence activities by exposing improper, inefficient, or morally wrong activities, the prosecution must then rebut this claim and prove that the intelligence activities in question were not abusive (and that the defendant knew they were not) and would not only have to defend these activities but reveal their nature, extent, and purpose. This requirement in itself would make prosecution under an intent standard all but impossible without seriously compromising intelligence activities. In short, the adoption of the intent standard would make the Intelligence Identities Protection Act all but useless for prosecutorial purposes.

For similar reasons, advocates of the "reason to believe" wording argue, this clause is more protective of civil liberties and privacy than an intent standard. Under the latter, the prosecution must investigate and use as evidence many private and personal facts concerning the intentions, political beliefs and associations of the defendant. Such inquiries almost always involve intrusive investigation into matters not directly related to the actions for which the defendant is being prosecuted and thus might be held to jeopardize the privacy and civil liberties of the defendant.

Constitutionality of the "Reason to Believe" Standard

Those who advocate an intent standard and oppose the "reason to believe" standard argue that "reason to believe" is unconstitutional. In response, supporters of the "reason to believe" standard have pointed out that it has been upheld by courts against claims that it is vague (U.S. v. Bishop, 555 F. 2d 771 (10th Cir. 1977) and Schmeller v. U.S., 143 F. 2d 544 (6th Cir. 1944)). They have also pointed out that standing espionage statutes make use of a "reason to believe" standard.

Some opponents have argued that S. 391 is unconstitutional because it punishes the exercise of First Amendment rights. In this respect, a recent decision of the U.S. Supreme Court is important. In Haig, Secretary of State, v. Agee, handed down on June 29, 1981, the Court held, 7-2:

> Assuming arguendo that First Amendment protections reach beyond our national boundaries, Agee's First Amendment claim has no foundation. The revocation of Agee's passport rests in part on the conduct of his speech: specifically his repeated disclosures of intelligence operations and names of intelligence personnel....Agee's disclosures, among other things, have the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel. They are clearly not protected by the Constitution. The mere fact that Agee is also engaged in criticism of the Government does not render his conduct beyond the reach of the law.

The Court cited as precedent its own decision in Near v. Minnesota, 283 U.S. 697, 716 (1931), in which it upheld the right of the government to "prevent actual obstruction to its recruiting service or the publication of sailing dates of transports or the number and location of troops." As a result, Haig v. Agee effectively resolves the issue of whether the disclosure of the identities of covert agen is a legitimate exercise of First Amendment rights. By this decision, it is not.

Moreover, both the Carter and Reagan Administrations have supported the constitutionality of S. 391. Attorney General William French Smith, in a letter of July 20, 1981 to Senator Strom Thurmond (R-SC), Chairman of the Senate Judiciary Committee, stated his opinion that:

> I believe this Supreme Court decision [Haig v. Agee] should resolve any lingering doubt that may exist concerning the constitutionality of the proposed legislation.

On May 8, 1981, in a hearing on S. 391 before the Senate Subcommittee on Security and Terrorism, Richard K. Willard, Counsel to the Attorney General for Intelligence Policy, stated, "we are totally confident that a carefully drafted bill such as S. 391 is constitutional."

The Carter Administration also supported S. 2216 as reported by the Senate Intelligence Committee in the 96th Congress, a bill identical in every respect to S. 391. Deputy Attorney General Charles B. Renfrew, in a letter of July 29, 1980, to Senator Birch Bayh, Chairman of the Select Committee on Intelligence of the 96th Congress, referred to the deletion of an intent standard and the adoption of the Chafee substitute with the "reason to believe" standard:

> This formulation substantially alleviates the constitutional and practical concerns expressed by the Justice Department with regard to earlier versions of this bill that included a requirement that prohibited disclosures be made with a specific "intent to impair or impede" U.S. intelligence activities.

The consensus of the Department of Justice, under both the Carter and the Reagan Administrations, is that S. 391 is constitutional.

"By the fact of such identification and exposure"

The other distinction between the language of H.R. 4, as it was reported by the House Intelligence Committee and before it was amended and passed by the full House, and S. 391 was that H.R. 4 stipulated that:

> Whoever, in the course of a pattern of activities intended to identify and expose covert agents and with the intent to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure discloses...[etc., as in S. 391; emphasis added].

Under the terms of this language, the prosecution must show that the defendant's exposure of covert agents itself was intended to impair or impede U.S. foreign intelligence activities. Under the language of S. 391 and H.R. 4 as passed by the House, the prosecution must show (a) that the defendant did expose covert agents and (b) that the defendant had reason to believe that his activities would impair or impede. A defendant being prosecuted under the old language of H.R. 4 might admit that he had an intent to impair or impede and admit also that he had exposed covert agents, but he would deny that his exposure of covert agents was part of his intent to impair or impede. The prosecution would then have to show that his exposures were part of his intent to impair or impede. This would be impossible if a defendant had taken care in his previous statements about his exposure of covert agents. Under the language of S. 391, however, the prosecution would not have to show a cause-and-effect relationship between the defendant's exposure and his "reason to believe." It would have to show only that he did expose covert agents and that a reasonable man would believe these activities would impair or impede (as well as the other elements necessary for conviction).

The House Intelligence Committee, in adopting the language of the "by the fact" clause, stated in its Report that "To be subject to prosecution...one who discloses the identity of a covert agent must specifically intend that the impairing or impeding be the result of the identification and disclosure." This language was adopted to prevent the prosecution of those who have motive for exposing covert agents other than impairing or impeding, e.g., "one who seeks to indirectly influence public debate in the United States or urging executive or legislative

action is beyond the reach of this section." In other words, a defendant under the "by the fact" clause of H.R. 4 as reported by the Committee could defensibly claim that his exposure of covert agents was motivated by a desire to influence public debate, not to impair or impede. It would then be incumbent on the prosecution to prove that this was not his motive, that his motive in fact was to impair or impede the foreign intelligence activities of the United States, and that his exposure of covert agents was a result of this motive. Clearly, the "by the fact" clause has the effect of protracting the burdens on the prosecution.

Since the Haig v. Agee decision makes clear that the exposure of covert agents is not protected by the Constitution, there is no need to include language that would protect those who expose covert agents, regardless of their alleged motivations. As Congressman Ashbrook stated in a separate opinion on the "by the fact" language of H.R. 4:

> A person with intent to impair or impede who reveals the identities of covert agents may slip through the loophole in the bill by arguing that he intended to impair and impede the intelligence activities by exposing the activities and that the naming of the covert agents was an incidental by-product. This new phrase narrows the bill too much and places too great a burden on the government. (House Report, p. 29).

THE ANTI-INTELLIGENCE LOBBY

The first bill to protect the identities of U.S. intelligence personnel was introduced in the 94th Congress. Since that time such legislation has enjoyed broad bi-partisan support as well as the support of the intelligence community and the Carter and Reagan Administrations. At the same time, much of the opposition to such legislation, and, more recently, efforts to alter or dilute it, have come from a number of organizations, often called the "anti-intelligence lobby." On one extreme, it includes individuals and publications such as Philip Agee and Counterspy and Louis Wolf and Covert Action Information Bulletin. It also includes those who deny any desire to harm U.S. intelligence activities and claim only to make them more compatible with constitutional rights.

Two of the most articulate spokesmen of the anti-intelligence lobby in the latter category are Morton H. Halperin, Director of the Center for National Security Studies, and Jerry J. Berman, legislative counsel for the American Civil Liberties Union and a staff member of the CNSS. The CNSS is itself a joint project of the ACLU Foundation and the Fund for Peace. Although Halperin and Berman, in recent testimony on S. 391 before the Senate Subcommittee on Security and Terrorism, denied that they would oppose legislation to prevent the exposure of covert agents for the purpose of harming the United States, they opposed the provisions of S. 391.

In fact, both Halperin and Berman have been associated with Agee and his overt supporters and apparatus in the recent past. Nicole Szulc, to whom Agee gave public recognition in the "Acknowledgements" to his Inside the Company: CIA Diary, an "expose" of CIA internal matters, was a member of the CNSS staff. Halperin himself was reported in 1977 as the head of a group called the Campaign to Stop Government Spying, which incorporated the successor to the group that published Agee's Counterspy. Berman was a member of this successor group, called the Public Education Project on the Intelligence Community (PEPIC).

Halperin and Berman in their writings have emphasized the "crimes of the U.S. intelligence agencies" (the subtitle of their co-authored work, The Lawless State), and both have advocated that clandestine intelligence collection by the United States be outlawed except in time of declared war -- a condition that would return the United States to the period prior to the attack on Pearl Harbor, when there were no national means of collecting foreign intelligence. In his testimony before the Subcommittee on Security and Terrorism, Berman stated that this is still the official position of the ACLU, although Halperin stated that he had abandoned this position. In 1977, when the government of Great Britain began deportation proceedings against Philip Agee, Halperin went to Great Britain to appear in his behalf.

Indeed, the public position of Halperin and Berman is that intelligence identities protection legislation is legitimate, but that the proposed language of S. 391 is not acceptable for reasons discussed in this paper. However, any concrete proposal for effective protection of intelligence identities seems to encounter their opposition and their efforts to dilute its coverage. As Senator John P. East (R-NC) stated to Halperin and Berman in the Subcommittee on Security and Terrorism:

> I am just concerned here...whether [given] your objections, as commendable as they are, ultimately, if you strip it down and probe it to its deepest level of rationalization, there really is not anything we could effectively do in this area in terms of protecting CIA agents or other agents from being exposed by private citizens or others, destroying their effectiveness, imperilling their lives and thereby imperilling the national security of the United States.
>
> At some point this Congress, and I think reflecting the will of the American people, is going to want to find a way to protect these people. It is a legitimate concern to national security, and it is indispensable in order the preserve the freedoms we all cherish under the First Amendment.

Thus, while Halperin and Berman and others in the anti-intelligence lobby express moderate views and do not deny in theory the propriety of identities protection legislation, in

practice they oppose every concrete proposal to promote protection of intelligence officers. They have associated with and defended Philip Agee; and they have promoted the actual abolition of U.S. intelligence gathering in peacetime. Given this record, it is difficult to take their expressed reservations about S. 391 seriously, and it is not improbable that they and their allies would oppose any bill designed to protect intelligence officers or strengthen the intelligence community.

CONCLUSION

The issue over S.391/H.R. 4, then, is less one of differing interpretations of the Constitution than it is of the proper role of the intelligence community and its mission. Those who most strenously oppose the present legislation are in general those who have attacked or have promoted the attack and the restrictions on the CIA, the FBI, and other elements of the intelligence community for the past several years. Those who support S. 391/H.R. 4 are in general those who argue that an effective and responsible intelligence community is necessary for the national security of the United States, including the security of constitutional rights.

The proponents of S. 391 argue that the carefully drawn provisions of the measure, the constitutionality of its proposals as drawn from Haig v. Agee, the widespread support for such legislation, and the pressing need for effective legislation to protect the lives and careers of intelligence officers and the security of their activities and of the United States present an overriding case for the need for the Intelligence Identities Protection Act.

Written at the request of
The Heritage Foundation
by Samuel T. Francis, Ph.D.

(Dr. Francis previously worked as a policy analyst for The Heritage Foundation specializing in intelligence and terrorism. He is now Legislative Assistant for National Security to Senator John P. East.)