

FEDERAL POLYGRAPH LIMITATION AND ANTI-CENSORSHIP ACT

HEARING
BEFORE THE
SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

H.R. 4681

FEDERAL POLYGRAPH LIMITATION AND ANTI-CENSORSHIP ACT

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WEDNESDAY, SEPTEMBER 12, 1984

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met at 9:30 a.m., in room 2141, Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Representatives present: Edwards, Schroeder, Sensenbrenner, Gekas, and DeWine.

Staff present: Stuart J. Ishimaru, assistant counsel; Phil Kiko, associate counsel.

Mrs. SCHROEDER [presiding]. Let me call the hearing to order and thank everyone for being here early.

As you know, this is the hearing on the Federal Polygraph Limitation and Anticensorship Act.

I have an opening statement, but I think I will just put it in the record because I know that the Senator, whose presence we have been honored with, has a very busy morning.

[The complete statement follows.]

OPENING STATEMENT OF REPRESENTATIVE PATRICIA SCHROEDER

I am delighted that this subcommittee is considering H.R. 4681 today. As you know, the bill was reported by the Committee on Post Office and Civil Service after the Subcommittee on Civil Service, which I chair, considered it. The Federal Polygraph Limitation and Anti-Censorship Act is sound and needed legislation which should be passed this year.

The bill was drafted in response to two Administration initiatives dealing with pre-publication review and polygraphs. One of these initiatives, National Security Decision Directive 84 (NSDD 84), promulgated by President Reagan on March 11, 1983, is a crude and overbroad reaction to the real problem of leaks of classified intelligence information. The other initiative is a proposed expansion of the Defense Department's polygraph policy—a continuation of a twenty year old effort by DoD to authorize wider use of lie detectors in personnel security investigations.

H.R. 4681 would block the life-long prepublication review requirement that NSDD 84 seeks to impose on thousands of government employees and which is being imposed even though the directive has been suspended. The bill would also limit use of polygraphs against federal employees. I support H.R. 4681 because neither forced censorship nor widespread polygraph use deal with the problem of leaks of intelligence information.

My support for H.R. 4681 should not be read as indifference to the problem of unauthorized disclosures of classified intelligence information. This is a real problem which must be dealt with through instilling an attitude among those within the government that it is incumbent on them to safeguard information concerning our intelligence sources and methods.

The Subcommittee on Civil Service and this subcommittee held a joint executive session in February to hear from the Central Intelligence Agency and the National Security Agency about leaks of intelligence information. All of us who attended that hearing came away with an understanding of the damage which leaks of intelligence information can cause. We also learned that it is the rare case in which investigators can find out who leaked the information. And we learned that most damaging leaks seem to come from high political officials in the White House.

In our closed session, CIA told us about foreign governments that have stopped cooperating with us because the information they provided appeared in the newspapers. CIA told us of fabulously expensive technical collection systems which were reduced in value or rendered worthless by leaks. Besides being a waste of money, loss of collection systems deprives policy makers of information necessary for good decisions. A very practical consequence is that strategic arms limitation agreements become harder to verify.

There is a strong and, at least according to the CIA, increasing tendency of top government officials to leak sensitive intelligence information that compromises intelligence sources and methods. Often the damaging disclosure comes as an appendage to a background remark to a journalist. As an example, an administration official might warn about a military build-up by country X on its border with country Y. To make the comment more newsworthy, the official might describe what some secret collection device has picked up. This latter disclosure may well compromise the collection systems, while adding no real value to the policy comments of the official.

Leaks of intelligence information obviously present serious problems. But prepublication review does not stop leaks. And it is leaks, not negligent disclosures in books by former officials, which are the problem.

The prepublication review requirements of NSDD 84 might well prevent or deter past and present government employees from using public information to debate public policy, or from disclosing information revealing waste, fraud, or mismanagement. Public policy debates, as well as whistleblower disclosures, are essential in our society. Current and former government officials must be encouraged to engage in these activities. Leaking intelligence information for the sake of revealing secrets serve none of the important public purposes that whistleblowing and policy debates do.

I am also concerned about the administration's proposal to expand the use of polygraphs. My concern is that polygraphs falsely label honest people as liars and liars as honest. Their main value is that they scare people into confessing. I fear that, if the personnel security community is authorized to make greater use of lie detectors, these machines will soon become a low cost substitute for traditional investigation. If that happens, our security will be reduced. Personal interviews, telephone calls, and shoe leather are far more effective background investigation tools than are pneumographs, sphygmomanometers, and electrodes.

The problem of unauthorized disclosure of intelligence information is a serious one. Its solution will require a bipartisan effort targeted specifically at blocking harmful leaks of intelligence information, without burdening policy discussions or whistleblowing. But NSDD 84 will not accomplish this. Instead, in the name of national security, NSDD 84 reduces the freedoms and rights which our national security apparatus is designed to protect. I hope we will pass H.R. 4681. Once we do that, we can tackle the real problem.

Mr. SENSENBRENNER. Madam Chairman.

Mrs. SCHROEDER. Let me yield to the gentleman from Wisconsin.

Mr. SENSENBRENNER. Madam Chairman, because I know that Senator Eagleton is on a tight schedule this morning, I shall be very brief.

I welcome the opportunity for hearings on this very important subject, but I would like to add my word of caution that since this is such a tremendously complicated area with so many competing values I would hope that neither this subcommittee nor the Congress as a whole would make a rush to judgment on this particular piece of legislation in the waning days of the session. I am afraid that if we rush this thing through we are going to end up ruining the day that we did and spend a couple of years correcting our mistakes.

So I hope that we will have due deliberation and thought on this subject, and perhaps this will be one of many issues that we can deal with next year.

Mr. EDWARDS [presiding]. Senator, I, too, welcome you and apologize for being late. There were a couple of other meetings that I had. And I thank the gentlewoman from Colorado for very ably chairing the beginning of the hearing.

[Opening statement of Mr. Edwards follows:]

OPENING STATEMENT OF CONGRESSMAN DON EDWARDS

This morning we are meeting to consider H.R. 4681, the Federal Polygraph Limitation and Anti-Censorship Act of 1984. This bill regulates the use of prepublication review agreements and polygraph tests by Federal agencies.

H.R. 4681 was reported by the Committee on Post Office and Civil Service on August 6th. It was sequentially referred to the Committees on the Judiciary and on Armed Services, and to the Permanent Select Committee on Intelligence. The sequential referral ends on September 21st.

H.R. 4681, as reported, would prohibit the use of prepublication review agreements and would prohibit mandatory polygraph examinations. The bill would allow voluntary polygraph use in specific investigations of criminal conduct. The bill also exempts the Central Intelligence Agency and National Security Agency from coverage.

The Committee on the Judiciary requested sequential referral of H.R. 4681 because of the serious constitutional concerns raised by the use of prepublication review agreements and polygraph tests. This Subcommittee has held a number of hearings on these subjects, stemming from the proposal last year by President Reagan to expand the use of both prepublication review and polygraphs.

We recognize the fact that certain classified information may cause harm to the national security if it is leaked in an unauthorized disclosure. But the response of the President to plug these leaks by the expanded use of prepublication review agreements and polygraphs tests, will do little to solve the problems of leaks, but seriously threatens fundamental freedoms in the process.

Mr. EDWARDS. Again, Senator Eagleton, we are glad to have you here, and you may proceed.

TESTIMONY OF HON. THOMAS F. EAGLETON, U.S. SENATOR FROM THE STATE OF MISSOURI

Senator EAGLETON. Thank you, Mr. Chairman; thank you, Mrs. Schroeder; and, Congressmen, thank you as well.

I appreciate the opportunity to appear before this subcommittee concerning National Security Directive 84 and response legislation. Although the directive contains two key parts, namely, censorship and polygraph examinations, I will confine my remarks today to only the former, censorship.

We recently heard President Reagan at the Republican Convention call the Democratic party the party of fear. I find this rather preposterous coming from a President who has personally launched the most massive citizen censorship program in our country's history. There is no greater evidence of a government's fear than muzzling its own citizens from discussing vital national issues.

As this subcommittee knows, Mr. Reagan last year unveiled such a program in the form of National Security Directive 84, which calls for a massive Government censorship of the writings of tens of thousands of private citizens who were formerly in the Government.

The scope of materials they must submit is potentially endless, and the obligation to comply is lifelong.

I am not here to represent only my personal views. Rather, my purpose is to remind the subcommittee that an impressive coalition of individuals of both political parties has spoken out against the President's secrecy regime. They include some of our most eminent former Government officials, among our most experienced and respected journalists and some of the most distinguished of our constitutional scholars. These people are in the best position to advise on questions involving the delicate balance between protection of national security and freedom of expression.

These individuals have sent a uniform message: censorship is not the American way. One of America's most cherished values in an open society where people are free to speak their minds and to criticize their Government. This openness would not survive if the Government could screen the views of those best able to enhance public debate, such as former Government officials.

A second criticism commonly expressed about the President's censorship program is that it takes aim at the wrong animal. The President's impetus for launching the program was his aggravation over the large volume of leaks dribbling out of his administration. By definition, "leaks" are not caused by former Government officials but by current ones. In a recent GAO study of unauthorized disclosures of national security information, out of 43 agencies that responded not a single agency reported any unauthorized disclosure by a former employee. Not one out of 43. The President should discipline his own top appointees and quit looking for scapegoats outside of the Government.

Because no devastating harm to national security has been produced to justify such a harsh censorship regime, Mr. Reagan's plan has attracted concern, if not staunch opposition, from a vastly diverse audience. These people include William Colby, former CIA Director in the Ford administration; Bob Schieffer of CBS News, representing the Society of Professional Journalists; Noel Gayler, retired admiral of the Navy and former Director of the National Security Agency; George Ball, Deputy Secretary of State under President Johnson; and Lloyd Cutler, former Carter White House counsel, to name just a few.

Additionally, the Senate Governmental Affairs Committee organized a second hearing on this subject matter for last February; that is, until the White House pressured for its postponement. And those who were prepared to testify at that second hearing included Archibald Cox of Harvard Law School; Fred Friendly, former president of CBS News and now teaching at Columbia School of Journalism; William P. Bundy, editor of Foreign Affairs magazine; Townsend Hoopes, former Under Secretary of the Air Force; and James Schlesinger, former Secretary of Energy and former CIA Director.

I do not presume to know exactly what their full testimony would have been, but each of them to varying degrees had serious misgivings about the necessity and the wisdom of the President's program.

Mr. Chairman, even conservative political columnists have panned the President's plan. Mr. William Safire has written, "History will remember National Security Directive 84 as Ronald Reagan's greatest betrayal of conservative principles." James Kilpat-

rick called it "downright dumb," and that "the whole thing is loony."

Although friends of the President's directive are few and far between, it would be wrong for us to conclude that the program will be abandoned. The administration may have temporarily shelved the directive, but Mr. Reagan cleverly has chosen to implement a predecessor version of 84, to wit, form 4193, which is almost as bad.

According to the recent GAO report, 119,000 employees have been forced to sign that form—that's the older form, but it's still kicking around—pledging to submit to Government censorship for the rest of their lives.

If the administration won't eliminate all forms of censorship, including that old dog, form 4193, Congress has no choice but to resort to permanent legislation.

Mr. Chairman, I haven't examined line for line the totality of Chairman Brooks' bill, but it strikes me as being, on initial glance, a reasonable and sound approach to this matter. I urge that the House of Representatives initiate legislation in this area and hopefully the Senate will be able to respond.

Finally, I ask unanimous consent, Mr. Chairman, that the full text of my statement appear in the record as though read and that a statement on this subject matter that tracks with mine substantively from Senator Charles Mathias of Maryland likewise be printed in the record.

Mr. EDWARDS. Without objection, so ordered.

[The complete statements follow:]

Mr. Chairman, I appreciate the opportunity to appear before the Subcommittee concerning National Security Directive 84 and response legislation. Although the Directive contains two key parts, censorship and polygraph examinations, I will confine my remarks today to only the former.

We recently heard President Reagan, at the Republican Convention, call the Democratic Party the party of fear. I find this rather preposterous, coming from a President who has personally launched the most massive citizen censorship program in our country's history. There is no greater evidence of government's fear than muzzling its own citizens from discussing vital national issues.

As this Subcommittee knows, Mr. Reagan last year unveiled such a program in the form of National Security Directive 84, which calls for massive government censorship of the writings of tens of thousands of private citizens formerly in government. The scope of materials they must submit is potentially endless, and the obligation to comply is lifelong.

I am not here to represent only my personal views. Rather, my purpose is to remind the Subcommittee that an impressive coalition of individuals—of both political parties—has spoken out against the President's secrecy regime. They include some of our most eminent former government officials, among our most experienced and respected journalists and some of the most distinguished of our constitutional scholars. These people are in the best position to advise on questions involving the delicate balance between protection of national security and freedom of expression.

These eminent individuals have sent a uniform message: censorship is not the American way. One of America's most cherished values is an open society where people are free to speak their minds and to criticize their government. This openness would not survive if the government could screen the views of those best able to enhance public debate—the former government officials.

A second criticism commonly expressed about the President's censorship program is that it takes aim at the wrong animal. Mr. Reagan's impetus for launching the program was his aggravation over the large volume of "leaks" dribbling out of his Administration. By definition, "leaks" are not caused by former government employees but by current ones. In a recent GAO study of unauthorized disclosures of national security information, out of 43 responding agencies, not a single agency reported any unauthorized disclosure by a former employee. Mr. Reagan should discipline his own top appointees, and quit looking for scapegoats outside government.

Because no "devastating harm" to national security has been produced to justify such a harsh censorship regime, Mr. Reagan's plan has attracted concern, if not staunch opposition, from a vastly diverse audience:

William Colby, former CIA Director in the Ford Administration said, in his appearance before the Senate Governmental Affairs Committee: "it is undignified for the United States to rest upon contract law to protect its sensitive classified information."

Bob Schieffer of CBS News, representing the Society of Professional Journalists, before a House Government Operations Subcommittee, remarked: The Directive "is as unneeded as it is unprecedented and ill-conceived."

Noel Gayler, Retired Admiral of the Navy and former Director of the National Security Agency, appearing before the Senate Governmental Affairs Committee, preferred more "carefully drawn directives * * * and (to) use the rifle rather than the shotgun approach."

George W. Ball, Deputy Secretary of State under President Johnson, appearing before a House Government Operations Subcommittee concluded: "This Directive would require the establishment of a censorship bureaucracy far larger than anything known in our national experience." He continued: "Our current obsession with the Soviet Union should not lead us to initiate the very Soviet methods and attitudes our leaders most insistently deplore."

Lloyd Cutler, former Carter White House Counsel, testified before the Senate Governmental Affairs Committee that: "the *Snepp* Directive's broad requirement that all persons having access to SCI submit to prepublication review of virtually all their public statements unreasonably burdens First Amendment rights."

Additionally, the Senate Governmental Affairs Committee organized a second hearing for last February, until the White House pressured for its postponement. Those prepared to testify included, among others: Archibald Cox of Harvard Law School; Fred Friendly, formerly President of CBS News and now teaching at Columbia School of Journalism; William P. Bundy, editor of Foreign Affairs Magazine; Townsend Hoopes, former Under Secretary of the Air Force; and James Schlesinger, formerly Secretary of Energy and CIA Director. I do not presume to know what their full testimony would have been, but each of them to varying degrees, had serious misgivings about the necessity and wisdom of the President's program.

Throughout this year of debate on NSDD-84, editorials and articles from across the country have uniformly regarded the Directive as dangerous and ill-conceived. Even conservative political columnists like William Safire and James J. Kilpatrick have panned the President's plan. Safire has written: "History will remember National Security Directive 84 as Ronald Reagan's greatest betrayal of conservative principles." Kilpatrick called it "downright dumb," and that "the whole thing is loony."

Mr. Chairman, although friends of the President's Directive are few and far between, it would be wrong for us to conclude that the program will be abandoned. Back in February, when the White House temporarily backed-off the Directive, an aide to the President admitted that it removed a source of controversy during the election and that the President could reissue the order if reelected. I am no soothsayer on the November election returns. But I know this: it is imperative that we settle this issue immediately, because censorship is going on right now. The Administration may have temporarily shelved the Directive, but Mr. Reagan cleverly has chosen to implement a predecessor version, "Form 4193," which is nearly as bad. According to the recent GAO Report, 119,000 employees have been forced to sign this form, pledging to submit to government censorship for the rest of their lives. If the Administration won't eliminate all forms of censorship—including Form 4193—Congress has no choice but to resort to permanent legislation.

Chairman Brooks' bill strikes me as a reasonable and sound approach. While I have not studied every word of it, I can certainly support its underlying principle. I congratulate Mr. Brooks for moving forward, and for refusing to allow Congress to become an accomplice in Mr. Reagan's secrecy campaign. I intend to do all I can to push legislation of this kind in the Senate, and I urge the members of this Subcommittee to give it their support. I hope that we can continue to handle this issue in the bipartisan manner which has characterized congressional involvement thus far. Senator Mathias (R.-Md.) and I have deliberately led the Senate effort in this spirit, and could not have succeeded in enacting into law the six month moratorium last October, without the helpful support of Senators Percy, Cohen, Danforth, Gorton, Heinz, Lugar, Quayle, Rudman, Specter, and many others.

In closing, Mr. Chairman, I believe a serious question faces us: Do we want the government to censor the future writings of distinguished individuals such as Secretary of State George Shultz, U.N. Representative Jeane Kirkpatrick, Attorney Gen-

eral William French Smith or Secretary of Defense Casper Weinberger? I believe we do not. Perhaps the Soviet Union needs to control information through a government shield of secrecy, but if a bipartisan Congress has the will to stand up to Mr. Reagan's dangerous policy, there shall be no Ministry of Truth in the United States. Thank you.

TESTIMONY OF SENATOR CHARLES MCC. MATHIAS, JR.

Thank you for giving me this opportunity to present my views about prepublication censorship of federal employees. This is an issue of broad bipartisan concern, and I commend the Subcommittee for taking a close look at this important problem.

Almost exactly one year ago, the Senate Governmental Affairs Committee held a hearing on certain provisions of National Security Decision Directive 84 (NSDD-84). At the hearing, we learned that the Administration planned to implement a sweeping program that would oblige many federal officials, for the rest of their lives, to submit for government censorship many of their writings on issues of public concern. Several members of the Committee, concerned about the impact of such a program on the constitutional guarantee of free speech, asked what need had been shown for creating such a vast censorship program. In response, we were told that the government knew of only two incidents over the previous five years in which a former employee of the Defense, State, or Justice Departments had published classified information without getting official authorization to do so—and that one of those incidents was unconfirmed.

That information lent credence to the view that the Administration was trying to hit a gnat with a sledgehammer. This vast censorship program was proposed in response to a real and serious problem of unauthorized disclosure of sensitive information—of leaks—but if offered little promise of solving that problem. At the same time, we were concerned that it cut too deeply into the ability of former federal officials—including some of the most articulate and knowledgeable citizens in our society—to speak freely on issues of public concern. Senator Eagleton and I, along with a number of our colleagues, therefore proposed that the Administration postpone the implementation of this portion of NSDD-84 for six months, so that Congress would have a chance to determine whether this unprecedented censorship program was in fact justified.

On October 20, 1983, a broad bipartisan majority of the Senate approved the Mathias-Eagleton amendment, which delayed implementation until April 15, 1984. The House agreed to that amendment in conference, and it was incorporated into the bill by the President on November 22. Before the April 15 deadline arrived, however, the Administration announced that it would voluntarily adhere to the conditions imposed by the Mathias-Eagleton amendment for the remainder of 1984. The Administration also pledged that it would give Congress 90 days notice before reinstating the controversial portions of NSDD-84.

Since the Senate vote, we have learned a great deal more about official censorship of the writings of current and former federal officials. For this we can thank several concerned members of the House of Representatives. Through their efforts, for example, we have learned just how extensive a system of pre-publication censorship was in place even prior to NSDD-84. A GAO report requested by Chairman Jack Brooks of the Committee on Government Operations and by Chairman William Ford of the Committee on Post Office and Civil Service revealed that nearly 119,000 federal employees have signed agreements committing themselves to lifetime censorship.

The agreements that these officials have signed are somewhat less sweeping than those drawn up in the wake of NSDD-84. But the basic problem with prepublication review remains: it is a form of prior restraint by the government. Any proposal for a system of censorship, no matter how narrowly drawn, and no matter how well-intentioned, demands the most searching examination. Any form of prior restraint bears a presumption of invalidity that only a strong showing of need can overcome.

In response to many of the same concerns that prompted the Mathias-Eagleton amendment, Representative Brooks has introduced the bill that is before this subcommittee today. H.R. 4681 would invalidate most federal prepublication review programs except those in place at the Central Intelligence Agency and the National Security Agency. This bill deserves the close scrutiny of this subcommittee and of the other House bodies to which it has been referred.

The problems we face in this area are complex and difficult. We must find a balanced solution that safeguards sensitive government information without infringing on cherished constitutional freedoms. We cannot realistically expect to resolve these

problems during the brief time that remains before the 98th Congress adjourns. But this issue will not go away. When we return to it in the 99th Congress, I look forward to working with members of the House to build upon the progress that has been made this year.

Before closing, I want to reaffirm the importance of maintaining a broad, bipartisan coalition on this issue. As the Senate vote last year showed, there is nothing partisan about the protection of free speech. By freeing former officials from needless harassment by censors, we can ensure that distinguished public servants from either party—whether George Shultz or Cyrus Vance, Henry Kissinger or Zbigniew Brzezinski, Caspar Weinberger or Harold Brown—will be free to enliven the debate on issues of public concern when they return to private life. By ensuring that scientists, historians, and other scholars are not deterred from public service by the prospect of onerous censorship requirements after leaving office, we can help the federal government attract the best talent available—regardless of politics. And by eliminating funding for unnecessary censorship of the writings of private citizens, we can together make a modest but important contribution to the reduction of wasteful federal expenditures.

Mr. Chairman, I regret that the hectic pace of these last weeks of the 98th Congress prevents me from appearing to present my testimony in person today. Once more, I commend you for convening this hearing. I look forward to working with you and with other members of the House on a fair and balanced resolution of the issues presented by this important legislation.

Mr. EDWARDS. Senator, we thank you very much.

I recognize the gentlewoman from Colorado, Mrs. Schroeder.

Mrs. SCHROEDER. Thank you very much.

Senator, we do appreciate your being here, because, as you know, the House has started to move on this. I am pleased that there are those in the Senate who also care about this.

I think you make an excellent point about the fact that all the hearings that we have had have shown that it really is a bogeyman that we have set up, a straw man that really doesn't have any facts backing it when we talk about someone leaking. The leaks have tended to be from political appointees just smoozing with the press, if anything, and conscious leaks by people who are professionals just haven't really happened.

So I thank you very much for being here and for concentrating on it. Anything you can do to get the Senate moving would be terrific.

Senator EAGLETON. Thank you, Mrs. Schroeder, and I subscribe to your comment as well. I think we know the source of the leaks, and it is not the professionals who have left the Government.

Mrs. SCHROEDER. That's right.

Mr. EDWARDS. The gentleman from Wisconsin.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

Senator, I noticed you were very eloquent in your denunciation of National Security Directive 84. Wasn't that directive placed in abeyance by the administration last spring?

Senator EAGLETON. It was after the Senate had voted to put it in abeyance as a matter of law for 6 months.

Mr. SENSENBRENNER. We did have a number of hearings over here on the House side, and I have not noticed any resurrection of that national security directive, and I think that the administration has gotten the message that that directive will not fly either here or over on the other side of the Capitol unless it is substantially reworked.

Senator EAGLETON. I am not as sanguine about that as you are, Congressman, because I think after the first Tuesday of November a lot of things might start to fly that wouldn't be able to fly today.

Mr. SENSENBRENNER. Gee, you're more pessimistic than many of my Democratic friends.

I do have one question on the merits of the legislation. I notice that the legislation specifically exempts the NSA and the CIA from it but does not exempt the Department of Defense. If prepublication restrictions and polygraph tests are so morally reprehensible, why not take away the two exemptions that are contained in the legislation right off the bat and make it apply to everybody?

Senator EAGLETON. In my prepared statement—in the interest of time we x'd out some lines—I think it is in the next to last page, we mentioned that the bill does cover the Central Intelligence Agency and the NSC, National Security Council, but does not cover the FBI and the DIA. I would like to listen to the testimony on that subject matter to see if that exemption should or should not be broadened from what it now appears to be in the Brooks bill. So I am willing to be persuaded on that.

Mr. SENSENBRENNER. Fine. This subcommittee did have an executive session several months ago where we had representatives come here and give us some specific instances where prepublication guidelines were extremely useful in preventing the leaks, perhaps inadvertent, of classified information. Do you see any justification for that kind of thing, where a former Government official does write a book and might drop something that inadvertently could be used to leak classified information and merely by having the review it allows this problem to be brought to the author's attention?

Senator EAGLETON. I can see that there are sensitive national security areas. We have already mentioned, for instance, the CIA. And through experience we've seen what can happen when a former employee of the CIA recklessly abuses the information that he had access to. So I think one has to draw a line, carefully draw it, not draw it in too big an arc so as to include people who need not be included, but carefully draw a line in security-related agencies. Certainly the CIA is within that scope. As I say, I would like to listen to testimony on the FBI and the DIA.

Mr. SENSENBRENNER. Thank you very much.

I yield back the balance of my time.

Mr. EDWARDS. Thank you very much, Senator Eagleton, for very useful testimony. It is really astonishing to think that this comes up at this time when we have survived 200 years without any kind of draconian, shocking methods this order entails. And, yes, as Mr. Sensenbrenner points out, when the reaction of the public and the press was so negative when this program was first announced, the White House said that they were going to pull back on it, but it is my understanding it is still being implemented.

Thank you very much.

Our next witnesses are from the Department of Justice. John Otto is the Executive Assistant Director of the Federal Bureau of Investigation. With him is Jerry Schroeder, Senior Attorney with the Office of Intelligence Policy at the Department of Justice.

I understand that Mr. Otto will be giving the Department's testimony and Mr. Schroeder is available to answer any questions we may have.

Mr. Otto, it is good to have you here again, and it is nice to have you, Mr. Schroeder. You may begin.

[The complete statement follows:]

Mr. Chairman and members of the subcommittee, I welcome the opportunity to share with you the FBI's use of the polygraph and views concerning pending legislation in this area.

Present FBI policy regarding the use of the polygraph encompasses many different factual situations that do not involve allegations of criminal conduct or unauthorized disclosure of classified information. Examples of such situations include the use of the polygraph as a factor in resolving questions concerning an applicant's suitability for employment with the FBI, as well as a factor in resolving issues that concern serious violations of FBI policies or fitness for duty. H.R. 4681, as presently drafted, would prohibit these uses of the polygraph, thereby severely jeopardizing the Bureau's ability to assure the trustworthiness, reliability, and effectiveness of its employees.

We recognize that the polygraph should not be used indiscriminately. A properly structured polygraph program balances the need for security and relevant information with the protection of the individual's rights. At the FBI, the decision to request an employee to submit to a polygraph examination is made on a case-by-case basis. Additionally, it is not our policy to require or coerce an employee to submit to a polygraph examination, although, in certain limited situations, an adverse inference may be drawn from an employee's refusal to submit to a polygraph examination.

The FBI and other members of the intelligence community have national security responsibilities which are, to a great extent, indistinguishable from those of the CIA and National Security Agency (NSA), both of which are exempted under section 6 of the bill. Information originating with any of the members of the community is frequently shared with one or more of the other members; therefore, the penetration of any such agency by a foreign intelligence service or the unauthorized disclosure by an employee has as great a potential for damage to the national security or foreign policy of the United States as the loss of information in possession of NSA or the CIA. The bill creates a disparity in the safeguards employed by agencies possessing the same information. There are positions within the FBI which require access to the same type, if not the same, sensitive information in possession of NSA or the CIA.

The direct impact of the bill on the FBI can be illustrated by several examples. In the preemployment area when a decision has to be reached to hire someone who will have access to sensitive material, the FBI is frequently confronted with applicant background information which is not verifiable through normal investigation because this information is sometimes only available in other countries. Although individuals with certain ethnic backgrounds are especially valuable to us, such a lack of verification could prevent their being hired. In addition, although someone with a highly desirable ethnic background may have spent his/her entire life in the United States, hostage situations may exist where family members or friends remain in hostile countries. The only way to discover such a situation or its effect on the applicant or employee may be through use of the polygraph. In situations involving information or allegations pertaining to on-duty employees, the problem is even more serious. The limitation of damage done to the national security would be dependent upon the speed of discovery. The bill in section 3(B) implies that an investigation must have focused upon the particular employee and then only when classified material, as defined by the executive order, or criminal conduct is involved. The initial stages of contact with an intelligence officer frequently involve information which, while not classified and not criminal in its passage would be of extreme importance to a hostile service and would quickly lead to the passage of more sensitive information if not acted on promptly. The bill would greatly hinder the FBI's efforts in such a situation where prompt but judicious use of the polygraph would result in a quick resolution and limitation of national security damage.

The Bureau's use of the polygraph is a responsible and measured response to investigative requirements. During fiscal year 1983, the polygraph was used in only 166 situations which would have been proscribed by the bill. Of those, 40 involved personnel matters, 116 applicant matters, and 10 security clearance matters. While the number of examinations was small, the benefit derived was extremely great. As these numbers indicate the FBI's use of the polygraph in those situations which would have been proscribed by the bill, is subject to stringent internal controls which include high level review and approval strict guidelines, and annual audits.

The proposed legislation's prohibition on the use of prepublication review requirements would dramatically affect the FBI's policy in this area. At present, the FBI uses a standard employee agreement contract, FD-291, wherein a prospective employee, as a condition of employment, agrees to submit for prepublication approval the content of any proposed disclosure which includes any information acquired as a result of, or during the course of, his/her official duties/position. The proposed legislation would totally prohibit the continued use of such an agreement. The effect would be to end prescreening of any communication, written or oral, by present or past employees regarding information obtained through their official duties or position.

It should be noted that in the intelligence and criminal investigative fields the damage is done upon the release/disclosure of sensitive information. Even though other statutes or regulations exist which provide for criminal and civil penalties for the unauthorized disclosure of such information, these penalties do not prevent the potential loss and damage to the Nation's national security and its law enforcement efforts.

We believe that the proposed legislation is overly broad and restrictive. Its total prohibition is inconsistent with past judicial decisions in the area of prepublication review [e.g., *Snepp v. United States*, 444 U.S. 507 (1980)].

That concludes my opening statement. I would be happy to answer any questions this subcommittee may have.

**TESTIMONY OF JOHN OTTO, EXECUTIVE ASSISTANT DIRECTOR,
FEDERAL BUREAU OF INVESTIGATION, ACCOMPANIED BY
JERRY SCHROEDER, SENIOR ATTORNEY, OFFICE OF INTELLI-
GENCE POLICY, DEPARTMENT OF JUSTICE**

Mr. OTTO. Thank you, Mr. Chairman.

I would like to begin by reading from my prepared statement, copies of which we have made available.

Mr. EDWARDS. Without objection, your full testimony will be made a part of the record.

You may proceed.

Mr. OTTO. Mr. Chairman and members of the subcommittee, I welcome the opportunity to share with you the FBI's use of the polygraph and views concerning pending legislation in this area.

Present FBI policy regarding the use of the polygraph encompasses many different factual situations that do not involve allegations of criminal conduct or unauthorized disclosure of classified information. Examples of such situations include the use of the polygraph as a factor in resolving questions concerning an applicant's suitability for employment with the FBI, as well as a factor in resolving issues that concern serious violations of FBI policies or fitness for duty.

H.R. 4681, as presently drafted, would prohibit these uses of the polygraph, thereby severely jeopardizing the Bureau's ability to assure the trustworthiness, reliability, and effectiveness of its employees.

We recognize that the polygraph should not be used indiscriminately. A properly structured polygraph program balances the need for security and relevant information with the protection of the individual's rights. At the FBI the decision to request an employee to submit to a polygraph examination is made on a case-by-case basis. Additionally, it is not our policy to require or coerce an employee to submit to a polygraph examination, although in certain limited situations an adverse inference may be drawn from an employee's refusal to submit to a polygraph examination.

The FBI and other members of the intelligence community have national security responsibilities which are to a great extent indistinguishable from those of the CIA and National Security Agency, both of which are exempted under section 6 of the bill. Information originating with any of the members of the community is frequently shared with one or more of the other members; therefore, the penetration of any such agency by a foreign intelligence service or the unauthorized disclosure by an employee has as great a potential for damage to the national security or foreign policy of the United States as the loss of information in possession of NSA or the CIA. The bill creates a disparity in the safeguards employed by agencies possessing the same information. There are positions within the FBI which require access to the same type, if not the same, sensitive information in possession of NSA or the CIA.

The direct impact of the bill on the FBI can be illustrated by several examples. In the preemployment area when a decision has to be reached to hire someone who will have access to sensitive material the FBI is frequently confronted with applicant background information which is not verifiable through normal investigation because this information is sometimes only available in other countries. Although individuals with certain ethnic backgrounds are especially valuable to us, such a lack of verification could prevent their being hired.

In addition, although someone with a highly desirable ethnic background may have spent his or her entire life in the United States, hostage situations may exist where family members or friends remain in hostile countries. The only way to discover such a situation or its effect on the applicant or employee may be through the use of the polygraph.

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clude high level review and approval, strict guidelines and annual audits.

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We believe that the proposed legislation is overly broad and restrictive. Its total prohibition is inconsistent with past judicial decisions in the area of prepublications review. And we cite *Snepp v. United States*.

That concludes my opening statement. I would be happy to answer any questions this subcommittee may have, sir.

Mr. EDWARDS. Thank you very much, Mr. Otto.

In 1983 you used the polygraph in 166 situations; 40 involved personnel matters. What happened in those 40 cases? Did some people not get jobs because the polygraph didn't give them a clearance?

Mr. OTTO. In the personnel matters, those would primarily pertain to people who were on board already, sir. In the applicant and security clearance area, we might have some of that where people would not get the job. We have had a number of situations where people who have applied for positions with us to be translators who have been detected through the use of the polygraph to be deceptive in terms of why they want the job. It has been detected where they have been sent to try to penetrate the FBI by a foreign hostile government for the purpose of espionage. So the polygraph did detect that.

Mr. EDWARDS. It did detect in some of the 116 applicant matters that there were efforts to penetrate, right?

Mr. OTTO. Yes, sir.

Mr. EDWARDS. Did they admit it after the polygraph?

Mr. OTTO. There were some that admitted it. I don't know how many did do that, but other investigative efforts also corroborated this in many of those instances.

Mr. EDWARDS. Wouldn't they be violating some criminal statute if they were unregistered foreign agents?

Mr. OTTO. If it is provable, yes, sir.

Mr. EDWARDS. Did you try to prove it? If they admitted it, you'd have to get an indictment, wouldn't you?

Mr. OTTO. If they admitted it. The circumstances usually are such it is very difficult to prove because the investigation would have to occur in a foreign country, or much of it.

Mr. EDWARDS. Of the 40 personnel matters, did the examination result in some people being suspended or discharged?

Mr. OTTO. Yes, sir. I don't have a definitive breakdown, but I can obtain that for you and supply it to you. We do have that information.

Mr. EDWARDS. Did some of the people feel that they were treated unfairly because of the polygraph examination?

Mr. OTTO. I would imagine some would feel that they were treated unfairly. We try to be very careful in the use of it. The individual at FBI headquarters who approves polygraphs for testing of our personnel and in applicant matters is the Assistant Director in charge of our Inspection Division, and he works in our organizational chart for the Director. But he personally approves all use of the polygraph for our employees.

Mr. EDWARDS. The Bureau has the responsibility to investigate leaks of classified information. Have you caught leakers as a result of the polygraph?

Mr. OTTO. In terms of classified information, I believe there have been a few that have been caught. Also, there have been a few who have been detected leaking information which either by statute or by Attorney General guidelines there are prohibitions against leaking.

Mr. EDWARDS. How many books or articles do you have now awaiting prepublication review?

Mr. OTTO. I don't believe that at the present I am aware of any. I think in the past year we did two books and three articles, if I am not mistaken. It's in that area. We asked about what could be expected for this year, and they said about the same as it has been in the past, and it may be three books or four books and maybe as many articles at the most.

Mr. EDWARDS. Is it your custom to delete more than classified information?

Mr. OTTO. I am not aware of any efforts to do that; as a policy approach by the Bureau, no.

Mr. EDWARDS. When did the polygraph practices start in the Bureau? When did you start to use it?

Mr. OTTO. We began them in about 1972 and then changed our approach in 1978 in terms of more extensive training, more study, more research, more stringent control over the results. In 1978 we went to a quality review process where all polygraph tests are subjected to a second review at FBI headquarters to verify the initial findings, and no reports or use is made of the polygraph test until the quality review has occurred. That began in 1978.

More recently, I think within the last 3 years, we have aligned ourselves with the University of Virginia and prepared a 4-week, very intensive course, a nine-credit graduate course, for our polygraph operators where they receive instruction in physiology, and psychology, and so forth, taught by the staff at the University of Virginia, trying to upgrade the approach and the use of the results of the polygraph test.

We are also doing research in the area of trying to improve the instrumentation so that as a diagnostic device it is as unobtrusive and as unoffending as something like this can possibly be. Also to improve the ability of the instruments to give you a diagnostic result.

We have entered into several research projects, trying to get at the validity of the whole process. We have presently surveyed all of our special agents, asking them if they have been involved in a case where the polygraph was used, and if so, were there any instances where they knew that through independent means the polygraph results were determined to have been false or incorrect. We have not completed that study right now. It involves all of our 8,500 agents, or more. I would say that we are close, though, to having all the survey results in, and then in each instance where it is believed by an agent that the results are false we will have a team go to the site and actually examine the case file and the reason they believe it was not a correct finding by the polygraph, trying to get at a position where we can see how many times in our own experience polygraph results may have been inaccurate and why and if it was one where the quality check, the second check at headquarters also failed.

We have also entered into a joint study with the National Academy of Science. They have participated in meetings with us at our Quantico facility where they have assisted us in looking at the control-question approach to our polygraph tests. They are going to help us establish the methodology to look at it, once again trying to see how valid that approach is, and I believe they are going to assist us all the way through, although that has not been their final report to us yet. But it is encouraging.

Last, we are going to try to do a validity check of the process that we do now in terms of the whole criminal and foreign counter-intelligence use of the polygraph, trying to get at something as close as has ever been to the validity of the process.

Mr. EDWARDS. I'm glad you are going at it in a very thorough way, because it is a subject that has been the focus of controversy for a long time. I hope you also make a study with an institution of great integrity like the Academy as to the possible effect on the people who are applying for positions. Otherwise you going to lose people of great talent because they must submit to such strict rules and regulations, such as if anything they write, or if they speak before the Rotary Club, for the rest of their lives, might have to be approved by some bureaucrat in Washington first. You are going to lose good people. I think you ought to look at that, too.

I thank you.

I recognize the gentleman from Wisconsin, Mr. Sensenbrenner.

Mr. SENSENBRENNER. No questions.

Mr. EDWARDS. The gentleman from Pennsylvania.

Mr. GEKAS. I have no questions.

Mr. EDWARDS. Thank you very much.

Mr. OTTO. Thank you, sir.

Mr. EDWARDS. Our next witness is Prof. Michael Tigar, who is the Raybourne Thompson centennial professor of law at the University of Texas.

Professor Tigar has been involved in a number of leading constitutional cases and has written a number of books and scores of articles. Before going to Texas, he practiced for a number of years here in Washington. As a matter of fact, he has been a valuable witness before this subcommittee before.

It is nice to have you back in town, Professor. Without objection your full statement will be made a part of the record and you may go ahead.

[The complete statement follows:]

ANALYSIS OF H.R. 4681: CENSORSHIP AND POLYGRAPHS BY MICHAEL E. TIGAR, RAYBOURNE THOMPSON CENTENNIAL PROFESSOR OF LAW, UNIVERSITY OF TEXAS AT AUSTIN

About the author: Michael E. Tigar holds the B.A. and J.D. degrees from the University of California at Berkeley. He has practiced law since 1967, and has represented clients in some leading constitutional cases involving First and Fourth Amendment rights. He is the author of three books and scores of articles and essays. He has taught and lectured at a number of law schools, and before judicial conferences, bar associations and elsewhere. In 1983, he returned to full-time law teaching to accept a tenured appointment at the University of Texas, where he now holds an endowed professorship, the Raybourne Thompson Centennial Professorship in Law.

Prof. Tigar has testified on a number of occasions concerning legislation dealing with national security issues.

The views expressed in this memorandum, and in Prof. Tigar's testimony, are his own and do not represent any official position of the University of Texas or its law school.

This memorandum is prepared in relative haste as a collection of thoughts about the legislation. It should be regarded as a discussion paper, not a finely-honed and compendious research document.

Overview of H.R. 4681: This bill was called into being by President Reagan's proposed National Security Decision Directive (NSDD) 84, and by the administration's increasing proclivity to require polygraph tests of employees concerning alleged "leaks" of classified information. Relevant background information appears in H. Rep. No. 98-961, Part I, 98th Cong., 2d Sess., August 6, 1984 ["Report"].

NSDD 84 represents an effort to impose, by contract, upon about 200,000 government employees, a purported consent to prior restraint on publication of information. NSDD would also impose a contractual nondisclosure agreement upon every federal employee with access to any classified information: there are more than five million such employees. Report, pp. 38-39.

The second issue addressed by H.R. 4681 is the use of polygraph tests to screen employees and to detect "leaks."

Analysis of censorship provisions of NSDD 84 and restrictions contained in H.R. 4681: If one imagined a group of government lawyers sitting down after the *Pentagon Papers* decision⁴ and planning to circumvent its teaching, a proposal remarkably like NSDD 84 would surely be the result. The *Pentagon Papers* case upheld, against a strident claim of national security, a consistent line of Supreme Court precedent that presumptively prohibits prior censorship, or "prior restraint" in the phrase often used in the cases.⁵

Any effort at prior restraint, the Supreme Court has consistently held since *Near v. Minnesota*⁶ in 1931 comes to court with a triple burden to bear. The proposed restraint must be narrowly-drawn; it must be related to an imminent danger to core governmental concerns; and, the government must assume and meet a heavy burden of proving that the facts justify the restraint. NSDD meets none of these criteria, and even H.R. 4861, by giving the CIA and National Security Agency a blanket exemption, fails to engage in critical line-drawing in areas where Congressional oversight is most necessary.

(Footnotes 1-3 omitted.)

⁴ *New York Times Co. v. United States*, 403 U.S. 713 (1971).

⁵ See generally *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539 (1976); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

⁶ 238 U.S. 697 (1931).

To begin with the problem of proof, a restraint on publication—or even on news-gathering—cannot be justified by resort to general principles or shared notions about what “ought” to be secret. The government must make its case “with the degree of certainty our cases on prior restraint require.”⁷ Just this past Term, a unanimous Supreme Court revisited a closely-related issue, closure of pretrial proceedings. The Court held that closure decisions must be made on a case-by-case basis, on a factual record subject to judicial scrutiny.⁸ The point is that any administrative system that imposes prior restraint regardless of the specific harm that may be occasioned by a specific disclosure is procedurally deficient.

The second problem with NSDD 84 is its overbreadth and vagueness. Study after study has confirmed that all administrations overclassify. Any regulation that leaves it to the executive branch to define what kinds of information shall be subject to prior restraint, and then gives that same branch the power to identify the class of persons who are regarded as possessing such information, is fraught with peril to First Amendment values. A vague definition of “Sensitive Compartmented Information” may have value for administrative convenience. However the vice of vagueness in the First Amendment context is that the individual subject to a command is unable to determine whether his conduct is within or without its prohibition. This uncertainty chills the exercise of protected speech. Thus, vague rules are inherently overbroad in their impact.⁹

The regulations proposed in NSDD are expressly overbroad in their coverage, however. All employees within the defined group must submit all writings for all time, provided only that a relatively minimal test of connection to the prior employment is met. The history of such provisions is proof enough that they strike at protected freedoms. The Marchetti-Marks episodes, cited in the Report, p. 28, are but one example of the censors’ exuberance. When one looks at the deletions initially made in that manuscript, the problem becomes clearer: One such deletion was of the names of the candidates in a Chilean presidential election.

In addition to vagueness and overbreadth, NSDD is inherently discriminatory. The “tired cliché,” Report, p. 36, about the American ship of state leaking from the top reflects the real world that anyone who had spent any time in Washington knows. When Henry Kissinger writes his memoirs, an influential history goes forth to paint a picture of American military and foreign policy during an important period. When scholars and journalists seek access to information and documents that might cast doubt upon the Kissinger version, they are met with claims of secrecy.¹⁰

Under NSDD 84, the powerful will have their say. When those who served under them want speedy access to the media to rebut or clarify, they will be subject to a cumbersome mechanism of review. The Committee has already heard, and its members already knew, how quickly events move in the field of foreign and military policy. The decision to invade, to sponsor covert intervention, or to conduct paramilitary activity, is made and set in motion in a matter of days. The necessary

⁷ Nebraska Press Ass’n, 427 U.S. at 558 (Burger, C.J.).

⁸ *Waller v. Georgia*, — U.S. —, 104 S.Ct. 2210 (1984). The same day, the Court reaffirmed the basic principle that curtailment of free expression is permissible only if doing so furthers “an important or substantial governmental interest unrelated to the suppression of expression,” and when “the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.” *Seattle Times v. Rhinehart*, — U.S. —, 104 S.Ct. 2199, 2207 (1984). Given the extremely spotty evidence of serious and consistent leaks accompanied by damage to identifiable national security interests, NSDD 84 is an outrageous proposal. Of course, the restraints imposed by NSDD 84 have no plausible function unrelated to suppression of speech, so they fail both parts of the Seattle Times test.

⁹ This point is made in many cases, e.g., *Smith v. Goguen*, 415 U.S. 966 (1974); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Goodling v. Wilson*, 405 U.S. 518 (1972); *Plummer v. Columbus*, 414 U.S. 2 (1973). See also the test quoted above in note 8. An able student author (who was later to become Attorney General of Oregon) analyzed this issue in Comment, 54 Calif. L. Rev. 132, 153-54 (1966). He pointed to *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), in which the Court struck down an informal censorship scheme that Rhode Island had superimposed upon the criminal process. Characterizing the flaw in that system, the author wrote, “Conduct may be circumscribed by an administrative determination which, if acquiesced in, precludes a judicial determination of whether the conduct intended or contemplated constitutes a protected form of expression.” So with NSDD 84, the cumbersome process of censorship illustrates the old Texas saying that “you may be beat the rap, but you can’t beat the ride.” The “ride” as well as the “rap” is unconstitutional.

¹⁰ Both this observation and the one preceding, concerning the Marchetti episode, are documented in Center for National Security Studies. The Consequences of “Pre-Publication Review”: A Case Study of CIA Censorship of The CIA and the Cult of Intelligence (1983), and First Principles, “Former Officials on Prepublication Review,” Nov./Dec. 1983.

public debate over such important decisions cannot reasonably be stayed for the weeks and months required for administrative censorship of proposed rebuttal, particularly when the process is in the hands of the very branch of government whose actions are going to be criticized.

This much of the analysis is probably familiar to the Committee. Let me address some specific concerns that have been raised about the interests ostensibly protected by NSDD 84.

Right of access to Government information: Constitutional scholars have ably argued a right of access to government information.¹¹ I agree with them that the First Amendment assumes that citizens must know what government is doing in order to exercise intelligent choices, and that the presumption of access has often been recognized, for example in the Freedom of Information Act.

NSDD 84 presents a special, and in a sense easier, case for access. Those subject to censorship do not need "access" to information. By definition, they have it. They want simply to tell their fellow-citizens what they know. It is elementary that the First Amendment protects the citizens' right to know as well as the communicators' right to speak and publish.¹² NSDD seeks to head off these acts of communication by a system of prior restraint. Its advocates say, however, that no issue of prior restraint is properly raised because the information is properly subject to contractual provisions prohibiting the communicator from publishing or speaking. So we need to analyze these claims of contract.

Property claims of Government: The Reagan administration is claiming, in effect, a "property right" in "its" information, gathered by intelligence services for use by the Executive Branch. This right is not said to rest upon any statutory grant; it represents government setting itself up in opposition to the citizenry as "owner" of the information on the basis of which public policy is made. This claim of ownership is contrary to suggestions in relevant Supreme Court opinions that property rights in information "affected with a public interest" must be "qualified."¹³ When coupled with an assertion that the property right can be enforced by injunction, recent Supreme Court law on injunctive relief in the trade secret area suggests that the strictures are too broadly drawn.¹⁴

Moreover, since the dawn of the Republic, we have insisted that government as such has no right of copyright in "official information, and we (unlike Britain) have no "official secrets act." The deliberate decision not to give government a property right in official information is designed to encourage public access to information. I have discussed the implication of a government property right in information in a forthcoming article, to which I refer anyone who is interested.¹⁵ The point of that article is that invocation of a generalized right of property in government information is laden with dangers to First Amendment values, and is an inappropriate mechanism for adjusting the competing claims of government and the citizenry to access to information.

Contract arguments—Snip. Snip. Snepp: Everyone who appears before you will have to discuss *Snepp v. United States*.¹⁶ for in that case the Supreme Court enforced a contractual nondisclosure agreement against a former CIA employee. As

¹¹ See Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 Cornell L.Q. 690 (1984); Emerson, *The System of Freedom of Expression* 673 (1969).

¹² See *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

¹³ *International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918). This analysis appeared in Justice Brandeis' opinion dissenting from the result in the case, but is not at variance with the majority opinion's view of the property issues involved. See also *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir.), cert. denied, 395 U.S. 947 (1969).

¹⁴ See *Ruckelshaus v. Monsanto Co.*, — U.S. —, 52 U.S.L.W. 4886 (1984). I am not citing *Ruckelshaus* as a definitive answer to this question, simply as a suggestion that the use of injunctive-type restraints may be inappropriate with respect to certain claims concerning intangible property interests such as the government claims to have in its information. These prudential considerations are in addition to the constitutional strictures against prior restraint, and would come into being only if one recognizes—as I would not—the government's claim to proprietary interest in its information concerning official business. Indeed, I would suggest that the government's property claim would have difficulty meeting the threshold test set out in *Ruckelshaus*.

¹⁵ M. Tigar, *The Right of Property and the Law of Theft*, 62 Tex. L. Rev. — (1984) (forthcoming). This article is a survey from Biblical times to the present of important recurring issues in the law of theft.

¹⁶ 444 U.S. 507 (1980).

my colleague Lucas A. Powe, Jr.,¹⁷ has pointed out, the *Snepp* majority stressed the relationship of trust and confidence that *Snepp* had with the agency and the sensitivity of the information entrusted to him. *Snepp* is not a license to exact a contract from every one of the five million government employees with access to classified material, nor even to impose such a condition on the employment of those with access to Sensitive Compartmented Information.

Millions of Americans are employed by the Federal Government: millions more by the state and federal governments. Still more Americans receive benefits from government agencies, require a license to practice a profession or occupation, or are subject in varying degrees to regulation in their vocations. The Supreme Court has repeatedly insisted that conditions imposed upon public employment, the grant of public benefits, and the issuance of licenses must be rationally related to a legitimate government purpose and must not require forfeiture of a constitutional right. This "unconstitutional conditions" analysis is a powerful antidote to the administration's insistence that problems of prior restraint are solved if employees "voluntarily" agree to lifetime censorship.¹⁸

The "unconstitutional conditions" cases do not speak with one voice, but that fact supports the thesis of H.R. 4861 rather than otherwise. Each proposed condition on public employment must be individually measured against a standard of "appropriateness" to the particular employment relationship, and when the condition implicates speech, it is subject to a more rigid scrutiny. Consider, for example, the recent 5-4 decision, *Connick v. Myers*,¹⁹ upholding dismissal of a public employee for circulating a document critical of her supervisors. The narrowness of the Court's majority underscores the narrowness of its carefully-qualified opinion. The employee's speech related to the functioning of her office, and the result, the majority concedes, might well have been different if it had dealt with "a matter of public concern." After all the Court had previously held that a teacher could not be disciplined for discussing politics outside the classroom.²⁰

Study of other cases helps to draw the line: Public employment may not be conditioned upon agreement to an agency shop arrangement;²¹ denial of a veterans' tax exemption to those who hold certain beliefs violates the First Amendment.²² And where the employee is not seeking any personal benefit from speaking, or only a nominal benefit, the scope of protection of First Amendment freedoms is certainly broader. The *Snepp* analysis deals with an employee who sought to profit from the sale of information gained during his tenure.

A former employee who wants to inform the public steps under the umbrella that shields all those engaged in a communicative process, and invokes the rights of hearers as well as the communicator's own. By the same token, a contract that would preclude the employee from ever stepping into the public forum to communicate is or ought to be subject to special scrutiny. Such a contract, with its lifetime provisions, prevents the government from relying upon the government employment cases such as *Connick* that speak of interference with the present functioning of an agency.

It is worth noting that the unequal bargaining power of government and the prospective employee is another, non-First Amendment reason to tread cautiously in imposing this kind of condition.²³

¹⁷ L.A. Powe, Jr., *The Constitutional Implications of President Reagan's Censorship Directive* 84. *The Center Magazine*, March/April 1984, p. 2. I owe a great deal to Professor Powe's trenchant analysis.

¹⁸ The relevant cases are summarized in M. Nimmer, *Freedom of Speech* § 4.08 (1984); see also W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 *Harv. L. Rev.* 1439 (1968). See also *Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977).

¹⁹ — U.S. — 103 S.Ct. 1684 (1983).

²⁰ *Perry v. Sinderman*, 408 U.S. 592 (1972); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

²¹ *Abood v. Detroit Board of Education*, 431 U.S. 109 (1977).

²² *Speiser v. Randall*, 357 U.S. 513 (1958).

²³ A public agency cannot impose a condition that in effect deprives someone of fundamental rights, and defend its action on grounds of "consent." *Ohio Bell Tel. Co. v. Public Utilities Commission*, 301 U.S. 292, 306-07 (1937). More importantly, we must recall that *Snepp* was a suit in equity to claim profits found that have been made from violation of *Snepp's* voluntary bargain. When one seeks to impose a general condition of employment upon five million employees, and a further condition upon tens of thousands of their number, the unequal bargaining power of the parties, and the "take it or leave it" nature of the purported bargaining may make the contract unconscionable and therefore unenforceable. Justice Frankfurter developed this theme in a dissent in *United States v. Bethlehem Steel*, 315 U.S. 289, 326 (1942). But his words in dissent have been revisited, and in the words of one court, "the law . . . is now compelled to accept"

Is H.R. 4861 enough? The exemption of the CIA and NSA from H.R. 4861 is troubling. It cannot possibly be said that every employee of these agencies handles information so sensitive that a lifetime contract is appropriate. I regard the exemption as insensitive to the demonstrated continuing need for Congressional oversight of these agencies. Did we learn anything from the Rockefeller Commission,²⁴ or from the ever-longer list of CIA excesses? Whatever one's view of the CIA's activities and influence, almost everyone agrees on the need for some limits.

More tellingly, even a limitation to so-called Sensitive Compartmented Information (SCI) is illusory, and accepts too easily the premises of censorship. Everything is the stuff of intelligence and every conceivable means is used to gather it.²⁵ What the people of a given country eat, what they wear, what they write in aboveground and underground newspapers, what their diplomats say at cocktail parties, what their economic future looks like: all this and more is grist for the CIA analysts' mills. Battalions of bright scholars sift this information and provide information to policymakers. The implications of adopting a definition that shields all of this from public security into the indefinite future, are profoundly disturbing.

The sorts of decisions made on the basis of such information are precisely those that affect the lives of Americans most clearly, for in some real sense the foreign and military policy decisions that rest upon this mass of information will determine, among other matters, whether or not this country enters a war.

The point here is really no different from that made throughout the House Report concerning the endemic overclassification that has been documented time and again.

Some observations on national security: It is true the Committee is considering legislation in the field of national security. Invocation of that term as Professor Emerson has pointed out is not the end but the beginning of analysis. From the *Steel Seizure* case, to *United States v. Robel*, to the invalidation of warrantless electronic surveillance in domestic national security cases,²⁶ the Supreme Court has shown some skepticism about using the national security rubric as universal solvent of constitutional issues.

In the Rockefeller Commission²⁷ report on CIA activities in 1975, warned that "the mere invocation of the national security does not grant unlimited power to the government." Have we, in the nine intervening years, forgotten that lesson? I hope not, particularly given revelations in the intervening years about the harm done by covert intelligence operations to individual rights in the United States and abroad.²⁸

The House Report should be proof enough that claims of wholesale risk to national security are far-fetched. Neither the numbers nor the seriousness of alleged threats can possibly justify the uncritical insistence that everyone with access to so-called classified information, or even to SCI, take a pledge of lifelong abstinence from public debate.

Polygraph testing: Recently, a perceptive student comment on the polygraph issue was published.²⁹ Polygraphs are notoriously unreliable: the risk of falsely branding a government employee is so great that making submission to polygraphing a condition of employment, drawing inferences from refusal to take a polygraph, and using polygraphs as a basis for employment decisions are all inherently suspect.

Again, the doctrine of unconstitutional conditions and the other observations about freedom of contract made above are relevant. Public employees are entitled to due process of law, and the degree of protection to which they are entitled varies with the type of employment at issue. For example, an applicant may be entitled to less protection than an employee already hired and vested with civil service protections. No matter what the employee's or prospective employee's status, decisions on

them, *Weaver v. American Oil Company, Inc.*, 276 N.E. 2d 144 (1971). See also *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948).

²⁴ Commission on CIA Activities Within the United States. Report to the President (1975).

²⁵ See the cogent comments of the German political theorist Hans Magnus Enzensberger *Politics and Crime* 5-18 (1974).

²⁶ The *Steel Seizure* case is *Youngstown Sheet & Tube v. Sawyer* 343 U.S. 579 (1952), *United States v. Robel*, 389 U.S. 258 (1967); *United States v. United States District Court*, 407 U.S. 297 (1972).

²⁷ *Supra* note 24 at 5.

²⁸ Some of these revelations come from leaks from the so-called "Church Committee." See M. Tigar, *The Foreign Sovereign Immunities Act and the Pursued Refugee: Lessons from Letelier v. Chile*, [1982] *Michigan Yearbook of International Legal Studies* 421, 422-23.

²⁹ Note, *The Presidential Polygraph Order and the Fourth Amendment: Subjecting Federal Employees to Warrantless Searches*, 69 *Cornell L.Q.* 896 (1984).

employment, retention, and promotion may not be based upon criteria that are irrational or unrelated to job performance.³⁰

Polygraph evidence is no different from any other kind of unreliable evidence that an agency may seek to use as a basis for hiring or retention: the due process clause presumptively forbids its use.

The comment further claims that polygraphing is a form of search and could not be imposed on employees except in compliance with Fourth Amendment standards. I tend to agree with the analysis set out in the Cornell student comment cited above, but I think one need not go that far in order to find the polygraph policies of this administration repugnant to fundamental values.

Fourth Amendment analysis may risk bogging one down in defending analogies that are more or less persuasive depending on how one reads the relatively delphic pronouncements of shifting Supreme Court majorities. Is this like a "stop and frisk," a "dragnet" search, or something else. Is it "administrative", "criminal", or like some hybrid such as a border search? Is the polygraph examination "testimonial," so as to implicate Fifth Amendment concerns? Can it be fairly characterized as nonintrusive compelled replication of conduct that one would normally expose to the public anyway, or at least to one's employers?

I think everyone would agree that a polygraph is intrusive at least in the sense that its successful use depends upon including behavior that varies from a "norm" established as a baseline by the polygraph operator. If this proposition is accepted, the Cornell student's conclusions follow. Everyone would also agree, however, that the validity of polygraph examinations is subject to serious question in the individual case; that is, whatever the "statistical" claims of reliability, any given test is subject to a high risk of inaccuracy.³¹

If these propositions are accepted, and one further agrees—as the decided cases teach—that due process guarantees government employees that hiring and retention decisions are to be made upon the basis of a fair determination of the facts, the conclusion seems inevitable that H.R. 4861 is if anything too narrow, again because it excludes the CIA and NSA.

Asking someone to submit to a polygraph is seeking consent to an intrusion, and even with restrictions based on voluntary consent, such a request should not be made absent some basis. H.R. 4861 sets out such a basis.

More importantly, H.R. 4861 approaches the problem in the way suggested above: as a matter of our traditional concern that a person can be subject to adverse government action only on the basis of evidence that meets minimal standards of reliability.

Concluding observations: The list of former public officials and employees who inform citizens and legislators is long and impressive. Every Member can think of dozens of such persons that she or her staff consult in the course of a legislative session, either directly, through published writings, or by informal letter or memorandum. So one clear risk of NSDD 84 is to the integrity of the legislative and oversight processes of the Congress.

This observation suggests that the issue before the Committee is not what sort of interference with freedom by the Executive or even by the Congress a hypothetical Supreme Court majority might sustain.

After all, the Court's majority will pay deference, even where protected freedoms are at stake, to the determination by the Executive or Congress about the permissible scope of regulation. The view that restrictions on freedom of speech should be tolerated because of a guess about what the Supreme Court will do is precisely the sort of abdication of constitutional responsibility that led to the most cogent expression of fears during the Constitutional debates over the power of the Presidency, and which led to the adoption of the Bill of Rights.³² Those ten amendments begin with an adjuration to "Congress" and not to someone else.

NSDD 84 puts power in the hands of any administration to silence the critics of its choice at the time and in the manner of its choice, for the power to censor is triggered by the debate that impels the former public official to speak. The image of America evoked by exercise of such a power is far indeed from that reflected in the

³⁰ See generally *Greene v. McElroy*, 360 U.S. 474 (1959); R. O'Neil, Public Employment, Antiwar Protest and Preinduction Review, 17 U.C.L.A. L. Rev. 1028 (1970).

³¹ The unreliability of evidence as a basis for excluding it has been canvassed in varying contexts in, e.g., *Communist Party v. SACB*, 351 U.S. 115 (1956); *United States v. Valdez*, 722 F.2d 1196 (5th Cir. 1984).

³² See Patrick Henry's comments, quoted in M. Tigar, Judicial Power, the "Political Question Doctrine," and Foreign Relations, 17 U.C.L.A. L. Rev. 1135, 1172 (1970), reprinted in 3 *The Vietnam War and International Law* 654 (Falk ed. 1972).

first amendment. The "security of the Republic" and the "very foundation of constitutional government" lies, as the Supreme Court reminded us in the *Pentagon Papers* case, in robust and uninhibited debate.³³

**TESTIMONY OF MICHAEL E. TIGAR, RAYBOURNE THOMPSON
CENTENNIAL PROFESSOR OF LAW, UNIVERSITY OF TEXAS AT
AUSTIN**

Mr. TIGAR. Thank you very much, Mr. Chairman.

Because my statement will be a part of the record, I will not attempt to read it in its entirety.

NSDD 84 is an unprecedented effort to impose, by contract, a purported consent to prior restraint on publication of information. The constitutional issue that the committee must confront in evaluating this legislation is that of prior restraint.

The Supreme Court has held that any attempt to restrain publication has a threefold burden: First, it must be related to an imminent danger to core governmental concern; second, it must be narrowly drawn; and, third, the government must assume and meet a heavy burden of proving in each particular case that the facts justify the restraint. That is, prior restraint on publication is not, as NSDD is, a wholesale, blanket matter. Rather, in particular cases a court must weigh under narrowly drawn standards the particular dangers that government proves exist from a particular disclosure. The *Pentagon Papers* case is perhaps the most famous example of a court applying these sorts of standards.

This constitutional lore has been restated by the Supreme Court on a number of occasions. The theory that lies behind the *Pentagon Papers* case and has been a part of our law, expressed at any rate, since *Near v. Minnesota* in 1931 was recently reaffirmed by a unanimous court just this term.

When I say that based on my analysis NSDD 84 meets none of these criteria I have in mind, first, that the definition of sensitive compartmented information is nowhere near as narrowly drawn as a court would require in a prepublication censorship situation to pass constitutional muster.

I have before me a copy of the form 4193, which I understand from Senator Eagleton's testimony is now in use. I have also before me a copy of the 1983 update which it is proposed to use.

My first observation is that the proposed new form is a great deal broader than then former one. For example, it imposes the lifetime censorship obligation upon "any information concerning intelligence activities, sources or methods."

Mr. Halperin, who I think will appear before you next, has some experience in this field, and the committee members know from the experience of the House Intelligence Committee and from the investigations into the activities of the Central Intelligence Agency that intelligence activities, sources or methods is a very broad term indeed. The Central Intelligence Agency prepares estimates of the economic conditions in foreign countries, what people wear, what people eat, what they think about their government, do they read underground and overground newspapers, and so on. These intelligence sources and methods are the same sources and methods that

³³ Quoted in Powe, *supra* note 17, at 9.

scholars use in preparing scholarly papers. There is nothing unique to a secret service about them, and yet sweeping them into the censorship provisions of NSDD 84 through the device of this agreement would not only shut down debate about important public issues, but would shut down debate in an area where experience has unfortunately dictated that we seem to need it.

In 1974 the Rockefeller Commission reported on CIA activities in the United States and proposed a number of controls on intelligence gathering within our borders. That distinguished bipartisan commission issued a report that I had thought commanded broad acceptance.

The Church Committee, not all of whose findings have been made public, showed that there are at least some grounds to be concerned about intelligence gathering activities.

I am not here to testify that a particular intelligence method is good or bad; I am here to say, however, that the breadth of this proposed form would stifle public debate about those issues.

The administration responds with two arguments, and I want to deal with them in a little more detail than in my prepared testimony. The first is a property argument. These forms, as a matter of fact, contain an acknowledgement by the employee that the information that he or she is receiving is the property of the government.

Mary Cheh, a professor at George Washington University Law School, has written a very able article in Cornell about a right of access to government information. That is a frontier constitutional question, and it is one that the committee need not reach in its consideration of this legislation. The public employees who are stifled by NSDD 84 already have the information. When they leave government employment they want to share it with their fellow citizens.

We don't need to consider a constitutional right of access in the sense of a right of a citizen to write to government and get information back, although the Freedom of Information Act is a suggestion that the Congress believes that some such right exists, whether it rests in statute or is a matter of interpreting the Constitution, which is equally the duty of the Congress as it is the duty of the courts.

The property claim here is that what is contained in a former government official's head, that got there during the former government official's service in government belongs to the government. Mr. Chairman, that's nonsense. Of course government has property rights; government owns airplanes; they own houses. But when the property that is being talked about has to do with communication the first amendment cuts in and says, "No, Government, you can't assert your property right against the interest of citizens to communicate." The government has a property interest in the streets and in the parks and in the places of public assembly, but no one would claim that government could set itself up as a private owner could and say "we're not going to permit speaking or parading or first amendment activities in those places that are suitable to the expression of views on matters of public concern."

So this Government interest in property is utterly unprecedented and is at war with the profound tradition of openness in public

debate, the profound tradition that Government can't invoke the right of a property owner as an answer to the exercise of a constitutional right.

The second thing the Government says is, well, what we are doing here is, we're asking people to waive a right; they are to waive it as a condition of employment by signing a contract. That's pretty easy to understand. After all, this Congress has considered consumer protection legislation over the past number of years. It has been very concerned about it. I submit to you, Mr. Chairman, that that kind of take-it-or-leave-it, gun-to-the-head contract would not pass muster in the sale of a used car under the views expressed in legislation passed by the Congress. This is a classic contract of adhesion; that is to say, it's a take-it-or-leave-it kind of contract that is imposed on someone who, unless he signs it, doesn't get the job.

Not only that, Mr. Chairman, if I, because I am in a weak bargaining position, sign a contract for a car that doesn't work very well, I am the victim. Maybe if the wheel falls off and I run into somebody I might cause one other life to be lost or cause some injury.

These contracts make all of us in a sense the victims, because, Mr. Chairman, the information that is sought to be bottled up by the coerced signature is information that the public has a right to hear as well as information that the citizen in question has the right to divulge. That analysis, it seems to me, suggests that contract analogies are not a universal solvent here.

It is true the Supreme Court in *Snepp v. United States* validated the contract that Snepp had signed with the Central Intelligence Agency. However, that contract was special and has to be viewed in the light of the jurisprudence that informed, to the extent it was informed, the Court's decision.

Snepp was said to have occupied a special relationship of trust. Not only did his contract say that he did, but the nature of his employment would have told anyone that he did. All employees have a fiduciary obligation to their employer. However, that fiduciary obligation is measured and limited by the nature of the employment relationship in question. And even the Court's majority in *Snepp*, which is as far as the Court has gone, does not validate the across-the-board imposition of this sort of condition upon public employees, not to mention the fact that the proposed new contract attempts to go several steps beyond *Snepp* with respect to the breadth of its coverage.

We are a long way, Mr. Chairman, as I say in my statement, from saying that public employment is a benefit, it's governmental largesse that should be dispensed without any regard to constitutional right.

Justice Holmes' famous aphorism in *Commonwealth v. Davis* that the petitioner may have a constitutional right to free speech but he has no constitutional right to be a policeman, upholding the firing of a policeman for exercising first amendment rights, that observation has fallen into disrepute of late, and I see no reason to attempt to resurrect its decaying corpse by the mechanism of this national security directive.

The Supreme Court taught in cases beginning with *Sherbert v. Verner*, a case involving the attempt to condition the giving out of unemployment benefits on the willingness to work on Saturdays, the Supreme Court invalidated that in the case of a Seventh Day Adventist and said it is far too late in the day now to claim that Government employment or Government benefits can be conditioned on anything at all that springs to a bureaucrat's mind.

It is true the Supreme Court has upheld, for example, the firing of a public employee whose speech on the job creates disruption, just as the firing of a private employee in those circumstances would be upheld. That decision, *Connick v. Myers*, was five to four, and the Court's majority took pains to point out that speech on matters of public concern outside the narrow ambit of the office, which had been held protected in such cases as *Pickering v. Board of Education*, was not affected by anything that the Court said.

Mr. Chairman, I want to turn briefly to the polygraph question.

Before I was a law professor appointed to this endowed position, which may only prove that the University of Texas has more money than sense, Mr. Chairman, I practiced law for some 17 years.

Mr. Chairman, in the field of national security, if somebody thinks that there is harm being done, this Congress in 1968 passed 18 U.S.C. §§ 2510 through 2520, which gives the Government the right to get a warrant and tap people's phones. Then in 1978 you passed the Foreign Intelligence Surveillance Act, which has a secret court, where, if you think that a hostile foreign service is at work, you can go get a warrant and listen in on people's phones. We also found that because consent is involved the FBI can go in without a warrant and video tape people, try to set them up and get them to commit their crimes on television so that they can be prosecuted.

I must say that I sort of thought that after the FBI had all these powers that the committee might quit hearing from them for a while until they got used to using those and ferreted out the crime and prosecuted. It seems to me that even these unprecedentedly broad powers simply aren't enough.

I was disappointed, Mr. Chairman, because I heard the FBI come back and say that they need more, they need more. And not only that, Mr. Chairman, but it is going to be all right because the internal review process in the FBI is going to make it all right.

Mr. Chairman, I read every word of the reports this committee did on how the internal review process broke down during the so-called ABSCAM and BRILAB investigations, and it seems to me that on that record the committee is entitled to exercise a great deal of skepticism about the claim that administrative internal review is going to make everything all right, particularly when there lays readily to hand the two wiretap statutes that at least give some measure of judicial review.

That, Mr. Chairman, represents an exegesis upon a couple of the points that I had made in my prepared testimony. I thank you for the opportunity to appear, and I am prepared to answer any questions you may have.

Mr. EDWARDS. We thank you very much for being here today. We have missed you in Washington and trust that you are enjoying your tenure at the university.

Incidentally, we are paid to be skeptics about the various bureaucracies. That's part of our job, of course, and we are not doing our job unless we are skeptical, especially of internal procedures which are alleged to be a substitute for law. That is what we ran into in our investigations of various undercover activities, in particular Corkscrew in Cleveland.

We will talk about the FBI for the moment, because they are against this bill and have testified against this bill. Before 1972 they didn't have these weapons that they have now, and want to continue using, and they say these weapons are very important to them, really on grounds of national security more than anything else.

What are they supposed to do if they don't have the right to pre-publication review and the use of polygraph tests? What weapons can they use to protect themselves?

Mr. TIGAR. Mr. Chairman, I have referred to the investigative devices that already exist. The polygraph is a demonstrably unreliable device. That is one objection to it. The use of demonstrably unreliable evidence as a basis for Government action is fraught with serious due process problems.

Let me be practical for a moment. When I practiced law we had to make a lot of decisions. We liked to think that the ability of the people we hired to maintain the confidences that were reposed in them was without peer. We also had important concerns of clients that we were going to try to protect. In a capital case that could be somebody's life or somebody's death. In a felony prosecution that could be a number of years of imprisonment.

So in trying to understand the FBI's position I put myself in the position of somebody who has made a lot of hiring decisions that I think are important. It doesn't seem to me that the polygraph is a necessary part of that process. I don't see in what the FBI has presented so far any hard evidence that the polygraph is necessary, and to the extent they may come up with one or two examples of situations where the polygraph uncovered something, it then seems to me they have to be arraigned upon, first, whether the alternative means that they already have would have provided the same information, whether what used to be called good agents who observe and know how to ask questions would have been able to come up with the same information, and then, as might have been suggested by one of your questions, Mr. Chairman, whether even given all that the costs are worth it.

Not only is there a substantial deterrent effect on people who think they are going to be subjected to invasions of their privacy in order to keep their job or to get their job, but I think the ongoing fear of that kind of unreasonable surveillance is bad for morale.

I seem to recall that when Mr. Hoover was the Director of the FBI that he used to snoop on the agents about their sexual activities and who they would spend time with and all sorts of irrelevant inquiries. Well, the agents in question tended to perceive that that was an invasion of their privacy, and I think that was bad for morale. The polygraph is an invasive device that is notoriously un-

reliable, and that perception, it seems to me, would also be bad for morale. I don't know that and don't hold myself out as an expert on it, but it seems to me that that parallel could be drawn.

Mr. EDWARDS. That part of it bothers me very much. I would not want to see the quality of agents or the quality of employees damaged in the long run by requirements and promises made, and contracts signed, that would make them less of a citizen, a person with fewer civil and constitutional rights than anybody else. I just wonder if this had been in effect when I was an agent, many years ago, for the FBI that somehow or another the contract that I would have had to sign, or the law that would have been effect at that time, would have precluded me from doing some of the work that I do with the FBI here in Congress. I think it would be an open question.

Mr. TIGAR. I think so, Mr. Chairman, because if you look at the breadth of this 1983 version, "Information concerning intelligence activities, sources or methods," it would be very hard to think much of your job as a special agent of the Federal Bureau of Investigation, particularly assigned to certain kinds of details, that couldn't come under the rubric intelligence activities, which is just utterly unqualified. You might have been in a position of having to submit your opening remarks this morning to the Reagan administration to make sure that it was all right.

Mr. EDWARDS. I think that is a real concern.

The gentleman from Ohio, Mr. DeWine.

Mr. DEWINE. I don't have any questions.

Mr. EDWARDS. Mr. Tigar, you note that procedural difficulties in the Government's prepublication program make the plan unconstitutional. Can you elaborate on that? What procedural difficulties are you referring to?

Mr. TIGAR. I am referring to two separate issues, one of timing, the timing of the review, and second, to the methods and standards of review.

The timing of the review stops publication until the process is finished. In the nature of public debate, the need for relatively instantaneous comment by people who have the knowledge that the public needs are substantial. The Supreme Court has held again and again and again that any administrative system which funnels or channels or restricts speech must provide for very prompt, thoroughgoing judicial review without these sorts of delays.

The second thing is really a reference to *Bantam Books v. Sullivan*, a Supreme Court case that involved an informal censorship board. We have already seen a number of instances of how this prepublication review works, the breadth of the review, the number of excisions that are made which turn out in the end to have been far greater than any rational person could support as a matter of potential damage to national security.

Thus the mere existence of that scheme of censorship not cabined within very narrow and precise rules is a deterrent to speech of the kind the Supreme Court condemned in *Bantam Books v. Sullivan*.

Mr. EDWARDS. If we wanted to stop burglaries or robberies in this country we could just enact a national curfew at 9 o'clock at night

or 8 o'clock at night, and I am sure it would cut down by 50 or 60 percent right away if you weren't allowed to leave your house.

Mr. TIGAR. That's true.

Mr. EDWARDS. Can you relate that to this issue to some extent because you are balancing again what the executive department is saying is national security against certain privileges and rights that we think all Americans are supposed to have.

Mr. TIGAR. We know, to begin with, that the national security is not the universal solvent of questions regarding free speech. Not only has the Supreme Court said so, but the Rockefeller Commission recognized it in the context of a study of the Central Intelligence Agency.

All speech involves risk taking. The first amendment represents a deliberate judgment about the risks that this country is willing to take in order to have robust and uninhibited debate. Exceptions to the absolute command of the first amendment, the courts have said, cannot be the sort of blanket imposition of the free speech curfew, but rather must be based upon case-by-case analysis based on narrow standards. That is curfew versus arresting people caught robbing houses or as to whom one has probable cause to rob houses.

Something else our national history has taught us. I didn't have time to search it out, but I will send it along to the committee. Zecharia Chaffee, who was professor at Harvard Law School, studied the anti-free speech prosecutions during the First World War and was able to document that the suppression of free speech in that time, when the Nation's national security was thought to be threatened, was a direct contributor to wrong decisions by the Wilson administration, terribly wrong decisions, which not only cost the lives of American young men, but by virtue of the suppression of the dissenting voices perhaps crushed whatever chance the League of Nations might have had to build a postwar world where collective security could head off another war.

That analysis, it seems to me, commends itself. One could make similar analyses, although much more controversial, about recent American foreign policy developments.

I think the lesson of all of those is that it isn't too much speech that causes the problem; it is Government's efforts to bottle up speech that causes the problem, that prevents public debate that might have kept the Nation off a wrong course.

Mr. EDWARDS. Thank you.

Counsel.

Mr. ISHIMARU. Thank you, Mr. Chairman.

Professor Tigar, in your statement you say that polygraph use may violate the fourth amendment to the Constitution. Could you expand on that some more, please?

Mr. TIGAR. There is a student note in Cornell that develops the case citations. We start with the fact that the Supreme Court has said that a handwriting exemplar doesn't implicate fourth amendment values; perhaps a voice exemplar would not because you are simply exhibiting to someone characteristics you exhibit all the time. So we put that aside analytically.

The second thing we put to one side is the notion of the fifth amendment. That is to say, compelled testimonial conduct where

the interrogator is listening to your answer to see whether it is true or false based on the interrogator's perception. That is, you are being asked to give information about things you know. We put that to one side because in fact there are fifth amendment considerations that would restrict the drawing of adverse inferences from the refusal to be interviewed, even by a Government employee.

I just won that case in the Supreme Court a few years ago 7 to 1, Justice Rehnquist not sitting, Chief Justice Burger writing for the Court. So that principle isn't even very controversial.

Now we come to the center point, which is the fourth amendment point. A polygraph operator doesn't really seek to elicit information from the person who is talking; it is, rather, the galvanic responses and other physical manifestations that the machine measures that is being sought. Does that mean that an individual is simply exhibiting conduct normally exhibited? No. Because the polygraph operator establishes a norm or baseline, and then, based on that, makes a series of judgments by manipulating the consciousness of the person who is subject to the examination. Only the manipulation of consciousness that leads to the electronic responses that reflect unconscious responses makes the polygraph worth whatever people say it is worth. Therefore, since it goes beyond the Mara case type manifestation of conduct you manifest all the time, and since it isn't testimonial in character, I think there is a sound basis to conclude that there is a fourth amendment issue here. If there is a fourth amendment issue here, then that means probable cause and warrant.

Mr. ISHIMARU. Does the public have an absolute right to Government information? And if not, where would you draw the line?

Mr. TIGAR. No; the public does not have an absolute right to Government information. Government, for example, can hold copyrights, by escheat or will, to books, and they own those just as private persons do. Government can own trade secrets. Trade secrets are property. The Supreme Court reaffirmed that in *Ruckelshaus v. Monsanto* this term.

What we are really talking about is Government claiming a property right in information related to issues concerning public policy. As to that kind of information, the Government doesn't own it, and therefore citizens have a right to get it. Or at the very least, they have the right, if they already have it, to tell it to somebody else.

Since Government doesn't have this property right, the analogy I drew earlier comes into play: Government has a property right in its houses and its airplanes; but it doesn't have the same kind of property right in its streets, parks, and public halls. If we keep that analogy firmly in mind we can develop a constitutional right of access to information.

A military base may be wonderful place to have a demonstration, but the Supreme Court has said you can't have demonstrations there if the base commander says, based on articulated and articulable standards, that it is going to be bad for the military function that is going on there. Similarly, narrowly drawn, precise standards subject to judicial review that relate to the kinds of information that Government needs to protect can be a basis for the Government claiming not a property right in its information, because I

think that metaphor doesn't get us anywhere, but simply the right to withhold in the interest of all of the citizenry.

That, it seems to me, is the kind of analysis one needs to make.

Mr. ISHIMARU. Thank you very much.

Thank you, Mr. Chairman.

Mr. EDWARDS. Counsel.

Mr. KIKO. Following up on the question by majority counsel, isn't that what the Government is claiming, though, that it has a right to prevent the public from having access to information that is sensitive for executive branch reasons or regarding national security reasons?

Mr. TIGAR. Counsel, of course Government is claiming that it has a right to prevent access to information which is sensitive. I don't think the word "sensitive" is susceptible of the kind of defining that makes it an appropriate standard for judging first amendment questions. That's the point.

Second, I find that the system Government has chosen that restricts judicial review until after a cumbersome administrative process is a far greater interference with freedom of speech than could possibly be justified by any danger either perceived or demonstrated.

Mr. KIKO. Isn't the Government—and I think the Supreme Court alluded to this in the *Snepp* case—if they had to go to court almost precluded then because they would have to expose these documents in a court? Aren't they almost without a remedy if that is the way they are going to have to stop employees or former employees from leaking some of this information or giving the public access to information that is sensitive?

Mr. TIGAR. Within the confines of the *Snepp* decision, based on the very special relationship of trust that *Snepp* enjoyed with his agency, the Supreme Court made the observation that you've just referred to. I've already testified about the attempt to broaden that concept to include far many more employees than I think could be justified by reference to *Snepp*.

With respect to the broader question, the judicial review problem where classified information is at issue has already been addressed by the Congress, and the Classified Information Procedures Act provides a mechanism for courts to make determinations concerning invocations of executive privilege in such a way as to permit litigation to go forward without sacrificing demonstrable national security interests.

If you want to go beyond that and say that we are going to have to keep judges even from knowing about these things and ruling whether they can come into evidence or not, then we really have to rewrite the Constitution, because I think article III assumes that that is the function of judges, and the Supreme Court has said that it does.

The Supreme Court's observation you quoted was not a statement that judges are not qualified to make decisions about what is privileged in the national security sense and what is not. It was made in the context of the enforcement of *Snepp's* particular bargain. I say that because the Supreme Court evinced neither in *Snepp* nor in any other case any intention to overrule such cases as *Alderman v. United States*, which I think is 394 U.S. 165, a 1969

case in which the national security issues that the Government put forward were thought not to foreclose judicial review.

Mr. KIKO. Would you be in favor of a governmentwide type of thing like was evidenced in *Snepp* where a person was in a special trust relationship? Would you have any problem with a prepublication review procedure in that context, along the same lines as *Snepp* enjoyed with the CIA, applied to other agencies?

Mr. TIGAR. You are asking me personally?

Mr. KIKO. Yes.

Mr. TIGAR. I would not, had I been on the Supreme Court, have joined the *Snepp* majority. I think the decision is wrong, and I think that history will prove me right. And I guess the only thing we are going to have to do is wait. The problem, of course, is that it wouldn't be the first time that national security considerations have caused courts to come out wrong. In the trial of Queen Carolyne, Lord Erskine rose to say "Proceedings of this kind, My Lords, have never been tolerated save in the worst of times and have not only been reversed but scandalized." That's what I would like to think will happen to the *Snepp* decision.

Mr. KIKO. Thank you. I have no further questions.

Mr. EDWARDS. Thank you very much, Professor. Will you carry our good wishes back to Austin?

Mr. TIGAR. I certainly will. I hope that perhaps you can come down for a visit.

Mr. EDWARDS. Thank you.

Our final witness today is Morton Halperin, Director of the Center for National Security Studies. Dr. Halperin has served as Deputy Assistant Secretary of Defense and as a senior member of the National Security Council.

We are glad you could come today, Mr. Halperin. Please begin and introduce your colleague.

[The complete statement follows:]

STATEMENT OF MORTON H. HALPERIN

Mr. Chairman: I appreciate the opportunity to appear before this subcommittee to present the views of the American Civil Liberties Union on prepublication review and polygraphs and specifically, H.R. 4681. The ACLU, as you know, is a nonpartisan organization of over 250,000 members dedicated to defending the Bill of Rights.

Full disclosure requires that I reveal that I am a former government official who has had access to SCI information and that I have now foreclosed the possibility of once again assuming such a position. Since I left the government in 1969 I have devoted considerable time to the study of government secrecy.

When the White House agreed in March of this year not to go forward with the implementation of the expansive prepublication review and polygraph programs proposed in President Reagan's National Security Decision Directive 84, it was widely believed by Congress and the public that thousands of federal employees had been spared the injustice and indignity of having these unwise, unnecessary and constitutionally-suspect policies imposed upon them as a condition of seeking or continuing government employment. Unfortunately, a report of the General Accounting Office released just three months later (GAO/NSIAD-84-134, "Polygraph and Prepublication Review Policies of Federal Agencies") confirmed that this was not true. In fact, as had been indicated by testimony of officials from the State and Defense Departments at hearings before the Senate Governmental Affairs Committee last September, the Reagan Administration had already imposed a less extensive but nonetheless onerous lifetime prepublication review obligation on well over 100,000 federal employees with access to Sensitive Compartment Information (SCI) more than a year before NSDD-84 was first issued. Moreover, the GAO report indicated more than 11,000 polygraph examinations of federal employees (with some 10,500

occurring in the Defense Department alone) had taken place in 1983—increased from some 6,500 just two years earlier in 1981—with agencies such as the Defense Department planning to double the size of their polygraph programs in the near future.

The ACLU strongly opposes subjecting federal employees to polygraph examinations because the device lacks scientific validity (See Office of Technology Assessment, "Scientific Validity of Polygraph Testing: A Research Review and Evaluation," November 1983) and, more importantly, constitutes with respect to such individuals an invasion of privacy and affront to human dignity in violation of the Fifth Amendment's protection against self-incrimination, the Fourth Amendment's protection against unreasonable searches and seizures, and the fundamental elements of fairness embodied in established principles of due process of law. While we recognize that even H.R. 4681 would not create a blanket prohibition on the use of polygraphs by the federal government, as we believe would be appropriate, we support its provisions prohibiting their use where the subject has not voluntarily agreed to be tested, and prohibiting agencies from taking adverse action against an individual based solely upon that individual's refusal to submit to a polygraph or solely upon the results of such testing.

On the matter of prepublication review, we support the restriction in H.R. 4681 because we believe that the imposition of such obligation on federal employees, especially after they have left government service, can have very serious adverse consequences for free and full public debate on national security matters with no offsetting gain for the protection of legitimate government secrets.

That such prepublication review requirements simply do not address a real problem has now become very clear. Hearings before other committees and various reports make clear that the government cannot document any such problem. There are few, if any, cases of the inclusion of classified information in the writings of former officials. Former officials, like current officials, provide information to the press on background. If they want to reveal serious secrets they do so in such conversations. No system of prepublication review of the writings of present or former officials can deal with this problem. Indeed, the requirement of prepublication review of written material would simply encourage former officials to continue the practices they learned while in government of providing information not on the record or in on the record question and answer sessions.

The obligation not to reveal classified information even when one leaves the government exists now and would not be affected by the implementation of these new rules. Perhaps it would be wise to systematically remind senior officials of this obligation when they leave the government and urge them to voluntarily submit material if they have any doubt as to whether it is classified.

Let me now try to explain briefly why going beyond that to a prepublication review system for the writings of former senior officials would be disastrous.

There can be no doubt that we are dependent on the writings and testimony of former government officials for the information and authoritative alternative points of view which make serious debate on major national security issues possible. Since many questions central to important policy questions turn on detailed information, it is imperative that former officials be free to enter the debate not only with factual information but also with the authority that comes from having had access to the most sensitive information.

The adverse consequences of such prepublication review requirements can be illustrated by examining the Washington Post's reaction to President Reagan's speech proposing an increase in research designed to lead to an effective defense against ballistic missiles. The Post asked a senior Defense Department official (Deputy Undersecretary of Defense for Policy, Fred Ikle) and two former senior Defense Department officials (former Secretary of Defense, Harold Brown and former Undersecretary of Defense, William J. Perry) to prepare op-ed pieces which it ran together on the back page of its opinion section on the following Sunday. These pieces—which I would like to submit with my statement, are reproduced as they appeared, with the text of each on the following pages—provided readers with a balanced and informed discussion of the issue.

If such obligations for prepublication review had been in effect when Harold Brown and William Perry served in the Pentagon in the Carter Administration, this timely debate would not have been possible. Brown and Perry would have had to submit what they had written to the Defense Department for review, probably by Ikle himself. The Defense Department would have had 30 days to respond and the current Administration would have been able to decide what Brown and Perry could say about the technical situation.

In reviewing the Brown and Perry pieces and comparable materials for possible release senior officials would be affected by the general belief that their authority to classify and declassify information is essentially a matter of pure discretion. Senior officials of the government are not acutely aware of the standards in the Executive Order that governs classification. They tend to consider all of the information with which they deal as "classified" unless they decide to make it public. They release information not because they decide that it is not properly classified, but because they conclude, on balance, that release of the information would advance their objectives or those of the Administration.

Reviewing the writings of their opponents, they would have no difficulty reaching the conclusion that release of information would adversely affect the national interest and that the information was properly classified.

Moreover, the system would inevitably bog down with writings being bucked to higher levels for review. Junior officials would not be willing to censor the writings of former senior officials (for one thing, given another turn of the wheel, they may once again be senior officials) nor would they be willing to sign off on its release for fear that current senior officials would complain when the information was used against them.

The result would be that many distinguished and highly qualified people would simply refuse to accept positions in the government. Those who did would be people with no interest in participating in the public debate when they leave the government. The public service would suffer and so would the public debate on vital national security matters.

This is surely not a partisan matter. As the senior officials of this Administration appear to have noticed, they will be the first to suffer under such an agreement and to be required to submit to the censorship of the next Democratic administration whenever it may come. Those who cherish the First Amendment and the robust public debate that it promises want Weinberger and Shultz along with Haig, Vance and Brown to be able to participate fully in that debate.

On behalf of the ACLU, I am pleased to commend the Post Office and Civil Service Committee for reporting H.R. 4681 and to urge this Committee to move forward with this legislation without any amendments which would weaken the protections it will afford.

[From the Washington Post, Mar. 27, 1983]

REAGAN'S NEW IDEA—WHAT ABOUT IT?

President Reagan electrified the nation's nuclear debate last week by proposing to study whether an effective system might be developed in the next century to destroy Soviet missiles during their flight through space. The idea is that such a system would allow the current doctrine of deterrence, with its terrifying threat of vast mutual death and destruction, to be set aside. We invited three ranking defense experts to evaluate the president's proposal: Fred C. Ikle from the Reagan Pentagon, and Harold Brown and William J. Perry, who served under Jimmy Carter.

THE VISION VS. THE NIGHTMARE

(By Fred C. Ikle)

Over the last two decades, two broad views of the future in the nuclear age have been contending in American strategic thought. Both views recognize that our own defense effort must be complemented by internationally agreed policies that will restrain and reduce the nuclear arsenals.

But if peace is to be preserved, according to the first view, mankind must remain locked into permanent hostile confrontation of missile forces poised for instant retaliation. The second view searches for ways to stop a nuclear attack, rather than relying exclusively on the threat of revenge, and seeks to harness science and technology to reduce the role of nuclear arms. In the 1970s, the first view largely dominated our strategic policy.

The first view is like a permanent nightmare; the second view is a vision of the future that offers hope.

According to the first view, we must, for the indefinite future, rely on strategic forces that can revenge a missile attack but not defend against it, on weapons that can destroy cities but cannot protect them, on forces forever poised to avenge but never to save lives.

This view implicitly accepts a world of nations frozen into an evil symmetry: two "superpowers" forever confronting each other with hair-triggered missile arsenals, leashed precariously by the fear of "each side" that its society is threatened by devastating nuclear retaliation. This view of the world imagines that the U.S. and Soviet governments act alike. Indeed, it is the hallmark of this strategic philosophy that "they" and "we" are always interchangeable. If the United States has some legitimate fears about Soviet military policies, "they" must have exactly symmetric fears about us. If we base our defense on a need to deter Soviet military aggression, "they" must be driven by a symmetric objective. Moreover, there is no room in this simplistic view for the fact that more than "two sides" control nuclear weapons, and more nations will yet acquire them. And little allowance is made for the risk of accident and irrational acts.

If we continued to follow this nightmare view of the nuclear age, arms control would hit a dead end. Since "each side" in this view must retain offensive forces able to ensure nuclear revenge, reductions in missile arsenals at some point become destabilizing. Indeed, some people of this persuasion have criticized the arms reductions proposed by President Reagan as endangering the stability of the "mutual" deterrent relationship. If nuclear weapons must remain forever invincible, then arms control could never lead to low levels of nuclear offensive arms since, in a world without defenses, a few hidden weapons could mean a decisive military advantage.

Worse yet, according to some proponents of this nightmare view of the world, arms policy must rig our strategic forces so that they could only be used to kill civilians, not to destroy military targets. Consonant with this attitude is the belief that outer space, rather than the cities we live in, ought to be protected from military competition. Thus, the president's decision to pursue defenses against ballistic missiles is being criticized as "militarizing" outer space. What are the priorities of those who eschew possibilities for increasing the security of the space we live in, just so as to preserve some pristine sanctuary in *outer space*?

The president's decision to remove the doctrinal blinders against strategic defenses cannot overcome our current predicament overnight. But it offers a new hope. To travel the road now being unblocked will call for much careful choice and thoughtful change. Research and development priorities will have to be pursued; and as we realize the vision of a different and safer strategy, we must continue to include our allies in this development.

The scope and opportunities have now been widened for arms control negotiations that can grapple with the fundamentals. There is evidence to suggest that over time the Soviet Union will become receptive to such a new approach. Sixteen years ago, at a U.S.-Soviet summit meeting in Glassboro, N.J., President Johnson argued that arms control negotiations should give top priority to curbing systems that could defend each country against ballistic missiles. The Soviets disagreed. "I believe," Kosygin explained, "that defensive systems, which prevent attack, are not the cause of the arms race, but constitute a factor preventing the death of people."

The nightmare view of the nuclear age has broader implications, going well beyond the question of missile defenses. It becomes an excuse for not improving our conventional defenses, for a reckless reliance on nuclear escalation: "Any major war will 'go nuclear,' any use of a nuclear weapon will mean global holocaust, so why spend more money on conventional forces." It is symptomatic of the incoherence of the nightmare strategists that they usually hold three incompatible positions: that we can safely cut our conventional defense budget, that we can safely rely on the threat of nuclear escalation, that any use of nuclear arms will mean the end of the world.

The Reagan administration has emphasized conventional force improvement, precisely to reduce our reliance on the threat of nuclear escalation. "We must take steps," President Reagan said Wednesday night, "to reduce the risk of a conventional military conflict escalating to nuclear war by improving our non-nuclear capabilities. America does possess—now—the technologies to attain very significant improvements in the effectiveness of our conventional, non-nuclear forces."

Given congressional support for the president's defense budget, we can improve and deploy conventional forces that would be effective. Such forces could discriminatingly repel an attack—without destroying ourselves or our allies. In this way, and in this way only, will we have an effective deterrent to conventional aggression.

As the president stressed, we face a formidable task and there will be failures and setbacks. But we can count on the common sense of the American people to reject the permanent nightmare and support the vision that offers hope.

IT MAY BE PLAUSIBLE—AND IT MAY BE INEFFECTIVE

(By Harold Brown)

In June 1980, Geng Biao, the senior defense official of the People's Republic of China, visited the United States. On Geng's Sunday afternoon arrival, President Carter, who was then about to watch "The Empire Strikes Back" in the White House projection room, suggested I bring Geng over to meet him. The group, including spouses, White House staff and their families, watched laser beams, death rays and spaceship destruction on the screen. Afterward, I told Geng that this equipment was not yet ready for consideration for U.S. forces, let alone transfer to the PRC.

What a change three short years have made! President Reagan now "offers a new hope for our children in the 21st century," based on directed-energy weapons, including nuclear weapons, laser beams, particle beams and all the panoply of Darth Vader and Luke Skywalker. Like the nuclear freeze movement, the president's approach is a slogan and a drama, not a program.

But these are serious matters. For over three decades, the prospect of nuclear retaliation against the military forces and urban-industrial strength of a potential attacker has operated as a deterrent to prevent nuclear war, and even to prevent direct conventional conflict between the forces of the superpowers. Yet to rely on the threat of mass destruction to preserve peace is morally disturbing. And military leaders naturally see their functions as being able to prevent an attack, if it occurs, from destroying their country, rather than being able to avenge their country, after it is destroyed in an attack.

For decades there has been reaction to the destructiveness of nuclear weapons and to the strategy of deterrence, along the following lines. It has again become intellectually and politically influential. This is the position that a threat produced by technology can be alleviated by a combination of determination and additional technology—that nuclear weapons are simply another form of warfare and that an effective military counter can be found to it, just as to other forms of warfare. There is a major flaw in this approach. It is that a millionfold increase (from tons to megatons) is extremely difficult to overcome, even with the best combination of technology and determination.

If a single weapon can destroy a city of hundreds of thousands, only a perfect defense (which, moreover, works perfectly the first time) will suffice. The extreme destructiveness of nuclear weapons is magnified by the concentration and fragility of urban society. To this must be added the availability to the attacker of the tactic of concentrating its forces to saturate and overwhelm any possible defense, even if an individual defensive weapon can destroy an individual attacking weapon.

In these circumstances, the prospects for a technical solution to the problem of preserving modern society in the face of an actual thermonuclear war—whether that solution calls for laser-antiballistic missile systems in space, elaborate civil defense schemes or combinations of these with counterforce capability (that is, ways of destroying enemy weapons before they are launched) seems to me very poor. The effort to attain such technical solutions could itself be quite dangerous if it created an illusion that such a solution has been achieved or is likely to be.

Deterrence must leave no doubt that an all-out nuclear war would destroy the nation—and the leadership—that launched it. Realistically, we must contemplate deployments by both superpowers, investing huge amounts in such defensive systems. If a clever military briefer, in a time of grave crisis, with such systems in place, can persuade the political decision-makers that the defensive systems, operating together with other strategic forces, had a reasonable chance to function well enough to result in even a severely damaged "victory," the scene will have been set for the ultimate disaster.

There are indeed new ideas for directed-energy weapons aimed from space or from the Earth's surface, which could attack ballistic missiles during their powered phase, in flight, or during reentry. Some of them have been funded by the Department of Defense for five years or more, and hundreds of millions of dollars have been spent on them. Such weapons could involve nuclear explosions, laser beams, charged or neutral particle beams, material pellets, or combinations thereof. Calculations and very preliminary experiments—some of them promising—exist, but these ideas are far (as President Reagan implies, decades) from the stage of deployed systems. Their physical principles may not work. The combination of engineering needs—energy generation, target acquisition, pointing, etc.—may not be feasible. Or the costs of such systems may be greater than the cost of countermeasures to defeat them.

I believe that one or more of these defects will prevent all such active defenses against ballistic missiles from proving practically effective. Moreover, they will not work to defend against air-breathing systems (bombers and cruise missiles)—particularly those using “stealth” technology—that fly low in the atmosphere. Air-breathing systems, however, take hours to reach their targets and thus allow more time for decision in crisis. In that sense, they are less dangerous than ballistic missiles.

In any event, I could be wrong in my negative technical evaluations. Moreover, the United States needs to know what defenses might be deployed against our own ballistic missiles. And a world in which nuclear destruction was not possible would be a greatly preferable one to what we have now. I therefore support research and study of such defensive technologies, and thinking about the systems to which they might be applied. Research and study—but not development, testing or deployment of space-based systems—are permitted by the AMB Treaty of 1972.

But these activities should be carried out in a spirit of skepticism sorely missing in the president's speech, and at a level and pace consistent with their unlikelihood of producing the advertised technical and military revolution. There is danger of alienating our allies by what may seem an attempt at creating a Fortress America. And we must remember to guard against the most dangerous outcome of all. That would be the deployment of defensive systems on both sides (and we must expect that if one superpower does so, the other will emulate it before long) that are incorrectly thought to be effective in preventing the success of a retaliatory strike.

My concern is that the ideas presented to the president are likely when developed to fall into that category of the plausible but ineffective. Some of his words expressed such cautions, but the enthusiastic tone and especially the context of a major presidential speech will magnify public expectations. To the extent that attention to far-out technological approaches to active defense against ballistic missiles detracts from programs to retain deterrence, or distracts from arms control efforts, the results could be dangerous indeed. The search for technological breakthroughs is no substitute for political and negotiating skill, nor for competent military planning and strategy. The proposed defenses against nuclear attack, which could well become the first trillion-dollar defense system, would then constitute a nightmare rather than a hope we would leave to our children in the 21st century.

AN EXPENSIVE TECHNOLOGICAL RISK

(By William J. Perry)

The president did not actually describe any specific technology underlying his hope of defending the country against nuclear attack. But administration officials in background briefings after the speech suggested that a primary emphasis be placed on directed energy weapons, one possibility being space-borne lasers. Therefore, it may be illustrative to consider the prospects of this particular technology for providing an effective defense for the country.

A space-borne laser system is by no means the only approach to ballistic missile defense but, among the exotic technologies being considered, it is the most mature and best understood. The Defense Department has invested some \$1 billion in high-energy laser technology in the last decade, during which time substantial technical progress has been made. Even more technical progress may be confidently predicted in the coming decade, especially with the projected increase in funding. Still, the most optimistic forecast I can make is that this technology could produce an operational system capable of degrading a nuclear attack, but not capable of protecting the nation from devastation in the event of a massive nuclear attack. To understand this conclusion, it is instructive to consider the operational concept of such a system.

A space-based laser would be designed to attack an ICBM by burning a hole through the rocket during the period that the missile was still under powered flight. The ICBM would thus be destroyed, not only before it reached its target but before it even had a chance to release its multiple warheads. To hit the ICBM target with enough laser energy would require having the laser on a low-altitude satellite “battle station” that must be located over the launch area when it fires its laser beam. Because of the orbital motion of the satellite, not one but a whole constellation of satellites—about 20—would be necessary to shoot down any particular ICBM at any given time that it might be launched.

A few seconds would be required to detect, track, lock on, and dwell on the target long enough to burn a hole through it. Therefore, any given laser is tied up for

several seconds in this operation, which has to occur during the few minutes the ICBM is in powered flight. The 20 satellites required for continuous coverage of the launch area could attack in sequence perhaps a few tens of ICBMs that were launched simultaneously, but they could not handle a mass attack of even a few hundreds of ICBMs from one geographical area. Therefore, the base number of 20 satellites would have to be multiplied by about 10 to deal with a mass attack. In other words, several hundred satellites continually orbiting the Earth would be needed to maintain enough laser beams to deal with a mass attack against the United States.

The necessary laser weapons in these several hundred battle stations would be immensely complex. The lasers would require an operational pointing and tracking accuracy of a few inches at a range of a few hundred miles; that is, better than one part in a million accuracy, requiring a feasible but difficult and expensive development program. Once the beam is properly pointed, it must have sufficient energy to burn a hole in the missile skin. This would require a more than tenfold increase in power over what has already been demonstrated for high-energy lasers. Finally, the reflecting mirror of this whole system would need to be several times larger than any that has been built so far, even on the ground. I believe that these problems would eventually yield to a determined and expensive development program, but this new generation technology would have to be demonstrated before we could begin to build the hundreds of operational laser weapon systems and put them in space.

A laser system with these capabilities would likely be too large to be launched from the space shuttle. For each of the several hundred battle stations, four or five shuttle launches may be required to place its components in orbit for assembly in space. (During this assembly phase, the system would be extremely vulnerable to attack or disruption.) My most optimistic view is that such a program would cost well in excess of \$100 billion in today's dollars and could not reach a beginning operation status until some time in the next century.

If we spend two decades developing, testing and then deploying a system to defeat the Soviet ICBM and SLBM forces, they certainly have ample time to consider, develop and deploy a variety of countermeasures. Some of these are straightforward. Against lasers, for example, infrared decoys might be used to simulate the heat signatures of missile launches. Another countermeasure would be to rotate the ICBM in flight or coat the ICBM skin with the same kind of heat-absorbent material already used on reentry vehicles so that still higher levels of energy would be required to burn through the skin, requiring increases in laser power or in the mirror size of the laser weapon. Direct countermeasures against the space stations also might be possible, including space mines and anti-satellite satellites. The space-based laser perhaps would be most vulnerable to an attack by ground-based lasers.

Even if the technology development is successful beyond my expectations, the ultimate operational problems are a major concern. Whatever exotic technology we finally settle on, we must believe that, like every other weapon system, it will be subject to some countermeasures. And because of the measure-countermeasure contest, our defensive System will have some variable level of effectiveness at any given time. In World War II, the best air defense systems achieved about 10 percent effectiveness. The program manager of the space-borne laser program has estimated that it might achieve 50 percent effectiveness. If by remarkable improvements in defense technology we were able to deploy an antiballistic missile system with 95 percent effectiveness and during this period the Soviets made no changes in their present force of ICBMs, they would still be able to place a residual force of 360 ICBM warheads on our cities, each of which was 30 times larger than the atomic bomb that devastated Hiroshima. Therefore, we would still want some deterrence in addition to our defense; that is, we would still want to maintain offensive nuclear forces to threaten retaliation. So, unless a defensive system were perfect—which is as unachievable as the perpetual motion machine—it would not replace offensive, retaliatory forces, only supplement them, and the task of maintaining that deterrent would be made immeasurably more difficult by the existence of a Soviet missile defense built to match ours.

This need for deterrence, not hoping for perfect defense, is the inevitable consequence of the enormous destructive force of the excessively large numbers of nuclear weapons possessed both by the Soviet Union and the United States. Maintaining our security through the threat of nuclear retaliation puts us in an agonizingly uncomfortable position. If we could find a safe way out, we should seize it. But we should not delude ourselves. Pursuing the unattainable risks diversion from real priorities—better conventional defense (including using our technology as leverage), secure and stable retaliatory deterrence, and the search for arms control.

It has always been tempting to solve the problems posed by nuclear weapons by wishing them away. But we cannot uninvent the nuclear bomb—we cannot repeal E=MC.

TESTIMONY OF MORTON H. HALPERIN, DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES, ACCOMPANIED BY ALLAN ADLER, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. HALPERIN. Thank you, Mr. Chairman.

I would like, if I may, to have Allan Adler, legislative counsel of the American Civil Liberties Union, join me, and in particular to respond to questions you may have about the polygraph issue which he has been following.

Mr. EDWARDS. Very good. And without objection your entire statement will be made a part of the record and you can proceed as you please.

Mr. HALPERIN. Thank you.

I would just really like to summarize my statement very briefly.

I think there are many situations in which you do have a legitimate clash between concerns of national security and concerns of civil liberty, where it is necessary to balance the various rights of citizens against the Government's need to protect all of us against threats of national security. This is, I think, not such a case. It is not such a case because the record that has been developed since the directive was released and the public controversy began demonstrates, I think quite clearly, that there is no national security problem which is solved by this directive, and that it does have an enormous effect on public debate in the United States on national security issues. It doesn't solve any security problem, not because there is not a problem of unauthorized disclosure of information; I think there are situations where Government officials and even former Government officials reveal information that the Government has a right to keep secret which those officials acquired in confidence and do not have their own authority to make it public.

But the fact is that this directive and the prepublication review requirements of this directive simply do not deal with that problem. The problem of leaks is almost entirely the problem of current Government officials providing information, not by writing articles and publishing them, but by giving that information to reporters or others on background or deep background or on grassy knolls, and not by publishing it. No prepublication review scheme will prevent a current Government official from getting information to the press if he or she wants to do so.

The same is true of requiring prepublication review of former Government officials. If you look at the *Snepp* proceedings, for example, it is important to recall that the first thing that Frank Snepp did in making this information public was to go on national television live, on 60 Minutes, and answer a series of questions in which most of the information that the Government apparently was disturbed about having come out was made public before millions of people, far more people that have read his book; a transcript of that proceeding is available for anybody.

According to the CIA, Frank Snepp violated no agreements in conducting that live interview on television, nor would anybody

who signed this prepublication review agreement, because the prepublication review agreement, even in the draconian form drafted by the administration, only requires you to submit something if you write it down.

That means two things, one quite perverse. It means that if you are responsible and carefully prepare what you are going to say in public you then have to clear it, but if you go live on national television and answer questions without thinking about the answers then you don't have to clear it. But what it means that is more important is that anybody who wants to leak information is going to do it in a form that isn't covered by a prepublication review; he is going to do an interview; he's going to leak the information, or otherwise get it to the public. There is no way by this process of prepublication review to stop a determined former Government official or present Government official from getting out information which the Government claims to have a right to keep secret.

So the system simply does not deal with any of the problems. What it does do, and I think the record is clear, and what it would do if it was allowed to go forward, is to create a system whereby the senior political officials of the Government of the day can censor the public statements of senior officials of former Governments. I really find it hard to believe that any administration would want that to happen.

Presumably even Mr. Reagan acknowledges that sometime, perhaps in the next century, there will be another Democratic administration, and it will then be able to censor the writings of the current Secretary of State, Secretary of Defense, National Security Adviser, and so on. That is a process that I think is not in the interest of any political party, which is not in the interest of any Government officials, and it certainly is not in the interest of the public as a whole, because the temptation to censor, to eliminate information necessary for public debate will simply be irresistible. The notion in our system of Government that anybody would want to trust the government of the day to decide what former officials could say in criticism of their policy seems to me to go against all the principles of the kind of Government we have and of the first amendment.

It will have the other effects that you have alluded to, Mr. Chairman, of discouraging people from serving in the Government, particularly people who come in for a year or two. If what they then face is lifetime censorship of their writings they would have to think twice about whether they would be willing to serve in Government. The impact on Congress would be great since a very substantial portion of congressional testimony on national security matters comes from former Government officials.

I think, therefore, it is clear, and as other witnesses have said, almost everybody who has testified on this issue has agreed that it is not a good idea to give this power to current officials.

I think we then come to what Congress ought to do about it, and I think there is a clear need for legislation. It may be true that Mr. Reagan has promised not to issue this directive in this Congress and to give you 60 days notice in the next Congress. In my view that is not enough.

Now that we have seen that a President can do this late on a Friday afternoon, without any public debate, without any public notice, that even if Mr. Reagan was to say tomorrow "I will never do this," future Presidents may be tempted to do it, I think, therefore, Congress ought to legislate. Whether there is time in this Congress to complete that is, obviously, a difficult question, but I think it is important for Congress to move forward as quickly as it can to Legislate as comprehensively as it can to say that prepublication review is not permissible and has enormous negative costs and no gains.

The issue on polygraph is, I think, clear. This is an intrusive, demeaning procedure with no evidence of reliability, and therefore the position of the American Civil Liberties Union, which I am testifying on behalf of, is that they should not be permitted. We would hope that there would come a time when Congress would simply say that the Federal Government may not use polygraphs, and until that time comes we would urge the strictest possible limits that are capable of being enacted.

I appreciate the opportunity to testify. Mr. Adler and I are available for your questions.

Mr. EDWARDS. We appreciate your contribution very much, Dr. Halperin.

Let's assume that there would be a change of administration next year. Under the Executive order all of the prepublication restraints would be in place. What would that mean insofar as the Secretary of State, the various under secretaries, assistant secretaries, and so forth, the political appointees of which there are scores are concurred? Does that mean for the rest of their lives they have to submit to a Democratic administration whatever they are going to write?

Mr. HALPERIN. Absolutely. We have tried to illustrate in the attachment to my testimony for this administration, but I could do the flip side in a second.

If you look at the attachment to my testimony, we have reproduced a page from the Washington Post a few days after President Reagan made his so-called star wars speech. What you had is three articles, one by the Under Secretary of Defense for Policy explaining how terrific this was, and then one by the former Secretary of Defense, Harold Brown, and the former Under Secretary for Research and Engineering, Mr. Perry, very critical of that speech.

They could not have written those articles if the directive had been in effect, because they would have had to clear them with Mr. Ikle, who would have certainly taken more than 3 days to decide whether they could say what they say.

Now just turn it around. Assuming there is a Democratic administration, both Mr. Brown and Mr. Perry may well be back in the Government; Ikle presumably will be back in private life. Assuming a President made a speech saying star wars was all a lot of nonsense, it can't be done, there was no way to do it, this was all a hoax by Ronald Reagan on the American people. Mr. Ikle, and Mr. Weinberger presumably, and Mr. Keyworth, the President's science adviser, would all then be invited by the Washington Post for another page in which Mr. Perry would be on the top supporting the President, and you would have presumably Mr. Ikle and Mr.

Keyworth down on the bottom. They would not be able to write those articles, because they would have to submit them to Mr. Perry and he would at least have 30 days to decide what to let them say, and he would be as tempted as Mr. Ikle would have been to decide that the information they thought they needed to criticize the policy was classified information and could not be made public.

I think in both cases the public is hurt and the Congress is hurt by not being able to have this public debate, and in both cases, if Mr. Ikle or Mr. Perry are determined to get into the public domain classified information which they think will help them, they will call up a reporter for the Washington Post and give him that information even if there is a prepublication review scheme and do it on background and we'd never find out about it anyway.

So if there really is a genuine secret and Mr. Perry or Mr. Ikle are determined to get it out, they will get it out. What this thing would simply do is keep them from participating in the public debate.

Mr. EDWARDS. The administration says that these leaks are really very serious and increasing. From your experience in the Government, has the leak problem grown since you were a part of the Government? Or has the perception of it grown?

Mr. HALPERIN. Every administration always thinks the leak problem has gotten worse and has to be controlled in some way, and they eventually discover that there is not much they can do about. By then they are on their way out and they come to appreciate leaks more.

Relevant to this topic, there is no evidence that the leaks come from published articles that were not cleared, and with all of the studies that were done and the testimony and the questionnaires that were put before various agencies, nobody can come up with examples of saying here was something that was published without prepublication review and if we had prepublication review we would have stopped it and that would have prevented a serious leak. I think we have been given, from all the agencies of Government, over the past 10 years two examples of such sentences, and even there there is some dispute about them, while every day we pick up the paper and will read things that the National Security Council adviser would think was a leak.

So there is a leak problem, but it is not sure, nor does it come from the published writings of former Government officials.

Mr. EDWARDS. We get conflicting reports about the reliability of polygraph testing. The OTA reports that they have reliability problems, and yet the Department of Defense came in and testified and said they were up to 90- to 95-percent reliable. What are your observations on the reliability?

Mr. HALPERIN. I would like to turn that over to Mr. Adler.

Mr. ADLER. It is interesting, Mr. Chairman, to examine how this issue has seemed to repeat itself over the past 20 years. In 1964, the Foreign Operations and Government Information Subcommittee of the House Government Operations Committee held extensive hearings on Federal use of polygraphs because it was concerned that in 1963 nearly 20,000 polygraph examinations involving Federal employees had been conducted.

At that time in 1964, the subcommittee concluded that there was no scientific evidence supporting the validity of the use of the polygraph, that inadequate research had been done on the question of accuracy for the uses that the Government supported and recommended that the use of the polygraphs be very closely circumscribed.

This was followed, in 1966, by President's Johnson's interagency committee study, which again concluded there was no scientific evidence of validity or the reliability of polygraphs.

Ultimately, some 12 years later, in 1976, the subcommittee took another look at the problem, finding that in the interim 12 years no studies had been done which gave any further evidence of reliability or validity for this particular investigative technique, and, in 1976, the subcommittee recommended that polygraph use by the Government be abolished in total.

It has only been within the past few years that the intelligence community, particularly the NSA and the CIA, have claimed to find that the polygraph is a useful tool in personnel screening and for periodic testing of current employees for security purposes.

With respect to their claims, I would focus your attention on the OTA study, which is the most thorough review of previous studies that have been done since the time of the 1976 hearings by the Government Operations Subcommittee, and which again found that there is no scientific evidence to demonstrate the validity of polygraphs, particularly for the screening purposes that the Defense Department wants to make most use of.

We believe the Defense Department should be particularly concerned about lulling itself into a sense of false security by use of the polygraph for screening Government employees with access to sensitive information. Since there is no scientific evidence that in fact supports the validity of polygraph results, it would seem quite reasonable to assume that, in many cases, conclusions based upon polygraph testing of Government employees, finding them to be capable of handling very sensitive information in a very secure fashion, will simply be wrong, and that, in many cases the Government will believe it has cleared employees for access to very sensitive information when in fact it has not cleared them at all by use of polygraph testing.

We would point out that H.R. 4681, the bill before this subcommittee, does allow for the closely circumscribed use of the polygraph by the FBI in the context of a specific investigation of an alleged criminal act, and that is the one area in which OTA and other studies have found some scientific evidence to support the usefulness of the polygraph. That particular use would not be disturbed by this bill. We are concerned, however, and believe this subcommittee should be concerned that over a period of 20 years there has been a consistent record of no scientific evidence to support the other proposed uses of the polygraph.

Mr. EDWARDS. Counsel.

Mr. ISHIMARU. Is part of the problem of the growing number of leaks due to the fact that so many documents are classified and so many people have access to the classified information? In 1983, some 18 million documents were classified in some form or another, and some 4 million people had some sort of security clear-

ance which gave them access to this information. Over 120,000 people had access to the most sensitive information, which is known as SCL. Does that cause problems as well? Is too much information classified?

Mr. HALPERIN. I think it contributes to the problem. Justice Stewart said in the Pentagon Papers case: "When everything is classified, then nothing is classified."

One of the problems in the Government is that since everything is stamped classified in some form nobody takes it very seriously and people make their own independent judgments about what really ought to be kept secret.

But I think that is really only a small part of the problem. I think the basic problem is that the Government tries to keep a great deal of information secret which is relevant to current public policy debates. As long as people think that releasing the information will help them in those public policy debates they are going to leak it, and I think as long as the Government doesn't release the information which is necessary for that debate that that information is an important contribution to the public debate on the issues.

Mr. ADLER. I would also keep in mind that, under the current legal interpretations of classification policy, information may be widely disseminated in the public domain through newspaper reports and other publications, yet the Government will still maintain that such information is officially classified, together with all the implications that classification brings into play. And so what you will find with prepublication review is that very often a former Government employee would not be permitted to write about a particular incident using information that is already in the public domain because that information, from the Government's perspective, is still officially classified.

Mr. ISHIMARU. Would that person be subject to prosecution if he talked about it?

Mr. ADLER. One of the interesting things about the prepublication review issue is that, before the Government came up with this particular approach, for years they had contract agreements with employees who have access to classified information whereby those employees contractually agreed not to disclose classified information. The Government has never, with the exception of the *Marchetti* case, pursued an individual for disclosing information after the fact; it has not tried to enforce the contract by saying that an individual has in fact breached the contract by making a disclosure.

What that has done in the way of a negative contribution to deterrence is, I think, quite important. The Government sought prepublication review, in a sense, because it finds it easier to address the problem from the front end, possibly because in many cases it would find that having to go to court and explain the reason for the classification of the information that is the source of the action would be embarrassing.

Mr. ISHIMARU. Thank you.

Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you very much, gentlemen, for very useful testimony.

The subcommittee stands adjourned.

[Whereupon, at 11:05 a.m., the hearing was adjourned.]

ADDITIONAL MATERIAL

STATEMENT OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS AND THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

The American Society of Newspaper Editors (ASNE) is a nationwide, professional organization whose approximately 900 members are directing editors of daily newspapers throughout the United States. The ASNE was founded more than 50 years ago. Its purposes include the maintenance of "the dignity and rights of the profession" and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and free press in the service of the American people.

The American Newspaper Publishers Association (ANPA) is a nonprofit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of about 1400 newspapers constituting 90 percent of the daily and Sunday circulation and a substantial portion of the weekly circulation in the United States.

At the ASNE annual meeting in Denver, Colorado, on May 11, 1983, the Board of Directors of ASNE directed John C. Quinn, Editor of USA TODAY and then president of ASNE, and Edward R. Cony, Vice-President—News, Dow Jones & Company and chairman of the Freedom of Information Committee of ASNE, to send a letter to President Reagan asking him to rescind his Presidential Directive on Safeguarding National Security Information. This Directive, also known by the appropriately Orwellian title of National Security Decision Directive 84, or NSDD 84, was issued on March 11, 1983.

This letter opened with the statement:

"The American Society of Newspaper Editors urgently requests you to rescind your secrecy order of March 11, 1983, because it violates the First Amendment rights of free speech and free press and constitutes peacetime censorship of a scope unparalleled in this country since the adoption of the Bill of Rights in 1791."

A copy of the full text of this letter is attached to this statement.

NSDD 84 grew from the President's Executive Order 12356, which went into effect in August 1982. That Executive Order expanded the government's power to classify information. It thus reversed a thirty-year trend toward restricting that power.

Thus, Executive Order 12356 broadened the government's power to classify information, and NSDD 84 creates a framework for maintaining and enforcing the new classification scheme. To those of us in the working press, these two infringements on the public's right to know—particularly NSDD 84—are analogous to a physician prescribing a lobotomy to cure a headache.

Like most Americans, the ASNE and the ANPA do not disagree with the stated aim of both Executive Order 12356 and NSDD 84. None of us wants properly classified information revealed publicly without proper authorization. Moreover, we agree that it is necessary to safeguard bona fide national security information against unwarranted disclosure.

Nonetheless, we vigorously protest, question, and challenge the evident breadth of NSDD 84. For we also know that the American people often are needlessly deprived of information that they need to understand, and to make informed judgments about, their government and its policies. NSDD 84 would not simply extend that deprivation. In fact, if it were applied with the full fervor that its language would allow, it could lead from information deprivation to information starvation. Almost as destructive, NSDD 84 could lead highly qualified academics and other experts—people whose temporary service in government long has benefited this nation—to renounce that service because to serve would jeopardize their First Amendment rights.

An estimated 120,000 or more government employees have access to "sensitive compartmented information," or SCI. This directive would require all officials and employees with access to SCI to sign nondisclosure agreements that would be binding on them for life. Anything that they chose to publish—be it a book, a speech, an article, or even a letter to the editor—would first have to be reviewed by government censors. Only after those censors had removed any references to SCI or any other classified information could publication take place. If this requirement does not violate the Constitution's prohibition against prior restraint on free expression, it comes perilously close. So close, in fact, that its effect would be indistinguishable from prior restraint.

NSDD 84's required prepublication review evidently would apply to the White House staff, to Cabinet members, to top officials in the Defense and State Departments, and to the National Security Council and its staff. The order also may cover some government contractors who have access to certain classified information. Applying this directive to contractors could exert a chilling effect on their rights, as private citizens, to analyze and criticize government policies. Because of considerable confusion among contractors about the classification scheme in general, the public could be deprived of even more information than this directive intended (GAO Report PLRD 81-3 3/23/81).

Equally as chilling as NSDD's 84's breadth is its length. This directive contains no "statute of limitations": Those required to sign it would be subject to its strictures for life. This lifetime vow of nondisclosure is customary—and defensible—for employees of the Central Intelligence Agency and the National Security Agency. But it is unprecedented in U.S. history—even in wartime—to impose such a tight muzzle, for so long, for so little reason, on so many Executive Branch personnel. Nor would those whose jobs involve access to SCI have any choice about donning the muzzle. If they refused, they automatically would be denied access to SCI.

The folly of imposing indefinite secrecy, of extending it long after the protected material has lost its currency or value, is self-evident. Naturally the government's censors probably would be less picayune about clearing material for publication as its sensitivity diminishes. Nonetheless, the very process of clearance could discourage attempts to publish analyses and criticisms of the government's policies. The clearance process unquestionably would create delay. It would require new layers of bureaucracy, each more fearful than the last of erring on the side of free expression. Costly litigation surely would ensue.

On its face, NSDD 84 could mean that high officials of this or any Administration could not criticize the security-related policies of successive Administrations without submitting their comments for review. The reviewers would, of course, be the officials being criticized. Partisanship aside, this review could take weeks or months if the government's performance under the Freedom of Information Act is any indication. That creates at least two possible—indeed, likely—ill effects. First, it cannot help but stifle healthy—no, essential—debate about public policy. Second, it could deny the public a rebuttal of inaccurate information that the Administration then in office had portrayed as true.

Had NSDD 84 been in effect previously, the speeches and writings of Alexander Haig, George Ball, Henry Kissinger, Eugene Rostow, Zbigniew Brzezinski, Richard Nixon, Jody Powell, and William Safire—to name only a bipartisan few—probably would have been subject to review and censorship. Faced with this directive restricting their writings for the rest of their lives, scholars and journalists who have served their nation ably as Federal appointees might have said, "No thanks." And why not? Why should such people jeopardize their future livelihoods in the bureaucratic morass that this directive would mandate? This directive, in short, would tend to deprive the Federal government—and thereby the American people—of the intellects that are often at the cutting edge of socially beneficial thought.

Immediately after NSDD 84 was promulgated, the Justice Department issued Order 2620 to codify the directive's implementation. That order makes clear that persons covered by NSDD 84 must submit for censorship all forms of written material that the author even suspects may imply sensitive compartmented information. It's obvious that an informed opinion, such as a former government official might beneficially offer the public, would be based upon facts. NSDD 84 thus confronts this individual with a dilemma: Should he publish, supporting facts and all, without government clearance—and risk punishment for violating his oath? Or should he submit his writings and risk having censors remove the facts that give credence to his analysis—and risk being judged merely an opinionated fool?

Thomas Jefferson conceived of the free press as a marketplace of ideas. There, free for the taking, would be offered the true, the untrue, and the mixture of both. There the public, having access to all ideas without prior restraint on any, could choose the truths that it would follow. We submit that NSDD 84 is an effort—probably sincere but certainly misguided—to erect an impenetrable wall of secrecy around that marketplace. Consider some of this directive's inevitable effects:

Hundreds of books, newspaper columns, lectures, and magazine articles would have to be reviewed and cleared annually.

That clearance process would require a bureaucracy far larger than now exists. Only the naive would expect that a bureaucracy created to suppress would risk deviating from its mission.

This directive would hand each successive Administration the power—indeed, the mandate—to censor the criticisms of its predecessor. Only the naive would expect

that any Administration—whatever its ideology—would refrain from using that power in its own behalf.

In today's American newspapers, Jefferson's marketplace of ideas does business principally on the editorial and op ed pages. Articles by persons subject to NSDD 84's suppressive effects are standard fare on the nation's newspaper opinion pages.

Their concern in turn would echo the belief of our nation's Founding Fathers that a free press is fundamental to a free people. Freedom requires a form in which the governed can engage in unfettered discussion about the terms of their governance. This directive, NSDD 84, fetters that discussion in a way that no single instrument ever has attempted to do.

Heed, if you will, the alarm of George W. Ball, former Under Secretary of State and former U.S. permanent representative to the United Nations. Were he in office today, NSDD 84 would apply to him. One October 19, 1983, he testified before the Government Operations Committee in opposition to this directive. He said, in part:

"Since, as I know from experience, no one who has had high responsibilities in the upper reaches of government for any extended time can possibly remember the source of all the information to which he has been exposed in the course of his duties, he will feel under pressure to err on the side of prudence and submit substantially all of his writings or even his speech notes to the censorship apparatus—waiting for weeks as the cumbersome machinery clips and deletes anything that might conceivably fall in the offending classification."

Mr. Ball's commentaries periodically appear in many newspaper opinion pages. We heartily agree with his further testimony that:

"Those in government are often tempted by the wistful thought that they could more effectively conduct the nation's business if the media were content with official publicity hand-outs and did not challenge their substance. They would be even happier if those with prior government experience were not looking over their shoulder and subjecting current policy to the test of prior experience—those hard lessons derived from trial and error."

In promulgating NSDD 84, this Administration seems unmindful of the lessons of history. As Professor Chaffee notes in his book *Free Speech in the United States* the framers of the Bill of Rights

"* * * did not invite the conception of speech as a result of their own experience in the last few years. The idea had been gradually molded in men's minds by centuries of conflict. * * * It was formed out of past resentment against royal control of the press under the Tudors, against Star Chamber and the pillory, against the parliamentary censorship which Milton condemned in his *Aeropagitica* by recollections of heavy newspaper taxation, by hatred of the suppression of thought which went on vigorously on the continent during the eighteenth century."

The list of Constitutional scholars, publishers, authors, and former government officials who adamantly oppose NSDD 84 is too long to merit recitation here. Permit us to quote from the additional views filed by the Honorable Frank Horton, ranking minority member of the Committee on Government Operations, and four other minority members regarding NSDD 84. Their report stated:

"Concerning the life-long pre-publication review requirement, we agree: (1) that there is no evidence presented to the Committee to indicate that there exists a serious problem of former Governmental employees divulging sensitive compartmented information through published materials; (2) that a compelling over-riding governmental need for prior restraint has not been established; and (3) that the few instances of unauthorized disclosure do not, on balance, justify or warrant the imposition of a life-long censorship system."

As the judgment of Mr. Horton and his colleagues attests, opposition to NSDD 84 is not really a partisan political issue. Rather, it coalesces around those of both parties—and among all segments of the American press and academic community—who object strenuously to NSDD 84 as an unwarranted, excessive, and unprecedented clamp on free expression.

The members of the ASNE and the ANPA endorse the thrust of H.R. 4861. H.R. 4861 would reaffirm in this ominous year of 1984 what the Founding Fathers so presciently declared in 1791. Yours is the opportunity to declare the marketplace of ideas open, as Jefferson envisioned it, or closed to all except those whom the government anoints to speak its version of the truth. On behalf of this nation's newspaper editors and publishers, we submit that your choice could not be clearer.

AMERICAN SOCIETY OF NEWSPAPER EDITORS,
May 11, 1985.

The PRESIDENT,
The White House,
Washington, DC.

MR. PRESIDENT: The American Society of Newspaper Editors urgently requests you to rescind your secrecy order of March 11, 1983, because it violates the First Amendment rights of free speech and free press and constitutes Peace-time censorship of a scope unparalleled in this country since the adoption of the Bill of Rights in 1791.

We refer specifically, Mr. President, to your directive that all government officials who have access to special intelligence information must, as a condition of employment, agree to submit to the government, for pre-publication review, anything they write which is based on their government experience.

We note, Mr. President, that the order also covers these officials even after they retire and may well include any government employees which have access to any kind of classified information.

We fear thousands of government officials—perhaps as many as 100,000—will have to submit to this censorship if they are to retain their jobs. Furthermore, all federal employees agreeing to this review are bound to that promise for the rest of their lives.

Mr. President, the sweep of this directive would have this result high officials of one administration could not criticize the national security-related policies of a succeeding administration without submitting their criticisms to their successors for clearance. This absurd situation could deny the public the views of former officials based on their experience in government.

Mr. President, had a previous administration issued such an order consider its impact on public figures wanting to offer their views to the American citizenry:

President Carter's memoirs would be subject to censorship—so would the writings of Alexander Haig, Melvin Laird or Paul Warnke would have to have their testimony cleared before they could give it to a Congressional committee.

Mr. President, it appears to us that your directive will require a sizeable bureaucracy. The State Department, the Defense Department, The National Security Council, indeed the White House itself will each have to set up a censorship board to sift through hundreds of speeches, articles and books each year. If the government is to avoid lengthy delay in clearance, it must hire censors by the score.

Finally, Mr. President, we believe all this is unnecessary. Current laws and regulations amply safeguard national security information.

Regards,

EDWARD R. CONY,
*Chairman, Freedom of Information
Committee.*

JOHN C. QUINN,
President.

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